

2ND EDITION



Protocols for producing Indigenous Australian writing

# Writing

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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 'Writing 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

*As an Aboriginal writer I am constantly aware of literature being the 'little sister' to other artforms like visual arts, theatre, music and dance. The 'little sister' syndrome exists largely due to the fact that literature is a relatively new artform for Aboriginal people, visual and performing arts being part of our culture since the beginning of time.*

*We have now mastered the same language that was once used against us – describing us as barbaric and savage – and we have empowered ourselves to tell our stories, in our styles, for our people.*

Dr Anita Heiss<sup>1</sup>

Even though publishing has only become accessible to Indigenous writers in the past 50 years, literature is a vital part of Indigenous culture. For Indigenous Australians, writing is largely about expressing cultural belonging and identity. However, it goes beyond that. When writing about their Indigenous cultures, Indigenous writers are custodians of culture, with obligations as well as privileges.

As part of their practice, Indigenous writers take on responsibilities as educators, informants and conveyors of the diversity of Aboriginal and Torres Strait Islander cultures. Writing encompasses several obligations for Indigenous authors and these may bring about conflict in the creation and publication of their literary works. This guide examines some of these issues.

This guide is one of five protocol guides produced by the Australia Council for the Arts, which clearly spell out clearly the legal as well as the ethical and moral considerations for the use of Indigenous cultural material. It is designed to help writers and people involved with them do the right thing.

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/territory government agencies
- 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 2006 *United Nations Declaration of the Rights of Indigenous Peoples*,<sup>2</sup> which says Indigenous peoples have the right to practice and revitalize 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*<sup>3</sup>: 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 some of the mediums for 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 artform, the same underlying principles are common to each.

We hope Indigenous people, and those working with them, will be inspired and encouraged 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 writers, 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 writing.

The Indigenous heritage section gives an overview of the issues that inform the development of Indigenous protocols. It explores the complexity of Indigenous Australia, and the potential impact on the planning of a writing project. It also charts international initiatives for the protection of Indigenous cultural and intellectual property rights.

The principles and protocols section 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 writing practice. A number of case studies and commentaries from Indigenous writers identify pitfalls and offer readers valuable advice.

The guide 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 of the guide 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 writing project.

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

### What are protocols?

Protocols are appropriate ways of using Indigenous cultural material, and interacting with Indigenous people and Indigenous communities. They encourage ethical conduct and promote interaction based on good faith and mutual respect.

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.

Indigenous protocols arise from value systems and cultural principles developed within and across communities over time. Agreeing to comply with the accepted protocols of other cultural groups promotes interaction based on good faith and mutual respect, thus encouraging ethical conduct.<sup>4</sup>

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

The protocols outlined in this guide are shaped by nine 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 spoken word performance, launch or literary event; and in the acknowledgment of a published text about a specific Indigenous country.

This guide identifies many specific protocols, which can be applied or adapted by writers, publishers, arts organisations, cultural institutions and others working with Indigenous literature.

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

While protocols differ from legal obligations, this 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 literature.

These protocols are accepted and used by many Indigenous writers. They have also been used for several Indigenous writing projects. Writing guides are recommended by the Australian Society of Authors and have been endorsed by the Copyright Agency Limited.

Non-Indigenous writers have also used them when writing about Indigenous people and their cultures.

### What is Indigenous writing?

Indigenous writing in an Australian context refers to the written word and text produced by Aboriginal and Torres Strait Islander people.

Indigenous writing crosses a range of genres including:

- short stories
- novels/novellas
- non-fiction, including essays and opinions
- poetry
- autobiography/biography
- community and oral histories
- children's books.

### Special nature of Indigenous writing

*The story is the most powerful thing on earth because it will last as long as there are two people left on it. And when there is only one she will whisper these stories to remind herself of what has been lost and, in that way, she will have the company of her ancestors.*  
Bruce Pascoe<sup>5</sup>

Knowledge, history and other cultural information have been orally transmitted through many Indigenous generations. Now, Indigenous writing has an important place in the transmission of Aboriginal and Torres Straits Islander cultures.

Some of the reasons Indigenous writers put pen to paper include:

- facilitating ongoing transmission of information
- providing reading materials for Indigenous readers
- recording community histories
- recording oral histories/life stories
- fostering community ownership of stories
- reclaiming and maintaining culture
- reclaiming and maintaining language
- entertainment
- healing individuals and communities (for example relating stories of the Stolen Generation)
- providing an authentic voice in Australian writing and the literary scene
- educating the broader community about Indigenous issues
- educating Indigenous communities on local and national Indigenous issues.

Over the past 20 years, the development of Indigenous writing has resulted in a range of works on contemporary themes including Indigenous issues and topics, such as the Stolen Generation, living in the era of Aboriginal protection, and Indigenous identity. Indigenous books on the Stolen Generation range from

Dr Anita Heiss' historical novel for teenagers *Who am I? The diary of Mary Talence, Sydney 1937*<sup>6</sup> to Glenys Ward's autobiography *Wandering Girl?* on life at the Wandering Mission in Western Australia. Kim Scott's *Benang: From the heart* deals with issues that include identity.<sup>8</sup> She says:

*There are many reasons to write. I partly write to think things through in the form of a story, and to seek a deep communication with the future and the past; attempting to understand my own ancestors, and attempting to communicate with integrity to both present and future readers among my people.*  
Kim Scott<sup>9</sup>

Indigenous writers also pen poems, stories and novels on themes that are not solely about Indigenous issues. For instance, Aboriginal poet Dennis McDermott's poetry anthology *Dorothy's Skin* includes themes of identity, working life, and also growing up in the 1950s<sup>10</sup>. Jared Thomas' *Sweet guy* is a novel about male coming of age built around surfing and university life.<sup>11</sup> Norm Newlin writes poetry inspired by love.<sup>12</sup>

Writing and oral stories, like other aspects of Indigenous heritage, often stem from a social and cultural base. In some cases, stories may relate to a group or groups of Indigenous people where one author cannot be singled out from group ownership. *The Painters of the Wagilag Sisters story*<sup>13</sup> is an example of a culturally based story that has ancient origins and spans a number of language groups.

Indigenous Australians are concerned that there is no respect for their Indigenous cultural knowledge, stories and other expression in the wider cultural environment.

The current legal framework does not promote or protect the rights of Indigenous people – particularly to own and control representation and dissemination of their stories, knowledge and other cultural expression.<sup>14</sup>

A further concern is the passing on of stories and Indigenous knowledge to outsiders. In Indigenous communities, the telling of stories is a right given to particular and qualified individuals. The re-telling of those stories by unqualified outsiders may be offensive to customary law beliefs.

### Individual stories and communally owned stories

Indigenous writers may draw from their traditions and beliefs and cultures. Writers also develop their own individual contribution, which is based on their own artistic endeavours. In this respect, literature does not embody Indigenous cultural and intellectual property or heritage in a strict sense. For straight-out individual artistic projects these protocols are a guide only. Their main focus is where writing draws from existing cultural information.

### Collaborative Indigenous literary works

Indigenous writers and storytellers also collaborate with non-Indigenous writers to produce literary works. For example, *Jandamarra and the Bunuba Resistance* and *Woman from Nowhere*<sup>15</sup> are works written by a collaboration of non-Indigenous and Indigenous writers. It is accepted by industry that such 50:50 collaborative efforts can be defined as Indigenous writing; however, the Indigenous author should ultimately have the discretion to decide if the book is to be categorised as 'Indigenous writing'.

### Indigenous studies

Much literature is produced by Indigenous and non-Indigenous researchers, academics and commentators about Indigenous topics and Indigenous culture. These literary works fall into the genre of 'Indigenous studies'. This guide may also be useful for researchers and academics when writing and publishing the results of their research. Refer also to the Australian Institute

of Aboriginal and Torres Strait Islander Studies' *Guidelines for Ethical Research in Indigenous Studies*.<sup>16</sup>

### Non-Indigenous writers writing on Indigenous themes

Indigenous people and their cultures have been depicted widely in Australian literature. Some of what has been written about Indigenous people has served to develop stereotypes that do not adequately reflect the diversity of Indigenous people and their culture. Writers need to be aware of these issues about the use of Indigenous cultural and intellectual property within their works. Attention must be paid to the cultural accuracy of using Indigenous knowledge, cultural information and stories. Questions of authenticity and appropriate cultural protocols require thought when writing down Indigenous cultural information.

Non-Indigenous writers who cover Indigenous themes in their works are also advised to consider these protocols. Two recent works by non-Indigenous authors are worth noting: *The Secret River*<sup>17</sup> by Kate Grenville and *Journey to the Stone Country*<sup>18</sup> by Alex Miller.

