

A New Approach (ANA)

10 May 2024

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Department of Infrastructure, Transport, Regional Development, Communications and the Arts
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Stand-alone legislation to protect Indigenous Cultural and Intellectual Property (ICIP)

A New Approach (ANA) welcomes this opportunity to make a submission. ANA is Australia's national arts and culture think tank. Through credible and independent public leadership, ANA helps build an ambitious and innovative policy and investment environment for arts, culture and creativity. We work to ensure Australia can be a great place for creators and audiences, whoever they are and wherever they live.

ANA supports the consultation with First Nations peoples on this legislation, including establishment of a partnership with First Nations experts. ⁱ ANA's national focus group research shows middle Australians value First Nations cultural and creative practice in Australia.ⁱⁱ This legislation has the potential to give this value tangible impact by granting ICIP rights to First Nations peoples. ANA also supports the staged consultation and development for this legislation, which could have widespread and long-term impacts on arts and culture.

Below, ANA provides perspectives to assist the Department's development of the legislation. ANA understands that there will be further consultation as this legislation develops over the coming years. In our role as a philanthropically funded, independent think tank, ANA is ready to provide further information about the response in this submission and would welcome the opportunity to discuss.

Warm regards,



Kate Fielding, CEO, A New Approach (ANA)

Perspectives on potential legislation

ANA suggests planning for evaluation. Consistent with Australian Government Policy Impact Analysis requirements, any legislation should be accompanied by a plan to evaluate actual impacts against policy objectives. Evaluation could also include considering consistency with any future World Intellectual Property Organisation (WIPO) obligations on Australia.ⁱⁱⁱ

ANA suggests identifying and minimising overlaps in IP rights—including ICIP, copyright and resale royalties—which can have potentially undesirable impacts on art, merchandise and souvenirs.^{iv} Rights of different ICIP rightholders, and between ICIP rights and other intellectual property (IP) rights, can often overlap. Avoiding or minimising overlaps can make it easier for ICIP rightholders to exercise their rights, and for users to obtain consent. Australian IP law provides several approaches for avoiding overlaps.^v

ANA encourages analysis of a fuller range of costs, benefits and impacts. The scoping study commissioned by IP Australia included an ‘initial’ cost-benefit analysis (CBA) but recommended the Australian Government conduct a more detailed CBA.^{vi} ANA also understands the Department may need to prepare an Impact Analysis to inform a final decision on this legislation.

A detailed CBA or Impact Analysis could consider:

- **costs beyond those on the federal government and parliament for developing and passing legislation**, which were the focus of the initial CBA. For example, costs on ICIP users also deserve attention, especially if ICIP rightholders gain rights automatically without registration and users of ICIP must obtain consent prior to use.^{vii} Under Australian copyright law, another IP system with automatic rights and prior permission requirements, these costs occur frequently.
- **options to minimise unintended transaction costs**, such as
 - supporting ICIP rightholders and users, including arts and culture organisations, to develop guidance on which uses require consent.^{viii} This could promote consent and lower barriers for ICIP users.
 - legal presumptions that a group of people are ICIP rightholders in the absence of evidence to the contrary. This could reduce burden on ICIP rightholders.^{ix}
 - limiting liability for ICIP users who have acted in good faith, for example by obtaining consent from some but not all relevant traditional owners.^x
 - exceptions for ICIP users, such as those in Australian copyright law.
 - collecting societies, such as those involved in the Australian copyright system.

ANA highlights issues arising from artificial intelligence (AI). These issues include:

- **whether AI trained on ICIP should be protected as further ICIP.** The Attorney-General's Department is considering similar issues in the context of copyright.
- **the lack of consent when using ICIP to train AI.** ANA's recent Analysis Paper canvassed issues from using First Nations speech to train language models.^{xi} These language models can help to preserve endangered languages but training them could infringe ICIP in future. When the developer of ChatGPT OpenAI released an automated Māori speech recognition tool, Māori people were concerned that over 1,000 hours of recorded speech to train the tool but no consent was obtained.^{xii} By contrast, Māori charity Te Hiku Media shows it is possible to obtain consent in these circumstances, by running a reading competition which invited Māori people to speak Māori and build a training corpus.^{xiii} ANA is also aware that researchers at the ARC Centre of Excellence for the Dynamics of Language applied machine learning to build models for 12 Australian First Nations languages.^{xiv}

