



**Australian Copyright Council response to
Interim Report on scoping study for stand-alone legislation to protect and
commercialise Indigenous knowledge**

9 November 2022

The Australian Copyright Council acknowledges the Traditional Custodians of the lands on which our Redfern office is located, the Gadigal people of the Eora nation, and all Traditional Owners of Country throughout Australia. We pay our respects to all Elders past, present and emerging and recognise their continuing great, creative and cultural expressions.

The Australian Copyright Council (the ACC) is grateful for the opportunity to comment on the [Interim Report](#) published by IP Australia on the scoping study being conducted on potential elements of stand-alone legislation that would support Aboriginal and Torres Strait Islander peoples to protect and commercialise their Indigenous Knowledge (IK) (Interim Report).

About the Australian Copyright Council

1. The ACC is a small, independent, not-for-profit, non-government organisation dedicated to promoting understanding of copyright law and its application. Representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies, the ACC works to foster collaboration between content creators and consumers.
2. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, advice and information on copyright issues
 - it is a membership-based organisation, representing over a million creators.
3. The ACC has [26 affiliate member organisations](#)¹ representing over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers,

¹ See Appendix 1 of this submission.

producers, publishers, record labels and architects working in the Australian creative industries.

4. As part of its services, the ACC provides [information](#), [education](#), [training](#) and [free legal advice](#) to those who fall within its guidelines including the staff of libraries, galleries, museums and educational institutions.²

Background and context

5. As noted in the Interim Report, the scoping study is being undertaken alongside other government projects, including the Productivity Commission's examination of the nature and structure of the markets for Australia's First Nations peoples' arts and crafts.³
6. The ACC made a submission⁴ in response to the [Productivity Commission's Aboriginal and Torres Strait Islander Visual Arts and Crafts Draft Report](#) (Draft Report) and we reiterate the general comments set out in that submission on the application/operation of the existing copyright framework and its impacts on the issues raised in that Draft Report.
7. In addition to the ACC's submission to the Draft Report, this submission develops on the ACC's comments provided in response to the Commission's [Aboriginal and Torres Strait Islander Visual Arts and Crafts Issues Paper](#).⁵ It complements the ACC's submission to the 2019 Environment and Communications Legislation Committee's (the Committee) inquiry (Inquiry) into the [Competition and Consumer Amendment \(Prevention of Exploitation of Indigenous Cultural Expressions\) Bill 2019](#)⁶ which sought to amend the *Competition and Consumer Act 2010* (CCA) to 'prevent the proliferation of fake Aboriginal and Torres Strait Islander art and art products'⁷. The ACC's CEO, Eileen Camilleri, appeared before that Committee.⁸
8. The ACC's brief comments to the Interim Report, here, are limited to issues which relate to copyright only, that are raised by Parts A and B of the Interim Report.

Copyright and proposed IK protection

9. The definition of IK outlined in the Interim Report⁹ includes:
 - **Traditional Cultural Expressions** (TCEs) covering tangible and intangible forms of expression and communication including language, music, performance, songlines, stories, dance, symbols, designs, visual art, crafts and architecture. For copyright purposes, it is only those things which are tangible (expressed in material form), that may be protected.

² See Appendix 2 of this submission.

³ Interim Report p 11.

⁴ September 2022. [Post-draft submissions no 50](#).

⁵ December 2021. [Initial Submissions, Submission no 14](#).

⁶ 14 August 2019. [Submissions – Parliament of Australia \(aph.gov.au\) Submission no 10](#)

⁷ [Explanatory Memorandum, Competition and Consumer Amendment \(Prevention of Exploitation of Indigenous Cultural Expressions\) Bill 2019 \(Cth\) p 1](#).

⁸ See [Commonwealth Environment And Communications Legislation Committee, Senate, 6 November 2019 p 20](#).

⁹ Interim Report p 11.

