Indigenous Knowledge and Intellectual Property Rights

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Abstract

This article aims to give both an overview as well as to develop certain critical thinking tools that can help a reader engage with the complexity and diversity of Indigenous knowledge and intellectual property rights. It considers the cultural specificity of intellectual property law as well as looking at sites of contemporary struggle. Embedded in the article are questions of knowledge and power as well as how historical legacies of colonialism continue to affect the way we interpret the world and its cultures. The article also raises questions about legal authority and the way frameworks for participation and interpretation in legal contexts are produced and made available to parties that have been marginalized from such spaces.

Research within late-modern and late-colonial conditions continues relentlessly and brings with it a new wave of exploration, discovery, exploitation and appropriation. Researchers enter with good will in their front pockets and patents in their back pockets, they bring medicine into villages and extract blood for genetic analysis. No matter how appalling their behaviors, how insensitive and offensive their personal actions may be, their acts and intentions are always justified as being for the ‘good of mankind’.

Smith, 1999: p. 24

Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as 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. They also have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 31, United Nations Declaration on the Rights of Indigenous Peoples, September 2007

Introduction

The intersection of Indigenous knowledge with intellectual property law has produced one of the more complicated legal problems in the contemporary present. This is partly because the issues regarding the protection of Indigenous knowledge are not only legal in nature but also raise questions of historical injustice and colonialism, and at their core reveal that intellectual property law was never designed to incorporate or protect.

Another complicating factor is that discussions about this issue are not only located within the legal discipline, but are spread across the sciences and humanities. This means that multiple discourses, with very different objects of inquiry, produce different and sometimes contradictory interpretations. Moreover, the problems that intellectual property law raises for non-Western knowledge systems are directly experienced in communities across the globe. Unfortunately these experiences are not always included in the disciplinary analyses that tend to focus more on abstract elements like definitions, boundaries of knowledge systems, and legal rationalities. This results in multiple registers of meaning – those produced through experience and those constructed through disciplinary foci. This leads to different interests and interpretations of what makes this problem to start with, and importantly, what options for adequately dealing with it are available.

Indigenous representatives in multiple countries and contexts including (but not only) Australia, the United States, Indonesia, Brazil, the Philippines, India, Canada, Vanuatu, Cook Islands, Kenya, Peru, Namibia, Mexico, Jordan, Russia, and Sweden argue that they have legitimate rights to control, access, and utilize in any way, including restricting other’s access to, knowledge or information that derives from unique cultural histories, expressions, practices, and contexts. A key concern in the intersection of Indigenous knowledge with intellectual property law has also been the inevitable translation of Indigenous knowledge systems into frameworks of western property, complete with principles of alienation, exclusion, and exclusive possession. Such property systems are often not culturally compatible, as the translation into western paradigms requires foundational transformations in how knowledge is understood and how it is shared. Such transformation often sheers off the complexity, interconnection, and intelligibility of these knowledge systems in order to render them legible for property-style protection. This translation and transformation raises very real concerns from Indigenous peoples.

One of the most significant challenges for the protection of Indigenous knowledge systems is that intellectual property has a unique European derivation, and this informs its modes of classification, identification, and operation (Rose, 1993; Drahos, 1996; Sherman and Bently, 1999; Deazley, 2004). Intellectual property law promotes cultural interpretations of knowledge, ownership, authorship, and property. For intellectual property law, the individual as author, genius, owner, and creator hold a central position. These frameworks do not necessarily correspond or compliment Indigenous people’s understandings about the role and function of knowledge, or the role of individuals within communities and the joint responsibilities for collectively developed and held knowledge.

As intellectual property law has developed from a Eurocentric location and logic, alternative conceptualizations have been very difficult for this area of law to acknowledge and absorb.
There is no easy compatibility between intellectual property law and Indigenous knowledge systems. Their intersection raises issues that involve both legal and nonlegal components, are almost always political, sometimes controversial and can produce conflict in ideals, values, and desired outcomes. Problems, concerns, and claims are not always commercial in nature, and can involve ethical, cultural, historical, religious/spiritual, and moral dimensions. For example, inappropriate use of sacred cultural artifacts, symbols, or designs may not cause financial loss but can cause considerable offence to the relevant community responsible for the use and circulation of that artifact, symbol, or design.

With a field this large and spread across so many different community and disciplinary locations, it is not possible to give voice to every instance, concern, or interpretation. In this regard the article has specific limits. This article is arranged without presuming prior knowledge of Indigenous rights or intellectual property law. By necessity it is also deeply interdisciplinary.

The discussion begins with the one central theme that underpins this issue at very basic and functional levels. This is the role of colonialism, law, and the treatment and construction of Indigenous peoples. The issue of intellectual property and Indigenous knowledge only arises because of this history. Therefore it must be understood in relation to these dynamics especially as they continue to fold into the issues themselves. To not address these is to perpetuate a profound silence of dispossession, presumed superiority, and discrimination: a past that nonindigenous peoples have largely benefited from and that still has significant effects today. This article then moves to address definitions and classificatory frameworks as well as considering the way in which intellectual property law has been made and remade over time. This is important for appreciating the way in which intellectual property law is not ahistorical and timeless, but is constantly evolving as new concerns and problems arise. What makes intellectual property law so powerful and important in our present society is precisely the way it has been able to adapt and develop in reach and scope, and to incorporate new technological and other developments.

