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Heritage as Property

Michael F. Brown

> Ownership gathers things momentarily to a point by locating them in the owner, halting endless dissemination, effecting an identity.
>
> (Strathern 1996: 30).

Frontiers tend to be disordered and troublesome places. Where concepts of property are concerned, a particularly unruly frontier lies at the crossroads of ethnic nationalism and control over the disposition of knowledge in its multiple forms: artistic, spiritual, and technological. The dramatic dematerializations facilitated by new digital and genetic technologies have made information hard to regulate. In societies whose social organization relies on elements of secrecy, loss of control over the movement of information is deeply threatening. Add to this the injustice of powerful corporations reaping profits from indigenous music, art, biological knowledge – even the genetic code of isolated communities – and one has a recipe for anxiety and anger. (See chapters by Hayden, Parry, Rowlands, and Seeger, this volume.)

Public discussion of these issues is taking place on several fronts. Social scientists are forging analytical links between Western knowledge practices and broader questions of intercultural exchange. Legal codes such as the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, implemented in the United States, have provoked dramatic policy changes in museums, archives, and other public repositories. International organizations are struggling to formulate protocols for the protection of "heritage," the term increasingly used to encompass native cultures as well as the biological species and geographical locations to which (at least in the minds of international lawyers) they are ineluctably tied (Daes 1998).[1] As is often the case with

newly contested domains, debate about heritage protection darts from one metaphor to another. Some indigenous advocates argue that "control over one's culture" should be considered a basic human right. Others appeal to a supposed right of cultural privacy.[2] Nevertheless, most policy forums addressing the disposition of indigenous knowledge gravitate to the language of property.

In the United States, Canada, Australia, and other settler democracies, legislation dealing with cultural ownership thus far has focused primarily on the disposition of human skeletal remains and objects of religious significance. The success of repatriation policies has shifted attention to the realm of the intangible and led to calls for the "repatriation of information." But here matters quickly become vexed, raising knotty questions. To what extent, if any, do ideas submit to a logic of ownership? What kinds of regulatory structures must be deployed to maintain the level of control that would make such ownership possible? Should anthropology abandon its relativizing impulse in favor of the transcultural categories that some experts believe are necessary to protect indigenous heritage? Might there be an escape from what Marilyn Strathern (1999: 134) sees as the inevitable link, at least in the modern context, between issues of identity and matters of property?

To begin to answer these questions, I first consider recent efforts to reconceptualize cultural heritage as a set of things and practices subject to principles of group ownership – in effect, as a form of property, although the identification of culture with property may be emphatically denied by proponents of such protection schemes. I then explore some of the paradoxes of the expansive vision of heritage protection that seems to be gaining ground in international circles. Finally, I sketch an alternative vision of how the integrity and dignity of indigenous societies might be defended without capitulating to the inexorable, commodifying logic of the culture-as-property perspective.

Culture Materialized

One would be hard pressed to find a term more frequently used and, in anthropology at least, more widely disputed than culture. In the interests of sidestepping the definitional quagmire, I am content to rely on the conventional anthropological vision of culture as an abstraction or analytical place-holder for shared behavioral patterns, values, social practices, forms of artistic expression, and technologies. It hardly matters whether this formulation is good or bad because the culture

concept was long ago expropriated by non-anthropologists, and anthropology's continuing debate about its utility has had little impact on how it is used in the world at large.[3]

Popular definitions of culture share several characteristics. Culture is, or is fast becoming, a synonym for society, such that one can be said to "belong to a culture" or be "a member of a culture," assertions that most anthropologists would reject. Culture, in other words, is seen as bounded and isomorphic with a specific community. It has also become entangled with the rise of ethnic nationalism, leading to demands that groups be granted "cultural sovereignty" to complement the political sovereignty they seek or sometimes already possess.[4] The notion that culture is concrete, circumscribed, and amenable to control by deliberate policy is impossibly far from the Boasian view of culture that proved so influential in North American anthropology.

