Indigenous Knowledge and the Duties of Intellectual Property Owners

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Drawing on the work of Grotius and Pufendorf, this article develops a matrix based on distinctions of positive and negative community. All regulatory arrangements for access to knowledge are supported by some version of positive or negative community. The paper argues that in a world of global production indigenous people should embrace the western commodity form, otherwise their knowledge will simply function as a free input of production. In order to ensure that the western commodity form is consistent with their version of community, indigenous peoples should draw on those theories of property that link property to freedom and personality. This line of argument the article contends will make it easier to establish the idea that intellectual property owners owe others duties. The final two sections develop this idea.

S'inspirant des travaux de Grotius et de Pufendorf, cet article propose un cadre basé sur les distinctions entre les collectivités positives et négatives. Toutes les formes de réglementation de l'accès à l'information s'appuient sur quelque modèle de collectivité positive ou négative. Dans le présent article, il est proposé que dans un univers de production mondiale, les peuples indigènes devraient adopter le modèle occidental de bien de consommation, autrement leurs connaissances ne constitueront qu'une fourniture gratuite dans la chaîne de production. Afin de s'assurer de la compatibilité du modèle occidental de bien de consommation avec leur propre modèle de collectivité, les peuples indigènes auraient intérêt à s'inspirer des théories de la propriété qui relient cette dernière à la liberté et à la personnalité. Selon le présent article, cette approche rendra plus acceptable l'idée que les titulaires de droits intellectuels

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ont aussi des devoirs envers autrui. Les deux dernières parties développent cette idée.

INTRODUCTION

There are only four types of community. Arguing for this starkly reductive proposition is the beginning of a wider argument in this article. This argument contends that when indigenous communities come to make regulatory arrangements for the intellectual commons they mediate those arrangements through one of four types of community. These arrangements represent, to follow an idea of Hegel's, the embodiment of freedom for that community.[1] The capacity of all communities to determine a regulatory structure for the intellectual commons is in the process of being taken away from them. It is being taken away because the regulation of abstract objects is progressively shifting from the territorial and the international to the global.

The costs of this shift run deep. One such cost comes in the form of a moral sovereignty cost. Somewhat paradoxically, the article suggests that the loss of moral sovereignty should be countered by the development of more intellectual property forms — sui generis indigenous intellectual property forms. The essential idea behind the strategy is that economic forms of intellectual property rights should be relocated in a discourse which sees them treated as privileges and that those who hold such privileges are thereby subject to duties. Indigenous intellectual property forms, on the other hand, should be linked to the protection of personality, both collective and individual.

Before moving onto the main parts of the argument we need to set out the limits of this article a little more carefully. The focus here is on indigenous knowledge and not indigenous culture or the physical objects of culture.[2] Under the combined influence of what might loosely be described as post-modern philosophy and an anthropology informed by both principles of modernity and post-modernity, an epistemology of culture has become something of a vain hope. The result is that making credible knowledge claims about the culture of others or even about one's own culture is close to impossible. Universal structural

1 G.W.F. Hegel, *Philosophy of Right* (1821), trans. T.M. Knox (Oxford: Clarendon Press, 1952) (1967 reprint of 1st ed., 1952) at [45].

2 This article then does not discuss the important developments in the protection of cultural heritage. See P.J. O'Keefe & L.V. Prott, *Law and Cultural Heritage* (Abingdon: Professional Books, 1989).

truths about culture are out. Particularities, perspective, localism and contingency are in. So in an era when we have more information about culture than ever before, currently fashionable metaphysical theories tell us that we know and understand less than ever before. We do not enter these swirling waters. Rather, the article centres on the link between indigenous knowledge and intellectual property. Obviously enough, there are links between indigenous knowledge and indigenous culture and between intellectual property and culture, but this article makes no attempt to explore those links. Following on from this, we shall say that indigenous knowledge is knowledge that originates with and is distinctively linked to an indigenous people. The knowledge claim that 68 + 57 = 125 is not an example of indigenous knowledge even though it might be articulated by an indigenous person. Knowledge claims by the indigenous peoples of Australia concerning the existence of the Rainbow Serpent would constitute examples of indigenous knowledge. A fully worked up definition of indigenous knowledge would have to specify the conditions under which the distinctive link between the knowledge claim and an indigenous people would be satisfied. Finally, indigenous knowledge is used in this article in an open-ended way. It refers to a knowledge of people, places and things. Indigenous knowledge is not pigeonholed into various kinds of scientific or cultural knowledge or legal categories such as those to be found in copyright law (artistic work, literary work, dramatic work).

The remainder of this article comes in five sections. The section which follows develops an analysis of the intellectual commons and community and relates this to indigenous knowledge. The second section looks at the general consequences of global property. This is followed by a section on the effects of global property on personality. The fourth and fifth sections examine indigenous intellectual property and the duties of intellectual property owners.

1. FOUR KINDS OF COMMUNITY AND THE INTELLECTUAL COMMONS

How might we describe the intellectual commons? One way is to say that it consists of that knowledge which is not subject to any of the following: property rights or some other conventional bar (contract, for instance); technological bars (for example, encryption); or a physical bar (hidden manuscripts). This definition emphasizes the idea that the intellectual commons is an independently existing resource which is

open to use. Open to use does not, however, mean that knowledge in the intellectual commons is necessarily accessible. Moreover, the fact that a given item of knowledge is not in the intellectual commons and therefore not open to use does not mean that it is inaccessible. Some examples are needed to illustrate.

