

Intellectual property and traditional law

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The study of Indigenous intellectual property can be said to be made up of a set of questions and propositions: what is knowledge in a clan; how is it determined; how is that knowledge protected rather than defended in the courts; and what are the duties and roles of custodians in this realm of protection? Furthermore, it can be said that authenticity of intellectual property is not the issue but rather who does it inform and who is the audience? In other words which community is involved?

Too often debate around the above questions smothers the so-called truth and facts. But facts just as truth are subject to whoever is the dominant power. For example each nation has its own interpretation of historical events and past empires have recorded and edited history to glorify their own nation's deeds. However, the right of interpretation must be given to all nations, especially as the past monopoly on history by colonialist nations has proven detrimental not only to the oppressed but also to their own population's ability to reconcile its past. Therefore, Indigenous people need to be given the academic space to interpret their own intellectual property which in turn caters for their own people's creative productions.

The following article discusses field work in the Torres Straits Islands. The discussion is meant to give voice to the Torres Strait Islanders and how they see the problem. It is not meant to represent a hard and fast way of resolving the issues that plague most Indigenous groups, but rather to offer a process of how an Indigenous group is educating its people as well as declaring its rights to control its own intellectual property with their own traditional legal system.

The Torres Strait Islanders are at the most northern part of East Coast Australia. The people comprise a distinct group of clans which are different and separate to Australian mainland Aborigines. However, over the millennium there has been much trade and intermarriage. These people have their own relationship with the Government of Australia, however the issues surrounding the control of their intellectual property in their culture is the same as the mainland.

Intellectual property as a concept

Murray Island Chairman Ron Day uses the example of how different concepts of culture must be understood to grasp the full meaning of Indigenous intellectual property rights (IPR). He explains that Torres Strait Islanders see a cultural object — like a stone implement created by ancestors — as having a spiritual value. Anything that was made 2000 years ago has a spiritual dimension that continues to the present day. But others might look at the artefact and merely see a piece of rock. Day continues:

'Let me put it this way. When we address international or national forums with respect to culture, people usually give it out from the top of their minds. I question that all the time. Anybody can talk about culture but not everyone practises it. So when you talk about culture you have to talk about it from your own being and not from a textbook. So when you approach objects like that (the artefact), its power naturally becomes part of you' (TSIMA, 1999b).

This suggests that an important starting point for thinking about Indigenous IPR is to consider culture as a dynamic, lived experience. This is in accord with concepts of culture as 'a constitutive social process' (Williams, 1977: 19) that incorporates both 'lived practices' and 'practical ideologies' to enable societies to make sense of their lives (Hall, 1982: 77).

Traditional management structures

'IPR is for men and women. So get involved, it's your culture and your law.' This call by pioneering Torres Strait Island broadcaster Aven Noah (TSIMA, 1999a) reveals a growing awareness by Indigenous people of the need to recognise and manage their intellectual property. When a community produces a CD of a traditional song or a story broadcast by the BBC World Service, who owns these products? Who will benefit from any commercial gain from the sale of these products? These are important questions that all communities who produce cultural products need to address because of the operation of global laws concerning copyright ownership.

One solution is for Indigenous communities to look to the traditional processes which determine ownership of their cultural products. These crucial questions have been dealt with for generations by Indigenous people who traded with each other under the terms of traditional Law. Many communities still use this framework as a way of determining ownership of knowledge. In the new communication environment, this has to be extended to include all cultural products, including media. But how can this be done within a Western-dominated legal system?

