

Submission to the Senate Select Committee on the Aboriginal Flag from Claire G. Coleman, Noongar writer, artist, cultural advisor and art critic.

Invitation to submit received by email on 8 September 2020.

Summary

1. Any attempt to wrest control of the Aboriginal Flag copyright from the flag's creator Harold Thomas would strip the creator of agency and endanger Indigenous intellectual property rights.

Introduction

2. Through my work as a writer, art critic and cultural advisor, and my personal position as a member of the Noongar nation, I am particularly aware of the cultural risks of government intervention into the copyright of the Aboriginal flag.
3. Harold Thomas' agency in regards to the licensing of his Aboriginal flag design, and the importance of his right to agency, is an important and often ignored aspect of the debate.

History of the Flag

4. Harold Thomas, a Luritja man from the Northern Territory, designed the flag in 1971, while he was an art student in Adelaide, for a land-rights march in that city. In 1972 that same flag design was adopted by the Aboriginal Tent Embassy in Canberra as a flag of pride and protest.
5. When the Federal Government mandated that the Aboriginal flag was to become a flag of Australia in 1995 Thomas, who had previously maintained the flag was his design but did not enforce his copyright, asserted his rights.
6. Thomas has stated he asserted his copyright to prevent the design's appropriation, misuse and abuse by government; including his desire to have the right to stop the government from incorporating the flag into other designs.

Agency of Harold Thomas

7. Upon asserting his copyright Thomas negotiated deals for the commercial use of his design, signing agreements with Flagworld for the flag and Birubi for t-shirts and accessories. Flagworld still hold the license for physical flag products.
8. The owners of WAM clothing, the current licensees for clothing are the former owners of Birubi; a now defunct company. However, outside opinions about the owners of the organisations Harold Thomas has chosen to deal with do not negate his agency in making that decision.
9. Thomas has been unequivocal in his desire to work with WAM clothing and Flagworld with whom he has had relationships for more than 20 years.
10. Harold Thomas has done nothing but assert his rights under copyright law by licensing his design with whomever he desired to. Any creator of a work has the right to assert their copyright and to control who can reproduce their work. To remove that right is to remove the creators agency and infringe on their rights.
11. In an interview with CAAMA radio in Alice Springs in July 2019 (available online on the CAAMA website) Harold Thomas expressed his agency in his decision making regarding

the flag copyright and expressly requested that Clothing the Gap drop their “Free the Flag” campaign.

Parallels with the Albert Namatjira Case

12. There are parallels between the treatment of Arrente artist Albert Namatjira and the intent to acquire the flag. In the 1980s the public trustee handling the Namatjira estate disposed of the copyrights to all of Namatjira's works to a publishing company, for a pittance; against his wishes and in direct opposition with what was written in his will. This stark example of the government disrespecting the will and agency of an Aboriginal copyright owner should serve as a warning. Namatjira's family lived in poverty while the owners of Namatjira's copyright earned millions of dollars from that asset.
13. The family of Albert Namatjira sued the government for the loss of income caused by the public trustee disposing of the copyright and the matter was settled out of court for an undisclosed sum.
14. Any attempt to legislate changes to copyright law specifically to effect Harold Thomas would be discriminatory and disrespect the creators agency, in a manner reminiscent of the experience of the Namatjira family.

Conclusion

15. Much has been said regarding the importance of empowering Indigenous Australians economically and of increasing Indigenous agency in decision making in what affects our lives. What is proposed, Government intervention into an Aboriginal elder's decisions regarding his intellectual property, would remove that economic opportunity.
16. Anything other than maintaining the status quo regarding the copyright of the Aboriginal Flag and allowing the creator of the flag Harold Thomas to make all decisions regarding his intellectual property removes agency from an Aboriginal elder and should be avoided at all cost.
17. Compulsory acquisition of the flag copyright endangers copyright laws and agency for artists particularly Aboriginal artists and credibly increases the risk of a proliferation of fake art. Therefore, compulsory acquisition of the flag copyright by government is to be avoided at all cost.
18. Enforcement of statutory control over the flag copyright endangers Aboriginal agency regarding our creative output and intellectual property and derails attempts to develop financial independence through the licensing of cultural and intellectual property.
19. This removal of a creators intellectual property has never been suggested by Government before and it's important to consider the consequences of it being considered now, particularly in regards to Aboriginal cultural or intellectual property.
20. The only effective solution that respects the creator of the flag, Harold Thomas', copyright is the Government negotiating a solution with the copyright owner himself.

Two published pieces from Meanjin Journal unpacking the history of the flag's copyright (*The Flag is Art, Art is Copyright*) and the cultural risk (*Harold Thomas and the Legacy of Albert Namatjira*) have been included in my submission.

Regards

Claire G. Coleman

18 September 2020