

Vita nullius

Anthony Jackson and Nigel Mullan

**The hand that signed the treaty bred a fever,
And famine grew, and locusts came;
Great is the hand that holds dominion over
Man by a scribbled name.**

Dylan Thomas: *“The hand that signed the paper”*

At the end of the 18th century the British crown declared Australia “an uninhabited and unsettled land”. Subsequent commentators and judges invented a doctrine called Terra Nullius that effectively legalised what has now more or less been recognised as a grand theft. “After a long court battle non-Aboriginal law not only refused to recognise our claim to our land, it also refused to acknowledge we were ever there! Citing a doctrine called “terra nullius”, a judge said in 1970, that we were an “uncivilised people with no recognisable system of law”, that we had no “proprietary interest in land” and that we passed through the land but did not own it.” However in 1992 the Australian Federal nullified the concept of “terra nullius” by which the British crown had declared Australia “unsettled and unoccupied” in 1788, and created a legal precedent for future land rights claims. 1

Terra Nullius may have been technically nullified in Australia whilst the land rights claims of Australian First Peoples and many others worldwide are largely still outstanding, but elsewhere at roughly the same time, a new legal precedent just as fictitious on a global scale was attempting to assert that life itself was unsettled and uninhabited and open to proprietary interest. Vita Nullius is the name given here for this expanded area of theft that patents living systems, which by an act of international statecraft calls itself Trade Related Aspects of Intellectual Property Rights, coded under the tidy, innocuous acronym TRIPs.

The TRIPs treaty was signed by more than 100 government ministers under the auspices of the World Trade Organisation (WTO) in 1994, and passed mostly unnoticed.

Introduced as part of the General Agreement on Tariffs and Trade (GATTs), the treaty specified a wide range of internationally binding legal requirements for intellectual property. In doing so, it not only radically strengthened monopoly privileges over intellectual property

patents; it also paved the way for claims to the ownership of life itself. Thirteen years on, TRIPs remains relatively obscure, yet the processes it has set in motion could lead to a situation whereby everything imaginable, and not yet imagined, is owned by corporations, complete with the rights to rent it out.

The expedient and novel concept of terra nullius meant that the claimed 'discovery' of large tracts of the world could be settled and brought into the market system, regardless of the rights and customary practices of peoples already living there. **However, whilst Terra Nullius, arguably, was an extension of feudal and pre-feudal practices of conquest and enslavement, Vita Nullius maybe represents the last frontier of the global enterprise of robbery, killing, raping and enslaving.**

The TRIPs agreement represents the single greatest expansion of intellectual property protection in history. The process that culminated in the agreement was initiated and formulated by a small group of CEOs from multinational corporations, including strong representation from big Pharma and the then-emerging biotechnology industry. They identified and targeted intellectual property as much more than a key area for future growth: patents on life offered potentially phenomenal new areas of enclosure and profit. This small group drafted proposals, almost as a wish list, and then used government institutions in the US, international business partners in the EU and Japan, and eventually brute economic and political power, to force their designs through the WTO negotiations.

Such intellectual property 'rights', based on earlier landed property rights, depend on the distribution and exercise of power to ensure their effectiveness. The consequences can be devastating. For example TRIPs extended patent protection on medicines to twenty years, thereby keeping inexpensive generic medicines off the market, at the direct cost of the lives and health of millions. And since 1994 there has been a wave of 'TRIPs+' agreements, in which the signatories agree to restrictions that are additional to those in the TRIPS treaty. These tend to be imposed on countries in no position to refuse, often in bilateral trade deals between countries of unequal power - e.g. in negotiations between the USA and less powerful countries over FTAs (Free Trade Agreements). The general trend towards 'TRIPs+' threatens the imposition of ever greater monopoly protections for pharmaceutical and biotechnology multinationals.

Patents on life

A process of enclosure is underway, slapping patents on life, its forms and its systems, fortifying and securing a property right on everything from mere fragments of understanding to boundless precipitate understandings within our common heritage of the history of knowledge. A chairman of a large pharmaceuticals corporation recently went so far as to proclaim that 'genes are the currency of the future'. As with the land enclosures in the past, the power for such recourse to legal property enforcement is in the hands of a powerful few **and is as contested and controversial.** Most important patents are owned by big companies, because of the high costs of development, application and enforcement. Yet these rights are conferred on such companies for knowledge and products that have resulted from the creativity of a common human heritage. (Of course some patents may merit some kind of reward and recompense, but the extent of such reward and the basis of exchange remain to be justly established.)

The first patent on a modified life form was awarded for Ananda Chakrabarty's work on a project sponsored by the General Electric Corporation (GEC) in the late 1970s, which produced a genetically engineered bacterium capable of consuming oil. In 1980 the US Supreme Court voted by 5-4 to allow a patent on the form, upholding the distinction that, as a synthetic product, not occurring naturally, it was patentable. This landmark decision ushered in a long line of patents on plants, animals and their parts, including genes, and genetically engineered organisms. TRIPs is the mechanism for globalising this process.

TRIPs is an extension of property rights that is enclosing the plants and knowledge of traditional medicines. It is a neo-colonial transfer from community commons to private property; the complexities of culture, heritage, history and identity are being sold to the highest bidder, to then be rented back in packaged form. This threatens the 80 per cent of the world's population that depend for their health care on traditional medicines (from which many modern medicines have, of course, been derived). Such practices of biopiracy have also included the taking of blood from indigenous populations for scientific scrutiny, product development and patenting.

