Abstract

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Cultural Appropriation and Laws of Property in Cultural Property Claims

Recent legislation in the United States has produced a groundswell of activity from museums (mandated to comply with the terms of the law), and by indigenous communities in the United States seeking to utilize the intent of the law to restore cultural property to aboriginal title. Related concerns emerge in international forums both within and outside of museums as to the broad applicability of notions of "cultural property" and most recently, the application of legal constructs of "intellectual property" as a means to protect indigenous knowledge. While issues of appropriation date to the initial phase of native dispossession, the context in which the law has shaped these debates brings new ways of unveiling western philosophical ideas about property, ownership, selective representation, and possessive individualism on the one hand, and the inextricable relationship of land to spirituality, cultural history and the production of cultural artifacts and knowledge on the other.

This paper considers the philosophical contradictions embedded in cultural property policies, and the practical problems that can arise between communities, museums, and their power brokers. On the one hand, the federal-trust relationship between the United States and American Indian Nations acknowledges the sovereign status of tribal governments to appoint their own representatives, while at the same time retains subordinating structures of representation by 1) framing it with respect to a collectively shared identity (and assumed agenda) and 2) maintaining the balance of power in the hands of policymakers. In order to work within the frame of "collective individualism," indigenous claimants must assent to the underlying principles of possessive individualism and the language of the law that guides proprietary interests.

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"Aboriginal people should have the sole right to determine what will happen to aboriginal cultures." This sentiment was expressed by Tasmanian activist James Everett and echoed by New Zealand Maoris, native Hawaiians, and numerous Native American representatives at the 1989 World Archaeological Congress held in Vermillion, South Dakota. It seems appropriate to re-state Everett's imperative in the international context of the IACSP as the concerns raised six years ago were specific to the return of human ancestral remains held by museums and government agencies. Subsequent repatriation legislation passed by the US Congress in 1990 (NAGPRA PL 101-605 and PL-101-185, SI Bill to establish NMAI) marked a turn in the current debates over protection of cultural resources and indigenous knowledge (cf. Berman and Brooks 1991). Questions posed over the last ten years of political and legal volleying sound out as revelry under the banners of representation and restitution. Related to these concerns loom larger questions about the way in which "representativeness" becomes a process of collectivizing (and consequently, essentializing) identity in political and legal arenas. In restitution claims, the "burden of proof" lies with Native Americans to prove their "Indianness" and "legitimacy" in staking claims to cultural property away from holding institutions, and has forced a log-jam of paperwork in the form

of museum inventories (which most tribes are ill-equipped to handle financially and personnel-wise) while maintaining the balance of power in the hands of policy-makers. [cite NAGPRA].

Thus it was in this context in 1993 that I contracted to prepare ethnographic inventories of American Indian collections housed at the National Museum of Natural History at the Smithsonian Institution in Wash. DC. in compliance with repatriation legislation. Despite the provisions of NAGPRA (1990), the Smithsonian was exempt from the guidelines for reporting cultural objects to American Indian tribes, but had agreed to devise an internal policy for cultural property claims. This exemption made for a complicated task of careful internal debates about procedure and "legitimacy" of claims. My task of policy implementation followed almost immediately on the heels of a fifteen month residency on the Fort Berthold reservation of northern North Dakota (below the Canadian border), among the Mandan, Hidatsa and Sanish (Arikara) people. I therefore found myself confronted with untangling the bureaucratic structures of governmental institutions while still maintaining a fresh eye to community-based concerns of daily survival on the reservation - which itself depends on the equitable implementation of federal policies. In the corridors of world power in Washington, D.C. the <u>effects</u> of policy are not immediately apparent - if at all. In simplified terms, the political decisions of government often conflict with the community-based concerns of tribal groups - especially where kinship relations remain at the core of

structuring (Native) community life, and are not well understood by most bureaucrats. I will return to the dimension of kinship as a critical one for regulating competing claims to cultural property later.

First, the degree to which US and international property laws can be applied in native cultural property claims must be situated within the historical encounter of Euro-American colonization based on the legal tenets of Common Law. Restitution for appropriation of native "property" dates to the initial phase of dispossession of native lands by Treaty and later allowed for protracted legal phases of compensation - from the [1950s?] Court of Claims hearings that re-instated some nineteenth century land bases to the wave of land claims litigation in the 1970s, spawned after the founding of the Native American Rights Fund in 1970. The super-structures of the law have stood to uphold U.S. interests, and only since the last generation of active participation by indigenous legal scholars have considerable strides been made in using the law to redress past losses of land, religious freedom, child welfare, and most recently, repatriation of human remains and sacred cultural objects.

