

SUBMISSION

“Protection of Indigenous Knowledge in the Intellectual Property System” - Consultation Paper IP Australia - September 2018

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A. Summary

1. This submission comprises two parts.
2. Firstly, this document which is directed specifically to the IP Australia consultation questions.
3. Secondly, a paper titled “*Aboriginal and Torres Strait Islander peoples’ Cultural Property and Copyright Project*,” written by the submitter and made possible through the Copyright Agency Cultural Fund decision to support this project through the 2015 Copyright Agency Research Fellowship (the “CAL research paper”).ⁱⁱ
4. The aims and methodology of the CAL research paperⁱⁱⁱ may be summarised as follows:
 - (a) Firstly, to consider the nature of ATSI^{iv} heritage.
 - (b) Secondly, to identify aspects of ATSI heritage which are protected under currently under the *Copyright Act* and those which are not.
 - (c) Thirdly, to identify key concerns of the ATSI people.
 - (d) Fourthly, to consider case studies which expose shortcomings of the *Copyright Act*.
 - (e) Fifthly, devise a model which strengthens the enforcement powers of ATSI heritage rights, is directed to the expressed concerns of the ATSI peoples and utilising as far as possible existing structures and processes.
5. In the submitter’s research for the CAL research paper, submissions which were responsive to the “*Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples*”, conducted by IP Australia and Office for the Arts 31 May 2012, were considered.
6. The submissions almost all supported *sui generis* legislation and committees to address the issues involved with enforcement of ATSI heritage. In particular, the submission by the Arts Law Centre of Australia^v argues that the existing intellectual property systems (including copyright), are ineffective to protect indigenous cultural rights. Relevantly the submission stated:

Terri Janke’s 2009 work Beyond Guarding Ground convincingly argues why the existing legislation creating individual rights of copyright, design, patent and other intellectual property rights is ineffective to protect, except tangentially and coincidentally, Indigenous cultural rights which are generally communal in nature. There is currently no legal right of community cultural heritage which would support a right to a royalty, no legal obligation to respect traditional knowledge which could be the basis for mandatory standards of third party conduct using or affecting such knowledge and no legal right of ownership of ICIP capable of enforcement by the Australian legal system ...

... ICIP^{vi} covers a broader range of creative and intellectual and cultural concepts than those protected under the existing copyright, designs and patent laws. It should be dealt with in one piece of legislation and any attempt to deal with it solely in the context of, say, copyright will be artificial and incomplete

...

7. The submitter respectfully does not share this view in the CAL research paper. There is no doubt the present *Copyright Act* 1968 (Cth) and the common law, do not meet the unique needs of ATSI heritage protection, recognition, control and pecuniary relief. However, the submitter has arrived at a fundamental conclusion: Of the various statutory and non-statutory areas generally referred to as “intellectual property” (“IP”), copyright (in the author’s opinion), is the most useful platform from which to consider the protection of the unique characteristics of ATSI heritage utilising an existing regime
8. The question will no doubt be asked: “Why does ATSI or ICIP heritage protection need to be aligned with the closest existing IP rights anyway? Why cannot it be completely free standing?”
9. The submitter’s response is that the fundamental position taken in this and the CAL research paper is that there is a greater likelihood of legislative acceptance of the unique nature of ATSI heritage when existing structures and jurisprudence may be utilised in the protection of these rights.
10. The submitter proposes in response to the consultation question, that IP Australia consider its role in the model proposed in the CAL research paper, which is summarised as follows:
 - (a) The insertion of a discrete chapter in the *Copyright Act*.
 - (b) The creation of a unique right, the “heritage right” substantially defined as proposed herein.
 - (c) Benefits shall attach to the heritage designation.
 - (d) The designation entitles the custodian/s or community to rights including perpetual duration, exclusive rights of exploitation and the recognition of community ownership.
 - (e) The rights are defeasible so that a person claiming a better title to custodianship may apply to replace another custodial claimant.
 - (f) Like copyright, there will not be a grant of rights on registration. The rights will exist because the expression falls within the definition.
 - (g) The use of ATSI elders, acting as court experts under the existing *Federal Court Rules* 2011, to give opinions on heritage status of the expression and custodial entitlement.^{vii}
 - (h) The introduction of a register administered by **IP Australia** whereby:
 - i. The custodian/s may apply for registration of the heritage.
 - ii. ATSI experts appointed by IP Australia opine on heritage status and/or the custodian’s entitlement to apply for registration in the examination process.

