Who owns what? Indigenous knowledge and struggles over representation

Keyan G. Tomaselli

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Abstract

Ownership of field research records involving informants and subject communities is discussed with regard to doing research amongst indigenous populations. Intellectual property rights (IPR) law often assumes, for example, that an age-old mythical story retold by a contemporary informant is owned by the legal entity that facilitated its being captured in writing. The implication is that if the story-teller now wants to tell the same story to someone else, written legal permission from the legal entity would be required. IPR contracts freeze the dynamism of knowledge, killing its ‘lived’ relation, and the process owned by others (our research partners/host/subjects) is transformed into commodities that the original storytellers no longer own or control. For our ǂKhomani Bushman hosts, this constitutes information theft. A third party, in our case the academy, claims ownership of ideas our subjects thought were theirs. This article examines ensuing issues of IPR and ethics in relation to doing research amongst indigenous communities.

Keywords: Bushmen, copyright, indigenous knowledge, information theft, intellectual property rights, ǂKhomani, research ethics

Introduction

The relationship between ethical considerations, grant application and intellectual property takes us into the complicated realm of indigenous cultural considerations rarely acknowledged by legal regimes. Legal formulas, in contrast, are easy because

Keyan G. Tomaselli, the Centre for Communication, Media and Society, University of KwaZulu-Natal. tomasell@ukzn.ac.za
they ignore complexity, eliminate contradiction and seek single, determining, interpretations. This suppression of complexity often results in academic myth-making, while the application of intellectual property rights (IPR) aims at ownership, rather than enabling our primary task of learning via doing research. Publicly-funded research is supposed to occur in the open creative commons that is being everywhere commercialised, copyrighted, patented and trademarked. While the Berne Convention for the Protection of Literary and Artistic Works (1886) is necessary to prevent plagiarism and literary anarchy, the increasingly demanding IPR auditing regimes to which authors are now subject can only impede open commons research.

This article aims to engage academic researchers, legal representatives and indigenous communities in a discussion that brings to the fore the complexities of implementing indigenous IPR laws. Specific mention is made of the #Khomani San research informants of the Northern Cape, as this community is embedded in the Rethinking Indigeneity research track that is facilitated by the Centre for Communication, Media and Society (CCMS) at the University of KwaZulu-Natal (UKZN) (Finlay 2009).

*Intellectual property* (IP) refers to the intangible products of the mind, of which patents, trademarks, designs and copyright are the four forms. The first three are also known as *industrial property*. Patent law protects inventors of new products and processes from unauthorised manufacture, use or sale. Trademark law secures rights to distinctive words and symbols. *Copyright* confers upon creators of original forms of expression exclusive rights and protects authors from unauthorised usage (*Encyclopedia Britannica*). *Open access* and *creative commons* offer the right to access and to do so freely, sometimes with authorisation and/or payment for mass copying. Creative commons partially restricts use and commercial exploitation. Due citation is necessary to prevent plagiarisation. This issue is currently pertinent to academic researchers, authors and the like as the Department of Trade and Industry recently gazetted its draft national policy on IP. However, as the Authors’ Non-Fiction Association South Africa (ANFASA) notes, there are omissions to the draft relating to IP in digital format, as well as a lack of provision made for materials created for the blind and visually impaired (ANFASA 2013). The draft Protection of Traditional Knowledge Bill was also gazetted in April 2013, which acknowledges the legitimacy of traditional knowledge as a *bona fide* category of IP. The Traditional Knowledge Bill, proposed by Wilmot James, allows for the IP rights to be held by ‘community proxy’, i.e., a member of a community is delegated to serve as a representative to the community as an entity. This takes into account the collaborative nature of traditional knowledge (see Anon. 2013; James 2013). These internationally pertinent issues are made sense of through specific encounters with indigenous groups in South Africa.

