



Submission to Department of Infrastructure,
Transport, Regional Development,
Communication and the Arts – ***Seeking views on
new laws to tackle fake Indigenous-style art***

28 June 2024



INTRODUCTION

We would like to acknowledge the Traditional Owners of the Country on which our staff work and pay our respects to Elders past and present.

[Indigenous Art Code Ltd](#) (IartC) is the national organisation responsible for administering a voluntary industry code of conduct for art dealers^[1] and other entities that trade in or deal with Aboriginal and Torres Strait Islander artworks^[2]. The Indigenous Art Code commits signatories (Dealer Members) to fair, ethical, and transparent dealings with Aboriginal and Torres Strait Islander artists^[3] and their artworks.

IartC is a limited liability public company led by a Board of Directors drawn from the Aboriginal and Torres Strait Islander visual arts industry and the wider community. IartC is also a registered Charity through the Australian Charities and Not-For Profits Commission.

The IartC Board is independent from government and is administered under the Australian Corporations Act 2001.

IartC administers the Code, through:

- a) administering voluntary membership of the Code and overseeing compliance;
- b) coordinating, liaising, and seeking the support of governments, regulatory and legal bodies, and associations and groups with a role in the promotion and sale of Artworks;
- c) furthering the Objects of the Company with the principal object being the promotion of Indigenous visual arts.

The Code provides clear standards for dealings between dealers and Aboriginal and Torres Strait Islander Artists to deliver:

- a) fair and ethical trade in Artwork;
- b) transparency in the process of promotion and sale of authentic Artwork; and
- c) efficiency and fairness in how disputes are dealt with.

We have approached this submission with the understanding that this stage of inquiry and consultation by the Office for the Arts (OFTA) is focussed on the fake art issue as per information on the Department of Infrastructure, Transport, Regional Development, Communications and the Arts website ***The Australian Government is seeking the views of communities and organisations across the country to inform the development of new laws to address the harm caused by fake art, merchandise, and souvenirs.*** Our submission does not go into detail

regarding ICIP more broadly but notes that if limited to ICIP in visual art, this framework would miss a key opportunity to protect other forms of traditional knowledge (e.g. language, dance, stories, song). It is relevant to note that ICIP cannot be easily divided into discrete categories and enforced only partially, as this would divorce artwork from its broader meaning and connection to other aspects of ICIP.

PAST WORK AND ENGAGEMENT WITH THIS SPACE

In 2016, following representations by Indigenous community members, artists, and key peak bodies, Arts Law, the Copyright Agency | Viscopy (as they were then known), and IartC began to explore how to best respond to concerns about the growing presence of inauthentic 'Aboriginal-style' art and craft products and merchandise for sale across Australia that had no connection to Aboriginal and Torres Strait Islander artists and communities. The result was the creation of the **Fake Art Harms Culture** campaign, the core aim of which was to end the market of fake Aboriginal and Torres Strait Islander art in Australia by increasing consumer awareness and advocating for meaningful law reform in settings such as this.

This submission is informed by IartC's experience with the Fake Art Harms Culture campaign, our daily interactions with IartC members and the sector broadly, and our advocacy for fair dealings with Aboriginal and Torres Strait Islander artists, including past submissions we have made. IartC strongly encourages cultural policy development and supports the Australian Government's promise to introduce standalone legislation to protect ICIP.

IartC also respectfully acknowledges the work that many Aboriginal and Torres Strait Islander artists, communities, and individuals have done over many decades and continue to do in the ongoing pursuit of rights recognition.

ADHERENCE TO BOTH DOMESTIC AND INTERNATIONAL OBLIGATIONS

The proposed legislation is necessary to ensure Australia meets its domestic targets and international obligations. It should also be developed with these external instruments and measures in mind.

