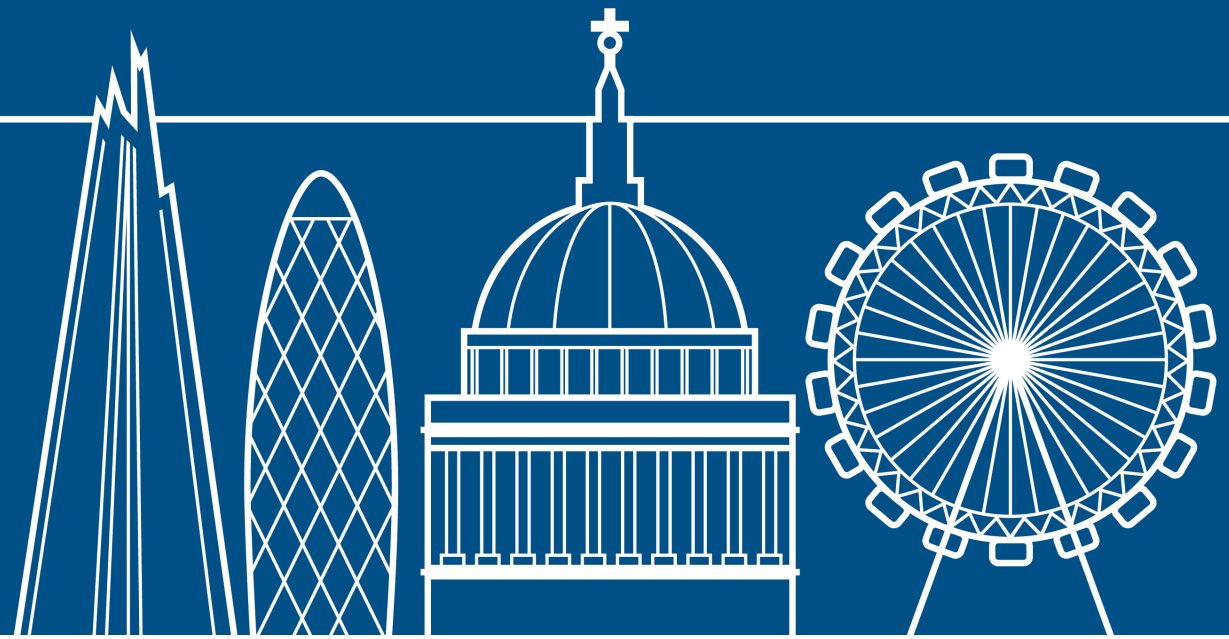




FICPI ExCo & 21st Open Forum

London, 1-7 October 2023



PLENARY SESSION 1

Intellectual property (IP), traditional knowledge (TK), traditional cultural expressions (TCEs), and genetic resources (GRs) - How to deal with and balance their interoperability?

STRENGTHENING THE PRACTICE OF THE INDEPENDENT IP ATTORNEY

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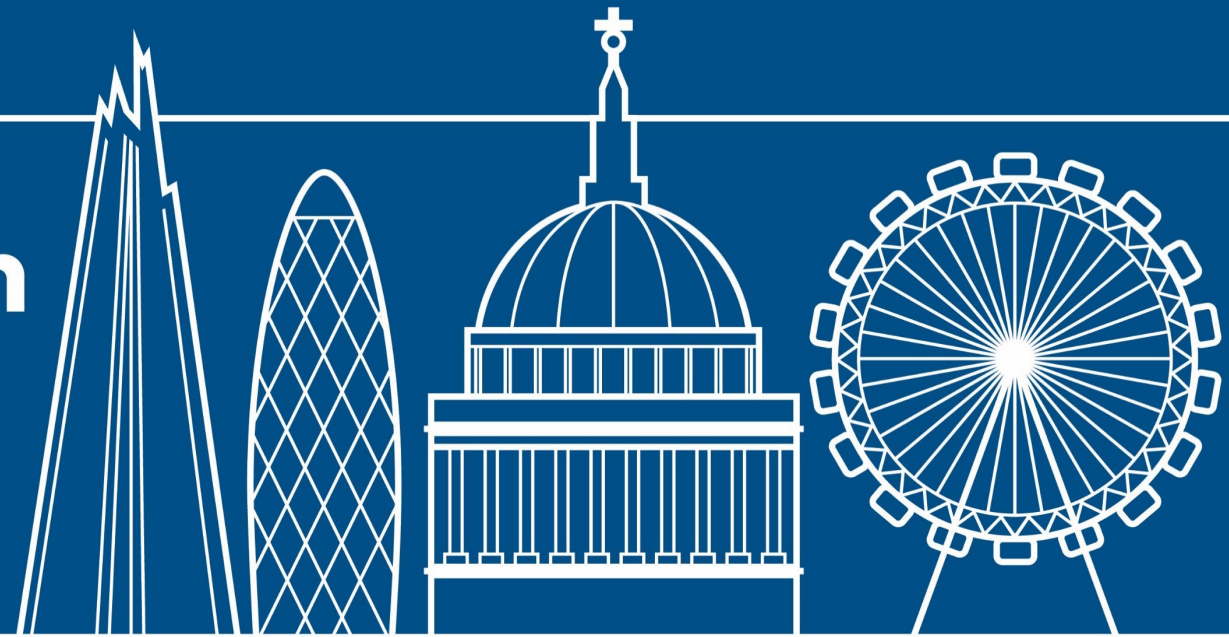
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21st Open Forum

London

4-7 October 2023



Introduction

Moderator: **Swarup Kumar**

Managing Partner, Kumar & Sardana Associates (KSA)

India



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Swarup Kumar



Marion Heathcote



Edward Kwakwa



Shoshanna Paul

KSA

KUMAR & SARDANA ASSOCIATES

IP Attorneys
& Advocates

**Swarup Kumar, Deputy Secretary General, FICPI
Managing Partner, Kumar & Sardana Associates (KSA)**

*Intellectual property (IP), traditional knowledge (TK), traditional cultural expressions (TCEs),
and genetic resources (GRs) - How to deal with and balance their interoperability?*

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Interface between IP and TK, TCEs, and GRs:



WIPO and International Jurisdictions

- **WIPO's Role**

- Plays a central role in facilitating international cooperation on IP matters.
- Initiatives like the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC),
- Setting global norms, fostering dialogue among member states, and providing technical assistance to countries in protecting their traditional knowledge and cultural expressions.

- **International Jurisdictions**

- Different countries and regions have varied approaches to protecting TK, TCEs, and GRs.
- some countries have enacted specific legislation, while others rely on a combination of existing IP laws, contractual agreements, or sui generis systems.
- Analyzing these approaches helps in understanding the diversity of global practices and identifying effective strategies.



Role of IP Principles and Systems

- **Misappropriation Prevention**

- Preventing the misappropriation of TK and TCEs requires a combination of legal tools, disclosure mechanisms, and awareness-building.
- IP principles, like prior art searches and patent examination processes, need to incorporate TK and TCE databases as sources of information.
- Stricter scrutiny and disclosure requirements can help ensure that patents are not granted for existing knowledge.

- **Equitable Benefit Sharing**

- IP systems should be designed to facilitate equitable benefit sharing from the commercialization of TK and TCEs.
- Creating legal frameworks for benefit-sharing agreements, revenue-sharing mechanisms, or partnerships between indigenous communities and commercial entities.
- Ensuring that benefits flow back to the communities that hold these assets is essential.



