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Sent by email to consultation@ipaaustralia.gov.au

IP Australia
PO Box 200
Woden
ACT 2606
AUSTRALIA

SUBMISSIONS ON PROTECTION OF INDIGENOUS KNOWLEDGE IN THE INTELLECTUAL PROPERTY SYSTEM

These submissions have been prepared by the New Zealand Institute of Patent Attorneys Inc. (NZIPA).

The submissions are made in response to the Discussion Paper entitled ‘Protection of Indigenous Knowledge in the Intellectual Property System.’

BACKGROUND

The NZIPA was established in 1912. It is an incorporated body representing most Patent Attorneys registered under the New Zealand Patents Act, and who are resident and practising in New Zealand. A significant majority of our members are registered as Trans-Tasman Patent Attorneys and/or Australian Trade Mark Attorneys.

Members of NZIPA represent local and international patent owners and alleged infringers of patent rights in New Zealand and Australia. Due to this diversity of clients in certain cases, a single unified view on some points may not be possible.

Indigenous peoples around the world have sought recognition and protection of their indigenous knowledge. We consider there are many existing models that could assist and inform the development of an appropriate regime for recognition and protection of indigenous knowledge in Australia.

Our views and comments in response to the discussion paper also consider our experience in light of the steps that have been taken to recognise and protect traditional knowledge in New Zealand.

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

We consider that you have correctly summarised all the issues raised by indigenous peoples around the world in relation to the recognition and protection of indigenous knowledge.

We have no additional issues to raise.



2. What do you consider to be the greatest challenges for Indigenous people in ensuring that Traditional Knowledge is not misappropriated or misused?

One of the challenges facing indigenous people is that, in the current intellectual property system, indigenous knowledge and traditional knowledge are deemed or considered part of the ‘public domain’.

This assumption often results in research without consent or even regard for indigenous people, the indigenous or traditional knowledge itself, or the protocols and rights that apply to the use of indigenous or traditional knowledge.

As discussed in the paper, this assumption undermines the ability of indigenous people to exploit or commercialise their knowledge.

Another challenge arises in those situations where researchers wish to engage with the traditional owner(s). It is often difficult to identify and/or contact the traditional owner(s) of the indigenous or traditional knowledge.

A further challenge is that often the indigenous group does not have the capacity or capability (financial and otherwise) to engage with the intellectual property system, including negotiating with researchers and scientists over a research or collaboration agreement.

Finally, we consider that any review of the intellectual property system to recognise and protect indigenous knowledge is unlikely to have the desired impact for indigenous peoples if the review does not include a review of other regimes, such as Australia’s biodiversity and conservation strategies.

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

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

We agree that aspects of the current intellectual property system provide protection for aspects of traditional knowledge. But the current intellectual property system is not capable of addressing all the issues identified in the consultation paper. In fact, the intellectual property system was not designed to address these issues. And for this reason, addressing all the issues raised in the consultation paper requires not only a review of the intellectual property system, but a review of other regimes such as Australia’s biodiversity and conservation strategies.

We agree there are mechanisms that can be introduced to provide for the protection of aspects of traditional knowledge, but we think it is important these additional mechanisms be consistent with the well-established intellectual property principles of territoriality, certainty, exclusivity, priority, and notice.

For example, we support the use of the certification trade marks, collective trade marks, defensive trade marks, and geographical indications to protect aspects of traditional knowledge.



In addition, building capacity and capability to engage with the intellectual property system must be considered, to ensure true engagement in the intellectual property system by indigenous people.

Proposal 2: Standardise research protocols and guidelines

We agree introducing minimum standardised research protocols and guidelines would assist in the recognition and protection of indigenous knowledge and traditional knowledge.

We also consider it is important to allow parties to freely negotiate, where both parties have proper representation and are fully informed.

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

Developing and promoting standardised research and commercialisation agreements that vest traditional knowledge rights with the traditional owners would help to address the issues identified in the Discussion Paper.

However, vesting traditional knowledge rights with the traditional owners may deter researchers and collaborators, because the benefits from the research, collaboration, or commercialisation will be exclusively held by the traditional owners.

