

**FILM AUSTRALIA**  
**CULTURE & ETHICS: WHO DECIDES?**

Transcript of the first meeting of the Footage Industry Group for 2003, held on 27 February at Film Australia's Roxy Theatre, 101 Eton Road, Lindfield.

**Topic** The management of access to audiovisual materials raises many complex issues involving privacy, copyright ownership, censorship and community attitudes. Increasingly, specialist expertise is required when making judgements about releasing footage which may be deemed sensitive for inclusion in new productions.

**Guest speakers** Rachel Perkins (filmmaker), Terri Janke (Indigenous lawyer), Michael McMahon (producer) and Simon Etherington (Legal Officer, Arts Law Centre of Australia) lead a discussion about the licensing or releasing of audiovisual material that may be culturally or ethically sensitive. Hosted by Film Australia Chief Executive Officer, Sharon Connolly.

Connolly                      Thank you for coming and welcome and also a special welcome and thank you to our speakers for today. From this end - Rachel, Terri, Michael and Simon, who I'll introduce in more detail a bit later. We thought that we would start today with a sort of thrown-together compile in the way that these things are. Just a small selection of clips of material from the Film Australia Library which has been requested in recent times and which has given us cause for concern on a number of grounds and the clips illustrate a number of the issues that may come up today hopefully. Some of the examples are sensitive because they deal with issues such as crime and

public health and they're controversial in some way; in some, the people featured in the clips have signed releases for a particular production but may not have understood at the time that their images might be re-edited into new programs and new contexts further down the track; there are some examples of filming done in public places where we don't have releases for people who've wandered into shot and who now can't be identified; and there are also some examples of footage in Indigenous communities or of Indigenous people which contain images of people or places even that we can't identify and for which we can find no records. But I thought this was, or the people in the library really thought this was a good little compile of those sorts of examples so we might roll that and then we'll get on with introducing some speakers.

<film clips>

Connolly

Millions of miles more of the same in the library. In fact my favourite example actually of a piece of sensitive footage isn't in that and it's just a funny story of something that happened to me here in about, it must have been 1996 when I was Executive Producer of a series called *Australian Biography*, which illustrated interviews, if you like, profiles of prominent Australians and we had done quite a famous interview with Malcolm Fraser in which he talked at length about his life and time in politics and so forth. And they're basically projects that are done for the archive as well as to be cut into television programs and in the course of cutting that interview into a half-

hour television program for SBS we'd given a transcript of the interview to Graham Freudenberg in order that he could examine it for any sort of great historical moments related to the Dismissal which we, in our ignorance, might have missed. So Freudenberg was very familiar with the transcript. Some years later during the '96 election campaign I had a phone call from Bob Ellis, who was working in Kim Beazley's office and Freudenberg had told him about the transcript and at a certain point in the interview Malcolm Fraser has said some fairly derogatory things about the man who was to become our current Prime Minister. And I was left sort of, in the unenviable position of incurring Bob Ellis' wrath by not giving him the piece of footage or incurring the wrath of the government to be, and it was clearly at the time the government to be, by giving them footage which would have been damaging to John Howard, and worse still I also faced the prospect of incurring Malcolm Fraser's wrath for allowing the use of footage in a totally inappropriate context really. So I chickened out and I don't think Bob's ever forgiven me. I'm sure everybody here today has got a story of some sort and the first person to address some of the issues is Simon Etherington, who isn't Elizabeth Beal who you thought might be here but is none the less is representing the Arts Law Centre of Australia <for which he is Legal Officer>. So Simon, would you mind leading the discussion off? Thank you.

Etherington

Christopher Sexton is our new Supervising Legal Officer but he's just on day two of the job and sent me instead. So I'm

glad to be here to talking to you today. I want to start off very generally. I think as we work through the panel we're going to get a bit more specific. I'm going to talk about copyright infringement. I don't know how much the people here know about copyright infringement. In fact I might just start off by taking a little bit of a straw poll. Who here has absolutely no idea about copyright at all? Who here has heard of copyright, knows a little bit about it but wouldn't really feel much confident beyond that? Couple of you? And who here's got a pretty good working knowledge of copyright, like enough to get by? It seems most of you. All right. Any expert copyright people out there? Right. Well you don't need to listen to what I have to say but I hope that I have something that I can offer to the rest of you and I wasn't sure how much you would know about copyright already, so I want to talk particularly about copyright infringement, sorry about authorisation of copyright infringement. I'll start off just by talking a little bit about the kinds of issues that arise in relation to copyright in film generally, then talk about what can be copyright, authorisation of copyright infringement and then about any steps you can take to minimise the risk of exposure to liability due to copyright, authorising copyright infringement. As you all know copyright is a bundle of rights. If someone other than the copyright owner does one of the exclusive rights of copyright, does one of the acts comprised in the copyright without the permission of the copyright owner, that is 'prima face', at first blush, an infringement of copyright. For film the exclusive rights of the copyright owner are to make copies of the film, to

show the film in public, this would be a public screening of a film in case that's not clear, it can be relatively small gatherings and by invitation and that sort of thing. And the third exclusive right of copyright owners of films is to communicate the films to the public online or by the internet. How many of you here work with organisations that actually produce film footage? Quite a lot of you. And you all work within organisations that lend out film footage to other people, is that right? So I've chosen to focus on authorisation because that is something that will apply to all of you, whereas I'm going to focus less on issues that arise when producing a film but I'll just go over those quickly. The important thing when you're producing a film and especially where you anticipate that it's going to be lent out in the future is to ensure that you are confident that you have all the rights that you need in the film. Where you incorporate in the film material which is from other sources, you need to make sure that you have the permission of the other sources to use the material in all the ways that you anticipate using it. That means if there's a script in the film, if there's music accompanying the film, if there are artistic works that are going to appear in the film, you need to get licences for that to happen. Really good idea is to get it, it doesn't have to be writing but I would strongly recommend that it is because it makes it much easier later on, it makes it easier to prove that you have all the rights and if you want to deal with copyright, if you want to lend it to people and give licences to them or if you're seeking funding to produce the film, those sort of things are commonly required and I think Michael and probably

