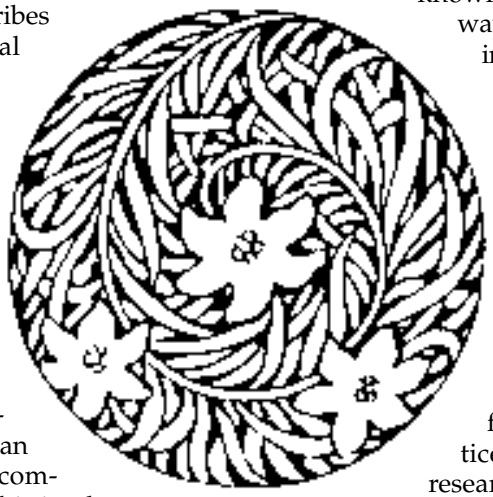
# Intellectual Property and Indigenous Knowledge

**Cynthia Townley**

One common justification for intellectual property rights treats knowledge as a commodity whose production can and should be maximized. This justification is unsatisfactory. Often the authority of experts and the promise of the utility of knowledge eclipse such considerations as the cultural sensitivities of indigenous populations, which have prior claims to knowledge and different understandings of it. Until recently, for instance, American museum curators and researchers refused to return the bodies of Native Americans to their home tribes for proper burial. Instead, the official position was to insist that these human remains were artifacts to be studied, and the promise of knowledge trumped any other considerations. Further, all too often no recognition is given—and no compensation is paid—to those indigenous knowers from whom information is obtained. Thus, for instance, controversy has erupted over a new obesity treatment derived from a plant traditionally used for appetite control by the San people of South Africa, because no compensation is planned for the use of this intellectual heritage. In such cases, indigenous knowers are regarded as instruments and sources of knowledge, but not as morally relevant parties whom researchers or "prospectors" must engage responsibly.



While many complex issues—including race, colonial exploitation, views of social justice—contribute to a full understanding of indigenous intellectual property rights, in this article I suggest that the re-evaluation of claims about *what constitutes knowledge* is a promising start. While exposing dubious epistemological assumptions will not eliminate unjust practices, such disclosures help undercut the apparent justifications for those practices. I conclude the article with the proposal for a more appropriate basis for intellectual property negotiations.

## Knowledge as Intellectual Property

In the Western tradition, rights to property are associated with activity and innovation or discovery, classically expressed through eighteenth-century political theorist John Locke's influential claim that "The labour that was mine, removing them out of that common state they were in, hath fixed my property in them." To obtain intellectual property rights one must have exerted oneself in some way to produce new knowledge. The Lockean view opens the way, for instance, for the "discovery" of information, new plant varieties, and medicinal remedies, by Western researchers who learn the uses of botanical materials from indigenous healers. The knowledge and rights to that knowledge become those of the scientists, so the argument goes, because before their investigations, there existed no knowledge recognizable according to the Western scientific model of knowledge. There first existed only traditional practices and traditions, to which the researchers added their "labor" to create knowledge.

Contemporary accounts of the justification for intellectual property remain faithful to Locke. Philosopher Edwin Hettinger, for instance, has recently invoked utilitarian justifications for intellectual property. He claims that more value is produced with property rights and the restrictions that such rights involve, than would be produced without the institutions of intellectual property, copyright and trade secret protection. The optimal output of intellectual products requires restrictions:

> Granting property rights to producers is here seen as necessary to ensure that enough intellectual products (and the countless other goods based on these products) are available to users. . . . This approach . . . establishes a right to restrict the current availability and use of intellectual products for the purpose of increasing the production and thus future availability and use of new intellectual products.

For Hettinger, intellectual property rights (copyright and the right to trade secrets) are justified on the grounds that such protections and regulations provide incentives that promote further intellectual progress. The development of medicines (from traditional herbs or otherwise) is said both to advance human knowledge and to promote human welfare. Learning information from small local groups, and then incorporating it into the stock of global pharmacological and botanical data is part of a worthwhile project (even a scientific duty) to increase human knowledge.

