

Forum for Anthropology and Culture
‘Traditional Culture and Folklore as Intellectual Property’

Response to ‘On Copyright and Culture’ (Sergey Sokolovskiy)

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I am delighted to have the opportunity to respond to this article. My specific knowledge in this area is largely confined to events of an earlier decade when I was involved in a collaborative study with Eric Hirsch and other colleagues [Hirsch, Strathern 2004]. The study (1999-2002) was undertaken in Papua New Guinea, an independent and self-governing Pacific nation. This was at a time when, in response to an initiative of the World Trade Organisation, the PNG parliament was enacting intellectual property rights (IPR) legislation, while members of its Cultural Commission and others were simultaneously involved in developing, under the auspices of WIPO, a Pacific-wide Model Law for the protection of traditional knowledge and expressions of culture.¹ This is now part of the history of international bodies to which Sokolovskiy alludes.

Like others I have some general knowledge of the field. For instance, in response to question (3), anyone from the UK would probably point to national holdings of antiquities collected from outside the UK that have been under constant pressure of demands for repatriation. These frequently give rise to well documented discussion and have been the subject of much critical commentary from within and outside the museological world. Rights of possession are not the same as rights of reproduction, with which IPR is concerned, but claimants do not necessarily make the same distinctions between different kinds of appropriation as holders of the material do. Australian Aboriginal groups, for example, have been among those who have pressed

¹ Papua New Guinea was among many states faced with international pressure to protect outside investment through intellectual property provisions. In the wake of the 1994 WTO agreement on TRIPS (Trade Related Aspects of Intellectual Property Rights), it honoured its obligation to introduce legislation on copyright and patents in 2000.

museums in Britain to return, in their case, not cultural property as such -- indeed not property at all from their point of view -- but their ancestors and relatives held in skeletal form. While the UK has its counterparts to NAGPRA, which addressed First Nation peoples (Native Americans) in the US, an important class of UK claims come from overseas. This does not mean that minority communities in Britain do not have concerns; these have been raised, for example, in objections to historical exhibitions about the slave trade. Information on these matters is generally available. Within Papua New Guinea, it is worth adding, the National Museum tries to keep at bay the predations of overseas art dealers. But this gets us into the arena of illicit trade.

The following is informed, then, by ideas circulating at the time that the newspaper-reading Papua New Guinean public was made aware of intellectual property (indeed, 'intellectual, biological and cultural property', see [Whimp and Busse 2000]). Intellectual property issues were turning around the way in which people who spoke about such things spoke about cultural property. Up to that time, it had been regarded as a matter of scheduling ancient monuments and precious pieces of 'heritage'. It now became a matter of asserting rights to and seeking to preserve a whole range of material and immaterial artefacts and types of knowledge variously understood as tradition (modes of transmitting knowledge) or custom (with the PNG inflection of present day practices). The notion of 'culture' that passed into general discourse was freshly linked to the notion of 'property'.

It is in the detail of some of the attendant discussions that interest lies for the anthropologist. I therefore focus largely on one issue that was of concern in Papua New Guinea, namely *how to think about culture as custom, that is as something living in the present whose reproduction is taken as essential to human flourishing*. I go outside PNG, as will be seen in a moment, but only because some of the thinking at this time was informed by an overseas, albeit neighbouring, example. Indeed the story is left largely in the hands of two key Papua New Guinean academics who were involved in IPR policy making, drawing on accounts already published ([Strathern 2006a, 2006b]).

What follows is divided very roughly into responses to questions (1) and (2). As far as question (4) is concerned, the implications for the discipline of social anthropology fall into two main camps. First are all the issues raised by the ethics of information-collection that receive a special twist when information comes to be regarded as property, cultural or otherwise. Second is what anthropological knowledge can contribute to the interpretation of events. The first is important, but not taken up here; I hope my concern with the second

will be evident throughout my remarks. As to the future, others will be in a better position than myself to comment, but one arena that was already evident more than a decade ago was the position of contemporary Papua New Guinean artists and musicians in relation to the ancestral origins of their own creativity. It is touched on briefly below. Whether conflict arises will depend much on how relationships are managed.

