International Trademark Association

Comments on the Interim Report: Scoping Study on stand-alone legislation to protect and commercialize Indigenous Knowledge

November 2, 2022

The International Trademark Association (INTA) would like to thank the Government of Australia for the oppotunity to provide input to the *Interim Report: Scoping Study on stand-alone legislation to protect and commercialize Indigenous Knowledge.*

INTA is a global association of brand owners and professionals dedicated to supporting trademarks and complementary intellectual property (IP) to foster consumer trust, economic growth, and innovation, and committed to building a better society through brands. Members include nearly 6,500 organizations, representing more than 34,350 individuals (trademark owners, professionals, and academics) from 185 countries, who benefit from the Association's global trademark resources, policy development, education and training, and international network.

INTA has for several years has been engaged in the intersection between trademark rights and Indigenous Rights and in 2015 established its Indigenous Rights Committee. INTA has participated in consultations with countries such as South Africa, Ethiopia and other jurisditions around the world. The Association also participates in the efforts of the World Intellectual Property Organization (WIPO) which has devoted considerable resources to the issue pursuant to the UN Declaration on Rights of Indigenous Peoples (UNDRIP) which recognized that these rights included the right to intellectual property. Moreover, INTA actively participates in the work of the IGC and has provided resource persons to WIPO's capacity building programs related to traditional knowledge (TK) and traditional cultural expressions (TCEs), such as practical training workshops for indigenous peoples and local communities (IPLCs) around the world.

The Association posits that it is possible to offer protection against inappropriate use of words, symbols, sounds and smells through the trademark law by including a prohibition against registration of a mark if it would be contrary to public policy or accepted principles of morality.

INTA suggests that the following measures be taken into consideration:

PART A

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

    - Public domain rights – some of the IK may unfortunately have already fallen into public domain, hence the notion of putting limitations on such IK and the potential of "taking back" the knowledge from the public domain into the control of Traditional Owners may create issues, for example third parties that have been using the knowledge in good faith, or that is used in publications, the media, etc. It would be appropriate to navigate such issues, and to define what "public domain" is, in relation to IK.

- Confidentiality – to understand and determine the appropriate definitions, both inside and outside the Traditional Owner communities. The way the knowledge is made available to outsiders in many cases is under the understanding that such knowledge is to be kept as part of the community but not outside of it.

- If stand-alone legislation is contemplated, there is a need to address third parties that have registered and protected IK through the current IP regime, for example, in collaboration with the Traditional Owner communities. How will these be addressed?

- If IK was lost, or the link to the Traditional Owner communities has weakened over time due to commercialization (i.e. it is thought to be free-for-use), could it not be considered IK anymore, and in which case, the communities would not benefit from it?

PART B

1. Should each of these four elements be part of a stand-alone legislation model for the protection of IK? Why or why not?
   Yes, the four elements, working in its separate and in combination as a single legislation model, is a useful launch point for the introduction of such a model. The division, according to elements, facilitates better understanding of such a model, and presents individual objectives that addresses the perspectives of both the Traditional Owner communities, as well as prospective "users" of the IK.

   - Element 1: Grants protection to the community as a whole and recognizes it as a collective right. However, it is important that this is viewed in tandem with the current IP regimes and legislations, as there is a potential for overlaps between the two systems. In recent times, communities have utilized collective trademark, trademark and design systems to garner some form of formal protection over their IK and have some ability to formally own IP assets, and potentially enforce it.

   - Element 2: This is a welcome effort and element, though the reality might be that such labellings/markings may also be copied by the inauthentic product manufacturers, which in turn, will still affect the communities. Nonetheless, such an initiative and effort still present itself as a simple yet effective method to create awareness of authentic products and the importance of supporting the communities, and deterring people from purchasing inauthentic products that are not benefitting the Traditional Owner communities. It might be better to focus on what is authentic and educating people about what is authentic.

   - Element 3: Where possible, it is important to have a central authority that can be a source of truth, and that will provide help to the communities, especially in areas where the communities may not have sufficient experience (formulating agreements, collecting fees etc).

   - Element 4: It is crucial to build and develop the capacity of the communities, because upon gaining experience, these communities can have the full independence of managing IK and its related issues on their own, thus allowing them to have control over their IK. This, in turn, will ease the workload of the authority.

