

Protection of Indigenous Knowledge in the Intellectual Property System

Consultation Paper

September 2018



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Introduction

IP Australia

IP Australia is the Australian Government agency that administers intellectual property (IP) legislation relating to patents, trade marks, designs and plant breeder's rights. IP Australia does not have responsibility for copyright policy, which is administered by the Department of Communications and the Arts.

Consultation objectives

IP Australia is consulting with stakeholders with an interest in how Indigenous Knowledge is protected, used and managed. Our aim is to identify policy options that relate to the IP responsibilities of IP Australia and help promote the cultural integrity and economic potential of Indigenous Knowledge.

'Indigenous Knowledge' includes:

- **Traditional Knowledge** – know-how, practices, techniques and skills; and
- **Traditional Cultural Expressions** – visual imagery, performance, design, words and names.

To understand more about what could be done to improve the protection of Indigenous Knowledge in Australia, in 2017, IP Australia and the Department of Industry, Innovation and Science (DIIS) commissioned a discussion paper from Terri Janke and Company on the IP issues relating to protection and management of Indigenous Knowledge. The paper, titled *Indigenous Knowledge: Issues for protection and management*, is available here:

<https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>

This consultation paper is presented in two parts:

- **Part A** seeks to highlight the issues that affect Indigenous people in relation to the protection and management of Indigenous Knowledge.
- **Part B** seeks your views on specific options that may help address some of the issues raised that relate to the IP responsibilities of IP Australia.

Inauthentic products

This consultation process is not intended to cover the issue of inauthentic Aboriginal and Torres Strait Islander 'style' arts and crafts products. This issue is under investigation by the Australian Parliament's House of Representatives Standing Committee on Indigenous Affairs. Further information on this issue and the inquiry can be found on the Standing Committee on Indigenous Affairs website: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs. Similarly, this consultation is not intended to cover copyright policy issues.

How to participate in this consultation process

There are a range of options for you to provide feedback.

Please send written submissions in Word, RTF or PDF format to consultation@ipaustralia.gov.au by no later than Friday, 1 February 2019.

You can also respond to our online survey or attend one of our roundtable consultation sessions. Full details on the roundtable sessions and our online survey are available at:

<https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultations>

If you have any questions, please contact Kerry Sillcock (ph: 02 6283 2225) or Will Nixon (ph: 02 6283 2916) or email us at consultation@ipaustralia.gov.au.

Part A: Indigenous Knowledge issues in Australia

Part A of this consultation paper provides an overview of the issues that Indigenous people encounter in relation to protecting and managing Indigenous Knowledge.

The *Indigenous Knowledge: Issues for protection and management* discussion paper identifies six key issues, summarised below. For a more detailed discussion of the issues please access the full report at <https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>.

IP Australia is not consulting on the six issues listed below. We are interested in consulting stakeholders on whether there are any additional issues that IP Australia should consider.

Issue 1: Misappropriation of Indigenous arts and crafts

The term ‘Traditional Cultural Expressions’ generally refers to how knowledge and culture are expressed and communicated. Examples include languages, music, performances, literature, song lines, stories and other oral traditions, dance, games, mythology, rituals, customs, narratives, names and symbols, designs, visual art and crafts and architecture. Indigenous art in particular is an expression of belonging and connection to country. Indigenous arts often originate in ceremony or represent landscape features, bush foods, historical events and ways of knowing. Indigenous people and advocacy groups have raised concerns that the visual imagery, styles and motifs of Indigenous Traditional Cultural Expressions are being adopted and sold by people with no connection to that Indigenous community. This can cause deep offence to Indigenous communities and affect their opportunities to benefit economically from their culture.

Issue 2: Misuse of Indigenous languages, words and clan names

Indigenous languages are an integral part of Indigenous cultures, spirituality and connection to country. Similarly, rights to Indigenous language are communal and based on customary laws of kinship and custodianship. As a result, ownership of Indigenous language recordings is important for Indigenous people and is central to maintaining and preserving culture. Some Indigenous people have expressed that they want greater involvement, especially when Indigenous language is being recorded, researched or practiced. The continuing link to the language group is also important. Further, it can be important to be acknowledged as the source, given the importance of language to Indigenous identity.

