

INTELLECTUAL PROPERTY GUIDELINES FOR DOCUMENTING, RECORDING  
AND DIGITIZING INTANGIBLE CULTURAL HERITAGE: TOWARDS AN  
INTERNATIONAL FRAMEWORK

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Building Community Capacity: A Roundtable on Practical Initiatives on Intellectual  
Property and Traditional Cultural Expressions, Traditional Knowledge and Genetic  
Resources.

World Intellectual Property Organisation, Geneva  
10-12 December 2007

**DRAFT**

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## Introduction

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Firstly I would like to thank Wend Wendland and his colleagues for inviting me to participate in this Roundtable. It is certainly a privilege to be here and to listen to new perspectives about IP issues. In particular I am excited to be part of such a dynamic collectivity that is working to devise some new strategies for the future management of IP in relation to Traditional Cultural Expressions.

Before I begin I just want to give a very brief summary of how I come to these issues, and in which contexts I have been working. In this sense I am wanting to emphasize my situated-ness in relation to IP and the protection of traditional knowledge.

My background is law and cultural theory – particularly the making of legal categories. My interest lies in understanding how law works to make certain problems and how it produces knowledge about a specific subject – the case in point would be how law makes sense of and seeks to determine the boundaries of and the remedies for traditional knowledge protection through the lens of IP. Beyond this theoretical position though, I have been working on specific IP issues since 2000 and have worked on major IP projects in both Australia and Indonesia. Of direct relevance to this Workshop is the Project I designed and researched between 2002 and 2006 in Australia at the Australian Institute of Aboriginal and Torres Strait Islander Studies.<sup>1</sup> (AIATSIS holds the largest collection of Aboriginal and Torres Strait Islander cultural material in the world – it is also an Indigenous run organization with an Indigenous council that oversees its decisions.)

The project – *Intellectual Property and Indigenous Knowledge: Ownership Control and Access to Cultural Materials* was designed to respond to an increasing disjuncture between the rhetorical writing around Indigenous interests in intellectual property and the realities of indigenous expectations of and capacity to utilize intellectual property law. Beyond concerns for the protection of Aboriginal art, I became acutely aware how the largest IP issue facing indigenous people in Australia involved ownership and control of cultural materials held throughout archives, libraries and other repositories throughout Australia and internationally. Thus the project explored challenges in determining ownership of this ethnographic cultural material (in the main films, photographs, sound-recordings and unpublished papers and manuscripts), and the locally specific contests and conflicts over the management of knowledge that arose through the repatriation and reuse of this material, often in digital format, to communities.

The scope of the project required working across an array of academic disciplines, Indigenous and non-indigenous communities, specialist expert and cultural institutions and governmental departments. In understanding local experiences around an intensely political, economic and cultural issue, the project sought to develop practical outcomes that responded to the changing social dynamics resultant from emerging expectations about the potential to ‘own’ knowledge. Outcomes included locally developed

community strategies for Indigenous engagement with intellectual property law, especially in a digital environment; national guidelines for managing Indigenous material in cultural institutions; policy advice for Indigenous and non-Indigenous organizations and bureaucracies, as well as a variety of academic articles exploring the politics of these debates and the social contests that develop around claims to knowledge ownership.

Needless to say, my paper today on International IP Guidelines derives from this work. I am also influenced by the recent WIPO inquiries in this area – particularly the recent surveys conducted by Martin Skrydstrup and Malia Talakai.<sup>ii</sup> Specifically I want to start mapping out what International IP Guidelines for the Recording, Collecting and Digitizing of Intangible Cultural Heritage should encompass. In order to do this, I will focus on 4 key questions:

1. What kinds of problems the guidelines are seeking to address?
2. Who are the guidelines designed for?
3. In what kinds of circumstances would they be useful?
4. What other strategies could be developed to complement the guidelines?