Role of IP Principles and Systems

- **GR Access and Benefit Sharing**

- The Nagoya Protocol provides a global framework for access to genetic resources and the fair and equitable sharing of benefits.
- IP principles should align with the Nagoya Protocol to ensure that bioprospecting activities respect the rights of provider countries and communities.
- This includes proper documentation and benefit-sharing agreements.



Ethical Concerns

- **Cultural Communities and Economic Advantage**

- When cultural communities wish to benefit economically from their TCEs, ethical considerations include informed consent, fair compensation, and ensuring that the cultural integrity of the expressions is preserved.
- Contracts and agreements should be drafted to respect these principles.

- **Folklore Protection**

- Protecting folklore involves striking a balance between recognizing cultural heritage and allowing for creative adaptation and evolution.
- Ethical concerns include ensuring that adaptations respect the traditions and modes of life of the communities involved.
- IP laws, particularly copyright, should consider cultural sensitivity when dealing with folklore.



Defensive Vs Affirmative Protection

- **Defensive Protection:**

- Defensive protection mechanisms like TK databases are vital for establishing prior art, especially in patent challenges.
- Improving the availability, searchability, and exchangeability of TK as prior art requires international collaboration.
- Standardized formats and interoperability are essential to enhance their effectiveness.

- **Affirmative Protection:**

- Affirmative protection may involve leveraging existing IP rights such as patents, copyrights, or trademarks.
- It could also entail creating sui generis systems tailored to specific categories of TK and TCEs. The choice depends on the specific assets and the goals of the communities involved.
- International cooperation can help in sharing best practices and developing sui generis systems.



Indian Perspective

- **Steps taken and way ahead:**

- India has taken several steps to protect its traditional knowledge, such as creating the Traditional Knowledge Digital Library (TKDL).
- TKDL is a database of traditional medical knowledge, which makes it challenging for others to claim patents on it.
- India has also ratified the Nagoya Protocol, emphasizing access and benefit-sharing concerning GRs.
- Examining India's experiences can provide insights into how a culturally rich country endeavours to navigate these issues.



Role of TK Database

- **Evidence in Patent Challenges:**

- TK databases like TKDL in India are indispensable as evidence in patent challenges. They
- They serve to establish that certain knowledge or expressions existed prior to a patent application, thus preventing the grant of improper patents.
- International collaboration is essential to develop and maintain such databases, ensuring their accuracy and accessibility for patent examiners worldwide.

- **Safeguards:**

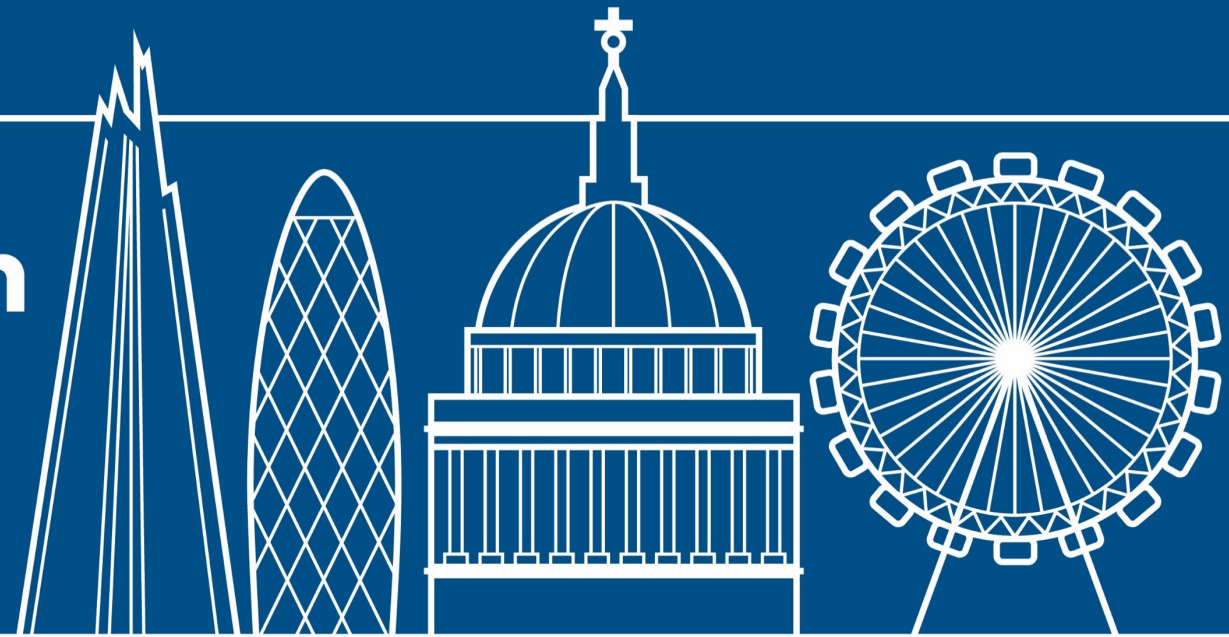
- Safeguards for TK databases include ensuring data accuracy, preventing misuse, and respecting traditional knowledge holders' rights.
- International standards and guidelines can be established to maintain the integrity of these databases. Regular audits, data security measures, and community involvement are crucial components of these safeguards.



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Interface between IP and TK, TCEs, and GRs: WIPO

Edward Kwakwa

Assistant Director General, Global Challenges & Partnerships Sector

World Intellectual Property Organization

Switzerland



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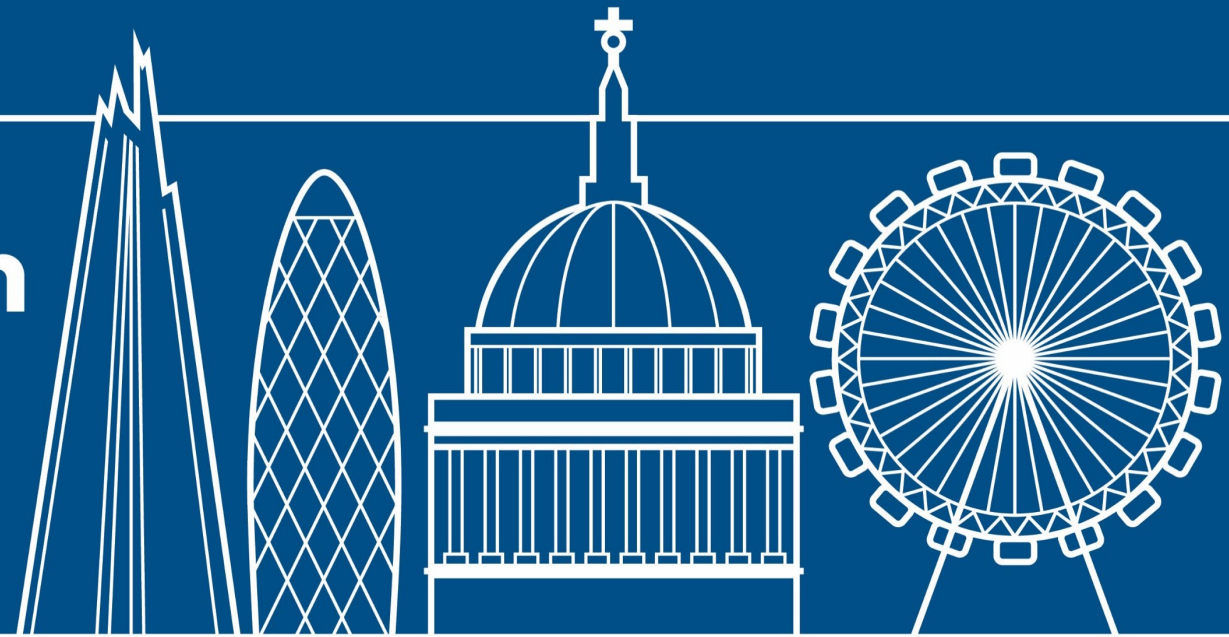
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Balancing the Interface between Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions – The Canadian Perspective

