Caught in the Middle Intellectual Property and Indigenous Communities

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For centuries, museums and cultural institutions (collec tively "institutions") across North America have pur- chased, collected, catalogued, displayed, and exhibited the artwork, sacred objects, and, particularly, human remains of indigenous peoples from regions across the continent with minimal regard to the cultural importance of those items and remains to their respective tribal and native communities. One could argue that this inherent insensitivity was not intentional but due to the mission of most institutions to educate the public at large. With this mission, however, comes the obligation to responsibly display and exhibit all artwork and sacred objects with the dignity and respect of their native origins.

To gain a better understanding of what it means to exhibit such objects within the appropriate cultural context, it is important to define or at least comprehend what those objects mean to a member of one of these ethnic groups. There is no formal definition for indigenous peoples. However, during the United Nations "Workshop on Data Collection and Disaggregation for Indigenous Peoples" in New York City in January 2004, the special rapporteur prepared a background paper entitled *The Concept of Indigenous Peoples*, offering the following working definition of indigenous peoples:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[1]

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Indigenous peoples generally have a deep respect for their ancestral history, are highly spiritual, and are in many ways connected to the earth and what it provides for their existence. While many institutions display and conserve countless sacred indigenous objects and human remains for historical purposes, they haven't always done so in a manner that is mindful of the cultural respect and sensitivity the respective indigenous community would have held toward objects utilized for ancestral or ceremonial purposes.

Community Works of Art

As collection items, sacred objects from indigenous communities do not fit neatly into the categories that institutions handle. They are not historical or scientific artifacts like fossils, which may be old, rare, or scientifically significant but lack a strong present day cultural identity that transcends their illustrative value. Nor are they works of art ascribed to an individual and recognized as deserving of protection from appropriation because of their value as creative expressions. Rather they are more of a hybrid—objects for which age may not be a determining factor of relevance or value, but where an individual is not celebrated as the creator. Copyright seems the most likely means to afford protection to these indigenous works whose value transcends utility. However, indigenous communities face roadblocks when attempting to protect their works. The primary reason: indigenous cultures typically recognize community creation of intellectual property, a very non-Western philosophy. Furthermore, U.S. copyright law does not even address the idea of copyrighting "culture," which is largely what indigenous communities would want to protect. Instead, nonindigenous groups have misappropriated, and continue to misappropriate, indigenous cultural traditions (religious practices, oral traditions, music, dances, etc.) for material gain with little recourse for indigenous communities.[2]

Artist and author Richard A. Guest addresses whether existing copyright law is capable of providing the necessary protections Hopi Native Americans might seek for their hand-carved kachinas, a Hopi art form of doll carving passed down from generation to generation. He notes three reasons why existing copyright law is incapable of doing so: (1) there is no one author to claim "authorship" to the kachina; (2) contemporary Hopi kachinas are based on designs created centuries ago; and (3) copyright terms are limited under current law, and the Hopi would require a perpetual copyright term.[3] National and international nonnative groups have made "kachinas" and claimed that they are "authentic," despite being factory produced in bulk. Because they are factory produced, they cost significantly less than the real Hopi kachinas. In this way, the Hopi not only are deprived of copyright ownership, they also lose the financial benefit of selling their culture's wares.[4] Furthermore, the mass-produced kachinas flood the market like Barbie dolls and dilute the ability of the Hopi to market and sell what was once a unique, limited product.

Fixation: A Threshold Issue for Indigenous Works

For indigenous communities, sound (both spoken word and music) poses a particular challenge when it comes to the issue of protecting creative rights. Music and spoken word are an especially rich source of cultural identity, history, and heritage for indigenous peoples. Creation stories are passed from generation to generation through spoken word, often never committed to writing. Music, too, is both a means

of storytelling and celebration, shared within the community through performance. The experience of sound, and the imagery, messages, and history contained within, can be the most critical means for a community to teach its members about shared culture. It also plays a central role in enabling the communities to establish a consistent sense of identity that can withstand the pressures to adopt the cultural attributes of the outside world. In any layman's sense, this would likely lend support to the notion that indigenous sound works are indeed works deserving of protection as surely as the creative works of any individual artist deserve such protection. However, as U.S. copyright law is written, a sound work is not "created" until it is fixed in a copy or phonorecord for the first time. Sound works that are "fixed" only in the sense that they are etched in the cultural memory of an indigenous community are not protected by copyright unless and until they become fixed in a tangible/audible form.

