

Thomas declared that he has no objection to the flag being reproduced freely by Aboriginal people themselves. What he wanted was to control its use by others, who must ask him for permission and, if permission is granted, purchase it from a licensed manufacturer.²¹

A national flag is by definition a public symbol, one of the most potent that a group possesses. Its power ensures that it will be used for many purposes, some of which may not be pleasing to the group's members. Hence the persistent quest of American conservatives for a constitutional amendment to criminalize desecration of the U.S. flag. The case of the Aboriginal flag is an unusually frank expression of broader indigenous efforts to use copyright law to control key symbols of native identity. Copyright stands little chance of dismantling the master's house, but it is already offering native peoples modest protection for their own dwellings.



3. Sign Wars

Members of the North American Vexillological Association, an organization dedicated to the systematic study of flags, recently voted the state flag of New Mexico the best in the United States. It is certainly one of the most memorable: against a field of brilliant yellow, a red circle radiates four lines in each of the cardinal directions. The design was officially adopted in 1925 at the behest of the Daughters of the American Revolution, who five years earlier had sponsored a competition for a flag symbolizing New Mexico's unique landscape and history. The winning proposal was submitted by Harry Mera, a physician and avocational archaeologist from Santa Fe. Mera's sun symbol was inspired by the central design element of a nineteenth-century ceramic pot crafted by an anonymous potter from Zia Pueblo, an Indian community located thirty-three miles northwest of Albuquerque. According to state documents, the Zia sun symbol "reflects the pueblo's tribal philosophy, with its wealth of pantheistic spiritualism teaching the basic harmony of all things in the universe." In 1963 these sentiments were formalized in the official salute to the flag: "I salute the flag of

the State of New Mexico and the Zia symbol of perfect friendship among united cultures." A Spanish translation of the salute was officially recognized a decade later.¹

In 1994 the people of Zia challenged this perfect friendship by formally demanding reparations for the state's use of the sun symbol. By 2001 the monetary demand had risen to \$76 million, one million for each year that the symbol had been used on the state's flag and letterhead. When a bill responsive to the tribe's demand was first considered by the New Mexico legislature, it provoked expressions of skepticism and anger in the regional press. The Associated Press listed it among unusual legislative resolutions and bills reported under the headline "Lawmakers Tackle Asparagus-Bashing, State Dinosaur, Square-Dancing Lobby." The article implied that the sun-symbol bill was in the same league as a South Carolina measure making it illegal to lick hallucinogenic toads. In a letter to the *Arizona Republican*, a citizen named Shirley Kinney complained that "something is very wrong" when the Zia tribe demands compensation for use of its symbol. "The Zia Pueblo," she wrote, "should be proud to be American and have the tribe's symbol used on the state flag. We are one people, not separate, in this great country."²

The Zia demands proved anything but frivolous. They were precipitated by a trademark application submitted by American Frontier Motorcycle Tours, a Santa Fe-based company specializing in travel on Harley-Davidson motorcycles. The company's logo prominently displayed a stylized version of the sun symbol. Nothing was especially unusual about the application. New Mexicans are accustomed to seeing the sun symbol affixed to everything from automobile license plates to convenience-store signs. But the trademark of the motorcycle touring company pushed the Zia into action after decades of muted grumbling. The religiously powerful version of the sun symbol, which has clusters of three rays pointing in each direc-

tion rather than the four found on the state flag, is used by the Zia, and possibly by other Pueblo peoples, in rituals ranging from the ceremonies that welcome new babies into this world to the funerals that usher the dead into the next. Aside from their concern about the inappropriate use of a powerful religious symbol, residents of Zia were angry because no one had asked their permission before adopting the symbol for the state flag.³

In the face of unfavorable publicity and intervention by one of the state's U.S. senators, Jeff Bingaman, the touring company withdrew its trademark application. In a newspaper interview, Zia's tribal administrator, Peter Pino, noted that the Zia routinely approve the use of the symbol by businesses that seek the tribe's permission and declare in writing that it belongs to the pueblo. His comments imply that the issue is less one of religious desecration than of basic respect. There is little question, though, that some Zia residents object to the idea that businesses might profit from the use of a symbol strongly identified with the community's religious practices.

The dispute over the sun symbol secured a prominent place in public hearings mandated by Public Law 105-330, which called on the U.S. Patent and Trademark Office (USPTO) to examine its policies relating to the official insignia of Indian tribes. Central to the hearings was the question of whether tribal insignia—the scope of which, as will become clear, is difficult to define—should be granted the protections conferred on the insignias of local, state, and federal agencies. A related issue was whether marks already registered by commercial firms are disparaging of Native American cultures.

