



AUSTRALIAN  
DIGITAL ALLIANCE



Australian Libraries  
Copyright Committee

Friday 1 February 2019

IP Australia  
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To whom it may concern

### **Protection of Indigenous Knowledge in the Intellectual Property System**

The Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) thank IP Australia for the opportunity to make a submission in response to the *Protection of Indigenous Knowledge in the Intellectual Property System Consultation Paper*.

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998. Its first patron was retired Chief Justice Sir Anthony Mason. Its members are from the education, cultural and research sectors and include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- National and State Libraries Australia
- Council of Australian University Librarians
- Australian Government Libraries Information Network
- National Archives of Australia
- Australian School Library Association
- Australian Society of Archivists
- Council of Australasian Archives and Records Authorities
- NSW Public Libraries Association

The ADA and the ALCC acknowledge that we are not experts with respect to Indigenous Cultural Intellectual Property (ICIP) however we recognise that this is an important issue that impacts upon the entire community. There is growing awareness of the importance of ICIP in the many of the sectors to which our members belong, especially the cultural and education sectors. As such we support IP Australia's efforts to more effectively recognise and protect ICIP in Australia.

It is unclear from the Consultation Paper what if any role IP Australia sees copyright playing in relation to ICIP. We note that the inclusion of visual imagery, performance, design and words in the definition of 'Traditional Cultural Expressions' used in the Consultation Paper covers material that is protected by copyright. As is identified in the Consultation Paper, other areas of IP may also have a role to play in efforts to more adequately protect ICIP in the future.

The ADA and the ALCC note that the House of Representatives Standing Committee on Indigenous Affairs has released their *Report on the impact of inauthentic art and craft in the style of First Nations peoples* which recommends a consultation be undertaken to 'develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions.'<sup>1</sup>

The ADA and ALCC support this recommendation. We are concerned that copyright and other IP are not appropriate to protect ICIP. We believe the papers previously provided by Terri Janke and Company to IP Australia on legal protection of Indigenous Knowledge in Australia is the best current examination of this issue. In particular we note that:

- In cases such as patents and trade marks protection arises with the registration of IP. The successful applicant often enjoys exclusive protection for the duration of protection. This causes complications with respect to ICIP, both because of the impact of prior art in the form of existing cultural expressions, and because it raises the spectre of First Peoples communities being excluded from their ICIP if they are not the first to register it. This would go against the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which Australia has supported since 2009,<sup>2</sup> and in particular Articles 24 and 31.<sup>3</sup>

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<sup>1</sup> See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Indigenous\\_Affairs/The\\_growing\\_presence\\_of\\_inauthentic\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_style\\_art\\_and\\_craft/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report).

<sup>2</sup> See 'Media Release: United we stand – Support for United Nations Indigenous Rights Declaration a watershed moment for Australia', <https://www.humanrights.gov.au/news/media-releases/2009-media-release-united-we-stand-support-united-nations-indigenous-rights>.

<sup>3</sup> UNDRIP Article 24: 'Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.'

Article 31: '1. Indigenous peoples have the right 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, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'

- The duration of protection afforded by IP lasts for a defined period of time. For example, copyright (which enjoys the longest period of protection) protects literary, dramatic, musical and artistic works for the life of the author plus 70 years. This period of protection does not easily align with the lived, continuous nature of First Peoples connection to traditional knowledge and traditional cultural expressions from which ICIP is drawn. As noted by Terri Janke and Company in *Legal protection of Indigenous Knowledge in Australia Supplementary Paper 1*, 'Indigenous clan designs, stories and rock art that first existed in material form thousands of years ago and remain part of the particular Indigenous culture in perpetuity are not protected by copyright.'<sup>4</sup> Similarly 'Indigenous people, however, seek to hold rights in their medicinal and plant knowledge in perpetuity,' making the short duration of protection patents receive '... unsuitable as a method of enforcing rights in Indigenous Knowledge.'<sup>5</sup>
- This also highlights the incompatibility between copyright and ICIP. To illustrate, concepts such as authorship, originality and material form in copyright do not easily accommodate the communal, iterative and often intangible nature of Indigenous Knowledge.<sup>6</sup> For much ICIP material '... no singular individual ... can be identified as the creator or author of a work' and 'Indigenous Knowledge is largely transferred through the spoken word and survives in intangible form.'<sup>7</sup>
- While many aspects of ICIP fall within the scope of copyright and IP, there are other aspects which may not be protected under these mechanisms but which form part of traditional knowledge and traditional cultural expressions. For example, Terri Janke and Company in their *Indigenous Knowledge: Issues for protection and management Discussion Paper* identify song lines, stories and other oral traditions, games, mythology, rituals, customs and narratives which may not fall into existing categories of copyright or IP protection.

