

---

## New York Law Journal

News

### LAWYER'S BOOKSHELF; Who Owns Native Culture †

Reviewed by **Dana Neacsu**

1,242 words

25 May 2004

New York Law Journal

NYLJ

p. 2, col. 3

Volume 100

English

Copyright 2004 ALM Properties, Inc. All Rights Reserved.

Michael F. Brown, the Lambert Professor of Anthropology and Latin American Studies at Williams College, has spent many decades researching indigenous cultures in Australia and the Americas. With "Who Owns Native Culture†" -- as the title suggests -- he embarks on solving proprietary issues related to indigenous knowledge and its artistic, religious or holistic value.

This topic is neither new, nor rarely addressed. In legal literature, indigenism and the problems raised by intellectual property protection have often, and with greater recent frequency, been debated. For example, concisely yet comprehensively, Cleveland State University Professor Michael Davis recently summarized the five goals of indigenism in the *Cardozo Journal of International and Comparative Law*. In his article entitled, "Some Realism about Indigenism," Davis reviews issue of ownership, control of information and the indigenous peoples' ability to exploit and profit from the use by others of that information. He persuasively analyzes the standard and different legal solutions that could best answer those goals. All in 16 pages.

So what does Professor Brown offer his readers in 252 pages† First, he offers more factual details. Next, he addresses a larger audience, including, non-lawyers interested in anthropologic research of native knowledge, as well as attorneys interested in non-legal arguments and solutions about protecting indigenous cultures.

If non-lawyers may easily find the book fascinating, attorneys -- used to arguing in an adversarial environment -- may be distracted from finishing it because the author does not identify his adversary until chapter seven: United Nations' Approach to Protecting Native Culture, outlined in the so-called "Daes Report." With that stylistic choice in mind, the book nevertheless reaches the status of a clear voice in favor of protecting indigenous knowledge through imperfect solutions that would rather "encourage," than hinder, "improved relations between native peoples and the nation-states in which they find themselves citizens."

The book is structured in an introduction and eight chapters that abound in factual detail. The "Introduction" alleges that the goal of the enterprise is to "seek answers to questions raised by efforts to protect native heritage from commercial and non-commercial use by outsiders." But when the reader reaches chapter seven, she understands that the book is a critique of overly legalistic solutions that mistakenly encourage a grandiose "one-size-fits-all" model of "heritage protection" which have yet to prove workable. The author instead encourages us to follow historian Robert Conquest's approach of "imaginative realism" and support a degree of compromise and imperfection in the indigenism discourse rather than a highly simplified and bureaucratized solution. Such an approach should be refreshing today's legal world today which seems to have forgotten a lesson taught centuries ago by well established jurists, such as Rudolf von Jhering, that law alone cannot offer any long-term solutions to real life problems.

Chapter one "The Missionary's Photographs" tells the story of the Reverend Heinrich R. Voth and the pictures he took of the "Hopi Indians, a small Arizona tribe," in the first half of the 20th century. The pictures immortalized every-day events, as well as details of alleged "important rituals" that are coming under attack for offending "Hopi sensibilities about the proper circulation of knowledge." Because the Hopi's community values "discourage curiosity" and their indigenous lifestyle rests on a hierarchy based on access to knowledge, the author notes that

the revealing nature of the pictures have come to be the center of the discussion of protecting indigenous knowledge. Similarly, the musical records made by Frances Densmore of the Ojibwe's alleged secret and sacred songs, which she purportedly had obtained through bribery, charm, or badgering, are coming under attack as illegitimate and violating the proposed "right to cultural privacy," notes the author. The chapter concludes with an examination of these allegations and the solutions offered. Often, these are illusive and patronizing.

Chapter two, "Cultures and Copyrights," further details the problems raised by ownership of indigenous knowledge and the lack of a single workable solution applicable world-wide. The chapter looks at Australia's Aboriginal legal solution which links Aboriginal art to Aboriginal land. Its pinnacle is the famous Bulun Bulun case which acknowledges that "rights in land and the right to produce specific images are closely tied in Aboriginal thought."

Chapter three, "Sign Wars," is equally interesting. It focuses on the conflict between the Zia Pueblos, an Indian community situated northwest of Albuquerque, and the State of New Mexico, over the state flag's motif. Adopted in the 1920s, the motif is said to be based on a design which had been inspired by a 19th century sun-image created by an anonymous Zia potter. In the 1990s the Zia Pueblos identified it as their tribal symbol. In 2001, they sought \$76 million in reparations for the alleged misappropriation -- "one million for each year that the symbol had been used on the state's flag and letterhead." The chapter concludes with questions about the indigenous peoples' needs for protection for both symbolic and lifestyle values.

Chapter four, "Ethnobotany Blues," tells the story of native knowledge used in classifying the botanical universe, often described as "biopiracy." While there is a strong argument to be made in favor of indigenism in this area, Brown maintains the position (as Davis does in his above cited article) that privatization of folklore knowledge cannot be part of the solution

After laying down the facts in the book's first four chapters, the following four chapters -- five through eight -- looks at the different solutions endorsed by various institutions. The author favors a piecemeal approach, that in only certain circumstances may depend upon a legal answer. One such idea is the creation of a U.S. National Register of Historic Places, "which requires a pattern of 'use or continued value' for at least fifty years for a site to be designated a 'traditional cultural property.' "

I found chapter seven the most stimulating as the author indulges himself in analyzing the ambitious United Nations backed plan -- the Daes Report, entitled "Protection of the Heritage of Indigenous People" -- which proposes that indigenous cultures be shielded in their entirety. Brown criticizes the report's solution starting with the view that "there is reason to be wary of totalizing solutions to complex social problems." Such a proffered solution makes the endeavor difficult, and Erica-Irene Daes, the author of the Daes Report, believes that there exist simple solutions to complex problems.

Unfortunately, the report promotes a political and polarizing view instead of a viable solution. And, as Brown stresses, it may likely have a negative impact on everybody's life.

Brown does not have a solution either. As developed in the final chapter, chapter eight, he promotes a point of view. Unlike the Daes Report, his centrist approach lies in the "distinction between matters of economic justice and the broader goal of protecting 'cultural integrity' -- an emerging code word for the respectful treatment of indigenous symbols, religious practices, and knowledge." The final chapter, and thus the book, ends with a call for diverse solutions proposed locally by the people who face them and need to live respectfully together. For example, pivotal elements of civil society, such as professional associations, the author suggests would be better equipped to tackle these issues as they "influence occupational networks through codes of ethics and best-practices standards."

Document NYLJ000020040531e05p00003

### Search Summary

Text	"dana neacsu"
Date	All Dates
Source	New York Law Journal
Author	All Authors
Company	All Companies
Subject	All Subjects

Industry	All Industries
Region	All Regions
Language	All Languages
Results Found	4
Timestamp	27 August 2016 2:34 PM