#### Case study: *The Secret River* by Kate Grenville

In the process of writing *The Secret River*,<sup>19</sup> a book about early contact relations between Indigenous and non-Indigenous Australians, Kate Grenville was mindful of her depiction of Indigenous Australians and the events and places that were the subject of the book.<sup>20</sup>

Grenville discusses the process:

*I approached the Darug descendants diffidently because I knew that I was asking them to talk about traumatic events in their peoples' past, but I was overwhelmed by the generosity of their response.*

*They told me many things I hadn't known, or hadn't realised the significance of – an example would be the 'yam daisies'. I'd had no idea from my reading in non-Indigenous sources that they were a staple in the Darug diet, and how the Europeans dug them up as weeds and replaced them with corn. Knowing about them made sense of what happened on those river flats.*

*Melissa Lucashenko, an Indigenous writer, and John Maynard, an Indigenous historian, were generous enough to read the book in draft form and tactfully pointed out several big mistakes I'd made (eg having Darug play didgeridoos in 1816). As well as picking up areas of my ignorance like that, they reassured me about the value of what I was doing. I'd been anxious that with a non-Indigenous world-view I might, even with the best of intentions, have been offensive or disrespectful.*<sup>21</sup>

#### Case study: *Journey to the Stone Country*

Before Alex Miller began writing his Miles Franklin award-winning novel *Journey to the Stone Country*, he was invited by his friend and the main character of the novel 'Bo' (fictionalised name), to visit his homelands. Miller was then given the story by 'Bo and Annabelle' (whose relationship the novel is based on), and it was suggested that he write the book. Miller did so with the understanding that he'd only publish the novel if they were completely happy with how the country and people were portrayed.

Miller's research and understanding of Indigenous lives was based on a friendship with Indigenous people and spending time on country with 'Bo and Annabelle'. When he returned to his home in Victoria he

maintained regular contact with his friends in northern Queensland. On completing the novel, Miller sent the entire manuscript to 'Bo' for feedback. Approval of the text was granted over the phone and all those represented in the novel are reported to be delighted with the final product. On the advice of producers, 'Bo' is also currently a consultant in the making of the movie based on the book.

### Indigenous heritage

Indigenous writing is an important means of expressing Indigenous heritage – past, present and future. Indigenous heritage, enshrined in Indigenous cultural and intellectual rights, is discussed at length in *Our culture: our future*.<sup>22</sup>

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

All Indigenous artists are responsible for safeguarding cultural knowledge and expression. 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. 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 to 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 material for a writing project.

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

### **Our culture: our future**

Indigenous cultural and intellectual property rights refer to Indigenous people's rights to their 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 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 customary law
- maintain the secrecy of Indigenous knowledge and other cultural practices
- full and proper attribution
- control the recording of cultural customs and expressions, as well as the particular language that may be intrinsic to cultural identity, knowledge, skill, and teaching of culture.

For a full list of rights, see *Our culture: our future*.<sup>23</sup>

### **Current protection of heritage**

Australia's current legal framework provides limited recognition and protection of these rights. *Our culture: our future* recommended significant changes to legislation, policy and procedures. As yet there has been no formal response to these recommendations from the Australian Government. However, there are proposals to amend the *Copyright Act 1968* to recognise Indigenous communal moral rights. These have not yet been debated in Parliament. In the absence of laws, 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 Indigenous cultural heritage.

These statements and declarations are a means of giving the world notice of the rights of Indigenous people. They also set standards and develop an Indigenous discourse that will,

over time, ensure that Indigenous people's cultural heritage is respected and protected.

In mid-2006, they were given international recognition when the *United Nations Declaration of the Rights of Indigenous Peoples*,<sup>24</sup> was passed. 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 recognize and protect the exercise of these rights.*<sup>25</sup>

The *Mataatua Declaration on Indigenous Cultural and Intellectual Property Rights*, in Article 1.3, urges Indigenous people to 'develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge'.<sup>26</sup>

The former Aboriginal and Torres Strait Islander Commission's Indigenous Reference Group adopted the *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People* (1993) in 1997.<sup>27</sup> Article 39 states:

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

Internationally, the World Intellectual Property Organisation (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.

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 principles<sup>28</sup>
- (ii) The protection of traditional knowledge; Draft objectives and principles.<sup>29</sup>

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.<sup>30</sup>

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.<sup>31</sup>

The prior and informed consent of the traditional owners is required to:

- reproduce or publish the traditional knowledge or expressions of culture
- perform or display the traditional knowledge or expressions of culture in public
- make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture
- use the traditional knowledge or expression of culture in any other form.

## Principles and protocols

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

- 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 writers and Indigenous communities.

### 1. Respect

Respectful use of Indigenous cultural material, including stories, traditional knowledge and information about life experience, is a basic principle. It is important to consider this when developing Indigenous literary works for publication and wide dissemination.

### Acknowledgment of country

Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia. As such they have a strong link to country, meaning the totality of life and the spirit of the particular area of land they and their ancestors inhabited.

In *Nourishing Terrains*, Deborah Bird Rose says:

*Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country*

*knows, hears, smells, takes notice, takes care, is sorry or happy. Country is not a generalised or undifferentiated type of place, such as one might indicate with terms like 'spending a day in the country' or 'going up the country'. Rather, country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is home, and peace; nourishment for body, mind, and spirit; heart's ease.<sup>32</sup>*

When organising a book launch or literary event of 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 opening of events. As a matter of cultural protocol, large cultural events like writers' festivals or conferences, 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.

It is respectful for others speaking officially to also acknowledge country and custodians at the site of each spoken word performance, book launch, storytelling or literary event, and in the acknowledgment of a published text about a specific Indigenous country. The master of ceremonies, the publisher or the author could do this by way of an introductory acknowledgment.<sup>33</sup>

Seek advice from the Indigenous community on the preferred manner of acknowledgment, and the relevant groups to be acknowledged.

## Representation

Representation of Indigenous cultures should reflect Indigenous cultural values and respect customary laws.

It is respectful to write and speak about Indigenous cultures in a manner preferred by those cultures, avoiding inappropriate or outdated terms and perspectives. It is important to consult with relevant groups about preferred language and terms.

## Accepting diversity

There is great diversity of experience and cultural context within Indigenous communities. Indigenous writing reflects this diversity in the genre, subject matter and cultural setting the Indigenous writer might choose.

People working in the literary field are encouraged to foster diversity of expression in Indigenous writing.

## Living cultures

Indigenous cultures are living and evolving entities, not simply historical phenomena. Contemporary stories of Indigenous lives and experiences today are just as valid as traditional stories.

## Publishing stories and ideas

The effects of publication of an Indigenous traditional story – whether sacred, closed or general – should be discussed with traditional custodians of the stories prior to publication, especially if the traditional story is being published for the first time. Books, the internet, journal articles and magazines are part of the mass media, and are open for general consumption.

Once publicly released, it is difficult to control how a story might be embraced, adopted and engrained within dominant and other cultures. There are also legal limits in being able to control the general expression of Indigenous stories and

knowledge once the copyright period expires. For example, ancient Greek stories, fairytales and Bible stories are all re-told in many different ways and languages by writers of varying cultural backgrounds.

Using knowledge as part of the general spread of ideas is a concept that often sits at odds with Indigenous notions of holding and disseminating knowledge. It is a right given to people based on their standing in an Indigenous society.

## 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 development and production of literary works.

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 clearances of traditionally and collectively owned material.

Speaking to the right people is very important. Indigenous communities, whether regional, urban or remote, have an infrastructure of organisations and individuals who can advise on a range of issues – including guidance about locating Indigenous people with authority to speak for specific Indigenous cultural material.

If your project involves a visit to Aboriginal lands or outer Torres Strait Islands, you must obtain permission from the local land council or trust, or the relevant community council.

Some other useful starting points for inquiries include:

- the relevant individuals or family members

- elders and custodians of relevant Indigenous language groups
- Indigenous language centres
- Indigenous publishing houses
- the Australian Institute of Aboriginal and Torres Strait Islander Studies
- Aboriginal land councils
- Office of Indigenous Policy Coordination
- Torres Strait Regional Authority
- Island Coordinating Council
- Indigenous unit of the Australian Film Commission
- Indigenous theatre companies
- Indigenous media organisations
- Indigenous curatorial staff at local keeping places, state and national galleries, museums and libraries.

It is also prudent to involve Indigenous people in all stages of writing projects, including Indigenous writers, community members, storytellers and editors. Some contact information for Indigenous professionals can be found in the *Black Book*,<sup>34</sup> available online at <[www.blackbook.afc.gov.au](http://www.blackbook.afc.gov.au)>.

## Commissioning Indigenous writers

When engaging Indigenous writers to participate in a project, including writing assignments and speaking engagements, most organisations use the definition of Aboriginal and Torres Strait Islander 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:

- a 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; and

- a declaration that they are of Aboriginal or Torres Strait Islander descent, identify and are accepted as such in the community in which they live.

The Australia Council's current practice requires all Indigenous participants to provide a letter of support confirming their Aboriginal or Torres Strait Islander identity from an Indigenous organisation.<sup>35</sup>

Discuss copyright ownership at the outset. The following factors may be relevant in discussions:

- nature of the commission
- nature of subject matter
- whether it is a collaboration
- fees for services.

## Working with communities

In some writing projects, where the writer has worked closely with a community or group and the book is accepted for publication, the writer acknowledges this contribution by sharing a percentage of the royalties. The writer and a representative community organisation might also jointly own the copyright in the book. For example, *Jandamarra and the Bunaba Resistance* was written by Howard Pedersen and Banjo Woorunmurra; however, Bunuba Productions, Howard Pedersen and Banjo Woorunmurra own the copyright, in recognition of community, individual and traditional elder interests in the expression of the story in book form.

