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Intellectual Property and Conceptions of Culture

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Underlying conceptions about culture continue to play an important and often not sufficiently recognised role in intellectual property theory and practice. For example, ideas about cultural progress and culture as autonomous are key conceptions underlying intellectual property doctrine that have continuing resonance. Conceptions of culture and cultural value have also played an important role in determining the shape of intellectual property frameworks and types of cultural production that have come to benefit from intellectual property protection. Intellectual property frameworks also have an impact on culture that merits greater attention.

Intellectual property laws today reflect an increasing emphasis on depicting knowledge and culture within a property rights paradigm. This emphasis is most evident in approaches to intellectual property that treat cultural material as primarily constituting a valuable asset. Such perspectives tend to coalesce around views of intellectual property that highlight its role in protecting commercial value. Valuable asset approaches to cultural material may reflect an incomplete understanding of the potentially varied and multifaceted roles of culture. In contrast, understanding culture from an anthropological perspective may shed insight on the critical role played by cultural elements that intellectual property may protect in cultural creation and the transmission of culture both contemporaneously and between generations.

Perceiving culture as a vibrant and living force draws attention to the many potential ways in which culture is shared. The “valuable asset” and “vibrant force” approaches to cultural material account quite differently for the role of context in the culture and intellectual property arenas. As a result, an emphasis on culture as a valuable asset often leads to treatment that may be inconsistent with the ways in which culture is frequently recycled as a vibrant aspect in new creations and new uses of existing cultural elements. This article will discuss how conceptions of culture and cultural progress are important for understanding critical aspects of intellectual property theory and its implementation in varied contexts. It will also discuss the implications for culture of underlying assumptions based on valuable asset conceptions that continue to shape intellectual property frameworks.

Sacred cultures: Cultural progress and intellectual property

The centuries starting from the 16th century were characterised by increasing European awareness of the differences among humans, particularly with regard to technology and political organisation. These differences were thought to be a result of innate differences, an assumption that continues to have some resonance even today. Nineteenth century categorisations of human differences in an evolutionary light were connected to experiences of ethnographic travellers (armchair anthropologists) on whom many proponents of evolutionary ideas based their writings. Although progressivist discourse was prevalent prior to the 19th century, the broader discourse during that time and increasing knowledge about encounters with “others” made the 19th century a particularly fertile time for development of conceptions of progress

that are yet with us. This intellectual history is an important starting point for understanding the development of formal intellectual property frameworks in the 18th and 19th centuries as well as fundamental underlying conceptions about culture imbedded within such frameworks.

The creation of hierarchies was an important feature of 19th century European and American views of society and was associated with emergence of the industrial economy. Evolutionary views were a characteristic feature of 19th century social theory, both from the perspective of those who glorified in the accomplishments of the industrial economy, as well as those who foresaw its demise, such as Marxists. From the perspective of both ideological views, the “primitive” was a reflection of an earlier and retrograde state. The advent of an industrial economy highlighted the relative technological advancement of European countries and the United States as compared to the rest of the world. The cultural hierarchies that subsequently developed were based on the questionable assumption that technological superiority extended to all aspects of socio-cultural formations. These hierarchies assumed that culture was unitary, autonomous and characterised by universal stages of development. Existing cultures and societies could then be categorised according to their position in an assumed evolutionary chain. Human history thus came to be viewed “as a single evolutionary development through a series of stages which were often loosely referred to as savagery, barbarism and civilization”, despite the fact that many components of a culture or society are not cumulative in this way and are not measurable on a unidimensional scale.

The idea of progress in civilisation was closely tied to European and American notions of cultural and racial superiority. This led in turn to notions about the linkage of civilization and particular cultural forms. In the decades following Darwin’s 1859 publication of The Origin of Species, theories of social and cultural evolution and progress, which predated Darwin, became even more popular.

Hierarchies of cultures: Progress and intellectual property frameworks

Nineteenth century evolutionary assumptions profoundly shaped discourse in a number of areas in ways that continue to resonate today. The evolutionary progression of humans towards civilisation was often seen as accompanied by the regression of folklore. Under such devolutionary views, the cultural production of “savages” and “barbarians” was seen in many respects as retrograde survivals of a past era that the “civilised” had left behind. This devolutionary ethos, which suggested that societies were destined to lose their folklore as they progressed, was inextricably connected to evolutionary theories. This led 19th and early 20th century folklorists and anthropologists to believe that their societies had no local knowledge (the actual term used during that time was folklore) because they were “civilised” and such forms only existed in lower stages of development, a view that persisted until well into the 20th century. As a result,
evolutionary theories were as much about a progressive view of the development of cultures as a statement about the evolution out of forms of local knowledge such as folklore. 19

This view of folklore as dying, dead or vestigial significantly influenced treatment of folklore under existing social norms. As a result of the association of folklore with a past age, folklore was conceived as synonymous with ignorance, leading to efforts to eradicate it and the establishment of a conception of an opposition between education and folklore. 20 This dichotomy between valid and invalid knowledge is echoed today in attitudes towards and treatment of local knowledge in legal and other areas.

