

Boasian Ethnography and Contemporary Intellectual Property Debates¹

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IT IS AN EXTRAORDINARY HONOR to have been given this opportunity to address the members of the American Philosophical Society, a body that has directly supported my research in crucial ways since the earliest days of my career. The honor is doubled in this context, in which we are reflecting upon the legacy of Franz Boas. As an anthropologist and folklorist I endeavor to work in a tradition that is a direct extension of Boas's foundational accomplishments and I have always felt a deep sense of appreciation for the four remarkable scholars who connect me, via student-adviser ties, directly back to Boas. I want to thank Professor Greenhouse and the Society's leadership for this chance to reflect on contemporary problems of wide concern in light of the work of Boas and his students and of my own experiences as a field ethnographer who has worked in consultation with the Native American peoples of Eastern Oklahoma since 1993.

Around the world, we live in an era dominated by intellectual property concepts of a distinctive, and increasingly powerful, sort. The United States government, in alignment with the interests of multinational corporations, is at the forefront of a global effort to formally establish, expand, and synchronize laws governing such intellectual property rights as patent, copyright, and trademark protection. For international bodies such as the World Intellectual Property Organization, the worldwide extension and harmonization of Western intellectual property systems is understood in strictly positive terms as a means of promoting economic

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and political “development.” But this view is widely contested in a dizzying array of venues.

In reference to the increasingly digital culture of the global North, one of your newest members, Lawrence Lessig, has been at the forefront of efforts to both understand and mitigate the consequences of such transformations, particularly the enclosure of the public domain by an ever-expanding realm of copyright and so-called “digital rights management” technologies. The copyleft movement, centered on new legal tools such as Creative Commons licenses, represents a growing alliance of diverse individuals and groups, from open source computer programmers to collage artists, hip hop musicians, and advocates for open access publication of scholarly research.²

These issues have a particular appearance as they are viewed from the vantage point of the legal department of a major record label or from the dorm room of the college freshman engaged busily but illegally in downloading pop songs. They look and feel different, again, from the perspective of the French or California vintner battling over whether it is, or is not, Champagne if it is produced outside of France’s Champagne region. Such geographical indicators or regional appellations are a form of intangible property that few of us gave much thought to until they, in relatively recent times, became the center of loud, newsworthy regional and international battles.

Then there are ways that intellectual property contests have been emergent in the developing, third, and fourth worlds. Artists from Aboriginal Australian communities seek to stop overseas firms from mass-producing consumer goods featuring sacred imagery. Indian farmers fight the patenting of Basmati rice by a U.S.-based agribusiness. A diverse array of indigenous and non-indigenous actors weigh in on the worldwide project of pharmaceutical bioprospecting/biopiracy. Global open source yoga advocates go to court to battle the enclosure of, and commodification of, yoga techniques by a superstar California guru.

²For an introduction to the issues animating the copyleft movement, see Lawrence Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity* (New York, 2005) and Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York, 2001). Anthropologists and folklorists are increasingly concerned with these communities and with the larger contests and debates in which they are engaged. My colleagues are also seeking to document and theorize such developments with an eye on the wider economic, historical, and geopolitical contexts in which they are unfolding. Cf. Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, N.C., 1998); Christopher Kely, *Two Bits: The Cultural Significance of Free Software* (Durham, N.C., 2008); Valdimar Tr. Hafstein, “The Politics of Origins: Collective Creation Revisited,” *Journal of American Folklore* 117 (2004): 300–15.

Michael F. Brown and others of my colleagues have been vigorously tracking and interpreting such conflicts for much of the past decade.³

The shorthand labels with which we try to sort such issues are evocative if a bit dizzying: pharmaceutical bioprospecting, agricultural biopiracy, traditional knowledge prior art databases, open source yoga, the copyleft movement, geographic indicators, open data, digital rights management, and terminator seeds. In all of these conflicts, cultural knowledge is contested as a form of property, and questions over the nature of its circulation in the world are raised. These debates, and the legal battles and public relations campaigns that they engender, are made even more intense because they always seem to link up with neighboring dilemmas and anxieties, such as those evoked by the words globalization, cultural endangerment, environmental degradation, media consolidation, privacy, nanotechnology, genetic engineering, indigenous rights, sovereignty, and repatriation.

