

Comment on “On Copyright and Culture” by Sergey Sokolovsky

Original English version of 'Obsuzhdenie stat'i S. Sokolovskogo "Neskol'ko istorii pro kopirait i kul'turu"' [A Contribution to a Discussion of Sergei Sokolovskiy's Article "Copyright and Culture: Some Case Histories"].

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Understanding the nature of conflicts relating to intellectual property relating to cultural heritage is a challenge that is arising more and more frequently around the world today. It reflects an intersection of traditional cultural values, entrepreneurial interests, and consumer needs.

Achieving a clearer understanding of how and why concerns over intellectual property arise has great relevance to members of descendant communities whose cultural patrimony has often been appropriated and commodified; to archaeology and other heritage-based disciplines that seek to identify and understand the nature and value of tangible and intangible heritage within cultural systems; and to a public that is constantly incorporating elements of world cultures, past and present, into architecture, fashion, music, and art.

What constitutes intellectual property? How and why do conflicts over it arise? What is the difference between appropriation, cultural borrowing, and culture sharing? Who has access to, control over, or benefits from other peoples' heritage. These questions and many others — including those raised in Professor Sergey Sokolovsky's thoughtful essay—require careful consideration. Here I take the opportunity to comment on some of the problematic aspects of intellectual property, specifically the harm caused to Indigenous peoples by unwelcome and inappropriate use of their heritage.¹ I also describe several initiatives that seek to reverse the too-frequent pattern of cultural capital flowing from the community to outside consumers.

My starting point is a set of two examples relating to Aboriginal Australians, the first of which was already noted by Professor Sokolovsky. These provide an opportunity to consider the nature of different cultural and legal systems, as well as the harms and other negative impacts that unauthorized cultural borrowing may have. My comments are informed by an anthropological perspective, and reflect a long-standing interest in this topic.

When the Russian skating team took to the ice at the 2010 Winter Olympics, the nature of their Aboriginal Australian-“inspired” costumes, music, and dance routine resulted in three responses. The first was a series of complaints from indigenous Australians and other protesting the

¹ By no means are intellectual property concerns over cultural heritage limited to Indigenous peoples; however, their concerns are highlighted here because they have generally had the most to lose and have had the fewest resources with which to protect their heritage.

appropriation of elements of their culture Bev Manton, representing the New South Wales Land Council, stated:

I am offended by the performance and so are our other councilors... Aboriginal people for very good reason are sensitive about their cultural objects and icons being co-opted by non-Aboriginal people – whether they are from Australia or Russia. It's important for people to tread carefully and respectfully when they are depicting somebody else's culture, and I don't think this performance does.

The second response was confusion. Maxim Shabaline said “We researched a lot of information on the Internet.” What’s more commentary on this controversy on some web sites indicates that many members of the public are sympathetic with the Russian’s skaters. Here is a case where, even when cultural borrowing is done with good intentions, or indeed even meant to honor other cultures, the communities whose culture it is may see things very differently. And the third reaction was dismissal of the complaints as political posturing or as unreasonable demands by the Aboriginal groups. Viewer’s comments on one Youtube video of the performance² included such comments as “how did these offend aboriginals? ...they only seen it on tv cuz none of em work,” and other insensitive (if not offensive) remarks.

The second example is a television advertisement for Versetel, a communications company.³ Set in the Australian outback, it features an Aboriginal man and woman at a waterhole. The man, his chest painted, climbs onto a boulder and twirls a bullroarer, which makes an ethereal sound. As he does so, the cord breaks and the bullroarer flies off, hitting the woman in the back as she kneels before the waterhole, knocking her face down into it. The text then appears “Communication just got easier.” The accident aside, what is troubling about this advertisement is that the bullroarer is a sacred object never to be seen by women or uninitiated males, and body paint is not simply personal adornment but serves to connect the wearer to totemic ancestors or like purpose.

Both of these examples—one ostensibly seeking to honor Aboriginal Australians, the second to parody them—feature unwelcome, inappropriate, and even harmful appropriation of their cultural heritage. Not only is there the complaint of their property being used without permission, certainly a familiar complaint in Western society, but that cultural items and expressions used out of context or in improper ways can actually jeopardizing identity, health, and worldview. To understand how this may be the case, we need to acknowledge that there are very different cultural and legal systems to consider.

In Western society, we are familiar with intellectual property as situated in legal precedents and actions (e.g., copyright, patents, trademarks). It is based on property values and “rights”; is concerned largely with things; has a limited array of ownership types (e.g., individual); and infringement results in economic loss. In many indigenous societies, however, the situation may be substantially different. In this case, intellectual property is situated in customary law and

² <http://www.youtube.com/watch?v=JJGo32BUah0> Of note is the fact that there were also many viewer’s comments who lambasted those who debased Aboriginal culture.

³ This is accessible on line at http://www.youtube.com/watch?v=3Kf_RYVt2XQ

culture; is based on social relations and responsibilities; is concerned largely with people; there is a wider array of ownership types (e.g., communal); and infringement results in cultural, spiritual and economic loss. In such cases, there may be no distinction made between tangible and intangible culture, between the natural and supernatural realms, or between past and present — all of which are reflected in the complex and multi-dimensional Dreamtime of Aboriginal Australians that provides the basis for their religion, law, and social organization.

