Community and the Exhaustion of Culture

Creative Territories in Traditional Cultural Expressions

Introduction

> Indigenous communities and their individual members draw their identity and form their world-view from specific historical and cultural contexts that include their own beliefs, social organization, language, customs and knowledge. As children, indigenous people develop a profound bond with their territory of origin, whether or not they and their communities still occupy this space.[1]

The assimilation of traditional knowledge within intellectual property models persists as a questionable and frequently problematic objective of current international discussions.[2] In fact, the very process of classifying traditional cultural expressions separately from traditional knowledge, in order to maintain a semblance of compatibility with intellectual property categories, is itself contrary and foreign to the realities of this knowledge for traditional and Indigenous[3] communities.

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[1] UNICEF (2003). *Ensuring the Rights of Indigenous Children*. Report. October 2003. Innocenti Digest 11: 2.

[2] IPCB. (2004), Collective Statement of Indigenous Peoples on the Protection of Indigenous Knowledge. Agenda item 49(e): Culture. UN Permanent Forum on Indigenous Issues. Third Session, New York, 10-21 May 2004:

> We know the current proliferation of debate regarding the protection of traditional knowledge and genetic resources that is taking place in various UN fora is centered on mechanisms for exploitation, not protection. These discussions focus on the use of Western Intellectual Property Rights to be used as the mechanisms for the protection of Indigenous knowledge. These mechanisms are not only inadequate, but dangerous.
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> Indigenous peoples who have participated in the CBD, WIPO, and other UN processes, have consistently asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and biological resources. Those who wish to impose intellectual property rights over our traditional knowledge and resources, if successful, will transform our knowledge and resources into individually owned, alienable commodities, subject to IPR protection for a short period of time.

[3] However, the term "Indigenous" is retained, coupled with "traditional" and capitalised throughout this work, operating both as a proper noun and as a pre-condition of knowledge and community, rather than a category of knowledge.

Indeed, at the recent Seventh Session of the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), some representatives of Indigenous groups and developing countries rejected such categorisation as being in conflict with the holistic nature of the knowledge of traditional and Indigenous communities, where traditional knowledge is intrinsic to expressions of culture (Call of the Earth). Such separation was seen to be ultimately contrary to the encouragement of traditional processes of innovation and development.

In earlier fact-finding missions and consultations with stakeholders, undertaken by WIPO, it emerged (and continues to be critical) that what is fundamental in the context of customary and traditional use of resources, and what must be protected (as advocated by the presentations to the WIPO IGC[4] and reports of various Indigenous groups[5]) is not merely the object of intellectual enterprise in and of itself, but the nature of its exchange and the ability to control and regulate that exchange. The object of protection is not necessarily the resource as an end in itself but the ability of the community to continue to function and observe internal differentiation and communal integrity through its management and deployment of resources. The ability, "to protect, in a positive sense, their traditional cultural expressions, which, where collectively owned, should be protected in the name of the relevant community"[6]

[4] The work of the IGC is considered in more detail in Gibson J, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*, Aldershot, Ashgate, 2005. See in particular the discussion in Chapter 4.

[5] Indigenous Australian intellectual property lawyer, Terri Janke, has undertaken extensive reviews of the relationship between Indigenous Australian culture and intellectual property in the comprehensive report, *Our Culture Our Future* (1997) and also the WIPO Report, *Minding Culture* (2003).

[6] WIPO/GRTKF/IC/4/3 (20 October 2002): 14.

arose as one of the key concerns of Indigenous peoples and traditional communities consulted as part of WIPO's fact-finding and other consultative processes.[7]

Therefore, the "evolution" of the culture, beyond the physical, localised, geographical place,[8] should not preclude or supersede the protection imagined within a *sui generis* system of obligations to the practice of community itself. This is because such a system should facilitate the particular community's legal and social capacity to regulate itself and develop through social and cultural differentiation unique to itself. In other words, a *sui generis* system of community resources resists the fixing of the "identity" of the object itself, whether that fixing occurs through the identifiable author in traditional art, the immobilisation of community according to geography, or the simplification of creativity according to western linear models of progress.

Furthermore, Indigenous and traditional groups have raised concerns regarding the constructions imposed upon their knowledge as commodities, fixed and discrete products or resources, where access and subsequent developments upon that knowledge are considered to be separate, without recognising or understanding the impact upon the relationship between the community and its resources. Indeed, access to knowledge and subsequent developments have a significant impact on the traditional knowledge itself and its value to a community, raising the need for traditional management of the unique quality, relationships, and values embedded in those resources.[9]

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[7] WIPO Fact-Finding Mission (2001).

[8] This is considered further in the discussion of "place," later in this paper.

[9] IPCB (2004): "We ask the Permanent Forum to intervene in the various UN fora to ensure that truly sui generis systems of protection of Indigenous peoples are protected. These sui generis systems are based on our customary laws and traditional practices. Our existing protection systems are legitimate on their own right and any new mechanisms for protection, preservation and maintenance of traditional knowledge and associated biological resources must respect and be complementary to such existing systems and not undermine or replace them."

This paper will develop the concept of "community resources,"[10] in recognition of the inextricable relationship between a community and its resources, and the concept of disenfranchisement through "resourcelessness" (drawn from environmental philosophy). This is towards understanding the need to approach protection from the perspective of respect for cultural diversity and dignity of all peoples, rather than perhaps from the more limited perspective of the value of traditional knowledge as commodities in trade.

Efforts at "protecting" traditional knowledge, within intellectual property frameworks, largely presume the objective to be the defence of that knowledge against misappropriation, through safeguarding that knowledge and its origin within an ethic of sharing it as a global resource, rather than realising positive rights in traditional knowledge development and management according to the customary law of the community. However, the subject matter of protection for Indigenous and traditional groups is not necessarily captured within this conceptualisation of the problem. Furthermore, even within the framework of intellectual property protection, construction of traditional knowledge as "information" for the purposes of the trade-related system of intellectual property largely neglects the legitimate interests of communities, concerning customary management, cultural integrity, and traditional knowledge development.

For instance, copyright protection may not apply to traditional knowledge, where the material is deemed unoriginal and in the public domain, or where the misappropriation is a legitimate adaptation under copyright law.