Specifically, the proposed legislation reinforces the sentiment communicated by the Australian Government in their strategy for Closing the Gap. **The National Agreement on Closing the Gap** expressly acknowledges "that strong Aboriginal

and Torres Strait Islander cultures are fundamental to improved life outcomes for Aboriginal and Torres Strait Islander people.”¹

Several of the 17 Outcome Areas that sit beneath the National Agreement’s Priority Reforms could be addressed in part by the proposed legislation, namely:

- Outcome Area 8: Strong economic participation and development of Aboriginal and Torres Strait Islander people and communities.²
- Outcome Area 15: Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.³
- Outcome Area 16: Aboriginal and Torres Strait Islander cultures and languages are strong, supported and flourishing.⁴
- Outcome Area 17: Aboriginal and Torres Strait Islander people have access to information and services enabling participation in informed decision-making regarding their own lives.⁵

In addition to the above outcome areas, support for and protection of the Aboriginal and Torres Strait Islander art market, more broadly is of great significance to the social, economic, and cultural lives of First Nations people in Australia.

The introduction of standalone legislation addressing the harm caused by fake Aboriginal-style products and providing protection for visual art products containing ICIP would also serve to bring Australia in line with key international human rights instruments. Most notably, Australia has commitments arising under the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** – which are enshrined in Australian law. Specifically, Article 15, which states

(emphasis added):

Article 15

1. The States Parties to the present Covenant recognise the right of everyone:
 - a) **To take part in cultural life;**
 - b) To enjoy the benefits of scientific progress and its applications;
 - c) **To benefit from the protection of the moral and material**

¹ Australian Institute of Health and Welfare

² Closing the Gap Target and outcome area 8

³ Ibid outcome area 15

⁴ Ibid outcome area 16

⁵ Ibid outcome area 17

interests resulting from any scientific, literary or artistic production of which he is the author.

2. **The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.**
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.⁶

Furthermore, this legislation would also align with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) – endorsed by Australia in 2009 – which has a number of sections pertaining directly to cultural rights. This includes Article 31, which states that:

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.⁷

⁶ ICESCR art 15

⁷ UNDRIP art 31

RECOGNISING THE BARRIERS TO ADVOCACY IN THIS SPACE

The constraints our organisation faces are experienced by many in the arts. The inability of many organisations working with Aboriginal and Torres Strait Islander artists to participate in studies and inquiries like this one is not due to a lack of interest, care or knowledge that would be beneficial for the public record. Rather, there is a sense of fatigue and ambivalence about whether such inquiries and consultations will have any meaningful impact that is proportionate to the resources required to make a submission.

It is essential that the messages presented during the [Parliamentary inquiry \(The growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia\)](#) are reread and considered. This should include reviewing written submissions and engaging directly with individuals who have demonstrated commitment to addressing ICIP and associated concerns. We must acknowledge and honour those who have advocated in this space for many years, including those who have passed away, ensuring their voices and messages continue to be heard and valued.

Where Aboriginal and Torres Strait Islander people are invited to participate in developing this legislation, it must be done in a meaningful way. Government processes should include direct engagement with senior traditional knowledge holders. They must be involved, and workshops need to be held at a community level. On this, we seek clarity as to what this process will look like so that communities can understand how the legislation will work and relate to them and the protection of their ICIP in practice.

THE LANGUAGE OF THE PROPOSED LEGISLATION

The relationship between our organisation and artist members of lartC means that we are often approached by Aboriginal and Torres Strait Islander artists who have questions about their rights in the visual arts space. Therefore, many of the questions we pose in this submission are consistently brought to the lartC, and thus, we have identified them as industry-wide concerns.

HOW IS FAKE ART DEFINED?

Does the scope of the proposed (fake art) legislation extend only to addressing:

- The harm caused by fake First Nations-style art, merchandise, and souvenirs where there is no connection to an Aboriginal or Torres Strait Islander person?
- Will it also extend to where an Aboriginal or Torres Strait Islander person creates artwork about which they do not have cultural authority or are not custodians of

the ICIP and the meaning associated with designs and symbols they have used in their artwork?

It is our view that the (fake art) legislation will not only have to deal with these issues but also be workable for future legislation concerning broader protections of ICIP.

WHAT IS AUTHENTIC?

