

Indigenous Cultural and Intellectual Property Rights

Latest News

IP Australia has recently published *Indigenous Knowledge: Issues for protection and management*, a paper by Indigenous intellectual property (IP) firm Terri Janke and Company, a copy can be found here: <https://www.ipaustralia.gov.au/about-us/news-and-community/news/indigenous-knowledge-issues-protection-and-management>

Indigenous Peoples' rights to their heritage

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 - all of those things 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:

- literary performing and artistic works - songs, music, dance, stories, ceremonies, symbols, language and designs
- all items of moveable cultural property
- immoveable cultural property - sacred sites, burial grounds
- documentation of indigenous peoples' heritage in archives, films, photographs, video and audio tapes and all form of media

What is ICIPR?

Essentially, ICIPR are a bundle of rights of indigenous peoples which protect 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
- protect significant and sacred materials

How is ICIPR protected in Australia?

There is no specific legislation in Australia that recognises ICIPR. ICIPR may be protected by copyright, trade marks, confidential information, passing off and trade practices law. However this piecemeal protection is fragmented and limited.

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 which has been passed through generations
- copyright is generally granted to the author and does not recognise communal or customary ownership

Increasingly indigenous communities are using non legislative means such as contract and protocols to protect their ICIPR.

Dealing with ICIPR

The best non-legislative means of dealing with ICIPR is to develop an organisational cultural protocol. A protocol may include guidelines on procedure, a code of behaviour or a set of rules on how to recognise and deal with ICIPR.

The development and use of protocols is becoming common practice in government and the corporate sector. By way of example, set out below is the NSW Ministry of the Arts Indigenous Arts Protocol.

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a. Principles

- All Aboriginal people are entitled to respect for their culture
- All Aboriginal cultural heritage, including cultural expression, is the intellectual property of Aboriginal people
- Aboriginal people have the right to protect and manage the use of their cultural heritage and expression
- Aboriginal people have the right to benefits accruing from any activities that use their cultural heritage and expression
- Aboriginal people have a right to Government support in the protection and maintenance of their cultural heritage and expression

b. Guidelines – (for arts workers and organisations developing project proposals)

As best practice, any projects involving Aboriginal cultural expression should be negotiated with the owner/s using appropriate protocols which include:

- An agreement outlining the conditions of consent should be obtained from the owner/s for projects to commence and continue.
- An acknowledgement of the owner/s of the cultural heritage or expression.
- A clear description in plain and appropriate language of:
 - i. the aims and objectives
 - ii. the methodology
 - iii. how the results are to be interpreted
 - iv. what the results are to be used for
 - v. what the anticipated benefits to the community will be.

Proposals should also demonstrate that:

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

An Aboriginal perspective should be sought on all issues surrounding the proposal.

c. ICIPR Checklist

The following questions are intended as a guide to assist educational institutions in negotiations and consultations with Aboriginal communities.

- Does your nominated Aboriginal 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 Aboriginal peoples and communities?
- Have you ensured that the community understands the copyright issues of the project?
- Does your proposal safeguard Aboriginal sensibilities?

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