What can be learnt from Aboriginal Australia

[Question 1.] It is intriguing that Sergey Sokolovskiy starts off with an example from Australia, since it was a comparable – and very famous – Australian case more than a decade earlier that Lawrence Kalinoe brought to the discussions. Kalinoe, a prominent Papua New Guinean lawyer, was trying to encourage a broad approach to the upcoming legislation; among other things he sat on the National Intellectual Property Rights Committee while legislation was being formulated. His interest was in how cultural property might in the future be handled, that is, once copyright legislation was in place. The case also throws some light on what may have been behind Buzzacott's action.

Briefly, an Aboriginal artist, Yumbulul, challenged the Reserve Bank of Australia for reproducing on its ten dollar note an image of the 'Morning Star pole' that he had carved and painted; it was on display in the Australian Museum. (See e.g. [Barron 1998; Blakeney 1995, 2000]). There were two circuits of action here. One was a legal circuit. The bank used the design quite legitimately under a sub-liscence granted them by an Australian agency administering reproduction rights in Aboriginal art; the agency in turn had obtained an exclusive licence from Yumbulul himself with respect to the copyright he held in the decorated wooden pole. However, Yumbulul went to court to dispute the original licence, complaining that he did not really have copyright to dispose of. (Against the artist's will, the Australian Federal Court hearing the case in 1991 upheld the appropriateness of copyright as a property relation between the Aboriginal artist and his carving of the sacred emblem, validating the subsequent licence.) Yumbulul's court action was the hinge between the first and a second circuit. The second circuit concerned his relations with his clan 'elders' (Galpu from Yolngu), who claimed that this reproduction by the Bank was a desecration. The principal person at fault was the artist himself: he had been granted the right to carve the pole, but he was obliged to ensure that the pole would not be used or reproduced in a demeaning way. He had certainly not been granted an absolute right as an individual to pass that right of reproduction on.

The grounds of the conflict here cannot be generalised as a matter of 'traditional knowledge' being owned by a 'group'. Through a series of initiation rites, which among other things authorised his production of the Morning Star pole, Yumbulul had been placed into a specific position with respect to diverse clan ancestors, co-members, related clans and other kin.² As the lawyer Anne Barron, drawing on anthropological studies, put it, being shown the sacred evidence of ancestral Dreamtime carries obligations as well as rights [Barron 1998: 48-51]. Yumbulul's entitlement was to paint and even sell the relevant designs but not to authorise their reproduction by others.

An anthropologist might remark that the concerns surfacing in this second circuit are not adequately described as a property interest in cultural possessions (although they may be translated that way and this may become the general language). It is necessary to add another connotation to 'reproduction'. For these concerns resonate with those kinship systems where the reproduction of persons is distributed between sets of kin in such a way that, while everyone enjoys clan membership and access to its resources, only some members transmit the right to reproduce its identity. (A parallel in a different context makes the point succinctly: what anthropologists call patrilineal kin reckoning in Papua New Guinea means that while both sons and daughters receive their father's clan / lineage identity, only sons can pass it on.) The Aboriginal design in question was intimately bound up with the artist's 'birth' (the initiation rites) as a member of a kin group. We may add that a design executed in reference to ancestral images contains its own conditions of reproduction, since only those in the appropriate relationship to **an image [Yes, this is fine: it could be either design or image]** are endowed with the capacity to re-create it. In this manner, artist belongs to artefact rather than artefact to artist.

Has this any bearing on the Buzzacott case and its aftermath? We could read the latter day political activists as seizing on the legal language of copyright, property (that which can be stolen), and culture to try to bring home a general complaint about how Aborigines were being mistreated. Uncle Kev was a well known campaigner for justice, environmental issues, and land rights, as well as for cultural recognition. We could also take the specific reference to the tribe

² Kalinoe (2004) focuses on the fact that the artistic capacity to carve the pole did not indicate original creative work but had been bestowed through initiation rites; the carving only worked as a faithful reproduction of existing imagery.

whose permission had to be sought as an echo of the second circuit of events that put Yumbulul under such pressure. Here kangaroo and emu were claimed the preserve of a tribe not as artefacts ('expressions of culture') but as living / ancestral animals in sacred association (totems) with them. So if it was not a design that was an issue perhaps what was at issue was the concept³ of these creatures, to which particular human groups were held to belong. In this case, then, the emblem would have been seen as **a can I delete this, or is there a noun missing? YES: please delete. Sorry – left over from an earlier phrasing.** invoking the concept.

