MORE THAN WORDS

Writing, Aboriginal and Torres Strait Islander Culture and Copyright in Australia

Terri Janke and Company
LAWYERS AND CONSULTANTS
More than Words
This discussion paper provides guidance to authors and illustrators on respectful story telling practices when working with Aboriginal or Torres Strait Islander people or working with their Indigenous Cultural and Intellectual Property.

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WARNING
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1. Introduction

Australia’s Aboriginal and Torres Strait Islander peoples are part of some of the world’s oldest living cultures. While colonisation has had a devastating impact on cultural practices, language and connection to country, Aboriginal and Torres Strait Islander peoples continue to care for and practice their culture on a daily basis, ensuring ongoing connection to their ancestors, community and country.

Language and storytelling play an essential role in the maintenance, transmission and protection of cultural practice to Aboriginal and Torres Strait Islander peoples and future generations. Aboriginal and Torres Strait Islander languages are foundational to cultural identity and are essential to the transmission of cultural practices, expressions and stories. Stories (oral and written) encode messages of cultural law, land, place, knowledge, experience, spirituality and survival.

Australian Intellectual Property laws (IP), including copyright, approach the literary tradition from a Western perspective where inspiration tends to flow through an individual and onto the page. Creative expression is an individual’s journey and the end result – the book, story, illustration, article etc. – is the individual’s property to be protected. Therefore, Australian IP laws focus on recognising the author’s ownership over his or her material expression, not safeguarding the information itself which may have been passed onto the author on the understanding that they share responsibility for the care of the story. Under the Copyright Act 1968 (Cth), the author is given economic rights over his or her work, and controls how it is reproduced, used and adapted.

Indigenous Cultural and Intellectual Property (ICIP), being Aboriginal and Torres Strait Islander peoples’ rights over their heritage, and its expression and protection, operates very differently. Aboriginal and Torres Strait Islander communities share custodianship responsibilities to their ICIP. Their languages and stories – oral or written – constitute ICIP and therefore must be used in accordance with best practice and cultural protocols designed to maintain their integrity for future generations.

ICIP rights empower the self-determination of Aboriginal and Torres Strait Islander peoples in relation to their heritage. As outlined in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)\(^1\), Indigenous peoples:

signs, 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.

Ethical and cultural protocols are also relevant where stories incorporate communally owned ICIP, are about Aboriginal or Torres Strait Islander peoples, or include Aboriginal or Torres Strait Islander characters. As recognised in Article 3 of the Declaration, Aboriginal and Torres Strait Islander peoples have the right to a voice in stories written about them.²

To speak for an Aboriginal or Torres Strait Islander person without consultation and consent, is to undermine Aboriginal and Torres Strait Islander peoples’ right to self-determination and their right to control how their ICIP is maintained, transmitted and protected.

This paper seeks to inform authors and illustrators about ICIP and IP (including copyright), and provide guidance for authors and illustrators on respectful storytelling practices. The purpose of this guidance is to empower Indigenous communities, foreground Aboriginal and Torres Strait Islander voices and contribute to an Australian literary sector based on authenticity and integrity that celebrates its unique cultural identity.

The figure below highlights key questions when determining whether ICIP protocols apply, as well as an overview of the consultation and consent considerations, when they do.

Figure 1: Do ICIP Protocols apply?

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² See note 1, Article 3.
Authors or Writers?
This discussion paper was written predominately for non-Indigenous authors and illustrators. We have used the term "authors" rather than "writers" because generally authors have published works, while writers may be unpublished. The ICIP protocols referred to in this discussion paper are relevant from the very start of any writing project. However, the ICIP protocols also recommend developing continuing relationships and having ongoing discussions concerning ICIP as the writing continues to develop, including during the publication and marketing stage. For this reason, we have used the term "authors" – to reflect that the protocols, correctly applied, encompass all stages of the writing project.
2. Culture and Copyright

2.1. WHAT IS INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY (ICIP)?

Indigenous Cultural and Intellectual Property (ICIP) refers to the rights of Australian Aboriginal and Torres Strait Islander peoples to their language, stories, songs, knowledge (including spiritual and ecological), knowledge systems, cultural practices, land, waterways, sacred sites, ceremony, objects and ancestral remains, literary, performing, musical and artistic works, and documentation and recordings of or about Aboriginal and Torres Strait Islander heritage and peoples. ICIP is contributed to by each generation and is ever changing and ongoing.

**TIP!** ICIP rights continue indefinitely and do not expire in the way copyright expires.

Authors and illustrators may incorporate ICIP into their work in a number of ways including by:

- creating Aboriginal or Torres Strait Islander characters,
- incorporating Aboriginal or Torres Strait Islander references including to sites, country, ceremony, knowledge, stories, language or song,
- re-telling stories that contain ICIP,
- using resources or research materials that contain ICIP or refer to Aboriginal or Torres Strait Islander peoples (e.g. archival materials at the state library),
- referring to or using Aboriginal or Torres Strait Islander iconography, designs or artwork within their story, or
- speaking to or collecting information or knowledge from an Aboriginal or Torres Strait Islander knowledge holder.

ICIP is strongly connected to place and is regarded as collectively belonging to a particular community or group. This means that ICIP belonging to the Whadjuk people of Perth will be different to the ICIP of the Palawa people of Tasmania.
TIP! Aboriginal or Torres Strait Islander people identifying as being from a particular language group or country cannot speak for people and their stories or knowledge from another language group or country without consent. So, you can’t ask a Bundjalung person to consult or consent to a story about Darkinjung country.

Although ICIP may come in many forms, such as stories, songlines, plant knowledge, language, and knowledge of the seasons and the stars, they are often inter-linked. For example, a story about an animal can actually carry important information about a certain place, knowledge about the seasons or land management, and may also represent a person’s particular totem or connection to their ancestors.

Attached to ICIP are custodial obligations to ensure that ICIP can be nurtured, maintained and then passed onto future generations. Whilst all Aboriginal and Torres Strait Islander people have a responsibility to follow their community’s protocols for the care and protection of ICIP, only certain persons within each community will have the authority to know, hold and share knowledge, or give permission to use and share certain ICIP.

ICIP is not fixed or static. It is constantly evolving and changing as it is contributed to by each generation. This means that modern and emerging knowledges may be a continuation of traditional knowledges and will also be considered ICIP. Recently, there has been greater awareness of issues around Indigenous data sovereignty as new and emerging technologies present more ways of capturing, creating, accessing, using, disseminating and storing ICIP. This is discussed further in Section 2.6.

2.2. WHAT IS INTELLECTUAL PROPERTY?

Intellectual Property (IP) is an umbrella term for several areas of law that relate to peoples’ rights over their creative and intellectual output. Intellectual Property encompasses Australian laws relating to:

- Copyright
- Trade Marks
- Patents
- Designs, and
- Plant Breeders Rights.

These areas of law recognise people’s property rights over their creative expression. This recognition generally has a dual purpose which includes both social and economic benefit. For example, businesses use trade mark law to protect their logos and brand names. They register their logos and brand names with IP Australia so that other businesses cannot use them. This allows businesses to build brand recognition and create a profitable enterprise.

In general, authors and illustrators find copyright most relevant to them, as it allows them to protect their rights over their literary and artistic works.
2.3. WHAT IS COPYRIGHT?

