



## Australian Copyright Council response – Copyright and licensing arrangements for the Aboriginal Flag

**ACC Submission date: 18 September 2020**

The Australian Copyright Council (**ACC**) is grateful for the invitation from the Select Senate Committee on the Aboriginal Flag (**the Committee**) for the opportunity to make a submission and appear before the Committee<sup>1</sup>, in relation to the copyright and licensing arrangements for the Aboriginal Flag (**the Flag**) design.

The ACC acknowledges the views expressed by members of the Indigenous community in relation to matters concerning the Flag, and confines its submission to matters of Australian copyright law.

### **1. About the Australian Copyright Council**

- 1.1. The ACC is a small, independent, not-for-profit organisation dedicated to promoting understanding of copyright law and its application, and to foster collaboration between content creators and consumers. We represent the peak bodies for professional artists and content creators working in Australia’s creative industries and, Australia’s major copyright collecting societies.<sup>2</sup>
- 1.2. ACC affiliates include representative bodies for artists and other creators, including the Aboriginal Artists Agency and the National Association for the Visual Arts.
- 1.3. The ACC provides information and free legal advice regarding copyright, including matters regarding the ownership and use of the Flag, to members of the public who fall within ACC guidelines.<sup>3</sup>

### **2. The nature of copyright**

- 2.1. Copyright owners have what is commonly referred to as a “bundle of rights” in their “works”, including in this situation, artistic works. These rights conferred by the *Copyright Act 1968* (Cth) (**Copyright Act**) include the exclusive rights to:

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<sup>1</sup> On Tuesday 22 September 2020.

<sup>2</sup> See Schedule 1 for a list of ACC current affiliate members.

<sup>3</sup> ACC legal advice guidelines may be found here

[https://www.copyright.org.au/ACC/Legal\\_Advice/Legal\\_Advice\\_Service/ACC/Legal\\_Advice/Legal\\_Advice\\_-\\_Introduction.aspx?hkey=7ba91199-427f-44c3-ab99-f4374a7cc075](https://www.copyright.org.au/ACC/Legal_Advice/Legal_Advice_Service/ACC/Legal_Advice/Legal_Advice_-_Introduction.aspx?hkey=7ba91199-427f-44c3-ab99-f4374a7cc075)

- **reproduce** the work, for example by photocopying, copying by hand, filming, recording or scanning;
- **make the work public** for the first time;
- **communicate** the work to the public, for example by email, broadcasting, or the internet.<sup>4</sup>

2.2 Copyright owners may choose to:

- (i) **assign**, that is, transfer or sell, any or all of the rights; or
- (ii) **license** any or all the rights.<sup>4</sup>

2.3 When copyright is assigned or licensed, it may be divided in any number of ways, including:

- by territory;
- time or duration; and
- type of use.

2.4 An assignment must be in writing to be legally effective.

2.5 Licences may be:

- (i) **Exclusive.** The licensee (that is, the person/entity that receives the licence) is the only person/entity that may use the copyright material in the ways outlined in the licence. Like assignments, these must be in writing to be legally effective.
- (ii) **Non-exclusive.** These licences allow for multiple licensees to use the copyright material in the same way. These licences need not be in writing.
- (iii) **Implied.** These licences to use copyright material are implied from all the circumstances of a situation.

2.6 It is important to note that there are no provisions under the Copyright Act which compel a copyright owner to assign, license or otherwise deal with their material. Copyright owners are free to choose if and how they deal with their copyright material.

2.7 The Copyright Act contains broad provisions permitting use of copyright material by libraries and by educational institutions. There are also fair dealing exceptions that permit use by anyone for particular purposes for example, research and study.

### 3. Background to copyright and licensing arrangements in the Aboriginal Flag

3.1 We understand that Mr Harold Thomas created the Flag in 1971.

3.2 On 14 July 1995, the Flag was originally proclaimed as an official 'Flag of Australia' under the *Flags Act 1953*.<sup>5</sup>

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<sup>4</sup> Section 31 *Copyright Act, 1968* (Cth)

<sup>5</sup> There was a subsequent proclamation made on 1 January 2008, due to an administrative error. See the [Explanatory Statement Flags Act 1953 - Proclamation \(Australian Aboriginal Flag\)](#)

