

# The IP Law Book Review

Published by the Intellectual Property Law Center  
Golden Gate University School of Law

ISSN 2154-6452

Vol. 5 No. 2 (June 2015)

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**INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE, AND THEIR KNOWLEDGE** by Peter Drahos

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Vol. 5, No. 2 (June 2015) pp. 19-25

**INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE AND THEIR KNOWLEDGE**, by Peter Drahos. Cambridge University Press, 2014. 262 pp. Hardback \$99.<sup>00</sup>

Reviewed by Ruth L. Okediji, University of Minnesota Law School  
rokediji@umn.edu

**INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE AND THEIR KNOWLEDGE** provides a critical account of the relationship between intellectual property (IP) and “the non-developmental state” (p. 1). Professor Peter Drahos argues that indigenous peoples’ knowledge has been systematically enclosed through pervasive and displacing strategies that have simultaneously excluded indigenous peoples from exploiting their own knowledge, while providing tools to allow others to appropriate that same knowledge. The book’s fundamental thesis—anchored in a deep skepticism about the role of IP as an instrument of economic development—is that indigenous people can adapt to, and benefit from, the utilization of their knowledge in Western-style economic markets with simple changes to existing intellectual property regimes associated with the leading developed countries.

The book starts with a compelling frame: the relatively high scores that economically successful states obtain in rankings about innovation, human welfare, political integrity, and economic progress stand in sharp contrast to the conditions of life that indigenous groups in these countries face on a regular basis. What defines this gap, how national and international regimes manage and perpetuate it, and what types of policy tools may facilitate a greater capacity for indigenous people to control and benefit from their own knowledge drives the books’ central purpose.<sup>1</sup> Based on detailed case studies in Australia, Professor Drahos analyzes challenges faced by Aboriginal groups who want to use their customary knowledge assets in formal market sectors (pp. 108-127). The case studies are not solely about indigenous knowledge rendered in the form of IP notions of creativity and innovation. Rather, in Chapters 2 and 3 Professor Drahos introduces a thorough and integrated value system that encompasses land, intellect, social order, and political structures among indigenous people. He describes how membership in kinship systems encompass a range and variety of property interests, including instantiations of intangible property that could “fit” under certain intellectual property categories such as trademarks or copyrights.

These early chapters proceed from an internal examination of how indigenous peoples view and understand their world, including the systematic risks posed by the imposition of foreign (and often hostile) legal cultures on their way of life. Professor Drahos tells *their* story, using their words and their worldview of the past, present, and future.

In sharing detailed insights about the power of land ownership and “cosmological connectionism,” (pp. 69-94) Professor Drahos, in Chapter 4, makes a compelling case for the economic value derived from indigenous peoples’ knowledge and why the official recognition of the value of this knowledge has historically had even greater adverse effects on Aboriginal communities. He demonstrates how, with the development of an international treaty complex recognizing the value of traditional knowledge,<sup>2</sup> states have conferred symbolic value on indigenous knowledge but did not fundamentally alter the extractive systems that devalued and misappropriated it. He argues that “rule ritualism”—representing a change in the law rather than “some deeper attitudinal and behavioral change” (p. 72) towards indigenous knowledge—has “given mythical assurances while denying tangible benefits” to indigenous peoples (p. 72). This Chapter illustrates a pattern also pervasive in intellectual property relations, a pattern in which treaties and text produce governance rules that appeal to economic development as the core objective behind the grant of proprietary rights, but in the end set very few meaningful standards that actually deliver development outcomes for indigenous people (or developing countries). Professor Drahos’ analysis offers cautionary lessons about the dangers associated with the recognition of indigenous knowledge, using these Aboriginal experiences in Australia as vivid examples of the costs of a relentless rise of administrative rules to govern knowledge networks on a global scale.