Rachel will be able to talk more about that later if necessary. You will also need to think about performers releases, interviewee's releases and location releases. Once you have all those things taken account of you need to keep them together with the film so that you have them when you need to licence the film or whatever later. At this point I'll note, I said that doing any of the exclusive rights comprised within the copyright without the consent of the copyright owner is usually an infringement. If you can't find the copyright owner to get their permission that's no excuse but I might talk about a bit later on, and I'm not going to be talking for very long I'm going to keep this short, about what you might do in that circumstance. The other thing I'll just flag is that in some circumstances you'll be able to avail yourself a fair dealing defence, which is, there are certain bases on which you won't be infringing copyright even where you do something that would otherwise be an infringement of copyright and that may sometimes be irrelevant if the people that want to use the footage you have are doing it for the purposes of research or study or criticism or review of a report in the news. Moving on to authorising copyright infringement. It is an infringement of copyright if you authorise someone else to do something which is an infringement of copyright. So if you lend some footage in your library to someone so that they can incorporate it into another film or so that they can broadcast it, that would potentially be authorising an infringement. The key when considering that is - what does it mean to 'authorise' it? The Copyright Act sets forth three things, which have to be taken

into account by a court, which is considering whether or not infringement of copyright has been authorised and they're set out in Section 36 and Section 101. Thirty six relates to copyright works like literary works, scripts, artistic works and music and Section 101 is for film. And they are: you need to consider the person's power — that is your power — to prevent the person that you're lending the film to from doing whatever it is that would amount to copyright infringement, the nature of your relationship, and what steps you took to prevent that person doing anything that amounted to copyright infringement. The issues come up in a number of cases and early on in the judicial history it was interpreted quite narrowly but these days it has a much broader interpretation, which is reflected in those statutory considerations. But there was a case where the University of New South Wales Library was sued for allowing the students to photocopy material that they had in the library and in that case the court considered - what does it mean to authorise? And they decided that the formulation that they would use and apply is to countenance, sanction or approve the copyright infringement. Which means you don't have to do anything active, you don't have to direct someone to do something which amounts to copyright infringement, it's sufficient that you are aware that it's going on and allow it to keep happening. That's a pretty important point and that was important because it led to the University of New South Wales being found to have infringed copyright by allowing students to come in and photocopy books without restricting their access to photocopiers and that in turn led onto

some legislative amendments. So now when you go into a library there's a notice near photocopiers warning about copyright infringement and it's alright but the parliament had to step in and sort that out. Other instances where people have been found to have authorised copyright infringement in a music context where music is being performed live at a venue and the venue operator knew that the musical works that were being performed didn't belong to the performers and they didn't worry about whether or not there were any licences being put in place. In fact they were put on notices that there were no licences. They didn't do anything about it and the performers went ahead without the copyright licence, infringed copyright, the venue owners were held to have authorised the infringement of copyright also and were held liable. So that goes to show that you don't need to take a very active role and that it is something that you need watch out for. Another reason you need to watch out for that is because, and Sharon might be particularly interested in this, is that individuals who are Directors or Chief Executive Officers of organisations that authorise copyright infringement can be found personally individually liable for that copyright infringement. And that's what happened in one of those cases of the music playing in the venue. The owner of the venue had seen correspondence from solicitors of APRA telling them to stop and that the works weren't licensed, so they knew about it and they let it continue and at the end of the day they were found personally liable because although they hadn't done anything particular and their involvement wasn't particularly great, that was enough to

get them individually and personally on the hook. Probably not so much an issue for library staff that are just employees, I think it's more of a concern for Directors and Chief Executive Officers. Lastly I'll just move on to talk about a few things you can do to limit your exposure to liability for copyright infringement. I recommend that you take these steps. First of all that with all film footage that you lend out you attach on the articles that you lend out clear notices warning that copyright infringement is illegal and setting out the purposes for which the person is allowed to use the article. For instance, 'you are allowed to use this film only for your private use or private viewing or something like that'. Secondly I suggest that in the agreements that you have with your members, the people that can borrow from your library or archive, you have some provisions dealing with this which say much the same thing that, you know, it is an offence to infringe copyright, you're not allowed to use any of the works in your libraries in ways that infringe copyright. Thirdly if you become aware that those measures aren't working, you're going to have to take further steps, further reasonable steps. The countenance, sanction and approve test hinges on you taking whatever reasonable steps are necessary and if you know that what you've done isn't working and there are other things that you could do which are reasonable, then you need to take those further steps, or alternatively consider no longer providing access to that footage. Fourthly if someone else comes to you and explains they do want to use the footage and they want to get a licence from you to use it in a particular way or that they are

convinced that they can rely on one of the fair dealing exceptions or if you can't find the owner or something like that and you decide that you want to go ahead and allow them to use the footage to put into another film or to broadcast or whatever then I suggest that you enter into a written agreement with whoever that is and as a fundamental part of that agreement from your side include provisions whereby they warrant to you, that is they promise to you, that whatever they're doing with the materials you're lending them will not amount to copyright infringement and that further that they promise to indemnify you, that is repay you from any losses you suffer later on as a result of getting sued. And that's a pretty standard sort of agreement of terms to find in contracts and I think it's quite reasonable for you to insist on those in circumstances. And I guess at that point you'd probably call up your lawyers or if you're a very small organisation, you might want to call Arts-Law and try for some preliminary free legal advice, because we give free legal advice. I think I'll leave it at that for now and pass to Michael and if there are any questions at the end I'd be happy to answer them.