As popular notions of culture become more reified, the knowledge, codes, and genres that underlie culture have, contrariwise, grown increasingly slippery and immaterial, a transformation facilitated by technologies that can instantly strip content from context. The disembedding of information from its original matrix has led to a wave of list-making – essentially an effort to block decontextualization by inventorying cultural content. The much-cited UN Draft Declaration on the Rights of Indigenous Peoples (1994) is essentially an enumeration of what constitutes culture and how it should be protected.[5] Likewise the attempt by a consortium of Apache tribes to identify their chief cultural resources. "Cultural property," Apache leaders declare, "includes all cultural items and all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas, and other physical and spiritual objects and concepts inalienably linked to the history and culture of one or more Apache tribes" (Inter-Apache Summit on Repatriation 1995: 3). The formulation of such lists is a primordial act of will that defines the ethnic nation. Lists etch boundaries between what is possessed and what is not in a world of permeable borders.

Indigenous peoples, of course, are not alone in worrying about the integrity of their cultural heritage. One can see a similar impulse in the efforts of the Académie Française to maintain the purity of the French language or the policies implemented by Canada to defend itself from cultural influences emanating from the United States. Until recently, the principal goal has been to slow the introduction of alien cultural elements from elsewhere. Today it is flows in the opposite direction – from within a minority community to the surrounding mass society – that garner the most attention. The perceived violation of boundaries

about which indigenous leaders complain threatens the distinction between sacred and profane, which in Durkheimian fashion also implicates the Us and the Not-Us. Resources must be inventoried to protect them from theft; the sacred must be catalogued to protect it from contamination.

Boundary-setting has practical as well as symbolic implications. In the United States, growing acceptance of Native American sovereignty has created new sources of economic power for enterprising tribes. The rise of the Indian gaming industry is the most obvious example, but this is only the leading edge of innovative, strategic uses of the autonomous political space enjoyed by Indian nations.

Familiar examples of identity's material value can be found in the art world. Molly H. Mullin's study of the Santa Fe Indian Market (Mullin 2001) shows how a major venue for the appraisal and sale of Native American art has codified questions of identity to guarantee authenticity. Similar issues preoccupy the art market in Australia. In 1997 it was revealed that an established Australian artist, Elizabeth Durack, had for some years created a series of paintings under the Aboriginal pseudonym "Eddie Burrup" – paintings that had begun to attract favorable attention from museums and galleries. Durack created a persona for Burrup that included explanatory texts written in colloquial Aboriginal style. The news that Burrup was an invention of a white woman evoked predictable expressions of outrage, including the claim that the goal of Durack's hoax was to reinvigorate her career by exploiting the strong contemporary market for Aboriginal art. More sympathetic observers suggested that Durack, who died in 2000 at the age of 84, felt compelled to create Eddie Burrup to give expression to a lifetime of deep involvement with Aboriginal people and their way of experiencing the Australian landscape. The controversy foregrounded the fragility of the link between the value of indigenous art and the authenticity of its creator. Under these conditions, Simon Harrison (1999) argues convincingly, identity becomes a scarce resource.[6]

The emergence of what Michael Rowlands (this volume) calls the "heritage industry" is expressed in a different way by the rise of lawsuits in which native populations seek damages for "cultural loss," typically associated with environmental disasters such as the 1989 Exxon Valdez oil spill in Alaska. Because scholars have long argued that property is as much about relationships as about things, damage to the social relationships central to culture can logically be equated with property losses (Kirsch 2001). The apparently growing acceptance of this argument in judicial and policy circles attests to the reification of culture and its increasing identification with property.

Cultural Property, Intellectual Property, or Something Else?

Advocates for the protection of indigenous heritage today deploy the term "cultural property," once applied to items of national patrimony plundered in wartime or looted from archaeological sites, to encompass all manifestations of an individual culture, both material and intangible. The expression works adequately as a general cover term, but it is burdened with awkward implications when subjected to close scrutiny. Some of these have been reviewed by Peter H. Welsh (1997: 13), who observes that the meaning of property varies so greatly among societies that persistent use of the word may, as he puts it, "extend the influence of Euroamerican values in the guise of supporting a return to traditionalism." He proposes instead that many questions falling under the rubric of cultural property would be better framed as conflicts over "inalienable possessions," invoking a concept first developed by Annette Weiner (1992). Weiner defined inalienable possessions as sacred or cosmologically ordained elements of a group's identity that are circulated within the group, largely between generations, to reproduce itself in a social sense. Inalienable possessions, according to Weiner (ibid.: 37), encompass such things as "myths, genealogies, ancestral names, songs, and the knowledge of dances intrinsic to a group's identity." These contrast with exchange goods that circulate reciprocally between groups.