I will conclude by making suggestions for what international guidelines should look like, how they might incorporate emergent best-practices in this area, and how they might be further developed to include customary law practices as these emerge into the future.

## **FUNCTION**

However, before considering what kinds of problems the guidelines are seeking to address, I want to make a few general comments about the function of guidelines. Obviously guidelines are about setting rules or standards and are developed in order to provide guidance and governance on appropriate behavior in particular situations. Through this definition then, we might understand the guidelines as a very specific intervention aimed at the particular situations that involve the recording, documentation and digitization of intangible cultural heritage. To this end I would also interpret this standard setting document as also being contained by the nature of IP law and I will say more about this presently.

By their very nature, guidelines are prescriptive. They can be understood as having an intimate relationship to law and legislation but they differ in very important ways. Unlike law, guidelines are more malleable and can accommodate change over time from different parties. This is important for several reasons. Firstly, guidelines can be culturally specific. For example, in the very kinds of behavior they are seeking to govern. Indeed any guidelines regarding behavior around intellectual property will inevitably be culturally specific owing to the very nature and genesis of intellectual property law. The point here, is to acknowledge at the outset, what the limitations of International IP Guidelines will be, and therefore also set to work productively to address these

limitations by, for example, developing additional and supplementary strategies that complement and enhance the Guidelines. I will make some suggestions about complementary strategies towards the end of this paper, but it is also something that can be explored further in our less formal session tomorrow.

Moreover, it is worth noting that the affectivity of these guidelines will depend heavily upon their capacity to embody both legal and sociological components. Thus, the guidelines must have as their point of departure an understanding of the way in which IP issues relating to intangible cultural heritage emerge and how they are embedded in broader social, historical and political contexts.

It is also important to recognize that the utility of these IP guidelines is that they have the potential to be applicable in *all* contexts where the recording, archiving and storage of intangible cultural heritage is taking place. For instance, this includes in contexts where there is increased recording of knowledge regarding biodiversity, the creation of inventories recording bio-pharma, the creation of databases for the storage of this informational material and the choices to either license (through creative commons or open source for example) or restrict access to this material. That is, they can stretch across what are now rather arbitrary definitional constraints of TK, TCEs, Genetic Resources and the like. Thus, the ambition for these guidelines is that they are also offered up as useful tools in other international/national and local forums currently fraught with IP and intangible heritage issues – namely contexts occupied by disputes over Indigenous/traditional/local knowledge in the Convention on Biological Diversity and UNESCO.

It is worth noting as an aside, that whilst the point of these guidelines is to change and direct certain kinds of behavior in relation to Indigenous cultural material, there is a politics to the very word ‘Guidelines’ that needs to also be acknowledged. In this sense, it is possible that national governments and/or institutions will be resistant to an international standard setting document that has ‘Guideline’ in the title. This can certainly be addressed as the guidelines develop but this politics does not need to affect the intention and function of these international IP guidelines.

So then:

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## **1. What kinds of problems are the IP Guidelines seeking to address?**

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One of the first concerns is an identification of the problems. These are both conceptual and specific in scope. For instance the questions can be posed –

To what extent can IP law as it is currently understood and operates, incorporate elements of customary law? Are the guidelines an attempt to address this historical and cultural disjuncture?

If we answer YES to this last question, we move to the HOW? Realistically and practically it will take more than a set of guidelines to augment IP law with the varied

customary laws and practices of local/traditional and Indigenous communities throughout the world. To this end, the Guidelines should be understood as an initial point of departure in this direction – and that coupled with other strategies (some that I will discuss towards the end of the paper) a trajectory for opening up the field of IP and encouraging further reflexivity upon it will be set.

