

Public Ethics Radio

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Episode 13, Sarah Holcombe on Indigenous Intellectual Property Rights

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MATT PETERSON: This is Public Ethics Radio. I'm Matt Peterson. This podcast features conversations between our host, Christian Barry, and scholars and thinkers who engage with ethical issues that arise in public life.

As part of the series we're doing on problems in intellectual property law, today we focus on indigenous intellectual property rights. Indigenous peoples are the descendants of residents of a territory that has been colonized. Many of these peoples, especially in the United States and Australia, have suffered terribly, and remain vulnerable and marginalized.

Indigenous peoples interact with the intellectual property system in a number of challenging ways. You might be familiar with cases where multinational pharmaceutical corporations have transformed traditional medical practices into successful patented medicines. This sometimes happens without the consent or knowledge of the locals, who may not be able to share in the benefits of those patents. In other cases, researchers may copyright indigenous oral history. The law then recognizes the researcher as the "owner" of that knowledge, despite its source.

Today we bring you a frank discussion of these issues as they relate to Australia's Aboriginal population. Christian Barry spoke to the social anthropologist Sarah Holcombe. Dr. Holcombe is a research fellow at the National Center for Indigenous Studies at the Australian National University, in Canberra.

CHRISTIAN BARRY: Welcome to Public Ethics Radio. Today we're very pleased to be joined by Dr. Sarah Holcombe. Dr. Holcombe is a Research Fellow at the National Centre for Indigenous Studies at the Australian National University, and she's a social anthropologist—the first that we've had on the program. And not only a social anthropologist by training, but actually brings 20 years of research experience in remote and very remote areas of the Northern Territories, Western Australia, and western Queensland. Welcome to Public Ethics Radio.

SARAH HOLCOMBE: It's a pleasure to be here. Hi.

CHRISTIAN BARRY: The Declaration on the Rights of Indigenous People was endorsed by the Australian government earlier this year. This declaration had been adopted nearly two years ago by the UN—almost universally supported by member states. So when we speak of

settler colonial societies and indigenous peoples, obviously one of the fundamental facts about the history was dispossession of people from land, things to which they had some claim, or conceived of themselves as having a claim, and their having lost these sorts of rights. But I know that a lot of the provisions of this declaration, although they do refer to some things connected to land, actually refer to rights to all sorts of other things, in particular knowledge, indigenous knowledge, so-called indigenous knowledge and traditional knowledge. What are some of the political issues around knowledge of these groups, and in particular what does it mean when people are referring to indigenous knowledge or traditional knowledge?

SARAH HOLCOMBE: Indigenous knowledge as a category is a pretty difficult one, really, because we live in a contemporary world, and as an anthropologist a lot of my colleagues would say there is no such thing as indigenous knowledge systems or traditional knowledge as such. There are different types of knowledge, there is no doubt about that, but I think for my purposes as a researcher working in this space, particularly an interdisciplinary space, indigenous knowledge does have its own form, its own structure and its own knowledge governance systems.

And I think when you're talking about research it's very problematic, even myself, who I guess I'd regard as a modern Westerner scientist, and I've been inculcated with my own theories of knowledge, and indigenous peoples also have their own theories of knowledge, around how to manage knowledge, how knowledge is transferred. And, I guess also coming from a research background where knowledge is valued in capital terms, there's some incommensurable systems there, with indigenous people, and their knowledge economy is significantly—obviously is valued, but there's not dollar values always on that knowledge. And there are hierarchies of knowledge. Knowledge is local, it's particular, and I think there are some real issues with the sort of—

CHRISTIAN BARRY: What are the kinds of conflicts that get created between these two different knowledge systems? Is it that—

SARAH HOLCOMBE: Well, it's the intellectual property regime that actually brings some of these issues to light, and something exciting about the declaration is that it does respect indigenous cultural intellectual property. The intellectual property system doesn't accord value to oral culture and oral knowledge. It always has to be tangible. And obviously, we don't want to simplify things. There's a lot of tangible indigenous culture, and aboriginal people and indigenous people are operating in diverse media and things like that.

From a researcher's perspective, when you go out there, the researcher will go and write notes and then come back and publish things, and then the copyright system comes into play. The copyright system, it's an extremely problematic system, that I think even anthropologists, who I think do collaboration in the field very well, when they leave the field and come back to their institutions and their offices, the issues around knowledge and ownership seem to be forgotten. We're subsumed under our own legal system and the IP system is part of that, and the knowledge that we've written down becomes our property. We hold the moral rights to that knowledge, and it usually gets attributed to us.

