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Native American Life Stories And "Authorship": Legal and Ethical Issues

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NATIVE AMERICAN LIFE STORIES AND "AUTHORSHIP": LEGAL AND ETHICAL ISSUES

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> In our culture—undoubtedly in others as well—discourse was not originally a thing, a product, or a possession, but an action situated in a bipolar field of sacred and profane, lawful and unlawful, religious and blasphemous. It was a gesture charged with risks long before it became a possession caught in a circuit of property values.[1]

INTRODUCTION

Juridical discourse concerning life stories has been primarily concerned with property and contract issues, and categories such as "ownership" and "authorship." Such legal discourse generally fails to acknowledge the unique nature of Native American life stories, particularly when such stories are written in collaboration with a non-Native editor or transcriber. This essay focuses on one fundamental question with overlapping legal and ethical aspects: how does a non-Native collaborator avoid a colonizing relationship to Native American texts? In suggesting possible answers to this vexing question, I always have on the horizon of my mind's eye two figures—Emmanuel Levinas, the philosopher, and Coyote, the trickster. Both remind me of the dangers of paradigms and the difficulty of my task. Levinas reminds me that paradigms are guilty of irresponsibility and tend to destroy Otherness.[2] Coyote reminds me that paradigms are meant to be broken in the name of fluidity and freedom. Keeping their admonitions in mind, I will attempt the delicate task of proposing an answer via the route of the master paradigm that is the law.

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1. MICHEL FOUCAULT, *What is an Author?, in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 124 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977).

2. For a look at Levinas' discussion of the "Other" see Emmanuel Levinas, *The Trace of the Other, in* DECONSTRUCTION IN CONTEXT: LITERATURE AND PHILOSOPHY 345-359 (Mark C. Taylor ed., 1986).

It is well known that Native Americans have suffered legally sanctioned appropriation of property rights in genocidal proportions. But there is one area of property law that has yet to be explored in any detail—intellectual property rights of Native American life stories. When such life stories are, as often happens, written in collaboration with a non-Native editor, translator, or transcriber, the commodification and objectification of the Other becomes a real possibility. This hazard of appropriation is always present when a text is the product of two unequally powerful cultures. Collaborations also raise some thorny issues in copyright, since the law is uneasy with the concept of multiple authors for a single work.

In grappling with some of the legal and ethical issues raised by collaborative life stories, I first describe the various legal options currently available for intellectual property rights in collaborative texts. Secondly, I explore the moral and ethical dimensions at stake in the categories of "authorship" and "ownership" of Native American life stories. Finally, I suggest some ways to legitimate the human rights underlying the property rights in Native American life stories by rethinking the category of "author" in relation to Native American cultural patrimony. I propose that collaborators should always contractually provide that the Native American subject retain copyright in his or her own life story.

Throughout, I will keep at the forefront a central issue raised by the Jewish philosopher Emmanuel Levinas (who himself experienced the extreme contempt for Otherness that was the Holocaust)—how can we make it impossible to annihilate the Other? How can we find a way of thinking (and writing) that lets the Other be?

The texts I am interested in—Native American life stories edited by, or written in collaboration, with a non-Native—pose a definitional problem. They often are categorized as "autobiography," and share many of the characteristics of autobiography—a first person narration of the story of an individual's life. Historically, though, they have been created by two people—one White, one Native American.[3] While such bicultural texts may "range from the literary right across to the anthropological," there is one thing they share in common: "the claim that this is a representation of an Indian speaking."[4] For purposes of utility,

3. *See, e.g.*, Arnold Krupat, *The Indian Autobiography: Origins, Type, and Function, in* 53 AMERICAN LITERATURE 22, 23 (1981).

4. David Murray, *From Speech to Text: The Making of American Indian Autobiographies, in* AMERICAN LITERARY LANDSCAPES: THE FICTION AND THE FACT 29 (Ian F.A. Bell & D.K. Adams eds., 1988).

I have labeled such personal narratives, written with a non-Native collaborator, as "Native American life stories."

PRESENT LEGAL OPTIONS

The short answer to the question, "who gets the copyright and the profits from a collaborative text?" is, "it all depends on the initial agreement." If, historically, life stories often have benefitted the white collaborator more than the Native American subject, then not only may that indicate basic misunderstandings but it also may reflect disparities in legal and societal power. This is not to suggest that all collaborators are just in it for themselves and only interested in the project because of money or to further their academic careers. To the contrary, many collaborators are genuinely committed to and respectful of their Native American subjects.[5]

However, socio-cultural power inequities make it all too easy for the Native American subject to lose both monetary benefits as well as control over the story of his or her life. The controversy surrounding the infamous bicultural text, *Black Elk Speaks*,[6] is one example of how misunderstandings and power imbalances may have contributed to yet another colonization—the colonization of story.