## 3. Communication, consultation and consent

Communicate and consult with the relevant Indigenous people in authority, and seek their consent for each project. According to Bruce Pascoe:

*Consent by both non-Indigenous and Indigenous writers is a priority. People wanting to write about Indigenous people should discuss their artistic ideas with Indigenous friends and acquaintances as well as consulting*

protocols. If the non-Indigenous writer doesn't know any Indigenous people to consult with then that is a great reason to abandon the project.<sup>36</sup>

Kim Scott discusses issues within the consultation process:

*It's difficult to know how to consult adequately in many instances. So there's great need for trust. And the authority is given by genealogical descent, by 'connection' to community and place, and by the validation of elders.<sup>37</sup>*

Non-Indigenous writers should consult and seek consent where use of Indigenous cultural material and histories are made fictional.

Here is a hypothetical example to consider:

*An Aboriginal community has lost their lands, the old people massacred, and the children removed from their mothers... Should non-Indigenous people assume they can write carte blanche about this without consultation? Consideration must be given to the effects on the Aboriginal community if the story is published and individual Indigenous names are mentioned.<sup>38</sup>*

Jackie Huggins advises non-Indigenous writers when consulting and seeking consent:

*One word of caution though – don't expect Aboriginal people to easily welcome you into their world. Some of us will be more open and tolerant than others. There is a long history of violence, mistrust, guilt and fear that cannot be erased overnight. Know when you are becoming an intruder rather than an accomplice. Do some homework first. Read books, watch films, and do Aboriginal studies courses. You should never expect Aboriginal people to do all the education because it's unfair and a personal drain... If there is trust, respect and genuine interest, one will possibly get past the first encounter and continue a dialogue.<sup>39</sup>*

In researching for this project we consulted Indigenous writers about communication, consultation and consent issues. Some protocols identified by Indigenous writers as important to the communication, consultation and consent process include:

- the need to identify relevant people with whom to discuss the intended publication
- when interviewing informants take good notes; if they provide photographs, recordings, news clippings and other materials, these should be looked after and returned as soon as they have served their purpose
- keep appropriate/relevant Indigenous people informed and advised, and where possible, provide regular updates
- when the first draft or work has been completed, take it back to the Indigenous people you consulted for approval and confirmation of facts
- be flexible with time and understand that the consultation process may be lengthy. Do not expect to have a reply to a question in a day or a week. Each community will need time to consider and consult.

### Creation stories

Creation stories or Indigenous Dreaming Histories – referred to by different Indigenous groups as the *Jukurrpa*, *Bugari* or *Altjeringa*<sup>40</sup> – are important to Indigenous cultures.

It is protocol to consult with cultural custodians of a story and other community members. There may also be one or more groups that have custodianship of a story. Consultation with, and consent from each identified group should be sought. Be prepared to reconsider your project if consensus cannot be reached. Under copyright law, it is not an infringement to refer to another writer's work. Creation stories that are published have copyright protecting the expression. However, it is possible for a writer to adapt a story, tell it in a different

context or use different words, creating copyright in another form.

It is also possible for a writer to include or write about creation stories without following the correct Indigenous protocol of seeking permission from the people in authority.

If the writing of creation stories involves the verbatim transcription of an oral story from specific informants, then permission, attribution and ownership of material should always be recognised.

Should non-Aboriginal writers be writing Aboriginal creation stories? This issue is discussed by Dr Anita Heiss in *Writing about Indigenous Australia: Some issues to consider and protocols to follow: a discussion paper*.<sup>41</sup> Some Indigenous writers and community people strongly believe that only Indigenous people should write about creation stories.<sup>42</sup>

The best approach for a writer in this situation is to get prior permission from the relevant Indigenous custodians of creation stories and once obtained, involve them in the process of writing, editing and publication.

Pat Mamanyjun Torres notes that the process she went through to publish *The Story of Crow* in 1987 required continual dialogue with the custodians of the story. She says:

*During my initial research period, approval was obtained from Auntie Magdalene for the future publication of this material in a book format so that children could learn about our culture. At all times throughout the development of the material her approval was sought for the working drafts and eventually the finished product.<sup>43</sup>*

Many Indigenous writers make draft copies available, before publication, to the relevant Indigenous people and family members for comment.

### Recording oral stories

Traditionally, Indigenous stories have been transmitted orally and passed on through the generations via the art of storytelling. Committing these stories to material form now creates a copyright interest in the expression of the story. In the past, there have been instances where non-Indigenous individuals have worked with Indigenous people to record their language group and creation stories. Copyright attaches to the written expression, so the non-Indigenous person who wrote down the language group or creation story was recognised as the sole writer and copyright owner. Indigenous people see ownership of stories and information differently, not as something an individual can possess, but as elements of culture that are owned communally and passed down.

Copyright does not protect oral stories, as the requirement of material form is not met. Hence, people writing about what you said will have a copyright interest in the written form as they express it because they put in their own skill and labour to transfer the oral story to the written form. You may not be able to stop them writing your ideas, unless you told them in confidence. If you told them in confidence, and they knew it was confidential, you may be able to stop them publishing your ideas by taking an action in breach of confidential information.<sup>44</sup>

The ability to capture these oral stories via sound recording introduces issues relating to the dissemination and ownership of the resulting recording. This is because copyright in the recording is separate from copyright in the spoken word. The person who makes the recording is recognised as the copyright owner of the sound recording<sup>45</sup> unless it is a recording of a 'performance'.

From January 1, 2006, performers will share copyright in sound recordings of their performances. Performances can include

expressions of folklore<sup>46</sup> (which could include Indigenous cultural material). This allows scope for exercising some control over the use of recordings of performances of oral stories. However, these general law provisions can be overturned by written agreement, and it is often the practice for performer's releases to determine the ownership of copyright in a recording. When agreeing to take part in recording of oral stories, it is a good idea for storytellers to discuss the copyright issue and to request a copy of the recording for their records.

### Protecting oral stories from unauthorised copying

Magabala Books suggests the following way of protecting rights when a story is first recorded:

*Most Aboriginal stories are part of an oral tradition and have never been written down. If someone wishes to record a story (by writing it down or taping it) then the recorder could claim to be the copyright owner of the material because they are the one who has written it down. A way to control this would be for the storyteller to argue that, as the story is theirs, the recorder should assign in writing the copyright back to the storyteller, who can then license the recorder to use the material in certain specified ways, such as for research or for linguistic work.<sup>47</sup>*

### Sensitivity of content

Be aware of gender division of responsibility and knowledge in many Indigenous communities. Sensitive content such as secret and sacred material or gender-based works may require special communication procedures. These procedures should first be ascertained. Consultation may take time depending on the sensitivity of the material.

### Writing life stories

In writing life stories of Indigenous people it is important to respect the rights of the subject in terms of ownership and approval over the representation of the story.

The following questions arise:

- Who is in control of the representation of the story?
- Is there anything sensitive that needs to be removed from the story – particularly in relation to events and cultural beliefs that involve other people?

### Case study: Writing lives

An Indigenous woman worked with a playwright to create a play about her life. The woman orally related her life story to the playwright who took notes. The oral transmission of the story does not constitute material form, which is created when the notes are made. The playwright used the notes as a basis to develop a plot.

He skilfully wrote more words and interpreted the woman's words into a framework suitable for production as a performance. After completion, there was a discussion about who owned copyright. The Indigenous woman had a legitimate claim to copyright in the play, given she had provided notes and the details on her life. However, the playwright was also arguably entitled to some copyright interest given he had skilfully developed text and a framework for her story.

In the end the parties agreed that the Indigenous woman should own copyright, however both should share royalties and be jointly attributed as authors. In this way, the resulting play was a collaborative work.

This example illustrates how copyright law can affect the rights of Indigenous people to important cultural stories. However, these problems can be avoided if issues are discussed at the outset and included in written agreements.

### Case study: *Woman from Nowhere* – Hazel McKellar/Kerry McCallum

The life story of an Indigenous woman, the late Hazel McKellar,<sup>48</sup> was written in book form by Dr Kerry McCallum.<sup>49</sup> The writing of *Woman from Nowhere* involved several stages:

Firstly, McCallum was approached by McKellar and given tapes of her talking about her life. McCallum typed these up before the two women met face-to-face.

The second stage involved them meeting. McCallum interviewed McKellar to find out more details of her life, and discussed the proposed format. Letters also were sent to and from the two women because McKellar did not have a phone.

Next McCallum wrote up the manuscript. 'I converted her oral story into a readable format. This involved taking out repetition, putting things in order and placing information in chapters to focus the story.'

The final stage involved McCallum reading the whole book out loud to McKellar. 'This took a couple of days. Hazel corrected things, and made changes where I had gone off on a tangent, and so that the book was still her work.'

The copyright in the book, published by Magabala Books, belongs to McKellar and has now been passed on to a family member. McCallum is attributed as the writer, as follows:

'*Woman from Nowhere* – Hazel McKellar as told to Kerry McCallum.'

## 4. Interpretation, integrity and authenticity

It is important for Indigenous culture that the interpretation, integrity and authenticity of a story is maintained. This means that Indigenous people will need to be consulted on how Indigenous heritage is presented.

### Interpretation

Interpretation refers to how cultural material is presented. This includes the perspective given and the language used in relation to cultural heritage and the medium in which it is reproduced.

