

SAVING OR ENSLAVING: THE PARADOX OF INTELLECTUAL PROPERTY

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Eye of newt and toe of frog...

IN the autumn of 1976 Andrew Duff-Cooper and I were among the new students enrolled to read social anthropology at Oxford under the mentorship of Professor Rodney Needham. Like a number of other incoming students, we had come to anthropology from other careers: in his case, the field of law; in mine, philosophy and art. In fact, the numbers of matriculating 'mature students' that year created an atmosphere of lively intellectual engagement in which previous professional experiences were examined through the lens of social anthropology. In the intervening years between then and his early death, Andrew and I would share many anthropological interests, including—though in different moments—fieldwork in Indonesia. For this Memorial Issue, however, returning to the legal domain that first concerned him seems both appropriate and timely.

As the age of 'salvage' ethnography gives way to one characterized by the absence of untouched tribal groups, the need to combine ethnographic experience with some awareness of the legal consequences of publicizing various forms of indigenous knowledge becomes evident. Indeed, few anthropologists realize that their own writing—the intellectual candour through which tribal knowledge enters the public domain—may actually be the very thing that denies tribal peoples their cultural and intellectual property rights. Even when intentions are clear, let us not forget that the legal issues of intellectual and cultural property are still much disputed within the cosmopolitan world itself. One cannot readily dismiss the general lack of agreement concerning the protection of inalienable property—for

example, the reluctance of nations that regularly import cultural property (e.g. Japan, Switzerland, Germany and Britain) to support the UNESCO Convention (on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property), or the long-standing refusal of the United States to join what has been called 'the premier instrument of international copyright' (Benko 1987: 6), the Berne Convention. Moreover, despite the fact that membership in the World Intellectual Property Organization is open to any member of the Paris or Berne Unions and any member of the UN, the age of technology transfer has enabled even the weakest link in any agreement to exploit for financial gain its independence and non-compliance.

What follows, then, is both a memorial to Andrew and an ethnographic view of intellectual property, with special reference to the patent rights of indigenous peoples. Though specific in certain details, it is meant to contribute to the sort of wider intellectual colloquy to which anthropology aspires and, indeed, to which Andrew was so devoted.

The irony of establishing what is meant by the term 'intellectual property' is that at least one common understanding of what 'property' means is subverted by the contemporary understanding of what is at issue when human knowledge is at stake. *Webster's Dictionary*, for instance, defines as 'property' not only a thing or things (such as land or movable goods) owned by someone, but also 'something that one has the right to use' (as when 'the contribution of one scientist becomes the property of scientists to follow'). In this essay I shall argue that the successful repayment for having utilized the intellectual property of indigenous peoples will occur (if it can at all) less through attempts to apply to indigenous peoples existing national laws and international agreements, than through fostering long-term moral relations among concerned indigenous and non-indigenous individuals or groups.

If a respect for difference may be said to be the first rule of diplomacy, then the appropriateness of any intellectual category for negotiating across cultures may in a similar spirit be quickly determined by assessing its capacity to help resolve actual problems and, through such an assessment, to isolate the conditions under which such categories are ineffectual. Like psychoanalytic categories (which may or may not be valid across cultures) those intellectual categories that function most successfully in more than one cultural setting do so not because they force diverse experiences into existing categorical frameworks, but because they help us recognize where and how actual phenomena deviate: where understanding the discrepancy between the category and the event it is meant to define actually results in a better understanding of what is at issue (Napier 1992: 194ff.). If, in other words, the intellectual property rights of indigenous peoples are to be preserved, we need to hone the concept of intellectual property into something rigorous, and to do so by whatever trials best indicate its current limitations.

Though advertising a drug may depend upon reiterating all of the occasions on which its efficacy has been proven, assessing its range can only be done by examining its potential efficacy under new or novel conditions.

While there are a number of ways in which the flow of ideas from one individual to another may be controlled, most national representatives agree that patent protection is the single most important vehicle through which intellectual property rights may be secured. In order to assess what may be at stake for an indigenous group with a marketable commodity, we must first determine what kinds of intellectual property are patentable, not because copyrights and patents are the only means of protecting intellectual property, but because they are the primary means by which indigenous property is appropriated for financial gain. Identifying patentable property is in itself no easy task, for one must first accept the ineffectiveness of any existing international agreement to be truly international. As a rule, the more international the scope, the less powerful the legislation. No agreements can be legislated universally, and none of them provides any real protection for indigenous groups, which, by definition, are not politically independent from the nations in whose boundaries they reside. Second, one must come to terms with the universal tendency to employ national laws (which vary enormously) as if they had, or should have, international authority. Because of the ineffectiveness of international law, its inapplicability to indigenous groups, and the tendency to assume that national habits ought to be embraced universally, looking at international protective agreements is far less productive in assessing how humans actually behave towards indigenous intellectual property than is examining an actual set of agreed-upon national principles. Coming to grips with a local moral world may, indeed, be the single most important way in which the anthropological method differs in its approach to problems of intellectual property from those legal or political methods that rely upon international agreements that almost wholly bypass indigenous groups.