- **Traditional Knowledge (TK)** covering knowledge resulting from intellectual activity in a traditional cultural context and includes know-how, practices, skills and innovations including environmental management knowledge, cultural and spiritual knowledge and practices, and agricultural, scientific, technical, ecological, medicinal and biodiversity-related knowledge. Again, if these items are not reduced to ‘material form,’ there is no copyright protection.
 - knowledge about **genetic resources** including biological material, including plants, fungi and animals. These items may be protected by other existing intellectual property laws for example, the *Plant Breeder's Rights Act 1994* (Cth).
10. It is not clear how the definition of IK will sit with those definitions outlined in the Productivity Commission’s Draft Report¹⁰ (and the existing copyright framework) which include:
- **Cultural asset:** the underlying cultural idea or concept that embodies Aboriginal and Torres Strait Islander traditions. Unless they are embodied in a ‘material form’, these ideas (cultural assets) are not protected by copyright.
 - **Traditional owner:** the person, group or community who has ownership and custodianship of the cultural asset. Under copyright, this person (or group of people – as joint ‘authors’), have no standing unless they are involved in creating the **cultural expression** (or the cultural asset, if the asset is in material form).
 - **Use giving rise to a cultural expression:** the act of giving expression to a cultural asset — in this context, the incorporation of a cultural asset in art, craft or other works. The resulting cultural expression would be protected by copyright, provided the requirements for copyright protection are satisfied¹¹, namely that:
 - the creator of the work was a ‘qualified person’ i.e. an Australian citizen or an Australian resident
 - the work is original (not copied from another), and
 - the work is expressed in material form.
 - **User:** a person, whether or not the traditional owner, who uses a cultural asset to produce an Indigenous style expression. Under copyright law, unless the user is dealing with a cultural asset that is embodied in cultural expression (or otherwise in material form), they are free to make use of the cultural asset e.g. tell their version of a story or create their visual interpretation of a clan’s dreaming.

¹⁰ Draft Report p 230.

¹¹ Copyright Act section 32(4).

ACC response to Part A: Challenges for Indigenous Knowledge Protection

PART A Consultation Question

What other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK?

11. The overarching issues that any proposed *suis generis* legislation seeking to protect IK, must consider include:
- the issues arising from a ‘Western’ legal framework being used to protect rights and obligations that exist within the social structures and mores of Aboriginal and Torres Strait Islander communities. For example, is it indeed appropriate to delineate between moral rights and economic rights within an IK framework?
 - the definition of IK and the scope of the *suis generis* legislation. This issue involves both the broader policy considerations (what is to be the subject of protection) and the interaction of state and federal legislation (see points below).
 - depending on the scope of the proposed *suis generis* legislation, how to address the specific considerations that arise in practice when dealing with different TCEs e.g how visual arts are created and shared compared with how music may be created, performed and communicated.
 - Australia’s federal system of government coexisting with any state and territory legislation¹² seeking to protect IK/cultural heritage and how any such legislation is to continue to operate with any new *suis generis* legislation, at a federal level. For example, the *Aboriginal Heritage Act 2006* (Vic) seeks to protect Aboriginal cultural heritage¹³ in the state of Victoria. In 2016, that legislation was amended to allow for the protection of ‘Aboriginal intangible heritage’, which is defined under that Act to mean ‘any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public’.¹⁴

¹² The website of the Department of Climate Change, Energy, the Environment and Water includes a [list of Indigenous heritage legislation](#) in Australia’s states and territories.

¹³ Under section 4 of the *Aboriginal Heritage Act 2006* (Vic), Aboriginal cultural heritage means Aboriginal places, Aboriginal objects and Aboriginal ancestral remains.

¹⁴ *Aboriginal Heritage Act 2006* (Vic), section 79B.

ACC response to Part B: Models for sui generis Legislation

PART B Consultation Questions

- 1. Should each of these four elements should be part of a stand-alone legislation model for the protection of IK? Why or why not?**
- 2. Is there anything missing from any of these elements?**

12. Part B's models for sui generis legislation, set out in the Interim Report include the following 4 elements:
 - (i) creation of a new IK right, including moral rights
 - (ii) implementation of measures to 'deter trade in inauthentic product'
 - (iii) establishment of a National Indigenous Knowledge Authority, and
 - (iv) development and implementation of measures to support Indigenous business.
13. We comment only on element (i) creation of a new IK right, and element (iii) the establishment of a National Indigenous Knowledge Authority, to the extent that they touch on copyright issues.
14. As outlined in previous ACC submissions¹⁵, the ACC supports the development of an IK regime in Australia that recognises, respects, and protects IK to address any limitations of the protection afforded by the existing intellectual property framework. In relation to copyright, the ACC supports an IK regime that:
 - recognises and protects collective/communal ownership. This may include the creation of a new intellectual property right which:
 - recognises collective/communal rights in TCEs and TK – that may correspond to the definition of 'Traditional owner' described in the Productivity Commission's Draft Report¹⁶
 - does not have the copyright requirement of originality or novelty, or
 - does not have a set term for protection, as does copyright.
 - respects the traditional or customary laws of a First Nations community as to who has permission to express and share that community's history, traditions, stories and culture
 - limits any exceptions to infringement to ensure that they do not interfere with First Nations peoples' ability to practise their own cultural practices
 - establishes appropriate forums for the resolution of disputes without the necessity of litigation – this may include disputes between or within communities as to the custodians and owners of the IK or who is authorised to grant permission for the use of that IK, and

¹⁵ September 2022. [Post-draft submissions no 50](#).

