THE TIPI WITH BATTLE PICTURES: THE KIOWA TRADITION OF INTANGIBLE PROPERTY RIGHTS*

*By Candace S. Greene** and Thomas D. Drescher****

INTRODUCTION

Not always visible to those of us whose time is devoted to securing and protecting corporate rights in trademark, copyright, and other intellectual property, is the on-going attempt of North American society to reconcile Western concepts of property ownership with claims asserted by Native Americans. Many of us may be familiar with Native American assertions of land claims. We may be somewhat less aware of the concern about the appropriation of Native American cultural property. One recent example was the use of the name "Crazy Horse" for a brand of malt liquor.[1]

In 1992, Hornell Brewing Co. introduced a malt liquor under the "Crazy Horse" name. Despite the outrage expressed by the Oglala Sioux Tribal Council,[2] the Bureau of Alcohol, Tobacco, and Firearms ("BATF") was helpless to act except with regard to the technical aspects of the product label. The BATF could address such issues as the general appearance of the product—i.e., whether it looked like whisky and was sold in a whisky-type bottle—but could do nothing to prevent use of the name.[3] It literally took an

** Member of the Department of Anthropology, National Museum of Natural History, Smithsonian Institution, where the author specializes in the study of Plains Indian art and culture. Dr. Greene's work on the Kiowa Tipi with Battle Pictures has previously appeared in Natural History (October 1993).

*** Associate with the law firm of Ross & Hardies, Chicago, Illinois, Associate Member of the International Trademark Association; member of the Editorial Board of The Trademark Reporter®. The author has previously written on the history and future of trademarks in an article published in 82 TMR 301 (1992). The author would like to acknowledge with gratitude the research assistance of John C. Nishi, an associate with Ross & Hardies, in connection with the legal aspects of this article.

1. For other examples, especially as they have occurred among the arts, see Brian D. Johnson, et al., Tribal Tribulations: Debate Grows Over Who Owns Native Culture, MacLean's, at 52-54 (February 19, 1990).

2. The vice president of the Oglala Sioux Tribe at Pine Ridge, S.D. in a letter to BATF Deputy Director Dan Black stated as follows: "'Crazy Horse, a warrior, a spiritual leader, a traditional leader, a hero, has always been and is still revered by our people. . . . His name being used on an alcohol product is a disgrace, a slap in the face to the Native American People.'" Chet Lunner, Crazy Horse Label Will Stay, Beverage Manufacturer Says, Gannett News Service, April 29, 1992 (LEXIS/NEXIS).

3. See Lunner, supra note 2.

act of Congress, in the form of a narrow amendment to a Treasury Department bill passed in October 1992, to deny and rescind any applications for "the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product. . . ."[4]

Today, there is increased assertion by Native Americans of tribal rights in cultural property, both tangible and intangible. The issues addressed range from land claims to the return of artifacts in museums to the rights to roles in films.[5] To the extent possible, Native Americans are seeking legal remedy and their claims are therefore expressed in terms of the dominant legal system. Such commonality of expression may, however, be a matter of expediency concealing a significant disjunction between the cultural framework within which the complaint arose and the legal system within which redress is sought.

Various societies construct concepts regarding personal and property rights differently from those that prevail under Anglo-American law. There is considerable variation in such concepts even among the nearly six hundred federally recognized tribes in the United States as well as many Native communities that have not received formal recognition. Cultural categories are always dynamic and subject to change. Native and Western systems of law have now been in interaction for many generations and have developed some common ground. There remain, however, many areas of fundamental disjunction between these systems. Issues constantly arise in which a Native community sees a clear case of infringement, but which the established legal system is not constructed to address, in spite of the community's best efforts to express their concerns in the language of the law.

The historic and radical tension between tribal legal systems and cultures and the dominant Anglo-American legal system no doubt has roots as old as the first European claim of possessory interest in the New World. Over the centuries, attempts to do justice to both sides have given rise to a sort of legal pluralism evident in the complex jurisdictional structure of United States Indian law, which Chief Justice John Marshall instilled with principles of tribal sovereignty.[6] The inherent tensions between

4. HR 5488, 102d Cong, 2d Sess (1992) (October 8, 1992); Kim I. Mills, "Crazy Horse" Beer Label Ban Unconstitutional, Company Says, Associated Press, November 7, 1992 (LEXIS/NEXIS); for a discussion of the Crazy Horse label, the problem of alcohol abuse among Native Americans, and the congressional effort to ban the label, see Antonia C. Novello, Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Damage of a Native American Hero, 38 South Dakota Law Review 15 (1993).