Shoshanna Paul

Lawyer, Thompson Dorfman Sweatman LLP

Canada



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Balancing the Interface between Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions – A Canadian Perspective

Shoshanna Paul, Thompson Dorfman Sweatman LLP

Traditional Knowledge and Traditional Cultural Expressions

- WIPO defines TCEs as follows: “also called ‘expressions of folklore’, may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.  
- TCEs “form part of the identity and heritage of a traditional or indigenous community” and are passed down from generation to generation (WIPO). 
- TCEs overlap with TK in that both are passed down from generation to generation and form part of a community’s identity. However, TK refers to the “skills, innovations and practices developed by indigenous peoples and local communities” (WIPO).
- TK and TCEs form part of a larger Indigenous knowledge system that is holistically integrated. In contrast, “western societies tend to have stark differentiation (for example, art, science, religion, law and politics and different systems), indigenous communities tend not to and different systems are closely interrelated” (Lai, p. 60).
- The Royal Commission on Aboriginal Peoples characterized Indigenous knowledge “as a cumulative body of knowledge and beliefs, handed down through generations by cultural transmissions, about the relationship of the living beings (including humans) with one another and their environment (RCAP, 1996b, 4:454).

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions, as well as the manifestations of their sciences, technologies and cultures...They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions

United Nations Declaration on the Rights of Indigenous Peoples, G.A Res. 61/295 (Oct 2, 2007), Article 31 (1).

Self determination

- A key principle of the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) is the principle of self determination, which is affirmed in article 3 and therefore underpins article 31.
- Self determination is a foundational right, from which other rights flow, including the right to free, prior and informed consent (Brenda Gunn).
- The principle of self determination is a right that may be exercised differently among different Indigenous peoples around the world, based on their own needs and aspirations (Brenda Gunn).
- The preamble of UNDRIP provides: “the situation of Indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural background should be taken into consideration.”

Self determination, visual arts and intellectual property (Canada)

- The principle of self determination in Canada has gained renewed attention through the Truth and Reconciliation Commission of Canada's Final Report and Calls to Action (2015), which called on all levels of government and all sectors in society to use UNDRIP as a framework for reconciliation.
- In 2015, the Canadian Museum Association was named in the TRC's Call to Action #67 to deliver a report and recommendations as part of a national review of museum policies and their relationship to UNDRIP, and in response in 2022 they released their response in *Moved to Action: Activating UNDRIP in Canadian Museums*.
- In 2021, the Canadian Artists Representation/Le Front des artistes Canadiens (CARFAC) released *Indigenous Protocols dot Arts: Indigenous Protocols for the Visual Arts*.
- In 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c 14, which is framework legislation to adopt and implement UNDRIP.
- In 2023, Canada released its action plan, which was completed in consultation and cooperation with Indigenous peoples (First Nation, Métis and Inuit). Canada committed to working in consultation and cooperating with Indigenous peoples of Canada to ensure that Canada's intellectual property legislative and regulatory frameworks (eg., *Copyright Act*, *Trademarks Act* and *Patent Act*) are consistent with UNDRIP (see priority 101, Chapter 1: Shared Priorities).

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

Constitution Act, 1982 (pt. II, s. 35(1))

Aboriginal Rights in Canada

- Indigenous peoples in Canada have unique rights that are constitutionally protected under section 35 of the *Constitution Act, 1982* – namely, Aboriginal and treaty rights. These constitutional rights place limits on federal and provincial governments' powers and authorities over the territories and activities of Indigenous peoples in Canada.
- Aboriginal rights refer to the legal rights that Aboriginal peoples continue to hold under Canadian law by virtue of their customs, practices, traditions and laws that pre-date European colonization.
- Canadian courts acknowledge Indigenous peoples' pre-existing customs, practices, traditions and laws and 'translate' these into equivalent modern legal rights within the Canadian legal system (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 32).
- Aboriginal rights are in part defined based on the "Aboriginal perspective", meaning the Aboriginal rights holders' customs, practices, traditions, and laws (*Tsilhqot'in*, para 34).