The question of managing intellectual property rights has been taken up directly in the Torres Strait by using traditional management systems to mediate disputes over ownership of land. I worked with several Torres Strait Island communities to begin thinking about a practical solution for these questions, based on traditional structures. The Murray Islands, or Mer, are perched at the northern end of the Great Barrier Reef, about 200 km north-east of Cape York in far north Queensland. Mer was at the centre of the historic 1992 Mabo High Court decision on Native Title, which overturned the 'legal fiction' of the notion of Australia being terra nullius (an empty land) at the time of British settlement (Brennan, 1991; ATSIC, 1997).¹

The islands' traditional owners have begun to use their local Native Titleholders' Court system as a way of resolving questions of ownership of Mer intellectual property. The Native Titleholders' Court is made up of representatives from each of Mer's clans. Although the court sits to determine ownership under non-Indigenous Federal law—the Native Title Act—it has adopted a resolution process based on traditional approaches. In this way, any dispute over ownership of cultural property — whether it's a song, a dance, a story — could be discussed at this forum. Resolutions would be reached via consensus. Now, the Torres Strait Island communities are beginning to use this system to determine ownership of intellectual property. Chairman of the Mer Island Council, Ron Day, explains how the Murray Islanders' land management system works:

'We have set up what we call a Native Titleholder' tribunal to look after the interests of the traditional owners of the land. So if a developer comes in...a company from the mainland, the government...to develop on that piece of land, we have to negotiate with the traditional owners through that body. That body has to mediate between the traditional owner, the Native Titleholder, and the developer. Now we have this body' (TSIMA, 1999b).

Day explains that most of the members of the Native Titleholders Court are elders of the

community representing the eight tribes on Mer. The court is totally independent of the Mer Island Council. Any issues concerned with the land or cultural matters come through the tribunal. It makes everyone's job easier. So the system used on Mer has moved towards recognising the existence of two laws: traditional Law and the Western common law. The system operating on Mer links those two together conceptually. Day suggested that this system could work to resolve copyright ownership disputes and Mer has moved to apply this process more widely.

Torres Strait filmmaker Frank Cook of Darnley Island makes the same point when he talks about the need to get permission to film on a particular place from the traditional owners. The Torres Strait is a popular location for local and international film and television crews. In the past, most arrive in the communities unannounced and begin shooting without seeking permission from either local landholders or councils. Cook reminds production crews from outside Torres Strait of the need to contact authorities at both local government and island community council levels to organise support like transport and accommodation. But permission to film must come from the traditional owners. This is an example of how Torres Strait Islanders are beginning to identify their cultural property along with ways of managing it through an intellectual property rights' regime based on traditional structures (TSIMA, 1999b).

The question of a broader Torres Strait-wide IPR management system has been taken up by the Torres Strait Islander Media Association (TSIMA), a body set up to manage communication production and processes both by and for Torres Strait communities. TSIMA's BRACS Co-ordinator, Aven Noah — an experienced broadcaster and filmmaker — argues that TSIMA is in the best strategic position to mediate issues of ownership of intellectual property throughout the region because of its knowledge base. He suggests that the mediation of IPR issues involving organisations and individuals outside the Torres Strait could be channelled through TSIMA rather than going directly to community councils or local government bodies. Key copyright management agencies like the Australian Performing Rights Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) already work through TSIMA suggesting that the association could become a clearing house for all performance-related IPR matters, taking its guidance from a community-based reference group.

Noah has suggested that members of a Torres Strait Islanders' reference group could be nominated by the island community councils. Information concerning IPR could then be passed on to the relevant communities for consideration by intellectual property owners at the community level. Noah has suggested the need for a Torres Strait representative to take up IPR issues at both national and international levels. He argues that TSIMA should be at the forefront because of the daily experiences of its members in dealing with copyright issues. In October 2000, Torres Strait community representatives met to discuss this issue further.

Traditional economy

Mer Chairman Ron Day (2000) describes how people from his island community, Stephens Island (85 km away) and Darnley Island (55 km away) have traditionally joined for festivals for generations. With no modern communication systems like telephones, they 'knew' when it was time to celebrate. He concludes, 'I don't know how, maybe it was telepathy.' Like many others, he acknowledges that communication was, and remains, a central part of the traditional economy:

'The main thing is the sharing of the concept of spirituality. I think that was the main thing because people have to be in contact with other people and the only way you can do that is through something spiritual like [with] Darnley and Stephens, for example, and I'm sure they had some sort of contact. In my tribal area we had what we call a communication point where people go to get information from other islands, including Kaurareg [Thursday Island]' (Day, 2000).