- iii. There is an opposition process contesting entitlement or the status of heritage.
 - iv. The expert opinion is in evidence in an opposition.
 - v. The decision of IP Australia on the conduct of the register, such as a decision in a challenge to entitlement of the custodian to apply for heritage registration, is not appealable to a court but is reviewable as are other administrative appeals.
 - vi. The register will act as a document of record only and does not confer any rights associated with the “heritage” classification.
 - vii. The maintenance of the register will have the following benefits:
 - 1. A view on “heritage” status and/or standing of the applicant.
 - 2. Provide public notice which may be relevant to a defence of innocent infringement under s 115(3) of the *Copyright Act* and/or additional damages under s 115(4) of the *Copyright Act*.
11. IP Australia is already well familiar with oppositions and competing entitlement claims in patents, designs and trade marks. IP Australia has also considered the rights of ATSI peoples within the ambit of the department’s jurisdiction.^{viii}
12. Under the submitter’s proposed new chapter, the custodian or the community may enforce the heritage rights simply because it is designated as “heritage”. The custodian or the community may apply directly to the Court for relief regardless of the progress of any registration application because the inclusion on the register, does not grant rights but rather may act as a public record, for several identifiable purposes, including evidence of a decision on heritage status and the custodian’s entitlement.

B. Consultation Paper

Part A – Indigenous Knowledge issues in Australia

Consultation question

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?

1. The Consultation Paper specifically identifies six issues IP Australia is not consulting on. These six issues are the subject of the Discussion Paper produced pursuant to a commission by IP Australia and the Department of Industry, Innovation and Science (DIIS) in 2017 from Terri Janke and Company on the IP issues relating to protection and management of Indigenous Knowledge. The discussion paper is titled *Indigenous Knowledge: Issues for protection and management* (the “Discussion Paper”).
2. The Consultation Paper also excises:

- (a) The inquiry being undertaken into inauthentic products Australian Parliament's House of Representatives Standing Committee on Indigenous Affairs.
 - (b) Copyright policy issues.
3. The Discussion Paper, the Our Culture: Our Future Report and the Submitter's papers, all agree that Aboriginal and Torres Strait Islander heritage, traditional knowledge or Indigenous Culture and Intellectual Property, comprise a number of various expressions which are interconnected with each other and with the land.
4. The issues identified in the Discussion Paper are an exhaustive list of the fundamental issues associated with heritage. They overlap with the standing committee's investigation.
5. The conclusion is that there is little for IP Australia to address which is not being addressed or excluded by the matters referred to in C1, C2 and C3.
6. This submission however raises a number of issues for the consideration of IP Australia as part of the proposed model for reform.
7. The submitter raises for IP Australia's consideration, the role of IP Australia in the proposed model,^{ix} specifically to initiate and administer a registration system through IP Australia whereby:
 - (a) an application is made by the custodian/s or the community which owns it, for registration of the heritage;
 - (b) an Aboriginal and Torres Strait Islander person suitably qualified with expertise and experience in the area of heritage, is an examiner, or provides an expert opinion to IP Australia examiners, on whether the form of heritage is in fact heritage;
 - (c) there is an acceptance of the application;
 - (d) the acceptance may be opposed, by the public, but presumably in cases of opposition by a contestant to the entitlement to make the application;
 - (e) the expert opinion is in evidence automatically;
 - (f) after either a successful resistance of the opposition or proceeding unopposed, the registration occurs;
 - (g) the registration will act as a document of record and does not create the rights associated with the heritage classification which will solely emanate from the dedicated new chapter inserted into the *Copyright Act*;
 - (h) the register will serve several purposes including notice relevant to a defence of innocent infringement under s 115(3) of the *Copyright Act* and additional damages under s 115(4) of the *Copyright Act*;