The *Fake Art Harms Culture* campaign defined fake art in our 2022 Productivity Commission submission. However, it is important to note that this definition was formulated in a specific and limited context: legislative amendments concerning fake art in the Australian Consumer Law.

In defining an art or cultural product as inauthentic for this purpose, we take as a baseline the indisputable position that art and cultural products are clearly fake if they are “Aboriginal-style” works with no connection to an Aboriginal or Torres Strait Islander artist or community.⁸

This definition was targeted at addressing the issue of the creation and sale of Indigenous ‘style’ art and craft created and sold without the knowledge or involvement of an Aboriginal or Torres Strait Islander person.⁹

It is also relevant to note that it has been our organisation’s experience that the term authentic is not used by most Aboriginal and Torres Strait Islander artists in relation to their work. The work artists create belongs to them, and the ICIP embedded in those works belongs to them. It should be noted that the words authentic and inauthentic are predominantly used by a non-Indigenous audience to understand this issue. However, given the proliferation of inauthentic art in various forms, views of this language are changing as more artists discuss the issue.

THE FAKE ART PROBLEM IS COMPLEX

There has been a growth in the market for merchandise embodying Aboriginal and Torres Strait Islander images, and Aboriginal and Torres Strait Islander people are taking advantage of the commercial opportunities this presents. A complex and evolving concern for many artists is the misappropriation of others’ ICIP by some First Nations visual artists. For some Aboriginal and Torres Strait Islander artists, this misappropriation is considered fake art. IartC has also seen a noticeable increase in

⁸ PC submission p. 23

⁹ PC submission p.42



artists and communities contacting lartC about other Indigenous artists (both lartC artist members and non-members) who they believe have misappropriated their and their community's ICIP. lartC was not established to address this concern, and artists are not signatories of the Code. While lartC is giving careful consideration to these concerns and how lartC membership is impacted, it is not lartC's role to be adjudicators in this space, but we also cannot disregard harm if it is being caused by any lartC member regarding such misappropriations.

For this legislation to operate effectively, it cannot simply protect against the infringements of non-Indigenous people; it must protect ICIP as a legitimate and legally enforceable property interest more generally.

Another area of concern being raised with lartC is that of individuals potentially '*making up*' their own ICIP without a genuine connection to traditional knowledge. Specifically, where an Aboriginal or Torres Strait Islander person is claiming a connection to ICIP that they have concocted themselves. Here, we ask if this is something the proposed legislation would deal with and at what point this becomes an IP issue as opposed to an ICIP issue. Here again, we would like to recognise the complex nature of disputing an individual's connection to ICIP, where there could be a myriad of reasons that their connection to Country and their heritage has been disrupted by factors out of their control.

The issues and conversations artists and community members have with lartC regarding this matter are complex and sensitive. Often, there is no expectation that lartC will address the issue, but individuals still want to be heard. Individuals want an opportunity to have a conversation about what is happening, and because there is an understanding that misappropriation is unfair and unethical, they feel it is something that should be brought to lartC's attention.

WHAT HARM IS THE LEGISLATION SEEKING TO ADDRESS?

Based on the community engagement sessions that lartC has attended, our understanding is that the first stage of the process to develop stand-alone ICIP legislation is to develop (fake art) legislation regarding the harm caused by fake art alone. During the sessions, there was an extensive discussion of the general protection of ICIP. This has left us with the following questions:

1. What, specifically, is the (fake art) legislation targeting?
2. What will not be addressed by the (fake art) legislation?

3. Was this consultation for only the first (fake art) stage of the legislation or for future development in this space as well?
4. If this consultation was looking beyond the first (fake art) stage, will there be more community engagement sessions in future?

WHAT DOES THE CURRENT FAKE ART MARKET LOOK LIKE?

Part of IartC's research during the FAHC was visiting retail outlets, souvenir shops, markets, and galleries selling what we understood to be fake art. IartC purchased products and questioned and documented the sellers' responses to questions we asked regarding those products purchased. Subsequently, reports were made to the ACCC about the representations made about some products purchased.

The ACCC vs. Birubi has undoubtedly impacted this market sector, but what does it look like now?

