

## Owning language: Copyright, Ethics and the Development of Aboriginal language programs.

### Background

This paper has been developed out of on going discussions raised in the development and implementation of Aboriginal language programs in NSW schools. These discussions are rooted in the considerable concerns raised by many Aboriginal communities and through peak Aboriginal community bodies such as the NSW AECG Inc, FATSIL and ATSIC, over the ownership and copyright of language materials. This matter has already been acknowledged in at least one other state, with the Department of Education and Employment (DETE) South Australia being part of a joint education and community working party, to developed draft protocols to assist the consultation processes between schools and Aboriginal communities. The concerns raised by this issue are pervasive and must be acknowledged and addressed by all key institutions if successful partnerships are to forged as schools and communities seek to develop effective language programs.

The development of language programs in schools cannot be achieved without the support and assistance of Aboriginal communities. Anecdotal evidence from a wide range of people working in Aboriginal language programs in schools, indicate that those which have been developed out of a context and which ignore community needs and aspirations have consistently failed. Communities belonging to language nations need to be acknowledged by educational authorities and as being the custodians of their language, and at a minimum, be considered as partners in the development of programs or published materials that have been drawn from their knowledge. While the focus of this paper is to draw out the need for schools to develop effective consultative processes with communities, this debate must be seen as part of a much larger discussion around the ownership and controls that Aboriginal communities are wanting to reassert over their language and culture.

There is an inclination by many well meaning non Aboriginals wishing to see the revival of Aboriginal languages, to highlight the role that schools can have in enhancing community interest in community language programs. However McKay, (1996) in his report to the House of Representatives, said that too often a heavy an emphasis has been placed on the role of schools in providing the foundations of language maintenance in Aboriginal communities. McKay argued that if the aim of an Aboriginal language program was to revive language to a point that it can be spoken by members of that community and passed on between generations, then a problem would inevitably arise when schools located within those communities were given too significant a mandate to deliver not only school but also community programs. This point was taken up in the AIATSIS (2000) report, when it made the point that effective community programs are those, which acknowledge the role that schools can play but which focus on linking this work to the development of long term community based language programs.

*Language revitalization and maintenance projects must be supported, owned and controlled by communities if they are to succeed in having long term relevance to the community for which they are designed. (AIATSIS 2000, p.19)*

The importance of school programs is that they can support and run parallel to community directed programs, and that they can be well placed to assist students in the attainment of broader community aspirations for language survival and cultural reassertion. However,

communities are the store from which the language originates, and they alone must provide the focus and purpose for its revitalization and use.

As communities and schools work towards the development of long term programs, the issue of ownership and the use of language materials becomes highly contentious among many Aboriginal communities. This debate cannot be seen in isolation or out of the context with the larger debate on the intellectual property and moral rights of Indigenous communities to their arts, culture and languages.

In part, the recent response to these issues has been a legal one, with a number of significant and defining test cases having been brought before the courts. (Janke 1998; Indigenous Arts and Copyright 1998; Protecting Indigenous Intellectual Property 1994; Protecting Australian Indigenous Art 2001) These cases have sought to have the courts adjudicate on issues of the copyright, ownership and use of the unique expressions of Indigenous culture. These decisions, which have assisted in defining the limits and rights of artists and performers in protecting the commercial, intellectual and cultural integrity of their works, have been found to be wholly inadequate in respect to affording any protection to communities over the title to their languages. A consequence of this legal void, has been for communities to be very wary in engaging with schools and educational authorities in the development of school based programs and associated teaching and learning resources.

This paper sets out to highlight the importance of language to Indigenous communities, and to expose the impacts that their loss has had on their well being as manifested in their spiritual, social and cultural revival. The second purpose of this paper is to explore alternative policy directions which may deliver to communities the degree of control and respect for Indigenous languages, which hitherto has not been found in legislation, administrative law or government practices.