5. See, eg, Johnson, et al., supra note 1 at 52-54.

6. See Cherokee Nations v. Georgia, 30 US (5 Pet) 1, 8 LEd 25 (1831); Worcester v. Georgia, 31 US (6 Pet) 515, 8 LEd 483 (Court recognized the Cherokee and other Indian nations as independent political communities possessing the right of self government and

native communities and the Anglo-American legal system with regard to concepts of property rights generally can be seen in cases such as Chilkat Indian Village v. Johnson, involving a conflict between an individual claiming personal ownership of artifacts which the Chilkat Indian Village asserted to be communal property.[7] Such conflicts, rooted in concepts of cultural property rights where the community as a whole asserts a claim, are the most visible aspect of the inherent tensions between native and Anglo-American concepts of property ownership. Conflicts regarding issues of intangible property, however, increasingly are becoming an issue.

The discussion that follows focuses on the history of an important form of cultural expression among the Kiowa tribe—the Tipi with Battle Pictures. The authors present this as a specific illustration of Kiowa cultural conventions, or legal system, governing the ownership of intangible property.[8] For one-hundred fifty years, from 1845 to the present, the Battle Tipi has been repeatedly produced, exchanged, and reproduced according to distinctive principles relating to the individual ownership of intangible property. Its material form was a means of publicly displaying more fundamental underlying rights of expression. As we will see, this complex relationship was governed by the unwritten rules of a legal system which was well suited to the culture within which it arose. One of the points to emerge from this discussion is that while Kiowa culture has changed over time, particularly in its outward material appearance, many concepts regarding rights and restrictions over intangible property remain based on a traditional legal system.[9] It is hoped that an increased awareness of the nature of tribal legal principles will aid our courts in cases requiring determinations of the right of possession of cultural property.

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the power to enter into treaties.).

7. 870 F2d 1469 (CA 9 1989). For an excellent discussion of this case and related issues concerning rights of possession of cultural property see Christopher S. Byrne, Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects, 8 Journal of Environmental Law and Litigation 109 (1993).

8. For discussion of issues concerning ownership of cultural property see Peter H. Welsh, Repatriation and Cultural Presentation: Potent Objects, Potent Pasts, 25:3-:4 University of Michigan Journal of Law Reform 837 (Spring and Summer 1992); see Marie R. Deveney, Courts and Cultural Distinctiveness, 25:3-:4 University of Michigan Journal of Law Reform 867 (Spring and Summer 1992) for discussion of treatment by the courts of claims for accommodation of cultural differences and the typical judicial determination of "authentic" cultural distinctiveness; see also Byrne, supra note 7, for related issues.

9. Deveney, supra note 8, points to a culturally distinct group's outward display of modernity as having often been a critical factor in refusal of the courts to recognize that group's assertion of traditional rights.

I. HISTORY OF THE TIPI WITH BATTLE PICTURES

At the beginning of the nineteenth century, the Kiowa, lured by the horses that could be acquired from the Spaniards, moved from their homeland at the headwaters of the Yellowstone to the southern Plains. Horses changed buffalo hunting from a means of subsistence to a source of plenty and helped transport the resultant wealth. With the new way of life, a tribe needed firearms to defend its hunting territory from competing groups. Initially, the major sources of firearms, ammunition, and weapons repair were the trading posts located on the Missouri River system, far to the north and east. But in 1833-34, Charles Bent established a trading post in eastern Colorado, in territory controlled by the Cheyenne and Arapaho. For some years, the Kiowa together with the Comanche battled the southern bands of Cheyenne and their Arapaho allies for free access to the post. Finally, in 1840, the tribes agreed to a lasting peace and alliance. Little Bluff, principal chief of the Kiowa, negotiated the peace with High Backed Wolf, a prominent Cheyenne leader.

Five years later, Little Bluff and the Cheyenne chief, Sleeping Bear, who had become his partner in a formal pact of friendship and mutual support, commemorated the continuing peace between the two tribes. Sleeping Bear presented his friend with a fine painted tipi. In accepting this special gift, Little Bluff in return presented Sleeping Bear with a number of horses, including a highly valued, black-eared racing mount.

