

11. The Possibilities and Perils of Heritage Management

Michael F. Brown

After two decades of spirited debate about the fate of cultural heritage in a shrinking, commodifying world, a few things seem settled. One is that the unsanctioned appropriation of cultural assets by outsiders is unjust and unethical, especially when undertaken by a more powerful group. It perpetrates an economic injustice because the stewards of an ancient song, art form, or useful element of traditional knowledge are denied whatever profits those cultural resources may accrue in the marketplace. Worse still, the act of tearing cultural elements from their original context may change their meaning, even to those who created them. When the source community is an embattled minority, the resulting distortion is especially damaging.

Many critics of cultural appropriation hoped that the framework of intellectual property (IP) law could be modified to curb such injustices. IP law's attraction was that it was already in place as a global system with well-established precedents. The prospect of co-opting international copyright and patent laws, often portrayed as engines of cultural theft, had a transgressive appeal to those who campaign for robust heritage-protection policies. Yet aside from a few modest improvements here and there, IP has proven to be a fickle ally. Patents and copyrights are time-limited forms of protection. Eventually their term expires, and they revert to the public domain, where they are available to anyone. This time-limited quality is objectionable to source communities that wish to shield their intellectual and cultural property forever. IP's transformation of sacred

forms of human expression into the language of property often offends the people it is ostensibly trying to help.

The multiple deficiencies of an IP-based model have led the heritage-protection movement to cast about for more promising frameworks. This has fuelled growing interest in so-called 'geographical indications' as a way to defend local traditions. Closely related to this is the emergence of formal certifications of virtue. These consist of administrative structures that designate something – a building, an art style, a craft, a genre of traditional music, a ritual – as meriting protected status because of its transcendent cultural importance. An obvious example of the latter is UNESCO's system for identifying and certifying World Heritage Sites.¹

Legal experiments in heritage management that have been implemented to date tend to follow a similar script. They inevitably give expression to what can be called the 'administrative mind'. The greatest student of the administrative mind was Max Weber (1864-1920), the German sociologist whose analysis of bureaucratic logic remains a touchstone for subsequent work in the field. In the highly rationalised world of bureaucratic administrators, Weber observed, problems are dealt with by carefully defining their properties, establishing fixed rules for dealing with them, subdividing authority among trained experts, and doing everything possible to squeeze awkward exceptions into existing procedural categories. Systems of this sort have become nearly universal because they manage complex systems predictably and, often enough, efficiently. What works well when manufacturing widgets in a factory, however, swerves toward absurdity when applied to more subjective dimensions of human life. A familiar example is the current enthusiasm for auditing the performance of university professors. Asked to judge teaching ability or scholarly merit in a precise way, administrators resort to dubious metrics of success in the name of objectivity. Even more vexing problems arise when attempting to manage something as elusive as culture in the name of protection.

Consider the following case which, although hypothetical, closely tracks emerging strategies to protect traditional crafts in many parts of the world. Let us say that a nation such as India or Ecuador or Kenya has a distinctive, localised, artisanal textile industry of some renown. The national government wants to protect this industry from imitators,

1 On certificates of virtue, see Michael F. Brown, 'A Tale of Three Buildings: Certifying Virtue in the New Moral Economy', *American Ethnologist*, 37(4), 2010, pp. 741-52.

especially industrial firms that can easily appropriate traditional designs. To accomplish this, the government creates a geographical indication unique to that tradition, such that no outsider can claim to make 'X fabric' or even 'X-style fabric' without violating national law. So far, so good.

For this law to have teeth, the government must define several things with great precision. First, what *is* X fabric? In other words, what are the boundaries of its design palette, raw materials, thread count, and the like? Next, what are the boundaries of the production zone protected by the new geographical indication? Within that formally defined area, who will be recognised as a certified artisan? Who will do the certifying? How much of the cost of administering the certification system will be passed along to the producers themselves?

One can readily imagine various unintended consequences of this scheme despite its apparent simplicity. The smallest producers may lack the financial resources or literacy skills to file the relevant forms and pay the inevitable fees, thus forcing them to merge with larger, better-established producers who have already achieved certification. Innovative artisans pushing the boundaries of an official style may find their legitimacy questioned by more conservative producers, risking loss of certification. Over time, such rigidity could turn a lively tradition into an inert museum-piece. As Winston Churchill once said of art, 'without innovation, it is a corpse'.

