

15 The Evolution of Cultural Heritage Ethics via Human Rights Norms

ROSEMARY J. COOMBE AND NICOLE AYLWIN

The rights of peoples with respect to their cultural heritage pose new and pressing challenges in terms of balancing the exercise of intellectual properties with individual freedoms of creativity, collective rights, and international human rights obligations. Digital technologies heighten anxieties around cultural appropriation because they enable the reproduction and publication of cultural forms at unprecedented speeds (Burri-Nenova 2008). If, as Michael Brown (2005) argues, digitization has accelerated the social decontextualization of cultural objects, it has also increased awareness of the exploitation of cultural heritage resources. Digitization has further enhanced political consciousness about the injuries these processes may effect, while fostering new initiatives for managing and sharing cultural heritage resources in a politically sensitive manner (Coombe 2009). Digital communications also afford new opportunities for communities to benefit from new uses for traditional cultural expressions that promote sustainable development (Antons 2008; Burri-Nenova 2008, 2009; Sahlfeld 2008).

In light of the increased spread and availability of digital technology, issues of cultural appropriation have received new scrutiny. The tendency to treat all cultural forms in digital media ecology as mere “information” enables everyone to access and make use of cultural goods – assuming we overlook the “digital divide.” Nonetheless, it is important to recognize that when creativity involves a practice described as appropriation, an assertion is being made that a text has been moved or removed from its authorizing context, or that it has, in some other significant sense, been taken (Meurer and Coombe 2009). In some cases, this decontextualization may be deliberately and critically intended – to challenge the fields of meanings in which the object properly figures,

to assert an alternative ownership over it, and/or to consider the importance of other realms of connotation in which it might signify. Other allegations of appropriation may occur when a cultural text is understood to have been *improperly* recontextualized to the harm of those who have serious attachments to its positioning in specific worlds of social meaning. In this chapter, we deal primarily with those forms of appropriation that effect injury to groups, primarily because of the power relations at work in digital environments that enable old inequities to be perpetuated in new ways.

As a representative example of this latter type of appropriation, anthropologist Steven Feld (2004) traces the sampling of a Solomon Islands Baegu lullaby by world music producers who earned handsome profits from their derivative work without compensating the singer or her community. Such appropriations are enabled by legal interpretations of oral tradition that invisibly transform the status of “signifying that which is vocally communal to signifying that which belongs to no one in particular” (74). Unless we know more about the social and cultural significance of such songs, however, we cannot deem such appropriations to be harmful nor characterize such takings as unethical. The status of ethno-musicological recordings as informational goods is also questioned by Coleman and Coombe (2009), who, as a moral philosopher and legal theorist, respectively, demonstrate that in certain Indigenous societies, music fulfils functions beyond those of expression or entertainment, and serves performatively – as a legal mechanism to transfer property rights and responsibilities. The categorization of such recordings as informational goods ignores the customary legal functions of the songs they register to the potential injury of a community and may even potentially affect the legal recognition of its territories. Both the “free sampling” of these recordings and restrictions of access to the work of a people’s ancestors – by virtue of intellectual property (IP) protections held in the recordings themselves – serve to perpetuate histories of colonial subjection, in which Indigenous culture was both targeted for eradication in community life and “salvaged” for the edification (and enrichment) of others. These studies suggest that both global IP regimes and the prevailing ethos and ethics of a universal digital cultural commons may provide insufficient recognition for community rights and interests.

Many of the essays in this volume assume that we need to understand the digital use of cultural goods – including protected intellectual property – as creative activity that actively produces our cultural

heritage. Rather than the passive appreciation of a field of static works, then, cultural heritage is the result of a dynamic, expressive, and productive practice of dialogue. This approach is consonant with an international movement to revalue cultural diversity and reconceptualize heritage values. However, this global revaluation of heritage also situates such cultural activities in the normative field of human rights. This has a number of implications for our ethical orientations when we share cultural forms in digital environments. When we consider our cultural activities with the copyright-protected goods of others as a matter of cultural rights, new freedoms come into view, but so do new responsibilities. In other words, although access and participation rights have become a major part of contemporary rhetoric about expressive liberties, we also need to acknowledge the necessity of respect for the cultural properties and heritage interests of others.

