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# Can Culture Be Copyrighted?<sup>1</sup>

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The digital revolution has dramatically increased the ability of individuals and corporations to appropriate and profit from the cultural knowledge of indigenous peoples, which is largely unprotected by existing intellectual property law. In response, legal scholars, anthropologists, and native activists now propose new legal regimes designed to defend indigenous cultures by radically expanding the notion of copyright. Unfortunately, these proposals are often informed by romantic assumptions that ignore the broader crisis of intellectual property and the already imperiled status of the public domain. This essay offers a skeptical assessment of legal schemes to control cultural appropriation—in particular, proposals that indigenous peoples should be permitted to copyright ideas rather than their tangible expression and that such protections should exist in perpetuity. Also examined is the pronounced tendency of intellectual property debate to preempt urgently needed reflection on the political viability of special-rights regimes in pluralist democracies and on the appropriateness of using copyright law to enforce respect for other cultures.

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1. My research on copyright and cultural appropriation was made possible by the financial support of Harry C. Payne, president of Williams College, and by the Francis C. Oakley Center for the Humanities and Social Sciences. Colleagues kind enough to comment upon an earlier draft include Sylvia Kennick Brown, David B. Edwards, Eduardo Fernández, Jonathan Haas, John P. Homiak, Gary J. Jacobsohn, William L. Merrill, Molly H. Mullin, Sydel Silverman, Mark C. Taylor, and Alan Wolfe. Two anonymous reviewers also provided many helpful suggestions. Because some of these readers vigorously dispute the analysis offered here, my thanks for their help in no way implies their endorsement of my opinions.

Sometimes profound changes in the Zeitgeist reveal themselves in small ways, like the first timid shoots of an oak seedling before it hauls itself skyward. For me, an article in the monthly *New England Archivists Newsletter*, a publication presumably unfamiliar to most anthropologists, signaled a potentially momentous change in the future of our discipline. The article, written by Elizabeth Sandager of Harvard's Peabody Museum, describes a situation common to museums and archives in the United States: the museum's staff discovered in its collection several drawings of Navajo dry paintings (referred to in the article as "earth images") made by the anthropologist A. M. Tozzer early in this century. Aware that the original images on which Tozzer based his sketches are traditionally destroyed at the end of Navajo healing rituals, the Peabody staff worries that the drawings' continued presence in the collection constitutes a form of disrespect. Worse still, the drawings could have come as the result of a violation of contemporary privacy norms (Sandager 1994:5):

Everything that happens in ceremony is privy only to those who are participants in the ceremony: the singer, the assistants, the sponsor, the family, and the patient. . . . We are attempting to determine the circumstances under which these earth image reconstructions were created, and whether privacy was breached. . . . Even though Tozzer did not describe the circumstances under which the reconstructions were created, it should not be assumed that they were created surreptitiously. On the other hand, if they were, there remains the possibility of a serious breach of privacy.

Because the Tozzer material is in a poor state of conservation, Sandager explains, the museum is seeking the advice of Navajo consultants before deciding whether the drawings should be restored or, she implies, quietly allowed to decompose. Sandager presents this case as an example of the responsibility of professional archivists to "consider whether we are violating the privacy of the affected tribe(s) by providing unrestricted access to documents describing traditional beliefs and ceremonies" (p. 5).

Sandager's thoughtful reflections raise a host of complex issues: research ethics and the nature of informed consent, respect for religious beliefs, and concepts of ownership at a time when indigenous intellectual property rights are the focus of lively international debate. Although her article asks vital questions, it conspicuously evades others. If the Tozzer papers are found to be objectionable, for instance, should they not be summarily destroyed rather than simply allowed to biodegrade? She mentions that the drawings have long since been published in a book. If a logic of ethical quarantine applies to the drawings, then why not to all known copies of the book, which is, after all, more readily available to the general public?

Then there is the question of privacy. In Anglo-American law, privacy rights cease or become significantly

attenuated when individuals die. Because Tozzer conducted his field research at the turn of the century, it is unlikely that any of the principals are alive today. In what sense, then, does the presence of Tozzer's notes and drawings in the Peabody collection violate individual privacy? Or do native societies enjoy an implicit right of *collective* privacy to which the museum should be attentive, a situation implied by Sandager's stated concern for "the privacy of the affected tribe(s)?"

Finally, what of the rights of A. M. Tozzer, who presumably bequeathed his fieldnotes to the Peabody on the assumption that it would curate them and make them available to researchers? Wouldn't the Peabody's decision to limit access to these materials or knowingly permit their deterioration violate the museum's fiduciary responsibility to Tozzer and to his descendants? After all, had Tozzer known that such a fate could befall the record of his life's work, he might well have taken his collection elsewhere. Could this act of passive curatorial destruction lead future donors to bypass public repositories in favor of private collectors, thereby contributing to the privatization of the human cultural record?

As Sandager's article makes clear, archivists and curators routinely confront an ever-widening series of dilemmas in the wake of the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, arguably the most important piece of museum-related legislation in American history. NAGPRA establishes a legal framework for repatriating human remains and ritual objects to Indian tribes that request them, provided that claimants can substantiate direct descent or, in the case of objects, prior ownership. The implementation of this legislation, which imposed substantial administrative burdens and was in some quarters regarded as disastrous for the future of American museums, has now become a routine part of museum practice. In fact, many curators hail it as the first step in a historic reconciliation between native peoples and museums, a process that may lead to new and rewarding partnerships.<sup>2</sup>

Few anthropologists would today question the legitimacy of the native claims that lie at the heart of NAGPRA. The outer boundaries of the law, however, remain vague. Although for the purposes of NAGPRA "cultural patrimony" refers solely to objects, the law sets the stage for comprehensive assertions of control over cultural records currently excluded from consideration. In a letter sent to a number of museums in 1994, Vernon Masayesva, chairman and CEO of the Hopi Tribe, formally states the tribe's interest in all published or unpublished field data relating to the Hopi, including notes, drawings, and photographs, particularly those

dealing with religious matters. Chairman Masayesva additionally requests the immediate closing of these records to anyone who has not received written authorization from the Hopi Tribe. "This request," he adds, "is meant to address the 'last minute rush' by researchers to access Hopi information and collections before they are declared 'off limits' or are actually repatriated back to the tribe." (For a longer excerpt from the letter, see Haas 1996:S4.) The Hopi initiative was soon followed by a declaration issued by a consortium of Apache tribes demanding exclusive decision-making power and control over Apache "cultural property," here defined as "all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts" relating to the Apache, including any representations of Apache culture offered by Apache or non-Apache people (Inter-Apache Summit on Repatriation 1995:3). This broad definition of cultural property presumably encompasses ethnographic fieldnotes, feature films (e.g., John Ford's *Fort Apache*), historical works, and any other medium in which Apache cultural practices appear, whether presented literally or as imaginative, expressionistic, or parodic embellishments of concepts with which Apache identify.

The recent history of relations between Indian tribes and major Anglo-American institutions, including the federal government, suggests that these encyclopedic demands represent an opening gambit in what are likely to be protracted discussions. The Hopi and Apache declarations echo similar manifestos from other parts of the world, including South America, Australia, and the Pacific.<sup>3</sup> Clearly, a profound shift in the way we conceptualize and contest cultural information is under way. The assumptions that inform this emerging perspective can be summarized as follows:

1. An ethnic nation—a people, in other words—can be said to have enduring, comprehensive rights in its own cultural productions and ideas. These include the right to exercise total control over the representation of such productions and ideas by outsiders, even in the latter's personal memoirs, drawings, and fictional creations.

2. A group's relationship to its cultural productions constitutes a form of ownership. This ownership may be literal—that is, based on some comprehensive definition of cultural or intellectual property—or metaphorical, reflecting universal recognition that in moral terms a group "owns" the ideas and practices that it holds dear.

3. Cultural information pertaining to ethnic minorities that was gathered in the past by anthropologists, missionaries, government administrators, filmmakers, and novelists is by definition so contaminated by the realities of colonial power that it cannot meet (today's

3. Prominent examples include the Mataatua Declaration (1993), the Julayinbul Statement on Indigenous Intellectual Property Rights (1993), and the Suva Declaration (1995). Copies of these documents can be found at (<http://www.icip.lawnet.com.au/info6.htm>) as well as other on-line sites devoted to indigenous and human-rights issues.

2. The literature on NAGPRA is too vast to inventory in this essay. Particularly instructive, however, is the richly detailed study of a single high-profile repatriation case offered by Merrill, Ladd, and Ferguson (1993). Other useful essays on the application of NAGPRA can be found in Ziff and Rao (1997); its legal ambiguities are explored in DuBoff (1992). For an elegant study of the difficulty of reconciling Anglo-American notions of intellectual property with those of a Native American people, see Greene and Drescher (1994).

standards of informed consent. This information may therefore be quarantined or subjected to severe access restrictions when and if its subjects deem its presence in the public domain offensive.

In this essay, I undertake a critical examination of these assumptions with the goal of broadening the scope of debate about the status of indigenous cultural and intellectual property rights. My skeptical intervention is motivated by a belief that current thinking on these issues has been dangerously narrow, marked more by passionate advocacy than by sustained reflection on the broader issues at stake in developing ethical standards and legislative mechanisms that impose new limits on the free exchange of information in the name of protecting ethnic minorities.

In framing my analysis, I use the recent work of the sociologist Alan Wolfe (1996) as a touchstone. Wolfe argues that the American tradition of social criticism has declined in the past three decades because of the ascent of a brand of romanticism based on a dream of utopian authenticity. The goals of today's romantic social critics, among whom cultural anthropologists stand out in disproportionate numbers, are manifestly therapeutic: they want their subjects to be "empowered" or even "healed." They celebrate resistance, rebellion, and deviance among social others—even when, in their own middle-class neighborhoods and places of employment, they are likely to advocate ever stricter forms of proceduralism. The trouble with romantic criticism, Wolfe argues, is that it simply fails to persuade a large public audience. Romantic criticism gratifies the writer's sense of moral worth but can offer only "utopian longings that ultimately have no critical edge" (Wolfe 1996: 39). The alternative is a return to a realist perspective that approaches social problems in all their ambiguity and nuance, confronting squarely the tragic contradictions that inevitably arise in the everyday life of pluralist societies.

As I will argue, the debate over intangible cultural property as it has been conducted by anthropologists, legal scholars, and indigenous activists has tended toward a polemical romanticism that produces memorable bumper-sticker slogans ("Give the natives their culture back!") but little in the way of sober reflection on the difficult balancing act required to formulate policies that provide reasonable protection for minority populations while maintaining the flow of information essential to liberal democracy.<sup>4</sup> In particular, a narrow focus on indigenous rights blinds social critics to the broader implications of the novel forms of cultural protection that some are enthusiastically endorsing. For thinking on indigenous cultural and intellectual property to be effective for policy-making purposes, it must be not only ethically sound but also thoroughly grounded in

4. Although I distinguish between anthropologists and indigenous activists here and elsewhere, I recognize that native peoples are a growing and welcome presence in anthropology. Some conflict between these two roles seems inevitable, however, because the discipline of anthropology is predicated on a *global, comparative* perspective rather than on a particular one.

the practical realities of cultural creativity, information storage and transfer, the fluidity of ethnic boundaries, and the limitations of judicial process in developed and developing nations alike.

## Cultural and Intellectual Property: Basic Concepts

The majority of anthropological research on issues of intellectual property confronts the appropriation of indigenous knowledge for commercial purposes, usually by transnational corporations. Case studies have documented the acquisition of native crop varieties for the genetic improvement of seeds, the transformation of traditional herbal medicines into marketable drugs by pharmaceutical firms, the incorporation of indigenous graphic designs into consumer goods without the permission of native artists, the exploitation of indigenous music by record companies, and the collection of DNA from isolated human populations for medical uses yet to be determined.<sup>5</sup> Although these cases raise complex dilemmas at the margins, most are fairly cut-and-dried. Commercial interests from the developed world prospect for information available in the unprotected public domain of indigenous societies. Then, by invoking prevailing law, they sequester the information in the protected, private realm of copyrights and patents, where it becomes a monopoly from which they alone profit. The problem is easy to identify, but, given the complexities of international law and the politically marginal status of many of the indigenous peoples directly affected, effective solutions are another matter. Nevertheless, there are encouraging signs that major institutions in the United States and elsewhere are preparing to consider appropriate remedies.<sup>6</sup>

These cases are made reasonably straightforward by the simple fact that the primary issues are mercantile: the native peoples whose intellectual property is being raided seek their fair share of any profits. Here the economy of information can be regarded not as a zero-sum game, in which one person's loss is another's gain, but as a process by which resources can be propagated to everyone's benefit.

Before pursuing the broader implications of this quality of information, let me review the basic rationale for intellectual property law. Lawmakers have long recognized an implicit tension between the need to protect a broad and lively domain of public discussion and the

5. Key sources on the exploitation of indigenous biological knowledge and resources include Brush (1993), Cleveland and Murray (1997), *Cultural Survival* (1996), Greaves (1994), and Posey and Dutfield (1996). Works that address the appropriation of indigenous art and music include Feld (1994, 1996), Golvan (1992), Pask (1993), Seeger (1996), and Zemp (1996).

6. See Grifo (1994) for a brief overview of a bioprospecting program, partially funded by the National Institutes of Health, that has implemented plans to guarantee compensation for native communities whose ethnobotanical knowledge leads to the discovery of marketable drugs.



creation of institutions that would foster creativity by allowing writers, musicians, and inventors to profit from their works. "The author," writes James Boyle, a law professor and an expert on intellectual property, "stands between the public and private realms, giving new ideas to the society at large and being granted in return a limited right of private property in the artifact he or she has created—or at least assembled from the parts provided by our common store of ideas, language, and genre" (Boyle 1996:xii). David Lange (1993:126), another legal scholar, describes copyright as an implicit contract that gives an author "the limited monopoly of copyright for a limited time, but only in exchange for an eventual dedication of the work to the public domain." The common theme is that the rights conferred by intellectual property laws are *limited*. Patents and copyrights, for example, have a finite term. (In the United States, a copyright endures for the author's life plus 50 years; for patents the term is generally 17 years.) Upon expiration, the work reverts definitively to the public domain, where it can be used however people wish. The range of these rights is similarly finite. I am free to quote limited sections of copyrighted works because of the fair-use doctrine, which holds that copyright is not absolute—nor can it be in a society that values creativity. Important legal decisions have also established the right to borrow extensively from copyrighted works for purposes of political parody. In other words, when intellectual property rights collide with reasonable assertions of free speech, free speech should prevail even if the results are offensive to the creator and intrude upon his or her copyright.

