INDIAN LAW TOUCHES THE ART WORLD:
EMERGING ISSUES OF TRIBAL CULTURAL AND INTELLECTUAL PROPERTY

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1. Introduction

In the Southwest, issues are emerging that highlight tensions between Art Law and Indian Law. What are the traditional bodies of law that apply to your average legal issue concerning art? Predominantly, issues arise over copyright, trademark, intellectual property, or licensing - legal issues concerning economic protection and security of the creator of an idea, design, or piece of art. Or perhaps constitutional issues arise, such as the ability of the creator to exercise their right to free speech. While these issues may apply to Indian Tribes like everyone else, emerging issues about Native American Cultural and Intellectual Property are pushing the limits and notions of these traditional bodies of law in the art world. Is an Indian Tribe's name or creation story the intellectual property of the Tribe? Is the image of a spiritual being so sensitive that it cannot be created or published? Is an ethnographic item the cultural patrimony of a Tribe that cannot be given away or sold? The answer to these questions is not always to be found in an ethnographic study by a learned anthropologist, or in a law treatise. Often as not, the answer lies with the Tribe and that Tribe's statutory and traditional common law.

An example of this in the recent news is the saga of the Acoma shield and the Paris auctioneers. In May, Acoma Pueblo, a federally recognized Indian Tribe[1] engaged in a public battle with a French auction house for the return of a ceremonial shield. On one side is a belief that the shield is art, probably purchased and exported from the United States by a consignor to be sold for its aesthetic, antique, and esoteric mystique. On the other side is a belief that the shield was not art, but an item with its own life and spirit central to the ongoing wellbeing of a community. Does the law accommodate both of these viewpoints, and should it?

While this example may be analyzed more easily with property law as modified by federal laws applicable to Native American cultural items, the law is less clear in issues of intellectual property. When private individuals, or other entities use, recreate, or depict symbols, names or stories of specific tribes and, at the same time, assert that it is the intellectual property of a private individual or other entity – how does the law respond? This paper explores these emerging issues.

2. Cultural Property

***A) - Eve Auction Company Offering the Acoma Shield*:** In May 2016, the Pueblo of Acoma protested the proposed auction of an Acoma shield. The EVE Auction Company of Paris, France ("EVE") announced an auction of the Acoma shield with hundreds of other items attributed to living and ancestral tribal communities including the Hopi Tribe, Zuni Pueblo, the Hoopa Tribe, the Oglala Lakota, and many

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[1] "Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02, at 3 (Nell Jessup Newton ed., 2012).

others. The Pueblo of Acoma identified the shield as an item of its cultural patrimony, and a sacred item used for ceremonial purposes. Under Acoma traditional common law, it could not be owned by any individual and was inalienable by any individual; it belonged to Acoma. The Pueblo immediately asked the Department of State, the Department of the Interior, and the Department of Justice for assistance in stopping the sale of this item.[2] The Pueblo also wrote to EVE demanding removal of the item from the sale. Acoma outlined the legal basis for its claim that the shield was the Pueblo's cultural patrimony, and that it could not have been legally removed from Acoma lands. EVE responded by stating: "[T]he public auction process allows the different tribes to acquire their past, and that is exactly what some tribes prefer to do, seeking efficiency and discretion[.]"[3] Acoma then provided additional information about the theft of the shield from Acoma during a burglary in the 1970s. EVE then removed the Acoma Shield while auctioning the remaining hundreds of other items.

This is the latest example of the protracted efforts of American Indian Tribes to have the Paris auctioneers return a Tribe's sacred items..[4] In the United States where courts are obligated to apply tribal and federal law, auction houses are much more responsive to Tribal requests that items be removed from sale. This example also illustrates a more fundamental issue - the competing viewpoints of cultural property and the boundaries of tribal and federal law, and perhaps, the misinterpretation of the law. Acoma identified the shield as (1) a sacred item, (2) an item of its cultural patrimony used in ongoing traditional cultural practices, (3) an item at least 100 years old, (4) an item stolen from the within the boundaries of the Pueblo of Acoma, and (5) an item owned by the Pueblo itself, that could not be owned by an individual. What tribal and federal legal boundaries did these classifications encompass? The following is a discussion of the laws and legal theories that the Pueblo believes to apply to the Acoma shield. These are important laws and legal concepts for any purveyor of Indian antiquities or ethnographic "art" to consider.

***B) Tribal Law*:** Quite often, the lens that looks at "sacred item" or "item of cultural patrimony" issues misinterprets, or omits, any understanding of how tribal law may apply to an item.[5] Why is it important to understand how tribal law may apply? Most, if not all, Indian ethnographic "art" or antiques, were created by tribal members within the boundaries of their reservations. The law of a specific tribe governs

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[2] The year before, Acoma Pueblo filed an action in France to try to stop the sale of other cultural patrimony of the Pueblo. The French agency that regulates auctions in France determined that Acoma, a federally recognized Indian Tribe under U.S. law, did not have standing to challenge the auction. *Decision du Madame la Présidente du Conseil des Ventes aux Enchères Publiques*, Paris, June 9, 2015.

[3] Allison Mier. *Smithsonian Hosts Emergency Meeting About Paris Auction of Indigenous Remains and Objects [Updated]*,HYPERALLERGIC (May 24, 2016), http://hyperallergic.com/301031/smithsonian-hosts-emergency-meeting-about-paris-auction-of-indigenous-remains-and-objects/.

[4] The French auction of Native American sacred items and artifacts has been widely reported since at least 2013. *See* Tom Mashberg, *Secret Bid Guides Hopi Spirits Home*, NEW YORK TIMES, (Dec. 16, 2013), http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html; Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, NEW YORK TIMES, (June 29, 2014), http://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items-continues-despite-us-embassys-efforts.html; SeaAlaska Heritage Institute, *Secret Bidder Saves Sacred Object from Auction for Alaska Natives*, INDIAN COUNTRY TODAY, (Sept. 6, 2014), http://indiancountrytodaymedianetwork.com/2014/09/06/annenberg-foundation-returns-sacred-object-alaska-natives-156764; AP, *Navajos Reclaim Sacred Masks at Auction*, CBS NEWS, (Dec. 16, 2014), http://www.cbsnews.com/news/navajo-indians-buy-back-sacred-masks-in-france-auction/; Reuters, *Hopi Sacred Masks Auction in Paris Despite Protests*, REUTERS, (June 11, 2015), http://www.reuters.com/article/us-france-auction-masks-idUSKBN0OR1DG20150611.

