

DR. JANE ANDERSON

COPYRIGHT ISSUES –
IDENTIFICATION AND
STRATEGY



Disclaimer notice:
 This map indicates only the general location of larger groupings of people, which may include smaller groups such as clans, dialects or individual languages in a group. Boundaries are not intended to be exact. The views expressed in this publication are those of the author and not those of the Australian Institute of Aboriginal and Torres Strait Islander Studies. For more detailed information about the groups of people in a particular region, contact the relevant local council.

NOT SUITABLE FOR USE IN NATIVE TITLE AND OTHER LAND CLAIMS



Map of
 Aboriginal
 Australian
 Languages



**Australian
Institute of
Aboriginal and
Torres Strait
Islander Studies**

Canberra



- 139 -

nimanamboring eriginians
 atinay paper ut. - 320 [gandji]

yalgardyan lewamargan.
 e. atinay - to little erit

g-on digaru luru nu nuru
 atinay 320 klt. - t

buridjagers. lews bilfyo-
 big children 320 -

-maniz ggal buru belos
 -gama-33 kom. - erit
 b-djiris. g-on rucidjiginians
 o to 33t atinay ut 320 gajo

buridjiris kards lewamargan
 material 320-33 erit little out

igergardiansamb 3.
 33 - atinay man

g-on inirilugan v. kards
 atinay 320 [g. j. g.] (g. j. g.) fitchi

winj igergardians djiris
 320-33

fj -

WHERE IS COPYRIGHT?

- Photographs
- Sound-recordings
- Films
- Manuscripts
- Wordlists
- Dictionaries

Largely non-NAGPRA material that is already or is currently being digitized.

Intellectual Property law is an umbrella term used to link several different and discrete areas of law together.

These include:

- **COPYRIGHT**
- **PATENTS**
- **DESIGNS**
- **TRADEMARKS**
- **CONFIDENTIAL INFORMATION**
- **GEOGRAPHIC INDICATORS**

What is
Intellectual
Property?

Legally?

Culturally?

COPYRIGHT protects a vast range of cultural works.

- Literary works like books, manuscripts etc
- Compositions like songs and music
- Photographs, films and visual material culture
- Compilations like databases

Three key requirements for copyright protection:

1. The work must be fixed in material form
2. The work must have been produced/created by an (individual) author or authors
3. The work must be original and not a copy

The period of protection (generally) is life of the author plus 75

COPYRIGHT

SOUND RECORDINGS



**Jesse Fewkes on his return trip to Maine,
May 1890**

All sound recordings In the US made before 1976 are protected under copyright till 2067. Then they will be in the public domain.

Why?

Copyright Act of 1909

Copyright Act 1976

In Canada – 1965 earlier in public domain.

Who is the owner of the Fewkes recordings?

1. **Culturally Specific** – Protects some important cultural heritage but not all
2. **Individualistic** – Does not recognize community, family or tribal ownership
3. **Property** – it makes cultural knowledge into a form of property
4. **Commercialization** – Seeks to foster and support commercial use
5. **Duration** – Has a set time period for protection
6. **Public Domain** – Once in the PD can be used by anyone at anytime

Other key problems:

- Works made by researchers working in tribal communities are owned and controlled by those researchers.
- Cannot recognize different forms of knowledge stewardship and custodianship
- Has difficulty in appreciating the inter-connectedness of knowledge/land/culture
- Privileges some kinds of knowledge over others
- Cannot be corrected retrospectively
- Problems of wrong authorship continue into the digital environment

Problems with COPYRIGHT

ARCHIVES, LIBRARIES AND MUSEUMS

- Can utilize the exemptions within copyright law to:
 - Make archival copies of works for preservation
 - To provide access for educational reasons
- Without getting permission from the copyright owner
- Without paying any licensing fee

