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# The Piracy Gap: Protecting Intellectual Property in an Era of Artistic Creativity and Technological Change

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# INDIAN CULTURE AND SPIRITUALITY: SOME REFLECTIONS ON THE SHAPING AND SHARING OF CULTURAL VALUES\*

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I am pleased to introduce the beauty and uniqueness of Indian culture by reviewing conflicts over American Indian cultural objects. There is clearly an internal appreciation of Indian culture by Indians themselves. Indians demonstrate pride in the manner in which they wear their jewelry and other cultural objects, and in their willingness to voluntarily share their works with others.

Additionally, there is an external appreciation of Indian culture by others. This can be observed at several levels: by people who want to claim Indian heritage,<sup>1</sup> by those who want to possess and wear Indian jewelry and other cultural objects, and by those who want Indian cultural objects for display in their homes, galleries and museums.<sup>2</sup>

First, I have encountered people wanting to claim Indian heritage. When I tell people that I live in New Mexico or that I was born and raised in Arizona, sometimes they will volunteer that they have an Indian ancestor, always female, usually Cherokee, usually a princess. Ironically, two of my great-great-grandmothers were full-blooded Indians, one of them a Cherokee, although she was not a princess.

Second, the external appreciation of Indian culture is evidenced by people from other groups seeking to possess Indian cultural objects, such as Indian jewelry, which are easily bought.<sup>3</sup> Genuine items of

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1. See Jon K. Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 498 (1993) (discussing that the relatively narrow definition of "Indian," under the Indian Arts and Crafts Act excludes individuals wanting to claim Indian heritage to only those individuals who are members of a federally or state-recognized tribe).

2. See FREDERICK J. DOCKSTADER, INDIAN ART IN AMERICA 30 (1962) (explaining that the "tremendous wealth of Indian art and craftwork" being displayed in the larger museum collections and private homes in the country, has led to a greater prestige and appreciation for Indian culture).

3. Parsley, *supra* note 1, at 487 (explaining that the Native American arts and crafts industry has become a multi-million dollar industry in the United States).

hand-crafted art are expensive, but imitations from Taiwan and other places are fairly cheap.

Finally, there are those who show appreciation for Indian culture by seeking Indian objects for display in their homes or in museums in this country and around the world. Indian objects are very popular in Germany, for example. When Indian items are voluntarily given or made available for purchase from an Indian tribe or from individuals, there is a sharing and shaping of cultural values.

Through this exchange, the creator of the objects shares his or her heritage with the recipient. By sharing art and cultural items, a learning process ensues about the objects and about those who created them.<sup>4</sup> In this manner, art and cultural objects can assist in bridging gaps that divide people. Both the creator's and recipient's culture become enriched and shaped by the sharing.

This works best when cultural objects are voluntarily shared. Conflicts arise when there is an involuntary or forced sharing of cultural objects. Consider, for example, the following contexts: misunderstandings about the concept of ownership; theft; and finding, unearthing, and displaying burial remains and objects that Native American tribes believe should remain interred.<sup>5</sup>

When I teach intellectual property, I tell my students that law belatedly follows technology in determining the ownership of intangible property.<sup>6</sup> In considering ownership of Native American cultural objects, the law has not only arrived belatedly, but also sometimes with indifference to historical and cultural contexts.

Many proponents of the Anglo-American legal system believe that neutral rules can be created that apply to any situation, and to any group.<sup>7</sup> In the Anglo-American legal system, property ownership is

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4. DOCKSTADER, *supra* note 2, at 30.

5. Tamara Jones, *Digging for Indian Pots: Brazen Thieves Plunder History with a Shovel*, L.A. TIMES, Dec. 28, 1986, at 2.

6. *See Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984). "From its beginning, the law of copyright has developed in response to significant changes in technology." *Id.* at 430. "The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas." *Id.* at 430 n.12.

7. *See Louise Weinberg, Against Comity*, 80 GEO. L.J. 53, 58 (1991) (explaining that comity theorists "advance their proposals for 'neutral rules' in the context of resolving so-called

understood as encompassing a “bundle of rights”<sup>8</sup> that includes title and a right of possession.<sup>9</sup> Conflict can arise if an Indian tribe, or even a state—as in the case of Peru<sup>10</sup> — does not have the same concept of property ownership.<sup>11</sup>

Peru, for example, did not anticipate that foreigners would arrive, encourage massive grave robbing, and send the un-earthed items abroad.<sup>12</sup> However, an incident giving rise to legal conflict over the concept of ownership arose in the 1980’s with the discovery of an ancient Indian burial ground.<sup>13</sup> United States entrepreneurs seemingly encouraged “huaqueros”<sup>14</sup> to dig up the burial ground. The treasures

‘true’ conflicts . . . the comity theorists limit to true conflict cases their proposal for neutral, reciprocal, policy-maximizing rules”).

8. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).

9. *Id.*

10. Nathaniel C. Nash, *Erasing the Past: Looters Plunder Archaeological Ruins, Leaving Little Cultural Heritage Behind*, HOUS. CHRON., Aug. 29, 1993, at A21 (discussing incidents of grave robbing in Lomas de Lachay, Peru, where looters were excavating ancient ruins and/or destroying archaeological evidence for financial gain).

