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On Resolution | Intellectual Property and Indigenous Knowledge Disputes | Prologue

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On Resolution | Intellectual Property and Indigenous Knowledge Disputes | Prologue

Cover Page Footnote
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PROLOGUE

The universal is an empty place, a void which can only be filled by the particular, but which, through its very emptiness, produces a series of crucial effects in the structuration/destructuration of social relations. (Laclau 2000: 58)

I

I am in Vancouver, Canada to attend a working group meeting for the largest multi- disciplinary intellectual property and cultural heritage research project to be funded by a national government's research council.[1] There is excitement and anticipation. Everyone here has an agenda, whether it be the general goal of furthering knowledge in this field, unpacking some of the theoretical conundrums that it presents or participating in the development of alternative strategies for protecting First Nations—Native American Indian—Aboriginal knowledge and knowledge resources. I am interested in the politics of the project: namely, what are its conditions for existence and to what extent is it positioned within and against global projects of intellectual property governance (Foucault 1991; Drahos 2002a, 2002b; May 2007; Sell 2007). I am also curious to hear how intellectual property law is being articulated and understood by the diverse and divergent participants within the project itself and, as a result, what kinds of strategies for practical response are being imagined. After years of working across multiple jurisdictions on these issues, it has become clear to me that developing options and possibilities for resolving the complex matrix of intellectual property and indigenous knowledge disputes has become the most necessary site of critical inquiry.

What strikes me during the course of the meeting are the range of perspectives and interests that are expressed, and consequently how far the traditional legal domain of intellectual property is being stretched. Certainly we are mobilized here because of the various concerns, problems and questions that intellectual property is provoking within indigenous sites. The multiple interpretations of law being articulated confirms an expansion of who is authorizing what intellectual property law is, what kinds of meanings of intellectual property are being circulated, how an intellectual property 'problem' is being identified, by whom and for whom. As is evidenced by the vast literature amassing on this subject, there are many different kinds of participants – anthropologists, archeologists, indigenous scholars, lawyers, technology experts, linguists, historians, policy-makers as well as others – all bringing different disciplinary and intellectual histories, different values, different levels of agency and, significantly, different understandings of law and its operation (Anderson 2010; Boyd White 1985, 1989; Sherwin 2000). This is affecting how intellectual property law itself is being understood and how it is being translated into

[1] *Intellectual Property Issues in Cultural Heritage; Theory, Policy, Practice, Ethics* (IPinCH) Project, is funded through the Canadian Major Collaborative Research Initiative (MCRI) program (Grant 412-2007-1007) by the Social Science and Humanities Research Council (SSHRC), Ottawa.

and out of local community contexts. By translation I mean both in its literal form as a movement from place to place, and as also a process where different kinds of alignments and linkages between varying actors and agencies are made possible (Callon, 1986; Latour 1987, 1993). It is important to understand how the very discourse is enabled and formed, as well as how it is expanded upon and through whose terms (Rose, 1999). With such varying interpretations of law being discussed, are workable options that are directly useful to indigenous people and the continued issues around the management of valuable knowledge resources, likely to be more forthcoming?

II

The issues of indigenous interests in intellectual property law and the current possibilities of controlling and managing indigenous knowledge resources, are difficult precisely because of the historical, political, cultural dimensions that inform the subject notion of 'property' and the historical delineation, exclusion and current inclusion of populations now referred to as 'indigenous', 'traditional' or 'local'. The current conditions of colonialism also mean that there are legitimate questions about the extent that the legal ordering of indigenous knowledge issues through an intellectual property paradigm works to privilege certain modes of inquiry and investigation over others. Looking more closely at such sites of knowledge production might help us understand the radical disjuncture between how the issue is constructed and organized through largely abstract universal categories by experts in locations far removed from indigenous and local circumstance, and how it is engaged, appropriated and particularized in practice as indigenous peoples, communities and advocates navigate paths through the universals into local processes and national legislative as well as international policy sites.