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

Indigenous people should be given the opportunity to interpret and present their own cultures.

Some important questions to consider about interpretation are:

- How will your writing affect the Indigenous group it is based on?
- Does it empower them?
- Does it expose confidential or personal and sensitive material?
- Does it reinforce negative stereotypes?

### Use of terminology

Writers are encouraged to examine the terminology used in Indigenous writing. For instance, Pat Mamanyjun Torres notes instead of using 'Dreamtime' (a Westernised construction) for creation stories, Indigenous language words should be used such as *Jukurpa*, *Bugari* and *Altjeringa*.<sup>50</sup>

The following references provide guidelines on the appropriate use of grammar and terminology in relation to Indigenous people:

- Jackie Huggins, in her article *Respect v Political Correctness* provides some guidance. For example, she states that ‘a’ is for apple, agile, anger, another, address and alphabet, but not for Aboriginal.<sup>51</sup>
- There is a list of suitable terms in the Australian Society of Authors’ paper, *Writing about Indigenous Australia* by Dr Anita Heiss.<sup>52</sup>
- The *Style manual for authors, editors and printers* sets out guidelines for the non-discriminatory portrayal of Aboriginal and Torres Strait Islander people.<sup>53</sup>

### Research

In the past, Indigenous people have complained that Indigenous culture has been portrayed falsely in texts. It is important to make sure writing is based on sound research and facts that are credible. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a useful starting point for research.

Its premises are in Canberra and it also has a website with a catalogue of library resources at <www.aiatsis.gov.au>. AIATSIS has developed research ethics, which are a useful guide for research projects about Indigenous cultures.

### Authenticity

A major issue for authenticity is the appropriation or fabrication of an Indigenous identity to market works. This differs from the adoption of pseudonyms as it is calculated to exploit an identity for financial gain. A series of Indigenous literary frauds were uncovered in the late 1990s, including an instance where a non-Indigenous author created a false identity and the resulting book was marketed and sold as Indigenous, although it was not written by an Indigenous author.

The Australian Society of Authors (ASA) recommends the introduction of a labelling system that would allow readers to know when books are written primarily by Indigenous authors, and when they are a collaboration with non-Indigenous writers.

#### Case study: *My Own Sweet Time*

In the 1990s, Leon Carmen, a non-Indigenous taxi driver confessed to having written the book *My Own Sweet Time*, under the name of Wanda Koolmatrerie, an Indigenous woman descended from the Pitjantjatara people in South Australia. The book was previously assumed to be an autobiography. As Dr Anita Heiss notes, the incident ‘raised issues and problems for Aboriginal authors including increased surveillance of Aboriginality in the publishing industry, in particular, the introduction of the Proof of Aboriginality form in Publishing Agreements’.<sup>54</sup>

Dr Anita Heiss considers authors appropriating Aboriginality do so for their own benefit.<sup>55</sup> Such actions have angered many Indigenous writers and the Indigenous community generally.

### Editing

*In working in a partnership situation with Indigenous communities or individuals it is important to understand that it is the community or the individual who should have the power to be the final censor of the work, not the editor, translator or writer. Trust is the key to a successful outcome for all concerned.*

Sally Morgan<sup>56</sup>

The editorial process of a manuscript can have a large impact on how the final document is presented and interpreted. The editing process can affect the authentic voice of Indigenous writers.<sup>57</sup> For Indigenous writers there are

concerns that non-Indigenous editors often misunderstand the content of their manuscripts, and often alter language and style to cater for a mainstream non-Indigenous audience. Some issues include:

- editing of ‘Aboriginal English’ to make it grammatically correct or to make it ‘High English’
- drawing plots and themes towards westernised concepts of storytelling and morals
- editing sensitive material.

*Sometimes people will share something very sensitive, but that doesn’t mean they want it included in a publication. Other times someone may share a story which is very sad and indicate that they want this story published, but after some thought change their minds. Such decisions must be respected. This is why it’s important to have an editing process that allows lots of time for consultation so that people can really think about what they want to say without feeling pressured to commit to something they may later regret.*

Sally Morgan<sup>58</sup>

Given there are few Indigenous editors, an Indigenous author’s manuscript will often be edited by a non-Indigenous editor. Findings from an Australia Council survey of Indigenous authors indicated that respondents believed non-Indigenous editors could edit Indigenous books capably. However, the report highlighted the need for trained Indigenous editors as a priority.<sup>59</sup>

The Australia Council’s literature board has funded an Indigenous editors’ training program to increase the number of trained Indigenous editors.

#### Case study: *Jandamarra and the Bunuba Resistance*

The book *Jandamarra and the Bunuba Resistance*<sup>60</sup>, published by Magabala Books in 1995, was written by Howard Pederson with custodian, Banjo Woorunmurra. The book accounts the resistance of the Bunuba people and relates a history which was previously untold. Copyright is shared by Pederson, a non-Indigenous writer and Woorunmurra. Sandra Phillips, an Indigenous editor, edited the book.

### Publishing

Mainstream publishing companies are publishing more Indigenous writers; however, there are few mainstream houses with extensive Indigenous lists. According to Willa McDonald:

*For Indigenous writing to be accepted by white publishers, it usually needs to be written in a way that is understandable by mainstream white Australians. The written word is part of white culture, and comes with rules about grammar, spelling and structure. Everything is sifted through white filters.*<sup>61</sup>

A report, *To tell my story*, by the Australia Council’s Aboriginal and Torres Strait Islander arts board, noted that many Indigenous writers find the atmosphere of publishing houses alien and alienating. There are very few Indigenous publishing houses and a number of Indigenous writers noted that waiting lists for publication are long.<sup>62</sup> Also many Indigenous writers would like to have more knowledge of the process involved in developing a manuscript for publication. The Australia Council has offered workshops to develop this skill.

Most aspiring Indigenous writers have limited knowledge of the processes involved in developing a manuscript for publication. The publisher may have specific guidelines and style

issues that are not applicable to Indigenous interpretation of works – for example, an in-house style of punctuation and grammar.

Publishers should make relevant inquiries to ensure a writer who is promoted and marketed as ‘Indigenous’ is an Indigenous Australian. An Indigenous person is a person of Aboriginal and Torres Strait Islander descent, who identifies as Aboriginal or Torres Strait Islander and is accepted as such by the community.

A sensitive issue is whether Indigenous writers should compromise their cultural integrity during the editorial and publishing process to get their work published. Indigenous writers state that while some publishing companies are sensitive to Indigenous manuscripts, there is a tendency to edit for genre and mainstream audiences.

Publishers are encouraged to broaden their understanding and appreciation of works that lie outside of the mainstream view of literary production. The publishing process must be a mutual process of collaboration between the author and the editor.<sup>63</sup>

There are few Indigenous publishing houses catering for the increasing number of new and emerging Indigenous writers seeking publication. The current houses are Magabala Books (Broome), Aboriginal Studies Press (Canberra) and IAD Press (Alice Springs). The following areas are highlighted for consideration when publishing.

### Web publishing

Indigenous people are often concerned about the publication of Indigenous heritage on the internet. This is because of the digital nature of the form presented and the ease of copying. Before publishing material online, discussions with Indigenous people are recommended.

### Illustrating Indigenous books

Visual elements are integral to many Indigenous stories. Sam Cook, an Indigenous illustrator, has developed a database of Indigenous

illustrators and says it is important to work closely with the author in children’s book or story-based designs. She advocates ‘extra care and attention to detail’ to ensure that Indigenous books have appropriate illustrations and authentic product.<sup>64</sup>

### Selecting cover images

The selection of artistic works for book covers may need consultation with the author and other relevant people. It is important to ensure the cover image is culturally appropriate and not exploitative.

The use of traditional designs and motifs (Mimis and Wandjinas, for instance) raises issues for protecting Indigenous heritage.

One author noted the draft cover layout for her work included a Wandjina, a cultural being from the Kimberley depicted in art and rock art from that area. Neither the author nor the story was related to the Kimberley or the Wandjina. This caused her embarrassment because, if the book had been published with the Wandjina on the cover, it could have offended the cultural custodians of the images. She was fortunate the publisher had sought her prior approval – the image on the cover was changed to a more appropriate one.

### 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 the writer, and those working on writing projects, to discuss any restrictions on use with the relevant Indigenous groups. Some issues to be aware of are discussed below.

### Representation of deceased people

The reproduction of names and images of deceased people in books may be offensive to Indigenous beliefs. Some Indigenous publishers have adopted the use of special warnings where necessary. For instance, IAD Press has

adopted this practice,<sup>65</sup> as has Aboriginal Studies Press. The following example is from the book, *Love against the Law, The Autobiographies of Tex and Nelly Camfoo*, published by Aboriginal Studies Press:

*Readers should be aware that if members of some Aboriginal communities see the names or images of the deceased, particularly their relatives, they may be distressed. Before using this book in such communities, the wishes of senior members should be established and their advice taken on appropriate procedures and safeguards.<sup>66</sup>*

The deceased’s family or community needs to be consulted so that the appropriate protocols are observed.

### Secret and sacred material

The reproduction or unauthorised use of secret and sacred material may be a transgression of Indigenous law.

‘Secret and sacred’ refers to information or material that, under customary law, is:

- made available only to the initiated
- used for a particular purpose
- used at a particular time
- information or material that can only be seen and heard by particular language group members (such as men or women or people with certain knowledge).