The task to be addressed here discusses a problem that the CCMS research teams encounter on every field trip when working with contemporary Kalahari communities:
how to deal with educational bureaucracy that sees the world only in terms of instrumentalist spread-sheets, quantifiable outputs and potential commercialisation. New forms of public accountability have lost sight of the lived, intangible practice of knowledge production in the field where remote rural communities live. It is exceptionally difficult to quantify and establish the origins of indigenous knowledge (IK). Due to the collective nature of knowledge production in cultures that rely on oral narrative as transmission, the boundaries and timeframes as to who composed collective narratives become blurred. In most cases IK emerges, adjusted and built upon in subsequent generations and in constantly occurring new contexts. As such, this fairly organic production of knowledge is incompatible with the rigours of copyright law. Copyright assigns protection to an original literary work for 50 years from the first date of publication. How does one ascertain the date of ‘first publication’ in a pre-literate society? Who determines when an oral narrative was first relegated to the public realm? Oral narratives are often used as a teaching device in indigenous communities; therefore they are subject to change and evolve with the current needs of the community. As the narratives are composed from within the community itself, it very often has close ties to a specific geographical location and to particular individuals in a community.

Predatory research versus knowledge production

The consequences of what is perceived as predatory research have resulted in some communities and many individuals within them resisting research, distrusting researchers and/or charging them for their cooperation and information/knowledge. They complain of maltreatment by researchers due to a lack of ‘recognition’ (Afrikaans: erkenning), theft of their ‘knowledge’ (kennis) and lack of due respect for them as individuals. DNA testing has resulted in more angry allegations of bio-piracy and bloodletting; now researchers are accused of stealing not only their ‘kennis’ but also their bodily fluids. This perceived irresponsible behaviour by a minority of academic researchers undermines the indigenous communities’ trust and rapport with all researchers. It is imperative that academic researchers behave in an ethically responsible manner when conducting fieldwork, so as not to break the tentative rapport established by other researchers. If both researchers and the researched do not implicitly agree to trust each other, then the research endeavour will result in an elaborate charade (see Metcalf 2002).

Academic institutions and IPR

It is not possible in anthropological and/or IK research to divide up holistic IK (kennis) and lived critical indigenous methodologies into separate parts, and to parcel each out for different ownership as the National Research Foundation (NRF) now
This kind of Cartesian-derived IPR categorisation does not recognise the indigenous as the repositories of aspects/versions of that knowledge. Pre-capitalist Malawian oral traditions, for example, did contain notions of ownership, in relation to the individual, the community, and even the genre and form (see Kerr 2006). These ‘notions’ are excluded by IPR discourse as they are not written down, codified legally, and lodged in law. UKZN further wanted to claim all the IPR, to the exclusion of the rights of our other sponsors and collaborators, though the NRF stipulation would have required acknowledgement of these. Certain practices are imbued with spiritual significance and tied to folk history. Consequently, research informants are reluctant to share what they deem to be ‘sacred’ information with strangers (Brush and Stabinsky 1996). The intellectual commons that we have developed with our subjects over a 19-year-period could have been destroyed had I signed the UKZN contract, its ‘Letter of Research’, as it stands. One is precariously caught between having to honour the indigenous community’s trust that is implicit when they impart their claimed kennis (IK) to the researcher on the one hand, and having to manoeuvre through institutional requirements on the other.

Like the Letter of Research, the UKZN Ethical Clearance Form, based on a biomedical or clinical psychology model, leaves little space for culturally sensitive approaches stemming from ontological frameworks different from the Cartesian assumptions codified in IPR law. These contradict the practices of critical indigenous methodologies (see Denzin, Lincoln and Smith 2008; Mboti 2012; Watal 2001).

Critical indigenous methodologies use the ontologies and worldviews of the indigenous population with which they work as the entry point for their analysis, rather than imposing a Cartesian perspective on what is observed. While control and monitoring mechanisms are necessary, they should be sensitive to different contexts and needs. What is legally feasible does not necessarily equate with what has meaning in the ontologies of our research informants. These legal stipulations do not take into account the unpredictable and spontaneous context of conducting fieldwork. Cumbersome legal requirements (such as getting a-literate informants to sign informed consent forms) often hinder the research process, as legal documents are viewed with suspicion and contempt due to indigenous communities sometimes linking the signing of such documents with their experiences of land dispossession. Further, the research letter and ethics form disrespect our subject communities’ rights to own their own information and to be treated in terms of the Kantian imperative. Finally, both documents need to address allegations by many subject communities and their representative organisations of ‘theft of [IP] knowledge’ perpetrated by researchers, their employers and their publishers, even if legitimised by IPR contracts.