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- 3.3 In 1997, Mr Thomas was confirmed as the copyright owner of the artistic work embodied in the Flag.<sup>6</sup>
- 3.4 Mr Thomas has granted three exclusive licences for use of the Flag (**Licences**):
- (a) in 1998, to Australian company Flagworld Pty Ltd (**Flagworld**) to, among other things, reproduce the Flag. This agreement is for the duration of copyright (that is, until 70 years after the date of Mr Thomas' death)<sup>7</sup>;
  - (b) in 2018, to Gifts Mate Pty Ltd (**Gifts Mate**) to reproduce the Flag on merchandise, for example, souvenirs<sup>8</sup>; and
  - (c) in 2018, to WAM Clothing Pty Ltd (**WAM**) to reproduce the Flag on clothing apparel, towels, and digital and physical media products<sup>9</sup>.
- 3.5 The ACC is aware that the Gifts Mate and WAM licences have caused concern in the Australian community resulting in petitions<sup>10</sup> and media attention.
- 3.6 The Licences are private agreements and the ACC is not privy to their respective terms and conditions.
- 3.7 The ACC notes that the debate surrounding the ownership and use of the Flag is highly sensitive involving a number of competing public policy considerations, including:
- (a) the cultural significance of the Flag to Indigenous Australians, particularly in the context of traditional community ownership;
  - (b) increased public sentiment that the Flag should not be open to commercial exploitation, particularly by non-Indigenous organisations;
  - (c) the role of copyright law in protecting an artist's creation and providing a framework for creators to benefit commercially from their work and protect their work from misuse;
  - (d) the right of a private citizen to deal with their personal property as they see fit including the freedom of contract; and
  - (e) the role of government intervention.
- 3.8 The ACC notes that this situation is unique and comments only in respect of Australian copyright law.

<sup>6</sup> *Thomas v Brown* (1997) 37 IPR 207, 214.

<sup>7</sup> [Carroll & Richardson submission to the Committee dated 11 September 2020](#).

<sup>8</sup> [Gifts Mate Pty Ltd submission to the Committee undated](#). The nature of the relationship between Wooster Holdings Pty Ltd and Gifts Mate Pty Ltd is not clear from the submission, although this licence appears to have been assigned from the now liquidated company Birubi Art Pty Ltd of which Mr Wooster is also a director. See paragraph 10 of the Gifts Mate submission.

<sup>9</sup> [WAM Clothing Pty Ltd submission to the Committee undated](#).

<sup>10</sup> <https://clothingthegap.com.au/pages/free-the-flag/>.

#### **4. Response to terms of reference**

- 4.1 In summary, the ACC is of the view that there would be significant problems, including unintended consequences, were the government to compulsorily acquire copyright from Mr Thomas.
- 4.2 From the perspective of Australian copyright law, any dealings affecting Mr Thomas' copyright ownership should be conducted within the following framework:
- (a) Does Mr Thomas wish to alter the contractual frameworks that he has set up through the Licences? If the answer to this question is yes, then,
  - (b) Given the terms of these Licences, does the artist have the power to amend or terminate the Licences? If the answer to this question is yes, then,
  - (c) How may Mr Thomas go about this?
- 4.3 Underpinning any subsequent negotiations, must be payment of proper commercial licence fees or compensation to Mr Thomas as the copyright owner, ensuring that he has had access to independent legal advice.

**(a) Who benefits from payments for the use of the Aboriginal Flag design and the impact on Aboriginal organisations, Aboriginal communities and the broader Australian community of the current copyright and licensing arrangements**

- 4.4 It would be standard under most copyright licensing arrangements for the use of artistic works, for the artist to receive payment in the form of a lump sum or a royalty on sales, and for the licensee to pay the costs of production and retain the balance. However, not having seen the terms of the Licences, the ACC is not in a position to comment on the particular operation of these Licences.

**(b) options available to the Government to enable the Aboriginal Flag design to be freely used by the Australian community, including:**

**(i) Negotiated outcomes with licence and/or copyright holders**

- 4.5 The ACC is of the view that subject to the framework outlined at 4.2, negotiated outcomes are the most appropriate way for the Government to resolve use issues concerning the Flag.

**(b)(ii) The compulsory acquisition of licences and/or copyright**

- 4.6 The Commonwealth has the power under s 51(xvii) of the Constitution to make laws with respect to copyright. It also has the power for the acquisition of property on just terms from any person for any purpose in respect of which the Parliament has power to make laws.<sup>11</sup>
- 4.7 It would appear, therefore, the Commonwealth has the Constitutional power to compulsorily acquire copyright property and/or the Licences provided that compensation on just terms were provided to the respective legal owners.
- 4.8 The ACC is firmly of the view that negotiated outcomes with the licence holders and particularly the copyright owner are preferable to any compulsory acquisition of property by the Commonwealth. That is, the consent of the rightsholders, particularly the artist, Mr Thomas, should be central to the outcome of any current issues.
- 4.9 The ACC notes that advice would need to be sought that, if other options were taken by the Commonwealth to enable the Flag to be freely used by the community, such as enacting specific legislation to put the Flag in the public domain, or a specific exception to copyright infringement of the Flag, the obligation to provide compensation on just terms may still apply because of the extinguishment of a vested cause of action belonging to Mr Thomas and the licence holders.<sup>12</sup>

**Compulsory Acquisition of copyright in the Aboriginal Flag**

- 4.10 While it may be constitutionally valid for the Commonwealth to compulsorily acquire the copyright in the Flag, the ACC believes it may give rise to further problems, including:
- (a) The Commonwealth should avoid the acquisition of personal property rights of Australian citizens where it is not necessary to achieve a specific and clear public interest objective. Australian copyright law is vital in protecting creators' integrity and providing an incentive for the creation of cultural goods.
  - (b) If Mr Thomas agrees that there is a public interest in allowing the Flag to be reproduced free of charge for certain groups, or more generally, a Commonwealth acquisition of the copyright in the Flag would not necessarily achieve this outcome.
  - (c) The precedent set by compulsorily acquiring the copyright in a work on the grounds that it had become iconic might lead to claims that other iconic works should be subjected to similar treatment.

