

The Flag Is Art, Art is Copyright.

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There has been much reporting over the past weeks on the “free the flag” movement, and their professed desire to force the Aboriginal flag licensing agreement to be changed. (A Change.org petition is titled “Change the licensing agreement around the Aboriginal Flag”). The AFL and many of their clubs have become involved in this movement though what their motivations are is not completely clear unless it's the desire to place the flag on their Indigenous round jerseys without permission. This has been misreported by the media as a ban on the flag being flown at the games; it is legal to fly an Aboriginal flag anywhere.

In reality flying the Aboriginal flag remains legal.

It is important at this point to clarify the misconceptions around ownership of the flag because the media reports apparently stem from an almost complete misunderstanding of copyright. Copyright for the flag belongs to it's designer Luritja (Aboriginal) man Harold Thomas and has done since he created the flag in 1971, for use at a land-rights march at Tarntanyangga (Victoria Square) in the city now known as Adelaide in Kurna Country.

Under Australian copyright law a work is copyrighted as soon as it's created.

The flag was assimilated into the identity of many Aboriginal people and has become a symbol of our pride, which became controversial when people discovered that it is in fact a copyrighted piece of art. The government declared the Aboriginal flag a “flag of Australia” back in 1995 and in 1997, fearing abuse of his design, intended as a symbol of protest and community, Thomas defended his ownership of the copyright.

WAM clothing, who the media would like you to believe own the copyright to the Aboriginal flag do not, they own exclusive rights to produce the flag on clothing (some reports include all physical and digital media). The copyright of the flag belongs to Harold Thomas, it's creator.

To put it as simply as possible, copyright on any creative work belongs to whoever created it. In Australia that's automatic, no registration required. Copyright gives the creator complete control over reproductions of their work. It is possible to sell copyright. However most creators do not sell their copyrights, they license the “rights”. Rights give the purchaser the right to produce products derived from the work for a length of time, sometimes for “life of copyright”. The creator still owns their work for life of copyright and the licensee pays a percentage of sales to the owner; licensees can also sub-license their rights and can sell them.

Life of copyright in Australia is 70 years after the creators death; copyrights from departed family members can be priceless inheritances.

The Aboriginal flag is copyright just like any other work of art. The licensing of any work of copyrighted art, such as an Aboriginal painting on a coffee mug or a t-shirt works in precisely the same way. So does the copyright of a book, a record, a movie; any created work. Without copyright protections anyone could photograph any work and sell it on a t-shirt for profit; without

permission and without paying or crediting the creator.

There have been calls for the government to purchase the copyright or the license, attempts have been made and rejected by Harold Thomas, the copyright owner. There have also been calls for the government to compulsorily acquire the copyright; the risk of this precedent to copyright, art and even freedom should not be underestimated. It's not hard to imagine a situation where another group could decide a piece of art should belong to everybody and request the art be compulsorily acquired.

It is also not outside the realms of imagination that the government might compulsorily acquire a copyright to suppress the work. A government should not be encouraged to compulsorily acquire copyrights. The precedent is a dangerous one to set, all creators of work, particularly Aboriginal creators, would be at risk.

Aboriginal people possess priceless cultural heritage that is often expressed in our works, works that can be our only source of income. Any weakening of copyright law, such as could occur if the copyright of the flag is attacked, puts all that cultural capital in danger. Any moves underway to protect Aboriginal art from fake creators and appropriation will be endangered.

As was pointed by Professor Isabella Alexander from University of Technology Sydney (<https://theconversation.com/explainer-our-copyright-laws-and-the-australian-aboriginal-flag-118687>) the protestation by the petitioners that “This is not a question of who owns copyright of the Flag. This is a question of control.” does not hold water because all a copyright gives its possessor is control over who can reproduce their work; the attempt to take away control is in effect an attempt to take away copyright.

This brings me to agency, to who should have control over a work. Harold Thomas is a 71 year old Aboriginal Elder who wishes to maintain control of his copyright and who possesses and displays great agency in his control of his copyrights. Only 4 years ago in 2016 Thomas won the National Aboriginal and Torres Strait Islander Art awards with a politicised repurposing of the “History painting” genre. Hardly a man who lacks agency.

In an interview for CAAMA in Alice Springs on the 24th of June 2019 (reposted on the CAAMA website in response to free the flag on the 19th of August 2020), Thomas expressed his horror and despair that people would desire to strip him of his copyright. I have to agree, any attempt to forcibly acquire Thomas' copyright, any attempt to wrest agency or control from Thomas, so that people can sell flag products without paying royalties, would be deplorable.

What we need to consider is that during this stoush over the Aboriginal flag the voice missing from the media cycle is that of the flag's creator Harold Thomas.

For more information on copyright see <https://www.copyright.com.au/about-copyright/>