[5] *See infra* note 13-14 (citing 25 U.S.C. § 3001(3)(c)-(d)).

the nature of an item and whether it can ever lawfully leave the community. The following questions need to be asked: does an individual, family, clan, or society own the item or are they merely the caretaker of the item? Who are they the caretaker for? Are there restrictions on how it is passed from caretaker to caretaker? Can an individual sell the item? Would there be community repercussions if an individual were caught selling an item? Many of these answers will differ from tribe to tribe. Importantly, related tribes, like the Pueblos, may even treat specific types of items differently. Nonetheless, tribal law on treatment of an item is the first important step in understanding the legal nature of any controversy over an item.

It is not unusual for tribal traditional law not to be in written tribal codes; rather it may need to be discerned or distilled from the cultural customs of the tribe – the traditional common law. For many tribes, the Pueblos especially, aspects of traditional common law are prevalent and living sources of law next to the tribe's statutory or codified laws.[6] It is a virtual certainty that no Pueblo has an express statute describing items it considers sacred and the regulations/prohibitions on their use. Instead, those explicit restrictions may only be found in the community's traditional common law. This traditional common law is exercised and used within the context of community life.[7] So how does one inquire about a Tribe's traditional common law as it might apply to an item? There is only one easy answer – contact the Tribe. One must be very cautious in relying on outdated academic resources. As discussed *infra*, the real experts are those members of the tribal community who can draw upon the complete cultural context of an item. Lack of context and understanding should be an immediate consideration when encountering the use of antiquated academic anthropological and archaeological resources that were many times not conducted under the full tenants of ethical indigenous research methodologies.[8]

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[6] An example is Section 1-5-5, Title I, Pueblo of Acoma Laws (2009 Repl.): "In addition to these written laws, the Pueblo of Acoma has a rich customary or common law tradition. A. In the absence of an express statement of an intention on the part of the Tribal Council to replace the common law tradition, these written Laws shall be interpreted to be consistent with the Pueblo's common law tradition. B. Where applying the written law makes it impossible to comply with the customary or common law of the Pueblo of Acoma, and there is no clear written statement of the Tribal Council's intent to replace the customary or common law, the customary or common law shall be applied and the written law shall be ignored."

[7] For context not on the law, but how many tribes treat "sacred items" through their world view, the Pueblo of Acoma Governor Kurt Riley and Hoopa Valley Tribal Nation Council members Bradley Marshall and Leilani Pole expressed their feelings on the auction of items they considered sacred in the 2016 Eve Auction in Paris, France. *See* Vincent Schilling, *NMAI Tells Press: Stop Paris Auction of Sacred Items and Human Remains*, INDIAN COUNTRY TODAY (May 24, 2016), http://indiancountrytodaymedianetwork.com/2016/05/24/nmai-tells-press-stop-paris-auction-sacred-items-and-human-remains-164583; *See also* EMERGENCY MEETING ON PARIS AUCTION OF SACRED ITEMS VIDEO (May 24, 2016) *available at* http://www.ustream.tv/recorded/87318741; *See generally NATIVE AMERICA CALLING: THE MARKET FOR SACRED ITEMS*, ALBUQUERQUE PUBLIC RADIO (Jun. 6, 2016)(podcast *available at* https://soundcloud.com/native-america-calling/06-06-16-the-market-for-sacred-items)(Comments from Acoma Governor Kurt Riley, Acoma member Conroy Chino, and attorney Aaron Sims on the EVE Auction and Acoma's response).

[8] For example, the 2016 EVE catalog listed on its information page a string of out of context quotes with citation to early 20th century anthropological papers on Hopi sacred items, and instances of their being sold or inherited.. These examples fail to comprehend the whole of Hopi traditional law, assume the sale was legal under traditional law, and do not mention criminal conviction for possession and sale of the same Hopi sacred items in recent federal cases discussed *infra*. More troubling, is that EVE's citation to these anthropology reports is to support the legality of selling all of the included Hopi and New Mexico Pueblo items being auctioned without recognizing that Hopi and the other Pueblos are separate sovereign tribes, and may have traditional distinctions in the particular tribe's treatment of similar sacred items.

Some tribes are developing Tribal Historic Preservation Offices ("THPO"s or "HPO"s)or have an individual in a tribal department designated as a contact for historic and cultural preservation inquiries. For example, at Acoma, the Acoma Historic Preservation Office coordinates an advisory board to provide comments and recommendations to the Office and Pueblo Governor. The advisory board consists of knowledgeable cultural leaders and practitioners who provide comment or may seek out community members with specialized knowledge for comment. As an example, the Acoma HPO through the Advisory Board viewed photos of the Acoma Shield, spoke with community members, helped to distill and articulate Acoma traditional common law regulating the shield, and who cared for the shield at the time it was stolen For Acoma, it is illegal for any member who may care for a sacred item, like the shield, to sell or remove the item from the Pueblo of Acoma.

Many people outside a tribal community fail to understand the limited interest that individuals may have for certain items. It is helpful to use the bundle of sticks analogy to understand the property interests in sacred items. It is not uncommon, as exemplified in the Acoma shield, for an item to be in the possession of an individual, but traditional common law does not equate, possession with ownership. Other "bundled" rights that may be missing could be: the ability to sell the item, the ability to destroy the item, and even the ability to choose the next possessor or caretaker. Different items can have different restrictions placed upon use, transfer, care, and possession equating to a highly complex form of community property. Going one step further, the community right may not only be shared by two people, but the entire tribal community itself. Many times traditional common law presumes an item that is kept in the care of an individual or group, is done so on behalf of and for the benefit of the entire community. This leads to the conclusion that the tribe itself owns the item due to its traditional regulation of its use, and the presumption of use for the benefit of the community.