At present, there is nothing to prevent Indigenous words and clan names being used in business names and branding without consulting Indigenous language groups. This can result in Indigenous words that have significant meaning being used in commercial contexts without connection or consent, which can be disrespectful or culturally offensive to Indigenous people.

Issue 3: Recording and digitisation of Indigenous Knowledge

Indigenous communities are sometimes asked to share their knowledge with academics, researchers, business and the media. These groups may wish to record this knowledge for later. There are concerns that the free, prior and informed consent of Indigenous people is not always obtained regarding Indigenous consultation. Once Indigenous Knowledge is recorded, it is difficult for Indigenous people to control who accesses the underlying Indigenous Knowledge in these records or how it is used and interpreted.

Issue 4: Misappropriation and misuse of Traditional Knowledge

Traditional Knowledge refers to the skills, techniques and practices that Indigenous people have developed, nurtured and passed on throughout the generations. Traditional Knowledge can be an important connection with culture for Indigenous people, and can play a role in providing economic opportunities. Traditional Knowledge relating to bush foods and land management practices are relevant examples.

Traditional Knowledge can be used in a range of commercial contexts. There are concerns that Traditional Knowledge is being accessed without consultation and consent, and without any benefits flowing back to

Indigenous people and communities. The misappropriation and misuse of Traditional Knowledge is a concern for Indigenous people because not only does it undermine the practice of culture, it may also affect economic opportunities.

Issue 5: Use of Indigenous genetic resources and associated Traditional Knowledge

A 'genetic resource' is any plant or animal material, including crops and medicinal plants and animals. Because genetic resources are found in nature and not created by an individual, they cannot be directly protected by IP rights such as patents or plant breeder's rights. However, Indigenous communities have developed innovative uses for local genetic resources as part of their Traditional Knowledge and this can be a source of new ideas in medicines, agriculture and other products. A new invention based on Traditional Knowledge about a genetic resource may be eligible for patent protection.

In some cases, consent must be sought from relevant Indigenous communities before Traditional Knowledge is used in research and development activities. There are concerns about whether there is enough information available to Indigenous people and non-Indigenous organisations about how to properly consult with or obtain the consent of Indigenous people to use Traditional Knowledge.

People wishing to use Traditional Knowledge associated with plant and animal resources may also be required to put in place a benefit sharing agreement which provides specific benefits to Indigenous communities in return for the use of their Traditional Knowledge. However, this is currently only a requirement for genetic resources taken from Australian Government land or waters, and some state and territory government land or waters. Because there is no national requirement for benefit sharing agreements to be put in place when Traditional Knowledge is used, Indigenous people's ability to control the use of their Traditional Knowledge, or realise potential benefits from its use and development, is limited.

Issue 6: Misuse and derogatory treatment of secret or sacred knowledge

Secret sacred knowledge refers to Indigenous Knowledge which has spiritual significance. It relates to spiritual practices, beliefs and customs like initiation, burial practices and other rituals. Secret sacred knowledge is often restricted, only being available to either women, men, clan groups or those who are initiated, or used only at certain ceremonies. The misuse of secret sacred knowledge can agitate spiritual connections and impact on an individual's or community's wellbeing. In customary law systems, people who misuse this knowledge may be shunned or punished. However, in Australia, an Indigenous person's ability to protect their secret sacred knowledge can depend on the application of confidentiality and heritage laws.

Consultation Questions

- 1. Are there any other issues associated with the protection and management of Indigenous Knowledge not addressed above that you would like IP Australia to consider?***

Part B: Proposed initiatives for the protection and management of Indigenous Knowledge

Part B of the paper focuses on issues relating to the protection and management of Indigenous Knowledge that relate to the intellectual property responsibilities of IP Australia. The issues discussed in this section are largely drawn from the following three parts of the discussion paper *Indigenous Knowledge: Issues for Protection and Management*:

- Issue 2: Misuse of Indigenous languages, words and clan names
- Issue 4: Misappropriation and misuse of Traditional Knowledge; and
- Issue 5: Use of Indigenous genetic resources and associated Traditional Knowledge.