This description, however, obscures the fact that knowledge will benefit some more than others—and may come at the expense of some, maybe many. Hettinger's endorsement of rewards to "producers" reinforces a view of knowledge as a commodity derived from raw material, and that is not considered owned until it is a *restricted* product ready for commercial transaction.

As Hettinger admits, there is something paradoxical about the argument that *restrictions* on the flow of information are justifiable by appeal to *greater* knowledge production. But, he argues, the paradox is not so puzzling after all, if one draws a distinction between short-term and long-term knowledge. Restricting knowledge in the short term allows for greater knowledge with greater utility in the future. He also stresses the importance of rewarding and supporting those willing to labor to make new discoveries. Even further, those with a track record of producing new knowledge should be encouraged—financially and with public recognition or other incentives—to continue their work. This utilitarian view relies on the justification of practices that yield an overall increase in knowledge.

*There is something paradoxical about the argument that restrictions on the flow of information are justifiable by appeal to greater knowledge production.*

Among other difficulties with this view, rarely can one calculate overall *quantities* of knowledge and evaluate the *quality* of contributions. Discerning and evaluating types of contributions to the increase of knowledge-dissemination versus innovation, for example—is no simple matter. Leaving aside these difficulties, I will suppose that Hettinger can perhaps provide a plausible account of measuring knowledge productivity. Instead, I examine his implicit presumption that knowledge is best understood as a product or commodity that can be understood as detached from knowers, which can be quantified and proliferated, and, unlike physical property, can be shared with no loss to the initial knowers.

Admittedly, the acquisition of knowledge commonly involves joint projects, and typically knowledge is considered "commonable," or able to be shared. But the commonability of knowledge is not the same as public knowledge, and even if all knowledge *can be shared*, that does not mean that all sharing of knowledge *is alike*. Just as there exist degrees and kinds of privacy, so there exist degrees and kinds of publicity.

*Transmissions of knowledge occur in relationships where discretion, discrimination and trust may be as or more important than increasing the amount of available knowledge.*

Transmissions of knowledge occur in relationships where discretion, discrimination and trust may be as or more important than increasing the amount of available knowledge. One must be sensitive to different kinds of knowledge; the information contained within the phone book, for instance, does not usually require any special responsibilities, but information that is confidential, sacred, or private often does. Hettinger's account, like intellectual property law, is blind to the importance of these epistemic considerations.

## A Troubling Case

One recent Australian case illustrates some of the ways that intellectual property regulation accepts the Lockean attitude toward knowledge at the expense of an appreciation of the complexities of ownership and dissemination of information. The case of *Yumbulul v. Reserve Bank of Australia* involves a conflict over the use of a ceremonial image on a commemorative bank note. Terry Yumbulul is an established Australian artist of the Warimiri clan group, who, through his mother's people, the Galpu, inherited the right to create Morning Star Poles. These poles have sacred power deriving in part from the images they bear, and they are exchanged between clan groups and used in ceremonies concerning spirits of the dead. As well as creating Morning Star Poles for ceremonial use, Terry Yumbulul crafted five poles for display in selected museums, one of which became the subject of legal conflict. Although, as in this instance, cultural tradition permits poles to be made by one individual, authority with respect to the pole and to the images and stories connected with it belongs to the clan, which guards the rights to use the identifying attributes proper to each group. Yumbulul's production of the museum poles was acceptable to the members of the clan and there was no explicit restriction on subsequent use or repro-

duction of these exhibited poles.

The Reserve Bank of Australia sought and obtained consent from Terry Yumbulul to reproduce an image of the Morning Star Pole, then on display in the Australian Museum in Sydney. And here is the source of the conflict, since, when the Bank issued a 1998 Bicentennial commemorative ten-dollar banknote that depicted the pole, Terry Yumbulul legally alleged the infringement of customary law. Although he had signed a license, he insisted that he had not intended the Morning Star Pole to be reproduced on currency.

In its defense, however, the Bank pointed out that "[Australian copyright provisions] allow the reproduction of a sculpture that is on permanent display without the permission of the copyright holder." The Federal Court of Australia ruled in favor of the Reserve Bank. It could not legally accommodate the distinction made by indigenous people between two kinds of public display. Displaying the pole in a museum maintained the confidential nature of its meaning. Reproducing the pole on currency, however, would destroy that meaning.