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

1. This submitter's definition for the purpose of the CAL research paper is too wide. It extends to knowledge concerning medicinal plants, genetic material and traditional medicines. These aspects of traditional knowledge are not considered in the CAL research paper, nor does the submitter consider the proposed designation in the *Copyright Act* is the appropriate legislation to deal with this subject matter. Those elements have been considered in the context of patents rights and plant breeders' rights, neither of which are considered in this paper.^x This paper is directed toward the arts and cultural expression rather than Indigenous ecological (biodiversity) knowledge.^{xi}
2. This extract from the CAL research paper^{xii} envisages that the patent or plant breeder's legislation, invoke similar discrete chapters dealing with these aspects of heritage, more appropriately adopting the approach, the submitter has adopted in relation to the copyright legislation.
3. In this regard, just as in the copyright example, the existing patent law which does not recognise communal ownership of patent rights, or cannot accommodate the cornerstone of patent ownership in the *patents Act* s.15, will in that discrete chapter, similarly accommodate the unique position of ATSI heritage relating to issues including:
 - (a) knowledge related to the use of plants, minerals and animals;
 - (b) knowledge of ecological processes;
 - (c) traditional healing methods;
 - (d) food preservation and processing methods;
 - (e) traditional tracking, hunting, fishing and gathering skills; and
 - (f) cloth weaving and dyeing techniques, and knowledge related to materials, dyes, paints, gums, and glues.
4. Just as the issue of authorship of a literary or artistic work requires identification for copyright, so too the inventor is required to be identified.
5. The submission is made that the definition used in the CAL research paper of "heritage" may be adapted to subject matter more closely aligned to the patent legislation. Such a definition, including the same proviso, could be:

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 PROVIDED ALWAYS that the use of such heritage is consistent with the cultural rights, obligations and duties of the custodian, caretaker or responsible community of the particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.

6. The greatest challenges, the submitter considers, in this area is to the custodians of the genetic heritage being able to provide informed consent, before entering into any commercial arrangements.

3. What are your views on the proposals considered above for the protection of Traditional Knowledge?

7. Proposal 1 – the submitter in line with the recommended model, supports systems that exist require “little or no changes to law”. The use of GIs may be a useful tool to identify different localised communities. The prospect of consensus as to the mark is increased by being at local level for particular areas.
8. Proposal 2 – the only additional point to make which was made in the CAL research paper, is that there may a need for a requirement that a lawyer certifies the explanation of the effects of an agreement.
9. Proposal 3 sound promising. The question is whether potential researchers will want to be bound by an agreement for IP to vest in traditional owners when they will be investing the research dollars without fully being aware of the potential commercial success.
10. Proposal 4 - Refer to the CAL research paper which raises a requirement for a solicitor’s certificate as to the terms and effect of licenses.^{xiii}
11. Proposal 5 – this proposal is not dissimilar to the register proposed in the CAL research paper of heritage, proposed to be administered by IP Australia. Such a database or register, is of value to researchers who are seeking to research for particular outcomes. It also provides evidence of a party claiming to be the appropriate custodian of the genetic resource.
12. Proposal 6 – this proposal notes:

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.

13. The issue is not dissimilar from the copyright issues raised in the CAL research paper. Specifically, the system would have to contend with the situation that a patent, will have a period of monopoly, which is inconsistent with perpetual ownership, which ATSI people would expect.
14. What incentive is there for ATSI people, if the genetic resources have a life of 20 years before they become usable by other parties? Just as it is suggested inappropriate for heritage works to become public domain 70 years after the life of the author, so too, there is little incentive to sacrifice perpetual control in favour of a period of 20 years.
15. Proposal 7 – the submitter supports the undertaking of training and legal support to indigenous communities as a method to make informed decisions.

4. Are there other ways in which collaboration between Indigenous communities and researchers could be encouraged and supported in order to create economic opportunities?

16. In addition to the above comments, the process of identification of the proper custodian/s with whom to deal. The common denominator for exploitation of genetic resources as well as the potential copyright material, is the provision that use will be consistent with the best interests of the community.

5. Are there other options that IP Australia should consider to protect Traditional Knowledge?

17. The submitter refers to the methods in the model suggested in the CAL research paper, which may have relevance to the non-copyright area.as applicable to copyright material.

Part B - Commercial use of Indigenous words and images

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?

18. The implementation of reforms which understand heritage and accommodate its unique difference (and similarities) from the copyright model in the *Copyright Act*.

7. What are your views on the proposals considered above for the protection of Traditional Cultural Expressions in the trade marks and designs systems?

