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Book Reviews

Michael F. Brown: 2003, *Who Owns Native Culture?*, Harvard University Press, Cambridge, MA, 315 pp., ISBN 0-67401-171-6.

This is one of the most important books in cultural economics published in the last fifteen years. It is not a work that retreads familiar ground in the tried and true debates. Rather it provides a balanced introduction to some new and pressing questions. Who should own "native" and "indigenous" cultures? Should copyright protection be extended to folklore? Is there a right of cultural privacy? Who owns the plants and medicinal rights in a given geographic area? When should cultural objects be returned to the tribes they came from? Do current models of cultural ownership unjustly favor Western interests at the expense of alternative visions of what a culture is about?

Brown's insightful book has proven controversial in the arts and anthropology fields, although the casual reader may wonder why. The work comes across as dispassionate, cool, and almost detached. Brown does not "oppose" the rights of indigenous cultures; rather he presents both sides of the story. He treats the policy questions as open to scientific and historical inquiry, rather than holding the status of obvious injustices that require immediate redress. That may explain why he has been the target of so much opprobrium. To his critics, Brown is overlooking an obvious and massive theft of resources, and refusing to call it by name. To his defenders, Brown is an accomplished scholar who realizes there are rarely simple answers to complex questions.

The author teaches anthropology and Latin American studies, and the presentation of the material reflects this background. Virtually every page offers economic analysis or discusses issues of economic importance, but rarely are the questions framed directly in economic terminology. In essence this is an original text on law and economics, but written in the languages of history, law, and anthropological "thick description."

I found the discussion of copyright protection for folklore especially interesting. Recent UNESCO and WIPO proposals have called for the creation of copyright in folklore and oral culture. In other words, if Disney drew from the native stories of a tribe, it would owe royalties or could face legal sanctions. We all know that U.S. copyright typically protects the expression of an idea, and not the idea itself. But native tales and folklore are expressions of sorts, just not durable expressions in the way we are accustomed to protecting under Western law. I do not see any principle in the pure theory of copyright itself that should rule out such an extension. We

usually think of copyright as balancing the incentive to create against the desirability of access. How might this balance shake out in the case of folklore? Why don't we protect folklore by copyright?

It does not suffice to argue that folklore is already produced, as the same could be said for music or any other artistic form. Nor is all folklore old and musty, and thus a candidate for expired copyright protection only. Folklore production is alive and well in today's world. Nonetheless several arguments militate against the extension of copyright to folklore production.

Most folklore could never have evolved in the first place, had earlier folklore received copyright protection. Folklore also makes it harder to define a clear line between copying and independent discovery. Similarly it is hard to distinguish between general inspiration and outright borrowing. Borrowing in general is harder to trace, as a given derived story could have come from numerous sources.

Perhaps most importantly, folklore is collectively produced, ownership is hard to assign, and often there are no well-defined corporate entities. If you contribute to the creation of folklore, what could you do to establish an ownership claim? To make matters even tougher, folklore rarely offers a final, canonical, or well-defined final product. The law is intrinsically unclear and entrusting copyright ownership to "tribes" would encourage politicization and rent-seeking behavior. The size of the payments will be determined, not by a rule of law, but rather by a mix of politics and international bargaining. It is unlikely that this use of copyright would encourage creativity.

Even if ownership were clear in principle, whose courts do we trust to get it right? Presumably Ghanaian courts would be deciding when Disney has borrowed too much from native folklore, but the incentive problems are obvious. Courts in poor countries will levy charges against richer multinational corporations. The legal complications increase if the "victimized tribe" crosses national boundaries.

Note also that the Hague Convention allows for the enforcement of "sui generis" copyright laws. So if Cuba enacted a *sui generis* regime and declared that Cuban musical rhythms were intellectual property, it could get a judgment in Cuba against U.S. music companies for cultural piracy. Or a country could sue a company for making a film set in that country, and so on. It is hard to imagine such possibilities encouraging the production of culture and the free flow of ideas. It should be noted that three Maori tribes threatened to sue Lego for using Maori and Polynesian words in a computer game, and later received a settlement.

The reality is this: copyright is a useful human invention, but its boundaries are morally arbitrary. Unfortunately a too-public recognition of this arbitrariness interferes with its usefulness, as evidenced by the current fancy for illegal music downloads. By asking for copyright protection for folklore, the poorer countries are revealing a preexisting tension in copyright law. Poorer countries and tribes feel they have a claim to some kind of compensation, and we cannot cite good moral arguments why they do not. At the same time we are not content to cite efficiency factors alone. We are reluctant to take the all-too-convenient

position that copyright protection is necessary for our products but not for theirs.

