"INTELLECTUAL PROPERTY" AND INDIGENOUS PEOPLES IN THE INTERNATIONAL HUMAN RIGHTS ARENA

Prof. Graham Dutfield

University of Leeds

The query:

As an internationally recognised concept, *can* and *should "intellectual property"* be used by indigenous peoples as a legal & campaigning strategy to pursue their rights in relation to knowledge and culture?

Or is it potentially harmful?

Can an alternative concept provide a better strategy?

What is "intellectual property" under international law?

Convention Establishing the World Intellectual Property Organization, 1967

Art.2 (viii)

"intellectual property" *shall include* the rights relating to:

– *literary, artistic and scientific works*,

– performances of performing artists, phonograms, and broadcasts,

– *inventions* in all fields of human endeavor,

– *scientific discoveries*,

– industrial designs,

– trademarks, service marks, and commercial names and designations,

– protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

It follows that: 1) intellectual property is an open concept; 2) the concept can partially accommodate rights of indigenous peoples in relation to knowledge and culture.

Is “intellectual property? a human right?

International Covenant on Economics, Cultural & Social Rights, Art. 15.1(c)

The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

See General Comment, No. 17, 2005

General Comment 17

The right of everyone to benefit from the protection of the moral & material interests resulting from any scientific, literary or artistic production of which he or she is the author is *a human right, which derives from the inherent dignity and worth of all persons*. This fact *distinguishes* article 15, paragraph 1 (c), & other human rights *from most legal entitlements recognized in intellectual property systems*. (Para. 1)

… States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge…. Such protection *might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use* of scientific, literary and artistic productions of indigenous peoples by third parties. (Para. 32)

Charter of Fundamental Rights of the European Union, 2000

Article 17 - Right to property

1. Everyone has the right to own, use, dispose of and bequeath *his or her lawfully acquired possessions*….

2. *Intellectual property shall be protected.*

This is the <u>only</u> explicit reference in an international instrument to intellectual property as a human right. Elsewhere, intellectual property protection *is not a human right* .

Indigenous people and intellectual property: Declaration on the Rights of Indigenous Peoples

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****. (Art. 29.1)*

Does IP work for IPs?
Conceptual issues

Individual creation v collective creation

Individual ownership v collective ownership

Inalienable v alienable

Private v public

Whose rules? Intellectual property (private rights), sovereignty (government), customary law (indigenous laws)

1. Intellectual property: a two-edged sword to be handled with care – if at all?

– patents (winner takes all, translation theory, 'biopiracy')

- copyright (individual author, right goes to the one who fixes; John Bulun Bulun v R&T)

- trade marks (misappropriation)

2. Culturally (in)appropriate?

3. But indigenous norms evolving – and inappropriate does not mean unusable.

What are intellectual property rights *in real terms*?

A class of (mostly) alienable business assets associated with tangible & intangible expressions of the mind typically given legal expression in the form of exclusive rights such as patents, copyright, trademarks, designs geographical indications, trade secrets etc. Increasingly these are owned & distributed by businesses rather than individuals.

***Accordingly,* it follows that intellectual property is <u>unlikely</u> to accommodate rights of indigenous peoples in relation to knowledge & culture more than in the most minimal sense.**

Strategic issues

1. Is it worth entering the policy spaces at all?

2. Is it better to avoid "intellectual property" and use a completely different concept?

Are there better alternatives? Darrell Posey's Traditional Resource Rights

TRR integrates the fragmented rights already available in international treaty & customary law, national statutory & constitutional law.

TRR does not prioritise knowledge over rights to land, culture, physical well being, fundamental freedoms. But can give appropriate weight to all issues of concern to indigenous peoples.

But… TRR has no official existence. Besides, … would TRR require a fundamental transformation of the relationship between individuals, peoples and the state that is politically unfeasible?

A matter of urgency

"With the extinction of each indigenous group, the world loses millennia of accumulated knowledge about life in and adaptation to tropical ecosystems. This priceless information is forfeited with hardly a blink of the eye: the march of development cannot wait long enough to even find out what it is about to destroy."

Darrell Posey

Not about salvaging – but about protecting peoples' rights.