

The New Voyages of the Santa María: Indigenous People and the (Post-)Colonial Order of Intellectual Property

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Abstract:

As a contribution to the Cambridge Intellectual Property and Information Law monograph series, the Australian law professor Peter Drahos engages with the issue of indigenous knowledge within an internationally regulated but nationally compromised intellectual property order. The author provides a broad, empirically well-based discussion of the struggle of indigenous people for their knowledge resources. Hereby they confront several problems while dealing with a (post-)colonial intellectual property order. While interesting and recommendable for detailing those frictions, the book disappoints in providing analysis or solutions merely within economic determinism, Western property order, and capitalist development.

How to cite:

Garbe, Sebastian: „The New Voyages of the Santa María: Indigenous People and the (Post-)Colonial Order of Intellectual Property [Review on: Drahos, Peter: Intellectual Property, Indigenous People and their Knowledge. Cambridge: Cambridge University Press, 2014.]“. In: KULT_online 44 (2015).

DOI: <https://doi.org/10.22029/ko.2015.927>

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Drahos, Peter: *Intellectual Property, Indigenous People and their Knowledge*. Cambridge: Cambridge University Press, 2014. 247 p., hard cover, 94.59 Euro. ISBN: 978-1-107-05533-9

Some time before modern property rights became a subject in Enlightenment philosophy, the question of legitimate possessions was defined in praxis as part of the European colonial project. It was Christopher Columbus and the following colonialists who were legally entitled to acquire the territories of the Americas – the birth of the first patent rights (Stam, Robert; Shohat, Ella: *Race in translation. Culture wars around the postcolonial Atlantic*. New York. 2012, p. 9-10). What connects the voyage of Columbus' Santa María with contemporary developments is the subject of Peter Drahos' monograph on intellectual property rights and the struggle of indigenous peoples for their knowledge. This book analyses how indigenous people and their immaterial or material assets suffer from a structural disadvantage under an extractive property order, which is shaped by each individual state, private actors, and international treaties. It is based on Drahos' fieldwork in Australia between 2008 and 2010 and mainly draws on cases in Anglophone, formerly settler-colony countries (Australia, Canada, New Zealand, and the United States).

At the beginning, Peter Drahos develops the notion of "non-developmental states" where indigenous people live: "The evidence points to a globally persistent pattern of indigenous people's disadvantage that occurs in both developed and developing countries" (p. 3). Within this broader context, Drahos identifies an extractive property order, which "refers to property systems in which the systems allow one group (the extractor group) to obtain control of assets belonging to a second group without the extractor group obtaining consent and offering proper compensation for the asset transfer" (p. 4). For Drahos, the main question regarding the socio-political position of indigenous people and the usage of their knowledge systems is how to overcome this developmental disadvantage in, mostly, economic terms (p. 26). Based on this general problematic, the author moves on to examine some characteristics of indigenous knowledge and its frictions with Western knowledge and intellectual property-rights order. After briefly describing negative consequences of colonization and capitalist expansion for indigenous societies (chapter 3), Drahos presents the contemporary international legal structure on intellectual property rights systems and how they affect indigenous 'knowledges'. This chapter is an excellent approach to and overview of the international intellectual property-rights framework that has been developed since the early 1990s. The author succeeds in showing "how international treaties project symbolic assurance and reward when it comes to

indigenous knowledge while at the same time setting very few standards that encroach on a state's sovereignty when it comes to devising systems of protection for indigenous knowledge" (p. 72).

In the following chapters (ch. 5 to 8) Drahos takes up some highly interesting case studies on how indigenous groups make usage of and struggle over intellectual property rights regarding their knowledge resources. Focusing especially on the outcomes for indigenous people, those examples range from struggles over patents of compounds derived from the smokebush plant to knowledge about forest conservation techniques and the unfair compensation of indigenous groups by private or public biotechnological research bodies.

Drawing on these experiences, Drahos opts for "indigenous developmental networks" as a "pragmatic response to the property order of the non-developmental state" (p. 156). Building those trust-based, time-intensive networks, especially with the help of scientists, indigenous people might be able to protect their knowledge, enroll capacities for intellectual property rights, and make further steps towards economic independence (chapter 11). Finally, for Drahos, indigenous people shall "distrust the property order of the Australian state, even if this order will in some circumstances offer a means to developmental goals" (p. 216). This is a lesson learnt from various indigenous societies all over the world who historically had and today still have to live with and without the state.

In conclusion, the value of Peter Drahos' work lies in the presented case studies nurtured by his empirical material and fieldwork in Anglophone post-colonies on struggles over indigenous knowledge resources. Here, the author very well accentuates indigenous groups as actors who are not merely at the mercy of state action and economic interests. He delivers a sympathetic characterization of indigenous knowledge, its cosmology and frictions with Western modes of knowing. The section on the existing international legal framework is a great resource for everyone engaged with human rights issues of subalternized (e.g. migrant or indigenous) populations. Further, Drahos does not stop short of criticizing the broader issues of capitalist property rights, land access (p. 79), and the "Westphalian resource enclosure" (p. 88) due to state power.

On the other hand, Drahos fails to criticize thoroughly the role of Western sciences in extractive and exploitative politics towards indigenous societies. Rather he sees the collaboration with scientists as a necessary step in improving indigenous socio-economic positions. The most unsettling aspect in Drahos' work is his underlying concept of indigenous people as mere homo oeconomicus reaching for innovation and economic benefit. This technocratic, rational choice model portrays indigenous people in Eurocentric ways, which Drahos actually sometimes tries to challenge. Furthermore, indigenous innovation and development are depicted as compensation for the most degrading consequences of colonial/modern capitalism, e.g. climate change. The argument, that now they should save us, seems quite pretentious. Drahos' approach succeeds in showing the malicious consequences of a modern property order for indigenous peoples but lacks a proper solution that overcomes colonial exploitative

structures. Instead he omits clarifying that for indigenous people modernity never has been universal but always colonial. At the same time they were never meant to be modern individuals with property rights “in the full Lockean sense” (s. 65) (Quiggin, John: John Locke Against Freedom. In: Jacobin.).

Finally, a critical account of Peter Drahos’ book must ask: Who will most benefit from this piece of work? Might it help to make indigenous people and their strategies more transparent for the interests of greedy states and multinationals? Or might their action be an example for other indigenous communities seeking to autonomously determine their knowledges? And what role remains for the committed scientist? Peter Drahos’ work is a motivation for everyone to ask these urgent questions – a new Santa María might already be on the way.