[10] The concept of "community resources" and its operation is introduced and developed by the author in *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*, Aldershot: Ashgate, 2005.

Nevertheless, this may constitute an offensive taking from the community in question through the inappropriate use of cultural symbols, dress, and artistic methods.[11] Similarly, trade mark protection is not readily available other than through efforts to "exclude" certain material from trade mark registration.[12] Any efforts within these models (including disclosure of origin in patterns, certification and authenticity marks, and so on) depend upon a presumption of the importance of safeguarding the traditional cultural expression as cultural artifact, rather than recognising community and respecting customary law.

What must be acknowledged is the existence and significance of "local" customary law, and the rights of Indigenous and traditional groups to manage resources according to custom within a transnational (as distinct from the "nationalistic" international model) system. Recognising the unique relationship between the Indigenous and traditional group and its resources, the community emerges as the organising principle of protection in relevant and culturally appropriate responses to access to and protection of traditional knowledge. "Community resources" emphasises cultural diversity and establishes the centrality of the traditional or customary relationship between community members and between the community and its resources as the subject matter for protection.

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[11] Owen Morgan provides a useful analysis of the relevance of offence in his discussion of the taking of Māori words and the legislative response in the New Zealand Trade Marks Act 2002. See Morgan O. (2003). "The New Zealand Trade Marks Act: No Place for Offence," Occasional Paper No 2/03. Intellectual Property Institute of Australia, University of Melbourne. See also the discussion of cultural offence in WIPO/GRTKF/IC/6/6 (30 November 2003): 24. See also the references to offence caused by the patenting of traditional knowledge in the final report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, 2002: 81-83.

[12] Problems persist in relying on exclusions of emblems and symbols, in that these must be fixed and repeatable for protection. Such defensive mechanisms cannot capture methods in cultural expressions (such as dot painting). See also footnote 14. Note the New Zealand approach to trade mark protection, discussed further in Gibson J, (2004) "Intellectual Property Systems, Traditional Knowledge, and the Legal Authority of Community. *European Intellectual Property Review*. 26(7): 280. See also fn 3.

Community

> [S]tories … become the method colonized people use to assert their own identity and the existence of their own history. The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative … The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.[13]

What is asserted in contemporary community, including "other" communities,[14] is communication, which may not necessarily be constrained by geographical identities.[15] Importantly, this marks a significant cognitive transformation in the concept of "community,"[16] which is relevant to current international legal and policy discussions concerning community resources. Traditional and Indigenous communities must nevertheless be understood as distinct from other "communities," which are drawn together as a "collective" in response to a feature in common. In contrast, traditional communities inhere in the prior stability of ancestral tradition, and the responsibility to narrate tradition and therefore maintain the "self"-expression of community according to shared "values." This tradition may not be personalised or "owned" as such, but must be expressed and maintained. This expression is therefore traditional, and will continue to be traditional where there is innovation in that

[13] Said EW, (1993). *Culture and Imperialism*, London, Vintage, 1994: xiii. Referring primarily to ecological knowledge, Darrell Posey describes the relationship between narration, oral literature, and the transmission of knowledge and identity, in Posey DA, *Indigenous Knowledge and Ethics: A Darrell Posey Reader*, New York, Routledge, 2004: 18, 30-31.

[14] The term community may be used, for example, with respect to "online communities," "virtual communities," "artistic community," and so on.

[15] Bauman Z & May T, *Thinking Sociologically*, 2nd ed, Oxford, Blackwell, 2001: 111-12.

[16] See the discussion in Amit V "Reconceptualizing Community," in Amit V (ed), *Realizing Community: Concepts, social relationships and sentiments*, London, Routledge, 2002: 1-20.

expression, because it continues with respect for custom and in performance of the responsibility to tradition and to community autonomy.[17]

It is this responsibility to tradition that founds the legitimacy of community resources, and to deny Indigenous and traditional groups genuine access to global relevance is to compromise the effective exercise by the community of its customary law with respect to resources, limit the means of a community's "self" expression, and undermine completely the nature of community as a legal actor.

Origination and In-imitativeness

The criteria for determining the existence of intellectual property may be summarised and understood more broadly by what may be referred to as "origination" and "in-imitativeness," in addition to aspects of protection and enforcement relating to the market for intellectual property (such as criteria for protection and different durations for the monopolies provided).

Origination will be used here to refer to the simplification of the creative process through the identification and individuation of author or inventor, the origin of the work, and the presumption of a finite, concluded, and indeed lifeless material form. Therefore, criteria such as authorship and material form in copyright and inventorship in patents are indicated by the notion of origination.

In-imitativeness may be understood as describing the criteria through which the apparent singularity of the work is presented, including the requirements of originality, inventiveness, and novelty – the construction of a simplified "originality." Crucially, in-imitativeness is not the same as inimitability. While inimitability may suggest uniqueness and originality, it is perhaps not in the same "economic" sense.

[17] The relationship between tradition, history, and evolution of community is considered in more detail in Gibson J, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*, Aldershot, Ashgate, 2005: Chapter 1.

The originality imagined in intellectual property law is strengthened through imitation. Indeed, to be imitated secures the object's singularity and semblance of originality. This is especially so (and indeed integral to) the value described by intellectual property systems. On the other hand, inappropriate imitation of traditional knowledge intrudes upon community identity and may compromise the integrity of the knowledge. This suggests an important "inimitability," as it were, of the subject matter of community resources in this respect, in that the knowledge is transformed in the reproduction. As Peterson J famously stated, "What is worth copying is worth protecting."[18] That is, what is worth copying has value in trade, a fixity that must be protected. The "inimitability" of community resources, therefore, paradoxically eschews protection within this logic.

Furthermore, the attachment to origin and singularity recalls the western construction of identity through possessory relations, including the self-possession[19] of expression. The legitimacy or "authenticity" of the "knowledge" comes about through the very misappropriation of culture against which protection is sought. Capturing traditional knowledge within this system would at once both miss the fundamental subject matter of community and "civilise" (as commodities) the traditional knowledge and resources of Indigenous and traditional groups.[20] In staging authenticity in this way, community is restricted to particular constructions of history, place, and creativity, in order to be rendered meaningful within intellectual property systems.