In the concept of inalienable possessions Welsh finds a suppleness that cultural property lacks. Cultural property implies a concern with origins, titles, and lines of demarcation that may not be appropriate when applied to the intangibles of heritage. The idea of inalienable possessions, in contrast, foregrounds the constructed quality of meaning and its links to social well-being. "Understanding the reasons for attachment to possession," he observes, "has less to do with understanding the source of rights than with understanding the consequences of loss" (Welsh 1997: 16).

Welsh's proposal has undeniable virtues. It shifts the focus from economic questions to matters of community survival and human dignity. Its flexibility allows for adaptive changes in the roster of elements that a group defines as essential. Yet these advantages come at a cost. If the inventory of supposedly inalienable possessions is subject to constant change, how are surrounding groups to know what is off limits to them amid today's cacophony of media voices and images? If we define the holder of inalienable possessions as communities rather than cultures, who determines what constitutes a community? The latter is more than a theoretical point. Indigenous peoples

are marrying out of their own ethnic groups at historically high rates, making it ever more difficult to determine who belongs to what group and which of these groups qualify as aboriginal.

The idea of inalienable possessions is itself problematic, as critics of Weiner's work have insisted (see for example Friedman 1995). Heritage protection has become a *cause célèbre* because so many elements of indigenous cultures have proved eminently alienable. A strategically placed DAT recorder, a video camera – even a simple notebook or a visit to the public library – can send abstracted elements of a group's heritage into the world at large. It is not clear that much can be done to slow these flows of information short of draconian state intervention.

Moreover, some of what is claimed today as cultural property has never before been "possessed" in Weiner's sense of the term. Obvious examples include rare and commercially valuable blood factors or genes found in isolated human populations. One struggles to see how such resources, the existence of which has been known to humanity for only a decade or two, qualify as inalienable possessions sacred to a group's identity. Nearly as ambiguous is the standing of traditional ecological knowledge (TEK). Although elements of TEK doubtless satisfy Weiner's requirement that inalienable possessions provide "cosmological authentication," much of TEK is so implicit, so much a part of a people's way of being in the world, that it resists claims of conscious ownership. Given these conundrums, there is reason to doubt that the concept of inalienable possessions can supplant other idioms for the assertion of control over a group's intangible resources.

By far the most influential model for regulating claims to the intangible is provided by intellectual property law. The Western intellectual property rights (IPR) tradition is often characterized by indigenous critics as an ontological aberration of the Occidental mind. Nevertheless, analogies to IPR are found in many aboriginal societies. Early in the twentieth century, Robert Lowie (1920: 235–43) offered a host of compelling examples of what he labeled "incorporeal property" among tribal peoples who see stories, dances, myths, magical rites, or even dreams as the exclusive property of individuals.[7] The ethnographic record contains many other examples of transferable, personal rights in information that bear a striking resemblance to Western copyright.

Still, one is on firm ground when emphasizing the contrast between the individualistic core of Western IPR law and the collective ownership characteristic of most folkloric productions. Hence the importance of Australian case law that has gradually recognized community rights and responsibilities in the work of Aboriginal artists.[8] Awaiting determination

is this principle's outer limit. To what extent, if any, does the principle apply to indigenous artists who live in urban areas? And what about people of mixed heritage? Presumably those who claim indigenous identity must answer to their communities in a social sense, but is this something that can be enshrined in law?[9]

A difficulty of Western intellectual property law is that its mercantile and utilitarian principles are hard to reconcile with the moral concerns of native nations. Copyright and patent law has emerged as an untidy, negotiated arrangement involving multiple tradeoffs. It acknowledges the legitimacy of a creator's desire to be rewarded for inventiveness and intellectual labor but balances this against the need for society as a whole to make use of innovation to move forward. Admittedly, the utilitarianism that underlies the existing intellectual property system has not proved completely successful even on its own terms. Many IPR experts argue convincingly that current patent and copyright practices do more to inhibit innovation than promote it. Supporting evidence of this claim can be found in the arena of biotechnology, where the awarding of patents on overlapping gene fragments is already creating obstacles to research. Advances in biotechnology have undermined the boundaries necessary for property law to operate efficiently (Heller 1999), just as digital technologies challenge the barriers that maintain cultural distinctiveness.