Indigenous and legal constructs can not be neatly dichotomized - beginning in the United States in the 1830s when the International Commerce Clause was invoked to uphold tribal sovereignty within state boundaries. Nor are legal and tribal interests mutually exclusive, as attested to by repatriation

(NAGPRA) and religious freedom (AIRFA; NAFERA amendments) legislation passed in the current policy era of Native Self-Determination. It remains useful, however, to consider the degrees of difference invoked by the law and federal policy on the one hand, and the extra-legal sanctions, community-based "precedents" and "evidence" that indigenous knowledge brings to bear on cultural property claims. These constructions of difference invoke more than parallel frameworks of discourse about the law: on the contrary, deeply embedded structures of inequality and power relations necessarily surface when "post"-colonial concerns jut into the internal colonial landscape of Indian-White relations (cf. Coombe 1993; Torres and Milan 1990). This allusion to a land-base moves us beyond metaphor by posing a direct link among the primary and inextricable relationships that First Nations peoples express to land, cultural history, and the production of cultural knowledge and artifacts. These "bundles of relationships" (Geertz 19xx), presiding over bundles of economic rights,[1] bind claimants to a collective assertion of "rights" that lie outside of the possessive individualism of Lockean principles of "abstract rights" inherent in US and Canadian (private) property law (Handler 1991; MacPherson 1962).

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[1]. This theme is affirmed by the findings of the UN Document, STUDY ON THE PROTECTION OF THE CULTURAL AND INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations. Commission on Human Rights, 28 July 1993.

In order to sort the complex of potentially competing interests in cultural property claims, I will outline a series of "rights" that raise philosophical contradictions through the application of cultural property laws to indigenous systems of knowledge, and illustrate some practical problems that can arise among communities, museums and their power brokers by drawing on case law and ethnography. I restrict my use of "cultural property" to refer to material cultural artifacts and the ideas and rights that govern their production, use, and ownership. In my discussion, I will link a set of previously unrelated themes in order to insert community-based prerogatives into the grand pillars of legal constructions. Western Law, from this perspective, serves as a type of trope through which economic, political and cultural justice can be interpreted (cf. Fernandez 1991). Conversely, native kinship arrangements serve as a regulating force in competing claims to cultural property - both between indigenous groups and bureaucracies (such as museums), and among competing community interests for control over cultural knowledge, symbolized by and inhered in cultural and artistic objects.

Rights to Production, Use Rights and Proprietary Rights

In order to protect creative ideas and the inventions that spring from them, US property law offers provisions for patents, trademarks and copyrights. Currently, in both national and international arenas, Native and non-Native lawyers, activists,

artists and anthropologists are focusing attention on the applicability of Intellectual Property Rights (IPR) as a means for creating legal standing in cultural property claims. Dean Suagee (1994), a Cherokee attorney who has worked extensively with the International Working Group on Indigenous Populations to formulate IPR agenda, divides IPR into two main categories of protection from infringement: 1) Industrial Property (inventions, trademarks, industrial designs and appellations of origin) and Copyright (literary, musical, artistic, photographic, and cinematographic works). Based on these legal categories, in 1984, the World Intellectual Property Organization (WIPO) devised "Model Provisions for National laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (viz. Posey 1991). The model provisions recognize expressions and productions to protect "folk traditions" that are recognized "collectively," thus removing the necessity of an individual creator or artist as required by copyright law (Posey 1991:31).

While WIPO, UNESCO, ICWGIP, and other UN NGOs work to hammer out international documents, great difficulty remains in ratifying agreements that can be applied cross-culturally and internationally. Some advocates of IPR question the relevance of western laws to indigenous codes of secrecy, ritual obligations and ceremonial transfers of knowledge and power (Greaves 1994; cf. Minthorn 1994). In this light, indigenous "rights to production" may lie so much outside of the law, that customary

law and social sanctions remain the only binding forces of protection and control of indigenous knowledge - in this context, the knowledge and accompanying rights of production that carry specific protocol for their artistic execution.

For example, Pinel and Evans (1994) report that Cochiti Pueblo drum makers of Northern New Mexico contested the production of drums by an individual claiming to be of Cochiti heritage, but having no cultural or kinship link to the community. The individual produced the drums without a culturally-sanctioned right that required, among other forms of initiation, apprenticeship into traditional techniques of production, which he did not use. Furthermore, the individual in question was marketing his "Cochiti" drums for a profit that steered sales away from the Pueblo by under-cutting their prices. In this case, as the authors show, New Mexico law prohibits the marketing of unauthentic "Indian" art under current statute, but can do nothing about the infringement of "cultural copyright." (ibid: 47). In the former instance, the 1988 NM Arts and Crafts Protection law (since amended) not only protects Native artists from outside infringement, but secures an economic base integral to New Mexico's tourist economy by legally authenticating (and sometimes overseeing) the production and sale of "American Indian" art.