The three specific sites to be explored where intellectual property and Indigenous knowledge issues play themselves out include: in art, in archives and museums, and in relation to biodiversity. All are illustrative of the tensions and challenges faced by Indigenous peoples and the very real difficulties for developing new forms of legal and social responsibility and respect for cultural differences in the use and circulation of Indigenous knowledge and knowledge products. This article will then detail some of the developments at an international level raising questions about how, in the international context, the debate itself is constructed and with what kind of participation and by whom. The final section of this article will focus on several recent developments that are designed to enhance Indigenous positions and strategies in both legal and educational ways.

**Colonialism, Law, and Indigenous Peoples**

Concerns for the protection of Indigenous knowledge have increased in visibility, circulation, and recognition in the last 30 years. Over this period, expectations and strategies for explaining and phrasing concerns have shifted and changed. At the core however, remain the structural, classificatory, and discriminatory legacies of colonialism. These have contributed to the ways in which Indigenous peoples were viewed and treated, and consequently how their knowledge systems have been treated. To be clear, because Indigenous peoples have historically been constructed as ‘primitives,’ ‘savages,’ and less than human; as homogenous groups of people despite different languages, customs, practices, and cultures; and as objects of curiosity for study, collection, and research, Indigenous knowledge systems have been treated in the same way. It is this lack of respect and dignity for Indigenous peoples as peoples and as part of sophisticated cultures with inherent rights to their cultures and their lands that make this problem in the first place. Importantly, the failure to account and accept difference on its own terms rather than through the narrow Christian and European lenses offered, continue to play out in many ways. Two of these include how Indigenous concerns in the present can be recognized, heard, and treated as legitimate; and how the same legal systems that facilitated Indigenous dispossession can be rehabilitated to include Indigenous interests.

Colonialism is one of those words that can cause unease. It is also something that many assume they already know enough about – it refers to a period in the past that is increasingly further and further away. Yet colonialism continues to condition the present in multiple ways. It is what makes modernity possible and it continues to function and underpin our modern social order (Quijano, 1999; Mignolo, 1995, 2000, 2011; Moraña, Dussel, and Jáuregui, 2008). Colonialism has many components and many different histories, trajectories, and effects. It is full of conflict and contradiction.

Central to the function and instrumentality of colonialism is law, as it is law that establishes the frameworks and the conditions for colonial conquest, domination, and control. The development of colonial legal systems foundationally affected the ways in which Indigenous peoples, as colonial subjects/objects as well as their laws, customs, and systems of governance, were recognized and treated within the colonial order of things. As Sally Merry explains:

Colonialism typically involved the large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct socio-cultural organization and legal culture. The result was a dual legal system: one for the colonized peoples and one for the colonizers … [t]he language of transfer and duality, however, ignores the central feature of colonialism: It was a process in which one society endeavored to rule and to transform another … [t]hus, law, along with other institutions of the colonial state, transformed conceptions of time, space, property, work, marriage, and the state. The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.

Merry, 1991: p. 891

Colonial legalities in new territories sought to render already existing laws, customs, and forms of governance as inferior to these newly transferred laws and institutions. Intrinsically they sought to change and reshape social expectations and behavior.
With imposed legal systems underpinned by new Christian moral value systems, those peoples subjected to these new frameworks were also positioned within hierarchical networks of relations that placed the colonists at the top and those ‘other’ peoples underneath. This ‘positional superiority’ naturalized discriminatory practices and embedded entitlement to conduct and govern according to a Eurocentric logic (Said, 1979). As colonialism advanced across and into new territories, so too did new governing techniques and new Enlightenment forms of classification and categorization, all of which targeted colonized peoples.

Alongside control of lands, control of knowledge became central to achieving colonial governing ambitions. This rendered many colonized peoples open to invasive and destructive regulatory and research practices. As Linda Tuhitiwai Smith observes:

> Indigenous peoples were classified alongside the flora and fauna; hierarchical typologies of humanity and systems of representation were fuelled by new discoveries; and cultural maps were charted and territories claimed and contested by the major European powers. Hence some Indigenous peoples were ranked above others in terms of such things as the belief that they were ‘nearly human’, ‘almost human’ or ‘sub-human’. This often depended upon whether it was thought that the peoples concerned possessed a ‘soul’ and could therefore be offered salvation and whether or not they were educable and could be offered schooling. These systems for organizing classifying and storing new knowledge and for theorizing the meaning of such discoveries constituted research. In a colonial context however, this research was undeniably also about power and domination. The instruments or technologies of research were also instruments for legitimizing certain colonial practices.

Smith, 1999: p. 60

The legacies of colonialism are apparent in how legal frameworks sought to position colonized and Indigenous peoples and their concerns (Benton, 2001; Keal, 2005). Colonial law sought to manage how these ‘subjects’ were recognized and translated in a myriad of contexts. While there was no ‘grand plan’ or homogenous colonialism, the 1452 Papal ‘Doctrine of Discovery’ certainly presented a consistent template for engaging with Indigenous peoples. It expressly gave Christian explorers the right to claim discovered lands that were not inhabited by Christians. In the attempts to recognize and deal with the peoples already existing on lands subject to colonial ambitions there were notable differences across jurisdictions, for example in Northern America, initially Indigenous peoples were treated as distinct entities and formal legal relationships (treaties), based on the prevailing international law, were entered into. This was later replaced by more oppressive ideological doctrines like Manifest Destiny, which subverted Indigenous rights and further justified the taking of lands and territories across the Americas. In other contexts like Australia, which was colonized under the doctrine ofterra nullius (meaning ‘no man’s land’), the mere presence of Indigenous peoples was harder to deal with because the doctrine posited that they actually were not there. This resulted in classifications of Aboriginal people as subhuman, and later, childlike, which had obvious consequences in terms of how Aboriginal people were placed under extreme regulation and governmental control well into the 1970s.