The principal goal of intellectual property laws, then, is to see that information enters the public domain in a timely fashion while allowing creators, be they individuals or corporate groups, to derive reasonable financial and social benefits from their work. Once a work enters the public domain, it loses most protections. I am free to publish *Uncle Tom's Cabin* or to manufacture steel paper clips without paying royalties to their creators, whose limited monopoly has expired. The same principle applies to prehistoric petroglyphs or to the "Mona Lisa," both of which have become part of our common human heritage, whatever their origins.<sup>7</sup>

Intellectual property has become the focus of considerable theorizing and legal maneuvering in recent years because of general alarm over the increasingly expansive claims of ownership made by corporate interests—claims that threaten the doctrine of fair use and limit

the scope of the public domain. Rosemary Coombe, a shrewd critic of prevailing intellectual property law, observes that a key characteristic of postmodern culture is the growing influence of commodified symbols in everyday thought and political speech. Children use trademarked action figures and cartoon characters in play; politicians encode their messages with references to advertising and popular television dramas (e.g., "Where's the beef?"). "Copyright laws," Coombe asserts, "restrict the social flow of texts, photographs, music, and most other symbolic works," a form of control that "may deprive us of the optimal *cultural* conditions for dialogic practice" (Coombe 1991:1866). According to Coombe and others, then, aggressive expansion of copyright and trademark is a significant threat to free speech and political dialogue. Concern over growing corporate control of the symbols that constitute everyday social life, as well as the emergence of new technologies that make possible cheap replication and instantaneous dissemination of music, graphic art, and text, have led to claims that copyright is, or soon will be, dead. "Information wants to be free" is the slogan of Internet prophets such as John Perry Barlow and Esther Dyson. Barlow and Dyson are at the cutting edge of spirited grassroots resistance to the intellectual property assertions of corporations, especially in the worlds of graphic design, avant-garde music, and networked communication.<sup>8</sup>

A critique of intellectual property law based on the fluid and infinitely replicable quality of information harmonizes well with theoretical developments in anthropology, which have increasingly emphasized such postmodern realities as globalization, transnational flows, and the creative mixing ("creolization") or invention of traditions. From this perspective, culture is not a bounded, static entity but a dynamic, constantly renegotiated process. So thoroughly has the processual nature of culture come to dominate contemporary thinking that anthropologists appear to be backing away from the culture concept itself (see, e.g., Gupta and Ferguson 1992).

From this theoretical milieu have emerged trenchant critiques of the presuppositions that underlie the developed world's intellectual property laws (see, e.g., Aoki 1996), which were shaped by the demands of 19th-century industrial capitalism. Copyright, critics have noted, is predicated on romantic notions of an isolated creative genius who plucks beauty out of thin air by an inspired act of the imagination. Copyright law was designed to ensure that the author and his or her immediate descendants will benefit from this miracle of creation. The identification of inventiveness with a solitary human life, however, cannot be easily reconciled with the political economy of modern industrial creativity or, for that matter, with the collective productions of indigenous peoples. Because neither corpo-

7. One could, of course, seek a patent for a *new* form of paper clip or a new translation of a work already in the public domain. And a new drawing or photograph of an ancient petroglyph would be copyrightable, although the design itself would not. It should be noted that trademarks represent an exception to the time-limited quality of most intellectual property protection. Generally, trademarks are eligible for protection as long as the holders can prove that they have an enduring economic value in identifying a commodity or product line and distinguishing it from others. If a company fails to use its trademark for an extended period, however, trademark protection may lapse.

8. Important statements of the libertarian position with regard to information include Barlow (1993) and Dyson (1995). Manifestos demanding an expansion of fair-use standards for musicians and graphic designers include Negativland (1995) and Samudrala (1995).

rations nor cultures have a predetermined life span—no three-score-and-ten that can be used as a yardstick for protection—the temporal limits of current copyright law appear exceedingly arbitrary. Finally, the spread of digital technologies and systems of distributed intelligence makes it increasingly difficult for the state to police information and thereby to enforce extant copyright laws. The image that I post on my Web page today can be reproduced and distributed around the world in seconds, then stored on personal storage devices relatively impervious to legal scrutiny. Digitally sampled portions of my music can be modified by other artists and then spliced into their work without my knowledge or consent. The chance that I will discover their piracy is vanishingly small.

Everyone, then, agrees that prevailing concepts of intellectual property are in crisis. But what is to be done? Before reviewing proposed solutions, we must consider indigenous views of information that differ substantially from those I have just described.

### Culture Reified: Information as a Limited Good

As a number of commentators have observed (e.g., Coombe 1993; Jackson 1989, 1995), the ongoing struggle for political and cultural sovereignty often leads indigenous activists to talk about culture as if it were a fixed and corporeal thing. Calls for the return of land and resources have a way of intertwining themselves with demands for religious freedom and other basic rights to such an extent that it is sometimes difficult to distinguish culture from its material expression. A United Nations report on the protection of cultural and intellectual property reflects this mode of thought when it asserts that “each indigenous community must retain permanent control over all elements of its own heritage,” heritage being defined as “all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks” (Daes 1993:11–13). The heritage in which native peoples have definitive rights, in other words, includes concepts and thoughts as well as their concrete enactment. This makes perfect sense, the report concludes, because for indigenous peoples “the ultimate source of knowledge and creativity is the land itself” (p. 10).

With few exceptions, cosmopolitan scholars find such reified views of culture problematic. In an incisive analysis of the expansion of property concepts into new conceptual domains, Marilyn Strathern (1996:22) notes that basic cultural understandings sit uneasily within a framework of intellectual property. Cultures lack clear spatial and temporal boundaries; human beings are members of a society but not “members of” a culture, which is a flexible set of understandings, dispositions, and behavioral scripts that change through time and freely influence and are influenced by social interactions with other groups. Philippe Descola (n.d.) illus-

trates the problem of literalist notions of cultural property with a memorable example. We commonly regard Greek civilization as the source of a mode of formal reasoning known as the syllogism. Does that mean that the Greek people therefore “own” syllogistic logic? Should they be compensated by American or British or Israeli software companies for their collective cultural contribution to modern programming?

Disjunctions between indigenous and cosmopolitan views of cultural information are particularly acute in matters of the sacred. Although it is impossible to offer a normative statement about how native peoples conceive of sacred knowledge, it is fair to say that many see it as a limited good that cannot properly exist in several places at once. Religious knowledge that resides in inappropriate places may find its power diminished or dangerously distorted, hence the common practice of compartmentalizing information in order to limit access to the inner meaning of religious symbols.

The latter impulse may have been a factor behind Zia Pueblo’s recent request that the state of New Mexico pay damages for the unauthorized reproduction of the Zia sun symbol on New Mexico’s flags, license plates, and official stationery since 1925. The state’s use of this graphic element in no way limits the ability of Zia residents to continue employing the symbol in their own artistic or religious activities. Yet if one believes, as people at Zia evidently do, that this is a design imbued with inherent power, its use for everyday civic and commercial purposes is at least an affront to their dignity, at worst a dangerous form of blasphemy capable of unleashing genuine misfortune. One may reasonably infer that the petition was motivated at least in part by a desire to assert control over something that was once solely the community’s. “Ownership,” Strathern (1996: 30) observes, “gathers things momentarily to a point by locating them in the owner, halting endless dissemination, effecting an identity.”<sup>9</sup>

Indigenous resistance to the promiscuous dissemination of knowledge, sacred and otherwise, lies behind emerging conflicts over secrecy. The vast majority of native peoples face so many challenges to their economic and political sovereignty that they have little time to fret about the information-management policies of public archives or museums. A small but growing number of native communities in North America and Australia, however, devote considerable energy to the protection of cultural activities from the scrutiny of inquisitive outsiders, whether they be scholars or tourists. Anyone who has visited the Hopi or Taos Pueblo reservations in the American Southwest, for example, knows that tribal authorities actively discourage non-Pueblo people from observing, recording, or even inquiring about a wide spectrum of cultural practices. Each

9. My request to the governor’s office of Zia Pueblo for information on this case went unanswered. I regret that I must therefore make inferences about motive without benefit of Zia Pueblo’s own perspective. Although the New Mexico legislature refused to award the pueblo cash damages, it did authorize a formal statement of apology.

community has a different policy regarding admission to community activities, including religious rituals, but overall it is accurate to say that the Pueblo place strict limits on the circulation of knowledge about their cultures. Although it is commonly believed that Pueblo secrecy is a defensive tactic reflecting centuries of external interference in the free exercise of religion, it also plays a key role in maintaining the Pueblos' own political system. In an essay on the social functions of secrecy in Taos Pueblo, Elizabeth Brandt (1980) argues that the primary motivation for closing religious knowledge to outsiders and for objecting to the collection and permanent storage of this information by non-Pueblos is to prevent it from cycling back to Pueblo individuals who are not authorized to possess it.<sup>10</sup> Strict compartmentalization of knowledge is necessary to maintain the community's religious hierarchy and ultimately the integrity of traditional institutions, which are based on theocratic principles. Of equal importance is the conviction that in the wrong hands religious knowledge loses its power or assumes destructive forms.

Few readers will dispute the general right of the Pueblo or of any other native groups to restrict the gathering of information about their societies as they see fit. But we must also acknowledge that principles of secrecy and strict control of knowledge contradict the political ideals of liberal democracy.<sup>11</sup> In the United States, secrecy has long been regarded as inherently inimical to democratic process and to personal freedom. There are, of course, circumstances in which secrecy is warranted: in matters of national security, in deliberations on sensitive administrative or legislative matters, in certain kinds of law-enforcement activities, and so forth. We also recognize that institutionalized secrecy nearly always leads to abuses of power. For this reason, we have implemented a wide range of "sunshine laws" that require government officials to conduct deliberations in public and to make administrative documents available to citizens on demand. There is also a strong presumption that once information enters the public domain, it should stay there. Secrecy, in other words, is inherently threatening to democratic process and to the

10. Christopher Anderson (1995:12) reports similar concerns about unauthorized access to sacred information among Aboriginal Australians. His own institution, the South Australian Museum, "had numerous requests from remote communities in Central Australia that the Museum never allow the Secret/Sacred Room and its collection to be looked after by an Aboriginal person," because these communities did not want men from other groups to see their religious objects.

11. The Hopi Cultural Preservation Office (HCPO) recognizes this fundamental difference in cultural perspectives in a judiciously worded statement found on its homepage on the World Wide Web. "Most European or Western societies are based in a tradition of scientific inquiry, the 'right' to ask questions and investigate the unknown," the document states. In contrast, the HCPO document continues, Hopi tradition discourages open-ended curiosity because many cultural activities are regarded as belonging solely to specific clans or religious societies. See "Respect for Hopi Knowledge," ([http://www.nau.edu/~hcpo-p/current/hopi\\_nis.htm](http://www.nau.edu/~hcpo-p/current/hopi_nis.htm)), accessed 8 September 1997, unpaginated.

public good except in a sharply circumscribed range of situations.<sup>12</sup> We demand that our educational, religious, and political institutions practice openness whenever possible. Although archives routinely impose restrictions on access—when, for instance, they abide by a donor's request that documents be closed to researchers for a stated period, usually to protect the privacy of living individuals—I know of no cases in which U.S. public repositories deny access to archived materials on the basis of a potential user's ethnicity, gender, age, or religious affiliation. Such selective restrictions would surely qualify as a form of illegal discrimination.<sup>13</sup>

Native values and the American legal system are especially prone to collision over the question of *retroactive* secrecy, the disposition of information that was obtained in the past and has long resided in the public domain. There are few precedents for the removal of information from the public domain in response to the demands of third parties asserting a right to determine when, where, and by whom this information is accessed.<sup>14</sup> Yet this is exactly what some Indian tribes are asking American museums and archives to do. There is no getting around it: in this case, indigenous beliefs about knowledge of the sacred conflict directly with the majority's commitment to the sacredness of public knowledge. This is a classic collision of irreconcilable values. To resolve it, both sides will have to reflect carefully on the global implications of their respective positions in order to achieve a suitable compromise.

In this context, one can easily see the attraction of framing indigenous demands in terms of copyright and

12. The philosopher Sissela Bok (1983) offers a thoughtful discussion of the moral and philosophical questions raised by secrecy. Amanda Pask (1993:84–85), a legal scholar, indirectly challenges Bok's universalist assessment by arguing that secrecy is inimical to the Western democracies for specific cultural reasons: "A community which conceives of itself solely as the administrative expression of the rational self-interest of individuals depends for its legitimacy on not being seen to limit 'information.' . . ." In Pask's opinion, however, this attitude toward information is a cultural artifact that may not be found among indigenous populations organized along communitarian lines.

13. Apparently, some public repositories in Australia close specific Aboriginal collections to women and uninitiated men. For a comprehensive analysis of the Australian case, including discussion of several precedent-setting legal decisions related to ethnographic secrecy, see the essays in Anderson (1995).

14. Jonathan Haas (1996:S5–6) proposes that such a precedent exists in the voluntary de-accessioning and destruction of a controversial collection of photographs of naked college freshman, mostly from Ivy League institutions, taken for scientific purposes that are now thoroughly discredited. The analogy has merit, but Haas overlooks at least two important facts: (1) the photographs violate the personal privacy of living individuals, and (2) the scientific utility of the photographs is and was minuscule, if it ever existed at all. Their value as historical and scientific documents is thus far outweighed by their ethical deficiencies. As I will argue, similar objections can doubtless be lodged against *some* ethnographic records (in which case de-accessioning may be warranted), but to apply them to all such records would be irresponsible unless Haas can establish that museum collections have somehow lost their inherent value. To do so, he would have to contradict the opinion of those indigenous spokespersons who argue that the collections are so valuable that they should be returned to their source communities for safekeeping.



broadened definitions of cultural property. After all, if native groups “own” their knowledge, if it was “stolen” from them by government officials, missionaries, and anthropologists, then they are simply seeking the return of pilfered goods rather than asking repositories to violate principles of free access. This approach may be appealing to all parties involved in the dispute. The petitioners regain exclusive control over their sacred knowledge. Chronically underfunded repositories, which may be worn down by expensive litigation, make a persistent problem go away without an apparent violation of their responsibility to the public. Politicians, who as a group are not known for their commitment to social research or their support of public access to information, leap at the chance to propose laws that summarily convert information into property. In this case, property discourse replaces what should be extensive discussion on the moral implications of exposing native people to unwanted scrutiny, on the one hand, and sequestering public-domain information, on the other.

For those who object that I attribute too much importance to claims that are solely relevant to the unique situation of native minorities, let me mention another case that has striking parallels to contemporary indigenous demands. For several years, the Church of Scientology has waged a relentless campaign against owners of Internet sites that store and transfer texts regarded by Scientologists as secret, copyrighted material. At the insistence of church attorneys, computers have been confiscated in the United States and Finland by law-enforcement officials searching for such documents. The Church of Scientology has also filed complaints that led to the seizure of public-domain court transcripts posted on the server of an Internet service provider in Virginia, and it is seeking civil damages from the *Washington Post* for publication of what it considers to be proprietary information (Grossman 1995:174, 252). Scientologists offer nearly the same rationale for these search-and-seizure acts as American Indians do for their opposition to the presence of religious information in archives (p. 174): “Scientologists genuinely believe their secrets can save the world, but that they must be doled out only to those who have proven ready to receive them. Followers hold fiercely to the notion that their revered, secret texts must never be disseminated, save to the rigorously initiated.” In other words, the formidable legal arm of the Church of Scientology has invoked principles of intellectual property similar to those cited by indigenous groups demanding that ethnographic material be removed from public access. Civil libertarians have denounced the Scientology campaign as a serious threat to free speech, in part because it uses copyright law to silence the church’s critics.