*In some cases, an individual or group is assigned the responsibility of possession and proper exercise of knowledge.*

In *Yumbulul*, the mere public display of the Morning Star Pole in the museum did not negate the confidential nature of its sacred meaning, since that particular use was authorized under customary law. However, when the pole was reproduced in a manner that contravened indigenous law, the aspect of confidentiality was lost.

The case of the Morning Star Pole shows an unintended, but undesirable, consequence of the proliferation of information—which in this instance does damage to the cultural meaning of a revered object. From the view of the original owners, the Morning Star Pole possesses a meaning that requires a certain kind of respectful or confidential treatment. Subsequent to its initial display, however, the original owners lost authority over that meaning because the replication of the image on currency was, under the Australian copyright law, presumed to be a normal part of its use.

In this case there also existed the further issue of whether the ascription of ownership to the individual artist reflected the communal rights of the indigenous group. Justice Michael Kirby commented that "the Federal Court of Australia found that communal rights were not protected by Australian copyright laws." The individualist, utilitarian, and Lockean understanding of knowledge is thus apparent in these regulations.

### Indigenous Knowledge and Social Engagement

Another important aspect of knowledge lost on those who accept a standard account of intellectual property concerns social engagement. John Browder, a specialist in Amazon regional development, points out that

> . . . indigenous knowledge is associated with a system of social accountability absent in modern society. Someone (eg. a shaman) is held responsible for the application of indigenous knowledge, whereas no one is responsible for (mis)application of modern knowledge.

On the view Browder presents, knowledge always carries responsibilities; further, these epistemic responsibilities cannot be reduced to the mere maximization of knowledge. In some cases, an individual or group is assigned the responsibility of possession and proper exercise of knowledge. And even when the community as a whole is the possessor of knowledge, it is sometimes ethically irresponsible to disseminate that knowledge indiscriminately. Further, knowledge properly disclosed in one context cannot be considered properly disclosed in all contexts. Wide disclosure of knowledge often transforms its meaning. Also, often what is *not* disclosed might be as important as what *is* revealed and, finally, transmissions of knowledge involve relationships of discretion, discrimination and trust. Indigenous knowers are parties to these elements and not mere possessors of knowledge.

The attitudes to knowledge and the public domain highlighted in the Yumbulul case do not apply only to cases of knowledge possessed by indigenous peoples. Valuing knowledge based only on its utility treats knowledge as a mere commodity from which to derive profit. Attitudes of knowers and relationships among knowers are rendered invisible, with a loss of meaning to knowledge, and a loss of respect and dignity to the knowers.

*Often what is* **not** *disclosed might be as important as what* **is** *revealed . . . .*

To reject the treatment of knowledge as atomistic bits of information to be made useful and profitable, to reject the assumption that knowledge can always be detached from knowers and their community, allows one to accept that with knowledge comes responsibil-

**Truth v. Justice: The Morality of Truth Commissions**

***Robert I. Rotberg and Dennis Thompson, Editors***

The truth commission is an increasingly common fixture of newly democratic states with repressive or strife-ridden pasts. From South Africa to Haiti, truth commissions are at work with varying degrees of support and success. To many, they are the best—or only—way to achieve a full accounting of crimes committed against fellow citizens and to prevent future conflict. Others question whether a restorative justice that sets the guilty free, that cleanses society by words alone, can deter future abuses and allow victims and their families to heal. Here, leading philosophers, lawyers, social scientists, and activists representing several perspectives look at the process of truth commissioning in general and in post-apartheid South Africa. They ask whether the truth commission, as a method of seeking justice after conflict, is fair, moral, and effective in bringing about reconciliation.

