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## Protecting Tribal Stories: The Perils of Propertization

Stephen D. Osborne

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## SPECIAL FEATURES

### PROTECTING TRIBAL STORIES: THE PERILS OF PROPERTIZATION

*Stephen D. Osborne\**

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*I. The Booming Market in "Indianness"*

As any New Age shaman — and many grave robbers — can tell you, Indians are hot. As appreciation of traditional Native American cultures has grown over the last few decades, so too has the market in objects and experiences thought to express those cultures.<sup>1</sup> To the extent that it indicates respect for Native American tribes and individuals and offers them a chance to profit in the market, this development has been embraced. When a Paiute basket can sell for \$25,675 and a Navajo serape for \$107,375,<sup>2</sup> opportunities for Native artists to make a comfortable living exist.

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1. See, e.g., Jim Adams, *If Dealers Come Calling, Be Warned: Indian Art Market Is Sizzling Hot*, INDIAN COUNTRY TODAY, Dec. 28, 2001, at D1; Brad Berton, *Public Develops Fetish for Fetishes*, 16 L.A. BUS. J., May 9, 1994, at 1 (noting popularity of Zuni stone carvings in trendy Venice, California). The downside of this popularity may be epitomized by Jack Lee Harelson, who looted more than 2000 artifacts from Native American graves in Nevada and Utah, then plotted to murder the detective and judge who helped convict him of the crimes. Beth Quinn & Bryan Denson, *Grave Robber Accused of Plotting to Kill Authorities*, OREGONIAN, Jan. 17, 2003, at A1.

2. Berton, *supra* note 1, at D1. Over ten years ago a Navajo men’s wearing blanket was estimated to be worth more than \$1 million. Danielle A. Warnes, *Law May Boost American Indian Art*, USA TODAY, May 16, 1991, at B4.

Many Native Americans, however, view the continuing popularity of all things “Indian” with more than a little skepticism.<sup>3</sup> The problems cluster around two distinct but related issues:

(1) Cheap imitation “Indian” crafts or services marketed by people who are not native or, in many cases, even Americans undercut authentic tribal artists.<sup>4</sup>

(2) According to many Indian artists and leaders, sacred aspects of traditional Indian cultures should not be sold commercially. Here the concern is not with lost profit, but with lost *meaning*. It is a cultural harm rather than financial harm.<sup>5</sup>

One scholar refers to these two sets of concerns as “realist” and “traditionalist.”<sup>6</sup> The so-called “realists” acknowledge the tribes’ partial assimilation into the world market and seek to prosper within that system by exploiting the niches carved for Indians by the dominant culture’s laws and the opportunities created by the free market. This group believes that the circulation of cultural property is inevitable, so Indians may as well stake out as much of the profits of such circulation as possible.<sup>7</sup> The traditionalists, meanwhile, are less concerned with money flowing in than with meaning flowing out. They fear that commercial exploitation of traditional symbols,

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3. The popularity or trendiness of “Indianness” can perhaps be seen not only in the desire to *have* Indian products but to *be* (at least part) Indian. The 2000 census registered a doubling since 1990 of people claiming to be part American Indian — Alaska Native. *Census Figures for 2000 Show a Large Rise in Native American Population* (National Public Radio, *All Things Considered*, March 26, 2001). In part this is a function of the census providing a new mixed-race option for self-identification. But the huge increase also suggests, at least to some tribal leaders, a large “wanna-be” factor. *Id.*

4. See *infra* note 108 and accompanying text.

5. See, e.g., Dirk Johnson, *Indians Complain of Religious and Cultural Theft*, N.Y. TIMES, June 12, 1993, § 1, at 7 (reporting on Indian reaction against “appropriating Indian culture into a kind of secular mysticism” divorced from any specific tribal significance); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995) (discussing the desecration of Sioux culture by using the legendary leader’s name to market malt liquor); Angela Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 177 (2000) (describing an indigenous group’s loss of collective identity due to appropriation by outsiders of its sacred tribal creation song).

6. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 14-15 (1997). Farley discusses a grievous case in Australia in which a rug manufacturer appropriated sacred aboriginal designs without authorization or paying compensation. *Id.* at 4-7.

7. *Id.* at 14.

images, stories and ceremonies may drain or dilute traditional cultural resources.<sup>8</sup>

These two perspectives, while not mutually exclusive, have led to controversy within the Native American community. For instance, individuals and tribes differ on whether the marketing of dream catchers is a legitimate business or a craven prostitution of culture.<sup>9</sup> The ubiquity of Kokopelli, the Pueblo symbol of fertility and gaiety now seen on T-shirts, wind chimes and refrigerator magnets,<sup>10</sup> can be seen as a triumph of cultural tolerance and exchange, or as a disastrous profanation of a sacred symbol. The domestication and sale of the Kokopelli image “makes our stories and religion cute and naive,” says Gloria Emerson (Navajo), executive director of the Center for Research and Cultural Exchange at the Institute of American Indian Arts in Santa Fe.<sup>11</sup>

The problem of expropriation of tribal meaning is global in scope, and impacts all indigenous cultures.<sup>12</sup> New Age “shamans” around the world construct their belief systems from images of American Indians.<sup>13</sup> Various human rights organizations worldwide have recognized this problem of cultural imperialism and recommended steps to combat it.<sup>14</sup> The Lakota, Nakota and

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8. *Id.*

9. See Renee Ruble, *Dream Catchers: Sacred or Sellers? American Indians Contemplate Marketing of Culture*, INDIAN COUNTRY TODAY, Jan. 9, 2002, at B2.

10. Johnson, *supra* note 5, at 1.

11. *Id.*; cf. Mark Shaffer & Bill Donovan, *Manufacturing of Fake Kachinas Offends Hopi*, NEWS FROM INDIAN COUNTRY, Feb. 1994, at 6 (describing five doll factories in New Mexico churning out hundreds of “kachinas” per year for one-fifth the price of authentic ones).

12. See, e.g., Emily D. Edwards, *Firewalking: A Contemporary Ritual and Transformation*, DRAMA REV., Summer 1998, at 98 (discussing the “American firewalking movement” appropriated from various indigenous societies including the holy men of Fiji); Farley, *supra* note 6, at 4-7 (describing an Australian case involving appropriation of sacred aboriginal designs).

13. See Simon Coleman, Book Review, 5 J. ROYAL ANTHROPOLOGICAL INST. 149, 149 (1999) (reviewing GALINA LINDQUIST, *SHAMANIC PERFORMANCES ON THE URBAN SCENE: NEO-SHAMANISM IN CONTEMPORARY SWEDEN* (1997)) (“[N]eo-shamans mimetically construct their culture out of images of the exotic Other — American Indian, Norse, and so on.”); Christian F. Feest, *Europe’s Indians*, in *THE INVENTED INDIAN: CULTURAL FICTIONS AND GOVERNMENT POLICIES* 320, 322-23 (James A. Clifton ed., 1990) (surveying the Continental history of “Indian” con men, including an ersatz Iroquois received by Mussolini); Ward Churchill, *Indians Are Us?*, in *INDIANS ARE US?: CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* 207, 224-25 (1994) (describing appropriation of “Indian” identity by Germans disenchanting with European culture and its colonialist history); Gordon Bronitsky, *Indians Find Doors Open Across Pond*, DENVER BUS. J., Oct. 17, 1997, at 46A (“In the summertime, . . . hundreds of Germans assemble teepees by the river and pretend to be Indians.”).

14. See, e.g., Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does*

Dakota Nations (popularly known collectively as the Sioux) have gone so far as to declare war against spiritual poachers.<sup>15</sup>

This article describes and assesses the responses to the proliferation of “culture vultures,” focusing on attempts to preserve the integrity of non-material cultural resources — ceremonies, oral traditions, folklore — as well as their material expressions in art and literature. I conclude that while present laws provide sufficient protection for material objects intended for sale by the “realist” group mentioned above, it fails to protect the interest of the “traditional” group in preventing the erosion of tribal values due to the marketing of “meaning.” Because of their communal authorship and cumulative development, ceremonies, songs and stories in oral traditions cannot be protected by current intellectual property laws. While new federal intellectual property law tailored to Native American oral traditions could fill this gap, the dangers of such a law outweigh its possible benefits. Heavy-handed federal legislation might well destroy — or at least devalue — the very resources it seeks to preserve. Instead, tribes must protect intangible cultural property by inventorying and asserting control over it through tribal laws, policies and treaties.

Part II details the theoretical basis of this analysis, discussing the process of commodification of cultural heritage and the damage such a process can wreak. Part III looks at laws currently protecting native cultural resources, including intellectual property laws and the Indian Arts and Crafts Act (IACA),<sup>16</sup> concluding that these laws are inadequate to the task. Part IV considers various potential sources of additional protection, based on communal rights acknowledged in federal Indian laws. Rather than being the property of an individual entitled to the exclusive profit from the work, the song or story would be considered communal property of the tribe, which would control rights to use and alienation. Part V, however, concludes that such a federal Indian intellectual property rights regime, by encouraging the conceptualization of cultural resources as commodities, would augment rather than stem the draining of meaning from those resources.

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*the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the Unesco Convention?*, 15 U. PA. J. INT’L BUS. L. 469 (1994); Farley, *supra* note 6, at 12-13.

15. Declaration of War Against Exploiters of Lakota Spirituality, Ratified by the Dakota, Lakota and Nakota Nations (June 1993), *reprinted in* Churchill, *supra* note 13, at 273-77.

16. 25 U.S.C. §§ 305-305e (2000).