Among the Kiowa, as among the Cheyenne, painted tipis were objects of considerable prestige.[10] Less than twenty percent of tipis were painted, the rest were of plain buffalo hide. An ordinary tipi belonged to the women of the household, but individual men owned the painted ones. At the time he received the tipi from Sleeping Bear, Little Bluff already owned a painted tipi known as the Yellow Tipi, which he had inherited from his father. Most tipi designs were spiritual in origin, inspired by a man's vision, dream,

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10. The tipi designs of the Kiowa and the Cheyenne were the subject of extensive study by James Mooney of the Smithsonian's Bureau of American Ethnology. His fieldnotes dating from the turn of the century are preserved in the National Anthropological Archives of the Smithsonian and form the foundation for the discussion that follows. See particularly Manuscript 2531 and Manuscript 2538.

Painted tipis were also prominent among the Blackfeet, who until well into the twentieth century painted their tipis with symbols received in visions. It was forbidden for anyone other than the owner of a painted tipi to reproduce the symbol on another tipi. Only after proper ceremonies had been observed could the rights to a tipi symbol be transferred. See Walter C. McLintock, The Old North Trail, ch XV (Lincoln, Nebraska: University of Nebraska Press, 1992); John C. Ewers, Blackfeet Crafts, at 24-27 (Stevens Point, Wisconsin: R. Schneider, 1986).

or other encounter with the supernatural. Sometimes, however, a man captured a tipi from an enemy tribe or received one as a gift from an ally. Both secular and sacred designs held equal prestige and were governed by the same rules of ownership. Whatever its origin, a painted tipi could be passed on to another member of a family (by blood or marriage), and a design might persist for decades.

Sixteen horizontal yellow stripes boldly adorned one-half of the new tipi, sweeping around from the center back to the front, where the sides of the cover joined. They represented successful Cheyenne war expeditions. The other half was devoted to scenes of warfare, a novelty for the Kiowa, who painted battle scenes on hide robes and calendar records, but not on tipis. As a result, the Kiowa named the tipi Do-giagya-guat, Tipi with Battle Pictures. Because tipis stood with the doorway facing east to greet the rising sun (and the back to the west, braced against the prevailing winds), the half with the battle pictures was known as the north side and that with the stripes as the south side.

Little Bluff soon added his own embellishments to the tipi. Between the yellow stripes he inserted fifteen black stripes, for successful war parties he had led. Down the back on the north side, he added twenty tomahawks. These represented the coups, or deeds of war, that the prominent warrior Heart Eater had achieved with that weapon in combat with Pawnee enemies. Above the front doorway, a row of eight feathered lances symbolized the coups Sitting on a Tree had struck with that weapon. A picture of a warrior encircled by enemies decorated the top on the north side. The story of this deed was contributed by Feathered Head Pendant, a Comanche ally of the Kiowa who, surrounded by Mexican troops in about 1830, had defended himself all day behind a breastwork hastily scooped out of the sand, eventually escaping after killing one of the soldiers.

Buffalo-hide tipis rarely lasted more than one year in regular use. They became smoke and weather-stained and rotted around the bottom where they were staked to the ground. Poor people might get by with cutting off the bottom and making do for another year with a smaller tipi, but a prestigious dwelling demanded regular renewal. A tipi required about twelve freshly tanned buffalo hides and twenty-two poles. The Tipi with Battle Pictures was a little larger than most, requiring perhaps two more hides. Men killed the buffalo to secure new hides, while women tanned the hides and cut and sewed them to make the tipi cover. The men then did the painting.

Summer was the ideal time for tipi renewal because the hair on hides secured in this season was more easily removed. Also in

summer, the Kiowa left their dispersed hunting camps and came together in larger groups, culminating in the great tribal gathering at which the Medicine Lodge, or Sun Dance, ceremony was held. This assembly allowed for wide participation in the painting of the cover and provided an appreciative audience for display of the beautiful new tipi.