## Context

There can be little understanding of the complexity of these issues, nor of the anger that they engenders, without there being first an acknowledgment and an understanding of the impact that invasion has had on the social, cultural and economic cohesion of Aboriginal communities. Having been well documented in numerous texts they demonstrate the active collusion between 'settlers' and the various colonial government's policies which aimed at breaking the resistance of Aboriginal people to the invasion of their land. (Moses 2000) Within this context that we should examine the loss of language, and see that the active steps undertaken to ensure that the policies which actively sought to limit its use, as being part of the physical, cultural and social deprivation used in the colonisation of Aboriginal people. The lack of any cultural sensitivity or understanding of differences between Aboriginal communities, saw these diverse peoples brought under an ethnographic umbrella which classed them as 'natives' or *Aborigines* to this country. This overlay of a *Pan Aboriginal* identity, with its own flag and discourse over belonging and identity, has provided the sharp edge in the ethno-political debates around self-determination, land rights and sovereignty. (Fleras 1999) However the paradox for Indigenous peoples in this country is that these discourses about themselves is being conducted in the language of the invader. How better to demonstrate the totality of their subjugation, than to ensure that the colonised would be forced to speak the language of the coloniser. The language of each Indigenous community carried within them, the codes and secrets of their culture, sense of place and spiritual being and its replacement with a foreign language signaled the reality of the power dynamics between coloniser and the colonised. This power differential is still being played out in classrooms across Australia, as Standard Australian English is pitted against that of the unique contemporary language of Aboriginal English. (Ashcroft 1989, p.7-8; McConaghy 2000 p.200/1) One impact of this clash has been an on going refusal by

many teachers to identify the linguistic features of Aboriginal English and to ground the development of Standard Australian English literacy skills in the real life language contexts of Aboriginal students. While ever this approach is maintained, Aboriginal students will continually fall behind in the acquisition of Standard Australian English literacy skills compared to their peers.

The application by both State and Federal Governments of policies which brought about the relocation and removal of communities to missions, along with the assimilation of 'lighter coloured' Aboriginal people into the homes and workplaces of 'White' Australia, was symptomatic of attempts to extinguish the cultural and political sovereignty of the people. Commissioner Johnson, in his landmark report into *Aboriginal Deaths in Custody*, noted the consequences of such policies on the social fabric of Aboriginal communities, when he said '*...Aboriginal people were never treated as equals and certainly relations between the two groups (sic Aboriginal and non Aboriginal Australians) were conducted on the basis of inequality and control*' (Johnson 1991 p.10). The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children (1996)* also reported on the consequences that followed the enforced removal of children from families and the consequent impact of such losses on community knowledge of their heritage. One such impact was the community's growing incapacity to maintain both the viability and uniqueness of their language, was an inability to discuss or locate their identity or to express their thoughts in the words of the language, which this was rooted.

The extent of the impact of these policies can be seen in the courts as individuals and language nations attempt to reassert sovereignty over the land in the post Mabo environment. Communities have to continually struggle with the legal system which insists that they must demonstrate their on going connection with the land, with one of the tests that the courts has used is whether the community still has a knowledge and use of its language.

The further legacy of this past also contains a paradox for contemporary Aboriginal communities, in that the survival of Aboriginal languages has been largely dependent on the activities of the colonial and early post colonial chroniclers, amateur linguists, and anthropologist who recorded Aboriginal languages as part of the process of exploiting, exhibiting and measuring the exotic and primitive. As part of these anthropological projects, Indigenous languages were recorded and in part, used as evidence of the primitiveness of the Indigenous world in comparison to that of the European settler. Australia proved fertile ground for the new study of anthropology, for it was seen to demonstrate the truth of the Darwinian model of an evolutionary hierarchy that placed the White man above all others. Anthropology provided a strong sense of legitimacy for the subjugation of the colonised as the Aboriginal people provided both the living fossils and skeletal remains, which could be studied and exhibited as human curiosities

While the appropriation of the intellectual property of Aboriginal people began with these early jottings, it became much more sophisticated when missionaries began the task of Christianising the apparently aimless and listful remnants of the Indigenous population . Many examples are be found of the complicity of Christian missionaries, who became either willingly became agents or at least abetted government policies which aimed to disenfranchise the Indigenous population of their cultural and spiritual heritage and to supplant it with the religion of the colonisers. Kidd (1997), Pearson (1998) and Attwood (1986) amongst others speak of the role of the missionaries and their part in furthering the dispossession of Aboriginal people from both their physical and spiritual worlds. A critical tool which aided this process was the bible, especially in those communities in which language was still being used, for its translation provided the missionaries with leverage over the now weakened communities for whom they were asked to administer. The appropriation of language for the purpose of proselytizing the faith was now used against the unique

spiritual lives of Aboriginal people so that they could be civilised. The use of language in this environment had become a sinister tool with which to use against its owners in the fight to civilize and to possess the hearts and minds of the colonised. The irony for Aboriginal communities is these very same people who sought to distance their 'charges' from the excesses of colonial exploitation, were themselves part of the spiritual destruction of Aboriginal communities.