December 2021. [Initial Submissions, Submission no 14](#).

14 August 2019. [Submissions – Parliament of Australia \(aph.gov.au\), Submission no 10](#).

¹⁶ See paragraph 10 of this paper.

- provides remedies for infringement (including cultural harm) which are meaningful to First Nations communities.¹⁷
15. As it is proposed that any new IK right will not have a set time for protection (as does copyright), the ACC is concerned (as noted in its submission to the Draft Report¹⁸), that any unintended consequences of the intersection of a cultural rights regime and copyright laws be addressed. A TCE that is a tangible form of expression (e.g. a painting), will likely also satisfy the requirements of copyright and therefore be protected by copyright. Where that artwork includes a symbol or is an expression of a songline that is protected by the new IK right, there will need to be some way of ensuring that the protection afforded by the new IK right (as it applies to the artwork) continues after the expiration of the copyright duration period.
16. Under the copyright framework, there is a distinction between the economic rights of a copyright owner and the moral rights (i.e. reputational rights) of the creator/s. It is not clear whether such a delineation is culturally appropriate nor how the inclusion of moral rights as part of an IK right would sit with the existing moral rights under the Copyright Act.¹⁹ Would the IK moral rights override the existing moral rights, resulting in perpetual moral rights in line with the IK requirement that there be no set time limit for protection?
17. While the ACC cannot comment on all aspects of the proposed National Indigenous Knowledge Authority, the ACC does support the establishment of:
- processes to help third parties to identify and secure the consent of Traditional Owners for the use of their IK ensuring proper attribution/acknowledgement in the terms required by the Traditional Owners²⁰
 - a body with responsibility for distributing any licence fees collected from third-party users to the Traditional Owners less a small commission applied towards its cost of operations. This has parallels in Australia's copyright framework, where collecting societies have an important role in facilitating access to the work of creators while also ensuring that creators receive fair remuneration for the use of their work.

Conclusion

18. The ACC welcomes the scoping study on stand-alone legislation to protect and commercialise Indigenous knowledge. We look forward to reading the Final Report. If IP Australia requires further copyright information in the interim, please let us know.

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Australian Copyright Council

9 November 2022

¹⁷ We have seen the National Aboriginal and Torres Strait Islander Music Office's (NATSIMO) submission and support their view on this issue at paragraph 30.

¹⁸ September 2022. [Post-draft submissions no 50](#), paragraph 38

¹⁹ See Copyright Act Part IX.

²⁰ See NATSIMO's submission at paragraph 23.

Appendix 1

Australian Copyright Council Affiliates

as at 9 November 2022

The Australian Copyright Council's views on issues of policy and law are independent, however we seek comment from the organisations affiliated to the ACC when developing policy positions and making submissions to government. As at the date of this response, the Australian Copyright Council affiliates are:

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Guild of Screen Composers](#)
8. [Australian Institute of Architects](#)
9. [Australian Music Centre](#)
10. [Australian Publishers Association](#)
11. [Australian Recording Industry Association](#)
12. [Australian Screen Directors Authorship Collecting Society Limited](#)
13. [Australian Society of Authors](#)
14. [Australian Writers Guild Authorship Collecting Society \(AWGACS\)](#)
15. [Big Studio Movie Licence](#)
16. [Copyright Agency](#)
17. [Design Institute of Australia](#)
18. [Illustrators Australia](#)
19. [Image Makers Association Australia](#)
20. [Media Entertainment & Arts Alliance](#)
21. [Musicians Union of Australia](#)
22. [National Association for the Visual Arts](#)
23. [National Tertiary Education Union](#)
24. [Phonographic Performance Company of Australia](#)
25. [Screen Producers Australia](#)
26. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free legal advice service. This community legal service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below, are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.