The reason behind why all this matters for the present discussion is intellectual property law folds into itself prevailing colonial logics about the value of Indigenous peoples and their knowledges. The development of intellectual property did not happen in some kind of political, social, and cultural vacuum, but was slowly assembled during the same colonial periods and was therefore affected by prevailing rationalities and assumptions about non-European peoples.

Definitions and Terminology

Almost all the terms in the debates on the protection of Indigenous knowledge are contested, have problematic histories, and/or defy simple definition. Indigenous, knowledge, local, community, tradition, cultural heritage, public, culture, property, are a sample of the most prominent of these. As Oguamanam perceptively explains:

> It is the norm that the majority of writings on this complex subject devote substantial effort to the clarification of terms. Without doubt, clarification of key terms is congruous to analytical integrity and guards against misleading assumptions. In some contexts, however, it may portend some form of red herring or escapist expedition from the substantive questions, especially if every given phrase or term is a contested one.

Oguamanam, 2009: p. 35

The confusion in definitions and terminology moves in multiple directions and has diverse politics. The starting point for many of the definitional concerns is around ‘Indigenous peoples.’ For example, contests over who is or who is not Indigenous (which implicitly affects the identification of Indigenous or traditional/local knowledge) derives from both early Enlightenment thinking that sought to classify the stages of humanity and in colonial intervention and governance that subsequently created the means for the identification of peoples as Indigenous, Aboriginal, Indian, and so forth. As many Indigenous scholars have noted, these were not terms that Indigenous/Aboriginal/First Nations/Native American people used for themselves, but were created and became imposed forms of legal and social identification that erased the particularity of specific cultural and community names and their significance to identity making. The modern concept of indigeneity is produced through colonial relations (Popova-Gosart, 2012). The emergence of this concept, as an attempt to identify and classify a new category of peoples also, subsequently, informed the first legal and international documents addressing Indigenous rights. (The first international document addressing Indigenous rights and the responsibilities of States toward these peoples was the 1957 International Labor Organization’s Convention 107).

The modern appropriation and current mobilization of national and international Indigenous politics draws from this past but has also been graphically subverted and extended in multiple ways, especially through realignments of citizenship and identity. The 2007 Declaration on the Rights of Indigenous Peoples is significant precisely because it recognizes the distinctive nature of Indigenous needs in relation to language, education, culture, health, housing, governance, and representation. As James Anaya explains Indigenous peoples, in a legal context, are now defined as “the living descendants of...
pre-invasion inhabitants of lands now dominated by others” (Anaya, 1996: p. 3).

The problem of defining Indigenous peoples inevitably extends into Indigenous knowledge. The search for definitions is embedded in a classificatory logic that seeks clarity in the boundaries. Unfortunately such clear boundaries are impossible. This makes many parties very uneasy. While it might not always be clear what exactly Indigenous knowledge is, there must be a strong resistance to the binary of ‘Indigenous’ versus ‘scientific’ knowledge, because it upholds very specific power relations (Agrawal, 2002; Anderson, 2009). Knowledge, whether Indigenous, scientific or other, is notoriously difficult to define and identify and as Indigenous knowledge does not really offer itself as a special case to this problem, we need to be wary of situating certain knowledges as oppositional and easier to demarcate boundaries to than others, as this can reinforce cultural prejudices and colonial biases.

**Intellectual Property and ‘Gnaritas Nullius’**

Intellectual property is a term that often generates confusion. The potential for literal interpretation and the capacity for everybody who thinks to have some kind of intellectual property of their own only increase the problem. Intellectual property is actually an umbrella term used to cover specific laws that are loosely united in their efforts to manage the relationships between an idea and the tangible expression of that idea (a book, a photograph, an artwork, a sound-recording, a design on fabric, an invention). There is no specific intellectual property law named as such. Rather, the independent legislation for copyright, patents, designs, trademarks, trade secrets, confidential information together constitute the ‘laws of intellectual property.’ They are grouped under this term ‘intellectual property’ because they are seen to share some dimension of the problematic of determining legally recognized and justifiable rights in the expression of ideas and treating this expression as some kind of ‘property.’

Copyright, patents, designs, etc., are specific laws that evolved slowly and haphazardly in Europe from the late seventeenth century. This slow evolution was in response to cultural, political, social, and economic shifts that occurred throughout this period. Some scholars point to the development of the printing press by Johannes Gutenburg in 1450, increasing the possibility of the circulation of texts, as marking the moment where new laws governing the production and circulation of texts began (Eisenstein, 1980). Others point to the increasing development of nation-states following the Treaty of Westphalia in 1648 that saw the increased need for agreements and the development of reciprocal trading rights within and across newly emerging countries leading to the distinct patent and copyright statutes in Britain in 1623 and 1710, respectively. (Statute of Monopolies, 1623 and Statute of Anne, 1720. For some of the work on these see Deazley and also the Web site). Still others point to the emergence and maturity of concepts of property, like those espoused by John Locke, that helped establish the crucial relationships between property and individuals that continues to underpin current intellectual property law (Rose, 1993). Whatever the focus, it is clear that intellectual property law developed because of a combination of all these elements and was a result of significant political and economic changes occurring in Europe.