## II. To Market or Not to Market?: Conflicting Uses of Cultural Resources

### A. What Are Cultural Resources?

This article defines cultural resources broadly to include all resources for the creation and evolution of a group's distinctive cultural identity: language, songs, creation stories and other oral traditions both sacred and secular, as well as the material objects created in ceremonial or artistic activities. Although these resources are often referred to as cultural *property*,<sup>17</sup> because of the dangers of propertization (to be discussed in section V) the term cultural *resources* will be used.

Traditional definitions of cultural property limit the term to *material objects* expressing the culture of a certain defined group of people.<sup>18</sup> The major statutes protecting Native American cultural resources adopt this exclusively materialistic orientation. The Archaeological Resources Protection Act (ARPA)<sup>19</sup> protects material remains of human life and activities that are at least 100 years old.<sup>20</sup> The Native American Graves Protection and Repatriation Act (NAGPRA)<sup>21</sup> prohibits sale or purchase of Native American human remains or cultural items acquired without proper authority, and requires repatriation of such items to the culturally affiliated tribe.<sup>22</sup> In addition to human remains, NAGPRA sets forth a list of protected items: funerary objects (those associated with a death rite or ceremony), sacred objects (those used in traditional or present-day ceremonies), and cultural patrimony ("an object having ongoing historical, traditional, or cultural importance central to the Native American

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17. See, e.g., Suzan Shown Harjo, *An Approach to New Law to Protect Cultural Property Rights*, INDIAN COUNTRY TODAY, Jan. 20, 2002, at A5; Farley *supra* note 6, at 1.

18. See, e.g., Antonia M. De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 2-3 (1994) (defining cultural property as including "a variety of objects[:] . . . baskets, pottery, masks, tapestries, sculptures, or engravings"); Francis P. McManamon, *What Are Heritage Resources and Why Are They Protected?*, in HERITAGE RESOURCES LAW 1 (Sherry Hutt et al. eds., 1999) ("heritage resources" or "cultural resources" include "archaeological sites, historic structures, museum objects, historic shipwrecks, and traditional cultural places").

19. 16 U.S.C. §§ 470aa-mm (2000).

20. *Id.* § 470bb(1). Under ARPA, archaeological resources include "pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of the foregoing items." *Id.*

21. 25 U.S.C. §§ 3001-3013 (2000).

22. *Id.* § 3005.

group or culture”).<sup>23</sup> ARPA and NAGPRA, with their retrospective focus on preserving sacred materials from the past, extend no protection to non-material cultural resources such as stories or ceremonies.<sup>24</sup>

A similar approach is taken by those who distinguish *cultural* property — historical, archaeological, and ethnographical objects — from *intellectual* property — inventions or products designed to be marketed for sale.<sup>25</sup> Beyond its problematic attempt to sever intellect from culture (and perhaps to elevate intellect *over* culture),<sup>26</sup> this distinction suffers from a more concrete problem: in the context of Native cultures, it can be difficult to distinguish between the two.<sup>27</sup> Moreover, relegation of intangible cultural property to the protection of Western intellectual property law may be ineffective, since that law was designed to help individual authors profit, not to help collective cultures survive and develop.<sup>28</sup>

### *B. The Importance of Intangible Cultural Property: Stories in Native American Cultures*

The power and importance of oral traditions in Native American cultures cannot be overstated. The creative power of the spoken word is a central theme both in creation stories from tribal oral traditions and in contemporary written Native American literatures.<sup>29</sup> In the Navajo tradition, gods sang and prayed this world into existence during a sweathouse ritual.<sup>30</sup>

23. *Id.* § 3001(3).

24. Such non-material resources may find some protection in traditional intellectual property laws — patent, trademark, and copyright — as well as in specially tailored legislation such as IACA. See *infra* Part III.E (assessing the adequacy of such laws to protect Native cultural property).

25. See Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 115-16 (1995-96) (noting the difference between NAGPRA’s policy of protecting the past and IACA’s policy of protecting future profits).

26. The Romantic notion of the author as individual genius breaking free from culture and tradition to introduce, in Wordsworth’s famous phrase, “a new element into the intellectual universe” continues to be a dominant cultural belief, despite persistent scholarly attempts to demonstrate such a paradigm is a limited historical construct rather than a “natural” account of creativity. See Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992); Riley, *supra* note 5, at 182-84 (“Deconstructing the Romantic Author”).

27. See *infra* Part II.C (“The Dream Catcher Syndrome”).

28. See *infra* Part III.E.

29. A. LAVONNE BROWN RUOFF, AMERICAN INDIAN LITERATURES: 6-7 (1990).

30. GARY WITHERSPOON, LANGUAGE AND ART IN THE NAVAJO UNIVERSE 16 (1977).



The earth will be, from the very  
beginning I have thought it.  
The mountains will be, from the very beginning I have thought it.  
(and so on)  
The earth will be, from ancient times  
I speak it.  
The mountains will be, from ancient times  
I speak it.  
(and so on)<sup>31</sup>

Similarly, in Leslie Silko's acclaimed novel *Ceremony*, the contemporary narrative is woven together with descriptions of the traditional Laguna Pueblo creator, Thought-Woman, calling things into existence as she names them, and bringing events to pass as she tells their story.<sup>32</sup> Scott Momaday captured the essential insight:

that in a certain sense we are all made of words, that our most essential being consists in language. It is the element in which we think and dream and act, in which we live our daily lives. There is no way in which we can exist apart from the morality of a verbal dimension.<sup>33</sup>

Although this insight may be especially crucial in oral cultures, students of Christianity will no doubt recall the opening of the Apostle John's creation narrative: "In the beginning was the Word."<sup>34</sup> The primacy and centrality of language, and in particular the spoken word, seems to be a cross-cultural insight.

Compounding this importance is the fact that so much of traditional tribal knowledge and linguistic art is contained within oral traditions rather than written works.<sup>35</sup> Oral traditions are not merely intangible museums for storing

31. *Id.* (translating the Navajo "Beginning of the World Song").

32. LESLIE MARMON SILKO, *CEREMONY* 1 (Penguin 1986) (1977).

33. N. Scott Momaday, *The Man Made of Words*, in *THE REMEMBERED EARTH* 162, 162 (Geary Hobson ed., 1981) (1979).

34. *John* 1:1 (King James). For a funny yet telling "sermon" on this Gospel text by an urban Kiowa trickster-preacher, see N. SCOTT MOMADAY, *HOUSE MADE OF DAWN* 89-98 (Perennial Library 1989) (1968). In Momaday's Pulitzer Prize-winning novel, the Reverend John Big Bluff Tossamah concedes that John (the Apostle) made a good start in his gospel, but being a white man went on to say too much, as whites always do. White culture's endless proliferation of language, notably in advertising and political speechifying, has diluted the power of language, in oral performance, to bring the hearer into the direct presence of the speaker's mind and spirit. *Id.* at 95.

35. LAURA COLTELLI, *WINGED WORDS: AMERICAN INDIAN WRITERS SPEAK* 104 (1990)

outdated, static verbal “treasures”; rather, they are living, evolving bodies of what is sometimes called “esoteric knowledge”—knowledge about the physical and spiritual components of the world and how to live in harmony with that world.<sup>36</sup> Esoteric knowledge, in turn, is more than an assemblage of discrete segments of information; collectively it comprises a group’s distinct cultural identity. Stories, songs, and ceremonies are at least as important as material artifacts in nurturing and maintaining this sense of self. A people is without identity until it has imagined itself one and has given that imagined identity form through the art of storytelling.<sup>37</sup>

Like their material counterparts, intangible cultural resources have been subjected to expropriation by outsiders both for commercial and scientific purposes. Commercial exploitation of tribal traditions by “plastic shamans” has been widely documented and condemned.<sup>38</sup> These spiritual pot hunters, as they might be called, not only debase cultural traditions by prostituting them, but may also misrepresent those traditions to the consuming public.<sup>39</sup> Less appreciated, perhaps, is the damage that may be caused by even the most well-meaning efforts of scientific collectors of culture. Beginning in the late nineteenth century, scientific treasure hunters began extensive operations in “salvage anthropology.”<sup>40</sup> Operating under the assumption that the laws of social

(interview by Laura Coltelli with Simon Ortiz).

36. James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL’Y REV. 255, 259 (2001).

37. See generally Momaday, *supra* note 33. The importance of storytelling in the creation and evolution of Native identities is a recurring theme in contemporary Native literature and criticism. See JACE WEAVER, *OTHER WORDS: AMERICAN INDIAN LITERATURE, LAW, AND CULTURE* 45-48 (2001) (quoting several prominent Native authors on the central role of storytelling in creating and sustaining tribal communities).

38. See, e.g., Alice B. Kehoe, *Primal Gaia: Primitivists and Plastic Medicine Men*, in *THE INVENTED INDIAN* 194 (James A. Clifton ed. 1990); Ward Churchill, *Spiritual Hucksterism: The Rise of the Plastic Medicine Men*, in *FANTASIES OF THE MASTER RACE* 215 (1992).

39. For example, a self-proclaimed Northern Cheyenne artist and “shaman” named Nathan Cagle, who allegedly charged \$300 for sweat lodge ceremonies and \$600 for “vision quests,” recently was revealed as a sham and convicted of grand theft, theft by false pretenses and other crimes for defrauding his art dealer girlfriend. James May, *Man Claiming to Be Northern Cheyenne “Shaman” Convicted on Eight Felony Counts*, INDIAN COUNTRY TODAY, Feb. 20, 2002, at B1. In addition to his mercenary transgressions, Cagle also contributed to the vast pool of misinformation about Native spirituality by lecturing on Northern Cheyenne traditions at local elementary schools and to scouting troops. *Id.*

40. Brian Swann, *Introduction*, to *COMING TO LIGHT: CONTEMPORARY TRANSLATIONS OF THE NATIVE LITERATURES OF NORTH AMERICA* xiii, xxix (Swann ed., 1994).

progress made Indians, as distinct cultures, the “Vanishing Americans,”<sup>41</sup> ethnographers combed Indian country for stories and prayers as well as artifacts.<sup>42</sup> Regardless of whether one views this activity as a laudable rescue operation or an exercise in cultural imperialism,<sup>43</sup> it seems undeniable that the wholesale “collection” of culture was premised on the notion of making available for public education and appreciation much material that was never meant to be made public.<sup>44</sup> To the extent that this scientific-educational project succeeded, it spurred public interest in ethnic art both in the United States and abroad, fueling in turn an art market that encouraged widespread looting of cultural property.<sup>45</sup> Thus craven commercial exploitation and scientific “salvage” both contributed to the same dynamic of cultural dispossession. In each case, cultural resources, whether tangible or intangible, were torn from their living roots and became commodities.