<sup>11</sup> Constitution of Australia, s 51(xxxi).

<sup>12</sup> *Minister of State for the Army v Dalziel* (1944) 68 CLR 261. The ACC is not in a position to give advice on this as it is a matter of constitutional law but highlights it for the Committee for further investigation.



- (d) Given the unique situation, it would be difficult to quantify a fair price in order to provide compensation on “just terms” to comply with s 51(xxxi) of the Constitution.

### **Compulsory acquisition of the exclusive licences**

- 4.11 If a negotiated outcome between the Commonwealth, Mr Thomas and/or the licence holders cannot be reached, it would be open to the Commonwealth to compulsorily acquire the Licences.
- 4.12 While a negotiated outcome is preferable to compulsory acquisition, acquiring the Licences is preferable to acquiring copyright for the following reasons:
- (a) acquiring the Licences would allow the Commonwealth to achieve a substantially similar outcome to acquiring the copyright property in the Flag, while allowing Mr Thomas to retain ownership of copyright.
  - (b) The Commonwealth could allow for wider community use of the Flag through the establishment of a scheme where commercial uses of the Flag are subject to the payment of royalties to Mr Thomas. This would in effect, put the Commonwealth (or an appropriately appointed body) in the position now performed by the Licence holders. If this were to happen, the ACC supports the position that Mr Thomas retain control over the types of use that may be made of the Flag.

### **(b)(iii) ways to protect the rights and interests of the flag’s legally recognised creator Mr Harold Thomas**

- 4.13 As mentioned, the ACC is firmly of the view that copyright in the Flag should be retained by Mr Thomas.
- 4.14 The ACC is also of the view that Mr Thomas should continue to receive royalties for commercial uses of the Flag, if he wishes to do so.
- 4.15 Separate and in addition to the economic rights which underpin copyright, are moral rights. These are the artist’s rights to:
- to be attributed (or credited) for their work;
  - not to have their work falsely attributed; and
  - not to have their work treated in a derogatory way.<sup>13</sup>
- 4.16 Although written consent may be given by a creator for acts which may be a breach of their moral rights,<sup>14</sup> a creator cannot transfer or license their moral rights. The ACC does not know

<sup>13</sup> Part IX *Copyright Act, 1968* (Cth)

<sup>14</sup> Section 195AWA *Copyright Act*

whether Mr Thomas has provided such written consent to any of the licensees under the Licences.

**(c) any other matters relevant to the enduring and fair use of the Aboriginal Flag design by the Aboriginal and Australian community**

4.17 The ACC operates a free legal service for Australian creators. We receive queries regarding the use of the Flag in artistic works. These queries include those from Indigenous artists.

4.18 Examples of the queries regarding the use of the Aboriginal Flag include:

- using the Aboriginal Flag as a prop or background for photographs;
- reproducing the Flag (or a substantial part of it) in paintings, posters, drawings, street art etc; and
- the reproduction of the Aboriginal Flag as a tattoo.

## **5. Conclusion**

5.1 It is a testament to the power of creativity that creative works can achieve iconic status. This can lead to a public perception that it is unfair that copyright owners receive payment for the use of their works. Australian copyright law ensures that creators are entitled to control the use of their works, by receiving payment for use and by determining terms of use in the form of licences. The rights of creators should be treated with the same regard as the rights of owners of tangible property.

5.2 The ACC acknowledges the sensitivities involved in this issue and is thankful to the Committee for considering the terms of this submission.

5.3 If the Committee has any further queries or requires further information, please let us know.

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Australian Copyright Council

## **SCHEDULE 1: AFFILIATES OF THE ACC**

As at the date of this response, the Australian Copyright Council members are:

1. Aboriginal Artists Agency Ltd
2. APRA|AMCOS
3. Ausdance National
4. Australia New Zealand Screen Association
5. Australasian Music Publishers Association Ltd
6. Australian Cinematographers Association
7. Australian Directors Guild
8. Australian Guild of Screen Composers
9. Australian Institute of Architects
10. Australian Institute of Professional Photography
11. Australian Music Centre
12. Australian Photographic Judges Association
13. Australian Publishers Association
14. Australian Recording Industry Association
15. Australian Screen Directors Authorship Collecting Society Limited
16. Australian Society of Authors
17. Australian Society of Travel Writers
18. Australian Writers Guild
19. Authentic Design Alliance
20. Christian Copyright Licensing International
21. Copyright Agency
22. Design Institute of Australia
23. Media Entertainment & Arts Alliance
24. Musicians Union of Australia
25. National Association for the Visual Arts
26. National Tertiary Education Union
27. Phonographic Performance Company of Australia
28. Illustrators Australia
29. Screen Producers Australia
30. Screenrights