The early developments do not feature the terminology ‘intellectual property.’ Nevertheless the early cases make clear that the challenges in determining this kind of property arise from its intangibility: that it constitutes a product of the mind and therefore cannot be easily demarcated and identified in the same ways as tangible forms of property like land and livestock. For new ideas of property to be developed, law needed to create new categories for identifying the characteristics of this new kind of property. This was because of problems about what exactly the property was, how it could be identified, how it could be measured, how loss could be recognized and compensated, what labor the individual exerted to ‘make’ a work, and generally how a right to something that was intangible could be justified (Anderson, 2009).

For copyright law, the two most important categories developed were authorship and originality. The making of the category of the author within copyright law, and by implication within society, begins most clearly with the literary property cases in Great Britain in the seventeenth century. Yet it was ostensibly relations between booksellers and publishers that pushed the law to consider the category of the author. What this means is that intellectual property law, in various ways, has been influential in shaping some of the most foundational categories that we use in our society. The author as an individual, a genius and someone that exerts certain property rights over cultural products like writing is completely naturalized: to the extent that it is hard to imagine another configuration. But this norm is produced at the expense of appreciating that not all other cultures make this connection, do not have the same ideas about property nor have these concepts permeate their societies in the same way as they have come to dominate Western contexts. This begins to point to some of the incomprehensible concepts that arise in the intersection of intellectual property and Indigenous knowledge – that is, Indigenous knowledge is not easily individualized nor easily abstracted, but derives from and maintains meaning in the contexts in which it was developed and redeveloped. Moreover, there is often not a single identifiable author, rather a community of knowledge holders that act as custodians and keepers of the knowledge but not necessarily owners.

In 2010, Indigenous scholar Greg Younging wrote a paper titled *Gnaritas Nullius (No One’s Knowledge): The Public Domain and the Colonization of Indigenous Knowledge* (Younging, 2010). In this paper, Younging explains the complex and varied knowledge systems and knowledge products that Indigenous peoples across the Americas have produced for over 500 years from architecture to irrigation systems, from pharmacology to arts and intricate governance systems. Yet despite these significant innovations, the paradigms that newly arrived colonial peoples viewed Indigenous peoples, their cultures, and inevitably their knowledge systems and products, were so impoverished that they were unable to see Indigenous peoples’ civilizations as profound and advanced. Like the land Indigenous peoples were living upon which was, because of the discriminatory and myopic colonial legal doctrines, made into the possession and property of the colonists, so too Indigenous knowledge systems were rendered into either curiosities to be collected and gazed upon or taken and appropriated to be
repositioned as someone else’s idea and property. If the land upon which Indigenous peoples had lived for hundreds of years could be constructed into the fiction of terra nullius – no one’s land, so too was Indigenous knowledge and innovation constructed into the fiction of gnarus nullius – no one’s knowledge. And as no one’s knowledge it was never offered any kind of respect and certainly no legal protection. Intellectual property law, concerned with offering all kinds of different and varied protections never considered Indigenous knowledge valuable. It actively supported the contexts and nonindigenous individuals that appropriated, stole, and/or made this knowledge into colonial and recognizable forms of (intellectual) property.

**Sites of Struggle**

So how did this actually occur, what was the role of intellectual property in facilitating the dispossession of Indigenous knowledges, and what can this history tell us about present claims and problems? What follows is also an illustration of the inherent cultural biases built into the law in three different contexts. The way law presents itself as political, ahistorical, and acultural is herein undone. The next three examples show more clearly how intellectual property law has served one cultural vision of the world at the expense of others.

**Copyright and Aboriginal Art**

Art, in its broadest sense, is one area where intellectual property law effectively functions. From literary texts to painting, music, photography, and the performing arts, all now utilize elements of copyright to protect such works. As mentioned above the key relationship that functions at the core of copyright is that the author is the originator and owner of the work, and as the owner, the author has a range of rights that can be asserted over the work; including distribution, copying, licensing, and publishing.

From the moment nonindigenous people first encountered the cultural practices of Indigenous peoples, they were not considered art proper, but more cultural curiosities. Some products of Indigenous cultural practice, like beadwork and weaving in the Americas became highly sought after, but they were never considered ‘art’ in the sense that deserved protection. From a colonial perspective there were no clear authors and the works were religious, ceremonial, and functional within Indigenous societies. Such works circulated within an alternative regime of value that was unfamiliar to nonindigenous peoples. Instead, Indigenous cultural products were collected and placed in ethnographic museums and adorned curiosity shops. In other instances they became trophies from frontier battles or were used as items to trade with colonists.

In Australia, Aboriginal art is currently estimated to be worth several million dollars within the Australian economy. The making of this art industry is complex and depends not only on interactions between individual and governmental initiatives (Myers, 2000), but also involves the recognition of Aboriginal art as ‘art’ and therefore open to the same copyright protections as other works. Like in other contexts, prior to this transformation, Indigenous artistry was constructed by anthropological and ethnographic lenses as ‘objects’ of culture and constituted as ‘nonart’ captured through the term ‘folklore.’ As unprotected and valued for its strangeness, Aboriginal cultural products were collected and displayed in private collections and museums, while the persons responsible for making and painting the Aboriginal works were rarely documented. In the 1920s emerging new Australian artists were encouraged to copy the designs, styles, and colors – everything about the works was open to being copied, reproduced, and reused – without concern whether these uses were sensitive or culturally appropriate. The works were considered ‘raw material’ for other artists to benefit directly from.