### C. Commodification of Cultural Resources: The Dream Catcher Syndrome

It may not be immediately apparent why commodification of cultural resources, in itself, presents a problem for Native cultures. Unauthorized appropriation of stories or artworks, whether for scientific or commercial

41. See generally BRIAN DIPPPIE, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* (1982). A typical expression of this attitude, and the “salvage” anthropology it spawned, is the following from 1884:

European culture is engulfing and destroying the native peoples left in the world. Their customs and habits, legends and memories, weapons and artifacts are rapidly disappearing . . . .

Mankind must therefore make every effort to collect, as the most valuable knowledge of the ancient past, all the objects pertaining to the development of culture . . . . By rights the ethnological museums are the ones that should send collectors out to answer this call and salvage what can still be saved.

Adrian Woldt, *Translator's Preface* to JOHAN A. JACOBSEN, *ALASKAN VOYAGE, 1881-1883: AN EXPEDITION TO THE NORTHWEST COAST OF AMERICA* (Erna Gunther trans., 1977).

42. Swann, *supra* note 40, at xxix.

43. See Ward Churchill, *The New Racism: A Critique of James A. Clifton's The Invented Indian*, in *FANTASIES OF THE MASTER RACE* 163, 165 (1992) (arguing that even Clifton, a respected contemporary anthropologist, exploits “the Indian business” for professional gain as he tries to debunk racist traditions in his field); cf. Lenora Ledwon, *Native American Life Stories and “Authorship”*: *Legal and Ethical Issues*, 9 ST. THOMAS L. REV. 69, 69 (1996) (asking “how does a non-Native collaborator avoid a colonizing relationship to Native American texts?”).

44. Leslie Marmon Silko, *An Old-Time Indian Attack Conducted in Two Parts*, SHANTIH, Summer-Fall 1979, at 2, 3 (criticizing “the racist assumption still abounding, is that the prayers, chants, and stories weaseled out by the early white ethnographers,” [which are now] “collected in ethnographic journals, are public property”).

45. Nason, *supra* note 36, at 256-57.

purposes, clearly exploits those cultures and must be condemned.<sup>46</sup> But this could be seen simply as a problem of who *controls* the commodity rather than commodification itself. Correcting the “market” in cultural resources by restoring control of the “goods” to their “producers” would, in this view, solve the problem.<sup>47</sup> Native “owners” would then have the right to exclude others from the resources, or alienate those resources if the price (or other consideration) rose high enough, thereby maximizing their value.<sup>48</sup> This so-called “law and economics” approach would emphasize enforcement of traditional intellectual property law as well as specially tailored legislation like NAGPRA and IACA.<sup>49</sup>

In the context of goods produced for sale, this approach works well. However, it assumes the commensurability of all values on the same — ultimately mathematical and monetary — scale.<sup>50</sup> In order to be compared for purposes of exchange, all values must be reduced to cash sums.<sup>51</sup> While this scheme possesses an attractive simplicity, it ignores (or seeks to change) the

46. Suzan Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. ST. L.J. 321, 328 (1992) (characterizing “this time of increased appropriation of Native national names, religious symbology, and cultural images”).

47. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31-35 (4th ed., 1992) (arguing that if all things valuable could be reduced to property, and markets function properly, total collective value would be maximized).

48. See *id.* In Posner’s influential exposition of the “law and economics” paradigm, optimal market functioning depends on three conditions: universality, exclusivity and transferability.

[I]f every valuable (meaning scarce as well as desired) resource were owned by someone (the criterion of universality), ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and if ownership rights were freely transferable, or as lawyers say alienable (transferability), value would be maximized.

*Id.* at 34.

49. See, e.g., Guest, *supra* note 25, at 136-39 (arguing for aggressive enforcement of IACA to protect Native American intellectual property).

50. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 8-12 (1996).

51. *Id.* at 8. Karl Marx long ago noted this propensity of the capitalist market to erase qualitative differences, or “dissolve [them] in the cash nexus,” promoting transferability yet ultimately dehumanizing workers who came to view their own creative capacities as commodities for sale. Karl Marx, *The German Ideology*, in *THE MARX-ENGELS READER* 105, 115 (Robert C. Tucker ed., 1978) (1846). But as Radin and others have made clear, one does not have to denounce capitalism in general to insist that some values — like some rights — are inalienable. RADIN, *supra* note 50, at 16-29; cf. Wendy J. Gordon & Sam Postbrief, *On Commodifying Intangibles*, 10 YALE J.L. & HUMAN. 135, 136-39 (1998) (exploring possible limits of the legal trend toward increased propertization of intellectual property).

broad social consensus that some rights or “properties” — among them life, liberty and the pursuit of happiness — are inalienable, and thus cannot be measured on a scale of transferability.<sup>52</sup>

Many Native cultural resources fall into this category of market-inalienability.<sup>53</sup> Only an imposter would sell a sweat lodge ceremony “experience” for \$300;<sup>54</sup> actual spiritual leaders insist that sacred stories, images and ceremonies are not to be sold.<sup>55</sup> In fact it is precisely this inalienability and nonfungibility, this resistance to assimilation into a single world “market of ideas,” that enables cultural resources to define a distinct cultural identity.<sup>56</sup> When songs or designs are sold — or stolen and repackaged — as commodities, they become decontextualized, their meaning drained, and their value to the Native culture eroded.<sup>57</sup> Tensions may arise, however, when cultural resources are not appropriated by outsiders, but voluntarily offered for sale by Native artisans or business people. The issue then becomes where to draw the line between secular individual resources and those that are sacred, and hence inalienable.

52. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

53. The term “market-inalienability” is Radin’s. See RADIN, *supra* note 50, at 18.

54. See May, *supra* note 39 at B1 (reporting on the sham Cheyenne “shaman” Nathan Cagle).

55. One expert, testifying in a United Nations report, made the point in especially eloquent and relevant terms:

[A] song, for example, is not a “commodity,” a “good,” or a form of “property,” but one of the manifestations of an ancient and continuing relationship between the people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people’s collective identity, could be alienated permanently or completely. . . . [I]ndigenous peoples do not view their heritage in terms of property at all — that is, something which has an owner and is used for the purpose of extracting economic benefits — but in terms of community and individual responsibility. . . . For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.

Farley, *supra* note 6, at 14-15 n.52 (quoting Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. ESCOR, Hum. Rts. Comm., Subcomm. on Prevention of Discrimination and Protection of Minorities, 45th Sess., Item 14 of Provisional Agenda, at 7, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993)).

56. See RADIN, *supra* note 50, at 165-69 (critiquing the notion of a laissez-faire marketplace promoting “free trade in ideas”).

57. See Farley, *supra* note 6, at 10-11 (discussing designs of Australian Aborigines); Riley, *supra* note 5, at 175-79 (describing exploitation by German rock group of the sacred *Song of Joy* of the Ami, Taiwan’s largest indigenous tribe).

This line can be hard to draw, as controversy over the dream catcher suggests.<sup>58</sup> Dream catchers are net or web-like structures that, in the traditions of many tribes, are to be hung above a baby's cradle. The net catches and traps nightmares, but allows good dreams to pass through.<sup>59</sup> For the Ojibwe (Anishinaabe), the dream catcher is a sacred item to be made in a series of ceremonial steps.<sup>60</sup> Now, however, much like Kokopelli,<sup>61</sup> the dream catcher is being mass produced for sale as earrings, key chains and the like.<sup>62</sup> Because of this commodification, some Ojibwe feel the dream catcher has "lost a lot of meaning, even in our own tribe."<sup>63</sup> However, the owner of the tribe's gift shop sells dream catchers without compunction. "If people like and enjoy having Indian crafts, I feel great."<sup>64</sup> Where some tribal members see an opportunity both to make money and promote appreciation of tribal culture, others feel a hemorrhaging of cultural meaning. The former viewpoint has been characterized as realist; the latter as traditional.<sup>65</sup> Any scheme to protect cultural resources must accommodate both perspectives, negotiating the inherent tension between the two. The following survey of existing protections for cultural resources tells the story of a slow, and as yet incomplete, movement toward accommodation of the traditionalists' resistance to commodification.

### *III. Existing Protections for Cultural Resources: Problems and Potential*

The evolution of American laws protecting cultural heritage resources reflects a series of responses to different interests and perceived threats. In the chronological survey that follows, it will become clear that, in recent years, these laws have become much more responsive to and protective of Native American concerns.<sup>66</sup> Even so, more legal protection may be needed, particularly of intangible cultural resources a group may wish to designate as market-inalienable because those resources are sacred or central to communal identity.<sup>67</sup> But even to consider such laws as protecting a living, evolving tribal

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58. *Dream Catchers: Sacred or Sellers? American Indians Contemplate Marketing of Culture*, INDIAN COUNTRY TODAY, Jan. 9, 2002, at B2 [hereinafter *Dream Catchers*].