This is not to imply that the claims of the Church of Scientology are morally equivalent to, say, those of the Apache leaders who demand control over Apache concepts and images. The Church of Scientology, it must be noted, collects large fees from initiates before it allows them access to its secret texts. But their com-

mon appeal to principles of intellectual property has the insidious effect of *making* them moral equals. In both cases, broad questions of fair use and the free expression of ideas are magically transformed into a narrow dispute over commodities. This troubling moral alchemy underscores the observation of William Gass (1997:62) that “the chief mode of censorship in a commercial society is, naturally enough, the marketplace.” Here Gass refers to the power of publishers and booksellers, who largely determine what gets published and sold in capitalist markets, but he could just as well be speaking about the manifold ways in which intellectual property rights strategies can be, and are, used to deny access to information and to inhibit open communication.<sup>15</sup>

Advocates of the dramatic expansion of the intellectual property of native peoples seem oddly blind to the free-speech implications of their proposals. Kamal Puri (1995:338–39), for instance, supports the imposition of laws prohibiting the use of Aboriginal art and symbols by outsiders. The commodification of Aboriginal art, he argues, “deprives Aboriginal people of an important economic base; and secondly, if trivialized, it can undermine the autonomy of unique Aboriginal traditions.” Although this rationale for cultural protection seems reasonable at first glance, upon reflection one begins to wonder where the legal prohibition of religious “trivialization” or sacrilege might lead. Would citizens therefore be subject to civil and criminal penalty if they trivialized *any* religious symbols? Would indigenous peoples themselves be subject to reciprocal fine or arrest if they manipulated Christian imagery for their own purposes? One can easily imagine conservative evangelical groups taking offense at the use of Christian symbols by members of the Native American Church during peyote meetings. In the American context, certainly, legal efforts to prevent parodic or creative appropriations of religious symbols would present a serious challenge to the First Amendment.

## Information Ethics

Another element of contemporary debate over cultural and intellectual property is the claim that indigenous knowledge currently available in the public domain was obtained under circumstances so inherently coercive that it should be either sequestered or returned to its source community. The most extreme version of this position—the assertion that ethnographic field data have the same moral standing as the now-quarantined records of medical experiments conducted in Nazi concentration camps—still has few advocates, but it is only a step or two removed from today’s orthodoxy, which

15. Some experts in intellectual property law express concern that copyright is increasingly used to restrict access to information instead of encouraging its dissemination (see, for example, Branscomb [1994] on struggles over access to the Dead Sea Scrolls and Conley [1990] regarding the scholarly use of unpublished biographical information, especially letters and diaries).

sees ethnography as an important instrument in the hegemonic project of classifying, representing, and ruling subject populations (see, e.g., Pels and Salemink 1994). Once we accept the totalizing logic of this formula, the conclusion that all records from formerly colonized places are ethically tainted follows naturally.

Yet anyone willing to look carefully at the historical evidence will be dissatisfied with blanket condemnations of ethnographic records. At the very least, we must acknowledge the agency of indigenous peoples—their strategic decisions to share ideas and stories and songs with inquisitive outsiders when, in their judgment, circumstances warranted. In an informative analysis of a major Zuni repatriation case, for example, Merrill, Ladd, and Ferguson (1993:541) mention that several cultural items acquired by the Smithsonian Institution in the late 19th century may have been made expressly for the museum because Zuni leaders believed that greater public awareness of the beauty of Zuni religion would improve relations between their tribe and the federal government. Zuni authorities may also have revealed certain ritual secrets to the Smithsonian anthropologists Frank Hamilton Cushing, James Stevenson, and Matilda Coxe Stevenson in the hope that their continued professional involvement with Zuni culture would lead them to defend Zuni interests in Washington (Merrill and Ahlborn 1997:195). Both strategies seem to have worked. This is hardly a history free of coercion, but it includes powerful elements of volition and of cultural resistance through strategic sharing that merit acknowledgment and respect.

Interpretations that reduce ethnography to an encounter between oppressor and oppressed, interacting like automatons in a grim game of power, overlook the complex human motives that animate ethnographic encounters: curiosity, aesthetic delight, mutual self-interest, genuine respect or affection, erotic attraction (recognized or denied), the visceral pleasures of storytelling, and a desire to understand other social worlds. They also summarily repudiate the work of countless observers who have dedicated their lives to the documentation of indigenous lifeways, sometimes at great personal cost. This enterprise may have been facilitated by colonialism, but more often than not its effect was to challenge assumptions of colonial superiority. Today ethnographic records provide critical information that indigenous peoples use to revitalize their cultures and to substantiate land and resource claims in courts of law. The species of naive presentism that judges historical actors by today's ethical standards would, if given free rein, mandate the pious quarantine or even destruction of most of these important resources.

The alternative to ethical absolutism is ethical realism, with all its exacting ambiguities and dilemmas. Realists judge work by the extent to which it violates or conforms to the ethical standards that prevailed when it was collected. Was information gathered under circumstances that would have been considered dishonest or unduly coercive then? Was deception involved, and, if so, how egregious was it in terms of prevailing ethical

norms? Did the researcher keep his or her promises about how the information would be used?

Perhaps the hardest condition to establish retrospectively is informed consent. To what degree, for example, did research subjects realistically comprehend how their lives might be affected by their role in an ethnography, a documentary film, or an audio recording, especially if they were relatively unfamiliar with these media? Even conscientious and well-meaning researchers fail to anticipate all the possible effects of their work, and they are sometimes as disturbed as their subjects by the unexpected impact of their publications, recordings, or images. In this area, the Law of Unintended Consequences reigns supreme; there will always be unforeseen effects, both good and bad, when information enters the public domain.<sup>16</sup>

Ethical realism holds that each case is unique and therefore subject to careful retrospective review. If significant violations of the norms of the time took place, with lasting, negative impacts on a particular people or community, then it may be appropriate to quarantine the offending research in some way, perhaps by making it available only to members of the affected group or to others authorized by them. In keeping with the emphasis that repositories place on freedom of access, one would expect that closure of a collection would take place rarely, and only in the face of compelling evidence that continued use would damage the affected community. Such caution is warranted because decisions to quarantine information never take place in a political vacuum. Citizens of all ethnic origins have an interest in continued access to information already residing in the public domain. Moreover, voluntary removal of material from public access establishes precedents likely to be exploited by other religiously and politically motivated interest groups—some of which, it bears pointing out, would advocate positions strongly antagonistic to indigenous political rights and cultural self-expression.

Published accounts and my own queries to museums and archives suggest that at the level of day-to-day operations this commonsense approach to ethics is currently the norm in the United States.<sup>17</sup> These reasonable procedures stand to be usurped, however, by comprehensive claims of ownership. If it can be established that in some meaningful sense ethnographic and historical records are "owned" by the peoples who are their subject, then complex questions about the ethical sta-

16. Issues of informed consent in the filming of the controversial documentary *Titicut Follies* are explored in considerable detail by Anderson and Benson (1988). Zemp (1996:49–63) describes ethical struggles over the commercial licensing of Rajasthani music recorded by a fellow ethnomusicologist many years earlier, at a time when neither had anticipated the music's potential commercial value. For reflections on the role of ethics in the preservation of anthropological materials, see Fowler (1995) and Greaves (1995).

17. Letters to 16 American museums and archives to inquire about their response to the Hopi request for a moratorium on access to ethnographic materials produced 8 replies. Of these, none reported that it had actually closed collections, although several now mark collections relating to the Hopi and other tribes as "sensitive" and encourage scholars to contact tribal authorities before using them.



tus of the cultural property become irrelevant. And here we face one of the hidden ironies of contemporary debate: although advocates of expanded intellectual property laws typically denounce capitalist commodification, they implicitly encourage the translation of ethical and political discourse into the language of commodities.

### Ethnographic Fictions in the Age of the Simulacrum

Contemporary assertions of intellectual property offer other and perhaps more plangent ironies rarely noted by commentators. At a moment when many anthropologists have come to regard ethnographic and historical texts as interested fictions, indigenous peoples insist that these documents contain sacred knowledge so authentic and powerful that access to it should be carefully controlled. Even as ethnography moves in a confessional direction, offering ever more information about the ethnographer's personal history, feelings, and motives (to the extent, some would say, that it becomes difficult to find the Other in the text), the Other is claiming ownership of the textual simulacrum. Nowhere have these contradictory currents proved more acrimonious than in public debate over the New Age "appropriation" of Native American religion.

Across the United States—and, increasingly, in Europe and other parts of the developed world—middle-class spiritual seekers are enrolling in workshops and therapy sessions that introduce them to rituals identified with indigenous spirituality: ersatz Medicine Wheel ceremonies, sweat lodges, vision quests, and even healing sessions involving consumption of the Amazonian hallucinogen *ayahuasca*. Sometimes those who officiate are of native extraction, although few are recognized as religious leaders in their own communities. More commonly, they are non-natives claiming knowledge of indigenous lore.

To say that the practices of these "Indian wannabes" have evoked intense criticism would be an understatement of the first order. In a "declaration of war," Lakota leaders have denounced the "absurd public posturing of this scandalous assortment of pseudo-Indian charlatans" (Stampede Mesteth, Standing Elk, and Swift Hawk n.d.). Another Indian activist deems such faux-native ceremonials to be another example of "a very old story of white racism and genocide against the Indian people" (Smith 1994:70). Similar denunciations followed the publication of Marlo Morgan's best-selling *Mutant Message Down Under* (1994), a book that describes the author's religious experiences—later revealed to be entirely fictional—among a group of Aboriginal Australians. Robert Eggington, a spokesman for Australia's Nyoongah people, has been quoted as saying that Morgan's book "amounts to nothing less than cultural genocide of the spirit" (*Mutant message downed!!!* 1996). Academic observers are only slightly more measured in their criticism. Deborah Root (1996), for exam-

ple, depicts the New Age as a particularly offensive example of the commodifying logic of late capitalism. "Because so many people have been taught that the world is a giant warehouse in which everything is or ought to be available," she writes, "they too easily believe they can achieve enlightenment by paying money" (p. 97).<sup>18</sup>

However much we may deplore the cultural insensitivity that underlies these middle-class explorations of indigenous spirituality, Root's argument illustrates the strikingly cramped and in some cases misdirected debate that this situation has inspired. For example, when critics declare that indigenous spirituality lacks a commercial aspect, in sharp contrast to the alleged commercial vulgarity of the New Age, they willfully ignore a vast literature that establishes the economic nexus of ritual almost everywhere in the world, a pattern that often includes substantial payments, in cash or goods, to ritual specialists. Nor has the controversy seen contributions by anthropologists who in other contexts celebrate cultural flows and creative creolization, of which New Age practices are surely an outstanding example. One might also reasonably call for rigorous analysis of how this instance of religious borrowing differs from other kinds of intercultural sharing that underwrite religious innovation throughout the world. By pointing to these deficiencies, my purpose is not to defend the imitation of native rituals by non-natives. (I don't know how one could possibly endorse a practice as appalling as the "Smoki" Snake Dance, a parody of Hopi ritual conducted annually by wealthy Anglos in Prescott, Arizona, vividly described by Peter Whiteley [1997:177–79].) My personal view is that middle-class baby boomers looking for spiritual authenticity should explore the rich religious traditions of Europe and allow native peoples to worship in peace. Nevertheless, the phenomenon merits a broader and more dispassionate analysis than we have seen thus far.

Perhaps the most interesting feature of the controversy is the extent to which native religious leaders object to it not on the ground that New Age rituals are bogus but precisely because they are, in some sense, *real* (see, e.g., Whiteley 1997:188; Jocks 1996:418). A statement issued by Indian leaders meeting in Window Rock, Arizona, in 1984 notes that New Age ceremonials are "exposing ignorant non-Indians to potential harm and even death" (AIM Leadership Conference 1984) because of the rituals' inherent power. Much as the general public is repelled by the prospect of cloned human beings, native religious leaders express horror at the monstrous cloning of their visions of the sacred. For them, the New Age is a kind of doppelgänger, an evil imitation close enough to the real thing to upset the delicate balance of spiritual power maintained by Indian ritual specialists.

18. The firestorm of criticism directed to New Age practices has produced a literature too vast to document fully here. Useful sources include Albanese (1990), Brown (1997), Jocks (1996), Johnson (1995), Kehoe (1990), and Rose (1992).

"The culture of the copy muddies the waters of authenticity," Hillel Schwartz (1996:377) has observed. As the technologies of the simulacrum proliferate around us, producing what Mark Taylor and Esa Saarinen (1994) call the "simcult," souls lost in the forest of copies take up a desperate search for the original that leads them almost inevitably to indigenous peoples, who in our time have become icons of primordial integrity, of meaning uninflected by imitation. In seeking the authenticity of native religions, however, they succeed only in fashioning another flawed simulacrum.<sup>19</sup> Under the circumstances, it is hardly surprising that indigenous leaders want to tighten their grip on the originals. But this particular genie has already escaped from the bottle. Those who dream that knowledge can be "repatriated" through copyright laws—vain attempts to slow the metastatic self-replication of information in the Age of the Simulacrum—are destined to be disappointed.

Despite the Church of Scientology's single-minded pursuit of criminal prosecution and civil action to prevent the reproduction of its secret texts, for example, there is little evidence that it has succeeded in recapturing all or even a significant fraction of the copies held by its opponents, doubtless buried on the hard drives of their computers or squirreled away on diskettes. The recent history of the Internet demonstrates that draconian attempts to police information are likely to fail, although governments and powerful interest groups may succeed in temporarily stifling open dissent. The same fate awaits indigenous groups seeking total control over information about their societies. Its use by law-abiding historians and social scientists will surely decline, but there will soon arise an underground literature—a native-knowledge *samizdat* or, more likely, something resembling the *X-Files*, the American television series that exploits popular belief in the government's secret contacts with extraterrestrials—that is likely to give rise to distortions of fact far worse than the misrepresentations that today infuriate indigenous leaders. As is true in the case of religious secrets, the conversion of debate about New Age rituals into a struggle over intellectual property undermines prospects for urgently needed public discussion about mutual respect and the fragility of native cultures in mass societies.<sup>20</sup>

### Toward Genre Police and "Certified Indigenous Persons™"?

As I noted earlier, one proposed solution to the crisis of intellectual property is the libertarian option articulated by Barlow and Dyson: let information be free by

19. According to David Sanjek (1992:609), the availability of affordable digital sampling equipment has had a similar effect on contemporary music: "The elevation of all consumers to potential creators . . . denies the composer or musician an aura of autonomy and authenticity."

20. For further discussion of the contradictions and dilemmas of new media, see Schwartz (1996) and Baudrillard (1988).

unleashing it in an unregulated market, where consumers can pay for what they want and ignore what they don't. The illicit replication of information cannot be stopped; only performances can be controlled, so creative individuals and groups will have to find ways to benefit materially from performance-like encounters with a paying audience. Because this position has few followers among anthropologists and indigenous activists, I bracket it from serious consideration here. But whatever its flaws and blindnesses, the radical libertarian proposal injects a note of realism into current debate by reminding us that control of information and the proliferation of simulacra is or soon will be impossible.

The principal alternative to informational libertarianism is the creation of new institutions and legal mechanisms designed to protect "cultural heritage, folkloric productions, and biological 'know-how,'" to quote the language of the Bellagio Declaration, a document prepared by a diverse group of experts in intellectual property (reproduced in Boyle 1996:192–200). With admirable clarity and conciseness, the Bellagio Declaration advocates a two-pronged revision of intellectual property practice: on the one hand, it calls for a significant expansion of the public domain by diminishing intellectual property rights—say, by shortening the term of copyrights or by limiting the circumstances under which they may be awarded; on the other, it calls for the creation of "related rights regimes" to protect indigenous intellectual property. As experts on intellectual property law, the authors of the Bellagio Declaration are aware of conflicts between these two agendas, and within the limits of a brief document they try to reconcile them without specifying in detail how this harmonization might be accomplished.