Modern society, which celebrated science, was conceived in the 19th century as the apex of this evolutionary hierarchy. 21 World Fairs played an important role in crystallising recognition of the progress evident in scientific discoveries of the time. These fairs also offered countries presenting exhibits the opportunity to showcase their technological achievements for the rest of the world. For a relatively new country such as the United States, these fairs offered a chance to impress Europeans with American industrial accomplishments and advances. 22 The first international fair at London’s Crystal Palace in 1851 provoked dialogue about “the origins and progress of the civilization it epitomized”. 23 The Chicago World’s Fair in 1893 constituted the apex of American ideology of industry and enterprise and evolutionary folklore studies. 24 Taken together, World Fairs underscored the glorification of scientific progress and validation of the imposition of power and authority over the “backward” and “uncivilised”. 25

Hierarchical assumptions at such events were reflected in treatment of African American contributions to American society, which were, for example, excluded from the 1893 Columbian Exposition. 26 At the Columbian Exposition, live displays of the “primitive” were presented in contrast to the progress of industrial advancement evident in the manufactures halls, which were the main feature of such fairs. 27 Every American international fair between the 1893 Columbian Exposition and World War I included ethnological villages sanctioned by prominent anthropologists. These displays highlighted a mixture of derogation and appropriation that is linked to treatment of local knowledge as essentially public domain resources from which borrowing is permissible, if not desirable.

Not uncoincidentally, the 19th century was also the time period during which global intellectual property frameworks based upon existing national intellectual property systems in Europe and the United States began to emerge. 28 The Vienna World’s Fair, the 1873 International Exhibition of Inventions, led to a defining moment in international intellectual property law as well. The Paris Convention of 1883 was an outgrowth of the Congress of Vienna for Patent Reform in 1873, which dealt with inconsistencies in national patent regimes and the need for international reform. 29 The 1873 Vienna Congress occurred because delegates at the 1873 World’s Fair “refused to exhibit their designs for fear that other participants

20 Dundes, “The Devolutionary Premise in Folklore Theory” in Analytic Essays in Folklore (1975), p.22.
28 Such global frameworks were developed notwithstanding the fact that a significant debate occurred in the 19th century concerning whether patent systems should be abolished. See Fritz Machlup and Edith Penrose, “The Patent Controversy in the Nineteenth Century” (1950) 10 J. Econ. Hist. 1, 9.
would steal them”. 30 The situation in Austria-Hungary at the time of the 1873 World’s Fair reflects the fact that Austria-Hungary, like the United States, had historically used piracy for commercial advancement. 31 As a result of the protests, Austria-Hungary made temporary modifications of its patent law to accommodate the concerns of exhibitors. 32

Thus, World Fairs, which showcased the contrast between “civilization” and “savagery”, were an important factor leading to recognition of the need for global intellectual property protection, which in turn led to adoption of the first of a series of international intellectual property conventions in the last quarter of the 19th century. 33 The next international exposition following the Vienna World’s Fair, the 1878 Universal Exposition in Paris, hosted a second meeting, the International Congress on Industrial Property at Paris, which led to the formation of the Paris Convention for the Protection of Industrial Property of March 20, 1883, the parent of the modern Paris Convention. This event marked “the birth of concepts for intellectual property protection that still survive today.” 34

Later 19th century conventions addressed copyright. 35 Prevention of international piracy by countries such as the United States, which persistently refused to protect foreign works in the 18th and 19th centuries, was a principal reason for the development of international copyright law as reflected in the Berne Convention. 36 The arguments advanced in these 19th century debates in the copyright area were analogous to those made today in the context of developing countries. 37

These international intellectual property frameworks reflected the national systems of the countries at the negotiating table, which in turn reflected hierarchical value assignments of different types of knowledge. Such national frameworks also reflected the role of commercial interests within those countries which sought to promote the adoption of systems for their benefit. The influence of such interests is evident in the music area in the United States, 38 where US music publishers began to focus to a greater extent on legal protection 39 at the beginning of the era of American dominance of mainstream popular music. 40