While complex, and at times difficult for an outsider to simplify; defining and capturing the tribal law surrounding an item is essential. Not only for understanding how it would be treated; but equally as important, how that tribal law can affect an item's treatment under federal law.

***C) Native American Graves Protection and Repatriation Act*:** The Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. Section 3001 et seq., is an important federal statute possibly affecting Indian ethnographic "art" or antiques. Many times the public inadvertently dismisses NAGPRA due to a misconception that NAGPRA *only* applies to the federally funded museums[9]. This misconception is pervasive in the art world. For example, Donald Ellis, considered a leader in Native American art and antiques was recently quoted in "The Art Newspaper" during a Q&A[10]:

> One of the challenges is the endless misinterpretation in the media of the Native American Graves Protection Act [a 1990 law that requires the return of Native American cultural items to its descendants]. This act relates only to federally funded institutions in the United States. Neither private collectors nor Parisian auctioneers are affected.

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[9] A primary component of NAGPRA is the regulation of federal institutions or agencies receiving federal funding for the inventory and repatriation of cultural items. In addition, NAGPRA establishes procedures for the discovery or excavation of cultural items on federal or tribal lands. *See* 25 U.S.C. § 3002-3005.

[10] Emily Sharpe, *Canadian Dealer Fights to Raise the Profile of Native American Art*, THE ART NEWSPAPER (March 2, 2016) http://www.donaldellisgallery.com/files/Canadian_dealer_fights_to_raise_the_profile_of_Native_American_art_r1.pdf.

This is not accurate. Can NAGPRA apply to private collectors, galleries, and auction houses? Under certain circumstances the answer is yes. NAGPRA has criminal provisions that are applicable to the public and private collector alike :

> Whoever **knowingly** sells, purchases, uses for profit, or transports for sale or profit any Native American **cultural items** obtained **in violation of the Native American Grave Protection and Repatriation Act** shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both [emphasis added].

18 U.S.C. Section 1170(b), This criminal law relies on the basic three elements: (1) the *mens rea* element of "knowingly"; (2) the item is a "cultural item" as defined by NAGPRA; and (3) the sale violates NAGPRA. Perhaps, this is where the confusion exists as the criminal provision requires looking to NAGPRA's civil provisions to determine what may be prohibited.[11]

Under 25 U.S.C. Section 3001(3), NAGPRA defines "cultural item." "Cultural item" means human remains and four separate object definitions, including "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony."[12] Predominantly, Indian art collectors and dealers tread through the third and fourth definitions: items that are considered "sacred" or "cultural patrimony." A "sacred object" is a "specific ceremonial [object] which [is] needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."[13] More common, are items classified as "cultural patrimony." Cultural patrimony is:

> [A]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, **cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe** or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[14]

To answer whether an item is cultural patrimony, tribal law is the essential first step as the definition of cultural patrimony is a function of the associated tribal law. If an item is cultural patrimony, under 25 USC §3002(a)(2), ownership or control is with "the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered." Finally, it is important to note that most NAGPRA provisions concerning items removed from federal or tribal land only apply to items removed after November 16, 1990.[15]

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[11] NAGPRA has been upheld as not unconstitutionally vague. *See infra*, *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999).
[12] 25 U.S.C. § 3001(3).
[13] *Id.* § 3001(3)(c).
[14] *Id.* § 3001(3)(d) (emphasis added).
[15] 25 U.S.C. §3002(a). The exception to this is that human remains are subject to the provisions of the law without regard to when the remains were removed from federal or tribal lands. Federal agencies or museums after completion of inventory and notice, if requested by a tribe that has established its affiliation, shall expeditiously

What trips up many private collectors and the art world is "cultural patrimony." Who gets to define cultural patrimony?[16] As NAGPRA stands, the only definite answer for these questions lies with the Tribes themselves, and as exemplified by discussion *infra*, the onus may be on private collectors to ensure they have not crossed the boundary into criminal territory. This is not to imply that in every instance a misinformed tourist, who happened to purchase an Indian antique that is cultural patrimony, will be prosecuted. The *mens rea* element of NAGPRA's criminal provision offers that protection. However, *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999), discussed *infra*, suggests those who specialize in Indian art or antiques may be held to a higher standard.

***D) Archaeological Resource Protection Act*:** Another federal law that can apply to an Indian art or antique item is the Archaeological Resource Protection Act ("ARPA"), 16 U.S.C. § 470aa, et seq. Passed in 1979, ARPA protects "archaeological resources" from being illegally removed from public and Indian lands.[17] ARPA is most widely applied in cases involving pot hunters, or others who destroy or remove archaeological resources from archaeological sites.[18] The analysis for ARPA begins in defining what is an "archaeological resource." Under 16 U.S.C. Section 470bb(1):

> The term "archaeological resource" means **any material remains** of past human life or activities **which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter**. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any

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return the human remains or cultural item. This is regardless of when the item may have been removed. *See Id.* at § 3005.

[16] Congress, too, was concerned about the use of definitions like "sacred item" or "cultural patrimony" due to their ability to encompass many items unknown to a non-tribal member. The Select Committee on Indian Affairs debated this exact worry with competing testimony from tribes, museums, and private collectors. The Committee resolved to "carefully consider[] the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe..." *See* S. Rep. No. 101-473, at 4 (1990). For "sacred object" the Committee determined that it is much more than an item being "imbued with sacredness in the eyes of a Native American[,]" but the object must have been used in a traditional religious ceremony or ritual, and has a religious significance or function when possessed by a Native American. *Id.* at 5. For "cultural patrimony" those items have ongoing "historical, traditional, or cultural importance[,]" inalienable by any individual. *Id.* As examples, the committee listed cultural patrimony such as Wampum belts of the Iroquois, or the Zuni War Gods. *Id.; See also* Roberto Suro, *Zunis' Efforts to Regain Idols May Alter Views of Indian Art*, NEW YORK TIMES, (Aug. 13, 1990), http://www.nytimes.com/1990/08/13/us/zunis-effort-to-regain-idols-may-alter-views-of-indian-art.html?pagewanted=all (Concerning Zuni War Gods, wooden idols left ritualistically at open-air shrines surrounding the Zuni reservation); *See also* T.J. FERGUSON ET AL., REPATRIATION READER - WHO OWNS AMERICAN INDIAN REMAINS? 239-265 (Devon A. Mihesuah ed. 2000) *available at* http://pages.ucsd.edu/~rfrank/class_web/ES-110/ETHN110articles/Southwest/ferguson_ps.pdf (Concerning repatriation of the Zuni War Gods).

