

Creative Industry, Community Ownership and Crossing Over: Exploring Indigenous Music in Australia

Future of Music Coalition
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I. Introduction

Future of Music Coalition is a US-based not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about music and technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to the challenges of this space.

In order to assess the landscape for artists in a global environment of vast technological and legal change, FMC initiated the International Artist Collaboration project in 2006. With the support of The Christensen Fund, the focus of this effort has narrowed to identify and explore those issues that most deeply affect the relationship between indigenous musicians and those outside commercial and/or academic entities with a vested interest in the examination, development or commodification of traditional cultural expressions. This project encompasses both a general investigation of the key players and policies affecting the recording, performance and distribution of indigenous music worldwide as well as a site-specific study of those issues affecting indigenous musicians in the Christensen-funded regions of the African Rift Valley, the Northern Territories of Australia and Central Asia.

This paper serves as an interim report to the Christensen Fund, specifically exploring the recurring themes of the 2009 Garma Festival's Key Form on Indigenous Creative Industries and the 8th Annual Symposium on Indigenous Music and Dance, co-convened by Charles Darwin University and the National Recording Project for Indigenous Performance in Australia. In addition to participating in both convenings, FMC staff interviewed a cross-section of policy makers, academics and copyright collection agency staff in order to gain a fuller understanding of the challenges facing indigenous musicians and their advocates in Australia's Northern Territories and beyond.

FMC would like to acknowledge and pay respect to the Yolgnu people, the traditional owners of the land on which the Garma Festival took place, and to their elders past and present for the invitation to learn from and share in their traditions and perspectives.

II. Background

When compared with the other geographic areas currently under examination by FMC, including Southwestern Ethiopia and the Central Asian countries of Kyrgyzstan and Tajikistan, Australia is unique in its understanding and treatment of indigenous

musicians' rights, having developed a vast public discourse on the subject touching governmental, legal, academic and philanthropic sectors. A greater number of systematic protections and protocols are in place to protect the moral and economic rights of Indigenous Australians than exist in other regions throughout the world. The Australasian Performing Right Association (APRA) has a means of distribution which recognizes collective ownership; a national protocol has been developed to govern transactions between indigenous visual artists, gallery owners and individual buyers; and archival protocols govern access to and use of recording materials housed in Northern Territory libraries and elsewhere. While these systems are continually evolving and maintain their own inherent strengths and weaknesses, which will be discussed below, they point to a populace which, at the very least, acknowledges the need to protect traditional knowledge and creative expression.

One of the more substantial criticisms of this drive for government-mandated protections, however, was raised by Garma Festival Opening Keynote speaker Robyn Archer. Archer, an arts advocate, singer, writer and director, cautioned that many of Australia's governmental and legal impulses to protect indigenous forms of expression stemmed from understanding those expressions as essential to an evolving "creative industry" - an economic stream from which indigenous peoples might profit. Archer cautioned of the danger of using "creative industry" as an all-encompassing construct which includes art that is not commercially motivated: "The danger in lumping art in with creative industry is that it may start to be assumed that only those things which act in a business-like way and can be profitably marketed and replicated or duplicated en masse, as in other industries, are worthy of investment." Archer points to the federal government's support of a percentage royalty for the resale of visual art and investment in contemporary music initiatives as positive, but limited in that they create structures of support for creative industry, but create no opportunities for art created without a market in mind. The danger being that, if the artistic process is not nurtured, the potential for new expression is limited and culture ossifies into a cycle of marketable covers and copies.

The extent to which certain governmental actions, collection agency policies or legal structures foster creative industry over art, in a process-oriented sense, is debatable, and the agency of indigenous musicians themselves must, of course, be understood as part of the equation. However, what was mutually agreed upon as necessary by most, if not all, Garma speakers in working to preserve and promote indigenous expression was the needed for an integrated arts strategy - one which simultaneously invests in education, export markets, infrastructure, health services and creative industry. Because of the severe economic and political disenfranchisement of Indigenous Australians historically and contemporarily, most non-profit and for-profit bodies working to cultivate the work of indigenous musicians understand their endeavors as a social action, necessarily connected to community development. As an example, Mark Grose, the co-founder of Skinnyfish Music, frequently cited as the most successful distributor of both traditional and contemporary indigenous music to a broader Australian public, understands his business as both, "profit driven and community development driven." Grose explained,