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[18] *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610 per Peterson J.

[19] Note John Frow's use of the term self-expression to understand the western view of property as "a primordial property right in the self which then grounds all other property rights." See Frow J. (1995). "Elvis' Fame: The Commodity Form and the form of the Person," *Cardozo Studies in Law and Literature* 7: 131 at 149. For a discussion of property in personhood and the notion of possessive individualism see Davies M & Naffine N, *Are Persons Property? Legal Debates About Property and Personality*, Aldershot, Ashgate-Dartmouth, 2001: 3-15.

[20] Edward Said speaks of the importance of the expropriation of Indigenous culture to empire. See Said EW. (1978) *Orientalism*, London, Penguin, 1991; Said EW, *Culture and Imperialism*, London, Vintage, 1994.

Intellectual Subjectivity and Possessive Creativity

A significant case of the inappropriateness of the value distinctions of origination and in-imitativeness, in classifying knowledge, can be seen in the impact of intellectual property upon traditional cultural expressions. Art works, cultural dress, dance, song, and story, for instance, present particularly troubling cases of this incapacity of the present system to address the traditional relationship of community to knowledge and to expression.[21]

Western preoccupations with expression as a freedom of the self (freedom of speech, freedom of expression) and as the means by which to make oneself recognised, are critical to the natural justice and economic justifications for intellectual property protection as personal property. However, this perspective is at odds with communal experiences of cultural expression.[22] Indeed, one of the persistent problems for adequate protection within an intellectual property model is the inability of that model to account for community practices of sharing and transmitting knowledge, as distinct from the commodities in information derived from that knowledge.

This conflict is particularly acute in the example of traditional cultural expressions, in the unauthorised reproduction of the artwork of traditional and Indigenous peoples,[23] as well as the appropriation of the methods themselves.[24] As custodians, these communities have sought recognition of a right to prevent this re-presentation as

[21] See the discussion of the Sámi joik Gibson J (2005): Chapter 1.

[22] See the extended discussion of "freedom" in Gibson J, "Freedoms and Knowledge, Access and Silence: Traditional Knowledge and Freedom of Speech," in F Macmillan (ed), *New Directions in Copyright Vol II*, Cheltenham, Edward Elgar, (forthcoming), and in Gibson J (2005), Chapter 1.

[23] See Ellinson DA. (1994). "Unauthorised Reproduction of Traditional Aboriginal Art," 17(2) *University of New South Wales Law Journal* 327; Blakeney M. (1995). "Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law," 9 *European Intellectual Property Review* 442.

[24] For a comprehensive account of the appropriation of artistic method in Indigenous art, as an ongoing process of colonisation, see Thomas N. (1999). *Possessions: Indigenous Art/Colonial Culture*, Thames & Hudson Ltd, London: Chapter 4.

decoration of what are their culturally significant resources of identity.[25] Under customary law, pre-existing traditional designs, for instance, must be recognised and protected against unauthorised reproduction and adaptation. Obligations and responsibilities are owed to knowledge that is not only identified as cultural artifacts (cultural dress, dance, art), but also embedded in identity and inextricable from territory (beliefs, medicinal knowledge, agricultural knowledge, ecological knowledge, and landscape). That is, customary law protects the traditional knowledge and ideas that subsist and continue in the reproduction of the knowledge of Indigenous and traditional communities.[26]

Efforts to achieve protection through the safeguarding of designs as emblems are frequently inadequate,[27] presuming the fixity of their reproduction and an artificial circulation as object apart from the communities which they personify. Inherent in this approach is the persistent assumption that this is a purely emotional attachment to knowledge, without recognising full rights in the communities to manage the knowledge as appropriate, including licensing areas of knowledge according to shared values and consent.

As a result of the basic disjunction between traditional knowledge and intellectual property systems, responses to the protection of traditional knowledge have looked to

[25] This has included the call for separate legislation to protect indigenous intellectual property, acknowledging the very different value to Indigenous producers of that intellectual interest as well as the inadequacy of conventional legislative protection of intellectual property. See the ATSIC report, written by Terri Janke, *Our Culture Our Future* (1997), which recommends a *sui generis* legislative framework that draws upon customary laws to include and protect all forms of Indigenous cultural and intellectual property, including ecological and agricultural knowledge (Ch 18).

[26]Ellinson DA. (1994). "Unauthorised Reproduction of Traditional Aboriginal Art," 17(2) *University of New South Wales Law Journal* 327: 331.

[27] Earlier discussions noted the way in which this form of protection denies communities the ability to act in respect of their knowledge as they wish, including commercialisation of that knowledge where appropriate. The example of the sacred sun symbol of the Zia Indians of New Mexico illustrates this conflict: Lopez R. (1999). "Tribes seek trademark protection for sacred symbols," *Revista Magazine* 9 July 1999.

adequate attribution (including moves towards disclosure of origin) rather than restriction of use.[28] However, identification of the community in accordance with intellectual property models (and the western model of individual subjectivity) does not necessarily provide rewards that are appropriate/relevant/adequate in the context of traditional knowledge development and community integrity. Worse, the identification of community through such use may achieve little more than the stereotyping of individual communities as a generalised collective source of "tradition." The concern here is that such identification continues to depend upon a simplification of the creative process, and a simple demarcation between the creator and the product, contrary to the way creativity may be imagined in traditional and Indigenous groups.

Indeed, in being used non-traditionally, disclosure of the origins of traditional knowledge may not be adequate. Furthermore, this approach purports to identify the nature of what is being sampled (through attribution), but the transformation of knowledge in its unauthorised use is not necessarily countered by this attribution.[29] Arguably, the "originality" of the community resource is lost in the translation.

What is emerging is the inappropriate nature of the application of western notions of information and ideas as inexhaustible, non-rivalrous, and non-crowdable, to traditional knowledge which is embodied, corporeal, finite, and exhaustible (through cultural transformation and inappropriate use) – that is, inimitable. The objects of

[28] Defensive approaches to protection are examined in more detail in Gibson J (2005): Chapter 4, where the WIPO IGC discussions are considered, but, as discussed, they include an emphasis upon the documentation of traditional knowledge, disclosure of origin, and the "branding" of authenticity through certification marks and comparable mechanisms.