[17] 16 U.S.C. §470aa(a).

[18] *See generally*, *Local Man Gets Probation in ARPA Violation*, DEMING HEADLIGHT, (June 2, 2016), http://www.demingheadlight.com/story/news/2016/06/02/local-man-gets-probation-arpa-violation/85304994/ (Involving the conviction under ARPA of man who removed several pieces of a Mimbres pot); Kristina Killgrove, *Bundy Militia Compared to ISIS for Pawing Through Native American Artifacts, Destroying Sites*, Forbes, (Jan. 21, 2016), http://www.forbes.com/sites/kristinakillgrove/2016/01/21/bundy-militia-compared-to-isis-for-pawing-through-native-american-artifacts-destroying-sites/#15cb817c5e2c (Questioning whether the actions by militiamen occupying the Malheur Wildlife Refuge in Oregon may have violated ARPA).

> portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. **No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age** [emphasis added].

The definition of "archaeological resource" may require further investigation into regulations that define those items of archaeological interest.[19] However, important here is that the item must be at least 100 years old.

The next step in the analysis requires the item to come from "public lands" or "Indian lands." ARPA defines "public lands" to be any land within the national park system, national wildlife refuge system, national forest system, or all other lands held in fee title by the United States.[20] "Indian Lands" are all lands of Indian tribes, or Indian individuals, which are held in trust or restricted from being alienated by the United States.[21]

Criminal liability for ARPA is found in 16 U.S.C. §470ee(a)-(b). Section 470ee(a) prohibits the unauthorized damage or removal of an archaeological resource from public or Indian lands:

> No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

Additional criminal activity occurs when an archaeological resource is trafficked in violation of federal law. Section 470ee(b) states:

> No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—**(1)** the prohibition contained in subsection (a), or**(2)** any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

Compared with NAGPRA, ARPA does not have a *mens rea* element, and places the operative date of the statute squarely upon the age of the archaeological resource. Also ARPA allows for civil or criminal forfeiture of archaeological resources.

Importantly, ARPA is not limited to an archaeological resource that is found in your traditional archaeological site. An archaeological resource can be an item that is actively used and kept in a living community, but happens to be of the operative age of at least 100 years old. Depending on the type of

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[19] *See* 43 C.F.R. § 7.3(a)(1) (stating "*Of archaeological interest* means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.").
[20] *See* 16 U.S.C§ 470bb(3).
[21] *Id*. at §470bb(4).

object, an item can be both subject to *ARPA* and *NAGPRA*[22]. An item can be an archeological resource, a sacred item, and/or an item of cultural patrimony. Importantly, an item can fall into another category subject to other statutes – tribal property, discussed *infra*.

***E) Theft of Tribal Property*:** An often forgotten federal statute that can apply to Tribal "art" or antiques is 18 U.S.C. §1163 – Embezzlement and Theft from Indian Tribal Organizations. The analysis, surprisingly, is not that different than the other statutes discussed *supra.* It then follows that a piece of Indian art or antique may actually be the property of a tribe itself; and can therefore be embezzled, stolen, or illegally converted. Section 1163 states:

> Whoever **embezzles, steals, knowingly converts** to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, …**property belonging to any Indian tribal organization** or intrusted[sic] to the custody or care of any officer, employee, or agent of an Indian tribal organization; or
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> Whoever, **knowing any such** … **property to have been so embezzled, stolen, converted, misapplied** or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.
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> As used in this section, the term "**Indian tribal organization" means any tribe, band, or community of Indians** which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

This statute targets the individual who may have embezzled, stole, or converted tribal property. However, the statute goes further; it applies to the individual who knows the tribal property was embezzled, stolen, converted, or misapplied and intends to claim the tribe's property as their own.

Certainly, the stealing of tribal property can mean your run-of-the-mill burglary. The culpability of a third party purchaser, who knows that an item was acquired in a burglary, is certainly obvious enough to not be of concern for this discussion. It becomes less obvious for a purchaser when the act of "stealing" is less deviant. Does the gathering of prayer sticks, idols, or other objects placed or uncovered upon the land – seemingly to have been abandoned or discarded to the uninformed collector – constitute theft? Maybe not; stealing inherently contains some *mens rea* element of intending to deprive the rightful owner of their property. Is culpability more likely when the item is taken within the boundaries of the reservation? What if outside the boundaries – either on private or public property (assuming a statute like ARPA does not apply)? Regardless, this statute adds another means by which tribes may identify their

[22] An item may also be subject to the Antiquities Act, not discussed in this paper. The Antiquities Act of 1906, 16 U.S.C. § 431-433 repealed and re-codified at 54 U.S.C.§320101 et seq., was the first federal law protecting cultural and natural resources. The Act allowed the President to establish historic landmarks and national monuments. Criminal provisions of the Act, 18 U.S.C.§ 433 penalizes an individual who "appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without permission of the head of the Federal agency having jurisdiction[.]"

property through their own tribal law, and how criminal liability may apply to its theft, embezzlement, or conversion. It is another statute collectors of Indian art and antiques need to be aware of so as not to cross the boundary into criminal liability.