The Tale of Genji was completed probably by the first quarter of the 11th century in Japan. By now it is part of the intellectual commons. While this tale remained in Japanese it was accessible, at least on one level, only to those who could read Japanese. Much of modern theoretical physics is open to use (i.e., in the intellectual commons), but is accessible to only a small number. Hieroglyphics, while part of the intellectual commons, might have at some point in its history been accessible by no one. Accessibility to the intellectual commons depends on a commoner having the relevant capability and competence (for example, to be able to read and understand Japanese). The openness to use of knowledge depends on its subsisting in the intellectual commons. Intellectual property rights can take knowledge out of the intellectual commons, but this does not mean that it becomes inaccessible. Competent and capable persons can still access the relevant knowledge provided they pay the relevant licence fee. Intellectual property rights place restrictions on the use of knowledge, but this is a separate matter from the accessibility of the knowledge by persons. This, as we have said, relates to the person's capacities and competencies.

The intellectual commons, then, consists of knowledge which remains open to use. It is a resource which by its nature is inexhaustible but not necessarily accessible.

So far the intellectual commons has been portrayed as a global entity constructed by the collective labours of all humanity over all time. One implication which might be readily drawn from this model of the intellectual commons is that it is a resource open to use by all. This is by no means the only way in which the intellectual commons can be presented. Seeing the other possibilities is helped by a comparison with the common in English law.

The commons is a distinctive legal concept within English property law.[3] The commons refers to rights of common held by persons in relation to another's land.[4] These rights include rights of pasture, rights of digging turf (common of turbary) and rights of fishing (common of piscary). Rights of common are confined to specific groups, such as the inhabitants of a village or a manor or town. The concept of the commons in English law is a deeply territorial, group-specific one. It does not refer to something to which all humanity has rights of entry or even something to which all the citizens of one state have entry.

Rights of entry to the intellectual commons can also be limited to some group smaller than all of humanity. Some countries might lay claim to a distinctive intellectual commons which their citizens have over time generated. The cultural intellectual commons is something which is often linked to a specific group, this group being defined by reference to a criterion like race or territory. Within the context of international law at least, the idea of a distinct international cultural heritage has only embryonic beginnings.[5] The idea that there are objects that belong in a global cultural commons is an idea which has been discussed, but has in no way replaced the belief that the cultural commons is predominantly national or regional.[6] Just as countries recognize and protect their cultural commons, so they may lay claim to the existence of a distinctly territorial scientific/technological commons which is open only to those who are related to the territory or group. The belief in a territorial scientific commons may help to explain the reluctance of western countries to concede to developing countries the claim that technology is the common heritage of mankind. Yet at the same time there is no doubt that some technology is now the common heritage of mankind (for example, the water wheel).

The scope of the intellectual commons, we have seen, can be narrowed by being linked to the activities of different kinds of groups. The intellectual commons can be divided up in different ways according to place, time and content. There can also be different assumptions about the nature of community in the intellectual commons. At a fundamental level the decision comes down to a decision between positive and negative community. This decision, we shall see, has direct implications for the content and scope of intellectual property laws.

3 G.D. Gadsden, *The Law of Commons* (London, 1988).

4 6 Hals. (4th) 505.

5 The UNESCO *Convention for the Protection of the World Cultural and Natural Heritage* (1972), which requires states to cooperate in the preservation of cultural heritage, suggests that states may have to recognize duties towards some global cultural commons.

6 See Council of Europe, *International Legal Protection of Cultural Property* (Strasbourg, 1984). Individual states may recognize the existence of a distinct cultural commons within their borders. The *Protection of Movable Cultural Heritage Act 1986* recognizes an Australian Aboriginal Heritage.

In order to show the different choices to be made concerning positive and negative community we will draw on Pufendorf. (The use of Pufendorf is not part of an exegetical venture and should not be taken as such.) Pufendorf describes negative community as a "community of all things" in which "all things lay open to all men, and belonged no more to one than to another."[7] Negative community is a state in which things are open to anybody to make the subject of exclusive belonging. Air, for example, can be captured, compressed and bottled. By contrast, positive community is a state in which things are jointly owned by some group (for example, land or a fishing ground). In positive community there are joint rather than individual owners of common things. Pufendorf, in describing the difference, says that common things in positive community "differ from things owned, only in the respect that the latter belong to one person while the former belong to several in the same manner."[8]

Positive community is for Pufendorf clearly a product of consent. It is not the state in which people found themselves. Rather, it was created by people to suit their purposes. "And so things were created neither proper nor common (in positive community) by any express command of God, but these distinctions were later created by men as the peace of human society demanded."[9]

Pufendorf's discussion of positive community shows that it does not include all in the ownership of things but only "those for whom the thing is said to be common."[10] Positive community for Pufendorf is an exclusive state. It excludes those who are not part of the ownership agreement. In the case of negative community the position is different. There is no ownership agreement in place. No one is excluded by virtue of an agreement and so acquiring the ownership of something is open to all. Once acts of ownership take place in negative community, it too becomes exclusionary in nature. But at least in the beginning we might see it as an inclusive form of community, for ownership is open to all.[11]

Taking Pufendorf's distinction between negative and positive community and then applying the inclusive/exclusive distinction to

7 S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1672) (1688 ed., trans. C.H. and W.A. Oldfather) (New York: London, 1964) IV at 4, 5.