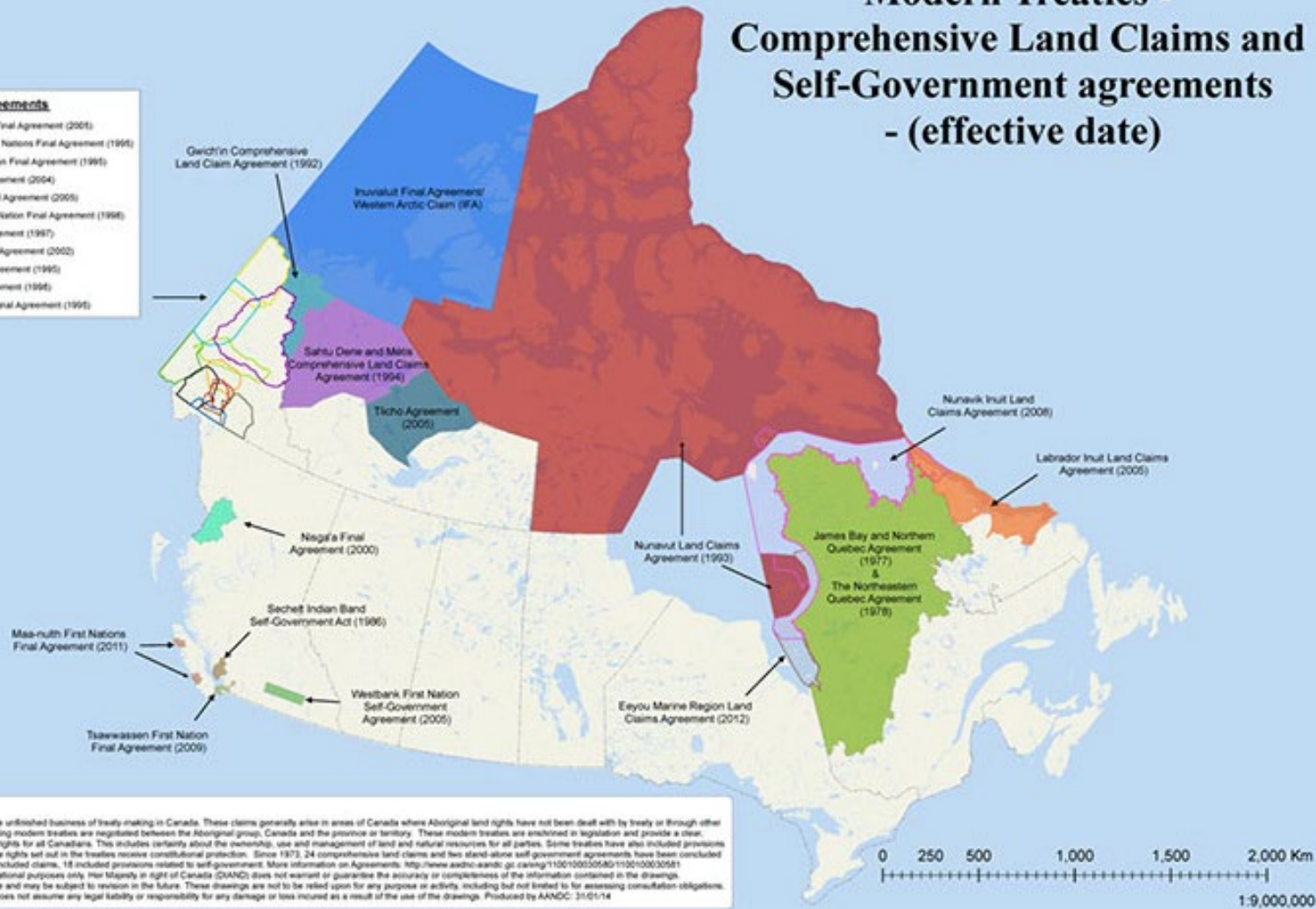


Source: AANDC
<https://tinyurl.com/yb3vw48k>

Modern Treaties - Comprehensive Land Claims and Self-Government agreements - (effective date)

Yukon Agreements

	Carcross/Tagish First Nation Final Agreement (2001)
	Champagne and Aishihik First Nations Final Agreement (1995)
	First Nation of Nacho Nyak Dun Final Agreement (1995)
	Kluane First Nation Final Agreement (2004)
	Waadle First Nation Final Agreement (2005)
	Little Salmon/Carmacks First Nation Final Agreement (1998)
	Selkirk First Nation Final Agreement (1997)
	Tahltan Kwakwaka'wakw Council Final Agreement (2002)
	Tsahiln Tlingit Council Final Agreement (1995)
	Transek Huetch'in Final Agreement (1996)
	Vuntut Gwitchin First Nation Final Agreement (1995)



Source: Douglas Eyford
*A New Direction: Advancing
Aboriginal and Treaty Rights*, 2015

Aboriginal Rights and Intellectual Property Regime in Canada

- No case presently grapples with the interface between western IP principles and traditional knowledge and traditional cultural expressions.
- However, while it did not end up in litigation, the Maliseet tapes is an example of misappropriation of Maliseet stories, demonstrating the limits of western IP in protecting traditional cultural expressions.
- Elders from the Maliseet (Wolastoqiyik) First Nation worked with a non-Indigenous university professor to record stories in the Maliseet language.
- By the 1990s, many of the Elders passed away, and the community wanted to publish the stories in the Maliseet language; however, the professor gained copyright over the tapes since he held the recorder, which came as a big surprise to the First Nation.



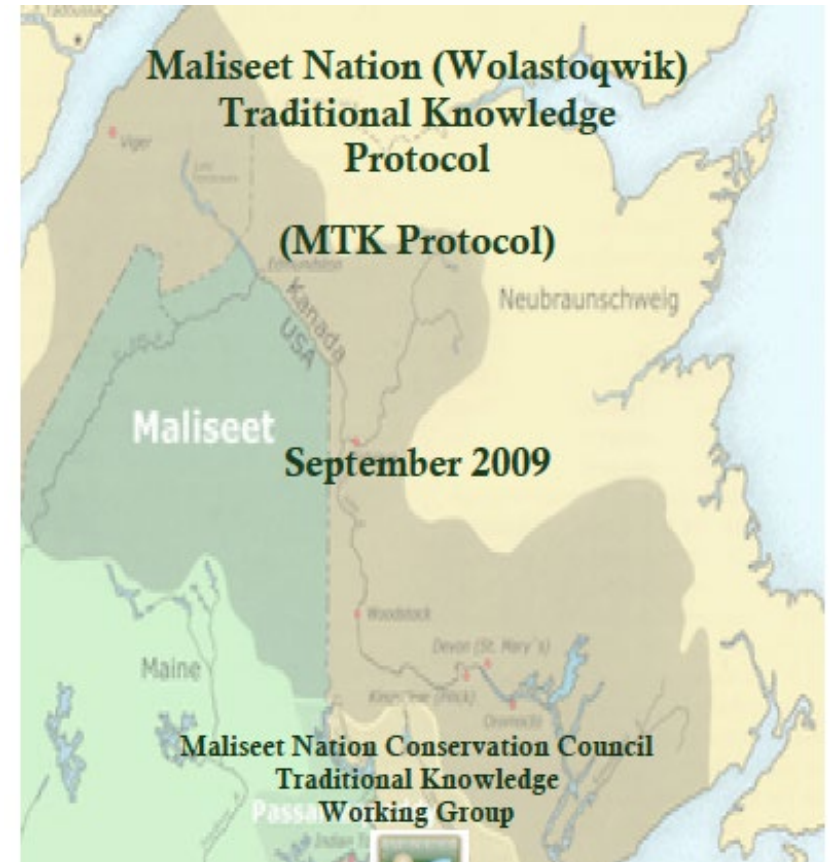
Image: The Aquinian, Shaw Goff, Feb 21, 2017, online:
<https://theaquinian.net/prof-upholds-maliseet-stories-language-new-book/>

Aboriginal Rights and Intellectual Property Regime in Canada

- Much legal uncertainty ensued as the First Nation attempted to negotiate with the professor to obtain the copyright to the tapes, but such efforts were not successful. In 2015, the decision was made to publish the stories despite the legal risk associated with doing so.
- Maliseet tapes highlight conflict between basic principle of copyright that the expression of the idea (tapes) is protectable work versus the possible constitutionally protected right of the Maliseet to “share among themselves traditional stories in their own language” (see Reagan Seidler, *Constitutionalized Rights to Indigenous Intellectual Property*, 2020)
- Section 35 could be used as defensive protection with respect to traditional knowledge and traditional cultural expressions (Reagan Seidler, 2020).
- The Canadian IP legislative regime could be better harmonized with section 35 of Canada’s Constitution (Marie Battiste and Sa’ke’j Young Blood Henderson, *Protecting Indigenous Knowledge and Heritage*).

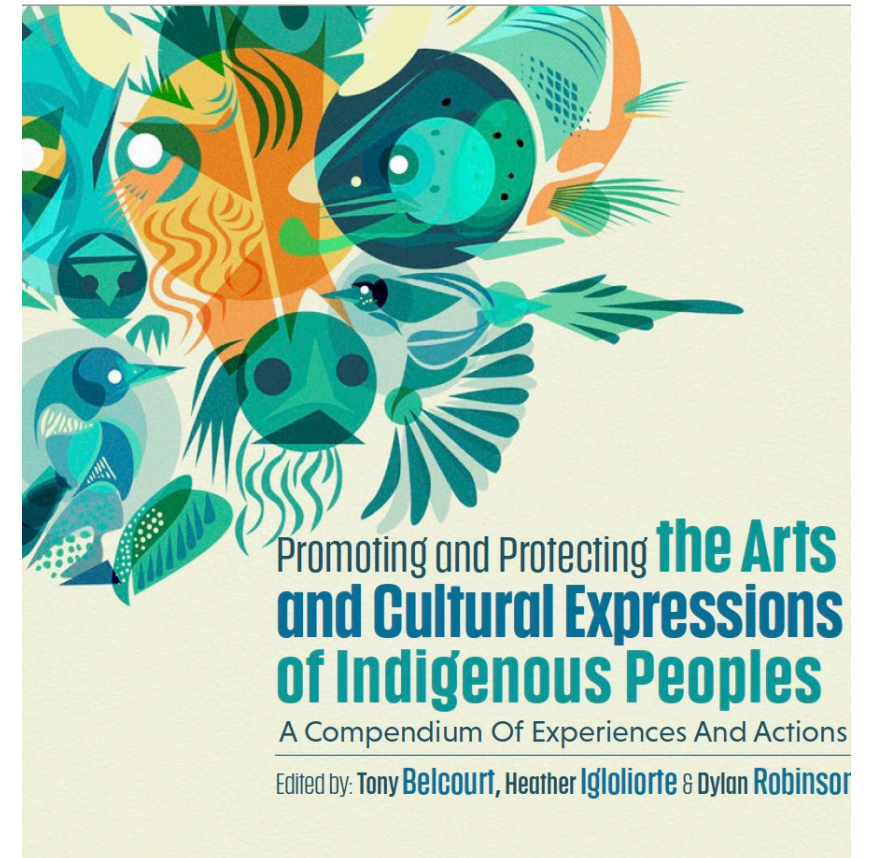
Indigenous Perspectives (Maliseet Nation Traditional Protocol)