This part of the paper is intended to further explore some of the issues raised in these sections of the discussion paper and highlight some options which may enhance the protection and promotion of Indigenous Knowledge in Australia.

Traditional Knowledge and genetic resources

What are genetic resources?

A 'genetic resource' can be any biological material, including plants, fungi and animals. In some areas within Australia, the informed consent of the local Indigenous community is a precondition for permission to collect a genetic resource for commercial purposes, which may include research.

What is Traditional Knowledge?

Traditional Knowledge refers to the skills, techniques and practices that Indigenous people have developed, nurtured and passed on through generations. It can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge. Traditional Knowledge can, but does not always, relate to the properties and uses of a genetic resource and some examples of Traditional Knowledge include:

- knowledge related to the use of plants, minerals and animals;
- knowledge of ecological processes;
- traditional healing methods;
- food preservation and processing methods;
- traditional tracking, hunting, fishing and gathering skills; and
- cloth weaving and dyeing techniques, and knowledge related to materials, dyes, paints, gums, and glues.

This knowledge can be an important connection to culture and land for many Indigenous people. It is often not written down, and is often the subject of oral tradition within an Indigenous community. Traditional Knowledge may also provide economic opportunities for Indigenous people, where its commercialisation is considered to be appropriate.

In some circumstances, Traditional Knowledge which has been kept secret within the local community may be eligible for protection through a patent, or by simply continuing to keep it a secret. In many other cases, Traditional Knowledge may be ineligible for patent protection because it cannot meet requirements that the invention be new and inventive. This may be because the knowledge has already spread to the public (not 'new'), or because the knowledge is about the properties of a naturally occurring plant or animal (not 'inventive'). However, some Traditional Knowledge can be used in a range of commercial contexts and can

be built on to develop new inventions. For example, Traditional Knowledge about the healing properties of local plants and animals could lead to the development of new patentable medicines and there may be opportunities for local communities to obtain economic benefits from such innovations. Indigenous communities could consider exploring these opportunities and develop new or improved technologies either independently or through collaboration with researchers and business partners. Such opportunities could be valuable in engaging communities in the knowledge economy.

There are concerns that some patent applications may claim inventions derived from Traditional Knowledge without acknowledgement or consent from the appropriate community. An invention may also be an obvious adaptation or application of Traditional Knowledge, and so not new, but this may not be apparent to the examiner of the patent application.

There are further concerns that Traditional Knowledge is being misappropriated and misused by being taken and used without obtaining the proper consent of traditional owners. Misappropriation and misuse of Traditional Knowledge has the potential to undermine the practice of Indigenous cultures and cause offence if used inappropriately or by unauthorised people. It may also deprive Indigenous communities of economic opportunities arising from the use of their Traditional Knowledge.

Free, prior and informed consent

Many issues concerning the use of Traditional Knowledge ultimately concern consent. Indigenous communities may face problems in ensuring that the use of their Traditional Knowledge is subject to their free, prior and informed consent. 'Free, prior and informed consent' refers to conditions where people can negotiate the terms of an action or policy which will directly affect their interests, and have the option to give or withhold their consent. The elements of this principle are:¹

Free: consent given voluntarily and without coercion, intimidation or manipulation.

Prior: consent is sought in advance of any authorisation or commencement of activities.

Informed: the nature and impacts of the activity are understood by the people whose consent is being sought.

Consent: collective decision made by the right holders and reached through customary decision-making processes of the communities.

It can be difficult to know if a researcher obtained the free, prior and informed consent of the relevant Indigenous community to use Traditional Knowledge to develop a new invention.

It is worth noting that there may be certain forms of Traditional Knowledge which local communities are comfortable with external parties using for particular purposes without consent being sought each time. In such cases, acknowledgement and attribution of the relevant Indigenous community may be sufficient.

Traditional Knowledge in research

A great deal of research is conducted on and about Indigenous people. Grant-funding for Australian Government-funded research which concerns Indigenous people is conditional upon, or assessed against,

¹ <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>, accessed 25 May 2018

compliance with various protocols and guidelines.² The Australian Research Council *National Principles of Intellectual Property Management for Publicly Funded Research* (the Principles) provides that institutions should:³

have ways of addressing cases where IP impinges, or potentially impinges, on the cultural, spiritual or other aspects of Indigenous Peoples.