### **Language and identity**

Language revival has become an important issue for many communities as they struggled to reassert those elements of their cultural heritage that can be pieced together from documents and records salvaged from the repositories of past anthropological endeavours.

The euphoric post Mabo environment in which Indigenous peoples believed that genuine Native Title would be granted has not lasted; and dreams of being able to reassert an even blighted sovereignty over ancestral lands was not to be realised. Although there has been recognition of Native Title in some areas of Australia in the wake of the Mabo and Wik decisions, the reality for urban and regional communities is that, these decisions have had little or no impact on their capacity to make Native Title claims. Though the absurdity of Terra Nullius has been finally exposed to be the legal fraud that it was, Aboriginal people should never have had the delusion that the States would ever had relinquish legal sovereignty over the land, for title to it was central to the legal legitimacy of government. While Mabo overturned the concept of Terra Nullius it only allowed for a complementary Native Title under the strictest of tests and under the legal umbrella which asserted the Crown's legal sovereignty over all land within Australia. (Bartlett 1999, p412) The realization that little would change has forced Aboriginal people to refocus on those elements which that set them apart from others and that are manifestations of separate identities and over which they have control. In this context, the revival of language has taken on a special place for Aboriginal people as it acts as a marker by which they can set out to redefine their sense of place and belonging in these new contemporary but still hostile environments. By the very same processes which saw the development of post colonial literatures, the unprecedented creative energy of Aboriginal and Torres Strait Islander peoples has developed out of the inexorable marginalisation of their culture and experiences by the colonial invaders. The resurgence of the arts has been in response to the denial of their social, cultural and political sovereignty and as an act of resistance and control which aims to position Indigenous people in a different but shared space in this country.

The importance of language in providing a critical focus for Aboriginal people was recognised by the *Royal Commission into Aboriginal Deaths in Custody (1991)*, and the 1996 *Bringing them home* report by HEROC. Both of these reports recognised the importance of language to the revival and maintenance of cultural identity, the impact that it could have on developing strong senses of self esteem and self worth and the reconciliatory role that they would have with those communities that had had that sense of belonging eroded by the policies of removal and language denial. What underpinned these reports was an acknowledgement of the uniqueness of language in providing a vehicle for the explicit expression of the cultural sovereignty of people. Implicitly, languages provide an expression of the wholeness of the people, sanctioning feelings of belonging to both place and family and having the capacity to connect people to the centrality of their being.

This rhetoric, which vocalises the critical importance of language for all communities, also carries a clear warning that the communities capacity to delivery language programs decreases daily as the number of language speakers diminishes. This in turn impacts on the delivery of programs due to reduced number of people who have appropriate language knowledge. (McKay (1996) p.4) A consequence of this loss of language speakers has led to

an increasing reliance on non-Aboriginal linguists to assist in the revival and maintenance of language programs. While these linguists have contributed, sometimes invaluable assistance and documentation, to many language programs, (McKay 1996 p.xxvii) they have also been seen to stand between Aboriginal ownership and control of language programs and their actual reclamation. The playing out of this often fractious relationship has been at the root cause of considerable anger and disquiet amongst Aboriginal communities, as they have felt that they have been held to ransom by the institutions and individuals who are seen to act as gatekeepers, and proprietorial owners of a nations language and thoughts. In this phase of language revival, there is the prospect of non-Aboriginal linguists not only instructing communities on the revival of language, but also rooting that instruction in the sacred and secret cultural forms that are central to the identity of those people. Without care, this could be seen as a contemporary variation of the appropriation of Indigenous peoples' life forces exerted by the colonial anthropologists over Indigenous communities throughout Australia.

### **Ownership of language**

The feelings of exasperation felt by Indigenous communities over the protection and ownership of their language, have been exacerbated by a legal system that has failed to understand or conceptualise that people do not have sovereign ownership over it. The sheer pervasiveness of the colonising language limits the dominant culture's capacity to either understand or indeed make space for the unique linguistic manifestations of the colonised. Instead of being spoken, communities have instead had to locate and negotiate access to their language found in the vaults of libraries and museums. Issues continue to be raised by communities over the legal entitlements that people have over their language, and the means they have in asserting and protecting the inalienable rights of their own cultural and spiritual icons. Questions implicit to this revolve on the issues of the intellectual property rights of Indigenous communities being dealt with and how they can assert control over the access, copyright and ownership of the sacred cultural manifestations of their knowledge.