- In the development of the proposed legislation, is OFTA conducting market research on the fake art products now available?
- What are they, and who is manufacturing the products?
- Who is selling the products?
- Is the fake art issue identified at the time of the Parliamentary Inquiry, ACCC v/s *Birubi* and the Productivity Commission Inquiry the same issue the (fake art) legislation is going to address?

IDENTIFICATION AND DEMONSTRATING CONNECTION TO ICIP

Our organisation sees the issue of fake art that has no connection to an Aboriginal or Torres Strait Islander person as a distinct issue from the misappropriation of ICIP by an Aboriginal and Torres Strait Islander artist. For this legislation to be able to deal with both, different processes will be required. For the latter issue, it must provide some kind of framework or guidance on how individuals can demonstrate their connection to certain ICIP. Our organisation understands that this would be a complex task, and we seek clarity on how the legislation would go about doing so.

Establishing a framework for Aboriginal and Torres Strait Islander individuals to identify as belonging to their specific community or language group and also having the authority to use associated ICIP will be challenging. We recognise the complexities of identification and acknowledge the deeply personal nature of connection to one's heritage.

It is important to both recognise the nuance and sensitivity of this issue while also establishing a reliable framework that provides clarity, ensures that the legislation is enforceable and works to address the identified problem.

If the proposed legislation does not seek to provide this kind of framework, will it instead simply state that the rights will exist and that a mechanism for demonstrating connection to ICIP will be established later, elsewhere, or in another instrument?

EVIDENTIARY BURDEN WHEN ICIP IS DISPUTED

If a party wishes to dispute someone's use of ICIP, they will likely have to present evidence of this misappropriation. Conversely, if someone is accused of misappropriating ICIP, they will also have to present evidence of their personal connection to the contested ICIP. Not only will this require individuals to demonstrate their connection to something immensely personal, but it will also likely demand evidence that may be hard to attain/present/communicate. This issue exists alongside other broader questions of access to justice.

This, again, can be illustrated best by examples. Take the example of artists from a remote desert community. They work at their art centre, which was established by community Elders 30 years ago. The art centre was established with a clear understanding regarding what, who and how people will create artwork for commercial exhibition and sale. The artist's authority to create artwork embedded with communally owned ICIP is indisputable. Artists know what, when and how they can and can't paint because of knowledge obtained throughout their lives. This could be distinguished from artists whose cultural connection may have been disrupted, and there may be less clarity about who has cultural authority to use certain ICIP. We have included this example because artists with the lived experience of establishing art and culture centres for the purpose of maintaining, transferring and educating future generations about their cultural obligations, including protection of ICIP, frequently raise concerns about artists from other unrelated areas misappropriating what they understand to be theirs.

"The ecosystem, the environment we live in, is full of natural resources. Our art is our resource; it belongs to us, we use it in a ceremonial context, and it is a resource for our survival. If control of that resource is taken away from us, we cannot meet our cultural obligations, we cannot use it for our families benefit. Exploiting our resources needs to be negotiated on our terms, we need to have control of how that's done".

Dr B Marika, Yolŋu Artist 2017

This raises the following questions about the disputes process:

- Similarly to land rights issues, will specialised lawyers be required?
- Is it proposed that a government agency would bring an action similar to the remit of the ACCC under Consumer Law?
- How would this process be made accessible for artists and community members who already face challenges in obtaining advice, including those in remote communities?
- If claims are either brought to or identified by organisations like IartC and Art Centre Peak Bodies, what role would such organisations have in this dispute?

INTERACTION WITH THE FAKE ART ISSUE

This also raises questions about how disputes regarding fake art will be managed. Specifically, disputes regarding fake art or artwork that misappropriates ICIP done by an Aboriginal or Torres Strait Islander person.

ASPECTS TO BE PROTECTED

The proposed (fake art) legislation's scope is limited to addressing the harm caused by fake First Nations-style art, merchandise, and souvenirs. Broader rights relating to Indigenous cultural and intellectual property will be addressed at a later unspecified date.

