

IP Australia and Traditional knowledge consultation process

Copyright Agency | Viscopy is a not for profit rights management organisation. We provide simple licensing solutions to allow users to copy images and text for a reasonable fee. Copyright Agency has over 29,000 members across Australia and Viscopy has over 12,000 members in Australia and New Zealand. 50% of Viscopy's members are Aboriginal and/or Torres Strait Islander. In 2014-2015, the Copyright Agency distributed over \$122 million to Australian authors and publishers. Viscopy distributed over \$2 million to Australian and New Zealand visual artists. We represent many Aboriginal and Torres Strait Islander visual artists and help them to better understand their legal rights in terms of copyright, licensing and the resale royalty scheme when dealing with commercialising their traditional cultural expressions. Viscopy works closely with thousands of Aboriginal and Torres Strait Islander artists and follow the Australia Council for the Arts Indigenous visual arts protocol <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/> Our Indigenous engagement program aims to assist and work with Aboriginal and Torres Strait Islander artists so that their traditional cultural expressions and knowledge is better protected.

Do these protocols provide sufficient protection for Indigenous Knowledge? Can intellectual property better protect Indigenous Knowledge?

Indigenous culture is significant and important to the livelihood and wellbeing of Indigenous Australians. The Australian Government has promoted their cultural policy under the Indigenous affairs group as well as under the Ministry for the Arts. Promoting the understanding and respect of Indigenous culture in Australia would encourage third parties to follow certain protocols when dealing with Indigenous culture and working with Indigenous communities and creators. The significant gaps in intellectual property laws such as the need to recognise communal rights, perpetual protection and intergenerational aspects of Indigenous knowledge need to be recognised in any specific protocols and sui generis laws.

Protocols are non- legal recommendations that encourage parties to consult and engage with Aboriginal and Torres Strait islander creators and communities when using Indigenous cultural material. There are a number of Australian arts protocols that exist such as the Australia Council for the Arts protocols, Screen Australia protocols, ABC and SBS protocols, AIATSIS protocols, and other traditional knowledge protocols. It is also considered that customary laws can be encompassed in protocols. Customary laws are the norms, ways and customs in which Indigenous communities operate in a social and economic way. Indigenous groups have argued that customary law play a vital role in protecting their traditional knowledge (TK) and traditional cultural expressions (TCEs) from further misappropriation and misuse. So if there are to be protocols used to protect TK and TCEs, then these protocols also have to have remedies and sanctions against offending third parties. There are numerous examples of third parties misusing and misappropriating Indigenous knowledge

without permission or any consideration of protocols. The current Australian intellectual property laws like copyright, trademarks, designs and patents do not fully protect Indigenous culture from being misused or misappropriated. This is why protocols are needed to protect Indigenous culture. The existing arts and cultural protocols that exist are ways in which any sui generis laws can be formatted on.

What about benefit sharing, or acknowledging when Indigenous Knowledge is used by others?

The Indigenous affairs group in the Department of Prime Minister and Cabinet is supportive of the Culture and Capability program which supports maintenance of culture and protecting Indigenous heritage¹. Benefit sharing is crucial for achieving these cultural targets which were set by the Government. It would encourage more ethical collaborations with Indigenous communities so that they can take pride in their Indigenous knowledge and possibly commercially exploit it. When there has been proper consultation and interaction by third parties with Indigenous communities for proper and appropriate use of Indigenous knowledge, then the next logical step is sharing the benefits of that collaboration. The Convention on Biological Diversity recommends for proper benefit sharing with Indigenous communities when using their associated traditional knowledge and genetic resources (GR)². These elements can be implemented in written agreements when consultation and negotiation takes place with the relevant Indigenous community. However, if it was implemented in law, in a *sui generis* law that was a new form of intellectual property protection, it would mean that any third party would have to share the benefits when commercialising and using genetic resources and associated traditional knowledge.

There should also be an acknowledgment of use of Indigenous knowledge when a new product or process is created. This would again support and encourage the Cultural policy which supports economic participation of Indigenous communities in Australian life. Acknowledgement of Aboriginal and/ or Torres Strait Islander knowledge from a particular community may encourage pride in that community's culture. The principle of acknowledgment would also be akin to the communal moral right of attribution whereby a community can be recognised as owning and practicing that particular TK or TCE or GR. The Indigenous communal moral rights bill (ICMR Bill) drafted in 2005 was too onerous on Indigenous communities as the protection was not automatic and there were too many requirements for communities to satisfy.

¹ Indigenous affairs group in the Department of Prime Minister and Cabinet

<https://www.dpmc.gov.au/indigenous-affairs/about/culture-and-capability-programme>

² CBD, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity

The ICMR Bill needs to be reviewed to be more favourable for Indigenous communities. Indigenous communal moral rights law could then be used to encourage acknowledgement of use of Indigenous knowledge by third parties.

The ongoing discussion is a positive step towards a future where Indigenous knowledge can be treated with respect and Indigenous communities can share in benefits of commercial exploitation of their TK, TCEs and GRs. Australia has already adopted the UN Declaration on the Rights of Indigenous peoples which has specific Articles that state that Indigenous peoples have the right to practice and have their TK respected and that benefits be shared with them when exploited by a third party³. Australia can be a leader in this area as there has been decades of discussion, case law, reports and consultation with Indigenous communities and organisations. There needs to be specific sui generis laws that can be modelled on the current Indigenous arts protocols and WIPO draft instruments on TCEs, TK and GRs that will aim to protect misappropriation of Indigenous knowledge.

The World Intellectual Property Organisation (WIPO) is in the midst of developing new international protection for Indigenous cultural intellectual property. The Intergovernmental Committee on Intellectual property and genetic resources, traditional knowledge and folklore (IGC) was set up in 2000 to work on text based negotiations which would lead to better protection of Indigenous knowledge worldwide. In the meantime, Australia can be a leader in this area by changing or creating a new law or laws that would protect Indigenous culture from misappropriation and misuse. Other countries like South Africa, Panama, the Philippines, Taiwan have implemented their own sui generis laws which protect Indigenous culture through respect and consultation of those affected Indigenous communities whose Indigenous knowledge is being used. Further consultation with Indigenous communities and organisations is recommended to encourage further understanding of these issues. Encouraging and assisting Indigenous representatives and organisations to participate at these important WIPO IGC meetings is also crucial.

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³ Article 31, United Nations Declaration on the Rights of Indigenous peoples, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf