

**INTA Comments and Recommendations Regarding Australia Indigenous Knowledge
Consultation**

Introduction

About INTA: Founded in 1878, INTA is the world's oldest and largest brand owners association. With a membership of over 7,200 companies, INTA represents over 31,000 trademark professionals in diverse capacities: multinational corporations, businesses of all sizes, law firms and other professionals, academic institutions, and not-for-profit organizations from 190 countries.

INTA's mission is to encourage and support best practices and excellence in the field of trademarks and intellectual property, and protection of rights for brand owners and consumers, as well as foster economic growth and innovation through awareness of the importance and development of brands. INTA is dedicated to the support and advancement of trademarks and related intellectual property rights as elements of fair and effective national and international commerce. To achieve this goal, INTA unveiled its new Strategic Plan, which is articulated around the following areas namely: 1) Promote the value of Trademarks and Brands, 2) Reinforce Consumer Trust and 3) Embrace Innovation and Change.

In this context, INTA has a long history of engagement which led to the establishment of an Indigenous Rights Committee (IRC) focusing solely on IR. IRC develops and advocates the Association's policy regarding the impact of indigenous rights and their enforcement on trademark rights. The committee monitors developments in treaties, legislation and implementation in various jurisdictions and complete various analyses. As part of this engagement, INTA works with the World Intellectual Property Organization (WIPO). For instance, in November 2017, INTA provided pro bono assistance to the Traditional Knowledge Division of WIPO in its holding of a capacity-building workshop in the Philippines. The workshop was aimed primarily at helping the indigenous peoples and local communities understand the IP system so that they can learn to make more strategic and effective use of IP tools, particularly trademarks. In 2018, with the assistance of our dedicated members INTA participated in workshops organized by WIPO and intends to carry on these type of raising awareness activities in 2019.

It is with these strategic interests that INTA views the publication of the Consultation Paper on the Protection of Indigenous Knowledge in the Intellectual Property System by IP Australia, and welcomes the efforts of your IP office in exploring options and identifying issues relating to the current protection regime for

indigenous knowledge, and sharing certain ideas and proposals for consideration by interested stakeholders.

Comments and Recommendations

The following are INTA's responses in accordance to the corresponding questions raised in the Consultation Paper.

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

No further additions apart from what has already been proposed.

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

- (a) The lack of awareness or possibility ignorance of the researchers/research community on the need to engage with indigenous people where it comes to research relating to traditional knowledge.
- (b) Identification of who are the indigenous groups, and how to contact them – no formal central communications point/portal to provide clarity on what is required or needs to be done where it comes to traditional knowledge related research.
- (c) Experience of Indigenous Groups – ensuring fair negotiations, and no unequal positioning when dealing with research organizations or commercial entities.
- (d) There is also, equally, sometimes the inability to identify the source of the “research”, or that the source is found in traditional knowledge.
- (e) The provision of a baseline of information and adequate resources (in line with Proposals 2, 3, 5, and 7) may be first steps towards addressing these issues.

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

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

INTA believes that the present IP protection regimes do provide protection for traditional knowledge, but there are challenges in terms of knowledge particularly by indigenous group of how to use such systems, thus education and ease of access to current IP systems are needed. For example, we support the use of the certification trademarks, collective trademarks, defensive trademarks, and geographical indications as a means to protect culturally significant products. It must be noted that the registration and maintenance of these collective and certification marks requires technical trademark expertise and can be a costly affair.

Proposal 2: Standardize research protocols and guidelines

We agree that setting baseline protocols and minimum standard operating guidelines would certainly be beneficial, especially if either or even both parties are not familiar with research involving traditional knowledge. This proposal does not discount the fact that proper consultation and collaboration on a case-by-case basis should be encouraged and the finer details should be set between the parties. A baseline protocol and guidelines, with a sample framework and structure and minimum standards is certainly a recommended task.

When setting such protocols and guidelines, it would also be appropriate to engage with WIPO, other active stakeholders in this area, or consider protocols and guidelines adopted in other countries, and take these into consideration when developing suitable and effective protocols and guidelines.

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

While this is a respectable option for consideration, there would be no incentive for researchers to invest in research utilizing traditional knowledge if all arising rights are vested with the traditional owners.

We agree that developing template research and commercialization agreements would be a useful option to encourage collaboration, and provide a template starting point for initiating discussions and creating bespoke agreements, however, each party naturally would want to have a certain benefit that is derived from such a collaboration. Traditional owners may consider a joint-ownership or licensing type agreement with the researchers, or any other such arrangement where they are able to retain at least a portion or full ownership of their rights, depending on what the research is.