Connolly

I forgot to say before we will take question at the end, so thanks Simon. Michael is also a lawyer but he's better known to many of us here at Film Australia as a producer who's possibly uniquely qualified to address some of the issues that will come up today because of his work on films like *Sadness*, which dealt with AIDS and the effects of AIDS and so contained images of people who were dying or had died. He's

also worked on a film called *Thompson of Arnhem Land* here, which again used a lot of Indigenous material and Michael's currently working on, well nearly finishing a film called *Wildness* about the Tasmanian wilderness photographers Olegas Truchanas and Peter Dombrovskis, which probably has sensitivities of which I'm not even aware. Michael also has a background with the Arts-Law people and was, now what was your title Michael? Was it Director of the National Indigenous Arts Advocacy Association for a time also?

McMahon

That's right. Thanks Sharon. Well, since Simon's covered copyright, what I want to do is just talk a little bit about some of the considerations that you would need take into account for people who might be included in footage, which you might be licensing out, and which as a producer I would want to be licensing. Like some of the images we've seen up there, the people walking in the street and the elderly woman in the bed. So I'll talk a little bit about some of the considerations that you would have to take into account in licensing that sort of material. I want to also talk a little bit about a new right that has arisen for the creators of film and that's moral rights, which you will also have to take into account for any film material that's created after the 21<sup>st</sup> December, in the year 2000. So moral rights in film footage is a new consideration for people who are licensing that footage and we'll come to that and talk about that and I'll try to refer to some of the examples that I've had to deal with as a producer. And finally before I pass over to Terri I just want to talk about some of the issues that as a producer I think

I have to deal with in considering whether or not to use footage, pre-existing footage in projects that I am producing. Firstly, just to talk a bit about the rights of the people who are included in footage, which you might be on-licensing to producers. Well I'm telling you what you already know and that is that you'd want to be generally fairly certain that a person who's included in the footage that you're licensing has given a release to the filmmaker and therefore had agreed to be included in the film and generally that will be included in your agreement — a warranty, an indemnity to that effect — and so there shouldn't be any problem with on-licensing that material where there has been a release. But you would also need to take into account just what has the person released their image and words for? They've consented to something but what is it? To the inclusion in a particular program and then and future uses of that program or parts of the program but in a lot of cases the people who are giving releases and the people who are actually being interviewed or who are being featured in some footage, I'll come to the people who are walking across the street in the shot in a moment, but particularly with people being interviewed, as Sharon said there is a lot of additional material that doesn't make it into the program that may well be available for licensing at a future time. And I think this is going to become more and more likely because storage of material has become so much easier now with digital storage possibilities whereas previously when material was on a film a lot of it was simply lost. A lot of the those outtakes of course are now available and might be able

to be used in uses other than simply licensing the segment that ended up in the filmmakers program. And I know this is arising already and must arise for programs like *Australian Biography*. It's likely to arise with the interviews that we've just completed in the project *Wildness*. We've interviewed Bob Brown. In an interview where he talks very personally about people, one person that he knew who is a principal subject of the documentary, Peter Dombrovskis and he talks very personally about a whole range of issues and his incredible sense of loss not only of a friend but also of a whole campaign around Lake Peddar. It's a very personal interview and I would imagine it would have value in the future. We've got a release for that material and it will go and sit in the Film Australia Library. I would expect in that situation with outtakes though that if it hasn't become part of the program then generally, and I'm sure most of you would do this, before those outtakes are actually used I would expect that it would be the usual practice, particularly if the release is not specific that there's a wider use allowed, that you actually go back to the interviewee or their family if that person's deceased and seek permission for the use of that particular material. And so generally it'll be covered by the original release but you would need to, particularly if you start getting into material that hasn't been included in the program and therefore aired publicly already then I think you have to go back to the next level and just check with family members, particularly if it's sensitive material. What about though if people haven't given a release, for example, we've seen two women walking down the street with an umbrella and

a man walking across the street with his umbrella, what rights might they have to limit the use of that footage? Well in Australia they've got very, very limited rights to restrict the use of that footage. With you licensing that footage, though, you have to be particularly careful and again you've got to look at your warranties and indemnities in your licence agreements to make sure that any use that's made of that footage doesn't result in a defamatory imputation arising from the use of the footage. For example, you'd want to be very careful if you were licensing that footage of the women walking down the street that the person who you licensed it to didn't, sort of, put some words over the top if it was a story about prostitution in a particular street in Sydney and the words overlaid those particular images, you might have some problems and you'd want to make sure that you're protected in that situation. If someone broadcasts that then they have taken a great risk indeed. There was a case about ten years ago now in Perth where Channel Seven ran a story about a dentist in Perth who reportedly was passing on hepatitis to his patients and they covered the story with stock footage of a dentist surgery and unfortunately for them the surgery was recognisable as a prominent dental surgery in Perth but it wasn't the dentist, it wasn't the surgery of the dentist who the story was about. The dentist concerned is very highly regarded and got damages. They just used stock footage of a dentist surgery and people recognised it as their dentist surgery and were quite upset as a result of it, as was the dentist. But what other protection might people have for their image that is in stock footage? Unlike in

the U.S. we've got limited rights in our image. Copyright doesn't protect our image. It protects the representation, the photograph, the film footage and that. So in the United States there's much more protection of a person's character and image, particularly if they're in a public position. In Australia there's been developing a series of cases which have seen that people with a public profile and one in which they engage in a trade or business have been able to protect the use of their image in footage. An example of this, I suppose one that comes to mind, is Kieran Perkins sued Telstra or Telecom as it was at the time, for the use of him swimming in a Telecom cap and they used it at the time when we all had to decide whether we were going to use Optus or Telstra as a carrier. The footage was shot at a time, I think he was in the Pacific Training Squad or something, Telecom was the sponsor at the time but they certainly used that footage and they used stills in a way which suggested that he was endorsing Telstra and they used it in their advertisements in that way and he sued and he was successful. On the basis that he was a person who had a profile, he was in the business of seeking endorsement and earning his income from endorsements and so the court sought to protect that ability for him to trade in that way. So if you've got a prominent public person in footage that you're licensing again you need to look at your warranties and your indemnities very carefully in your agreements because there is the potential that if it's then taken and used in a way which would suggest that the person in the footage is actually endorsing something when indeed they're not, then that

