

Indigenous cultural authorship and intellectual property

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The information below outlines the considerations to be taken when working with Indigenous Cultural and Intellectual Property (ICIP). Increasingly, First Nations groups are being sought for collaboration and contribution of ICIP to projects in the built environment. In working with First Nations peoples and property, it is important to be aware of the principles for respect and self-determination which underpin engagement with and use of ICIP.

Page contents:

- [Understanding Cultural Intellectual Property](#)
- [What is ICIP?](#)
- [Who owns ICIP?](#)
- [Does Australian law protect ICIP?](#)
- [Agreements about ICIP](#)
- [Further reading](#)
- [References](#)
- [About the Authors](#)

Understanding Cultural Intellectual Property

In Australia, there are limited legal frameworks for recognising the intellectual property rights and interests of First Nations peoples. International law, and specifically Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), recognises the right of Indigenous peoples to ‘maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...’ (United Nations 2007:22). Examples of ICIP are given below. The UNDRIP also recognises Indigenous peoples’ right to ‘maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions’ (United Nations 2007:23).

Many advocates are calling for development in this area to improve recognition where it does not exist or is not considered sufficient under existing legal frameworks. First Nations peoples are often therefore cautious when negotiating appropriate contractual protection of ICIP and seeking assurances that ICIP will be properly recognised and protected because they cannot rely on the law for appropriate recognition or protection.

For example, a First Nations consultant may be paid a fee to provide services, but any material created may not be transferred to the client for that project as they are retained by Indigenous peoples as part of their cultural heritage. This is fundamentally different to the more familiar scenario for an architect where the client is granted an express, non-exclusive licence for a certain design or project on a given site which is not to be replicated for another project.

Awareness of this context assists practitioners in engaging with respect and with a view to supporting the self-determination of First Nations peoples. Engaging appropriately with ICIP contributes to the preservation and celebration of these vibrant cultures and history, while also enhancing creative processes with diverse perspectives.

[Back to top](#)

What is ICIP?

ICIP refers to the rights that First Nations groups have to control, maintain, protect and develop their cultural heritage such as art and culture. This heritage is not just a collection of artefacts or designs; it represents the authorship of the identity, history, and living culture of First Nations peoples. ICIP is grounded in the fundamental human rights of Indigenous peoples to self-determination – setting the rules for themselves about how aspects of their identity, history and culture can be used and by whom.

Examples of types of ICIP given within the UNDRIP include ‘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’ (United Nations 2007:22). It is important to note that much of this ICIP is in the form of oral history and physical expression and is not necessarily recorded. ICIP therefore protects both tangible and intangible elements.

[Back to top](#)

Who owns ICIP?

First Nations principles of collective ownership are at odds with conventional legal notions of individual ownership within the Australian legal framework. ICIP is generally created over many generations and is considered to be owned collectively by a tribal or family group.

When First Nations consultants are engaged to assist on a project, their first piece of work will often be to engage with the local traditional family group to discuss ideas and consent to the inclusion of ICIP in a specific project. This consultation process may include a yarning

circle or walk on Country to obtain the views of Knowledge Holders within the family group. The right approach will depend on community protocols and vary from place to place. Engaging cultural advisers early in the project planning process can be beneficial.

The rights which may be granted to users of ICIP need to be understood in this context. Restrictions may be placed on conventional intellectual property licences to uphold rights of attribution and to ensure uses which are consistent with respecting identity, history, and living culture.

Different traditional owner groups will have different preferences on how these aspects are managed. Deep listening is important understanding that there is no one size fits all. One principle is consistent and that is that ownership of ICIP will always be maintained and conditions on use remain with traditional owners to self-determine.

[Back to top](#)

Does Australian law protect ICIP?

Broadly speaking, Australian law presently protects the expression of ideas in a material form and places conditions on those protections. Areas of protection include via copyright, trade marks, designs, patents and plant breeder's rights.

Principles within Australian law which conflict with principles of ICIP protection include:

- ideas which are wholly oral are not ordinarily subject to protection under any of these laws
- concepts of collective ownership of IP conflict with the law's protection of a single author
- limitations on time periods for recognition diverge with the long history and development of traditional knowledge and cultural expression that Indigenous communities have safeguarded over generations.

For example, traditional medicines and treatments are unlikely to attract the protection of patent law which requires a 'novelty' and 'inventiveness' which are unlikely to cover traditional knowledge that has existed for thousands of years. Similarly, time limitations under copyright law mean that protections will not extend to rock paintings which have existed for thousands of years.

These gaps in the law risk cultural appropriation where practitioners do not adequately engage with ICIP.

[Back to top](#)

Agreements about ICIP

ICIP clauses in agreements will usually need to be separated from and prevail over clauses which otherwise assign intellectual property ownership or grant licences in intellectual property. The two concepts are distinct and should not be treated as one.

Examples of topics that need to be considered and addressed in agreements to protect ICIP include:

- a definition of ICIP
- a licence to use ICIP may contain more conditions than standard intellectual property licences
- ICIP which can be licensed may be limited to elements which are suitable for public use and which do not contain any secret or sacred elements
- additional cultural protocols and restrictions may be placed upon recording and use of ICIP
- directions may be given as to the recording, expression and/or display of ICIP
- rights of full and proper attribution will be retained
- rights may be collectively held, rather than by a specific individual
- conditions may be placed on assignment of ICIP.

Some organisations and departments have policies for dealing with ICIP. Acknowledging that the law and policy in this area is presently unsettled, and that different traditional owner groups can have their own preferences, such policies may need to be treated with caution as they risk being outdated and/or not fit for purpose.

At all times, the principle of self-determination is paramount. Traditional owners have the right and ability to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

[Back to top](#)

Further reading

- Australian Copyright Council (2024) '[Indigenous Cultural & Intellectual Property \(ICIP\) An Introduction](#)' Australian Copyright Council.
- Dr Danièle Hromek and Dr Terri Janke (2021) '[Cultural Principles and Protocols for Designers](#)' [PDF]
- Law Council of Australia (2024) '[A new legislative framework to address and protect Indigenous cultural and intellectual property rights](#)' [PDF]
- United Nations (2007) '[United Nations Declaration on the Rights of Indigenous Peoples](#)'

[Back to top](#)

References

- United Nations (2007) '[United Nations Declaration on the Rights of Indigenous Peoples](#)', United Nations, accessed September 2024.

[Back to top](#)

About the Authors

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Sionea is a proud Aboriginal woman. She is the sole founder of SCB Legal and provides a range of advice, representation and support to Indigenous companies, organisations, and individuals in relation to their rights. Sionea is goal oriented and focused on achieving equality for our First Nations Peoples.

[Back to top](#)

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