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ity. In learning from another, I ought to think about *what this knower wants to teach me,* not just about what information *I think it would be useful to acquire.* I should consider trust and trustworthiness, both as part of my own practice, and as attributes that might be understood differently by knowers from a different community. I ought to think about confidentiality and disclosure, and the possibility that these are understood in many ways, depending on context and culture. In general, I should think about my interactions as contributing to relationships with the knower with whom I am conversing. Am I treating every knower I encounter as evidence, or have I made epistemic commitments to trust, and have I lived up to those who trust me? Fundamentally, am I treating other knowers with respect, or merely as an instrument for my own epistemic ends?

Thinking about questions such as these allows one to think more carefully about the ethical and social responsibilities that accompany knowledge acquisition. No longer can it be assumed that knowledge maximization and dissemination are the only important epistemic values.

## Knowledge as a Gift

In the remainder of this article, I explore a promising alternative to understanding knowledge as a commodity, a neutral object with no connections to persons except as a source of profit. Instead, knowledge could be understood in a way that reflects relationships among knowers, and values the virtues of social engagement. The phrase "the gift of knowledge" is already familiar in Western contexts, and the concepts

***Knowledge could be understood in a way that reflects relationships among knowers, and values the virtues of social engagement.***

of gift and knowledge are also associated in some descriptions of indigenous knowledge. Thinking of knowledge as a gift allows one to consider the many ways that gifts function in a community, and makes the concept a rich source of ideas for models of knowledge.

Philosopher Laurie Ann Whitt explicitly draws the distinction between knowledge as a commodity and knowledge as a gift: "[l]ike life itself, genetic information and knowledge more generally are for many indigenous peoples understood to be given, not produced. They are gifts, not commodities." Whitt suggests that some indigenous communities understand the relationship between knowledge and the natural

world, and the relationship between knowers within a community, in a way very different from that of the Western scientific view. Anthropologist Frédérique Apffel-Marglin, reports the relationship between indigenous cultivators and their land and environment in this way:

> We have great faith in what nature transmits to us. These indicators are not the result of the science of humans nor either the invention of people with great experience. Rather, it is the voice of nature itself which announces to us the manner in which we must plant our crops.

The knowledge of such farmers is clearly not, in their own view, detached from and independent of the land and its produce. The environment does not merely furnish evidence, but is acknowledged as an informant, an "announcer," a trusted expert.

*Instead of regarding knowledge as detached information atoms available for distribution, collection and purchase, we might consider that exchanges of knowledge also carry relational significance.*

Knowledge is a gift from nature, possible only within a set of relationships based on respect. Rejecting the view of knowledge as property to be acquired, sold, or stolen, in favor of viewing knowledge as a gift encourages attention to the relationships that exist among knowers and those who wish to know. It demands that we consider such questions as: What bonds have been (and must be) forged or reinforced? What responsibilities or obligations must accompany sharing knowledge? Receipt of a gift is different from discovering or collecting an item that is detached from any relationships with other people.

Gifts differ, of course; some come with "no strings attached," while others establish definite responsibilities. Merely using the phrase "no strings attached" reveals the possibilities of confusion around gift giving and receiving and ambiguities surrounding the complex expectations these activities engender. Typically, obligations with respect to gifts are not located in individual rights, but in norms and practices that are socially instituted. Gifts can be ways of continuing, establishing, or confirming relationships between members of a group, and giving or receiving a gift can be a way of acknowledging and demonstrating respect for others. A gift does not always have the same role and significance throughout transactions: if I give you an heirloom, and you give it to charity, very different engagements may be indicated. The timing of exchanges may also be important—perhaps that sequence of events must be understood differently depending on whether the intervening time is days, or years. Furthermore, since gifts have different roles in different cultures, one cannot assume that what is an appropriate form of gift giving in one community is considered appropriate in another. As in many matters in life, in giving and receiving gifts one must proceed with caution—in theory and in practice—and develop sensitivity to the possibility of inadvertent disrespect. Although my telephone number can be found in the phone book, I have felt uncomfortable in some situations when a friend has passed on that information. And certainly, for some groups, information such as names or one's image must be treated with discretion. It is unacceptable simply to learn and state, publish or broadcast a name, or to photograph an individual without explicit permission. Like the heirloom, knowledge of names and telephone numbers, for instance, carry many cultural-and context-dependent meanings. The proprieties of transactions vary enormously and are not given once and for all.