There is a further question here, and it revolves around the immediate IP problems facing Indigenous/local and traditional people and communities. It is indeed ironic that at the same time as issues regarding the ownership, control of and access to cultural materials held in depositories around the world, and the politics of the colonial collecting encounter are laid bare, there actually are more researchers, companies and organisations working with and within Indigenous individuals and communities than at the height of the colonial project. All parties in this ongoing encounter remain relatively naïve about IP and as such, the problems in terms of ownership, access and control are destined to be repeated. This should give us reason to pause. There are currently no clear international guidelines for research with Indigenous communities in terms of recording, documenting and digitizing intangible cultural heritage. Without an international standard setting document we are set to repeat the past. Realistic platforms for negotiating the terms of engagement for access and control of cultural material/TCEs need to be urgently developed.

So this is complicated – both in terms of adequately incorporating community perspectives around different interpretations of IP and addressing immediate knowledge gulfs that could mean that Indigenous people are provided with the appropriate tools to negotiate ownership and control on their own terms. The aim for the guidelines is to achieve both of these intertwining elements.

Of course, the shape and scope of international guidelines is also dependent upon the identification of certain kinds of problems being experienced at local, regional, national and international levels. Clearly the problems, as expressed already today, involve intersections of law, history, action, indeterminacy and knowledge. To be fair, the guidelines should be understood as part of a process not as a conclusion. To this end they are seeking to achieve a reconciliation of practice, and a mediation of the power of intellectual property particularly how it can be both mitigated against *and* usefully harnessed, as a very specific tool.

Asking the question about what kinds of problems the guidelines are seeking to address also requires an identification of who is experiencing those problems including for instance:

- Indigenous individuals and communities,
- Cultural institutions and repositories like libraries and archives, but also increasingly community cultural and/or knowledge centres,
- Researchers and funding agencies/institutions,
- Researchers, artists and others seeking to access and utilize material within archives.

The role of the International IP Guidelines then is to synthesize problems experienced by all stakeholders – in terms of understanding which ones cut across all these contexts. It is

also crucial to recognize the different levels of power and access at play between parties. I will come back to this again later in the paper.

### **1.1 IP as one of many problems**

As everyone in this room would be aware, intellectual property problems are not always easy to isolate. Rather, they are often tightly entwined around other legal, as well as non-legal issues. So identifying an IP problem is also about identifying what isn't, strictly or legally speaking, an IP problem. After identifying and remedying the IP issue what then follows is a commitment to finding innovative and alternative means for alleviating the other additional problems. Of course this presents its own difficulties, especially when they involve history, power, politics and subjectivity. Nevertheless, this is the reality of the current dilemma of IP and TCEs, and developing a framework that recognizes the interconnected nature of these issues also has the capacity to bring the problems, in their entirety, into sharper focus.

### **1.2 Knowledge of IP**

In order to identify an IP problem, there must be clear understanding of what is actually protected in law and what isn't. What makes this difficult, especially in our current context, is that so much specialized knowledge is required. Even experts in copyright law would not necessarily be across the intricacies of every country's copyright legislation. As law and access to law remain as key challenges to be overcome in many parts of the world, a function of the guidelines then is to provide as much of this knowledge, in accessible ways, as possible.

So a key problem is often a basic lack of knowledge about IP. This applies as much in local community contexts, larger institutional contexts and to all manner of researchers working within community contexts. I have found that there can be confusion about IP (for instance between copyright and patents) and this affects decision-making possibilities in all contexts. While some institutions have dedicated IP departments, this is by no means the norm. To this end, any International IP Guidelines need to have clear explanations of copyright and any neighboring rights such as performers rights, designs and confidential information.

We could break the specific knowledge around IP into the following categories:

#### **Current Copyright Protections:**

1. Subject matter (literary works, dramatic works, musical works, artistic works, films, sound recordings, broadcasts etc);
2. Duration of protection
3. Infringement
4. Exceptions (fair use and copyright for research purposes/for archival purposes)

#### **Performers rights:**

1. What are they/how do they work/For whom?
2. Infringement

**Designs:**

1. Different regimes (including Community Design UK, EU)
2. Registration/Unregistered Rights
3. Scope of Protection

**Confidential Information:**

1. What is this, and in what jurisdictions is it appropriate?
2. How to utilize?

An additional issue that arises time and time again in my conversations with collecting institutions, is that of transitional copyright – for instance, what the status of material that was made prior to or at the time of changing copyright statutes. This particularly affects the status of sound-recordings and photographs – in the future it will matter in relation to recorded performances and performers rights.