III

The making of indigenous knowledge as a site of specific legal inquiry and increasingly, intervention, has produced interest in varying local, national and international contexts (Anderson 2005, 2009; Sunder 2007; Coombe 2009; Reddy 2006; Geismar 2005). Indeed the issue itself cannot be discussed in local or national contexts without reference into the international sites that are also grappling with the subject. While no longer contained by national boundaries, there has been little consensus about what it is that is in need of 'protection', and how law and legal bureaucracy should respond (WIPO/GRTKF/IC/13). Proposals for the creation of new legislative instrument(s) currently constitute the extent of international as well as national governmental interest (WIPO/GRTKF/IC/14). The current expectations are that in the upcoming eighteenth and nineteenth sessions of the World Intellectual Property Organization's Inter-Governmental Committee on Genetic Resources, Traditional Knowledge and Folklore in 2011, the central text for three new treaties on genetic resources, traditional knowledge and traditional cultural expressions will

be negotiated. However, in many national and local contexts, it remains unclear how new forms of legal centralization and bureaucratization as well as international intellectual property standardization and 'harmonization', could meaningfully serve linguistically and culturally diverse, as well as geographically dispersed, communities. With negotiations taking place through the auspices of largely non-indigenous bureaucrats and UN member state representatives, there remain legitimate questions about the extent that indigenous needs and expectations, when they diverge from the dominant position, can be adequately represented and incorporated (Watson and Venne 2007).

Discussions of intellectual property and indigenous or traditional or local (depending on the forum or context one is in) knowledge protection are heard across a variety of contemporary socio-political spaces.[2] Such spaces include international forums that involve the United Nations or other UN agencies; regional meetings that bring activists and non-governmental agencies together; subject-specific conferences, workshops and/or working groups involving academics; policy meetings within governmental departments; local community council offices, art-centers and public meetings involving non-state and non-Indigenous participants; university classrooms and increasingly research ethics boards. An upcoming meeting in March 2011 to be held in Dehli, India, co-hosted in conjunction with the UN agency, the World Intellectual Property Organization (WIPO) based in Geneva and India's Council of Scientific and Industrial Research on the utility and transferability of the Traditional Knowledge Digital Library (TKDL) as a model for protecting traditional knowledge is a good example of the diverse parties who participate in this discourse. This meeting will bring together participants from at least 35 countries including Kenya, Ecuador and Indonesia and include international bureaucrats from UN agencies, national government officials including representatives from the United States Patent and Trademark Office (USPTO) and other patent offices in Germany and Switzerland, academics from India as well as the UK, the US, Australia and Italy, national activists with interests in the protection of Ayuvedic medicines, international activists interested in the application of digital technology more generally to the protection of traditional knowledge, technology experts working on databases and legal scholars with interests in the specific national and international legislative intellectual property frameworks that protect databases. This meeting is

[2] The problem of terminology is acute. In this paper I mainly use indigenous people and indigenous knowledge however at times I also utilize traditional and local as they are also terms of identification that are utilized across numerous sites where these issues are being discussed. As there is not an international consensus and with the aim of being inclusive to the political articulations of a diverse range of peoples these multiple terms indigenous, traditional and local are all used.

representative of the diverse geo-political dimensions that underpin intellectual property and indigenous knowledge discussions.

Despite the enlarging discourse, and the increasing amount of participants, there remains no real consensus within policy and legal circles on what the indigenous, traditional, local knowledge 'is' that is in need of protection (Oguamanam 2009). What this lack of consensus produces, is a consistent, even if it is accidentally myopic, tendency to abstract, juxtapose and contrast indigenous knowledges as specific 'types' of knowledge to those that are seemingly easier to demarcate the boundaries of - like 'scientific' knowledge (Agrawal 1995; 2002; Whitt 2009). The problematic typologies and binaries continue to inform policy and international discussions making it appear as if some knowledges are 'naturally' easier for law to identify than others. This, of course, is not so. International policy making sites like WIPO go even further, seeking to map indigenous knowledges onto (and into) already existing categories of copyright (traditional cultural expressions) and patents (genetic resources and traditional knowledge) as if intellectual property law is a naturally occurring body of law and thus more able to capture some essential component of the intangible (knowledge, information, data) in question.

The real problem is not one of correct and more natural 'identification' and definition, but rather the dominance of a culturally specific logic system that privileges and thus recognizes some forms of knowing over others, and consequently views and values specific relationships to knowledge more highly than others. It is this logic that allowed and facilitated the theft and appropriation of indigenous resources, including knowledge resources, without recognition or reciprocity, to begin with (Smith 1999; Chambers and Gillespe 2000). Notwithstanding that this logic was foundational to the making of the very problems that law is trying to find resolution for, it is this very same logic that now also precludes the inclusion of indigenous knowledges as legitimate subject matter for intellectual property law. This constitutes the paradox of exclusion—inclusion that both underpins and has come to characterize this field (Anderson 2009).