Although protection under a number of such national systems was extended to geographical indications, no protection was otherwise given to other forms of local knowledge, reflecting prevailing views concerning the devolution of folklore. Because of judgments about the cultural production contained in local knowledge, such systems were treated as entirely appropriable knowledge but not as valid systems in and of themselves and certainly not comparable to science or other products of civilisation. These value assignments were evident in Frederick W. Root’s explanation to a meeting of folklorists at the 1893 Columbian Exposition that “the utterances of the savage people were omitted, these being hardly developed to the point at which they might be called music”. 41

As a result of the lack of protection of local knowledge, the appropriation of such knowledge was made possible and even encouraged by intellectual property laws, which were based on assignments of value that mirrored hierarchies of cultures and their accompanying structures of power. An essential power

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31 Joel Sachs, “Hummel and the Pirates: The Struggle for Musical Copyright” (1973) 59 Mus. Q. 31, 32.
asymmetry characterised 19th century encounters between holders of appropriable knowledge and those who appropriated such knowledge. These hierarchical power relationships and dynamics are mirrored in contemporary relationships. 

**Hierarchies of power: Justifications for political domination**

Hierarchies of cultures were intimately linked to 19th century global hierarchies of power. Evolutionary doctrine was also used as a basis for justifying political domination of a “spreading empire of industrialized countries to ‘backward’ countries” and was used, for example, to justify US annexation of the Philippines. This rationale was also the basis for active intervention by the British in their colonies. Hierarchies of cultures and a presumed evolutionary progression were thus used to justify political domination through imperialism and colonialism and the creation of structures to enable appropriation of economic value. Imperialism and colonialism were more than “a simple act of accumulation and acquisition” and are supported by ideologies and a supporting vocabulary that made domination an imperative.

The Berlin Conference of 1884–1885 formalised the partitioning of Africa among European powers, in a process that has been characterised as akin to a form of Imperial Monopoly. The Berlin Conference illustrates the underlying power dynamics between the holders of power and those subject to the dominion of such imperial and colonial powers. These asymmetries of power were pervasive to the point that the subjects were denied not only the freedom to make choices about their own destiny, but even the opportunity to have their voices heard at the negotiating table where their futures were being decided.

The hierarchical assumptions underlying Imperial Monopoly carried over to other spheres of international relations and international lawmaking as well, and were reflected in the constitution and process of adoption of international intellectual property agreements such as the Paris and Berne Conventions. Legal structures thus emerged to complement and implement hierarchical worldviews. Hierarchies of power reinforced the exclusion of local knowledge from global intellectual property frameworks, partly by replicating and continuing the exclusion of representatives of the vast majority of the world’s population from the negotiating table. They are also a factor in the fact that developing country legal structures still often mirror the legal frameworks of colonial powers.

As former colonies moved toward and achieved independence, the former colonies increasingly exercised a voice that reflected issues of concern that diverged in many respects from those of countries in the West, although hierarchies of power erected during the era of colonialism and imperialism still dominated. This was evident in discussions about control of natural resources and efforts of newly independent states to renegotiate or void the “extraordinarily inequitable arrangements that had been imposed upon them during the colonial period”.

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In the intellectual property realm, the first major revision conference for the Berne Convention after the emergence of newly independent former colonies reflected their different agenda. Events during the 1967 Stockholm Revision Conference signalled that developing countries, most of which had become independent after World War II, had a markedly different agenda from that of countries in the West in certain specific areas. The lack of protection of folklore was raised by the Indian delegation at the 1967 Stockholm Conference. As a result of these concerns, the 1971 amendment to the Berne Convention authorised adoption of protections for folklore by member nations.

Hierarchies of cultures and power helped define what was deemed protectable within the framework of existing national and emerging global intellectual property frameworks. In addition to further contributing to these definitions, hierarchies of taste were an important factor in delineating hierarchical distinctions within the category of the “civilised” as well as in establishing the shape and texture of national intellectual property frameworks within countries such as the United States.

Hierarchies of taste: Expressive culture and the separation of high and low cultural forms

Hierarchies of taste, which are particularly relevant to conceptions of copyright, are yet a third aspect of 19th century hierarchies that have continuing resonance today. Hierarchies of taste are distinguished by being largely internal and relating primarily to the “civilised” and thus further refining hierarchies of cultures. Although hierarchies of taste are largely internal, the cultural values contained in such hierarchies have significant implications for local knowledge.