The Copyright Act 1968 (Cth) provides creators of literary works with the rights to own and control their written stories. Copyright also protects artistic works, including illustrations that may be incorporated in literary works. Copyright protection is automatic, and although you do not have to register your work for it to be protected by copyright, it must be written down or otherwise recorded in material form to gain protection.

**TIP!** Oral stories are not protected by copyright! Stories are not protected until they are written down or recorded, and when they are written down or recorded it is the writer who holds copyright (not the original storyteller!)

This means that copyright does not recognise community ownership of culturally significant stories or knowledge. It also means that non-Indigenous authors can hold copyright over Aboriginal or Torres Strait Islander stories, when they are the ones to write the story down.

In addition, copyright protection is time limited. Generally, a work is only protected by copyright for up to 70 years after the author’s death. This is inconsistent with ongoing ICIP rights! It means that even if a Mirning person writes down a traditional story, and is therefore the copyright holder, this protection only last for up to 70 years after that person passes away. After that time, the story passes into the public domain, and can be used, adapted or copied freely by anyone.

2.4. DOES COPYRIGHT PROTECT ICIP?

The short answer is no, copyright does not effectively protect ICIP.

Copyright law focuses on European notions of creativity. Creativity is largely separate from other forms of knowledge (e.g. science and medicine). Copyright law is designed to create a market that will provide economic incentives for the individual author to create – the exclusive economic right to use and reproduce their work during their lifetime, and for their heirs to benefit for a short period after the author dies. After that time, the work is released into the public domain where it can provide further inspiration and economic opportunities for future generations of authors.

It is apparent that this does not align with the holistic concept of ICIP: how ICIP is created, who has responsibility for ICIP, and how ICIP should be maintained, transmitted and protected for future generations. While copyright law can offer some protection of material expressions, it is equally possible that application of the law will leave ICIP either unprotected, or result in a non-Indigenous creator being the copyright holder over written expressions of Aboriginal or Torres Strait Islander stories and knowledge, and create challenges for the long term care of ICIP.

2.5. WHAT ARE THE GAPS IN THE LAW?

The following example demonstrates many of the issues when it comes to relying on copyright law alone to protect ICIP.
**Example:** Debbie, a non-Indigenous author, hears Mara, an Elder, telling a traditional story. Debbie then writes the story in her own words. Under the Copyright Act, Debbie will hold copy-right in that expression of the story. She then licences it to a journal for publication and receives payment. Debbie does not tell Mara that the story will be published and does not acknowledge Mara or Mara’s clan. The Elders of Mara’s clan see their story published in the journal. They are angry that they were not consulted about the publication and there is no reference to the cultural source. It is an old story, passed on through over four generations. Of great concern was that Debbie got some of the story details wrong. The changes made the story seem like a joke, they thought, and not true to the original spirit of their ancestors.

This example points to several limitations in relying on copyright to protect ICIP:

**Authorship is about who puts pen to paper**

Copyright does not protect underlying ideas or information. Under the general provisions of copy-right law, Debbie is recognised as the author of the written expression of Mara’s story. Mara has no copyright in her story because she told it orally. She also has no right under copyright law to be acknowledged, although it is best practice to do so.

**IMPORTANT NOTE!** If Debbie had made a sound recording of Mara telling the traditional story e.g. in an interview, Mara will jointly own copyright in the sound recording with Debbie (and therefore the story recorded). This is because Mara’s story is likely to be considered a “performance” of an expression of folklore. Performers have the right to consent to their performance being recorded, are co-owners of copyright in a sound recording of their performance, and hold moral rights in their performance. As a joint author of copyright in the sound recording, Debbie will need Mara’s permission to use the recording, including making a transcript of the recording and then writing her own version of the story. For more information see Australian Copyright Council’s Performers’ Rights information sheet.³

If Mara had written the traditional story down, could Debbie still write a story based on this information, drawing on a central theme? Possibly, so long as Debbie did not reproduce a significant part of Mara’s words without permission.⁴ Whether a reproduction is “significant” will be a question of quality and not just quantity.⁵ Your reproduction of another writer’s work may be “significant” even if it comprises a relatively small part of your finished work.⁶ Also Mara would have to be attributed.

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⁴ See note 4, ‘Writers & Copyright’ Information Sheet.


Copyright doesn’t protect old stories

Even if the first storyteller had put it in material form, the length of copyright protection is only 70 years after the death of the author. This old story would be out of copyright which means anyone can reproduce (copy) it without consent or payment to the first Indigenous storyteller.

Copyright laws focus on individual rights, not communal rights

Mara’s people do not own copyright in the story, even though cultural protocols dictate that this story belongs to them. The story’s continuing link to Mara’s people may have bearing on their rights to land and cultural identity. Copyright law, however, does not recognise this.

Moral rights are individual rights belonging to authors

The Copyright Act provides for moral rights, which give authors the right to be attributed, the right against false attribution, and the right of integrity. In the example above, these rights belong to Debbie. There is no right under the Copyright Act for the Aboriginal or Torres Strait Islander community to be attributed, or to take action against Debbie for false attribution. Although the cultural integrity of the story is important to community Elders, under the current moral rights regime, they have no claim for infringement of integrity.

Copyright can be assigned and licensed

Copyright, like other property rights, can be sold, licensed and assigned. The copyright owner is free to deal with the copyright in a story, including giving consent for others to reproduce (copy) the story, publish it, translate it, or adapt it into a film. The author is not bound by cultural obligations, like Indigenous custodians, who must consider at each stage whether a new use or medium changes the spirit of the work.

Copyright and Indigenous works

The 1998 case of Bulun Bulun v R & T Textiles addressed copyright and communal ownership. John Bulun Bulun, a Ganalbingu man, created an artwork, ‘At the Waterhole’, incorporating traditional knowledge of his people. He had permission from his clan to do this, so long as he used the artwork in accordance with customary laws. The artwork was altered and reproduced without Mr Bulun Bulun’s consent on fabric by textile importers, R & T Textiles. Mr Bulun Bulun and George Milpurrurru, a senior clan Elder, took action in the Federal Court. The Court held that R & T Textiles had infringed Mr Bulun Bulun’s copyright and ordered the fabric importer to stop importation and pay damages.

The question of whether communal copyright existed in the artwork was also considered. The Court held that while the clan did not own copyright in the artwork, Mr Bulun Bulun owed a fiduciary duty to the clan to protect the integrity of his copyright work in accordance with his cultural obligations to protect traditional knowledge. Whilst Mr Bulun Bulun could sell the artwork for his own benefit, he was culturally required to look after the traditional knowledge incorporated in the artwork and hold the clan’s interests at heart. If Mr Bulun Bulun had been unwilling or unable to
take action for infringement, then Mr Milpurrurrru, as representative of the Ganalbingu people, could take action against R & T Textiles.

Considering the finding in this case, it is possible that if an Aboriginal or Torres Strait Islander person shares a culturally significant story with a non-Indigenous author, that author may have ongoing fiduciary obligations to that community. While they may own the copyright in the story if they write it down, like John Bulun Bulun, they may be required to look after the story in a way consistent with the clan’s cultural protocols.