The ADA and the ALCC support IP Australia's proposal to establish an Indigenous Advisory Panel (proposal 11). The ALCC encourages IP Australia to consider including a First Peoples library representative on the Panel. While more work needs to be done, contemporary library practice is respectful of ICIP. As the Australian Library and Information Association (ALIA) identifies, libraries and archives are increasing their engagement with First Peoples communities in the collection, preservation, presentation and management of ICIP.

The Museums and Galleries Australia MGA Indigenous Roadmap<sup>8</sup> being completed by Terri Janke and Company is an example of this approach in the museums and galleries sector. These galleries, libraries, archives and museum (GLAM) sectors, as well as the arts and cultural sector, have established guidelines and protocols when working with

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<sup>4</sup> Sentina, M et al. 2018. 'Legal Protection of Indigenous Knowledge in Australia Supplementary Paper 1', Terri Janke and Company: Sydney, p 6.  
[https://www.ipaustralia.gov.au/sites/default/files/supp\\_paper\\_1\\_legal\\_protection\\_in\\_australia\\_28mar2018.pdf](https://www.ipaustralia.gov.au/sites/default/files/supp_paper_1_legal_protection_in_australia_28mar2018.pdf).

<sup>5</sup> Sentina, M et al. 2018. p 15.

<sup>6</sup> Sentina, M et al. 2018. p 6.

<sup>7</sup> Sentina, M et al. 2018. p 6.

<sup>8</sup> See <https://www.mgaindigenousroadmap.com.au>.

First Peoples.<sup>9</sup> This experience dealing consultatively with culturally sensitive material may be beneficial to IP Australia's proposed Indigenous Advisory Panel.

We also join the National and State Libraries Australia (NSLA) and ALIA in supporting initiatives that provide education and raise awareness about the concepts of ICIP (proposal 12).

In pursuing any of the proposed initiatives outlined in the Consultation Paper the ADA and ALCC encourage IP Australia to consult widely with First Peoples communities across Australia. This consultation could be undertaken collaboratively with a National Indigenous Arts and Cultural Authority (NIACA),<sup>10</sup> the establishment of which is currently in consultation. This would also comply with Articles 18 and 19 of UNDRIP.<sup>11</sup>

The ADA and the ALCC would welcome the opportunity to be involved in further discussions related to this consultation. Our contact for inquiries related to this submission is Jessica Coates, who can be contacted at [jcoates@digital.org.au](mailto:jcoates@digital.org.au) or on 02 6262 1118.

Yours sincerely



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<sup>9</sup> Examples include:

- Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS) *Guidelines for Ethical Research in Australian Indigenous Studies*, <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/GERAIS.pdf>.
- AIATSIS Aboriginal Studies Press' *Guidelines for the ethical publishing of Aboriginal and Torres Strait Islander authors and research from those communities*, <https://aiatsis.gov.au/sites/default/files/docs/asp/ethical-publishing-guidelines.pdf>
- Screen Australia's requirements where funded screen projects include Indigenous content or participation, <https://www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content>.
- The Australia Council for the Arts' Protocols for working with Indigenous artists, <https://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists>.

<sup>10</sup> See <https://niaca.com.au>.

<sup>11</sup> Article 18: 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.'

Article 19: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'