

# Indigenous Intellectual Property

Intellectual property laws provide legal protection for different manifestations of creativity, including books, films, art, technological products and processes, and designs. Intellectual property laws allow a person to own the products of his/her creativity and innovation, to control the uses of these products by others, and to be rewarded for third party use.

Indigenous intellectual and cultural property may cover many types of works, including:

- Art works;
- Written works;
- Stories (oral and written);
- Music;
- Performances such as dances and ceremonies;
- Languages;
- Sacred sites and burial grounds;
- Traditional and biological knowledge; and
- Documented forms of Indigenous heritage such as photographs, films, reports, sound recordings and databases.

## How is Indigenous intellectual property protected?

In Australia, Indigenous intellectual property is protected under the same laws as non-Indigenous intellectual property. This means that protection is available if individuals meet the criteria for protection under copyright, patent, trade mark, and design statutes, in addition to other relevant intellectual property laws. It has been widely recognised that the usefulness of these conventional systems of intellectual property to protect the interests of Indigenous creators and communities is limited.

## Problems with protection

The most problematic issue with applying the concept of intellectual property to Indigenous works is that legal systems that rely on notions of private ownership may be incompatible with Indigenous peoples' understandings related to the access and circulation of knowledge, connection to Country, communal responsibility, guardianship, and custodianship.

In addition, the appropriation or 'taking' of Indigenous styles, themes, images, knowledge, and biological materials has been a widespread and serious problem for Indigenous communities. This issue has arisen in relation to all conventional forms of intellectual property, implicating arts and cultural expressions, Indigenous languages, unauthorised uses of secret or sacred materials, Indigenous medicinal and nutritional knowledge, cultural objects, ancestral remains, human genetic material, and documentation of Culture on film, tape, or in databases.

## Laws that apply to Indigenous intellectual property

### Copyright

Copyright law is a bundle of rights that covers the *expression* of ideas but not the ideas themselves. The law protects the rights of creators for their art works, music, writing, some types of performances, and film and sound recordings. Copyright protection also covers the moral rights of an individual creator. Moral rights ensure that proper attribution,

acknowledgement, and integrity is afforded to third party uses of a protected work. Indigenous creators have been able to use copyright laws to prevent the copying of their art works to create souvenirs and other items without the creators' consent.

*Limitations:* To obtain copyright protection, a work must be original, reduced to some permanent form, and have an identifiable author. These requirements are often incompatible with Indigenous understanding of cultural productions. This is because works often follow a pre-existing theme such as a community design, and therefore it may be difficult to establish originality. However, in many instances the artistic interpretation of designs will be sufficiently original to obtain copyright.

Another limitation is that body painting, rock art, oral stories, etc. cannot be protected with copyright, because they are not fixed in the required form (in contrast to a painting on canvas or a story in a book). Furthermore, to obtain copyright there must be an identifiable author of a given work, so older creations with unknown authors are not protected. Finally, Australian law does not recognise customary laws relating to a community's interests in cultural material. Therefore, once copyright for a protected work expires (after the duration of the creator's life plus 70 years), anyone may freely use the material.

Specific examples of problems with copyright as a form of protection for Indigenous intellectual property in Australia have arisen in relation to photographs, reports, sound recordings, and films containing Indigenous cultural material. This is because in some instances the law has granted protection for these works to the non-Indigenous creators of the material and not to the Indigenous individuals or communities who feature in the materials.

### **Patents**

A patent is a set of exclusive rights granted for an invention, which may be a device, substance, method, or process that is new and useful. Patents provide owners with the right to exclude others from making, using, or selling the invention for 20 years.

*Limitations:* The economic value of Indigenous biological knowledge and resources is substantial, and commercial firms and research organisations alike have benefited from the use of such knowledge and resources at the expense of Indigenous communities. This is because in all Australian jurisdictions except for the Northern Territory, the law that regulates biodiscovery activities does not grant any protections to Indigenous communities to control access to or utilisation of the genetic resources or associated knowledge that may be obtained from their land. This means that Indigenous people may not benefit from downstream scientific or commercial utilisation of their knowledge or resources.

A related issue is that it is often difficult for Indigenous people to meet the requirements of patentability for the products of their knowledge. This contrasts with the many instances in which Non-Indigenous parties have obtained patents for inventions that incorporate Indigenous knowledge, which have been converted into commercially successful products.

### **Trade marks**

Trade marks are signs used to distinguish one trader's goods or services from those of another business. The sign may include a logo, word, slogan, or symbol. Trade mark protection can last forever if it is maintained, meaning that trade mark registrations must be renewed every 10 years. It is possible to register a trade mark in the name of a group who jointly use the mark. Therefore, an Indigenous community organisation could collectively register a trade mark, such as a clan symbol or design.

*Limitations:* Trade mark registration can be expensive. Another issue with trade marks is that Non-Indigenous individuals and companies have registered Indigenous symbols and names as trade marks. There is no direct legal protection to prevent this practice.

### **Designs**

In intellectual property law, a design refers to the features of a shape, configuration, pattern, or ornamentation that give a product a unique appearance. Designs apply to commercial products, and they must be new and distinctive to receive protection.

*Limitations:* Australian intellectual property law does not provide special protection for Indigenous designs or cultural material. A cultural motif can be a design, but it may only be registered if it is used on a finished product.

Therefore, if not applied to a commercial product, motifs such as community insignia

cannot be protected as designs. The period of protection lasts for 10 years, and after that time, the design becomes free for anyone to use. For this reason and because there is no recognition of community ownership, designs law probably does not constitute an appropriate form of protection for Indigenous intellectual property.

*Fact Sheet 10: Indigenous Intellectual Property September 2022*

*This fact sheet is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.*