Much of the controversy surrounding *Black Elk Speaks* relates to the fact that key sections of the powerful and poetic text were never, in fact, said by Black Elk.[7] Another issue that has more recently come to light is the nature of the agreement between Black Elk and John

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5. Richard Erdoes, for example, has long been active in American Indian civil rights movements and was a good friend both to Lame Deer and Mary Crow Dog. *See* JOHN FIRE/LAME DEER & RICHARD ERDOES, LAME DEER: SEEKER OF VISIONS (1972); MARY CROW DOG & RICHARD ERDOES, LAKOTA WOMAN (1990).

6. JOHN G. NEIHARDT, BLACK ELK SPEAKS: BEING THE LIFE STORY OF A HOLY MAN OF THE OGLALA SIOUX (Bison Books 1988) (1932). Specifically, the introduction to this book poses the question of whether Neihardt made "literary intrusions into Black Elk's system of beliefs" and if the "book reflects more of Neihardt than it does Black Elk." *Id.* at xiv.

7. In his 1979 introduction to BLACK ELK SPEAKS, Vine Deloria, Jr., acknowledges the debate over the authenticity of the book. "It is, admittedly, difficult to discover if we are talking with Black Elk or John Neihardt." NEIHARDT, *supra* note 6, at xiv. However, Deloria adds, "Can it matter? The very nature of great religious teachings is that they encompass everyone who understands them and personalities become indistinguishable from the transcendent truth that is expressed." *Id.* John Neihardt, the white collaborator, defended the text: "He [Neihardt] said that there were certain things Black Elk was not capable of saying, things he would have said if he could; and Neihardt, both as poet and spiritual son, said for him, pulling the parts of the book together into an artistic whole." Sally McCluskey, *Black Elk Speaks: and So Does John Neihardt*, 6 WESTERN AMERICAN LITERATURE 231, 238 (1972). For a recent essay discussing the implications of the debate over the authenticity of the text, see Michael E. Staub, *(Re)Collecting the Past: Writing Native American Speech*, 43 AM. Q. 425 (1991).

Neihardt concerning profits and editorial control.

In a November 1930 letter to Black Elk, Neihardt initially discussed the possibility of interviewing Black Elk for a book, writing, "I would, of course, expect to pay you well for all the time that you would give me," and added, "this is not a money-making scheme for me."[8] However, in a letter to friends, dated September 1934, Black Elk discussed a White man's offer "'to make a story book with him.'"[9] According to Black Elk's letter, Neihardt "promised . . . that if he completed and publish [sic] this book he was to pay half of the price of each book. I trusted him and finished the story of my life for him."[10] After publication, Black Elk inquired about payment, and according to Black Elk, Neihardt said he had not "'seen a cent from the book.'"[11] Black Elk wrote that, by this, "I know he was now dicieving [sic] me about the whole business."[12]

The world of publishing is a strange business, particularly in the case of non-mass market texts. It is perfectly possible that, after publication costs, there were no profits from the book. (It was not a big seller at the time of publication in 1932, although it became something of an underground classic in the 1970s.) However, Black Elk clearly believed that his initial agreement with Neihardt was that he was to receive some monetary benefit for each book published, regardless of whether the book itself generated profits.

In addition to the payment issue, Black Elk also seemed to have had some misgivings concerning editorial control. Black Elk said he asked Neihardt "'to put at the end of this story that I was not a pagan but have been converted into the Catholic Church in which I work as a Catechist for more than 25 years. I've quit all these pagan works.'"[13] Black Elk said that if his requests to affirm his Catholicism and to receive payment cannot be met, that "'this book of my life will be null and void.'"[14] *Black Elk Speaks* explicitly portrays Black Elk as a Sioux holy man, not as a Catholic.[15]

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8. NEIHARDT, *supra* note 6, at 278-79.

9. HERTHA DAWN WONG, SENDING MY HEART BACK ACROSS THE YEARS: TRADITION AND INNOVATION IN NATIVE AMERICAN AUTOBIOGRAPHY 120 (1992).