"You can't work with indigenous communities in isolation. You have to work with the community. You have to work with their families. They're all part of the whole scheme. No one could succeed in being a record label and ignoring the community so part of our ethos is that what we do has to have a positive impact, back into those home communities. We've got a really strong belief in the power of music to affect all sorts of change in people's lives." Grose's sentiment is shared by many outside intermediaries, from the National Recording Project for Indigenous Performance in Australia to Big hART, which aims to influence social policy and affect the public sphere through high quality, participatory cultural activities. The most general lesson that can be taken away from Garma's participants as representatives of Australian policies towards and extending from indigenous communities is that creative industry and/or art cannot be promoted in isolation - any protocol, project or mandate must take into account the community's sociopolitical and economic circumstances.

III. The Fragility of Existing Systems of Support

While Australia, when compared to other areas under investigation by FMC, has a proportionally large number of national, regional and local projects invested in the promotion and protection of music by Indigenous Australians, these efforts are not currently centralized through a national mapping or information-sharing mechanism. Some policy advocates believe that this lack of centralization has led to a duplication of effort; a disproportionate number of projects serving certain geographic regions and not others; and a lack of political power to implement change on a national level. Independent public policy analyst and lawyer Terri Janke has proposed a national indigenous cultural authority to compensate for this lack of overarching coordination. Janke specifically points to the dissolution of the Aboriginal Torres Strait Islander Commission in 2004 and the National Indigenous Arts Advocacy Association in 2002 as the reason why a nationally representative indigenous voice is absent from cultural policy discussions. While Janke acknowledges the work of the collection society APRA in working with indigenous communities and creating terms which address the collective ownership of indigenous cultural material, she points out that APRA's efforts are largely embodied by one staff member, and that their work could be substantially supported by a national indigenous cultural authority, which would create protocols for access and usage and tracks provenance and cultural rights. This work, to some extent, is an extension of APRA's own composer rights' database and the Northern Territory Libraries' database of cultural rights, but Janke's proposed authority would act as a national body connecting these dots.

While Janke's work aims to centralize information about cultural rights and usage, a lack of coordination between discrete projects and community-based programs would persist. The mapping of these efforts from a national vantage point has the potential to illuminate which communities remain underserved and which projects are themselves fragile. Players in the philanthropic community, according to Garma panelists Jill Reichsten of The Reichsten Foundation and Rhoda Roberts of the Queensland Folk Federation, are

also not strategically aligned with project-based funding often coming from outside Australia and private funders acting in isolation, providing risk capital in the hopes of stimulating more conservative government funding in the long run. Coordination on the national level would help to prevent duplications of effort, suggest organization collaborations and potentially utilize funding in a more strategic and far-reaching fashion. For example, the Northern Territories Libraries were granted one million dollars by the Bill and Melinda Gates Foundation to promote literacy in aboriginal children by providing the technology through which children might tell their own community's stories. This endeavor is similar to the work of IBM, which is providing laptops to aboriginal communities with similar aims.

In addition to illuminating potential collaborations, the mapping of services on a national scale has the potential to illustrate which geographic areas or communities are currently underserved. For example, the efforts of Skinnyfish Music can only serve a certain number of musicians. The company is limited by its modest size and by its commitment to community development, a commitment which is built on a foundation of trust created by working in a single community over time. As Mark Grose articulated, "We've been at it since 1999. We're still there. We still have the same relationships with all of the guys we've worked with since the beginning. For Indigenous Australians that's a huge advantage because non-indigenous Australians in their lives change all of the time, continuous change, continuous loss of forward development in their lives." Skinnyfish can only serve a small population, but understanding where their work takes place geographically in relationship to other communities that do not have a Skinnyfish or a Mandawuy Yunupingu can begin to guide philanthropic and governmental decision makers.