Equally problematic are limits on the life of copyrights and patents. From the time Western intellectual property laws were put in place, patents and copyrights have been designed to expire. Although copyrights and patents arguably qualify as property, they differ from other forms of property in their statutory impermanence, an impermanence reflecting a calculus of social utility that weighs individual incentives against the needs of society. This makes sense if the creator is a person or commercial entity that has a limited lifespan, but the notion that control over elements of culture should expire is unacceptable to advocates of indigenous rights. (See Anthony Seeger, this volume, with particular reference to rights in sacred music.) Most proposals for modifying existing intellectual property law to accommodate indigenous societies dance around the sensitive question of time limits, but one may reasonably infer that native peoples are generally opposed to termination of their rights after some arbitrary period. This may explain growing interest in the utility of trademark practices, an element of the IPR system that lacks a statutory life span.[10]

Trademark laws protect symbols and signs that give a distinct identity to a product's manufacturer. As long as a trademark holder defends a

registered mark from infringement, the mark is protected in perpetuity. The permanent character of trademarks and official insignia (symbols identified with non-profit organizations and government agencies) is proving attractive to indigenous groups. Early in 2000 it was announced that the Snuneymuxw First Nation, a small Coastal Salish-speaking tribe whose lands are located on Vancouver Island and adjacent islands in British Columbia, had secured protection for examples of rock art that the community insists were created by its ancestors (Tanner 2000). Although the petroglyphs are located in a provincial park visited by thousands each year, they have now been registered as official insignia of the Snuneymuxw. This makes it illegal for manufacturers to reproduce them without permission on tee-shirts, stationery, or postcards. The Snuneymuxw goal in seeking protected status for the images is not to defend their commercial use but rather to insure universal *non-use* – that is, to prevent anyone, including other native groups, from using the sacred petroglyph designs for any purpose that the Snuneymuxw deem inappropriate. New Zealand appears to be moving toward a legal framework in which applications for trademark registration of any "word, symbol, sound, or smell" thought to have originated among the Maori will have to be screened for appropriateness by a Maori consultative body (Janke 1998: 143).

In an effort to find a concept that adapts intellectual property law to the expressed desire of ethnic communities to control elements of heritage that are currently unprotected, the legal scholar Susan Scafidi (2001) proposes the invention of a new legal category, "cultural products." These would consist of anything derived from "ongoing expression and development of community symbols and practices" (ibid.: 814). Unlike the creations protected by copyright and patent law, cultural products would not have to demonstrate novelty, nor would their authorship necessarily be of concern. Among the examples she offers is the institution of Kwanzaa, now an important set of annual rituals for many African Americans. Kwanzaa is usually described as the creation of a specific individual, Maulana Karenga, a professor of African-American Studies, but it can now be said to belong to the entire African-American community. Scafidi apparently believes that African Americans should be given the legal power to control the diffusion of Kwanzaa and to protect it from unwanted appropriation or misuse. Moving beyond questions of heritage protection, she suggests that communities have an opportunity – perhaps even an obligation – to circulate carefully selected cultural products among consumers in the wider marketplace. "A source community with little social standing or political influence, or even one to which the majority culture may be hostile, might advance its cause by feeding, clothing, instructing, or entertaining the general public with distinctive cultural products" (Scafidi 2001: 839).

Although Scafidi's proposals are thoughtful and original, they would entail the creation of a staggeringly complex framework of regulations. These are likely to generate new inequities. The statutory regulation of product authenticity offers a simple example. In the United States, the Indian Arts and Crafts Act of 1990, which built on similar legislation dating to the 1930s, protects the authenticity of Native American art by prohibiting the sale of products falsely claiming to be made by American Indians or Alaska Natives. Far from being universally appreciated by Indian artists, however, this law is deeply resented by some who, owing to the vagaries of tribal membership rules, are prevented from identifying their work as Native American (Sheffield 1997; Hapiuk 2001).