In struggling to make sense of these matters, I have gained a great deal of inspiration and insight from my intellectual ancestors, particularly from Boas and his own students. In our disciplinary folk histories, we have tended to accord to kinship studies the status of primary ancestral obsession, but I would argue that the cross-cultural study of property, including the ethnography of what Boas's student Robert Lowie, in a 1928 *Yale Law Review* article, termed "incorporeal property," looms nearly as large in the history of our field.⁴ The property debates of early British and American anthropology have tended to be glossed over as battles in wider conflicts, such as those over the existence of primitive communism, itself a surrogate for debate over evolutionary social theories. Looking again at this history, I see in the older work—particularly in Boas's accounts of Northwest Coast systems of tangible and intangible property, as well as in the subsequent theoretical work of his students Lowie and Alexander Goldenweiser—a foundation for our own research aimed at documenting locally variable understandings of property, including its nature, distribution, circulation, and control.⁵ What is new, in degree if not in kind, is the global processes

³Michael F. Brown, *Who Owns Native Culture?* (Cambridge, Mass., 2003); Fred Myers, "Ontologies of the Image and Economies of Exchange," *American Ethnologist* 31 (2004): 5–20; Tiana Tew, "Legal Exercise: Re-Positioning Yoga in the Global Commons" (paper presented at the American Folklore Society Meeting, 22 October 2005); Sumathi Subbiah, "Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge," *Boston College International and Comparative Law Review* 27 (2004): 529–59.

⁴Robert Lowie, "Incorporeal Property in Primitive Society," *Yale Law Journal* 37 (1928): 551–63.

⁵For a historical account of tangible property debates in American anthropology, see Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical

through which the world's still diverse intellectual and tangible property systems are increasingly rubbing roughly against one another and against the globally harmonized intellectual property system promoted by WIPO and its corporate and national partners in the belief that "intellectual property is a powerful tool for economic growth."⁶

In an article reflecting his own views, but not necessarily those of his employer, Antony Taubman, head of the World Intellectual Property Organization's "Traditional Knowledge Division," has observed that "[t]he development of performers' rights is a concise instance of the contested recalibration of the public domain, as established notions of equity come under pressure through the impact of technological change and shifts in social values."⁷ This is a remarkably effective and concise expression of the problematic that I will now take up in my paper and in the longer project of which it is a first foray.

* * *

They were to be seen everywhere, as I traveled among the Indian people of eastern Oklahoma during the past few summers. As the men of the Duck Creek Ceremonial Ground fasted and danced the renewal of the world beneath a broiling noonday sun, as the community's little boys were ceremonially scratched and thereby purified and pushed onward toward manhood, as the townswomen reenacted the story of creation in their fantastically beautiful Ribbon Dance, throughout the whole of the annual Green Corn Ceremonial—the great communal ritual of their peoplehood—my Yuchi friends documented all of it with the latest generation of multifunction camera phones. They were not alone. The same scene of digital image-making is constantly repeated among the Caddo, the Cherokee, the Quapaw, and in most of the other native communities that I have continued to have the privilege of visiting. The technology

Considerations," *American Anthropologist* 104 (2002): 247–61. A sample pathway through three generations of Boasian literature on tangible and intangible cultural property systems can be followed through these illustrative works: Franz Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians* (Washington, 1897); Robert Lowie, *Primitive Society* (New York, 1920); Alexander Goldenweiser, *Anthropology: An Introduction to the Primitive Culture* (New York, 1937); and A. Irving Hallowell, "The Nature and Function of Property as a Social Institution," *Journal of Legal and Political Sociology* 1 (1943): 115–38. An exemplary present-day exploration is Kimberly Christen, "Digital Dynamics Across Cultures," *Vectors* 2 (2006) <http://www.vectorsjournal.net/index.php?page=8%7C4&projectId=67>, accessed 22 April 2008.

⁶Kamil Idris, "Message from Director General Kamil Idris," www.wipo.int/about-wipo/en/dgo/dgki_2003.html, accessed 8 December 2004.

⁷Antony Taubman, "Nobility of Interpretation: Equity, Retrospectivity, and Collectivity in Implementing New Norms for Performers' Rights," *Journal of Intellectual Property Law* 12 (2005): 351–425, at 353.

is new and its implications deserve consideration, but no one familiar with Native Oklahoma would be surprised.⁸ Beginning with the availability of consumer still-cameras and reel-to-reel tape recorders, Indian people in Oklahoma concerned with the performance of ancestral forms of music, dance, and ritual have integrated these, and subsequent technologies into their cultural practices, using them to create documentary archives for historical and educational purposes, as well as for personal enjoyment. These uses have unfolded within a *local* intellectual property (IP) system rooted more broadly in tribal and regional cultures and social norms.⁹

Central to the integration of recording technologies into Woodland Indian ceremonial life has been the authority granted to local town chiefs and councils to determine the scope of their appropriate use, as well as to place limits on the contexts in which recording takes place. While differences of opinion exist within communities, the nature of town life in Woodland Indian Oklahoma has been such that locally accepted and stable patterns of recording use have existed for more than a generation. The goal of my larger effort is to document this system and to explore how recent changes in digital technology have begun to undermine it, while concurrent developments in copyright and neighboring domains of law have now criminalized what has been an effective local system governing the production, circulation, and use of recordings of collective musical and ritual performances.