Little Bluff would invite as many as twenty to thirty men to participate in the renewal of the Tipi with Battle Pictures. They would discuss what events were worthy of depiction and would agree on two or three dozen. While the black and yellow stripes and the rows of tomahawks and lances were permanent features, other scenes might change. The space at the top was reserved for a "circle picture," a valiant stand in which a warrior surrounded by enemies eventually made his escape. In time, the Comanche picture gave way to one depicting the famous Kiowa warrior Big Bow with his wife Black Bear (who often accompanied him on war expeditions), surrounded by Mexican troops. Later the honor went to Yellow Wolf, encircled by Osage enemies.

II. INTANGIBLE PROPERTY RIGHTS AND THE GIVING OF DEEDS

A man's deeds were not painted on a tipi cover without his permission, since he owned the story of his accomplishments and the right to control their representation. But it was an honor to be asked to give them and few would decline such a request. The actual painting of the scene might be done by the hero of the event, by the owner of the tipi, or by any competent artist working under direction.

Intangible property played a significant role in Kiowa life. In addition to tales of military exploits, individuals owned the rights to their creative products. A man would not sing a song another had composed without permission. The same principle applied to women's beadwork designs. While a woman might present a pair of beaded moccasins to another person as a gift, this did not give the recipient the right to copy the design. Formal names, as distinct from common nicknames, were among the most valued items of property. If a child were ill or weak, its parents would ask a distinguished old man to give it a new, strong name to improve its health, offering him gifts in return. Such "medicine" names were a form of intangible property that themselves possessed power. Distinguished names often circulated within a family, their bestowal being a mark of honor. Before the imposition of mandatory patronymic surnames during the reservation period, however, individuals within a family did not carry the same name simultaneously. Instead when an older man chose to

give his name to a son, nephew, or other worthy man, he gave it completely and was himself no longer known by that name. Thus, when Little Bluff II gave his name to his cousin a few years before his death, he was subsequently known as Shoulder Blade, a nickname deriving from his stooped posture in old age.

Although Plains Indians were not the only tribes that recognized nonmaterial, high-status goods, such weightless baggage was ideally suited to their nomadic life style. If a tipi cover were destroyed by fire, as the Tipi with Battle Pictures was in 1872, or in the course of warfare, the loss was of physical property only. The rights to the design, the real source of the tipi's value endured. Even if a painted tipi was not made for a period of time, the rights were undiminished and could be reactivated. Ownership of the rights to a tipi design and possession of the tipi cover itself were viewed as separate. A tipi might be "loaned" to another person, giving them the right to use it until it wore out, but not the right to renew it. The transfer of such important property as the right to a tipi design was normally marked by a great feast and the presentation of return gifts. The guests at the feast served as witnesses to the exchange and the value placed upon the tipi or other property. In this way, the origin, ownership, and transfer of a tipi design were recorded in memories and community oral traditions.

With the rights to a tipi came the right to a designated camping position when all the tribe gathered for the Medicine Lodge ceremony. At that time, the tribe set up their tipis in a great circle opening to the east, its form echoing that of the individual tipis, whose doors faced east. Little Bluff's two tipis held the two most prestigious positions within the circle, immediately south of the entrance. His Yellow Tipi stood in first place and the Tipi with Battle Pictures next to it.

III. FROM LITTLE BLUFF TO THE PRESENT

In 1864, two years before his death, Little Bluff transferred the rights to the Tipi with Battle Pictures, along with his own illustrious name, to his sister's son, Gathering Feathers. In Kiowa reckoning, such a nephew could be considered as close a descendant as a son. For some years, the new Little Bluff (whom we might call Little Bluff II) continued to renew the tipi regularly. After a decade of debilitating warfare in the course of which the Kiowa lost more and more territory, Little Bluff II's band—among the last to surrender—was confined to a reservation in western Indian Territory, now Oklahoma.

With their hunting territory restricted and the buffalo exterminated, the wealth that had supported feasts and lavish gift

displays became a thing of the past. Both religious and social gatherings at which painted tipis and other symbols of status were proudly displayed were discouraged by the Bureau of Indian Affairs agents, who feared insurrections and considered gift-giving, an essential part of the transfer of intangible property, to be wasteful. It was felt that an essential part of converting Indians to capitalism was to teach them to accumulate goods rather than to distribute them widely. Painted tipis, now made of canvas, fell into disuse and their designs were not formally passed on. Eventually, most Kiowa people constructed wood frame houses, although often an unpainted tipi or Army-style wall tent was pitched nearby.