Scafidi and others who support the idea of using new variations of intellectual property law to protect indigenous heritage rarely mention IPR's tenuous moral standing at the grass-roots level. Discussion with ordinary citizens in the United States quickly reveals that they find aspects of IPR law illogical and even an affront to everyday morality. I vividly recall the bafflement expressed by my undergraduate students when in a lecture I mentioned that Home Depot holds a trademark on the color orange. (More precisely, Home Depot has been awarded a monopoly on commercial use of a particular shade of orange in the promotion of tools, home-improvement products, and related hardware.) "That's crazy," one responded. "How can a company own a color?" The moral ambiguity of intellectual property law is nowhere better illustrated than by the explosive growth of file-sharing technologies that facilitate the fee-free (and illegal) transfer of copyrighted music. On a daily basis, millions of citizens demonstrate their indifference to the intellectual property rights of media corporations. Although industry's efforts to stem the tide of file-sharing have punished a few rogue companies and individuals, the technology has thus far managed to stay ahead of enforcement efforts. My point is that unlike the theft of material goods, which all but a few radicals and anarchists regard as reprehensible, the unlawful use of intellectual property is less burdened with moral weight for most citizens. Such moral ambiguity does not bode well for efforts to establish an enforceable principle that ethnic groups "own" their histories, languages, or art styles.[11]

The many difficulties of using intellectual property law, or modifications of it, to protect indigenous heritage has led to a search for entirely

different approaches. One is to graft heritage protection onto existing human-rights protocols (Coombe 1998). The move toward human rights has several attractions. The global human-rights system occupies a moral high ground on which those seeking to protect indigenous cultural rights can add their own edifice of advocacy. But this strategy entails risks. Whatever power human-rights protocols possess comes from their transparency. Murder, torture, and the right of habeas corpus are readily understood by people everywhere. Once human-rights thinking wades into waters as muddy as "culture," "heritage," and "knowledge," we face the possibility that the legitimacy of all human-rights standards might be undermined.

Influential figures in the indigenous-rights movement have concluded that heritage protection will only succeed if it is based on new *sui generis* safeguards that apply to entire cultures. In the language of taxonomics, they advocate lumping rather than splitting.[12] Erica-Irene Daes, author of the UN's much-cited report *Protection of the Heritage of Indigenous People* (1997: 3), eloquently makes the case for lumping. "Indigenous peoples," she writes, "regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with other living creatures that share the land, and with the spirit world." Discounting the romanticism of such rhetoric, redolent as it is with hints of New Age holism, we are left with the claim that indigenous lifeways can be protected only through rigorous quarantine of the entire context of a people's heritage, from land to philosophical concepts and everything in between. In drawing an impregnable wall around culture, however, we end up with something thoroughly property-like in its essence, exhibiting such key attributes of property as responsibility, identity, rights of control or disposition, and a "distribution of social entitlements" (Hann 1998: 7). The UN report authored by Erica-Irene Daes insists that heritage is not property but a "bundle of relationships." In light of the powerful current of scholarly thought that defines property itself as a bundle of relationships, we find ourselves stranded in a circular argument without exit.

Advocates of comprehensive regulation also seem indifferent to the negative political effects of their supposedly benign commodification of culture. Universalist strategies, especially those that would reduce cultural property to a matter of fundamental rights, may have the perverse effect of stopping rather than promoting dialogue between groups. The political philosopher John Gray (2000: 116–117; see also Glendon 1991) declares that "the adversarial practice of rights has

obscured the permanent necessity of political negotiations and compromise." "If we seek a settlement of divisive issues that is legitimate and stable," Gray concludes, "we have no alternative to the long haul of politics." In multi-ethnic states, that means a process characterized by strategic compromise rather than a focus on absolute, non-negotiable rights.