Although often conceived of as eternal and unchanging, certain high cultural categories in the United States are contextual and contingent rather than fixed and determinate. Shakespeare and opera were popular forms of entertainment well into the 19th century and were in no way permeated with the high culture aesthetic connected to such forms of expressive culture in the United States today. Historian Lawrence Levine has outlined the processes in the United States in the 19th century whereby hierarchical cultural categories began to emerge. The processes he describes involved the decline of a rich shared public culture, and creation of hierarchies of cultural forms. As a result of these processes, forms of cultural production such as Shakespeare, Dickens and opera and places such as museums became increasingly separated from the broader world of everyday culture.

Sacralisation was also connected to the conversion of audiences “into a collection of people reacting individually rather than collectively, [which] was increasingly realized by the twentieth century”. Since the sacred sphere of a culture involves denial of less elevated forms and affirmation of the superiority of

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those who have the ability to appreciate such elevated forms, it fulfils an important social function of legitimating social differences by naturalising differences.

Sacred texts: Borrowing and autonomous cultures

Evolution, devolution and appropriation

Unitary views of the evolutionary development of societies from savagery to civilisation have profoundly influenced treatment of various types of cultural production. In addition to being a basis for denial of value and thus of intellectual property protection, the view of local knowledge such as folklore as connected to earlier stages of societies has been used to justify the taking of and widespread borrowing from local knowledge for various reasons, including the assumption that such knowledge would disappear with progress. Although the reasons for the disappearance of such products were often intimately tied to the actions of the “civilised” with respect to such “savages”, this aspect was typically ignored. In any case, the relative impotence of those seen as the producers of such knowledge with respect to the colonialismand imperialist powers that directly and indirectly governed them meant that no justification was even required. These fundamentally asymmetrical power relationships have not essentially changed in the years since developing countries gained independence.

Most former colonies had a significant quantity of their material culture taken, much of which is now found in museums and private collections in the United States and Europe. In the United States, one of the primary objectives of emerging museums in the late 19th and early 20th centuries was the collection of Native American cultural objects. Missionaries, soldiers and explorers and later anthropologists, ethnologists and government officials took cultural objects. In addition to tangible cultural property, intangible knowledge was also collected and borrowed, including oral traditions, ethnobotanical and ethnomedical data, information on religious ceremonies and rituals, beliefs, traditions and practices, and other technological, environmental and related information. The collection of such tangible and intangible material remains an issue of contention in discussions of the use of Native American local knowledge.

Foreshadowing practices that now lead to debates about “biopiracy” and misappropriation more than a century later, Stewart Culin, holder of positions in Philadelphia and New York museums and president and curator of the American Folklore Society, thought that objects collected from “lower” races such as Native Americans should be put to practical use to benefit American industry. Culin had a “guiding hand in the commercial packaging of the traditional game Parcheesi by Selchow and Righter”, game manufacturers who copyrighted the Asian game Parcheesi in the 1870s. Culin collected such objects with an eye towards their practical uses for American industry.

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64 Bourdieu, *Distinction* (1984), pp.6, 68.


As is the case today, use of the fruits of local knowledge existed simultaneously with a discourse that diminished the significance of local knowledge holders’ contributions to the development of such knowledge. This was evident in 19th century devolutionary views of folklore, as well as the denial of creativity of those categorized as “folk”, “savage” or “barbarian”, evident in the view that folklore produced by “savages”, involved no creativity and that the texts somehow produced themselves.\(^75\) This view of “primitives” and “barbarians” meant that their knowledge could be used to contribute to the products of “civilised” manufacturing. These derogatory views of local knowledge and its holders were widely accepted explicitly in 19th century and often remain at least implicit assumption of discussions about local knowledge.\(^76\) In discussing W.R. Grace’s filing of neem tree patents based on Indian local knowledge, a representative of the company dismissed such knowledge as “folk medicine”.\(^77\) Until as late as the 1970s, “development planning and conservation policies were usually based on very negative assumptions about traditional rural societies”.\(^78\)

Derogatory discourses based on evolutionary conceptions about the development of cultural knowledge are closely linked to sacralised views of culture. Sacralised visions of culture, however, often do not take account of the actual dynamics by which culture is transmitted. As a result, such visions may also distort conceptions of how culture should be accessed and used and issues related to cultural transmission and cultural dynamics more generally. Intellectual property approaches that focus on transmission and the regulation of the range of acceptable borrowing rather than the delineation of status through ownership rights to property would likely lead to greater attention to the cultural implications of intellectual property frameworks.