Since the twentieth century, the international community has engaged in ever-increasing levels of symbolic assurance of indigenous people and their knowledge. Professor Drahos in Chapters 5, 6, 7 and 8, offers a sustained analysis of the various ways such assurance has harmed indigenous people and placed ancestral systems of knowledge governance under immense strain (pp. 94-154). He gives examples of government projects, policies, and bureaucratic structures in Australia that ultimately legitimized the subordination of indigenous knowledge systems to formal state control, or otherwise structured economic interests in ways that destabilized the social networks and values central to indigenous populations (pp. 108-127). These chapters also reveal the outline of a regulatory approach that Professor Drahos hopes may accommodate the integrity of indigenous peoples’ interests in the control and use of their productive assets, while facilitating opportunities to participate successfully in economic markets governed by intellectual property and other legal orders. His potential solutions are not to disengage or remain in conflict with the IP regime; instead, he emphasizes the importance of simplicity in the rules that are extended to

indigenous knowledge and the establishment of institutions (e.g., national commissions such as the one recommended by the Waitangi Tribunal in New Zealand) to help forge and administer common understandings of indigenous intellectual property (pp. 194-208).

Professor Drahos' arguments point to the system of intellectual property—the rights it confers, the actors involved in it, and the system's rules and values—as a key facilitator of the twin forces of exclusion and enclosure of indigenous peoples' knowledge. He illustrates how the methodical de-valuation of indigenous knowledge provided opportunities to extract that knowledge, leveraging doctrines such as “novelty,” “originality,” “duration,” or the “public domain” as barriers to a participatory discourse about indigenous knowledge as appropriate subject matter for protection under the intellectual property regime or other legal normative orders (pp. 6-11). This knowledge could materialize not only as a quantifiable input in formal scientific endeavors, thereby resulting in significant commercial outcomes for the traditional actors and recipients of intellectual property's solicitude, but also as a key component in aiding contemporary scientific research in tackling various global challenges of our time such as climate change and other symptoms of ecosystem crises.

There are a number of important themes in INTELLECTUAL PROPERTY, INDIGENOUS PEOPLE AND THEIR KNOWLEDGE, at least three of which should be highlighted. First, intellectual property regimes facilitate the non-developmental state and, yet, they are deeply entrenched in the narrative of economic and political successes that have long-been associated with developed countries. Second, there are few *sui generis* regimes that have effectively overcome the extractive tendencies of the intellectual property system. Intellectual property rights play an important role in the means and processes by which indigenous groups are methodically carved out of the economically successful state. This point is well noted in the “IP and development” literature.<sup>3</sup> Professor Drahos advances the critique by showing how the presumed legitimacy of intellectual property regimes makes the adverse consequences on the welfare interests and rights of indigenous groups *okay*, and thus numbs the moral critique that even so-called benign justifications for intellectual property deserve. The power of such symbolic virtue for IP makes it extremely difficult to disgorge the profits or challenge the behavior of economic agents responsible for transforming indigenous peoples' knowledge assets into commercial products for the state. Third, indigenous knowledge and the scientific enterprise may benefit from changes to the intellectual property system, particularly when research is derived from partnerships that allow formal science to engage meaningfully with the methods and practices of indigenous custodians of ancestral knowledge systems.

The consequences of super-imposing intellectual property rules on these native systems are not trivial, whether to the indigenous groups or to the modern state. The stunningly low rates of education, high poverty, maternal death, and other

welfare indicators among indigenous groups living in developed countries are partly a reflection of these consequences. And despite the creative ways indigenous peoples have responded to “the state’s extractive order,” (p. i) both in regard to intellectual property rights and other legal regimes, Professor Drahos’ arguments make clear that the existential risks for indigenous groups remain.

Professor Drahos does not entirely eschew the possibility that intellectual property regimes can be useful for the protection of indigenous peoples’ knowledge, and he recommends simple rules for a regulatory system that meaningfully engages with indigenous knowledge systems. Such rules include a veto power for indigenous peoples over negotiations that affect their property interests, the recognition of duty-based notions of stewardship, trusteeship, and guardianship, and a disclosure requirement in intellectual property applications that reveals when indigenous knowledge has been utilized (pp. 94-108).

