CULTURAL PROPERTY LAW – FALL 2011

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Description

This class studies the emergence of "cultural property law" as a field of legal inquiry and practice. Cultural property law consists of a body of domestic and international law (cases, statutes, treaties, and other materials) recognizing and regulating group interests in resources that are integral to community identity and experience. With ancient origins in Roman prohibitions on the wartime looting of cultural objects, cultural property law entered the modern era with the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. In many nations, domestic law on cultural property has evolved alongside international law. In the United States, for example, extensive statutory regimes identify and regulate resources of national historic and archaeological importance. At the same time, federal law also implements international legal instruments recognizing trade limitations on certain cultural properties.

The class will examine the development of cultural property law as a general matter and with particular attention to indigenous peoples, whose claims have pushed the law to afford protections for subnational group rights (e.g., to traditional lands and religious sites) and intangible properties (from ethnobotany to genetic information). Following a long history of conquest and dispossession, indigenous peoples are now at the apex of the contemporary cultural property movement with major federal statutes (e.g., the Native American Graves and Repatriation Act of 1990) and international instruments (e.g., the United Nation Declaration on the Rights of Indigenous Peoples (2007)) recognizing indigenous self-determination over cultural resources. Yet, critics articulate competing scientific, speech, and market interests in the same resources. Organized around traditional categories of property (personal, real, and intellectual), this class will examine such laws in their own right, and as a basis for interrogating the doctrinal, theoretical, and political underpinnings of the field, including questions about the relationship among culture, property, and the law.

Course Materials

K. CARPENTER, S. KATYAL & A. RILEY, CULTURAL PROPERTY LAW: CASES & MATERIALS (manuscript on TWEN site) ("CB"). Guest speakers and field trips will be scheduled during the semester.

Classroom Requirements

Attendance, preparation, and professionalism all count toward the class participation grade. Students are expected to attend each class and be prepared to discuss all assigned materials. During the "paper workshop" section of the class, each student will present his/her paper as a work-in-progress, with another student assigned as "commentator" and the rest of the class will participate in the discussion. **Any student who is either unable to attend or unprepared for any class must notify the professor, <u>via email</u>, in advance of class.**

Evaluation

The grade will be based 15% on regular class contributions, 15% on the paper workshop presentation, 5% on the workshop commentary, and 65% on the paper (which will take into account the quality of the first draft, improvements made to it, and the final product). Students will select a paper topic in consultation with the professor and details about the paper schedule (topic, outline, draft, and workshop dates) will be provided early in the semester. The final draft is due at the last class meeting.

Law School and University Policies

Law School Rules, Including Rule on Absences, http://www.colorado.edu/law/about/rules/#3-1-1
Honor Code, http://www.colorado.edu/Law/about/honorcode/index.htm
Religious Observances, http://www.colorado.edu/policies/fac_relig.html
Disability Accommodations http://www.colorado.edu/disabilityservices/accommodations.html,
Discrimination and Harassment http://www.colorado.edu/policies/discrimination.html, and
Student Classroom and Course-Related Behavior http://www.colorado.edu/policies/classbehavior.html.

SYLLABUS

INTRODUCTION

1. What is Cultural Property? (CB Introduction)

The Machu Picchu Case: Peru v. Yale

Theorizing & Debating CP: BROWN, WHO OWNS NATIVE CULTURE? (2003); Posner, *The International Protection of Cultural Property: Some Skeptical Observations* (2007); Mezey, *The Paradoxes of Cultural Property* (2007); Carpenter, Katyal & Riley, *In Defense of Property* (2009)

FOUNDATIONS OF CULTURAL PROPERTY LAW

2. Cultural Heritage in Times of War and Conquest (CB, Ch. 1)

History of Wartime Cultural Heritage (Gerstenblith on Roman, Greek, French & British precedents – and U.S. Civil War-era "Lieber Code of 1863")

Merryman, *Thinking About the Elgin Marbles* & *Two Ways of Thinking about CP*

The Hague Convention (1899 & 1907)

3. World War II & Its Aftermath (CB, Ch. 1, cont.)

The Hague Convention (1954)

Menzel v. List (NY 1966); Cal. Civ. Proc. Code § 354.3; Von Saher v. Norton Simon Museum (9th Cir. 2009); Holocaust Victims Redress Act (1998)

4. Prohibiting Illicit Imports, Exports & Transfers of Cultural Property (CB, Ch. 11)

UNESCO Convention on Cultural Property (1970); Convention on Cultural Property Implementation Act (1970); UNESCO Database of CP Laws
http://www.unesco.org/culture/natlaws/index.php?&lng=en

Autocephalous v. Goldberg & Feldman Fine Arts (7^{th} Cir. 1990)

U.S. State Department http://exchanges.state.gov/heritage/culprop.html

ICOM Red Lists for Peru, Cambodia, Afghanistan, Iraq and Mexico

Meyers, *Iraqi Treasures Return, but Questions Remain*, NEW YORK TIMES (Sept. 7, 2010).