19. Proposal 8 – the submitter does not support the use of s.42(b) ‘scandalous matter’ as a method to reject a trade mark using an image or word/s which use heritage images or words. The NZ example, is appealing. Certainly it would give custodians and communities of a word or image the opportunity to oppose a registration which offends a significant section of ATSI peoples.

20. If the test were narrowed so as to not proceed if the local community was offended, this would lead to an argument by the applicant that the mark be registered but excise the community geographically from the area of use. An impractical result.
21. The principle reason being that in many cases, it is not obvious in many cases that the mark is offensive. For example, the word mark “Migaloo” 1060791 registration, may be highly offensive to certain ATSI people but not be known at all by other people. The name is the name given by ATSI people which means “white fella” and refers to a white whale.
22. Proposal 10 – the difficulty with this proposal is that heritage as understood in the CAL research paper is not a detachable unit from other forms of heritage. It is intermingled with other heritage concepts and the land. The submitter considers that it is problematic to give ownership to heritage words, images because this is inconsistent with the handing down of this heritage to ATSI generation.
23. There is no difficulty with licensing these designs and marks. The problem lies when title to them leaves ATSI peoples, regardless of their consent.
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?*
24. No contribution to make.
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?*
25. As stated, the submitter considers that divesting ownership of heritage represented in an image or a design has two main issues militating against it:
- (a) Firstly, the heritage is for passing down from ATSI generation to generation. Consenting to ownership by a non-ATSI party interferes with this very key purpose of heritage.
 - (b) Secondly, it will be said that such a consent will not interfere with the community’s use of an image or word. However, such a registration may lead to the growth of the reputation of a party other than the ATSI party, who was intended to be the beneficiary of the heritage.

Part B - Supporting initiatives

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?

26. As stated in the CAL research paper, self-determination is an important concern of ATSI peoples.^{xiv} The proposed model in the CAL research paper, envisages the use of individual experts, or panels of three ATSI elders to act as advisers:

(a) In court proceedings for infringement as expert witnesses, a facility which is already accommodated by the appointment of court experts under the Rules of Court.

(b) As expert advisers individually appointed by IP Australia to assist examiners consider an application or actually train ATSI examiners to consider applications for registration on the register proposed to be administered by ATSI peoples.

27. The expertise goes to whether something claimed to be heritage is in fact heritage and whether the custodian is entitled to apply for registration.

10. Are there any specific issues you would want IP Australia to consider, were it to set up an Indigenous Advisory Panel (or similar body)?

28. The establishment of an advisory panel is not inconsistent with the role proposed in the CAL research paper to appoint suitably qualified ATSI persons to provide opinions on entitlement and substantive issue of whether something is in fact heritage.^{xv}

12. Are there any issues you think should particularly be included in any education and awareness campaign?

29. The requirement that heritage must have a requirement that

...the use of such heritage is consistent with the cultural rights, obligations and duties of the custodian, caretaker or responsible community of the particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.

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?

30. No contribution to make.

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- ⁱ Dimitrios Eliades, Barrister www.deliades.com.au .
- ⁱⁱ The paper has a word count of 39,259 including footnote references.
- ⁱⁱⁱ CAL research paper [1.6] and [1.7] page 9.
- ^{iv} “ATSI” is an abbreviation for the Aborigine and Torres Strait Islander peoples.
- ^v The submitter is a panel lawyer of the Arts Law Centre of Australia and a supporter of the invaluable function the centre carries out.
- ^{vi} “ICIP” is an abbreviation in the submission for ‘Indigenous Cultural and Intellectual Property’
- ^{vii} *Federal Court Rules* 2011 (Cth) r. 23.01.
- ^{viii} “Protection of Indigenous Knowledge in the Intellectual Property System” Consultation Paper, September 2018 <https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultations>.
- ^{ix} CAL research paper [5.9] particularly [5.9.5].
- ^x *Our Culture: Our Future Report* Chapter 11 p. 135.
- ^{xi} *Our Culture: Our Future*, Executive Summary Chapter Eighteen p. xxxvi.
- ^{xii} CAL research paper [5.33] page 71.
- ^{xiii} CAL research paper [5.60.3] page 76.
- ^{xiv} CAL research paper [1.13]; [1.36.2]; Chapter III Item E page 33 [3.42] to [3.49].
- ^{xv} CAL research paper [5.9.5] page 65.