



IP Australia

International Policy and Cooperation  
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### **Indigenous Knowledge Consultation : Have Your Say**

The Arts Law Centre of Australia (**Arts Law**) is a not-for-profit national community legal centre for the arts. Through the Artist in the Black (**AITB**) service, Arts Law has provided targeted legal services to Indigenous artists and their organisations and communities for the last nine years. Much of that advice has focused on ways of securing protection for Indigenous cultural heritage as expressed through Indigenous art, music and performance.

ArtsLaw **welcomes** the opportunity to contribute to the discussion on the adequacy of protocols to manage 'Indigenous Knowledge' or 'Indigenous Cultural and Intellectual Property' (ICIP) and the potential for better protection to be achieved through reform of the existing IP legislation. Arts Law commends and agrees with IP Australia's broad definition of 'Indigenous Knowledge' to mean knowledge that is unique to Aboriginal and Torres Strait Islander Peoples and is interchangeable with traditional knowledge and cultural expressions (including stories, dance, languages, symbols, crafts, cosmology, medical and environmental knowledge). Arts Law also commends and endorses the multidisciplinary approach taken by IP Australia to this issue.

Arts Law's objective is to foster a society that promotes justice for artists and values their creative contribution. From our experience working with Indigenous artists and their communities we believe that while Indigenous protocols are useful, they are not capable of protecting Indigenous cultural heritage effectively. Such protection will require legislative reform creating a rights framework which facilitates consultation and consent, develops appropriate standards of use to guard cultural integrity and enforce rights.

Terri Janke's 2009 work *Beyond Guarding Ground*<sup>1</sup>convincingly argues why the existing legislation creating individual rights of copyright, design, patent and other intellectual

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<sup>1</sup> Janke, T, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Co, 2009

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.

These are all matters to be addressed by legislation implementing Australia's obligations under Article 31 of the Declaration on the Rights of Indigenous People to "take effective measures to recognise and protect the exercise of ... rights" to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.

Arts Law believes that adequate protection can only effectively be achieved by separate sui generis legislation for the following reasons:

- ICIP 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;
- ICIP is fundamentally different from traditional legal constructs of intellectual property in that it is a communal not individual right albeit with individual custodians;
- ICIP is an intergenerational right which does not lend itself to traditional approaches involving set periods of time;
- ICIP evolves and develops over time unlike traditional Intellectual property rights which focus on fixing a point in time at which the property which is protected is defined;
- ICIP is not concerned with individual originality or novelty which is the basis for all existing intellectual property rights, whether copyright, design or patents;
- ICIP stands beside existing intellectual property rights – it is not an extension of them.

Arts Law is aware of the alternatives which have been canvassed for the protection of ICIP and believes each of those alternatives has shortcomings:

- Amending the *Copyright Act* – this is inadequate for many of the reasons set out above. ICIP is far broader than the types of artistic and creative expression covered in the *Copyright Act*. The notions of individual authorship and originality at the heart of the Act are fundamentally inconsistent with notions of traditional knowledge;
- Treaty – agreement at international level is not enough to create protection at a domestic level. Parties to treaties and conventions must still implement the obligations under the treaty by enacting domestic legislation;
- Customary law – it is true that many Indigenous communities generally rely on customary law among themselves. However the difficulty for Indigenous communities is invariably seeking respect and protection for cultural heritage by non-Indigenous parties who are not bound by traditional or customary laws. While traditional laws can be recognized by the common law, the native title experience shows that this can be deeply complex and costly and still necessitates the enactment of legislation anyway. Further, unlike native title, the existing case law suggests that the common law of Australia may not recognise traditional laws relating to cultural heritage;
- Protocols – IP Australia has identified the existing protocols of the Australia Council and other arts organisations on Indigenous cultural expression as a useful starting point. We agree that such protocols are thoughtful and comprehensive but by their very nature they fall short of providing adequate protection. Applying such protocols relies on the good will of third parties choosing to meet the best practice standards contained in those protocols. While expanding those protocols to cover a wider range of cultural heritage material is useful, the difficulty with all protocols is that, absent the force of legislation, they are not binding and provide no enforcement avenue against those who chose to disregard them;
- Private law and contract – Arts Law has successfully campaigned for wider use of ICIP clauses protecting ICIP in contracts. However, this is still a bandaid solution to address the lack of relevant legislative protection. Again it relies

on the agreement of contracting parties and is seldom adopted where the Indigenous community or individual is in a poor bargaining position. It provides no protection or redress against third parties who are not in a contractual relationship or who refuse to agree to such clauses. Relying on the occasional use of such clauses in private contractual arrangements does not constitute compliance with the Australian government's obligations under the Article 31 of the Declaration on the Rights of Indigenous People.