One wonders how citizens will be able to talk to one another when key symbols of national history have been redefined as the exclusive property of Maoris, Native Americans, Aboriginal Australians, and other ethnic communities. The jointness of shared historical experience tends to get lost in proposals for comprehensive control of key cultural symbols and forms of expression (Munro 1994). Consider an obvious example. Navajo weavers are admired for their skilled craftsmanship and impeccable sense of design. But the rugs for which they are justly famous are a medium that emerged from the Spanish colonial period. Navajos acquired knowledge of weaving from Pueblo Indians who took refuge among them after the Pueblo Revolt in the late seventeenth century. The wool from which the rugs are woven comes from sheep introduced by Europeans. It is well known that Anglo-American traders often provided basic designs and color schemes that individual weavers embellished and made their own. In an important sense, then, Navajo weaving is the product of a cultural conjunction: mercantile and aesthetic, European and indigenous. This is not to question the authorship of individual weavers – or, if you prefer, the cultural community to whose creativity they give expression. It is only to note that at a fundamental level Navajos cannot claim absolute ownership of the Navajo rug as an art form. It evolved in collaboration with other Indian peoples and Hispanic and Anglo-American settlers as part of their shared historical encounter.

The movement toward legal protection of intangible heritage offers rewarding vistas for connoisseurs of irony. To defend their cultures from commodification, indigenous leaders deploy Western idioms of property in their protests and communiqués. In the name of protecting diversity, international lawyers – whom the legal scholar Martin Chanock (1998: 59) labels "the quintessential centralists and uniformisers" – draft protocols that wedge cultural differences into standardized categories. To solve problems created or sharply intensified by globalization, advocates for indigenous rights demand global solutions, leading to a situation in which proposals to conserve the cultural heritage of indigenous peoples from the Arctic scarcely differ from those advanced in defense of Native Amazonians. Most of these plans, however well

intentioned, have a powerful tendency to flatten difference in the interests of procedural uniformity.

Other Paths

Are there alternatives to the apparently inexorable transformation of heritage into property? To imagine other ways of helping indigenous peoples to maintain the integrity and vitality of their cultures we must first acknowledge that totalizing, legalistic approaches are incompatible with the diversity of values they claim to promote. The powerful norming and rationalizing currents of formal law cannot readily accommodate the situation-specific negotiations required to ensure the dignity of indigenous cultural life in pluralist states. Although broadly framed rights policies are useful instruments for bringing contending parties to the negotiating table, every additional degree of specificity increases the likelihood that laws will produce unintended harm, especially when confronting the complex, dynamic quality of living cultures.

A different solution lies in strategic use of the diverse resources of civil society. Usually defined as the complex web of interlocking private and commercial associations standing between the individual and the state, civil society encompasses organizational nodes defined by shared religious, fraternal, occupational, political, and mercantile interests.[13] Globalization has internationalized civil society. In the following discussion, then, it should be understood that I refer both to local-level groups of the smallest scale and to powerful, highly organized advocacy groups (i.e., large NGOs) and transnational corporations. These organizations of different scales form an interlocking social ecology that also encompasses indigenous organizations and quasi-governmental bodies such as the United Nations.

To the extent that property concepts are at issue, universalist approaches either push toward the complete commodification of culture or deny that property concepts are appropriate at all. In fact, it is obvious that the spectrum of indigenous cultural productions encompasses things that are property-like in their essence – for instance, closely guarded technical knowledge of medicinal plants – as well as practices and concerns remote from property. The pursuit of indigenous agendas in each of these distinct spheres offers better prospects for introducing creative alternatives to present practice than does a top-down regulatory approach. A review of local-level cultural-rights negotiations strongly suggests that face-to-face encounters of people who are neighbors, who share even to a limited extent the overlapping allegiances characteristic

of civil society, create a context in which indigenous concepts of property may spread, virus-like, into negotiated arrangements with institutions and ultimately the state.

The advantages of letting heritage-protection reforms work themselves out in diverse venues are both substantive and tactical. On the tactical front, they provide opportunities for non-natives to hear other perspectives first-hand and to reassure themselves that they are ceding rights and resources for a worthwhile purpose. The power of voluntarism in changing hearts and minds in majoritarian societies should not be underestimated. In substantive terms, the solutions that emerge from local-level negotiations are more likely to be tailored to the relevant circumstances, increasing their prospects for success.

