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# Commentary on "Fear, Hope, and Longing for the Future of Authoship and Revitalized Public Domain in Global Regimes of Intellectual Property"

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# COMMENTARY ON “FEAR, HOPE, AND LONGING FOR THE FUTURE OF AUTHORSHIP AND REVITALIZED PUBLIC DOMAIN IN GLOBAL REGIMES OF INTELLECTUAL PROPERTY”

*Jane Eva Baxter\**

Rosemary Coombe, in her distinguished lecture, uses the concept of authorship broadly “to refer to the practice of state recognition of intellectual investment in ‘works’ whether this be aesthetic creativity (in copyright fields), scientific invention (the domain of patents), the production of marketing vehicles (trademarks), or even the production of celebrity or the design of integrated circuit topography”<sup>1</sup> Even with this broadly defined conception of authorship, Coombe cogently demonstrates that current Eurocentric conceptions of authorial investment, creativity, and responsibility (or lack thereof) do not recognize the types of knowledge, creativities, and responsibilities held by many of the world’s peoples.<sup>2</sup>

Striking three different poses of fear, hope, and longing, Coombe presents the problems and possibilities that exist among current legal constructions of intellectual property and the diverse natures of intellectual properties held by the world’s peoples. As an anthropologist, it would be hard to disagree with Coombe’s position toward a more broadly constructed notion of authorship that offers the protections, rights, and responsibilities of authorship, in its myriad forms, to all of the world’s peoples. Coombe makes a compelling case for the extension of such recognition having clear benefits to all the world’s citizens. However, I also view the idea of constructing authorship in legal and global domains problematic without a consideration for the local implications of recognizing indigenous authorship, and with it the very nature of “indigenesness.”

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1. Rosemary Coombe, *Fear, Hope, and Longing for the Future of Anthropology and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1171-72 (2003).

2. Coombe, *supra* note 1, at 1173-74.

To begin, I think it is useful to consider the function of authorship in legal and cultural discourse. Hermeneutical scholarship has long recognized that authorship is both historically and culturally situated.<sup>3</sup> It is unnecessary to take hermeneutical inquiry to its more “radical” and critical extremes suggested by many postmodern thinkers to invoke the utility of this concept in the consideration of indigenous authorship. Instead, it is useful to use hermeneutics as a starting point to consider the relationship between author and culture, and the classificatory function that authorship provides in our historical and cultural context of the present.

Michele Foucault coined the term “authorial function” to describe the set of beliefs and assumptions that govern the production, circulation, classification, and consumption of texts.<sup>4</sup> The “authorial function” refers to the classificatory nature of authorship that allows “us” to name things and to determine to whom a particular work may be attributed in both editorial and legal considerations. Coombe argues in her article that there are certain types of cultural works and knowledge that are held not only by individuals, but also by families, clans, lineages, and moieties, and that these types of works are found most often in societies that are termed indigenous.<sup>5</sup> By extending legal protections of authorship to these types of cultural knowledge, a link can be made both in hermeneutical and classificatory realms between these types of authorship and the nature of indigeness.

In the past thirty years, anthropology has become increasingly aware of history. Through the recognition of the pre-colonial and colonial interactions that have shaped present conditions of globalization, anthropologists have acknowledged several important aspects of societies now often considered by those in “Western” or “developed” countries to be an “indigenous” other. First, the European writing of history during the colonial period has left a historical legacy that serves to obscure the complex and dynamic links that existed among the world’s peoples long before colonialism.<sup>6</sup> Second, the very ethnic terms used to define indigenous cultures stem largely from European classifications defined during the colonial period, and these terms mask the historical and cultural processes that shaped regional and

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3. See, e.g., ROLAND BARTHE, *IMAGE, MUSIC, TEXT* (1978); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (1980); MICHELE FOUCAULT, *THE FOUCAULT READER* (1984); FRIEDRICH SCHLEIERMACHER, *HERMENEUTICS, CRITICISM: AND OTHER WRITINGS* (1999).

4. FOUCAULT, *supra* note 3, at 101-20.

5. Coombe, *supra* note 1, at 1183.

6. ERIC WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982).

local dynamics in pre-colonial times.<sup>7</sup> Finally, the attempts by former colonial subjects to recapture a sense of tradition and identity are inherently informed by the colonial processes that shaped their relative position on a global scale, and their ethnic identity as used in global discourses.<sup>8</sup> The denial of the complex local and global historical processes that factor into the creation of indigenous identities often results in a reliance on an imperially-informed dualism of indigenous/non-indigenous, developed/developing, or Western/non-Western that serves to create a sense of “otherness” when referring to indigenous communities.