Because sound has such power to communicate and preserve cultural heritage, it also represents a tremendous source of knowledge about the people who create it. Since the advent of recording equipment in the late 19th century, ethnographers have collected song and spoken word for the purpose of documenting the cultures of the works' origins.[5] Thus, the first "fixation" of many indigenous stories and musical performance is made by ethnographers or archaeologists studying indigenous peoples. Moreover, many such works would be considered traditional folk works, thus giving weight to the assumption that indigenous sound works are well beyond the term of copyright protection. Therefore, such works would be in the public domain even if otherwise eligible for copyright protection.[6]

Where that leaves many indigenous sound works is that they are protected by copyright only insofar as they are fixed in a recording by a researcher or compiler. In a practical sense, this means that any royalties associated with a sound recording performed by an indigenous community but fixed by an "outsider," and then assembled into a curated collection of works, are legally due the compiler, and not the community of origin.[7]

Balancing Indigenous and Institutional Interests

Compilers and indigenous communities can work together for mutual benefit. It is not unusual for the community to desire that its songs and stories be shared (something it might not have the means to do), nor is it unusual for the compiler to pay the performing musicians for their time, or the community for the right to make the recording. Also, the reality is that these recordings often have scholarly rather than monetary value, and their production may even be subsidized.[8]

Organizations like the American Folklife Center at the Library of Congress and the Center for Folklife and Cultural Heritage of the Smithsonian Institution (particularly through its Smithsonian Folkways recordings program)[9] may look to U.S. copyright law to provide the legal basis for affording rights to the communities responsible for creating traditional sound works. However, organizational practice often sets the moral obligations.[10] For Smithsonian Folkways (Folkways), policy with respect to collection of works comprised of indigenous recordings is currently evolving.[11]

Central to the current discussion about establishing organizational best practices is the concept of "repatriation" of indigenous sound works. Consistent with its mission to keep its catalogue in print forever, Folkways interprets repatriation to mean the return of a digital copy to the community of origin, as well as the informal return of some control over its use. By policy stemming from its mission, Folkways necessarily retains the copyright itself. This also acknowledges that once a sound recording has been made and distributed, it is impossible to return the original recording to the community and remove all other copies from circulation.

Folkways seeks to maintain an open dialogue with indigenous communities, and responds to requests for community influence on decisions about the works. For example, when an anthropologist raised questions about Folkways' compilation *Songs of the Western Australian Desert Aborigines*[12] and whether it was appropriate for the sacred traditions of the Ngatatjara peoples of Australia featured in the recordings to be heard by outsiders, Folkways reached out to the community. Through such inquiry, Folkways learned that the songs on the recording were not intended to be accessible to anyone other than those directly engaged in the related rites. In response, and despite its mission, Folkways took the album out of print.[13] From the standpoint of preserving cultural heritage, it is neither feasible nor desirable to take all questionable works out of circulation. The Ngatatjara recordings provide an extreme example of how one institution decided to address a culturally sensitive issue and how indigenous works need special considerations that go beyond the law.

Structured Royalty Funds for Community Works

Researchers and organizations such as Folkways also balance the responsibility of preserving and ensuring access to sound recordings with honoring and valuing the creative contributions of the communities of origin by arranging royalty payments to the communities. *Voices of the Rainforest*,[14] an album in Folkways' collection, contains recordings of the Kaluli people of Papua New Guinea. To recognize community contribution to the album, Steven Feld, the anthropologist and ethnomusicologist responsible for making the recordings, set up the Bosavi People's Fund, a nongovernmental organization controlled by the community, to be the recipient of all of the royalties earned from the recordings.[15]

With royalties received from the recordings during the last decade, the Bosavi committed to digitizing all of the recordings along with the associated text and images as well as established a fund to provide scholarships to community youth.[16] In most cases, it would not be feasible for a recorder or compiler to send all royalties earned on such a costly project, likely to earn little income, back to the community. The Bosavi fund presents an interesting case study in favor of returning at least some portion of the revenue associated with the recording of indigenous works back to the communities of origin.

Working to Building Trust: Two Case Studies

The Smithsonian Institution's National Museum of the American Indian (NMAI) has attempted to address Native American copyright concerns as well. Recently, NMAI negotiated with Ute tribal leaders for a conference in which the tribal leaders were to be recorded for museum and educational purposes,

with the possibility of licensing the recording to other museums and tribes. Due to the collaborative nature of the event, there was some disagreement about the ownership of the copyrightable material that would be produced on the recording. Part of the underlying issue was rooted in the fact that Native Americans have a severe distrust of nonnatives, dating back to their first encounters with Europeans and continuing today with the continued perceived misuse of cultural traditions and symbols. Allowing the tribe to retain copyright would garner more trust from the tribal leaders. In this instance, as a trust-building exercise, the tribal leaders retained copyright ownership and granted the Smithsonian a perpetual license to use the material for museum and other educational purposes to reach resolution. This model satisfies the needs and concerns of both parties and has been mutually beneficial.