But I certainly know in my background, I've written down lots of Tjukurpa, dreaming stories, indigenous music, all sorts of things, and it was all attributed to me, effectively. So what happens is that the indigenous owners of this knowledge become voiceless under that system.

And I think gradually now, we're becoming to realize that this intellectual property system—at least copyright and issues around attribution—is extremely problematic and marginalizes indigenous people even further.

CHRISTIAN BARRY: Turning to some other areas of IP, in what contexts is this become something that's really harmful to the communities in question, either directly in that it dispossesses them in a way that makes their livelihoods under threat. Or second that it doesn't—as is technically required by international law—allow for an adequate sharing of benefits of this type of knowledge.

SARAH HOLCOMBE: Well, certainly increasingly there's an understanding that sustainability is tied to local knowledge, and indeed that biological diversity is intrinsically tied to cultural diversity. So there's an increasing respect for indigenous knowledge at that local level, when it comes to potentially new medicines, new bio-discovery, those sorts of things.

And there's a lot of international precedents, you know, around the neem tree. I think there was the Hoodia plant with the San bushmen, where people did have this sort of local-level knowledge in terms of their own bush medicines that they've used for countless generations. And then bio-prospectors come in, or scientists come in, and they put a patent over that, and people lose all rights to that. And potentially there's significant money-making opportunities there, obviously.

So that's an extreme example, but increasingly we're realizing—modern Western science is realizing that there's real value in trying to I guess access this knowledge. So we're also increasingly realizing that processes and systems need to be put in place to ensure that it's done equitably, and that indigenous people also know what their rights are.

CHRISTIAN BARRY: It just seems to be a very complex thing, how you would actually approach—how you would actually even attribute knowledge claims to a community. Who speaks for a community? How do those distributional issues, insofar as we're ignorant, as outsiders are ignorant of these epistemologies, they're also often ignorant of power structures and how—whether or not anyone is even entitled to speak for a community. I know that with the Bushmen, that was one of the real issues, that they didn't recognize the same type of authoritative structure, where they would go “Who speaks for the community?” they would say “Nobody really speaks for the community.” It's not that sort of community.

SARAH HOLCOMBE: Well it is very problematic. The reality is across Australia that you might find bush potato, for instance, or akudjura—a bush tomato. And even though there might be a group who holds rights to that Tjukurpa, that dreaming story, that actual animal or plant species might exist across lots of different groups. So even something like a geographic indicator—putting that sort of stamp on it won't necessarily work, because knowledge is communally held. So this is of course one of the problems with the intellectual property systems where knowledge needs to be privatized and individuals or certain groups specified as owners. So it's a very problematic area.

I guess in Australia there haven't really been too many examples, or any that I actually know of, where there's been a commercial benefit-sharing agreement with an indigenous group. But certainly there's an increased awareness and respect for indigenous people as land managers. So I think that a lot of—I guess a more engaged approach and a more

understanding and respectful approach is needed, in terms of managing intellectual property on that level.

That was actually one of the recommendations that was made out of a project that the Northern Territory NRM Boards sponsored to develop resources to manage indigenous ecological knowledge. And certainly the Northern Territory NRM Board is well aware of some of these issues, but resolving issues in contract law around the management of IP, is the tip of the iceberg, I think, in this area. Because IP can mean money, whether it's copyright that comes from CAL—the Copyright Agency Limited—you know, royalties can flow back. And we are talking about marginalized peoples who need these resources more than those living on the Eastern Seaboard, for instance.

CHRISTIAN BARRY: You're listening to Public Ethics Radio. Today we're joined by Sarah Holcombe and we'll be back with more on indigenous people's rights and knowledge.

MATT PETERSON: This is Public Ethics Radio.

CHRISTIAN BARRY: One thing that I know that you've been actively involved in is developing ethics protocols for researchers. Could you just talk a little bit about what an ethics protocol is, and how that could make a meaningful difference in terms of engaging in a way that's adequately respectful, and that takes into consideration the claims of the communities that you're working with.

SARAH HOLCOMBE: As an academic, we always place most value on the outputs, the products, the publications, that sort of stuff. We're often expeditious about the process of undertaking the research, gathering the empirical data. But I think that if we're going to be behaving equitably, collaboratively, and essentially ethically, with those we work with, equal emphasis has to be put on the collaboration: spending the time in the field and working in a way that ensures equitable benefit sharing and those sorts of things. And this essentially costs more money and takes more time, but that's a really essential part of this sort of process, I guess for me. And things like free, prior informed consent—you could write a paper just around what that could actually mean, in terms of the processes involved with gaining that with your indigenous co-researchers.