In his later years, Little Bluff II sought to bestow the rights to the Tipi with Battle Pictures on various descendants. None, however, had the resources to finalize the transfer with an appropriate reciprocal gift. The community measured the value of the tipi in terms of the gifts given in return for the rights to it. Failure to make suitable return would have devalued the tipi and brought shame on the family. Finally in 1881, one of his sons, White Buffalo, was able to make a suitable return and the tipi rights were transferred to him, although Little Bluff II continued to live in it until his death over ten years later.

James Mooney, an ethnologist with the Smithsonian's Bureau of American Ethnology, began his studies among the Kiowa in 1891. Mooney was intrigued by the designs painted on shields and tipis. During the course of his studies, Mooney, respecting Kiowa custom concerning the ownership of knowledge, always sought to interview the person who held the rights to a design or at least a member of the family for whom the design was traditional.

Much of the financial support for Mooney's early work among the Kiowa came from funding for major exhibitions, such as the 1904 Louisiana Purchase Exposition in St. Louis, and he was always seeking materials suitable for display. As large painted tipis were not available, he commissioned the production of small scale models. Among these was the Tipi with Battle Pictures. This model was painted by High Forehead, twin brother of White Buffalo, the son who had received the tipi in 1881. High Forehead, most commonly called Charley Buffalo, was a recognized artist among the Kiowa. He painted the model with the distinctive black and yellow stripes on the south side and the rows of tomahawks and feathered lances on the north side. Only seven battle scenes fit onto the small cover, including one at the top of the tipi of a single warrior encircled by United States soldiers.

Mooney recorded in his notes that the battle scenes were all imaginary, for "the artist has no correct knowledge of the

historical incidents recorded upon the actual tepee." More likely, Charley Buffalo—who lived in the tipi as a child and must have witnessed its renewal on many occasions—used imaginary events because he knew that actual deeds should not be represented without obtaining their owners' permission. This event elucidates two features of Kiowa property rights. The first is the distinction between knowledge and the right to reproduce that knowledge. The second is the independent operation of the rights to a tipi design including the elements that had become an integral part of it (stripes, tomahawks, and the like) and the right to depict the war deeds of individuals, which evidently were given for one time use only.

An important renewal of the Tipi with Battle Pictures took place in about 1916. More than a hundred people gathered to watch Charley Buffalo paint the tipi again, this time full size. Charley Buffalo invited eminent old warriors to record their deeds on the new canvas cover, in addition to the classic stripes, tomahawks, and lances. While no record exists that the rights to the tipi had been formally transferred to Charley Buffalo, they may have been, or perhaps by this time the tipi was regarded as a family possession rather than a purely individual one.[11]

Following this grand renewal, the Tipi with Battle Pictures again ceased to be made, although it continued to hold an important place in Kiowa oral tradition. In 1974, a new tipi, inspired by the Tipi with Battle Pictures, was adopted as the official tipi of the Black Leggings Warrior Society, a Kiowa veteran's organization formed in 1958 as a revival of an old warrior society of that same name. The new tipi painted by Dixon Palmer retained the black and yellow stripes but now represented the war experiences of society members who served in World War II, and included pictures of tanks, bombers and paratroopers. Like the old tipis, the new tipi has been renewed from time to time over the years, changing somewhat with each renewal. The current version now uses pictures of service patches to represent the war deeds of members. The Kiowa still recognize the tipi as inspired by Little Bluff's Battle Tipi, but it is now known as the Black Leggings Tipi.

Most recently, a great-great-granddaughter of Little Bluff II, Vanessa Paukeigope Morgan, in 1992 produced a three-foot-high version of the tipi for an exhibit at the National Cowboy Hall of Fame in Oklahoma City. For her model, Morgan drew upon

11. See Karen D. Petersen, Plains Indian Art from Fort Marion, at 168-69 (Norman: University of Oklahoma Press, 1971). Additional information on this event was obtained from interviews with Kiowa people carried out in the 1990s by C. Greene, as well as from transcripts preserved in various archives of interviews of the 1930s and 1960s.

family history to depict military deeds, such as her great-grandfather Paukeigope's battle with the Ute, which she considers to be family property. Respecting the Kiowa tradition that only men could reproduce such images, she instructed her son Seth who actually drew the battle pictures.[12]

IV. THE QUESTION OF DISJUNCTION

It is clear that the Kiowa recognized a warrior's ownership of the story of his deeds, as well as individual ownership of songs, formal names, tipi designs, and beadwork patterns. Recognition of a traditional Native American legal system for the ownership of intangible property raises a fundamental question as to whether Western intellectual property law can accommodate the Native American tradition and whether it is an appropriate vehicle for the protection of Native American intangible property.