person may well have a right of action both to stop the use but also a right to damages. An example I thought of, if you had footage of say Ian Thorpe in a crowd at a football match and that was subsequently licensed out, it was stock footage, it was licensed and then used in a way that suggested that he was endorsing a particular product then he would probably have a right of action because we all know he makes a lot of money from endorsements and sponsorship. However if it was me in the crowd and it was licensed out and my enthusiastic barracking was used in some way then I would have great trouble getting the same sort of remedy because I don't trade in the business of getting sponsorship. I don't earn money from sponsorship unfortunately. So you need to just think about that if you've got footage of prominent people that you have to perhaps check the use that's actually going to be made of it and certainly check your warranties and your indemnities. I've already mentioned that anybody, but particularly people with a public profile, anyone where there's footage used and it's used in a way which might have the effect of lowering that person's reputation then you're entering into the area of defamation and you've got to be careful of the uses that are made. Again as people licensing footage you'll need to check that your indemnities are wide enough to cover the possibility of any action although as a licensor of footage you're one step removed, but I just raise it as a consideration. Privacy considerations, as I mentioned, there's no highly developed law in Australia that protects peoples images as such. There's a developing area concerning the use of personal information.

It existed for quite some time for government organisations and has now been extended about the way in which people can disclose personal information but in terms of our images we're in the same sort of stream of law as the United Kingdom where they seemed to have an inquiry every time Princess Di was photographed in the gym or Fergie was photographed sucking some Texan's toes or something, there would be an inquiry about the need to give people more privacy concerning the use of their images but in fact there's been no significant changes to the law. So I think it's an interesting case and it's worth following at the moment the one where Michael Douglas and Catherine Zeta-Jones are trying to use the courts in the United Kingdom to seek damages for reproduction of photographs of their wedding and my understanding — and I've only followed it through the press — but my understanding is that a large part of that action is dependent of privacy and as I said it's not a particularly developed area of the law in the UK. It'll be interesting to see how they go. I would have thought that what they're seeking to enforce is a right to control the publicity because they'd already authorised and received a million dollars for the use their wedding photos so it's hardly a private matter. I think they want to control the way that their publicity is done. Okay. I mentioned that I wanted to talk really briefly about moral rights. Moral rights are a new statutory right that's come about in our scenario, legal scenario in Australia and they're new rights that are given to a whole range of creators, including the creators of film and basically the two main moral rights are the 'right of attribution', the right for someone to be

attributed as the creator of the film, the creator of the work and the 'right to maintain the integrity' of the work that they create. I might just mention that and you could keep in mind that the right not to have your work falsely attributed has also been extended to films so you've got to again, it's more the user of your footage that has to be careful in this situation but I think be aware and you might want to say to them 'you've got to be very careful that you put the correct attribution on the film because they now have a legal right to pursue you if you falsely attribute the footage'. The moral rights apply to all films created after the 21<sup>st</sup> of December 2000 and the right adheres to the creators of the film who will be the principal director, the principal producer and the principal screenwriter. And the right integrity is the right to ensure that the work is seen in the way that the creator intended. I think that's particularly important and it will be interesting to see how it develops over the years because we are in the situation now with all the footage that you're licensing, every day there seems to be a new way in which it can be manipulated, changed and how's this going to sit with the right of integrity, the right not to have your work subject to derogatory treatment. I think I'm running out of time so I should finish with just saying, what are some of the things that I would consider when I'm looking at footage for inclusion in a program, apart from all the legal considerations. Firstly I'd be looking at the footage and asking how was the footage obtained in the first place, have there been releases obtained and what did those releases cover? What was that person consenting to? Secondly, what was the power relationship

between the subjects and the person making the footage?  
Was the release in a language the person could understand?  
And I'm sure Terri and Rachel will talk more about that. Was the person in a position where they could have objected to the filming? For example, the elderly woman in the hospital bed. Is it appropriate that that footage be used? She is clearly not in a position to have either consented or to objected to that footage. Is it appropriate that it be used? There was an incident last week where I saw news footage of three young Japanese men in a very distressed state on the beach while their friend's body was being carried of the ocean; he'd drowned. Is it appropriate that that footage should firstly be showed in the first place but should it be re-licensed? These are all subjective considerations, which a filmmaker has to take into account. What is the use that we're going to make of it anyway? We've got to be careful, I mean is the intention to distort it? What context is it going to be put into? And that of course will become particularly significant for footage of Indigenous material. And is that particular use that we're going to make it of that footage an appropriate use in this case? This is often a really hard decision and needless to say it's a subjective decision that someone has to make and I suppose the most recent example of that that I've had to deal with is that when Peter Dombrovskis died in 1996, the ABC with the consent of his family actually filmed his funeral. It was well attended on a very stormy day on the side of Mount Wellington. It's incredibly moving, it was of potentially great significance for our program but Peter's family had never

actually seen that footage, they'd consented to the making of it but they hadn't actually seen it. So we had to sort of negotiate and make decisions about whether it would be used. The family agreed to us using the footage, they haven't actually seen the excerpts that we've included in the program yet and just in terms of sort of applying these principles, on one of the cuts I saw I just felt that the director and the editor had dwelt too much on the family at the funeral and I just simply made the comment that I didn't think that added anything and it had the potential to cause considerable distress to the children and to Peter's wife and the next cut I saw that had been minimised. It was a very fleeting shot. So I think you have to be sensitive and subjective but sometimes those decisions are hard. Thank you Sharon.