CHRISTIAN BARRY: Can you talk a little about a process of—that's obviously an incredibly difficult concept in any area of ethics, whether it be bioethics, or—

SARAH HOLCOMBE: It is. You're right. It's problematic. Miners find that—those who are in the resource-extractive industries—find that really scary, because as an acephalous or stateless society, indigenous societies don't have one leader, one perspective, one government. And getting everybody to agree can be problematic in any sort of situation, and that maybe is another area that I won't go into. But in terms of the research process, it requires... It's not free, in that it's not something that you will hand over and get no return for, but it's given freely. And in a way, that will take more than one or two or even three visits.

And it's educative, it may require translation of your project into the local language. It may require, as I said, three or four visits, scoping—more resources needs to be put into this—changing your research project depending on what local priorities and interests are, and ensuring that you've got monies there to pay researchers insuring that—there are lots of

problematic issues around this too, of course, because we all like to have our independence and our scholarly independence, but different sorts of researcher projects can be developed. So it's about explaining the risks as well as the benefits of the research project. And that takes time. There is no doubt that real collaboration and partnership building takes time, and offers its own challenges.

I think methodology is a really interesting part of any research project anyway. You can write that up, about how it evolved, in terms of the empirical analysis, and that sort of thing. So FPIC, as it's called, is a really fundamental element of any research process. And then after that is the benefit sharing that goes on, and this is in relationship to any project, really, with indigenous people. And it's interdisciplinary; it's not just in the soft sciences, so to speak, or the social sciences.

CHRISTIAN BARRY: Sarah, one thing that you mentioned before was free, prior informed consent as one ethical norm that is appealed to in questions of whether a research project can be undertaken in an indigenous community. I wanted to know to what extent communities themselves actually have ideas of what the ethical norms governing researchers are and what they ought to be, to what extent they are aware of these sorts of norms. Do they attempt to translate it into their own value systems? Is it something they think is sufficient to make sure that actual research is actually being carried out in a way that is respectful of their rights?

SARAH HOLCOMBE: Yeah, it's interesting. When we were undertaking workshops to develop some resources for the Desert Knowledge CRC and others, people didn't like—aboriginal people didn't like the word “free.” They just wanted prior informed consent, because they did think that free was giving it away. But the prior was very important. “Before you undertake the research you have to talk with us.” And it's true, there are local ethical protocols. Every community has its own local ethical protocols.

And I think you mentioned, earlier, too, in relation to the Declaration of the Rights of Indigenous Peoples, how free, prior informed consent can be harnessed locally, and there's the move not only to translate, if you like, these larger ethical research tools that are for researchers, that there's a move to translate those into community guides, whether it's the International Society of Ethnobiology Code of Ethics, which they're currently translating into a set of toolkits that are relevant for local people, so they can be aware of their rights, and basically manage and monitor researchers—because I don't think it's just up to researchers to do this. I think it's really important for local people to know their rights as well.

But regionally, there are some pretty, I think, sophisticated land management organizations, such as Dhimurru in the Northern Territory—they're on Aboriginal land, working under the Land Rights Act, but they're also an indigenous protected area—and they have their own systems of protocols and an agreement that any researcher has to go through, and they have to outline in significant detail the benefit sharing, the amount of money that they will have to pay for co-researchers, where intellectual property is going to be vested, how that's going to be managed, all those sorts of things. So people are taking this on board themselves. They're not waiting for larger organizations, or government, to come forward with answers. They are doing it at a local level.

CHRISTIAN BARRY: We're going to take a short break, and we'll be back.

CHRISTIAN BARRY: So, as declarations do, the Declaration of Indigenous Peoples is filled with very broad and wide open claims. For example, claims about the rights of indigenous peoples to maintain control and protect their cultural heritage and so on. To what extent do these communities, how do they understand these rights? Or to what extent do they see these rights as being infringed on different occasions? What, in their view, are the things that are most concerning about researchers, and appropriation of different types of cultural products or cultural enactments?

SARAH HOLCOMBE: Well, it's really hard to generalize. I mean, there's such a diversity of communities out there, obviously, but certainly a community like Yuendumu in Central Australia is very proactive here. They've got their own media organization, Walpiri Media, and they monitor very closely the research that's being undertaken there, and all sort of media activity that happens there.