The publication of sacred and secret material raises sensitive issues for Indigenous people. Some people question whether it is at all appropriate to publish sensitive material in a manner where it can be disseminated widely.

One example that highlights concerns in this area is the case of *Foster v Mountford*<sup>67</sup> involving the issue of published secret and sacred material collected in research. Charles Mountford undertook a field trip in 1940 into remote areas of the Northern Territory. The

Pitjantjatjara people revealed tribal sites and items of deep cultural and religious significance to the anthropologist. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara men. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society – should the book come into the hands of the uninitiated: women and children. The court allowed them an injunction to stop the sale of the book in the Northern Territory.

Clearly, copyright in the book would have belonged to Mountford. The claim was based on an action for breach of confidence. That is, the researcher had known the confidential nature of the information and the detriment it may cause to the informant’s society, yet still published it. Therefore the Pitjantjatjara were granted equitable relief to stop dissemination of the book where women, children and uninitiated people might find it.

This example illustrates the effect that publishing sacred or secret material may have on Indigenous cultures. In order to respect the cultural sensitivities associated with sacred and secret information, the wider publication of this material should be restricted.

### Personal privacy

The personal privacy of Indigenous people should be respected. Personal and confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure.

Ask the individual, community or relatives of the individual for permission. Observe close consultation and consent throughout the process.

Disclosure of personal information about an Indigenous person who has passed away should also be cleared with family and community.

## 6. Attribution and copyright

Indigenous people should be attributed for use of their cultural heritage material in stories. In many instances in the past, and even today, Indigenous people have been used as informants for research, evaluations and theses.

Today, Indigenous people are seeking greater acknowledgment than being recognised as mere informants. They seek the right to be acknowledged as owners of this knowledge and information. They also seek to have a greater share in benefits generated from the use of their cultural stories.

### Case study: *Home*

Larissa Behrendt in her novel *Home* writes about Candice Brecht, a young city-based lawyer who visits her ancestral country for the first time with her father. Candice is a descendant of the Eualeyai people (as is the author) and in 1918 her grandmother Garibooli was abducted.

The story retraces the family history re-establishing the connection. Behrendt references Eualeyai stories and in the acknowledgment Behrendt makes clear attribution of this as follows:

*The stories of the Eualeyai that appear here belong, as they always have, to the Eualeyai people. I heard these stories from my father.*<sup>68</sup>

### Case study: *The Rain Flower*

Drawing from her strong community knowledge of the Yuin nation, Mary Duroux wrote *The Rain Flower*,<sup>69</sup> a book about Australian night and day animals living in the bush. The story describes the journey to find the rain flower in one spring when the rain doesn't come.

She notes in her book 'In *The Rain Flower* Mary Duroux has used cultural knowledge passed on to her through her elders as the basis for this story. It is not a traditional story'.<sup>70</sup>

### Individual and community contributors

Under the moral rights provisions of the *Copyright Act*, the right of attribution is recognised for creators. However, it is recommended that contributors also be attributed for their role in the development of a literary work. It is also important to attribute the cultural source of a story. For example, a story originating from a particular language group should be attributed in each and every publication.

### What is copyright?

Copyright is a form of legal protection that provides the author or creator of a work with the right to utilise it and prevent others from capitalising on it without his or her permission.

The *Copyright Act* is the main law in Australia that governs the use, production and dissemination of original artistic works. Copyright protects literary, artistic, dramatic and musical works, sound recordings and films. Rights are provided to authors under the Act.

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

Authors can license other people to reproduce their work under an agreement. This agreement will include certain terms such as the fee for

use, the purpose of the agreement, the nature of the rights granted and the period of time the agreement will last.

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

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

There are no special provisions for the protection of Indigenous cultural and intellectual property under the *Copyright Act*.

### How does copyright protect writing?

It is not necessary to register for protection of copyright. Copyright protects literary, artistic, musical and dramatic works as soon as they are created in a material form. This means that a work must exist in a permanent and tangible form.<sup>71</sup> For example, copyright would exist in a book's unpublished manuscript as a literary work.

Copyright protects the expression but not the underlying idea. In the case of writing this is the written expression<sup>72</sup> and, with recordings, in the recorded form. Indigenous traditional knowledge, dance, designs and stories that are orally or ephemerally transmitted are not protected under the standard copyright laws.

### Who owns copyright?

As the person who records the work in a material form, the writer is generally recognised as the copyright owner of a literary work. For instance, the copyright in the poem 'Journey', written by Terri Janke, is owned by her although published in the anthology *Untreated: Poems by Black Writers*. The publisher, in this example IAD Press, owns the copyright in the collection.

There are some notable exceptions to the general rule of ownership:

- An employer will own the copyright to works produced under a contract of employment

unless an alternative arrangement is agreed to in writing. For example, if you are employed as a researcher for an organisation and write a book as part of your paid employment, it is likely that the copyright will be held by the organisation. If the work is commissioned and the writer is an independent contractor, the copyright will remain with the writer.

- The Australian Government can assert copyright to works produced under its direction and control. However, if a writer receives a government grant from the Australia Council, for instance, the copyright will belong to the author.

Importantly, for copyright to exist, an individual author or group of authors must be identifiable.

With Indigenous cultural expression some stories have been passed down through many generations. An individual author may not be able to be identified, and indeed may not exist, because much Indigenous cultural expression is owned communally.

While individual authors of a work are recognised as copyright holders by the Act, communal ownership of Indigenous heritage such as language group designs or language group knowledge is not recognised. Protection of much of this material is therefore not guaranteed.

### What rights do copyright owners have?

Copyright owners have the right to earn money from the use and copying of their literary work. The copyright owner of a literary work has the exclusive right to do all or any of the following:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work
- do any of the above in relation to an adapted literary work.<sup>73</sup>

### Collaborative works

Under the *Copyright Act*, a ‘work of joint ownership’ refers to a work resulting from the collaboration of two or more authors and where each author’s contribution is equal to the contribution of the other authors.<sup>74</sup>

The author must contribute to the work by way of effort, skill and labour. It is not enough to inspire or make suggestions. In this interpretation, the custodians of cultural stories will generally not be recognised as the legal copyright owner of an Indigenous literary work that depicts language group creation stories.

Each author of a work of joint authorship owns copyright in the resulting work.<sup>75</sup> This means that each author must obtain the consent of the others before exercising any of their rights under copyright. For example, if an author wants to license the rights to reproduce a collaborative work to another party, he or she must get the consent of all the authors who participated in the collaboration.

### Communal ownership versus joint ownership

In *Bulun Bulun & M\* v R & T Textiles*,<sup>76</sup> the court decided that artistic works containing Indigenous ‘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 designs and knowledge within the work, copyright does not recognise the group as the owners.

The individual artist is recognised as the copyright owner and may have a special obligation to the language group to deal with the copyright in the work, in ways that are consistent with Indigenous law. Depending on the circumstances, this obligation may be enforceable in the court. The nature of this relationship may also extend to knowledge in the written form.

### How long does copyright protect literary works?

Before 2006, the duration of copyright in literary works was 50 years after the death of the author. From January 1, 2006, the copyright term was extended to 70 years after the death of the author.<sup>77</sup> If copyright in a literary work expired before January 1, 2006, it is in the public domain and may be freely used. All literary works in copyright after January 1, 2006 are now protected for 70 years after the death of the author.

Copyright only protects works for a limited period and therefore assumes that some forms of Indigenous art and cultural expression are in the public domain and are free for all to use and exploit.

### What is the public domain?

Once copyright lapses the work is said to be in the public domain. The law no longer prevents anyone from accessing and exploiting the material. For example, old stories that are out of copyright can be reproduced without the consent of the copyright owner. Indigenous people’s right to culture exists in perpetuity. To respect Indigenous cultural heritage, it may be necessary to get permission to use Indigenous stories even though, legally, they are in the public domain.

### What are moral rights?

The Moral Rights Amendments to the *Copyright Act* were introduced in December 2000 and provide some new ways to challenge inappropriate treatment of Indigenous literary works. These new laws provide the following rights to authors:

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

The author of a work has the right to be identified as the author where his or her work is reproduced in material form, published, performed, adapted, or communicated to the public.<sup>78</sup> Authors can require their names be clearly and prominently reproduced alongside all reproductions of their works.<sup>79</sup>

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

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

#### 3. The right of integrity

Authors can take action against parties who treat or alter their works in an inappropriate way, causing harm to the author’s reputation.<sup>80</sup> This may, for instance, be a work that is edited or altered in a way considered inappropriate to the writer.<sup>81</sup> There will be no infringement of the moral right of integrity if inappropriate treatment or other action was reasonable.<sup>82</sup>

Prior to making any significant alterations to, or adaptations of, a literary work, it is important to get the consent of the author in writing.

The potential for the Moral Rights Amendments to increase copyright protection for Indigenous writers 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.

### Indigenous communal moral rights

Existing moral rights are individuals’ rights only. The communal nature of Indigenous cultural material and the right of an Indigenous language group to protect and guard against issues of misinformed source or integrity are not recognised. In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act* for Indigenous Communal Moral Rights (ICMRs). The Exposure Draft proposed the introduction of Indigenous communal moral rights for copyright works and films.