[29] This same transformation may occur through the preservation of knowledge. For instance, objects removed may lose their spiritual power and literally become a museum artifact: Simpson MD, *Making Representations: Museums in the Post-Colonial Era*, London, Routledge, 2001: 198. This is in addition to the possible wider transformation through the removal of knowledge comprised in that object, and through its display.

knowledge are not independent from the creators of traditional knowledge. Therefore, non-traditional and/or inappropriate use of traditional cultural expressions and knowledge fractures that relationship, and transforms the value of the knowledge (through mis-identification of self and community).[30] In particular, the conflict between traditional knowledge and western conceptions of information becomes acute in the context of arguments against *sui generis* protection, based on notions of freedoms of speech and expression,[31] which presume this independence in order to justify the individualistic rhetoric of these "freedoms." These arguments mark a critical turn in the emphasis upon the individual creator in intellectual property discourse.[32]

Arguments for access to traditional knowledge, based upon freedom of expression, fail to recognise the transformation of traditional knowledge in that process, and the possible exhaustion of its value to the community and its significance as the community's own means of self-expression, thereby literally denying the community access to the means necessary for its own freedom of expression. Thus, justifications for the sampling of traditional cultural expressions may be countered by arguments for restriction to access as a necessary protection of a finite cultural resource against its commodification and potential exhaustion within a free market economy of ideas.[33]

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[30] For a discussion of this relationship between identity and knowledge, see Martin M, "What's in a Painting? The Cultural Harm of Unauthorised Reproduction: *Milpurrurru & Ors v Indofurn Pty Ltd & Ors*," (1995) 17 *Sydney Law Review* 591. This process of appropriation of identity through the inappropriation reproduction of cultural symbols is also considered in Loftus P, "Colonisation Through Art: How Western Intellectual Property Law is Failing Indigenous Art" (2000) 1(1) *Balayi* 183, as a process of ongoing colonisation.

[31] See for instance Brown MF, "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193.: 199.

[32] The notion of freedom is examined furthering Gibson J (2005), Chapter 5 in the context of the principle of freedom in "open source" and "open access" models.

[33] Fourmile H. (1999). "Indigenous peoples, the Conservation of Traditional Ecological Knowledge, and Global Governance," in Low N (ed), *Global Ethics and Environment*, London, Routledge, 215: 235-37. See also King AB & Eyzaguirre PB. (1999). "Intellectual Property rights and Agricultural

In fact, freedom of expression may prove to be a legitimate justification for restrictions to access, based upon the freedom of traditional and Indigenous communities to pursue their self-expression.

With these aspects in mind, to argue for unfettered access to traditional knowledge, from the point of view of freedom of expression or freedom of speech, is to disregard the attending "duties" that qualify those freedoms. It is to impersonate the community, and to ignore the "exhaustion" of Indigenous and traditional knowledge that may occur in the process of "the imperial refusal to accept limits on either intellectual or physical space."[34] In other words, what must be acknowledged is the way in which adaptation of Indigenous and traditional knowledge may suggest an interpellation and "impersonation" of culture to the detriment of community identities. That is, artistic method, spiritual beliefs, and traditional custom (which importantly, are not necessarily separable from each other for the purposes of regulatory taxonomies) may be re-presented as "traditional" in the form of that particular "non-traditional" work.

This returns the discussion to the notion of exhaustion of traditional knowledge, the problem of its "inimitability," and the need to protect it as a finite, exhaustible, and non-renewable resource. The objectives of this protection are potentially inconceivable within intellectual property paradigms:

> Through the use of ancestrally inherited designs, artists assert their identity, and their rights and responsibilities. They also define the relationships between individuals and groups, and affirm their connections to the land and the Dreaming.[35]

Biodiversity: Literature Addressing the Suitability of IPR for the Protection of Indigenous Resources" 16 *Agriculture and Human Values*, 41: 42.

[34] Marcus J, "New Age consciousness and Aboriginal culture," *Thamyris* 3(1) 1996: 41: 41.

[35] Artist Wally Caruana quoted in *Minding Culture* (2003): 75.

Thus, the adaptation of designs, perfectly valid under intellectual property laws, is incoherent and destructive to the particular community whose identity may indeed be at stake.[36] The subject matter of protection is conceived in fundamentally different ways. While intellectual property, generally speaking, asserts the identity of the individual through attribution, publication, and display, traditional knowledge must be protected through differentiation according to the laws and rights of identity asserted within the community, rather than as a mere object of information for dissemination and exchange. The importance of "inimitability" is seemingly overwhelmed, however, by the second organising principle of intellectual property frameworks – that of "in-imitativeness."

The community, as the site of cultural contestation, as the "space" of Indigenous and traditional community, is at risk of trespass by a non-Indigenous or non-traditional[37] work itself. In other words, encroachment upon the cultural space of the traditional expression is a trespass upon knowledge as a tangible, exhaustible resource in the context of community resources. This raises the significant relationship between cultural expressions and the land, and the way in which conventional notions of community within physical, "propertied" space, undermine not only claims to land, but also to the traditional cultural knowledge in that land – that is, the creative territories embedded in physical place.

Cultural Expressions and the Land

> You see, the land is not only to cultivate. The land is also for you to be cultivated in as a person. This is why, when the land is in the hands of others, you are only a tool.[38]

[36] The question of identity is emphasised throughout *Minding Culture* (2003).

[37] The use of the term "non-traditional" signals production that is contrary to the shared values and customs of a community, and is not to imply "tradition" as in historicity.

[38] T Marcelino, Guarani Farmer, Bolivia, quoted in UNICEF (2003). *Ensuring the Rights of Indigenous Children*. Report. October 2003. Innocenti Digest 11: 2

The tension between "Indigenousness," cultural and physical belonging to nature and the land, and the economic and legal regulation of place is of special interest when considering the threat of exhaustion of traditional cultural expressions.

Territory is not a simple equation between community and physical land or "place," but is a vital expression of community "space" that is ongoing because of community, not despite it (as distinct from the implication in Australian native title law's adherence to a physical connection to and grouping within physical place, discussed later in this paper).