59. *Id.*

60. *Id.*

61. See *supra* notes 10-11 and accompanying text.

62. *Dream Catchers*, *supra* note 58, at B2.

63. *Id.* (quoting Gerald White).

64. *Id.* (quoting Ruth Garbow).

65. See *supra* notes 4-6 and accompanying text.

66. See *infra* Part III.C-D.

67. See *infra* Part IV (discussing the legal bases for such additional protection).

heritage rather than relics of an extinct race shows a dramatic reorientation from the humble beginnings of cultural resource protection law.

A. *The Antiquities Act of 1906*

The late nineteenth century, with the end of the Indian wars and the expansion of the railroads, ushered in the Golden Age of pot hunting in the West.<sup>68</sup> A widespread concern that vandals and looters were depriving the public of valuable archaeological resources prompted Congress, on June 8, 1906, to pass the Antiquities Act.<sup>69</sup> In addition to authorizing the President to designate national monuments,<sup>70</sup> the Act establishes a permit system for “the gathering of objects of antiquity” on federal lands,<sup>71</sup> and establishes criminal penalties for persons who destroy or appropriate such objects from federal land without permission.<sup>72</sup> Permits are to be granted only to those “properly qualified” to excavate and collect antiquities, presumably persons affiliated with “recognized scientific or educational institutions” where the artifacts are to be deposited.<sup>73</sup> The goal is “to increas[e] the knowledge of such objects” and to provide for their “permanent preservation in public museums.”<sup>74</sup>

The Antiquities Act asserted ownership and control by *the federal government* of cultural resources located on federal land. In the name of a generalized national heritage, the Act aimed to exclude private plunderers and bring the resources into the public domain for educational and scholarly purposes. The original owners, whether individual Native Americans or tribes, were presumed to have vanished, consigned to the realm of “antiquity.”<sup>75</sup> Even

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68. HUTT ET AL., *supra* note 18, at 182; POLLY MILLER, LOST HERITAGE OF ALASKA: THE ADVENTURE AND ART OF THE ALASKAN COASTAL INDIANS 237 (1967) (arguing that the “massive exodus” of native art “not only disrupted cultural patterns responsible for the creation of the arts, it began to clean out the native inventory as well.”).

69. Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (2000)). For a detailed history of the Antiquities Act, see RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 (1970).

70. Antiquities Act, 16 U.S.C. § 431 (2000).

71. *Id.* § 432.

72. *Id.* § 433. The criminal penalty provision was pronounced void for vagueness by the Ninth Circuit when the “objects of antiquity” the defendant was charged with appropriating were San Carlos Apache masks used in ceremonies of ancient origin but the masks themselves were only three or four years old. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

73. 16 U.S.C. § 432.

74. *Id.*

75. See *supra* notes 41-42 and accompanying text (discussing the prevailing image of the Indian as “Vanishing American”).

so, the Antiquities Act represents an important first step on the path to cultural resource protection.

### *B. The Archaeological Resources Protection Act of 1979*

By the 1970s it had become clear that the Antiquities Act was toothless. Not only was its \$500 fine woefully inadequate to deter looters given the potential profits to be made in the international art market,<sup>76</sup> the criminal provisions of the Act had been held void for vagueness by the Ninth Circuit Court of Appeals.<sup>77</sup> Finding that archaeological resources continued to bleed into the hands of private plunderers, Congress in 1979 passed the Archaeological Resources Protection Act (ARPA).<sup>78</sup>

Like the Antiquities Act, ARPA protects archeologists more than the cultures they study. Like its predecessor, ARPA asserts federal ownership and control of archaeological resources on “public lands” (including Indian lands),<sup>79</sup> resources excavated and removed pursuant to a permit “remain the property of the United States.”<sup>80</sup> In issuing permits, federal land managers must make sure the applicant is “qualified” (i.e. a professional archeologist rather than a pot-hunting desert rat) and is “furthering archaeological knowledge in the public interest.”<sup>81</sup> The interests to be protected are those of the archeologists and the public, not the tribes.<sup>82</sup> Much like “antiquities,” resources deemed “archaeological” are presumed to have passed from individual or tribal ownership into federal ownership, in trust for the public.

ARPA’s relatively stiff penalty provisions may help discourage private looting of native heritage resources.<sup>83</sup> Another improvement on the Antiquities

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76. HUTT ET AL., *supra* note 18, at 188-89.

77. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

78. 16 U.S.C. §§ 470aa-mm (2000). ARPA largely supercedes the Antiquities Act with respect to the permit program. See Archaeological Resources Protection Act, 16 U.S.C. § 470cc(h)(1) (“No permit or other permission shall be required under the [Antiquities Act] for any activity for which a permit is issued under this section.”).

79. *Id.* § 470bb(3)-(4) (defining “public lands” and “Indian lands”).

80. *Id.* § 470cc(b)(3). “Archaeological resource” is defined broadly to include virtually any material evidence of human habitation or activity, provided the artifact is at least 100 years old. *Id.* § 470bb(1); *cf.* 43 C.F.R. § 7.3(a)(1) (2001) (“‘of archaeological interest’ means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques . . .”).

81. 16 U.S.C. § 470cc(b)(1)-(2).

82. *Id.*

83. Violators may be fined up to \$10,000 and imprisoned for up to a year. If the value of the resources involved and the cost of restoration and repair exceeds the relatively paltry sum of \$500, those penalties may increase to \$20,000 and two years imprisonment. Subsequent



Act is ARPA's requirement to provide notice to Indian tribes if the permitted activity may damage religious or cultural sites.<sup>84</sup> Moreover, permits involving resources located on Indian lands may be granted only with the consent of the individual or tribe owning the land.<sup>85</sup> But title to the artifacts collected under ARPA remains with the United States;<sup>86</sup> ARPA contains no repatriation provision. The Act apparently did help spur some voluntary repatriations, however, foreshadowing and paving the way for NAGPRA.<sup>87</sup>

### C. *The Native American Graves Protection and Repatriation Act of 1990*

Building on the impetus of ARPA, and other legislation protecting Native American cultural heritage resources such as the American Indian Religious Freedom Act (1978),<sup>88</sup> Congress passed NAGPRA in 1990.<sup>89</sup> NAGPRA represents a dramatic shift in orientation toward Native American cultural heritage resources by recognizing Indian nations' property rights — and human rights — in Native remains and certain objects of cultural importance.<sup>90</sup> In contrast to the earlier archaeological acts, NAGPRA asserts Native American tribes and individuals, not the federal government, own Indian human remains and cultural items.<sup>91</sup> Procedurally, the Act requires institutions receiving federal funds to inventory their collections of human remains and, in consultation with tribes, determine the cultural affiliation of those remains and associated funerary

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convictions may carry fines of up to \$100,000 and five years in prison. *Id.* § 470ee(d). The Criminal Fines Improvement Act of 1987 increased the maximum fine under ARPA to \$100,000 for a misdemeanor and \$250,000 for a felony. Pub. L. No. 100-185, 101 Stat. 1279 (1987) (codified at 18 U.S.C. § 1 (2000)).

84. 16 U.S.C. § 470cc(c) (2000). As long as the notice is given, presumably the damage may proceed.

85. *Id.* § 470cc(g)(2).

86. *Id.* § 470cc(b)(3).

87. Jane Gross, *Stanford Agrees to Return Ancient Bones to Indians*, N.Y. TIMES, June 24, 1989, at 1 (describing the University's agreement to return the remains of 550 Ohlone Indians for reburial); Patrick Sweeney, *Indians Win Battle to Bury Ancestors*, ST. PAUL PIONEER PRESS DISPATCH, July 16, 1989, at 1B (describing the University of Minnesota's agreement to repatriate the bones and skulls of approximately 1000 Indians previously excavated from burial mounds).

88. 42 U.S.C. § 1996 (1978).

89. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (2000)).

90. Sherry Hutt & Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 364 (1999).

91. 25 U.S.C. § 3002 (2000).

objects found with them.<sup>92</sup> Once cultural affiliation is determined, the process of repatriation — returning the remains or objects to their rightful owner(s) — must begin.<sup>93</sup> This explicit statutory recognition of Native American human and property rights “brings to an end the domination of Eurocentric assumptions concerning property rights and the disparate treatment of human remains.”<sup>94</sup>

While a detailed discussion of NAGPRA<sup>95</sup> is beyond the scope of this article, it should be noted that the Act not only acknowledges Native American rights to cultural heritage resources but also that some of these rights may be inalienable. One of the categories of items subject to NAGPRA is “cultural patrimony,” defined in the statute as

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such native American group at the time the object was separated from such group.<sup>96</sup>

As will be discussed in Part IV, this acknowledgment of a communal right to certain resources central to Native American culture provides one legal foothold for constructing a protective scheme not predicated entirely on Western intellectual property’s emphasis on individual creativity and ownership.<sup>97</sup>

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92. *Id.* § 3003.

93. *Id.* § 3005.

94. Hutt & McKeown, *supra* note 90, at 367.

95. See generally Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992); Leonard D. Duboff, *500 Years After Columbus: Protecting Native American Culture*, 11 CARDOZO ARTS & ENT. L.J. 43, 49-52 (1992) (describing the Act and noting some ambiguities in the definitions of categories of “cultural items”); HUTT ET AL., *supra* note 18, at 316-352; Renee M. Kosslak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study*, 24 AM. INDIAN L. REV. 129 (2000) (exploring troubling aspects of NAGPRA from a scientific perspective); Nason, *supra* note 36, at 258-59.

96. 25 U.S.C. § 3001(3)(D). The Tenth Circuit has rejected the argument that the statute’s definition of “cultural patrimony” is unconstitutionally vague. See *United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997) (affirming a criminal conviction for trafficking in eagle and owl feathers).