The measured language of the Bellagio Declaration contrasts with the sweeping demands of those who see intellectual property law as a mechanism for protecting indigenous philosophies. Recall, for example, the manifesto of the Inter-Apache Summit on Repatriation (1995:4), which asserts title to "symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts," or the UN document stating that native people have an inherent right of control over everything encompassed by the term "cultural heritage" (Daes 1993). These documents lay claim to *thought* as well as its actualization in concrete acts of creation. Those familiar with copyright know that the distinction between ideas and their expression—that is, "fixing in tangible form" (see Litman 1991:239)—is foundational to notions of intellectual property. The reason for this is obvious: because we cannot ascertain the origin of ideas unless they are expressed in some stable, material form, it would be impossible to enforce claims on them. Yet some experts in intellectual property now urge that the idea/expression distinction be abandoned because of its alleged ethnocentrism, its inability to protect creative linguistic, artistic, or musical productions expressed through performance rather than preserved in a permanent medium such as writing. Proposals for the expanded protection of indigenous intellectual property

rights also typically object to the time-limited quality of current copyright and patent laws. If native knowledge is held to be collective and eternal rather than the invention of a solitary author, then it follows that time limitations keyed to the human life span, which clearly reflect the possessive individualism of Western capitalist thought, should be replaced by some form of perpetual copyright.<sup>21</sup>

These proposals call to mind Apple Computer's highly publicized infringement lawsuit against Microsoft, which claimed that Microsoft's Windows program illegally appropriated the "look and feel" of Apple's proprietary software (Mota 1995). Although Apple ultimately lost the suit, notions similar to its look-and-feel claim have been picked up by participants in the expanding scholarly debate about cultural appropriation. In a recent essay on the ethics and pragmatics of the music industry, for instance, Steven Feld (1996) brilliantly tracks the processes by which recordings of the musics of Mbuti and other "Pygmy" peoples find their way into contemporary jazz and World Beat, usually without attribution or compensation. My reading of Feld's analysis is that he views those artists whose work replicates even the *sounds and textures* of Mbuti music as performing an act of cultural appropriation. In other words, imitating the "look and feel" of a people's music is a form of cultural theft, even if it occurs within a genre such as jazz, which is largely predicated on improvisational transformations of the artistry of musicians from every corner of the globe.

Although Feld wisely steers clear of proposing that we create a new species of genre police to protect indigenous musicians from exploitation, other scholars prove less cautious. Indeed, journals devoted to the subject of intellectual and cultural property cheerfully offer any number of schemes to codify culture and thereby protect it from misuse. Most of these proposals call for the redefinition of folklore as part of a national or even a global patrimony. They also encourage the imposition of a regime of "moral rights" for cultural property that would exist in perpetuity. (The moral-rights concept, which is alien to U.S. copyright law but commonly applied in European countries, asserts that the state has an enduring interest in the integrity of works of cultural patrimony. Any attempt to modify a protected work—say, by altering a classic film or images of a famous painting—would violate its moral integrity even if its formal copyright had long since expired.) UNESCO, which has drafted schemes for the application of this kind of protection to indigenous cultural productions, envisions the establishment of state folklore protection boards that would "register [folkloric] works and authorize their use," allowing exceptions for "educational and inspirational purposes" (Berryman 1994:327).

21. See, for instance, Berryman (1994) and Mills (1996). The Mataatua Declaration, which was issued after a 1993 conference in New Zealand, calls for a "multi-generational coverage span" for indigenous intellectual property, leaving unanswered the question of whether such protections would be permanent.

Among other things, folklore-protection boards might be authorized to intervene if nonfolkloric people produced designs that imitated authorized folkloric styles or if native art were used in "culturally inappropriate contexts."<sup>22</sup>

Perhaps I am alone in wondering how a UNESCO-style bureaucracy would further the interests of indigenous peoples by codifying their knowledge in what would have to be a byzantine series of regulations. One can only imagine the endless legal actions and legislative initiatives that would be required to protect against infringement of the look and feel of Tlingit art or the stylistic particularities of Shuar oratory. And when considering parts of the world where the rule of law is so tenuous that even basic traffic regulations are the object of collective scorn, we might well question how indigenous populations would benefit from the implementation of far less enforceable laws relating to intangible cultural property.

It is also prudent to consider what the broader social impact of look-and-feel protection might be. Could it in fact be confined to "designated folkloric populations" or "certified indigenous peoples" without seeping into the broader world of commerce, where corporations are already storming the borderland between idea and expression? Who is more likely to be silenced by the enforcement of look-and-feel copyright: the Sony Corporation, for its infringement of Mbuti flute playing, or the emerging African recording artist whose first commercial CD infringes the style of Michael Jackson? And what of scholarship? Anthony Seeger (1996:87) notes that it is already difficult for ethnomusicologists to publish articles on popular music because of copyright constraints that prevent the quotation of lyrics and musical scores, an example of the corporate world's concerted efforts to downsize the scope of fair use. Consider, then, what history or anthropology will become when scholars are prevented by law from writing accounts specific enough to evoke the religious or political practices of protected native populations. Perhaps we can look forward to the day when the Freud estate is sued on the grounds that *Totem and Taboo* violates the folkloric copyright of indigenous peoples—from two world regions, no less. Less fanciful is the prospect of court orders that remove works of ethnomusicology, history, and ethnography from library shelves because they pur-

22. In Australia, where the protection of Aboriginal art and culture is strongly supported by anthropologists, lawyers, and native activists, Colin Golvan reports that successful attempts to enforce Aboriginal copyright to traditional designs led wily tee-shirt manufacturers to produce knockoffs that merely imitated the *style* of Aboriginal art. Golvan (1992:229) comments: "One issue which justifiably arises for attention is whether there ought to be protection to prohibit this bastardization of Aboriginal art, and if so, how this protection would work." (See also Blakeney 1995 for additional discussion of Australian legal initiatives.) In the domain of music, Mills (1996:74) provides a detailed description of recent Brazilian legislation designed to protect the intellectual property of indigenous communities by "eliminating burdensome, ethnocentric copyright requirements of living authors, originality and tangibility."



vey stolen property. If time limitations on indigenous copyright were waived, as has been proposed by some scholars, then this intellectual stalemate could exist in perpetuity.

For the most radical of indigenous activists—and, incidentally, for the giant corporations that oversee the world's news and entertainment media—such impediments to scholarship and the exchange of ideas would be welcome. The Hawaiian nationalist Haunani-Kay Trask (1991:162), for example, characterizes anthropologists and historians as “part of a colonizing horde because they seek to take away from us the power to define who and what we are, and how we should behave politically and culturally.” Trask evidently hopes that indigenous peoples will eventually achieve exclusive power to represent themselves to the world at large. If realized, this vision would impound knowledge in a new reservation system: reservations of the written word, an apartheid of the mind.<sup>23</sup>

In his reflections on the separatist movement in Quebec, Richard Handler (1988:194) observes that nationalists make preemptive claims to knowledge because they are “haunted by a vision of totality” that can be achieved only when a people becomes “an irreducible, homogeneous unit, securely in control of its borders, self-contained, autonomous, and complete.” The ethnic nation, in other words, seeks to recover and then to control its history and its folklore, sharing it with outsiders only in forms that it deems appropriate. A consideration of the moral standing of this dream of cultural purity is beyond the scope of this essay. But there can be little doubt that attempts to impose new border controls on the flow of knowledge raise troubling questions that should be resolved, or at least thoroughly discussed, before supporting new legal regimes that codify cultural property and potentially even criminalize its unauthorized possession.

## Closing Thoughts

Although there are compelling reasons to be skeptical of some indigenous intellectual property rights proposals currently under discussion, I strongly support efforts to create basic mechanisms for the compensation of native peoples for commercial use of their scientific knowledge, musical performances, and artistic creations. Equally necessary are clear guidelines for the collection of culturally sensitive ethnographic data and potentially marketable human biological materials, including cell lines. I would hope, too, that anthropologists will continue to register objections to the patenting of medicinal and agricultural plants discovered or

domesticated by indigenous populations and used by them for centuries.

It is the broader debate about cultural appropriation that I find disturbing—specifically, the reluctance of otherwise thoughtful scholars to dissect the ethno-nationalist claim that there exists an inherent, permanent right of cultural ownership and that this right should be guaranteed by new laws that, among other things, define ideas as property. Discussions about strategies for preventing cultural appropriation seem to take place in a parallel universe unaffected by the fierce struggle of creative artists and the general public for free access to information in the face of growing corporate domination of knowledge, now commodified as “content.”<sup>24</sup> To some extent, of course, ethno-nationalists are reacting to this mad scramble for control by protecting what they can. But nothing would serve corporate interests more perfectly than the collapse of the idea/expression distinction or the abandonment of time horizons on copyrighted material. Expectations that such radical extensions of intellectual property laws could be restricted to indigenous populations through the establishment of regimes of special rights are extremely naive. The legal frameworks necessary to sustain the permanent protection of entire cultures will inevitably require greater involvement of governmental or quasi-governmental agencies in the business of determining who is a native person and exactly what qualifies as indigenous knowledge, a situation that one would be hard-pressed to see as beneficial for ethnic minorities. One wonders, too, about the fate of those artists—Louise Erdrich, Allan Houser, and Baba Olatunji come immediately to mind—who have drawn on native identities to fashion art that transcends ethnic boundaries. Would they, too, have to “repatriate” themselves to satisfy the demands of a system that defines ownership primarily by ethnicity?

A realist perspective acknowledges the uneven hold that intellectual property laws have on the flow of knowledge into and through the new digital technologies. Even the supposedly privileged artists and writers of the majority culture routinely find their copyrights violated by information-distribution services that provide copies of works to clients on demand (Tisdale 1997:70). One can imagine how much more difficult it will be to police the comprehensive copyright protections now being considered for indigenous cultures. As the legal scholar Jessica Litman (1991:248) has pointed out, when copyright regulations diverge too dramatically from the practical understandings of authors and the general public, these laws lose legitimacy. This problem would surely intensify were governments to implement radically expanded copyright laws designed to protect all forms of intangible cultural property. The ensuing flurry of litigation would favor only the largest

23. “In such circumstances, a particular version of the past becomes a commodity that can be mobilised for political power and economic gain, where a sovereign territory of knowledge is assertively appropriated as one’s ‘own,’ in the interests of creating a useable history that will serve as a vehicle for correcting past wrongs” (Munro 1994:233).

24. See, for instance, Bettig (1996), Browning (1997), Samuelson (1997), and Schiller (1989) for discussion of attempts by North American media interests to impose ever more restrictive copyright laws on the rest of the world.

corporate interests, for whom legal fees are simply a routine cost of doing business.

Conspicuous by its absence is a vigorous defense of the concept of a public domain.<sup>25</sup> This is doubtless because postcolonial scholars regard appeals to notions of the civic whole as thinly veiled advocacy for (white) elites. “Whose public are we talking about?” they ask. The question admits of no easy answer. The realities of money, power, and social capital make the public domain more accessible—and exploitable—for some citizens than for others. Yet the public domain that permits the intellectual colonization of native peoples also offers resources that they regularly appropriate for their own cultural redefinition and political advancement (Coombe 1997:74–75). The same cannot be said for systems that dispense information on a strict need-to-know basis.

Lurking in the background is a curious reluctance to come to grips with the pragmatics of multicultural democracy. It is one thing to insist that the deeply felt views of a particular minority be taken seriously, quite another to propose workable procedures by which these cultural differences (which of course must be multiplied by the number of ethnic groups and subcultures that a given nation encompasses) can be reconciled with majoritarian government and a commitment to equal treatment before the law. Every legitimate demand for special consideration, including the claim that native peoples deserve regimes of intellectual property unique to them, must be weighed against the injurious effect that special rights have on prevailing notions of fairness. The philosopher Charles Taylor, who along with such legal thinkers as Ronald Dworkin (1986) and Will Kymlicka (1989) has done some of the heavy lifting shirked by anthropologists, asserts that if one *genuinely* takes the claims of minorities seriously, they must be assessed with the same thoughtful deliberation that we insist upon in legal proposals coming from the cultural mainstream. Taylor rejects the simple-minded relativism that says, in effect, “If the So-and-So demand it, we must give it to them because their cultural values are as valid as our own.” For Taylor (1994:70), this demonstrates “breathtaking condescension.” He continues:

No one can really mean it as a genuine act of respect. It is more in the nature of a pretend act of respect given on the insistence of its supposed beneficiary. Objectively, such an act involves contempt for the latter’s intelligence. To be an object of such an act of respect demeans. The proponents of neo-Nietzschean theories [expressed in the work of Foucault and Derrida] hope to escape this whole nexus of hypocrisy by turning the entire issue into one of power and counterpower. Then the question is no

more one of respect, but of taking sides, of solidarity.

Fortunately, something close to Taylor’s vision of authentic intercultural respect appears to be taking hold in archives and museums. Aware of their responsibility to protect public records while remaining responsive to the concerns of groups who claim an interest in them, repositories are willing to ask tough questions of those who demand that irreplaceable cultural information be destroyed or closed to the multiple publics whom they serve. New working relationships between repositories and indigenous communities, many set in motion by NAGPRA, are helping to foster relationships of mutual trust that produce realistic compromises appropriate to individual cases (Nason 1997). Similarly pragmatic ethical protocols are being formulated by anthropologists and ethnomusicologists (see, e.g., Seeger 1996). If clearly communicated and enforced by professional societies, these codes are likely to prove more effective than radically expanded legal regimes for the protection of intangible cultural property, which will provide guaranteed employment for bureaucrats while doing little to shield native peoples from the depredations of mass society.

Perhaps the most promising approach is advanced by scholars such as Karen J. Warren (1989) and Donald Tuzin (1995), who argue that frameworks based on joint stewardship are preferable to models based on rights and rules. Joint stewardship implies a willingness to compromise, which is essential for hammering out workable agreements between parties who may hold incompatible attitudes toward the proper use of information. The historian Doug Munro (1994:236) notes that the intercultural encounter is a shared experience that belongs solely to neither party. “In short,” he adds, “the terms ‘insider’ and ‘outsider’, far from representing discrete categories, are convoluted and often permeable.”

A basis for joint stewardship is admittedly harder to find in the predatory activities of corporations that seek to appropriate indigenous knowledge for commercial purposes. Even here, however, situational pragmatism may prove more effective than a radical expansion of intellectual property laws to encompass every aspect of native cultures. Widespread public sympathy gives native peoples considerable influence in the court of world opinion, and this can be used to pressure corporations into complying with basic ethical standards. Creative licensing partnerships between native communities and corporate interests offer another path to fair compensation and a modicum of indigenous control (see Cleveland and Murray 1997:488). Like most realist strategies, these options lack the rhetorical appeal of ethno-nationalist denunciation or the hyper-rationalist allure of novel legal schemes, but they are far more likely to produce the desired results.

In the final pages of *The Protestant Ethic and the Spirit of Capitalism*, Max Weber (1930:181) speaks movingly of modernity’s “iron cage,” an ascetic rationalism driven by the overwhelming power of material

25. A notable exception is the Bellagio Declaration (Boyle 1996: 195), which advocates “an increased recognition and protection of the public domain” in tandem with the creation of regimes of special rights for indigenous peoples. For critiques of the concept of the public domain and the notion of common human heritage, see Pask (1993) and Coombe (1996).

goods. Weber's iron cage has steadily expanded to include ideas and images, which have become tokens in economic exchanges facilitated by the new information technologies. To resist the expansion of these processes into indigenous cultures, legal experts and indigenous advocates have come forward with proposals to sequester some forms of knowledge and to protect everything else with dramatically expanded intellectual property laws. Unfortunately, the advent of the Age of the Simulacrum has rendered the first strategy futile, although it may provide a false and temporary sense of security. The second represents a total surrender to the commodifying logic of advanced capitalism. Now it may be time to temper demands for comprehensive copyrighting of native cultures with earnest reflection on the future of the imperiled intellectual and artistic commons called the public domain, whose survival is of vital significance to us all.