The African American community also has a history of cultural appropriation by European and Western cultures. Since enslavement, African Americans have stored their personal property/family heirlooms close to the heart, believing these items to be at risk.[17] They shared concerns similar to indigenous peoples that their culture, creativity, and real and personal property had been stolen and misappropriated in the past. In many African American homes, one need not go further than an attic, basement, or mattress to uncover true, African American treasures. Perhaps this is why the Smithsonian's newest museum, the National Museum of African American History and Culture (NMAAHC),[18] launched its *Save Our African American Treasures: A National Collections Initiative* program (*Treasures*).[19] NMAAHC has visited communities throughout the country and requested that members of each community bring family heirlooms, photographs, quilts, personal papers, etc., to the *Treasures* event. NMAAHC does not ascribe monetary value to these heirlooms; it does not have the expertise to do so. Instead, it lends its professional conservationists to teach basic preservation techniques for storage and care of the visitors' family treasures.

Many of the participants in these events do not realize the historical and artistic value of their "treasures," viewing them only as family items with sentimental value. According to Tracey Enright, public programs coordinator for *Treasures*:

> More than 150 people brought family objects to the first *Treasures* program held in Chicago in January 2008. In the crowd was Patricia Heaston of Chicago, who brought a white sleeping-car porter's cap, and a gold-colored pin bearing the image of an African American woman. [Heaston] learned that the white porter's cap was rare (most caps were black or blue), and its color meant that its owner had tended to prominent travelers (perhaps even Presidents) on a private train car. The image on the pin was that of Madame C.J. Walker (1867–1919), the first African American female self-made millionaire. The pin was probably given as a prize to successful sales agents of Walker's hair-care products.[20]

Most importantly, Enright added, *Treasures* has proven very effective in supporting local agencies of the cities it visits. The program connects local citizens and their "basement collections" with the museums, archives, and historical societies of each city. While these events may not yield copyrighted treasures (in the monetary sense), they often provide the owners with a greater sense of pride in their culture and heritage by revealing the historical and artistic value of the pieces.[21]

Collaborative Works of Art

Collaboration as a Means to Move Forward and Build a Future Together

The Native American Graves Protection and Repatriation Act has been progressive in moving U.S. cultural institutions in the right direction. NMAI holds one of the largest collections of Native American human remains and cultural objects,[22] and is "devoted exclusively to Native American history and art"[23] and to "giv[ing] all Americans the opportunity to learn the cultural legacy, historic grandeur, and contemporary culture of Native Americans."[24] Since opening in 2004, NMAI "has repatriated more than 2,000 items to more than 100 Native communities and individuals throughout the Western Hemisphere."[25]

Institutions throughout the country are moving beyond just repatriating human remains and cultural items to native communities. They also seek collaborative opportunities with indigenous communities and cultural institutions to better understand these communities and their cultural heritage. By entering into collaborations this way, institutions are making strides toward better understanding these communities and joining with them in presenting their cultural artifacts and heritage to the public, locally and globally. Specifically, North American institutions have entered into exhibition loan agreements with Native Indian communities, Alaska Native villages, and Native Hawaiian organizations and/or their respective museums or community centers (collectively "communities") to display and exhibit sacred and cultural objects. Such collaborations may consist of (1) an institution loaning cultural items, artifacts, and artworks in its collection to a community museum; (2) a community approving the display of certain sacred objects in an institution exhibition; and (3) the creation of collaborative online catalogs.

The Smithsonian has made significant efforts to collaborate with communities for the display of various exhibitions. Beginning in 2006, the Smithsonian created a traveling exhibition, entitled *Native Words, Native Warriors*, that honors Native American war veterans in World Wars I and II. The exhibition highlights the bravery and service of code talkers who used their native languages to communicate sensitive information. This greatly assisted the United States military during combat.[26] This exhibition is unique in that it provides each native community museum with the framework of an exhibition. The exhibition consists of freestanding banners and texts, enabling each community to create its own exhibition and tell its own specific story of its history and accomplishments during the wars. The traveling exhibition is slated to tour until at least 2013.

In 2010, the Smithsonian entered into a long-term exhibition loan agreement with the Anchorage Museum in Alaska to return more than 600 cultural objects held in its collections to their native origins in Alaska. The objects are displayed at the Smithsonian's Arctic Studies Center in the Anchorage Museum in an exhibition entitled *Living Our Cultures, Sharing Our Heritage: The First Peoples of Alaska*.[27] This exhibition also is used as a teaching resource to educate the local communities about their history and culture.