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

The issues of anticipated increase in time, added burden and discouragement should not overtake the purpose of free, prior and informed consent, which is to ensure that the indigenous communities' consent has been properly obtained prior to research being carried out. The process for applying for research grant funding already has a number of conditions, hence, adding one more condition is unlikely to be a significant deterrent, particularly in situations where clear guidance is provided on how to obtain free, prior, and informed consent.

Providing a clear, effective framework on how to obtain consent is likely to increase certainty for the researchers, and builds trust with the indigenous communities that their consent has been formally and properly sought and obtained. The ability for both parties to mutually agree on research, the added ability

for the communities to obtain a share in the benefits from the research, and the researchers fulfilling their objective of carrying out the planned research results in a beneficial outcome for all parties.

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

The issue of the creation of a national database of traditional knowledge and genetic resources seems to be a possible solution to address issues relating to the collection and recognition of traditional knowledge as long as it is not miss-perceived as a “registry” for protection or enforcement. As rightly pointed out, guidelines and protocols around access to and control of the traditional knowledge, and in particular sacred or secret knowledge will need to be put in place. As such, this option needs to be reviewed carefully, and all considerations taken in prior to any implementation of such database.

As suggested, information should be provided on an “opt-in” basis, to ensure that only appropriate information is shared. Access may require to be based on a “two-tier” access system, possibly to provide commonly known knowledge as publicly accessible, and the second tier to be private access to only those who require access (Patent Examiners, for example). In line with the possible development of an Indigenous Advisory Panel, it could be the case that there is also a third option, where a group of respected elders/members of the panel would be the custodians of the sacred/secret knowledge, and answer specific questions that are put to them.

Before collection of the traditional knowledge, indigenous communities will need to be given adequate education and instruction. The best way to encourage a comprehensive and useful database is to minimize the burden to each group of including its knowledge in the database, and providing surety on the objective and purpose of the database and the intentions for the database to be a formally recognized collection of knowledge that is used to safeguard their identity and rights in that traditional knowledge.

In setting up such a database, IP Australia (or another appropriate government department) should reach out to as many indigenous groups as possible, educating them about the database, and visiting their areas to collect and record the traditional knowledge each wishes to include.

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

INTA has no comments on this proposal.

Proposal 7: Provide training and legal support to Indigenous communities

We agree the provision of training by the government must be an ongoing, continuous effort, and that adequate pro bono legal support also be available to the indigenous communities. This training and legal support will enable access to resources, research, and economic development, which will benefit all.

It will also be important to provide continuing education and support to researchers who wish to work with indigenous groups and traditional knowledge.

Access to alternate dispute resolution services is also important, as protection and recognition of rights is just half of the issue – the more cumbersome and costly affair would be the enforcement of these rights, and support in this area will also be important.

The Australian Government could also have a role in identifying indigenous communities and their memberships, as important Government statistical and demographic information.

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

No further additions apart from what has already been proposed and commented upon.

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

No further additions apart from what has already been proposed.

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?*

- (a) No clear guidelines/legal positions on what are traditional cultural expressions and their role in society – who can use, what can be used, how it can be used.
- (b) Unclear positions on what is considered offensive/misleading.
- (c) Indigenous groups have a limited understanding of the effect of the intellectual property regime, limited access to the intellectual property regime, and lack the resources to engage with present IP/commercial systems.
- (d) Inconsistent responses from cultural organisations – both within nations (again, highlighted in the Borobi case) and between nations.

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

Proposal 8: Measures to prevent registration of offensive trademarks and designs

The discussions raised within these proposals are acknowledged, and clarity needs to be sought where it relates to trademarks and designs that relate to the traditional cultural expressions of indigenous communities, as ‘scandalous matter’ may not appropriately define the misappropriation of such trademarks and designs from the communities.

It is of course appropriate to consider the New Zealand experience, with its offensive provision in the TMA 2002. While it does address the registration of offensive trademarks, it of course does not apply holistically to all use of traditional cultural expressions. This is left to the general law, notably the Fair Trading Act 1986 (equivalent of Competition and Consumer Act 2010), which has yet to be applied to alleged culturally inappropriate use of traditional cultural expressions.

