

Friday 18 December 2020

Visual Arts and Design Section  
Office for the Arts  
GPO Box 2154  
CANBERRA ACT 2601

By email: [IVA@arts.gov.au](mailto:IVA@arts.gov.au)

To whom it may concern

**Re: Consultation Paper on Growing the Indigenous Visual Arts Industry**

As the primary policy body for copyright issues affecting the library, archive and information sectors in Australia, the Australian Libraries Copyright Committee (ALCC) recognises the importance of Indigenous Cultural and Intellectual Property (ICIP), especially as it relates to the sectors to which our members belong. The ALCC is pleased to respond to the *Consultation Paper on Growing the Indigenous Visual Arts Industry*, and thanks the Office for the Arts for the opportunity to contribute to the process. In particular, our comments are focused only on Theme 4: Legal protections.

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](#) (ALIA)
- [National and State Libraries Australia](#) (NSLA)
- [Council of Australian University Librarians](#) (CAUL)
- [National Library of Australia](#) (NLA)
- [Australian Government Libraries Information Network](#) (AGLIN)
- [National Archives of Australia](#) (NAA)
- [Australian School Library Association](#) (ASLA)
- [Australian Society of Archivists](#) (ASA)
- [Council of Australasian Archives and Records Authorities](#) (CAARA)
- [NSW Public Libraries Association](#).

The ALCC acknowledges that we are not experts with respect to ICIP however we recognise that this is an important issue that impacts upon the entire community. In the sectors we represent there is growing awareness of the importance of ICIP and, while more work needs to be done, libraries and archives are increasing their engagement with Aboriginal and Torres Strait Islander communities in the collection, preservation, presentation and management of ICIP. As such we support efforts across government to more effectively recognise and protect ICIP in Australia.

The House of Representatives Standing Committee on Indigenous Affairs released its *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 ALCC supports this recommendation.

Our support for stand-alone legislation comes from our concern that current copyright and IP laws are not appropriate to fully protect ICIP. We believe the papers provided by Terri Janke and Company to IP Australia as part of their Protection of Indigenous Knowledge in the Intellectual Property System Consultation is the best current examination of this issue.<sup>2</sup> To echo our comments made to IP Australia in response to its consultation,<sup>3</sup> the ALCC notes that:

- Conflicts can arise between current IP laws and ICIP where IP rights in material that would be protected by ICIP vest in individuals or corporate entities. Copyright and other IP rights can exist in current and historical items drawing from ICIP that were created by Aboriginal and Torres Strait Islander people or non-First Nations people with or without approval.<sup>4</sup> This can see libraries and archives in situations where respecting the rights of an individual IP owner becomes a barrier to First Nations recognition, control and community access, and compel libraries and archives to act in ways that exclude First Nations communities from their culture held in collections. The potential for tension between IP and ICIP must be acknowledged and appropriately considered when determining the best mechanisms for protecting ICIP and respecting communities' interest in that material.
- Further, registrable IP which typically affords exclusive protection to the successful applicant – such as patents and trade marks – can be complicated with respect to ICIP, both because of the potential for existing cultural expressions being taken as prior art, and because it raises the spectre of Aboriginal and Torres Strait Islander communities being excluded from their ICIP if they are not the first to register it. This would go against Articles 24 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>5</sup> which Australia has supported since 2009.<sup>6</sup>
- IP protects material only for a specified duration. Copyright, as an example, enjoys the longest period of protection – protection of literary, dramatic, musical and artistic works lasts for the life of the author plus 70 years. While this period may seem lengthy, it does not easily align with the lived,

---

<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). See also Janke, T and Sentina, M. 2018. 'Indigenous Knowledge: Issues for protection and management Discussion Paper', IP Australia, Commonwealth of Australia. [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), p. 70.

<sup>2</sup> See Janke and Sentina. 2018. See also Sentina, M, Mason, E and Janke, T. 2017. 'Legal Protection of Indigenous Knowledge in Australia Supplementary Paper 1', Terri Janke and Company: Sydney. [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>3</sup> See Australian Digital Alliance and Australian Libraries Copyright Committee. (2019). Available at [https://www.ipaustralia.gov.au/sites/default/files/australian\\_digital\\_alliance\\_australian\\_libraries\\_copyright\\_committee.pdf](https://www.ipaustralia.gov.au/sites/default/files/australian_digital_alliance_australian_libraries_copyright_committee.pdf) and <https://libcopyright.org.au/indigenous-knowledge-consultation-joint-submission/>.