PERSONAL PROPERTY

5. Art and Other Chattels: Museums & Dealers (CB, Ch. 2)

a. The Duty of Care & Loyalty

Barnes Foundation (PA 2004)

b. Authenticity, Provenance & Title

Boule v. Hutton (2nd Cir. 2003); O'Keefe v. Snyder (NJ 1980)

National Stolen Property Act

Waxman, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD (excerpt).

6. **Museums & Tribes: Ownership of Cultural Property under State & Tribal Law** (CB, Ch. 2 cont.)

Onondaga Nation v. Thacher (NY 1903)

Chilkat Tribe v. Johnson (9th Cir. 1989); In the Matter of the Sacred Arrows (Chey-Arap. 1990)

Appiah, *Story of the Nok Scupltures*; Clifford, *On Collecting Art and Culture* (excerpts)

Riley, *"Straight Stealing": Towards an Indigenous System of CP* (excerpt)

7. **"Embedded Property": Artifacts** (CB, Ch. 3)

Antiquities Act of 1906; Archaeological Resources Protection Act of 1979

U.S. v. Shumway (10th Cir. 1997)

Borrell, *FBI Sting Catches Alleged Archaeological Thieves in the Southwest*, Scientific American June 16, 2009

NOTE: U.S. v. Lynch (9th Cir. 2000); U.S. v. Quarrell (10th Cir. 2002); NOTE: State statutes re artifacts on state and private lands

Other Nations' Cultural Property Laws: A Comparative Approach to Artifacts in (Peru, China, Mexico, Italy, Egypt, South Africa & Japan)

8. **Human Remains and Funerary Items** (CB, Ch. 4)

Wana the Bear v. Community Construction (Ca. Ct. App. 1982) ; Charrier v. Bell (La. 1986)

NOTE: Newman v. State (Fl. Ct. App. 1965); Town of Sudbury v. Dept. of Public Utilities (Mass. 1966); Dayton, "*Trespassers, Beware!": Lyda Conley & the Battle for Huron Place Cemetery*

The Museum of the American Indian Act (1988)

Lonetree, *Missed Opportunities: Reflections on the National Museum of the American Indian*, (excerpt); Trope and Echo-hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History* (excerpt)

Native American Graves Protection and Repatriation Act (1990); 43 C.F.R. 10 (2010)

9. **Implementing NAGPRA** (CB, CH. 4 cont.)

a. Burial sites

Bonnichsen v. U.S. (9th Cir. 2004)

WEISS, BIOARCHAEOLOGICAL SCIENCE: WHAT WE HAVE LEARNED FROM HUMAN SKELETAL REMAINS; THE EFFECTS OF REPATRIATION AND REBURIAL ON SCIENTIFIC INQUIRY (excerpts).

Ayau, The Native *American Graves and Repatriation Act* (excerpt)

b. Museum Collections

R. Echo-hawk, Denver Art Museum Protocol, http://www.denverartmuseum.org/files/File/nagpra.pdf (excerpt)

Paddock, *Native Americans Say Museum Is No Place for Their Ancestors*; Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty* (excerpt)

c. Trafficking

U.S. v. Corrow (10th Cir. 1997)

10. Other Human "Property": Genetic Materials & Information (CB, Ch. 5)

Moore v. Regents (Cal. 1986) ; Tilousi v. Arizona State University (D. Ariz. 2005); Havasupai v. Arizona Bd. of Regents (Ariz. 2008)

Harmon, "Indian Tribe Wins Fight to Limit Research of its DNA," N.Y. TIMES, April 21, 2010

Rohter, "In the Amazon, Giving Blood but Getting Nothing," N.Y. TIMES, June 20, 2007

Canadian Institutes of Health Research Guidelines for Researchers Working in Aboriginal Communities

Tsosie, *Cultural Challenges to Biotechnology: The Concept of Cultural Harm* (excerpt).

REAL PROPERTY

11. Ownership, Occupancy & Takings: Aboriginal Lands (CB, Ch. 6)

Johnson v. M'Intosh (U.S. 1823); Mabo v. Queensland (Australia 1992); Delgamuukw v. British Columbia (Canada 1997)

12. Loss & Recovery of Real Property (CB, Ch. 6 cont.)

Tee-Hit-Ton Indians v. U.S. (U.S. 1955); U.S. v. Sioux Nation (U.S. 1980); Awas Tingni v. Nicaragua (Inter-Am. C.H.R. 2001); Dann v. U.S. (Inter- Am. C.H.R. 2002)

NOTE: Anaya & Williams, *The Protection of Indigenous Peoples' Rights over Lands & Natural Resources Under the Inter-American Human Rights System*; McCoy, *The Land Must Hold The People: Justifications for Placing Land Into Trust*

13. **Historic Preservation** (CB, Ch.6 cont.)

National Historic Preservation Act of 1966; State Historic Preservation Acts & Offices

Penn Central Transportation Co. v. New York City (U.S. 1978)

The Sand Creek Massacre Site & Tribal-Federal Historic Preservation Partnerships
http://www.nps.gov/sand/index.htm

14. **Sacred Lands – Disputes** (CB, Ch. 7)

1st Amendment & Property Clause; APA; federal public lands statues; American Indian Religious Freedom Act (1978)

Lyng v. Nw Indian Cemetery Assn (U.S. 1988)

Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise* Cases

Carpenter, *A Property Rights Approach to Sacred Sites: The Rights of Indians as Non-Owners*

15. **Sacred Lands - Accommodation, Negotiations & Recent Developments** (CB, Ch. 7 cont.)