For this reason, we suggest that developing and introducing guidelines for standardised research and commercialisation agreements would be helpful to assist in the recognition and protection of indigenous knowledge and traditional knowledge. These guidelines should follow well-recognised and accepted principles of Access and Benefit Sharing arrangements.

We consider it is important to allow parties to freely negotiate, where both parties have proper representation and are fully informed.

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

Including free, prior, and informed consent for Australian Government-funded research programs would help to address the issues identified in the Discussion Paper.

We consider it is important to allow parties to freely negotiate, provided both parties have proper representation and are fully informed, and this includes free, prior, and informed consent.

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

We consider there are significant benefits to be gained by developing a national database of traditional knowledge and genetic resources, including introducing another level of certainty to the intellectual property system. For example, researchers,

collaborators, and examiners would be able to clearly identify if any intellectual property right is based on traditional knowledge before any research, collaboration, or examination process of an intellectual property right.

If a national database is developed, it will be important to also develop guidelines and protocols on access to and control of the traditional knowledge, including, sacred or secret knowledge.

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

We agree including a disclosure of source requirement for genetic resources in patent applications will help traditional custodians identify and prevent the commercialisation of traditional knowledge.

Introducing a disclosure of source requirement needs to be developed alongside a broader initiative to ensure that researchers and collaborators are encouraged to keep records of the source of genetic resources and traditional knowledge at the time of conducting any research or collaboration.

In some cases, this could be burdensome, particularly if the research started many years ago (where it may be impossible to determine the source now) or the research is conducted over many years.

Incorporating a disclosure of source requirement may become an impractical burden and deter researchers and collaborators.

We consider a disclosure of source requirement needs to be considered as part of the international developments in this area, and there are many models to consider. Flexibility for projects commenced several years ago or projects developed over many years should be considered.

Proposal 7: Provide training and legal support to Indigenous communities

We agree that building capacity and capability (financial and otherwise) by providing training and legal support to enable traditional owners to engage with the intellectual property system will be needed to address all the issues raised in the Discussion Paper.

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

The NZIPA has no further suggestions to assist with collaboration between indigenous communities and researchers.

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

As mentioned above, to address all the issues raised in the consultation paper requires not only a review of the intellectual property system, but a review of other regimes such as Australia's biodiversity and conservation strategies.

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?

One of the challenges facing indigenous people is that in the current intellectual property system, traditional cultural expressions are deemed or considered part of the 'public domain'.

This assumption often results in traditional cultural expressions being used without consent or regard for indigenous people, the traditional cultural expression itself, or the rights and protocols that apply to the use of traditional cultural expressions.

As discussed in the paper, this assumption undermines the ability of indigenous people to exploit or commercialise their knowledge.

Another challenge arises in those situations where potential users of traditional cultural expressions wish to engage with the traditional owner(s). It is often difficult to identify and/or contact the traditional owner(s) of the traditional cultural expression.

A final challenge is that often traditional owners do not have the capacity or capability (financial and otherwise) to engage with the intellectual property system, including protecting, registering and enforcing their rights in traditional cultural expressions.

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

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

We agree the introduction of a similar mechanism to that adopted in New Zealand would assist in ensuring that trade marks and designs that are considered offensive to indigenous peoples are not registered as trade marks or designs.

In addition to introducing this mechanism, we suggest you consider including a definition of the term 'offensive' to assist in the application of the new provision. There is no equivalent definition in the New Zealand legislation, which led to some uncertainty when introduced.

Proposal 9: Database of culturally significant words and images

We consider there are significant benefits to be gained by developing a national database of culturally significant words and images, including introducing another level



of certainty to the intellectual property system. For example, businesses and examiners would be able to clearly identify if any intellectual property right is based on any culturally significant word or image before use or registration.

If a national database is developed, it will be important to also develop guidelines and protocols on access to and control of the database in consultation with the traditional owners.

Proposal 10: Requirement for consent

The requirement to indicate whether an indigenous community has consented to the commercial use of a word or image is not part of the law in New Zealand. However, the WAI 262 report (Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy affecting Māori culture and identity)¹ recommends that for traditional cultural expressions where there is an identifiable kaitiaki (guardian), consent from the kaitiaki is required for any commercial use of that traditional cultural expression.