References

- ⁱ This implements the scoping study recommendation 'a co-design process for the development of such standalone legislation in partnership with First Nations peoples'. Delwyn Everard, Boyd Blackwell, and Tim Acker, "Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge - Final Report" (Ninti One Limited, July 4, 2023), <https://www.ipaustralia.gov.au/tools-and-research/professional-resources/data-research-and-reports/publications-and-reports/2023/07/03/05/26/scoping-study-on-standalone-ik-legislation>.
- ⁱⁱ This was a nationwide study exploring attitudes towards arts, culture and creativity. In rooms and Zooms around the country, ANA brought together people from low to middle income households, living in outer suburban and regional areas, in every state and territory. Jodie-Lee Trembath and Kate Fielding, "The next Generation of Voters: Young Middle Australians Talk Arts, Culture and Creativity," Insight Series (Canberra: A New Approach, August 2021), <https://newapproach.org.au/wp-content/uploads/2021/08/ANA-InsightReportSix-Fullreport-6.pdf>; Angela Vivian and Kate Fielding, "Lifelong: Perceptions of Arts and Culture among Baby Boomer Middle Australians". Insight Report No. 2022-02" (Canberra: A New Approach (ANA)), accessed January 19, 2023, https://newapproach.org.au/wp-content/uploads/2022/09/Lifelong_-Perceptions-of-Arts-and-Culture-among-Baby-Boomer-Middle-Australians-1.pdf.
- ⁱⁱⁱ ANA is aware that Australia is discussing draft international obligations for traditional knowledge and traditional cultural expressions with other WIPO members. See https://www.wipo.int/tk/en/igc/draft_provisions.html
- ^{iv} ANA notes '65% of the artists receiving [resale] royalties are Aboriginal or Torres Strait Islander artists and they have received 40% of the total royalties'. Copyright Agency, "Resale Royalty," 2024, <https://www.resaleroyalty.org.au/>.
- ^v For example, Australian designs law and copyright law work in tandem to avoid dual protection. Australian copyright law also includes provisions to clarify how authorship operates when a copyright work has more than author. See *Designs Act 2003* (Cth), section 18 and *Copyright Act 1968* (Cth), sections 77 and 81.
- ^{vi} "Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge - Final Report" (Ninti One Limited, July 4, 2023), <https://www.ipaustralia.gov.au/tools-and-research/professional-resources/data-research-and-reports/publications-and-reports/2023/07/03/05/26/scoping-study-on-standalone-ik-legislation>.
- ^{vii} These are two features with broad support, according to the scoping study. See Finding 4 in Everard, Blackwell, and Acker, "Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge - Final Report," 8.
- ^{viii} Tim Wu has pointed out how 'no action policies' from copyright rightholders can confirm which uses of copyright material attract no or low risk of litigation. Tim Wu, "Tolerated Use," *Columbia Journal of Law and the Arts* 31 (2008): 617-35. There are also codes of best practice that help groups

of copyright users to use material without infringing copyright. See Stanford Centre for Internet and Societies' list of 'Codes of Best Practice': <https://fairuse.stanford.edu/charts-and-tools/>.

^{ix} Such presumptions are part of Australian copyright law. *Copyright Act 1968* (Cth), Subdivision G

^x The Attorney-General's Department is continuing to consult on an orphan works scheme in Australian copyright law, and a limited liability scheme has been part of discussions.

^{xi} Alan Hui and Kate Fielding, "Friend, Foe or Frenemy - Foreseeable Impacts of AI on Arts, Culture and Creativity," Analysis Paper (Canberra, Australia: A New Approach (ANA), October 31, 2023), <https://newapproach.org.au/analysis-papers/friend-foe-or-frenemy-foreseeable-impacts-of-ai-on-arts-culture-and-creativity/>.

^{xii} Rina Chandran, "Indigenous Groups in NZ, US Fear Colonisation as AI Learns Their Languages," *Reuters*, April 3, 2023, sec. Cyclical Consumer Goods, <https://www.reuters.com/article/newzealand-tech-lawmaking-idUSL8N2UQ0EC>. OpenAI is also the developer of other generative AI tools, including the DALL·E text-to-image tool and the Sora text-to-video generator.

^{xiii} Te Hiku Media collected 316 hours of speech in 10 days, forming a training corpus for an automated speech recognition tool and an app to improve Māori pronunciation. Erin Kalejs, "How AI Is Helping Indigenous Languages Survive and Thrive," *AI for Good* (blog), August 9, 2022, <https://aiforgood.itu.int/how-ai-is-helping-indigenous-languages-survive-and-thrive/>; *Te Reo Māori Speech Recognition* (Te Hiku Media, 2020), <https://tehiku.nz/te-hiku-tech/papa-reo/14135/te-reo-maori-speech-recognition>; Peter-Lucas Jones - *Protecting Our Future - Indigenous Data Sovereignty* (Canberra, ACT, 2024), <https://www.youtube.com/watch?v=y0muBYqlprE>.

^{xiv} Abbie O'Brien, "How AI Is Helping Preserve Indigenous Languages," *SBS News*, 2018, <https://www.sbs.com.au/news/article/how-ai-is-helping-preserve-indigenous-languages/w3jfh4lln>.