In short, the question is: How do we practise Agnes Heller’s reformulation of Immanuel Kant’s injunction, ‘Act in such a way that you will always treat humanity,
...whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end’.

For logistical reasons we had started a second phase of a cultural mapping project in July 2011 before the UKZN letter of research, the grant contract, previously unknown to us, had been received. On receipt via 3G transmission after our arrival at Witdraai in the Kalahari, we realised that the contract encoded a whole series of contradictions that needed resolution before we could accept the funding.

CCMS had responded to a call put out by the College of Humanities for strategic research funding that would involve students. Our proposal, ‘Beyond Biesje Poort: extending participatory indigenous research’, was inserted into an ongoing 20-year project entitled Rethinking Indigeneity that had attracted financial support from a variety of international funders, including the NRF. Only one of the funders, M-Net, of a different sub-project with a different San community, had claimed copyright on any aspect of the overarching project (a television programme sponsored by the channel, made by a student). UKZN, however, initially insisted on total ownership of the resulting ‘intellectual property and information’ generated by the research done in the specific Beyond Biesje Poort sub-project for which the College of Humanities funds were allocated.

Contracts and ethics forms assume that all parties are literate. Our informants/co-researchers/subject community/hosts are largely a-literate. Conventional letters of consent and written permissions are often treated with suspicion by them. We thus largely work through their designated cultural, communal and development organisations which often require written research and/or media contracts. These list payment (i.e., a kind of facilitation tax) as being required.

The first phase of the Biesje Poort sub-project had secured multiple funding sources (National Heritage Council, McGregor Museum, the NRF and the Northern Cape provincial government). In the broader multi-institutional team, individual staff and students were separately sponsored by the Durban University of Technology (DUT), and the universities of Cape Town (UCT) and Pretoria (UP). UKZN, without consultation with CCMS, had declined the bulk of the costs – travel and accommodation – from the budget (for a project in the Northern Cape, a 3 400km round-trip from Durban). Nevertheless, the UKZN one-size-fits-all contract wanted total ownership of the IPR and information, no matter the multi-institutional intellectual composition of the team and its diverse financial sponsorship, of which the UKZN allocation was minuscule.

A-literate informants do not write or publish; however, academics and journalists do. Unless specified, copyright of someone else’s idea thus resides with the author of the written document, not with the oral story-teller who relayed the narrative in the first place. This also applies to the taking of photographs, especially in public spaces; another irritation for our ǂKhomani hosts.
The issue here related to the university’s confusion between patent, trademark and copyright laws, and the commodification of cultural research practice and outputs by tertiary institutions everywhere. What this contract did was to objectify the researcher–researched relationship, to commoditise it, thus turning it into a perishable good and putting a value on that which cannot be valued. Placing my argument into a legalistic perspective, Kundayi Masanzu, Director of ANFASA, responded:

[The UKZN contract] is a typical ‘run of the mill’ contract from most institutions where they claim – and rightly so – ownership of the finished product because they either commission and/or fund it and it is also being done within the scope of the academic’s employment. However, in scenarios where the foreseeable output is nothing more than a publication, some institutions will relax the rules and re-assign the copyright in the publication back to the academic/researcher in exchange for a non-exclusive licence.

Legal or not, by taking total ownership of both the research information and the final product, which were not defined in the letter of research, the potential consequences of the contract may have denied the research team the opportunity 1) to publish its findings, thereby ironically a) putting its staff in breach of university conditions of service and b) dissuading students from publishing from their theses, even though this is a requirement of their registration. Further, our informants might have accused us of 2) engaging in the theft of indigenous knowledge; and 3) in the event that publication did occur, the bizarre requirement was imposed that acknowledgement of the source of the funding (the College) was denied unless ‘express permission’ was obtained in writing; 4) the removal of the research (‘release of information’) from the public domain (through which it was to be funded), or acknowledgement of the grant, public or otherwise, without written permission, is incomprehensible in an academic environment which is supposed to be operating in the global intellectual commons. My making information about the source of this project’s funding known to our co-sponsors without ‘written permission’ thus possibly implicated me in a legal transgression, should any gathering at which this analysis is presented be deemed by the university to constitute a ‘public’ event. And finally, 5) many of the instructions that emanated from the grant selection committee were ill-advised, insisting on all kinds of requirements that were financially and logistically impossible to meet. In the event, I insisted on the exclusion of the clause claiming for UKZN ‘intellectual property rights and information’ from the final contract which was acceded to. I was the only grant holder to raise these objections.