However, researchers may not always be aware of how to undertake consultation and consent processes to comply with the Principles and it can be difficult to identify the correct contacts and beneficiaries. The extent of consultation required may also be unclear, and may appear daunting to those unfamiliar with the Indigenous sector. Accordingly there may be a need to bring certainty to external parties who want to consult and obtain consent to use Traditional Knowledge.

Commercialisation of Traditional Knowledge associated with a genetic resource without access and benefit-sharing arrangements

It can be difficult to know whether a researcher who develops a new invention based on Traditional Knowledge or a genetic resource collected from Indigenous land has complied with relevant access and benefit sharing requirements. Accordingly, it may be difficult for an Indigenous community to identify whether they may be entitled to benefits arising from that invention's use of Traditional Knowledge or genetic resources.

The Commonwealth, Queensland and the Northern Territory have specific legislation under which providers of genetic resources, including Indigenous communities, can seek benefits that come out of the use of genetic resources from their land, such as royalties from a successful commercial product. Other states and territories have more general laws on management of natural resources. In 2002, Commonwealth, State and Territory Governments agreed to a 'nationally consistent approach' for access to and the use of Australia's native genetic and biochemical resources. It aims for the fair and equitable sharing of benefits derived from the use of these resources.

Requirements can include that consent be linked to a written benefit-sharing agreement. Benefit-sharing agreements can provide for the Indigenous community to receive an agreed share of the benefits, if any, which arise from the use of the genetic resource or Traditional Knowledge. For example, a benefit-sharing agreement may provide that the Indigenous community is entitled to a royalty only if research conducted on a traditional medicine leads to the invention of a new marketable product.

Opportunities for Traditional Knowledge in the bush food industry

Indigenous Knowledge in relation to bush foods are showcased and made widely available to consumers, thereby increasing awareness of Indigenous Australian cultures and history. Bush tucker recipes, herbal teas, and food preparation techniques often contain Traditional Knowledge – these processes are intrinsic to Indigenous Australian heritage and are themselves expressions of culture and connection to country. Indigenous people can use their Traditional Knowledge about bush foods to innovate and create food products that are made available to wider markets. As the bush food industry expands there may be a greater opportunity for Indigenous producers to promote the genuine cultural element present in their

² These include the Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS)' *Guidelines for Ethical Research in Australian Indigenous Studies*, and the Australia Council for the Arts' *Indigenous Cultural Protocols for Producing Indigenous Australian Music, Writing, Visual Arts, Media Arts and Performing Arts*.

³ Australian Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research* <http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research>.

product. This may include reference to the Indigenous community or area from which the product is sourced or developed in order to demonstrate provenance and quality.

A broader discussion of the issues relating to the use of Traditional Knowledge and genetic resources is provided in chapters 5 and 6 of the discussion paper, *Indigenous Knowledge: Issues for Protection and Management*.

<https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>

Proposed initiatives

Proposal 1: Support the use of IP rights to promote Indigenous products

The establishment of collective or certification trade marks could provide a legally enforceable system of Indigenous Knowledge protection with little or no need for changes to law. For example, a certification trade mark for bush foods, medicinal and craft products may assist to promote the cultural element of Indigenous products in the market. Regional certification trade marks would give local producers the opportunity to come together and set their own regional standards for a regional trade mark, and set a self-determining system based on the needs of their region. A national scheme with regional certifiers could also be developed, learning from past experiences.

Geographical Indications (GIs) are another mechanism which could potentially benefit Indigenous communities by assisting the commercial exploitation of Indigenous Knowledge. There may be opportunities for Indigenous communities to promote their traditional products using GIs, and to have those GIs protected as IP rights. For example, certain traditional bush foods may have qualities which are integral to the land on which they are harvested or prepared. A local community may consider protecting that bush food product as a GI distinct to that area and community.