Connolly

Michael can get people to do things in cutting rooms, that's why he's such a good producer. Terri Janke is our next speaker. Again, Terri may be well known to many of you because she's a very prominent Indigenous lawyer specialising in issues involving Indigenous culture and heritage. She's Director of Terri Janke and Company Propriety Limited and she's also President Ngalaya Aboriginal Corporation, which is an association for Indigenous lawyers. And I might actually introduce Rachel at the same time because I understand, are you doing something that flows on one to the other rather than interrupt again?

Perkins

Yeah.

RC

Connolly Rachel's probably best known to most of us here as director of the feature film *Radiance* and more recently *One Night the Moon*. Rachel has also been an Executive Producer at SBS and at the ABC, she's a graduate of the Film School, she's worked for CAAMA and she's currently producing a series with, or developing a documentary series with SBS Independent, which is currently titled *First Australian Nations*. Is it still titled that?

Perkins Yes.

Connolly Okay. Thank you.

Janke Thank you. I'd like to acknowledge the traditional Aboriginal owners of the Sydney region and I'm here today to talk about film archives and Indigenous culture and intellectual property. I've called my paper *Captured Images* because of the history of this country and Indigenous people being captured on film since invasion. I did some research preparing for today and read a catalogue of the AFC production *Hidden Pictures*. Wal Saunders and Michael Leigh wrote in that catalogue that the first film made with Indigenous Australians was made by A.C. Haddon. He was a visiting academic from England who had done ethnographic research in Mer, Murray Island in the Torres Strait. Since then the cameras have captured a lot of Indigenous content. It includes quite a range of material: ethnographic accounts of culture, sacred ceremonial practices,

personal histories, cultural knowledge, traditional knowledge of Indigenous people about plants, land, animals, and their relationships with people. As a result of this, film archives have inherited a lot of significant Indigenous films. These films have significant Indigenous content. Film archives are now confronting issues of how to manage this material. Often the depositors or the copyright owners are not the Indigenous people - the owners of culture. Indigenous people, who are now reclaiming their culture and are seeking to recognise and enforce their Indigenous cultural property rights. They are concerned about the uses of the film footage taken and they seek to have a say how that material is used. I've worked in the intellectual property area for ten years. When I left Law School, Michael was the Director of the National Indigenous Arts Advocacy Association (Aboriginal Arts Management Association as it was then known). I took on the position as a Copyright Information Officer at the time but it really was my introduction to this area of law. I became very interested in it and after I graduated I went to work for a law firm, Michael Frankel and Company. We were successful in winning a tender to work on a project, which was to look at what Indigenous Australians see as their indigenous cultural and intellectual property and how they would like that protected. The project was a response to Indigenous concerns about a lot of rip-offs that were occurring. These rip-offs were occurring not just with film but also with art, culture and traditional knowledge. So I undertook a study, which looked at what is Indigenous cultural and intellectual property. And what we

came up with was that Indigenous cultural and intellectual property is Indigenous people's rights to their heritage and the heritage of Indigenous people is comprised of objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation and which is regarded as pertaining to a particular people or territory. Indigenous cultural and intellectual property includes literary, performing and artistic works, like traditional songs, stories handed down. It also includes artistic works that come from a particular group within Australia. There are many Indigenous clans within Australia and they each assert ownership over different stories and works that relate to their identity and their land. Languages is another area, traditional scientific and ecological knowledge, cultural property, that's objects and cultural property, ancestral remains, immovable cultural property. The ICIP definition includes documentation of Indigenous people's heritage, such as research reports, films, sound recordings that were recorded by often non-Indigenous people that recorded Indigenous people's culture. They were all seen as being part of Indigenous cultural and intellectual property. In *Our Culture, Our Future*, the report lists 17 rights Indigenous people want to their ICIP, but I've just picked out some today. The rights Indigenous people are seeking: the right to own and control Indigenous cultural and intellectual property; to require the prior informed consent or otherwise be it access, use and application of Indigenous cultural and intellectual property; to maintain secrecy; to prevent derogatory, offensive and salacious uses. And these

developments, well you can download a .pdf copy or view it in .html format at the website that's listed there: [www.icip.lawnet.com.au](http://www.icip.lawnet.com.au). There are no more hard copies available of that report but that's where you can find it. The World Intellectual Property Organisation is also doing work with the protection of traditional knowledge and that is happening at a global scale and the work that they're doing can be viewed at the World Intellectual Property internet site there: [www.wipo.org/](http://www.wipo.org/). What the report also found was that current laws don't protect these rights of Indigenous people seeking copyright being one example, is it recognises ownership in the filmmaker, having been the owner of the recording. If it is a performance, for instance, there is no copyright performance recognised like in a ceremony, the story of a traditional creation story or of belonging to a particular country may not have copyright ownership. The recording. The person, who owns the recording can control its dissemination, as Simon said, so there's limited protection of these rights within the intellectual property regime but also under Australian cultural heritage laws as well.