***F) United States v. Tidwell*:** *United States v. Tidwell*[23] is an important case involving the criminal conviction of an art dealer under all of the discussed statutes. *Tidwell*, although perhaps an extreme example, is helpful for its analysis of NAGPRA, ARPA, and the criminal statute for theft of tribal property. More importantly, *Tidwell* demonstrates how federal courts have upheld the constitutionality of statutes like NAGPRA, even though the tribes themselves define the important elements of the crime, like "cultural patrimony." Finally, *Tidwell* suggests a heightened responsibility for Indian art dealers, galleries, and those in the regular business of Indian art and antiques for ensuring the legality, under tribal and federal law, of the items they acquire.

Rodney Tidwell was convicted of seven counts of trafficking cultural items under 18 U.S.C. Section 1170 (NAGPRA), eleven counts of theft of tribal property under 18 U.S.C. Section 1163, and one count of trafficking an archaeological resource under 16 U.S.C. Section 470ee (ARPA)[24]. Through an undercover investigation, Tidwell sold or attempted to sell eleven Hopi kachina masks and a set of ancient priest's robes from Acoma.[25] The masks and robes were the basis for the NAGPRA convictions, the masks alone formed the convictions for theft of tribal property, and the robes alone formed the basis for the ARPA conviction.[26]

Tidwell argued that NAGPRA was unconstitutionally vague because "cultural patrimony" relies on tribal law, which may be unwritten, so as to lack fair notice.[27] Specifically, Tidwell challenged as vague the "'inalienability' of an item, and an item's 'ongoing historical, traditional, or cultural importance[.]'"[28] The Ninth Circuit held that NAGPRA is not unconstitutionally vague. In its reasoning, the Court pointed to Tidwell's claimed expertise in Indian art, so as to put Tidwell on notice that he may be dealing with prohibited items.[29] The court stated:

> Even if he was not sure about whether a particular item was protected, he had sufficient understanding of Native American art and the NAGPRA to know that he would have to inquire further or consult an expert when he purchased the items. As we repeated in *United States v. Bohonus*, "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[30]

The Court specifically noted Tidwell's background in Indian art as implying additional knowledge or expertise by Tidwell of the boundaries of prohibited conduct, or as creating a duty to inquire further where those boundaries are.

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[23] *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999).
[23] 25 U.S.C. § 3001(3).
[24] *Tidwell*, 191 F.3d at 979.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 980.
[28] *Id.*
[29] *Id.*
[30] *Id.* citing *United States v. Bohonus*, 628 F.2d 1167, 1174 (9th Cir. 1980).

Is this a heightened standard for Indian art dealers, galleries, or those who regularly engage in the commerce of Indian arts and antiques? It is not clear, and the Court does not expressly state it is. Tidwell's expertise was complicated by a previous conviction under NAGPRA, which further implicated his awareness of the legal boundaries.[31] But the Court's explicit mention of his Indian art knowledge should cause some pause on the responsibility of those engaged in the regular commerce of Indian art and antiques. It was not Tidwell's prior conviction that put him on notice, but the requirement on everyone to know the boundaries of criminal conduct.[32]

Certainly, the Court goes further and explains that NAGPRA is not meant to unnecessarily capture the innocent purchaser. "[The] scienter element protects the unwary from criminal punishment."[33] Nor is NAGPRA mean to be arbitrarily enforced by law enforcement: "[A]s determined by the *Corrow* court, the NAGPRA does not foster arbitrary enforcement because law enforcement officials ***must*** consult with Native American officials to identify items that are cultural patrimony ***before*** they can investigate and arrest a suspect."[34]

Tidwell is an important case for illustrating the functioning of cultural resource laws, and an example of the care Indian art and antique businesses must take with their transactions.

3. Intellectual Property

Tribal identity is important. Today we see Indian Tribes taking action to protect Tribal identity, whether it is something as obvious as the right to the use of a Tribal name or symbol, or a Tribe's story of how it came to be. Sometimes a Tribe relies on the legal system, *See, e.g. Navajo Nation v. Urban Outfitters*, 12-cv-00195 (D.N.M.), and sometimes, it is through other means. *See, e.g.* Khristaan D. Villela, *Controversy Erupts over Peter Nabokov's Publication of 'The Origin Myth of Acoma Pueblo'* PASATIEMPO, SANTA FE NEW MEXICAN, Jan. 20, 2016.[35] Another case of interest to Indian Tribes and their members centers on whether an institution, through the art of photography, can essentially expropriate tribal symbols and forms.

Whether to pursue legal claims in court in this particular legal area is still an open question. One of the more notable disputes was that instituted by the Zia Pueblo against the State of New Mexico over the Zia Sun symbol, a version of which was on the winning design for the State of New Mexico flag in 1925.[36] For most Indian Tribes, these cases are the perfect example of trying to push a square peg

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[31] *Id.* at 980.

[32] The Court's quotation of *United States v. Bonhous*, involving the conviction of someone engaged in mail fraud, not a cultural resource crime, supports the Court's firm belief that NAGPRA is to be treated no different than any other criminal statute. While it may require some effort to define the boundaries of criminal conduct, it nonetheless does not relieve the individual, especially those with specialized knowledge, from inquiring further to ensure they have not crossed the line. NAGPRA is no different than any other criminal law.

[33] *Id.*

[34] *Id.* citing *United States v. Corrow*, 119 F. 3d 796, 804 (10th Cir. 1997) (*Tidwell* confirmed *Corrow*, a case two years prior involving a conviction under NAGPRA of an Indian art dealer for purchasing Navajo Yei B'Chei masks from a Navajo medicine man's widow).

[35] *Available at* http://www.santafenewmexican.com/pasatiempo/columns/viajes_pintorescos/controversy-erupts-over-peter-nabokov-s-publication-of-the-origin/article_1bcbe12b-b5c2-527e-93e9-1759fec994c5.html

[36] *See* Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 Chi.-Kent J. Intell. Prop. 116 (2012) (This article offers a good discussion of this particular dispute and citations to articles on the different views as to whether intellectual property law as developed in the United States can be an

through a round hole. While bringing legal actions can generate needed public education and support for Tribes involved in these disputes, the protection afforded under this body of law is not consistent with what is needed by the Tribes in many instances.