8 Ibid. at 4, 2.

9 Ibid. at 4, 4.

10 Ibid. at 4, 2.

11 This is how Buckle interprets Pufendorf. See S. Buckle, *Natural Law and the Theory of Property* (Oxford: Oxford University Press, 1991) at 94.

both produces a matrix of four basic types of community: inclusive positive community, exclusive positive community, inclusive negative community, and exclusive negative community. These four types of community have the following stipulative meanings assigned to them.

Inclusive positive community represents a broad vision of human community, for it includes all humans; that is, there is only one group.[12] Inclusive positive community is a global vision of community in which all have the right to use the commons for their individual welfare.[13] The commons acts as a kind of global resource which belongs to all to use. This form of community is perfectly consistent with individuals holding private property. Under conditions of inclusive positive community all individuals have a right to use the commons as a resource and may generate property rights in those things made by using the resources of the commons.[14] The commons itself does not fall into appropriation, for that would be to destroy it as a resource for all.

Exclusive positive community is the ownership of things in the commons by a group of some kind; that is, a group smaller than all of humanity. Those who are not part of the ownership group are necessarily excluded.

Inclusive negative community, like inclusive positive community, encompasses all individuals. It is, following Pufendorf, a community in which the acquisition of things lies open to all. The principal difference between it and inclusive positive community is that, in the case of the former, the commons does not belong to anyone. But anyone may capture and own a part of it.

Exclusive negative community represents some subset of inclusive negative community. The ownership of things in the commons is open to all the members of some group, rather than just all.

There are many forms of community. It seems the worst kind of reductionism to posit four types, but that is not our claim. There are as many kinds of community as there are moral traditions, shared understandings and ways of life. Different communities also make very different normative and legal arrangements for the distribution and use

12 It is not the broadest possible vision of community since the reference to humans makes it vulnerable to the charge of specieism.

13 Tully claims that Locke redefined positive community along these lines. See J. Tully, *A Discourse On Property* (Cambridge: Cambridge University Press, 1980) at 126-129. For some objections to Tully's interpretation of Locke see Buckle, above, note 11 at 183-187.

14 Tully, ibid. at 127.

of property. However, all communities have to make decisions about the scope of the commons and the relationship of those in the community to the commons. Our four basic types of community represent alternative models of how that relationship might be constructed. The existence of these four models is perfectly consistent with the existence of many communities, all differing in the detail of their moral and property norms. Two communities, for instance, might both adopt a model of an inclusive negative community, but have very different views on what may be taken out of the commons. The fact that in negative community things lie open to all does not necessarily mean that all things are open to ownership.[15] Furthermore, as we saw earlier, the intellectual commons itself may have different boundaries drawn around it, based on content, time and place. So, for example, the intellectual commons might be limited to the culture of a particular people, or a place like North America, and this form of the intellectual commons might be linked to exclusive positive community.

All property regimes, when it comes to the regulation of the commons, are underpinned by some version of one of the four basic types of community we have identified. Which model serves any given property regime is a question of fact. Pufendorf, for instance, makes it clear that the original community was negative and that this is a matter of fact, not moral argument.[16] Humans are free to change this arrangement, provided always that whatever they choose is consistent with natural law.

Decisions about who is to have rights of access and use of the intellectual commons communities are decisions that are constitutive of community. When it comes to considering indigenous knowledge in light of the typology which has been outlined it seems to reveal that indigenous people have perhaps evolved more complex structures for the access and use of knowledge than western communities. Naturally this is a broad generalization which would require a lot of anthropological work in order to assess its truth, and so the proposition is only put forward as a conjecture. The use of Aboriginal knowledge in artwork provides an illustration of the complexity we have in mind. In *Milpurrurru v. Indofurn*[17] a number of Aboriginal artists gave evidence concerning the ownership and production of their artwork. One artist, for instance, explained that

15 Here we do not follow Pufendorf since he took the view that in negative community "all things lay open to all men." Above, note 7, IV at 4, 5.

16 Ibid.

17 (1995), 30 I.P.R. 209.

> As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolgnu with an interest in the story.[18]

This and other evidence suggests that the different types of community we have outlined function as multiple and simultaneous frames of reference within Aboriginal clans when it comes to making decisions about the openness and use of knowledge. Some knowledge may be open to all (including non-indigenous people) to use (positive inclusive community), some knowledge may be open to all clan members to use (positive exclusive community), while other knowledge may only be available to the intiated (a subset of positive exclusive community), and again some individuals may be given temporary appropriation rights over some knowledge (negative exclusive community).

2. GLOBAL PROPERTY

The coexistence of different property arrangements that have been chosen by different communities for the intellectual commons has been possible because property, for most of its history, has been a territorial institution. Standards of property regulation have been territorial standards. This has been true of intellectual property as much as of real property. The protection of intellectual property at an international level can roughly be divided into three periods. The first, the territorial period, was essentially characterized by an absence of international protection. The second, the international period, began in Europe towards the end of the 19th century with some countries agreeing to the formation of a Union for the protection of industrial property (*Paris Convention*) and a similar group agreeing to a Union for the protection of the rights of authors in their literary and artistic works (*Berne Convention*).[19] The third, the global period, has its origins in the linkage that the U.S. began to make between trade and intellectual property in the 1980s, a linkage which emerged at a multilateral level with the

18 Ibid. at 215.

19 *Paris Convention for the Protection of Industrial Property* of 20 March 1883, as last revised at Stockholm on 14 July 1967 and amended in 1979; *Berne Convention for the Protection of Literary and Artistic Works* of 9 September 1886, as last revised at Paris on 24 July 1971 and amended in 1979.

signing of the *TRIPS Agreement* on April 15, 1994.[20] The dates of the various Conventions do not represent a sharp epochal divide. They do mark a significant change in the evolutionary direction of intellectual property protection.