I now want to talk about some of the concerns that Indigenous people have about use of film that is made available and the first one is that it's not used in the original context. A classic example is when film footage from all sorts of contexts is used in news items. You often see footage of one Indigenous group used even when stories from other areas are portrayed. For example, file tape on Arnhem Land Indigenous people might

be used to depict Western Australian Indigenous people, which, in its context is misleading and shows no respect for either Indigenous group. Indigenous people see that as muddying the waters. Taking stories out of context is a concern for Indigenous people. Michael McMahon raised moral rights, raising implications of different contexts and cutting and secondary uses; that moral rights are individual rights. There are no rights of Indigenous communities to use a moral rights argument to stop that sort of thing happening, although there have been calls recently within parliament by Senator Ridgeway for the recognition of Indigenous communal moral rights. Another issue is representation. A lot of old film such as ethnographic projects were interpreted by 1950s non-Indigenous perceptions of how Aboriginal people were meant to be. These representations served to basically put together social stereotypes we have today, you know, like the pointing-the-bone native or the cute piccaninny or that Aborigines are going walkabout, the sort of things you see in a lot of that old film footage is quite offensive and perpetuating stereotypes. Taking without proper consent. Now a lot of this footage was taken at a time when there was no discussion of secondary uses. A lot of the Indigenous people did not know about the technological possibilities of film. They would not have known about the technology in that day, nor have spoken the English language to be able to be given the requisite consent. The images were taken of people who were seen to be dying out. The "soothe the dying pillow" perceptions of Indigenous culture but that's not the case now. Indigenous people are reclaiming

culture. That's important for them to be seeing what information is made available for specific uses that weren't originally intended. And also limited purposes, not used as per the original arrangements as told to Indigenous people. I'm thinking of where Indigenous people might be told it's for a documentary about promoting their culture and then used in a report about petrol sniffing for instance. It's taken out of context. Those sort of things are misuse and get Indigenous people quite offended.

Another example that's happening now is where sacred image might be in films or events being used again for secondary uses other than the original filming purposes. There's also problems where sacred images might be contained in films or in events and be re-used again for a different film. You need to really make clear that you go back and ask for consent for that. For instance with the Sydney Olympics, the opening ceremony which featured the *Wandjina*, the ancestral spirit from the Kimberley region, now that, obviously it was filmed around the world and beyond and the provisions for that filming, the contract required that secondary uses had to go back to the traditional owners for consent in the particular context.

Deceased persons is another issue. Images of deceased persons is another issue because in many Indigenous communities the reproduction of names and images of deceased people is against law and it's seen as being against Indigenous mourning beliefs and it can be something that

Indigenous people might go to a conference and see their deceased family members displayed in the film and it can be quite shocking and cause them quite a lot of personal grief. Putting up the warning before the film is necessary. You also need to get the consent of the family to put a deceased family member in the film.

A case study for example is the filming of the Yepperenye Festival which Rachel put together in 2001. The grant of rights for the ABC filming allowed a broadcast of the dance on television, however it did not allow internet reproduction and also the use was only for one year.

There are regulations within the Environment Protection Biodiversity Conservation Regulations that relate to the filming of Uluru (Ayers rock). Filmmakers are required to get a permit from the Director of the National Park prior to filming in the park but also to use old film footage taken in the park in new ways.

It's a challenge for film archives I guess to make available part of the cultural record because in reclaiming culture, Indigenous films are invaluable for Indigenous people, so it's for film archives, I think, to forge a working relationship with Indigenous communities. And some of the key issues for film archive practice, which I've put together just for general discussion. Is that prior consultation with Indigenous people for use of old film footage is something that needs greater

thought, how you obtain that. And I had a look at the Film Australia Memorandum of Understanding that related to the ethnographic film footage taken by Ian Dunlop and I thought that covered a lot of secondary uses and procedures for getting consent and it even lists the organisations that should be consented. I thought that was a good practice. Depositors, at the time that information is taken clear instructions about content, people and places and consent provisions need to be obtained and also there needs to be more working with Indigenous communities to identify material and develop relationships about management of film images and also we need to increase Indigenous projects about the archival films and increase Indigenous staff board members and reference groups and adopt clear and continuing policies that need to be reviewed and updated.

In conclusion Indigenous cultural and intellectual property is now becoming widely recognised internationally. There is a need for these rights to be respected within the Australian cultural industry and prior informed consent with Indigenous people should be obtained before making films with significant Indigenous content available for secondary use. Full and proper attribution and cultural integrity of the material is a consideration and also the fair and equitable sharing of benefits is something also that needs to be included in any management practice that's adopted.

The other thing that I wanted to say before handing over to Rachel Perkins is that the Indigenous branch of the Australian Film Commission this year has engaged me to consult on an industry protocol for filmmakers working with Indigenous content and Indigenous communities. The protocol is for all filmmakers Indigenous and non-Indigenous it is important for all filmmakers to know about Indigenous cultural and intellectual property rights and to look at practices within their craft, which will assist them when going into Indigenous communities to film. The protocol documents will also have sections that relate to how filmmakers might get consent and for future uses I have brought some copies of the discussion paper: *Towards a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities* and it is also available on the website: [www.afc.gov.au](http://www.afc.gov.au). We would like to encourage all of you to respond. We're basically seeking case studies or any information which you might want to share that we'll put together a protocol that can help people working in this area because the idea is to continue these films but let's make them something that we can all be proud of and that goes to serve future generations of all Australians.

**Submissions are due by the 30<sup>th</sup> of June.** Thank you very much!

Perkins

When Bev approached me to be on this panel I was really enthusiastic because I feel really passionate about this area of film and I don't know a lot about it but I'm sort of a user of archives and I've worked to some degree with Aboriginal

communities and have come up against a lot of the issues that film archivists or institutions that manage Indigenous film materials might deal with. My first experience began when I worked with CAAMA in 1988. CAAMA is the Central Australian Aboriginal Media Association and they also operate Imparja Television. At that time, there wasn't a lot of Indigenous people making films. So we wanted to get Indigenous content on Imparja Television. At that time a lot of the films with Indigenous content had been made by the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra, who had a long history of ethnographic filmmaking. So they gave us all their films for free to broadcast on Imparja and we sort of said we'd show everything that was made after 1980, because we were pretty desperate to get Indigenous content on air. We also got a lot of other films for free too from other sources. So then we had the problem of, well...these films were made many years ago and we needed to show them and obviously where we were broadcasting into would be these communities and a lot of the people would have been deceased since the time of production and also they may not have felt that they, you know... we wanted to make sure that they were comfortable with the material that depicted them and that we were able to show it. So I got a grant from the Australia Council for five thousand dollars, got in a Toyota, got all the films and drove to each of these communities depicted in the films. I drove up from Alice Springs, up through Arnhem Land, all around to the top end, back down across into the Kimberley and back down to Alice Springs. I went to about twenty