Professor Drahos prefers these changes to *sui generis* or otherwise “autonomous” legal regimes to protect indigenous knowledge. He argues that such regimes exacerbate and extend the extractive consequences of intellectual property rights (pp. 94-108). Citing India’s traditional knowledge digital library as an example, he notes that occasional victories for the knowledge assets of indigenous people are short-lived because these are merely “rule adjustments” that do not undo the propertization impulse of the state (pp. 154-175). At the same time, such rule adjustments fail to advance development among indigenous groups and provide a gloss of legitimacy that hides the structural causes of the non-developmental state of indigenous groups. In this view, creating policy space for indigenous knowledge within contemporary intellectual property regimes may facilitate indigenous economic activity by allowing markets to capture the value of activities within the customary economy. Copyright and trademark rules in particular have already engaged many customary practices, creating branding opportunities and niche markets for “authentic” indigenous stories, arts, crafts, and foods (pp. 175-202).

I am not as sanguine as Professor Drahos about the constructive prospects of accommodation for indigenous people’s knowledge within the intellectual property system for at least two reasons. First, the intellectual property system itself has come under serious criticism for failing to promote the quality and scope of innovation for which it was originally designed. Placing indigenous knowledge within this deeply flawed knowledge management system may serve only to entrench the longstanding distrust and devaluation of indigenous knowledge by most developed countries. The risks of gilding the historically dismissive view of indigenous knowledge with the deep discontent shared among many citizens, policymakers, and firms about the modern IP system are too great to be ignored. Second, as Professor Drahos himself observes, changes in the rules and institutions of the intellectual property game will not be enough to forestall extractive effects on indigenous peoples; meaningful efforts to recognize

indigenous people's knowledge — both in its scientific and economic dimensions — requires partnerships between scientists and indigenous peoples. By sharing and observing certain aspects of indigenous knowledge systems, the methodology of formal or “normal” science can be more systematically challenged, assumptions tested and, if necessary, discarded, and new findings gained more quickly (pp. 202-221). For example, in Chapter 2, Professor Drahos describes how the Aboriginal use of fire systems to manage the landscape was thought to be destructive by early colonizers (pp. 31-56). It was more than three decades later before “scientific” study revealed the beneficial effects of such fire systems. Similarly, indigenous knowledge has helped scientists better understand the links between groundwater hydrology and sustainability of wetlands. Indigenous cosmology can help identify plants for specific therapeutic use, aid in understanding the relationship between a combination of plant compounds, and so on (pp. 31-56).

Examples of the contributions of indigenous knowledge to scientific endeavor are numerous; numerous enough to have galvanized a multilateral effort at the World Intellectual Property Organization (WIPO) to create a *sui generis* regime to protect against the misappropriation of Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions.<sup>4</sup> Professor Drahos gives surprisingly brief treatment to this fifteen-year effort, which now incorporates elements of the proposals he outlines in the latter half of the book. In part, as noted earlier, Professor Drahos does not consider this effort as ideal for the multidimensional value sets embedded in indigenous knowledge systems. But it is important to acknowledge, too, that indigenous peoples are not the only groups with traditional knowledge; local communities have knowledge assets and, in many cases, different needs that also deserve recognition. The complexity of indigenous people's knowledge, the inextricability of their *living* from their *knowing*, and the legacy of highly evolved social, religious, and political ordering cannot be easily captured in a single regime. I agree with Professor Drahos that trying to do so places indigenous institutions, rules, and processes that are so deeply embedded into the cultural fabric of the people at great risk, in part because such a regime necessarily implicates the state apparatus. But many indigenous peoples and local communities have expressed a desire for a multinational regime, and those expressed desires cannot be discounted for fear the process may add a disabling complexity.

While states certainly can (and undoubtedly will) try to limit the potential efficacy of new legal instruments to protect indigenous knowledge, the fact of the normative recognition of indigenous peoples' knowledge, and the formal acknowledgement of alternative knowledge systems, is a positive step in the international legal system. At a minimum, it sets up a counter-regime to the global intellectual property system, in which countries who wish to can implement meaningful instruments of control and place them in the hands of

indigenous peoples to facilitate their control over their productive assets. The genetic resource disclosure of origin requirement, which is now part of the patent law in a number of developed and developing countries,<sup>5</sup> illustrates that changes to the structure of the intellectual property system are not implausible, and that firms who wish to engage in international trade will be subject to disclosure obligations even when countries such as the U.S. or Canada decline to join the Convention on Biological Diversity and the recently ratified Nagoya Protocol. In other words, the dense transnationalism of the intellectual property system makes it impossible for even the most powerful countries to avoid the consequences of normative change occasioned outside the international intellectual property regime, but that are implemented within its gates.