Decentralized, non-regulatory approaches to heritage protection are regarded skeptically by the many legal scholars who hold that social conflicts between parties of unequal political power are rarely settled without the influence, direct or implied, of formal law. The threat of invoking the power of law forces adversaries to negotiate. This perspective is evident in the assertion of Susan Scafidi (2001: 826) that, where cultural property issues are concerned, "without a legal structure there can be no framework for discussion of meaning and normative use, dispute resolution, or even recognition of conflicting values."

It is undeniable that positive social change often takes place, as the saying goes, in the shadow of the law. Supporting evidence can be found in such domains as civil rights and environmental protection. Where indigenous heritage is at issue, however, the argument conveniently ignores the inherent risks of legalism and the long history of high-minded but ultimately destructive regulation of indigenous societies by settler governments. Nor does it take sufficient account of the positive change already effected by the implementation of NAGPRA in the United States and the Aboriginal and Torres Strait Islander Heritage Protection Act in Australia. Although these statutes say little or nothing about the disposition of intangible expressions of culture, they have led to the creation of institutional review boards and advisory committees on which indigenous people are conspicuously represented. Closer engagement with indigenous perspectives has prompted museums and archives to revise policies that reach far beyond the scope of existing law.

A case from California serves to illustrate the latter point. California State University, Chico, was bequeathed the substantial ethnographic collection of Dorothy Morehead Hill, a local anthropologist who died in 1998. During her long career, Hill amassed thousands of

photographic images and hundreds of taped interviews of local Indians, mostly from Wintun, Maidu, and Pomo communities. By all accounts, the collection is of great value, both to anthropology and to California Indians, because it documents stories and practices that are threatened with extinction. It may also prove useful in land-claims litigation and the protection of sacred sites. Yet some of this information is considered sensitive and proprietary by Indian people. Among the most controversial items are photographs of religious rituals that today are closed to the public.

Out of respect for Dorothy Morehead Hill's long and cordial relations with the region's Indians and the university's own interest in maintaining a positive image, the collection's overseers have established an advisory committee that represents the donor's family, the university, and local Indian tribes. The committee, with the help of knowledgeable Indian people, is systematically reviewing the collection to determine which items should be available to researchers and which should be subject to restricted access. Far from creating a new arena of conflict, joint management of the collection has been portrayed by Native American leaders as a welcome opportunity to build trust between the university and local tribes (March 2002).[14]

No law specifically requires the university to take tribal concerns into account. The positive response thus far seems to be driven by a combination of public-relations acumen and the obligation of a public institution to attend to community concerns about its resources and programs. Of course, nothing guarantees that the advisory process will satisfy everyone. At other archives and museums in the United States, requests that collections be closed to women or members of specific ethnic groups have been rejected on the grounds that such practices violate state and federal laws prohibiting discrimination. Repositories are also obliged to respect the donor's preferences when these are compatible with relevant laws and policies. The result may be a series of awkward half-measures that make no one completely happy. They will almost certainly fail to satisfy the UN's demand that "each indigenous community . . . retain permanent control over all elements of its own heritage" (Daes 1997: 4). Compromise solutions are rarely elegant, yet they may be the best outcome when irreconcilable values collide. Unconstrained by statute, they can readily change to reflect improving relations between indigenous communities and national societies.

In the context of a spirited debate about whether a people owns its culture, Manuela Carneiro Da Cunha (Strathern *et al.* 1998: 115) insists that treating knowledge as property is the best and perhaps only way

for indigenous peoples "to define, to represent, to keep or to dispose of" their heritage. Unfortunately, the suppleness of thought that allows anthropologists to move comfortably between the literal and figurative meanings of ownership may not be characteristic of those whose job it is to turn such sentiments into implementable law. Law has its own implacable logic, and it may unfold in ways that are difficult to foresee or to control. There is clearly much to be done to reform dominant property concepts, as well as ideas about the public domain, so that they are less prejudicial to indigenous interests. But if modernity has shown anything, it is that highly rationalistic legal frameworks presided over by mandarins and bureaucrats often work against the interests of the poor, the marginal – indeed, all those outside the boundaries of elite occupational networks. Contemplating the prospect of endless litigation in defense of cultural elements newly defined as property, one is reminded of the Mexican saying, "May you have a lawsuit in which you are sure you are right." It is invoked not as a blessing, I'm told, but as a curse.