- In 2009, the Maliseet Nation Conservation Council developed a “Traditional Knowledge Protocol” (TKP).
- Applies to ancestral remains, cultural heritage including tangible (clothing, ceremonial objects, artistic works etc) and intangible (language, stories, history, ceremonies, customs, songs, beliefs and performances”), sacred and historical sites, all research materials gathered from the Maliseet Nation relating to their ancestors, cultural heritage, sacred and historical sites, their people and community
- TKP establishes the Maliseet Research Review Board (MRRB)
- MRRB responsible for identifying and establishing Maliseet claims to cultural material in the possession of non-Maliseet individuals and institutional, no matter how acquired from Maliseet people, and includes cultural materials that have passed into the public domain.
- MRRB responsible for informing and negotiating with past researchers and collectors (or their heirs) about the TKP and seek proper attribution on the display and publication of materials, including ensuring that the copyright is credited to the Maliseet Nation, community, individuals or their heirs, where the origin is known, even where the copyright has passed into the public domain.



Indigenous Perspectives (Nisga'a Lament Song)

- The use and translation of a Nisga'a lament song (limx oo'y/Song of Skateen) into Cree for an aria in the 1967 Canadian opera *Louis Riel*. The Canadian Opera Company & National Arts Centre re-performed for Canada 150.
- Song collected by anthropologist in 1927 without regard for Nisga'a protocol.
- Composers encouraged to use and free to access Indigenous songs, stories, words and oral histories while at the same time Indigenous peoples were prohibited from practicing their culture.
- Limx oo'y must only be sung by those w/ hereditary rights, and if not, one breaks Nisga'a law and releases their spirit



Indigenous Perspectives (Nisga'a Lament Song)

- Solutions:
- Git Hayetsk Dangers & Kwhlii Gibaygum Nisga'a Dancers performed at the Toronto (COC) & Ottawa (NAC) performances in 2017
- Inclusion of short writing in *Louis Riel* program note
- COC, NAC, Nisga'a Lisims Gov't & executors to the estates of Somers and Moore worked collaboratively to seek redress for appropriation
- Nisga'a Lisims Elders Council called for the complete removal of all unauthorized forms of the limx oo'y following performance

“I simply no longer want to feel like our nations’ songs are incarcerated in institutions; I no longer want to have First Peoples’ songs held hostage in classical music pieces; I no longer want to hear that museum copyright is asserted as a means to refuse an Indigenous singer/artist the right to use their family’s song as they see fit; I no longer want to hear members of Indigenous communities telling me they had no idea their songs were part of a museum’s collection.”

Dylan Robinson, The Appropriation and Incarceration of Indigenous Songs, in *Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: A Compendium of Experiences and Action* (Canadian Heritage, 2020), at p. 44

Indigenous Perspectives (The Witness Blanket)



Image: CMHR, Jessica Sigurdson
(online: <https://humanrights.ca/exhibition/the-witness-blanket>)

*The Witness
Blanket -
Agreement
between
Newman &
CMHR*

Newman & the Canadian Museum for Human Rights (CMHR) entered into "An Agreement Concerning the Stewardship of the Witness Blanket – A National Monument to Recognize the Atrocities of Indian Residential Schools"

Weaves Kwakwaka'wakw law and Canadian law into a collaborative engagement in which the parties are joint stewards to the Witness Blanket

Legal rights vested in the artwork itself as a living entity (stories were given to Newman by survivors, and the collection of the stories are embodied in the artwork). It is this embodiment in which the rights are vested

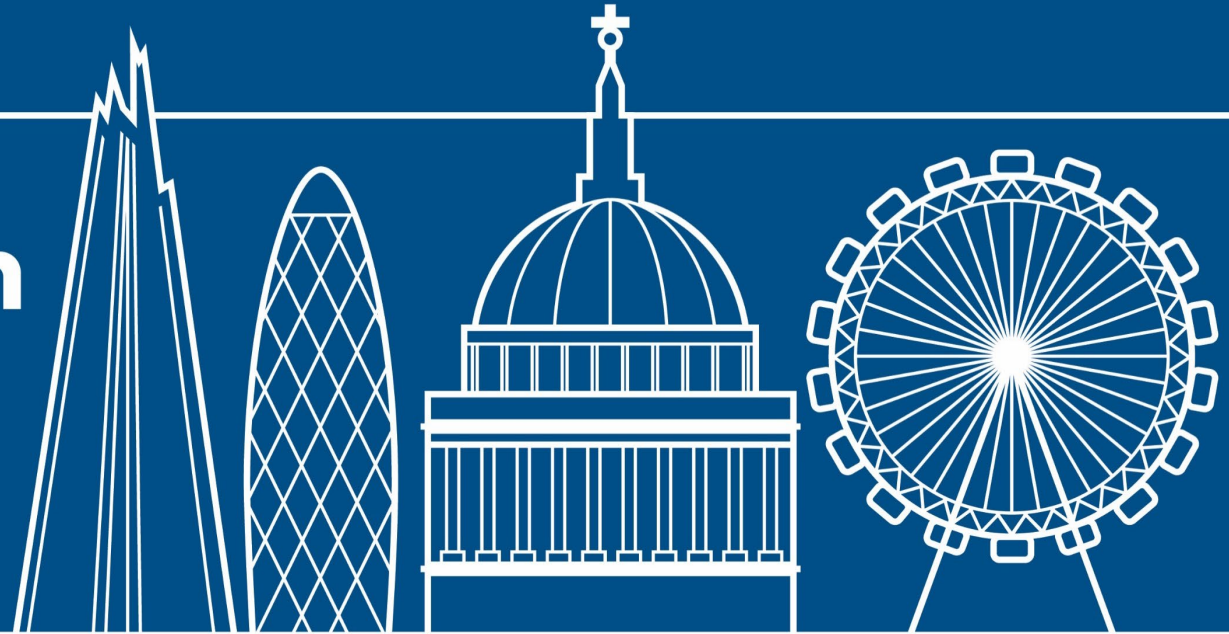
Does not transfer legal ownership to the museum but creates shared responsibility for its physical and spiritual care & making decisions in its best interest



