Indigenous Cultural and Intellectual Property (ICIP)

1. What is ICIP?

ICIP is a short way of saying Indigenous Cultural and Intellectual Property. ICIP means all aspects of Aboriginal and Torres Strait Islander peoples' traditional knowledge and cultural expressions. This is also sometime referred to as "cultural heritage".

ICIP can take many forms. Some of these are:

- Knowledge about stories, places or rituals.
- Writing, such as a book or poetry.
- Music, such as songs.
- Performances, such as dance.
- Ceremonies.
- Artistic works, such as paintings, traditional symbols and designs.
- Language.
- Cultural objects, such as tools or artefacts.
- Sites, such as sacred sites or burial grounds.
- Secret or sacred information.
- Human remains or tissue.
- Documented cultural heritage, such as in reports, films, or sound recordings.

Every Aboriginal or Torres Strait Islander community has unique and special ICIP. That ICIP is dynamic and living. It includes traditional knowledge and cultural expressions that are passed down over time and between generations. It also includes knowledge and cultural expressions generated now, and in the future.

Aboriginal and Torres Strait Islander peoples are the custodians of their traditional knowledge and cultural expressions. Aboriginal and Torres Strait Islander laws and protocols say how knowledge and culture can be shared and used. The laws and protocols may be different for each Community.

The UN Declaration on the Rights of Indigenous Peoples says that Indigenous Peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression. This recognises "ICIP rights". Principles of self-determination and free, prior and informed consent underpin respect for ICIP and ICIP rights.

While there are some Australian laws that can be used to protect ICIP and ICIP rights, ICIP rights are yet not a legal right that Australian law recognises and protects.

Arts Law acknowledges the important and foundational work of Dr Terri Janke in advancing recognition of and respect for ICIP in Australia. Her report, *Our Culture: Our Future*, and subsequent work has been critical in the work to protect ICIP in Australia.

2. What does respecting ICIP look like in practice?

Although Australian law does not specifically protect ICIP and recognise ICIP rights, anyone who uses or receives ICIP should respect Aboriginal and Torres Strait Islander peoples. You can show respect to traditional owners by respecting their

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ICIP and ICIP rights.

ICIP rights include the rights of Aboriginal and Torres Strait Islander peoples to:

- Protect traditional knowledge and cultural material.
  This includes controlling the way that ICIP is shared and used, and by keeping secret and sacred material secret.
- Ensure respect for traditional laws and customary obligations.
  This is particularly important when ICIP is used, shared, or when someone makes money from ICIP.
- Be paid for the use of ICIP, especially if money is being made from it.
- Be credited and acknowledged as the traditional owners and custodians of the ICIP.
- Prevent insulting, offensive and misleading uses of ICIP.
- Control the documentation or recording of ICIP (including cultural customs and expressions and language).

Respecting ICIP means recognising that Aboriginal or Torres Strait Islander peoples should have control over how ICIP is shared and used. This includes making sure that sharing and using ICIP follows community laws, systems and protocols.

An example is where a manufacturer wants to use a traditional motif on a t-shirt design. Recognising and respecting ICIP and ICIP rights mean that:

- The manufacturer seeks and has appropriate Community consents before the motif is used.
- The manufacturer makes sure that the motif is only used in line with the consent that has been given.
- The motif used does not contain any secret or sacred knowledge.
- The motif is not used in a way that is offensive or unacceptable under Community laws.
- The Community share in the profits of the commercial use of the ICIP.
- The T-shirt is sold with a label that credits the Community as the traditional custodians of the motif.

3. What protections does Australian law currently provide for ICIP?

Australian law currently does not specifically protect ICIP or recognise ICIP rights.

However, there are existing laws that may give some protection to ICIP.

Copyright: Creative work by Aboriginal and/or Torres Strait Islander artists and creators may be protected by copyright and moral rights.