This framework, if limited to ICIP in visual art, would miss a key opportunity to protect other forms of traditional knowledge (e.g. language, dance, stories, song etc.). It is relevant to note that ICIP cannot be easily divided into discrete categories and enforced only partially, as this would divorce artwork from its broader meaning and connection to other aspects of ICIP. Additionally, any proposed legislation should be cautious not to limit protection to 'traditional' or historic cultural expressions. Living Aboriginal and Torres Strait Islander cultures are not fixed but continuously evolving, with new expressions of those cultures being developed over time.

If a 'multi-pronged approach' is preferred, we encourage such laws to be developed in tandem to achieve consistency and avoid prioritising one form of traditional knowledge over the other.¹⁰ The adoption at a federal level of a national ICIP strategy led by the Minister for Indigenous Australians could be one means of achieving such coordination within a multipronged cultural rights regime.¹¹

¹⁰ Draft report pp 222-223

¹¹ Ibid pp 225-226

Ultimately, just because the legislation may not extend beyond the protection of ICIP in the visual art space, this does not mean that there will not be other manifestations of ICIP within the artwork.

MANDATORY LABELLING

The Productivity Commission Recommendation 7.1 (page 37)
<https://www.pc.gov.au/inquiries/completed/indigenous-arts/report>

Mandatory disclosure where products are non-Indigenous authored should be required. The Australian Government should introduce a mandatory disclosure requirement to address the information gaps in the market that make it difficult for buyers to determine if products are created or licensed by an Aboriginal and Torres Strait Islander artist.

This should be done by requiring the clear and prominent disclosure of non-Indigenous authorship where products that a buyer might reasonably consider to be of Aboriginal and Torres Strait Islander origin, design or style have not been produced by or under license from an Aboriginal and Torres Strait Islander artist.

Under a government-mandated mandatory labelling scheme, the sale of fake art would be permitted, provided that a government-approved label is fixed to the art being sold. This would communicate to First Peoples' communities that the sale of fake art is legitimate and approved by the Government, provided there are labels to ensure consumers are not misled. It would say that while consumers' interests need to be protected, Aboriginal and Torres Strait Islander cultures do not.

- Is mandatory labelling being considered as a mechanism within the (fake art) legislation?

DEIDENTIFIED EXAMPLES

These issues outlined above regarding identification, evidentiary burden, and what aspects of ICIP will be protected by this legislation can be best understood by employing some scenarios that have been raised with IartC.

1. The high-profile artist who understands their ICIP has been misappropriated

The artist is a high-profile senior Aboriginal artist (primary artist). She is a master weaver, and much of her subject matter is centred on weaving fibre art. The artist's work is highly collectable. Another Aboriginal artist has created artwork with strong similarities to the design and construction of the artwork created by the primary artist. Therefore, the primary artist understands that her ICIP has been misappropriated.

The primary artist's artwork is informed by her relationship to and how she navigates her Country: where, when, and how to collect plant materials, the right grasses, vines, and sources of natural colour like flowers, berries, and roots for dyeing. The artist's relationship with her Country manifests in her art and has contributed to her becoming an authority figure for her sense of familial and cultural identity, which sustains and ensures the continuation of ICIP for future generations.

The primary artist comes to IartC with evidence referencing the misappropriation. The initial thought is that it is unlikely it will be deemed a copyright infringement, but it is probable that there has been a misappropriation of ICIP. At this point, IartC's ability to act on the issue is limited. IartC can hear their concerns, explain the need to refer the concerned artist or art centre elsewhere for legal advice and explain that under the current Australian law, ICIP is not protected. IartC can also direct the aggrieved party to the consultation process underway for the development of stand-alone ICIP legislation so that their experience might inform how legislation is developed.

Artists can approach those they believe to be misappropriating their work directly, but without legally enforceable rights and the protection of ICIP, they may find it hard to communicate the wrongdoing or the gravity of the situation.