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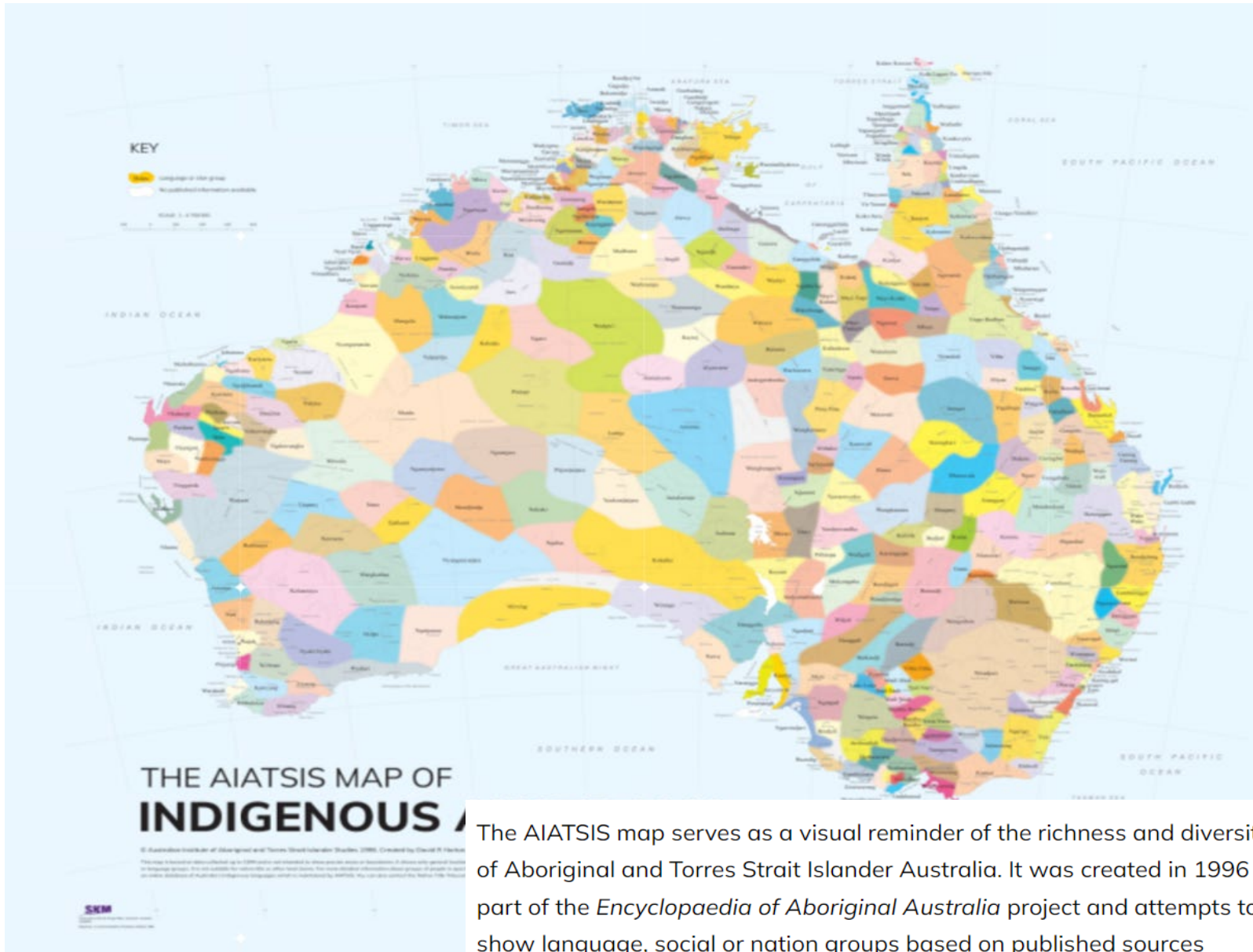


‘Control, Protection, Recognition, Respect’ – the interface in the Australian context

Marion Heathcote
Principal, Davies Collision Cave
Australia



elizabeth



The AIATSIS map serves as a visual reminder of the richness and diversity of Aboriginal and Torres Strait Islander Australia. It was created in 1996 as part of the *Encyclopaedia of Aboriginal Australia* project and attempts to show language, social or nation groups based on published sources available up to 1994.



Overview

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- What
- Why
- Where
- How
- Who



Photo by Vadim Bogulov on Unsplash



What :

Indigenous Cultural & Intellectual Property

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TRADITIONAL KNOWLEDGE

- Includes know-how, practices, skills and innovations
- Resulting from intellectual activity
- In a traditional context
- Passed from generation to generation
- That forms part of the traditional lifestyle of indigenous peoples and local communities
- Not limited to a specific technical field

TRADITIONAL CULTURAL EXPRESSIONS

- Form in which traditional culture is expressed
- Form part of the identity and heritage of a traditional or indigenous community / nation
- Passed down from generation to generation

CULTURAL HERITAGE

- Culture
- Values
- Tradition
- Expression of the ways of living developed by a community and passed on from generation to generation .



Why : the objectives of protection

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- Prevent misappropriation/misuse/unauthorized use
- Control ways in which ICIP is used beyond the traditional context
- Ensure remuneration for third party use
- Encourage community-based innovation and creativity
- Promote economic development and legitimate/appropriate trading opportunities
- Promote respect for traditional cultures
- Ensure acknowledgement



Where :

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The UN Declaration
on the Rights of
Indigenous Peoples

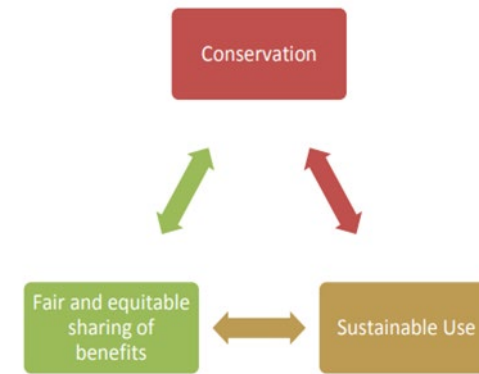
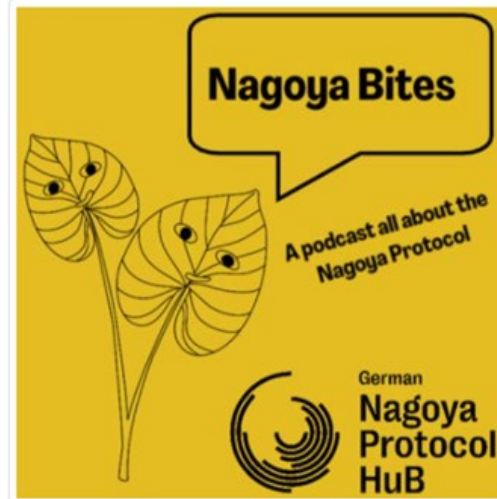


Photo by Markus Winkler on Unsplash 37



How:

Differing purposes & characteristics

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Indigenous Cultural & Intellectual Property

- Socially based and collectively passed
- Preservation of culture/spirituality
- Non transferable (or if can be is subject to cultural considerations)
- Inter – related/non – divisible
- Enduring

Traditional IP

- Individual
- Material form and economic right
- Alienable
- Categorised
- Time limited



IP Australia's Public Consultation

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Working Respectfully with Indigenous Knowledge

Indigenous Knowledge is an important asset belonging to Aboriginal and/or Torres Strait Islander people, their communities and their organisations or businesses. Indigenous Knowledge can reflect and identify a community's history, cultural and social identity and its values. If you are working with Indigenous Knowledge, treating it appropriately ensures you are being respectful and this can be part of building a brand that consumers view positively.