In 2011, the North Vancouver Museum and Archives (NVMA) in Vancouver, British Columbia, Canada, had the rare and unique opportunity to display a *sxwayxway* mask of the Squamish Nation.[28] The Squamish Nation is comprised of descendants of the Coast Salish Aboriginal peoples who lived in the present day Greater Vancouver area—Gibson's landing and Squamish River watershed.[29] The *sxwayxway* mask holds great cultural significance for the Squamish Nation and is used in its spiritual cleansing rites ceremonies.[30] The *sxwayxway* mask that was displayed was part of the Maisie Hurley collection to be exhibited at the NVMA. Maisie Hurley was a longtime advocate for the rights of the Squamish Nation and other First Nations in Canada. Ms. Hurley "developed a significant personal friendship"[31] with one of the chiefs of the Squamish Nation, and during his lifetime, he gave to Ms. Hurley a *sxwayxway* mask that he himself had made. It had been over 30 years since such a mask was publicly displayed. A *sxwayxway* mask is held by high-ranking family members of the Squamish Nation. Once it is worn by a man during a ceremony, it is held by that family until the next ceremony.[32] The inclusion of the *sxwayxway* mask in the Maisie Hurley collection exhibition, entitled *Entwined Histories: Gifts from the Maisie Hurley Collection*, began with the NVMA initially bringing the Squamish Nation into the decision-making process regarding the mask's inclusion.[33] "With [the Squamish Nation's] expertise, all the right protocols could be followed to let the mask . . . be shown in the exhibition . . . ."[34] Consequently, the inclusion of the *sxwayxway* mask was seen as a huge accomplishment and a new beginning of a collaborative relationship between the Squamish Nation and the NVMA.

With the increased use of digital technologies, institutions are creating online exhibitions and catalogs as a means to further educate the public, particularly those who may never have the opportunity to physically visit a particular institution. With the advent of these new technologies come the challenges and opportunities to create additional collaborations between community and mainstream institutions that hold native collections.

A collaboration among six organizations—the University of California at Los Angeles Department of Information Studies, the Pueblo of Zuni's A:shiwi A:wan Museum and Heritage Center (AAMHC), the Museum of Northern Arizona, the Denver Art Museum, the Denver Museum of Nature and Science, and the Cambridge Museum of Archaeology and Anthropology[35]—sought to do just that. This collaborative three-year project developed an online catalog to assist museum curators by providing definitive and correct documentation of its collections of Native Indian artifacts and cultural objects. One of the primary concerns was the protection of Zuni intellectual property rights in the information sharing process. The project leaders would need to create a system that would combine the functions of the different entities as well as respect "Zuni practices and local social and cultural expectations."[36] From initial discussions, they devised a "system where the appropriate religious leaders would review the object information coming into the database at AAMHC and make a determination about whether specific objects [could] be accessed by all Zunis, only certain groups, or only religious leaders."[37] This approach allowed for the protection of Zuni intellectual property rights by having their appropriate religious leaders determine their level of such rights at the outset of having specific objects included in the catalog. NVMA took a similar approach by having the Squamish Nation involved in the decision-making process regarding the inclusion of the *sxwayxway* mask in its exhibition. The importance of having native communities integrally involved in determining whether a specific object should be displayed and how its access to others should be provided, either in a physical exhibition or an online cat-

alog, is extremely vital to the success of these types of collaborations. It provides for the acknowledgment and respect of the native communities' cultural heritage and the protection of intellectual property rights in the objects being shown.

Furthermore, the collaborations mentioned above were made possible through the critical development of relationships between museum staff, including curators and executives, community leaders and advisors, and those individuals, including nonnatives, who forged relationships through research and a sincere commitment to understand and respect these communities' cultural heritage.

Individual Works of Art

Recent Case Law Developments: The Emerging Importance of Licensing in Appropriation Art

There is no single homogenous style of indigenous art. Contemporary indigenous artists are striving to break down the separation between art and artifact by getting away from indigenous art as simply craft, artifact, or primitive art.[38] Fixation is not necessarily a concern for contemporary indigenous artists because they are creating new works of art. Contemporary native artist Sonny Assu stated in a 2011 interview:

> Whether it's Canada or the United States, we have [a] culture of Aboriginal people that has been now influenced by various outside sources. . . . [W]e're looking at an Aboriginal culture that has been decimated by Western culture but is now taking the influences from it. . . . I see . . . influences [on] my own personal culture coming from various different levels. It's my traditional culture and the Western culture that I grew up in; it's how we use branding and how we adopt these items of pop culture to dictate our personal linage. It's sugary breakfast cereals; it's the brand of soft-drink and type of media we consume.[39]

Works created independent of the community by individual indigenous artists depend on intellectual property protection under the U.S. copyright law in the same way as other artists. In the United States, the foundation for individual ownership of creative content is based in Article I, Section 8, Clause 8 of the U.S. Constitution. Tension between the protection offered by the U.S. Copyright Act and the constitutional First Amendment right to free speech stems from the necessary restriction of the speech of some in protecting the speech of others. The corresponding carve-out intended to ensure that speech is not chilled in the application of the Copyright Act is called fair use.[40] Fair use emerges as a common defense to copyright infringement. Whether applying fair use factors[41] to indigenous or nonindigenous works of art, artists, judges, and practitioners alike have struggled with the proper application of the legal standard. It has become an even more elusive concept as the populace advances quickly into an electronic future, where the emerging standard is one linked to licensure of the underlying rights rather than a reliance on legal principle. Two cases in the recent years address the evolving frontier of fair use: *Fairey v. Associated Press*[42] and *Cariou v. Prince*.[43]

Copyright cases are often settled out of court, so when Shepard Fairey filed a motion for declaratory judgment after being accused by the Associated Press (AP) of copyright infringement, everyone took notice. The case, although involving nonindigenous parties, is demonstrative in this discussion due to the appropriation and fair use argument and resulting outcome. Once filed, the case brought hope to

both the artistic and legal communities that the court would clarify the application of the fair use factors. While the case was never decided on its merits, there were several interesting takeaways for any appropriation artist.

