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Intellectual Property Rights: A Focus on Photography of Native Americans

Jennifer Wiggins

In 1990, many believed that Native Americans were aided in their fight for equality and justice with the passing of the federal Native American Graves Protection and Repatriation Act (NAGPRA). This act did not, however, include items of intellectual property such as photographs. It is now vitally important, as we enter the technological age, that Native Americans regain control of their images, beliefs, and religion that are captured on film. However, it is not feasible that all photographs depicting Native Americans can be returned. Those to which they do have a viable reclaimance are the photographs that show private religious ceremonies, which were taken by anthropologists and photographers between the mid-1800's and early 1900's. These religious photographs, now held by museums, represent the intellectual property of the whole tribe and thus should be returned.

In 1990, the Native American Graves Protection and Repatriation Act (NAGPRA), which aided Native Americans in their fight for equality and justice, was passed. NAGPRA illustrates the federal government's belief that Native Americans have the legal right to possess their own religious objects, which at one point were taken or given away. This act forced federally funded museums to return all Native American human remains, unassociated funerary objects, cultural patrimony, and sacred objects. However, in NAGPRA the federal government neglected the subject of intellectual property rights. According to Messenger, "All peoples have a right to those cultural properties which form an integral part of their cultural heritage and identity (i.e., their 'national patrimony')" (Messenger 1989:8).

In an age of visual images, photographs of Native Americans are often detrimental to the Native Americans' cultural image. These depictions frequently perpetuate negative images and stereotypes. In addition, many elements of the Native American culture, some of which were of private religious ceremonies, were subjects of photographs. Many Native American tribes view this as an invasion of cultural privacy, and are now calling upon museums to restrict access to these photographs. They are also developing methods to retrieve these sacred, religious, and defamatory photographs from the museums.

INSTANCES OF DEFAMATION

Native Americans have been combating the negative images that non-Indians have conjured up for decades. By repressing Native Americans through defamatory images, in the United States, we end up squashing their rights to equality. If the public views Native Americans as "redskins," "savages," "alcoholics," and so on, there is little chance that their intellectual property will receive proper protection or that their culture will be given appropriate respect and rights under the United States

law. Thus, it is important that Native Americans fight to squash and gain control of these images, to save their culture.

One modern medium of defamation is the sporting industry. In the world of the sporting industry, not many people care who they are offending or ridiculing, if it earns them the "easy buck." Many sporting teams are associated with names, logos, and "actions" that are seen as racist, degrading, and defamatory to Native Americans. This happens not only at the national level, but also with represent university and college teams, high school and middle school teams, and even with grade school teams. Two examples are the Washington Redskins and the Atlanta Braves, with their "signature" tomahawk chop. Under normal circumstances no one would get away with calling a team the "redskins," for it is the same as calling a team the "N....." Supposedly under the Lanham Act, Section 2, which was passed by Congress in 1946 (15 USC. SS 1051-1127 [1988]), teams should be prohibited from using such terms and symbols as trademarks for they "Consist(s) of or comprise(s) immoral, deceptive, scandalous, matter: or matter which may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs, or national Symbols, or bring them into contempt, or disrepute" (Pace 1994:8).

However, this law only goes so far to prevent a team or company from registering a trademark. If they still choose to use the trademark and not register the symbol—that is acceptable. This means anyone can use and market the same name and symbol for their own profit. It comes down to being an economic deterrent; if the team or company wants to risk losing money on an unprotected symbol they can choose to do so.

Normally, an ethnic group could protest and eventually have the trademark name changed so as not to offend their ethnicity or race. This takes a group that is large and loud enough to be heard. African Americans present

such a power, as evidenced by the Million Man March, or by their ability to have the Quaker Oats Company change their "Aunt Jemima" product's image, so not to portray African Americans in a degrading fashion (Pace 1994:2). Native Americans do not have the population numbers to manage this type of pressure, since their numbers have been forcibly decreased in size ever since colonial contact.