Cultural Heritage and Human Rights: New Relationships and Challenges

Cultural rights have authoritative origins in the 1948 United Nations Declaration of Human Rights (Silverman and Ruggles 2007, Arzipe 2010), specifically in Article 27, which specifies both that (1) “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,” and that (2) “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” The text simultaneously recognizes both individual rights to participate in the cultural life of a community and private rights to benefit from the creation of cultural goods, which means that proprietary rights that wholly exclude others from all use of works would rarely qualify. As a human right, an author’s material and moral interests carry weight. However, corporate exercises of IP rights that wholly prohibit the use of cultural objects – and, therefore, prevent cultural expression, participation, and the public enjoyment of the arts – do not. Digital technologies clearly enable new forms of access to cultural works and participation in cultural life, so exercises of intellectual property that constitute the simple trumping and trampling of those rights in the name of corporate profit should have little normative purchase. Cultural rights also address the interests and needs of collectivities, particularly minority groups and Indigenous peoples, whose rights with respect to cultural goods

bear a distinctive relationship to their dignity, autonomy, and potential self-determination.

Contemporary debates about the extension of IP rights and the endangerment of the public domain, however, have largely ignored questions of cultural rights (Coombe 2005, 2006). Perhaps this is because the most publicized IP activists operate within US legal traditions, where the cure for ever-greater expansion of copyright monopolies is a combination of a robust jurisprudence of “fair use” and strong constitutional protection for freedom of speech. At the same time, they rightly lament the lack of certainty that such principles provide to the average user of cultural works (e.g., Boyle 1996, 2008; Lessig 2001, 2004; McLeod 2001, 2007; Vaidhyanathan 2001, 2004). It should be clear that in Canada we lack this strong jurisprudential foundation, along with any legitimate recognition of the constitutional dimensions and limits to copyright (Amani, this volume; Reynolds 2006). We do, however, have distinct international obligations to respect social, economic, and cultural rights, to which we give, at least nominally, greater allegiance than does our southern neighbour. The International Covenant on Social, Economic, and Cultural Rights, for example, alludes to rights of intellectual property as means to serve specific ends (protecting an author’s moral and material interests), and arguably should be so limited. Moreover, as human rights, intellectual properties should be governed by the overarching human rights obligation to identify and take specific measures to improve the position of the most vulnerable and disadvantaged groups in society.

The assumption that there is or should be a singular or unitary public domain of cultural materials does not acknowledge the interests of ethnic minorities and Indigenous peoples and their distinctive histories. These include long periods of forced assimilation, prohibitions on Indigenous cultural practices, and the appropriation of cultural forms by majority groups under situations of internal colonialism, where heritage may be the basis of group identity and an integral resource for the continued survival of a people and their self-determination (Hardison 2006, Graham and McJohn 2005, Brown 2003). Indigenous heritage has often been seen as *de facto* public domain material (Nicholas, this volume); appropriations are often justified by enduring colonial narratives that place Indigenous culture in the past with little regard for its importance as “living culture” (Aylwin, this volume). But, as Bowrey and Anderson (2009) argue, the assertion of a cultural commons is a

political act that serves particular interests and ignores others, leaving existing relations of power intact and ignoring the disparate means that groups have to represent themselves in public fora.

Movements to enhance human rights have been instrumental in opening up spaces for non-state actors such as NGOs and advocacy groups to draw attention to the plight of Indigenous peoples, questioning the modern relationship between the state and the individual as the primary vector of rights violations and providing new opportunities to acknowledge social collectivities as rights-bearing subjects (Anaya 2004). The two major international human rights covenants – the International Labour Organization Convention No. 169, adopted in 1989, and the 2007 proclamation of the Declaration of the Rights of Indigenous Peoples – both reiterate as principles of international human rights that Indigenous communities have some measure of control over their cultural heritage (Ahmed, Aylwin, and Coombe 2009).

International human rights norms demand a special sensitivity to the rights of minorities and Indigenous peoples, whose cultural rights have often been violated through a long history of sanctioned state initiatives designed to forcibly assimilate minorities and to catalogue their allegedly “dying” cultures (Nicholas, this volume). Recently, however, international policy has recognized that Indigenous and minority heritages are not remainders of the past, but dynamic and ongoing reservoirs of knowledge, practices, innovations, and expressions invaluable for maintaining the interlinked goods of cultural and biological diversity while providing the basis for sustainable development. The World Intellectual Property Organization (WIPO), for example, has accepted the need to reach out to “new beneficiaries” and acknowledged the need to find new means to recognize, maintain, and protect traditional cultural expressions (TCEs) if the global IP system is to retain legitimacy (Graber and Burri-Nenova 2008). Although rarely framed as such, these efforts involve the elaboration of cultural rights principles.