However, my prime interest is what the PNG Lawyer, Kalinoe, made of the Australian Yumbulul case [Kalinoe 2004: 44-6]. He notes that there are two significant lessons to be drawn with respect to contemporary artists who deploy traditional art forms. Copyright seems an effective means to protect artists' individual endeavour, and he is sympathetic to their situation, but while copyright declares their originality, it does not deal with the other side of their creativity -- the simultaneously derivative nature of the work with reference to its ancestral origin. So the first lesson is the question of authorisation; if Papua New Guinea wants to avoid a situation like Yumbulul's, he wrote, it will be necessary to make statutory provision that authorisation must be obtained from everyone involved, not just the individual artist. And second, the very notion of derivation is obliterated in copyright, since -- however much a work draws on others -- in concrete form it exists for copyright purposes as the original creation of the artist. Copyright would thus introduce a double bias.

However, there is a further 'underlying issue' that the Yumbulul case 'brings to the fore' [Kalinoe 2004: 46]. This was to do with the public protection of items that Kalinoe called 'sacred' (such as those with ancestral value, ancestral not because they are antique but because it is the living presence of ancestors in their descendants that guarantees continuity of inner power). He came to the conclusion that these should be treated, for legal purposes, simply as property -- emphatically *not* as intellectual property. Rather, finding a suitable regulatory regime for 'indigenous cultural and intellectual property and traditional knowledge' could be significantly enhanced if the issues relevant to a regime for the preservation of culture were separated from those relevant to the implementation of IPR protection. In effect this is in part what the Model Law (see below) sought to do.

³ In English either design or concept may be rendered as 'image'.

One reason Kalinoe offers for avoiding the IPR route in the protection of sacred property is because IPR brings things into the public eye. The limited time restriction guaranteed by IPR protection is nothing compared to the long term publication entailed when copyright expires. He is thinking of items identified with particular groups which should only be revealed under controlled conditions e.g. when the moment for their reproduction is ripe. The public domain aspect of IPR is well known to cause problems for this kind of resource.⁴ It is the reverse of, but complementary to, Sokolovskiy's comment on the monopoly that lasts for ever.

What global discourse reveals and conceals

[Question 2.] As intellectual property entered what can only be called a global discourse of indigenous rights, it seemed to carry great potential for the recognition of those very intangibles (ideas, values, images, knowledge) associated with tradition / custom / culture that had for so long struggled to make themselves heard (e.g. [Brush 1993; Greaves 1994]). IPR held much promise for producing an international legal instrument that would put value on things, to which the world would have to attend, that had not been valued before. Over the decade of the 1990s it gradually became clear that IPR was a less than adequate tool for what people wished to attach to particular relations and sets of persons. But once in general circulation, and detached from its exclusive association with the law, the language of IPR continued to fire activist consciousness. Thus it appears of a piece with protests about 'cultural property', 'theft', and 'exploitation'.

Here the history of IPR crosses with that of First Nations' political activism. I offer a brief comment. It would seem from Sokolovskiy's account that the further removed such conflicts are from the specific claims of individuals or groups, the more power they have to mobilise sentiments on a nation-wide basis, as in the claim in the second Australian case he cites. What was under attack was 'Aboriginal culture' at large. In the accusation from the Council of Aborigines of New South Wales the connection with the origins of any specific artefact seems rather distant, the object of complaint being a diffuse and generalised borrowing of costume, signs of a kind of generic indigeneity. Indeed, a generic characteristic was claimed that could apply to any Aboriginal ceremony: *knowing* which dancing would never be mixed-sex, but could only take place with all women or all men present. The quotation from Bellear imagines that the dance regalia could have borrowed from a specific instance (to which specific people belonged) under such an interdict.

⁴ For example, Brown 1998, 2003; Brush 1999; Coombe 1998.