97. See Riley, *supra* note 5, at 213 (noting NAGPRA’s recognition of “indigenous communal property — that which is created by a group for long-term use within the community

Nearly as important as NAGPRA's ownership provision is its provision that the culturally affiliated tribe itself determines which resources are "sacred objects" and "cultural patrimony."<sup>98</sup> By requiring an ongoing dialogue between tribes and the museums and government agencies holding cultural objects, NAGPRA ensures that the culture of origin is not just a passive recipient of discrete objects, but a continual participant in defining the meaning of those objects.

Tribal determination of which resources are inalienable cultural patrimony may be crucial to a tribe's economic as well as spiritual well being. Designating too much of culture as "sacred" and thus inalienable would not only stifle commerce but could distort tribal cultures.<sup>99</sup> Whereas ARPA and NAGPRA restrict commerce in certain Native American artifacts,<sup>100</sup> the Indian Arts and Crafts Act addresses the related problem of controlling tribal intellectual property for profit.

#### *D. The Indian Arts and Crafts Act of 1990*

The original Indian Arts and Crafts Act was passed in 1935 as part of President Roosevelt's "Indian New Deal."<sup>101</sup> The Act authorizes the Indian Arts and Crafts Board<sup>102</sup> to undertake various activities designed "to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship."<sup>103</sup> The amendments of 1990 extended

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and whose value is not fully materialized unless the property is available to the group as a whole.").

98. 25 U.S.C. § 3001(3)(C)-(D) (2000); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 INDIANA L.J. 723, 726 (1997) ("NAGPRA in effect substitutes tribal property institutions for Anglo-American property institutions.").

99. See Richard White, *All Roads Are Good: Native Voices on Life and Culture*, NEW REPUBLIC, Apr. 21, 1997, at 33 (warning of a romanticist trend, among both whites and Indians, "particularly among urban Indians, to define more and more of Indian life as sacred.").

100. 16 U.S.C. § 470ee(c) (2000) (prohibiting trafficking in objects unlawfully obtained); *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (affirming conviction under ARPA where defendant transported in interstate commerce burial mound artifacts obtained in violation of Indiana state laws of trespass and conversion); 18 U.S.C. § 1170(b) (2000) (providing criminal sanctions for anyone who "knowingly sells, purchases, uses for profit or transports for sale or profit any Native American cultural items obtained in violation of [NAGPRA].").

101. GAIL K. SHEFFIELD, *THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990*, at 16 (1997).

102. 25 U.S.C. § 305 (2000).

103. *Id.* § 305a.

the scope of the Act by expanding the Board's enforcement powers,<sup>104</sup> authorizing civil actions against merchants who misrepresent goods as "Indian,"<sup>105</sup> defining key terms of the Act such as "Indian,"<sup>106</sup> and granting the Board authority to assign "trademarks of genuineness and quality" to Indian products.<sup>107</sup>

On its face, IACA seems a straightforward law promoting economic welfare rather than protecting cultural heritage resources. The central idea is to protect market share, not tribal identity, through preventing the flooding of the market with fake products.<sup>108</sup> To this extent, IACA is, as the Board itself once declared, simply an Indian "truth-in-advertising" law protecting consumers as well as Indian artisans.<sup>109</sup> However, a close reading of the legislative history of IACA leads at least one commentator to conclude the Act was nothing less than "an effort to save Indian culture itself."<sup>110</sup> The economic and cultural aims converge in the Act's delegation to Native institutions and individuals the power to define what goods are authentic "Indian" products.<sup>111</sup> In addition to the Board's power to certify the "genuineness and quality" of the work of individuals, tribes, or arts and crafts organizations, tribes play a key role in determining authenticity because the Act defines "Indian" as one who is either a member of a tribe or certified as an Indian artisan by a tribe.<sup>112</sup> Cultural authenticity, perhaps oddly, depends on political affiliation; a dream catcher made by an enrolled Ojibwe artist would be an "Indian product" under the Act,<sup>113</sup> while the dream catcher of

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104. *Id.* § 305d.

105. *Id.* § 305e(a)-(c).

106. *Id.* § 305e(d). In October 2000 Congress passed the Indian Arts and Crafts Enforcement Act of 2000, which made some minor technical changes to the law. Pub. L. No. 106-497, 114 Stat. 2219 (2000).

107. *Id.* § 305a.

108. A U.S. Department of Commerce report in 1985 estimated annual sales of Native American jewelry and handicrafts at \$400 to \$800 million. However, fake products sold at cutthroat prices accounted for up to 20% of that figure. INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, STUDY OF PROBLEMS AND POSSIBLE REMEDIES CONCERNING IMPORTED NATIVE AMERICAN-STYLE JEWELRY AND HANDICRAFTS (1985).

109. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1027 (2001) (citing INDIAN ARTS & CRAFTS BD., U.S. DEP'T OF INTERIOR, MISREPRESENTATION (1999)).

110. *Id.* at 1028.

111. *Id.*

112. 25 U.S.C. § 305e(d)(1).

113. *Id.* § 305e(d)(2). This example is not far-fetched. Jimmie Durham, an artist whose work hangs in the permanent collection of the Vatican, is of Cherokee descent but not enrolled in the tribe. When he sought certification, the Cherokees denied it. On the other hand, Jeanne Walker Rorex, another prominent artist of Cherokee descent, refuses to seek enrollment or

his unenrolled grandmother (barring certification) would not. If the grandmother offered her dreamcatcher for sale, she would be in violation of IACA and subject to a civil action or criminal prosecution.

IACA thus may be seen to create a kind of property right in “authentic” Indian identity.<sup>114</sup> By granting the right to define this identity/property and exclude others from it, IACA provides federally recognized tribes and members of those tribes important economic and cultural protection. As the example above suggests, however, this power may be asserted arbitrarily to exclude individuals who may be thoroughly steeped in a tribal tradition yet not meet the Act’s political definition of “Indian.” Such an outcome may be unwise from a social standpoint, and may even violate the Fifth Amendment as a deprivation of property (Indian identity) without due process of law.<sup>115</sup> At the very least, IACA’s attempt to certify “genuineness” of artistic goods is problematic.<sup>116</sup> Thus it is not surprising that estimates of IACA’s probable effectiveness have varied wildly.<sup>117</sup> Many commentators agree, however, that some legal protection regime sensitive to the unique nature of some Native cultural resources is necessary, because traditional intellectual property law does not adequately protect those resources.<sup>118</sup>

### *E. Patent, Trademark, and Copyright Laws*

As discussed above, NAGPRA and ARPA provide important protections for tangible items of cultural property, but do not reach intangible resources such as stories or ceremonies. The focus of IACA, similarly, is on concrete items, although in this case goods for sale.<sup>119</sup> But this is not to say intangible cultural

certification, seeing the issue as individual autonomy. Hapiuk, *supra* note 109, at 1034-35.

114. SHEFFIELD, *supra* note 101, at 138-41.

115. *Id.* at 138; U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

116. 25 U.S.C. § 305a (2000) (authorizing the Board to assign “trademarks of genuineness and quality”); Hapiuk, *supra* note 109, at 1029-31 (by equating “genuineness” of the product with the “Indianness” of the producer, IACA “grossly oversimplifies the ‘genuineness’ issue.”).

117. Compare Duboff, *supra* note 95, at 57 (dismissing IACA as a “paper tiger”) with Guest, *supra* note 25, at 136-39 (advocating vigorous enforcement of IACA as the best means of protecting tribal intellectual property).

118. See, e.g., Riley, *supra* note 5, at 214-18.

119. Richard Guest argues that, since IACA does not define “Indian products,” giving it only “the meaning given such term in regulations which may be promulgated by the Secretary of the Interior,” 25 U.S.C. 305e(d)(2) (2000), and since no such regulations have been promulgated, it may be possible to convince a court that the term extends beyond the arts and crafts arena to include seeds, stories and other cultural property. Guest, *supra* note 25, at 136. But this would only protect the property owner from unfair competition from fakes; it would not help a

resources lack protection altogether. Like any other persons, Native Americans can and do use patent, trademark, and copyright laws to protect their intellectual property.<sup>120</sup> Intellectual property law regulates the relationships between holders of rights in non-physical objects — designs, symbols, original expressions of ideas, etc. “[I]ntellectual property is not really property at all; the things that we call intellectual property are really rights to do certain things, to authorize others to do certain things, and to prevent others from doing certain things.”<sup>121</sup> The problem for Native Americans in asserting these rights is that often either the holder of the right or the property itself is not recognized by Western law.<sup>122</sup> The Western focus on the lone originator, the free agent, the creative genius<sup>123</sup> often conflicts with the more communal focus of native peoples, in which identity and rights derive from membership in clan, kinship and tribal networks.<sup>124</sup> Western intellectual property law works well in protecting Native creations it recognizes as valid, but, as the following brief survey shows, falls short when those creations fall outside the intellectual property paradigm of the individual seeking to exploit an idea for profit.<sup>125</sup>

### *I. Copyright*

Copyright protection gives the author a kind of limited monopoly right to control and profit from the distribution of her work. Many of the most famous Native American works of art are protected by copyright — for example the best-selling novels of Louise Erdrich,<sup>126</sup> or Sherman Alexie’s film *Smoke Signals*.<sup>127</sup> However, even a cursory examination of the Copyright Act of

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community seeking to protect inalienable resources.

120. See generally *id.* Trade secrets and other intellectual property protections are not discussed in this article, but may also supply protection. See David J. Stephenson, Jr., *A Practical Primer on Intellectual Property Rights in a Contemporary Ethnoecological Context*, in ETHNOECOLOGY: SITUATED KNOWLEDGE/LOCATED LIVES 230, 239-41 (Virginia D. Nazarea ed., 1999) (discussing the potential utility of trade secrets to indigenous peoples).