Interest in the protection of signs and symbols is an expression of the continuing search for ways to shore up what are, from the indigenous-rights perspective, key weaknesses of copyright: its time-lim-



The New Mexico state flag and the Zia pot that inspired it. *Left:* Reba Mera, widow of the flag's designer, Dr. Harry P. Mera. *Right:* Betty Toulouse, curator, School of American Research, Santa Fe. Photograph probably taken in 1968.

ited quality and its inability to effect absolute control over the use of protected work. Protection and fair use are two sides of the contractual nature of copyright. Native activists stand firmly in support of protection; many oppose fair use, which they say is incompatible with their own cultural rules. That is why they have focused atten-

tion on two aspects of intellectual property law that offer enduring, comprehensive control over the use of works: trademark law and the moral-rights element of copyright, sometimes referred to as "author's rights."

At first glance, native concerns seem tailor made for a moral-rights strategy. Moral rights, unlike the economic rights associated with copyright, are perpetual. They are also designed to defend the creator against defamatory uses of a copyrighted work. This potentially cordons off material from fair use, including the selective quotation of material by someone whose views the original author finds offensive. In principle, this could provide a powerful screen of protection for indigenous cultural productions. In practice, there are obstacles. Copyright law protects discrete products defined as "works." Is a group's folklore a work or is it something else? Even if all known myths and folktales of a particular society have been transcribed and published, would the moral-rights doctrine give the group control over novel tellings of the same tales? Would such rights have limits? That is, if groups control all uses of works defined as theirs, would this effectively prevent others from quoting or borrowing from those materials in perpetuity?

An Australian study, *Our Culture: Our Future*, published in 1998, considers the implications of moral rights and other expressions of intellectual property law for native peoples. In reviewing proposed Australian legislation intended to protect indigenous peoples from "derogatory treatment" (defined as "doing anything that results in material distortion, mutilation of or material alteration to the work that is prejudicial to the author's honour or reputation"), the report allows that it will be hard to distinguish between simple portrayals of Aboriginal life and investigative reporting that documents troubling aspects of it. Critics of the proposed legislation obviously fear that it will inhibit the ability of the news media to talk about native peoples

in public forums. In contrast, native-rights activists argue that the legislation is not restrictive enough, leaving too many loopholes and unanswered questions about precisely who will be able to exercise moral rights after an author's death.⁴

Despite initial hopes that principles of moral rights would provide powerful leverage for indigenous societies, little has happened on this front. As noted earlier, the moral-rights dimension of copyright is underdeveloped in the United States, a situation that seems unlikely to change. Even in places where moral rights have legal standing, the gap between Western notions of individual creativity and the concerns of native communities may be too great to be bridged. Interest has shifted instead to another key element of intellectual property law, trademarks.

A trademark is a sign or, as USPTO attorneys put it, an "indication" clearly identifying something as the product of a particular manufacturer. The use of marks has been traced as far back as First Dynasty Egypt (ca. 3200 B.C.), when pottery was inscribed with distinctive symbols that identified the maker. One of the earliest legal contests dealing with trademark infringement took place in 1618, when an English textile manufacturer sued a competitor who used the plaintiff's mark on inferior cloth with the intention to deceive.⁵

Textbooks on intellectual property law explain that a distinctive mark serves two main purposes. First, it identifies a product to buyers and assures them that they know who made it. Second, it protects the maker from other companies that might be tempted to confuse buyers by using the same mark. Anyone who travels in countries where illiteracy is common receives a rapid education in the power of manufacturers' marks. Among Indians in the Peruvian Amazon, even members of the community who cannot read are comfortable talking about *tátasham máchit* ("woodpecker machetes"), tools of Span-

ish manufacture whose blades are stamped with the woodpecker trademark. Ironically, trademarks have become even more important in the developed world because their stark simplicity keeps them visible amid the media-generated tidal wave of imagery. The legal scholar Rosemary Coombe suggests that trademarks are now such important signifiers of difference that they provide a parallel language that we use to communicate with others via the goods arrayed in our homes and on our bodies.⁶

Trademark thinking has become sufficiently pervasive that college and university presidents talk publicly, and with no trace of embarrassment, about the value of their "brand." Ordinary words and phrases—"Big Kids Meals," "Increase," "It's a good thing"—are trademarked, and businesses are now reaching for letters of the alphabet: in 2002, attorneys for Oprah Winfrey and her publishers went to court to defend her in a lawsuit claiming that Winfrey's publication *O, The Oprah Magazine* infringed the registered trademark of another magazine, also called *O*, that features erotic images of women in fetish clothing. (The judge ruled for Winfrey on the grounds that the plaintiff had waited too long to file suit and that the two magazines are so different that consumers are unlikely to confuse them.) As we run out of available space in the lexical domain, companies are actively exploring other sensory arenas. Jingles provide a familiar example of auditory trademarks, but perhaps not all readers know that the ticking-watch sound of the CBS news program *Sixty Minutes* is also protected, as is the roar of the MGM lion. The Harley-Davidson company attracted public attention in 1994 when it attempted to register the distinctive sound of its V-Twin motorcycle engine. (The company abandoned the campaign six years later, citing the cost of responding to litigation launched by competing manufacturers.) Trademark has begun to homestead the olfactory

world as well. The European Union recently granted a trademark for the smell of freshly cut grass. This mark will identify a line of tennis balls sold under the name "Scenter Court."⁷