Depending upon who is speaking and where, discussions slip between, or at least move interchangeably across, an intellectual property, cultural heritage and cultural property spectrum which can also engage land rights questions (Merryman, 1986; Prott and O'Keefe 2004; Bell and Paterson 2009; Bell and Napolean 2009; Hoffman 2009; Coombe 2009). This makes consensus on the issues harder to find and any conflict or dispute more difficult to resolve. This is not only because of the expertise required to straddle all these areas of law competently, but that each body of law is unique in constitution and in application. Part of this slippage owes itself to the very different jurisdictional questions that mark the contours of each country's specific debate on the rights that indigenous people have to their knowledge resources and their consequent international extrapolation. This has the inevitable affect of informing the possibilities for what, and where, new forms of relief can be imagined

and are directed. For example in the United States it is the *Native American Graves Protection and Repatriation Act* (1990) legislation that provides a specific (however not the only) point of departure and vehicle for extended questions about the rights to control indigenous knowledge resources. Thus within the United States a cultural property language exists within the literature and debates in ways that it does not in other jurisdictions (Tsosie 1997; Carpenter, Katyal and Riley 2009; Carpenter, Riley and Katyal 2010). This goes some of the way to explain how, in this context, issues tend to move more readily between the discourses of cultural property and intellectual property where the cultural property paradigm, with its distinctive genesis from real property law, is never fully displaced.

In other jurisdictions, like Australia for example, the key legislation that invigorates and extends claims to knowledge resources is not one that explicitly involves or evokes cultural property. Rather it is the *Native Title Act* (1993), which has a different but nevertheless somewhat related relationship to real property law that cultural property has. While Australia also had a series of significant cases involving copyright and Aboriginal art in the 1980s and the 1990s, the development of this *sui-generis* legislation offered a new platform. This platform was used extensively to argue the 1998 Bulun Bulun copyright case (*Bulun Bulun v R and T Textiles* 41 IPR 513 [1998]). Here the central argument was that rights in knowledge are a natural consequence of rights in land, the intangible and the tangible property claims dissolving into each other because the latter cannot exist except by virtue of the former. This connection between land rights and intellectual property makes for a different rendering of the issues than that between cultural property and intellectual property, and consequently affects where specialized advocacy should be directed. For example there are significant political differences in terms of how indigenous issues are incorporated and played out between international policy sites like UNESCO where questions of cultural property find carriage and the Convention on Biological Diversity (CBD) where questions of biodiversity, indigenous access to lands and to rights in knowledge that derives from those lands find articulation, especially through Article 8j.

The point here is that these differences in articulation tell us important things about the particularity of how indigenous claims to knowledge have been built, and to what extent earlier country-specific legislation informs and shapes the kinds of claims for rights in knowledge that are now being articulated in national and international contexts. Slipping between very different bodies of law, which are complete with their own rationalities and different objectives in law and policy, affects the nature and the direction of the conversation. For instance, intellectual property law and cultural property law differ significantly in how each conceptualizes and understands the property in question including how each historically and contemporarily manages the shifts between the tangible and the intangible (Sherman and Bently 1999; Hoffman 2009). While they have increasingly seen overlaps

(produced more through politics than instinctual legal relations), they are not easily made commensurate, as Article 3 of the UNESCO *Convention on the Safeguarding of Intangible Cultural Heritage* 2003 makes clear. Thus, because the sites of attempted inclusion of indigenous knowledge issues are already somewhat incommensurate and fractured, conversations weave back into themselves to include questions of adequately identifying, defining and protecting specific 'types' of contextually dependent knowledge, the dangers of imposing western liberal legal structures over knowledge systems that have never been thus managed, the re-emergence of tensions from unresolved legacies of colonial pasts, and a questioning of the utility of international legal instruments, as well as what these are actually able to address and where they are limited through the capacities of their own logic and reason.