The Native American voice is just now beginning to be heard. As sovereign nations, Native American tribes are winning federal court ruling to keep their treaty rights, e.g., their right to traditional environmental resources. They are also benefiting from NAGPRA, and their ability to retrieve their ancestors and religious artifacts from museums. Unfortunately, the courts have done nothing to stop the defamation they deal with on a daily basis.

One might expect that defamatory remarks and symbols would be covered in the new hate crime legislation. However, the law states that a hate crime is "...a legally prohibited activity motivated by...being different. Thus hate offenses are directed against members of a particular group simply because of their membership in that group" (Levin and McDevitt 1993:4). Being "different" includes race, ethnicity, religion, sexual orientation, and gender. Name and identity slurring is not considered brutal enough to be called a crime. For a behavior to classify as a hate motivated act, one or more people must be physically tormented while the tormentor yells defamatory remarks.

PHOTOGRAPHY OF NATIVE AMERICANS

Native Americans have watched their cultural image attacked on the sporting field, in advertisements, and in the visual field of photography. Thus, it is no surprise that NAGPRA was a cultural "win" for the Native Americans. However, for all NAGPRA accomplished for Native Americans, it left many gaps—one of which was photography. When Native American tribes began communicating with museums about NAGPRA, some tribes started requesting supplementary inventory lists. The Hopi tribe, through its Tribal Chairman Vernon Masayesva, is one of many that has requested any "...archival material (that) includes sensitive information contained in field notes, artifact/ material collections and photo and film archives" and any published or unpublished field notes and records, "...that document esoteric, ritual and privileged information on religious and ceremonial practices and customs" of their tribe (Haas 1996:S4). However, these inventory lists are only the beginning stage.

There are many photos that step beyond the bounds of privacy and are degrading to Native Americans; however, the process of legally recovering these photographs is a slow one with many small steps, starting with inventory lists and restrictions. Native Americans do realize that NAGPRA can be used as legal leverage in court. Thus, Native Americans will look to the Federal Courts for a ruling on the return of Native American intellectual property rights, beginning with photographs of Native Americans taken between the mid-1800s and into the early 1900s. There are, however, many different aspects of photographs on which the courts will need to deliberate.

Posed Photographs

During this time period there were many different types of photographs taken of Native Americans, and the courts will have to take each type into account. The first type of photographs are those that are posed. Many argue that some of these poses portray Native Americans in a defamatory and degrading manner. Rick Hill discusses many different styles of Native American posed photographs. One such style portrays Native Americans as "naked savages." "Photographs of nearly naked Indians served to reinforce the view of white society as morally and culturally superior" (Hill 1996:114). Some illustrate Native Americans as the "vanishing American," where "...Indians (are) caught in the timeless past... (to) serve as a reminder that, as part of Manifest destiny and cultural Darwinism, Indians are an inferior race meant to disappear because of their own cultural flaws" (Hill 1996:114).

Though these types of photographs are demeaning to Native Americans, in all probability there will be a problem reclaiming photographs that are posed. Posing for photographs presumes consent. Native American tribes today will most likely have no legal control over these types of photographs. During the 19th Century, however, Native Americans did not realize that these photos would be used to create and perpetuate negative images of Native Americans. They most likely saw the experience as a way to capture their image forever; an image that people would honor and respect (Holman 1996:99). In the early 1880s William Curtis quoted Old Pedro Pino in a discussion concerning photography, "Though your body perish, nevertheless you shall continue to live upon the earth" (Holman 1996:99). It is because of these beliefs that consent was given.

Although legal recourse is limited, Native Americans may request museums to limit the public and scientific access to these types of photographs. It is also possible

that the museums and Native American tribes can work together, by having individuals who request the use of such photographs contact the appropriate tribe for approval first. It is through cooperation such as this, that both the museums and tribes benefit.