**FAIR-USE IS THE MOST IMPORTANT EXEMPTION
FOR TRIBAL INSTITUTIONS, SOVEREIGN IMMUNITY IS ALSO
IMPORTANT**

When digitizing documents or other objects to be made available to wider audiences, it is necessary to first determine whether the item is protected by copyright or whether it is in the public domain. These are key questions you need to ask:

1. What is the material being digitized?
2. Is the item published or unpublished?
3. What year was it published, or if unpublished, what year was it created?
4. If published before 1989, does it have a notice of copyright (© or the word Copyright or Copr.)?
5. If published between 1923 and 1963, was the copyright renewed before 1964 when renewal became automatic?
6. Is the author dead, and if so, in what year did he or she die?
7. Are pre-1972 unpublished sound recordings included? (If yes see below)

Digitization and Copyright



Published; 1922 or earlier; author dead or alive
In the public domain. No permission is necessary.

Published without © notice before 1989
Probably in public domain. Works published without © before 1978 are definitely in the public domain. No permission necessary.

Published with a © notice between 1923-1963 and renewed, or published between 1964 and 1977

Will be protected by copyright until 95 years after date of publication. Get permission from current copyright owner.

Published with a © notice between 1923-1963 and NOT renewed

In the public domain. No permission necessary.

Published; 1978 - present; author dead or alive
Will be protected by copyright until at least 70 years after the death of the author. Get permission.

If Published

Peabody Archive

Photograph by
Paulina Johnson



Unpublished; created in 1977 or earlier; author died more than 70 years ago

In the public domain. No permission necessary.

Unpublished; created in 1977 or earlier; author died within the last 70 years

Will be protected by copyright until 70 years after the death of the author. Get permission from current copyright owner.

Unpublished; created in 1977 or earlier; author alive

Will be protected by copyright until 70 years after the death of the author. Get permission from current copyright owner.

Unpublished; created in 1978 or later; author dead or alive

Will be protected by copyright until 70 years after the death of the author. Get permission from current copyright owner.

**If
Unpublished**

Peabody Archive

**Photograph by
Paulina Johnson**

THE BIGGEST ISSUES ARE: ACCESS, CONTROL AND OWNERSHIP

- **Providing access, making collections available**
- **Incorporating tribal perspectives into collection management**
- **Returning cultural materials (material and digital)**
- **Collaborating in the repatriation process**
- **Divesting control to tribal authorities**
- **Addressing tribal concerns about public domain material**
- **Recognizing the legitimacy of cultural protocols**

Recognizing past injustices in how Indigenous and Native communities and their cultural heritage has been collected and treated.

**Problems for
Tribes and for
Institutions**

OTHER ISSUES

- Knowing how copyright affects your institution
- Informing community members about copyright
- Developing a shared understanding of tribal IP (something that may go beyond the traditional boundaries of IP law)
- Developing infrastructure to help make decisions
- Getting access to useful resources
- Building a institutional/community IP strategies that suit your needs and issues



**INTELLECTUAL PROPERTY
AND THE SAFEGUARDING OF
TRADITIONAL CULTURES**


Legal Issues and Practical Options
for Museums, Libraries and Archives

Written for the World Intellectual Property Organization (WIPO)
by Molly Torsen and Jane Anderson



Copyright &
CULTURAL INSTITUTIONS

*Guidelines for Digitization
for U.S. Libraries, Archives, & Museums*



PETER B. HIRTLE,
EMILY HUDSON,
& ANDREW T. KENYON

STRATEGIES

- 1. Do the legal research on specific collections. Sometimes ownership is not what it seems.**
- 2. Develop specific protocols to deal with legal categories and cultural categories.**
- 3. Develop Cultural Protocols for use and access of materials.**
- 4. Think about research happening now – or collections being created now – can the future ownership of these collections look different?**
- 5. Utilize TK Labels and Local Contexts for templates and useful information.**
- 6. We are working to set up a interconnected legal clinic to help provide support on these issues as well as develop training for non-Native institutions that hold material.**



Indian
photographing
tourist
photographing
Indian.

Zig Jackson 1994