121. Christopher C. Larkin, *Traps for the Unwary: Avoiding Some Common Mistakes in Intellectual Property Law*, 27 BEVERLY HILLS B. ASS’N J. 89 (1993).

122. Riley, *supra* note 5, at 203; Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 697 (1993).

123. See *supra* notes 26-28 and accompanying text.

124. Riley, *supra* note 5, at 203; Robert Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 742 (1990).

125. See Guest, *supra* note 25, at 115 (stating “intellectual property rights in the United States are driven by the economics of free enterprise and profit”).

126. See, e.g., LOUISE ERDRICH, *THE ANTELOPE WIFE* (1998).

127. *SMOKE SIGNALS* (Miramax 1998). The film is based on Alexie’s collection of stories. See ALEXIE SHERMAN, *THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN* (1993).

1976<sup>128</sup> reveals it to be entirely inadequate to protect much of the Native American linguistic and literary resource base from exploitation by outsiders.

Copyright protection extends to "original works of authorship fixed in any tangible medium of expression," including written works, visual arts, film, music, and performance arts.<sup>129</sup> Much Native knowledge, because it is embodied in oral traditions developed collectively over generations, fails to meet all three of the central requirements of copyright law: originality, individual authorship, and embodiment in a tangible medium.<sup>130</sup>

The U.S. Supreme Court has stated that "[t]he *sine qua non* of copyright is originality. . . . Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."<sup>131</sup> A traditional song or story, while each performance may be creative, is not original in the sense of being "independently created." Nor is it the product of an identifiable "author"; instead, the work is typically a communal, intergenerational collaboration.<sup>132</sup> Finally, since it exists solely as part of an oral tradition, the work has not been reduced to a "tangible medium" and thus cannot be copyrighted.<sup>133</sup>

128. Pub. L. No. 94-553, 90 Stat. 2598 (1976) (codified at 17 U.S.C. §§ 101-914 (2000)).

129. 17 U.S.C. § 102 (2000).

130. See Riley, *supra* note 5, at 185 (concluding that "[i]ndigenous conceptions of [communal] ownership, rights, and values, which inhere in cultural property suggest that the rationales which justify the current scope of copyright protection within and for the dominant society may not be applicable or relevant in indigenous communities.").

131. Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 345 (1991).

132. WEAVER, *supra* note 37, at 47 ("The notion of a story with a single author, especially one who then has a proprietary right in the act of his or her creation, would have struck pre-Columbian Natives as absurd."); Riley, *supra* note 5, at 194.

133. 17 U.S.C. § 102(a) (2000). Copyright law is not the only legal arena in which oral traditions fare badly in relation to written documents. In 1976 the Mashpee Tribe brought suit under the Nonintercourse Act, 25 U.S.C. § 177, claiming its tribal land had been taken without federal consent. The district court dismissed the suit on the ground that the Mashpees failed to establish they met the definition of "tribe of Indians" under the Act, and thus lacked standing to bring the suit. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 (Mass. Dist. Ct. 1978), *aff'd*, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). Among other problems, the Mashpees' claim to have been continually self-governing lacked documentary evidence and relied on oral history. Some observers felt the court and jury in *Mashpee Tribe* heard these oral histories merely as "gaps" in the evidentiary record. "The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible." Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 649 (1990). The centrality of

## 2. Patent

Similar problems arise when protection for indigenous knowledge is sought under patent law. Many traditional seeds and folk crop varieties are the result of centuries of agricultural experimentation and experience.<sup>134</sup> This knowledge harbors enormously valuable crop genetic resources.<sup>135</sup> However, any attempts to protect indigenous plant varieties for the exclusive use or profit of a tribe under patent law again run into the individualistic and profit-oriented basis of Western law. For one thing, persons applying to patent a plant variety must be the breeder, inventor or original conceiver of the new plant variety.<sup>136</sup> Since traditional knowledge develops over centuries or even millennia, generally it will be impossible to establish any individual as the plant's originator or "breeder." Moreover, a patent may only be awarded a plant variety that is "new" — that is, has not been in public use in the United States for more than one year.<sup>137</sup> Since most traditional seeds and folk varieties have been in public use for a century or more, this novelty requirement will generally doom any attempt to protect their use by patent.<sup>138</sup> Like copyright law, patent law is based on the Western paradigm of the individual creative genius profiting through the public dissemination of her creation. As such, the law applies poorly to esoteric knowledge — the communal, cumulative knowledge embodied in oral traditions.<sup>139</sup>

## 3. Trademark

The function of the trademark is "to identify and distinguish [a person's] goods, including a unique product, from those manufactured or sold by others."<sup>140</sup> Thus IACA, as we saw, authorizes its Board to create "trademarks of genuineness and quality" distinguishing Indian goods from cheap

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the written word in the Western legal system makes it difficult for that system to acknowledge, let alone protect, oral traditions, whether artistic or governmental.

134. Guest, *supra* note 25, at 122.

135. Daniela Soleri & Steven E. Smith, *Conserving Folk Crop Varieties: Different Agricultures, Different Goals*, in *ETHNOECOLOGY: SITUATED KNOWLEDGE/LOCAL LIVES*, *supra* note 120, at 133, 133-34.

136. Plant Variety Protection Act, 7 U.S.C. § 2402(a) (2000).

137. *Id.* § 2402(a)(1)(A).

138. Guest, *supra* note 25, at 122-23.

139. Nason, *supra* note 36, at 259; *Potts v. Coe*, 140 F.2d 470, 478 (D.C. Cir. 1944) (explaining that the purpose of the plant variety protection laws is "to reward individual and not group achievement").

140. 15 U.S.C. § 1127 (2000).



imitations.<sup>141</sup> As a means of protecting intangible cultural resources such as a tribe's name and image, trademark law is limited by its commercial basis and focus. In order to bring a trademark claim under the Lanham Act,<sup>142</sup> a party must be a competitor in the market.<sup>143</sup> If the Cherokee tribe made sport utility vehicles, they could sue Jeep to enjoin the use of the tribe's name<sup>144</sup> and recover Jeep's profits and the tribe's damages for economic losses caused by that use.<sup>145</sup> Barring such direct commercial competition, however, and the potential confusion of products' sources, trademark law does not give tribes or individuals standing to contest use of tribal names.<sup>146</sup>

To be sure, trademark law can, in some instances, provide valuable protection for tribal symbols and even for the image of Indians in general.<sup>147</sup> For instance, the Cow Creek Band of Umpqua Tribe of Indians in Oregon has asserted intellectual property rights in filing a lawsuit against the Indian Motorcycle Company.<sup>148</sup> As Tribal Chair Sue Shaffer said, "We wanted people, when they see the 'Indian' brand, to think about positive things like quality, durability and integrity."<sup>149</sup> At least one enterprising native group has even used its tribal name, and trademarked it, to repackage stereotypes for sale as commodities such as "Savagely Yours™" perfume.<sup>150</sup>

141. 25 U.S.C. § 305a(g)(1) (2000).

142. Ch. 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051-1127 (2000)).

143. *Johnson & Johnson v. Carter-Wallace Inc.*, 631 F.2d 186, 189 (2d Cir. 1980) (only "commercial parties" have standing under section 43(a) of the Lanham Act).

144. 15 U.S.C. § 1125(c)(1).

145. *Id.* § 1117(a).

146. *See* Guest, *supra* note 25, at 129 (concluding that "the universal and exclusive use of tribal names sought by Native American tribes does not appear possible.").

147. The Zia Indians of New Mexico, for instance, have sought trademark protection — and \$74 million in compensation — for their sacred sun image, which New Mexico has used on the state flag for seventy-four years. Rebecca Lopez, *Tribes Seeks Trademark Protection for Sacred Symbols* (July 9, 1999) available at [www.onlineathens.com/stories/070999/new\\_tribe.shtml](http://www.onlineathens.com/stories/070999/new_tribe.shtml); *cf.* Rick Mofina, *Culture "Confiscated" for High Fashion: Inuit Women Want to Trademark Tradition to Fend Off Fashion Industry's "Exploitation,"* OTTAWA CITIZEN, Nov. 16, 1999, at A1.

148. Wayne Shammel & Dave Stephenson, *Protecting American Indian Intellectual Property in the Twenty-First Century: The Case of the Cow Creek Tribe and Indian Motorcycle* (n.d.) (on file with author).

149. *Id.*

150. *See* Wappo Tribal Enterprises Unlimited (n.d.) (on file with author) ("Savagely Yours™" is one of the legal trademarks of Wappo Tribal Enterprises Unlimited . . . celebrating the Native American way of life."); *cf.* Guest, *supra* note 25, at 129 ("There is no question that Native American tribes can seek federal registration of their tribal names under the Lanham Act for goods and services they currently sell or contemplate selling in the future.").

While such protections and opportunities may cheer the “realist” groups seeking a fair share of the culture industry, they provide cold comfort to the traditionalists seeking to protect certain cultural resources from commercialization.<sup>151</sup> Some degree of assimilation into the world market is both inevitable and, contrary to common perceptions, consistent with many traditional tribal cultures.<sup>152</sup> The question is how to accomplish this economic participation while simultaneously retaining control over inalienable cultural resources. To that end, intellectual property laws, including IACA, as well as laws protecting tangible cultural resources, like ARPA and NAGPRA, may need to be supplemented by a protective scheme more attuned to tribal oral traditions and ceremonial wisdom. The following section surveys various potential sources of such legal protection in both tribal law and national legislation.