The paradox for communities is that while the actual material expressions of their cultural spirituality are protected by the law of copyright, there is no such protection of the language that provides the unique linguistic vehicle through which these icons of identity can be explored, discussed and inherited across generations. Language is an integral part of the relational positioning of the people in and between the physical, spiritual and intellectual worlds in which they live. Thus any impediment which acts to restrict the access to it is a stark reminder for communities that their place in this country is one which is constructed around the continual denial of the means to articulate the essence of their being in their own language, with the constant reminder of the loss of their intellectual sovereignty by having to use the language of their persecutors.

The revival to languages has become an emerging marker of cultural, social and political difference. The increased interest in the revival of language has framed a critical point of tension between the inexorable pressure of a dominant western orientated 'Australian' culture that attempts to expunge Aboriginal senses of difference, and a growing demand for an identifiable, and separate Indigenous presence in this country. Attempts to forge explicit cultural, racial and political identities outside the acceptable national framework are viewed with concern by many in the mainstream as being socially divisive and at odds with policies which have sought to dissipate difference through the assimilation of other cultures into the contemporary multicultural framework in Australia. (Stratton 1998)

While the discourse of multiculturalism privileges a concept of cultural diversity, it has not yet come to terms with the very different aspirations of Indigenous communities, who seek to assert their unique place in the social, political and cultural landscape of Australia. Other

indigenous commentators such as Linda Tuhiwai Smith (1999) see this growing contestation between institutional policies which underpin the state and Indigenous peoples, as being part of the post-colonial experience where Indigenous peoples set about to assert their own identity by reclaiming those elements of their lives that they see as being central to their understanding of themselves. The early phases of this contested space are marked by increased levels of resentment to both present policies and past practices, and that levels of resistance by Indigenous people will remain heightened until they are able to articulate sense of belonging in their own country. In this climate, the desire to revive language is a political act, and as such an expression of authentic Indigenous agency in the development of the self assertion of an identity fashioned by themselves and over which they will have control.

Aboriginal and Torres Strait Island communities have continued to object to the controls exerted over their language by non Indigenous people, institutions and corporations. There are numerous examples where words and symbols have been appropriated and used as part of the exclusive trademarks of company names and logos. Indeed some have entered into the iconography of the Australian commercial landscape and have become unredeemable to their Aboriginal owners as far as being able to reassert copyright claims over them. However the appropriation of these cultural and sacred images should not be confused as being part of some inclusive multicultural discourse, but rather an exemplification of the cultural subjugation of an invaded people.

While the ownership of Aboriginal languages is not located in any group or custodian, a critical problem exists in the scarcity of community members who have any substantial language knowledge. Communities are at present very reliant on a decreasing number of people who are in a position to provide language instruction. The consequence of such a precarious position is that while communities have an interest in the controls and ownership of the language, for all intents and purposes it is vested in the few remaining language speakers, who may, in some cases not be of Aboriginal descent. This issue can only be addressed by developing programs, which lift the number of speakers to a critical mass so as to ensure the survival of the language.

### **Issues of Copyright**

An issue of major concern in many communities has been the apparent legal transfer of copyright from members of the community, to non-Aboriginal individuals or institutions. Beyond the case of the direct appropriation of language, there have many more subtle 'collaborative' enterprises that had the unintended consequence of unwittingly transferring community copyright ownership to the crown, universities and/or individual researchers. In such cases, the law of copyright has proven to be an effective tool in assisting in the seizure of language from its Indigenous owners by these institutions that often claim to be working in their interests. As Janke (1997) notes, conflicts do not arise from the ownership of the language itself, but in the transfer of ownership that comes with the publication of language materials.

*'While copyright exists in literary works, there is no copyright in languages, unless they are expressed in material form, that is, written down or recorded. Indigenous languages themselves are not protected by copyright, but expressions and compilations of Indigenous languages, such as dictionaries and word lists, are eligible for protection.'* (Janke (1999) p.60)

The fact that there is no copyright protection for Indigenous people's secret or sacred material critically impacts on the control of language and other intimate cultural expressions of a community. It is the loss of control and ownership of the language and its appropriation

by another foreign and invading culture, that is the cause of so much disquiet amongst the wider Aboriginal community. Without protective legislation, communities are forced to seek redress through other avenues. Janke (1997) further notes

*'There is a need to differentiate between the rights over the language per se and the rights to specific materials written in language. The people affiliated with the language should be regarded as the owners of the language.... As such they should be consulted in matters related to the language.'* (Janke (1999) p.61)

The fact that often not even the most cursory of attempts have been made to consult communities, has made them suspicious of the motives of those who seek to work with them in the development of programs. Trust, which can be so easily damaged, must be developed between all the key stakeholders prior to programs moving forward. Before a balance can be achieved between the competing needs and interests of Aboriginal communities, educational institutions and others interested in the development of programs, there must be an unambiguous understanding of the communities' unequivocal title to their language. The interactions between communities and educational providers around these issues must be based on a combination of legal protections and mutually acceptable and respected protocols. Both Janke and the Australian Copyright Council suggest various processes that would assist in the development of these comprehensive frameworks to protect the cultural, artistic and linguistic heritage of Indigenous Australians.