The notion of rights is, as you say, a very acephalous one. It doesn't make much sense, in many ways. And it's only when they are infringed that people know what they don't like, that people realize that their comfort zone has been infringed. And there are plenty of examples that I discovered when we held these focus groups to develop these resources, of Aboriginal people—particularly their grandparents and older people—who revealed, if you like, lots of local stories, dreaming stories, all sorts of information, and even languages, and they were recorded. And copyright was obviously given in these times, and it still happens today, of course, to the nonindigenous researcher. And there are lots of complaints about that.

People are well aware now that copyright is the most common form of intellectual property, and people will say their rights have been infringed. They do feel betrayed, and they will tell stories. And there's always a story around that sort of issue, when knowledge has been essentially alienated. And they lose control of that knowledge. And any third party, once it's been published, can access that without attributing the community. So there's increasingly resources being developed to ensure those forms of attribution continue—things like traditional knowledge notices, ensuring that copyright goes to the individual, or I guess if there are separate authors in a paper, or sections of a paper, that copyright is held by those story tellers, as well as by the white fellow—non-Aboriginal person who compiles it. So there's ways of attributing knowledge now that we just weren't aware of before.

CHRISTIAN BARRY: Well, one other way I imagine—I vaguely recall a case where there was a member of an Aboriginal community who found that some of the artistic marks or creations were turning up in the artworks of others. And of course this raises all sorts of interesting questions because the very nature of a lot of modern art and post-modern art is that it is freely appropriative. And in a sense, it is supposed to be transgressive, that it supposed to take, where there are rival ideas of what should be treated as an ownable, and that art itself is taking that. Which raises, I think, important questions. Is there any worry or is there any concern that the pushing of these types of claims might be going in the wrong direction in some cases? That is, that trying to assert ownership over marks, artistic creations, can be actually stifling? And certainly given that that is happening elsewhere to some extent, they should get their fair share of this sort of system. But at the same time, a lot of people are struggling against the strengthening of copyrights across the whole range of types of creations.

SARAH HOLCOMBE: You're right. It has to be on a case-by-case basis. There was an earlier example of this Bulun Bulun, you know, this fellow—I think it was about a tea towel

or something—but he was a fellow from Arnhem Land, in the 1970s or maybe even the 1980s. It was quite a recent case. And he had an image appropriated and used on tea towels and that sort of thing. And he had no idea about that, and that was a really significant issue at the time. And that actually did say that there was a fiduciary duty on the copyright owner to ensure that morally—there was an awareness then that this fellow, this indigenous owner, Bulun Bulun, had a moral obligation to those others within his group to care for that design. So I think that actually led the way—Terri Janke talks about this in some detail—that actually led the way to an awareness that there’s a communal copyright in effect that is emerging as a unique sort of copyright for indigenous people.

And actually, Terri Janke, it just reminds me. She has this great quote: “Why should it be up to creative lawyers to try to find elements that fit, if you like, with the IP system?” Like they did with the Bulun Bulun case? That was a successful outcome, but why should it be up to creative lawyers to try to use the system for indigenous knowledge, when it’s not necessarily relevant? But as a settler state, they’re forced to work under this system. And in fact, that was one of the reasons the Howard government chose not to endorse the declaration, was their concerns about the indigenous intellectual property rights. Because it’s one of the clauses in the declaration, where it actually says that indigenous people have rights to their own indigenous culture.

CHRISTIAN BARRY: And what was the concern there?

SARAH HOLCOMBE: That there would be a new set of laws created for indigenous people. They live in this one country, this sort of one country, one peoples type argument. And they didn’t want to support that. So that was one of the many fears.

CHRISTIAN BARRY: To what extent is there—to what extent does the Declaration have norms within it that could be seen as very alien to the laws governing intellectual property, for example in Australia? I guess I’m just not quite seeing what the major threat was. So the thought was this would lead to the claiming of a need to institute all sorts of different and parallel intellectual property legislation covering the artifacts created within these communities?

SARAH HOLCOMBE: I guess so. I mean, there are sui generis laws in Australia anyway. New laws are developed, and interestingly enough, there’s a new law developed for the Strehlow Research Centre in Alice Springs, which is a centre that the Strehlows have deposited all of this extraordinary wealth of tangible cultural property from Aranda people from the last 80 years or so. And a new law was developed to manage that Centre, so it’s not as if sui generis laws aren’t developed.

I think that there’s a fear of the unknown in many ways, because a lot of research needs to be done around this area. As you know, Australia is a member of the Convention on Biological Diversity, and in there it also talks about these sorts of issues too, that indigenous peoples need to be recognized as holding different laws and institutions. And when dealing with free, prior informed consent, it needs to be acknowledged that they might choose to own their own knowledge.