In addition to this legal incommensurability across different bodies of law, with the institutionalization of debates about indigenous knowledge protection in international agencies and international forums, unresolved sovereignty politics between indigenous peoples and nation states have re-emerged and are undergoing re-assemblage. These can range from the reluctance to admit to the existence of indigenous peoples and their political status within a state (for example in Indonesia), to the ongoing tensions between settler colonial states and their Indigenous populations (for example in Australia, New Zealand, Canada, United States, South Africa). The different international forums that are dealing with intellectual property and indigenous knowledge issues, most prominently the World Intellectual Property Organization (WIPO) and the Convention on Biological Diversity (CBD), function as key sites for the negotiation of multiple political interests. These are performative sites in the sense that they demand particular representations of agents and agency, but they also present a range of difficulties in terms of the extent that founding rationalities govern the *permissible* and *recognizable* forms of representation and agency (Butler 1990; Povinelli 2002). In themselves such sites highlight key legacies that underpin indigenous issues as well as pointing to why these are so hard to overcome. That indigenous people are still only afforded observer status and cannot officially participate within the United Nations system, either to vote or to draft treaties that will govern their interests, is indicative of the extent of complications about political representation that exist for this area of law and its potential transformative processes of policy-making (Anaya 1996; Warren 1998; Muehlebach 2001). Inclusive forms of representation and hence decision-making processes would address only one part of the systemic forms of exclusion that need to be mediated if appropriate remedies that address indigenous concerns are to be developed.

The multiple positions to be engaged legally, culturally, historically, economically and politically also make legislative solutions (in terms of an international treaty for example) increasingly contested and elusive. The problem of protecting indigenous knowledge cannot be solely secured through legal intervention because the problems are not solely legal in derivation. Rather than finding more clarity in this recognition,

it seems that instead there is more confusion about law and its operation, about what representational politics is needed, about where the power to make decisions resides, about whose history should matter most and about who is authorized to speak.

IV

Intellectual property law produces conflicts and disputes in almost every context where it exists and has been introduced. This is because it works specifically to demarcate domains of knowledge and segment them off for specific and exclusive use. Disputes between indigenous peoples and third party users of indigenous knowledge resources over ownership and control, access and benefit-sharing have steadily increased in the last five years. Examples of the most prominent of these include the case of the cosmetics corporation AVEDA trade-marking the name 'Indigenous' for its line of 'natural' sandalwood products; the toy company LEGO utilizing numerous significant and important Maori names for a children's game; the 100 patents filed for inventions relating to the Peruvian Maca Root with no prior art reference to the traditional and known uses of the plant in Peru; the benefit-sharing agreements being negotiated between the San and the South African based Council for the Scientific and Industrial Research over the Hoodia plant and the ongoing questions of the rightful ownership of ethnographic films, photographs and sound recordings taken by researchers when studying indigenous communities (Wynberg, Schroeder and Chennells 2009; Anderson 2011; Wong and Dutfield 2010; Torsen and Anderson 2010). These disputes are complex and multi-dimensional, often cross-jurisdictional and combine legal and non-legal components. Importantly, they are not always commercial in nature and involve ethical, cultural, religious/spiritual and moral components.

Owing to the combination of elements that constitute a dispute over indigenous knowledge resources, remedy through litigation or court-based processes are not always possible or desirable. The very real difficulty of including and accommodating indigenous values, testimony, evidence within western legal structures has been well-documented across colonial nations and runs like a consistent fault-line of what Mignolo (2000) labels coloniality (Anaya 1996; Merry 2000; Churchill 2003; Benton 2002; Hamilton 2008). Such processes have the added disadvantage of potentially further disenfranchising and alienating indigenous people as well as limiting the chance for productive resolution of the issues facing the parties as court-based procedures function to identify the issues through the frameworks set by the relevant law. This means that in circumstances where a dispute has multiple components and transcends the relevant law, or engages multiple legal jurisdictions, those additional elements cannot be heard or accommodated.

There is currently no service dedicated to resolving disputes between indigenous peoples and third parties over the ownership, use and access to indigenous knowledge resources. This is despite several successful services being developed for

other new and emerging areas of intellectual property conflict – namely domain names, trademarks and technology transactions. Alternative dispute resolution, in particular mediation, offers a potential framework to address complex disputes over indigenous knowledge. This is because ADR relies upon processes wherein the parties themselves become responsible for whether and how the conflict is resolved. ADR and mediation options create a framework of operation where legal norms are not necessarily the exclusive basis for decision-making. This is particularly important given the combination of legal and non-legal dimensions, as well as cross-jurisdictional nature, that characterize indigenous knowledge disputes.