So it would be useful to have a section on:

**Transitional Copyright:**

1. Subject matter most affected
2. Duration of the protection
3. Exceptions

**Historical Copyright:**

1. When the main changes were
2. What works are affected
3. Problems for historical copyright (public domain, orphan works)

After providing specific knowledge about IP, it is then possible to move into the immediate contexts where IP issues almost always arise. These are contexts of documenting, recording and digitizing. I want to group together some of the kinds of problems that are experienced at each of these moments. I think this helps build out from the specifics of copyright into a more contextualized discussion. I also think that this is the part within the guidelines where examples can be utilized to great effect in order to show both the specificity of the problems, but also the way in which certain questions of law are repeated.

**For all three areas of documenting, recording and digitizing the following questions are fundamental for IP law and subsequently determinations of ownership and access:**

- **Who is doing the documenting?**
- **For whom?**
- **What kinds of agreements have been set in place?**
- **Between who?**
- **What kinds of permissions and consultations have been engaged?**
- **Who legally owns the material?**
- **Who culturally owns the material?**
- **Where will the material be stored?**

- **For how long?**
- **How will access be facilitated?**

### **Documenting:**

The first questions here are:

What constitutes documentation?

Who will be doing the documentation?

What alternative notions of ownership and control are in operation within the context?

Who is making the decisions?

Documenting is the process where an intangible expression is rendered tangible. This does not necessarily mean that all the meaning that the intangible expression encompasses has been captured, but that some form of representation of form has been made. Examples include written works. This may include word lists, field-notes, thesis, unpublished manuscripts etc.

There are a range of questions that emerge around whether a work is published or unpublished, for instance if the work is unpublished what is the duration of the copyright? In other contexts, there are questions about what constitutes a publication – for instance, if word lists are compiled and produced for a community of 20 people, does that constitute a publication?

In the relationships between IP and documentation, specific questions also need to be directed towards:

What documentation means for a local knowledge holders or the broader community?

What this means for a collecting institution?

What this means for a community archive?

What this means for the individuals involved in the recordings?

What this means for the funding agency?

### **Recording:**

Determining what a recording constitutes is the initial starting point. Like documentation above, recordings seek to capture an element of the intangible expression or imagery and contain it in a tangible form such as in a sound-recording, photograph or film. A main concern with these forms of recording is that the owner of the recording is, unless negotiated through contract or other work for hire doctrines, the person who physically makes the recording. This has created numerous problems for Indigenous communities seeking access and reclaiming ownership of cultural materials.

There are special provisions that have been made for performers and performances.

Where are the overlaps, and what kinds of different rights could exist in one recording?

There are problems of storage and access and the dissemination of older public domain materials

## **Digitizing:**

Digitization is the process of converting information into a digital format. Both documented material and recorded material can be subject to processes of digitization.

What kinds of material can be digitized?

What are the issues around databases?

Creating Databases – who owns a) the database, b) the content in the database?

What issues of privacy, confidentiality, open source, restricted material, public domain emerge?

Digitizing old material?

Making new material (born digital)

What issues arise for cultural centers and digital archives

Digital storage of genetic materials – what issues arise now and might in the future?

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## **2. Who are the guidelines designed for?**

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This is a crucial question that affects both the utility of the guidelines as well as the plans for effective communication and dissemination of the guidelines. This also requires a determination of the needs and expectations of parties in relation to IP and in relation to IP Guidelines.