### **Developing a Language protocols framework**

The limited coverage afforded by the Copyright law, and the complexity of these legal protections for the cultural manifestations of Aboriginal communities, such as arts and music, focuses attention on the need for the development of tightly constructed consultation procedures and protocols. These would set out the ground rules for the on going interactions between all parties. The need to develop such a framework is highlighted when one considers the day-to-day interactions between communities and institutions such as schools. These negotiations are held well away from the gaze of lawyers, and often occur in ignorance of both the law and appropriate process. Often it is only after the event that more considered discussion highlights the anxieties that should have been acknowledged and dealt with at an earlier stage.

The purpose of such a protocols document would be to lay out the ground rules that would situate the various roles and responsibilities of the all key stakeholders and that would outline the processes sanctioned by all parties to assist in the collaborative development of policies, programs, and resources. The framework should articulate a clear rationale that would underpin this process, as well as providing clear advice on appropriate consultation processes.

The following are a summary of the substantive issues raised in discussions with communities and which should to be addressed within a such a document. The points raised should be seen as representing common anxieties and concerns of communities vis a vis the development of language programs in school education systems.

### **Issues of Concern**

- The appropriation of Aboriginal language for personal and/or commercial gain.
- That in the development of syllabuses and curriculum resources, there may be processes which privileges some languages above others. This has had the effect of

- enhancing the view that other Aboriginal languages are no longer in existence or are not as important or significant.
- That in the process of revitalising languages, the linguistic practice of amalgamating separate languages or dialects into a single language program, (unless sanctioned by all the various communities) can have the serious impact of calling into question the language's legitimacy and authenticity.
  - That the current policy of all government's in asserting crown copyright over all teaching and learning materials produced in Government schools, may place them in potential conflict with communities or individuals when they collaboratively develop them.
  - That in asserting institutional copyright ownership over such material, the moral and intellectual property rights of the Indigenous contributor/s have often not been acknowledged.
  - That the community is often ignored in the selection of the person/s seen as the most appropriate within that community to contribute language knowledge.
  - Those communities are often not being provided with the opportunity to validate or veto information provided by individuals. Educational institutions must acknowledge there are multiple layers of custodianship within communities and that each must be consulted before consensus can be achieved.
  - That the language needs of communities have often been ignored by non-Indigenous language researchers who often have a different agenda to those of the community from which the language comes.
  - That language work submitted by students must fall within the ambit of these protocols.
  - Indigenous education workers, who assist in the development of specific cultural resources, are often placed in an invidious position when they 'share' their knowledge. One consequence of this sharing, has been the transfer of both knowledge and of copyright to the employer as a consequence of the subsequent development and publication of materials.

The issues listed above do not purport to be exhaustive, but reflect the degree to which Indigenous communities perceive present legal failings and their sense of impotence in asserting controls over their language. Current Government policy efforts being made to engage Aboriginal communities in programs to improve student outcomes will only occur when appropriate consultative processes are put in place. Consultations, which flow from dealing with these issues, must demonstrate in real and tangible ways the importance of Aboriginal communities in both the development of positive student aspirations and increased cultural capital through community developed language and cultural programs.

The development of a *Community Consultation and Protocols* document that meets the needs of all parties and assists in delivering effective language programs and resources to institutions such as schools, will need to be carefully crafted if it is to address the issues of concern. However it is possible to complete such a task as long as those who oversee its implementation, do so with the intention of empowering community participation in real educational decision making. The purpose of this document will be not only to assist schools to meet the concerns of communities, but also to highlight the school systems bona-fides in delivering true collaborative partnerships. The document should exemplify best practice in regards to the consultation process and talk to communities about what they can expect as curriculum and pedagogic issues are discussed and policies and practices developed. The capacity for the document to provide such a two way dialogue will be an important test its integrity and a measure of its success.

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