CASE STUDY 13

A solution to a conflict between intellectual property law and customary law in Australia

This case study discusses the solution found to a conflict between Australian copyright law and the customary law of the Wik community.

The Wik community participates, with various other communities, in the Laura Aboriginal Dance and Cultural Festival, a biannual celebration of Indigenous Australian song, dance and music. However, ‘In 1998 it was revealed that certain images of dancers from the Wik community taken while they were performing at the Festival were being reproduced commercially without [their] permission. Photographs were available on CDs, postcards and other products.’[[1]](#footnote-1) Since, according to Wik customary law, these images are only suitable for reproduction with the permission of specific individuals – senior custodians or elders – the reproductions were deemed to be culturally offensive. According to Molly Torsen and Jane Anderson:

Under Australian copyright law, like most copyright laws, the copyright in the images of the dancers is vested in the photographer (who is the author for copyright purposes). Had the dancers known this, they would not have allowed any photography during the performance or would have reconsidered performing at the Festival. This highlights the need to provide information to tradition bearers about the range of rights that may exist in a performance and, when a performance is documented, the performers themselves need access to information about IP rights in order to make informed decisions.

Since 1998, the organizers of the Laura Festival have adopted a written agreement concerning all photography and filming at the Festival. The agreement contains terms requiring that consent be obtained from the performers and that certain conditions for control of commercial photography be followed. Approved photographers sign an agreement stating that any commercial photography will be undertaken only after consent of the performers is received.[[2]](#footnote-2)

1. . M. Torsen and J. Anderson, 2010, Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives, Geneva, World Intellectual Property Organization (WIPO), pp. 81–82. [↑](#footnote-ref-1)
2. . Ibid. [↑](#footnote-ref-2)