Though what follows can only be considered specific for the United States, we may at least get a sense of what is at stake in what may be the world's most litigious nation. Employing, therefore, a set of guidelines provided for presumably ethical principal investigators at a major research university yields some useful generalities about how individuals (researchers, policy-makers, and corporate representatives) might actually respond to an indigenous intellectual property claim. These guidelines include the following items as protectable:

- (1) a *process*, such as a method of applying a vapor barrier to silicon materials;
- (2) a *machine*, such as a new instrument to deposit uniform layers of metallic compounds;
- (3) an *article of manufacture*, such as an assay kit for an infectious disease, or class of diseases;
- (4) a *composition of matter*, such as a new molecule (characterized by amino acid sequence or base-pairs), or a new chemical compound;
- (5) *new and useful improvements* of the above;
- (6) any *distinct and new variety of plant* which is asexually reproduced;
- (7) any *new, original, and ornamental design* for an article of manufacture. (Harvard University [HU] 1988: 43)

According to most nationally and internationally accepted standards for determining intellectual ownership, a patent application will be honoured if a product is: (1) *new* or novel ('the invention must be demonstrably different from any existing prior art; this means it cannot be described in prior "public disclosures," which include publications and/or availability of the invention to the public, as a commercial product, for example' (ibid.: 44)); (2) it must be *useful* ('the invention must be useful in ways which represent improvements over existing products and/or techniques' (ibid.)); and (3) it must be *non-obvious* ('the invention cannot be obvious to a person of "ordinary skill" in the art; non-obviousness usually is demonstrated by showing that practising the invention yields surprising, unexpected results' (ibid.)). 'Newness' and 'non-obviousness' serve to define what is not in the public domain. Though 'usefulness' or utility is sometimes unclear (as when the scope of a molecule's use is unknown), one's chances for patenting a square wheel will be limited by what seems reasonable, as much as by formal law.

What sorts of local cultural conditions are most at risk from these criteria? From a multitude of potential hazards, I should like to isolate three areas of cultural concern: (1) the identification of the patentable thing; (2) its ownership; and (3) its causal agent (and, more broadly, its role in the indigenous cosmology).

1. Identification of patent

As the above conditions make clear, a patent cannot be obtained for a broad class of chemical compounds; an agent or agents must be isolable and even the patenting of a single compound will normally not be granted without some specific description of how it has been synthesized and the exact structure of its synthesis.

In the case of protecting an ethnopharmaceutical, therefore, we are immediately presented with two related problems. First, it is not enough to know the tree, the shrub or the animal from which a product is derived in order to obtain protection. Second, though a process may be patented, the definition of what is necessary and what is contingent is not very broad: though boiling a dog's leg may not actually *prevent* a formula that contains atropine from stimulating the heart, it will not do to include it in applying for a patent, or to bring it to a court of law. As the famous biologist, Ludwik Fleck, once said, 'It is easier to find one's way in the woods than in botany. It is also easier to cure a patient than to know what his disease is' (quoted in Löwy 1991: 64).

Since, therefore, the indigenous cultural description will, for any number of reasons, neither lend itself to chemical specificity nor conform to the procedures of laboratory practice, any discussion of how intellectual property rights can be established and maintained for indigenous peoples will necessarily focus on long-term educational avenues by which these groups may learn the necessary laws to which their property may be subjected in other cultures, or on the custodial goodwill of those who represent them or who function as their advocates. Ideally, such protection would comply with guidelines established by an international body

(such as the World Intellectual Property Organization); but in the absence both of an international body with real executive authority, and of the requisite time to educate large masses of indigenous peoples about laws that are often at odds with local moral orders, custodial goodwill is essential. Such goodwill necessarily relies upon either the nation in which an indigenous group resides, or the ethnobiologist who, or corporate entity which, isolates a particular compound and describes its synthesis. For though the law may be unclear in many ways, what is perfectly clear is that the one who does this is its legal owner and retains for varying duration the right to sell or license its use. And who is to say, moreover, that the ethnobiologist has not made a discovery? For the compound is new, it is useful, it is non-obvious, and it certainly was not known (even though it functioned in many cures) before he isolated it. And if this fieldworker has indeed made a discovery, why shouldn't he or she, too, enjoy legal protection?