Land rights generally, and Australian native title law in particular, rationalise claims as competition for crowdable, rivalrous, physical place, and justify denial of rights through the event of the loss of that physical place. By defining and immobilising community as a "neighbourhood" or place, community is thereby also "expired" or denied where that connection to place is severed.

Fundamentally, this discursive action of the law upon community resources (in land) defines the "apparatus" of community through place, thus undermining the community in land and the knowledge in that land in its institutional blindness to the cultural resources embedded therein: "this elucidation of the apparatus by itself has the disadvantage of *not seeing* practices which are heterogeneous to it and which it represses or thinks it represses."[39]

The Individual Competition for Place

While place (as physical situation), especially the competition for land as pre-conceived by western law, "excludes the possibility of two things being in the same location," community opens up space (as cultural and subjective capacity and

[39] De Certeau M. (1988). *The Practice of Everyday Life*, Rendall S (trans), Berkeley, U of California P: 41.

belonging) that is mobile and dynamic, "in a sense actuated by the ensemble of movements deployed within it."[40] Community, therefore, territorialises place, and not the contrary: "In short, *space is a practiced place*."[41] This is the "territory" of community resources.

Space, the territory of community, is created by community and its movements, rather than reduced by the law. Indeed, it is precisely through the movements of community that territory is also re-affirmed, rather than lost. In other words, "stories" (knowledge) are integral to the community, part of the community, and inalienable as commodities or individual expressions, deriving their legitimacy from the stability of tradition and the responsibility to its narration.

The Community Potential for Space

> The landscape includes ground, trees, rocks and streams - the landscape as well as the people on the land who identify with the land, and its spirits.[42]

A community model for the protection and management of traditional knowledge will be ineffectual if indeed that model continues the historical archiving of community,

[40] De Certeau M. (1988). *The Practice of Everyday Life*, Rendall S (trans), Berkeley, U of California P: 117. Also of interest here is the work of Henri Lefebvre work on space as a social production, concepts of "field of action" and "basis of action" related somewhat to space and place respectively, as considered in this chapter. See Lefebvre H. (1991). *The Production of Space*, Nicholson-Smith D (trans), Oxford, Blackwell. Examining Indigenous Australians and landscape, Nancy D Munn identifies a similar concern, drawing upon the work of Henri Lefebvre, and considers the cultural production of a "mobile spatial field": Munn ND. (1996). "Excluded Spaces: The Figure in the Australian Aboriginal Landscape," *Critical Inquiry*, 22, 1996: 446-65.

[41] De Certeau M. (1988). *The Practice of Everyday Life*, Rendall S (trans), Berkeley, U of California P: 117. See also the work of John Gray on community as producing and as a product of place, through the sharing of culture, using the specific case of sheep herding in the Scottish borders and the perception of a shared "way of life." See Gray J. (2002). "Community as place-making: Ram auctions in the Scottish borderland," in *Realizing Community: Concepts, Social Releationships and Sentiments*, Amit V (ed), London, Routledge: 38-59.

[42] *Colin Goodsell v Galarrwuy Yunupingu*, Court of Summary Jurisdiction, Northern Territory of Australia (Gillies SM), 20 February 1998, (1999) 4 Australian Indigenous Law Reporter at 30.

the nostalgia of "tradition," and the moralising of the protection and safeguarding of the traditional community as a global "public good."[43]

Furthermore, the notion of community as a localised geographical creation, confined by house, neighbourhoods, settlements, families, and so on – that is, place in the conventional sense – is problematic in understanding traditional knowledge. However, the potential of modern communication, and the phenomenal evolution of community through that communication, have suggested an emergence of the concept of community beyond limits of place and materiality,[44] whether speaking of traditional communities or the virtual community. The concern is the processes through which the information exchanged in that communication is made readable and commodified, without necessarily acquiring understanding or, indeed, knowledge. Thus, the relationship between information and its exchange signifies a critical aspect of community in the context of the current debates.

Much of this conflict between private rights in information and communal rights in traditional knowledge may be traced to this territorial exchange value of information. Indeed, rights to land (and the possible cultural knowledge therein) are more or less de-limited by place as a means by which to prevent the perceived proliferation of adversarial and competitive use. Thus the attachment to place continues the process of simplification and objectification of community knowledge, in ways not unlike the simplification of creativity and the legitimation of information through intellectual property requirements of origination (authorship, inventorship, the personality of information) and in-imitativeness (originality, inventiveness, novelty).

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[43] See for instance, the discussion of problematic nostalgic notions of community in Bauman Z. (2000). *Liquid Modernity*, Cambridge, Polity: 92.

[44] Bauman Z & May T. (2001). *Thinking Sociologically*, 2nd ed, Oxford, Blackwell: 111-112.

In the emphasis on finite place as distinct from community space, both for the definition of "Indigenous" and for the recognition of community,[45] traditional knowledge is disassembled, as it were, into information within an econo-legal framework of protection and regulation.[46] This discursive rendering of community as a finite place (and therefore translating space as recordable and "readable") diminishes knowledge to make it available as objects of information, operating as: "a master of places through sight."

> The division of space makes possible a *panoptic practice* proceeding from a place whence the eye can transform foreign objects into objects that can be observed and measured, and thus control and "include" them within its scope of vision … It would be legitimate to define the *power of knowledge* by this ability to transform the uncertainties of history into readable spaces. [47]

It may be seen that in exhausting knowledge in this way, and re-presenting it as information, the community is deterritorialised and deferred from its knowledge, culture, territory, and integrity. Knowledge, as discussed, is an intimate part of Indigenous and traditional territory. In this way, territory is affirmed not through historical, legal, or classical anthropological renditions of place, but through ongoing community expression of space.

The ongoing expression of tradition is vital to the dynamic concept of community, but inextricable from this connection to and expression through territory and its resources (cultural, natural, intellectual, and otherwise). Territory is not just the physical

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[45] Seen, for example, in the unbroken connection to place required by Australian courts in determining native title claims, discussed later in this chapter.