The artist, Shepard Fairey, used a photograph found on the Internet of then-Senator Barack Obama to create the work which ultimately became known as the "Hope" campaign poster. Fairey made several hundred copies of the image and distributed it on the streets, made it available for download on his website, and printed it on T-shirts for merchandising distribution. The underlying photograph used in the creation of the Hope poster was taken by Mannie Garcia, a photographer employed by the AP. When confronted by the AP with his unlicensed use, Fairey sued for declaratory judgment, claiming that the photo was his own and even if there was infringement, his use was transformative in nature and therefore qualified as fair use under the meaning of 17 U.S.C. § 107.[44]

The settlement and the statements released by the parties shed valuable light on their motivations and give a strong indication of the future role licensing will play in appropriation art. The AP released this statement: "Mr. Fairey has agreed that he will not use another AP photo in his work without obtaining a license from The AP."[45] The AP also stated that this was a "clear reminder to all of the importance of fair compensation for those who gather and produce original news content."[46] The AP photographer, Mannie Garcia, told the *New York Times* that he was very happy when he found out that his photo was the source of the poster image but didn't "condone people taking things, just because they can, off the Internet."[47]

The message from both the photographer and the AP is not an objection to the use of their work, but rather to the *uncompensated* use of the work, which is resolved through licensing. At the close of the *Fairey* case, instead of the sought after illumination on fair use in appropriation art, what we see is a business practice filling the gaps and uncertainty left open by the law.[48]

Soon after *Fairey*, the art world was rocked by a second fair use appropriation art case: *Cariou v. Prince*.[49] Patrick Cariou, a professional photographer, spent approximately six years in Jamaica, living with Rastafarians, gaining their trust, and taking their photographs. Cariou ultimately published *Yes, Rasta* in 2000.[50] Cariou sued Richard Prince, Gagosian Gallery, Lawrence Gagosian, and Rizzoli International Publications for copyright infringement in 2009, when he became aware that Prince had used approximately 35 photographs from *Yes, Rasta* in his most recent appropriation art series called *Canal Zone*.[51] Prince had used images taken from *Yes, Rasta* in a variety of ways, enlarged, cropped, tinted, painted over, and collaged with appropriated photos from other artists.[52]

The federal district court granted Cariou's motion for summary judgment and found that Prince had acted in bad faith by failing to seek a license from the photographer.[53] The case is currently on appeal before the Second Circuit.[54] The court's finding of Prince's failure to license to be evidence of bad faith takes the licensing element discussed in *Fairey* one step further, putting an affirmative duty on the defendant to seek a license first, or else risk being found to have acted in bad faith by the court. While requesting a license is arguably the most conservative approach, it is not a requirement of fair use. By incorporating Prince's failure to obtain a license into its analysis of "the propriety of [the] defendant's

conduct," as part of its consideration of the first fair use factor of the work's character of use,[55] the district court ruling in *Cariou* moves us closer to compulsory licensing. In the instance where appropriation artists for one reason or another are unable to get a license, are the scales now weighed further against them in presenting their fair use defense in asserting their right to free speech?

The license is certainly a practical, cost-effective solution to situations like these. Before *Fairey* and *Cariou*, a lawyer advising appropriation artist clients on the fuzzy degradations of fair use might well steer them clear of appropriation works entirely because of the risk of unpredictable and costly litigation.[56] Now it is clear that one should advise clients to first seek a license, and if they cannot get a license either because the copyright holder is uncooperative or cannot be found, then to avoid it entirely. Otherwise, the appropriation artist risks being seen by a judge as having acted in bad faith. As contemporary indigenous artists appropriate images, brands, and sounds from mainstream culture for use in their works in order to comment on the intersection between Western culture and their own, they might consider the cautious route and seek a license.

Emerging Institutional Duty to Inquire into Ownership

The other ruling from *Cariou* shaking up the art community is the district court's finding regarding Gagosian's direct, contributory, and vicarious copyright infringement liability for distributing images of and selling paintings from *Canal Zone*.[57] In addition, the judge ruled that Gagosian had "at the very least the right and ability (and perhaps even responsibility) to ensure that Prince obtained licenses."[58]

A recent copyright infringement suit was filed in the U.S. District Court for the District of Colorado against nine galleries by the widow of prominent Native American painter Earl Biss. Biss's works are part of the U.S. Department of State's *Art in Embassies* program and were hung in the Brussels embassy in 2010.[59] The galleries have allegedly profited by more than $3 million in the unlicensed sale of Biss's works and reproductions of his works. The basis of the claim is that the "Defendants know, and reasonably should know, that Plaintiff's or Earl Biss's permission was or is required to reproduce copies of, to distribute, to sell and publicly display copies of the Biss Works."[60]