In approaching this question, there are four key interest groups that can be initially identified. (These groupings are not mutually exclusive and there are many instances where they overlap):

### **1. Indigenous and/or traditional knowledge holders and/or communities who are participants in the recording, documentation and/or digitization projects.**

In this sense, what strikes me as key needs for this group oscillates around knowledge about IP, and the increased capacity to make decisions about when, how and what will be recorded. There is a need to know what is at stake and where and how the recorded material will be managed. Most importantly, however, is the need to know how alternative ownership, use and access can be negotiated. To the extent that resolution of these issues are vital, I believe that while these IP Guidelines can address some of these issues, there are also a separate range of concerns here that need to be addressed by alternative means, ones that particularly speak to and are targeted towards Indigenous individual and community needs.

The guidelines here should be instructive but not prescriptive, as each case will be different, and it is also equally important to develop, within a community context,

knowledge about how individuals, families and/or communities can respond and negotiate. In this sense, a separate guide for communities could be developed that could be complementary to the IP guidelines currently under discussion. It is worth restating that these guidelines are tackling one part of a broader social problem that has as much to do with access to law, legal resources and the capacity to make informed decisions as much as anything else. Thus in providing guidelines for institutions and researchers, whilst empowering in that they are prompting more appropriate behavior, and fostering new relationships, there also needs to be accessible information provided for Indigenous communities. It is important to pay attention to how informational needs are still being addressed at non-indigenous parties to the detriment of Indigenous capacity to make informed decisions regarding the same questions.

EXAMPLE – Aveda – protocols and negotiation

## **2. Individuals/organizations conducting research with Indigenous people and communities**

The moment when researchers begin conducting research and working with Indigenous people and communities is often when an IP issue will arise. For instance, they might emerge as part of discussion between the community and the researcher about the kinds of research being conducted, or as questions that the researcher has herself about the ownership of what is produced in the course of the research. The Guidelines can explain what kinds of IP issues will be present, what kinds of questions the researcher needs to have addressed prior to conducting the research and how a researcher should proceed in terms of negotiating these. Here the IP guidelines need to provide specific IP guidance and thus can also be seen to be filling a void in that they function to complement a range of ethical guidelines for research with Indigenous people and communities that are already in circulation.

EXAMPLE – thesis, word lists, biodiversity research.

## **3. Institutions funding research with Indigenous people and communities**

Many agencies and institutions (including philanthropic organizations, universities and non-governmental organizations) that fund researchers, and or community organizations, often overlook the IP implications in the conditions of the grant of funding. In many instances, these funding agencies, through contract or through employer/employee relationships within copyright law, actually own much of the material produced through the research. Funding institutions are increasingly interested third-parties in relation to material collected during the course of research with Indigenous communities. They need to be made aware of their IP obligations, as well as how they should behave in relation to funding research with Indigenous peoples. This also relates to how institutions manage access to material upon its collection and later storage.

EXAMPLE – Human Rights Watch, Witness – documentary film; Ford Foundation, Rockefeller Foundation

**4. Collecting Institutions and individuals managing the access and long term storage of cultural material**

When newly documented or recorded cultural materials (TCEs) reach collecting institutions, many of the IP issues are already operating – for instance, the TCE will already be in tangible form and there will already be an author and/or owner. One element of the IP Guidelines is to help direct collecting institutions in their organization and management of IP issues *before* they arise. In many ways this is also derived from experience within each institutional context, and in particular, through the problems experienced with older collections. In the main, IP concerns are often experienced the most acutely with older collections where issues of providence, transitional copyright, unpublished works digitization, open access and orphan works emerge. For collecting institutions the main problem remains building institutional capacity to deal with IP more generally. Institutions need guidance in order to develop institutional policy and to also develop risk management strategies for the unauthorized use of cultural materials. Institutions need to be encouraged to treat TCEs as special collections and develop management practices accordingly. There are several initiatives under way in this area, and I would suggest connecting these with the IP Guidelines. In addition, I would also make sure that the IP Guidelines are able to address issues developing in the newer and emergent cultural centres within in more local and regional contexts.