2.6. WHAT IS INDIGENOUS DATA SOVEREIGNTY?

Indigenous Data Sovereignty refers to the rights Aboriginal and Torres Strait Islander peoples have over the collection, use and storage of data (e.g. information, statistics, reports, articles, e-books, catalogues, datasets etc.) that include their personal and community information and their ICIP.

IMPORTANT NOTE! Non-Indigenous authors should consider Indigenous data sovereignty during their research, or if they incorporate ICIP into their work, or refer to the personal information of an Aboriginal or Torres Strait Islander person.

For example: An author writing an historical novel is researching at her local state library. She finds an old recording from the 1930s of an Aboriginal Elder singing a traditional song about country. She would like to reproduce a few lines from the song in her book. She checks with the library and makes sure that copyright in the recording has expired. While the copyright has expired, ICIP rights in the data continue.

Indigenous data sovereignty is not just about use of historical records, but the collection, management, interpretation and storage of data today.

2.7. WHAT IS THE ROLE OF PROTOCOLS AND WHEN DO THEY APPLY?

It is evident that copyright can only offer a limited amount of protection for ICIP. ICIP protocols can work to address some of these gaps. It is increasingly common for industries, organisations, statutory bodies and businesses to adopt standard setting best practice protocols designed to guide their members, staff, clients and partners in respectful engagement with ICIP and Aboriginal and Torres Strait Islander peoples. These are often referred to as ICIP protocols.

Given the diversity of Aboriginal and Torres Strait Islander cultures and communities, each language group and clan will likely have their own rules or protocols for managing their ICIP. These will be specific to the community. Industry and organisation-based ICIP protocols however, are generally addressed to non-Indigenous members of that industry and provide higher...
level guidance on respectful collaboration with Aboriginal and Torres Strait Islander peoples and communities.

While protocols are not by themselves legally enforceable, they can be given legal effect through the use of contracts. In addition, to receive funding for creative projects that include ICIP, you will have to comply with industry ICIP protocols.

Indigenous communities and organisations may have their own cultural protocols, so it is important to ask about this when including Indigenous content.

See Section 6 for further information on relevant international laws and standards, as well as an overview of industry ICIP protocols already actively used in Australia.

### 2.7.1. Addressing ICIP in participant, commissioning and publishing contracts

Whenever working with Aboriginal or Torres Strait Islander people or their ICIP, it is relevant to address ICIP in your agreements. For authors and illustrators, the contracts that they may need to enter into include:

- Participant Release Forms or Cultural Clearance Forms e.g. the author interviews an Aboriginal or Torres Strait Islander knowledge holder for their research;
- Collaboration Agreements e.g. the author collaborates with an Indigenous person to develop the story;
- Consent or Licence Agreements e.g. the author or illustrator incorporates existing ICIP material such as an image, story or language words in their work;
- Commission Agreements e.g. a children’s book author commissions a local Aboriginal or Torres Strait Islander illustrator; and
- Publishing Agreements e.g. the author receives a pro forma publishing agreement from their publisher.

In the same way that IP and copyright is addressed, the incorporation, ownership and use of ICIP in a manuscript or work should be addressed in these contracts, including any limitations on use that the author has agreed to with the ICIP knowledge holder or community.

**For example:** If a non-Indigenous author wishes to use particular Aboriginal language words in their book, it would be best practice for them to work closely with the Aboriginal representative body or language centre for that language group to ensure permission and cultural appropriateness of the use, and the correct grammar and spelling. Free, prior informed consent should be sought for use of the language and best practice would mean that this process is guided by a Consent or Licence Agreement setting out the terms for use of the language.

**TIP!** An author interviewing an Aboriginal or Torres Strait Islander knowledge holder should use a Participant Release Form or Cultural Consent Form to obtain the consent of the knowledge holder for the recording and use of their IP and ICIP. The Form should also explain who will own the recording (remembering that expressions of folklore like ICIP constitute a performance and
NOTE! It is best practice for knowledge holders to own copyright in any recordings made of their traditional stories or ICIP. This means the author should ensure the Form being signed addresses assignment of copyright from the author to the knowledge holder.

2.7.2. ICIP clauses in contracts

Where a book or other literary or artistic work contains or refers to ICIP, it is best practice that any agreement should include a clause addressing the ownership and use of ICIP. This includes any publishing agreements. Authors and illustrators should refer to ASA’s template publishing agreement, available on the ASA website.

An ICIP clause in a publishing agreement should consider how ICIP in the book may be used appropriately and respectfully. The clause must include acknowledgement of continuing ownership of ICIP by traditional owners or custodians and commitment to complying with industry ICIP protocols and any other cultural protocols relevant in the circumstances. The clause must ensure ICIP in the book is correctly identified. The clause should also include an undertaking to only use the ICIP for the purposes agreed to in the contract, and a promise to seek further consent if any other uses are proposed. Attribution of the traditional owners or custodians should be also addressed. Depending on the circumstances, the clause may also be appropriate to refer to cultural mourning protocols for deceased Aboriginal or Torres Strait Islander people.
3. ICIP Best Practice and the Writing Process

3.1. PRE-WRITING

As the name suggests, pre-writing is the earliest stage of your creative process. It starts as soon as you begin to plan your characters and story. In this stage you will probably be conducting a lot of research to develop your narrative and to better understand your characters. You may come across ICIP materials in your research. For example:

- your story could include reference to an historical event or place;
- you may be reading old journals, or newspaper articles of the period that refer to Aboriginal or Torres Strait Islander peoples, or issues or events that affected them;
- your story may include an Aboriginal or Torres Strait Islander character;
- one of your characters may re-tell an Aboriginal or Torres Strait Islander story; or
- you might interview an Aboriginal or Torres Strait Islander person about their personal experience.

This list is not exhaustive and there are all sorts of ways that your research may include ICIP or reference Aboriginal or Torres Strait Islander peoples.
3.1.1. Including ICIP materials and stories in your notes

Writing about Aboriginal or Torres Strait Islander people, knowledge or culture will often involve representation of ICIP in the form of stories, information, place or language. Using, adapting and incorporating this information into plots within novels, or even writing versions of traditional stories, requires authors to think beyond conventional copyright laws.

The main question to consider is: **Does the work incorporate ICIP? Does it refer to the lives and experience of Aboriginal or Torres Strait Islander peoples and communities?**

For Aboriginal and Torres Strait Islander authors, cultural obligations require them to consult the clan and acknowledge the source.

### Case Study: Pat Mamanyjun Torres

Pat Mamanyjun Torres explains how the process of gaining consent for her book, *The Story of Crow*, was a continual dialogue with custodians of the story. She obtained approval in the research stage to make the story into a children’s book for the purposes of educating all children about her culture. She continued to consult as the material for the book developed, seeking approval of working drafts, and finally the manuscript.8

Non-Indigenous authors and illustrators must seek free, prior informed consent of traditional owners or custodians before incorporating ICIP into their stories and should ensure they are not incorporating culturally sensitive information, such as secret or sacred information – see section 3.2.3 for further information.

### Should non-Indigenous authors retell and write Indigenous dreaming stories?

Generally, no. Indigenous dreaming stories are stories that Aboriginal and Torres Strait Islander groups have as part of their cultural heritage. They describe how the ancestor spirits created country and the universe. For example, the Rainbow Serpent story is one important dreaming story shared by Indigenous groups throughout the country.