A. The Kiowa Legal System

Kiowa concepts of law developed within a social system quite different from that which has shaped the history of Western law over the past several hundred years. An immediately apparent difference is that it was codified in oral tradition rather than in written statute or common law form. This distinction is not, however, as significant as might appear from a Western perspective, for oral tradition was a respected source of authority and did not hold the second-rate status that it is often accorded in literate societies. Also, the total Kiowa population was small, averaging around three thousand people through most of the nineteenth century. It was thus not difficult to maintain a shared knowledge of the basic precepts of the system.

The major difference between Western law and that of the Kiowa (as well as many other Native American peoples) is that Kiowa law developed and functioned within a small scale society in which individuals were in intense interaction and often dependent upon each other for successful exploitation of the environment. This social situation shaped both the goals of the legal system and its mechanisms of social control. The goal of the system was to maintain peace in the community and heal breaches in the social fabric, rather than to right wrongs. The usual mechanisms of social control consisted of ridicule, loss of prestige, and ostracism. These mechanisms were effective within a community of small size in which individuals generally knew each

12. Information on these recent versions of the tipi are based on C. Greene's interviews with the artists.

other and many of whom were also linked by ties of kinship and personal obligation. More severe measures could be invoked if necessary, often consisting of the destruction of property such as horses, hunting equipment, and/or one's tipi. Such losses forced the violator into dependency on the community and the choice between behavior modification and potential starvation. Extreme cases of misbehavior automatically brought supernatural sanctions, and individuals so cursed would be shunned by all. When the tribe was assembled for the communal hunt, one of the warrior societies functioned as a police force and was authorized to whip anyone who endangered the success of the hunt, the community's major food supply.

Jane Richardson's Law and Status Among the Kiowa Indians,[13] the only book published regarding Kiowa law, states that the only property about which disputes occurred was horses. All other property, although not communally owned, was expected to be automatically shared with one's kin and others in need and refusal to respond to a reasonable request was considered to be stingy, a particularly despised behavior. Richardson, however, considered only material possessions and failed to recognize the importance of intangible property. Such property was often highly valued and carefully guarded, and it appears that rules regarding intangible property were more developed among the Kiowa than those regarding tangible possessions.

For Kiowa people who are deeply involved in their cultural community, these legal precepts still function to regulate many aspects of traditional life within which issues of intangible property continue to be of importance. The question is whether Native systems of law, which developed to regulate specific social behaviors within small communities sharing certain common beliefs, can be successfully applied within a Western legal system grounded in principles of private property and capitalist economics.

B. Points of Divergence

Western copyright law is the product of a sedentary, agrarian/industrial culture which invented the printing press. Prior to the growth of literacy under the influence of Rome and the Church, many Western cultures had an oral literary tradition. The Anglo-Saxon epic, Beowulf, was, for example, an oral verse which survived for centuries prior to its reduction to writing by Christian scribes. Much of the greatest poetry of the Medieval period is anonymous. With the introduction of the printing press

13. New York: J.J. Augustin, 1940.

in about 1450, it became possible to effectively freeze a form of expression, reproduce it en masse, and exploit it commercially. In order to encourage both creativity and the availability of literary works, Anglo-American copyright law emphasizes protection of the right to reproduce a given form of expression.[14]

Kiowa protection of intangible property rights arose in the context of a non-monetary, nomadic hunting society with an oral rather than a written culture. Rather than protect the right to reproduce a given form of expression, the Kiowa focused on protection of the story, of the deed itself. Honor was the Kiowa currency of exchange and deeds attached themselves to individuals as marks of status. Recognition of an individual's rights in his deeds was clearly desirable in a society whose survival depended on its prowess in war and the hunt. Thus, the Kiowa legal system, like Western legal systems, sought to make the most efficient use of its society's resources.

At first glance, there is a deceptive similarity between Western copyright law and the Kiowa recognition of individual rights in intangible property. Both systems protect individual rights in such intangibles as songs, designs, and stories. However, once we begin to analyze the most basic rights under each system, radical points of departure are revealed.