**In your discussions with us, you have identified case studies as an effective medium to illustrate the deficiencies of the existing system. Set out below are some examples of situations in which the assistance of Arts Law has been requested and in which the provision of effective help is hampered by the existing legal framework.**

1. In 2010, a gallery in the Blue Mountains in NSW, erected a large sculpture featuring Wandjinas, the creation spirit sacred to the Worrora, Wunumbal and Ngarinyin Aboriginal tribes in Western Australia without permission from the cultural custodians of the Wandjinas. While the sculpture was highly disrespectful appropriation of Indigenous cultural imagery, it did not appear to be a copy of any particular artwork by a known artist and therefore no complaint about infringement of copyright could be made. Ultimately, the ability of community opposition groups to achieve removal of the sculpture rested on its serendipitous placement on the verge of a heritage listed property meaning that local development approval was required (which was not granted). The result was based on legal considerations of social impact NOT the value of any ICIP.
2. The unique and ancient rock art of Australia's Indigenous peoples has widely recognized cultural significance. Yet such works are invariably outside the period of copyright protection and can be reproduced and used by third parties without any need to consult or consider the cultural owners. Non-Indigenous artists can appropriate and reproduce such images with impunity and even claim their own copyright in their appropriation – see for example <http://www.archeologicalart.com/Web2/Galleries/The%20Aboriginal%20Art/Warmaj/FMWarmaj.htm>.
3. Researchers and anthropologists have routinely gone into Indigenous communities and been welcomed. They have written down dreamtime stories and taken film footage which they then claim copyright over and the Indigenous community has no rights over. In one example, unique footage by a documentary filmmaker in the 1960s showing sacred rituals and ceremonies is now held in a deceased estate. The deceased estate has refused access to the families and communities of the Aboriginal individuals who, at the time, permitted filming as

a way of explaining and sharing their culture, not realizing that such participation gave them no rights.

4. In other examples, non-Indigenous authors have persuaded Indigenous community members to relay oral stories over which they have then published and claimed copyright – with the bizarre result that the community is itself prevented from publishing those stories under threat of copyright infringement.
5. There are numerous examples of misappropriation of Indigenous artistic traditions to create cheap merchandise to see to the Australian tourist trade. The only legal avenue of complaint is if such items are branded as ‘authentic Aboriginal art’ and most are not.
6. There are examples of tourists filming dance performances and then using the footage to brand or sell their own local tourism businesses in competition with the local communities.
7. The widely publicized and brazen appropriation by the Russian ice-skating team at the last Winter Olympics of Australian Indigenous ceremonial body decoration traditions is another obvious example.
8. In one case, a non-Indigenous artist simply combined elements from various Indigenous cultural traditions to produce Indigenous style artwork, and sold his artwork without any clarification or explanation that he was not Indigenous – absent an actionable misrepresentation or omission in breach of the Australian Consumer Law, it is almost impossible to pursue such conduct. Not only did this compete and undercut local Indigenous artists but many were offended at the way certain symbols and stories had been intermingled and adapted.

IP Australia’s case studies on its website are, in our view, not representative – telling stories where goodwill and cooperation have achieved a successful result. We also have many such experiences but they are quantitatively outweighed by circumstances in which protocols have been ignored and cultural sensitivities trampled upon.

IP Australia has indicated some concern about the potential for sui generis legislation of the type proposed to be hindered by disputes between different groups of Indigenous cultural owners as to ownership of particular categories of Indigenous knowledge or cultural traditions. That has never been our experience. The first case study exemplifies this – Indigenous community leaders from four language groups reaching from the Kimberley to the Blue Mountains united and worked cooperatively to achieve an outcome consistent with respect for Indigenous culture generally. More recently the Canning Stock Route exhibition demonstrated how over ten different language group worked together to communicate the Aboriginal story of their interaction with white engagement along the Canning Stock Route. Many of the relevant traditional stories were shared or overlapped or varied. No ownership disputes were experienced.

Arts Law hopes that IP Australia’s consultation on this important issue will provide the impetus for domestic action on this internationally significant issue. Arts Law is willing to commit its resources to

assist in the development of an effective policy, and would welcome an opportunity to discuss these issues in more detail with you.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Robyn Ayres".

**Robyn Ayres**  
**Executive Director**

A handwritten signature in blue ink, appearing to read "Delwyn Everard".

**Delwyn Everard**  
**Senior Solicitor**