Unlike copyrights and patents, trademarks do not require originality, only distinctiveness. They last as long as the trademark holder uses and defends them. They may be lost if allowed to slide into common usage, which explains why companies oppose even innocuous references to trademarked material in books and magazines. The need to defend a trademark may produce litigation that fosters head-shaking cynicism about the law. In 1999 the pop musician Prince filed suit against a fan magazine devoted to his music on the grounds that it had used his identity-symbol without authorization. In response to a long-running feud with his record company, Prince dropped his name in 1993 and replaced it with a trademarked symbol. (Hence press references to him as "the Artist Formerly Known as Prince," subsequently shortened to "the Artist." He resumed use of his name in 2000.) The suit, however bizarre and ill-considered, offers an object lesson in how the expansion of trademarking threatens the fundamental ability of people to communicate.⁸

Against this backdrop, Zia Pueblo's complaints about outsiders' use of the sun symbol become more convincing. And the people of Zia may not be the most aggrieved among American Indians. Registered trademarks drawn from just three tribal names, "Navajo," "Cherokee," and "Sioux," number more than a hundred. Other tribal names and symbols are in similar if less common use in the marketplace, largely by non-native businesses.

In recent years the USPTO has begun to take this problem seriously. Existing laws allow the agency to deny registration to any mark that "consists of or comprises matter which, with regard to persons, institutions, beliefs, or national symbols, does any of the following: (1) disparages them; (2) falsely suggests a connection with

them; (3) brings them into contempt; or (4) brings them into disrepute." Using these criteria, the USPTO has refused registration of the name Zia and the Zia sun symbol to a software company and a maker of cocktail mixes, citing a false association with Zia Pueblo and, in the second case, "possible disparagement of the tribe." The most prominent case in which the agency has invoked these regulations involves the name and logo of the Washington Redskins football team, whose registration the Trademark Trial and Appeals Board of the USPTO revoked after concluding that the term "redskins" was disparaging to Native Americans both today and when the mark was registered decades ago. The case was still under appeal in Federal District Court in 2002, but the tide appears to have turned against the trademark holders. Revocation of registered-trademark standing will not prevent the owners from continuing to use the name and logo. It will simply end the trademark's protected status, opening the door to unlicensed use. Given the financial stakes, loss of trademark registration is likely to put the owners under great pressure to rename the team.⁹

Crazy Horse Malt Liquor, a beverage produced by Hornell Brewing Company and Ferolito, Vultaggio & Sons, has long been the target of a national campaign to end its demeaning use of a revered American Indian leader's name. The USPTO refused to register the trademark, and the manufacturer has been publicly denounced by the U.S. Surgeon General, members of Congress representing both parties, the governor of South Dakota, and countless church groups and student organizations. In 1992 Congress passed a law that specifically banned the association of Crazy Horse's name or image with any alcoholic beverage, although the statute was subsequently overturned on free-speech grounds. The manufacturer's stubborn refusal to abandon the name eventually prompted the descendants of Crazy Horse to bring suit against the company in Rose-

bud Sioux Tribal Court, alleging, among other things, defamation, emotional harm, and violation of the "right of publicity"—that is, the right of a person or his estate to control the commercial use of a name and image. Subsequent litigation in federal court has focused on whether tribal courts have jurisdiction over parties operating off-reservation. In 1998 the Eighth Circuit Court of Appeals ruled that "the tribal court lacks adjudicatory authority over disputes arising from [the Breweries'] conduct." Since then, efforts of the descendants of Crazy Horse have shifted to federal court, where they filed suit in 2000. A secondary defendant in the suit, SBC Holdings, owner of a brewing company that at one time produced Crazy Horse Malt Liquor for Hornell, reached a settlement in April 2001. John Stroh III, chairman of SBC, went to Mission, South Dakota, to present "32 blankets, 32 braids of sweet grass, 32 twists of tobacco, seven thoroughbred racehorses and an apology" to the administrator of the Crazy Horse estate, Seth Big Crow, thus ending the company's role as a defendant in the lawsuit.¹⁰

Social critics cite the continued sale of Crazy Horse Malt Liquor as evidence of Indian powerlessness, but the relentless pressure on the product's manufacturer can also be read as a demonstration of the moral authority and political muscle that American Indians—among whom are more than a thousand lawyers—can bring to bear when confronted by egregious cultural insensitivity. In present circumstances, any corporation that emulates Hornell by using Native American names or symbols in defamatory ways must be seen as showing poor judgment, even by the standards of market capitalism.¹¹

These distinct currents—commercial, political, and religious—collided in the USPTO-sponsored hearings about the trademark status of tribal insignia, which were held in mid-1999. Written submis-

sions from the public range from the telegraphic ("NO ONE should be able to use insignia in ads, names of products, etc. that belong to Native Americans," from a Nevada resident) to sophisticated special pleading by attorneys representing DaimlerChrysler, the flatware manufacturer Oneida Ltd., and the Mohawk Carpet Corporation. Opinions offered by lawyers focused on three key issues. The first was how the law should define "tribal insignia." Attorneys representing Native Americans proposed definitions of great breadth. The Native Affairs and Development Group, for example, argued that insignias should embrace "any word, name, symbol, or device or any combination thereof used by Native Americans and/or adopted by tribal governments . . . and which is not used in commerce." A second concern was whether new protections for tribal names or insignia would be retroactive, thereby voiding long-standing trademarks of great commercial value. DaimlerChrysler, obviously concerned about the future of its Jeep Cherokee mark, argued against defining tribal names alone as insignia, citing the financial harm that current trademark holders would suffer if their marks lost protection.