In my book *Yuchi Ceremonial Life* and elsewhere, I have discussed the documentary impulse that is such a prominent feature of present-day community life among Indian people in eastern and central Oklahoma.¹⁰ For today, I wish only to describe a bit more concretely the system of control that underpins the use of recording technologies among the region's ceremonial ground people. This will set the stage, I hope, for considering the impact of changing technology and IP regimes.

For quite good reasons, Woodland ceremonial ground people possess considerable apprehensions about being misrepresented in the media or, more profoundly, about having aspects of their culture appropriated

⁸For historical, cultural, and social background on the Yuchi and the other native peoples of eastern and central Oklahoma among whom I have studied, see Jason Baird Jackson, *Yuchi Ceremonial Life: Performance, Meaning and Tradition in a Contemporary American Indian Community* (Lincoln, Neb., 2003) and various chapters found in Raymond D. Fogelson, ed., *Handbook of North American Indians*, vol. 14 (Southeast) (Washington, 2004) and Bruce Trigger, ed., *Handbook of North American Indians*, vol. 15 (Northeast) (Washington, 1978).

⁹See Jason Baird Jackson, "The Paradoxical Power of Endangerment: Traditional Native American Music and Dance in Eastern Oklahoma," *World Literature Today* 81 (September–October 2007): 37–41.

¹⁰Jackson, *Yuchi Ceremonial Life*, 266, 278–79.

and commodified by outsiders. More fundamentally, ceremonial ground people throughout Woodland Oklahoma hold clear ideas about the collective nature of their beliefs and practices, asserting that the domain that they identify as traditional culture can be shared but not individually profited from. This assertion holds for insiders as well as for outsiders, and my ethnographic work has unfolded within the bounds of this understanding. Such anxieties mark the “no recording allowed” pole on the use of documentary technology continuum.

Concern over the preservation and revitalization of valued cultural expressions and recognition of the usefulness of these technologies mark the other pole. For many but not all Woodland Indian people, documentary recording gear offers communities the means by which they can create audio and visual records of considerable value in the present and in various imagined futures.

Within the limits of individual community custom, Woodland Indian people have continued to adopt and use various new recording technologies. What is radically new is not recording itself, but the way the latest generation of gadgets lessens the ability of local ceremonial leaders to monitor and control their use. The typical ceremonial ground allows still photography throughout its ceremonies and audio recording of the evening and nighttime dances that follow daytime ritual events. Most have permitted video recording only in closely controlled ways, if at all. Generally, anyone seen using a video camera at ceremonies has been asked to stop and is given a quiet explanation of town policy.

The norms that I have just described are changing with the advent of new technologies. A phone doubles as both a still camera and a video recorder. Dedicated video cameras are also still cameras and are physically indistinguishable from them. Affordable and effective audio recorders are now so small as to be unnoticeable in the context of ceremonial ground ritual events. These new facts make existing methods of surveillance and control ineffective.

Complicating matters further are local values, closely aligned with pre-Christian religious practice, that emphasize avoiding interpersonal conflict in general, but at community rituals most specifically. Thus even when ceremonial ground leaders suspect that marginal townspeople or visitors are surreptitiously using one of these technologies in ways that would have previously been forbidden, when such use was blatantly obvious to all those assembled, they, more often than not, now let the infraction pass, for one cannot be absolutely certain what exactly is being done. Creating an incident is a greater social and spiritual risk, for the moment, than the possibility such “bootleg” recordings might be misused by those who, in making them, demonstrate that they do not know any better.

My friends among the Woodland Indian ceremonial people in Oklahoma do not use the word “bootleg,” as I just did, to refer to these unauthorized recordings. While not completely inaccurate, my use is intended to shift our attention to the other change relevant here—the legal one. I am new to thinking about the ramifications of international law. My introduction to these issues came first with the World Intellectual Property Organization’s 2003 report on legal and policy options available for protecting folklore. It was only in reading this white paper that I learned that the U.S. is already a party to the WIPO Performances and Phonograms Treaty (WPPT).¹¹ Under this convention, I and several thousand of my closest friends in Oklahoma are, it seems, in massive violation of U.S. and international law. Along with a parallel U.S. anti-bootlegging law adopted in accordance with the Uruguay Round of GATT, this treaty grants performers the exclusive right to permit or not permit recording, and makes the creation of such recordings without such permission illegal.