Many of WIPO’s draft legislative provisions (the Provisions) for the protection of TCEs – internationally negotiated over the past decade – are designed to recognize that the cultural heritage of Indigenous peoples and other cultural communities has inherent value, and provides people with culturally meaningful resources that can be used to meet community social needs and promote development guided by community aspirations. They aim to prevent misappropriations and misuse of heritage that might damage the integrity of community identity:

Protection should respond to the traditional character of TCEs/EoF [expressions of folklore], namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. (WIPO 2010)

The Provisions draw upon legal principles such as copyright, moral rights, performance rights, unfair competition, trademark, certification and collective marks, fiduciary obligation, and the prevention of consumer confusion; they are balanced by familiar IP exemptions. Some dimensions of these new proposals to provide protection for TCEs outline exclusive rights that may allow communities to use their TCEs as the basis of economic development strategies (Art. 2, Art. 4). They also provide means to insist upon fair compensation and recognition of source and/or to insist that researchers and corporations follow local customary protocols (Art. 4). In some limited instances, communities are enabled to prevent the use of especially significant TCEs by others who may use them in ways that are contrary to a community's aspirations and cultural identity (Art. 3). Ultimately, the guiding principles of the Provisions rest on a renewed valuation of cultural distinction; they are designed to promote respect for traditional cultures and the inter-generational character of heritage (Coombe 2009). This may be read as an indication that WIPO is gaining awareness that IP rights need to be shaped in such a way that they respect the principles of cultural rights enshrined in the international human rights framework.

These developments should not be interpreted to suggest that Indigenous peoples have no interest in sharing their knowledge, or that the concept of the commons is necessarily alien to their needs. Indeed, there have been various initiatives to create commons of traditional knowledge as well as proposals for using open source (OS) software models to manage traditional knowledge. As early as 2005, it was suggested that despite their seemingly disparate interests, open knowledge advocates and traditional knowledge rights advocates might both agree on the need for a "some rights reserved" model for sharing cultural materials in digital environments (Kansa et al. 2005), in order to prevent undesirable forms of unfair exploitation that might detract from community abilities to share resources in the future. Building upon the voluntary licensing tools pioneered by the Creative Commons (CC), originating communities could impose their own restrictions on

how cultural content was used. In this way, it might be possible to avoid both exclusive private rights and a universalizing public domain that fails to consider local needs and values:

As Creative Commons has demonstrated, enhancing communication requires recognition of the motivations and interests of content creators. By extension, recognition of the motivation and interests of researchers and members of indigenous communities must be a priority. In the case of traditional knowledge and field sciences, we must similarly explore how to facilitate negotiations that reconcile the needs and interests of all the diverse stakeholders. It is only by considering these diverse perspectives and interests that we can hope to build communication frameworks that encourage both greater respect for multiple claims of ownership and enhanced openness, sharing, and creative use of information. (Kansa et al. 2005: 292)

Recently, for example, a group of elders, traditional knowledge practitioners, and legal activists met in South Africa to devise the principles of a Traditional Knowledge Commons (that drew upon values expressed by traditional healers in Rajasthan) and to develop a biocultural community protocol to govern access to traditional knowledge. Such protocols are charters “developed as a result of a consultative process within a community that outlines the community’s core cultural and spiritual values and customary laws relating to their traditional knowledge and resources” (Abrell 2010: 7). They outline terms and conditions of access and are “used to emphasize the central importance of the interdependence of TK [Traditional Knowledge], biodiversity, land, cultural values and customary laws to the holistic worldview of many indigenous communities” (7).

Recognizing that many Indigenous and local communities conceptualize their relationships to their knowledge and heritage as involving not only rights but also customary responsibilities and obligations to peoples, territories, and ecosystems, activists argue that any mechanisms to “protect” knowledge or to share it must take customary law into account as a fundamental matter of human rights (8). A Traditional Knowledge Commons based on the online use of general public licences for non-commercial use of knowledge and cultural expressions has also been proposed by indigenist advocates as a means of creating a more sustainable knowledge commons based on conditions of mutual recognition and respect (Christen 2012).

Nonetheless, from a cultural rights perspective, it might be just as valuable to enable and support cross-cultural exchanges that enable traditional healers to share their knowledge as it might be to build online databases, especially given the tacit, embodied, and sociological dimensions of much traditional medicinal knowledge. Digital communications will not fulfil *all* needs for knowledge transfer and exchange between communities. Still, the endeavour to imagine new means for practitioners of traditional knowledge to communicate and exchange information online in a fashion that respects and communicates their values has produced many new initiatives. The Honey Bee Network is one such system, documenting agricultural innovations and traditional practices among communities in seventy-five countries, in order to enable local communities to share their knowledge for the enhancement of community security and sustainable development (<http://www.sristi.org/hbnew/index.php>). Such initiatives are concomitant with new valuations of cultural heritage and evolving legal recognitions of cultural rights.