The recognition of indigenous authorship is one inherently fraught with political implications, and one that is centrally tied to indigenous struggles of identity, recognition, and self-determination. One cannot pretend that we live in a world that is not divided along lines of power: social power, legal power, economic power, and political power among others. However, the process of classifying cultures into groups defined by their historical and contemporary positions of powerlessness is very problematic. This problem arises because of the very attempts to classify or define groups or knowledge as indigenous, thereby creating issues in the realms of inclusion *and* exclusion.

Coombe argues that a position concerned for the expansion of intellectual property rights as a “copyrighting of culture” is one of fear, and one that stems from an ignorance of actual negotiations involving indigenous peoples at an international level.<sup>9</sup> The concerns cited by Coombe come from anthropologists who are speaking from a position of concern over the constraining nature of defining indigenous culture.<sup>10</sup>

These critiques are informed by the understanding that culture is inherently fluid and dynamic, rich in history, and ever changing. In placing a definition on what an indigenous culture is, communities are forced to maintain a static identity containing the necessary attributes to retain the rights bestowed upon them as indigenous. These defini-

7. See, e.g., Edwin Wilmsen, *Who Were the Bushmen? Historical Process in the Creation of an Ethnic Construct*, in *ARTICULATING HIDDEN HISTORIES: EXPLORING THE INFLUENCE OF ERIC WOLF* 308-21 (J. Schneider & R. Rapp eds., 1995); NICHOLAS DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* (2001).

8. See, e.g., Michael Adas, *The Reconstruction of “Tradition” and the Defense of the British Colonial Order: British West Africa in the Early Twentieth Century*, in *ARTICULATING HIDDEN HISTORIES: EXPLORING THE INFLUENCE OF ERIC WOLF*, *supra* note 7, at 291-307; JOHN PEMBERTON, *ON THE SUBJECT OF JAVA* (1994).

9. Coombe, *supra* note 1, at 1186-87.

10. Michael Brown, *Can Culture Be Copyrighted?*, 39 *CURRENT ANTHROPOLOGY* 193, 193-222 (1998); SONIA ALVAREZ ET AL., *CULTURES OF POLITICS. POLITICS OF CULTURES: REVISIONING LATIN AMERICAN SOCIAL MOVEMENTS* (1998).

tions also fall under the conflict of the historically-naive structuralist dualisms that creates the indigenous “other,” and identifies certain types of human cultures (indigenous) as qualitatively and inherently different than others (non-indigenous or modern).

An understanding of international negotiations involving indigenous peoples does not necessarily ameliorate these fears or invalidate these critiques raised by anthropologists. The United Nations (U.N.) Working Group on Indigenous Populations was created in 1982, and involves representatives of the U.N. and indigenous communities from around the globe in an ongoing dialog on the human rights of indigenous peoples. Specifically, the group is charged with: (1) reviewing the social, economic, judicial and political situation and the evolution of human rights of indigenous peoples; and (2) elaborating on new international norms about the rights of these peoples. The U.N. Working Group on Indigenous Populations used the following working definition until 1997:

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form, at present, non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems.<sup>11</sup>

This definition requires indigenous cultures to be several things.<sup>12</sup> First, this definition specifies the criteria by which indigenous groups must identify themselves as “peoples,” including historical continuities with pre-colonial populations. Second, the groups must have a history of invasion and colonialism and a present state of non-domination. Finally, these groups must have a determination to preserve, develop, and transmit their ancestral territories and ethnic identity to future generations.

The restricting nature of these definitions affects “indigenous” cultures in two main ways. First, certain ethnic groups, particularly those in parts of Asia and Africa, do not meet all of the criteria of this defi-

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11. United Nations Office of the High Commissioner for Human Rights Working Group on Indigenous Peoples, *available at* [http://193.194.138.190/indigenous/ind\\_wgip.htm](http://193.194.138.190/indigenous/ind_wgip.htm) (last visited Feb. 26, 2003).