> [O]n the whole, non-legal measures have been more effective than legal ones in the tribe's fight to protect its sacred symbol. In the past ten years, the Zia have looked beyond trademark law and fashioned an informal system whereby the tribe is able to control, and obtain monetary benefits from, outsiders' uses of its symbol. The case of the Zia thus brings to the table an option for indigenous groups that has been overlooked by scholars: indigenous groups should consider employing non-legal approaches – including political lobbying, educational initiatives, and informal negotiations – to protect their sacred symbols and their cultural rights more generally.[37]

As practitioners representing Indian tribes, our view is that there is no one right answer. We begin our discussion with the recent decision concerning the stunningly beautiful work of the Hopi Potter called Nampeyo.

***A) Photography Copyrights – Nampeyo Photographs*:** *President and Fellows of Harvard College v. Elmore, et al*[38] is a good example of the way tribal views of cultural property do not align with U.S. law. The case involves photographs of pottery from Keams Canyon in Arizona. It is virtually undisputed that the pottery that is the subject of the photographs was created by members of the Hopi Tribe, and that the pottery is important because of the incredible design work on the pottery depicting items of cultural importance to the Hopi Tribe – designs that some would attribute to renowned Hopi potter, Nampeyo. Perversely, this case does not even have the descendants of Nampeyo or Hopi Tribe as a party, even though the art and creativity that is celebrated in the photographs that are the subject of the dispute is that of Nampeyo or another Hopi artist, and the culture expressed in the artwork is that of the Hopi Tribe. Rather this dispute is between Harvard College and the author of a book over photographs of the pottery. In the end, though, the District Court did not let Harvard College copyright the work of Nampeyo or the Hopi culture, through an asserted copyright of photographs of pottery.

Peabody Museum at Harvard College holds a collection of Hopi pottery found in Keams Canyon, Arizona. As is typical for museums, black and white photographs were made of the collection for recording the condition of the pottery and to catalog the extent of the collection. In 1981, Harvard published a "preliminary survey of historic Hopi ceramics from the Keam collection" in a book entitled *Historic Hopi Ceramics.* Harvard registered a copyright for the book that same year.

Harvard contracted with Steve Elmore, a long-time dealer of Hopi pottery, to write a book about the possibility of the pottery in the collection being the work of Nampeyo. Things did not work out, and Mr. Elmore published the book elsewhere. Elmore used another photograph of a Keams Canyon pottery, the Tusayan Jar, on the front cover of the book and had illustrations in the book based on photographs in *Historic Hopi Ceramics.* The illustrations were created by using a computer program to trace over the photographs, fill in the tracings, and erase the photographs. The tracings were then colored using black,

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effective tool for protection of tribal cultural property). *Available at* http://scholarship.kentlaw.iit.edu/ckjip/vol11/iss2/2.

[37] *Id.* at 118.

[38] Memorandum Opinion and Order, *President and Fellows of Harvard College v. Elmore, et al.,* No. CIV 15-00472-RB/KK (D.N.M. May 19, 2016).

tan and red, eliminating the gray original gray scale of the photographs. This coloring was done "to identify the design elements" in the pottery. The illustrator "clean[ed] up the design" and "defin[ed] the details". Images were lightened and blemishes on the pots were removed.

Harvard sued Elmore, claiming infringement on the copyright held on the 1981 *Historic Hopi Ceramics*, and the copyright they obtained in 2016, after the lawsuit was filed, on the photograph of the Tusayan Jar. The Court found in favor of Mr. Elmore, granting summary judgment. The Court found that there was no issue as to whether Harvard had registered its copyright for both the Tusayan Jar and *Historic Hopi Ceramics* photographs. [39]

Harvard could not establish, however, that the photograph of the Tusayan Jar was an "original work of authorship" as required by federal copyright law, 17 U.S.C. §102. The legal standard to evaluate whether this statutory requirement is met is that "a work must be 'independently created by the author (as opposed to copies from other works), and …possess[] at least some minimal degree of creativity[.]'"[40] The short-term for this element is "a creative spark." In the case of the Tusayan Jar, the court found no creative spark. "In Harvard's case, the photograph was not part of a study of photography, but rather a 'conservation image' taken 'as part of a condition assessment.'"[41] Any choices as to how to photograph the Jar "were utilitarian, not creative[.]"[42]

With the illustrations taken from photographs in *Historic Hopi Ceramics*, Harvard lost again, but for different reasons. The court found that here, unlike the Tusayan Jar, there was at least a minimal spark of creativity in the decisions as to how to photograph the collection.[43] That was not enough though, because, "even if a work is copyrighted, the copyright may not protect 'every element of the work.'"[44] **The court concluded that Harvard's copyright did not extend to "the most prominent features in the works: the intricate pottery designs and forms achieved by a Hopi potter, perhaps Nampeyo."**[45] The photographs in *Historic Hopi Ceramics* were found to have only minimal copyright protection – basically what are referred to as verbatim or exact copies. Since Elmore's images were not verbatim copies, and there was no substantial similarity between the illustrations in Elmore's book at the protected elements in *Historic Hopi Ceramics*, so Elmore's photographs were found not to infringe on Harvard's copyright.

Here, the photographs were taken of pottery that Nampeyo may have made over a century ago. What this case does suggest is that with a modern day artist, a museum could not defeat the artist's claim to the work merely by photographing an item in the museum's collection. It is an open question whether a Tribe could assert an intellectual property claim to pottery forms and designs central to a Tribe's identity, and if it could, to what extent the law could be effective. What is clear from this case is that if the Tribe did assert such a claim, it is not at all clear that a museum could defeat it merely with a cataloging photograph of an object with the design or form.

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[39] Even though the copyright for the Tusayan Jar was not registered until after the lawsuit was filed, no claim of infringement was made as to the Tusayan Jar photograph until after it was registered, and Harvard moved to amend the complaint.