In the 1970s there started to be a visible and voiced concern from Aboriginal spokespeople about the large-scale copying of Aboriginal designs and works onto fabrics, tea towels, and carpets. For the Aboriginal producers (not yet recognized as artists), these copies were not only offensive because they failed to acknowledge the original painters and designers, but they also disturbed important cultural stories and narratives that were embedded in the works. As a result, the 1980s and 1990s saw the Australian courts grapple with a series of cases that focused on inclusion of Aboriginal art as a legitimate copyright work. These cases have been repetitively written about in numerous national and international contexts, partly because of their novelty and partly because they really function as the foundational case law in the entire area of intellectual property and Indigenous knowledge. They showed that peoples whose knowledge was historically considered inferior, timeless and without ‘authors’ could assert legal title to the works and could be recognized as ‘artists’ in their own right. Due to the strategic work of several key individuals working on these cases, Aboriginal art was included within the intellectual property paradigm and Aboriginal producers were recognized as individual artists who had legally defensible rights in relation to their works.

Through these cases, intellectual property law was shown to be capable and responsive to the inclusion of new subject matter. This deflected attention away from the conditions that led to the exclusions to start with – namely culturally specific categories (of authorship and ownership for example) that privileged some forms of cultural production and not only ignored others, but also endorsed the wholesale copying for nonindigenous artists’ benefit. This cultural specificity and hence bias was really only addressed in the margins of the cases, but the law was unable to expand its own presumed neutral categories to include other cultural interpretations of artistry, and importantly, where that artistry came from if it did not come from the individual ‘genius.’ The complexity of Aboriginal artistry was flattened into the already existing copyright categories in order to secure protection. For instance, copyright law could not cope with the reality that Aboriginal rights to paint certain images came from rights to land, and that Aboriginal artists painted according to complex governance systems and obligations within their cultural contexts, and were not considered exclusive ‘owners,’ nor were the works considered ‘property.’ Fitting an entirely different paradigm of cultural production into the narrow terms of Western intellectual property law has come with costs for Aboriginal artists, and while many artists work around some of these confines, the bias within the law still
perpetuates forms of exclusion while at the same time presenting apparent inclusion.

**Archives, Museums, Libraries, and Indigenous Collections**

While copyright and Aboriginal art prompted some of the first case law in this field, it is also an example of the specific national contours of the emergence of Indigenous knowledge issues more generally. The actions and reactions in Australia were unique and have opened up a significant area of discussion about Indigenous knowledge rights in a range of contexts. Addressing Indigenous intellectual property rights is now integral to governmental funding initiatives and research collaborations which engage with Indigenous people and their perspectives, authority and governance frameworks.

At least since the 1970s, another area of contest and struggle over intellectual property and Indigenous knowledge has been within archives, libraries, and museums. These contests are international because across contexts the issues tend to be remarkably similar. Cultural institutions that hold Indigenous collections are at the forefront of Indigenous peoples’ efforts to achieve access and control of materials relating to their families and communities. These issues are understandably acute in settler colonial contexts, where relations with Indigenous peoples continue to be difficult and historical legacies of discriminatory treatment remain remarkably present.

The struggle for control over Indigenous collections within cultural institutions exists because these sites are primary repositories for enormous amounts of materials collected over the colonial period on the lives, cultures, and languages of Indigenous peoples. This was almost always without the consent of those being recorded, and certainly without any clear explanations of where this material would be kept, who would be able to access it, and that it would often be used to prove the inferiority of Indigenous peoples and their practices. Alongside the troubling history of how these collections were acquired and their uses, one main point of concern is that these collections are also not legally owned by Indigenous peoples but rather, by the person, usually a researcher, governmental official or curiosity seeker, who came to the community and made the documentation – either in sound, in film, through photographs, or even written transcription.

In this context, intellectual property law again finds itself on the side of maintaining unequal relationships. For the nonindigenous peoples, rights to this material, regardless of how the material was collected, are upheld. Moreover, through specific exceptions and limitations within the copyright legislation, cultural institutions are given specific options for making the material accessible, especially material that is no longer protected and now exists in the ‘public domain.’ This is despite Indigenous claims that some of this public domain material should not be circulated, does not have a time period for circulation, and is to be governed according to complex Indigenous authority and management systems. Again copyright is beholden to its own cultural contingencies. In dismissing any role in the social conditions that led to these collections, copyright law nevertheless endorses those very conditions by vesting the ownership and the property rights with those people who ‘made’ the works. This legal entitlement granted to the nonindigenous recorders assumes that it is they that have the creativity, the genius, and authorship. Those peoples in the recordings and documents remain passive subjects whose representations remain controlled by others. It is this unequal terrain that makes Indigenous peoples so concerned about the collections within cultural institutions. That the law cannot be retroactively undone also means these legacies – with copyright protection extending far into the future (death of the author plus 70 years in almost all jurisdictions that hold this material) – remain very present and very difficult to negotiate (Anderson, 2012).

**Biodiversity and Biopiracy**

While the ongoing problems over Indigenous collections are probably one of the most substantial areas of concern given the sheer amount of Indigenous materials within collections, they are not very visible in the literature. The area that is the most discussed, and fiercely debated, is over rights to biodiversity and threats of biopiracy – where concerns oscillate around circumstances where Indigenous knowledge about plants, animals, and medicines, is taken and converted into a ‘scientific’ language of synthesized distinct properties that can be isolated and patented.

This area appears much more complicated than the copyright issues partly because of the different area of intellectual property law that is involved. Patents themselves are difficult because of the extent of the rights, what exactly it is that is protected and the necessary steps to secure protection. Patenting requires access to sophisticated scientific equipment, access to technical language, and access to extensive financial resources to file the patents and to protect them. In this sense alone there are very specific protections for very specialized research endeavors.