The implication is that if the indigenous story-teller wants to tell the same age-old story to someone else, ‘express written legal permission’ from UKZN will be required. The university’s claim to ownership of local (indigenous) knowledge is exactly what the IKS paradigm questions. IPR freezes the dynamism of knowledge and the process owned by others (our research partners/hosts/subjects) into copyrighted and
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trademarked commodities that the original story-tellers no longer own or control. For our hosts, this is information theft, as the university has by this means now legally positioned itself to sell back to them (and anyone else) their own information and stories, whether original or inter-generationally transmitted. This, clearly, was not the university’s intention. However, the contract nevertheless claimed ownership of ideas which our subjects claimed were theirs. Thus is knowledge thereby frozen, commodified and copyrighted by IPR.

In the letter of research, UKZN claimed ownership of all the IPR and all information gathered by its grantees. If the research generated is to become the ‘property of UKZN’, then it is unlikely to be published even as a final product, as most journal publishers require that copyright be assigned to them on publication. This consequence was not the university’s aim, but the implication could be to prevent publication of the research by a third party. In the normal course of events, however, publishers are quite flexible in terms of specific considerations.

IK cannot be ‘owned’ by a corporation or a university, and, indeed, our subjects would not permit ownership of their stories by an external entity. We are dealing with intangible conceptual, spiritual and cultural knowledge here, not patents, procedures or inventions as might be the case in engineering, science or agriculture. What UKZN was doing, however, was to trademark (popular) information which it did not itself generate. This appropriation may be legal, but is it ethical?

These issues are, to a good degree, addressed by Brill (Amsterdam) which has developed the following protocols in its ‘Consent to Publish’ agreement:

a. the right after publication to include the Contribution free of charge in a compilation of own works in print, such as a collection of own articles and/or lectures, on condition that due acknowledgment is made of the original publication;

b. the right after publication to quote the Contribution and/or build on the content of the Contribution, on condition that due acknowledgment is made of the original publication;

c. the right to reproduce the Contribution in a limited number of copies for the sole purpose of private practice;

d. the right to include the Contribution in a collection by way of a support to lectures and presentations given by the Contributor, on condition that the normal exploitation of the Work by the Publisher is not harmed and that due acknowledgment is made to the original publication;

e. all the intellectual and industrial property rights or any similar rights with respect to (the protection of) methods, processes, designs and models described in the Contribution;
f. The right to post the post-print version of the Contribution on his/her own personal website free of charge. This means the Contribution may be shown exactly as it appears in print;

g. The right to allow the institute employing the Contributor to post the post-refereed, but pre-print version of the Contribution free of charge on its website. The post-refereed, pre-print version means the version which contains all adaptations made after peer reviewing. The Publisher’s lay-out must not be used.

Within this framework, the IPRs are usually dealt with as follows in our own research: 1) our informants own the stories they tell us, but give us permission to publish them with acknowledgement; 2) we, the researchers, own the arguments and explanations that the stories illustrate; 3) the publisher might claim copyright of the article, book or chapter via which these stories are made known. In terms of this value chain, it is unclear what ownership the university was claiming. If the intention was to commercialise intangible humanities research, how is this possible when we are simultaneously required to lodge our work with publishers who themselves often claim copyright? This clause would appear not to be of much use in the humanities, which, in contrast to science and engineering, critique processes, which have little or no commercial value.

Even where invention does occur, or where materials are processed into a commodity, with, for example, the Hoodia appetite suppressant, ownership is often contested. An IPR lawsuit against the Council for Scientific and Industrial Research (CSIR) by South African San Institute (SASI) resulted in the establishment of the Hoodia Trust to distribute a six per cent portion of proceeds earned by the patent to the San. However, other indigenous groups (and San in Namibia and Botswana) have also used the Hoodia plant and question the recognition of only some South African groups in claiming sole ‘IK’ of the plant’s pharmacological properties. In our case, we have secured from Unisa Press its agreement to cede full copyright to authors when republishing two independently produced works that have been largely authored by our informants (Kruiper and Kruiper 2011; Lange, De Wee and Van Rooi et al. 2007).