To answer this last question, of course, we must first determine if the knowledge actually was his or hers. And what knowledge are we speaking of? Can an individual be said to possess a right to intellectual property if he or she does not possess the intellectual categories to determine the scientifically recognized active agent? Most laws say no, though morality may indicate otherwise. Furthermore, if the biochemical knowledge does not 'belong' to the ethnobiologist, whose is it?

2. Authorship

As the above discussion illustrates, the problem of identifying that which is patentable is directly linked to the problem of ownership—and, by extension, to whether we are dealing with an invention (which is unique) or an innovation (which streamlines an existing art). Can a shaman be said to possess an intellectual property right if he, as the user of a number of substances that include one or more active agents, cannot isolate the active substance in his recipe? Moreover, how can a tribal 'inventor' responsibly subscribe to the commodification and scientific inscription of his idea when, even at major research institutions, 'a substantial majority of the faculty are not aware of what constitutes an invention' (HU 1988: 42)? Those who would wish to find the matter less complex might argue that the relationship between knowledge and ownership is intuitively grasped, that the perception of 'knowledge as power' is a human universal and that, therefore, the concept of an intellectual property right is something that should be readily understood by anyone. What is at issue in the case of indigenous property rights, however, is not whether the human mind is capable of producing and controlling powerful information, but whether or not the indigenous categories that govern this knowledge in any way conform to the cosmopolitan category of 'intellectual property' as a thing that is 'new, useful, and non-obvious'.

Though we might wish to think the issue straightforward, it is not. In fact, without some understanding of the specifics of indigenous life (about such

concepts as agency, ownership and object relations), the practice of regulating intellectual property rights dissolves into empty rhetoric, or into unproductive narratives about saving tribal life, when what should be discussed are the potential avenues by which individuals may learn enough to stand a chance of negotiating their own entitlement. After all, certain indigenous systems of intellectual property protection (for example, esoteric magic) actually sensitize practitioners, as we shall see, to concepts very much like those that are essential for the successful international protection of intellectual property. The situation, however, is further complicated by the fact that, while shamans and other owners of exclusive knowledge in tribal cultures may be said to perform a balancing function in the daily affairs of their neighbours (say, in settling disputes, or in presenting requests to the gods), it can hardly be said that they always work in the common interest. To the contrary: their powers may depend, quite directly, on their ability to produce harm as well as good and, through whatever means, to fend off challenges to their authority. If an anthropologist or biochemist has a moral obligation to the indigenous people who have shared with him a certain form of knowledge that contains something patentable, how are we to proceed in ascribing intellectual property rights if the relevant knowledge is, for example, held by exclusive inheritance, or if the individual who holds that knowledge is considered a rascal by his more passive neighbours?

Part of the problem with international goodwill here is that little of it proceeds from any real understanding of local moral realities; what is worse, a great deal of this goodwill is predicated on the blatantly false assumption that all tribal peoples are egalitarian, that people in these cultures do not suffer from their own despots, and that, if given the choice, they would reject wholesale the bankruptcy and collective corruption of the Western world. At the other end, of course, stand those who are highly cynical about these stereotypes and who argue that we need only look at how goods sent as disaster relief are sometimes mercilessly bartered (for example, by some Third World tyrants to the Fourth Worlds they victimize, or by black-market profiteers) to realize how essential for intellectual property protection locally negotiated reciprocal agreements are.

These difficulties, however, could (were we critically prepared to examine them) lead to quite different conclusions; for, far from providing excuses for custodianship (for saying that we have to control their intellectual property so as to distribute fairly the aid it produces), they could also encourage us to rethink the extent to which we are asking others to participate in our cultural saga about lost golden ages populated by noble, fair and highly individualistic people whose ideas are always new, useful and non-obvious. Without digressing at length here, it is important to raise this problem because thinking about our own cultural mythemes leads us to examine, in general, just how unrealistic our dramas about others may be and, in particular, how unlikely are the scenarios we imagine about the preservation of their intellectual property. One might even argue that the power of such sagas to influence our collective imagination is such that we are incapable of recognizing the demise of other forms of life until they can be brought to

conform to the major plot in which a silent and innocent savage mind is rescued in the hour of its demise by a modern-day Rousseau flying a cargo plane or another such reconnaissance device.