Patents over bioresources have been controversial in many other contexts besides Indigenous ones. The first patents over live organisms and, subsequently, cell lines have produced significant commentary ranging from justification to ethical questions to future implications. The opportunities to patent live organisms and biocompounds have corresponded with significant technological developments in the biotechnology arena, and this has led many researchers to remote and bioresource-rich contexts: contexts often inhabited by Indigenous peoples.

There are multiple examples of patents that have provoked significant condemnation because they are based upon already existing Indigenous or traditional knowledge and therefore should not meet the standard of ‘novelty’ for the patent grant. The most discussed patents in this context are turmeric, neem, and ayahuasca – and significant efforts have been made to have these patents revoked. Anthropologists like Cori Hayden and Shane Green have provided much needed analysis in tracing the ways in which researchers come to gather botanical samples from Indigenous communities, and the challenges in translation and understanding about what is exactly going on and for whose benefit (Hayden, 2003; Greene, 2004).

One of the most infamous cases of bioprospecting and patenting involve the San people of South Africa, Namibia, and Botswana and the Hoodia plant known for its appetite suppressant properties. A case that has produced a significant amount of literature, it raises issues about the early documentation of Indigenous medicinal knowledge in the colonial
period, how knowledge about these properties was transmitted to researchers who began developing new drugs based on this knowledge, how this activity happening in labs and involving significant financial interests and pharmaceutical companies, was made known to the San and the subsequent negotiations over consent and benefit sharing (Wynburg et al., 2009).

The problem for intellectual property is, again, the conditions embedded in the grant of the property right that privilege certain actors over others. Those that benefit are those that have access to the language, technology, and financial resources. Indigenous peoples are seldom in these positions, and their knowledge is regarded as ‘raw material’ from which others can extend and benefit from. In this paradigm, there is very limited space to recognize the long and substantial work Indigenous peoples have made to refining this knowledge, nor acknowledgment of the labor that is involved in determining which plants have special properties and which do not. For those seeking to utilize Indigenous environmental knowledge, it is almost assumed that Indigenous peoples developed knowledge about the properties of plants by chance, rather than through innovation, invention, and hard work. This treatment of Indigenous knowledge is completely consistent with the embedded colonial assumptions about Indigenous peoples as backwards and limited. Thus the patent system reinforces this view of Indigenous peoples and their knowledge by not according them legitimate status or authority in the discovery and husbandry of these plants and their medicinal and health-based properties.

**International Interest and the World Intellectual Property Organization**

Key agencies like the World Intellectual Property Organization (WIPO) have been instrumental in establishing new frameworks for the interpretation of Indigenous interests in intellectual property. This includes setting new parameters for identifying Indigenous knowledge in need of protection. For example, the three discrete areas to refine discussion and policy development are now conceived as: ‘genetic resources,’ ‘traditional knowledge,’ and ‘traditional cultural expressions/folklore.’ In international contexts, these new phrases do more than ameliorate contest. They streamline the discussion in important ways so that the international framework assumes an authoritative position and starts to function as the point of departure for any discussion of the issue. This has the additional effect of enhancing the reputation and authority of the body that is circulating them to start with.

The WIPO has come to hold a central position in relation to debates around intellectual property and Indigenous interests therein. This was not always the case. There is sufficient evidence to suggest that countries like Australia, India, and Canada would have had the debates about intellectual property and Indigenous knowledge regardless of international attention and reworked interagency agendas. (This is because the claims in these countries arise out of the particular colonial politics arising from land rights. Australia’s interest predates the WIPO focus by at least 20 years).

Even though discussions about the protection of Indigenous knowledge (specifically biological knowledge) have also been channeled through the Convention on Biological Diversity (CBD) and UNESCO retains expertise in relation to cultural property or tangible and intangible cultural property, WIPO remains the key site for making meaning about the legal possibilities for the protection of Indigenous knowledge through intellectual property law. This speaks to the modern significance and importance of intellectual property law itself. The politics of intellectual property law, and the diverse range of contexts that it reaches into, affects any contemporary discussions about knowledge protection. Importantly, and because of this, it also mobilizes a range of interested parties that might otherwise have no reason to pay attention to Indigenous knowledge issues.

**Future Options and Strategies**

Despite the historical use of intellectual property law against Indigenous peoples and their knowledge systems, Indigenous peoples also see potential opportunities within this body of law. This forward-looking approach recognizes the power of intellectual property law. But intellectual property law is not a panacea. It still remains firmly grounded in Eurocentric visions of the world, which include ideas of property, the concept of individual creation and genius that happens in a context void of human relationships, and that it exists to foster economic return. In circumstances where Indigenous expectations are malleable and can meet these embedded assumptions, intellectual property law can work quite effectively. When the needs differ, for instance in asserting community rather than individual authorship, or when there should be no time period for protection, intellectual property law is not necessarily the best option.

The problem for Indigenous peoples is that they are experiencing a range of problems in multiple areas of knowledge control and knowledge governance, especially when dealing with nonindigenous people and other third party interests. It is unlikely that one specific legislative development could comprehensively solve all the issues currently being encountered. While the development of an international approach to Indigenous intellectual property issues is important, there is also an urgent need to develop local strategies that are appropriate to both community and context and are more immediately accessible.

The extent of current proposals reflects the complexity of the issues for law, policy, and local/national/regional/international governance. Due to space constraints these cannot all be outlined here but can be found elsewhere (Anderson, 2010). While they are neither uniformly coherent nor necessarily applicable for every instance or in every context, they can be loosely grouped into six separate categories:

- Proposals that modify the current intellectual property framework;
- Proposals that utilize other areas of critical intellectual property discourse;
- Proposals that target private law solutions;
- Combined approaches;
- Alternative regimes; and
- International treaties and conventions.