To help address the issues identified in the consultation paper, a similar approach could be adopted in Australia, and there would not then be a need for an additional requirement for consent to be shown on the register.

The Advisory Panel's role could be expanded to assist with identifying the traditional owner(s) and when negotiating 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?

We are aware that some traditional communities around the world have developed their own database or collection of traditional cultural expressions, but these are strictly controlled by those communities.

The only other national database we are aware of is the Native American Tribal Insignia database managed by the US Patent & Trademark Office.

We mention that it would be difficult for any database or collection of traditional cultural expressions to be comprehensive without full cooperation from all indigenous communities within that nation.

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?

In New Zealand, we have seen the development of sui generis legislation such as the Haka Ka Mate Attribution Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, which provide specific protections for specific traditional cultural

¹ A copy of the report can be found at <https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>, see Chapter 1 for relevant discussion.

expressions. As part of the ongoing Treaty of Waitangi settlement and negotiation process in New Zealand, it is possible we will see more of this type of legislation being developed.

Similarly, in Australia, there may be certain traditional cultural expressions that warrant specific protection in a similar way. This option should not be ruled out, even if traditional cultural expressions are granted general protection in Australia.

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?

To achieve the desired outcome and address the issues raised in the Discussion Paper, an Indigenous Advisory Panel or panels will be needed to assist in the implementation and ongoing facilitation of the recognition and protection of indigenous knowledge.

The Advisory Panel can assist with:

1. drafting the protocols and guidelines for researchers and collaborators
2. drafting templates for research, collaboration, commercialisation, access and benefit sharing arrangements
3. facilitating and/or adjudicating on any research, collaboration, commercialisation, access and benefit sharing arrangements
4. facilitating and/or adjudicating negotiations with traditional owners, including assisting with requirements around free, prior, and informed consent
5. assisting with identifying traditional owners
6. assisting with educational and awareness programs for non-traditional owners and traditional owners
7. advising on whether use and registration of particular trade marks or designs is offensive
8. advising on whether a patent is derived from traditional knowledge and the use is likely to be contrary to the traditional owner's rights
9. facilitating and developing national databases for traditional knowledge, genetic resources, and traditional cultural expressions.

In New Zealand, the Trade Mark Advisory Committee and Patent Advisory Committee established under the New Zealand Trade Mark and Patent Acts, respectively, fulfil several roles.

The Trade Mark Advisory Committee advises whether the use or registration of a trade mark or the registration of a geographical indication is likely to be considered offensive to Māori.

The Patent Advisory Committee advises on whether (a) an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals, and (b) if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values.

The WAI 262 report recommended the Advisory Committees' roles be expanded to include some of the other roles identified above.

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)?

We consider that the role of the Indigenous Advisory Panel (or similar body) needs to be clearly articulated to help achieve the desired outcomes. The panel will also need to have a variety of skills to be able to adequately deal with all the issues identified in the Discussion Paper. It may, therefore, be more appropriate to have several Advisory Panels, each of which deals with different issues, like the New Zealand model of having separate Trade Mark and Patent Advisory Committees.

In New Zealand, any person appointed to the Trade Marks Advisory Committee must have knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture), and any person appointed to the Patent Advisory Committee must have knowledge of Mātauranga Māori (Māori traditional knowledge) and tikanga Māori (Māori protocol and culture).

We recommend similar requirements be applied when appointing people to the Advisory Panels in Australia.

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

We consider the issues identified in the Discussion Paper cover all the relevant issues to 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?

To achieve the desired outcomes, we consider a targeted education and awareness campaign throughout the different levels of the science community should be conducted first, moving to other industry sectors in time. But ongoing education and awareness will be imperative.



CONCLUDING REMARKS

We would welcome the opportunity to discuss any aspect of our submission with the review team.

Yours faithfully

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Duncan de Geest
NZIPA Council Member

A black rectangular redaction box covering the contact information.

Email secretary@nzipa.org.nz