EXAMPLE – AIATSIS, Northern Territory Libraries and Knowledge Centers

**5. People seeking access to the recordings for purposes of reuse (this can be individuals and well as organizations and corporations)**

I have been repeatedly approached by researchers, artists and other individuals and organizations about what they need to know about IP if they are to use works that have been located in archives and or libraries. These people may be understood as ‘Users’ of TCEs. These people need guidance in relation to what is at stake with the recycling and or reuse of these works. To this end, the point here is about influencing relevant behavior and expectations of TCE collections – ie that they are not always free, that liberal narratives of individual subjects are not always appropriate, that collections have histories and pasts and that these need to be recognized, and that while an object may appear to be a disembodied decontextualised object, this is actually only a matter of perspective. For these ‘Users’, the guidelines function as educative materials as much as anything else. In many cases, this could be initially addressed by developing a checklist for the future use of material – for instance,  
Has Providence been determined?  
Is the work still in Copyright?

Have negotiations with the copyright owner been undertaken?  
How to do this?(Indeed this forms a context for where examples best practice negotiations could be incorporated into the Guidelines - some of the consultations being undertaken by WIPO would provide invaluable advice)  
What are you planning to do with this work?  
How will it be circulated?

I would also suggest that either within the guidelines, or perhaps separately, it would be possible to develop a collection of first hand examples indicating how these issues arose and were negotiated.

People want to do the right thing, they just don't know how – or where to start.

It is important to remember that this category of user could also be an Indigenous user from a neighboring community or from an urban community, or an Indigenous organization seeking to display or re-circulate Indigenous works.

EXAMPLE – Film 'Ten Canoes' and the use of historical works in collections

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### **3. In what kinds of circumstances would they be useful?**

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This is a question that arises from observing the overwhelming number of reports and guidelines that accumulate on shelves and on desks in offices seldom opened.

What are the situations that would make someone reach for these Guidelines?

A key here is in identifying the situations in the initial drafting. For instance, would they be useful in the:

- Day to day operation within institutions?
- In the planning of larger collaborative research projects (consider those especially being designed around biodiversity documentation)?
- Helpful in developing targeted institutional policy?
- Developing local community archives or cultural centres?
- For organizations worried about the collections they hold (including Indigenous organizations - for instance land councils as repositories)?
- Useful for researchers and organizations – from NGOs to research networks like the AAAs.
- Developing research projects
- Future contexts of recording and digitization

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#### **4. What other strategies could be developed to complement the guidelines?**

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As I stated at the beginning of this paper – I believe that the IP Guidelines are part of a process. As such it is important to view them as a very particular kind of tool, and to consider what other strategies could be developed that could work alongside and complement the Guidelines.

##### **- Frameworks for incorporating local community law and practice**

Whilst the intention is for the Guidelines to be useful for Indigenous people and communities, researchers and collecting institutions alike, there are additional strategies that need to be developed that specifically target traditional knowledge holders and communities. Building the capacity for Indigenous people and communities to make informed decisions about the documentation, collection and storage of traditional cultural expressions is vital, but it is only one part of the story. Here there is a need to combine IP law, which is often translated into a community, with local community laws and practices that are already occurring. Changing institutional and research practice in relation to Indigenous people and TCE collections requires an understanding of the locally specific conditions that can govern access to and management of TCEs. To this end it would be useful to develop a framework so that local communities can establish their own codes of conduct or protocols for behavior that incorporate customary law and/or community practices. Thus, when people external to the community come seeking new research partnerships, Indigenous individuals and communities can set parameters for access and ownership of knowledge. In part this is a strategy that seeks to embolden local governance, but it also seeks to emphasize the sovereignty that Indigenous people have over knowledge and knowledge resources.

Empowering Indigenous communities about what kinds of possibilities exist marks a significant step ensuring that the negotiating tables are equitable. Providing a Framework allows communities to develop their own local and site specific code. The Framework can be operationalized differently depending on the needs of each context.