Now before becoming too certain that we know why cultural property may be pressed globally into service as a banner for declamations about exploitation, we might want to remember that one of the *general* complaints that Aborigines have is the failure of white Australian society to acknowledge the *specificity* of their title to land, song, carvings, totemic beings. So even when speaking about something that is stolen from Aboriginal people in general, we might say that what is ‘stolen’ is the precise (often kin-based) connection between human flourishing and entitlements distributed between different people. Maybe it is the ‘idea’ (concept) of *that connection* that was suggested by the dance costumes. We have come by another route back to the intimate link between artefact and entitlement.

The form the conflicts take, and the concomitant language of dispute, are indeed recent and ‘culture’ is imagined in ways that were never articulated before, at once opening up new understandings and exploited no doubt to propagate various political and economic interests. But the language also constantly slides off, slips away from, conceals, the substance of certain claims. Let me enlarge a little on the above observation about what it is that people might feel is taken from them.

Consider the views of a Papuan New Guinean anthropologist, at the time Director of the PNG National Cultural Commission (Simet 2000, 2001), in relation to the Model Law on protection of cultural property in the Pacific.⁵ The Model Law was advanced in its thinking, insofar as it advised setting up protection mechanisms outside intellectual property regimes. However, it did so by insisting on the claims of ‘traditional owners’⁶ identified as groups, implying they are

⁵ Under the auspices of UNESCO and WIPO: a Model Law for the Protection of Traditional Knowledge and Expressions of Culture in the Pacific Islands. At the time of Simet's observations in 2001 it was being discussed at various fora, including the South Pacific Commission (e.g. [Kalinoe 2001]). The Model Law envisages the concept of 'traditional knowledge' as covering all tradition-based innovations and creations, including literary, artistic and scientific works, along with names, symbols, information, and so forth.

⁶ Indigenous systems, the principal architect of the Model law [Puri 2002] states, ‘are driven by characteristics of trans-generational, non-materialistic, and non-exclusive or communal ownership of rights’ which make IPR inappropriate. Despite this openness to other forms, the Model Law deliberately uses the term ‘property’ in accord with international usage, thus

singular and homogeneous in nature. The issue on which Simet dwelt is one we have already encountered: how to accommodate multiple rights when they derive from diverse relationships. Thus he observes of the Papua New Guinean Tolai (2000: 78):

One idea which might easily form part of the development of a mechanism for protection of indigenous knowledge is the assumption that all traditional knowledge is communally owned. [In fact] ... people were very particular about acquisition, ownership, transfer, protection and use of knowledge. Only some kinds of knowledge belonged to the public domain, while the rest belonged to individuals and social groups.

Tolai persons and groups are enmeshed in diverse relations with one another. What distinguishes the PNG regimes from those where IPR originated is that the reproduction of things -- including licences for copying them -- carries with it *the reproduction of relationships*. Drawing on other people's generative power becomes the basis of relationships. The Tolai case shows an institutionalised relationship between those who hold the right to reproduce and those who are the effective agents of reproduction. Reproductive capacity may thus be embedded in persons who are socially distinct from one another, and between whom the distribution of powers must be respected.

This Simet demonstrates [Sinet n.d.] through the Tolai manner in which the signs of a clan's identity are distributed between its masks and the magic that makes the masks vehicles of power. The mask is held by a manager from the clan; the magic is held by a non-member, who as its custodian deploys the magic on the clan's behalf. The example returns us to a procreative model that supposes a clan depends on other clans for its reproduction. What goes for the procreation of persons and the perpetuation of identities is found over again in the fact that clan members cannot use their own magic for themselves; they can only benefit from it by entering into transactions with others, and by bestowing benefit on others in turn. But how, for an other than anthropological audience, could Simet, himself a Tolai, convey this obvious fact?

conferring a 'property right' on those who own traditional knowledge and expressions of culture (Part II: Rights of Traditional Owners) and seeks to identify the 'true owners' in each case.

One could extend this into some interesting comments on the Creative Commons. But I remain with the following detail. Hidden behind the ‘global’ spread of claims that deploy concepts of property and culture, on the part of ‘groups’ or congeries such as ‘nations’, may well lie other considerations altogether. The nostalgia for or loss of culture summoned in such terms sounds gross; however, it sounds a little more nuanced if one realises that it is precisely the nuances, the details, that are lost when ‘cultural property’ is ‘stolen’. It is stolen in part by the very success that such concepts have in mobilizing, if not always political support, then at least widespread public attention.