[40] Memorandum Opinion and Order, *supra* note 38, at 15 (citing to *Feist Publ'n, Inc. v. Rural Tel. Serv. Co. Inc.,* 499 U.S. 340, 361 (1991).

[41] *Id.* at 19.

[42] *Id.* at 20.

[43] *Id.* at 21.

[44] *Id.* (citing *Feist Publ'ns,* 499 U.S. at 348).

[45] *Id.* at 22 (emphasis added).

***B) Trademark – Navajo Nation v. Urban Outfitters*:** The ongoing case of *Navajo Nation, et al. v. Urban Outfitters, et al.* is an example of the limitations, and seeming disconnect of the law, when a tribe attempts to assert control over a basic concept - its name. On February 28, 2012, the Navajo Nation along with the Diné Development Corporation, its wholly-owned instrumentality, filed a complaint[46] against Urban Outfitters, its subsidiaries, and retail brands for their use of the names "Navaho" and "Navajo." Urban Outfitters, a retail and clothing store, since March 2009 sold and promoted a number of its clothing products and accessories by labeling them with the names "Navajo" or "Navaho."[47]

The Navajo Nation claimed ownership of the name "Navajo" and "Navaho" by its people's recorded use of the name since at least 1849.[48] The Navajo Nation asserted the continued use of the name through its tribe, its corporations, and its enrolled members' using the name in a wide range of commercial activities.[49] Going even further, the Navajo Nation itself, and through its wholly owned corporations, has registered 86 trademarks using the name "Navajo" with the United States Patent and Trademark Office.[50] The Diné Development Corporation authorizes licenses for use of the "Navajo" trademark.[51]

The Navajo Nation alleged under the Lanham Act[52], that Urban Outfitters' use of "Navajo" and "Navaho" was trademark infringement. The Navajo Nation argued Urban Outfitters' activities "intended to trade on the good will established by the Navajo Nation...[,] created actual confusion in the market place...[,and would] cause confusion, mistake, or deception of others, as to the affiliation... of [Urban Outfitters'] products with the Navajo Nation."[53] The Navajo Nation further alleged Urban Outfitters' activities diluted and tarnished its trademark under the Lanham Act[54] by its using the names on scandalous and derogatory items such as alcoholic flasks and the purposeful use of "Navaho" that is expressly rejected by Navajo statute.[55] Navajo Nation alleged this activity by Urban Outfitters amounted to unfair competition under the Lanham's Act[56] and unfair practices under the New Mexico Unfair Practices Act.[57] Finally, the Navajo Nation alleged Urban Outfitters' misrepresented and falsely suggested its products were the product of the Navajo Nation in violation of the Indian Arts and Crafts Act.[58]

The District Court of New Mexico has issued several orders affirming the Navajo Nation's standing to bring suit, while also dismissing some of the Navajo Nation's claims. On March 26, 2013, the District Court dismissed the Navajo Nation's claims that Urban Outfitters activities diluted and tarnished

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[46] Complaint, *Navajo Nation, et al. v. Urban Outfitters, Inc., et al.*, No. 1:12-CV-00195 (D.N.M. Feb. 28, 2012).
[47] *Id.* at 12.
[48] *Id.* at 2.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 5.
[52] 15 U.S.C. § 1114.
[53] *Id.* at 26.
[54] 15 U.S.C. § 1125(c).
[55] Complaint at 19-21.
[56] 15 U.S.C. § 1125(a).
[57] NMSA § 57-12-3 (New Mexico's similar statute to the Lanham's Act prohibiting false or misleading representations in connection with the sales of goods).
[58] 25 U.S.C. § 305 *et seq.*

their trademark by the intentional misspelling of "Navajo" to "Navaho" and the branding on the flasks.[59] Later, on December 21, 2015, the District Court affirmed Navajo Nation's standing to bring claims under the Indian Arts and Crafts Act.[60] Most recently, the District Court dismissed Urban Outfitters' affirmative defense of laches,[61] but dismissed Navajo Nation's federal and New Mexico trademark dilution claims entirely.[62] The District Court reasoned that the dilution claims under the Lanham Act require Navajo Nation to meet a high standard demonstrating their "Navajo" mark is famous or distinctive. The District Court held the "Navajo" mark was not a widely recognized famous mark, and instead, is a "niche" mark based on Navajo Nation's long use of the mark predominantly in jewelry and art (rugs).[63] What remains for the Navajo Nation are its allegations of (1) trademark infringement under the Lanham Act, and (2) violation of the Indian Arts and Crafts Act.

This case is important to see the tensions that develop in the appropriation of perceived tribal intellectual property. Navajo Nation certainly may be in the best position out of many tribes to establish precedent in asserting protection of intellectual property. However, it should be noted that, in some respects, the Navajo Nation may be an exception as many tribes' make lack the capacity to bring similar lawsuits. Navajo Nation, for all intents and purposes, had a staggering amount of trademarks already registered well before Urban Outfitters' use of "Navajo." It is unclear how many other tribes have made such a systematic effort to register their trademarks. This effort has positioned them well to fit squarely within the remedies of trademark infringement and the Indian Arts and Crafts Act, even if its dilution claims were dismissed. If the Navajo Nation did not have the 86 trademarks, one must question whether a court would have allowed a case to get this far at all. Although the case is ongoing, it seems that the Navajo Nation may be able to have some remedy.

In contrast, the next discussion contemplates what happens to tribal intellectual property that may have no remedy available that is acceptable to a Tribe.

***C) The Origin Myth of Acoma Pueblo*:** An Indian Tribe's view of how it came to be can be so tied to the identity of the Tribe that it cannot be separated from it. Long ago, the American Bureau of Ethnology, an arm of the United States government, took great interest in ethnographic studies of the Indian Tribes of North America, under the mistaken view that the tribes would disappear from modern life through governmental policies of assimilation. Some of these studies focused on the origin stories of Indian tribes. As was the case with many of the early ethnographers, no thought was given to whether this was acceptable to the subject Tribe, much less, the veracity of the person telling the story to the ethnographer.