A growing roster of news stories and case studies shows that my hypothetical example only begins to inventory the unintended consequences that may arise from the application of the administrative mind to the challenge of protecting heritage. In 2009, for example, a noisy dispute broke out between Bolivia and Peru over a costume worn by Miss Peru in the Miss Universe Pageant. In the portion of the competition devoted to each nation's folklore, Miss Peru crossed the stage dressed in a costume linked to *La Diablada* ('Dance of the Devils'), which is performed in the Andean *altiplano* region shared by Peru, Bolivia, and Chile. It happens, however, that Bolivia's version of the dance – specifically, the version performed in the town of Oruro – has been certified by UNESCO as a 'Masterpiece of the Oral and Intangible Heritage of Humanity'. For reasons known only to UNESCO, the same dance as performed in Peru and Chile lacks such certification. Thus Bolivia, which sees the designation as an important draw for international tourism, protested that by wearing the costume of *La Diablada*, Miss Peru had pilfered its national patrimony. The colourful scrimmage between Andean nations echoes an earlier dispute

between China and South Korea over stewardship of the Duanwu Festival, celebrated in the fifth lunar month in both countries.²

Another example is provided by the American Indian Arts and Crafts Act (1990), a US law with the straightforward goal of protecting consumers from false claims that a given piece of artwork has been created by a Native American. The law says that for a work to be legally portrayed as Indian-made, the artist must be an enrolled member of a federally- or state-recognised tribe or Alaska Native community. The doctrine of tribal sovereignty that applies in the United States, however, gives tribes great latitude in their enrolment practices. Some are expansive in their standards, others quite restrictive. The result is that certain artists widely regarded as Native American by fellow Native Americans cannot advertise their work as Indian-made, whereas others with more tenuous links to Native American society are free to do so. Admittedly, these problems arise around the edges of an otherwise effective law, but they illustrate the difficulties that arise when cultural definitions – in this case, of tribal membership – become concretised in formal bureaucratic practice.³ More troubling still, the law is virtually powerless in the face of products that imitate Native American art but make no explicit claim of Native origin. A morally complex instance of this would be the inexpensive ‘Southwestern-style’ rugs made by indigenous Zapotec weavers in Mexico, which turn up with great frequency in Native American arts shops in the United States, where they compete with more expensive rugs made by Navajo weavers.

In the arena of traditional music, the ethnomusicologist Javier León has documented the effects of formal certification on Peruvian musicians of African descent. In 2001, Peru’s National Institute of Culture declared an instrument called the cajón to be the ‘Cultural Patrimony of the Nation’. As the name implies, the cajón is a wooden box that has long been used as a percussion instrument by Afroperuvian musicians. Whether the cajón is unique to Peru is disputed, although exposure to Peru’s version of the instrument has unquestionably led to its recent adoption by performing artists in Spain, Cuba, and Mexico. Peru’s claim on the instrument has various motivations: national pride, the possible benefits to cultural

2 Matt Moffet and Robert Kozak, ‘In this spat between Bolivia and Peru, the details are in the devils’, *Wall Street Journal*, 21 August 2009, <http://online.wsj.com/article/SB125081309502848049.html>. On Duanwu, see ‘Paying more attention to cultural heritage’, *Financial Times*, 18 May 2004.

3 William J. Hapiuk Jr., ‘Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990’, *Stanford Law Review*, 53, 2001, pp. 1009-75.

tourism, and, according to León, the attraction of 'reaping any revenue that such ownership might yield'.⁴ One comes away from his study with the sense that declaring the instrument to be an item of national patrimony has produced as much divisiveness as pride among musicians by fostering disputes over whose use of the cajón is more authentic. In a similar analysis of policies designed to protect the musical heritage of the Seto minority group in Estonia, Kristin Kuutma concludes that the 'discursive impact of the concept and perspective of intangible heritage paves a battleground of celebration and contestation among those entangled in the process of heritage production'.⁵

The administrative mind is not the only source of trouble when heritage is redefined as a resource amenable to bureaucratic supervision. Equally vexing is the role of the state. With few exceptions, nation states consider themselves the proper stewards of heritage resources found within their borders, a premise that the charters of organisations such as UNESCO are obliged to honour. Yet the state's interests and those of internal cultural communities often diverge. In the interest of national unity, the state may choose to emphasise some aspects of heritage and suppress others. States may wish to promote certain traditions and heritage sites because they attract tourists, whereas local communities may value a way of life that residents see as irreconcilable with an ever-increasing number of visitors. More often than not, state institutions such as national museums and archives exercise control over heritage resources in ways that are deeply resented by source communities – in recent years prompting calls for the 'liberation' of culture from the iron grip of distant bureaucrats.

