

Cultural Property, Control of Meaning, and Paths to Recognition

[Original English version of "Антропологического форума". Содержание вы можете найти на сайте журнала: <<<http://anthropologie.kunstkamera.ru/05/>>>.]

Michael F. Brown

Dept. of Anthropology & Sociology, Williams College, Williamstown, MA 01267 USA

[Completed July 2011]

Sergei Sokolovskiy correctly pinpoints emerging ideas of cultural ownership as a significant global preoccupation. In common with many observers of this phenomenon, he is struck by the frequency with which discussions about cultural heritage gravitate to the idioms of intellectual property--in particular, ideas based in copyright and patent law. I have come to believe, however, that the idioms of intellectual property are dominant largely because they offer a convenient way to talk about anxieties that are broader and deeper than simple disputes over the commercial value of artistic creations or technical innovations.

Consider a recent news story. On May 20, 2011, the *New York Times* reported that a lawsuit had been filed by a tattoo artist against Warner Brothers Entertainment for the company's use of a tattoo design on the face of an actor in the film *The Hangover, Part II* (Cohen 2011a). The design, which the artist had years earlier inked onto the face of the boxer Mike Tyson, was described as "tribal" in origin. It was clearly inspired by, if not directly copied from, the tattooing tradition (*tā moko*) of the Maori people of New Zealand. A month later, the same newspaper announced that Warner Brothers and the artist had reached an amicable settlement (Cohen 2011b). No details were disclosed, but one may presume that the artist received financial compensation for the unauthorized use of "his" design.

A notable feature of this tempest in a pot of tattoo ink is that neither the presiding judge in the legal case nor the journalists covering it thought to question how an American artist could plausibly assert a copyright interest in a design that he admitted to have lifted from an indigenous cultural tradition. Media outlets in New Zealand duly reported Maori complaints, but these had no apparent effect on legal processes in the United States.¹ With respect to U.S. law, then, the Maori people and their religious and artistic traditions are invisible.

¹ *New Zealand Herald* 2011.

Although public discussion of this case emphasized its implications for intellectual property law, I am convinced that Maori protests had less to do with financial injustice or ownership than with the *control of meanings* and, more broadly, the *struggle to achieve political recognition*.

Meanings. For the Maori, tattoos transmit specific messages.² The right to use individual designs is determined by genealogy and other social attributes. When non-Maori people use these same designs for aesthetic reasons or to satisfy their sense of personal identity, they disrupt the tattoos' socially embedded meanings. The problem of corrupted or diluted meaning is hardly unique to the indigenous world: in the commercial arena, registered trademarks gives manufacturers greater control over the meaning of their brands. The latter is strictly an economic concern, whereas the desire of traditional communities to maintain control over their most potent symbols is felt to be a matter of cultural coherence and even cultural survival.

Indigenous communities are following multiple paths to regain authority over symbols that they insist are theirs alone. Some communities have used trademark law to protect iconography from appropriation by outsiders (Brown 2003, 83-87). Some are experimenting with "geographical indications" that identify commercially valuable products with a specific place. Others seek comprehensive control of symbols under the rubric of indigenous sovereignty, although it is by no means clear how sovereignty, as such, can prevent ideas and symbols from crossing cultural borders. Probably the most common strategy is to embrace secrecy. The latter is having a significant impact on anthropologists, whose profession requires discussion of ritual practices and other forms of traditional knowledge increasingly defined as secret or "sensitive."³

Recognition. Many scholars have noted the link between recent conflicts over cultural property and the politics of recognition, the latter arising from the demand of indigenous peoples that their continuing presence be acknowledged by the nation-states to which colonial history has consigned them.⁴ Although the global campaign for indigenous recognition is pursued using various rhetorical frames--the language of human rights, demands for repatriation or reparations, assertions of sovereignty, among others--property claims have proven to be especially influential. Property is a robust and malleable concept supported by highly developed legal machinery. With the near-disappearance of socialist governments in the late twentieth century, capitalist ideas of property have made themselves felt in almost every corner of the world. At the same time, intellectual property has gained global salience that it formerly lacked, raising difficult questions

² For an extended discussion of this issue, see Pritchard 2000.

³ Christen 2006.

⁴ For a recent example, see Skrydstrup 2009.

for indigenous and non-indigenous citizens alike. How is it, we ask, that private corporations are free to turn local knowledge into legally protected property over which they exercise monopoly rights for decades? Why can a pharmaceutical company lay claim to parts of our genetic endowment without our knowledge or consent? What can we do to protect the cultural commons from what seems to be a mad scramble for the privatization of knowledge?