## Comments

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With limited space I can comment on only a few of the many points mentioned by Brown in his wide-ranging and very perceptive paper. He raises issues likely to become increasingly critical for anyone seeking greater knowledge and/or wider justice. Both goals are estimable, but unfortunately the paths leading to them often diverge. Roughly speaking, there are three overlapping ways of perceiving knowledge: as a source of enlightenment, as a source of power, and as a kind of private property (Barnes 1980:64–66; 1990:209–11). Knowledge as enlightenment enhances our understanding of the world; the more people possess it the better, and there is no zero-sum game. Brown stresses that a flow of information is essential to “a liberal democracy,” a type of polity he implicitly endorses. As power, knowledge helps us to alter the world; actors compete rather than share, and the game approximates to zero-sum. Possession of knowledge as private property may be a value in itself; secrets can be hoarded unused but enjoyed and shared only very selectively. Anthropology, like other social sciences, is premised on knowledge as enlightenment, although administrations have intermittently tried to use ethnographic knowledge as a source of power. Some societies, notably those of Australian Aborigines, elaborate the notion of knowledge as private property; it is local Aborigines who have organized segregated museums at Yuendumu in Central Australia, one for men and one for women. But irrespective of cultural emphases indigenous peoples everywhere are typically materially poor and politically powerless. Possessing meagre resources, they tend not surprisingly to view

their knowledge as private property, and it is understandable that their ethnographers should be sympathetic to their attempts to empower themselves. This process is reinforced when indigenous people see their knowledge of plants and medicines converted into private property by outsiders and corporations through patenting.

Privacy laws in Western democracies establish a distinction, variously drawn, between public and private spheres of activity, and patents and copyright provide analogous protection for private ideas. When we are dealing with artefacts and the hidden meanings of paintings and rituals it may be feasible to work out a compromise between those seeking enlightenment and those who wish to protect the privacy of their knowledge. Compromises are harder to reach with reference to social activities that traditionally have been perceived as part of culture. Cross-cousin marriage can no more be effectively patented than syllogistic logic. A real conflict arises when a material object has different meanings for different actors. One example is recently unearthed bones of individuals who lived long ago. Archaeologists in Australia see these as providing information about the type of DNA prevalent during past millennia, whereas Aborigines tend to see them as the bones of ancestors which should be reburied.

The difficulties currently faced by social scientists of all kinds in our quest for enlightenment arise from the shift in the balance of power that has occurred during the past hundred years or so. Not only so-called indigenous people but all segments of society (with the possible exception of children) are nowadays in much stronger positions to obstruct or influence the gathering of information about them and its subsequent dissemination. Though this makes the task of social inquiry more difficult, we should not regret it; reduction of inequalities in the distribution of power is just as essential for maintaining liberal democracy as is a free flow of information. Brown's paper reminds us that in our postcolonial world the inequalities we should target are no longer those between indigenous peoples and colonialist ethnographers but those between private citizens and powerful corporations, whether secular or religious.

We can put our ethical house in order for the present and future, but what should we do with knowledge gained in the past under conditions we now reject? Brown mentions the quarantining of the records of Nazi medical experiments. Perhaps in the short term this may be the right way to handle these records; nevertheless, we don't feel that we should, for instance, stop vaccinating children against smallpox because Jenner didn't get clearance from an ethics committee before doing his experiment. There seems no reason for adopting an ostrich-like stance of refusing to see and use information that is already in the public domain. In any case, as Brown points out, for every overconscientious ostrich there are many more actors who have no intention of burying their heads in the sands of pseudo-ignorance.

Material objects collected in the past call for different treatment. Much that is now stored in museums would



have perished long ago if it had not been taken into alien custody. Many indigenous communities are, however, now well able to preserve their own heritage and thus have good grounds for reclaiming their former possessions.

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Brown's review of current approaches to "rights" in "culture" is an insightful and stimulating critique. He skillfully points out the confusion of values and facts that characterizes so much of the debate over rights to intellectual property, especially among advocates of indigenous rights. A narrow struggle over intellectual property diverts public discussion about mutual respect and the fragility of indigenous cultures in a global society, and anthropologists should face up to the probable effects on the public domain of greatly expanded intellectual property protection of cultures. I differ with him, however, on several points.

He accepts the "political ideals of liberal democracy" as a standard for dealing with secrecy. Yet many indigenous groups, such as the Hopi he cites, have a wide range of views on the recognition and treatment of rights in intellectual property (Cleveland and Murray 1997). "Ethical realism" is advocated as a "commonsense" approach to the ethics of intellectual property, but it is only "realistic" and "commonsense" if one agrees with the liberal democratic values on which it is based. My point is that there is a "realistic" or "commonsense" approach *only* from within particular worldviews. What, for example, is the basis for Brown's statement that he doesn't know how one could possibly endorse a practice as "appalling" as the "Smoki" Snake Dance yet also condemn those who seek to limit all outsider use of insider religious knowledge? Where one draws the line is a matter of values, not of discovering some absolute standard. Any agreement must therefore be based on open-minded negotiation.

Brown suggests that it is ironic that those who seek to protect local cultures with "expanded intellectual property rights laws" typically denounce capitalism while encouraging the commoditization of ethical and political discourse. However, the motives and methods of local groups and their advocates are not homogeneous. Some groups are using industrial-world intellectual property rights laws and asking for their expansion because this seems the best way to protect their culture from outsiders using these same laws. In the case of crop genetic resources, advocates of local farmers' rights initially pushed for free access to all resources, but strong opposition by industrial nations led to a switch to advocating intellectual property protection for farmers' crop genetic resources (Fowler 1994). Other groups demand that their own intellectual property rights regimes be respected by outsiders, as do the Zuni (Soleri

et al. 1994). The Zuni also offer evidence that not only museum curators but indigenous peoples can be very practical in their approach to intellectual property in a globalizing world.

I agree emphatically with Brown's statement that resolution will require reflection on the part of those holding different positions on their "global implications" in order to achieve suitable compromises. Rather than focusing on methods, we might better first try reaching a consensus on goals. To the extent that conservation of cultural diversity is an agreed-upon social goal, we need to explore how existing and new ways of managing intellectual property can best serve this goal.

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"Can Culture Be Copyrighted?" addresses several issues of contemporary political significance to cultural anthropologists and points to many of the ethical dilemmas that attend the movement towards an intellectual property paradigm for promoting cultural self-determination through control over cultural patrimony and the protection of local knowledges. The author's case, however, may be as overstated as the rhetorical strategies to which he is responding. As a lawyer and an anthropologist I think that the debates around intellectual property are neither sufficiently careful in their articulation of the law nor ethnographically sensitive to the contexts in which intellectual property assertions arise as rhetorical claims.

Let me begin with the law. In his title and introductory paragraph, Brown conflates intellectual property with copyright, when in fact many of the assertions made by indigenous peoples have been made as interventions in the fields of patents and trademarks. None of these domains of intellectual property provides absolute rights of exclusion; all are premised on a social bargain that grants specific rights and imposes specific responsibilities on holders who exercise these rights in the public sphere. It is true, as Brown recognizes, that rights of proprietary exclusivity have been expanded over the course of this century at the expense of broader principles of public policy and that the public domain is increasingly endangered by the overreaching of industry interests. Ironically, as rights to real property have become more and more attenuated to accommodate social needs, rights to intellectual properties have become more absolute. It is precisely in such contexts that property claims become compelling as ideological vehicles with which to assert other interests and voice other concerns. We should, however, bear in mind the political positionings of those who articulate social needs in the idiom of rights and the imperative of making concerns known in authoritative discursive forms. Property, though, is more dynamic than its ideological deployment might suggest; it is constituted of flexible nexi of multiple and negotiable relationships between

persons and things that continually shift to accommodate historical recognitions of prior inequities and current social needs.

I am uncomfortable, also, with any vision of democracy which poses complete freedom of speech and full access to all cultural forms as the only response to corporate possession of culture, broadly defined. Absolute rights of private property and absolute rights of access to the public domain entertain only extreme points of a Eurocentric spectrum of possibility that needs to be challenged by the cultural mores of others. Peoples have other relationships to cultural forms—trust, secrecy, guardianship, stewardship, initiation, sacralization—and obligations to relatives, ancestors, spirits, and future generations which make models of access and ownership appear extremely impoverished. Such knowledge is not adequately understood as information, nor may its circulation be properly understood as speech.

Indeed, Western notions of property are themselves not nearly as narrow as this dichotomy between exclusivity of possession and an unrestricted public commons would suggest. Western juridical traditions recognize relations of trust (express and constructive), fiduciary obligation, implicit license, breach of confidence, stewardship, and local observances of negotiated customs and ethics. Brown asserts that secrecy and strict control of knowledge contradict the political ideals of liberal democracy, but trade secrets, corporate confidentiality arrangements, and the fiduciary obligations of employees (not to mention ties of kinship obligation) have long been important means of maintaining the value of intangibles in industries and family firms in capitalist democracies. Certainly some holders of valuable knowledge and cultural forms have had greater resources at their disposal than others to preclude the dilutions and devaluations occasioned when these valuables are transformed into mere information freely available in the public domain. By using the idiom of property, then, many indigenous peoples may simply be taking the initial and necessary step of insisting upon a leveling of the playing field before working out the details of particular contractual arrangements. Contracts based upon duress, unconscionability, coercion, and grossly unequal bargaining power are not enforced in most democracies, and our legal regimes are constantly forced to deal with demands for restitution and compensation in such instances. The trivialization of symbols, the disparagement of peoples, and misrepresentations in the public sphere are also injuries that legal systems both recognize and redress in fields as diverse as tort, unfair competition, and trademark; First Amendment concerns are indeed raised and interests in freedom of expression balanced, but speech rights have never been recognized as absolutely trumping claims based upon injuries effected by expressive activities.

The emphasis upon freedom of expression and its role within a democracy in this critique must begin with some assumptions about why we value this freedom and to what ends. Although there is a rich vein of philosophy and jurisprudence to be mined here, concerns

with self-development, self-determination, and the promotion of dialogue and dialogic conditions must be central to issues of cultural representation. To the extent that anthropological records have been influential in characterizing and authoritatively representing the cultures of others in some jurisdictions, questions about the conditions under which such records were compiled and authored seem entirely apposite. To the extent that anthropologists were complicit in giving cultural identity its contemporary juridical force and providing the means by which authorities fixed and defined such identities, it is unfortunate but not surprising that descendants of these anthropological informants have to claim these records as their property in order to prevent their continuing use to define their cultures. In this context, it is somewhat disingenuous to claim that, as ethnography moves in a confessional direction that situates the author more squarely in the text, “the Other is claiming ownership of the textual simulacrum.” This is to conflate two distinct historical periods and attitudes towards ethnographic authority and to discount the ways in which ethnographic fictions have historically figured as truths in regimes of power and knowledge. Who determines where fiction resides and in what circumstances? Clearly, if we are to encourage democratic dialogue, we must open these questions up to an “urgently needed public discussion about mutual respect and the fragility of native cultures in mass societies.” To grant native peoples full voice in these discussions, however, may well involve a preliminary recognition of proprietary claims—not as exclusivity of possession but as bundles of multiple rights and relationships still to be delineated in contested and contingent dialogues that may well reshape the concept of property as we think we know it.

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Brown must be commended for his fair and subtle treatment of a difficult topic usually fraught with controversial or shortsighted statements. I share most of his views, especially his strong commitment to the concept of the public domain, and would not have thought it necessary to add a comment had he not treated too lightly perhaps what I perceive to be one of the most serious consequences of what he calls “ethical absolutism,” namely, the covert institutionalization of cultural apartheid as the postmodern form of racial apartheid. Most claims advocating indigenous intellectual property rights studiously avoid formally defining the status of the populations to which special-right regimes should be granted. This is perhaps because the debate has been mainly restricted up to now to native peoples of the Americas and Australia, that is, to cultural and linguistic autochthonous minorities that are clearly identifiable within nations settled by Europeans. In the course of their struggles for land, dignity, and the recog-

nition of their cultural uniqueness, these minorities have often obtained special or derogatory legal statutes (concerning land tenure, civic duties, or personal rights) which contribute to setting them apart, socially and spatially, from ordinary citizens and render them more conspicuous as distinct subsets of the national communities. But such visibility is not the norm everywhere in the world, and advocates of “differentialism” should perhaps pay more attention to the fact that cultural diversity is not only an internal phenomenon typical of great melting-pot nations but also a feature of the whole wide world. Now, if there is a lesson that we have learned from anthropology, it is the impossibility of conceiving cultures as bounded territorial wholes defined by sets of substantive attributes. Who will decide, then, and how, that a specific social grouping does or does not qualify as a genuine native minority, ethnic nation, folkloric community, or whatever you choose to name the culturally unique potential beneficiaries of a special regime of collective intellectual property rights? Are we to consider the Basques (who are among the ethnic samples of the Human Relations Area Files) as likely candidates? Or the Welsh, or the Ossetians, or the Kabyles? And if not, for what reasons? Are they not minorities within nations, with their own distinctive cultures and languages and a long history of difficult relations with hegemonic states? Are they not as much entitled as the Apache tribes to demand control over all images, texts, ceremonies, music, songs, stories, symbols, customs, and ideas relating to them? And if the possibility for these types of cultural minorities to gain exclusive control over their “cultural property” is brushed aside as fanciful or ludicrous, is it not because an implicit distinction is made between, say, the Basques and the Kabyles, on the one hand, and the Apache and the Pintupi, on the other, regarding their very essence and claims to authenticity? If this is the case, it is quite worrying. Europeans have very painful memories (and nightmarish contemporary examples) of ideologies that claim ethnic purity as the basis for self-closure and self-fulfillment. Although the fiction of purity was established mainly according to supposedly racial criteria, cultural dimensions were also taken into account, especially in the German *völkisch* tradition, to underscore the uniqueness of communities and the necessity of their segregation (Conte and Essner 1995). Even now, far-right movements such as the Front National in France disguise their acute xenophobia under claims that cultures should not be mixed for fear of losing the specific identities that they convey. To be perfectly clear, I do not mean that advocating collective intellectual property rights over cultural patrimony for ethnic minorities is akin to racial segregation; rather, history has taught us that giving special status to specific peoples is fraught with dangers, as it tends to perpetuate the idea of irreconcilable substantive differences between fellow-humans. The collective debt that Euro-Americans have incurred while submitting native populations to different forms of genocide and ethnocide will only be dispelled not by setting apart these

populations through the implementation of specific legal frameworks but by a vigorous defense of what Brown calls “ethical realism.”

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Suppose an ethnic nation wishes to prevent outsiders from (a) making money from its culture that could be made instead by its own members and (b) making any statement about the culture that the ethnic nation finds offensive. Anthropological associations might at a certain point be expected to lobby against such protectionism, since (a) their members’ jobs are threatened and (b) they cherish critical inquiry and free speech. The indications at the moment, judging from Brown’s exemplary essay, are that anthropologists are ready to abandon both profession and libertarian principle in the perceived interests of those whose cultures form their subject matter.

Support of the weak against the strong is a noble tradition, long entrenched in the ethos of anthropology, and altruism is a virtue not to be mocked. Brown, as I read him, has no quarrel with either. His argument, rather, is that legal and bureaucratic control of cultural property is likely to benefit the strong more than the weak, for example, entertainment corporations more than folk musicians. It would certainly benefit lawyers, bureaucrats, and political elites more than rank-and-file culture-bearers in nations and ethnic nations alike.