There are substantial advantages in considering mediation or dispute resolution possibilities in this context. For example such mediation processes: are more likely to address direct needs and foster new kinds of relationships between parties; have the capacity to fully explore grievances in ways that recognize the different cultural value systems that constitute the dispute; enable parties to develop solutions beyond what court based processes may allow; allow all parties, including those who have historically been alienated from formal legal frameworks, to direct the process; facilitate the integration of customary law practices; promote informed decisions about the level of formality within the proceedings; encourage the parties to tailor the process to fit the dispute; enable a choice of neutrals and mediators that have direct experience and substantive expertise in relation to the issues; recognize the significant relationships between indigenous individuals *vis à vis* community interests; offer confidentiality if the parties so wish; provide a context where an indigenous community can be a party; allow for a dispute to be addressed and resolved within a reasonable timeframe; and keep costs considerably lower. These advantages alone illustrate the need for the development of a framework for considering the possibilities of a specific service

While there are significant advantages to considering mediation as an option for contests over indigenous knowledge, it is important also to remain mindful of the potential disadvantages or reasons why a service would not be utilized or effective. For some parties, mediation may not be an appropriate mechanism. For example, parties may be seeking more formal mechanisms and they may feel that their direct legal rights are being reduced in favor of less formal legal concerns. In certain circumstances, parties may reject mediation in favor of litigation with a view to developing precedent within the specific area of concern. In other circumstances, parties may interpret mediation as an option that favors one party at the expense of the other. For example, indigenous peoples and local communities may consider mediation as an unworkable culturally specific form of legal negotiation that cannot accommodate diverse, non-legal interests. Indeed, certain parties may be uncomfortable with the extent that customary law protocols and procedures are incorporated and therefore decide not to pursue mediation alternatives.

These are relevant factors to consider alongside the historical and contemporary realities of law's limits, especially in relation to treatment of indigenous people and indigenous issues. But this should not preclude consideration of new possibilities for resolving disputes that can be expected to increase into the future. The absence of mediation or dispute resolution services for indigenous knowledge issues may be because there is confusion about how to proceed with claims that are made up of both intellectual property and non-intellectual property dimensions and also perhaps because there has been limited consideration of the future scope and implications of disputes in this area. There is an urgent need to combine sophisticated theoretical thinking with practical responses to current needs. This is in regards to providing access to legal tools when they are needed, increasing the capacity for people to make informed decisions, and the development of practical and effective strategies for resolving problems and disputes when they emerge.

V

It is the complex politics and political intentions that inform and underpin each dispute that makes the real difficulty for law and for the development of legislative remedy in this area. This is the case in national contexts as well as international ones. While some nations and regions have been able to adapt and write specific legislation (for example Panama, Bolivia, and the Pacific region), it is never fully able to catch all the discrepancies in meaning and value that often also exist within a dispute. This is especially in relation to the multiple directions that the idea of intellectual property is traveling and the contexts in which it is making new meaning.

If there are to be serious efforts made at delivering effective and meaningful options for indigenous people so that there are real choices available when it comes time to protect knowledge and access to that knowledge, then there must be more critical attention to the governing logics that uphold certain kinds of law reform proposals at the expense of other, perhaps more appropriate, options. A new kind of politics that embraces the interlocking potential of both legal and non-legal strategies for indigenous knowledge protection, promotion and preservation, within and determined through the interests of the actual communities, needs to be developed. This requires, at first instance, critical engagement with the way in which indigenous claims are recognized and constructed in national and international contexts and how such constructions seek to narrow the extent of the problems so that they 'fit' the proposed solution (a new law or special treaty). It also must include reflective engagement by experts and knowledge authorities about the privilege of their subject positions (including an understanding of the work that this does), as well as an acknowledgement of the very real circumstances that Indigenous people find themselves in. Following Laclau (2000), it is the *particular* instances of interpretation occurring in and through local, national and international sites that need to be more

fully engaged in order to disrupt the effects that abstract universalisms are having on ideas and the subsequent possibilities for action.

For indigenous claims to be thoughtfully and effectively addressed, a new politics must emerge that simultaneously recognizes the limits of international policy making in this area and the need to focus more closely on existing and developing local knowledge management initiatives. Sustained collaboration and negotiation with indigenous people in this process is a matter of necessity and priority.

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