My argument is not that knowledge ought never be treated as a commodity, or that payment for information is never appropriate. Nor am I arguing that a particular form of gift exchange ought to be the unique model. Knowledge is no more monolithic in Western than in indigenous cultures. Rather, I suggest that gifts have the capacity to reveal, sustain and create relationships among persons. Instead of regarding knowledge as detached information atoms available for distribution, collection and purchase, we might consider that exchanges of knowledge also carry relational significance. While there exist anonymous or "no strings attached" gifts, a gift often is part of an ongoing relationship, enriching the gift and relationship with added meaning. Sharing information that is secret or confidential can indicate trust and can build friendships, but these kinds of disclosures in professional or collegial contexts, for instance, also build the bonds necessary for epistemic communities. Communities are not sustained by maximizing revelations, but discretion, discrimination, and selectivity are central to the strength of many communities, both professional and cultural.

*When knowledge is understood as a gift, not a commodity, it is impossible to retain the view that maximizing the production and collection of knowledge is all that counts.*

Although knowledge can be stolen, appropriated, or purchased, the responsible knower rejects not just these kinds of transactions but also the proposition that learning is nothing more than the opportunity to collect so-called independent or autonomous informa-

tion. When knowledge is understood as a gift, not a commodity, it is impossible to retain the view that maximizing the production and collection of knowledge is all that counts. The responsible knower is at the same time a responsible giver and recipient, sensitive to what knowledge is offered, and eager to establish and maintain relationships in which gifts of knowledge are possible.

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Sources: Indigenous Australians face challenges similar to US Native Americans in their efforts to repatriate ancestral remains from British and European institutions. On the controversy over the obesity treatment derived from the plant used by the San people, see Rena Singer, "African plant's promise puts spotlight on tribal remedies" *Boston Globe* (December 3, 2001). I thank Vicki Spelman for pointing out the analogy between the treatment of indigenous knowledge as intellectual property and the treatment of indigenous knowers as flora, part of the natural world ready for harvesting. John Locke: "The Second Treatise of Government," edited by D. Wooton, in *John Locke Political Writings* (Penguin, 1993); E.C. Hettinger, "Justifying Intellectual Property," *Philosophy and Public Affairs,* 18 (1989). On the notion of knowledge as "commonable," see, for example, M. Welbourne, "The Community of Knowledge," *The Philosophical Quarterly,* 31 (1981) and L. Code, *Epistemic Responsibility* (University Press of New England, 1987). In describing the source of the controversy regarding the Morning Star Pole, Joseph Githaiga finds that "Terry Yumbulul was authorised by tribal elders to craft the Morning Star Pole ("the pole") and license its display in selected museums. The Reserve Bank of Australia commissioned an agent to obtain authorisation from Yumbulul for the use of the pole on a ten-dollar banknote." Conceivably, breach of confidence could provide a legal remedy, but Gilgaitha suggests that this would be a "piecemeal solution" and he favors more radical legislative reform. For reasons of space, I will not discuss the details of Gilgaitha's proposal for legislative reform, but I merely note that it is an attempt to respond to the different understandings of knowledge, ownership and custodianship that the Yumbulul case reveals. "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge," *E Law—Murdoch University Electronic Journal of Law,* 5 (1998). On additional elements of the case, see also *Re: Terry Yumbulul and: Reserve Bank of Australia; Aboriginal Artists Agency Limited and Anthony Wallis* No. D G26 of 1989 FED No. 448. M. Kirby, Address to a UNESCO workshop, at the University of Waikato, New Zealand (1998); J. O. Browder, "Redemptive Communities: Indigenous Knowledge, Colonist Farming Systems, and Conservation of Tropical Forests." *Agriculture and Human Values,* 12 (1995); L. A. Whitt, "Metaphor and Power in Indigenous and Western Knowledge Systems." Unpublished paper (1996); *The Spirit of Regeneration: Andean Culture Confronting Western Notions of development,* edited by F. Apffel-Marglin and PRATEC (Andean Peasant Technologies Project) ( Zed Books, 1998). The words are credited to "a Bolivian peasant."

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