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Intellectual and Cultural Property: Between Market and Community, Fiona Macmillan, (Routledge, London and New York, 2020) 209PP, £96 hardback; £29.59 eBook, ISBN: 9781138388062

In *Intellectual and Cultural Property: Between Market and Community*, legal scholar Fiona Macmillan considers the relationship between law, culture and capitalism, in view of ‘capital’s occupation of our culture generally’ and more specifically the way that Western capitalist culture has ‘penetrated and occupied’ the post-colonial world (p.177). This book, in Macmillan’s words, is ‘a political project’; it ‘invokes law’s political register and its capacity for transformation – both of itself and of its subjects’ (p.208). The message, then, is that law matters: contemplating legal change allows us to imagine a different cultural world with different power relations.

Central to Macmillan’s argument, is a re-think of the relationship between cultural heritage law and copyright law, as two legal regimes for regulating creativity in the creative arts (p.7). In closely analysing these areas of law, Macmillan explores a number of binary distinctions common to both systems - nature/culture, authentic/fake, moveable/immovable, tangible/intangible - while also exploring the ways in which the two regimes differ: copyright relates to markets whereas cultural heritage concerns the community (of which the market is just one aspect). In Chapters 1 and 2, Macmillan critiques both the claim that copyright stimulates and protects artistic creativity, as well as the assertion that the public domain or commons provides a meaningful means of defending the interests of the community. Chapters 3 and 4 concern cultural heritage and bring the international law instruments into conversation with ‘critical heritage studies’. In Chapters 5 and 6, the analysis includes the ‘problematic relationship’ between cultural heritage and intellectual property (p.5), including a study of arts festivals as a site of such conflict, mediating the relationship between community and cultural production.

Central to Macmillan’s argument is the need to re-think ‘community’ in cultural heritage as part of dynamic and constitutive processes of community formation. Such an approach to ‘community’, argues Macmillan, provides an alternative basis for expressing and controlling the value of cultural works to copyright’s focus on the market value of private property, and opens up ‘the possibilities for resistance inside – or alongside – the copyright system’ (p.181). Macmillan proposes ‘embedding the market within the community’ which would entail ‘rethinking copyright’ and ‘radicalising cultural heritage’ so as ‘to invert the current

relationship between privately and non-privately propertized space' (p.197). These two aspects of Macmillan's vision are now considered in turn.

'Rethinking copyright' would involve building a system that acknowledges (1) that cultural production is always a collective undertaking (in the sense that cultural production and the use of cultural goods, services and other intangible resources are part of the same process) *and* (2) that individual creators (i.e. not corporate authors) have personal and non-transmissible rights to be recognised and remunerated for their work, but also (3) that as creativity serves the common good, the balance of individual private rights and the collective interest should be rethought through a reinvigorated set of defences and exceptions to copyright (p.199-200). This reviewer notes that legal literature is not lacking on this latter topic: two recently published scholarly landmarks - T. Aplin and L. Bently, *Global Mandatory Fair Use*, CUP, 2020 and E. Hudson, *Drafting Copyright Exceptions*, CUP, 2020 - now complement the well-known account in R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact*, CUP, 2005. At a fundamental level, Macmillan proposes the removal of copyright's character as a 'property right' and she asks us to imagine the consequences of doing so for the landscape of cultural production: the existing global media and entertainment giants would collapse and a 'plethora of small independent producers and distributors' would emerge in its place (p.201).

Macmillan's second key proposal is for a radicalised concept of cultural property as 'artefact of community', such that the market for cultural products becomes embedded in the reciprocal obligations and social processes of community. Macmillan looks to a variety of legal concepts. These include the Roman law principle of *res universitatis* which, translated into modern terms, could provide the underpinning of a cultural property right, as a property right that surrounds the productive activities of a group: within the group there is freedom from property restraints (e.g. freedom of speech, to innovate, to create, to use and to develop and communicate ideas), but the activities of the group are protected from the outside by property rights (p.205-6). On this view, cultural property stems from membership of a community. Macmillan also takes inspiration from the law of geographical indications, advocating a regime of 'community indications', not necessarily linked to geographical regions, as a means of protecting certain types of cultural property through collective rights. While geographical indications are property rights, they would relate to a market that is embedded in community, and Macmillan imagines the possibilities this might open, for instance, the emergence of distinctions between free and open access to community property, and between access and use, depending on the choices and processes of the community (p.206-8).

While Macmillan considers that her second proposal - a new concept of cultural property - would develop best when combined with her first contention – copyright’s shift away from property rights - she also contemplates a ‘slower version’ where copyright’s property rights basis is retained (p.201). This alternative middle-ground, no doubt, reflects the centrality of property logic to existing national and international systems of copyright (and intellectual property more generally). The manner in which Macmillan presents this middle road, as an alternative to, but not a compromise to her central proposals, is most refreshing: radicalism of vision is at no point compromised by expediency.

In conclusion, *Intellectual and Cultural Property* offers a highly original critical analysis of the law of copyright and cultural heritage. However, as will be apparent from the above overview, it is far more than that. It is a manifesto for a better world, with legal change placed centre-stage. In Macmillan’s own words: ‘The final argument of the book is for a new concept of cultural heritage/property that is capable of providing a political and legal counterweight to the power of the intellectual property system and, consequently, offering resistance to the processes of capitalist accumulation that dominate the current era of total market thinking’ (p.6). To this end, this book is essential reading for legal scholars not just for the specifics of the legal analysis, but for the radical imprint that it leaves on the legal scholarly imagination. The message that law matters will no doubt be inspirational to a new generation of legal scholars seeking to inject their writing with energy and radicalism.

DR ELENA COOPER

CREATe, University of Glasgow