The difficulty for people in the Torres Strait is that missionaries imposed a new spirituality on people and Islanders now need to rediscover 'the old ways'. Day sees these contradictions but he also acknowledges that prior to the arrival of the London Missionary Society in the Torres Strait in 1871, the traditional economy had established an order:

'Today we're finding it hard to get it [the traditional structure] back because most of the young people won't cooperate. They just feel they are not part of it. So we have to sit down and get this small community to understand from where they came to exist; what was in place before. There was an order of something that made them to be what they are now' (Day, 2000).

Indigenous thinkers like Ron Day and Noel Pearson are in no doubt of the value of traditional structures as a framework for modern Indigenous society. Pearson (2000a: 20) writes: 'Central to the recovery and empowerment of Aboriginal society will be the restoration of Aboriginal values and Aboriginal relationships which have their roots in our traditional society.' He acknowledges that despite all of the losses Indigenous people have experienced, what has survived are traditional relationships, values and attitudes Aboriginal Law—which gave (and continues to give) structure and strength to families and communities (Pearson 2000a, p. 23).

Traditional structures and indigenous knowledge management

Like Ron Day, Noel Pearson stresses the importance of seeking out traditional structures of governance for Indigenous societies—regional, community, and clan-based (2000a: 68). Just as the Mer Islanders have proposed a traditional management system for intellectual property, the processes of traditional subsistence economies — with their in-built systems of responsibility and reciprocity — may offer a model for Indigenous communication. Unless communication processes are part of this traditional economy, then their chances of success seem minimal. Because they do not come out of the community social structures, or form part of the traditional economy, their place in the community is always in flux.

Knowledge management also needs to be discussed in terms not only of human resources, but also of the implications of IPR. Franey (1998) an Indigenous Broadcasting Manager points out that Indigenous people have a different sense of IPR than non-Indigenous people. For example, Indigenous management must vet the use of Indigenous knowledge before it can be placed in the public domain. When Indigenous and non-Indigenous people work together there is a 'sharing of knowledge' that can create tensions (Morris, 1997: 9).

Franey (1998) argues that researchers wrongly assume that because they have researched a people, or collaborated in the research, they are entitled to go out on their own and do as they see fit with the IPR from that research. This has been a burning ethical issue in Indigenous communities for many years. The present laws of copyright allow people to do this as long as there is acknowledgement and it is in the public domain. However, this is non-Indigenous law and does not include values such as reciprocity, central to the operation of Indigenous law.

As Paulson (1996: 85) points out: 'We are a relational-type society. Our whole system is held together by relationships, the relationship between individuals in our society is more important than the simple performance of task.' So when Indigenous people enter a community, they must first ask themselves: 'What is it that they require of me?' rather than, 'What can I do for them?' (Franey, 1998). This is why it is important to understand the different cultural laws in relation to intellectual property, which go beyond mere reciprocity.

Conclusion

This discussion has shown an example of how one Indigenous group has moved to set up a framework for determining how IPR issues should be handled using traditional law. By focusing more on the process and management rather than the control of a cultural product these people are able to educate their people to value what is important to their meaning as a people and also to focus back on their own Law and associated responsibilities, The issue of the control of the intellectual property of Indigenous peoples knowledge and cultural products therefore can be said to have offered the people a new means of solidifying their identity and the laws which give their lives meaning as a distinct people. It also gives them a focused responsibility about who they are and why they exist, something that is badly needed in times of global commodification and political instability. n

Notes

1. The High Court decision was named after one of five plaintiffs from Mer, Eddie Mabo. The legal battle began 10 years before in the Queensland courts before the High Court decision was handed down on 2 June, 1992. Tragically, Eddie Mabo died of cancer a few months before.

2. The arrival of representatives of the London Missionary Society in 1871 is celebrated on July 1 each year in the Torres Strait as the Coming of Civilisation or the Coming of The Light. Christianity has had a profound effect on Torres Strait Island people: every single inhabited island has a monument commemorating the event; no aspect of life in the Torres Strait is unchanged by the coming of religion (Schnukal 1987).

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