During our Indigenous Knowledge [consultations in 2018-19](#), the following high-level themes about using Indigenous Knowledge emerged:



Control

Indigenous people want to be able to control who uses Indigenous Knowledge and how it is used.



Protection

Indigenous people are seeking measures that can prevent unauthorised use of their knowledge and impose sanctions against misappropriation.



Recognition

Indigenous people want to be recognised as the owners of their Indigenous Knowledge.



Respect

Indigenous people want their ownership of Indigenous Knowledge and the cultural protocols associated with it to be respected.

<https://www.ipaustralia.gov.au/indigenous-knowledge-ip-hub#respectfully>

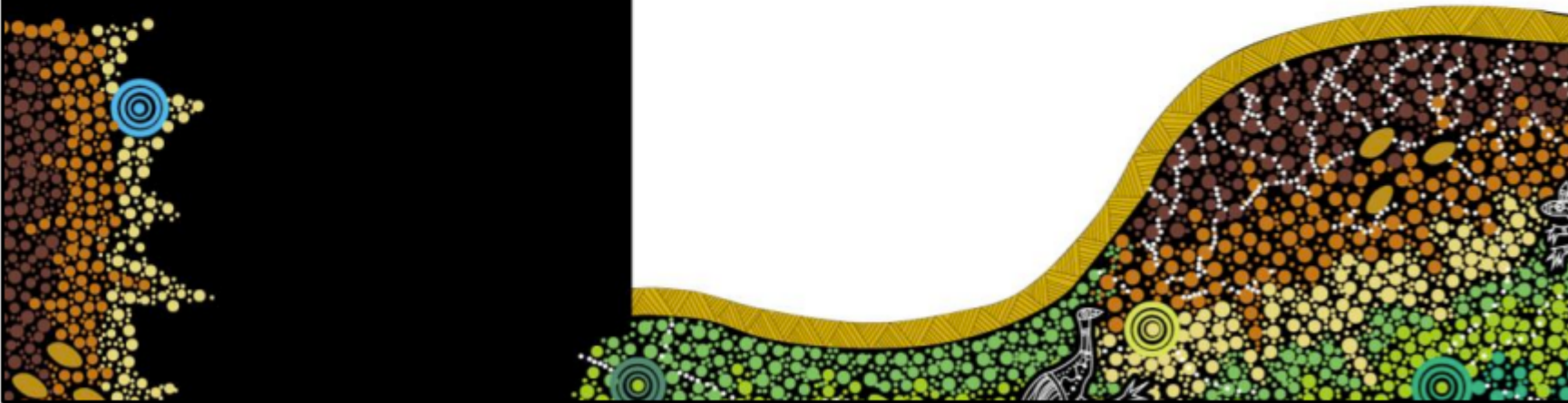


Source : [Talking Indigenous Knowledge with FICPI Australia \(ipaaustralia.gov.au\)](https://ipaaustralia.gov.au)



Current practice for Trade Mark & Design Examination

- The Indigenous Knowledge Subject Matter Expert (IK SME) Group identifies applications containing IK or those that appear to be connected with Indigenous businesses.
- To ensure consistency and culturally-competent customer service, the IK SMEs manage the examination of most marks containing IK themselves, and provide their direct contact details to applicants.



Source : [Talking Indigenous Knowledge with FICPI Australia \(ipaaustralia.gov.au\)](https://ipaaustralia.gov.au)



Indigenous Knowledge Panel

Functions

- Provide guidance on IK strategy and policy
- Advise on IP applications that contain IK
- Promote awareness and understanding of IK as it relates to intellectual property rights

Benefits

- Advice from an Indigenous perspective
- Better informed decision making
- Community connection



Source : [Talking Indigenous Knowledge with FICPI Australia \(ipaaustralia.gov.au\)](https://ipaaustralia.gov.au)

A vertical decorative bar on the left side of the slide, featuring a black background with a dotted orange line and four green circular icons with concentric rings.

Possible legislative reform

- Proposals for enhancements for Trade Marks and Designs to prevent misappropriation and misuse, with scope to consider appropriate permissions or consent.
- Proposals for disclosure of source for Patents and Plant Breeder's Rights which could increase transparency, attribution and recognition for traditional knowledge, and encourage informed consent and access and benefit-sharing arrangements.

Source : [Talking Indigenous Knowledge with FICPI Australia \(ipaaustralia.gov.au\)](https://ipaaustralia.gov.au)

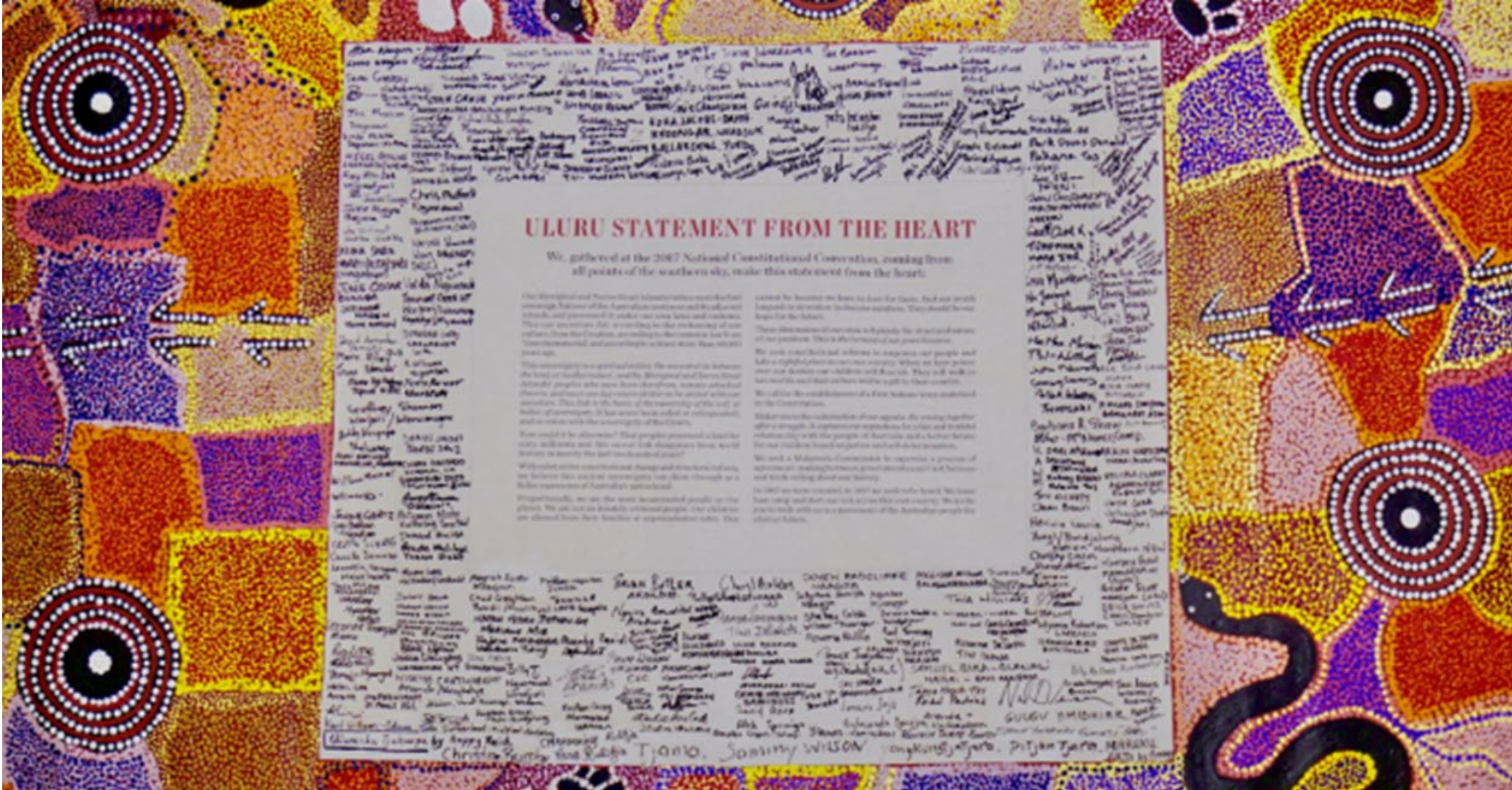


Australian Government

Australia's Cultural Policy for the next five years.