Although *Biss* is decidedly different in nature from *Cariou* as the case involves misappropriation rather than appropriation issues, it is perhaps evidence of a growing demand for institutional accountability. Given the practical leap from gallery to museum, it's really no surprise that several institutions have filed amicus briefs in *Cariou*.[61] There is a very real concern that this extension of liability will cripple museums in fulfilling their social roles. Columbia University law professor Philippa Loengard commented:

> Are they suggesting that galleries go into the studios of artists and say, you can't do that because that might not be fair use and we might lose a lot of money? . . . Do they have to have insurance? Are they supposed to demand changes to work before exhibiting, a sort of pre-exhibit review? [62]

Ms. Loengard has a point in that this is certainly raising a lot of questions for galleries and museums alike. If a court is willing to find liability for the display and sale of an appropriation artist's work, it is easy to see liability extending to all manner of intellectual property and cultural property display disputes.

Previously, galleries and museums have been fairly insulated from these disputes, receding into the background as the artists fought in court. *Cariou* has opened the door to gallery accountability in a way that may not be practical to predict. It will take some time to see whether or not this is a trend that will catch on in intellectual and cultural property disputes.[63] In the event the trend continues, those involved in the display of artworks can look to the Online Copyright Infringement Liability Limitation Act (OCILLA)[64] to develop guidelines on how to responsibly limit liability. Although not completely analogous, OCILLA deals with a similar concern over the display of works and with the widespread use of digital technology. The physical boundaries of galleries and museums are quickly deteriorating while the digital landscape is expanding, so a certain amount of overlap between the two areas may already make sense.

Conclusion

Much work remains, but it is heartening that institutions, indigenous communities, and artists alike are learning from past mistakes and finding the creativity and flexibility among themselves to come together in so many unique ways. As the legal landscape grinds slowly in the background, struggling to keep up with both cultural and technological advances, and as elements of these advances become less distinguishable from one another on the terms defined by our legal system, it remains to be seen whether and to what extent these burgeoning relationships will be tested.

Endnotes

1. United Nations, Dep't of Econ. & Soc. Affairs, Background Paper Prepared for the Workshop on Data Collection and Disaggregation for Indigenous Peoples: The Concept of Indigenous Peoples (Jan. 19–21, 2004), *available at* http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc.

2. *See* Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995–96); Suzanne Milchan, Note, *Whose Rights Are These Anyway?—A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157 (2003–04).

3. Guest, *supra* note 2, at 125.

4. There are some who suggest that Congress should pass a statutory exemption to the U.S. Copyright Act that would recognize collective property rights for Native Americans under copyright law. For example, one author argues that Congress has passed other legislation with regard to Native Americans' property and familial rights, but no legislation addressing copyright issues. He states that, although his opinion may be "paternalistic, . . . [s]uch an exemption would have to recognize the 'different-ness' of Native American cultural property, which is often in oral form and does not have a single, identifiable author." Philip Bennett, *Native Americans and Intellectual Property: The Necessity of Implementing Collective Ideals into Current United States Intellectual Property Laws* (Fla. Int'l Univ. Coll.

of Law, Working Paper, 2009), *available at* http://ssrn.com/abstract=1498783. *See also* Indian Arts and Crafts Act of 1935, 25 U.S.C. §§ 305–305c (1994) (protecting Native American arts and crafts and supporting Native American tribal trademarks); Indian Child Welfare Act of 1978, 25 U.S.C. § 1911 (providing authority to tribal governments with respect to Native American children involved in custody disputes); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001–13 (providing that Native American human remains and cultural objects found on federal and protected land after November 1990 must be returned to the federally recognized Native American tribes).

5. For more on this topic, consider, for example, the Federal Cylinder Project of the Library of Congress, repatriating thousands of wax-cylinder ethnographic recordings made on the Edison cylinder machine beginning as early as 1890. *See A National Project with Many Workers*, AM. FOLKLIFE CENTER, http://www.loc.gov/folklife/guide/nationalproject.html (last visited Jan. 16, 2013).

6. 17 U.S.C. § 305.

7. Because copyright requires fixation, and a work in the context discussed herein isn't fixed until an unrelated party records it, then arguably the copyright is only in the recording owned by the unrelated party—a problem for the indigenous originator. *Id.* §§ 101 *et seq.*

8. *See* Anthony Seeger, *Singing Other Peoples' Songs: Indigenous Songs Are Often Considered "Public Domain"—Yet a Mainstream Musician Can Turn Them into "Individual Property,"* CULTURAL SURVIVAL Q. (Fall 1991).

9. The mission statements of these institutions provide for the collection, preservation, and accessibility of recorded sound.

