



Copyright

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Intellectual property management

A guide for WA TAFE colleges



Copyright



Intellectual property management

The term 'intellectual property' (or 'IP') is used to describe the intangible rights associated with creativity, innovation and business reputation. It is a general legal term and covers a number of areas of the law, including copyright, which protects the right of the copyright owner to copy, communicate and control original literary, musical and artistic works.

Ownership of IP rights allows the owner to assert legal rights and proprietorship over the intellectual property. The owner of IP can rightfully assign, develop, exploit, franchise, license, publish, sub-license, use or utilise their IP in any manner for commercial or non-commercial purposes. The right to deny or restrict the use of the IP comes with IP ownership. This ownership allows the owner to exploit commercially and obtain benefit from their intellectual property.

IP rights may be divided in a number of different ways, these being:

- for a fixed term or indefinitely;
- over a particular geographical area or industry sector;
- exclusively or non-exclusively;
- to use or copy in a certain way; and
- to use or copy a set number of times.

Ownership and management of IP

WA TAFE colleges, established under the *Vocational Education and Training Act 1996*, have ownership rights and authority over IP created or originated by their employees. Ownership of IP allows TAFE colleges the right to determine the use of their IP, as well as the right to exploit it commercially where appropriate.

Any commercialisation should be in accordance with the nine key principles of government IP policy, which describe the general approach agencies should take to IP management and commercialisation. The principles are:

- 1 Lawfully use IP to improve service delivery and operational performance.
- 2 Preserve and enhance IP asset value while achieving core strategic business objectives.
- 3 Cooperate with the Western Australian business community to develop and commercialise IP opportunities, including open data access.
- 4 Ensure IP-related risks are known, managed and acceptable for Government.
- 5 Ensure IP policies, processes and decisions are accountable, transparent and auditable.

- 6 Adopt best practice for IP development, management, commercialisation and disposal.
- 7 Recognise, and as appropriate, reward employee achievements – including outstanding extraordinary outcomes.
- 8 Clearly communicate to staff and stakeholders how the Western Australian IP Policy is applied within the agency.
- 9 Where considered appropriate adopt Creative Commons Licensing as described in the Australian Governments Open Access and Licensing Framework (AusGOAL) and seek to minimise net costs to the Western Australian Government from copyright use.

Key principles reproduced from Western Australian Government Intellectual Property Policy 2015 under a [CC BY 4.0 licence](#), © Government of Western Australia (Department of Mines, Industry Regulation and Safety, formerly the Department of Commerce) 2015.

Each TAFE college is responsible for dealing with the administration of its IP issues and the management of its IP assets. Employees should advise their TAFE college of relevant potential commercial opportunities. Under the terms of the *Public Sector Management Act 1994*, employees are not to disclose IP to third parties without obtaining written permission from their employer. This includes addressing workshops or conferences. While employees are advised to seek and obtain specific advice from their college on the administration of pertinent IP issues, further information may be obtained from sectorcapability.ip@dtwd.wa.gov.au or from smartcopying.edu.au.

Formal agreements for the provision of products and services containing IP

When a TAFE college enters into a collaboration or formal agreement to provide products and services that will create IP, the TAFE college must ensure that there is a formal agreement in place to address any possible IP ownership issues.

The agreement should cover the following aspects:

- ownership rights in relation to the end product, resultant material or products of the collaboration or contract agreement;
- ownership rights in any IP brought to the project by any of the parties, including referral to rights associated with the underlying or original material, and subsequent rights in the enhanced or modified material;

- ownership rights of IP in future updates or modifications to the products of the agreement, including the right and authority of the parties to authorise amendments at a later stage and/or join with another partner to update the IP;
- the right to license third parties to develop or amend the products or materials produced under the agreement;
- rights to commercialise the IP; and
- if the IP is commercialised, how the revenue from the commercialisation is to be shared.

Individuals, industry bodies, the WA Department of Training and Workforce Development or any other entity may assign ownership rights to a TAFE college, normally on a contractual or licence basis.

When an organisation grants a licence to a TAFE college to use its material, the agreement must include a warranty that the organisation's representative has the ability to grant such a licence and that the grant does not infringe any third party's rights.

Preventing infringement of third-party IP

TAFE colleges should try as much as possible to use their own IP in all materials or products developed, generated or created for TAFE purposes.

When including third-party IP in any documents intended for commercial/fee-for-service purposes, permission must be gained in writing from the copyright owner prior to the documents' publication. The copyright owner must be told of the intended commercial use. This includes educational material intended to be sold to students for a profit. Note that there may be several layers of intellectual property in any one work, for example, quotations within quoted text.