[46] Similarly, this compartmentalisation renders the issues of knowledge translatable as a contest. This is related to earlier discussions of intellectual property regimes and the economic modelling of information. See also McKenna (2002): 47, where he discusses the way in which Australian Indigenous land rights are constructed as a competition for place, rather than more appropriately understood as territory. This construction of land rights results in the kind of abrogation of rights to knowledge seen in recent native title decisions in Australia, and discussed later in this chapter.

[47] De Certeau M. (1988). *The Practice of Everyday Life*, Rendall S (trans), Berkeley, U of California P: 36. McKenna also notes this discursive containment of history through the law in *Looking for Blackfellas' Point: An Australian History of Place*, Sydney, UNSW P, 2002.

parameters of rivalrous place, but emerges through community practice and cultural knowledge. This integral relationship between knowledge, the earth and nature, and identity can be traced throughout Indigenous and traditional beliefs and uses:

> As LA Whitt explains, the Cherokee see knowledge itself as being an integral part of the earth. Thus, a dam does not just flood the land, but destroys the medicines and the knowledges of the medicines associated with the land. "If we are to make our offerings at a new place, the spiritual beings would not know us. We would not know the mountains or the significance of them. We would not know the land and the land would not know us. We would not know the sacred places. If we were to go on top of an unfamiliar mountain we would not know the life forms that dwell there."
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> The same is true for the Mazatecs of Southern Mexico, whose shamans and *Curandeiros* confer with the plant spirits in order to heal: successful curers must above all else listen to the plants talk.[48]

Traditional Cultural Expressions, Becoming Community, Marking Territory

> I really get cross when people say, "Oh, what are you on about? You don't come from here anyway!" That really sticks in my craw. I always say, "Look, that's not important. I'm Koori, that's it!"[49]

While belonging to incorporeal, infinite, and timeless territory as a province of knowledge, community nevertheless refers to finite place that may be identified by ancestry, heritage, and practice.[50] Furthermore, place may be neither sufficient[51] nor

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[48] Posey DA. (2001). "Intellectual Property Rights and the Sacred Balance: Some Spiritual Consequences from the Commercialization of Traditional Resources," in Grim JA (ed), *Indigenous Traditions and Ecology: The Interbeing of Cosmology and Community*, Cambridge Mass, Harvard UP, 2001: 4-5.

[49] Mary Duroux, Moruya, quoted in Chittick L & Fox T. (1997). *Travelling with Percy: A South Coast Journey*, Canberra, Aboriginal Studies P: 163

[50] This is derived from Félix Guattari's distinction between the virtual Universes of value, and finite existential Territories, but departs from this distinction in maintaining territory as central to community without limiting it to physical space. A re-definition of "territory" pre-figures the incorporation of knowledge into information systems that seek to limit the knowledge in "territory" according to the same taxonomy. See Guattari's discussion in Guattari F (1995). *Chaosmosis: An Ethico-Aesthetic Paradigm*, Bains P & Pefanis J (trans), Sydney, Power Publications. This shares aspects of Gilles Deleuze's notions of the relative (finite Territory) and absolute (virtual Universe of value): Deleuze G. (1986). *Cinema 1: The Movement-Image*, Tomlinson H & Habberjam B (trans), Minneapolis, U of Minnesota P.

[51] This is important to arguments against the denial of community based upon the loss of place (as in Australian native title law).

even necessary,[52] but will frequently be relevant as an aspect of the resources of community. The concept of community resources, therefore, does not deny the importance of actual identifiable place, but eschews the pre-conception of simplistic identification of origin and the ontological separation of community and its resources:

> Subject and object give a poor approximation of thought. Thinking is neither a line drawn between subject and object nor a revolving of one around the other. Rather, thinking takes place in the *relationship* of territory and the earth … Yet we have seen that the earth constantly carries out a movement of deterritorialization on the spot, by which it goes beyond any territory: it is deterritorializing and deterritorialized. It merges with the movement of those who leave their territory en masse … the earth is not one element among others but rather brings together all the elements within a single embrace while using one or another of them to deterritorialize territory. Movements of deterritorialization are inseparable from territories that open onto an elsewhere; and the process of reterritorialization is inseparable from the earth, which restores territories.[53]

The "community" is not tied to neighbourhood, to place, but is deterritorialised, and the model of community resources comes from a reterritorialisation of community itself, not from external (and revocable) regulation imposed upon the perception, conceptualisation, and management of traditional knowledge. In other words, community cannot be separated out by the physical information and boundary-making of place, but is expressed through the ongoing character of land and resources within community, as territory. That identity is indicated by expression through traditional culture and knowledge.

Territory emerges, therefore, in the interaction between community and resources, in the refrains of knowledge, as it were. Land is therefore a resource of the community

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[52] For instance, place may not be critical in the same way to the lifestyles and cultural expression of some traditional communities, including the Roma.

[53] Deleuze G & Guattari F. (1994). *What is Philosophy?* Burchell G & Tomlinson H (trans), London, Verso: 85-86. It is worth considering here also the slightly different principles put forth by Maurice Merleau-Ponty, who understands a kind of symbiotic and mutually constitutive relationship between the animal (nature) and the person, rather than essentialism based upon evolutionary hierarchy. See the discussion in Merleau-Ponty M. (1988). *In Praise of Philosophy and Other Essays*, J Wild et al (trans), Evanston, Northwestern UP: 165.

that is recognised through the tradition and cultural knowledge inhering in the land, rather than competitive relationships to land: "it is land involved in a particular relationship which is perceived as a resource, and thus the land itself *refers to* the site of real valuation – generative or productive relations between persons."[54] The site of contestation, of territory, is that of culture and community. "Land" is always already marked by community, the marking and making of territory, but physical land in and of itself is indexical of the depth of community integrity indicated by that land, and the territory constituted by and constitutive of community.

Therefore, while communities may be dispersed and alienated from their physical land (place), the assertion as communities cannot be defeated by this displacement, because of this disembodied memory of the community subjectivity (space).[55] This relationship anatomises territory. In other words, territory cannot be realised and accessed without the facilitation of community management and governance, and the access to and maintenance of traditional cultural expressions and their value to community structure, identity, and self-expression.