Thus, when the Russian ice-skating team, Versetel, or anyone else utilize images, music, and other cultural expressions of Aboriginal peoples without permission or in inappropriate ways, what may be considered entertainment to some has real consequences to the source community. This has been playing out in Australia for some time (e.g., Janke 2003; Johnson 1996), but of course occurs with other Indigenous peoples around the world abound (e.g., Brown 2003; Nicholas and Bannister 2004). The impact of appropriation and commodification of cultural and intellectual property ranges considerably, from annoyance to actual harm. The latter can take different forms, including:

- Loss of access to ancestral knowledge and property
- Loss of control over proper care of heritage
- Diminished respect for the sacred
- Loss of cultural distinctiveness
- Improper/dangerous uses of special or sacred symbols to the uninitiated
- Loss of confidentiality
- Reproductions replace original tribally produced work
- Loss of artistic control
- Threats to authenticity
- Loss of livelihood

(Nicholas and Hollowell 2006)

What is more, concerns about cultural integrity are not limited to original items, but may extend to replicas. This is the case for the Zuni of the American Southwest, who consider replicas of certain sacred items, such as masks, to also contain much the same features and powers as the original (Isaac 2011). Much the same is found with rock art images: whether in British Columbia, Canada (Nicholas and Bannister 2004) or the Kimberleys in Australia (Graber 2009) certain painted images of spirit beings are not only sacred but actually embody those beings. In such cases there is much more than tourism dollars or t-shirt sales at stake.

Understanding the nature of how and why concerns and disputes arise over cultural and intellectual property related to cultural heritage requires a multi-disciplinary and cross-cultural approach. This includes methods and insights derived from anthropology, archaeology, ethics, legal studies, and many other fields of study, coupled with the perspectives and values offered by members of descendant communities (e.g., Bell and Napoleon 2008; Bell and Paterson 2009; Riley 2004). The result is an array of resources and culturally appropriate methodologies, including both collaborative and community-based research practices, that both researchers and descendant communities can take advantage of (see examples in Nicholas et al. 2009, 2010). There is also a concerted effort underway among some intellectual property scholars to promote

more equitable research practices and to ensure that descendant communities are the primary beneficiaries of their cultural heritage.

One example of this is the Intellectual Property Issues in Cultural Heritage (IPinCH) Project.⁴ This is a 7-year, international and multi-sectoral initiative that brings together anthropologists, archaeologists, lawyers, ethicists, heritage and museum specialists, and community partners from eight countries to explore intellectual property-related issues that are emerging within the realm of cultural heritage and their implications for theory, policy, and practice. Key project objectives are: 1) to document the diversity of principles, interpretations, and actions arising in response to IP issues in cultural heritage worldwide; 2) to analyze the many implications of these situations; 3) to generate robust theoretical understandings and exemplars of good practice; and 4) to make these findings available to stakeholders—from Aboriginal communities to professional organizations and government agencies—assisting development and refinement of stakeholders' theories, principles, policies, and/or practices.

Some of the topics that IPinCH co-investigators and collaborators are investigating involve the commodification and circulation of cultural images and designs, protocols for ethical heritage research, access to museum records and other archives, cultural tourism issues, changing legal interpretations of cultural rights, and international heritage protection efforts, to name only a few. One major component of the project are 11 community-based initiatives now underway in Australia, Canada, New Zealand, Kyrgyzstan, and the United States, which target specific situations in communities relating to intellectual property. These initiatives are crucial in helping us to document and explore the diversity of principles, perspectives, and responses that arise in connection with IP issues. Here I briefly describe one of these studies, the Ngaut Ngaut Interpretive Project underway in South Australia, intentionally selected to resonate with the other Australian examples discussed above.

Ngaut Ngaut, more commonly known as the Devon Downs, is one of the most important sites in the history of Australian archaeology. However, it is also an ancestral site of considerable importance to the local Indigenous peoples, as revealed by the numerous petroglyphs there. The site controlled by National Parks and Wildlife. Several years ago the Mannum Aboriginal Community Association Inc. (MACAI) began discussions with the government not to restrict visitors to this popular location, but rather to work to develop culturally sustainable interpretive content. The community has been very concerned that visitors have access accurate content about tangible and intangible values and the cultural meanings related to this key heritage site, and local interpretations of rock art, the Dreamtime, oral histories, and more. While there is some secret-sacred information that community members will not share, there is also much about Ngaut Ngaut and their lifeways that they will. To this end, the Ngaut Ngaut IPinCH project, under the direction of Dr. Amy Roberts (Flinders University) and Ms. Isabelle Campbell (MACAI) is assisting with the development of a new management plan for the site and new

⁴ This seven-year project (2008-2015) is funded by Canada's Social Science and Humanities Research Council (SSHRC). For more information, visit the project website at www.sfu.ca/ipinch

signage and informational materials to ensure that the community has a say in what aspects of its heritage is shared and how.

To conclude, in this short essay I have addressed only briefly and very selectively some of the issues and questions raised by Professor Sokolovsky.⁵ As intellectual property issues arise in the realm of cultural heritage, there is much at stake for researchers, including potential denial of access to research materials (e.g., NAGPRA), but far more so the Indigenous peoples whose culture has often been considered public domain, and which has been afforded little protection. There is today an opportunity to redress by acknowledging the distinct cultural and legal systems that are represented here, and by seeking to develop new research relationships that are more equitable, responsible, and accountable.

Over the past three years, through partnerships with Indigenous communities (and others), the use of reflexive and participatory research methodologies, and dynamic intercultural and interdisciplinary exchanges, the IPinCH project has been examining intellectual property (IP) dilemmas arising over issues of control related to specific forms of cultural knowledge, how that knowledge is used, who has access, and who benefits. I encourage readers to visit our website not only to learn more about this project, but especially to become aware of the resources available there, including research bibliographies and publications on a variety of topics of interest to a wide variety of stakeholders.

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⁵ I have explored some of these issues in depth elsewhere.

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