#### *IV. Communal Rights to Intangible Cultural Resources: Sources and Prospects*

It is a commonplace that Western law in general, and particularly the discourse of property rights, derives from an individualistic — and largely commercial — ideology.<sup>153</sup> This law is not monolithic, however, as it increasingly acknowledges and incorporates Native American perspectives, nor is it altogether hostile to communal rights.<sup>154</sup> After examining tribal intellectual property rights law, this section will discuss the validation in federal Indian law of communal rights to cultural resources as evidenced in NAGPRA and the Indian Child Welfare Act.

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151. See *supra* notes 6-8 and accompanying text (discussing the tension between realist and traditionalist attitudes).

152. Robert J. Miller, *Economic Development in Indian Country*, 80 OR. L. REV. 757, 780-85 (2001). For one expression of the widespread, somewhat Noble Savagist, belief that Indians are not cut out for capitalism, see Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Development Amount to Cultural Assimilation?*, 25 N.M. L. REV. 23, 32 (1995) (“[T]he capitalistic principle of industry and commercial enterprise is arguably incongruous with Native American culture.”).

153. CAROL M. ROSE, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 105, 105-06 (1994) (outlining the familiar neoclassical economic argument that individual property owners, because they can exclude others, will devote more time and labor to the development of resources, to the ultimate aggregate enrichment of all); Farley, *supra* note 6, at 31 (“Western notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions.”).

154. See *infra* Part IV.B-C.

### A. Tribal Control of Intangible Cultural Resources

Tribal efforts to protect indigenous cultural resources from commercial exploitation, and from legitimate but culturally insensitive research, have been international in scope.<sup>155</sup> Control over such resources is a matter not only of property rights but of human rights. While the obligation of national governments to protect such rights should be clear,<sup>156</sup> tribes in the United States can do much themselves toward that end. Professor James D. Nason has outlined ten issues tribal governments need to address to help ensure oversight and control of cultural resources, including establishing research permit procedures, specific agreements asserting tribal copyright in research data and findings, and tribal identification of culturally sensitive data and guidelines relating to its access.<sup>157</sup>

Tribal definition and regulation of cultural resources is especially critical in the control of unauthorized alienation of items by tribal members. In many cases ownership of the resource (if any) may be unclear. For instance, in *Chilkat Indian Village v. Johnson*,<sup>158</sup> members of the tribe sold to an art dealer posts and a rain screen used in ceremonies by the Whale House, the Raven House and the Valley House.<sup>159</sup> These individuals, as members of the Whale House, asserted ownership of the artifacts and the exclusive right to sell them.<sup>160</sup> The tribe, however, asserted communal ownership of these and all such artifacts, passing a village ordinance stating “[n]o traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.”<sup>161</sup> Various possible owners of the artifacts can be seen: the

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155. See *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection, 43rd Sess., U.N. Doc. E/CN.4/Sub.2/1993/29/Annex I (1993) [hereinafter *Draft Declaration*]. Part III, Article 12 of the *Draft Declaration* asserts the right of indigenous peoples to “the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions, and customs.” *Id.* But see Harjo, *supra* note 17, at A5 (dismissing the U.N. and World Trade Organization indigenous intellectual property pronouncements as merely “theoretical tinkering” resulting in “bad paper”).

156. *Draft Declaration*, *supra* note 155, at pt. III, art. 14 (“States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected.”).

157. Nason, *supra* note 36, at 262.

158. 870 F.2d 1469 (9th Cir. 1989).

159. *Id.* at 1471.

160. *Id.* at 1471 n.4.

161. *Id.* at 1472. The *Chilkat* court did not reach the issue of ownership, deciding the case

individuals, the Whale House as a whole, the Ganaxtedi Clan to which the House belongs, and the village or tribe. Such complexity of interests in ceremonial art or songs is common within tribal societies, where individual identities and rights typically arise within a network of family, kinship and clan relationships.<sup>162</sup> Tribal members, who best understand these relationships, must be the ones to define which resources may be individually owned and alienated, and which are inalienable.

Whether the issue is resolved by a flat ban on export, as the Chilkat Village ordinance mandated,<sup>163</sup> or a more protracted and nuanced proceeding of the kind contemplated by Nason, tribes must take this necessary first step before any external legal protection will be meaningful. As tribes concurrently undertake this process of defining and controlling communal resources, Nason suggests, a consensus may emerge on what type of federal legislation, if any, is needed to provide additional protection.<sup>164</sup> Such legislation would need to abandon the individualistic and commercial orientation of the Western legal tradition<sup>165</sup> and embrace communal rights.

#### *B. Recognition of Communal Rights to Cultural Resources in Existing Federal Law*

Some critics of Western law see little to suggest it can accommodate community-based rights, arguing that “the existing legal structure focuses almost entirely on the individual, and does not concede value inherent in groups *per se*.”<sup>166</sup> However, U.S. law is not as monolithic as such arguments would suggest. In fact, laws relating to Indian cultural preservation explicitly *do* recognize the value inherent in groups *per se*, particularly tribes. A brief survey of these laws, focusing on their recognition of communal rights, suggests that the possible legal recognition and protection of communal resources like stories and ceremonies has substantial legal precedent.

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on jurisdictional grounds, but for purposes of this case “accept[ed] as true . . . that the tribe has a paramount proprietary interest in the artifacts.” *Id.* at 1472 n. 4.

162. Robert Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 742 (1990).

163. See *supra* note 158 and accompanying text.

164. Nason, *supra* note 36, at 263.

165. See *supra* note 153 and accompanying text; Herz, *supra* note 122, at 697.

166. Riley, *supra* note 5, at 203. Even Riley, however, finds authority for such rights in federal Indian law, as will be discussed below in Part IV.B.3.

### 1. *The Indian Child Welfare Act*

In response to abusive child welfare practices that resulted in the separation of huge numbers of Indian children from their families and tribes through state court adoption and foster care placements, Congress enacted the Indian Child Welfare Act of 1978 (ICWA).<sup>167</sup> ICWA seeks to ensure “the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture,” in order to stem the flow of Indian children to non-Indian families.<sup>168</sup> The Act grants exclusive tribal jurisdiction (and preferred concurrent jurisdiction) over the placement of Indian children domiciled on reservations,<sup>169</sup> and establishes a placement preference hierarchy in which extended family members get priority, followed by other members of the tribe, followed by other Indian families.<sup>170</sup> Disputes over placement and custody are resolved by the tribal agency or court.<sup>171</sup>

Having found “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,”<sup>172</sup> Congress in ICWA created a communal right in that “resource” held by the tribe. ICWA, in fact, curtails the individual freedom of the child’s parents to contract for adoption with whomever they see fit, for the sake of the long-term survival of the community.<sup>173</sup> A culture largely embodied in oral traditions is potentially only one generation away from extinction. As one tribal leader testified in a hearing on the bill that would become ICWA, “[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.”<sup>174</sup>

A kind of Endangered Cultures Act, ICWA explicitly creates a category of inalienable cultural resources: children. Viewing children in this way may pose

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167. 25 U.S.C. §§ 1901-1963 (2000).

168. *Id.* § 1902.

169. *Id.* § 1911(a).

170. *Id.* § 1915(a).

171. *Id.* § 1915(c).

172. 25 U.S.C. § 1901(3).

173. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 65 (1989) (Stevens, J., dissenting) (holding that Indian parents domiciled on a reservation cannot voluntarily avail themselves of state court adoption procedures).

174. *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) (testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians).

the risk of commodification and dehumanization.<sup>175</sup> Ironically, though, it also establishes a legal precedent in federal law for granting and protecting the kind of communal rights that could *prevent* commodification by outsiders of inalienable resources like sacred songs, stories and ceremonies.

## 2. NAGPRA

The goal of NAGPRA, as discussed earlier,<sup>176</sup> is to provide a legal mechanism for the repatriation of human remains and certain categories of tribal artifacts. The Act vests ownership of such items in the tribe on whose land they were found, or with whom the items are culturally affiliated.<sup>177</sup> Most pertinent to this discussion is NAGPRA's definition of "cultural patrimony" as property which, due to its central cultural importance, is owned by the group and not any individual.<sup>178</sup> Cultural patrimony is, by definition, "inalienable," so it cannot be conveyed by any individual, even a tribal member.<sup>179</sup> The determination of which property is inalienable cultural patrimony is made by the tribe.<sup>180</sup> Therefore ordinances such as the Chilkat Village's,<sup>181</sup> restricting alienation of cultural patrimony by individuals, should be enforceable as a matter of federal as well as tribal law.

Like ICWA, NAGPRA recognizes "the unique values of Indian culture" and seeks to protect them by limiting individual rights of alienation in favor of communal rights of possession and use.<sup>182</sup> While these acts are of relatively recent vintage, their accommodation of Indian culture through acknowledging a group-rights model of ownership was really prefigured in federal Indian law in general.

## 3. Communal Rights in Federal Indian Law

Angela R. Riley has offered a detailed argument for federal recognition of communal rights based in federal Indian law.<sup>183</sup> She first notes that the Indian Commerce Clause recognizes Indian Nations as distinct quasi-sovereign peoples, and empowers Congress to regulate trade not with individual Indians,

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175. See *supra* Part II.C.

176. See *supra* notes 21-24 and accompanying text.

177. 25 U.S.C. § 3002(a)(2)(A)-(C) (2000).

178. *Id.* § 3001(3)(D); see also *supra* notes 96-97 and accompanying text.

179. *Id.*

180. *Id.*

181. See *supra* note 161 and accompanying text.

182. 25 U.S.C. § 1902 (2000).