In addition to Terri Janke's independent efforts, there are several national and regional protocols in place to govern access to and use of recorded indigenous materials. Protocols govern behavior at the Garma Festival; inform the work of the National Recording Project of Indigenous Performance in Australia; control access to the Northern Territory Libraries collections; and, as of late 2009, guide transactions between indigenous visual artists and buyers on a national level. This visual arts code of conduct is currently voluntary, but has the potential to be ratified in two years time and made enforceable by law. Dr. Jane Anderson, Rockefeller Fellow with the Smithsonian Institution and a Visiting Research Fellow with the Australian Institute of Aboriginal and Torres Strait Islander Studies, points to Australia's use of protocols as a unique means to augment standard legal definitions and the exclusion of indigenous rights and interests that exist in documented materials: "Protocols are perceived as relatively neutral cultural forms - protocols are part and parcel of the legal dynamics that they have been set against - they are not made up counter to legal experience, but are informed by and respond to formal legal failings or inadequacies." Essentially, protocols are a means to negotiate and adjunct law making processes in a practical manner, and over time, can be an effective means of repositioning certain legal structures and political agendas. In the absence of a national indigenous cultural authority or mapping mechanism, protocols are one of the

means through which behavior, if not the reach of individual projects and services, is managed in Australia. While protocols are limited in that they are adhered to by choice and not enforceable by law, they are beneficial in the following ways:

- Protocols prescribe institutional and/or individual behavior thereby normalizing certain modes of cultural engagement over time.
- Protocols can influence change in a flexible manner contingent upon choice and open to negotiation as opposed to stricter bureaucratic or legislative edicts.
- Protocols can reposition past colonial agendas by emphasizing the moral rights of indigenous peoples and allowing the voices of indigenous people to be active rather than passive in standard setting.
- Protocols can raise the level of expectations guiding archival bodies, gallery owners or those recording, buying or sharing in indigenous knowledge.

Whether a protocol governing songs and recordings is put in place or a national representative body is created, there is one important caveat to this type of coordination. Legal analysts and policy experts, such as Rebecca Laubi of Arts Law Centre of Australia, emphasize that any national effort be necessarily balanced with on-the-ground, local systems of communication and control.

IV. Time and Ownership: Difference in Worldviews

The difference in worldviews between Indigenous Australians and non-indigenous Australians, referred to colloquially as blackfellas and whitefellas, can be seen in definitions of art, time and ownership and has affected the emerging legal structures and collection society policies aimed at protecting and promoting indigenous creative industry. The fundamental difference in worldview, in regards to creative expression, was articulated by Robyn Archer has having to do with the centrality of art and artists to Aboriginal society versus their separation and marginalization from European daily life:

Aboriginal society had no such separation – its artists were, and are, valued members at the heart of that society. I imagine that that centrality, that importance and respect, persists today in those communities, like this one, who have been able to preserve it. It's not just about celebrity or individual genius, or about those things alone, but about the weight of community responsibility and dignity which that artist bears throughout his or her life. And it is surely about the strength of continuing living traditions and spiritual value systems too. I have to believe that this perspective of art and artists being centrally important in Indigenous societies is absolutely crucial to the understanding of Indigenous Creative Industries in the twenty-first century.

Because indigenous cultural expressions are often tied to a collective identity and to, from a European perspective, the ephemeral elements of nature and spirituality, it is

difficult for Eurocentric law to pin down material for intellectual property rights protection. Robyn Archer explains, "You could claim copyright in a book because it was physical, tangible and existed as a thing you could see and hold – there was a visible solid thing to protect ... But how could you do that with an idea? An idea was not considered as something worth protecting in law: you can't protect an idea, they said. How could you do it with a belief?" While the ephemeral quality of indigenous creative expression remains difficult to translate into the context of European courts of law, some progress has been made in the realm of recognizing collectively owned material and distributing royalties via elders to benefit a community as a whole. Scot Morris, APRA's Director of International Relations, explains that:

Under traditional law or community law, the nature of the songs is related to the nature of their whole ceremony and their relationship to the land, and therefore they have very strict rules and quite complex rules about who has certain rights and obligations to sing certain song cycles and in what context, in what place, etc. So you know they have much more an idea of community ownership, and within that community certain people have rights and obligations. So it's quite different, and we've worked quite a lot in trying to bridge that gap, and you know, in terms of payment to be held in trust for the whole community. We can usually pay them for dispersion amongst the community because they know how to share the benefits of that.

While APRA has developed a model for collective benefit sharing, acknowledging the indigenous construct of community ownership, Morris sees tension in the areas of cross-over and digital technology. Cross-over artists must ensure that their respective communities' traditions remain protected and intact, but also desire the flexibility to reach non-indigenous audiences through sampling, borrowing and other genre-bending pop strategies which pervade popular music. In respect to digital technology, Morris sees a threat to community control of material - one which demands that certain protocols be created and exercised to ensure the moral and economic rights of indigenous peoples.