Territory cannot be understood simply in terms of place, rendered the physical "information" exchanged between community and the separate legal regulation of its resources. Territory does not pre-exist community, but can emerge only in the becoming of community, producing the site, the location, the "neighbourhood" of culture. The marking and recognition of territory, therefore, occurs not through

[54] Leach J. (2004). "Land, Trees and History: Disputes Involving Boundaries and Identities in the Context of Development," in Kalinoe L & Leach J (eds), *Rationales of Ownership: Transactions and Claims to Ownership in Contemporary Papua New Guinea*, Wantage, Sean Kingston Publishing: 42.

[55] Guattari refers to the impossibility of being wiped out in the process of "historical discursivity," such as the discursive translation of traditional knowledge through intellectual property law and through its misappropriation into non-traditional copyright, inventions, and so on, because of the persistence of the irreversible refrain of "the incorporeal memory of collective subjectivity." See Guattari F (1995). *Chaosmosis: An Ethico-Aesthetic Paradigm*, Bains P & Pefanis J (trans), Sydney, Power Publications: 27.

imperial models of "title," but through community: "All the inhabitants have to do is *recognize* themselves in it when the occasion arises."[56] Thus, territory is not de-limited by western conceptions of physical space, of utility, and of resources. These indications of territory are incomplete and worse, misleading in the attending subsidence and alienation of knowledge:

> Still, we do not yet have a *Territory*, which is not a milieu, not even an additional milieu, nor a rhythm or passage between milieus. The territory is in fact an act that affects milieus and rhythms, that "territorializes" them. The territory is the product of a territorialization of milieus and rhythms … There is a territory precisely when milieu components cease to be directional, becoming dimensional instead, when they cease to be functional to become expressive. There is a territory when the rhythm has expressiveness. What defines the territory is the emergence of matters of expression (qualities).[57]

What defines the territory is "community."

> The territory is not primary in relation to the qualitative mark; it is the mark that makes the territory.[58]

Thus, the relationship of community to territory and resources is realised not through the linkage of territory as object with an individual legal subject, but in its sense-making through customary law and cultural expression, which will differentiate territory (understood not just as land, but as knowledge, culture, and so on) according to subjects who are recognised by the community and perform within the community. In other words, rights will be conferred upon subjects because of their status within the community, and not despite it. Those individuals will not be "subjects," as such, unless recognised by the community. The agency of community does not constitute the individual subject, but the territory (knowledge, culture, land):

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[56] Augé M. (1995). *Non-Places: Introduction to an Anthropology of Supermodernity*, Howe J (trans), London, Verso: 44.

[57] Deleuze G & Guattari F. (1987). *A Thousand Plateaus: Capitalism and Schizophrenia*, .Massumi B (trans), Minneapolis, U of Minnesota P: 315.

[58] Deleuze G & Guattari F. (1987). *A Thousand Plateaus: Capitalism and Schizophrenia*, .Massumi B (trans), Minneapolis, U of Minnesota P: 315.

> The expressive is primary in relation to the possessive; expressive qualities, or matters of expression, are necessarily appropriative and constitute a having more profound than being. Not in the sense that these qualities belong to a subject, but in the sense that they delineate a territory that will belong to the subject that carries or produces them. These qualities are signatures, but the signature, the proper name, is not the constituted mark of a subject, but the constituting mark of a domain, an abode.[59]

Sui generis protection built upon the notion of community resources, or the inextricable link between community (cultural diversity) and resources, accounts for the knowledge and identity in land, culture, expression, and nature. This is distinct from the assimilation of community territory within legislative responses to land claims as competitive claims. Such responses attempt to decode externally the relations between community and resources,[60] ultimately erasing territory and abode[61] in the process. The legitimate subject matter of this model, therefore, is that of "community resources," rather than aspects decoded and compartmentalised according to existing laws, whether they be intellectual property, environmental, or rights to land.

The Community in Land

> This land is mine …
>
> *This land is me ...*[62]

These two lines come from the Australian musical film, One Night the Moon, directed and co-scripted by Australian Indigenous film-maker, Rachel Perkins. Based on events from 1932, it is the story of the disappearance of the daughter of a pastoralist couple who, after waking up at the bright moonlight streaming into her bedroom,

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[59] Deleuze G & Guattari F. (1987). *A Thousand Plateaus: Capitalism and Schizophrenia*, .Massumi B (trans), Minneapolis, U of Minnesota P: 316.

[60] See further Gibson J (2005).

[61] Used in the sense of Deleuze and Guattari, in the context of Territory and becoming community, in Deleuze G & Guattari F. (1987). *A Thousand Plateaus: Capitalism and Schizophrenia*, .Massumi B (trans), Minneapolis, U of Minnesota P.

[62] One Night The Moon. (2001). Film. Perkins R (dir). Perkins R & Romeril J (writers).

wanders into the night chasing after the moon and is lost in the bush. The father refuses the help of an Aboriginal tracker and orders him off his land, an action with tragic consequences. In the scene from which these words come, the father's refrain, "This land is mine," is juxtaposed by Albert the Tracker's refrain, "This land is me."

This film is particularly striking in its capture of one of the key differences between the concept of ownership under property law (and indeed, intellectual property law) and Indigenous Australian custodianship with respect to land and the traditional and cultural knowledge found within that land. While conventional models of real property ownership vest in the individual, rights with respect to a recognisable and exhaustible entity, diverse Indigenous concepts of custodianship resist the homogenising universality of this regime, and suggest various relationships of shared and enduring interaction with the land that transcend each individual and indeed the "boundary" of the parcel itself. Real, yet intangible, non-exhaustible, and inalienable, the various forms of Indigenous and traditional custodianship cannot be translated as the finite and temporary *this land is mine*, in which the enduring community in *this land is me* will expire.

In addition to intellectual property laws, the various laws pertaining to native title claims over traditional lands have been suggested as a means of protection for cultural practices associated with the land.[63] In Australia, recognition of the necessary relevance of customary law to the interpretation and application of intellectual property rights in Indigenous cultural property appeared to be extended by the High Court in the decision of *Mabo v State of Queensland (No 2)*,[64] which ultimately led to the enactment of the Native Title Act in 1993 (NTA). However, Australian native title

[63] Puri K. (1993). "Copyright Protection for Australian Aborigines in the Light of Mabo" in Stephenson MA & Ratnapala S (eds) *Mabo: A Judicial Revolution*, St Lucia, UQP: 132 at 159.