Proposal 2: Standardise research protocols and guidelines

One option is to develop a national set of protocols for research involving Indigenous Knowledge. This could be done by harmonising existing industry standard protocols and incorporating elements of international protocol frameworks, including draft articles developed under the auspices of the World Intellectual Property Organization.⁴ A standard protocol could empower Indigenous people and support their capabilities to make decisions on use and management of their Traditional Knowledge. The development of any new protocol should avoid disruption to arrangements for entities already operating under existing protocols.

Proposal 3: Develop and promote standard research and commercialisation agreements to vest Traditional Knowledge rights with traditional owners

Another option is to develop and promote standard templates for research agreements which vest in the traditional owners any relevant IP which arises from research, development or commercialisation of Traditional Knowledge.

An example to follow in this respect could be the Department of the Environment and Energy's funding agreement for the National Landcare Programme, which vests IP rights in materials created as a result of funding to the recipient. Funding guidelines mandate that recipients negotiate and obtain approval of Indigenous Knowledge custodians and knowledge holders.

Proposal 4: Include free, prior and informed consent as a requirement for Australian Government-funded research programs

Funding providers could better protect Traditional Knowledge through the policies of their programs and grants. Terri Janke identifies potential for a review of Australian Government policies including the *Commonwealth Grant Rules and Guidelines* and the Australian Research Council *National Principles of Intellectual Property Management for Publicly Funded Research*. This review could be directed at updating the policies to provide:

⁴ World Intellectual Property Organization, *Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources*, http://www.wipo.int/tk/en/igc/draft_provisions.html.

- a national framework for how to obtain free, prior and informed consent to use Traditional Knowledge;
- requirements for Indigenous IP plans, and the vesting of Traditional Knowledge-based IP in Indigenous communities, in order to obtain Australian Government funding;
- standard terms for licensing Traditional Knowledge to research partners and/or government for defined purposes.

This option might lead to an increase in time and costs for grant applicants. Free, prior and informed consent requirements might be considered burdensome and discourage people from seeking funding. Care would need to be taken to ensure that such requirements did not create disincentives to provide funding to initiatives involving Traditional Knowledge. However, by having the appropriate frameworks in place, Indigenous communities and researchers may be encouraged to enter into more collaborative activities with greater confidence. By collaborating with external parties under clear, certain and appropriate arrangements for Traditional Knowledge, Indigenous communities can gain access to resources, technical skills and expertise that would otherwise not be available to them in developing economic opportunities.

Proposal 5: Develop a national database of Traditional Knowledge and genetic resources

IP Australia could consider the use of a database of Traditional Knowledge to prevent the granting of patents that use Traditional Knowledge inappropriately, or without appropriate consent. Inventions must be new and non-obvious to be eligible for patent protection. During the patent examination process, the application is assessed in accordance with these criteria with reference to available prior art: that is, information which was available to the public before the filing date of the patent application. If patent examiners had access to a national database containing Traditional Knowledge, they could use this to assess the prior art. If they found the application's novelty claim was already Traditional Knowledge, this would mean that the invention could not be patented. Having a publically maintained and accessible database could save interested parties the expense of having to contest the patent in expensive and complex opposition proceedings.

Patent examiners could use this database to identify Traditional Knowledge uses associated with a particular plant or animal. Where an invention simply copies Traditional Knowledge, a search of the database may indicate that the invention is not new and so prevent a patent being granted over that knowledge. Such a database could also assist to identify relevant Indigenous communities for the purposes of assessing compliance with requirements for access and benefit sharing requirements and (if applicable) disclosure of source. If more effective existing resources are identified (such as third party databases), IP Australia could implement changes to examination practice to improve the use of such resources by examiners to identify genetic resources and associated Traditional Knowledge.

It is important to note that not all Traditional Knowledge should be included in a public database. Some knowledge may be considered too sacred to be made publically available, for which it may be more appropriate to not include on the database, or include only under strict access controls. Information recorded in the database would have to be included with the free, prior and informed consent of traditional owners to prevent to unintentional publication of sacred or secret knowledge. This process could include optional opt-in arrangements to promote follow-on innovation with potential research partners with access to the database, where it is appropriate to do so.