Special pleading has an inherent tendency to backfire. The very values of the open society that have facilitated the exposure of iniquities perpetrated against indigenous minorities must surely be compromised if the latter are now encouraged to reconstitute themselves as closed societies. How can we avoid a charge of cynicism if we insist on freedom of information in the interests of an ethnic nation whose own bureaucrats practice censorship? How can we in good conscience acquiesce in a demand that nothing offensive be said about the cultural beliefs and practices of an indigenous minority while resisting similar demands from chauvinist and religious interests among the settler majority?

Sooner or later the right to censor statements about ethnic nations made by outsiders would be asserted against insiders as well. Whatever solidarist illusions may be cultivated for ideological purposes, nations encompass competing social forces. Ethnic nations are no exception. And were a metropolitan government to authorise an agency within an ethnic nation to define its culture and decide what might and might not be said about it, in practice the external power would be favouring certain internal sectional interests and tendencies at the expense of others. By conferring upon an ethnic nation the right to suppress ideas and productions deemed to be offensive to its subjects, it would in fact be equipping dominant factions with a legal mechanism for discouraging dissidence and silencing rivals.

With Brown, I strongly support measures designed to



protect creativity in indigenous communities against commercial exploitation and to ensure a fair return to native artists whose productions enter the marketplace. Such objectives can be achieved without a totalistic copyrighting of culture. Anthropologists who allow their compassion for the underprivileged to take them down that path are helping to lay the foundations of totalitarian ministates.

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Brown has written a thoughtful, well-researched essay on a very controversial topic. The basic issue he explores is how best to protect indigenous peoples and culture in a world increasingly characterized by digital reproduction, commercial interests developing ever-new forms of prospecting, and ever-increasing appropriation of the exotic because it is authentic, curative, natural, etc. The problem is a very real one (see, e.g., the contributors to Greaves 1994). We are right to be concerned about increasing corporate domination of knowledge—one of several ironies pointed out by Brown, given that some of the push for commodification and copyright comes from corporations seeking increased profits by having exclusive rights to produce medicines, cell lines, and the like obtained from indigenous peoples. However, commodifying and copyrighting culture as opposed to the products of a culture (such as varieties of corn) is full of hazards, regardless of how appealing the restriction of access to it may appear in the face of egregious cases of disrespect and exploitation.

After reading this article we have a far better understanding of the many dilemmas involved that have helped turn this issue into a lightning rod. Brown's discussion deftly reveals why we—whatever our position—find this issue so threatening. Clearly, many scholars and activists will disagree with Brown's position, and this is as it should be, for several deeply held values are in conflict. Knowing why and how seriously irreconcilable some of these values are helps to keep knee-jerk responses to a minimum and to facilitate the search for more workable solutions.

A quibble: I find Alan Wolfe's critique, cited by Brown, seriously flawed and think that he could have made his argument without citing this particular example of neoliberalist thought.

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20 x 97*

Bringing culture into the domain of rights, ownership, and legislation is indeed, as Brown suggests, deeply problematic. Brown also raises several important ques-

tions difficult to handle for any anthropologist engaged in research on indigenous people. Even so, he seems to enter the discussion with the prime aim of provoking advocates of indigenous people's rights, whom he describes as "romantic social critics." Instead of slogans and "polemical romanticism" he calls for a return to a "realist perspective" considering these questions in all their "ambiguity and nuance." But by departing from a simplistic polarisation of positions (realism vs. romanticism, analysis vs. slogans) he does not take us far in that direction.

Reading Brown's article, I cannot help wondering why a person called upon to defend the sacred principles of liberal democracy chooses to make Native Americans his target. Brown has no problem with the state's right to withhold "sensitive" information on "matters of national security" while getting terribly worried over the Hopi and Apache peoples' resentment about sharing information relating their religion. One would assume that a civil rights activist would have it the other way around. I also find it striking that while Brown holds democracy sacred, he fails to extend similar principles of respect and tolerance to others. When Native Americans oppose New Age groups' misuse of their sacred rituals, Brown remains silent and without compassion. He argues instead that the most interesting thing about this is that the native religious leaders oppose such appropriation on the ground of the inherent power of these rituals and not because the New Age rituals are "bogus." Another problem with Brown's approach relates to his assertion that indigenous people's claim for cultural property rights is an opening bid in political horse-trading. This again is an oversimplification, leaving out existential dimensions having to do with respect, recognition, and identity. This also reflects Brown's argument that as most native peoples face threats to their economic and political sovereignty, they have little time to "fret" over issues of cultural properties (suggesting that such concerns are a luxury that only better-off indigenous people in the "West" can afford). That indigenous nations even face genocide does not make them less concerned with cultural matters. In fact, because having a culture of one's own is crucial to contemporary claims of self-determination, tremendous energies and emotions are invested in things like protection of language or preservation of traditional religious practices and symbols.

When most anthropologists, myself included, argue against or problematize earlier notions of culture as a coherent, bounded, and distinct "property" of a people and instead talk about culture in terms of construction and process (as culture-in-the-making), does this make us enemies of those "unenlightened natives" who continue to reify culture and claim a culture of their own? Brown thinks so, and casts the "cosmopolitan" scholar against the "indigenous" activist. Yes, there are problems in keeping culture an analytic concept when culture has turned into a major site of conflict and popular mobilisation. Rosemary Coombe, whose work Brown makes use of, argues that such antiessentialist claims

that culture is constructed and mobile always beg questions of perspective—for whom and in what circumstances is it so? And she asks, “How does this claim sound in the struggles of those for whom ‘culture’ may be the last legitimate ground for political autonomy and self-determination?” (Coombe 1997:93). Brown avoids these critical matters. He further too easily reduces the indigenous stance to one of cultural “essentialism.” I think that Arif Dirlik is right in arguing that the indigenous voices in fact are quite open to change, and what they insist on is not “cultural purity” as such “but the preservation of a particular historical trajectory of their own” (1996:18). It then becomes crucial to ask why indigenous peoples increasingly feel obliged to claim control over what they see as their culture. What is the social and historical context for such assertions?

In India the debate over indigenous cultural property rights is largely absent. During my work among the Rabhas or Kochas, an indigenous people in India, I have never been questioned over rights to my field notes, photographs, publications, etc. And I do not know how I would respond to possible later requests perhaps based on the argument that the material was obtained under coercive circumstances. As a *sahib* I have indeed been on top of things, and if a person had nothing else at hand he or she would certainly spare time to try to respond to my questions. Power is an issue here, but to describe fieldwork as an exploitative encounter between oppressor and oppressed is indeed, as Brown suggests, to take things too far. Brown is also right in acknowledging the agency and strategies of the “objects” of anthropological inquiry, something which Roger Keesing has brought attention to in his work on the Kwaio people. I am looking forward to the day when Rabhas themselves rather than any government department or forest authority are entitled to issue research permits and control access to their forest villages.

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Brown argues that “the debate over intangible cultural property as it has been conducted by indigenous activists has tended toward a polemical romanticism that produces memorable bumper-sticker slogans but little in the way of sober reflection on the difficult balancing act required to formulate policies that provide reasonable protection for minority populations while maintaining the flow of information essential to liberal democracy.” This is not quite the case.

Unfortunately, Brown has chosen examples to give the impression that indigenous groups are making demands that will ultimately restrict the liberties and freedom of others. He ignores the sophisticated debates on intellectual, cultural, and scientific property in the United Nations Working Group on Indigenous Populations (although he cites a study by the Special Rappor-

teur) and the protracted discussions associated with Article 8.j of the Convention on Biological Diversity. He also fails to consider the complex critiques put forth in numerous indigenous documents and summarized in reports of the Coordinador de Organizaciones de los Pueblos Indígenas de la Cuenca Amazona Regional Meeting on Intellectual Property Rights and Biodiversity, the UNEP Consultations on Protection and Conservation of Indigenous Knowledge, the Suva Declaration, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (mentioned briefly in a footnote), the Indigenous Peoples’ Biodiversity Network, and the Charter of the Indigenous-Tribal Peoples of Tropical Forests—to name a few. These documents show that indigenous “activists” are well aware of the dangers of intellectual property rights. Indigenous groups have made it quite clear that the concept of “property,” and especially individual property, is alien and antithetical to their collective values. They have repeatedly explained how many (but not all) songs, drawings, ceremonies, plants, animals, and designs are inalienable and, therefore, can never be property. And they point out that individuals who use or display them are the “holders,” “trustees,” or “stewards” for communities, lineages, ancestors, gender groups, future generations, or even spirits. Furthermore, indigenous peoples have been explicit in showing that “intellectual” aspects of culture cannot be separated from “physical,” “natural,” or “spiritual” elements because culture is an extension of nature (and vice versa). Thus “intellectual property” is doubly inappropriate in that it excludes plants, animals, and knowledge about them (seeds, soils, minerals, and management practices, etc.)—all of which are inextricable elements of a society’s “intellect.”

Brown, in contrast, reduces intellectual property rights to a question of copyright protection over material expressions of culture. Most indigenous groups are more worried about patents than copyrights. This is because patents are much more powerful tools of monopoly and globalization. Even so, some very innovative proposals have been put forth for the development of community intellectual property rights, applying know-how and trade secrecy for the protection of traditional knowledge and genetic resources, and adapting copyright concepts to community-controlled data. These are recognized by indigenous groups themselves as dangerous experiments but are anything but “extremely naïve” proposals as Brown claims.

Brown also states that “although advocates of expanded intellectual property laws typically denounce capitalist commodification, they implicitly encourage the translation of ethical and political discourse into the language of commodities.” This may be true in some cases, but the majority of those who discuss intellectual property rights tend to employ the political discourse of human rights: rights to land, territory, and resources, rights to full disclosure and prior informed consent, rights to cultural integrity and customary practices, and rights to equitable benefit-sharing and control

over access to “traditional resources.” It may be true that in the rarefied discourse of “cosmopolitan scholars” (Brown’s term, not mine) intellectual property rights have been inadequately analyzed, but that is in part because anthropology has not kept up with the rapidly advancing international debates of indigenous peoples themselves. And, furthermore, anthropologists have restricted themselves to the theoretical discourses in their favorite academic journals. The intellectual action is in fact in places like the World Trade Organization (discussions on sui generis systems of intellectual property rights protection), the FAO (expansion or reconceptualization of farmers’ rights), the CBD (intersessional process to implement Article 8.j), and ECOSOC (debates on the Draft Declaration of Rights of Indigenous Peoples)—not to mention the myriad conferences and workshops that indigenous peoples themselves organize to discuss copyrights, patents, community rights, genetically modified organisms, biosafety, participatory democracy, etc.

Brown asks: “What [will] history or anthropology become when scholars are prevented by law from writing accounts specific enough to evoke the religious or political practices of protected native populations?” One answer could be: disciplines that finally have to negotiate the terms of their intellectual pursuits with those who are affected by the results of their studies—and, as a result, begin to develop questions and methodologies that address the political problems that indigenous peoples still face. It would then be impossible for anthropology to ignore the intellectual contributions of indigenous scholars, faith-keepers, and political leaders that may be well ahead of the debates academics think they are pioneering.

Despite what may seem harsh comments, I am basically in sympathy with Brown. He is right to warn us of the serious threats from intellectual property rights. He is also justified in pointing out the urgent need for sophisticated analysis of “common property” concepts in globalization debates. I also heartily endorse one of his principal conclusions: that “pragmatic ethical protocols” (codes of ethics and standards of practice) for science and industry are far more desirable than radically expanded intellectual property rights. The International Society for Ethnobiology has taken nearly a decade to develop a draft Code of Conduct that will be debated during its next world congress, to be hosted by the Maori Congress of Aotearoa/New Zealand. A Maori lawyer co-chairs the Ethics Committee, and the ethnobiologists will be in the minority at the Congress for the discussion. That figures to advance understanding, research, and respect for rights in ways that laws never will.

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Brown’s essay is a cool-headed discussion of the broad array of issues in the debate regarding intellectual prop-

erty rights. The debate is, I feel, somewhat more positive than Brown has portrayed it. Copyright will not gain additional respect for indigenous people, but its discussion has already brought serious attention to their claims. It is, however, useful to take up the different forms of cultural information separately; the following comments relate specifically to written material.

Access to information is a core issue in most societies, however differently phrased and differently constructed. Intellectual property rights (such as copyright, patent, trademark law) are, as Brown notes, economic in scope. Copyright ensures that individual creators have the incentive to allow copies to be made available to the public. Access to information is thus never precisely free. Costs are involved in locating material and seeing it. Such costs are a control factor, though libraries and archives—paid for by taxes, organizations, and philanthropy—are sources available for reading freely. Market or political forces constrain the free flow of information.

New technologies—printing presses, cameras, photocopying machines, computers, etc.—continue to expand the availability of materials. These are not free either, but they make access easier and bring it closer to home. They also raise new issues for copyright, control, and economic benefit, and these issues are argued and settled, usually in the courts and most often by corporate giants. Protection of individual (or corporate) rights in creation has been under discussion since the 15th century (currently, “creations” such as databases are being examined); it is a fluctuating, ongoing dialogue, changing as society and technology change.

Copyright and the use of materials through libraries and archives exist in a socioeconomic context. An examination of these same issues in, say, France or Egypt would show differences in such concepts as authors’ creative rights and public domain. The burgeoning field of electronic communication (leaving aside any questions about the content or context of that information) illustrates the competing forces of corporate interests, rights to privacy and to information, individual economic claims, concerns of community or religious groups, and questions about preservation of information for the long term. Discussions are ongoing over the boundary between what is public and what private information, between “free” and “costly” access, between secrecy and openness, between what may inform and what may harm.

There is no reason that native groups should not argue these issues in the same courts and in the same manner as all the other parties to this dialogue. If, as Brown notes, secrecy is “of course” warranted for national security, there seems no underlying reason it should not also be warranted for any other culturally determined issues of sensitivity, as it is for privacy. By the same token, there is no reason that the legal solutions will be any more satisfying, any less ambiguous. The law is a blunt, two-edged, and expensive tool for deciding the issues.

Brown, noting the control that copyright exerts over access and hoping that it is not expanded by new intel-



lectual property rights laws, suggests a joint stewardship of cultural information. His point is that information should be free. This is a cultural ideal shared by the nation's archivists and librarians. It is a crucially important ideal which, like community harmony, is much honored in the breach.

With regard to archival materials, there are the beginnings of new approaches. Archivists have started dialogues on the issues of access with neighboring, and sometimes distant, American Indian communities. The Special Collections director at the Cline Library, Northern Arizona University, has opened discussions with the Hopi Tribe, seeking information and joint solutions. John Adair's papers have been acquired by the Wheelwright Museum in Santa Fe with an agreement to work out an access and use policy with one of the communities in which Adair worked for materials relating to that community. Tribal archives across the United States are grappling with incorporating preservation of written records into tribal budgets and in addition to an oral history background. Native archivists are at work in anthropological and other archives. These are models to look at in this dialogue.

The issues relating to written materials as I hear them are specific to each tribe or pueblo, tend to be differently perceived by native communities than by organizations or individuals, relate often not to closed but to appropriate access, are often concerned more with cultural than with economic points, are broadly construed to include all "others" including other tribes, and do not imply total closure of all information for all time. Non-native participants in this dialogue are equally responsible for raising issues and questions, as Brown has done, that are of concern for long-term solutions. There are many opinions and many stakeholders. The quest is for balance. Appropriate access to and use of information is part of this quest, for which the law is not an appropriate means.

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Not for the first time in history, the fundamental issues that surround the concept of property—who may exercise power over what, for what purpose, and by what right—coincide with technological development, commercial expansion, and cross-cultural contact. It matters, however, which of several basic concepts of property we employ. If ownership is conceived not solely as control over an object but as the relationships among people as they concern that object, the forms of proprietorship can be seen as inextricably bound to the political, the moral, and the emotional. To begin an understanding of changing concepts of property with this relational aspect in view may, of course, have a dramatic effect on the very shape of one's analysis.