That the proposals range from international and overarching frameworks (treaties), to localized and targeted strategies (private law making), reflect the different opinions about
what the nature of the problem is and what kinds of solutions might be developed that would provide immediate relief or remedy. Given the complicated dimensions informing this area, a singular solution is perhaps inappropriate. Importantly, any successful intervention in this area is dependent upon the capacity for Indigenous people and communities to make informed decisions about what options are available and appropriate for each problem and each context.

Research Agreements and Protocols

In order to deal directly with the problem of researchers within Indigenous communities and the embedded assumption that the researcher comes, does his/her research and then leaves with all the material gathered, research agreements and protocols have been developed. Protocols have played an important role in establishing new kinds of relationships between Indigenous people, Indigenous communities, and other organizations and/or nonindigenous people.

In general protocols can be understood as context-driven policy. They can be developed to address specific problems and provide guidance in relation to appropriate behavior when it is required. Protocols can incorporate community perspectives, and targeted to particular issues. For example, protocols have been developed for libraries and archives, for visual artists, for collaboration between filmmakers and increasingly for relationships around access to environmental knowledge.

A protocol is a code of conduct, a guideline, or a set of manners that explains how people should behave in certain circumstances. Protocols make new kinds of negotiation possible. They can be used to set community standards around knowledge circulation and use for outsiders as well as help change attitudes and set new standards. Generally, protocols are flexible and can change over time. It is important to see them as a tool to help achieve certain goals that other areas of law have been unable to fulfill. As formal or informal guidelines for behavior, protocols can help build relationships and make new ones possible.

Protocols are prescriptive and they offer Indigenous people a range of options. This is especially in situations when Indigenous people may not want to engage with formal law mechanisms, but rather find means for articulating customary law, or local laws specific to the context. Protocols provide conditions for Indigenous agency in the sense that they can embolden already existing practices rather than imposing new ones. This is one of the central reasons why they have been adopted and are increasingly found across all areas involving negotiations around Indigenous knowledge use.

International Legal Instruments

For the last 12 years, the WIPO has been working on developing an international legal instrument or instruments in this area. Currently there are three instruments being negotiated: one for ‘genetic resources,’ one for ‘traditional knowledge,’ and one for ‘traditional cultural expressions.’ The proposals for international instruments in this area provide an opportunity to streamline activity, ask fundamental questions about what is at stake and for whom, and develop an appropriate approach. Importantly they could offer an overarching authoritative framework for negotiating equitable relationships in the use of Indigenous knowledge.

Yet questions of jurisdiction, enforceability, and constructing foundational concepts remain as significant challenges. The highly contested political nature of Indigenous knowledge debates also slow the progress of development. Other questions about consensus, Indigenous participation in design, voting, and whom the instruments would be between again engage historical legacies that are not easy to resolve. Sensitivity to the range of complex interests, as well as the unequal negotiating positions that Indigenous people occupy in practice will directly affect the success and the usefulness of any new instrument/s.

Within the UN CBD, there has been sustained effort to develop mechanisms that recognize the value and significance of Indigenous knowledge within the life sciences and biotechnology industries. In particular, the CBD has been working to develop an international regime on access and benefit sharing of biological resources. This scheme seeks to develop equitable means for Indigenous communities to derive benefits from any knowledge that they grant access to in the context of genetic resources. Such benefits for the Indigenous community are not necessarily dependent upon the future financial benefits that may be developed. Rather, the scheme aims to create conditions where the knowledge of the source community is recognized and valued at the point of transfer/exchange. Access and benefit sharing is dependent upon the making of agreements between parties that recognize the contribution that each makes as well as the value of that contribution.

The development of an access and benefit-sharing scheme recognizes the value of Indigenous people’s knowledge, especially in areas where it has become highly desired. Not only do Indigenous people have the right to be involved in any decision making within research projects that involve themselves or their knowledge, but they also have the right to derive benefits from any products that are developed as a result of these participatory projects. However, the use of contract law, while offering a legal framework to secure Indigenous rights, still requires translation and legal advice. The primary way in which access and benefit-sharing agreements are being articulated is through protocols (Raven, 2006). There remain significant concerns about unequal negotiating positions – not only between a community and a researcher/researchers, but also between a national government and a community. This is particularly the case because what is also being negotiated in this context is the recurring issue of sovereignty over land and hence biological resources.

New Sui Generis Legislation

Owing to the perceived difficulties of building new mechanisms that directly address Indigenous needs and expectations about knowledge use and control within the current intellectual property framework, suggestions for an altogether different approach have been made. Sui generis law means of its own kind; that is, it is a unique law complete unto itself and often created when current and existing laws are inadequate. (Examples of sui generis legislation in relation to traditional/Indigenous knowledge include the USA Indian Arts and Crafts
Act 1990; Panama Law No. 20 (26 June 2000) and Executive Decree No. 12 (20 March 2001). Another example of sui generis legislation relating to Indigenous rights is the Australian Native Title Act 1993 (Cth).

A significant issue in this area is that Indigenous people must consistently be translating and transplanting their concepts into a framework of rights that are not necessarily appropriate or address the expressed needs. To the extent that Indigenous knowledge can be protected through laws of intellectual property, this is only possible through concepts including property, ownership, works, monopoly privilege, exclusive rights, originality, and individual authorship. Proposals for sui generis legislation for the protection of Indigenous knowledge and Indigenous rights are being slowly crafted. Countries like Peru and Panama have been at the forefront of developing national sui generis legislation. As Tobin and Swiderska comment:

> The role of a sui-generis regime could therefore be to establish a bridge between Indigenous/local community and national and international legal systems, in order to secure the effective recognition and protection of rights which derive from customary law and practice.