Photographs Without Permission

Not all photographs of Native Americans from this time period are posed. There are many photographs that show Native Americans with their heads down or looking away from the camera, in what appears to be avoidance of the photograph. There are others in which one questions if the Native Americans even knew they were being photographed. It was at this early point in time, that there was little to no legislation that stated photographers needed to have permission of consent from their subject. Many photographers argue that this legislation is a form of censorship of artistic expression (Ward 1995:75), when in actuality it is the protection of the right to privacy. Privacy that many photographers invaded, when dealing with Native Americans.

It is with these types of photographs that Native American tribes could argue invasion of privacy. However, current law will not allow such a claim by anyone but the subject of the photograph: "...invasion of privacy claims may only be made by the subject, or on the subject's behalf by the legal representative...." (Ward 1995:79). Unfortunately, these photographs were taken a generation or two ago, and so this is not possible. Even if these types of non-posed photographs were allowed to be reclaimed, there would be a large discrepancy on which photographs fall into the category of intrusion of privacy. In reality, it is highly unlikely this would be resolved. It would again come down to the museums and the tribes working together, on a case to case basis.

Religious and Ceremonial Photographs

The type of photographs to which Native Americans will most likely win a claim are ones of religious and sacred matters. Many Native American tribes believe these types of photographs are an "inappropriate use of images. Publication of such photographs is a direct assault on a crucial core of their—of any—culture" (Powers 1996:131). The photographs may not be outright demeaning, but they do illustrate a part of Native American culture that, for many years, the United States Government would not allow them to practice. Under the 1978 American Indian Religious Freedom Act (AIRFA), Native Americans were again able to openly practice their religion—a right they don't want to lose

again: "They didn't think they would ever lose their culture. But today they are afraid that they might lose it. And when you are afraid, you hold it closer to you, you show less people and you become more private" (Roessel 1996:88).

Yet with everything Native Americans have endured, they still share their religion and beliefs with the rest of the world. They accomplish this through powwows, poems, books, songs, and even through objects. It is through these mediums that they can also control what others see and learn. This gives them the ability to protect what is sacred and religious to them. However, they lose their guardianship over their religion, culture, and image when mediums, such as photography, are taken from their control.

AIRFA, calls upon the government to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions." (Vecsey 1995:7). Under NAGPRA, the government called upon museums to return Native American items that are sacred to their religion (including human remains). Now, tribes are calling upon museums to return religious intellectual property, in the form of photographs. "Photographs may depict dances, religious leaders in regalia, holy objects, religious buildings (exteriors or interiors), and shrines (including some pictographs)" (Powers 1996:131). As these past Federal rulings show, it is the Native Americans' right to possess religious objects and their images.

However, these photographs could present some potential difficulties regarding the subject of consent. are taken at such a distance away from the religious dance, place, or person, that it can be assumed that consent was never given, and it is an invasion of privacy. However, some were taken at close range, and one can assume that consent or allowance was given. It is also known that photographers would pay tribal leaders and others to allow them to take photographs of religious and sacred dances and ceremonies, sometimes even against the wishes of other tribal members. John Hilers described reactions of the Zuni in 1879: "While the priests and other high officials favored photographing the ceremonials...the populace were so opposed to having their masks and rituals 'carried away on paper'..." (Holman 1996:100). Yet, one must remember that payments were not limited to photographs. People also paid for Native American sacred and religious objects. In some cases, these objects were given away, as a gift or as a form of payment for services rendered. Under the laws of NAGPRA, these objects had to be returned to the appropriate tribes. It is believed that no one Native American had the right to give or sell a piece of the

culture's religion; this should also apply to religious and sacred photographs.