10. The concept of moral rights, recognizing that artists have the right to attribution for their work and for the integrity of their works to be preserved, is a concept not yet fully recognized in the United States, even though the concept is incorporated into the Berne Convention, to which the United States has been a signatory since 1989. Organizations looking to help establish international best practices with respect to moral rights include the World Intellectual Property Organization and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention). The ICH Convention defines cultural heritage broadly to include, among other things, the oral traditions, performance arts, and social rituals of indigenous communities, and commits its member states (the United States is not currently a member) to safeguard, ensure respect for, and raise awareness of the intangible cultural heritage. *See* UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, *available at* http://unesdoc.unesco.org/images/0013/001325/132540e.pdf.

11. Many indigenous recordings in the Folkways collection are historical compilations dating from its founding as Folkways Records & Service Co. by Moses Asch in 1948 through 1987 when the label was acquired by the Smithsonian Institution following Asch's death.

12. Recorded by R.A. Gould, Asch Mankind Series, AHM 4210, 1968, 33 1/3 rpm.

13. The recording remains available for study on a limited basis at Folkways' Ralph Rinzler Folklife Archives and Collections.

14. Recorded and Annotated by Steven Feld, Mickey Hart Collection, HRT15009, 1991.

15. Sita Reddy & D.A. Sonneborn, Ctr. for Folklife & Cultural Heritage, Smithsonian Inst., *Sound Returns: Towards "Best Practices" at Smithsonian Folkways Recordings*, *in* AFTER THE RETURN: DIGITAL REPATRIATION AND THE CIRCULATION OF INDIGENOUS KNOWLEDGE (2012).

16. *Id.*

17. Eric V. Copage, *The Race to Save Black History*, EBONY, Feb. 2008, at 116; Robin Givhan, *Black Fashion Museum Collection Finds a Home with Smithsonian*, WASH. POST (May 23, 2010), http://www.washingtonpost.com/wp-dyn/ content/article/2010/05/21/AR2010052101654.html; Jan Tarr, *African American Historical Collection to Be Displayed*, COURANT (July 1, 1999), http://articles.courant.com/1999-07-01/news/9906300065_1_black-history-history-center-center-street.

18. The NMAAHC building is scheduled to open in November 2015 on the National Mall in Washington, D.C. Although the physical museum is in the process of being built, NMAAHC has curated exhibits and created community programming, and has an online presence at http://nmaahc.si.edu/.

19. For more on *Treasures* and other NMAAHC public programs, see http://nmaahc.si.edu/Programs/.

20. Tracey Enright, *Save Our African American Treasures*, BIGGER PICTURE (Mar. 29, 2011), http://siarchives.si.edu/blog/save-our-african-american-treasures.

21. As part of a public program organized by NMAAHC's education department, NMAAHC invited Carlotta Walls LaNier to speak about her book, *A Mighty Long Way: My Journey to Justice at Little Rock Central High School*, in an open forum. Afterward, to NMAAHC's surprise, Ms. LaNier donated a dress she wore while being denied access to Little Rock Central High School, as well as some of her report cards and other personal records.

22. *Repatriation: The History of Repatriation at NMAI*, NAT'L MUSEUM OF THE AM. INDIAN, http://nmai.si.edu/explore/collections/repatriation (last visited Jan. 17, 2013).

23. National Museum of the American Indian Act, 20 U.S.C. § 80q(2).

24. *Id.* § 80q(5)(B).

25. *Repatriation: Human Remains*, NAT'L MUSEUM OF THE AM. INDIAN, http://nmai.si.edu/explaore/collections/repatriation (last visited Jan. 17, 2013).

26. *Native Words, Native Warriors*, SMITHSONIAN INSTITUTION TRAVELING EXHIBITION SERVICE, http://www.sites.si.edu/ exhibitions/exhibits/codetalkers/main.htm (last visited Jan. 17, 2013).

27. *Living Our Cultures, Sharing Our Heritage: The First Peoples of Alaska*, ANCHORAGE MUSEUM, http://www. anchoragemuseum.org/expansion/smithsonian.aspx (last visited Jan. 17, 2013).

28. Kevin Griffin, *Rarely Seen Artworks on Display*, VANCOUVER SUN, Jan. 22, 2011, *available at* , http://www.northvanmuseum.ca/documents/MaisieHurleyVanSunJanuary222011.pdf.

29. *About Us*, SQUAMISH NATION NETWORK, http://squamish.net/aboutus/modernProfile.htm (last visited Jan. 17, 2013).

30. Griffin, *supra* note 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *About the Project*, DIGITAL DIVERSITY, http://www.digital-diversity.org/?page_id=109 (last visited Jan. 17, 2013).

36. *IMLS Progress Report*, CREATING COLLABORATIVE CATALOGS (May 2, 2010), http://collaborativecatalogs.blogspot.com/2010/05/imls-progress-report.html.

37. *Id.*

38. *Changing How We See Native American Art*, YALE PRESS LOG (Apr. 12, 2012), http://yalepress.wordpress.com/2012/04/12/changing-how-we-see-native-american-art/.