In the past these stories were collected, retold and published by non-Indigenous people. This has been a point of contention as the copyright is claimed by the author. According to Jackie Huggins, an Aboriginal writer and academic, non-Indigenous authors shouldn’t write children’s literature based on dreaming stories. Quoted in 1997, Huggins said most traditional stories written by non-Indigenous writers, pitched at children, were ‘patronising, misconstrued, preconceived and abused.’9

3.1.2. Writing about Aboriginal and Torres Strait Islander peoples issues – who can tell which stories?

Some Aboriginal and Torres Strait Islander people question whether non-Indigenous people should write about Indigenous people or issues at all. Copyright does not protect themes, ideas or information, so it does not stop non-Indigenous people from writing on Indigenous history or topics.

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When referring to Indigenous culture, authors must consult and seek free, prior informed consent when a song, story or cultural fact is used.

**Case Study:** Kate Grenville consulted Indigenous Elders when she wrote *The Secret River*\textsuperscript{10} and had an Indigenous writer review her drafts. She said that the process actually made the book better and enhanced her understanding of cultural issues. Her first drafts had a didgeridoo playing in the Aboriginal camps around Sydney Cove, but after consultation she learned there would have been no didgeridoos there at the time.\textsuperscript{11}

Phillip Gwynne, the non-Indigenous author of *Deadly Unna*\textsuperscript{12} faced a storm of Indigenous anger when his book was made into the film, *Australian Rules*. His book was reported to have detailed the violent death of an Aboriginal boy in a South Australian community. The Aboriginal community called for consultation. The filmmaker considered it censorship. The author was quoted in the media as having said he would never write about Indigenous people again.\textsuperscript{13}

### 3.1.3. Connecting with key stakeholders for consultation and consent

At this stage, it is important to identify key ICIP stakeholders. It is likely that there will be several ICIP stakeholders, and authors will need to consult with more than one person, community or custodian. It is also likely that when consultations begin, the stakeholders may refer the author to other people they should speak to as well. As a starting place, relevant stakeholders to consult with could include:

- Community, custodian or traditional owner contacts;
- Cultural advisors including individuals, communities and custodians;
- Recognised individuals and academics;
- Indigenous organisations including native title representative bodies or Aboriginal corporations representing particular communities or traditional owner groups, Aboriginal land councils,
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS);
- Relevant artist/artist’s estate and art centres;
- Language centres;
- State and national libraries, archives and museums.

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\textsuperscript{11} Kate Grenville, Speaking at the Melbourne Writers Festival, 2005.
3.1.4. Scenario

Libby writes historical whodunnits set in 1930s Darwin. Both lead characters are non-Indigenous. In fact, all her characters are non-Indigenous. Libby is troubled by this. She wants her story to reflect 1930s Darwin society and does not want a “white washed” version of it. She would like her stories to incorporate more Larrakia people, but she does not want to be disrespectful or cause offence. What should Libby do?

Discussion

Libby can start by researching more about Larrakia peoples’ lives in 1930s Darwin. There will be historical records, but it is important to research even more widely than that as most historical records will be written from the white settler perspective and Larrakia voices are unlikely to be well represented. Libby should speak with local Larrakia historians. These historians might also be able to refer Libby to other significant cultural authorities that can give her further guidance on writing about Larrakia people and their lives in a way that reflects the diversity of 1930s Darwin society, but is still respectful. If Libby is unsure where to start her investigation, she should contact the Northern Land Council or Larakia Nation Aboriginal Corporation.

3.2. DRAFTING

3.2.1. Writing with Aboriginal and Torres Strait Islander peoples

Some non-Indigenous authors have collaborated with Aboriginal or Torres Strait Islander people to write their biographies. In many past cases, the Indigenous person did all the telling, and the non-Indigenous person ended up with their name on the book, and the royalty cheque. Copyright laws supported this.

This approach is being challenged as Indigenous people identify and declare their rights, and non-Indigenous authors become aware of the issues of cultural appropriation and misuse of Indigenous knowledge and stories.

TIP! Copyright can be jointly owned or even assigned (transferred) to the Indigenous person providing the knowledge or stories that form the basis of an author’s work. To be legally binding, the assignment of copyright must be in writing signed by the copyright owner.

For example: An author works with an Arrernte Elder from Alice Springs and makes an audio recording of her on Country telling stories about the uses of certain plants which the author wants to use in her book. Under copyright law, the author and Elder would likely share ownership in the audio recording. However, as the stories amount to cultural knowledge (or ICIP) held by the Elder, it is best practice to ensure that copyright in the recording is assigned (transferred) in writing by the author to the Elder.
NOTE! If the author writes down the stories instead of making an audio recording, the author would likely be the sole owner of the written record. However, it is still best practice for the author to assign their rights in the written record to the Elder.

Case study: The non-Indigenous author and academic Dr Kerry McCallum worked with the late Hazel McKellar to write the book **Woman from Nowhere**. Hazel approached Kerry and gave her tapes where she had dictated stories about her life. Kerry listened to the tapes and put the book together, meeting with Hazel to glean more details and to set the structure of the manuscript. Kerry describes the process, ‘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.’ After Kerry finished writing, she read the book out loud to Hazel so Hazel could make corrections. This process took over two days. The book was published by Magabala Books. Hazel (and now her heir) owns the copyright in the book. Kerry is credited on the cover ‘as told to Kerry McCallum’.

How could this case study apply to your biography?

At the beginning of an Indigenous biography, the writer should enter into a written Collaboration Agreement with the Indigenous person, with terms that address the collaborative nature of the project by sharing the copyright and benefits, for example:

The Writer and the Subject agree that the copyright in the manuscript (including all drafts) will be owned by them in equal parts, upon creation. The proceeds, royalties and payment from the exploitation of the manuscript will be shared by the Writer and the Subject (including monies received from Public Lending Rights and Copyright Agency Limited).

Publishers would then enter into a Publishing Agreement with both copyright owners of the work and an ICIP clause could be incorporated.

### 3.2.2. Copyright and ICIP ownership

As outlined at the beginning of this paper, copyright and ICIP rights are two separate, but overlapping sets of rights. ICIP is much broader than copyright which is why copyright laws don’t effectively protect ICIP rights.

TIP! To ensure best practice, an author must consider how ICIP ownership and use is managed, as well as who will own copyright in the finished work, at the start of the writing process. ICIP is communally owned by its source community. This ownership should never change. No one individual owns ICIP, and ICIP must never be assigned away from community rights holders.

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14 Hazel McKellar (as told to Kerry McCallum), *Woman from nowhere: Hazel McKellar’s story*, Magabala Books, Broome Australia, 2000.
As outlined in section 3.2.1, in general if the author writes the story down, they will hold copyright. However, copyright can be assigned, licensed, or jointly owned (shared) through use of written agreements. What amounts to best practice will depend on the circumstances. **The most important underlying principle is that of self-determination.** So best practice relies on respectful consultation processes where the author and the Indigenous knowledge holder/s have freely discussed the project, and mutually agreed on who should own copyright and how ICIP will be used. See the following examples of best practice:

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**Example: Copyright held by author**

Todd is writing a series of short stories. The short stories are semi-autobiographical and are about anecdotes of things that happened to him when he drove from Sydney to Brisbane when he was 24 in 1973. The second story is a re-telling of a conversation he had with a Bundjalung man after his car broke down in Lismore. The Bundjalung man was the mechanic who worked on his car and had to explain to Todd that there was only a 50/50 chance that his rusty old car would make it to Ballina let alone Brisbane. It is a short, but amusing story.