The question of what is protected is answered very differently by Anglo-American and Kiowa law. Western copyright law protects not the idea, but the form of its expression.[15] Historical facts, the events of an individual's life, for example, may be rendered by anyone in any number of literary forms without violating another's copyright.[16] The Kiowa, on the other hand, recognize individual ownership of deeds. In this respect, it may be

14. See Section 106 of the Copyright Act, 17 USC §106:

> . . . the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

15. See 3 Melville B. Nimmer and David Nimmer, Nimmer on Copyright §16.01 (1993) ("Copyright may be claimed only in the 'expression' of a work of authorship, not in its 'idea,'" citing Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F2d 1222, 1234, 230 USPQ 481 (CA 3 1986)).

16. 1 Nimmer on Copyright §2.11[A] ("One cannot build a story around a historical incident and then claim exclusive right in the use of the incident," quoting Echevarria v. Warner Bros. Pictures, Inc., 12 F Supp 632, 638, 28 USPQ 213 (SD Calif 1935)).

American right of publicity laws which most closely approach the Kiowa system. Although right of publicity does not protect one's deeds themselves, it arguably protects the commercial value of the fame which attaches to an individual as a result of his deeds.[17]

Second, the most fundamental means by which Western copyright law protects a form of expression is by granting the creator of a work the right to control its reproduction. Under the Kiowa system, rights to a tipi design could be assigned or inherited. However, because a man owned both the deed as well as its representation, Kiowa restrictions on the reproduction of an event may have a broader scope than under Western copyright law. "Facts" were not necessarily in the public domain.

Third, copyright protection is limited by law to a term of years, after the expiration of which a work enters the public domain.[18] As the history of the Battle Tipi shows, the rights in tipi designs never actually expire.

With respect to these points, the incident involving Charley Buffalo's tipi model is revealing. He chose to depict imaginary rather than real events on the model despite the fact that he almost certainly was familiar with the original designs, since he had lived in the Tipi with Battle Pictures as a child and was able to produce it in full size at a later date. Under Western copyright law, Charley Buffalo could have depicted the actual deeds in an original form of expression, or, if he had assumed the original designs had entered the public domain, he could have simply reproduced them. That he did neither reveals that the Kiowa restriction on his right to reproduce a design extended not only to the form of expression, but to the event itself. It also reveals the ongoing viability of the Kiowa legal system more than two decades after the establishment of the reservation system and the imposition of Western law. Charley Buffalo did not presume that the "traditional" designs were his for the taking. Moreover, as Vanessa Paukeigope Morgan's construction of the model tipi in 1992 shows, Kiowa tradition continues to guide who may depict

17. See Bi-Rite Enterprises, Inc. v. Button Master, 555 F Supp 1188, 1199 (SDNY 1978) (holding that the right of publicity "protects the persona—the public image that makes people want to identify with the object person, and thereby imbues his name or likeness with commercial value marketable to those that seek such identification."). Commentators argue that the Bi-Rite formulation is too narrow, since other attributes of a person than "name or likeness," including perhaps her deeds, serve to identify that person and thereby invoke her right of publicity. J. Thomas McCarthy, The Right of Publicity and Privacy §4.9 (Release #12, 7/94).

18. Indeed, copyright protection of unlimited duration would be unconstitutional. See US Const, art 1, §8, cl 8, which grants Congress the power to "promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."

deeds of battle—a family member—and who may reproduce the image of such events—only men.

There are still more fundamental differences. Western copyright law protects "original" forms of expression.[19] The Kiowa protection of tipi designs was not concerned with providing an economic incentive for artistic originality, but rather with the protection of designs which identified the deed or vision of an individual. As identifiers, tipi designs share a certain functional affinity with trademarks and aspects of our right of publicity law. Of course, trademarks are commercial identifiers and right of publicity protects an individual's right to commercially exploit aspects of his identity, such as name and likeness. As identifying symbols, tipi designs probably have more in common with European historical use of heraldic devices. It is fascinating to speculate, however, that those tipi symbols which were derived from vision, and thus possessed of an inherent power, or "medicine," might share something in common with symbols possessing what we now call in the commercial trademark context, a "persona," a property which some have argued is a distinguishing feature of modern trademarks.[20] 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.