[64] (1992) 175 CLR 1

law, in its judicial determination, requires a continuous connection to the land. This requirement is often fatal to claims in that dispersal of groups and alienation from cultural practice have almost inevitably occurred during the process of colonisation.[65] The material form that is central to the application of native title legislation, at least in Australia, is that of the community itself as a fixed and permanent entity in a geographical and historical place, thus defeating its evolution by fixing and locating tradition at that moment.

Competitive territories – *this land is mine*

While a careful consideration of the consequences of this application of community in Australian native title law is beyond the physical limits of this paper, the character of this relationship between community and resources, in the context of the concept of territory developed thus far, allows the identification of the injustice of the separation of cultural knowledge and natural resources in the application of this law. Indigenous and traditional resources are almost inextricably linked to the land (including traditional cultural expressions embodied in the land both literally, in the form of cave paintings, and performatively in the relationship between the production of expressions, knowledge in the land, and practices associated with the land). This is not to suggest that such processes are impossible without access to this physical land, but to reiterate the significance of a more holistic conception of "resources." This includes the recognition of traditional knowledge as beyond that of products registered by intellectual property law and to include knowledge in and of the land itself. Thus, access to land is also relevant in the context of freedom of expression, and access to the means to fulfil that expression.

[65] This is also relevant to concerns over self-determination in international human rights law. See further Gibson J (2005): Chapter 8.

Despite this relationship between land and culture, Australian native title law has resisted the acknowledgment of rights to cultural knowledge inhering in land, separating this as within the ambit of intellectual property laws. Therefore the law, in its application, manifests land as property, and justifies (alarmingly) the extinguishment of rights through alienation from the land and perceived "loss" of traditional knowledge.[66]

Furthermore, the international community also neglects the link between cultural knowledge and land, despite the conflict over access being conflict over resources in that land, and international discussions toward protection have placed the responsibility for examining protective regimes within an intellectual property context, in the form of the WIPO IGC. Nevertheless, the problems with this separation are identified by the IGC itself:

> The working concept of TK … puts a particular emphasis on the fact that TK is "tradition-based." That does not mean, however, that TK is old or that it necessarily lacks a technical character. TK is "traditional" because it is created in a manner that reflects the traditions of the communities. "Traditional", therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated … TK is a means of cultural identification of its holders, so that its preservation and integrity are linked to concerns about the preservation of distinct cultures *per se*.[67]

Indeed, the adequacy of native title laws is defeated by the same misunderstanding that underpins attempts to assimilate traditional knowledge within intellectual property models. Once again, the underlying objectification of information facilitates

[66] John Scott, Secretariat for the Permanent Forum on Indigenous Issues at the Division for Social Policy and Development, DESA, made the following comment on the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002): "The Yorta Yorta, unfortunately, listened to their lawyers, and the judge found that they had no claim to their native title because they were locked away on mission a hundred years ago and lost most of their traditional language and traditional knowledge." See Scott J, "Indigenous Peoples and the Creation of an Inclusive International Legal System." Edited transcript of remarks Carnegie Council Studies seminar. New York, Carnegie Council of Ethics and International Affairs, 14 January 2004: 9.

[67] WIPO/GRTKF/IC/4/8 (30 September 2002): 11

the translation of the cultural values of identity and community cohesion (*This land is me*) within the paradigm of individual ownership (*This land is mine*).

Community becomings: *this land is me*

> Land is our life, land is our physical life - food and sustenance. Land is our social life, it is marriage; it is status; it is security; it is politics; in fact, it is our only world. When you take our land, you cut out the very heart of our existence.[68]

In other words, land may be denied, but communities can never be alienated from territory, precisely because of the inextricable link between cultural expressions, traditional creativity, and the construction of territory. Indeed, it is the persistence of territory, through the knowledge, maintenance, practice, and expression of culture, which makes ongoing denial of access to land meaningful and significant to Indigenous communities. While land and territory are integral to culture and indeed to identity, this "connection" persists despite physical separation and colonisation:

> The significance of land is not restricted to indigenous peoples who continue to inhabit their place of origin. For those who have been forced off their land or who have moved, often to urban areas or shanty towns, for economic reasons, to escape armed conflict or to pursue education, the spiritual homeland continues to possess deep cultural resonance that is often reconfirmed by periodic ceremonies or rituals. From this perspective, denying indigenous children access to sacred sites because, for instance, they have been privatized or militarized, means denying them an important aspect of their own identity and compromising their full development.[69]

As distinct from individual relationships to a commodified entity (*this land is mine*), the community is realised through the ongoing and enduring relationships between members and towards tradition despite changes to its particular constitution over time. Traditional cultural expressions are intrinsic in the creation of territory and the

[68] Residents of Bougainville, southwest Pacific, quoted in Miriori MR. (1996). "Bougainville: A Sad and Silent Tragedy in the South Pacific," 5 *Do or Die* 59.

[69] UNICEF (2003). *Ensuring the Rights of Indigenous Children*. Report. October 2003. Innocenti Digest 11: 2.

resilience of communities. The identity of community, as it were, persists in the integrity of cultural and traditional expression and use of resources – *this land is me*.

Conclusion

In order to achieve an effective legal subjectivity for the Indigenous or traditional community, the community must be able to evolve beyond the fixation of the geo-historical moment of colonisation. This perspective enables the enduring identity and autonomy of a particular Indigenous or traditional community despite its evolution and adaptation in the face of ongoing colonisation and the effects of dispersal and alienation: "community should not be thought of solely as the domain of the small scale and geographically local."[70]

Traditional cultural expressions are part of the physical knowledge embodied in the land, and the ecological, social, and political knowledge of the community; indeed, the inextricable and fundamental relationship between traditional cultural expressions and the land is critical to community and of paramount importance to the relevant and appropriate understanding and protection of traditional knowledge.

[70] Little A. (2002). *The Politics of Community: Theory and Practice*, Edinburgh, Edinburgh UP: 63.