Proposal 6: Disclosure of source requirement for genetic resources in patent applications

Innovations that are based on Traditional Knowledge, but which are subject to further research and development may benefit from patent protection as long as they are new and inventive. There is no requirement in the patent system for applicants to disclose that they have used genetic resources or Traditional Knowledge in their inventions. Nor do patent applicants have to disclose how and where they have obtained these resources or knowledge. This can make it difficult for the traditional custodians of the resources or knowledge to benefit from, or prevent, its commercialisation by others.

Patents legislation could be amended to require that an application for a patent include clear disclosure of the source of genetic resource and Traditional Knowledge. A disclosure requirement may make it easier to monitor the use of genetic resources and Traditional Knowledge through the patents system. This monitoring may make it easier for Indigenous communities to be made aware of patent applications concerning relevant genetic resources and Traditional Knowledge. It would also support the development of improved practices among researchers and industry when working with Indigenous communities by encouraging compliance with access and benefit sharing requirements to use a genetic resource or Traditional Knowledge.

As noted in the discussion paper, industry and policy concerns with a disclosure requirement include that it would make the patent application process more onerous, time-consuming and costly for applicants, and for government patent offices.

A number of other countries have a similar requirement, but laws are not uniform and vary in regard to the nature of information that is to be disclosed. For example, South Africa requires applicants to provide evidence of their authority to make use of a genetic resource or Traditional Knowledge which an invention is based on or derived from. Similarly, Switzerland requires patent applicants to disclose the source of genetic resources and Traditional Knowledge which the inventor had access to, and which the invention is directly based on. There are also differences across countries with regard to the consequences of not making the disclosure. For example, South Africa allows a granted patent to be revoked for making a false statement in the disclosure. By contrast Switzerland does not allow for revocation of the patent for nondisclosure, but does provide for fines for intentional nondisclosure.

It is also important to note that not all inventions are patented. Some inventions are kept secret or are published to allow free, general use. A disclosure requirement is not a complete solution for the risk of misappropriation of Traditional Knowledge and genetic resources, but it could introduce greater transparency to the patents system and increasing awareness and understanding of this issue.

Proposal 7: Provide training and legal support to Indigenous communities

The Australian Government could provide support through the preparation and distribution of model contracts and key clauses or through training on negotiation skills and what is free, prior informed consent. There may also be value in assisting communities to access alternative dispute resolution services to reduce the costs of disputes and encourage effective collaboration. Model agreements and clauses on their own are unlikely to be effective. It is ultimately the parties' responsibilities to conduct their own negotiations and ensure that the contract terms are fair.

Indigenous communities require time to consult and negotiate agreements, and the cost of engaging lawyers to negotiate agreements over Traditional Knowledge rights in contracts can be prohibitive for Indigenous people and communities. Another consideration is that identifying relevant communities and potential beneficiaries could be time and resource intensive.

Without support, Indigenous people and communities may also be left in a poor bargaining position to negotiate contracts. The potential time and resources involved may deter non-Indigenous parties from entering into agreements to use Traditional Knowledge.

Consultation questions

- 2. What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused?***
- 3. What are your views on the proposals considered above for the protection of Traditional Knowledge?***
- 4. Are there other ways in which collaboration between Indigenous communities and researchers could be encouraged and supported in order to create economic opportunities?***
- 5. Are there other options that IP Australia should consider to protect Traditional Knowledge?***

Commercial use of Indigenous words and images

The discussion paper highlights that Indigenous languages are an integral part of Indigenous cultures, spirituality and connection to country. Language and visual expressions are shared communally and can be regulated through customary laws of kinship and custodianship.

There is growing awareness of the value of local Indigenous words and imagery to business. The use of these words and images in branding and design can be effective in evoking perceptions of locality and authenticity, and so benefit Indigenous businesses providing the product or service. Legally, any business can use Indigenous names, words and images in branding, trade marks and designs without consulting Indigenous communities or seeking consent. This means that Traditional Cultural Expressions with significant meaning to Indigenous groups can be used in commercial contexts without consent or any connection to the relevant Indigenous community. It also means that these expressions are at risk of being misused in culturally inappropriate or offensive contexts.

With Indigenous languages and imagery increasingly accessible to the public in digital formats, there may be a need to set standards against their misuse, ensure attribution and acknowledgment, and to create opportunities for Indigenous people to maintain and benefit from them.