The Kiowa also recognized individual ownership of designs that were the product of individual creativity without any spiritual association, such as those used in beadwork on clothing and riding gear. Such proprietary rights in a design might have served a trademark-like function by identifying the artisan who was the source of the work, thus attesting to its quality.[21]

The subject of proprietary beadwork designs also raises another question as to just what is, under Kiowa laws, a "traditional" design. Although American culture freely appropriates Native American designs as traditional works in the public domain, is the same understanding held by the Kiowa? Is

19. "Copyright protection subsists . . . in original works of authorship. . . ." §102(a) of the Copyright Act, 17 USC §102(a); 1 Nimmer on Copyright §2.01.

20. It is increasingly recognized by commentators, if not the courts, that modern famous brands, such as MUSTANG, "evoke a range of images that extend beyond the quality and variety characteristics of the products themselves. Many brands have their own 'personalities' . . . they make consumers feel good. . . ." Jerre B. Swann and Theodore H. Davis, Jr., Dilution, An Idea Whose Time Has Gone; Brand Equity as Protectible Property, The New/Old Paradigm, 84 TMR 267, 272-73 (1994) (footnote omitted). See also Ellen P. Winner, Right of Identity: Right of Publicity and Protection for a Trademark's "Persona," 71 TMR 193 (1981).

21. See 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§3.02[1] and 3.04[1] (3d ed Release #2, 4/94) (trademarks function as identifiers of source and as indicators of quality).

everyone but the Kiowa free to use Kiowa designs? As our discussion has shown, the concept of a "traditional" design among the Kiowa and other Plains Indian tribes, such as the Blackfeet, may be entirely illusory. It may be that under Kiowa law beadwork designs, like tipi designs, never pass into the public domain.[22]

Reflecting their distinct origins, the Kiowa and Anglo-American legal systems diverge radically with respect to certain fundamentals of intangible property ownership rights. At times, such divergences come glaringly before the courts, as in Chilkat Indian Tribe v. Johnson, where possession of cultural objects is at issue, or in the use of the Crazy Horse name on malt liquor, where rights to the Crazy Horse name should have been at issue.[23] What, we might ask, would be the proper response of the courts if replicas of the Tipi with Battle Pictures, replicas which did not falsely suggest that they were an Indian product, and so did not come within the scope of the Indian Arts and Crafts Act,[24] started showing up in gift shops across the country. On what grounds might the Kiowa challenge such use of historic designs and who would be considered to have standing? Submitting a claim under the copyright law would ensure the very fate they would wish to avoid, i.e., a judgment that the designs are in the public domain. It is unlikely that the mere use of the design would or should be sufficient to create a cause of action for misrepresentation of Indian produced goods under Section 305e of the Indian Arts and Crafts Act which provides that a civil action may be brought against "a person who offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization. . . ." Given Western society's widespread use of Indian designs, the question of ownership rights in such designs is fraught with potential legal tensions.

It is not within the scope of this article to answer such questions. Rather, we have attempted to show that certain tribal

22. Basic styles of design can be recognized for many tribes, including the Kiowa, based on characteristic combinations of elements. These represent the broad design canons within which crafts people created their individual variations. It is these variants that are considered distinctive design creations. Young women today, anxious to produce authentic Kiowa beadwork, sometimes seek out old objects in museums and carefully copy the designs. More traditional beadworkers criticize this as "stealing designs," themselves judging the process more important than the product in determining authenticity.

23. The various states disagree whether a person's right of publicity can be exercised by his descendants, and as to the post-mortem duration of that right. See McCarthy, Rights of Publicity, supra note 17, §9.

24. 25 USC §§305 et seq.

legal concepts may be very much alive, notwithstanding any outward trappings of modernity of tribal members, and that very real dilemmas may arise when questions of ownership rights in Native American cultural property come before the courts. Answers to that dilemma are still being explored.[25]

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25. Byrne, supra note 7 at 130-31, insightfully points out an inherent fundamental flaw in the Native American Graves Protection and Repatriation Act ("NAGPRA") concerning the rights of possession of cultural property. As Byrne suggests, part of the solution is, no doubt, to create new law. We would add that another essential part of the solution is to delineate tribal legal systems already in place which govern precisely such questions of ownership. By deferring to tribal law and custom, NAGPRA and the courts have, it appears, begun to move in this direction.