Student IP

Students will generally own the copyright in their work (unless it was created in conjunction with the TAFE college or an employer). Permission should be obtained from the student (or parent/guardian if the student is under the age of 18 years) to reproduce their work in any format.

IP and employment

Normally, TAFE colleges will own the IP created by their employees in the course of their employment. This extends to situations where the employee has not been specifically instructed or funded to create or use such IP, but rather shows initiative to develop a system or product. The TAFE college also retains ownership in instances where an employee is specifically commissioned to do work and the TAFE college has provided the necessary resources, equipment, facilities or money.

Creation of IP outside employment

Where an employee (employed in any capacity – including casual or contracted staff) intends to create IP outside their normal course of employment and wishes to assert ownership of the IP developed, the employee should submit a written request to the TAFE college's administration before embarking on the creation of the IP, outlining:

- the nature of the IP; and
- the circumstances surrounding its creation.

Note that under section 102 of the *Public Sector Management Act 1994*, employees of government agencies must receive written permission from the employing authority to undertake any outside employment. Failure to comply with these provisions may result in disciplinary actions as specified in the Act.

Pre-existing IP

Where an employee, lecturer, contractor, consultant or other person brings pre-existing IP to a project and chooses to retain ownership, the TAFE college should seek an irrevocable, non-exclusive, non-transferable, royalty-free right to use the IP.

Collaborative IP ownership

Where an employee, lecturer, contractor, consultant or other person brings pre-existing IP to a project and chooses to retain ownership, the college should seek an irrevocable, non-exclusive, non-transferable, royalty-free right to use the IP.

Rewarding employees for the development of IP

As a general rule, government IP policy allows for the recognition of employees for the creativity and innovation involved in the development of significant IP. Recognition may take the form of attribution, keynote-speaker opportunities or a letter of appreciation/acknowledgement.

Indigenous Cultural and Intellectual Property Rights

Indigenous Cultural and Intellectual Property Rights (ICIPR) is a reference to Indigenous peoples' rights to their heritage. Indigenous peoples' heritage is a living heritage and it includes objects, knowledge, performing works and literary works – created in the past, now and in the future. The nature and use of Indigenous peoples' heritage is passed down from generation to generation. Usually the particular objects, sites and knowledge pertain to a particular Indigenous group or territory.

Heritage includes:

- performance, literary and artistic works – such as songs, music, dance, stories, ceremonies, symbols, language and designs;
- all items of movable cultural property;
- immovable cultural property – such as sacred sites and burial grounds; and
- documentation of Indigenous peoples' heritage in archives, films, photographs, video and audio footage and all forms of media.

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Protection under ICIPR

Essentially, ICIPR are a bundle of rights of Indigenous peoples that protects the right to:

- own and control ICIPR;
- commercialise ICIPR in accordance with traditional laws and customary obligations;
- benefit commercially from the authorised use of ICIPR;
- enjoy full and proper attribution; and
- protect significant and sacred materials.

There is no specific legislation in Australia that recognises ICIPR. Increasingly, Indigenous communities are using non-legislative means such as contracts and protocols to protect their ICIPR, as IP legislation is not always adequate. For example, copyright can only provide limited protection of ICIPR, in particular:

- the material form requirement is not always met where the stories and songs have been passed orally from generation to generation;
- the period of copyright protection is finite and is unable to protect traditional art that has been passed through generations; and
- copyright is generally granted to the creator and does not recognise communal or customary ownership of cultural heritage of Indigenous tribes and clans.

Guidelines when negotiating with Indigenous communities

The following questions are intended as a best practice guide to assist educational institutions in negotiations and consultations with Indigenous communities to ensure that an Indigenous perspective is sought on all issues surrounding the project.

- Does your nominated Indigenous community representative have the authority to speak for, or on behalf of, the proposed project?
- Have you received written consent from the traditional owners/custodians of ICIPR for the project?
- Does the community understand the aims, objectives and methodology of the project?
- Does the community understand how the outcomes of the project will be used?
- Have you made arrangements with the community to provide feedback on the project at all stages?
- Have you acted in good faith and respected the privacy of Indigenous peoples and communities?
- Have you ensured that the community understands the copyright issues of the project?
- Does your proposal safeguard Indigenous sensibilities?

Any project proposals should also demonstrate that:

- the project will not result in damage to Indigenous cultural integrity; and
- the collected information remains the intellectual property of the people who provided it.

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