Indigenous peoples' knowledge is not valuable simply because of what it tells us about the past; it is not a historical relic or a romantic tradition. Professor Drahos demonstrates that indigenous knowledge is a living institution with deeply complex values embedded in well-grounded institutional forms and with dense rules governing its interaction with the state. The case studies show an indestructible link between the past, present, and future in the generation, use, and adaptation of knowledge for on-going productive purposes in indigenous communities. Any effort to "make room at the table" for indigenous people's knowledge, and to do so on functionally equivalent grounds, will require adjustments to the rules of the intellectual property system, to its processes and its core assumptions about what constitutes valuable knowledge, how such value is determined and who determines it. In his book, Professor Drahos notes early on that the effects of extractive property regimes go beyond economic loss, physical degradation of territories, or marginalization from the welfare ambit of the state's political obligation to facilitate development of all people. Rather, the battle for the protection of indigenous people's knowledge is "also a fight to preserve or rebuild ancestral systems of decision-making" (p. 10) or in other words, to maintain the right and the space to live who they are as indigenous groups. I should hasten to add that although this may echo strains of a right to self-determination, which is certainly part of the narrative of indigenous peoples under international law,<sup>6</sup> the fight for indigenous knowledge is more than that. It is, most fundamentally, a right for *equality* — the civil and political equality that enables indigenous groups to choose their own values and to hold firm to their self-association as a group.

While Professor Drahos' caution about the dangers of a new legal regime for indigenous knowledge must be well taken, the emergence in WIPO of a new alliance of developed, developing, and indigenous groups committed to an ecologically-oriented intellectual property order that also supports indigenous innovation should not be underestimated. This uncommon partnership at the multilateral level simulates the virtues of partnerships between indigenous peoples and scientists described in Chapter 11, in which a key requirement is to

overcome the “trust gap” between indigenous peoples and the state (pp. 202-221). As this Chapter suggests, the capacity to overcome this trust gap will lie partly in the development of indigenous developmental networks that function both offensively and defensively in the strategic management and oversight of indigenous people’s knowledge. At a minimum, such networks can serve as trust arbiters assessing when particular forms of intellectual property and other property arrangements operate in the best interest of indigenous groups.

Professor Drahos’ book is a remarkably powerful analysis of the failed promises of formal law to advance the interests of all people, particularly those whose knowledge assets remain so crucial for their and our collective well-being. In the dreaming tradition of some of the indigenous peoples that are the focus of this rich analysis of the knowledge ecology of competing worldviews, he has written a book to be “read, kept, and remembered.”

#### ENDNOTES

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<sup>1</sup> Although the book focuses on indigenous populations as the object of study, many of the insights shared and lessons elicited are applicable to other marginalized populations and, to some extent, developing countries.

<sup>2</sup> This complex regime includes international instruments such as Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, the United Nations Framework Convention on Climate Change, and the United Nations Convention on Biological Diversity. *See* Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, U.N. Doc. A/Conf.151/26 (Aug. 12, 1992).

<sup>3</sup> See, e.g., Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 *TEX. WESLEYAN L. REV.* 207, 207-08 (2009) (“Cultures die, in large measure, because of exploitation of peoples and the knowledge they possess.”).

<sup>4</sup> WIPO, *INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS: AN OVERVIEW* 22–30 (2012), available at [http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo\\_pub\\_933.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf).

<sup>5</sup> See INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES ET AL., *DISCLOSURE REQUIREMENTS: ENSURING MUTUAL SUPPORTIVENESS BETWEEN THE WTO TRIPS AGREEMENT AND THE CBD* 9 (Martha Chouchena-Rojas, Manuel Ruiz Muller, David Vivas & Sebastian Winkler eds., 2005), available at [http://www.ciel.org/Publications/DisclosureRequirements\\_Nov2005.pdf](http://www.ciel.org/Publications/DisclosureRequirements_Nov2005.pdf).

<sup>6</sup> See Russell A. Miller, *Collective Discursive Democracy As the Indigenous Right to Self-Determination*, 31 *AM. INDIAN L. REV.* 341, 341 (2007).

Suggested Citation: 5 *The IP Law Book Review* 19 (2015)

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