<sup>4</sup> Janke and Sentina. 2018. pp. 8, 23, 43 and 69.

<sup>5</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.'

See <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>6</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>.

continuous nature of First Peoples' connection to their traditional knowledge and traditional cultural expressions from which ICIP is drawn. Terri Janke and Company note in *Legal protection of Indigenous Knowledge in Australia Supplementary Paper 1* that, '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>7</sup> In relation to patent law, a similar issue arises: to quote that same paper, 'Indigenous people ... 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>8</sup>

- Beyond duration, other incompatibility between copyright and ICIP exist. Copyright's notions of 'authorship', 'originality' and 'material form' do not easily encompass the communal, iterative and often intangible nature of Indigenous Knowledge.<sup>9</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>10</sup>
- Further to the issue of 'authorship', some material held in library and archive collections that incorporate ICIP may be considered orphan works – copyright materials where the owner of the copyright is not readily identifiable. Collections' digitisation policies and any policies related to the handling of orphan works may see ICIP digitised and made viewable by the public. The proposed copyright access reforms announced by the Minister for Communications, Cyber Security and the Arts the Hon Paul Fletcher MP in August<sup>11</sup> include a proposal to introduce a limited liability scheme for use of orphan works. If introduced, the scheme could increase the potential for ICIP to be released to the public. This should not be a reason to consider abandoning the proposed orphan works limited liability scheme, but rather ICIP legislation and ICIP protocols should ensure whether material includes ICIP is a consideration when digitising and releasing collections material.
- Many forms of ICIP are within the scope of copyright and other areas of IP, but there are other aspects of ICIP which may fall outside of these existing mechanisms but which form part of traditional knowledge and traditional cultural expressions. Terri Janke and Company identify song lines, stories and other oral traditions, games, mythology, rituals, customs and narratives, each of which may not enjoy copyright or IP protection.<sup>12</sup>

New legislation that protects ICIP in tandem with current copyright and IP laws could address the issues outlined above. With or without legislative reform, informing the wider community about the importance of ICIP should be actively pursued. Broadly, the ALCC encourages the development of guidelines and protocols when working with First Peoples communities and ICIP. An option may be to develop a national standard protocol for Indigenous Knowledge protection<sup>13</sup> or continue to rely on industry-specific protocols. Many already exist<sup>14</sup> which can inform the development of similar approaches in other sectors and be

<sup>7</sup> 'Indigenous clan groups and their representatives cannot control reproduction of Traditional Cultural Expressions that are considered to reside in the public domain – that is, where copyright does not protect a work': Janke and Sentina. 2018. p. 44. See also Sentina et al. 2017. p. 6. and Janke and Sentina. 2018. p. 31.

<sup>8</sup> Sentina et al. 2017. p. 15.

<sup>9</sup> Sentina et al. 2017. p. 6.

<sup>10</sup> Janke and Sentina. 2018. p. 24. See also Sentina et al. 2017. p. 6.

<sup>11</sup> Fletcher, P. 2020. 'Copyright reforms to better support the digital environment', <https://minister.infrastructure.gov.au/fletcher/media-release/copyright-reforms-better-support-digital-environment>.

<sup>12</sup> Janke and Sentina. 2018. p. 17.

<sup>13</sup> See Janke and Sentina. 2018. p. 48.

<sup>14</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>.
- Australian Museums and Galleries Association's (AMaGA) *First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries*, <https://www.amaga-indigenous.org.au>.

updated to reflect any legislative change related to ICIP. We also support initiatives that provide education and raise awareness about the concepts of ICIP.<sup>15</sup>

In pursuing the goal of protecting ICIP the ALCC encourages the Office for the Arts – or any other government body tasked with advancing options to protect ICIP – 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>16</sup> the establishment of which is currently in consultation.

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 Ben Rice, [REDACTED]  
[REDACTED]

Yours sincerely

Margaret Allen  
Chair  
Australian Libraries Copyright Committee

- 
- 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>15</sup> See Janke and Sentina. 2018. p. 47.

<sup>16</sup> See <https://niaca.com.au>. See also Janke and Sentina. 2018. pp. 48 and 117–118.