While some mechanisms have evolved to address collective benefits sharing, concepts of time remain difficult to reconcile between indigenous and non-indigenous communities. The European legal construct of public domain is problematic for indigenous communities for whom time is measured with greater historical depth. Mark Grose of Skinnyfish Music elaborates, "I think the moral question is: Here's the most disadvantaged group in the country. They need economic activity, so they need to be continually getting royalties for the next thousand years on that song, not the next 50 ... There should be no public domain for any of those songs; they should remain with that collective forever."

While blackfellas versus whitefella concepts of time, art, society and ownership can be difficult to reconcile, theoreticians like Dr. Jane Anderson ultimately recommend that

“...the only way to work through the issues is to get them out on the table and make a start.” It should also be pointed out that while these concepts are summarized for the sake of simplicity, Indigenous Australian groups are not monolithic and their differences can make the implementation of blanket government or legal strictures difficult.

V. Conclusion

As with each site-specific visit that has made up FMC's International Artist Collaboration project, the question remains as to how Australia's unique set of strengths and challenges might inform a broader international discourse about the protection and promotion of indigenous musical expressions. Australia, because of its active public discourse in and between governmental, legal, academic and philanthropic centers, points to many strategies that might inform the work of those in other countries wrestling with intellectual property rights, collective benefits sharing and the management of archival materials amassed during a colonial or expansionary period. Specifically, Australia provides positive examples of:

- Royalties distribution that reflect the communal nature of ownership in many Indigenous Australian communities;
- Archival protocols which dictate the motivation for, access to and usage of recordings of traditional materials;
- National legislative precedents like the Code of Conduct for Visual Arts that govern economic transactions thereby avoiding exploitation or the undervaluing of indigenous work.

In addition, Australia points to particular set of illustrative challenges including:

- Evolving concerns over the management of indigenous digital content;
- The limitations of public domain;
- The difficulty of quantifying the benefits of creative industry within local communities;
- The need for an integrated arts strategy which serves basic health, educational and infrastructural needs simultaneously;
- The challenge of coordinating efforts through a national representative body or group while maintaining the flexibility to respond to local needs and practices.

These strengths and concerns can be added to a longer list of lessons learned to date through FMC's International Artist Collaborations. To date these overarching themes include:

- The importance of intermediaries in cross-cultural collaborations and the need for the eventual transference of the intermediary's power to local musicians;
- The importance of transparency, equitability and mutual intelligibility in exchange;

- The need for creative and culturally-specific benefits sharing models which accommodate collective versus individual ownership and engage local decision-making authorities;
- The respective roles of trust and time in managing expectations and perception;
- The need for intelligible and effective copyright law that is A) supported by the local government and B) enforced by functioning legal structures;
- The question of sustainability of tradition in the 21st century and the economic viability of cultivating a next generation of tradition bearers.

Australia's example reinforces many of these themes and augments them with the potential of protocols as a means of affecting legal change and a lesson in the need for coordination and an engaged philanthropic sector in addition to a supportive government and enforceable laws. Australia's final lesson, however, may lie in the recognition and retelling of its history. The Bill and Melinda Gates Foundation and the Northern Territory Libraries describe the conditions of Indigenous Australians today:

Many live in isolated, extremely poor communities. Substandard housing, high employment, and low levels of literacy and school attendance undermine health, well-being, and cultural continuity. Not surprisingly in these conditions, the beliefs and traditions of Indigenous Australians - expressed in hundreds of languages and dialects - are now disappearing.

These modern-day conditions are the result of a long, colonial history - one which, in the words of Robyn Archer, was "intrusive, violent and dispossessing." Any ongoing work in indigenous communities today, whether it be the recordings of Skinnyfish Music or the academic investigations of Charles Darwin University, acknowledges the deep social, political and economic disenfranchisement of indigenous peoples and the great psychological scarring effect of racism, oppression and violence. Any larger cultural effort is, by definition, a social one - one which must instill community elders and, perhaps more importantly, indigenous youth with confidence, power and a belief in the value of their traditional knowledge and cultural expressions.