More subtle but no less profound implications of state insertion into local heritage practices have been documented by Lorraine Aragon and James Leach in their research on Indonesia's efforts to implement laws that shield traditional arts from exploitation by outsiders. Among their findings is that 'bureaucrats' best-intentioned legal plans do not easily encompass artists' complex aims for art production processes and transgenerational reciprocity'.⁶ In other words by reframing local heritage in international

4 Javier F. León, 'National Patrimony and Cultural Policy: The Case of the Afroperuvian Cajón', in A.N. Weintraub and B. Yung (eds.), *Music and Cultural Rights* (Chicago, IL: University of Illinois Press, 2009), p. 129.

5 Kristin Kuutma, 'Who Owns Our Songs? Authority of Heritage and Resources for Restitution', *Ethnologia Europaea*, 39(2), 2009, p. 36.

6 Lorraine V. Aragon and James Leach, 'Arts and Owners: Intellectual Property Law and the Politics of Scale in Indonesian Arts', *American Ethnologist*, 35(4), 2008, p. 608.

legal terms, the state is changing local cultures in ways that the alleged beneficiaries find unsettling and even destructive.

Ethnographic fieldwork in certified heritage sites likewise offers a picture of local dissatisfaction simmering under the surface of an upbeat, culture-affirming label. Consider, for instance, the Pelourinho neighbourhood of Salvador de Bahia, Brazil, which was declared a World Heritage Site by UNESCO in 1985. The anthropologist John Collins has assessed the process by which this former red-light district and its primarily Afro-Brazilian residents were converted into national patrimony. In order to conform to the state's idea of acceptable heritage, those inhabitants have been subjected to coercive government reform efforts. Collins finds that 'the Bahian state arbitrates "correct" markers of ethnic identity and national history that qualify bearers for political rights while residents who exhibit incorrect behaviours face exile on Salvador's periphery'.⁷

Different concerns are voiced by residents of another World Heritage Site, the mud-brick city of Djenné in Mali. The rigorous preservation protocol developed by UNESCO prevents the people of Djenné from altering the structure or appearance of their houses in any way. Those who wish to increase the size of rooms or renovate them to accommodate plumbing and modern appliances are prohibited from doing so. The inevitable frustrations seem to be turning citizens against the tourism-promoting authenticity from which only a few derive direct benefits.⁸

I could continue piling up examples of what Lisa Breglia, in a study of local attitudes toward Mayan archaeological sites in Mexico, memorably calls 'monumental ambivalence', but the contours of the problem should now be readily apparent.⁹ Even thoughtfully designed heritage-protection laws and policies tend to be flawed affairs. Their imperfections arise from two sources. First, most are creations of the nation state, whose interests are likely to diverge from those of subcultural communities struggling to maintain a degree of distinctiveness. Even when the state is not aggressively trying to redefine local cultures and heritage sites to suit a nationalist narrative, a predilection for centralised control is likely to put too much

7 John Collins, "But What if I Should Need to Defecate in Your Neighborhood, Madame?": Empire, Redemption, and the "Tradition of the Oppressed" in a Brazilian World Heritage Site', *Cultural Anthropology*, 23(2), 2008, p. 312.

8 Neil MacFarquhar, 'Mali City rankled by rules for life in spotlight', *New York Times*, 9 January 2011, A4, <http://www.nytimes.com/2011/01/09/world/africa/09mali.html>

9 Lisa Breglia, *Monumental Ambivalence: The Politics of Heritage* (Austin, TX: University of Texas Press, 2006).

power in the hands of credentialed experts far removed from the everyday interactions that keep heritage alive.

Equally problematic is the transformative power of law itself. As various legal scholars have noted, by its nature law imposes uniformity. In contrast, cultural heritage embodies flexibility and highly contingent ways of doing things, both of which are anathema to law's search for procedural regularity. Indeed, a great irony of the heritage-protection movement is that it advances globally uniform approaches to the defence of heritage said to be threatened by globalisation. Law not only encodes meanings, it retools them in ways that change social practice.

An example that comes readily to mind is the impact of the concept of 'repatriation' encoded in a celebrated US law called the Native American Graves Protection and Repatriation Act of 1990, better known by the acronym NAGPRA. NAGPRA provides for the return of human remains and objects of religious patrimony to Native American communities from which they were taken, subject to specific conditions. Ethnographic studies of the repatriation process have shown that the law has in some cases transformed Native American notions of cultural ownership: tribes now regard themselves as the proper owners of objects that once belonged to individuals, families, or sub-tribal units. This is not necessarily a bad thing – surely it is preferable to having sacred objects of doubtful provenance remain in the hands of museums – but it should not be mistaken for the preservation of tradition. It has changed that tradition in innumerable ways. Moreover, NAGPRA's success in rectifying historic wrongs has inspired supporters of indigenous rights to demand the 'repatriation' of *intangible* heritage – recordings of songs, photographs of rituals, digital images of indigenous art – to source communities. In a digital age, however, intangible heritage does not answer to the logic of the material objects covered by the terms of NAGPRA. Digitised heritage may reside in thousands of places simultaneously. It can be diced into partial elements and distributed instantly around the world. Recovery, reassembly, and sequestration of these scattered shards is an unlikely prospect, however much we might wish it. Leakage of the legal concept of repatriation into a domain where it doesn't readily apply has sometimes made it harder to find effective solutions to the circulation of elements of cultural heritage over which source communities have long sought control.¹⁰

10 On the complex interaction between law and culture, see especially Naomi Mezey, 'Law as Culture', *Yale Journal of Law and the Humanities*, 13, 2001, pp. 35-67.