The argument here is not only that we are incapable of controlling the desire to enrol others as straw men in this cultural drama, but that once the possibility of loss becomes real, the actual loss may already have taken place: Teddy Roosevelt embraced the idea of a national park system precisely at the moment when the mapping of the American wilderness had eliminated the true category; and he and J. P. Morgan subsidized the feverish, romantic and encyclopaedic photographing of Native Americans by Edward Curtis at the very moment in history when the eradication of all bellicose forms of 'otherness' in the United States had guaranteed that the swan song could go unchallenged. If the connection between our greatest and greediest capitalists and an earlier swan song does not convince us of the need to reassess what is at stake in the current debates over intellectual property rights, then perhaps the growing popularity of such concepts as 'cultural capital' (which, interestingly, was an invention of management specialists) and procedures like 'social price costing' (which addresses our felt need to commodify empathic relations) will alert us to this trend.

Obviously, the goal in this discussion is not to criticize the goodwill that has resulted in development concepts that are frequently unworkable, but to shape the concept of intellectual property into something realistic for indigenous peoples, or, failing that, to see it for what it is.

3. Agency

Patenting knowledge, as we have seen above, is highly dependent on the notions that property is something exclusively held—by one individual, by an institution, or by a definable corporate entity—and that what is held is not part of what is shared or obvious to members of society at large or to people outside the group. In this sense, authorship is synonymous with agency. The difficulty arises when a form of ownership is collective; for things which are shared are generally obvious, and, in order to secure an exclusive right to something patentable, one must demonstrate that one's idea is 'non-obvious'. Shareholders in a corporation are not collectively sharing obvious knowledge, but empowering the corporation to exclude others for its own gain. As long as ownership and agency are synonymous, obviousness is not a problem; but as soon as a patent begins to look like something already known, exclusive ownership ('who owns what') becomes contested. It is for this reason that "obviousness" is most frequently cited by patent examiners as the reason an invention is not patentable' (ibid.: 44).

In one sense, tribal shamans would have little difficulty with understanding the 'non-obvious' since, as we have seen, the non-obvious is usually demonstrated 'by showing that practising the invention yields surprising, unexpected results'. For some shamans, this more or less accurately defines what they do. What is

'non-obvious' becomes complex when we marry it to the idea that in order for an invention to be non-obvious it 'cannot be obvious to a person of "ordinary skill" in the art'.

Contrary to popular belief, magic—far from being a primitive system of hocus pocus—actually has a great deal in common with contemporary conceptions of how intellectual property is protected, and in particular provides some insight into how inventors actually regulate the use of their ideas in the absence of government interventions. First and foremost, magic is secret, except to those who have negotiated to share such knowledge (the analogy here is, of course, the licensing of patents). Indeed, one might even argue that indigenous priesthoods that control access to sacred magical knowledge bear an eerie resemblance to Western patent-pooling cartels (Suchman 1989: 1285). Furthermore, there is, in fact, no evidence to support the widely held belief that 'the opposite to a publicly structured market for intellectual goods is no market at all' (ibid.: 1290). Secrecy, as much in the West as elsewhere, is a *primary* technique by which intellectual property rights are retained, for within limits secrecy functions well (both for tribal priest and bench scientist) without government intervention. As the president of one innovative computer chip manufacturer put it, 'in this business, only the paranoid survive'.

Remember, we only know what tribals tells us; let us not forget that we will not learn their indigenous ethnobotanies without a deeply cultivated sense of reciprocity, moral engagement and personal trust; it is here that the greatest challenge resides for both policy-makers and ethnographers. The problem, however, is complicated by the fact that, while the subject-matter of international law is extremely rich, cross-cultural comparative work on the legal content of indigenous ideas about property is so rare that 'the ratio of empirical demonstration to assumption in this literature is close to zero' (Suchman 1989: 1290). The problem with systems of magic and secrecy—i.e. the real reason why we very much need legal intervention—is that they promote well-known forms of non-productive behaviour in which rights are so protected that essential knowledge is denied to other potential innovators (ibid.: 1292). Tribal people are often no more willing to discuss their intellectual property with ethnographers than are academics to circulate unpublished manuscripts.

Ironically, the problems of securing their intellectual property rights arise at the exact moment when they consider their knowledge obvious enough to share openly. Those Arcadian tribal peoples we intend to 'save'—i.e. not the bellicose ones, but the ones who engage in the peaceful gathering of nuts and berries and the unselfish distribution of common goods—are precisely those hunters and gatherers who, so social evolutionists tell us, live without cultural specializations and who, therefore, share knowledge of all tools and survival procedures. These are the ungreedy versions of ourselves that we hold up to the many fun-house mirrors that form the backdrop of our swan song—for the absence of greed is the thing that for us is, as it were, 'least obvious'. They are also the models of the public sharing that, by definition, exempts them from any patent rights.