Also, there was concern when the TMA 2002 was introduced that the system would lead to inertia, with significant delays in examination of trademark applications that included Māori words or images, or wholesale rejection of marks that included Māori words or images. Those concerns have proved unfounded, but it is unknown what impact would result with similar legislation and procedures in Australia – both a more litigious country than New Zealand and where the cultural organizations representing different nations may be more disparate in approach and commerciality.

Proposal 9: Database of culturally significant words and images

Please see the discussion points in Proposal 5 above – we would apply the same comments and points for this database of culturally significant words and images. However, this database may be an easier resource to pull together and may function very well as a resource center to identify the source of words and images, especially for people who have yet to be aware that such words and images belong or are associated with a particular indigenous community.

Proposal 10: Requirement for consent

Please see the discussion points in Question 10 below.

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?*

While there could be other existing database and collections, it runs the risk of being selective and not comprehensive, and we may not know the objectives or the scale of such database and collections. The identification process may also be varied, depending on the nation. Also, by their nature, traditional cultural expressions will often not (yet, and maybe not at all) be defined and identified in a way that can be recorded in a database. Any database that is put together should always be assumed to be indicative rather than definitive.

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 trademarks and designs?*

While options and discussions have been made surrounding the recognition of traditional cultural expressions and relevant protection regimes for such expressions, there is a need to consider how the indigenous communities enforce their rights, as this aspect can be a burdensome and costly affair. Again, availability of pro bono legal advice is important.

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?*

An Indigenous Advisory Panel could play a role in the protection of indigenous knowledge, and this option should be explored further. Perhaps consultation with territories that employ such a panel (New Zealand being the closest example) would be useful in determining the benefits and also potential concerns of such a panel.

Taking New Zealand as an example, the role of the advisory committee is to advise the Commissioner whether the proposed use or registration of a trademark that contains a Maori sign (including text and imagery) is, or is likely to be, offensive to Māori. The committee must include a person that has Māori worldview, and knowledge of Māori protocol and culture.

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)?*

Taking New Zealand as an example, specific issues to consider require traditional knowledge of culture and protocol, and this varies from tribe to tribe (iwi), and takes in commercial interests that specific iwi may have negotiated in terms of treaty settlements between them and the Government of the day. Treaty settlements are still ongoing with iwi in New Zealand.

Databases of Māori words (dictionaries) and Māori geographical names are useful guides to assist the advisory committee, but in most cases, it comes down to the members' traditional knowledge, as well as a strong understanding of the Māori culture and protocols.

When the advisory committee reports back with a finding that a particular trademark application is likely to offend Māori, the Commissioner then notifies the applicant. It is possible for the applicant, or his agent, to approach the particular iwi to which the trademark is offensive, and to seek a resolution of the issue. This is not so much a commercial transaction, but looking at a way where the use or registration of a particular mark may be rendered inoffensive in terms of its use – it all comes down to consultation, which is important for the Māori iwi in question.

In most cases, a resolution is reached between the parties.

It has been observed over the past 12-18 months that more trademark applications comprising Māori text and imagery have been referred to the advisory committee, and there has been an

increase in trademark applications being rejected because of their “offensiveness” to Māori, due primarily to a change in personnel on the committee.

In applying such a formula to Australia, it would thus be appropriate to identify the landscape insofar as Australia is concerned (in view of the larger diversity of the indigenous people in Australia), and how such an Advisory Panel might be formed to appropriately encompass the requirements that may need to be fulfilled in Australia.

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

None insofar as the overall scope of the education and awareness activities.

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?*

Such activities should not be just a one-time affair, and needs to be carried out on a regular basis, and the content be developed to address the appropriate audience. Awareness campaigns for indigenous communities, businesses, research organizations and other stakeholders are primary.

Collaborations and partnerships with existing organizations that are championing particular topics and issues would also enable a farther reach of key education and awareness topics. As an example, INTA, with a strong focus on trademarks and related issues, constantly carries out a variety of educational programs, seminars and activities to provide education and awareness across all industries and audiences on such issues and is well placed to provide support in creating awareness across indigenous rights-related areas.

Conclusion

INTA is pleased to have the opportunity to provide its feedback on the Consultation Paper.

INTA would welcome any questions that your office may have and is available to discuss our recommendations in more detail. In this respect, please contact:

- Seth Hays, Chief Representative Officer, Asia Pacific Office [REDACTED]
- Tat-Tienne Louembe, Representative, Africa Middle East and Intergovernmental Organizations and Staff Liaison for INTA Indigenous Rights Committee [REDACTED]