The third issue concerned links between American trademark policy and global business practices. The United States is a signatory to the Paris Convention, which obliges the USPTO to honor registered foreign trademarks that are consistent with American norms. "If a foreign-owned company cannot continue to protect its established trademark rights in the United States because its mark is also the name of a Native American tribe, or a component of the tribe's insignia," wrote attorneys for DaimlerChrysler, "this could well result in foreign countries refusing to protect the established trademark rights of United States companies because of native European, Asian, African or South American tribal names and symbols." In fact, changes in the trademark status of indigenous words and symbols are already

poised for adoption in Australia and New Zealand. The extent to which this would affect American trademark holders with businesses in those countries is unclear.¹²

The transcripts of the three regional public hearings held by the USPTO in mid-1999 offer a better sense of the emotions behind resistance to the use of traditional symbols for commercial purposes, or for that matter, any purpose not defined by native peoples themselves. Oral testimony also reveals the difficulty of translating these sometimes diffuse sentiments into the narrow goals of a bureaucratic entity such as the USPTO. USPTO officials heard complaints about everything from the use of the word "squaw" in local place names to the sale of Native American tarot cards in New Age bookstores. At the San Francisco hearing, a Dakota woman named Fern Mathias, who identified herself as director of the American Indian Movement in Southern California, urged officials to regulate the use of all Indian symbols, especially religious ones. "Just because the Indians didn't have copyright laws doesn't mean others can take and use their symbols," she said. She continued: "We, as Indian people, never had to regulate fairness, dignity and respect. It came naturally. But we live in America, in the modern age, and we have to protect ourselves. We need to make a list of Indian symbols, especially the religious ones, that should be excluded from commercial use. We need to create an awareness of these symbols and explain why it is offensive to use them. Every company and official organization needs to be furnished with such a list so there will not be the excuse of pleading ignorance."

Mathias urged the USPTO to protect American Indian religious symbols, tribal insignia, tribal names, and "Indian words of significant social, religious or tribal meaning." When asked how the government could best determine which symbols merit protection, she suggested that officials go to traditional religious elders rather

than to tribal councils, which she dismissed as an invention of the U.S. government. In view of the government-to-government nature of relations between Indian nations and Washington—a relationship that Indian officials took pains to emphasize in the same hearings—it is difficult to see how the USPTO could bypass the formal governance structure of tribes and communicate directly with "traditional people," whose identity, Mathias herself noted, is often a well-kept secret.¹³

In the day-long hearing held at the Indian Pueblo Cultural Center in Albuquerque, the Zia sun-symbol case took center stage. After brief remarks by USPTO Commissioner Q. Todd Dickinson, Senator Jeff Bingaman, and Representative Tom Udall, the floor was turned over to Amadeo Shiye, governor of Zia Pueblo. Governor Shiye briefly discussed the history of Zia and its survival against formidable odds. He then turned to the subject of the hearing:

I know there are other symbols that are important to other tribes. These tribes will speak for themselves about this . . . But I will say that the injury that my people have suffered from the disrespectful use of the Zia sun symbol has been very, very deep. The history of the European in this continent has been a long history of unauthorized taking. We are in the beginning of, I hope, a different frame of mind. I do not see how the Trademark Office in good conscience can give a person, foreign to our nation, the right to use our symbol on a chemical fertilizer or a porta-pottie or whatever business or service he is peddling. Under the existing law, other governments in this country are protected from such an affront. I understand that there are separate statutes protecting the Boy Scouts' insignia and the Red Cross. Even using western logic alone, without using any kind of compassionate understanding of our culture and our way

of life, the official insignia or symbols of the sovereign tribes should be protected as much as the symbol or insignia of municipalities, states, foreign states and so forth.