Ethical implications

Given that our projects are people-based, overall, the output or finished product will be the publication that comes out of this research and little more, unless action-based research is involved. The South African Intellectual Property Laws Amendment Act was referred by the president back to the National Assembly on 26 September 2012, partly because it had not been referred for comment to the National House of Traditional Leaders. The proposed act makes IK the commercial property of the
community from which it emanates. But this poorly drafted law is unable to clearly define ‘the community’ that would own IK. In contrast, in the field of patents, benefit-sharing agreements are usually signed with the community involved in the research.

In the UKZN case, an unsuitable contract was applied to anthropology/archaeology/humanities/critical social science scholars, whose outputs should not be considered commercially equivalent. However, as a criminologist and lawyer who specialises in the protection of traditional knowledge in Africa, Andrew Mutsiwa notes that

the UKZN letter of research does not draw distinctions between patents which have commercial and industrial implications, as is the case with engineering or industrial design, and the humanities which is much more fluid in terms of intellectual property ownership and commercial impact. Letters of research should be reviewed to ensure that it is relevant and appropriate to the discipline that it serves. (Personal communication, 24 April 2013)

He adds: ‘The approach that has been here adopted by UKZN is tantamount to granting Indigenous Knowledge ideational dependence to the dominate culture of western knowledge regimes through integrating the former into the knowledge infrastructure of intellectual property’ (Personal communication, 11 July 2013).

Institutions will try to secure ownership of IP in the form of patents and trademarks to leverage monetary value; the second reason cited by the president for referring the act back to Parliament was because certain provisions make it a ‘Money Bill’ – one that involves taxation or government spending, but whose provisions were not in accordance with the constitution. While these issues are under discussion, generally, copyright is excluded from these provisions, because it usually results in a publication which is governed by different criteria characteristic of the publishing industry. Issues surrounding IPRs are being negotiated on a global scale, as there are far-reaching cost implications for the publishing industry in both developed and developing countries (Maskus 2000).

I now return to the question of ethics with regard to the context in which my example has been framed. While statutory ethical procedures are intended to (and do) protect the researcher, the employer and the subjects, in the specific cases of the kind discussed here, the opposite would appear to be true in this particular instance. In such situations 1) ethics and legality are not necessarily co-incident; 2) ethical considerations can be overruled by commercial imperatives legitimised by IPR-led contracts; 3) the biomedical assumptions of the current ethical clearance form are often inappropriate for other kinds of social, cultural and historical research; and 4) IPR overrides the Kantian imperative.

What are the options facing researchers in light of these contradictions? Our researchers assess their location within the IP value chain and anticipate the likely
consequences for their subject communities, which are also discussed in their theses and publications. Where subject communities might be disadvantaged by IP legislation, the following mechanisms might apply: 1) liaison with their representative organisations; 2) the making available of the research data generated to them; 3) ensuring that the published products are supplied to our hosts; 4) care is taken not to alienate the subjects from their intellectual labour or the researcher’s labour from them, such work being potentially useful for the subjects’ own purposes; 5) never to commercialise academic research. Subject communities require that systems that work for them are to be incorporated, failing which researcher access to them may be compromised, and may be even denied; 6) facilitating organisations like SASI and the Working Group of Indigenous Minorities in Southern Africa (WIMSA) also enable such work, and due acknowledgement is given.

The non-governmental organisations (NGOs) which facilitate our research sometimes suggest that a ‘payment’ be made to the organisation (see WIMSA contract, p. 2). This provision is difficult for academic researchers to comply with, as research funders like the NRF or universities do not normally approve this kind of expense as a legitimate line item. In any event, the sheer cost of doing field research – if the abovementioned reciprocity is adhered to – provides already funded research and data to representative NGOs, data which are statutorily lodged in the public domain, on open access where unpublished student thesis research is concerned.