The model first proposed in 2005 introduces ICMRs to exist alongside individual moral rights. It was proposed that the ICMRs would be exercisable independently of the individual author’s moral rights. ICMRs would exist in

works and films drawn from a traditional base,<sup>83</sup> if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film, and the Indigenous community.<sup>84</sup> There must also be acknowledgement of the Indigenous community’s association with the work.<sup>85</sup> Further, all interest holders in the work (ie copyright owners) need to have consented to the ICMRs existing in the work or film.

ICMRs would exist for the term of the copyright period.

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community, according to decision-making processes.<sup>86</sup> The proposed regime incorporates defences and consents.

The ICMR regime is not yet law, and many commentators have criticised the model as being overly complex. Further consultation with Indigenous creators and communities has been recommended.

### Licensing

Copyright is personal property and can be assigned and licensed including by way of purpose, place (territory), or time period.<sup>87</sup> Rights can be split and dealt with in a range of categories. A grant of a right comprising the copyright of a work is referred to as a licence.

A licence is a grant of rights in intellectual property. To do, or to authorise the doing of, any act comprised in the copyright in a work, film or sound recording without the licence of the copyright owner is an infringement of copyright.<sup>88</sup> A licensing agreement is made when the copyright owner enters into a

contract with another person to authorise use of the copyright material. By entering into a publishing agreement with a publisher, an author is giving a licence to the publisher to reproduce their literary work, and make it into a book. There will also be terms relating to other rights, such as digital rights.

### Licensing for publication

The publisher of a literary work will need permission from the writer to publish their work. Some points to consider are:

- Written contracts are preferred to oral agreements.
- Indigenous authors should be given the opportunity to consider contracts and obtain proper legal advice.
- The contract should be explained to Indigenous authors and, if necessary, a translator be used to explain the major issues of the contract.
- Appropriate royalties should be paid to the author.
- If the work is to be altered or adapted for mass production, authors should be given the opportunity to approve or otherwise reject the alteration or adaptation of their work.

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

### Assigning copyright

Copyright can also be assigned. This means that you give your copyright to someone else. They become the copyright owner and can authorise others to reproduce your literary work. Copyright is usually assigned under written agreement. Once assigned, the author relinquishes copyright in his or her literary work.

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

It is important for Indigenous authors to check agreements and make sure they are not

assigning away their rights instead of alternatively licensing use of their work.

### Publishing contracts

Publishers offer authors a publishing contract, which is an agreement to reproduce and publish a literary work. The contract may include terms such as:

- licensed rights – the author's grant of rights to publish and sell the literary work
- royalties – Australian Society of Authors (ASA) Minimum Standards are encouraged
- territory – which countries, for instance, will be the subject of the right to reproduce
- term – length of time the publisher has the rights to the literary work.

The ASA publishes two comprehensive books that provide useful information on publishing contracts:

- *Australian Book Contracts* (3rd ed), Barbara Jefferies et al., Keesing Press, Sydney
- *Between the Lines: A Legal Guide for Writers and Illustrators* (2004), Lynne Spender

The ASA also operates a Contract Advisory Service that is funded through the the Australia Council's literature board.

The Arts Law Centre of Australia has a free information service for members, and hosts 'Artists in the Black', an advice service for Indigenous artists and writers, employing an Indigenous solicitor and an Indigenous information officer.

It is recommended that legal advice be sought on each contract. Some terms that Indigenous authors should aim to include for better recognition of Indigenous cultural issues are:

- cultural integrity
- attribution of communities (where applicable)
- dispute resolution clauses.

### Case study: Aboriginal Studies Press – dispute resolution clause

The Aboriginal Studies Press has a dispute resolution clause in its publishing contract, which provides that the author and the publisher must notify each other of a dispute, and hold good faith discussions to try to resolve it. If a dispute cannot be resolved it will be put to mediation before any action can be taken in a court of law.<sup>89</sup>

### Managing copyright to protect your interests

As copyright exists as soon as a work is created, it is not a legal requirement to register copyright. However, certain precautionary practices can provide good warning to potential infringers and notify them of where to get prior permission to copy.

It is important to keep good records of your works. It is a good idea to write your story down, or type it into your computer.

Label all reproductions of the work clearly with the following information:

- title of the paper, novel or short story
- writer or author
- date created
- copyright owners
- cultural group or language group, if applicable.

When authorising others to reproduce your works make sure that you use written agreements and keep records of the rights you have granted, and where your works have been published. Ask for copies of any journals or anthologies that reproduce your work.

### 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.

It may be appropriate to seek advice from a suitable practitioner on the appropriate wording for the copyright notice.

The following is an example of a copyright notice for a literary work:

*Butterfly song* © Terri Janke, 2005\*

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

The Arts Law Centre recommends the following traditional custodian notice in artworks with traditional knowledge:

*The images in this artwork embody traditional ritual knowledge of the (name) community.*

*It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary law of the (name) community, and may also breach the Copyright Act 1968*

*For enquiries about permitted reproduction of these images, contact (community name)*

The copyright for this anthology is noted as follows:

© Collection IAD Press, 2001.

The following is an example of a notice for language group-owned traditional stories:

Traditional story: Torres Strait Islands

This version: © A. Murray, 2002. This version is made with the permission of the language group. It may not be reproduced in any form without the permission of the writer and the language group concerned.

For more information on recommended copyright wording for publications, see the *Style manual for authors, editors and printers*.<sup>90</sup>

### Moral rights notice

If your work is to be distributed in New Zealand and Britain, it is also a good idea to include a notice asserting your moral rights:

The creator(s) assert their moral rights.

### When is copyright infringed?

It is an infringement of copyright to copy or deal with a copyright work without the consent of the copyright owner.

A person will infringe copyright in a literary work if he or she publishes, adapts, reproduces the work in material form or communicates the work to the public without permission from the copyright owner.

It is also an infringement of copyright to copy directly a substantial part of a literary work. Substantial does not necessarily refer to a large part of the work. The court will look for striking similarities between the original work and the infringing copy, and assess the quality of what was taken.

It is also an infringement of copyright to import an infringing work into Australia for sale or hire.

Some exceptions to copyright infringement are:

### Fair dealings provisions

The argument of 'fair dealings' can be a defence to allegations of copyright infringement. Copyright is not infringed if the work is used for:

- research or private study purposes<sup>91</sup>
- criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made<sup>92</sup>
- the purpose of, or associated with the reporting of news in a newspaper or magazine and a sufficient acknowledgment of the work is made; or for the purpose of, or associated with the reporting of news by means of broadcasting or in a cinematograph film<sup>93</sup>

- judicial proceedings or a report of judicial proceedings, or for the purpose of the giving of professional advice by a legal practitioner.<sup>94</sup>

### Crown use of literary work

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 author is still entitled to payment for use and the government must contact him or her as soon as possible to negotiate this.

### Library copying

Libraries and archives can make copies of copyright works under certain circumstances in accordance with statutory procedures.<sup>95</sup>

### Educational copying

Educational institutions, such as schools and universities, can make multiple copies of print material, and can copy television and radio programs for education purposes. They must however pay statutory licence fees to the relevant collecting societies. Authors should be aware of these schemes, as there may be royalties payable in certain circumstances. Contact the Copyright Agency Limited, Screenrights or Viscopy where applicable.

### Lending rights

#### Public Lending Right

Public Lending Right (PLR) is based on the concept that creators and publishers may incur a loss of income when copies of their books are freely available in public libraries, and are borrowed by the general public who might otherwise purchase the book.

Australian authors and publishers are eligible for payments under the scheme provided they meet eligibility criteria and satisfy specific requirements. Claims are made to the Department of the Environment, Water, Heritage and the Arts. For information on guidelines, visit <www.arts.gov.au>. It is free for authors to register and you must be registered to receive any payments.

### Educational Lending Right

Educational Lending Right (ELR) is an Australian Government cultural program administered by the Department of the Environment, Water, Heritage and the Arts. The Australian Government has made \$44 million available to support the scheme for the years 2004–05 to 2007–08. ELR makes payments to eligible Australian creators and publishers whose books are held in educational lending libraries.<sup>96</sup> This scheme complements the PLR.

For information on guidelines, visit <www.arts.gov.au>. Authors can register for free; you must be registered to receive any payments. You also must be eligible either as a creator or publisher to qualify for an ELR<sup>97</sup>. For full criteria or further details of this scheme visit <www.arts.gov.au>.

### 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.*<sup>98</sup>

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.<sup>99</sup>

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.<sup>100</sup>

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 work that you lose a lot of control over the way it is used. This could also cause serious problems if you later want to enter into a publishing agreement, because you no longer have control of the rights a publishing 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 provide 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.*<sup>101</sup>

**Hypothetical case study:  
Free website download**

Hanna has written down a traditional story of her mother's clan. She is encouraged by a friend to put her story on a website, and sign a Creative Commons licence that will allow anyone to download the story for free, and to make commercial uses. Hanna finds that someone has downloaded her story from the website, and adapted it to create a new story. Hanna is very unhappy with the way the story has been altered, and is now claimed by the new 'author' as his story. She feels that her original story has been ripped off.

Hanna can remove her story 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 publishing deal for a compilation of stories, but she is unable to include this story in the deal because she has given up so many aspects of her copyright that the publishing company won't include it in the deal.