Governor Shije was followed by other speakers who emphasized the same themes: the religious importance of the sun symbol and the sadness or anger that Indian people feel when they see such images being used for commercial purposes; the possible confusion generated by labeling a product with a tribal name when it is not a product of the tribe; and the difficulty that tribes have in licensing their names and symbols when these are already in use by outsiders. Occasionally percolating to the surface in the generally cordial and measured exchanges were sentiments that if enacted into law would take trademark protection to new places. William Weahkee, executive director of the Five Sandoval Indian Pueblos, spoke of his experiences as the only Indian member of a national committee concerned with petroglyphs—rock images found widely in North America, especially in the West. Commenting on the thoughtlessness with which non-Indian people use these images for their own purposes, Weahkee said: “These things are tied in with song. They’re tied in with the ritual. They’re tied in with things that we cannot divulge, because what happens when we divulge something like that [is that] it’s always exploited at our expense. Nothing comes back to the tribes.” In response to a question from a USPTO attorney, Weahkee suggested that the more than 17,000 images and designs already documented should be shielded from exploitation that allows non-Indians “to make profit all the time and not give anything back to the Indian people at all.”¹⁴

The USPTO’s final report on the tribal-insignia issue, released in November 1999, shows the difficulty of reconciling anxiety about the proliferation of culturally significant symbols with the tightly focused and largely commercial mission of the USPTO. The agency

stood by a definition of insignia encompassing only symbols used for official purposes. This kept at arm’s length alternative formulations that would embrace everything from native-language words to iconography used in religious rituals and works of art. The agency argued that its current rules and procedures can meet the needs of Indians by preventing the registration of a mark that falsely implies a connection with a particular tribe. It promised more vigorous efforts to document the official seals and symbols of recognized Indian tribes, few of which had responded to the USPTO’s 1994 invitation to enter their insignia in a national database.¹⁵

The agency’s task is made difficult by the tribes’ differing ideas about the proper balance between commercial and religious uses of traditional symbols. If the USPTO were to declare tribal insignia equivalent to other government symbols, as some Indian activists demand, then tribes would be unable to license them for commercial use, thereby losing a potential source of income. A recent case illustrates the volatility of claims about the appropriate use of religious symbols. In 2000 the Tigua Tribe of Ysleta del Sur Pueblo, Texas, sent the Texas Parks and Wildlife Department a letter directing them to cease publishing images of a well-known pictograph from Hueco Tanks State Historical Park, located near El Paso. The letter states that the design, referred to as the Tigua Sun Symbol, has “deep religious and cultural significance for the Tribe, symbolizing the key to the return to the mother pueblo by the last tribal member alive.” Yet the tribe had already registered the pictograph design as a service-mark, precursor to a trademark, and featured it prominently in the tribally owned Speaking Rock Casino.¹⁶

The USPTO’s counterpart agency in Canada has shown greater willingness to assist native communities seeking to control circulation of culturally sensitive images. A small Coastal Salish tribe called

the Snuneymuxw (usually pronounced "Snuh-nái-mo") First Nation, most of whose lands are located in and around the town of Nanaimo on Vancouver Island, British Columbia, announced in 2000 that it had secured protection for ten petroglyph images on the nearby island of Gabriola. The images are protected under a provision of Canadian trademark law that applies to "any badge, crest, emblem or mark adopted and used by any public authority." Having registered the petroglyphs as official marks, the Snuneymuxw have the right to take legal action against anyone who uses the images without permission. The Snuneymuxw have already asked local shops to cease selling tee-shirts and other items that reproduce the registered designs. The museum on Gabriola Island declared that it would remove images of the petroglyphs from its site on the World Wide Web and no longer offer visitors material for making rubbings of the museum's petroglyph reproductions.¹⁷

In a telephone interview, Kathleen Johnnie, Lands and Resources Coordinator for the Snuneymuxw First Nation Treaty Negotiation Office, emphasized that the main interest of the Snuneymuxw in the petroglyphs is religious rather than commercial. Community elders want to limit frivolous uses of these potent symbols. They hope that the legal protection now afforded the images will create a framework within which they can educate the public about Snuneymuxw spiritual values and their link to ancestral designs. "In Canada," she said, "we're expected to respect other cultures, their religions and ways of doing things. That's all we're asking, for people to respect our culture. We're not using the images for commercial purposes, and we're asking people to respect that. We use them for religious purposes. They are very sacred to us."¹⁸

In seeking protection for the designs, the Snuneymuxw wrestled with difficult questions. The community reportedly discussed whether protection should be sought for all petroglyphs in which they have a cultural interest. After considering the pros and cons,

they opted for a more limited strategy focusing on the most widely reproduced images, although they did not rule out the possibility of seeking protection for other petroglyphs. "We first created the official mark status so that people would understand that there's an intellectual property right in the images," Kathleen Johnnie said. "If they didn't want to understand that, then we provided cultural education and background on the issue. We hadn't been doing that on a regular basis before, but now we're trying to educate them as much as possible about the sensitivity of the issue and the importance of it in our culture." A paradox to which the Snuneymuxw had to reconcile themselves is that the official-mark registration process that would remove the petroglyph designs from the public domain required that facsimiles of the images be available for public inspection in the trademark database of the Canadian Intellectual Property Office.¹⁹

The actions taken by the Snuneymuxw can be seen either as a canny use of law for new purposes or a troubling distortion of the trademark system's intent. As Rosemary Coombe observes in her analysis of contemporary trademark practices, the legal protection of certain public symbols has several rationales. Use of the logo and name of a local police or fire department, for instance, is regulated in the interests of public safety. In a broader sense, Coombe argues, the protection afforded official symbols exists to "singularly determine the 'official' meaning of the sign and to prosecute those who give the signifier unsanctioned connotations." In securing official-mark status for petroglyph images, the Snuneymuxw people assert control over meaning, but they do so by severely limiting access to reproductions of the images. The rock art thereby becomes an anti-icon, an absence where there once was a presence. From the Snuneymuxw perspective, the analogy to public-safety emblems is accurate. They insist that any use of the images uninformed by religious understanding exposes the user to spiritual harm.²⁰