Religious and sacred photography is also considered offensive and dangerous, for it is believed that photographs of certain items can usurp their spiritual powers. "Certainly this is clear with sacred materials, such as photographs of sandpaintings being used in healing practices, for a photograph preserves something that is to be consumed in the healing" (Faris 1996:68). In cases like these, the photographs should have never been taken. However, they do exist, but that does not mean they should be utilized. Another example are the carved house posts of the Makah and Puget Sound Salish, "Guardian spirit figures were carved on house posts and represented the spirit powers of the owner. These objects were sacred and had to be protected from outsiders" (Marr 1996:54). Thus, photographs of their homes were forbidden, so there was less chance of the carved posts being photographed.

Restrictions on photography of religious and sacred matter is nothing new to the world. The Hopi prohibited photography at their religious ceremonies in 1915, because they found it disrupting (Jacknis 1996:6). The Zuni, among other tribes, have restricted photographs of certain type of dances, which were seen as very sacred and religious.

The point raised about dances is that since the nineteenth-century photographs, many pueblos have explicitly requested that sketches and photographs not be made of certain religious activities and items, but the requests were not always honored. Thus many nineteenth-century photographs were taken in express disregard of the desires of religious and other leaders. (Powers 1996:132).

It is because of photographs and photographers like these that Native Americans must now request the photographs back. The photographers clearly were at fault in regards to invasion of privacy. Thus, museums should immediately restrict access of these photographs and eventually return the photographs to the appropriate tribes.

TECHNOLOGY CREATES URGENCY

These requests for restriction, and eventually return, could have not have come at a more urgent time. Presently, technology is surpassing the laws of protection. "The law always lags behind technological advances and cannot, in any event, precede a consensus based upon ethical concepts the community is willing to support and sanction" (Branscomb 1994:80). Today, computers and the Internet have propelled us into an age in which everything is at a touch of a button, including

photographs. The first problem with this is that by dispersing photographs, Native Americans will have no capabilities of control and regulation. Once again their religious, sacred, and also defamatory photographs will be placed in hands that can misappropriate their culture. It is at times like these that Native Americans must grasp onto their culture in fear that it could be destroyed and lost: "And when you are afraid, you hold it closer to you" (Roessel 1996:88). Thus, it is extremely important that Native American tribes immediately move to restrict access to Native American photography, and eventually require its return to the tribes.

The second problem with current technology deals with copyright protection of photography. Copyrights of photographs are normally held by the photographer; however, once a museum owns a photograph, they possess the copyright. "The 1976 Act expressly states that the owner of a work automatically acquires the exclusive rights to do and to authorize any of the following..." (Weinstein 1987:47): "...(1) reproduce, (2) create variations of, (3) distribute publicly, (4) perform publicly, and (5) display the creative work publicly" (Weinstein 1987:5). However, if a museum allows a private company, such as Bill Gates' company Corbus, to digitize photographs onto the computer, without a work-for-hire contract, they could lose the rights to that digitized photograph. It is possible that the medium and the "concept" of the photograph can be altered enough, through digitalization, to warrant a new copyright.

Many museums that are allowing private companies to digitalize photographs of their objects and images, do not understand the implications. However, they also do not possess the financial capabilities to digitalize the images themselves, a practice which would allow them to retain the copyrights of those objects and images. Thus, museums allow companies to digitalize these images for CD-Rom and Internet, in return for free advertising and publicity. These companies benefit by now owning the copyrights over the digital images, which allows them to disperse them and charge for their use, even to the museums who own the objects and Native American tribes from which they were derived.

The museums might be gaining greater visibility by digitalizing these images, but the Native American community is losing more of their culture and religion to the general public. "History has demonstrated to the Pueblo people that once photos, designs, stories, or ceremonies are public, a Pueblo Indian tribe cannot stop their use for individual gain" (Pinel 1994:44). It is this individual gain that hurts all Native American tribes. The best method of controlling the release of photographs is to return them to their appropriate tribes. Then the

tribes will own the exclusive copyrights to the photographs, under the 1976 Copyright Act. Laws will also have to be established regarding copyright laws of digitalized images.