Todd does not know the man’s name and the mechanic shop has long since closed down, but he has consulted with the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal). The Corporation has read through the manuscript and agreed that there is no cultural information or traditional stories (ICIP) contained in the conversation, and that they have no other reservations about Todd including reference to the man in his book.

It is agreed that Todd should own copyright in the story, but the Corporation has asked that Todd include a note of thanks to them for their assistance, which he has happily agreed to do.

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**Example: Copyright held by Indigenous storyteller**

The car makes it to Brisbane after all. There Todd meets a Yugerera woman, Kat, who tells him stories about the Brisbane River. One of these stories is the subject of the fifth short story. In fact, the first draft of the story is basically Todd re-telling Kat’s story. When Todd comes to drafting this chapter, he realises he can’t tell it without speaking with Kat first. She’d been a history student at the University when they met, and she is a lecturer at the University now. He connects with her again to discuss the story. They decide that they should work on the story together. Kat will own copyright in the story and give Todd a licence to include it in his book. They are also going to include an ICIP ownership notice for that chapter stating that the ICIP contained in the story is owned by the Yugerera people, and is reproduced with their permission.

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Indigenous storytellers who write books that incorporate ICIP often do not wish to claim ‘ownership’ of a traditional story, knowing that it is the cultural asset of their community or language group. Some do not even want to be named as the author. Aboriginal and Torres Strait Islander authors should be recognised as the copyright owners of their expressed cultural stories, and attribution should also be given to the relevant community or language group.

A copyright statement could deal with the incorporation of ICIP, for example:

**Traditional story from Torres Strait Islands.**

This version ©Terri Janke, 2020 is made with the permission of the Elders group. It may not be reproduced or adapted in any form without the permission of the author and the Elders group.
Copyright succession

Copyright lasts for 70 years after the death of the author. Aboriginal and Torres Strait Islander people often do not have wills. Magabala Books includes an heir letter with their Publishing Agreement which allows the author to identify who should control copyright and receive royalties after the author dies.

3.2.3. Sacred and Secret material

In Aboriginal and Torres Strait Islander knowledge systems, there is information that may be referred to as ‘secret’ or ‘sacred’ under customary laws. Such knowledge may only be made available to the initiated, used at a particular time or for a specific purpose. It may be information that can only be seen and heard by particular community members (such as men or women or people with certain knowledge or status).

**TIP!** Sacred and secret material should not be published.

**Case Study:** In 1977, as a result of the *Foster v Mountford* case, a book containing secret sacred information of the Pitjantjatjara men was withdrawn from sale in the Northern Territory. The information had been given to the author 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 it come into the hands of the uninitiated, women or children. The court issued an injunction to stop the sale of the book in the Northern Territory.

**Case Study:** The publisher HarperCollins apologised for offending Indigenous Australians in September 2008, after Indigenous groups complained that a pending edition of *The Daring Book for Girls* included girls playing the didgeridoo. For many Indigenous groups, the playing of the didgeridoo is culturally restricted to men only. The publisher showed cultural respect by removing the content from the edition.

3.2.4. Seeking free, prior informed consent

It is likely that the author will need to obtain consent for the use of ICIP from multiple stakeholders. Consultations with stakeholders should make it clear who has cultural authority to give consent, but generally consent must come from:

- The creator, or family of a deceased creator, of the ICIP or any copyright material containing the ICIP (for example, the creator of the source material the author used in their research);

• The traditional owners or rightful custodians of a traditional story referred to in the author’s research or draft manuscript;
• The person (or family if the person is deceased) depicted in the research materials or draft manuscript;
• The community organisation involved in decision making for a local community who can speak for the country depicted in the research materials or draft manuscript.

In order to ensure that the consent is fully informed, authors should ensure that the stakeholders receive all the relevant information including:

• Providing clear information about the writing project and the people involved;
• Providing clear information about how the ICIP will be used, the context in which it will be used, and the intended audience;
• Providing further information about the intended methods of publication and distribution;
• Providing information about benefit sharing.

Information should be provided in an easily understandable format which may change depending on the Indigenous stakeholder, but could include written details, email, letters, phone discussions, and face-to-face meetings.

Indigenous people should be allowed sufficient time to make a determination about the use of their ICIP.

3.2.5. Scenario

Adam is a non-Indigenous author. His story is told from the perspective of an 8-year-old boy growing up in the 1960s in Sydney. The little boy is not Indigenous, but his best friend at school is a Dharug boy about his age.

Adam was inspired by his own childhood, and the character of the Dharug boy is based on Adam’s own childhood best friend, except that her name was Jan. Adam is still in touch with Jan and consults her and her family on the manuscript.

Through the little boy’s eyes, we meet the friend and his family. Adam wants to include a story Jan told him when they were kids about a birthing tree. Jan’s Aunt had been pregnant and had gone to the birthing tree. Jan explained to Adam that there were parts of that story that are not culturally appropriate to publish. Jan and Adam worked on the story together to make sure no secret or sacred material was included. Jan also helped Adam speak to her family about the final version of the story to make sure it was appropriate for wide publication and to seek consent.

Adam and Jan worked together really well. With Jan’s help Adam’s manuscript became a deeper, more authentic story. Jan also helped Adam to ensure cultural protocols and appropriate consultation and consent processes were followed.

In this scenario, what were some of the best practices? What should Adam and Jan have a further discussion about?
Discussion:

It is great that Adam and Jan worked closely on the manuscript, while Adam was telling a fictionalised version of his own story, he was also telling a fictionalised version of Jan’s childhood. This close working relationship meant that Adam did not publish secret material, or information that was not appropriate for a wide audience. It also meant that his story was much richer and deeper. The friend’s character was far more developed and the book gave a sense of the time as viewed through a child’s eyes.

Adam and Jan still need to talk about how Jan and her family and community can benefit and be acknowledged in the book. Even if the book had a lot of other plot points, and Jan’s story was a relatively small part of the book, her input, and the time and care her family took in reviewing the manuscript was significant and really benefitted Adam’s finished work.

Adam should work with Jan and her family to prepare an ICIP notice to include in the book, acknowledging the cultural knowledge depicted and thanking Jan and her family for their contributions. Jan’s family has also asked Adam to make a donation of part of the profits from the sale of the book to their local Aboriginal Medical Service. Adam has happily agreed – this is a great way of returning benefits to the community.

3.3. REVISING & EDITING

3.3.1. Review by knowledge holders

Review of stories containing ICIP by traditional owners or custodians of that ICIP has already been referred to, and forms part of any best practice consultation and consent practice. Authors should ensure they allow sufficient time for review of their manuscript by relevant knowledge holders. The length of time can vary significantly depending on the circumstances. For example, a relatively short manuscript that refers to ICIP only in passing, may only require a couple of weeks to review. However, in a lengthier manuscript with an extensive use of ICIP, or where an Aboriginal or Torres Strait Islander person is the main character, will require lengthier review time. The author should also leave enough time to make any necessary amendments based on feedback from knowledge holders.

