



EMPOWERING FIRST NATIONS

Australia's Move to Protect Indigenous Cultural and Intellectual Property

This article highlights the shortcomings of Australia's current IP frameworks in protecting Indigenous cultural and intellectual property and explores the long-overdue solutions proposed by the newly announced First Nations-led working group.

It has long been acknowledged that current intellectual property systems are not sufficiently adapted to protect indigenous cultural and intellectual property (ICIP).

ICIP includes a broad range of practices, expressions, and knowledge systems, including dance, languages, designs, and art as well as traditional medicines, foods, and biological/ecological knowledge.

The Australian Government, in January 2023, announced a commitment to develop new laws to help protect ICIP. A critical factor in ensuring any new legislation is fit for purpose is to ensure that its development is First Nations-led. In view of this, the Aboriginal and Torres Strait Islander Expert Working Group on Indigenous Cultural and Intellectual Property was announced in December 2024. The working group, comprised of eight first nations experts and cultural leaders will inform the development of the legislation.

WHY ISN'T THE EXISTING INTELLECTUAL PROPERTY FRAMEWORK SUFFICIENT TO PROTECT ICIP?

Existing intellectual property rights (such as patents, copyright, trade marks and designs) can be used to protect some forms of ICIP, but often fall short for a range of reasons, including:

- ICIP is not usually “owned” by any single person or entity, but are held by groups of people who are the custodians of such knowledge whereas existing intellectual property rights usually require the identification of specific owners;
- there are customary laws around the appropriate use and dissemination of such knowledge, which is not usually recognised in existing intellectual property rights;
- the knowledge may have been publicly known and used for thousands of years, meaning that it is not sufficiently “novel” to qualify for protection such as patent rights; and
- the duration of rights for existing intellectual property regimes are not consistent with timeframes for ICIP which have been and will continue to be practiced for thousands of years.

WHAT ARE THE PROPOSED NEW LAWS?

A range of different proposals to protect ICIP around the world have been raised over the years, which can generally be grouped into two types – positive protection and negative protection:

- **Positive protection** seeks to use existing intellectual property mechanisms and new types of rights to protect the content of ICIP themselves.
- **Negative protection** seeks to prevent outside users of ICIP from misappropriation of such information and knowledge.

The new laws under development are proposed to address both positive and negative protection. In particular, the negative protective mechanisms will focus on the significant issue of fake and misappropriated indigenous souvenirs and merchandise sold in Australia, with up to half of such items currently estimated to have not been made by aboriginal or Torres Strait Islander artists. The second stage will relate to broader positive protection for ICIP more generally.

However, the initiative is at an early stage, and there is no proposed legislation for consideration yet. Given the complexities in this area of law, the development of a cohesive set of new provisions will take time, as has been observed around the world. The World Intellectual Property Organisation (WIPO), for example, approved a historic new treaty on intellectual property, genetic resources and associated traditional knowledge after almost 25 years of negotiations in May 2024. Further negotiations remain ongoing in relation to the development of legal instruments to protect traditional cultural expressions. Nevertheless, the establishment of the working group is a small first step in the development of long-overdue laws to protect ICIP in Australia.

FOR FURTHER INFORMATION

For further information about the protection of Indigenous Cultural and Intellectual Property; please contact the author of this article Bindhu.Holavanahalli@wrays.com.au. Another recent article on a similar topic can be viewed [here](#)

[New WIPO Treaty](#)



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