REGAINING CONTROL

The tribes' first step in recovering these photographs has been to request inventory lists, along with asking museums to restrict access to these photographs: "...the governor and the tribal council of the Pueblo of Zuni will formally request that museums and archives holding photographic images of Zuni religious ceremonies place restrictions on access to these images by scholars and commercial users" (Holman 1996:93). However, this request of restriction does not stop museums from allowing access; they don't have to supply inventory lists to the tribes; and they can still digitalize images. A federal act is needed, requiring museums to return photographs of Native Americans to the appropriate Native American tribes. This can be done by creating a separate act for Intellectual Property, or the act could be attached to the Native American Graves Protection and Repatriation Act (NAGPRA). The latter is most probable, for photographs could fall under the heading of inalienable communal property, as they have traditional, historical, or cultural importance to the tribe. Communal property items are considered to be property of the whole tribe and not of just one individual within the tribe. Thus even if a photographer was given consent by an individual to take a photograph of a religious or sacred matter, it doesn't matter, for that individual never had the right to do so.

If an Intellectual Properties Rights act concerning photographs of Native Americans is to be attached to either NAGPRA or to an act based on NAGPRA, there are many issues to be considered. First, it must be determined if all photographs of Native American images will be returned, or if only certain types of photographs will be returned. If only certain types of photographs are returned, most likely these will be of religious and sacred matters, because of the existence of such acts as NAGPRA and AIRFA which set the tone.

The next issue is the problem of determining with which tribes the photographs are affiliated. If proper documentation is available on the photographs, museums will not have much difficulty identifying which photograph belongs to which tribe. However, this is not always the case. Some photographs might not be able to be identified, in which case it is probably best the museum retain the photograph and restrict its access. Also, as under NAGPRA, it is probable that only tribes

found on the Federal Registrar will be able to receive their intellectual property back. In order to be recognized by the Federal Registrar, tribes must be ethnically and culturally identifiable and have had a continuous and autonomous existence throughout time. Thus, groups who have recently formed or are a political faction that separated from the main body, will most likely not be recognized. Thus, they are not able to qualify for the return of their intellectual property.

It must always be remembered that federal acts only administer jurisdiction over federally funded museums. Thus, any private museums that receive no federal funding are exempt. Those museums who do receive federal funding must abide by the act. However, these museums are currently having difficulty abiding to NAGPRA, because of the expense. Thus, if funded museums must return intellectual property, they will need federal assistance to do so.

Consideration of time limits, for both the museums and the Native American tribes, must also be considered. In NAGPRA, museums have time limitations set upon them to complete inventory of the items, send notice letters to the appropriate tribes, and then actually return the items. These time limitations would also have to be set in the case of intellectual property. It is advisable that the tribes also have time restraints. Under NAGPRA, tribes do not have to have their items returned and can leave them with the museums. Then, at a later date, the tribe can request the return of the item. However, with photographic material this can be difficult. If Native American tribes are not interested in the return of the photographs, museums would still retain the copyrights over the photographs and could digitalize them. Thus, if a tribe requested the return of a photograph after it has been digitalized, they have little chance in controlling the digitalized copyright. This leads them right back to where they began. It is important that laws be created immediately to return intellectual property to Native Americans, before all control is lost.

CONCLUSION

Native Americans have endured through the centuries, but not without struggle. They have watched as their cultural identity was slandered by defamatory images, and as their cultural privacy was invaded by photography. Yet decades later, they are slowly beginning to regain control over their culture and the images that represent them. However, never has it been so urgent for them to gain control than in this technological age. If they are unable to act soon, they may never be able to contain their images, beliefs, and

religion. They may not be able to provoke the federal government to act fast enough for legislation protecting their intellectual property, but until then they can begin to request restraint by the museums. It is only through cooperation from museums that the Native Americans can save part of their culture before it is peeled and chiseled away from them once again.

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