communities, took a video player, camped and showed these films and talked to people about who could be in, who could be out, whether they were happy with films and you know, whether they were happy for them to be screened or not. And that was sort of my birth of fire in terms of coming to terms with screening films that had Indigenous content in them. Since then I've sort of worked exclusively in Indigenous film and I've come across a lot of different instances where the issues are complex but I think a lot of the issues that we all come up with in our work in terms of dealing with Indigenous material can be solved and often it's difficult because people who are working in the area aren't given the time or the money that's required to sort through these issues and those two simple things of time and money, can help create solutions to the problems that we all face. And you know if you could all have Toyotas and <laughs> three months off work and some petrol money and a swag, I think that, you know, we could sort through a lot of these issues. And it's fun doing it that way too; you get out of the office, which is good. So when I was asked to participate in this conference I thought that what I'd like to do is look at what's happening at the moment in the state of archiving in terms of Indigenous film. This is based on a very brief look and I'm going to talk about where I think it's at and I could be very wrong, so please pipe up and say 'your wrong!' I'm going to make a lot of broad comments about a lot of the organisations you work in. So, you know in some cases I'll be wrong. Sorry. And we can discuss that if we've got time. So looking at what is the status of most of the archives I found a few common

things or a few facts. No common, universal policy or framework is shared by institutions or organisations, both Indigenous and non-Indigenous. Places like Film Australia have some policies, Screensound has some policies, CAAMA doesn't have any policies, SBS doesn't have a policy, ABC has some policies but we have various rules and frameworks that we work to and it depends on which organisation you're at about how far you have to go with the community, how much access you have, those sorts of things, so there's nothing across the board. For organisations that do have policies, some but not all, have no mechanisms whereby those policies are measured. So often, even though you've got a fantastic policy, you might find that those objectives in those policies aren't being met. In some cases, programs for preservation, digitisation and repatriation of Indigenous films to communities are not given priority. In some institutions maybe sound, you know digitisation of sound that year has got priority or some, you know, they're not being digitised at all. So therefore if they're not given a priority within the organisation you'll find that you don't have the resources so therefore you're not meeting your objective. But when I talked to people, I talked to quite a few of you while I was doing this and I know quite a few of you through working with you that there is a general and good understanding of protocol issues amongst people who are working in film archives. People are really aware of restrictions for secret sacred material, deceased people and that community permissions is now part of the process, which is a big change from where we were ten years ago. A huge

change and that's good. So there's enormous goodwill as well from staff and institutions to deal appropriately with Indigenous material but what you'll find is that the staff are there trying to do the best work they can and trying to do their jobs as well as try and contact communities and clear footage and you know, preserve and archives and do all of those things but without proper adequate resourcing and the time to do it within the organisation is not allowed to them. Most collections of Indigenous material within institutions are less digitised and documented than any other of their other collections. It's a sad fact of some organisations. And a few institutions directly maintain ongoing relationships with communities, particularly in a repatriation of Indigenous materials to appropriate communities. No institution to my knowledge employ any Indigenous staff aside from AIATSIS to manage their Indigenous collections. Now I could be wrong about that but there are some great exceptions. And I've probably got some mistakes in here, but one exception is that the ABC has meticulously archived their entire Indigenous collection. Actually they've only taken this process up to I believe the 1970s and have been waiting for about ten years to get the funding to complete that archiving process but a lot of good work's been done there. Film Australia has developed a landmark agreement with the films of Ian Dunlop through a Memorandum of Understanding which is one of the most excellent agreements that Terri mentioned earlier that I've come across and I'll go into that a little bit later. And AIATSIS has in the past repatriated a significant amount of materials

from its collection to communities such Yuendumu and Ernabella also makes it a condition of use that express permission is received by communities who may hold Indigenous cultural and intellectual property rights in film materials. There's also overseas where we can look where Maori people have developed a thorough culturally appropriate and workable approach to the use of material including Maori people and culture. And this was something of a revelation to me when I went to a conference in Auckland about three years ago and met Huia Kopua. I'm not sure what her title is but she's a Maori woman and is in charge of the Maori collection there and she told me about the things they had achieved there and I just thought it was such a wonderful thing and we could learn so much from them. They are very different because they have the Treaty of Waitangi and the Treaty has enabled them to argue a whole lot of things and particularly a case where they have rights to what they call taonga and someone from New Zealand might know more about this than me but taonga refers to treasures and that Maori have a right to maintain a connection and ownership of their treasures and material that includes Maori cultural and intellectual property is defined as taonga and in the Constitution of the New Zealand Film Archive, this right is respected and enshrined in their Constitution. They make mention of the Treaty of Waitangi, their Board is fifty percent Maori, they employ two Maori staff to look after their archive and so they've done a lot of work that we can look to and in fact I'm going to just read you an excerpt of one of their documents which is a Memorandum of