Note: The quantity and quality of consultation with knowledge holders during the earlier development and drafting stages will also impact the duration of review.

3.3.2. Editing Aboriginal and Torres Strait Islander books

Given the small number of Indigenous editors working in the publishing industry, it is most likely that an Indigenous author’s work will be edited by a non-Indigenous editor. In the editorial process, the editor will suggest changes. These changes may inadvertently affect cultural integrity and the appropriate interpretation of ICIP and Indigenous people. The editorial process can have a large impact on how the final document is presented and interpreted. It is important to understand that
non-Indigenous editors often misunderstand the content of manuscripts by Aboriginal or Torres Strait Islander authors, and often alter language and style to cater for a mainstream non-Indigenous audience.

Pursuant to Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, Indigenous people have the right to self-determination and are best placed to interpret their culture, knowledge and stories. It is important for Indigenous and non-Indigenous authors to ensure that editors are made aware of ICIP incorporated in a manuscript, any cultural protocols associated with this knowledge and the potential impact of the editing process in relation to ICIP. Editors should be willing to engage in respectful and open communication and dialogue with authors concerning appropriate representation and interpretation of ICIP.

**Case Study:** Margaret McDonnell describes her experience as a non-Indigenous editor working on an Indigenous author’s manuscript as ‘an exercise in cross-cultural communication and negotiation.’ McDonnell edited Ruth Hergarty’s work, *Is that you, Ruthie?* McDonnell says:

‘There are two separate aspects to the issue of community that need to be considered: The first is the notion of one’s self as part of a community, [and] the second is the notion of the right or responsibility of an individual to tell a particular story, which entails responsibilities to the community.’

### 3.3.3. Cultural mourning practices

The practice of restricting the use of images and names of deceased Aboriginal or Torres Strait Islander people also raises issues for authors, editors and publishers. Michael Jacklin, Associate Research Fellow from the University of Wollongong notes:

Difficulties... stem from the fact that Indigenous mourning practices vary from community to community, or even between families, but also from the changes being experienced in customary practice, in reaction to both technology and the increasing likelihood of non-Indigenous interest in or impact on sorry business.

**Case Study:** Wandjuk Marika and Jennifer Isaacs began writing Wandjuk’s life story together. The process involved careful consideration of text and photographs, ensuring there was no disclosure of any sacred or secret material. Before publication Wandjuk passed away and the publication of the book *Wandjuk Marika: Life story* was suspended for eight years due to name and image restrictions relating to cultural mourning practices. The names of other family members who had passed away were omitted from the text as well.

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21 *Ibid*, p 188.
Case Study: At the Residential Editorial Program in 2006, Marg Bowman, then senior editor of IAD Press, spoke of her experience of working on a biography of Mr Rubuntja, a senior Indigenous artist and law man. As he was an old man, they had to ask the question: should his photograph go on the cover? The artist was clear that he wanted his image on the cover. He also asked for the book to remain in circulation after his death.22

Publishers and authors should discuss mourning protocols with Aboriginal and Torres Strait Islander contributors at the time the book is being put together. It may also be included as a term of the Publishing Agreement in the same way that filmmakers working with Indigenous people commonly include such terms in Performer Release Forms.23

Warnings about deceased person references in books are common in Australian publishing. The following example comes from The little red yellow black book: an introduction to Indigenous Australia, 2008, published by Aboriginal Studies Press:

Aboriginal and Torres Strait Islander peoples are respectfully advised that this publication contains the names and images of deceased people. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) apologises for any distress this may inadvertently cause.24

3.3.4. Attribution, acknowledgement and copyright notices

Attribution is about acknowledging where a story originates. Under the moral rights provisions of the Copyright Act 1968 (Cth), the right of attribution is recognised for individual creators only, not necessarily for participants, subjects or storytellers whose knowledge or stories are incorporated in a work.

Aboriginal and Torres Strait Islander peoples have historically been used as informants for research, data collection and creative practices. Today, Indigenous people are demanding greater involvement and collaboration in the creative process, and appropriate acknowledgment as knowledge and rights holders.

It is important to consider attribution not only of the relevant cultural knowledge holder, subject, participant or storyteller, but of the community who are the source of a story. For example, the particular language group who are the source of a particular story or knowledge should be attributed in each and every publication.

Case Study: Larissa Behrendt incorporates stories from her clan, the Eualeyai, in her novel Home. To acknowledge the clan as the source of the stories, she makes the following acknowledgment in the book:

‘The stories of the Eualeyai that appear here belong, as they always have, to the Eualeyai people. I heard these stories from my father.’25

3.3.5. Traditional Custodians Notices

Notices can be used for published ICIP knowledge and stories. Notices included in published documents, marketing material and on websites and social media will put the viewers of this content on notice that any traditional knowledge or ICIP should not be used, adapted or commercialised without the prior informed consent of the relevant traditional custodians.

Here is an example of a notice that could be used in a book on Indigenous plant knowledge:

The language and information contained in this book includes the Indigenous Cultural and Intellectual Property (ICIP) of the (name of Indigenous group). The information is published with the consent of the traditional owners.

This information should not be used without observing the Indigenous cultural protocols of prior informed consent, attribution to traditional Indigenous communities, cultural integrity, and the sharing of benefits. Contact the traditional owners at (contact details.)

3.3.6. Cover design

Author’s should give consideration to the cover design for their books in the same way they consider ICIP written into their pages. This means consultation and free, prior informed consent whenever the cover design incorporates or refers to ICIP contained in the story.

Author’s could consider engaging local Aboriginal or Torres Strait Islander artists to design the book covers. Non-Indigenous illustrators should avoid using Aboriginal styles, techniques or motifs when designing book covers.

3.3.7. Consultation and record keeping

The consultation process with Aboriginal and Torres Strait Islander stakeholders should be an ongoing process, starting at the research and development stage of the project and continuing through drafting and revisions. Indigenous stakeholders should be given the opportunity to revise the drafts and final version of the manuscript, and provide feedback and consent on the use of ICIP.

Authors should keep records throughout the consultation process, including records of final consents given by Aboriginal or Torres Strait Islander stakeholders. Methods of record keeping include:

- Written clearances, consent forms or agreements setting out the terms of the consent;
- A written record made by the author of the consent (given verbally over the phone or in person) and signed off by the relevant Indigenous stakeholder;
- An audio or video recording of the consent being given by the Aboriginal or Torres Strait Islander stakeholder;
- Letters, emails, facsimiles or other correspondence documenting the consent.
3.3.8. Scenario

Andrea lives at Batemans Bay. She writes a children’s book series about a little non-Indigenous girl named Cate. Cate loves to climb trees, and her favourite thing to do is climb to the top of the biggest tree in her backyard. In her next book, Andrea would like to have Cate invite her friend Hollie over after school. Hollie is a Yuin girl. Andrea would like Cate and Hollie to climb to the top of the tree and look out at the neighbourhood. However, this time, Hollie will tell Cate about her country – about what she sees when she looks out across the neighbourhood. For these pages of the children’s book, Andrea would like to engage a local Yuin illustrator to do the illustrations, as a visual representation of Cate seeing her familiar scene through Hollie’s eyes.

Andrea has connected with Jenn, a local Yuin illustrator, who has agreed to do the illustrations. Both are looking forward to working together. What are some of the things they should be discussing?