10. *Id.*

11. *Id.*

12. *Id.*

13. WONG, *supra* note 9, at 120 (Wong speculates, however, that Black Elk might have made reference to his being a devout Catholic in a disingenuous move to placate local Jesuits.).

14. *Id.*

15. *Id.*

Whatever the factual basis for Black Elk's letters, they raise some troubling issues about control and profits. Generally, in collaborative life stories, the white collaborator contributes talent and effort, but so does the Native American subject. And there is some moral force behind the notion that the person whose life it is should have some control over and receive some profit from the text. Whose story is it, anyway?

Issues of profits and control vary from agreement to agreement. Bylines, too, are another matter for agreement. According to industry practice, "With" indicates that a writer has assisted with the text but the material is the subject's.[16] "And" typically signifies that both parties have contributed a significant amount to the text.[17] "As Told To" indicates that the writer has transcribed the subject's story.[18] (Alternatively, there can be no credit line at all for the collaborator.) *Black Elk Speaks* is subtitled, "Being the Life Story of a Holy Man of the Ogala Sioux as told through John G. Neihardt (Flaming Rainbow)," but Neihardt held the copyright for the book.[19]

The best advice, of course, is to only enter into a collaborative writing arrangement with someone you know and trust. However, any relationship can break down. At a minimum, it is prudent to have a written letter of agreement, signed by both parties, confirming what the two parties intend with regard to such matters as payments, royalties, control, and the like.[20] The advice to "get it in writing" may strike a hollow note for a cultural group that historically has found agreements with Whites to be honored more in the breach than in the observance. Still, such a written agreement is at least the minimum level of protection necessary to ensure that parties' expectations may be met.[21]

Collaboration agreements generally fall into one of two broad categories of work under copyright law: (1) joint work and (2) the work for hire.[22] The Copyright Act of 1976 defines "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[23] Intent is the key element for a joint work.[24]

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16. EVA SHAW, GHOSTWRITING: HOW TO GET INTO THE BUSINESS 75 (1991).
17. *Id.*
18. *Id.*
19. NEIHARDT, *supra* note 6.
20. SHAW, *supra* note 16, at 57.
21. *See id.*
22. Copyright Act, 17 U.S.C. § 101 (1994).
23. *Id.*
24. *Id.*

A joint work has "several individual authors."[25] All the authors in a joint work are co-owners of the work, with copyright vesting in all the authors.[26] The only responsibility one joint owner has to the others is a duty to account for profits.

The Copyright Act defines "work made for hire" in one of two ways: (1) "a work prepared by an employee within the scope of his or her employment" or (2) a work specially ordered or commissioned for use and which falls into one of nine categories (one of which is "a translation").[27] Typically, under work for hire arrangements, the writer receives a flat fee but does not share in the copyright or royalties.[28] (The writer in this case is considered to be an employee or an independent contractor.) A variety of methods of payment can be worked out. The writer can take a straight fee, a percentage of royalties, a fee plus a percentage, or other arrangements can be made.[29]

Whether collaborators are joint authors or in a work for hire relationship is largely a matter of the agreement. Thus, it is important to carefully work out a written agreement at the beginning of the collaboration in order to avoid subsequent misunderstandings or injustices.

MORAL STAKES OF "AUTHORSHIP" AND INTELLECTUAL PROPERTY

Justice Story (a wonderfully apt name) has said that patent and copyright cases come the closest of all legal cases to "the metaphysics of the law."[30] Therefore, a shift toward the metaphysics of copyright law is now in order. That is, a shift toward issues of the self and the Other, the ethics of "authorship," and the colonization of story.

At stake for the White collaborator is the ethnological aim of "'making us look into the other's face,'" as Todorov describes it.[31] At stake for the Native American is a sharing of a living cultural heritage. As Mourning Dove says in her autobiography, "I paid careful attention to the words of my parents and older persons. This manuscript is one

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25. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 314 (1991).

26. *Id.* at 315. Copyright law, because of its individualistic bias and reluctance to acknowledge the idea of collaborative works, tends to treat "joint authorship as a deviant form of individual 'authorship.'" *Id.*

27. 17 U.S.C. § 101.

28. TED SCHWARZ, THE COMPLETE GUIDE TO WRITING BIOGRAPHIES 173 (1990).

29. *Id.* at 174-75.

30. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

31. TZVETAN TODOROV, THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER 240 (1984).

result of such careful attention to what they were willing to share with me for my benefit and now for yours."[32] Despite the outward movement at stake for both collaborators, the end result all too often is sole authorship in the non-Native editor or transcriber.