Cultural Rights and Heritage Interests

The management of cultural heritage properties is one area in which cultural rights are increasingly recognized in practice. Canada has historically played a key role in the work of UNESCO – the UN body responsible for preparing and interpreting international normative principles and instruments with regard to cultural heritage – and has recently ratified the International Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which links the management of cultural heritage to respect for cultural difference and the promotion of diversity (Aylwin, this volume). During the 1980s, international debates about the meaning and value of cultural heritage were positioned within larger deliberations about the relationship between culture and development. In 1987, the United Nations launched its World Decade for Cultural Development (1987–1997), adopting a more anthropological view of culture as a way of life and a form of social organization (Blake 2009: 48). This new definition reinforced the idea that cultural heritage could not be restricted to historical sites and monuments, but also needed to include oral tradition and expressive culture (Blake 2009). In 1995, at the UNESCO General Conference, the World Commission on Culture and Development solidified this new perspective in its report *Our Creative Diversity*, by highlighting that

heritage is made up of more than monuments and historical sites, and that both tangible and intangible cultural heritage are key to “ensuring the flourishing of human existence” (Arzipe 2010: 32).

Claims to heritage have since become central to the collective struggles of many marginalized peoples, who see culture as a concept to be used reflexively when engaging with state institutions or non-governmental organizations. The purposes of this reflexive use include asserting identity, demanding greater inclusion in political life, local autonomy, and control over resources, but it also enables the search for new forms of engagement with (and resistance to) global markets (Coombe 2009). Cultural distinction has gained new international purchase as a valuable social, political, and economic resource (Yúdice 2003, Rao and Walton 2004, Comaroff and Comaroff 2009). As marginalized communities attempt to regain control over their cultural heritage, cultural rights have been vehicles for the pursuit of political claims. Cultural claims now figure in struggles for political autonomy, legal entitlements to territory and other resources, and designs for alternative forms of development (Coombe 2011a, 2011b; Marrie 2009; Robbins and Stamatopolou 2004).

Claims by groups that seek the acknowledgment of their cultural distinction have too often been characterized as an expression of an inherent or universal need for recognition. This has the effect of siphoning off the political context in which such claims are made, and separates them from the more pressing economic disadvantages that marginalized peoples often face (Holder 2008, Fraser 2000). If we conceive struggles over the recognition of difference narrowly, as if they are a form of mere identity politics, it may have the effect of minimizing political and economic interests that may be central to them, such as the assertion of self-determination and the redistribution of material resources (Jung 2003, 2008).

New forms of cultural heritage preservation are being negotiated to meet political and economic needs. Archaeologists, cultural resource managers, and museum curators, among others, have come to understand that the management of heritage is crucial to contemporary political movements of decolonization that redefine relationships between the modern state and resident minorities (Coombe 2009: 399). New and creative uses of intellectual properties, particularly in the area of digital heritage management, have allowed Indigenous groups to limit inappropriate use of heritage while building goodwill between various stakeholders. One such project is the Mukurtu Archive, an archiving

tool that uses OS software designed by an Indigenous community to dictate how their cultural goods are circulated, accessed, and viewed, based on rules consistent with their own customary cultural protocols (Christen 2012, n.d.). In similar fashion, the Indigenous Knowledge and Resource Management in Northern Australia project created a digital Indigenous knowledge archive that gives Indigenous researchers the primary role in developing protocols for database structures. As Verran (2009) suggests, this means that Indigenous property rights can be protected in a way that best facilitates intergenerational transmission of knowledge, relinking people and places, clans and territories, a process crucial to Indigenous territorial entitlements and political self-determination.