2. Is there anything missing from any of these elements?
   - In relation to Element 1, it would be important to add any person who attempts to access the IK of the communities, should mutually agree on the conditions of the access, which would mirror what has been outlined and established in the Nagoya Protocol. A prescriptive approach, such as that adopted in the Pacific Model Laws, could be useful as it shifts the

burden to the entity using the IK be requiring them to apply for the use of IK and obtain free, prior and informed consent and/or enter into an authorized user agreement.

- The elements are focused on local legislation and protection and does not address any international protection (such as collective trademarks and designs, that can be extended internationally) – it would be important to review the intersection between the current IP regime and potential new stand-alone legislation to find the balance point in both local and international protection. How would the proposed legislative scheme interact with the existing IP and Australian consumer law legislation?

- There are possibilities that the IK is owned by more than one indigenous community. In such situations, how would benefits be shared, and who would have control?

- It is interesting to note that the IK rights omit genetic resources, and it refers to the Nagoya Protocol, for which Australia has yet to ratify. Where possible, it would be useful to review and coordinate the potential stand-alone IK legislation in tandem with observations on issues relating to genetic resources, and thus encapsulate the full ambit of indigenous knowledge and culture, given their interaction and interdependence.

- It may help if the scheme included a suite of offences with civil and criminal penalties, depending on the severity of the action and the damage caused. For instance – civil penalties could be issued for unauthorized and misleading use of cultural material whereas criminal sanctions could be issued for more serious breaches involving destruction of indigenous sacred material.

- Should a lengthy statute of limitations be provided to allow Aboriginal Communities adequate time to identify any breaches and seek remedy?

- In relation to Element 3, could it potentially include alternative dispute resolution forums and mechanisms for more flexible, cheaper and quicker dispute resolutions?

PART C

1. Which element (1 to 4) and combination of elements would deliver most benefit to you?
We believe this question is targeted to the Aboriginal and Torres Strait Islander peoples. From an external viewpoint, it is our view that the combinations of 1+3+4 would deliver the most immediate benefits to the peoples, whilst Element 2 will require some lead time to develop and grow into something that will deliver benefits, but only if sufficient awareness is carried out at momentum. It is important to note that IK has cultural, social and economic value, which can be difficult to quantify. It is therefore imperative that the relevant stakeholders are engaged in the process to properly capture and ascertain the benefits and values of these elements.

2. What broader benefits, costs or risks would stand-alone legislation like this deliver to Aboriginal and Torres Strait Islander peoples?

- In relation to Element 2, there is a particular risk in allowing inauthentic products to still be sold, but with clear indications that they are inauthentic – this raises the issue on how such labeling will be enforced. This also ties in to the discussion in the paper where there are mixed opinion on the labeling schemes, and thus, the current suggestion of it being on a voluntary and optional basis. There would need to be continued awareness on why the labelling is important, and how it can result in benefits. The mechanism that is set to be adopted will need to be able to distinguish the authentic and inauthentic products, and the test for Aboriginality

can be complex and not very straightforward. Further, if the communities do not want to go through the labelling and authentication process, how does this affect their ability to sell their products, and, if they intend to export it, are there further regulations that are in place where Customs may inadvertently declare their products as inauthentic?

- In relation to Element 3, there will always be the risk of trust between the communities and authorities, and particularly where it relates to the negotiation of agreements and such, especially where there is a lack of knowledge and experience. There will need to be a lot of building of trust between the relevant parties and open communication channels to ensure that there is no risk where some might feel taken advantage of.

- Furthermore, there is a general lack of trust by communities for current systems of protection for traditional knowledge – one of the key issues being the disclosure of secret information for compilation in a database. Without clarity on how such databases operate and are accessed, and the appropriate legislation governing this, it will always remain an ongoing issue.

- Programs and policies must be put in place to gain the trust of the Traditional Owner communities – without trust, they will not use the law. In addition, raising awareness within these communities about IK, the intellectual property system and any proposed law which is set to protect their IK, is crucial.

- In line with Elements 3 & 4, Traditional Owner communities will require access to any new system that allows them to protect their IK and enforce their rights – this will require assistance in the form of educational, legal, financial and other such support.

- It is important to note that indigenous legal systems existed prior to the introduction of the current legal systems – these must also be taken into consideration when formulating any new laws for the protection of IK.

INTA thanks the Government of Australia for its consideration on this submission and remains available to discuss these recommendations in further detail. We welcome the opportunity to provide further comments to support this important topic as it develops. Please contact Seth Hays, Chief Representative Officer, Asia-Pacific and China at shays@inta.org