So it’s hard to answer that sort of question, other than the fact that there’s still a call out there within Australia for new sets of laws to operate across the country because you know, even under the... As you know, there’s been recently a review of the Environmental... the

Environmental Protection and Biodiversity Act—EPBC Act—sorry. Under that, we put in several submissions about the fact that all of the states and territories are developing their own versions of those acts, and there are no systems in place to ensure that indigenous knowledge is managed in a way that guarantees equitable benefit sharing and acknowledges different systems of knowledge and that sort of stuff.

CHRISTIAN BARRY: Sarah, I wonder if we could just put together two things that you mentioned. One was about the importance of free, prior informed consent. And the other about how it's often the case that communities don't really have a clear sense of how they understand their own rights or what they're comfortable with until something's already ongoing. And of course, the very idea, and this is again, a very sort of Western legal notion of free prior informed consent, that once you've given this consent, that's pretty much it. And if after a while the hair starts to grow a little bit longer behind your ear as the doctor said it might, if you've consented to it, that's not something that they're liable for. But of course these communities may not conceive things this way. How, on the ground, as it were, would you—is this idea of prior consent understood, and is it adapted to the needs of communities who may not always be so sure about what they're signing up and so on?

SARAH HOLCOMBE: Yeah, I guess the issue is that in any partnership or collaborative research, it's ongoing. Consent is not a one-off event that happens when somebody signs a form. And in fact, consent can be oral consent. You know, it's usually given orally or via a form. But it's not a one-off event. It's always ongoing. And consent can always be withdrawn at any time. And it's incumbent on the researcher to let the people they're working with know that. That they can withdraw it. Particularly if research changes. It always evolves. And you'd expect that. We're not in a laboratory. We are working with people. And I guess if the project changes, it's very important to let people know what the risks are. And what the benefits are, as well, of course.

But I guess from the researcher's point of view, if people choose to pull out, then that's just a fact of what will happen. But, presumably, if it's a genuinely collaborative production of co-generation of knowledge, and people have—it's been explained at the outset that it's evolving, any piece of research evolves. Then I don't think that would be necessarily a problem.

And as I said, you never really know what the outcome of research is going to be. And can I just briefly mention an example? Everyone's aware of the Northern Territory intervention. And some people say, and it's certainly true in terms of the way the policy evolved very quickly, is that there was quite a bit of research happening in Mutitjulu, at Mutitjulu near Ayer's Rock or Uluru, has a lot of research happening at some point around child abuse and petrol sniffing and things like that. And when I was working in Alice Springs, there was a lot of discussion around the old women who said that they spoke up really strongly about this and it really worried them, and all the rest of it. So they were speaking really honestly and from the heart, around their concerns of petrol sniffing and child abuse. But they said they never knew it would lead to the intervention, which is what it was understood to happen. Because that community was seen to be such an extreme case of dysfunction—and that's a word that's really ugly, problematic word that I would never use, but that's policy-speak in some ways—effectively that's what then happened. The government stepped in.

CHRISTIAN BARRY: So that counted as consent? Or as a type of—

SARAH HOLCOMBE: Well, they never realized it's a risk.

CHRISTIAN BARRY: —invitation.

SARAH HOLCOMBE: It's very problematic. It counted as an invitation. These women expressed their concern, but they never realized with being honest and speaking up strong, that the government would just step on them effectively, and say, "We're going to take control now. You've spoken up strongly; you've said what needs to happen." But they've said that they could take control if they were given the resources. They didn't realize that it would be taken out of their hands. And they feel responsible for that. Well, certainly some members of that community. And this was a lot of—this was really the big talk around Alice Springs soon after. I was just north of Alice Springs when the intervention was announced. And yeah, so that unintended consequences. That can never be... I guess catered for. But there is a risk to research. And I guess Aboriginal people, for a lot of indigenous people, research is a dirty word. And that might be another conversation about the sort of colonial history and the imperialism of modern Western science and research.

CHRISTIAN BARRY: Sarah Holcombe, thank you for joining us on Public Ethics Radio.

SARAH HOLCOMBE: My pleasure. Thanks for having me.

MATT PETERSON: Thanks for listening to Public Ethics Radio. The show is an independent production, supported by the Carnegie Council for Ethics in International Affairs, the Centre for Applied Philosophy and Public Ethics, an Australian Research Council Special Research Centre, the Australian National University, and Yale University. We'll be back soon with another conversation about Public Ethics. In the meantime, you can find out more about us and our guests on the web at publicethicsradio.org.