Discussion

Andrea and Jenn decide that Andrea will hold copyright in the text of the story and Jenn will hold copyright in her illustrations, providing a licence to Andrea for use of the illustrations in the book. As Jenn will be drawing illustrations of Yuin country, she will need to speak to her Elders about the illustrations and seek permission for use in relation to the book. Jenn will need to provide her Elders with an opportunity to review the illustrations to make sure they are accurate, and that they do not contain culturally sensitive information about place. If appropriate, Jenn should also arrange for the Elders to sign a Cultural Consent Form agreeing to use of the illustrations in the book.

The book should also include a Traditional Custodians Notice so readers know that it includes depictions of country and that that knowledge is held by the Yuin people.

3.4. GETTING PUBLISHED AND BEYOND

3.4.1. Publishing agreements

Publishing Agreements can severely impact the protection of ICIP rights. It is important that authors consider the impact of a publishing deal on ICIP rights and cultural protocols at the same time IP rights are negotiated.

Case Study: Magabala Books has had extensive experience dealing with cultural interests in their Publishing Agreements and working practices. Some of the culturally flexible approaches Magabala Books has developed include:

Incorporating an heir letter as an appendix to the Publishing Agreement so that the author/s or copyright owner/s can state who they want to look after the copyright and receive royalties after their death.

If a cultural story is predominantly collectively owned and culturally significant, the appropriate Aboriginal representative organisation will hold the copyright, and the Publishing Agreement is entered with that organisation.
Where a book project has involved the writing and recording of an Aboriginal or Torres Strait Islander person’s story by a non-Indigenous writer, Magabala Books has used a Commission Agreement to recognise joint ownership of copyright. They have also negotiated staged withdrawal by non-Indigenous recorders from royalty schemes and subsidiary licences. Aboriginal or Torres Strait Islander community organisations are used heavily for consultation and approval of proposed material for publication. Organisations such as the Kimberley Aboriginal Law and Culture Centre are asked to review materials to consider whether they are culturally appropriate for wide dissemination.  

To help Indigenous authors understand the publishing process, Aboriginal Studies Press has produced an Information Kit for Indigenous Authors. It not only explains the process, but outlines the terms and conditions of a Publishing Agreement. Understanding the cultural responsibilities Indigenous authors have to their communities, ASP has inserted a dispute resolution clause which allows for good faith negotiations if the publishing process conflicts with any cultural obligations. The clause promotes mediation of any disputes before commencing legal action.

Understanding the terms and conditions of a publishing deal are to a large extent industry issues that are shared by all authors. The Australian Society of Authors’ publications - Australian Book Contracts and Between the Lines: A Legal Guide for Writers and Illustrators – are useful references. The Arts Law Centre of Australia recommends that a writer seek legal advice before entering a Publishing Agreement. Arts Law has also been running Artists in the Black since 2004 to provide legal advice to Indigenous creators, including authors.

### 3.4.2. Benefit sharing

Another principle of ICIP rights is benefit sharing. The value of Aboriginal and Torres Strait Islander people’s contribution must not only be acknowledged but appropriately compensated both financially and non-financially. Examples include:

- paying Aboriginal and Torres Strait Islander contributors fees at appropriate industry rates;
- assisting with training and skills development;
- paying a royalty fee to an Aboriginal or Torres Strait Islander consultant;
- making a donation to a community organisation at the request of an Aboriginal or Torres Strait Islander knowledge holder who assisted the author.

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26 Magabala Books, Submission to Our Culture, Our Future, as cited in Terri Janke, Our Culture, Our Future, p 221.
Even if copyright in the work developed is owned by the author, remuneration should be made to Indigenous people for inclusion of ICIP in the same way a creator’s artwork, poem or song might be remunerated for inclusion in another author’s work.

It is likely that a non-Indigenous author will have two key questions when it comes to ensuring appropriate benefit sharing:

- How do I know the most appropriate person to pay?
- How much should I pay, and should I put this in the publishing contract?

In answer to the first question, identifying the community entity to whom benefit should flow, will generally become clear during the consultation process. For example, if an author works with a Language Centre to obtain permission to use a language word or expression, it is likely that payment and fees will already have come up in conversation. In fact, many Language Centres have a schedule of fees for consultation and language permissions.

In answer to the second question, what is an appropriate payment or fee is completely up to the author and the knowledge holders. Starting a conversation about benefits is the first step. It makes practical sense for payments to be evidenced in writing. It is up to the author and the circumstances whether the payment is written into the publishing contract. If the author paid consultation fees to a Language Centre during the drafting process, and there are no further plans for further payment (because the payment was commensurate with the nature and the use of ICIP), then there is no need to record the payment in the publishing contract. However, if the return of benefit is based on an understanding between the author and an individual or community organisation that a percentage of the royalties will go to that individual or the community organisation, then it is appropriate to include in the publishing contract. This is something that can form part of a legal review of the publishing contract.

**TIP!** It is recommended that authors always have their publishing contracts reviewed by a lawyer before signing.

Authors should also consider the cultural legacy that they will be leaving for future generations. How will future Aboriginal and Torres Strait Islander generations get access to these stories? Making books available to communities or depositing copies with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) or such other archive as advised by the community are some ways to promote cultural maintenance.

**NOTE:** Archives, museums and libraries are bound by copyright laws and require the permission of the ‘author’ prior to publication or for any further use by third parties. A significant problem for future generations trying to reclaim archival records or works of deceased ancestors has been the lack of appropriate rights and cultural clearances for the material which may limit their ability to access, use, copy or adapt this material in new publications.
3.4.3. Continuing the relationship

Once stakeholders have reviewed the final manuscript and provided their consent, the author should continue the discussion with the stakeholder to:

- outline the correct attribution for the ICIP;
- specify a family or community contact that the author can contact in the event that the subject passes away;
- facilitate access of stakeholders to copies of the published book; and
- ensure that use of the ICIP continues within the scope of consent given.

At the time of publication, it is hoped that the author has already established a solid working relationship with the Aboriginal and Torres Strait Islander stakeholders who contributed to the work. Given this, it is recommended that the author continue to maintain that ongoing relationship. Continuing the relationship will also be helpful if the author ever needs to return to the stakeholder for further permissions beyond what was already agreed to. For example, if the book was initially only published in Australia, but it is picked up by an overseas publisher, the author will need to return to the stakeholder to seek permission for the further use of ICIP.

3.4.4. Scenario

Tom is a non-Indigenous poet. He is writing a book of poetry about the experiences of being a new dad. Tom’s wife Stacie is a Kaurna woman, and their daughter is 18 months old. In one of his poems, he wants to describe the feeling he had when he watched Stacie singing a song in language to their daughter to put her to sleep. When he asked his wife where she heard the song, she said she wasn’t sure. She knows that her Mum would sing it to her, but she doesn’t know too much else about the song or its meaning.

Both Tom and Stacie decide that they would like to interview Stacie’s family about the song, its history and meaning. In the end the poem is a comparatively small output compared to the large number of audio recordings and notes Tom and Stacie have made of Stacie’s family stories. However, Tom and Stacie know the information they have is important and they want to keep it safe for their daughter and future family.