Justice O'Connor, writing for a unanimous Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*,[33] sets forth the Court's most recent pronouncement on the meaning of authorship.[34] In *Feist*, the Supreme Court adhered to a longstanding definition of "author" as "he to whom anything owes its origin; originator; maker."[35] The privileged category of "author" is in opposition to "others" under copyright law. When the non-Native editor or transcriber retains sole copyright, he or she essentially retains the power and privilege of authorship. Authors own the copyright. "Others" do not. An author is privileged because he or she owns the copyright of the work and has the power to prohibit others from doing any of five actions: (1) reproducing the work, (2) adapting the work, (3) distributing the work to the public, (4) performing the work in public, or (5) displaying the work in public.[36]

I would like to make the case for always including the Native American subject as an "author" of his or her own life story. In adopting what initially seems like a radical departure from accepted principles of copyright, it is important to take into account the historical colonization and commodification by Whites of Native American land, art, religion, stories, and even personhood.

In 1823, Justice Marshall explicitly recognized the doctrine of discovery used to legitimate the taking of Native American land.[37] But

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32. MOURNING DOVE: A SALISHAN AUTOBIOGRAPHY 14 (Jay Miller ed., 1990).

33. 499 U.S. 340 (1991).

34. *Id.* at 346-47. This was the first time the Supreme Court directly addressed the issue of whether one can copyright a compilation of facts. In determining what degree of originality was needed to copyright a telephone directory, the Court held that the names, towns, and telephone numbers of a phone company's subscribers were uncopyrightable facts because they were not arranged in any original way in the company's white pages directory. *Id.* at 362-63.

35. *Feist*, 499 U.S. at 346 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)).

36. 17 U.S.C. § 106 (1994).

37. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). In a well known passage, Justice Marshall set forth the discovery doctrine:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they

the colonialist impulse has not been limited to land. Religion, art, culture—all were subject to appropriation. And, personhood soon followed. Whether we consider the U.S. Surgeon General, who, in the 1860s ordered soldiers to collect as many Indian skulls as possible for scientific study, or the case of the prisoner of war, Geronimo, who was exhibited in public as an official "attraction," the Native American as Other was denied the status of subject and reduced to an object of commodification.[38]

The twentieth century colonizing impulse has proceeded apace, turning the Native American Other into an object for consumption. Consider, for example, *Gilham v. Burlington Northern*,[39] in which an artist painted the portrait of a fourteen-year-old Blackfoot Indian girl. Without the girl's consent or knowledge, the artist sold the copyright for the portrait to a railroad company.[40] The girl's portrait was eventually published as one of a series of Indian portraits in a portfolio in a railroad calendar, on the railroad's menu, on playing cards, and eventually on the cover of a magazine with the caption, "The Crow Woman Who Died For Love."[41]

Michael Green has examined the recent pervasive use of images of Native Americans in advertising (in everything from margarine commercials to names of sports teams) and concluded that such images are not morally acceptable because they deny the humanity of Native Americans.[42] And in the latest instance of "culture theft," New Age adherents have created a market not only for Indian prayer pipes, drums, and flutes, but for sacred Native American ceremonies.[43] To

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> made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title.

Id. at 572-73.

38. *See* John Robert Leo, *Riding Geronimo's Cadillac:* His Own Story and the Circumstancing of Text, 1 J. AM. CULTURE 818, 830 (1978).

39. 514 F.2d 660, 661 (9th Cir. 1975).

40. *Id.* at 661.

41. *Id.* at 661-62.

42. Michael K. Green, *Images of Native Americans in Advertising: Some Moral Issues*, 12 J. BUS. ETHICS 323 (1993).

43. For a discussion of the implications of the "culture theft" of Native stories, see Lenore Keeshig-Tobias, *Stop Stealing Native Stories*, THE GLOBE AND MAIL, Jan. 26, 1990, at A7. *See also*, WARD CHURCHILL, FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS 185-213 (M. Annette Jaimes ed., 1992) (writing on what he calls "culture vultures" or "genocide with good intentions" to express a scathing indictment

traditional Native American holy men, this selling of religion is "akin to having holy communion served at McDonalds."[44] Such problems of culture theft prompted a Declaration of War by the National Congress of American Indians against "exploiters of Lakota spirituality."[45] The resolution seeks to enable "the preservation of cultural and natural resources," and declares war against "all persons who persist in exploiting, abusing and misrepresenting the Sacred Traditions and Spiritual Practices of our Lakota, Dakota and Nakota people."[46]