A broader discussion of the issues relating to the use of Traditional Cultural Expressions is provided in chapter 3 of the discussion paper, *Indigenous Knowledge: Issues for Protection and Management*. <https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>

Proposed initiatives

Proposal 8: Measures to prevent registration of offensive trade marks and designs

Australian trade marks legislation provides that an application for registration of a trade mark must be rejected if it contains or consists of ‘scandalous matter’. A number of court cases have provided guidance on how this provision should be applied and the general principles are:

- the trade mark should be evaluated in the context of the ordinary people it might offend;
- only a proportion of Australians need to be offended for a ground for rejection to be raised;
- the scandalous element has to be something that is obvious and up front in the trade mark – a mere suggestion within the trade mark or a vague possibility that someone might find it offensive is not sufficient;
- a ‘sentimental objection’ is not enough for a registration of a trade mark to be rejected; and
- the standard to be adopted when evaluating grounds for rejection is how the ordinary person will react to the trade mark, whether that person is of any religion, race, or persuasion.

The decision must be made on the merits of each case, taking into account the words or images applied for, the intended market for the goods/services involved and the level of acceptance of the terms within the general population.

It is not clear whether the use of a word or image which is culturally sensitive only to a particular Indigenous community would constitute ‘scandalous matter’ under the Act.

Indigenous imagery can also be used in the design of a product which may be registered under designs legislation, such as designs that incorporate Indigenous imagery in fabric patterns and jewellery. As with trade marks, there is no requirement for businesses to consult Indigenous people or seek their consent before using a Traditional Cultural Expression in a registered design.

Australian designs legislation provides that an application for registration of a design must be refused if the design is ‘scandalous, or might be or might reasonably be taken to be scandalous’. As discussed above in relation to trade marks, it is not clear whether the unauthorised use of Indigenous imagery in the visual features of a product would constitute a ‘scandalous’ design.

As it is not currently clear whether the registration of trade marks and designs that may offend Indigenous people is prevented by the current legislation, IP Australia could pursue measures to clearly prevent such registrations. This would involve amending the legislation to specifically provide that a ground for rejection can be raised against an application if the trade mark or design contains features that may offend Indigenous people or communities. A similar mechanism exists in New Zealand, where the trade marks legislation allows for a trade mark to be rejected if it is likely to offend a significant section of the community, including Māori.

Proposal 9: Database of culturally significant words and images

A database of Traditional Cultural Expressions, particularly those of cultural significance, could assist with the implementation of measures to prevent registration of offensive trade marks or designs. Such a database could include images and words which are considered inappropriate to be included in a trade mark or design. For example, this may include sacred spiritual imagery or ancestral names. A database could be public or subject to access controls.

The United States Patent and Trademark Office (USPTO) maintains a database of official tribal insignia of Native American tribes. USPTO trade mark examiners use this database as an aid in the examination of applications for registration of a trade mark – in particular to determine whether a trade mark falsely suggests a connection with a Native American tribe.

Proposal 10: Requirement for consent

There can be circumstances where the commercial use of a word or image could be acceptable to the relevant Indigenous community, but consent has not been sought. IP Australia could consider introducing a new requirement in the trade marks and designs systems that obliges applicants to advise if consent to use a word or image has been sought and obtained when considering an application to register that word or image as a trade mark.

Consultation questions

- 6. *What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Cultural Expressions are protected from inappropriate commercial use?***
- 7. *What are your views on the proposals considered above for the protection of Traditional Cultural Expressions in the trade marks and designs systems?***
- 8. *Are you aware of any existing databases or collections of Traditional Cultural Expressions that could be used or built upon to implement the database option (Proposal 9) outlined above?***
- 9. *Are there any other options that you think IP Australia should consider to address the issue of inappropriate use of Traditional Cultural Expressions in trade marks and designs?***

Supporting initiatives

In order to operate effectively, the options canvassed above may require supporting initiatives. IP Australia would need to access suitable expertise on Indigenous Knowledge issues when required, and be able to apply that expertise to applications for IP rights containing an Indigenous Knowledge element.