The Snuneymuxw First Nation claims the petroglyphs as its own

by right of oral tradition and common-law title, and some commentators celebrated the “repatriation” of the petroglyphs when they were certified as official marks of the band. By their nature, however, petroglyphs are difficult to date or to identify with specific creators, at least by the standards of Western law and science. The Snuneymuxw assertion of rights in the rock images of their traditional territory is strong because their presence in the region appears to be of considerable antiquity. In many other parts of North America, in contrast, dramatic population movements since the sixteenth century make it impossible to link rock art to existing native communities. In what sense, then, can the images be considered the intellectual property of a people? Might not the creators of the rock art have been the ancestors of other native groups of the region or of peoples who left no descendants, perhaps because they were only passing through? The Snuneymuxw’s newly granted monopoly over religiously significant images is likely to become the gold standard for similar claims elsewhere, some of which will be far more difficult to substantiate. At bottom, the Snuneymuxw case, like the Zia Pueblo one, is less about intellectual property than about resistance to the uncontrolled proliferation of signs—more precisely, copies of signs—that a community considers theirs. The language of commercial gain in which trademark disputes are typically cast accommodates these religious concerns only awkwardly.²¹

Kathleen Johnnie acknowledged as much. “If the federal government or the global community would provide a different kind of protection for Aboriginal cultures, then we’d use that. We did what we had to do given the resources that were available. If the global community would come together as effectively to protect our intellectual property rights as they’ve come together to protect Coca-Cola or Microsoft, we wouldn’t use the trademark. We’d use something else. People justify their use of the petroglyphs by saying that they’ve

been in public view for however long. My community is ten thousand years old, so seventy-five years is just a drop in the bucket. Our arguments and our rights go back much further than that.”

It is fair to say that the *Trademark Reporter* is not everyday reading for cultural anthropologists. But in 1994 it published an article by Candace Greene, an anthropologist on the staff of the Smithsonian Institution, and Thomas Drescher, an attorney, that assesses the similarities and differences between American trademark practices and graphic traditions among the Kiowa Indians. The essay tracks the history of a tipi given in 1845 to the Kiowa chief Little Bluff by a Cheyenne leader named Sleeping Bear. The gift celebrated a peace treaty concluded by the two groups several years earlier. The tipi given to Little Bluff was decorated on one side with sixteen yellow stripes, which commemorated Cheyenne war expeditions, and on the other with depictions of actual battles. To these motifs Little Bluff eventually added his own designs. Painted tipis were rare among the Kiowa, and this tipi’s unusual history made it exceptionally valuable from their perspective.

As Greene and Drescher explain, tipis made of buffalo hides lasted only a season or two before they needed to be replaced. As long as he was alive, Little Bluff periodically called together a large group of men to help him renew the tipi by painting the designs on fresh hides. Over time, the designs changed to reflect new military victories, but the tipi itself was considered to be the same. The rights to reproduce the images on the tipi were regarded as belonging to Little Bluff alone. These were transferable rights, and a few years before his death he passed them to his nephew, whose name also became Little Bluff. The nephew renewed the tipi as long as he could, but confinement to a small reservation and the disappearance of the buffalo

eventually made this difficult. Poverty also interrupted the cycle of tipi renewal. When the second Little Bluff sought to transfer his tipi design rights to younger relatives, few had access to the reciprocal gifts that the transfer required. Eventually, however, rights to the *Tipi with Battle Pictures* were passed to one of his sons, White Buffalo. The last recorded renewal of the tipi took place around 1916, when it was painted by White Buffalo's brother, a noted artist named Charley Buffalo. Kiowa people still remember this tipi even though it has been superseded by designs that celebrate more recent military exploits, including Kiowa participation in World War II and the conflicts in Korea, Vietnam, and the Persian Gulf.

The Kiowa zealously protect their personal rights to intangible property, in this case the right to use individual designs and to depict particular events. In fact, in times past they may have been more concerned with intangible property—what we would call intellectual property—than with material goods. This Kiowa version of intellectual property differs from Western norms in several key respects. The distinction between an idea and its expression so crucial to copyright is unknown to them: Kiowa individuals own ideas and personal life experiences. For others to depict these things, even in their own words or artistic idioms, is a violation of cultural rules. Such rights are transferable and perpetual. Their permanence and their close identification with individuals, Greene and Drescher argue, bring them closer to trademark practices than to copyright: "Whether the symbol possesses a religious 'medicine,' or a commercial 'persona,' the phenomenon is the same—the inherent capacity of symbols to be imbued with power."²²