The increasing popularity of all things Indian is in inverse proportion to tribal autonomy. David Murray notes that, "as they became *subject* peoples, they became, ironically, *objects* of white attention, comprehended in all senses."[47]

HUMAN RIGHTS, PROPERTY RIGHTS, AND NATIVE AMERICAN LIFE STORIES

What all this suggests for copyright is that, given historical and cultural inequities, non-Native collaborators must be very aware of the dangers of colonizing the life stories they help to write. As Levinas would advise, we should never let our thinking sleep. We must deconstruct the notion of "authorship" solely as a property right and recast it as a human right. There is some precedent for this from two rather different sources—the Berne Convention for the Protection of Literary and Artistic Works[48] and the Native American Graves Protection and Repatriation Act (NAGPRA).[49]

The Berne Convention is a multilateral treaty protecting intellectual property rights. The United States has chosen to implement it in a noncommittal way so as to minimize changes to existing United States copyright law.[50] The Copyright Act of 1976 does not provide for mor-

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of the roles played by literature, film, and academia in colonizing all things Indian).

44. *All Things Considered* (NPR radio broadcast, Nov. 24, 1993).

45. *See* National Congress of American Indians, *Resolution Supporting the Declaration of War Against Exploiters of Lakota Spirituality.* Res. NV-93-146 (Dec. 3, 1993).

46. *Id.*

47. David C. Murray, *Authenticity and Text in American Indian, Hispanic and Asian Autobiography, in* FIRST PERSON SINGULAR: STUDIES IN AMERICAN AUTOBIOGRAPHY 177-97 (1922).

48. Berne Convention for the Protection of Literary and Artistic Works, S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. (1986) [hereinafter Berne Convention]. *See also* Rufus C. King, *The "Moral Rights" of Creators of Intellectual Property*, 9 CARDOZO ARTS & ENT. L.J. 267, 268 (1991) (explaining some of the moral rights afforded by the Berne Convention).

49. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) [hereinafter NAGPRA].

50. Berne Convention, *supra* note 48, Letter of Submittal at III.

al rights, and such rights have yet to be generally recognized in the United States.[51] The Berne Convention recognizes "moral rights" in intellectual property.[52] Moral rights include the "right of publication"—the right to decide whether a work will be made public; the "right of paternity"—the right to claim authorship; and the "right of integrity"—the right to object to distortions of the work that would harm honor or reputation.[53] Moral rights suggest something of the distinctive qualities of created works. A painting or a book is different from other kinds of property because of the intensely personal nature of its creation. The created work comes from within the writer, or "maker,"[54] and is a part of its creator. Even the term, "right of paternity," indicates that the work is linked by family-like ties to its creator. It is hard to conceive of a more personal form of literature than the telling of one's own life story.

In addition to the Berne Convention, NAGPRA also offers some justification for viewing authorship as a human right. NAGPRA requires federal agencies and museums to return certain cultural items to Native Americans because of familial, religious, or cultural significance.[55] The items include human remains, funerary objects, sacred objects, and items of cultural patrimony.[56] The Act defines "cultural patrimony" as "an object having an ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American."[57] Examples of items of cultural patrimony include the Zuni war gods and the Iroquois Wampum belts.

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51. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.21(A)(2) (1992).

52. Rufus C. King, *The "Moral Rights" of Creators of Intellectual Property*, 9 CARDOZO ARTS & ENT. L.J. 267-68 (1991) (even though the United States has recognized the Convention, "moral rights" still are not enforceable under federal law).

53. *Id.* at 268. Perhaps the closest analogue to cultural property in the Berne Convention is a special category for folklore. *See* Berne Convention, *supra* note 48, art. 15(4). However, as Cathryn A. Berryman notes, the article's requirements are difficult to meet and protection is very limited. In general, copyright law is "ill-suited for adequately protecting folklore. . . . [Since the laws] recognize solely an individual author's creative expression as the authorship in a work and normally require fixation of the work in a tangible medium before limited duration rights will vest." Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 315-16 (1994).

54. *Feist*, 499 U.S. at 346.

55. 25 U.S.C. § 3005(a)(1) & (2).

56. 25 U.S.C. §§ 3003-3004.

57. 25 U.S.C. § 3001(3)(D).