The questions we pose as an organisation regarding scenarios like this and the development of stand-alone legislation are as follows:

- Will this legislation be able to manage disputes between two Indigenous or more artists as opposed to just non-Indigenous people making and distributing inauthentic (fake) art?
 - Will this legislation recognise that ICIP embedded in artwork extends beyond just the issue of fake or inauthentic art and encompasses language, scientific and ecological knowledge, and immovable and movable cultural knowledge?
 - In the above-mentioned example the artist could provide evidence of their past artworks through an extensive and developed back catalogue. Would this legislation be as effective for artists who may not be able to provide such detailed records of their work?
2. *Licensing agreements where Aboriginal and Torres Strait Islander artists are employed to avoid fake art claims on a superficial level but are still misappropriating ICIP*

This submission has already made mention of the work done in the Fake Art Harms Culture campaign and the proposed draft amendments to the ACL. These

developments, along with the decision in *Birubi v ACCC* have targeted specific issues regarding the production of artwork and souvenirs with 'Aboriginal inspired' designs and no connection to an Aboriginal artist. However, IartC has witnessed the emergence and/or rebranding of products, shops and souvenir wholesalers that advertise 'authentic Aboriginal' artwork and designs, also stating on their website that these products 'are painted by genuine Aboriginal Artists, each with their own individual style and story.' IartC understands this is sometimes an insincere representation of the situation, whereby artists are directed in their work to the point where it is no longer genuine. This level of direction may also see a misappropriation of ICIP in the process.

- Would this meet the legislative definition of fake art?
- Would the proposed legislation address this issue?
- If so, how would it ensure Aboriginal artists are better protected?

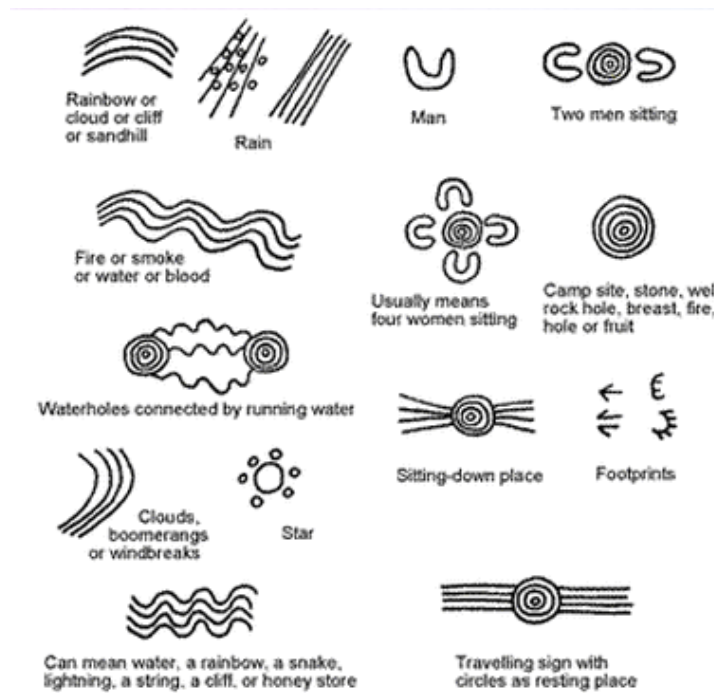
3.Foreign-owned businesses with no connection to an Aboriginal or Torres Strait Islander artist, potentially both infringing copyright legislation and misappropriating ICIP

IartC is aware of businesses (often foreign-owned, sometimes with a representative on the ground in Australia) producing 'Aboriginal and Torres Strait Islander style' artwork and designs onto clothing and souvenirs. These artworks and designs are a mish-mash of designs and symbols visually associated with Aboriginal and Torres Strait Islander culture but have not been created or licensed by an Aboriginal or Torres Strait Islander artist. These same businesses will also copy artist's work onto products and merchandise without any agreement with the artists whose work is being reproduced.

These businesses will include on their websites, '*Our products are Print-On-Demand, which means your items will be the newest item produced from our factory when you place an order. They are...produced by many of our own and co-operate vendors in North America, the EU, and China.*' This type of business may misappropriate ICIP and often infringe on existing copyright. These companies, however, attempt to evade the definition of fake/inauthentic art by describing the designs they use as 'Aboriginal inspired'. Thus, differentiating them from the *Birubi V's ACCC example*, as they are not explicitly stating their designs are authentic. Print-to-order businesses are consistently brought up with IartC by concerned individuals. IartC frequently refers artists for legal advice on this issue, and there is an expectation that the (fake art) legislation will address this issue.