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[59] Memorandum Opinion and Order at 45, *Navajo Nation, et al. v. Urban Outfitters, Inc., et al.*, No. 12-195 LH/WDS (D.N.M. Mar. 26, 2013)

[60] Memorandum Opinion And Order Denying Defendants' Motion For Partial Summary Judgment On Standing [Doc. 222] And Denying Plaintiff's Cross-Motion For Summary Judgment On Standing [Doc.265], *Navajo Nation, et al. v. Urban Outfitters, Inc., et al.*, No. 12-195 BB/LAM (D.N.M. Mar. 26, 2013).

[61] Memorandum Opinion And Order Denying In Part Defendants' Partial Motion For Summary Judgment Based On Laches (Doc. 214) And Granting In Part Plaintiffs' Cross-Motion For Summary Judgment On Defendants' Affirmative Defense Of Laches (Doc. 252), *Navajo Nation, et al. v. Urban Outfitters, Inc., et al.*, No. 12-195 BB/LAM (D.N.M. Mar. 31, 2016).

[62] Memorandum Opinion And Order Granting Defendants' Motions For Partial Summary Judgment On Plaintiffs' Trademark Dilution Claims [Docs. 239 And 254] And Denying Plaintiffs' Cross Motion For Partial Summary Judgment [Doc. 318] On Those Claims, *Navajo Nation, et al. v. Urban Outfitters, Inc., et al.*, No. 12-195 BB/LAM (D.N.M. May 13, 2016).

[63] *Id.* at 8.

One day, a person claiming to be a member of Acoma Pueblo appeared at the offices of the Bureau and offered to tell an ethnographer a version of the Acoma Origin story. What was ignored by or unknown to the Bureau is that the Pueblo treated its origin story as sacred knowledge, not to divulge except through ceremonial activities at the Pueblo, or at the direction of Pueblo leaders. Also ignored or unknown to the Bureau was that their visitor was a member of Acoma who was estranged from the Pueblo, one who had disavowed the traditional culture of the Pueblo in favor of the protestant wing of the Christian faith.

When members of the Pueblo learned of the Bureau publication many years later, Pueblo leaders thought the best approach was to not protest the publication or its errors as that would bring public interest to a subject that was a very private part of the key identity of the Pueblo and its members. Old copies could collect dust in the stacks of university libraries, and federal agencies, and the Pueblo could preserve its sacred knowledge. One day in 2007, all of this changed. Acoma leaders learned through the internet that University of California at Los Angeles Professor Peter Nabokov was planning on re-publishing the Acoma origin story. In the 1950s, as a result of reports generated for the Indian Claims Commission, Acoma established a policy for scholars seeking to study the Pueblo and possibly publish information about the Pueblo. Generally, a scholar had to set out what they proposed to do, provide a copy of the final draft of any publication to the Pueblo, meet with the Pueblo to discuss the publication, and if everything was acceptable, obtain the permission of the Pueblo Tribal Council to publish the information. In 2007, upon learning of Nabokov's intention to re-publish the Acoma Origin Story, the Pueblo directed its attorneys to contact Nabokov and the Chancellor of UCLA and invite Nabokov to follow the established policy for scholars. Nabokov responded quickly:

> I would welcome the opportunity to appear before the Governor and explain myself. If permission to publish is granted I would also like to state that I have no interest I making any money from this publication. I would welcome the opportunity to turn over any and all royalties that came to me personally from such as edited version of this publication of the creation story to the Acoma Tribe.
>
> I would like to request that when I complete the editing of this restored version of the myth that I send the manuscript directly to [the Pueblo Governor]. And then I would like to come out for a meeting to explain my interest in this version and my hopes for it as a publication.[64]

The law office stayed in contact with Dr. Nabokov over the years, inquiring as to the status of the work. Then, thanks again to the internet, in March of 2015, Acoma learned that several internet book sellers including Amazon and Barnes and Noble were taking pre-publication orders for the work. Dr. Nabokov was reminded of his 2007 statement that he would seek Acoma permission to publish **before**, not **after** publication.

Dr. Nabokov did send the Pueblo a copy of the book after being reminded, but did not delay publication to allow Acoma time to thoroughly review the publication and arrange for him to meet with the Governor or appear before the Tribal Council to obtain the Pueblo's permission for publication. Acoma

[64] Letter from Peter Nabokov, UCLA, to Ann Berkley Rodgers, Chestnut Law Offices, P.A. (Aug. 14, 2007)(on file with the Chestnut Law Offices, P.A.).

learned that Nabokov had arranged for book signings at bookstores in Albuquerque and Santa Fe. Members of the Pueblo attended those events and confronted Dr. Nabokov. The public was asked not to purchase the book.

The publication of this material by the Bureau of American Ethnology so long ago, was done without any knowledge of or approval by the Pueblo. Federal law treats the publication as in the public domain – fair game for all sorts of academic freeloaders. Present copyright law provides no remedy for the Pueblo. While a lawsuit might be brought on other legal theories, Acoma had to consider if that was a means to the end that was sought – retaining this sacred information for Acoma. Ultimately, the decision was made that bringing a lawsuit would only give more publicity to the publication. Again, Acoma opted to let the book be consigned to the cobwebs and dust motes of the libraries of the world.[65]

[65] For more information on the background of the publication, Dr. Nabokov, and the Pueblo of Acoma's response, *See generally* Khristaan D. Villela*, Controversy Erupts over Peter Nabokov's Publication of 'The Origin Myth of Acoma Pueblo*,' PASATIEMPO, SANTA FE NEW MEXICAN, Jan. 20, 2016, *available at* http://www.santafenewmexican.com/pasatiempo/columns/viajes_pintorescos/controversy-erupts-over-peter-nabokov-s-publication-of-the-origin/article_1bcbe12b-b5c2-527e-93e9-1759fec994c5.html; Lucas Iberico Lozada, *The Professor and the Pueblo*, SANTA FE REPORTER, Jan. 27, 2016, *available at* http://www.sfreporter.com/santafe/article-11510-the-professor-and-the-pueblo.html.