National Historic Preservation Act (1992 amendments); Exec. Order No. 13,007 (1996)

National Park Service, Devils Tower Final Climbing Management Plan (1995)

Bear Lodge Multiple Use Ass'n v. Babbitt (10th Cir. 1999)

Uluru National Park Plan of Management 2010-2020 (Australia)

RFRA (1993, 2000); RLUIPA (2002)

Navajo Nation v. U.S. Forest Serv. (9th Cir. 2008)

INTELLECTUAL PROPERTY

16. **Creative Expressions: Copyright, Originality & Art** (CB, Ch. 8)

The Copyright Act of 1976

Feist v. Rural Telephone Service (U.S. 1991); Rogers v. Koons (2nd Cir. 1992) ; Bulun Bulun v. R&T Textiles Proprietary Ltd. (Fed. Ct. Aus. 1998)

Note: Moral Rights & the Visual Artists Recording Act of 1990

17. **Music & Other Writings** (CB, Ch. 8 cont.)

Campbell v. Acuff-Rose Music Inc. (U.S. 1994); Ami & Enigma dispute (Taiwan)

Note: Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property* (excerpt)

Note: Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright & Cultural Context* (excerpt)

Notes: SunTrust Bank v. Houghton Mifflin Co. (11th Cir. 2001) (Wind Done Gone case); Salinger v. Colting (2nd Cir. 2010)

18. **Trademark** (CB, Ch. 9)

a. Source Identifiers

The Lanham Act

Qualitex v. Jacobson Products Co. (U.S. 1995); In re Shinnecock Smoke Shop (Fed. Cir. 2009)

NOTE: Tribal Insignia: The Zia Sun Symbol matter and USPTO.gov database on tribal symbols

Indian Arts and Crafts Act of 1990

b. Disparagement and Cancellation

Pro-Football, Inc. v. Harjo (D.D.C. 2003)

Mezey, *The Paradox of Cultural Property*, and Katyal, *Trademark Intersectionality* (excerpts)

Norwood, *NCAA to Crack Down on "Hostile" Nicknames*, L.A. TIMES (2005)

19. **Rights of Publicity & Geographic Indicators** (CB, Ch. 9 cont)

Martin Luther King, Jr., Center for Social Change v. American Heritage Products (Ga. 1982)

Hornell Brewing Company v. Rosebud Sioux Tribal Court (8th Cir. 1998)

NOTE: Elizabeth Stawicki, *Crazy Horse Dispute Settled*, http://news.minnesota.publicradio.org/features/200104/26_stawickie_crazyhorse

Munzer and Raustiala, *The Global Struggle Over Geographic Indications*

20. **Traditional Knowledge: Plants & Patents** (CB, Ch. 10)

a. Domestic and Comparative Law

U.S. Patent Act and Patent Plant Act

Monsanto v. Schmeiser (Canada 2004)

Winona LaDuke, *Ricekeepers*, Orion article on Wabizii v. Busch Agricultural Resources (1988)

Ghosh, *Globalization, Patents, and Traditional Knowledge;* Munzer and Simon, *Territory, Plants, and Land-Use Rights Among the San of South Africa*

b. International Law

Convention on Biodiversity (1993)

World Intellectual Property Organization ("WIPO") – Traditional Knowledge & Folklore Principles (2010)

World Trade Organization – Trade Related Aspects of Intellectual Property Rights ("WTO-TRIPS Agreement")

Coombe, *Protecting Traditional Environmental Knowledge*

NOTE: A Bonn Guidelines (2002)

NOTE: "Patenting Yoga?"

21. **Language as Traditional Knowledge** (CB, Ch. 10, cont.)

Native American Languages Act of 1990 & 1992; Esther Martinez Native American Language Preservation Act of 2006

Office of Hawaiian Affairs v. Dept. of Educ., 951 F.Supp. 1484 (D. Haw. 1996)

Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*

NOTE: Language Revitalization Efforts - Honoring Nations: Ojibwe Language Program

Articles on Omaha Tribe's claims against University of Nebraska Linguist

State English-Only initiatives: e.g., *Official English legislation passes House committee following tense hearing*, NewsOk.com, April 2, 2008

PART V CULTURAL PROPERTY LAW IN PERSPECTIVE

22. **From Wartime to Anytime, Tangibles to Intangibles, and Nations to Peoples** (CB, Ch. 11)

Review UNESCO Convention on CP (1970)

UNESCO Convention on Protection of Intangible Cultural Heritage (2003)

The Case of the Maya Indigenous Communities of the Toledo District (Belize), Inter-Amer. Commission H.R. 2004)

U.N. Declaration on the Rights of Indigenous Peoples (2007)

NOTE: ILO Convention 169 and International Convention on Civil and Political Rights

NOTE: Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*