The dominant feature of each period relates to the territorial reach that intellectual property law gives to an owner of intellectual property. In the territorial period the owner of an abstract object finds that this ownership does not extend beyond the reaches of the territory in which his government is sovereign. The international period is underpinned by the principle of territoriality, but states, through the contractual device of treaty-making, extend the rights of owners of abstract objects rights beyond the jurisdictional confines in which the rights of ownership originate. The global period, a period which is just beginning, sees the aspirations of some 19th century jurists for a world system of sorts for intellectual property begin to be fulfilled. A supra-national organization, the World Trade Organization ("WTO"), is given custody of intellectual property norms. Because of the wide membership of the organization, its dispute resolution mechanisms, and the sponsorship of the rights of intellectual property owners by the U.S., the world's last remaining hegemonic power, the creation and enforcement of high-standard intellectual property norms world-wide becomes a political and legal reality.[21] Owners of abstract objects see the dawn of an age in which they enjoy rights that have a global reach.

The global period of intellectual property is marked by a weakening, at least in relation to property, of the principles of territoriality and sovereignty. During the period of globalization three major things happen. First, the range of regulatory standards which states are obliged to implement increases and those standards are characterized by a greater specificity. So, to take a quick example, trade secret protection, which is not explicitly mentioned in the *Paris Convention*, becomes an

20 *Agreement on Trade-Related Aspects of Intellectual Property Rights*. The *TRIPS Agreement* is a multilateral trade agreement that is part of the *Agreement Establishing the World Trade Organization ("WTO Agreement")*. *TRIPS* is binding on all members of the World Trade Organization. See Art. II, 2 of the *WTO Agreement*. Both *TRIPS* and the *WTO Agreement* are part of the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Market (15 April 1994).

21 P. Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13 Prometheus.

explicit regulatory standard of protection to which states which sign the *TRIPS Agreement* have to adhere.

Second, adopting regulatory standards becomes mandatory for states. Rather than being permitted to enact certain standards, states are required to adopt certain standards. Often these standards are foreign to their existing legal tradition. A good example is the reversal of the onus of proof in the case of process patents, something that is contrary to the traditions of, amongst others, Australia.[22] Another example is that states have less discretion to determine the criteria of patentability.[23]

A third outcome of global period is that intellectual property owners find that the intellectual property systems around the world begin to converge on the same substantive standards. The international period of intellectual property sees equal treatment but not equal standards. Globalization sees equal treatment according standards that are the same for all. This is because in the global period the principle of national treatment is not abandoned but rather is tied to a higher set of standards of protection for intellectual property. The principle of national treatment, or assimilation as it is sometimes called, simply requires a state to extend to non-nationals the same rights and obligations in respect of intellectual property which it extends to its own nationals.[24] Once states begin to harmonize their national standards of intellectual property protection the effect of the principle is that the citizens of different states come to possess the same set of rights and obligations as each other. The citizens of Rwanda, for example, just like the teams of genetic engineers working for Pfizer Corporation, have the right to apply for a patent on a genetically engineered microorganism in the United States. And those Pfizer teams have the same right to apply for a patent in Rwanda. Both U.S. and Rwandan patent law have to recognize the patentability of microorganisms and both states have to extend those rights to non-nationals. When the principle of national treatment is combined with national laws that have been harmonized the outcome is that the nationals of states find themselves in a position of formal

22 See art. 34 of *TRIPS*.

23 Under the *Paris Convention* states are free to determine criteria of patentability. See G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva: BIRPI, 1968) at 15. Under art. 27 of the *TRIPS Agreement* states cannot exclude from patentability microorganisms and essentially biological processes for the production of plants or animals.

24 See, for example, art. 5(1) of the *Berne Convention* and art. 2(1) of the *Paris Convention*.

reciprocity, each possessing the same set of rights and obligations in each other's territory. Obviously the capacity of citizens of different countries to exploit a reciprocally globalized set of duties and rights for intellectual property will vary dramatically.

3. PERSONALITY IN THE ERA OF GLOBAL PROPERTY

There are three kinds of consequences of property globalization: efficiency, distributive and moral autonomy consequences. The focus in this article is on the third kind of consequence, but a quick word is in order about the other two kinds. The first type of consequence relates to the likely welfare effects of a set of intellectual property norms which have been unified on a world basis. One question is whether overall global welfare will be raised by such a set of norms.[25] Other questions relate to the welfare gains for particular regions or groups of countries, such as developing countries or industrialized countries, or simply individual countries.[26]

A second set of issues relates to the distributive effects of a globally harmonized intellectual property regime. Even if there are dynamic efficiency gains to be had from a globalized intellectual property regime we may be critical of such a regime on the basis of some view of international justice.[27] Such distributive arguments are to be found, for example, in the debates taking place over the role of intellectual property rights in plant genetic resources.[28] Very often new plant

25 For a critical discussion of this see P.A. David, "Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History" in M.B. Wallerstein, M.E. Mogee & R.A. Schoen, eds., *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, D.C.: National Academy Press, 1993) 19.