##### **- Draft Agreements**

The IP Guidelines should include a comprehensive set of draft agreements that could be utilized by communities and researchers alike. The aim here is to minimize the need for expensive and often inaccessible legal experts. The draft agreements should be simple and easy to understand, and should cover a range of circumstances where agreements between parties about the recording, documenting and future use of TCEs often arise. The point here is that while agreements are not necessarily going to stop contest and conflict in the future, they do provide a platform for Indigenous people and communities to express and negotiate their terms within broader research and collection processes.

## - **Best Practice for Community Consultation**

The area of community consultation is always difficult. What is appropriate for one context will not necessarily be appropriate for the next. There are always issues of power and authority and these are often only experienced in situ. To this end, and given the range of community work that WIPO is undertaking through the Creative Heritage Project, it would be instructive to draw from the Project in terms of profiling some of the ways in which the Creative Heritage Project has gone about dealing with community consultation.

In addition, there are various national initiatives that have been developed that provide guidance for community consultations. It would be useful to draw all these initiatives together in order to provide a more comprehensive collection of materials that currently constitute best practice for community consultation.

## - **Intersecting Policy Advice**

Inter-related policy advice at national and institutional levels is a further strategy that could be developed to help both collecting institutions and funding institutions/organizations. To this end intersecting policy advice would target key areas affecting the acquisition, storage, digitization and management of TCEs. The aim of the policy advice is to encourage such organizations to take the lead in developing policy that is applicable in each context, and to encourage inter-institutional dialogue about the management of TCEs.

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## **5. What should International IP Guidelines look like?**

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This is an incredibly rough general outline and **draft** for thoughts and comments. It is meant to promote discussion, as I have most certainly not captured everything that the Guidelines need to incorporate. Whatever is created should begin with a statement from the UN Declaration on the Rights of Indigenous Peoples (2007). This sets the tone and indicates what is at stake in regards to the recording, documenting and digitizing of Indigenous collections.

### **PART ONE:**

Part One of the Guidelines needs to address:

- The relationships between customary law and practice and IP;
- IP Guidelines and ethical research;
- What drives the need to shift standards of behavior;
- Making these issues a priority rather than an after-thought.

### **PART TWO:**

The IP Guidelines need to initially address:

1. General Knowledge of IP

2. Historical IP issues
3. Anticipate Future IP concerns (for example Performers Rights)
4. Explain Jurisdictional IP (in terms of researchers working cross-country)
5. What about the non-IP issues

### **PART THREE: Documenting**

Focusing firstly on Documenting TCEs, the Guidelines needs to outline the relationship between IP and Documentation. THEN they need to establish what the implications and issues are for:

1. Indigenous communities/individuals/participants in research;
2. Locally developed and developing cultural centers and knowledge centers;
3. Researchers/artists;
4. Collecting Institutions/Funding Bodies

Conclude with suggestions and strategies to identify IP problems as they arise, and to alleviate their potential impact.

### **PART FOUR: Recording**

As above, the Guidelines needs to outline the relationship between IP and Recording. THEN they need to establish what the implications and issues are for:

1. Indigenous communities/individuals/participants in research;
2. Locally developed and developing cultural centres and knowledge centres;
3. Researchers/artists;
4. Collecting Institutions/Funding Bodies

Conclude with suggestions and strategies to identify IP problems as they arise, and to alleviate their potential impact.

### **PART FIVE:**

As above, the Guidelines needs to outline the relationship between IP and Digitizing. THEN they need to establish what the implications and issues are for:

1. Indigenous communities/individuals/participants in research;
2. Locally developed and developing cultural centers and knowledge centers;
3. Researchers/artists;
4. Collecting Institutions/Funding Bodies

Conclude with suggestions and strategies to identify IP problems as they arise, and to alleviate their potential impact.