As I have already noted, though, among the ceremonial people of eastern Oklahoma, this decision-making responsibility is held by a local ceremonial chief, whose decisions are buttressed by a council with whom he confers on matters of policy and procedure. Some ceremonial ground communities forbid recording altogether, but most bar it only during daytime ceremonies and allow it during evening and nighttime social dances. At many such social dances, up to half of the participants, sometimes numbering in the hundreds, will use audio tape recorders to “catch” their favorite song leaders and might possibly record the entire all-night event. Were they to obey these laws, every person running a recorder at such an event would need to formally secure permission from every participant present, as the basic performance format is such that everyone is simultaneously an audience member, dancer, and musical performer.¹²

Beyond being utterly unworkable in practice, the international conventions, and the U.S. law they prompted into existence, do what the WIPO folklore report actually cautions against—they negate local cus-

¹¹American Folklore Society, “American Folklore Society Recommendations to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore,” Electronic document, http://afsnet.org/aboutAFS/AFS_WIPO_IGC_GRTKF.rtf, accessed 17 January 2004; WIPO, *Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options*. WIPO/DRTK/IC/6/3. (Geneva, 2003); Sherylle Mills, “Indigenous Music and the Law: An Analysis of National and International Legislation,” *Yearbook for Traditional Music* 28 (1996): 57–86, at 65–66.

¹²Jackson, *Yuchi Ceremonial Life*, chap. 6; Jason Baird Jackson and Victoria Lindsay Levine, “Singing for Garfish: Music and Community in Eastern Oklahoma,” *Ethnomusicology* 46 (2002): 284–306.

toms regarding the nature of “traditional cultural heritage,” while hindering its circulation and perpetuation within the fabric of community life. One part of WIPO is listening, with one ear at least, to carefully crafted position statements by the American Folklore Society, by other NGOs, and, most prominently, by indigenous actors themselves, while another, more powerful, part of the body has already acceded to the demands of multinational media interests protecting profits against pirates in the global market.

After an earlier lecture in which I simply noted the existence of the performers’ rights paradox in the context of stomp dance performance and Woodland Indian social organization, a law school colleague with considerable sensitivity to anthropological nuance offered the view that none of this is actually deeply troubling or particularly significant because legal action will not actually result. While I hope that U.S. and international IP law do not show their faces in the Oklahoma stomp dance world, I am less sanguine about what it all means and about the likelihood that mischief will follow from the unasked-for bestowal of this globally uniform property right.

The social construction of new, internationally harmonized illegalities needs to matter to us. As international IP law changes with increasing rapidity, most often tilting toward the further enclosure of cultural forms and practices, one cannot help doubting that the current lack of prosecution makes the question irrelevant. As our symposium’s organizer, Carol Greenhouse, has characterized the issue for me, it is a “question of how law can be used to create zones of illegality (in effect, putting them on hold until/unless prosecution is in someone’s interest)—and how such zones impact cultural practices.”¹³

In following local recording customs during two months of fieldwork last summer, I may have exposed myself, in my most catastrophic interpretation of the statutory penalties provided under U.S. law, to fines totaling up to ninety million dollars, a figure calculated by multiplying the approximate number of individual performances that I recorded by the maximum penalty of \$150,000 for infractions committed by those who know what they are doing is illegal.¹⁴ I am obviously offering this figure for its rhetorical value, but it, I hope, suggests how costly the bestowal of such new rights might become for those hardheaded enough to privilege the local over the global in a one-size-fits-all, IP-driven world.

More likely than the bankrupting of my family and those of my many native friends is the likelihood of a smaller-scale catastrophe. One

¹³ Personal communication, 25 October 2005.