_Tobin and Swiderska, 2001: p. 47_

There remains a range of questions about how sui generis legislation should be developed. For instance, is it appropriate for international agencies to assist in the development of sui generis legislation or should each nation state take responsibility for the development of a sui generis approach that is appropriate to the circumstances of each context? Other issues such as the diversity of subject matter, the difficulty of identifying owners/custodians and applicability, enforceability, and transferability across diverse cultural contexts raise challenges and responses to these will affect what approach is taken.

**Traditional Knowledge Licenses and Labels**

The Traditional Knowledge Licenses and Labels initiative takes its initial cue from the success of Creative Commons. (This initiative has been developed by Jane Anderson, Kim Christen, and Michael Ashley with initial support from the Canadian Social Science and Humanities Research Council Intellectual Property in Cultural Heritage: Law, Policy, Ethics Project, and the WIPO). Creative Commons harnesses the capacity of copyright owners to license their works. In providing more detail to the expectations and desires of copyright owners regarding the use of their works, users of copyright material are provided with more information that helps them make better decisions about the use of such works. This is also the point of departure for the Traditional Knowledge Licenses and Labels. In short, they are designed to address two key problems being experienced by Indigenous peoples in relation to the management of their cultural resources. Firstly, how to protect individual, community, and familial rights to knowledge according to community based rules and regulations while simultaneously enabling the sharing of that knowledge with others beyond the community. Secondly, how to create a new informational and educational paradigm for documented cultural materials that Indigenous peoples can no longer control – for example the extensive material produced through the colonial encounter that resides in the public domain.

Addressing these two issues constitutes the foundational aims and ambitions of the Traditional Knowledge Licenses and Labels initiative. They are not being designed to provide blanket licenses for all Indigenous or traditional knowledge – but rather licenses for very specific contexts and situations, especially where current license options like Creative Commons fall short. The Labels function as an educative strategy to help users make more informed decisions about material that might generically be deemed ‘public domain’ but that still has Indigenous rules and obligations about access and use. The initiative is developed as a twofold strategy because it is not just legal protection that is required, but mechanisms that facilitate and support the communities from which this knowledge derives and is transformed. The hope is that this initiative will contribute to a shift in attitudes, understanding, and behavior about what Indigenous peoples consider to be fair and equitable use of their knowledge resources.

**Conclusion**

> Although Indigenous peoples are now recognized as key actors in this global discourse, it will need to be expanded to encompass a wider range of principles and priorities, which will eventually encompass political commitment to indigenous people’s rights of self-determination. Only when Indigenous peoples are full partners in this dialogue, with full juridical standing and only when their cultural world views, customary laws, and ecological practices are recognized as fundamental contributions to resolving local social justice concerns will we be engaged in anything we can genuinely call dialogue.


One of the substantive difficulties with this particular contemporary problem for law is that the issues are constituted through and by multiple discourses and historical moments – not all of which are located or properly accommodated (or recognized) within intellectual property law. This raises questions then about what intellectual property law is being asked to do and can reasonably achieve. It is not equipped, or even sufficiently self-reflective, to function as an agent of reconciliation. Moreover, intellectual property law poses specific kinds of problems for Indigenous people. Not only does it conveniently ignore its own role in the historical exclusion of Indigenous interests, but upon inclusion it demands that Indigenous people, as well as their cultural expressions, conform to normative identifications of liberal individualism, authorship, labor, property, creativity, identifications of what a work is, periods of protection, and the like. The incommensurability that this has produced exposes the differing cultural values regarding ownership, access, and control of knowledge that inform the law. Through the inclusion of this new ‘subject matter’ intellectual property law’s own historical methods for justifying a ‘right’ in something that is intangible have become more visible. With Indigenous issues, the position and politics of ‘culture’ have become much more apparent, but it would be a mistake.
to read the difficulties for law as only ones about the capacity of law to recognize culture and accommodate cultural difference (Anderson, 2009).

Questions around Indigenous knowledge protection are unlike any other issues that intellectual property law has had to consider. This is because Indigenous concerns stretch across every part of the intellectual property axiom. Issues can include legal questions involving copyright, patents, trademarks, designs, and/or confidential information. Moreover, how the problems manifest and are experienced are not always straightforward and often overlap into other areas of law, policy, and ethics. Therefore there is not yet an international consensus about how Indigenous rights to the protection of cultural knowledge systems can be secured, either within an intellectual property regime or through some other overarching legislative or policy framework.

Indigenous peoples are looking to this body of law for several interrelated but sometimes opposing reasons. Attention to intellectual property law is about both the way intellectual property law has been a tool to facilitate the exploitation and expropriation of Indigenous knowledge, wherein nonindigenous peoples become the owners, authors, and holders of property rights in Indigenous knowledge and how it can be used to protect and function as a tool of leverage to control Indigenous knowledge systems. To deal with both sides of intellectual property law – its historical use against Indigenous peoples and its contemporary use for Indigenous peoples – it requires understanding the history and inherent limitations as well as its potential in certain select circumstances.

See also: Cultural Heritage; Cultural Resource Management: Conservation of Cultural Heritage; Ethnography; Human Rights and Social Work; Indigenous; Intercultural Legal Discourse: Philosophical Aspects; Law and Economics; Law: Anthropological Aspects; Recognition, Politics of: Perspectives from Social Work and Sociology; Rights: Legal Aspects.

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