Twenty years of watching the world struggle with questions of heritage and its preservation have drawn me to the tragic view of human ambition embraced by the literary critic Terry Eagleton. As Eagleton puts it, 'Tragic protagonists ... acknowledge that flawedness is part of the texture of things, and that roughness and imprecision are what make human life work'.¹¹ However noble our desires, however much we strive to advance the cause of justice, the outcome of this human effort will be marked by imperfection. Such a perspective need not produce ethical paralysis, but it does call for humility and a willingness to change course when evidence warrants. A willingness to laugh at human folly helps, too.

Cultural heritage, whether embodied in places or stories, is a shape-shifting, protean thing whose contours may be contested even by those who create it. For centuries the powerful have tried to define its shape and the uses to which it is put. Now that it has become a commodity, the stakes have risen further. The cultural heritage of formerly isolated communities has gained value in markets hungry for novelty. This coincides with a democratic opening that in many parts of the world has empowered minority communities to reassert their cultural distinctiveness. The resulting convergence of economic interests and identity politics – to say nothing of the spiritual idioms in which heritage-protection demands are often couched – makes for an ethical landscape of great complexity. So what is to be done?

One useful step would be to revisit the broader context that gave rise to the current passion for protecting heritage. The expansion and tightening of global IP rules that began in the 1990s sparked a moral panic about cultural theft. The response has been an effort to defend heritage with new laws that sometimes outstrip copyright and patent law in the degree to which they commodify culture and downsize the public domain. Is emulating the worst features of IP the best way to hold it at bay? Perhaps it is time to re-energise public efforts to roll back expansive IP laws. After all, if corporations find it harder to privatise public knowledge, they will focus their acquisitive attention elsewhere. A promising tactic to undermine predatory IP law has been employed in India, where the creation of a publicly accessible Traditional Knowledge Digital Library has made it more difficult for bioprospectors to secure patents on products derived from Ayurvedic medicine. IP law says that patents may only be issued for

11 Terry Eagleton, *After Theory* (New York: Basic Books, 2003), p. 186.

products that demonstrate novelty. By putting ancient medicines in the public domain, India pre-emptively refutes claims that pharmaceutical products based on Indian tradition qualify as 'new'.

Operating on the fringe of the heritage-protection movement are scrappy outsiders whose creativity gives me hope for the future. Among the best is Mukurtu (www.mukurtu.org), a not-for-profit group of anthropologists, programmers, and indigenous thinkers who have created archival software that allows communities to preserve, study, and use their own digital heritage. The program's architecture can be customised to serve a community's changing needs and preferences. Mukurtu isn't a total solution, nor does it aspire to be; this is one of its strengths. Diversity sustains diversity; uniformity stifles it. The steadily growing list of independent museums and cultural centres in the United States, Canada, Australia, and elsewhere is a hopeful sign of local resistance to the imposition of a single set of global solutions. This isn't to say that international treaties such as the Convention for the Safeguarding of Intangible Cultural Heritage, approved by UNESCO in 2003, cannot serve a useful purpose.¹² They focus attention on heritage and, one hopes, help to mobilise public enthusiasm for its preservation. But to the extent that international agreements provide justification for top-down policies and centralised management, they may do more harm than good.

An unavoidable lesson of recent experience is that cultural heritage is most likely to thrive when shielded from the administrative mind's managerial impulse and the suffocating embrace of formal law. When controls are warranted, they should be developed by source communities rather than state bureaucrats. The state's remit should be limited to providing advice, financial support, and appropriate enforcement mechanisms for locally created controls. Such an approach honours culture's dual identity as a verb as well as a noun. For cultural heritage to survive, it must be cultured by its proper stewards.

¹² For the text of the 2003 Convention see http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html

A stone sculpture of an angel with large, feathered wings, holding a globe in its hands. The sculpture is mounted on a stone pedestal. A red-painted cylindrical object is placed on the angel's head, and red paint is splattered down its body and onto the pedestal. The background is a light-colored wall with architectural details.

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