Canada is no stranger to efforts at rethinking cultural heritage management with the goal of giving effect to cultural rights principles. The country boasts a progressive museum movement that recognizes the needs of diverse communities, is sensitive to the politics of multiculturalism, and promotes intercultural dialogue (Houtman 2009). The University of British Columbia's Museum of Anthropology, for example, is a world leader in collaborative practices. Its former director, Michael Ames, critiqued traditional museum practices and called "for their democratization in favour of the under-represented people of the world," championing the rights of all peoples to tell their stories and curate their own exhibitions (Mayer and Shelton 2010: 11). It is now widely acknowledged that the museum is "a performative space in which to develop new practices that meet the ethical, political and representational challenges posed by pluralism" (Phillips 2005: 89). To further this recognition, from 2005 to 2010 the Museum undertook a massive restructuring of its institutional, space, and presentation policies in order to better recognize Indigenous stakeholders and the continuing rights of descendant communities with respect to the cultural materials held in the Museum's collections. In the *Management of Culturally Sensitive Material* policy statement, the Museum affirms its commitment to the values and beliefs of the cultures it represents:

We know that our collections contain items which are important to the originating communities, and whose placement and care within the museum continue to affect the values and beliefs of those communities. The museum recognizes that these objects have a non-material side embodying cultural rights, values, knowledge, and ideas which are not owned or possessed by the museum, but are retained by the originating communities. (Cited in Laszlo 2006: 304)

Digital communications enable museums to give greater effect to these principles. Museum restructuring has included the development of the Reciprocal Research Network, an online research community that allows geographically dispersed users, including international museums holding Northwest Coast collections, and First Nation elders, artists, families, and researchers to share knowledge about the history and significance of cultural artefacts as research partners (Rowley et al. 2010). They hope that respect for cultural heritage rights will be achieved by new and potentially more intercultural and dialogic strategies in a digitally connected world. For the first time, through activities that Houtman (2009) has described as “virtual repatriation,” communities striving to reclaim lost cultural histories and families tracing their ancestry have access to cultural heritage held in distant museums (12). Moreover, museum archives are attempting to develop new protocols that balance the competing needs of different members of the public, recognizing that users and those peoples represented in the holdings may have distinctive interests:

Many of the ethnographic materials we house are considered by First Nations communities to be cultural property and to contain cultural copyrights that are retained by the peoples depicted. The case of images that portray ceremonial rituals and objects that are not intended to be seen by the uninitiated provides a good place to illustrate a number of the points under discussion and to begin to look at practical steps that the Museum of Anthropology archives has taken to improve the way it administers ethnographic records. We have consulted with First Nations groups about which of our records contain culturally sensitive images. Thumbnails of those images have subsequently been removed from our finding aids, with a note indicating what was removed and why. For the time being these images are restricted to all but members of the communities depicted. Currently, we have no protocols in place to handle requests from others to view these restricted images, but are in the process of setting up partnerships with communities to determine answers to questions of access and control of this type of material. (Laszlo 2006: 305)

The use of the term “cultural copyright” by this museum administration suggests that the logic of *both* IP and cultural rights now informs archivists’ understanding of the collective heritage interests of stakeholder groups. Although archivists might be expected to encourage and promote the greatest possible use of the records in their care, they are also required to give attention to issues of privacy, confidentiality,

and preservation, mandates that have been interpreted to accommodate the cultural and spiritual concerns of groups for whom certain cultural materials have historical significance as markers of their identity as a people. This is not to restrict access to materials simply because some groups might find them offensive, but rather to restrict only the circulation of images that have important sacred and ritual properties to specific communities, a process that will involve continual dialogue and collaboration.

In projects such as these museum initiatives, new forms of negotiated proprietary claims and relationships contribute to an emerging form of cultural rights dialogue. International instruments addressing the rights of Indigenous peoples – the most significant of which is the Declaration on the Rights of Indigenous Peoples (the Declaration) – have fundamentally altered the international consensus on the scope and meaning of cultural rights (Holder 2008). Prior to the negotiation of the Declaration (a 20-year process), international law largely objectified culture. Cultural rights protected heritage practices and cultural identifications only to the extent that these could be fixed as static symbols subject to state cultural recognition. This served to emphasize rights of access, preservation, and use (17), rather than material domains where communities have authority and political voice (12). As culture has come to be regarded as an activity and resource, however, its political and economic dimensions have come to the fore, putting new emphasis on community security, economic stability, and sustainable development. More and more, cultural rights claims have enabled groups to achieve control over significant material resources (Robbins and Stamatopolou 2004) and have heightened their stakes in fields of cultural representation.

Cultural rights now are broadly conceived to incorporate protections for minority communities, and to enable them to develop their capacities to engage with their cultural heritage in meaningful ways. Their recognition has prompted new forms of respectful, mutually beneficial negotiation between parties. New technologies make access to and the sharing of intangible heritage virtually effortless, but the dialogue and deliberations necessary to use digitalization to achieve greater respect and recognition between communities, and a more equitable share of political and economic benefits, are still works in progress.