Much of the debate ultimately concerns the redistribution of wealth. One group of people seeks to revise the world's distribution of wealth, but through the proper politically correct channels. Many means of redistributing wealth insult the dignity of the recipients. Copyright protection would transfer monetary resources, while at the same time referring to meritorious achievements of the native culture. What better way to address an obviously unjust global distribution of wealth? Transfer recipients also can feel that the law, and the global community, properly recognizes their different understandings of what songs, artworks, and oral tales are all about.

The temptation to accede to these demands is a strong one, especially once we ponder the imperialist injustices of the past. Unfortunately we would be putting arts policy, and creativity, at the mercy of redistributionist demands. Surely it is a mistake to sacrifice good arts policy, and more efficient means of wealth redistribution, just to make sure that no one's feelings are hurt. Nor would copyright-based redistribution in the longer run raise poorer cultures into riches; more likely we would encourage further rent-seeking rather than good economic policies. Fortunately, legal practice, which is pragmatic and incremental by nature, has for the most part kept a steady hand.

The treatment of copyright and folklore is just one of many topics covered in this book. Brown also considers whether a football team should be called the Washington "Redskins," whether climbers have rights to scale "sacred" rocks, and whether scholars should be restricted from disclosing the nature of secret cultural practices, typically religious in nature. Virtually every page of this book offers some new case or analysis of interest.

Brown's policy stances are pragmatic and based on the idea of compromise. At times he pushes us in the direction of compulsory licensing, rather than prohibitive rights protection:

> An obvious way to treat natural products and public-domain folk knowledge would be to implement a version of compulsory licensing. Compulsory licensing arose in response to technological innovations such as player pianos, jukeboxes, and commercial radio. If radio stations were required to obtain prior permission before broadcasting each song, the transaction costs would be overwhelming, and programming would grind to a halt. Compulsory licensing allows for use of copyrighted material without permission; at the same time, it requires commercial users to pay reasonable fees to copyright holders. It is a "liability rule" rather than a "property rule." The system strives to balance the rights of copyright holders against society's need for the circulation of art and information. It also accepts that a copyright system is workable only if transaction costs are low. A licensing system for natural products would acknowledge that local populations, especially indigenous ones, have legitimate proprietary interests... (p. 239).

We also are told (pp. 241–242) that many good solutions are local in nature, and rooted in civil society, rather than strictly legal. Furthermore not all cultural areas should receive the same treatment.

Brown offers mixed but skeptical recommendations when it comes to trademark protection for native identities:

> There is doubtless a place for sharply focused legislation that confers limited rights in cultural information and community symbols, especially to groups that can show how misuse of such resources by others would cause genuine harm. The problem is that advocates of Total Heritage Protection are edging toward insistence that all representations of native cultures merit legal regulation. I can think of few contemporary rights claims that are at once so vast, so vague, and so frankly separatist in intent. (p. 247).

I wish to offer my strongest agreement with the following excerpt from the last page (p. 252) of the book:

> Advocates of Total Heritage Protection fail to offer a comprehensive vision of what the world will look like after they have imposed the institutions of surveillance, border protection, and cultural purification that some call for. They talk of respect, cultural survival, and economic justice for indigenous communities. These are admirable goals. All of us should work to advance them. Nevertheless, history suggests that the legal regulation of culture is at best a fruitless enterprise and at worse an invitation to new forms of manipulation by the powerful. (p. 252).

In sum, if you are reading this journal and this review, you should read this book. I would add that for a very useful website on the book and related issues, visit http://www.williams.edu/go/native/, constructed by the author Michael Brown. For a very interesting Richard Shweder review, visit http://www.transhumanism.org/pipermail/wta-politics/2003-September/000394.html. You can read chapter one of the book itself at http://www.transhumanism.org/pipermail/wta-politics/2003-September/000395.html.

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Niva Elkin-Koren and Neil Weinstock Netanel (eds.): 2002, *The Commodification of Information*, Kluwer Law International, The Hague, ISBN 9-041-19876-8.

Copyright law and the economics of copyright are subjects that are increasingly recognised as crucial to understanding the way markets work in the cultural sector.