In a related case, among the Mandan and Hidatsa, the production of quilled objects was traditionally governed by age-graded social and ceremonial structures (Bowers 1955 and

1965). For the Hidatsa, age-graded societies involved kin relations that fostered the persistence of ceremonial rituals. Among these, women's quillworking societies allowed women to participate in shared ritual knowledge that included the technical craft of quilling. While age-graded societies no longer function as they did in the nineteenth century, quillwork motifs continue to belong to individual women who dream of a particular design. Techniques continue to be passed on through kin-based structures of learning and ritual "payments." (Berman 1989). Hidatsa women accrue prestige for their quilling skill, and in former times, kept records of their accomplishments through "quilling counts." As an illustration of this, an elder Hidatsa quillworker (now deceased) told me in ranked order all of the quilled items she has produced in her lifetime.

As an adopted "clan child" of this woman's clan, she agreed to instruct me in the art of quilling, despite the fact that she was nearly blind. Our sessions, therefore, turned less on technical proficiency than accuracy in ritual performance and payment for the rights of production. Here, a type of "cultural copyright" governed the procedures for the acquisition of cultural knowledge, but it was, most importantly, my adoptive kinship relationship to one I called "grandmother," that entitled me to make the request. Moreover, through the interpretation of experiential knowledge (gained through visions and dreams), cultural knowledge could be directed. In this, and countless other examples cross-culturally, "rights of production" are

closely linked to "rites of passage" that determine not only life-cycle readiness, but social incorporation and relational reciprocity. The idea of "payment" to acquire the rights of production has only recently been construed in monetary terms, but as I argue elsewhere (Berman 1994), does not carry the same (fetishized) value (cf. Taussig ..) as a market transaction.

The notion of **rights to production** to cultural property in the above illustrations is closely linked - through kinship membership - to collective assertions and control over cultural identity. Cultural knowledge imbued in the production of ceremonial objects is given meaning not by outside evaluators - but by internally constructed values that reproduce cultural identity.

Notions of cultural identity link claims to rights of production to IPR if for the very reason that this arena may be the last level of appropriation extracted from indigenous peoples. While "cultural copyright," like "cultural citizenship" (Rosaldo 1988?) cannot by definition be legally enforced - once products enter the market economy, they become subject to laws that protect capital - hence the protection of Cochiti drum-making.

The next level of analysis relates cultural objects to their context and circulation in what I take as a form of **use rights.** So that in the case of Hidatsa quillwork, exchange relations that enter into the market must <u>first</u> be sanctioned by "cultural copyright," or hypothetically, risk being subject to legal

action. Again, New Mexico provides a case in point, where the people of Zia Pueblo sued the state of New Mexico for appropriating the Zia sun sign as the symbol for the New Mexico state flag. The Zia Pueblo recently won a court settlement, and now, having established legal precedent, are investigating the viability of laying claim to the Zia symbol when used by private businesses. A cursory survey of the Albuquerque phone book yielded ninety-six (96) variations of the sun symbol used by private companies (Pino, presentation at Roundtable on IPR, Applied Anthropology mtgs, Alb., NM 1995).

Another current case of appropriation of Native symbols for commercial use involves the legal case of the descendants of the Lakota Chief Crazy Horse v. the manufacturers of Crazy Horse Malt Liquor (Herrera 1994; Gough, in progress)[2]. While the details of this case remain in the formative stages of litigation, kinship clearly lies at the heart of the Plaintiff's complaint. In short, by establishing lineal and direct descendancy to the individual known as Crazy Horse, family members of the Rosebud Sioux Tribe work with tribal attorneys to create standing on

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2. Civil Complaint, Rosebud Sioux Tribal Court, IN THE MATTER OF THE ESTATE OF TASUNKE WITKO, a.k.a. CRAZY HORSE, Seth H. Big Crow, Sr., as Administrator of said Estate, and as a member and representative of the class of heirs of said Estate, Plaintiffs, vs. The G. Heileman Brewing Co., La Crosse, Wisconsin, and Baltimore, Maryland; The G. Heileman Brewing Co., d/b/a Hornell Brewing Col, of Baltimore, Maryland, and Messrs. John Ferolito and Dn Vultaggio, of Brooklyn, New York, individually, and d/b/a Ferolito, Vultaggio and Sons, of Brooklyn, New York, Defendants

issues of copyright infringement in the use of the Crazy Horse name and claim "inheritable rights to the publicity value inherent therein." The details of registration of copyright and the burden of proof upon the family to establish the inapplicability of "public domain" in this case will be left to the workings of lawyers. The issue with respect to **use rights** is clearly related to context and the expropriation of an identity upheld by claimants through lineal descendancy.