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Notes

1. In this discussion I avoid the expression "cultural appropriation" except when quoting the work of others. The phrase is now so burdened with opprobrium and at the same time so inconsistently applied that it has been rendered nearly useless for assessments of cultural flows. It should be obvious – and obviously deplorable – that these flows are sometimes divisive or hurtful, and that they may take place in the context of uneven power relations. But talk about cultural appropriation has become a convenient way to assert a moral

stance while sidestepping tough questions about the ethical ambiguities of intercultural exchange.

2. For an assessment of the potential utility and limitations of a principle of cultural privacy, see Brown 2003: 27–42. A provocative essay by George Marcus (1998) explores the arguments for using censorship to guarantee indigenous control over the transmission of proprietary or secret knowledge.

3. The literature on this issue is vast. Useful sources include Brumann 1999, Fox and King 2002, and Kuper 1999.

4. For a concise argument in support of the emerging concept of cultural sovereignty in the American Indian context, see Coffey and Tsosie 2001.

5. The full text of the Draft Declaration on the Rights of Indigenous Peoples (E/CN.4/Sub.2/1994/2/Add.1) can be accessed at the Human Rights Library of the University of Minnesota <www1.umn.edu/humanrts/instree/declra.htm> (accessed 13 September 2001).

6. On the Durack/Burrup relationship, see Smith 1997, an article that touched off an avalanche of commentary in the Australian press. On the general problem of authenticity and value in Australian art, key sources are Myers 1995 and 2003. I am grateful to Fred Myers for granting me access to chapters of his 2003 book prior to its publication.

7. I owe thanks to James A. Boon for bringing Lowie's observations to my attention.

8. For specific examples see, among many others, Golvan 1992 and Janke 1998.

9. Although published legal scholarship seems mostly to favor the expanded use of intellectual property law to protect indigenous cultural property, a few scholars of law have voiced more skeptical assessments. See for example Farley 1997 and Sunder 2000.

10. Space limitations prevent me from considering the subject of moral rights, another area of intellectual property law in which time limitations do not apply. Some experts on indigenous heritage-protection view the moral-rights framework as potentially useful because of its permanence and inalienability. But moral rights are poorly developed in the copyright laws of some nations – notably, the United States. As the legal scholar Paul Goldstein (1994: 166–171) points out, moral rights may be antagonistic to the interests of the public by limiting the scope of fair use, possibly including the use of copyrighted material for free-speech purposes.

11. A national survey commissioned by the New Jersey Institute of Technology in 2003 found that although 55 percent of respondents aged 18–34 agreed that file-sharing of copyrighted music qualifies as theft, 54 percent of them felt that such illegal traffic should not be restricted. The survey obtained similar responses from this age cohort when they were questioned about the illegal copying of copyrighted software. For details, see Carlson 2003: A27.

12. Posey and Dutfield (1996) propose that indigenous heritage can be protected through the concept of "traditional resource rights." Suffice it to say that this approach is promising but seems to offer few avenues for dealing with the rights of deterritorialized groups or people of mixed heritage.

13. Other participants in the Wenner-Gren conference in Ronda urged me to substitute the Foucauldian term "governmentality" for "civil society" on the grounds that the latter has become too freighted with ancillary connotations to be useful. After considerable reflection, however, I have concluded that civil society is preferable for my purposes because of its greater familiarity and clear identification with non-state, non-legislative groups and institutions.

14. Steve Santos, an employee of CSU-Chico and also Tribal Chairman of the Mechoopda Indians of Chico Ranchería, reports that progress in assessing the Hill Collection has been slowed by several factors, including a state budget crisis that has made it difficult to obtain funds to reimburse Indian consultants for travel to Chico to examine the collection's photographs, tapes, and textual materials. Nevertheless, he is generally optimistic about the program's prospects for creating a platform from which the university can reach out to the region's Native American community. Santos noted with particular approval the university's immediate repatriation of an interview tape identified by Dorothy Hill as a recording that should be heard only by members of a specific California tribe (Steve C. Santos, telephone interview, 20 June 2003).

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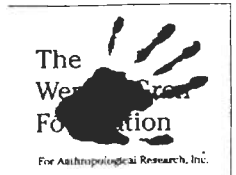

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