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REFERENCES

Barron, A. ‘No Other Law? Author-ity, Property and Aboriginal Art’ // Bently L., Mariatis A. (eds.), *Intellectual Property and Ethics*, London: Sweet and Maxwell, 1998.

Blakeney, M. ‘Protecting Expressions of Australian Aboriginal Folklore under Copyright Law’, *EIPR*. 1995. No. 9. Pp. 442-445.

Blakeney, M. ‘The Protection of Traditional Knowledge under Intellectual Property Law’ // *European Intellectual Property Review*. 2000. No. 6. Pp. 251-61.

Brown, M. ‘Can Culture be Copyrighted?’ // *Current Anthropology*. 1998. No. 39(2). Pp 193-222.

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

Brush, S. B. ‘Indigenous Knowledge of Biological Resources and Intellectual Property Rights: the Role of Anthropology’ // *American Anthropologist*. 1993. No. 95(3). Pp. 653-86.

Brush, S. B. ‘Bioprospecting in the Public Domain’ // *Cultural Anthropology*. 1999. No. 14. Pp. 535-555.

Coombe, R. *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. Durham, NC: Duke University Press, 1998.

Greaves, T. (ed.). *Intellectual Property Rights for Indigenous Peoples: a Sourcebook*. Oklahoma City: Society for Applied Anthropology, 1994.

Hirsch, E., Strathern M. (eds.). *Transactions and Creations: Property Debates and the Stimulus of Melanesia*, Oxford: Berghahn, 2004.

Kalinoe, L. ‘Expressions of Culture: A Cultural Perspective from Papua New Guinea’. WIPO Sub-Regional Workshop On Intellectual Property, Genetic Resources and Traditional Knowledge, Brisbane, Australia, 2001.

Kalinoe, L. ‘Legal Options for the Regulation of Intellectual and Cultural Property in Papua New Guinea’ // [Hirsch, Strathern 2004: 40-59].

Puri, K. ‘Draft Model Law for the Pacific’. Draft published as *Model Law for the Protection of Traditional Knowledge and Expressions of Culture* // *Working and Information Papers, 2nd Working Group for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture*. Noumea, New Caledonia, 2003.

Simet, J. ‘Copyrighting Traditional Tolai knowledge?’ // Whimp K, Busse M. (eds.). *Protection of Intellectual, Biological and Cultural Property in Papua New Guinea*, ANU, Canberra: Asia Pacific Press & Port Moresby: Conservation Melanesia Inc., 2000.

Simet, J. ‘Conclusions: Reflections on Cultural Property Research’ // Sykes, K. (ed.), with Simet J. and Kamene S. *Culture and Cultural Property in the New Guinea Islands Region: Seven Case Studies*, New Delhi: UBS Publishers' Distributors Ltd, 2001.

Simet, J. n.d. 'Custodians by Obligation'. Paper given to Workshop convened by K. Sykes, *Becoming Heirs: Making Inheritance Self-evident*, University of Manchester, December 2001.

Strathern, M. 2006a. 'Protecting Channels of Communication: Some Challenges from the Pacific', in F. Macmillan (ed), *New Directions in Copyright Law*, 2, Cheltenham: Edward Elgar, 2006.

Strathern, M. 2006b. 'Intellectual Property and Rights: an Anthropological Perspective', in Tilley C., Keane W., Küchler S., Rowlands M., Spyer P. (eds.). *Handbook of Material Culture*, London: Sage Publications, 2006. (Abridged as 'Cultural Inventions', in M. Biagioli, P. Jaszi and M. Woodmansee (eds.), *Making and unmaking intellectual property: Creative Production in Legal and Cultural Perspective*, Chicago, Chicago University Press, 2011).

Whimp, K., Busse M. (eds.). *Protection of Intellectual, Biological and Cultural Property in Papua New Guinea*. ANU, Canberra: Asia Pacific Press & Port Moresby: Conservation Melanesia Inc., 2000.