Brown's splendidly sensible analysis avoids the unambiguous results that single-minded ideologies so often demand. At the same time, it is of crucial impor-

tance in any discussion of property—particularly as it relates to indigenous peoples—how one constructs a set of appropriate analogies. In addition to casting issues of property in terms of relationships rather than control over objects it makes a great difference whether the objects currently in dispute are likened to forms of property recognized in an existing legal regime or symbolic of a deeper political history. If, for example, in any such discussion one replaces *indigenous* intellectual property with a form common in the West—music, literature, design—it might seem, given Brown's criteria, that *no* system of legal protection could ever succeed: the same criticisms he raises for indigenous property—that someone will always modify the original or hide it (digitally or otherwise) or that borders are invariably porous—would apply equally to similar Western property forms. But his article (and my comment) are copyrighted by the Wenner-Gren Foundation, and we both presumably have some confidence in these laws or we would not have signed over the rights. Thus from the outset it may be well to place a similar degree of confidence in the concept of protection and then sort out its appropriate forms in each circumstance—or forthrightly criticize the very concept of protectible property on deeper philosophical and political grounds.

Here the issues affecting indigenous intellectual property begin to resolve themselves into two related considerations. The first has to do with sovereignty. Brown does not mention this issue, but surely the question of whose laws will apply suffuses the entire topic. If indigenous property rights are seen as a subject matter over which some polity will exercise jurisdiction, then it may be necessary at the outset to come to grips with the appropriate distribution of powers as between indigenous and superordinate polities. The issue of intellectual property may, of course, serve as a vehicle through which such power to control one's own affairs is itself developed. But before one can get to questions such as the use of common accords or the distribution of powers through applicable laws, greater recognition and regularization of the powers of indigenous peoples need to be addressed (see Rosen 1997).

This, in turn, raises the second question: Is it intergroup relationships that are at issue here or only the control over property-like objects? If it is the former, then, as Brown himself suggests, we are not bound to all-inclusive deference or hegemonic control as our only options: It is possible to take issues one at a time having laid the groundwork for negotiated accords such as those that inform a number of transnational agreements. Differences of power will not predetermine outcomes as long as developing international custom supports an array of accords from which parties may choose. And specific issues will benefit from the specific attention they require as well as from the general context of internationally recognized intergovernmental agreements.

Indigenous intellectual property thus confronts us with a new form of an old puzzle: To what extent shall the internal rules of another group be accorded deference or constitute the subject of good-faith bargaining

among sovereign entities? If the model of negotiation prevails, each troublesome issue may begin to be seen in terms of differentiated political powers and the scope of government-to-government negotiation. The resultant process may then partake of greater scholarly and political realism than the extreme positions that Brown so rightly challenges.

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Brown's thorough analysis of current attempts to expand the notion of copyright introduces much-needed sense and sensibility into a debate that frequently seems to be disconnected from the harsh realities of an increasingly global world. Approaching the subject from different angles, Brown adds layer after layer of solid argument to demonstrate the negative consequences that attempting to copyright the cultural heritage of minority groups could have for free speech, the exchange of information, and, more generally, the "status of the public domain." What is especially commendable is that he opposes this copyrighting while leaving no doubt that he firmly condemns the appropriation by large corporations of indigenous cultural products for commercial use. More laudable still, he avoids offering ready-made solutions for a problem that, as he constantly reminds us, is extremely complex.

Here I would like to elaborate upon five very practical issues that derive from the fluid character of cultures. I consider these to be central to the problem being discussed, yet they have only been tangentially touched upon, or implied in passing, by the author.

As Brown states, cultures "lack clear spatial and temporal boundaries." Even the social groups that embody them rarely have clear-cut boundaries. More commonly, there is a gradient of more or less inclusive groups that live in a certain region, have similar histories, and share many cultural traits. For instance, the Aguaruna people of the Upper Mayo River studied by Brown are a somewhat distinct offshoot of the Aguaruna of the Marañón River, who in turn have relationships of alliance and hostility with a number of other Jibaro-speaking peoples on both sides of the Peruvian-Ecuadorian frontier. Whose culture should we copyright? That of the Upper Mayo Aguaruna, that of the Aguaruna as a whole, that of the Aguaruna and the Huambisa, who are now organized in a common ethnic federation, or that of the Jibaro as a whole?

Not only do cultures lack clear boundaries but, as Brown stresses, they "freely influence, and are influenced by, social interactions with other groups." Cultures do not exist in a vacuum; they are constantly nurtured by contact with other cultures. No people exists that can claim that its culture is a pristine product, uncontaminated by foreign elements—least of all Amerindian peoples, who share a high proportion of traits, whether myths, rituals, kinship systems, scientific

knowledge, or material culture. If we were indeed to copyright indigenous cultures, to which Amazonian people should we grant rights to, let us say, the hallucinogenic ayahuasca vine? To which Northwest Coast people should we grant rights to potlatch rituals? Or, for that matter, to which Andean people should we grant rights to chicha or maize beer?

A culture is "a flexible set of understandings, dispositions, and behavioral scripts" shared by a given people. However, cultures are not external entities distinct from their bearers. Although cultural forms may be collectively constructed, cultural products are always the output of particular individuals. In fact, among Amerindian peoples an individual's high prestige is very much dependent upon masterful production, whether of a basket, a dugout, a garden, a song, or a mythical narration. Cultures are not merely replicated ad infinitum by their bearers but constantly enriched by the latter's creative acts. Thus, if it were possible to copyright cultures, who would reap the profit from the marketing of specific products, the collectivity or the individual?

Although cultures have been (and unfortunately continue to be) treated as fixed, bounded realities, recent studies have recurrently demonstrated that cultures "change through time" and are always in the making. If copyrighting the culture of an indigenous people were at all possible, which culture should be copyrighted—the one at the time of European invasion, the one that emerged after subjugation, decimation, missionization, and resettlement, or the one existing at the time the copyright is granted? Should abandoned traditional practices, some of which are now regarded with embarrassment by contemporary Amerindians, be included, or should only "sanitized" versions of culture be copyrighted?

Moreover, although the relationship between indigenous peoples and national societies is asymmetric, cultural flows have not been unidirectional, benefiting only the latter. There are numerous Western cultural traits that have been adopted by indigenous peoples not as a result of external pressures but for their beauty, their usefulness, or their symbolic power. Beads, horses, and writing are good examples. Are these traits going to be abandoned for the sake of purity, or are they going to be included in the indigenous copyrights?

Whatever may be the answers to the above issues, they bring to mind one last question: Are not those attempting to copyright culture running the risk of transforming what are still vigorous cultures into fossilized relics?

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Brown's paper raises important questions, political as well as ethical, and does so with honesty and clarity. It is evident that the confrontation of the Western and the American Indian points of view in this context gener-

ates two paradoxes. One originates from the attempt to consider a culture as a collective author in order to protect it. From this perspective, the more one tries to protect culture—which should mean “to preserve it as it is”—the more one transforms it into a fictive construction very different from reality. The second paradox originates from the attempt to apply criteria of legitimate property (and legal conditions of trade)—typically applied to merchandise made to be exchanged in a market—to religious artifacts, which, by definition, are made for ritual performances and do not belong in the market.

An illustration of this situation is the notion of “cultural heritage” as applied to American Indian societies. At first sight, this notion seems obvious. Everybody is committed, at least in Europe, to the preservation of the cultural heritage of a nation. If the Italian or French governments have the right to prevent, for instance, a Michelangelo or a Chardin from being commercialized on the international market, one does not see why the American Indians should not be keen to protect their own techniques, religious beliefs, traditional narratives, and works of art. The assimilation of a native culture to a collective author, however, can also have near-absurd consequences. The idea of having not only documents, drawings, and artifacts but also traditional “ideas” protected by intellectual copyright seems a self-defeating strategy. How is language or thought itself to be preserved from the risks implied by communication? Since images are made to be seen and words are made to be exchanged, it is difficult to decide what images or what words must become someone’s exclusive property. However, it is one of the merits of Brown’s article to make it clear that there is more to this question than mere propaganda or political naiveté. Few anthropologists would deny that “complete freedom” in the field of information and marketing would expose American Indian societies, as in the past, to all kinds of injuries and theft.

Distinctions and clear thought are everywhere difficult to achieve in political debate. In this respect Brown’s paper is useful in that it clearly establishes the premises for a crucial debate. Pursuing this debate, I would like to add two remarks:

1. The “implicit assumptions” emerging from the discussion of the protection of ethnic minorities (at least in Brown’s account) seem reluctant to make any distinction between scholarly examination and analysis of cultural facts, imitation or theft of cultural items for commercial use, blasphemy, and even sacrilegious caricature of rituals. However, it is one thing to study, with the permission of the local authorities, the meaning of a religious object and quite another to caricature a ritual. Scholarship and blasphemy are not the same, and this holds true, in my experience of fieldwork with the Kuna, for some Indians as well as for some anthropologists. In this respect, Brown’s account seems to me too pessimistic.

2. On the anthropologist’s side, I see another risk. Opposing religious Amerindian traditions to “scientific-

democratic and liberal” Western conceptions would be unfair for at least two reasons. First, nonreligious persons exist in Amerindian societies, too, and they should obviously have a right to express their views just like the others. Secondly, Amerindian religious customs should be compared with Western religious traditions; the comparison between the intention to put some Indian “ideas” under the control of an intellectual copyright and the free use of syllogism “invented by the Greeks” is not entirely correct. While a Western scholar would certainly agree that anyone is free to use a syllogism, I wonder whether any use of Western religious notions would be considered acceptable by Western religious authorities.

Indeed, it would be hard to deny that we seem to accept “syncretism” only when the contact of different cultures is realized under the domination of a Western framework. When the Indians of Mexico worship a Virgin Mary unconventionally there is no question but that this results in a local variety of Christianity, not a continuation of Nahuatl cults marginally including certain Christian elements. When this is not the case—as in Haiti, where Christianity was really subverted by African traditions—religious authorities do not hesitate to respond violently. In order to repress too free a use of Christian images, artifacts, and such Christian religious concepts as “communion” and “repentance of sin,” the Catholic bishop of Port au Prince organized an immense *auto da fé*—a spectacular burning of “contaminated images” of saints in the public square—as recently as in the early forties (Métraux 1958). In short, when the cultural contact happens under the control of Western religions, we call it “syncretism”; when it escapes it, we call it “blasphemy.” Religious intolerance, in our tradition as elsewhere, has little use for legal rights.

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This thoughtful, provocative article is a valuable contribution to the ever-widening conversation about the intellectual property rights of indigenous peoples. Brown graphically supports his healthy skepticism of legal schemes to control cultural appropriation, or misappropriation, with a wide spectrum of poignant, timely concrete examples. The thrust of his article is to force critical reflection in an arena where it is much needed, because without such critical reflection the notion of intellectual property rights for indigenous peoples will be abused to the point that it eventually is eviscerated. Brown’s clarion call is reminiscent of the arguments of the more moderate and dispassionate commentators during the tumultuous sixties in the United States that the country needed fewer uncritical lovers and unloving critics and more critical lovers. Brown is a critical lover. He offers positive insights and constructive suggestions (e.g., ethical realism and frameworks based on joint stewardship) alongside his thorough cri-



tique of overzealous advocacy for native intellectual property rights.

His concerns about how to reconcile Western notions of intellectual property with native claims to the right to protect virtually everything that may be deemed part of the broad fabric of "culture," including thoughts, is consistent with my own cautions about the dangers posed by the inherent vagueness and overbreadth of the term "cultural patrimony" in the Native American Graves Protection and Repatriation Act (Stephenson 1996) and the arbitrariness and overbreadth of the Indian Arts and Crafts Act recently detailed by Gail Sheffield (1997). Brown's call for ethical realism is echoed in my prediction that the most successful strategies for protecting, conserving, and compensating cultural property "are more likely to be those that translate broad, lofty principles into local *sui generis* initiatives" (1996: 118). Brown's observation that zealous protection of intellectual property rights is inconsistent with other highly valued principles, such as freedom of expression, as reflected in the First Amendment, is encapsulated in Sheffield's comment that "the right to foreclose another's use of Indian identity will conflict with that individual's right to freedom of expression" and her reflection on David Lange's (1981:147) comment that "the growth of intellectual property in recent years has been uncontrolled to the point of recklessness" (1997:141).

At the same time, it is ironically precisely the broadening of traditional intellectual property concepts in recent years, brought on by such technological revolutions as the Internet and computer software, that offers promise for finding a proper fit between traditional legal rules for protecting intellectual property in the Western tradition and the integrity of the attributes of traditional cultures, however intangible those attributes may be (Stephenson 1994). Because the concept of intellectual property in Western law is itself undergoing such rapid transformation, it would be premature to dismiss its potential utility for protecting at least the more measured attributes of native cultures identified in the Bellagio Declaration about which Brown comments favorably.

By the same token, Brown's analysis might have benefited by a consideration of efforts to develop alternatives to traditional intellectual property, such as Darrell Posey's concept of "traditional resource rights," as more appropriate for non-Western traditions (Posey and Dutfield 1996).

On the whole, however, I applaud Brown for thoroughly exposing important issues that desperately need more critical reflection.

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Brown's opening remarks pinpoint an inflationary dimension to recent discussions of intellectual property. The idea of intellectual property rights as a potential in-

strument for the recognition of rights of a "cultural" nature is merged with the anthropologists' perpetual fashioning of their relations with those whose cultures they study. The curator's response was not to destroy the papers or prioritise the rights of the donor but to pose questions about the conduct of relationships. This is a sensibility with (so to speak) a life of its own, a triumph of anthropological theories of culture and of two decades of enhanced sensitivity to professional practice. It is interesting that it should be a museum example, for here "cultural property" (in tangible items) flourished as an issue long before it became blown up into a ubiquitous index of ethical awareness (apropos tangible and intangible items alike). (Busse [1997] notes that in Papua New Guinea the change from the language of antiquities to the language of national cultural property, and thus cultural heritage, dates from 1965.)<sup>1</sup>

The intellectual property rights problematic has in effect taken over others, and Brown appraises the consequences of this. It is an important task. Thus property discourse replaces, he argues, what should be discussion on the moral implications of subjecting people to unwanted scrutiny or sequestering public-domain information. It runs the danger of what he wonderfully calls the moral alchemy of converting multiple interests and questions about fair use and fair expression into narrow disputes over commodities or of overlooking the "complex human motives" that coalesced at the time when ethnographic items were obtained or of abandoning the conventions of "reasonable procedure" or a common-sense approach to complex ethical issues in favour of comprehensive claims to ownership. I might add to these the late-20th-century money effect; bodies such as the British Economic and Social Research Council, by analogy with commercial companies, may use the rubric of intellectual property to reify national interests in the nationally funded. While this proprietorship refers in the first place to research with a financial potential, in the ESRC case it sits side by side with requirements that research-generated information (including primary data from interviews or diaries) be datasetted and thus archived for use by third parties. No mention is made of intellectual property rights *here* except as a "problem" which may affect the deposition of data. The issue is not claims to original ownership but the assertion of national interests against other claims to the country's store of information.