12. Sylvia Escarcéga, *The Politics of Indigenous-ness: A Case Study of Mexican Indigenous Intellectuals and Activists at the United Nations* (forthcoming 2003) (Ph.D. dissertation, Department of Anthropology, University of California, Davis) (on file with author); ALVAREZ ET AL., *supra* note 10.

inition, and therefore, can be excluded from international dialogs on human rights. Second, because of this working definition in the political struggles for human rights, "culture" becomes highly essentialized and forces peoples to actively demonstrate their "authenticity."<sup>13</sup> This performance of "strategic essentialism" may be witnessed in international debates at the U.N. where a forum on universal human rights often becomes a forum for negotiating tools to engage in specific struggles on local and national levels. Both of these conditions, then, force communities and peoples to construct and present identities that are to be used and consumed in a specific type of dialog, and the penalty for altering these identities can result in exclusion from protections and access to resources.

The issues that arise at an international level are only made more salient when one considers local implications of these international definitions and decisions surrounding indigenoussness. George Marcus has advocated and demonstrated the utility of conducting "multi-sited" ethnography as a means to understand the cultural dynamics that take place in a globalized society.<sup>14</sup> His position demonstrates that cultural interactions are informed by and take place simultaneously on multiple levels and in multiple spaces. Therefore, discourses on an international or global scale cannot be understood without a comprehension and appreciation of the national and local, and vice versa. In order to understand the implications of international dialogs on human rights, or extending authorship in a "global terrain," one must consider the implications that will take place at other levels and in other places.

One important dynamic that takes place among indigenous communities at an international level is the politics of inclusion and exclusion under definitions of "indigenoussness."<sup>16</sup> Who is and is not indigenous is an issue that presents itself not just between the "indigenous" and "non-indigenous" sectors of global society, but rather is a heated and controversial issue among "indigenous" peoples themselves. Why, one could ask, would certain indigenous communities work to exclude others from receiving rights, protections, and resources? On an international level where the discourse of inclusion and exclusion is focused on human rights, the answer is not clear. The politics of inclusion and exclusion that takes place among indigenous communities on an international level can only be understood if one turns to national and local levels.<sup>15</sup>

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13. Escarcéga, *supra* note 12.

14. GEORGE MARCUS, *ETHNOGRAPHY THROUGH THICK AND THIN* (1998).

15. Escarcéga, *supra* note 12; ALVAREZ ET AL., *supra* note 10.

Groups recognized as indigenous on an international level often receive particular benefits at a national or local level. Resources in any one nation allocated for “indigenous communities” are limited. These resources, in any one place, may include the following: land to be set aside as territories for self-determined nations; grants, medical care, scholarships, and other forms of financial assistance; exemptions from taxation; recognition for alternative legal, political, religious and social practices; the ability to participate in certain legal actions, such as the repatriation of human skeletal remains and sacred artifacts; and, even in some cases, the right to operate a casino. Whatever the resources, benefits, and protections any one nation places under the rubric of “indigenous rights,” there is only so much to go around. There is, then, a real strategic benefit to keep one’s “people” within the defined boundaries of “indigenous,” while using the same definition to keep others out.

This dynamic not only demonstrates the problem of looking at indigenous as a category of peoples and a classification of knowledge, juxtaposed against a “modern” or “Western” system of legal and political rights, but also the problem of looking at a dialog of rights only on an international level. Coombe argues that authorship is a privilege that should be extended into the realm of rights on an international level to include works, knowledge, and creativities that are currently excluded because of their very nature. By equating these types of works as products of indigenous populations, these works serve to classify their authors as indigenous.

The desire to extend authorship to include other types of works not traditionally seen as worthy of legal protection is laudable. Undoubtedly, this type of discourse and negotiation must take place at an international level where the greatest number of voices can be brought to bear on the issue, and where the greatest levels of protection can be offered and rights and responsibilities guaranteed. It is imperative, however, that the implications of such actions be understood not just as a benevolent gesture toward those disempowered in current global discourse, but in a way that carefully considers the implications that these types of “rights” can have at different levels. As such, I would say that the cautionary voices that stem from anthropological insights toward the nature of culture, the problematic of creating an indigenous “other,” and the many levels and spaces that constitute and inform cultural interactions in a globalized world should not be seen as one of fear, but one that voices its own longing for respect for cultural knowledge and creativity in its countless forms.