Proposal 11: Indigenous Advisory Panel

The New Zealand Intellectual Property Office has two Māori Advisory Committees that can provide advice on whether features in a trade mark or design would cause offence to Māori, or an invention claimed in a patent application draws on Traditional Knowledge or genetic resources.

IP Australia could look at establishing an Indigenous Advisory Panel of representatives with an understanding of Indigenous Knowledge protocols and IP to assist with the implementation of the proposals described above and other matters. This could include:

- providing advice on registration and use of trade marks and designs that include Traditional Cultural Expressions;
- providing advice on consent to use of Traditional Knowledge or Traditional Cultural Expressions;
- assisting with the development of databases of Traditional Knowledge, genetic resources and Traditional Cultural Expressions;
- contributing to IP Australia's engagement with the World Intellectual Property Organization's Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore;
- providing a forum for IP Australia to seek Indigenous input on IP policy issues.

Proposal 12: Education and awareness

IP Australia could expand its education and awareness activities on the cultural significance of Traditional Knowledge to Indigenous people and its relationship with IP rights. A targeted campaign could:

- raise the profile of genetic resources and Traditional Knowledge as an area for research collaboration;
- enhance understanding of the range of IP rights that could assist with the commercialisation of Indigenous Knowledge, where commercialisation is appropriate;
- educate industry on seeking and documenting free, prior and informed consent to use Indigenous Knowledge;
- inform businesses about the negative effects of misusing Traditional Cultural Expressions in trade marks and designs.

Consultation questions

- 10. What role do you think an Indigenous Advisory Panel (or similar body) could play in advising or assisting IP Australia on the protection of Indigenous Knowledge?**
- 11. Are there any specific issues you would want IP Australia to consider, were it to set up an Indigenous Advisory Panel (or similar body)?**
- 12. Are there any issues you think should particularly be included in any education and awareness campaign?**
- 13. Do you have any suggestions for how an education and awareness campaign should be conducted and whether any particular community or industry sectors should be targeted?**

Glossary of Intellectual Property Rights

Patents

A patent protects how an invention works or functions and an invention needs to be new and inventive when compared to the existing state of known technology in order to be eligible for patent protection. The owner of a patent has the exclusive right to use or sell an invention, and can decide who else can use or sell the invention in Australia. Once granted, a patent lasts for up to 20 years, except for patents over certain pharmaceutical inventions which can last for up to 25 years.

Trade Marks

A trade mark identifies the particular goods or services of a trader as distinct from those of other traders. Trade marks can be words, slogans, logos, pictures, colours, sounds, scents, shapes or any combination of these. A person can register a trade mark by applying to IP Australia, paying the applicable fee, and demonstrating that their trade mark is distinctive and different to other trade marks for similar goods or services. Once registered, a trade mark may be renewed indefinitely.

Designs

A registered design protects the way a manufactured product looks, but not the way it works. The owner of a design has the exclusive right to use or sell that design in Australia. A person can register a design by applying to IP Australia and paying the applicable fee. To qualify for protection, a design must be new and different to other designs in the market.

Plant Breeder's Rights

A plant breeder's right protects a newly developed plant variety. A plant breeder's right cannot be granted over a naturally occurring plant variety. The owner of a plant breeder's right has the exclusive rights to grow and sell the propagating material of the new plant variety (eg. seeds and clippings) for commercial purposes, and can decide who else may grow and sell the propagating material of the new plant variety. A person can obtain a plant breeder's right by applying to IP Australia and paying the applicable fee. Plant breeder's rights can last for up to 25 years, depending on the variety.

Geographical Indications

Geographical Indications (GIs) are signs that identify goods as originating in a country, region or locality where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.

There are two ways to protect GIs in Australia:

- for all products, registration of the GI as a certification trade mark with IP Australia; and
- for wine and grape products, special protection under the *Wine Australia Act 2013*.

Copyright

Copyright provides legal protection for people who express ideas and information in certain forms. The most common forms are writing, visual images, music and moving images. Copyright is granted for a limited term of protection depending on the type of material and other factors. Once copyright has expired, the material is commonly referred to as being in the public domain. Copyright policy is administered by the Department of Communications and the Arts.