**Borrowing and the diffusion of knowledge: Creolization and appropriation as cultural norms**

A focus on transmission inextricably brings attention to borrowing and how forces of diffusion interact with and affect cultural systems. Cultural systems are not discrete and autonomous units that can be separated by clear lines analogous to delineating territories on a map. Instead, cultural boundaries are fluid and shifting, and cultural systems significantly affected by outside forces and influences.\(^79\)

Further, as a result of borrowing, diffusion and other factors, cultural elements are often shared among multiple cultural systems.\(^80\) Much of the approach in legal discourse reflects assumptions about cultural systems that are no longer accepted in disciplines such as anthropology and folklore.\(^81\) In fact, borrowing, creolisation and cultural mixture are normal aspects of the development of cultural systems.\(^82\) Creolisation is “most vividly manifested and represented in the expressive forms and artistic behaviors of everyday and ceremonial life as folklore”.\(^83\) Cultural mixture can also be an important force in innovation.\(^84\)

Borrowing and cultural mixture are not just products of colonial and post-colonial encounters, but are characteristic of human history and evident in language, religion, diseases, agricultural practices and crops,
folklore and a myriad of other cultural elements that may form local knowledge. In addition, isolation from the influences of diffusion from outside of a specific area does not mean that cultural system within that area remained static.

Borrowing and expressive culture: The distribution of folktales

Any process of borrowing necessarily involves acts of appropriation, which are a means by which such borrowing occurs. In addition, folktales and other types of cultural expression that are cited as being part of the cultural heritage of a people may in fact be a result of borrowing and may also exist simultaneously in many different versions among many different groups. The widespread diffusion of folktales is one reason why folklorists developed reference sources called tale type indexes, which are classification tools that compile tale types and indicate the geographic distribution of certain specified tales. Tale type indexes highlight the fact that particular tales are often not exclusive elements of the cultural patrimony or heritage of specific groups.

In most cases, a given item of folklore “will not be limited to a single culture, nor will it be worldwide.” The distribution of a particular item of folklore cannot be known in advance. Some Indo-European folktales have been reported from India to Ireland. Such Indo-European tales would typically exist in multiple variants across their range of distribution, but would likely not be found, at least prior to the colonial period, among Australian Aborigines or South American Indians. Diffusion of tales may also reflect patterns of population movements and are reflected in the transmission of African oral narratives to African American folklore traditions, as well as folktales such as Cinderella to the New World. In the case of Cinderella, variants have been reported from China to Europe.

Conclusion

Visions of culture play a critical and at times insufficiently recognised role in intellectual property doctrine and practice. Conceptions of culture in intellectual property have long been shaped to a significant degree by evolutionary perspectives on human society. Intellectual property discourse also reflects assumptions about the nature and constitution of the elements of culture regulated by intellectual property. Conceptions of culture play an important role in determining policy outcomes. Policy choices informed by recognition of culture as a vibrant force draw attention to the ways in which culture is transmitted and shared and give needed attention to questions of cultural value. Policy choices rooted in a conception of culture as a valuable asset often give priority to questions of economic and business value and minimise or ignore the cultural consequences of such choices.

Cultural resources may be simultaneously both valuable assets and essential elements in living cultures. Reconciling these two potentially conflicting conceptions of culture remains a key element to restoring

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87 Zumwalt, American Folklore Scholarship (1988), p.56.
88 Antti Aarne and Stith Thompson, The Types of the Folk-tale: A Classification and Bibliography (Helsinki: Suomalainen tiedekatemia, 1927).
89 Stith Thompson, Tales of the North American Indians (1929), pp.201–266.
what many consider to be needed balance to intellectual property frameworks. The operation of cultural resources today as valuable assets cannot be denied given the business structure of the cultural industries and other intellectual property intensive industries and the economic and business importance of intangible resources generally. However, intellectual property discussions and doctrine must take greater account of the dual nature of cultural resources as both valuable assets and potentially essential cultural elements that have significant cultural value that should not be dismissed or ignored.

Recognising and balancing valuable asset and vibrant force and economic, business and cultural aspects of cultural products entails greater recognition of the implications of shared culture, which includes understanding the nature and types of borrowing and collaboration that are often inherent parts of creation and invention processes. Such recognition can be incorporated in a number of ways, including by addressing the scope, power and duration of intellectual property rights, incorporating liability rule in intellectual property rights frameworks in certain instances, and generally giving greater recognition to the importance of borrowing and collaboration in creation and invention. Solutions that fully acknowledge the dual nature of the cultural knowledge underlying intellectual property rights may potentially help resolve persistent tensions and conflicts between competing visions of culture in intellectual property.