- Copyright protects material such as artwork, stories, songs, plays, craft and film. There are some requirements for protection, like originality and being put down in a material form. Material form means it has been recorded or captured in some way, such as being written down, captured in a video file or painted on a canvas.. The copyright owner has exclusive rights, including the right to reproduce and communicate their work to the public. The copyright owner can usually say “no” to reproductions or communications they do not want. You can read more in Arts Law’s information sheet on Copyright.
- Copyright laws also provide protection for the moral rights of individual authors or artists. Moral rights include the right to be named as the author or artist. It also includes the right to prevent your work being treated in a way that is derogatory. You can read more in Arts Law’s information sheet on Moral Rights.

Contracts can also be used for protection of ICIP. Contracts can set out the specific way in which ICIP can or cannot be used. In a contract, you can decide and agree that ICIP will be used and treated in a way that is respectful of traditional laws and protocols. For example, a contract can require parties to seek approvals of draft uses of ICIP from the custodians or acknowledge the custodians of ICIP material. You can read more about contracts on Arts Law’s information sheets on

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Contracts.

ICIP may also be protected in limited ways in other areas of law. These include:

- **Design law** protects new and distinctive designs.
- **Patent law** protects inventions, such as medicines, methods or products.
- **Trade mark law** protects ICIP by preventing the registration of certain trade marks. A trade mark should not be registered if it implies that the goods or services have an Aboriginal or Torres Strait Islander connection or origin when they do not. A trade mark should not be registered if it would be likely to offend, and this can include offensive use of ICIP.
- **Confidential information** can protect the misuse of confidential information, including secret knowledge that has been disclosed in circumstances where it was clear the knowledge was secret.
- **The Australian Consumer Law** and the law of **passing off** can prevent someone using ICIP in a way that wrongly conveys that there is a connection with or licence from the traditional owners.
- **Heritage protection laws** provide some protection for places and for moveable cultural heritage, such as objects. In Victoria, there are laws that protect intangible cultural heritage that is registered.

The purpose of most of these existing laws is not to protect ICIP. They are often not consistent with the way in traditional laws and protocols deal with ICIP and do not provide adequate protection of that ICIP. For example:

- Intellectual property laws, like copyright, do not recognise traditional communal rights or communal ownership. The focus is instead on the individual author, designer or inventor.
- Intellectual property rights generally have an end date. ICIP rights do not expire.
- Copyright protects how ideas or knowledge are expressed. Copyright does not protect underlying knowledge or ideas themselves. For example, copyright protects a painting but it does not protect the story that the painting conveys, the general style of the painting or the painting method used. Or copyright may protect a dictionary that records traditional language but it will not protect the traditional language itself.
- Moral rights recognise the right of creator to be credited to make sure their work is not treated in a way that is derogatory or damaging to their reputation. However, moral rights do not recognise a Community's right to be recognised for the ICIP or the right to make sure the ICIP is not used in a way that is damaging.
- A patent may protect a new invention based upon traditional knowledge. However, it will not protect traditional knowledge handed down over many generations. This long-standing use of a product or substance may mean that someone else cannot get a patent for the same product or use.

4. Will the Australian Government make changes to laws to protect ICIP and ICIP rights?

In 2023 the Australian Government launched a new national cultural policy and said that it will introduce stand-alone ICIP legislation. These laws will be based on the principles of respect, self-determination, consent and consultation, interpretation, cultural integrity, secrecy and privacy, attribution, benefit sharing, maintaining First Nations culture, and recognition and protection. These ten principles are a reference to Dr Terri Janke's *True Tracks®* principles.

At the time this information sheet was written, the proposed laws have not been released or enacted. In 2024, the Federal Government is engaging in consultations on the first stage of its proposed changes, namely to address the issues of fake art, merchandise and souvenirs.

5. How can I respect ICIP in my art practice?

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Respecting ICIP in your art practice means collaborating with, and seeking free, prior and informed permission from Aboriginal and Torres Strait Islander traditional owners for any use of ICIP.

Creative Australia has published *Protocols for using First Nations Cultural and Intellectual Property in the Arts*. These protocols contain guiding principles and practical guidance for working with ICIP and Aboriginal and Torres Strait Islander peoples. They encourage self-determination and the responsible and ethical use of ICIP.

If you are a creative practitioner funded by Creative Australia, you may be required to comply with the protocol as part of your funding requirements.

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