11. K.O. Dawes, *Artifact Cache Found in Homewood Home*, CHI. SUN-TIMES, Apr. 30, 1992, at 16. An amateur archaeologist was arrested for taking hundreds of priceless artifacts from Starved Rock State Park, for the purpose of adding to his private collection. Items which were stolen included old French musket balls, quantities of Indian arrow heads and pieces of pottery. *Id.*

12. James Brooke, *Chancay Journal; Where Ancient Infants Lie, Grave Robbers Thrive*, N.Y. TIMES, Feb. 3, 1990, § 1, at 4. Peru, due to its rich archeological wealth, has become a major center for grave robbery. The practice of grave robbery has existed since the Spaniard’s arrived seeking gold almost five hundred years ago, but has gained momentum recently due to a growing international market for pre-Columbian ceramics. *Id.* World-wide trade in smuggled art has led to a three billion-dollar-a-year industry, for dealers willing to exploit the poverty and ignorance of Peruvian citizens. United States Customs agents are being pressed by Peru, Mexico and other Latin American countries to curtail further trading of Pre-Columbian artifacts. Cathleen McGuigan & Elaine Shannon, *The Booming Trade in Smuggled Art*, NEWSWEEK, May 30, 1983, at 84.

13. See Peru v. Johnson, 720 F. Supp. 810, 812-14 (C.D. Cal. 1989) (addressing the issue of whether the Government of Peru was the owner of pre-Columbian artifacts which had been seized by U.S. Customs officials from an American citizen and holding that Peru was not entitled to the artifacts because it was uncertain where the artifacts were found, when they were found, whether they were in the private possession of Peru more than one year after an official registry book was opened and the extent of Peru’s claim of ownership as part of domestic law), *aff’d*, 933 F.2d 1013 (9th Cir. 1991). See also James F. Smith, *All Hands Reach for Treasure: In Its Battle to Stem the Outflow of Artifacts, Peru Wrestles with Conflicting Pressures from Museums, Collectors and an Ancient Tradition of Looting*, L.A. TIMES, Oct. 12, 1989, at A1 (discussing the conflict arising from the discovery of the Moche Kingdom burial mound, in Sipan, Peru, which caused guards to defend the burial mound against armed looters, and explaining that the incident brought’s Peru’s internal conflict between commerce and cultural heritage to the international forefront).

14. See Lynn F. Monahan, *Thieves Stealing Incan Heritage*, N. ORLEANS TIMES-

were shipped to the United States, via several other countries where false bottoms were applied to conceal the cargo.<sup>15</sup> When Peru sought the return of the items by suing the entrepreneurs in the U.S.,<sup>16</sup> the Federal District Court held that since Peru could not prove ownership by showing a legal rule through which it claimed title to the items, the items must remain with the person in possession of them in the United States.<sup>17</sup> While that court would not want to encourage massive grave disturbances in this country, what if that was the ruling's effect?

As for theft, there is an Anglo-American rule that a thief cannot pass good title,<sup>18</sup> and that the stolen item retains its character through the chain of possession.<sup>19</sup> In other words, once stolen, always stolen.<sup>20</sup> There have been attempts to modify this rule, by adopting a bona fide purchaser (BFP) for value rule.<sup>21</sup> This modification permits a BFP who purchased an item in good faith and not knowing that the item was stolen to keep the item. The problem with this modification is that the BFP keeps the item to the detriment of the original owner. Another modification to the rule that a thief cannot pass good title has been an effort to require due diligence, i.e., constant searching by the owner for the item.<sup>22</sup> If the original owner does not continue the search, the original owner loses the right to reclaim the item from a BFP.<sup>23</sup>

These modifications can pose problems in the Native American context when a tribe does not know that a grave has been disturbed, or if a tribe has since become extinct, or if a tribe does not think that burial items should be owned by anyone. In all these instances, no one would come forward and say "we own those items and we want them back." Does the grave robber get to keep the items? Would a BFP get

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PICAYUNE, Aug. 1, 1993, at A36 (indicating that "huaqueros" are grave robbers who steal from pre-Columbian ruins, and explaining that the term "huaqueros" is derived from the word "huanca," which is the Quechua name for burial mounds and temples).

15. See *Johnson*, 720 F. Supp. at 811-12.

16. *Id.* at 811.

17. *Id.* at 814.

18. *O'Keefe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980) ("Our decision begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft.").

19. *Id.* at 849.

20. *Id.*

21. *Diesel Equip. Corp. v. Epstein*, 169 So. 2d 61, 62 (La. 1964).

22. *Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 619 (N.Y. App. Div. 1990).

23. *Id.* at 620.

to keep them? The answer within the Anglo-American legal system is probably yes.

These situations amount to involuntary or forced sharing. In our attempts to appreciate other cultures, we must guard against involuntary or forced sharing. Forced sharing can create gaps, rips, and misunderstandings. For instance, if the Zuni<sup>24</sup> people tell the Denver Museum that they want Zuni War Gods returned, to be restored to their proper place in the elements, where the War Gods will deteriorate and bestow benefits to the tribe, the Denver Museum should-as it did-yield the items.<sup>25</sup> The Denver Museum may question whether objects of beauty should be permitted to deteriorate, but it should not control what happens to the objects. Rather, the Zuni people, as the creators of their cultural objects,<sup>26</sup> should determine how those objects are used, and when to share those objects with others.

In his opening remarks, Reverend Monsignor Franklyn M. Casale, the President of St. Thomas University, mentioned the word "respect." Respect is evident when people accept items that Indians are willing to share and do not force a parting of items that they are not willing to share. In this way, the cultures of both creators and recipients are enriched.

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24. Leonard D. DuBoff, *Protecting Native American Cultures*, 53(2) OR. ST. B. BULL. 9, 10 (Nov. 1992).

25. *Id.*

26. Adele Merenstein, *The Zuni Quest For Repatriation of the War Gods: An Alternative Basis for Claim*, 17 AM. INDIAN L. REV. 589 (1992).