¹⁴ Title 15, Chapter 5 § 504, see: <http://www.copyright.gov/title17/92chap5.html#502>, accessed 26 October 2005.

easily imagined is that a local community will attempt to produce a CD from existing recordings made live at their town's ceremonial ground, only to discover that no recording company or digital reproduction house, in the for- or non-profit sector, will work with the material in the absence of the required permissions. Such instances, even if they remain solely chilling effects, are examples of the kinds of problems Taubman has recently identified as stemming from a one-size-fits-all definition of performer and performance. Writing on these issues in the mid-1990s, Sherylle Mills saw hope in the prospect that indigenous communities could protect their music from exploitation through these new anti-bootlegging laws. I see a cloud where she saw a silver lining.¹⁵

All around the world, local peoples, their practices, and the distinctive IP systems in which they are still imbedded, are pressed in upon from two sides. Both the Euro-American public domain being defended by the Free Culture movement *and* the strengthened and harmonized IP system promoted by WIPO and WTO offer themselves up as solutions to the problems faced by indigenous and other so-called traditional communities, but both encroach upon and destabilize societies that might otherwise wish to be left alone.

Stomp dance music and stomp dance musical performance are not, contrary to the ways that many lawyers and policy makers are retheorizing folklore, things that are and always have been found in the public domain. As Kimberly Christen has persuasively argued, the commons, as construed by Western social theory, law, and colonial policy, is just as much a historically constituted imposition as is copyright (à la Disney) and patent (à la Monsanto).¹⁶ Stomp dance songs and stomp dance recordings circulate in a large and complex social network, but not (yet) in a (fully) global or commodified one.¹⁷ Stomp dance songs do not (yet) belong to anyone in particular, but they also do not belong to everyone, either as part of humanity's shared cultural heritage or as "prior art" awaiting the addition of "value" that will permit enclosure through the copyright/patent process.¹⁸ For a moment or two longer, at least, their use goes hand-in-hand with the acceptance of a complex package of local and regional beliefs and social norms.

¹⁵Mills, 66.

¹⁶Kimberly Christen, "Gone Digital: Aboriginal Remix and the Cultural Commons," *International Journal of Cultural Property* 12 (2005): 315–45.

¹⁷Jackson and Levine.

¹⁸Barbara Kirshenblatt-Gimblett, "Intangible Heritage as Metacultural Production," *Museums International* 56 (2004): 52–65; Cori Hayden, *When Nature Goes Public: The Making and Unmaking of Bioprospecting in Mexico* (Princeton, 2004), 24–25; Stephen A. Hansen and Justin W. VanFleet, *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting Their Intellectual Property* (Washington, D.C., 2003).

With the unasked-for imposition of performers' rights, as one of copyright's new neighboring rights, a tragedy of the anti-commons is created among stomp dance people, in law if not yet in practice.¹⁹ Anyone who sings at a stomp dance, myself included it seems, now has the power, in theory at least, to use the law to prevent what is now a customary and accepted use of recording technologies. Taubman's recent paper offers a detailed assessment of the general conceptual problems arising from the establishment of "performer" as a general all-purpose legal category, including the veto power accorded to minor participants in the performers' rights context.²⁰ He argues that these problems, once recognized, can be fixed in reasonable ways in national legal implementation. From the point of view of indigenous groups encompassed by nation-states, national approaches tend to be about as bad as international ones. Thus, I suspect that any extra-local solution will make matters worse, especially given the law of unexpected consequences.

Admittedly, I am still struggling to make sense of all of this, but I am convinced that we have new work to do in the still incomplete ethnographic project of understanding property and its analogs, both tangible and intangible, in cross-cultural terms. I do hold, as my collaborator Kimberly Christen has put it, that

all of this points to the larger issues of how the cultural is constructed in dialogue with the legal in terms of IP in such a way that, in terms of international law, indigenous peoples are both excluded from a "progressive" invocation of the commons (that seeks to undo the strangling effects of corporations) and at the same time excluded from the legal discourse (as their property doesn't normally "fit" in the legal construction that aids corporations!). It is this legal bind that shows us both the weakness of the system and its inability to articulate with other property/knowledge management/circulation systems.²¹

Using ethnography to address such problems is a Boasian project in more than one sense. It reflects Boas's scientific concern with documenting and interpreting human variability across time and space, while echoing his theoretical, political, and ethical commitments. It is also a Boasian endeavor in that Boas's early and foundational work, along with that of his students, now takes on new and unexpected relevancy in our own complex, global, and property-obsessed moment.²²

¹⁹Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," *Harvard Law Review* 111 (1998): 621-88.

²⁰Taubman.

²¹Personal communication, 24 April 2008.

²²I wish to record my appreciation to all of the many people and institutions who have supported my studies in Oklahoma. For assistance on broader intellectual and cultural property questions, I am especially grateful for the counsel provided by Kimberly Christen, Valdimar Tr. Hafstein, Michael F. Brown, Carol Greenhouse, and Dorothy Noyes.