It is not always clear with which organisations one is dealing when in the field or how to proceed when different agendas (and perhaps competing intermediaries) seem to be at work. For example, some of our ǂKhomani partners prefer to work directly with researchers and other professionals, irrespective of NGO contracts and policies claiming to represent and protect them. Organisations like the San Councils are WIMSA’s representative bodies in Namibia, South Africa and Botswana. WIMSA is a regional advocacy San organisation; SASI, on the other hand, is a support organisation; while the Bushman Council seems to be a support-NGO in something of a competing space (see Francis and Francis 2010).

Where SASI and WIMSA act as enablers and sometimes seemingly as regulators, the San Council’s agenda appears to include one of labour brokering for its own members, having twice insisted that CCMS employ one of its members on its short-term research projects. It was not clear what this person would be doing or why his/her employment was being requested. The San Council does not have statutory oversight as a gatekeeper between researchers and the researched, though WIMSA states that the councils, as political bodies, negotiate with governments and coordinate national issues regarding development programmes with their communities, donors and the industry. Except for Angola, each country has a San Council which is financially supported by WIMSA, the regional mother body and secretariat. The South African San Council (SASC) was mandated by the WIMSA annual general assembly (AGM)
to negotiate with the CSIR, Phytofarm and, later on, Unilever, regarding royalties administered by the Hoodia Trust. About R500 000 was used by both the SASC and WIMSA to travel to and attend meetings, and also to communicate with the San communities. It was not meant to split the milestone payment amongst the countries and San communities.

In the Biesje Poort research project, contracts had already been signed with four ǂKhomani individuals with whom we have had a long-term relationship, whose employment had been approved and processed by UKZN and the McGregor Museum which administered the funds, and whose interpretations we wanted to elicit. We were scrupulous in applying labour law and in respecting the requests of our short-term employees who were wary of the San Council’s claims to employment and representation. Members of councils may have no clear historical link to the IP they claim is part of their heritage (Prins, in Rønning et al. 2006: 12; Francis and Francis 2010).

Some organisations additionally insist that researchers pay ‘taxes’ to them, to enable them to facilitate the research, to ‘protect’ their constituents’ interests, or to ensure access to such research subjects. We pointed out to the San Council gatekeeper that 1) an extra position (or tax) was not a line item in our or the funder’s budget; 2) that we had already engaged four members of the community in terms of the research contract signed with the funder; 3) the local people to be employed had the cultural expertise needed for the project; 4) we were following labour law to the letter; and 5) we did not need his or his organisation’s permission to do the research (though it would be helpful to have their blessing, as they could muddy the waters).

All over the country remote communities are held hostage, or supposedly represented, by kinds of ‘cultural’ and development gatekeepers who claim to exercise communal rights over individuals who are rarely consulted on the options available to them. The result is that such individuals are often eliminated from employment and opportunities by these gatekeepers who want to act as official labour brokers despite not being officially registered to conduct such business. They operate as a kind of rentier class who monopolise and manage access. This creates multiple layers of increasing dependency on the one hand, and resistance on the other, on the part of those being ‘represented’ – people who, on occasion, are eking out their survival despite these supposed development agents. That is one reason why they engage directly with researchers. Although these issues have been discussed largely in a southern African context, tussles over the ownership of IK have international resonance (see Brokensha, Dennis and Werner 1980).

**Conclusion**

Postmodern research methods, as we are developing them, respond constructively to the non-Cartesian ontology of our co-researchers/subjects (see, e.g., Mboti
But these are now subject to claims of ownership placed in a positivist and objectified structurally violent commercialised IPR realm that is antithetical to the ways the indigenous make sense of the world as a set of interacting intangible (often unknowable) spiritual resources, elements of a landscape, linked to the ancestors, impacting them continuously. The final question in the logic here is: Who owns God or the ancestors – the copyright lawyers? The universities? Corporations?

Academic research is largely funded by taxpayers, yet ownership of this labour is conventionally ceded to publishers, many of whom then sell it back to the institutions within which it was produced. This is similar to the CSIR’s appropriation of certain chemicals found in the *Hoodia* plant, without initially acknowledging centuries-old traditional knowledge. Scholarship in the Third World is similarly vulnerable: high-quality research is produced at a fraction of its actual cost (thanks to the public purse), which is then donated to international commercial publishers who package it and charge huge fees for it, with little direct material return to its authors or knowledge holders (Merrett 2006). In any event, just who gets the returns is always contested (Nwauche 2003), as has been the case with *Hoodia* royalties. What was previously a traditional commons has been translated into ‘property’ whose proceeds and recipients are now being questioned by those who still have access to the plant, but have been excluded from the monetised value chain once it had been processed as a product and marketed as a commodity. The stringent adherence to IP laws may, in effect, dispossess indigenous communities of even their indigenous oral history.