Critics of contemporary intellectual property laws and their effects on native peoples often insist that copyright and patents are unknown in non-Western societies, which treat information as communal property. The Kiowa case demonstrates that this claim is

misleading. There exists a rich ethnographic literature detailing the complex rules about knowledge and its uses observed in countless indigenous societies. It was not unusual for Indians of Plains tribes to buy and sell personal songs, blessings, visions, and other expressions of spiritual knowledge. Among the Oto people of Oklahoma, for example, payment in goods for spiritual knowledge was a requirement, since it was believed to effect the transfer of power from seller to buyer. The problem is not that copyright or its equivalent cannot be found among native peoples. It is that the rules controlling the flow of ideas and information are often hard to reconcile with Western practices and, perhaps more significantly, with the replicative technologies spawned by the Industrial Revolution.²³

Confronting the challenge that Western law and technology pose to indigenous cultures, some critics demand that copyright law be changed so that it protects indigenous art *styles*, not just their manifestation in concrete works or performances. Colin Golvan, the barrister who argued *Bulun Bulun* in Darwin, raises the issue in an essay exploring the possibilities and limits of copyright law for the protection of Aboriginal art. After Australian tee-shirt companies were sued for infringing the copyright of Aboriginal artists, they began to print shirts with fake designs. "Most tourist shops today are replete with examples of T-shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art," Golvan writes. "One issue which justifiably arises for attention is whether there ought to be protection to prohibit this bastardization of Aboriginal art, and if so, how this protection would work."²⁴

Golvan's proposal that fake designs be treated as if they were authentic moves into territory that his colleagues are energetically litigating in courts throughout the industrial world: ownership of the "look and feel" of products and forms of artistic expression. In *Onassis v. Dior*, a landmark case dating to 1984, the New York State

Caricatures of
Aboriginal art

Supreme Court ruled that the fashion designer Dior had violated the rights of Jacqueline Kennedy Onassis when it published an ad that showed an Onassis look-alike named Barbara Reynolds standing with various other celebrities who played themselves. The court in effect determined that Barbara Reynolds no longer retained exclusive ownership of her own image because it resembled that of someone far more famous. Similar disputes have arisen over the use of vocal material that can easily be mistaken for the work of popular singers. Courts have concluded that this violates the identity of the imitated vocalist. Real and counterfeit are no longer legally separable where familiar images or sounds are concerned. Shouldn't the same logic apply to native cultures, whose authentic identity is also at stake?²⁵

Many writers, artists, and legal scholars worry about the trend toward aggressive protection of personal identities and arbitrary legislative extensions of copyright terms. Expressions like "strangling culture" and "stifling creativity" mark these discussions. Such fears have done little to deter the conviction of advocates for cultural protection that settler nations must somehow "repatriate" words, symbols, and culturally inflected styles back to indigenous communities. Nicholas Thomas, a respected commentator on the indigenous art of Australia and New Zealand, insists that abuses heaped on the Maori during New Zealand's colonial history "can only suggest resonances between invasions of land and of culture." "These identifications," he continues, "in turn suggest that quotations of indigenous art on the part of non-indigenous artists (irrespective of their ambivalence or complexity) are to be censured."²⁶

However much one sympathizes with the idea of discouraging tasteless or hurtful quotations of native iconography or design styles, Thomas's blanket condemnation of *all* references to indigenous cultures by non-indigenous artists or writers drifts perilously close to a semiotic version of ethnic cleansing. This would be alarming if it

were not so impractical. In settler democracies, native design styles have become part of the warp and weft of mass culture and visual expressions of national identity. Purging them would require draconian social engineering. Place names drawn from indigenous languages are ubiquitous in the United States and Canada, as they are in other settler nations. About half of the names of states and provinces originate in native languages, as do those of innumerable counties, cities and towns (for example, Chicago, Minneapolis, Miami), and geographical features, some of which incorporate the names of tribes (Sioux Falls) or native individuals (Seattle). Nor do native peoples always oppose the use of tribal names by outsiders. Apache religious leaders, for instance, turned out to bless the latest model of the AH-64D Apache Longbow helicopter prior to its deployment, and Apache military veterans continue to express pride in their association with such a formidable weapon.²⁷

In 2000 Zia Pueblo negotiated an agreement with Southwest Airlines for use of the sun symbol on a specially painted aircraft christened "New Mexico One." According to Peter Pino, the Zia tribal administrator, the airline considered approaching the pueblo for several years but feared a hostile response. Eventually it contacted Zia's tribal government, and negotiations went smoothly. "I think that they were pleasantly surprised that we were civilized people," Pino said. At the dedication ceremony for the new aircraft, Zia officials were among the honored guests, and children from the pueblo performed a Crow Dance. The airline issued a press release that declared the company "proud to carry New Mexico's message to the 56 cities across the country served by Southwest Airlines."

As part of the agreement with Zia, the airline gave an undisclosed sum to the tribe's scholarship fund. Pino pointedly stressed that this should be described as a donation rather than as compensation. The distinction between the two underscores the pueblo's difficult bal-

ancing act. Is its interest in the sun symbol religious or commercial? When asked about this, Pino said that in the best of worlds the symbol would never have come into public circulation, since it was traditionally used only by permission of specific religious societies within the pueblo. But because the sun symbol is now ubiquitous, the community wishes to share in whatever wealth the familiar image can produce.