The notion of cultural patrimony is a grid of intersecting cultural and legal concepts.[58] One concept implicit in the definition is the idea that cultural identity is an important human right, and should be preserved.[59] Tied in to this concept is the implication that certain items can promote grouphood.[60]

Another concept in the grid is the fact that Native American groups "often view their cultural artifacts as communal property."[61] Vine Deloria, Jr. and Clifford M. Lytle point out that concepts such as property law are embedded in a fragmented western European heritage that has traditionally failed to take into account communal tribal perspectives.[62] This is not to say that Native Americans do not believe in personal property. However, generally speaking, the Anglo-European world view, with its privileging of law and property rights, is a very different world view from that of many Native American cultures. Paula Gunn Allen conceptualizes the two world views as circular versus linear, with the Native American circular viewpoint requiring that all "points," which make up the sphere of being, be significant in identity and function. The Anglo-European linear model assumes that some "points" are more significant than others.[63]

Rennard Strickland sums up the differences between Native and non-Native world views by reference to Neill Alford's distinction be-

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58. *See generally* Roger W. Mastalir, *A Proposal For Protecting the 'Cultural' and 'Property' Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1037 (1992-93). Mastalir presents an excellent discussion of the treatment of cultural property under international law, including discussion of the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240. *Id.* at 1035-36, 1040-42, 1047-49 (identifying two general schools of thought on cultural property: (1) cultural internationalism (grounded primarily in property law, and utilized by such institutions as museums) and (2) cultural nationalism (grounded primarily in human rights law, and utilized by source nations or native people)).

59. Mastalir, *supra* note 58, at 1036; *See also* John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1185 (1989).

60. Moustakas, *supra* note 59, at 1184.

61. Christopher S. Byrne, Chilkat Indian Tribe v. Johnson *and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109, 111 (1993).

62. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 194 (1983). "If we subsume property, contract, and retribution under the general idea of clan and family and come to understand that these functions of social and legal organization were viewed from a group rather than an individual perspective, we will be able to see how most tribes handle their civil law matters." *Id.*

63. Paula Gunn Allen, *The Sacred Hoop: A Contemporary Perspective*, *in* STUDIES IN AMERICAN INDIAN LITERATURE: CRITICAL ESSAYS AND COURSE DESIGN 3, 7 (Paula Gunn Allen ed., 1983).

tween "apple societies" and "orange societies":

> In apple societies: law, religion, art, economics, and all other aspects of society are a part of a single whole, an integrated oneness. In orange societies: law, religion, art, and economics are each a segment; life is fragmented into separate sections or compartments. An apple society does not make the same kinds of rigid distinctions between art and religion that orange societies believe to be absolutes. It is often difficult for these two societies to understand each other because their fundamental approaches to life are at opposite ends of the scale of perception. In terms of judicial systems, the Anglo-American common law represents, in Alford's analysis, the classic case of law in an orange culture; Native Americans and their legal systems are apple societies in an almost pure form.[64]

The concept of communal property generally is antithetical to the "orange society" of Anglo-American common law, which is rooted in the concept of private property. However, NAGPRA appears, on its face, to recognize something very much like communal property. Property acquires this communal status when it enables cultural identity.

If this notion of communal interest in property seems too far removed from the Anglo-American tradition, there is one area of copyright which seems to recognize something like communal ownership—the area of facts. Facts are not copyrightable.[65] The justification for this, as expressed by one federal court, is that "the cause of knowledge is best served when history is the common property of all."[66] Like cyberpunk enthusiasts, the courts recognize that it is important to keep some things in flow in the information network. Facts are a sort of cultural property.

Adding to the legalized "free play" given to facts, increased technology promises more and more public access to information and less and less traditional copyright interests. Benjamin Kaplan, in the 1960s, presciently envisioned a general decline in copyright as personal property as we know it.[67] In a lecture which preceded by nearly thirty years all the recent talk about an electronic Super Highway, Kaplan envisioned an information society in which copyright, as we understand

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64. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181 (1992) (citations omitted).

65. *Feist*, 499 U.S. at 350. Even though facts are not copyrightable, the particular *expression* of facts (an individual's word selection) can be copyrighted. *Id.*

66. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir. 1980).

67. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 118 (1967).

it, was no longer relevant and information was accessible to all:

> You must imagine, at the eventual heart of things to come, linked or integrated systems or networks of computers capable of storing faithful simulacra of the entire treasure of the accumulated knowledge and artistic production of past ages, and of taking into the store new intelligence of all sorts as produced. . . . Copyright is likely to recede, to lose relevance, in respect to most kinds of uses of a great amount of scholarly production. . . .[68]

The communal nature of facts in general, the potential for changing notions of copyright in a technological age, and the recognized importance of cultural patrimony for Native Americans specifically, suggest that communal property is not so outlandish a concept for U.S. law as one might think.

CONCLUSION

In combination, NAGPRA and the Berne Convention offer a theoretical underpinning to support the proposition that the Native American, whose life story is being written, should retain an authorship interest in the text. This interest stems from notions of cultural patrimony recognized in NAGPRA and from the moral rights of the Berne Convention. Native Americans are, as N. Scott Momaday writes, "Men [and women] made of words."[69] The most common justification for telling a life story (as voiced in many Native American texts) is to help preserve a cultural heritage. This is a human right, even before it is a property right. The particular Native American who is the subject of a life story should be viewed as a cultural representative, holding the cultural patrimony that is his or her life story in trust for the tribe.

Native American life stories are, as Kathleen Mullen Sands notes, "both personal and cultural narrative."[70] Thus, the idea of an individual holding the story in trust for the group makes perfect sense. Discussing the cultural appropriation of Native stories, Rosemary Coombe clarifies that Native peoples today do not make claims to their stories

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68. *Id.* at 119-20.

69. N. Scott Momaday, *The Man Made Of Words*, *in* INDIAN VOICES: THE FIRST CONVOCATION OF AMERICAN INDIAN SCHOLARS 55 (1970).

70. Kathleen Mullen Sands, *American Indian Autobiography*, *in* STUDIES IN AMERICAN INDIAN LITERATURE: CRITICAL ESSAYS AND COURSE DESIGN 57 (Paula Gunn Allen ed., 1983) (discussing Indian autobiographies written with the aid of a recorder or editor and noting: "The American Indian autobiography centers on personal experience, but the subject, no matter how dominant within the culture, is a participant in his or her own family history and in the events of the tribe.").

as "[r]omantic authors nor as timeless homogenous cultures . . . but in the name of living, changing, creative peoples engaged in very concrete contemporary political struggles."[71] As in the Berne Convention, this interest should extend to the moral right to prevent mutilation or distortion of the story, in order to avoid the type of concerns voiced by Black Elk.

Where does this leave the non-Native collaborator? What incentives are left for him or her to engage in the project of a life story? The collaborator can still have a byline. However, we need some new categories such as "primary and secondary authors," or perhaps "facilitator" to reflect more equitably the collaboration relationship.[72] The collaborator can still arrange for payment of services. What the collaborator cannot do is appropriate the copyright and the authorship role exclusively. Otherwise, the collaborator begins in the subject position and subverts the moral issues at stake. When one starts as a subject, he or she can never really be open to the Other.

Levinas notes that the great failure of Western thinking is to forget and negate the Other, to want to *possess* the Other so that it becomes the same as "me."[73] Western philosophy is "allergic" to the Other that remains the Other, and constantly works to transmute the Other into the same.[74] Collaborators much too often appropriate the Other. That kind of knowledge is knowledge as the act of grasping, seizing, possessing.[75] That kind of writing turns the Other into a theme, destroys Otherness, and cancels the Other's autonomy.

Levinas challenges us to change such possessive knowing to a radical responsibility, and privilege the Other rather than the "me." Responsibility "empties the I of its imperialism and its egoism."[76] Respect and concern for Otherness means that ethical concerns drive our actions: "one has to respond to one's right to be, not by referring to some abstract and anonymous law, or judicial entity, but because of

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71. Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 268 (1993).

72. To avoid calling the speaker "subject" or "object," one writer suggests "autobiolocutor"—one who speaks one's life to another. Rosemary G. Feal, *Spanish American Ethnobiography and the Slave Narrative Tradition: Biografia de un Cimarron y Me Llamo Rigoberta Menchu*, 20 MOD. LANGUAGE STUDIES 100, 102 (1990).

73. Levinas, *supra* note 2, at 346.

74. *Id.*

75. Emmanuel Levinas, *Ethics as First Philosophy*, *in* THE LEVINAS READER 76 (Sean Hand ed., 1989).

76. Levinas, *supra* note 2, at 353.

one's fear for the Other."[77] But how is that kind of thinking possible?