26 In Australia the economic evidence seems to suggest that Australia has nothing to gain in welfare terms from the globalization of intellectual property. See Industrial Property Advisory Committee, *Patents, Innovation and Competition in Australia* (Australia 1984); Bureau of Industry Economics, *The Economics of Patents*, Occasional Paper 18 (Canberra: AGPS, 1994); Office of Regulation Review, *An Economic Analysis of Copyright Reform* (Australia, 1995); N. Gruen, G. Prior & I. Bruce, *Extending Patent Life: Is It in Australia's Economic Interests*, Industry Commission, Staff Information Paper (June 1996).

27 For a discussion of international justice, see C.R. Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979).

28 For a discussion of the issues, see J.R. Kloppenburg, Jr., ed., *Seeds and Sovereignty: Debate over the Use and Control of Plant Genetic Resources* (Durham, N.C.: Duke University Press, 1988).

varieties are developed by transnational companies using germ plasm which they have obtained from developing countries. The new varieties are sold back to these countries. There is, in other words, a royalty flow from south to north in relation to products that would not have been possible without the south's contribution.

Understanding the third set of consequences of property globalization, the moral autonomy consequences, depends in turn on understanding the link between property and personality. One of the best explanations for the link between property and personality is Hegel's. Hegel is concerned with the beginnings of mind or will in the external, physical world. Persons inescapably have to make decisions about the external world. This is a situation that has the character of both immediacy and confrontation.[29] Personality begins to lift itself out of this situation by claiming the "external world as its own."[30] Property represents the first stage of this actualizing process. It is one of the first acts of free will in which the will as personality takes on a concrete, free form. Property for Hegel, however, does not primarily exist to satisfy ordinary needs, desires or cravings, although he concedes that it can easily appear so.[31] The underlying reality is that "property is the first embodiment of freedom."[32]

Why Hegel says this is more readily understandable when his concept of will is exposed a little more. Hegel does not reject private property. He is critical of Plato for doing so in the *Republic*. To reject property is to misunderstand the true nature of freedom. Freedom has a subjective element, an element which Plato's state denies its citizens. Their freedom is the objective freedom that comes from conformity to a set of rules cognized and promulgated by those possessing moral wisdom and objective knowledge — the Philosopher Kings. Hegel's constant claim is that the modern state must recognize subjective freedom.

What is the role of property in the attainment of subjective freedom? One suggestion has been that private property is the institution which allows the exercise of subjective freedom, where subjective

29 Above, note 1 at [34], [39].

30 Ibid. at [39].

31 Ibid. at [45].

32 Ibid.

freedom means the satisfaction of individual wants and desires.[33] Another is that the making of property claims contributes to the development of personality. It invites recognition by others, which, if given, helps to foster a moral and social dimension in the personality of the property claimer.[34] There is more to add here however. It is certainly true that for Hegel property plays a crucial role in defining an arena of social life in which desires rather than law are the prime determinants of choice and activity. But property also has a more fundamental role. Hegel's argument, although encased in complex language, carries a simple message: property is essential to individual survival in the world where survival refers not just to biological survival but also the ability to cope with life in the context of one's given social system. Living in the world, the exercise of our abilities in life requires certain things of us if we are to survive, and one of these is the accumulation of property. Mine and thine is not only a division that personality needs to make, in order to take its place in the world as a moral free-willing individual entity or particularity, but it is also an institutional form which individuals need in order to make their way in the world.

Intellectual property offers personality the possibility of a qualitative shift in its powers to extend itself into the world. Ideas, knowledge and all forms of information circulate in the world in a way that blocks of land and chattels do not. By positing property laws in abstract objects, the personality in Hegelian terms gains a proprietary hold over the production and distribution of physical objects in undreamt-of ways. The very act of communicating an abstract object becomes the subject of a property relation. Moreover, since abstract objects are not territorially bound, it becomes meaningful for personality to begin to contemplate property laws that have a global reach. Through property, personality imposes itself on its immediate social world and local community. Through a global system of intellectual property law, personality has the potential to reach into other social worlds, other communities. The possibility of a global system of property to regulate relations between states is hardly one that Hegel could have foreseen. Yet his theory does carry a warning for this kind of development. Within Hegel's system, property remains the embodiment of freedom

33 See M.B. Foster, *The Political Philosophies of Plato and Hegel* (Oxford: Clarendon Press, 1935, reprinted 1968) at 84.

34 See J. Plamenatz, "History as the Realisation of Freedom" in Z.A. Pelczynski, ed., *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: London, 1971) at 40-41.

because he clearly assumes that property relations occur within the context of a community which has its own distinctive ethical life. Property is a way of taking a participatory position in that life. This is not necessarily true of a global system of property that regulates access to the abstract objects of art and science. Property rights in abstract objects facilitate trade in culture between states. To the extent that such trade promotes the homogenization of culture it threatens the survival of local cultural forms and therefore local communities.[35]

There is another problem. The very fact that the global system of property regulates access to abstract objects means that it has the potential to separate some individuals from those objects. This separation occurs when individuals cannot meet the demands of the commerce in culture and information that a global system of property rights in abstract objects creates. In short, a global system of property can easily become a force for destabilizing the pattern of local institutionalized cultural values and can separate creators from their creation; or, in more Hegelian terms, a force for disrupting and perhaps destroying the ethical life of communities.