Zia Pueblo's quest to resolve its differences with the state of New Mexico has been less successful than its negotiations with businesses. In the autumn of 2001, New Mexico House Bill 423, which would have appropriated \$50,000 to set up a special state commission to undertake negotiations with the pueblo, died in committee. Representative James Roger Madalena, the bill's sponsor, believes the measure fell victim to two forces. The first was fiscal: this was not considered a high-priority issue in a state with many claims on its modest resources. The second, which he heard mentioned by other members of the appropriations committee, was more philosophical. "How can you place a dollar value on such an important cultural and religious symbol?" they wanted to know.²⁸

Behind these controversies can be detected the destabilizing influence of the copy. New technologies of duplication often threaten existing lines of social control. The advent of the printing press, which gave literate lay persons access to inexpensive Bibles, challenged the power of church authorities and helped to bring about the Reformation. The rise of motion pictures spelled the end of vaudeville. Industrialized mass production destroyed craft guilds. Computer software that encourages the free replication of copyrighted music is shaking the recording industry and may eventually transform it. The book that you hold in your hand may be destined for obsolescence

now that university presses are offering electronic copies to research libraries in lieu of physical ones. Not that it matters much, since the book's royalties are already compromised by photocopy machines and Internet-based marketing systems that put used copies into the hands of customers with startling efficiency. The history of attempts to control the products of replicative technologies gives one little reason to hope that indigenous heritage will prove any more protectable than other cultural resources. Isolation affords modest shelter, but this is fast disappearing. The languages in which native songs and stories are embedded offer another barrier. Here, too, optimism finds little support: experts believe that half the world's languages will be extinct by century's end.²⁹

The most pressing challenge for native societies is not the greed of businesses that traffic in indigenous symbols, although this is worthy of pointed criticism. Many firms have proved responsive to boycotts, campaigns of negative publicity, and the intervention of national and global agencies that regulate trademarks. The fundamental problem is technology, which provides new ways of reproducing information and images whose circulation was once more easily monitored. This threatens traditional authority and the authority of tradition itself. The consequences for indigenous artists may be grave. In a ruling on another Aboriginal copyright case, Justice John von Doussa, who presided over the *Bulun Bulun* trial in Darwin, notes that Aboriginal artists whose work is misused by outsiders may be barred from participation in ceremonies, denied permission to paint traditional clan images, or forced to pay damages to local authorities. More rarely, they are the victims of physical assault. Similarly, indigenous writers and intellectuals may find themselves subjected to fierce criticism within their own communities when they publish culture-specific information that has been available for decades in libraries.³⁰

The increasing porosity of all societies and the strain of maintain-

ing a firm grip on one's identity in a media-rich world generate spirited resistance. For indigenous peoples this takes the form of hypersensitivity to perceived misuse of traditional symbols. It also gives rise to dreams of separateness, of control over the stories, art, music, and religious practices of one's community. For pluralist states, a key challenge of the coming decades will be the implementation of public policies that honor indigenous sensibilities without violating basic freedoms. No sloganeering about cultural sovereignty will solve a problem rooted in the rise of revolutionary communication technologies; no appeals to free speech will settle the moral debate occasioned by thoughtless and disrespectful use of a people's iconography.

Some skirmishes in the ongoing war of signs are more theatrical than substantive. When the publicity value of one issue is played out, activists move on to others. But Pueblo Indians usually take the long view, and Zia Pueblo is determined to press on with its sun-symbol campaign regardless of the disappointments it encounters along the way. Peter Pino notes that much of the general public believes the pueblo has sued the state over the flag issue, which is untrue. Pino expresses hope that the matter can be settled without an expensive lawsuit. "We'd like to think that we're still civil enough to resolve this issue across a conference table," he said. "The sun symbol is something that we feel rightfully belongs to the Pueblo of Zia. This issue is important to us. It was a directive given by some of the elders who are no longer with us in this world. So we have a charge, and we're going to continue to work on this."



4. Ethnobotany Blues

Since the late nineteenth century, the interdisciplinary field of ethnobotany has brought together elements of anthropology, agronomy, botany, and ecology to document the practical and symbolic significance of plants in societies around the world. One branch of ethnobotany studies the progressive domestication of the crops that made settled life possible. Practitioners typically divide their time between archaeological sites, where they harvest fragments of preserved plant parts from excavated soil, and laboratories, where they painstakingly study the gleanings to understand interactions between plants and people at a given moment in prehistory. Another branch of ethnobotany investigates how native peoples classify their botanical universe. The results of this research have proved useful to cognitive scientists searching for the underlying principles by which humans organize information.

The most flamboyant ethnobotanists may be those who scour the planet in search of medicinal and mind-altering plants. For much of the twentieth century, few people other than professional naturalists took notice of their work. That changed in the 1960s. The writings