The unamenability of the concept of intellectual property to that of collective ownership is seen quite clearly, that is, in the difficulty we have in deciding what constitutes an 'ordinary skill in the art' in a tribal setting, and in the complexities of incorporating tribal groups who have their own criteria for establishing social boundaries—for determining who 'we are' as a function of 'who we are not'. Though this is not the place to examine the general issue of how cultural property law has influenced the corporate identity of indigenous groups (e.g. among Native Americans or Australian Aborigines), it is worthwhile noting that when traditional peoples are forced to negotiate their identities in contemporary legal terms, what takes place is not at all unlike efforts to redraw municipal boundaries in advance of a local election.

What is far more culturally complex is the issue of assessing what is and what is not an 'ordinary skill'. Is an ordinary skill, for example, the shared knowledge of how a medicinal plant is used? If so, the common knowledge in Guyana that nuts from the greenheart tree can limit fertility does not, at least presently, entitle the indigenous peoples who use greenheart nuts for that purpose to the patent for birth control that could result from the synthesizing of a molecule of greenheart. Non-obvious means what it says: the knowledge cannot be obvious to anyone except its owner. In other words, being moral does not simply involve admitting that it's 'their' idea and not 'ours'; for the concept of tribal egalitarianism itself excludes those very tribal peoples from competing in the patent courts: what they know is commonly shared, and if it's not commonly shared we cannot be party to any squabbling, or (to invoke the children's parable) Mr Gumpy's boat will surely overturn: 'Well, might as well secure custodial rights, no? At least *I'm* not greedy.'

Such a concern over misplaced ownership would be unwarranted were it not for the fact that even in our well-managed centres of consumption the concept of what is 'non-obvious' remains both the most complex of the three aforementioned requirements and the one most subject 'to broad and often inexact interpretation':

For example, it might be argued that a new method of controlling protein production in bacteria is obvious in the face of prior art because it relies on a collection of well-known, existing and proven concepts. Conversely, one could argue the same method is *not* obvious because certain specific elements of the method yield surprising, unexpected results. Judging what is obvious to one of 'ordinary skill' in an art is rarely straightforward, especially in technologically complex and rapidly changing fields. (HU 1988: 44)

This problem, finally, is most emphatically seen when the greenheart nut is perceived in Guyana as a gift of God or, more complex still, the gift of the gods in general who, among themselves, will not or cannot determine who first had the idea of using the nut to control ovulation.

One widely held definition of 'obvious' is 'that which is taken for granted'. How, then, is one meant to embody a sense of ownership and self-interest if the knowledge in question is obvious, in the sense of being either self-evident or God-given? Our Guyanan native, who believes the greenheart tree to grow everywhere and the knowledge of its properties to be self-evident, will need to become cosmopolitan very quickly if he is to benefit from any commercial derivative of greenheart. But the very process by which he gains that knowledge may actually limit his claim to the privileges of tradition. In short, he can easily become trapped: as he adopts the behaviours that will allow him to become more familiar with an international commodity exchange, he becomes less traditional, since the negotiation of his intellectual property will require that he redefine a traditional religious framework in terms of a modern system of property. What is more, in making this transition, he will not only become less traditional, he may actually forfeit his claim to the minority rights provided to the disenfranchised.

Like the Hopi Indian now living in a Phoenix caravan park, he will have a very difficult time indeed convincing others that he should be allocated any particular privilege because he is Hopi (Napier 1992: 51). The more he looks and thinks like us, the more difficulty he will have—despite what he wears to court—convincing a judge that his collectively shared intellectual property is 'non-obvious'.

REFERENCES

- BENKO, ROBERT P. 1987. *Protecting Intellectual Property Rights: Issues and Controversies* (AEI Studies 453), Washington, DC: American Enterprise Institute for Public Policy Research.
- HARVARD UNIVERSITY (OFFICE OF SPONSORED RESEARCH) 1988. *Principal Investigator's Handbook*, Cambridge, MA: Harvard University.
- LÖWY, ILANA 1991. 'The Immunological Construction of the Self', in Alfred I. Tauber (ed.), *Organism and the Origins of Self* (Boston Studies in the Philosophy of Science Vol. 129), Dordrecht: Kluwer Academic, pp. 43–75.
- NAPIER, A. DAVID 1992. *Foreign Bodies: Performance, Art, and Symbolic Anthropology*, Berkeley: University of California Press.
- SUCHMAN, MARK C. 1989. 'Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Pre-literate Societies', *Columbia Law Review*, Vol. LXXXIX, no. 6, pp. 1264–94.