"Lineal descendancy" emerges as a criterion in cultural property claims, and is defined as an authenticating variable in the language of NAGPRA [SEC 10-2, (14)]. In my comments on NAGPRA Regulations published in the 1993 Federal Register, I identified some problems with definitions that too narrowly defined kinship affiliations in genealogical terms, and took issue with the reification of "traditional kinship systems," which I maintain are dynamic and changing systems.

Stereotypes of American Indians persist in both the appropriation of Native imagery and symbols (Jojola 1994) and in bureaucratic formulations of representations of "Indianness." Romantic notions of American Indians framed in an ethnographic present on the one hand, or vilified images of militant activists on the other, continue to shape legal and political discourse and the selective representation of tribal members by policy officials. The issue of "who gets to speak for whom" in the halls of political power is fraught with uneven, and sometimes underhanded selection processes.

At the community level, tensions between tribal governments and their constituents have long been a product of federal Indian policy, especially for those tribes who agreed to the terms of the 1934 Indian Reorganization Act that established federally chartered tribal governments. Yet, NAGPRA stipulates that tribally-appointed government spokespeople are the only individuals charged with the power of official representation in cultural property claims.

The issue of representation in the context of **use rights** presents a conundrum by which tribal sovereignty at the level of government-to-government relations sometimes conflicts with the use rights of objects caretaken by medicine people with the culturally sanctioned power to transfer use rights and make claims on cultural objects because of their responsibilities endowed by the collectivity, and their privileged knowledge about the appropriate context and care of the objects in question. As Philip Minthorn, a Sahpatin (Cayuse) research archaeologist and artist, has pointed out, indigenous claims to cultural artifacts housed in museums are inherently counter-hegemonic in that they pit indigenous use rights against the proprietary interests of holding institutions. The Western notion of "possessive individualism" (Handler 1991) that would have individuals demonstrate their unilateral links to objects becomes the model against which a type of "collective individualism" is forced to assert itself - even as a mis-represented identity.

Conflicts erupt at the community level when "collective individuals" assert a unitary right to claim an object on behalf of the entire community. Some scholars (Lanowski 1994; Biolsi 1994) argue for a reform in tribal charter governments that would more evenly reflect the proportional representation (PR) of old-time consensus-oriented tribal governments. The Rosebud Sioux Tribe is exploring mechanisms for re-structuring their tribal government along these lines. This could potentially give greater voice to families (again, the heart of kin-based communities) whose claims are silenced by current procedures of representation. Those then claiming **use rights** would be enabled to assert **proprietary rights** on legal bases that challenge, as repatriation policy now allows for, the legal "ownership" of objects deeded to museums on illegal grounds (i.e., theft, removal from sacred contexts). As Minthorn states in relation to indigenous claims of tribal bundles in museum collections:

> Native communities are now required to divulge sacred and esoteric forms of knowledge in order to substantiate their claim or to insure the appropriate disposition of such objects...without the guarantee of the protection of that knowledge (1994:11).

Since the burden of proof lies with Tribes and tribal members to assert their proprietary interests in cultural objects, IPR might provide a useful mechanism for protecting ceremonial knowledge that becomes part of the public record as a "standard of evidence" in federal cases.

3. Rights to claims and legalising mechanisms in the protection of cultural and intellectual property

This paper has suggested three categories of rights for examining the application of IPR and other legalising mechanisms in cultural property claims: rights to production, use rights and proprietary rights. These "rights" must first be understood within cultural frameworks that may in some cases challege these categories by definition. For example, rights to production may be first governed by cultural codes of conduct ("cultural copyrights") and cultural citizenship, especially where use rights carry ritual knowledge and responsibilities. The law can be useful in protecting knowledge that is wrongly appropriated outside of the cultural group, but may have limited usefulfullness to enforce intra-cultural claims. Once objects enter the market, however, proprietary rights can be asserted, such as in museum and repatriation claims.

Definitional difficulties arise in proprietary claims by begging the definition of "property." In western law, property claims are enmeshed within philosophical assumptions about individualism and private property - ideas that conceptually conflict with indigenous claims to cultural objects. Furthermore, western ideas about ownership link individuals to cultural objects through a type of "collective individualism" that sometimes complicates the issue of representation in cultural property claims. The issue of cultural patrimony forces a re-consideration of "the collectivity" from a myriad of standpoints, especially where kinship regulates claims to

cultural property. Selective representation of tribal officials may not adequately address the competing interests of communities. Mechanisms, such as IPR, for legalising collective rights to production, use and claims to artistic objects must be framed within larger protections of cultural knowledge and the right to self-determination as collective and fundamental assertions of human rights.

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