Brown dryly observes that in the mad scramble for control, ethno-nationalists are similarly promoting ideas about cultural protection—the collapse of the

1. And enshrined in the 1970 UNESCO convention on the illicit transfer of ownership of cultural property, part of the postwar anthropological effort to put "culture" into the international vocabulary. But if the formula (cultural property) was relatively new, some of the sentiments concerning the appropriation of people's heritage had been long in place: see Winter (1993) on Greenfield's (1989) *The Return of Cultural Treasures*. Busse notes that the Ordinance relating to Papuan Antiquities dates from 1913; the issue then was not claims to original ownership but the assertion of national interests against other claims to the country's "antiquities."

idea/expression distinction or the abandonment of time horizons—which, converted into intellectual property rights regulations, would certainly serve the interests of corporations.

This is a judicious and cool account. If it leans towards particularly American cultural pragmatics in its concerns for native peoples, Brown's careful weighing is also more generally useful. On the one hand, he advocates compensation mechanisms for the commercial use of knowledge/artefacts and clear guidelines for collecting culturally sensitive ethnographic data. On the other hand, he is in despair over some of the broader debate about cultural appropriation, the very kind of wider contextualisation that anthropologists normally favour. He sees anthropologists abandoning social critique when it comes to ethno-nationalist claims to enduring rights. Yet this politics has its own social reality: people who feel that their ancestors were duped do not want their descendants to have been. Brown does appeal to "situational pragmatism"; a multicultural democracy implies weighing the benefits of special rights against the injury done to notions of equity and fairness. This of course is an old political-economic issue that recurs at every angle or joint in the social body.

I have a single comment: one needs to pick one's social domain. In terms of the many decision-making contexts Brown summons (e.g., the ethics of Native American churches' using Christian symbols), he is absolutely right to point to the excesses and absurdities of "the dramatic expansion of the intellectual property of native people." But if we shift into the world of already existing inequities, where—to use a romanticist metaphor—it is hard to make one's voice heard, then intellectual property rights is a forceful sound bite. Precisely because it rolls so much up into a bundle, precisely because it has rhetorically inflationary potential, and precisely because it invokes property, it is a political slogan of power. Power is not always so easy to come by. The anthropologist just needs to be careful not to mistake slogan for social analytic.

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In these postmodern times, anthropology, to quote the Lord Ko-Ko and friends, finds itself in a "pretty how-de-do." The debates over cultural copyright are filled with strange bedfellows and moral dilemmas. Having barely completed the task of dereifying culture and discrediting the concept of "the tribe" as an instrument of 19th-century imperialism, anthropology, at times, seems ready to welcome back such notions in order to defend intellectual property rights on the part of indigenous collectivities and the corresponding right to prevent "outsiders" from emulating or commercially exploiting their cultural patrimony. The role of indigenous advocate may come easily to anthropologists, considering

the practical, sentimental, and philosophical ties that bind them to the peoples they study, but, as Brown's masterful analysis shows, in the case of the more draconian versions of "cultural copyright" such partisanship can run afoul of principles of equal or more compelling value, such as public domain, fair usage, and, perhaps above all, the preservation of cultural knowledge in all its variation.

Furthermore, even if one were to accept the validity of radical claims, such as that of the Apache tribal consortium, who gets to speak for "the tribe"? Regardless of whether such spokespersons are designated by democratic elections or by nondemocratic customary procedures, as social actors they are subject to situational constraints and temptations that could result in faulty decisions; only a naive observer—a *fortiori* a poor ethnographer—would mistake rhetoric for the complex motives that drive high-stakes culture politics in matters of copyright and other new arenas. And yet, this said, who *should* determine whether and to what extent culture should be copyrighted? What solomonic process will sort out and create enlightened, sustainable policy upon the balance of rights among individuals, culturally identifiable collectivities, commercial interests, and the long-term public good? For the present, at least, these issues are being decided in the courts, but in the end it is posterity—the descendants of ourselves, as anthropologists, and those of the peoples we study—who will judge whether, in retrospect, cultural privacy was worth the price of cultural oblivion.

Brown's sane and judicious study is not only a timely wakeup call for anthropologists to ponder the potentially grave implications of cultural copyright legalities for the future of the discipline; more positively, through detached, clear-sighted renderings it discloses the very anthropological saliency of the value contests surrounding cultural copyright. Do we glimpse, here, a research orientation constructive for anthropology in an era when so many old disciplinary verities no longer apply? If so, this would be good news, indeed, for "cultural copyright" is only one in an emergent family of issues that pose important challenges and opportunities for future anthropology. For instance, how far does cultural relativism go in defending practices, such as infibulation and clitoridectomy performed on little girls, that seem to offend more universalistic values? Similarly, what should be anthropology's stance on the knotty issue of *cultural* asylum—as, for example, in the case of the Saudi Arabian woman who sought Canadian asylum on the grounds that Saudi culture deprived her (as a woman) of her basic human rights? On a much larger scale, the combined effects of runaway population growth and prospective global warming imply that the not-too-distant future will witness population dislocations of monumental proportions. Never mind indigenous *intellectual* property rights; how defensible will exclusionary *real* property rights and sovereignty be, for the autochthone, when a growing proportion of the human race, with rights of its own, is beating on the door? And again, as the loss of biodiversity on the planet even-

tually approaches crisis levels, how far will anthropology go in defending the rights of indigenous groups to dispose of their resources entirely as they see fit?

These are the sorts of challenges that anthropology will face in the coming century. If anthropology's arid response is to invoke what D'Andrade (1995) has called "moral models" and join the babble of competing advocacies—reifying and sentimentalizing culture all over again—it will fail in its purposes; it will fail to develop new purposes appropriate to the new sociocultural realities of the 21st century; and it will become part of the problem, not part of the solution.

## Reply

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These 15 reasoned responses illustrate the wide-ranging thought needed to gain analytical purchase on issues of information policy and cultural ownership. Some commentators (e.g., Santos Granero, Powers, Posey) would move the analysis farther in the direction of concrete policies, whereas others (Barnes, Coombe, Descola, Hiatt, Strathern, Rosen, Tuzin) argue for situating the issues within larger debates about property concepts and their limitations, the politics of knowledge and representation, and dilemmas of ethnic sovereignty within multicultural states. The subject clearly demands both approaches, and I am grateful for the impressive erudition that the commentators have brought to bear on its many facets.

Let me begin by underlining areas of general agreement. The commentators acknowledge that the language of cultural property is a problematic and in many ways impoverished way of talking about social problems that really turn on questions of sovereignty, mutual respect, and the precarious status of native cultures within mass society. As Strathern notes, however, intellectual property discourse is a "forceful sound bite" because it condenses many issues into a compact notion that feeds upon public uneasiness about the future of authenticity in a world increasingly defined by simulation.

Most of the commentators also recognize that comprehensive claims of cultural ownership can, if taken to extremes, play into the hands of demagogues. European observers—in particular, Descola and Hiatt—are more sensitive to this issue than their colleagues from North America, South America, and Australia, doubtless because of their proximity to recent cases of genocidal violence rooted in ideologies of ethnic nationalism. Even those who do not share their dark view of the trajectory of indigenous political assertion must acknowledge the power of their cautionary tale.

We also agree that the current struggle over intangible cultural property can be seen as a hopeful sign—

hopeful because it signals the arrival of native peoples as significant players in global debates about social and economic justice. Here, however, I part ways with some commentators. Coombe, for example, seems unable to distinguish between *comprehension* of native claims and unthinking support for them. I have no trouble understanding the historical circumstances that lead indigenous groups to assert control over cultural records, nor do I contest demands that they should have a voice in determining how such records are used. Nevertheless, those who value anthropology and other forms of social inquiry also have a responsibility to ask whether the wholesale "repatriation of information" is either feasible or morally defensible and, if we destroy cultural records or sequester them through novel forms of indigenous copyright as some would insist, what legal principles will prevent other social groups—defined by ethnicity, religious affiliation, or political agenda—from advancing similar claims. In an age of identity politics, it seems only prudent to ponder the broad implications of such policies before embracing them.

Coombe is mistaken when she implies that I advance absolutist visions of free speech and freedom of access to information. Although I argue that standards of free speech and freedom of access should be considered in cultural-property debates, nowhere do I contend that these goals always and everywhere trump other considerations. I have no more sympathy for unqualified application of the principle of free speech than I do for preemptive claims of cultural ownership or for the simple-minded notion that a people has an inherent right to control how it is represented to the world at large. Only by clearing away such totalizing positions can we begin the difficult business of finding a middle ground that balances the genuine concerns and grievances of native groups with the democratic values (however imperfectly applied) of the liberal state. In this sense I find myself drawn to the pragmatism of Powers, Cleveland, and Stephenson. It may be time, as Cleveland says, to focus on goals rather than on methods.

Karlsson misconstrues my references to American Indians. I mention Hopi and Apache assertions of control over cultural information because on this issue, as on many others, these tribes are leading the way for other indigenous groups in North America and elsewhere. The tribal documents in question offer unusually clear and straightforward expressions of the authors' positions. My respect for their views does not, however, oblige me to agree with all of their assertions. I do not dispute the sovereign right of native peoples to restrict the activities of outside researchers as they see fit. The principal point at issue is the claim that indigenous groups "own"—that is, possess inalienable and exclusive rights in—cultural information that they have shared over the years with outsiders and that has long resided in the public domain.

American Indian spokespersons have every right to criticize New Agers who imitate Indian rituals or engage in other offensive behavior. In fact, vigorous condemnation of New Age practices by Indians is far more



likely to promote greater cultural sensitivity than are a score of scholarly treatises on the problem of cultural appropriation. Nevertheless, there is little evidence that greater native control over material in libraries, museums, and archives will discourage the activities of those determined to emulate Native American religious rituals, who are far more likely to talk things over with their channeled spirit guides than to consult works of anthropology.

Karlsson incorrectly concludes that I question the sincerity of American Indian activists simply because some happen to be skillful negotiators. Indians have been forced to hone their negotiating talents through decades of involvement with state and federal governments, the news media, nongovernmental organizations, and researchers of various descriptions. I see no necessary contradiction between a sincere commitment to one's cultural values and mastery of the skills of cross-cultural communication. It bears noting, however, that burgeoning revenues from tribal gaming enterprises now permit American Indians to hire some of the nation's most influential lobbyists and lawyers to advance their interests in the public arena. Elsewhere, for instance, in Australia, the state routinely finances litigation and other legal activities that contest the state's own power. These developments beg for dispassionate analysis by scholars willing to jettison habitual assumptions about the relative powerlessness of native peoples, especially in the developed world. Despite anthropology's claim to be attentive to human agency, we prove highly selective in our willingness to acknowledge it, especially when the fate of received wisdom hangs in the balance. It would seem that we need victims far more than they need us.

Posey is right to emphasize the many efforts being made to develop workable strategies for the protection of indigenous know-how from corporate efforts to alienate it through the prevailing system of copyrights and patents. But the devil, as they say, is in the details. I have read most of the documents to which he refers, and I do not share his conviction that they offer a clear vision of how the desires of indigenous peoples to "control their heritage" (to frame the issue in an idiom favored by the United Nations) can be balanced against the legitimate claims of other social actors.<sup>1</sup> The situation is hardly helped by the recent reemergence in international forums of what Descola identifies as *völkisch* philosophy, that is, belief in a transcendent, mystical link between a people and its territory. This is not to deny that many native peoples identify closely with their land, investing it with sacred qualities and seeing it as a source of knowledge. But as a generalization about indigenous cultures it seems neither accurate nor

free of an insidious naturalism. Given anthropology's long struggle against essentialist approaches to culture, I would expect Posey to be more cautious about jumping onto this particular bandwagon.

With the exception of Jackson, Rosen, and Stephenson, the commentators express little concern about the impact of digital technologies on proposed schemes to protect indigenous heritage. Rosen uses the copyrighted status of this current anthropology article as evidence that intellectual property laws still work, yet the example illustrates perfectly why copyrights and patents cannot protect indigenous knowledge that was never intended for uncontrolled circulation. Rosen and I write to disseminate our thoughts, not to shield them from scrutiny. A century ago we would have been reasonably assured that our exchange would be read only by those possessing a copy of the journal. Now that we have inexpensive photocopying, however, this article is far more likely to be seen in facsimile than in its original form. This may be disturbing to the Wenner-Gren Foundation, which bears the journal's production costs, but for academic authors it is cause for quiet celebration, since our ambition is to be read and cited. If our goal were to *restrict* access to our words, in contrast, the journal's copyright would afford us no protection whatsoever. Compared with the digital technology now on the horizon, the photocopy machine is as crude as an Oldowan hand-axe, and we are sure to witness profound changes in the ways in which information is created, circulated, transformed, and used—changes that will undermine cultural-protection schemes based on the logic of patents and copyrights.

Cleveland raises the important question of cultural values, a theme also developed to a greater or lesser extent in the comments of Rosen, Severi, and Tuzin. Anthropology has found its place in Western thought by showing how practices that seem illogical or immoral in one culture appear perfectly normal from the perspective of another. Yet, as Tuzin points out, in a globalizing world our analysis cannot stop there. We must now come to grips with the challenges of reconciling widely divergent cultural values in our neighborhoods, schools, and workplaces. The turn toward indigenous sovereignty solves some problems but in turn creates others, especially as social boundaries become more permeable. It is crucially important to move the cultural-property debate beyond reflexive expressions of solidarity to a more nuanced consideration of the conflicting rights and responsibilities at stake in the formulation of public policies relating to information.

I was reminded of the human dimension of this struggle several months ago while observing an intellectual property trial in the city of Darwin, the capital of Australia's Northern Territory. The plaintiffs, a well-known Aboriginal artist from Arnhem Land and his senior clan relative, were asking the federal court to recognize the clan's economic and moral rights in the artist's graphic designs, rights tied to the clan's territory and ritual knowledge. Representing them were a local solicitor and a genial barrister from Melbourne named

1. An important exception is Janke (1997), an Australian document that came into my possession while this reply was being drafted. Consisting of a general overview of Aboriginal intellectual property and legal frameworks that affect its disposition and use, the document proposes a range of specific changes in Australian laws relating to copyright, patents, trademarks, and archives management.

Colin Golvan, who brought to the case his considerable expertise in intellectual property litigation. The respondent, a company that had pirated the artist's work for mass-produced tee-shirts, was nowhere to be seen, apparently because prior litigation had forced it into bankruptcy. Instead, opposing counsel was provided by the Ministry for Aboriginal and Torres Strait Islander Affairs, which feared that the case, if won by the plaintiffs, could destabilize Australia's system of native land titles. In gowns and wigs, the lawyers from both sides presented cogent arguments on behalf of their clients. Documentation was brought forward in impressive quantities. A museum curator furnished an example of the artist's work for the inspection of the court. The presiding judge, obviously engaged by the case, seemed willing to do the right thing if only he could figure out what it was and then reconcile it with existing laws and commercial practices.

Although it was impossible not to admire the goodwill of the participants and, indeed, of a society that would devote so much institutional energy to the resolution of an isolated community's concerns, I found myself wondering whether this was the most effective way to help Aboriginal artists carry on the traditions of their people while receiving reasonable compensation for their efforts. Max Weber's analysis of bureaucracy demonstrated long ago that modern procedural rationality inevitably spawns its own forms of irrationality. As heritage-protection laws come into effect and legal precedents accumulate, lawyers will apply ever more intricate casuistry to contests over cultural ownership. Each innovation in legal thinking invites new claims in a spiral of complexity increasingly removed from the goal of creating social spaces in which indigenous peoples are safe from predatory corporations and mass cultures hungry for glimpses of human understanding perceived as uniquely authentic, perhaps even as redemptive.

Hence my contrarian arguments, offered as a profession of doubt. If they cause readers to pause for a moment of reflection before blindly supporting plans to bureaucratize and police the public domain in the name of respect for other cultures, then they will have served a useful purpose.

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