**Further copyright information**

Copyright law may impact on the rights of Indigenous people to their traditional knowledge. It is therefore important for Indigenous writers to know about copyright laws.

For general information on copyright laws, see the following websites:

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

**7. Proper returns and royalties**

Indigenous people should share in the benefits and receive proper returns for use of their cultural heritage material. When commissioning Indigenous writers, fees should be paid at an appropriate industry rate. The Australian Society of Authors has recommended minimum rates, including freelance rates, and teaching, reading, speaking and judging rates for writers and illustrators. There are also minimum rates for poetry developed with the Poet's Union. These rates recognise the professional standards, time and effort that go into writing and book illustration. They are useful guides for authors negotiating fees for their professional services. They are available online at <[www.asauthors.org](http://www.asauthors.org)>.

When using communally owned cultural heritage material, it is important to consider ways the language group can benefit from the use of their material. For example, you could host a launch in the Indigenous community or provide copies of the published documents. Another way of reciprocating could be to conduct workshops for emerging writers.

**Copyright collecting agencies**

Most copyright owners lack the time and necessary bargaining power to manage and exploit their copyright works. For management and administration of copyright, there are several collecting societies that have been established within Australia. These collecting societies administer the rights of members for a fee or share of the royalties. Some of them, such as the Copyright Agency Limited (CAL) and Screenrights, have a legislative basis for collecting royalties. Others are voluntary organisations that artists are required to join. The list below contains details of the most relevant collecting societies for authors as well as details of two key organisations – the Australian Society of Authors and the Arts Law Centre of Australia.

**Copyright Agency Limited**

Copyright Agency Limited (CAL) is an Australian copyright management organisation that aims to provide a bridge between creators and users of copyright material.

CAL is the non-exclusive copyright agent for authors, journalists, visual artists, photographers and publishers to license the copying and communication of works to the general community.

CAL manages licences for the copying and digital communication of print material by educational institutions, government agencies, corporations, associations, places of worship and other organisations.

Authors must register to receive monies directly from CAL. If not registered, the monies may go to the publisher who is then responsible for passing on the author's share under the terms of the publishing contract.

For more information about CAL, visit <[www.copyright.com.au](http://www.copyright.com.au)>.

**Screenrights**

Screenrights is an audio-visual copyright society representing more than 2600 members. These include copyright holders in scripts, music, sound recordings and artistic works from all around the world. A non-profit society, its royalty collection services operate in 'circumstances where it is difficult or impossible to license your work on an individual basis'.<sup>102</sup>

Writers can join Screenrights online free of charge. They need to register their titles, production details and the nature of their claim.

Screenrights collects royalties from schools, TAFEs and universities when they copy from television. It distributes this money on a non-profit basis to the producers, screenwriters, distributors and copyright owners of music and 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 licence,

Screenrights has also created <[www.enhance.tv.com.au](http://www.enhance.tv.com.au)>. This site gives educators free resources for using television in the classroom, as well as a weekly email guide of TV highlights.

Screenrights also administers provisions in the *Copyright Act* that allow pay television operators to retransmit 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. They can also make their registration global, appointing Screenrights International to collect any royalties being held for them by other similar societies in Europe, Canada and the United States. This enables filmmakers to maximise their returns and minimise their costs.

For more information about Screenrights, visit <[www.screenrights.com.au](http://www.screenrights.com.au)>.

**Viscopy**

Viscopy is the copyright collecting society for visual artists in Australia and New Zealand. Established in 1995, Viscopy is the main point of contact for those wishing to clear copyright for the reproduction of artistic works.

Viscopy has about 2000 Australian artist members, half of whom are Indigenous artists and their estates.

Viscopy negotiates copyright-related transactions between the artist and the user for reproductions of artistic work in advertising, publications, newspapers and electronic media such as television, cinema, internet and CD-ROM.

Viscopy handles associated contracts, negotiations, legal requirements and the distribution of royalties. There is no membership fee to join Viscopy, however an administrative charge applies to clearances. Payments are then made to artists half-yearly.

For more information about Viscopy, visit <[www.viscopy.com.au](http://www.viscopy.com.au)>.

### Australian Society of Authors

The Australian Society of Authors (ASA) is the peak professional association for Australia's literary creators with more than 3000 members in Australia and overseas. Its members include biographers, academics, food and wine writers, children's writers, ghostwriters, librettists, travel writers, romance writers, translators, journalists, poets and novelists.<sup>103</sup>

The ASA provides information and advice to both emerging and established writers and illustrators, offers mentorship programs and seminars, and is a strong national advocate for author's interests. It sets minimum rates of pay and conditions for authors.<sup>104</sup>

An executive director manages the ASA with policy direction set by a 14-member management committee. Some of the committee members have responsibility for specific portfolio areas. South Australian author Jared Thomas is currently responsible for the Indigenous portfolio; past portfolio holders include Dr Anita Heiss and Alexis Wright.

The ASA has presented national mentorship programs and seminars for Indigenous writers and illustrators, developed a code of ethics for writing about Indigenous issues and is currently involved in the National Literacy Challenge.

The ASA successfully campaigned for Public Lending Rights and Educational Lending Rights, which together will pay almost \$50 million to copyright holders in the next three years. The ASA was instrumental in setting up CAL and helped establish the Australian Copyright Council, which offers free advice on copyright issues.

ASA members can use a subsidised contract advisory service, receive discounts on ASA publications, seminars and events, and can call anytime for friendly and informative advice about all aspects of writing and publishing.

For more information about ASA, visit <[www.asauthors.org](http://www.asauthors.org)>.

### Arts Law Centre of Australia

The Arts Law Centre of Australia gives advice to artists, writers and filmmakers on legal matters relating to arts practice. The Arts Law Centre website publishes useful information sheets on copyright and the arts at <[www.artslaw.com.au](http://www.artslaw.com.au)>.

In 2004, the centre established the Indigenous program 'Artists in the Black', which employs an Indigenous legal officer and an Indigenous information officer, and is overseen by an Indigenous reference group. The Artists in the Black program goals include:

- providing legal service and information to Indigenous artists, communities and arts organisations
- doing informed advocacy work on issues relating to Indigenous cultural and intellectual property.

## 8. Continuing cultures

Consultation is an ongoing process. Cultures are dynamic and evolving, and the protocols within each group and community will also change.

It is important to consider how you will maintain relationships for future consultations. This might include consultation at a later date for future uses of the work that were not envisaged during the initial consultation.

## 9. Recognition and protection

The increasing level of appropriation of Indigenous arts by non-Indigenous people has compelled Indigenous communities to seek greater protection of Indigenous arts, including the call for new legislation recognising communal rights to culture.

Dr Anita Heiss has published *Writing about Indigenous Australia – some issues to consider and protocols to follow: A discussion paper*.<sup>105</sup>

The paper discusses the issue of non-Indigenous writers writing about Aboriginal society and culture. It goes through the issues for and against and gives some advice for those contemplating writing on Indigenous themes. There are also some protocols to follow and a useful guide on use of terms. There is also information on getting advice from organisations where material for writing is collected.

### Case study: *Mutant Message Down Under*

In 1994, Marlo Morgan's best-selling book, *Mutant Message Down Under*, was marketed as a true account of the author's real spiritual experiences among a group of Aboriginal Australians known as 'Real People'.

The book was supposedly inspired by the author's experiences with Australian Aboriginals during a very brief stay in the early 1990s. Indigenous groups voiced their concerns about the misinformation and distortion of Aboriginal culture that the book represented.<sup>106</sup>

According to one journalist's report, there is speculation over whether Morgan ever made the journey described in the book.<sup>107</sup> Robert Eggington of Dumbartung Aboriginal Corporation condemns the book as a 'fabricated fantasy'. He further notes that if Morgan has done what she claims to have done without proper consent, she would have been in breach of Indigenous laws. So serious is the breach that under Aboriginal law it would once have been punishable by death.<sup>108</sup>

The Australian Society of Authors has produced two discussion papers relating to issues of Indigenous literature. Written by Indigenous portfolio holder Dr Anita Heiss, the first set of protocols focuses on issues for non-Indigenous writers to consider when writing about Indigenous

Australian society and culture. The paper outlines what Indigenous writers have said on the topic and how non-Indigenous writers have dealt with the issues. The paper includes a basic code of ethics checklist covering areas of representation, consultation and attribution.

The second paper, *Australian Copyright vs. Indigenous Intellectual and Cultural Property Rights*, explores the shortfalls in the *Copyright Act's* protection of Indigenous cultural interests. Both papers can be downloaded from the ASA website at <[www.asauthors.org](http://www.asauthors.org)>.

For further resources consult the references at the end of this guide.

## Implementation

The protocols in this guide are flexible. You can use them to further develop protocols for your writing project, program or practice, Indigenous 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 an Indigenous writing 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 Indigenous writing are encouraged to respect that:

- Indigenous Australians, the Aboriginal and Torres Strait Islander people, are the original inhabitants of Australia.
- It is important to seek consent from and acknowledge the Indigenous country and custodians at the site of each spoken word performance, launch or literary event, and in the acknowledgment of a published text about a specific Indigenous country.
- Indigenous people have the right to own and control their heritage – including Indigenous body painting, stories, songs, dances, images, traditional knowledge and other forms of cultural expression.
- Indigenous cultures are living cultures.
- The diversity of Indigenous culture should be acknowledged. Culture varies from country to country and from language groups.
- Indigenous people have the right to choose their own representatives.
- The cultural contribution of Indigenous people to writing should be valued, acknowledged and remunerated.
- Local community protocols and protocols associated with a specific work should always be respected and observed.