And this is not just a problem for indigenous communities. A recent US landmark case established a patent right to a cell line developed from a patient's bodily substances, without the knowledge of the patient. John Moore had his diseased spleen and other bodily substances removed at the UCLA medical centre; these contained a rare type of T-lymphocyte that produced an abnormally large amount of immune system regulating lymphokine proteins. Without consulting Moore, his doctor then developed a cell line culture, the 'MO cell line', which perpetually reproduced Moore's T-lymphocytes. This cell line was commercially important because it could biologically produce lymphokine proteins at a lower cost than synthetically developed versions. The patent to this 'invention' was later assigned to the Regents of the University of California. John Moore eventually became suspicious of his treatment regime and began to question the purposes of his continuing visits to the UCLA Medical Centre. He eventually found out what had happened and took the case to court, but the court upheld the Regents' claim to the patent.

Craig Venter, who led the race in the private sector to map the human genome, has recently filed for a patent on the first synthetically created life form. Dubbed Synthia, it is a bacterium made in the laboratory, entirely with synthetic DNA. There are some doubts as to whether this is actually a fully functioning organism, but there is no doubt that this claim opens the way for a whole new era in the patenting of life.

Food is another major target for the new enclosures. TRIPs extends intellectual property protection into agriculture in most middle and low income countries, as well as radically expanding monopoly privileges across the rest of global agriculture. Patenting of seed is the basis of genetic modification (GM), and now directs agricultural research and development - and therefore the crops we grow, the food we eat, who gets to eat and who gets to farm. Patents have been applied for on sunflowers, broccoli and pigs. Seed companies can successfully sue farmers whose crops show signs of cross pollination with their patented varieties, suggesting that patent rights supersede landed property rights. Concentration has accelerated as a result. The fruits of ten thousand years of global agricultural development could potentially come to be

owned by the ten seed and chemical multinationals who currently control 50 per cent of the global commercial seed market, and have access to vast amounts of germplasm.

Genetic Use Restriction Technologies (GURTS), the so-called Terminator Technologies, are aimed at the protection of intellectual property by sterilising seeds. Along with the patents first derived for GM crops, Terminator Technologies (and associated 'Traitor' seed, with germination 'turned on' via proprietary chemicals) are at the forefront of the industrial drive to make inroads into the 80 per cent of global seed stock that is still farm saved, publicly developed or freely exchanged. The big commercial interests have their eyes on its huge market potential, along with the profits and control that go with it.

Biofuels, the latest agricultural craze, will also be developed and patented by the multinational agrichemical/seed companies. These products see a coming together of controlling corporate interests in energy and food production. The continuing collaborations of the big commodity traders with the chemical and pharma companies that now run the post-GM industrial seed industry will now be augmented by the arrival of big oil and their associates at the table. This is a trend that is expanding intensive monocultures and decreasing agricultural diversity at a time when we need to be developing agricultural diversity and protecting biodiversity in its widest sense.

Problems for the enclosers

There are a number of problems for those wishing to enclose the intellectual commons. One of these is the complex nature of genetic science. Recent research has acknowledged that the human genome might not be the tidy collection of independent genes that was originally envisaged, with each sequence of DNA linked to a single function – **one gene, one protein, the Central Dogma (a term coined by Watson of Crick and Watson fame, discoverers of the DNA double helix and Nobel Laureates)**. In fact genes operate within complex networks; they interact and overlap with one another, and with other components, in ways not yet fully understood. This understanding of how genes operate has the potential to undermine the practice of the US Patent and Trademark Office, which allows genes to be patented on the basis of uniform effect or function, an ordered sequence of DNA 'that encodes a specific functional product'. The impact of the scientific recognition of **gene** complexity on intellectual property law is likely to be an interesting process.

Another problem for those seeking to enforce TRIPs is the difficulty of policing, and here patented plants present a particular difficulty. In India, farmers plant GM cotton without paying Monsanto (so-called 'brown bagging'). In Argentina, Monsanto has taken the government to court to try and get some form of licensing remuneration for the vast swathes of GM soya that have been planted across the country, to date **with no royalties being paid to** Monsanto at all. This, as in the case of Brazil, may be its comeuppance for having introduced GM crops into countries illegally, in order to expand their cultivation in the face of widespread opposition.

In addition to this, the rights and absurdities of many of these patents are being questioned and challenged by a range of groups; these include the governments of countries in the South that have immense biodiversity, environmental, health and development NGOs, patent lawyers, philosophers, economists, environmentalists and civil rights campaigners. Scientists, some

governments, and even some sectors of industry, are noting the skewing of research agendas, as patented products redirect resources. The dramatic increase in the patenting of science increases secrecy instead of the sharing of ideas, leading in turn to less creativity.

Questioning this form of property ownership leads towards opportunities to question other forms of enclosure and the existing ways that global resources are misallocated and pirated, the whole dire lineage of the perverse acquisition through appropriation and accumulation of property and attendant property rights. If the wider public knew what was going on, it would be appalled. Its involvement in ending these pernicious patterns of ownership is crucial. The vested interests, on the other hand will indeed reformulate and adapt their fictional precedents to survive, making it ever more urgent to resist and create a system that equitably rewards invention and innovation without absurd and iniquitous accumulation.

**The law locks up the man or woman
Who steals the goose from off the common
But leaves the greater villain loose
Who steals the common from off the goose.**

(17th century protest against English enclosure)

1. The authors would like to acknowledge here the source ARATJARA – Art of the First Australians. Traditional and Contemporary Works by Aboriginal and Torres Strait Islander Artists, exhibition catalogue, by the Kunstmuseum Nordrhein-Westfalen, Düsseldorf, Bernard Lüthi and the Aboriginal Arts Unit of the Australian Council, Sydney – 1993; and particularly the voices and efforts of First Australians for their overwhelming part in producing this significant exhibition and catalogue as well as in drawing attention to and exposing Terra Nullius from which the title of this present paper is derived. Once again, it is people at the raw end whose contributions provide the greatest bite.