Understanding between the New Zealand Film Archive and representatives, individuals and the Iwi of Maori nations. Now my Maori pronunciation is really awful so I'll just read this out. "For the past seven years the New Zealand Archives have been actively engaged in discussion with Iwi/Maori" (which refers to language groups of Maori nations) "regarding the ongoing care and access to taonga (films with Maori content of importance to Maori society) housed at the New Zealand Film Archive. These discussions have been an integral component of Te Hokinga Mai o Nga Taonga Whitiwhia, an initiative of the New Zealand Film Archive which has been facilitating partnership with Te Papa's national services. The main objectives are: to inform and reacquaint Iwi/Maori with taonga currently housed at the film archive, pertaining to their people, geography and events; to provide opportunities for Iwi/Maori to view these taonga by conducting Iwi specific appurtenant regional touring film programs on marae and, where appropriate, at schools and museums; to invite Iwi/Maori to assist the film archive in the development of culturally appropriate access procedures for reuse of these taonga and to establish Iwi-based video copies of these taonga within the region." They then have moved on to develop with Iwi throughout the region a protocol discussion paper and that sort of pro forma — it's a legal pro forma and it's a process — that identifies appropriate persons to give advice and authorisation . Now that is a constant challenge that film institutions come up with in identifying people who can advise on behalf of material but there are those people out there. I mean it's not that

difficult to find them if you're given the adequate resources, time and if you've got the expertise and know-how to access those communities, it's actually pretty straightforward I've found myself. Also they've worked towards a Memorandum of Understanding, which identifies and formalises an agreed methodology for access to taonga housed at the film archives. So they've actually gone through the whole process with Maori communities about how people should access their films, who would be the authorised person and how those films would be used and although it's taken seven years they've got a really workable framework for achieving that which we can learn from. Also I think it's really important to think about the responsibility on the filmmakers behalf because filmmakers often go out to communities, shoot film, bring all their rushes back and just shove them in a box under their bed for a couple of years and then maybe they'll give them to AIATSIS or Screensound totally un-archived with no contact numbers of who to contact and with no clear negotiations with the communities for future use. So then film institutions have to deal with that legacy. Ian Dunlop is an excellent model who we can look to for the relationships between communities, filmmakers and archival institutions. Now that Memorandum of Understanding which Film Australia has with Ian is really a landmark document that could be used to form the basis of a protocol for filmmakers to use in the future. I'm sure Sharon [Connolly] will copy a few for you if you want.

<panel talks off mike>

Perkins

There's other examples of successful projects apart from Ian Dunlop, there's the films that Trevor [Graham], Denise [Haslem] and Sharon made. First *Land Bilong Islanders* then *Mabo—Life of an Island Man*; and there's also the example of the filming agreement used for *Everyday Brave*, which I have a copy of here and basically it goes through a very clear process with the interviewee in terms of what they are entering into at the time of filming, what their rights are, you know, when they will be given a rough cut of the film, that they will be given the rushes of the film, that they will be invited to comment on the rough cut of the film, you know, just the whole process is extremely clear and it's a wonderful sort of protocol that's been successful for that series. I wanted to just look quickly at an excerpt from the Ian Dunlop agreement and really maybe just for time we won't go through the whole thing but I thought that it was really good, the second paragraph which says, "in particular the filmmaker and the production company have an obligation to honour the trust placed upon the filmmaker by the communities being filmed by (a) respecting the integrity of the material obtained in good faith (b) and only using the material in a way approved of by the community filmed including any secondary use of the material and (c) respecting the confidentiality of secret, sacred and other restricted material." And it goes on to say that even though there may be no evidence that, you know, a discussion has taken place between the filmmaker and the community or you know, ICIP Rights are not there or there's no agreement in place, it still

binds Film Australia to the honour that agreement between filmmaker and community. Which is fantastic on behalf of Film Australia to acknowledge that commitment between the filmmaker even though there's no legal documents in place. So when Terri and I were talking about this conference/gathering we were talking about: well, it's fine to sort of sit around and say 'there's these problems and there's these problems' and, you know, talk about the problems all the time but we thought it would good to sort of think about a way forward, how we could move forward from these problems that we all face. So we got all excited and thought, 'how can we work with the people who are going to be there who are either part of these organisations, work with it every day and how could we use this opportunity to build something to take into the future?' So we thought we could talk about a proposal to assist future minimum management standards and protocols for the preservation, repatriation and access of Indigenous film materials. The aim of such a policy would be to enable all institutions to adopt an endorsed workable framework for the future management of their archives. This policy could be the basis from which institutions may develop special guidelines for specific projects. It is also proposed that such a policy would also relate to filmmakers and would give them appropriate guidelines on how to ensure the responsible management of their films in the future and that could be, you know, in the ways that Terri's mentioning: providing contact numbers and properly archiving their material; in getting agreements — written agreements — with communities that

can be used in the long term with institutions. So a possible process for this thing if people wanted to do it might be that institutions and organisations who manage Indigenous collections form a working party to collectively develop a national policy outlining minimum standards on the management of Indigenous materials. This policy might be developed in partnership with the Indigenous unit of the Australian Film Commission who we've already spoken to and they're very keen to do it. An Indigenous Australian Screen Australia, which is a representative body of Indigenous filmmakers. Once a policy draft was developed, advice from representatives from the New Zealand Film Archive could be sought in the preparation of this policy or earlier. A draft policy could then be circulated to Indigenous communities through ATSIC and relevant Land Councils and media associations for discussion and approval. And in the future, once the policy might be formalised it could be used as a platform to lobby government and internally within institutions for greater funds to realise the aspirations of such a document. So I sort of raced through all of that and I know that might be a bit of a pie-in-the-sky sort of scheme but it feels like everybody's working in isolation, we have common issues that we face every day and that we could work collectively together to solve some of those issues. I mean Indigenous filmmakers and people feel incredibly passionate about their archival material and they're becoming more and more important to us every day and we as an industry, you know certainly in the Indigenous industry, want to work with institutions to try and protect, preserve and

promote those materials. So we're very keen and out of this Terri and I were thinking that what we could do is write to organisations and if you were interested, get your ideas about it and that possibly some sort of policy could come out to coincide with the Australian Film Commission policy on protocols in filming with Indigenous communities, so it could be a two-fold document. Might be a nice time to do it together. So I'll leave off there.

**End Transcript**