- Would this meet the legislative definition of fake art?
- Will this be something that the proposed legislation can address?
- If so, how would the legislation deal with 'Aboriginal-inspired' products?

4. Aboriginal symbols used in contexts including educational resources



lartC understands the above symbols originate from the desert regions, namely Australia's Central and Western Deserts. These symbols became widely known with the emergence of the Western Desert art movement in the 1970s.

The above line drawings are frequently cited as originating from Papunya NT. Geoffrey Bardon is often mentioned, but many others claim ownership over these designs and symbols. We have taken screenshots from the internet, where no individual has been attributed.

What will this legislation mean for what have become seemingly generic Aboriginal symbols used by Aboriginal people from across Australia in their artwork as well as by non-Aboriginal individuals and businesses?

This raises the question of whether there is an assumption that all Indigenous people have ownership over and the right to reproduce certain common symbols or designs.

Numerous other examples are raised with lartC, and OFTA has undoubtedly been presented with further examples during the consultation.

Ultimately, people's understanding of what is and is not fake art differs, but there is an expectation that the fake art component of the proposed stand-alone legislation will address a wide array of issues. It will be helpful in managing artists' expectations if there is clarity about what the legislation will not address.

COMPLICATIONS POSED BY COMMUNAL OWNERSHIP

CONSENT TO REPRODUCE

One key difference between existing Australian copyright law and ICIP is that copyright looks for an individual author or creator, while ICIP is collectively owned. This may pose complications as for copyright, an author can consent to the reproduction of their work, but with ICIP, it is unclear whether an individual could consent to reproduction when something is communally owned. The communal ownership of ICIP may also complicate payment/right to reward/general benefits obtained through the production of work containing ICIP. Furthermore, what would happen if other owners of a particular ICIP reject the commercialisation of their ICIP by another legitimate owner?

WHO IS RESPONSIBLE FOR CHALLENGING DISPUTES?

Another consideration is who would have the right to challenge someone's use of ICIP. Specifically, would an action be brought by an individual on behalf of a community, by a cultural authority, or by a government agency?

INTERACTION WITH EXISTING LAW

WHAT TAKES PRECEDENCE?

Naturally, the proposed legislation will interact with the existing copyright legislation, and thus, the question of what takes precedence will arise.

WILL THERE BE EXCEPTIONS?

If, like the Copyright Act 1986, the proposed legislation will include exceptions, it is crucial that these be narrowly defined. The Copyright Act has numerous exceptions, the most commonly used being the fair dealing exceptions. Division three of the Act accommodates the fair dealing exceptions, which extend to the use of copyright for research or study, criticism or review, parody or satire, and news reporting.

It is our view that there should be very limited exceptions available so as not to erode protections provided by the new laws.

CONCLUSION

This submission has outlined our organisation's key questions about the proposed legislation. Ultimately, our hope is that this legislation will:

- Be implemented within the promised timeline,
- Respond in a practical way to the day-to-day real-life challenges First Nations artists face in protecting their ICIP.
- Facilitate broader education in this area. Accessible and relevant education for artists, the sector, and the market is essential in addressing the misappropriation of ICIP.
- Enable a process in the development of the stand-alone legislation that properly engages traditional knowledge holders, including those in remote locations for whom engaging in online information sessions will not necessarily be accessible or appropriate and that these knowledge holders are properly acknowledged and recognised for their contribution to developing the legislation. These are individuals who continue to hold, manage and safeguard their ICIP. They will have solutions for developing this legislation, and it should embed what they already do and know.

We have attempted to capture some of the concerns regarding ICIP that have been raised and discussed frequently with IartC to help illustrate the harm of fake art in its everyday context. IartC fosters trusting relationships with artists, and throughout this submission, we have tried to provide insights to aid in the development of this legislation.