The widespread disquiet generated by aggressive expansion of intellectual property has created an opening that indigenous peoples have been quick to exploit to advance their political ends. They have been helped, too, by the growing interest of nation-states in recovering symbolically potent items of material culture that, owing to the vagaries of conquest and colonialism, are in the hands of distant powers. If Greece, Italy, Scotland, and other nations can clamor for repatriation of objects that embody cultural patrimony, shouldn't the Hopi, the Seneca, or the Quechua be free to do the same?⁵

In the United States, demands for the legal protection of Native American cultural property in all of its varied forms have yet to produce dramatic changes in property law. In part this is because the U.S. is relatively decentralized. For historical reasons too complex to explore here, the U.S. has also been wary of efforts to bureaucratize or regulate culture, which is why the federal government has never had a cabinet-level post equivalent to the ministries of culture found in many other nations. The most important U.S. law affecting the status of Native American cultural property is the Native American Graves Protection and Repatriation Act (NAGPRA), implemented in 1990. NAGPRA requires most federal agencies, as well as museums and repositories that receive federal monies, to repatriate human remains, grave goods, sacred objects, and "items of cultural patrimony" to Native American communities that request their return and which can prove descent or prior ownership. The law is primarily intended to undo more than a century of grave-robbing and allow federally recognized Native American nations to rebury their ancestors in a dignified manner. NAGPRA says nothing about Native American intellectual property, and its implications for indigenous cultural property, construed broadly, are limited. Nevertheless, the law has helped to foster new, collaborative partnerships between museums and Native American communities, partnerships that seem likely to continue long after the disposition of items covered by NAGPRA has been resolved. It has also caused archives to develop new policies that take into account Native American sensitivities about the circulation of information about certain

⁵ For a concise analyses of the emergence and expansion of the legal concept of cultural property, see Coombe 2009 and Carpenter, Katyal, and Riley 2009.

traditional religious practices. In that sense, NAGPRA represents a pivotal moment in the process of recognizing the moral and political claims of the country's indigenous citizens.⁶

In sum, the growing importance of cultural property is an instance of what philosophers call an "overdetermined" phenomenon, something that has multiple causes and implications. It draws on growing anxiety about cultural identities in a world that seems, at least in some respects, increasingly borderless. It can be seen as a reaction to the predatory patent and copyright practices of the corporate world, especially in the areas of biotechnology and media. It draws strength from parallel efforts to redress the grievances of indigenous peoples in settler democracies (e.g., Canada, Australia, and the United States) and campaigns to repatriate items of cultural patrimony to nation-states who successfully argue that the objects were improperly alienated from them.

Where this process is headed is anyone's guess. A dystopian vision is offered by John and Jean Comaroff in their book *Ethnicity, Inc.* (2009). They fear that cultural identities and culture in general are fast becoming commodities to be trafficked for economic gain. More optimistic assessments come from bureaucrats at UNESCO and similar institutions, who are reinventing heritage as a resource that can be legally defined and rationally managed in a manner akin to electricity or water. Many anthropologists and museum professionals voice the opinion that repatriation of human remains and important items of material culture has dramatically improved relations with indigenous communities and offered new possibilities for collaborative research. Others--and I count myself among these--celebrate increased attention to cultural heritage and issues of social justice while wondering how the tendency to treat culture as a form of group property can be reconciled with an ethic of free, open discussion and constructive dialogue across cultural boundaries. Sorting out the virtues and pathologies of property-based ideas of heritage is likely to remain one of the biggest challenges facing anthropologists and folklorists in the coming decades.

References

Brown, M. *Who Owns Native Culture?* Cambridge, Mass.: Harvard University Press, 2003.

⁶ As with all legal regimes, NAGPRA's apparently simple language can generate considerable complexity. For details on complications that arise in the law's implementation, see, among many others, Brown and Bruchac 2006 and the articles in a recent special issue of the journal *Museum Anthropology* (Colwell-Chanthaphonh and Nash 2010).

Brown, M., and Bruchac, M. "NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences." J.H. Merryman, ed., *Imperialism, Art, and Restitution*, pp. 192-217. Cambridge: Cambridge University Press, 2006.

Cohen, N. "On Tyson's Face, It's Art. On Film, a Legal Issue." *New York Times*, May 20, 2011, A1.

Cohen, N. "Tattoo Artist Settles Tyson Dispute With *Hangover 2*." *New York Times*, June 21, 2011. [<http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2>]

Carpenter, K., Katyal, S., and Riley, A. "In Defense of Property." *Yale Law Journal* 118: 1022-1125, 2009.

Christen, K. "Changing the Default: Taking Aboriginal Systems of Accountability Seriously." *World Anthropologies Network* 2: 115-126, 2006.

Comaroff, J.L., and Comaroff, J. *Ethnicity, Inc.* Chicago: University of Chicago Press, 2009.

Coombe, R., "The Expanding Purview of Cultural Properties and Their Politics." *Annual Review of Law and Social Science* 5: 393-413, 2009.

Colwell-Chanthaphonh, C., and Nash, S., eds., *Museum Anthropology* 33 (2), 2010. (Special issue commemorating twentieth anniversary of NAGPRA.)

New Zealand Herald, "Tyson's Moko Draws Fire from Maori," May 25, 2011. [http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10727836]

Pritchard, S. "Essence, Identity, Signature: Tattoos and Cultural Property." *Social Semiotics* 10 (3): 331-346.

Skrydstrup, M. "Theorizing Repatriation." *Ethnologia Europaea* 39 (2): 54-66, 2009.