4. ETHICAL LIFE AND INDIGENOUS INTELLECTUAL PROPERTY

The previous section of the article argued that the globalization of property poses serious dangers for the ethical life of communities. Somewhat paradoxically, this section of the article argues that one way in which the indigenous people might meet the threats of property globalization is to press for the creation of indigenous intellectual property forms.

The standard economic argument for intellectual property says that such property rights are needed to correct for the freerider problem that exists in markets for information.[36] The history of intellectual property protection shows that intellectual property protection evolves in highly selective ways. Farmers operating with traditional agricultural

35 On the dangers of homogenization for the modern state see C. Taylor, *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979) at 114-117.

36 For a classic discussion of the limitations of the property solution, see K. Arrow, "Economic Welfare and the Allocation of Resources for Invention" in National Bureau of Economic Research, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton, N.S.: Princeton University Press) 609.

techniques have contributed enormously to the development of biodiversity, but because of the distinction between discovery and invention in patent law this work has gone unrewarded by the patent system. Copyright protection depends on conditions such as materiality being satisfied and this excludes oral works from protection. Moreover, assumptions about the individual nature of authorship in copyright law mean that it fails to protect knowledge and beliefs that have been collectively authored by an indigenous people over a long period of time.[37] While new forms of intellectual property in the form of protection for semiconductors or plant varieties have readily been minted for transnational industrial elites both nationally and internationally, the recognition of indigenous intellectual property forms has proceeded slowly or not at all. This selective approach to solving freeriding problems comes into sharp focus when one compares the evolution of protection for the semiconductor chip and protection for folklore. Prior to 1984 manufacturers of computer chips in the U.S. had complained that existing intellectual property regimes often failed to protect their products. Their chips often failed to clear the patent hurdles of novelty and inventiveness. A proposal to protect chips through copyright had first been introduced into Congress in 1978.[38] In 1984 the *Semiconductor Chip Protection Act* was passed. At the international level WIPO in

37 An important literature has grown on the inadequacies of western intellectual property regimes and the needs and interests of indigenous peoples. Some examples are M. Blakeney, "Protecting Expressions of Australian Aboriginal Folklore under Copyright Law" (1995) 9 E.I.P.R. 442; R. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 Can. J.L. & Juris. 249; C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 E.I.P.R. 227; G.S. Nijar & C.Y. Ling, "The Implications of the Intellectual Property Rights Regime of the Convention on Biological Diversity and GATT on Biodiversity Conservation: A Third World Perspective" in A.F. Krattiger et al., eds., *Widening Perspectives on Biodiversity* (IUCN — The World Conservation Union and the International Academy of the Environment, Gland, Switzerland, 1994) 277; K. Puri, "Copyright Protection for Australian Aborigines in Light of Mabo" in M.A. Stephenson & S. Ratnapala, eds., *Mabo: A Judicial Revolution* (St. Lucia, Qld.: University of Queensland Press, 1993) 132; F. Yamin & D. Posey, "Indigenous Peoples, Biotechnology and Intellectual Property Rights" (1993) 2 Rev. Eur. Comm. & Int'l Env. L. 141.

38 See *The Semiconductor Chip Protection Act of 1984*, S. Rep. No. 425, 98th Cong., 2d Sess., in B.D. Reams, *The Semiconductor Chip and the Law: A Legislative History of the Semiconductor Chip Protection Act of 1984*, vol. 1 (Buffalo: William S. Hein, 1986), Document 4 at 9.

1984/1985 had convened the Committee of Experts on Intellectual Property in Respect of Integrated Circuits. This initiative culminated in the *Washington Treaty on Intellectual Property in Respect of Integrated Circuits* of 1989. While the U.S. did not accede to this treaty, it incorporated parts of it into the *TRIPS Agreement* of 1994, an agreement which provides a high standard of protection for chipmakers. In contrast, the issue of protection for indigenous knowledge has largely remained just that, an issue. Proposals and models have been put forward but little in the way of concrete, binding law has emerged. An example is the international campaign for the protection of folklore which began in Africa in the 1960s.[39] Such protection is recognized in the *Tunis Model Law on Copyright* for developing countries, an initiative of the Tunisian Government, UNESCO and WIPO in the 1970s. Under article 6 of the model law, works of national folklore are explicitly protected.[40] While some developing countries have adopted this model, it has had little influence on western copyright regimes.[41] There are also *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, UNESCO and WIPO, 1985. But these model laws are not international treaty obligations. The recent *TRIPS Agreement* makes no mention of protection for folklore and it explicitly places no obligations on states concerning moral rights protection for authors. Basically international norms for the protection of indigenous knowledge have thus far taken the form of model laws and declarations by NGOs — in other words, the softest of soft law.[42]

39 See K. Puri, "Cultural Ownership and Intellectual Property Rights Post-*Mabo*: Putting Ideas into Action" (1995) 9 I.P.J. 293 at 337.

40 A copy of the model law is contained in (1976) 102 Copyright Bulletin (UNESCO).

41 For countries that have adopted the model see J.G. Weiner, "Protection of Folklore: A Political and Legal Challenge" (1987) 18 I.I.C. 56 at 87.

42 See, for example, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993*; Articles 12 and 29 of the *Draft Declaration on the Rights of Indigenous Peoples* (UN Commission on Human Rights, Subcommission on Prevention of Discrimination and the Protection of Minorities, Working Group on Indigenous Populations); Principles 3 and 5 of the *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* (Commission on Human Rights, Subcommission on Prevention of Discrimination and the Protection of Minorities, Working Group on Indigenous Populations); Article 8(j) of the *Convention on Biological Diversity 1993*; *The COICA Statement 1994*, Statement by the Coordinating Body of Indigenous Organisations of the Amazon Basin, on intellectual property rights and biodiversity.