Part Two, Three and Four could draw heavily on examples as illustrations – these could be derived from community consultations and the variety of experiences of many people in this room. The first part of each section should incorporate Indigenous perspectives on recording, documenting and digitizing – thus setting the tone for each part. I think this is important in terms of contextualizing the guidelines and indicating what is at stake in terms of reconciling past with present and future practices.

Part Six could make recommendations for national policy and recommendations for institutional policy. This would be useful in suggesting how institutions can move forward themselves.

Part Seven could have a range of draft agreements as well as advice relating to how and in which contexts such agreements might be useful. It would also be useful to have details of national and community based points of contact for further advice.

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## **6. Conclusion - Final Questions For Consideration**

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⇒ Indigenous perspectives and interpretations – How are these perspectives to be incorporated in meaningful ways? How can they be utilized to set the tone for the whole document including its purpose and function?

⇒ Definitions – Until this point I have deliberately avoided the problem of definitions but it will no doubt need to be discussed. Clearly there are a range of terms and accompanying definitions including but not exclusively: TCES, heritage, intangible heritage, traditional knowledge, folklore, indigenous intellectual and cultural property. The IP Guidelines will need to be consistent with current international discussions, but the Guidelines must also work across different categories. For example, they will have a need to be as relevant to the documentation of what is now understood as TCEs as they are for the documenting, collecting and archiving of knowledge that informs debates around genetic resources.

⇒ Dissemination – Whilst a little down the track, the issue of dissemination will be crucial. The Guidelines will need to be translated and made accessible in hard-copy and digital formats. The digital format will allow a little more maneuverability in terms of interaction, and it is possible to envisage that in the parts that draw on examples, there could be an interactive dimension that allows first hand narratives and interviews to be incorporated.

⇒ Building Experiences From the Creative Heritage Project into the Guidelines – This should be done in terms of best practice consultations, community collaboration and informed consent. As this is emergent and novel, this could be kept in mind for future utilization within the Guidelines.

⇒ Continuum – How might the Guidelines be shaped so that they can accommodate new models for practice as they emerge.

⇒ Anticipating Future Issues – the Guidelines can be developed in such a way as to be able to anticipate future problems. For example, I can think of three emerging issues that involve issues that the guidelines are seeking to address. For example:

- International funding of local projects – who owns the material upon research? Will the material will be held in another country? Will duplicates be made?
- Cross-jurisdictional problems – for instance can customary laws be translated across continents and; in a similar vein, to what extent are IP policies governing research in the US applicable to US researchers in say Indonesia?
- What kind of guidance could be given in relation to the collection, digital storage and reuse of human genetic material?

⇒ Mediation – There is the need to develop an additional body that has the capacity to advise and/or mediate specific moments of contest. (I envisage this as a specially designed alternative dispute resolution body that also helps monitor the design, development and dissemination of the Guidelines.)

The IP Guidelines are not going to resolve every issue, but they are, nevertheless, an important step in working towards new kinds of relationships and productive dialogue.

Overall, the aim of the guidelines are to:

- Foster better behavior, recognition and respect for Indigenous issues in relation to the recording, documenting and digitizing of intangible cultural heritage;
- Create new equitable relationships based on shared understandings and respect for diverging knowledge management practices;
- Provide Indigenous people and communities with the capacity to make informed decisions and negotiate on own terms;
- Put reconciliation of these issues at the forefront of research practice not as a secondary or after thought.

The protection of Indigenous interests in IP and control of knowledge resources should not be a burden for Indigenous people alone – it is all of our responsibility to both deal with the past and work towards the future.

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<sup>i</sup> See [www.aiatsis.gov.au](http://www.aiatsis.gov.au). The Intellectual Property Research Institute of Australia assisted with selected parts of the research.

<sup>ii</sup> See [www.wipo.int/tk/en/folklore/culturalheritage/casestudies](http://www.wipo.int/tk/en/folklore/culturalheritage/casestudies)