REVIVE

A PLACE FOR EVERY STORY, A STORY FOR EVERY PLACE.





Who :

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Indigenous Knowledge IP Hub

Indigenous Knowledge is an important asset belonging to Aboriginal and/or Torres Strait Islander people, their communities and their organisations or businesses. Indigenous Knowledge can reflect and identify a community's history, cultural and social identity and its values.

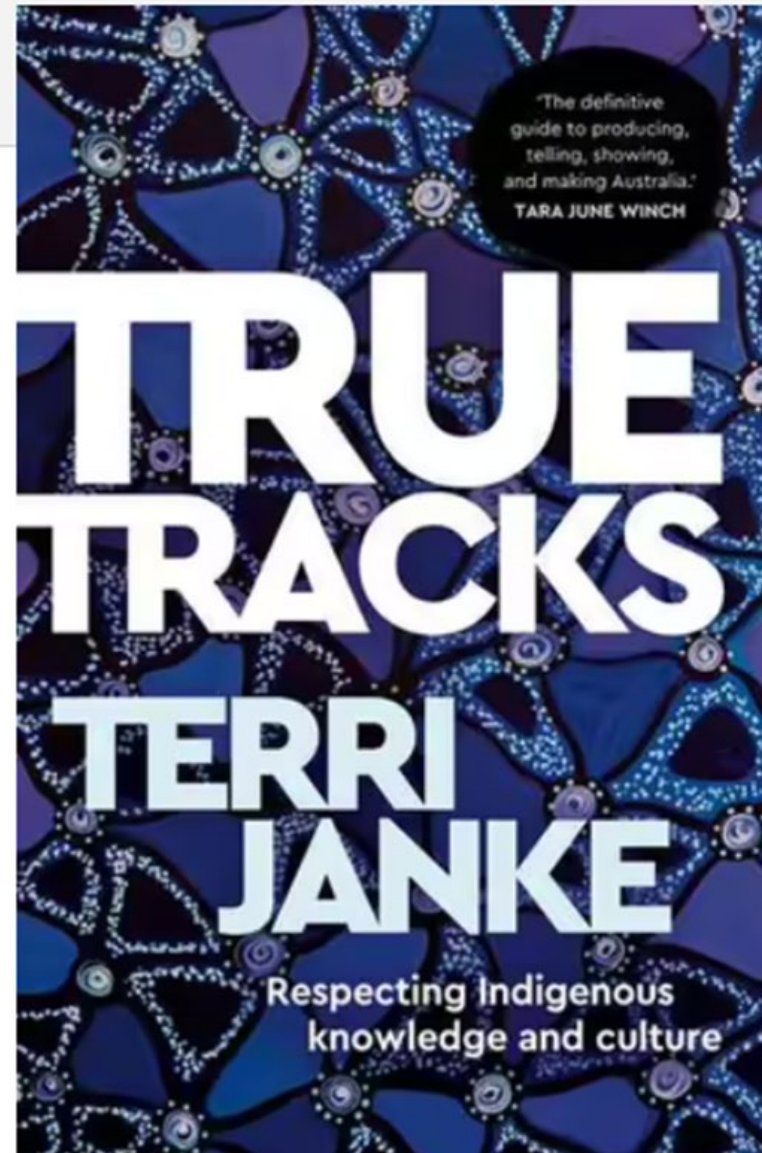
Indigenous Knowledge IP Hub is for anyone looking to work with Indigenous Knowledge as part of their business. Whether you are an Aboriginal and/or Torres Strait Islander business, or a business looking at engaging with IK, we'll guide you through some of the IP issues that you'll encounter as you take the steps to grow from idea to commercialisation.



<https://www.ipaustralia.gov.au/indigenous-knowledge-ip-hub#respectfully>



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Where in the world...
More than 300 million people – five per cent of global population in 1999 – retain a strong identity as members of one of the 7,000 or so indigenous cultures. The main groups are listed here.

Lotte Hughes, The No-nonsense Guide to Indigenous Peoples



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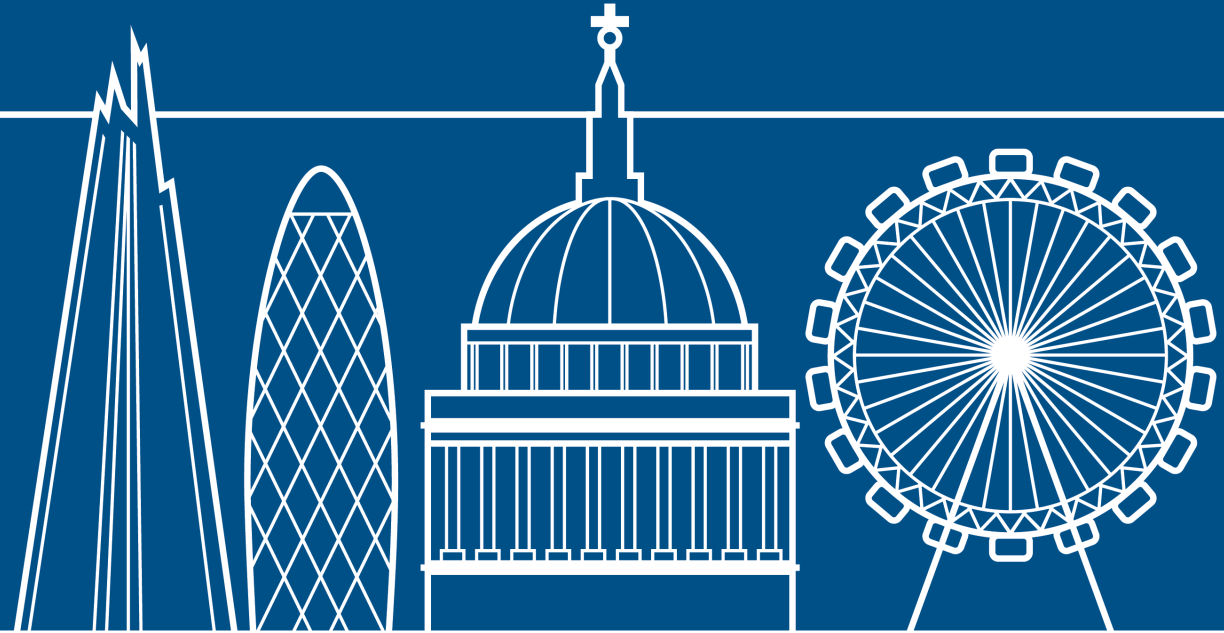


Photo Milada Vigerova on Unsplash



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