The view that states should support the creation of indigenous intellectual property forms might be criticized in this way. Surely it might be said that to advocate the propertization of folklore, of indigenous knowledge, is to ask indigenous communities to embrace a foreign lifeworld, a lifeworld in which their precious abstract objects simply become tradeable goods. To adopt the practices that lie behind intellectual property forms, it might be argued, is to invite Marx's fetishism of commodities. The spirit of this objection is nicely captured in the COICA Statement 1994:[43]

> Prevailing intellectual property systems reflect a conception and practice that is:
> *colonialist*, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
> *racist*, in that it belittles and minimises the value of our knowledge systems;
> *usurpatory*, in that it is essentially a practice of theft. [Emphasis added.]

There are very good reasons to be critical of western intellectual property forms. But there are also reasons for seriously considering the possibility that indigenous intellectual property forms might be a viable strategy of emancipation from present dominant western forms. First, to create indigenous intellectual property forms is not necessarily to imitate western models. The idea of property in intangibles has indigenous roots.[44] Moreover, the question of what indigenous peoples should do in the face of a dynamic capitalist rationality that has come to understand the importance of abstract objects in commodity production has to be addressed. It needs to be remembered that practitioners of this rationality are often high-technology transnational actors. We live in a world in which CNN can broadcast a sacred ceremony to all parts of the globe in real time. Such actors are likely to view indigenous knowledge as a valuable resource. The presence or absence of property rights in this resource does not determine the value of the resource itself, for that is a matter of prevailing market conditions. Nor is it plausible to think that the presence or absence of property rights makes a difference to the stock of indigenous knowledge or folklore, since the production of these things tends to have deeper motivations, such as the search for and maintenance of meaning.

What role, then, do property rights play? There are two obvious ones. First, they allow the holder of the right to appropriate the value of the resource to which the right relates. Second, the rights, or rather

43 See previous note.

44 R.H. Lowie, *Primitive Society* (New York, 1920) at 235-243.

their assignment, determines the direction of the wealth transfer. As Coase reminds us, in any negotiations between two parties over property rights the initial distribution of the property rights will determine who has to pay and who does not.[45] If there are no property rights in indigenous knowledge then for certain actors they will simply be a free input of production. The absence of property rights will not change the status of indigenous knowledge as an economically valuable resource.

The objection that trade in indigenous knowledge will end up destroying those cultures by allowing western free market ideologies and their attendant liberal values to infiltrate the cultural practices of indigenous people tends to oversimplify a more complex picture. Property rights in indigenous knowledge do not necessarily have to lead to open trade. They can be used to prohibit or to regulate such trade. It is a mistake to think that property only has an appropriation function. It also functions as a means of self-defence or survival. By recognizing property rights in the expression of subjective personality we allow that personality to take a place in the world and to journey through it. Moreover, we need to understand that property rights have option-creating and autonomy effects. Indigenous people may want to commercially exploit parts of their indigenous knowledge. In Australia Aboriginal art regularly appears on, for instance, postage stamps. It does so with the permission of Aboriginal artists and their communities and it generates royalties for those communities. Successful commercial exploitation of indigenous art can provide indigenous groups with revenue. It can help to promote indigenous identities within the broader social and economic world with which those indigenous groups now must interact. The crucial issue is not whether trade in culture will corrupt those who engage in it, but rather whether we can devise regulatory forms that will allow indigenous people to pursue their own economic interests in the use of their cultures in ways that are consistent with their aspirations for the preservation and evolution of those cultures. Devising such regulatory forms seems best left to indigenous people and the positive law of individual states.[46] Judges, even sympathetic ones, could hardly be expected to devise sui generis schemes of

45 R.H. Coase, The Problem of Social Cost (1960) 3 J.L. & Econ. 1.

46 For an example of a sui generis proposal in the Australian context, see *Report of the Working Party for the Protection of Aboriginal Folklore* (Department of Home Affairs and Environment, 1981).

indigenous intellectual property.[47] While they might help to inspire legislation, it is legislation targeted to the needs of particular indigenous communities that is required.

5. THE DUTIES OF INTELLECTUAL PROPERTY OWNERS

This section of the article argues that indigenous people should begin to push for a discourse change in intellectual property. This suggestion takes seriously the discourse theoreticians' claim that knowledge is constituted, shaped and transmitted by discourses.[48] Discourses are themselves intricate structures that are maintained by power and, in so being, return power. Whether discourse theoreticians are right about this is a deep metaphysical question. But if they are right it follows that one form of practical dissidence that the disempowered can practise is to push for a discourse change.

What kind of discourse should indigenous people begin to articulate for intellectual property? Intellectual property rights are generally classified as rights of personal property. One reason why proponents of stronger and stronger intellectual property have been so successful in campaigning for the extension of these rights is that they have managed to locate intellectual property within a broader liberal discourse and ideology which protects and makes natural the right of private property. Intellectual property benefits from the liberal idealization of private property rights. Both historical and conceptual analysis reveal that intellectual property rights are not like other property rights. Patents and copyright have their origins in privilege. The history of monopolies, particularly in the first part of the 17th century, reveals clearly that these prerogative-based privileges had the feature of creating a common disadvantage (the exclusion of others from trade) so that the holder of the privilege could benefit.[49] It was precisely because these privileges constituted such a profound interference in the negative liberties of the king's subjects that they were seen as privileges. They interfered in the negative liberties of others and were tolerated only to the extent that they promoted the welfare of all in the longer term.