That the San Council, comprised of an educated group of town dwellers, has been receiving the (diminishing) *Hoodia* royalties is an indication of how copyright enclosures operate to create, or reinforce, class divisions. It is these very exploitative relations that perplex our traditional, rural, a-literate Bushman informants, even as they may be unaware of the very complex and expensive international value chain that beneficiates their raw information into theory which itself frames the ‘final product’ as manufactured by academics and published in books, journals and films. It is these relations that the UKZN letter of research, ironically, sought to leverage in its favour.

Who owns what is no longer clear to our sources, who allege exploitation and knowledge-theft everywhere by everyone. By enacting what it saw as a protective mechanism, UKZN lost the plot of who owns what, how, and whether these ownerships can be identified and how due returns, if any, can be calculated and disbursed. What was once a non-rivalrous self-renewing free resource now becomes ‘owned’ by legal entities, and thereby a source of division, competition and contestation between representative bodies and between individuals and those bodies, purely because it has been monetised. IK cannot be privatised, which is in essence the aim of the university’s research contract, as the university can only own the structure and analysis of the argument, as carried out by its employee. But the
content should remain in the public realm, as it is communally produced. This is supported by Article 9(2) of the Trade Related Intellectual Property Aspects (TRIPS) agreement, which states that copyright protection extends to expressions but not to ideas, procedures or mathematical concepts.

If heritage is a bundle of relationships rather than a bundle of economic rights (see Puri 1997: 48), then forms of expression and what is innately known cannot be considered a commodity, a good or a property. One possible implication for critical indigenous research is the alienation of researchers, especially those in the field, from their subject communities, end distancing them from people and places that oral historians, anthropologists, cultural studies, and development and social work researchers, amongst others, take for granted.

Where official organisations appropriate ownership on the assumption of anonymity or unknown oral authorship, a category often elided with communal creativity, they marginalise the subjects of oral discourse, refuse individual human agency and confirm magical (timeless, uncopyrighted) sources of origin (see Kerr 2006: 146–147). The sense of extreme alienation from the collective has always been very strong amongst our traditionalist ǂKhomani sources, which may explain why the CCMS team seems to offer them ways of dealing with this sense of inclusion/exclusion on the part of their own officialdom. They want to be recognised as individuals creating individually, acting individually and owning individually. Two of our autoethnographic anthologies have offered this almost in play script fashion (Tomaselli 2005, 2007), though attracting serious criticism from two key Kalahari scholars (Biesele and Hitchcock 2008; see also Tomaselli’s reply 2013). IPR, the lawyers that write it, and academic bureaucrats often forget this human dimension. Too often, our hosts/subjects become objects of study and a means to someone else’s ends. An appropriate balance needs to be found.

It is worth citing a UNESCO statement at some length:

Knowledge itself, as an inexhaustible commons available to all human beings, is, if not a global public good (cf. Box 10.5), at least a ‘common public good’. For not only can knowledge not be regarded as a marketable good like others, but also knowledge only has value if it is shared by all. Such a mode of appropriation by way of sharing and making commonly available has long been formally regulated by law. Roman law thus made a distinction between res communes (what is owned in common and at the disposal of the public by virtue of a law), res nullius (what cannot be owned and is by nature at everyone’s disposal) and res publicae (what is owned by a civil community as a public body). Unlike information which only has value if it is fresh and little known, knowledge is lasting by nature. It grows and intensifies with time, as it is propagated and shared. To paraphrase an African proverb, knowledge is like love, these being the only things that grow through sharing.
Knowledge-sharing is the cornerstone of the practices and values that should be at the heart of knowledge societies. It cannot be thought of in terms of a distribution – of something like the sharing of booty. Knowledge-sharing cannot be reduced to the apportionment of knowledge or to a parcelling out of skills, whereby each person is able to take possession of a field of specialisation or expertise (or separate ownership of fragments of content in published papers, as the NRF requires). The advance of knowledge requires the collaboration of all. Often the most novel ideas germinate out of older knowledge, when they are not born – as is frequently the case – from the refutation of knowledge previously held to be irrefutable (UNESCO World Report 2005: 170).