- Indigenous worldviews and customary laws should be respected in contemporary artistic and cultural life.

### Publishing stories and ideas

The effects of a published Indigenous story – whether sacred, closed or general – should be discussed prior to publication. Once publicly released, it is difficult to chart how a story might be embraced, adopted and ingrained.

### 2. Indigenous control

Indigenous people have the right to control the use and expression of their cultural heritage. When working with Indigenous people:

- Discuss the use of Indigenous cultural heritage material with Indigenous people in authority.
- Involve Indigenous people in all stages of writing projects, including Indigenous writers, community members, storytellers and editors.

### 3. Communication, consultation and consent

- Consult with Indigenous people on the use and representation of their Indigenous heritage.
- Prior to use, inform Indigenous people about the implications of consent.
- Consultation should address the communal nature of Indigenous cultural expression.
- Allow sufficient time for consultation. Each community will need a reasonable period of time to consider and consult within their communities. Do not expect to have a reply to a question in a day or a week.

### Creation stories

- Speak to elders and other people in authority about using creation stories. It is not acceptable to source material from other books without considering the rights of Indigenous people.
- Seek permission prior to writing or re-telling Indigenous creation stories.

- Non-Indigenous writers should consider whether they should be reinterpreting creation stories, or whether they should rather find an appropriate Indigenous person to tell and record the story.
- Identify appropriate information and authority bodies to discuss ideas for literary works – for example, language centres or Indigenous publishing houses if the idea involves adaptation or translation of a creation story.

### Recording oral stories

- Consult with Indigenous people, family members, Indigenous organisations and other individuals relevant to the project.
- Make draft copies available before publication and allow relevant Indigenous people and family members to comment on drafts.
- Be aware that the inclusion of personal material may be sensitive.
- Consider who should own copyright in the published story. Where the work closely follows the words of the Indigenous storyteller, copyright ownership should be recognised as belonging to that person.
- Discuss how tapes or recordings of the orally related story will be used after the project. Ensure copies are given to the relevant people.
- Discuss copyright and clear publication rights with relevant people.

### Writing life stories

- If you are writing about living people, it is important to get their consent and work closely with them. Talk about copyright and intellectual property issues. If it is primarily their story (for example, if transcribed from tapes), then the life story subject should own copyright.
- If it is a collaboration (for example, where the writer has brought his or her skill to the work), then there may be some scope for sharing copyright.
- If writing about a deceased person, speak to the family or language group representatives to seek their permission and consult on issues of representation.

- If adapting oral stories and using true accounts for novels, consent should be sought from the person who is telling the story, elders and/or other persons in authority.
- Ensure that all collected materials such as photographs, recordings, copies of stories, CD-ROMs, books, radio interviews and newspaper clippings are returned to the original informant and/or family and community.

### 4. Interpretation, integrity and authenticity

- Consult with Indigenous people about the integrity and authenticity of their Indigenous heritage.
- Indigenous individuals and communities should have control over how their cultural material is presented.
- Make sure the writing is based on sound research and that facts are credible.

### Interpretation

- Consider reasons for writing or commissioning a work. Reflect on whose perspectives of Aboriginality are being represented.
- Be responsible for your representation of Indigenous cultures. Consider the following:
  - How will your writing affect the Indigenous group it is based on?
  - Does it empower Indigenous people?
  - Does it expose confidential, personal and/or sensitive material?
  - Does it reinforce negative stereotypes?
  - Have you used appropriate terminology?
- The cover and illustrations of the book should be checked by the author to ensure they are authentic and not culturally offensive to other Indigenous groups.

### Editing

- Indigenous individuals and communities should have the final approval on how the written form of their cultural material is presented. Reasonable time should be given for checking drafts.

- Once approval is given, any future editing should be checked again with the relevant Indigenous people.
- The use of Indigenous people as writers and editors of manuscripts, books and reports about Indigenous cultural material is encouraged.

### Publishing

- Publishers should not assume that traditional Indigenous stories are free to be exploited. It is necessary to consult with relevant Indigenous people for permission. If agreed, publishers and collecting societies should negotiate with Indigenous people on appropriate royalties for use.
- Publishers should make relevant inquiries to ensure a writer who is promoted and marketed as 'Indigenous' is an Indigenous Australian.
- Written contracts conforming to the Australian Society of Authors' minimum standards are encouraged.
- Indigenous writers should be given the opportunity to consider contracts and obtain proper legal advice.
- The publishing contract should be explained to Indigenous writers and, if necessary, a translator should be used to explain the major issues of the contract.
- Special attention should be paid to clearing any suggestions or changes made through the editorial process.
- When selecting illustrations for the cover, consult with the Indigenous author, artist and other Indigenous people to check the cultural appropriateness of the image.
- Where possible, an Indigenous artist should be commissioned to illustrate the publication, or the work of an Indigenous artist should be licensed for use for a fee. For appropriate rates refer to Viscopy.

### 5. Secrecy and confidentiality

- The right of Indigenous people to keep secret and sacred their cultural knowledge should be respected.
- Indigenous people have the right to maintain confidentiality about aspects of their personal and cultural affairs.
- In many Indigenous communities, the reproduction of deceased people's names and images in books is offensive to Indigenous beliefs. Consult with the deceased's family or community so that the appropriate protocols are observed.
- Secret and sacred material refers to information that is restricted under customary laws.
- The publication of secret and sacred material may be a transgression of Indigenous law.
- Some people question whether it is at all appropriate to publish sensitive material in a form that can be disseminated widely.
- The personal privacy of Indigenous people should be respected.
- Personal and confidential information must not be disclosed without permission from all Indigenous people affected by the disclosure.
- It is the responsibility of those putting together writing projects to discuss any restrictions on use of the information with relevant Indigenous people and groups.

### 6. Attribution and copyright

#### Attribution

- Indigenous people should be given proper credit or appropriate acknowledgment for their role in the development and use of Indigenous cultural material.
- Indigenous people should be attributed for the use of their cultural heritage material in stories.
- Ensure that proper attribution is given to the writer and the source community, or other relevant Indigenous people.

### Copyright

- The author is generally the copyright owner of a literary work. Exceptions include an author who is an employee under a contract of service.
- The work must be original and must be reduced to material form.
- To be original, for the purpose of copyright protection, the author must have applied sufficient skill, labour and judgment to create the work.
- Authors do not need to register for copyright protection.
- The copyright owner of a literary work has the exclusive right to:
  - reproduce the work in a material form
  - publish the work
  - perform the work in public
  - communicate the work to the public
  - make an adaptation of the work
  - do any of the above in relation to an adapted literary work.
- Copyright in literary works lasts for 70 years after the death of the author.
- Ideas and themes are generally not protected. It is the expression that is protected.
- The Indigenous author who incorporates traditional ritual knowledge in his or her work has a special obligation to the language group when exercising copyright in the work.
- The author has moral rights to his or her literary work. This includes the right of integrity and attribution.

There are proposals to introduce Indigenous communal moral rights into the *Copyright Act*, which will give Indigenous communities the right of attribution and integrity issues for works

that draw from a traditional base. There is already voluntary agreement that Indigenous communal moral rights exist in a work.

- When reproducing and publishing literary works, it is necessary to get copyright clearance from the author.
- Writers and publishers are encouraged to use written agreements.
- A person will infringe copyright in a literary work if he or she does any of the following without permission from the copyright owner:
  - publishes the work
  - reproduces the work in material form
  - adapts the work
  - communicates the work to the public.
- Statutory exceptions include the purposes of criticism or review, and incidental filming.
- Under the educational statutory licensing schemes, authors may be entitled to royalties for use of their works. Copyright Agency Ltd (CAL) and Screenrights collect and distribute royalties to author and screenwriter members.

### 7. Proper returns and royalties

- Indigenous people have the right to receive proper returns for their contribution and the use of their cultural material, including copyright and royalties.
- Make sure fees or other benefits are negotiated with the informers, storytellers, writers and any relevant traditional custodians.
- The issue of copyright ownership of the material form of cultural expression should be discussed up-front.
- Indigenous people have the right to control the commercial exploitation of their cultural material.
- Indigenous people have the right to share in the benefits from any commercialisation of their cultural material.
- Check whether benefits other than royalties are sought by or due to Indigenous people.

- Make sure you register relevant work with CAL or other collecting societies so you can benefit from royalties.

## 8. Continuing cultures

Indigenous cultures are dynamic and evolving, and the protocols within each group and community will also change. Consultation is a continuous process.

- Consider cultural protocols and include these in any future licence agreements for use of the work.
- Indigenous people have a responsibility to ensure that the practice and transmission of Indigenous cultural expression is continued for the benefit of future generations.

## 9. Recognition and protection

- Indigenous people have the right to protection of their Indigenous heritage.
- The Indigenous author should own copyright in his or her literary work, giving him or her control of reproduction and dissemination of the work.

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