47 This is not to say that judges cannot do much to recognize the interests of indigenous peoples. See Puri, above, note 39.

48 Foucault is perhaps the most famous exemplar of discourse theory. For a general discussion see E. Laclau, "Discourse" in R.E. Goodin & P. Pettit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993) at 431-437.

49 See P. Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot, 1996) c. 9.

Returning to this older way of thinking about intellectual property is important on several levels. First, it encourages us to think about intellectual property in an instrumentalist way, that is to say, as a means to an end rather than as an end in itself. It also helps to promote legislative and policy transparency, for the creation of intellectual property can now be seen for what it is: the grant of privileges to some at the expense of the negative liberties of others. The language of privilege would help to make the costs of intellectual property clearer. It would help to rob it of its mystique. Those who sought grants of privileges would have to work harder to obtain them.

Another reason for shifting intellectual property rights back into a discourse of privilege is that it helps to make clear the idea that intellectual property owners are the bearers of duties. Once it is shown that intellectual property rights are liberty-intruding privileges it is also possible to argue that these instrumentally based privileges are accompanied by duties that fall on the holder of the privilege. If the purpose in creating the privilege is to fulfil some approved goal then it should also follow that the privilege holder is subject to duties not to exercise the privilege in a way that defeats the purpose for which the privilege was granted in the first place. The derivation of such duties, like the creation of the initial privilege, would be done instrumentally. The holders of intellectual property privileges would be subject to those duties that maximized the probability that the purpose for which the privilege was first created would be achieved.

When it comes to thinking through this kind of approach in the context of the relationship between intellectual property owners and indigenous knowledge it is important to remember that the instrumentalism of property being advocated does not conceive of the role of property in exclusively economic terms. Property, for the kinds of reasons that Hegel articulates, has a crucial role to play in the protection of personality. It needs to be emphasized that property has a self-defence function. Property is a means of protecting those objects that subjective personality, whether individual or collectively, has found valuable to its expression. Indigenous intellectual property forms in indigenous knowledge should be expressly linked to the protection of indigenous personality. This is not the only way in which the creation of sui generis intellectual property forms could be justified. There are two reasons why this is perhaps the best jural path down which to tread. First the connection between personality and intellectual property has long been a part of the authors' rights tradition of European copyright

law. Said to be Kantian in origin, the moral rights doctrine holds that independently of any economic rights authors have the right to claim paternity of a work and a right to maintain its integrity.[50] The broad proposal being mounted here is that we should recognize that indigenous knowledge is the expression of indigenous personality and that the use of indigenous knowledge is circumscribed by duties that are owed to indigenous personality. Given that many western states already recognize the connection between artistic personality and copyright works, this way of justifying sui generis forms of intellectual property would be to argue for the extension of a principle rather than the creation of a new one.

There are other sources for the rise of indigenous intellectual property forms, but they would probably fail to meet the needs of indigenous people. Economic justifications, for instance, would tend to place the emphasis on the tradeability of indigenous knowledge, and this is precisely what indigenous people might not want. Another avenue might be to argue that indigenous knowledge forms part of indigenous culture and that one should protect indigenous knowledge as part of protecting indigenous culture. A jural theory which attempted to protect indigenous knowledge by incorporating it into a right to culture would have to overcome the traps set for it by rights discourse. Culture is a public good. Can there be individual rights to a public good? Following a Hohfeldian inference rule for rights, one might ask on whom the duties to provide such a public good would fall and what the content of the duty would be.[51] Perhaps the right to culture is a collective right rather than an individual right. If so, what is the social ontology of such a right? Does it, for example, depend on a collective of a sufficiently large size? Rights reductivism generally gives ontological priority to individuals rather than collectivities. Even if a rights-based theory is prepared to recognize a collective right to culture, the strength of that right may turn out to depend on the number of individual interests standing behind the collectivity in question.[52] The existence of a right to culture may turn out in some deeper sense to be a numbers game, a game which small indigenous populations are likely to lose. A

50 S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer, 1987) at 455-476.

51 J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) c. 8.

52 For a discussion see D. Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1.

personality-based approach to indigenous knowledge would not be contingent upon the size of an indigenous population.

6. CONCLUSION

Property for most of its history has been a territorial institution. This has allowed different regulatory arrangments for the intellectual commons and therefore different communities to flourish. But property, as this article has argued, is going global. It is also going global in ways that tend to favour the production needs of transnational elites rather than in ways that protect the intangible assets of indigenous people. Indigenous knowledge will continue to grow in importance in production. Perhaps a little counter-intitutively, this article has argued that indigenous people should concentrate their energies on getting states to recognize many forms of indigenous intellectual property. Such indigenous property forms will give indigenous people something with which to bargain. The best juristic route to this goal, it has been suggested, is to connect such indigenous intellectual property forms with the protection of indigenous personality. At the same time, traditional economic forms of intellectual property should be reintegrated back into the discourse from whence they came — the discourse of privilege. Economic forms of intellectual property are best seen as forms of privilege-seeking. This is not to say that such forms are never justified, but rather that we should be highly instrumental in our approach to the grant of such privileges.