Network societies rely on collaboration, free modes of cooperative organisation, and a clear reversal of the shrinkage that currently typifies the public domain.

Notes

1 See, e.g., Critical Arts theme issue 20(1) 2006 on IPR regimes as they apply in Africa and for a discussion of the creative commons. http://www.tandfonline.com/toc/rcrc20/20/1#.U3cQToGSxCY

2 The National Research Foundation (NRF) Online Submission System from 2013 wants reports (current and previous) to disaggregate publication outputs as follows: 1) conceptualised idea for research; 2) responsible for data collection/analysis/design; 3) lead author; 4) writer of first draft, editorial input; 5) postgraduate supervisor; 6) owner/co-owner of intellectual property of research; 7) co-developed and executed research; 8) project leader/budget owner. A distinction needs to be made between economic rights, which commercialise the academic work – claims ownership on the fact that research was conducted by the employee as part of his/her duties to the university – and moral rights, which give the authors the right to be identified as the creators of the work.

3 See Paton (1948: 91) and Heller (1987).

4 For reports on the first phase see SUBtext, Autumn 2011: http://ccms.ukzn.ac.za/index.php?option=com_content&task=view&id=1064&Itemid=142

5 Tom Hart’s Voice of our forefathers (2009); see also Dockney’s (2011) reception analysis of the video.

6 In ensuing discussion with the College, it was agreed on presentation of a short response reflecting the above arguments, that Clause 11 could be deleted.

7 For more information from Lawyers Challenging Poverty on Hoodia and ownership see: http://www.protimos.org/what-we-do/iprs-and-biodiversity/san-ipr-project/background/ See also Maharaj (2011) and WIMSA (2004). WIMSA’s Axel Thoma reports that the South African San Council (SASC) were given a mandate by the Working Indigenous Minorities of Southern Africa (WIMSA) AGM to negotiate with CSIR, Phytofarm and later on Unilever. Hoodia royalties are administered by the Hoodia Trust. About 500 000 Rands were received as a milestone payment. This income was used by both the SA San Council and WIMSA to travel to and attend meetings and also to communicate
with the San communities. The milestone payment also made it possible to have San representatives from Botswana and Namibia to attend meetings in South Africa. A great disappointment for the San was that farmers and companies who exported Hoodia did not pay their share for the San’s intellectual property rights (benefit-sharing). The South African government did not disclose the export figures since the necessary legislation was not yet in place. (WIMSA, personal communication, 4 July 2012).

8 CCMS reciprocates as follows: 1) hard and video copies of all publications are lodged with SASI; 2) research is reported on annually at the Wildebees Kuil auditorium, to which Northern Cape provincial, museum and local NGO personnel are invited; 3) research is also reported on at the public Northern Cape provincial heritage meetings; 4) students (and sometimes) our hosts publish in SUBtext, a student-produced magazine where our work is popularised in accessible language. Theme issues on the Kalahari are sponsored by the Northern Cape government and circulated throughout the province; 5) CCMS and its affiliate NGOs organise exhibitions to showcase Kalahari artists; 6) where methods, budgets and contracts allow, CCMS will formally employ San individuals on a contract basis; 7) CCMS has facilitated the publication of a number of books authored by our Kalahari research partners, and so on.

9 The WIMSA Research and Media contract evolved because the Nyae Nyae Ju’hoansi felt they had not benefited from films such as The Gods Must be Crazy. A French student, who researched and recorded San music, published San music on CDs without permission. All the San want is that the research is beneficial to their community, to receive copies of the findings, to be able to read what has been written about them (although they naturally often complain about the academic language) and to be able to offer corrections. The contract is not a money-making tool: it is a protection of San individuals and communities’ intellectual property rights. As one leading San person observes: ‘Many people from overseas and our countries have gained their academic qualifications with our information. I am still waiting for the San to get the chance to become academics as well’ (Axel Thoma, email, 4 July 2012).

10 This is a term they use as a means of subverting top-down political namings forced upon them by authority. See Bregin and Kruiper (2004).

References