When Levinas talks about the history of thinking, he discusses two figures: Ulysses and Abraham. Ulysses is the hero of Western thought who always wants to return home.[78] Abraham forever leaves home for an unknown land.[79] Appropriating the category of "author" can be the academic's equivalent of the voyage back to the self, rather than the journey toward the Other.[80] Levinas would tell us not to journey to Otherness only to return to the self. That would be to forget the Other, and to instead be the consciousness "which finds itself again in all its adventures, returning home to itself like Ulysses, who through all his peregrinations is only on his way to his native island."[81]

To the contrary, the non-Native collaborator must be prepared for a movement without return: "the heteronomous experience we seek would be an attitude that cannot be converted into a category, and whose movement unto the other is not recuperated in identification, does not return to its point of departure."[82] The text should not annihilate the Other but preserve the Other or, as Levinas puts it, let the Other be.

And what might Coyote say about all this? At first glance, it seems strange to compare the responsible, ego-less Levinasian ideal with the irresponsible, egotistical Coyote. However, there are some similarities. Coyote certainly is engaged in movement and endless journeying.[83] And like Abraham, Coyote is linked to the law.[84]

But with Coyote, things are not always what they seem. His endless journeying is more cyclical than linear.[85] And if he does not precisely return home, Coyote's familiarity to his audience makes him home-*like*.

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77. Levinas, *supra* note 75, at 82.

78. Levinas, *supra* note 2, at 346.

79. *Id.* at 348.

80. Native American subjects already make a Levinasian journey in sharing their life stories. *See* Sands, *supra* note 70. "Almost universally, the subject of an American Indian autobiography tells a story, not for his or her own people, but for the world at large—that is, in practical terms, for the white audience who will read the narrative." *Id.* at 58.

81. Levinas, *supra* note 2, at 346.

82. *Id.* at 348.

83. The common beginning for Coyote stories is, "Coyote was going along."

84. Many Coyote stories are considered didactic tales illustrating unacceptable behavior.

85. See, for example, the Winnebago cycle of Trickster tales. "Winnebago trickster myths . . . are arranged in a cycle. At the end of the cycle trickster abandons his foolishness and remembers the purpose for which he was sent to earth—helping Winnebago to cope with supernatural enemies." Alan Velie, *The Trickster Novel, in* NARRATIVE CHANCE 121, 136 (Gerald Vizenor ed., 1989).

Coyote's links to the law are equally ambivalent. Coyote stories are not simply didactic; they can "undermine man's belief in his own ability to govern himself," satirize social or religious customs, or attack "the dangers of institutional power in a social setting."[86] Coyote stories can paradoxically warn of the dangers of breaking the rules and at the same time emphasize the joyousness of freedom. Gerald Vizenor emphasizes the free play afforded by Coyote, identifying the Trickster as a communal comic sign which allows listeners and readers to "imagine their liberation."[87]

But at last the most inveterate common ground between Levinas and Coyote is hermeneutical: (1) a skepticism of paradigms and (2) a stubborn faith in endless possibilities. First, both Levinas and Coyote warn of the dangers of paradigms. Levinas tells us that paradigms are guilty of irresponsibility, and Coyote laughs at paradigms in the name of freedom.

Second, both Levinas and Coyote share a belief in possibilities. Levinas experiences the unimaginable, the Holocaust, and so is able to imagine the almost unexperienceable—the journey toward the Other without return. The imagining is hopeful, full of potential, and rooted in faith in possibilities. As for the bawdy, irrepressible Coyote, he too believes in potentiality. The Navajo storyteller, Yellowman, was asked, "why bother to tell Coyote stories to adults?" He replied, "Through the stories everything is made possible."[88] The teachings of these two very different figures, Levinas and Coyote, point the way toward a difficult but possible path—the path of reclaiming the human rights underlying the property rights in Native American life stories.

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86. ANDREW WIGET, NATIVE AMERICAN LITERATURE 16 (1985).

87. Gerald Vizenor, *Trickster Discourse: Comic Holotropes and Language Games*, *in* NARRATIVE CHANCE: POSTMODERN DISCOURSE ON NATIVE AMERICAN INDIAN LITERATURES 194 (Gerald Vizenor ed., 1989). "In comic discourse, the trickster is being, nothingness, and liberation; a loose seam in consciousness; that wild space over and between sounds, words, sentences and narratives; and, at last, the trickster is comic shit." *Id.*

88. J. Barre Toelken, *The Pretty Language of Yellowman: Genre, Mode, and Texture in Navajo Coyote Narratives*, 2 GENRE 221 (1969).