39. Crystal Baxley, *Sonny Assu—Laich-kwil-tach (Kwakwaka'wakw)*, CONTEMP. N. AM. INDIGENOUS ARTISTS (Spring 2011), http://contemporarynativeartists.tumblr.com/post/6030123932/conny-assu-kwil-tach-kwakwakawakw. See also Sonny Assu's *The Breakfast Series*, *iPotlatch* and *Coke Salish* series for examples of how one indigenous artist is using appropriation art to express himself.

40. 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

41. *Id.*

42. 09 Civ. 01123 (S.D.N.Y. Feb. 9, 2009).

43. 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

44. Fairey claimed no personal profit from use of the underlying photograph or promotion of his version of the work. His claim was substantiated by Yosi Sergant, a publicist Fairey worked with, who stated that all profits made from the sale of the Hope image went back into production in furtherance of the campaign. Ben Arnon, *How the Obama "Hope" Poster Reached a Tipping Point and Became a Cultural Phenomenon: An Interview with the Artist Shepard Fairey*, HUFFINGTON POST (Oct. 13, 2008), http://www.huffingtonpost.com/ben-arnon/how-the-obama-hope-poster_b_133874.html.

45. Randy Kennedy, *Shepard Fairey and the A.P. Settle Legal Dispute*, N.Y. TIMES (Jan. 12, 2011), http://www.nytimes.com/2011/01/13/arts/design/13fairey.html?_r=0.

46. Randy Kennedy, *Shepard Fairey Is Fined and Sentenced to Probation in "Hope" Poster Case*, N.Y. TIMES (Sept. 7, 2012), http://artsbeat.blogs.nytimes.com/2012/09/07/shephard-fairey-is-fined-and-sentenced-to-probation-in-hope-poster-case/.

47. Randy Kennedy, *Artist Sues the A.P. over Obama Image*, N.Y. TIMES (Feb. 9, 2009), http://www.nytimes.com/2009/02/10/arts/design/10fair.html.

48. This is not a new practice, just one that has been called into focus in the last few years. Many great appropriation artists had to learn the hard way that licensing was the better way to go about expressing their creativity. *See also* Laura Gilbert, *No Longer Appropriate?*, ART NEWSPAPER, May 2012, *available at* http://www.theartnewspaper.com/articles/No-longer-appropriate/26378, for a good summary of similar patterns among well-known appropriation artists.

49. 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

50. *Id.* at 343.

51. *Id.* at 344.

52. *Id.*

53. The court determined that the defendant's bad faith was evident by the fact that Prince had made contact with Cariou's publisher to obtain extra copies of the book, but never inquired about a license or asked for permission to use Cariou's works legitimately. *Id.* at 351.

54. Prince v. Cariou, No. 11-1197 (2d Cir. Mar. 28, 2011).

55. *Cariou*, 784 F. Supp. 2d at 351.

56. Robert Kirk Walker, *Artspeak v. Legalese: Transformative Use and the Importance of Defining Creative Practice Following* Cariou v. Prince, (Univ. of Cal. Hastings Coll. of Law, Working Paper, Apr. 9, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037420.

57. *Cariou*, 784 F. Supp. 2d at 354–55.

58. *Id.* at 354; *see also* Charlotte Burns, *Patrick Cariou Wins Copyright Case against Richard Prince and Gagosian*, ART NEWSPAPER (Mar. 21, 2011), http://www.theartnewspaper.com/articles/Patrick+Cariou+wins+copyright+case+against+Richard+Prince+and+Gagosian/23387.

59. Julia Halperin, *Widow of Native American Painter Earl Biss Sues Nine Galleries for Copyright Infringement*, IN THE AIR (June 11, 2012), http://blogs.artinfo.com/artintheair/2012/06/11/widow-of-native-american-painter-earl-biss-sues-nine-galleries-for-copyright-infringement/.

60. *Id.*

61. If one can establish liability for an action such as this with a gallery, the argument could apply equally to a museum or other nonprofit involved in the display of artworks. The Andy Warhol Foundation for the Visual Arts, Inc.; the Association of Art Museum Directors; and Picture Archive Council of America, Inc., filed amicus briefs in the appeal. Prince v. Cariou, No. 11-1197 (2d Cir. Mar. 28, 2011).

62. Rachel Corbett, *A Win for Richard Prince in Copyright Case*, ARTNET, http://www.artnet.com/magazineus/news/corbett/prince-wins-right-to-appeal-in-cariou-v-prince.asp (last visited Jan. 17, 2013).

63. This is not a completely novel concept, as Sonnabend Gallery was a named defendant in *Rogers v. Koons* in 1992. 960 F.2d 301 (2d Cir. 1992).

64. Passed in 1998, OCILLA creates a "safe harbor" for online service providers and other Internet intermediaries by shielding them from potential secondary liability for the infringing acts of others, among other things. 17 U.S.C. § 512.