They started this as a side project and so did not start thinking about copyright until quite far into the process. Tom owns copyright in the poem, but what about all the notes and recordings: Who should hold copyright in those? How should they be stored? Are there any Indigenous data sovereignty issues?

Discussion

In the absence of written agreements, Tom and Stacie are most likely the copyright owners of the notes and video recordings they amassed in their research, and will share copyright ownership with particular storytellers in any sound recordings that incorporate ICIP. Tom will retain copyright to his poem – he has obtained the necessary ICIP permissions from Stacie’s family. However, they know that the ICIP in the sound and video recordings really belongs to the community. There are
also issues of Indigenous data sovereignty given that the notes and recordings certainly contain personal information about Stacie’s family and community.

Tom and Stacie decide to assign (transfer) their copyright to Kaurna Warra Karrpanthi (KWK), the Language Centre for the Kaurna language. They know that KWK will store the notes and recordings for the long term, and they know that KWK’s relationship to community will mean the recordings are always used according to cultural protocols and to the benefit of community. For the sound recordings that incorporate ICIP, Tom and Stacie made sure KWK understood that they were joint copyright owners and provided the contact details of the storytellers who they shared ownership with.
4. Final thoughts

CIP rights are about respecting the rights of Aboriginal and Torres Strait Islander peoples to maintain their cultures. Like copyright material, consent is required to access, use, publish and adapt this knowledge in your own works. Stories and knowledge are connected with place. It is fundamental to acknowledge the origin or source. Stories link Indigenous people, place, the past and the future. Guarding cultural integrity and appropriate interpretation of ICIP is a serious responsibility of Indigenous custodians and are fundamental to the right of self determination of Indigenous peoples.

Aboriginal and Torres Strait Islander peoples call for greater recognition of their ICIP rights. There are some important international developments like the work of the World Intellectual Property Organization and the United Nations Declaration on the Rights of Indigenous Peoples that set standards for legal frameworks for protection of ICIP and Indigenous peoples rights. In Australia, there are no laws specifically designed for the protection of ICIP, but many intellectual property and heritage laws impact ICIP in various ways that are sometimes helpful and sometimes problematic.

In the absence of specific sui generis laws, copyright, contract law and ICIP protocols have become important and empowering tools for the protection, maintenance and continuation of ICIP. ICIP protocols also provide a helpful guide for non-Indigenous authors and illustrators wanting to collaborate with Aboriginal and Torres Strait Island peoples or wanting to engage with Australia’s rich and diverse Aboriginal and Torres Strait Islander cultures, in their creative work.

With knowledge of ICIP rights and copyright, and using the More Than Words guide, authors, illustrators, publishers and Aboriginal and Torres Strait Islander peoples can work together to ensure Aboriginal and Torres Strait Islander cultures remain strong and create a vibrant and authentic literary sector.
5. Decision Making Tree

Do the Protocols apply?

- Am I writing about Aboriginal or Torres Strait Islander peoples’ issues?
- Am I using resources that refer to Aboriginal or Torres Strait Islander people or their knowledge?
- Does my story include Aboriginal or Torres Strait Islander people?
- Does my story include ICIP?
- Have I spoken with Aboriginal or Torres Strait Islander people in my research?
- Am I collaborating with an Aboriginal or Torres Strait Islander person organisation or community?

Protocols do apply if yes ...

Consultation & consent required

Protocols do not apply if no ...

Consultation: seek to open dialogue; be transparent about project; seek free, prior informed consent; discuss copyright ownership, benefit sharing, & approvals process

Record keeping: Enter into a contract/keep record of consultation and consent process

Publication: attribution and acknowledgement, Traditional Owners Notice, reviewing your publishing agreement, giving back to community & benefit sharing
6. Overview of relevant international laws and Australian industry ICIP protocols

What are the relevant international laws and standards?

| United Nations Declaration on the Rights of Indigenous Peoples | As previously referred to, the Declaration is an internationally recognised standard. The Australian government signed the Declaration in 2009, although it is not yet legally enforceable in Australian law except to the extent that is has been expressed in State and Federal legislation.  

  Article 31 of the Declaration grants Indigenous peoples the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, and any intellectual property over the same. We refer to these rights as “Indigenous Cultural and Intellectual Property” and “ICIP” in this guide. The rights protect a broad range of material that authors and illustrators may come into contact with, for instance, stories of country and personal experience, cultural practices, languages and knowledge of country.

  To respect Article 31 of the Declaration, authors and illustrators should follow protocols, and seek free, prior informed consent before using any Indigenous Cultural and Intellectual Property. |
The World Intellectual Property Organization (WIPO) has published *The Protection of Traditional Cultural Expressions: Draft Articles* and *The Protection of Traditional Knowledge: Draft Articles* to protect traditional cultural expressions and traditional knowledge from misappropriation and misuse.\(^{31}\) The policy objectives of the draft articles for protection of Traditional Cultural Expression include to:

- prevent the misappropriation or misuse of traditional cultural expressions;
- control the ways in which cultural expressions are used beyond the traditional and customary context;
- promote equitable sharing of benefits arising from use of traditional cultural expressions, with free prior informed consent; and
- encourage and protect innovation.\(^{32}\)

The World Intellectual Property Organization’s Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has developed Draft Articles which set out a proposed framework for recognising Indigenous peoples rights to their songs, stories, dance and cultural expressions. While the Draft Articles have not been completed, Australia is part of the IGC. WIPO’s articles and other guides produced by the IGC provide useful guidance on best practice in the use of traditional knowledge, cultural expressions and ICIP in literary works.

**A note on Australian legislation:** There is no sui generis Australian law for the protection of ICIP, although there is Federal, State and Territory cultural heritage legislation that may impact use of ICIP. Most relevant to authors and illustrators is the Victorian intangible cultural heritage laws contained in the *Aboriginal Heritage Act 2006* (Vic). The Act permits the registration of intangible cultural heritage, including oral traditions and stories. It is an offence to use registered intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party, registered native title holder or traditional owner group who registered the heritage.\(^{33}\) At the time of writing, there is no equivalent legislation in other States and Territories.

**What are the industry protocols relevant for authors and illustrators?**

- Screen Australia’s *Pathways & Protocols: A filmmaker’s guide to working with Indigenous people, culture and concepts*.
- Australian Institute of Aboriginal and Torres Strait Islander Studies *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (the AIATSIS Code).

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33 *Aboriginal Heritage Act 2006* (Vic), s79G.
7. Key stakeholder and representative bodies

- Cultural advisors (including individuals, communities and custodians)
- Traditional owner groups, native title representative bodies and Aboriginal corporations
- Aboriginal Land Councils
- Language centres and art centres
- State and national libraries
- Museums
- Relevant artist/artist's estate
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
- Recognised individuals and academics
About the Australian Society of Authors

The Australian Society of Authors is the professional organisation, community and voice of Australia’s writers and illustrators.

Since 1963, we’ve been the peak national body representing the interests of Australia’s writers and illustrators. We provide advocacy, support and advice for authors in matters relating to their professional practice.

The ASA exists thanks to the support of our members, over 3000 professional and aspiring authors including novelists, biographers, illustrators, academics, cartoonists, scientists, food and wine writers, historians, graphic novelists, children’s writers, ghostwriters, travel writers, romance writers, crime writers, educational writers, editors, bloggers, journalists, poets and more.