183. Riley, *supra* note 5, at 205-14.

but with Indian Nations.<sup>184</sup> The federal trust responsibility which has evolved from two centuries of interpretation of, and enactments under, the Indian Commerce Clause<sup>185</sup> also emphasizes the group rights of tribes.<sup>186</sup> For instance, much tribal land is held in trust for tribes by the federal government and cannot be alienated by the tribe or any member of it.<sup>187</sup> As the Court of Claims noted in 1893, “[t]he distinctive characteristic of [tribal] communal property is that every member of the community . . . has a right of property in the lands as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.”<sup>188</sup>

Federal Indian law, then, recognizes group rights to property and other resources, particularly in the context of the cultural survival of Indian tribes, as seen with NAGPRA and ICWA. The plenary power of Congress under the Indian Commerce Clause gives it authority to deal with tribal groups. Thus it should also authorize Congress to protect group *intellectual* property rights of Indians as well. The question to be considered in the following section is whether Congress should do so.

#### *V. Freezing Tradition: The Dangers of Protecting Culture Through Legal Rights*

A number of commentators have touted group rights as the key to legal recognition of the cultural distinctiveness of indigenous peoples, as well as to legal protection of tribal cultural resources.<sup>189</sup> Riley, for example, has proposed an “Indian Copyright Act” that would be flexible enough to protect stories and songs in oral traditions, works with collective, cumulative authorship in

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184. *Id.* at 205.

185. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (tribe’s relationship to the United States is like that of “a ward to its guardian”).

186. Riley, *supra* note 5, at 207; Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498-99.

187. Riley, *supra* note 5, at 209.

188. Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 442 (1986) (citing *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281 (1893), *aff’d*, 155 U.S. 196 (1894)).

189. *See, e.g.*, John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1990); Herz, *supra* note 122; Riley, *supra* note 5; David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93 (2000-2001).

intangible media.<sup>190</sup> Under this proposed Act, the strict definitions of “originality,” “authorship” and “fixation” in current copyright law would not apply. Thus, ownership of the intangible property would remain with the tribe forever, inalienable by individual members.<sup>191</sup> Disputes over what is “collective” and what is individual would be left to the tribes to settle, much like custody disputes under ICWA.<sup>192</sup>

There is much to commend such proposals. As shown earlier, current laws protect tangible artifacts adequately but not intangible cultural resources. Moreover, as discussed in the previous section, a substantial legal basis exists in federal law for the recognition of rights in communal “property” such as stories and songs. Dangers lurk, however, in subjecting cultural resources to an intellectual property rights regime, even communal rights free from the Western individualistic and commercial biases. Property tends to become commodified, and to that extent drained of meaning.<sup>193</sup> Rather than impose a uniform federal law that may, like IACA, prove ineffective and do more harm than good,<sup>194</sup> the wisest course of action at this time is to encourage the tribes themselves to develop policies and procedures regarding access to cultural resources.<sup>195</sup>

#### *A. Protection as Ossification: The Danger of Stifling Innovation*

Imposing intellectual property protections — even protections under an innovative communal rights regime — on stories, songs, and ceremonies creates the danger of preserving a static “culture” at the expense of a living one. Native artists who wish to use tradition in innovative ways, to build on it and infuse it with other cultural influences, may be prevented or discouraged from doing so.<sup>196</sup> Legal overprotection of cultural resources “may ‘freeze’ the culture in a historic moment, allowing us to think of indigenous people as romantic relics from a lost time, and to deny them a contemporary voice.”<sup>197</sup> While Native American cultures have always valued tradition, they have never been static; oral traditions, not being fixed in writing, continually evolve through innovative

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190. Riley, *supra* note 5, at 214-18.

191. *Id.* at 217.

192. *Id.*; *supra* note 171 and accompanying text.

193. *See supra* Part II.C.

194. *See* Hapiuk, *supra* note 109, at 1031, 1067 (criticizing IACA’s definition of “Indian” and calling for the repeal of IACA’s civil cause of action and criminal provisions); SHEFFIELD, *supra* note 101, at 10 (suggesting IACA “may well be struck down as unconstitutional”).

195. Nason, *supra* note 36, at 262-63.

196. Farley, *supra* note 6, at 55.

197. *Id.*



performance.<sup>198</sup> As the Acoma poet Simon Ortiz has said, the oral tradition is not just speaking and listening, but “living that process” of cultural development.<sup>199</sup>

That development has included centuries of contact, conflict and trade with Euro-American cultures. It is safe to say that Native artists draw from a variety of traditions, not just a single tribal (let alone “Indian”) essence.<sup>200</sup> Anishinaabe writer and critic Gerald Vizenor refers to contemporary Indian artists as “postindian warriors of survivance” who draw on tribal traditions but also on “the ruins of the representations of invented Indians.”<sup>201</sup> Vizenor’s own novels draw on Anishinaabe (Ojibwe) oral traditions, such as the Earthdiver creation story and trickster tales, while employing techniques and tropes of postmodernism as well.<sup>202</sup> To compartmentalize one segment of a people’s cultural resources as communal property and thus unavailable for artistic — or commercial — appropriation would require the utmost delicacy. Therefore, it should not be undertaken with the blunt instrument of a uniform federal law, even one that leaves definition of the resource base to the tribes.<sup>203</sup> Tribal laws and practices will provide more sensitive and specific resource access regimes.<sup>204</sup> Only if and when a consensus emerges among the tribes that federal legislation — an intellectual property version of NAGPRA, perhaps — is needed, should such an avenue be pursued.<sup>205</sup>

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198. Ortiz, *supra* note 35, at 105; Swann, *supra* note 40, at xxiv; WEAVER, *supra* note 37, at 23-24.

199. Ortiz, *supra* note 35, at 104.

200. Weaver, *supra* note 37, at 29-30; Hapiuk, *supra* note 109, at 1054. Again, the fact that Native artists have become so adept at appropriating alien forms and themes makes IACA’s attempt to guarantee “genuineness” quite problematic. See *supra* notes 107-17 and accompanying text.

201. Gerald Vizenor, *Postindian Warriors*, in *MANIFEST MANNERS: POSTINDIAN WARRIORS OF SURVIVANCE* 3 (1994).

202. Stephen D. Osborne, *Legal and Tribal Identity in Gerald Vizenor’s The Heirs of Columbus*, 9 *STUDIES IN AM. INDIAN LITERATURES* 115, 119 (1997).

203. Commentators sometimes assume that, due to the communal orientation of tribes, individual artists would gladly consent to a communal intellectual property rights regime in which, for instance, artistic creations would be held by the tribe in shared ownership with the artist, or the property right in the work would escheat to the tribe upon the death of the artist. See Jordan, *supra* note 189, at 114 (advocating federal legislation providing for such communal rights). I doubt this assumption is well grounded. Even if it is, the communal property rights should be created pursuant to tribal law, so there is some chance of tailoring the legal regime to particular tribal traditions and contemporary circumstances, rather than imposing federal legislation uniformly on all tribes.

204. Nason, *supra* note 36, at 262; Farley, *supra* note 6, at 56 n.235.

205. Nason, *supra* note 36, at 263.

### *B. Commodification of Cultural Resources*

A related reason for caution in pursuing such resource protection legislation may be found in the tendency of legal rights to become propertized, then commodified. The damage this can do, while difficult to quantify, may be pernicious nonetheless. Both ICWA and IACA illustrate this process, which underlies some of the problems those statutes pose.<sup>206</sup>

We saw that IACA, by privileging “genuineness” and linking it to a particular definition of “Indian,” creates what some commentators see as a property interest in being Indian.<sup>207</sup> If Indianness is to be protected by intellectual property law, it must be identifiable and fixed, so that it can be “owned” by the holder.<sup>208</sup> Separated from both the individual subject and any specific tribal meaning, “Indianness” becomes an external object with a life and value of its own — in short, a commodity. Thus identity can be licensed and marketed — recall “Savagely Yours™” perfume — producing revenue but diluting or distorting meaning.

Similarly, ICWA defines Indian children as a cultural “resource,”<sup>209</sup> and creates a kind of communal property right in that resource.<sup>210</sup> To the extent that such a characterization becomes more than a mere figure of speech, children have become means to an end — cultural survival — rather than ends in themselves, tools or instruments rather than humans. Margaret Radin has presented a powerful argument that such rhetoric can and does, over time, influence the way we conceptualize the world, and ultimately act in the world.<sup>211</sup> If this is so, figuring children and Indianness as properties should be worrisome. Perhaps cultural survival is such a paramount concern that the dangers of commodification of children and identity are worth risking. This, too, is for the peoples themselves to decide; the purpose here is merely to articulate the risk.

### *VI. Conclusion*

Appropriation and misuse of intangible cultural resources is a real problem for indigenous communities. Due to the nature of oral traditions, intellectual

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206. See *supra* Part IV.B.1-2.

207. Sheffield, *supra* note 101, at 138; Shammel & Stephenson, *supra* note 148, at 3.

208. Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866-67 (1991).

209. 25 U.S.C. 1901(3).

210. See *supra* notes 172, 173 and accompanying text.

211. Margaret Jane Radin, *Human Flourishing and Market Rhetoric*, in CONTESTED COMMODITIES 79-102 (1996).

property laws based on Western law's traditional concern with individual rights and profit orientation fail to protect many Native works. Cultural resource laws such as NAGPRA and ICWA acknowledge communal rights for tribal peoples, but their focus on tangible resources (artifacts and children, respectively) leaves stories, songs and ceremonies unprotected. Lawyers and legal scholars, quite naturally, have sought the solution to this problem in more and better laws. It is tempting to employ intellectual property law, progressively reconfigured to accommodate the communal nature of oral traditions and communities, to fill this gap. This article argues, however, that the dangers of propertizing such cultural resources make such a strategy unwise. Employing intellectual property law to prevent appropriation and commodification by outsiders could, ironically, end up freezing cultures into static commodities. This paradox requires confronting the limits of what law can accomplish. Preserving *meaning* — as opposed to objects — sometimes lies beyond those limits.

Protection of cultural property is, of course, essential.<sup>212</sup> But not all elements of a culture can be protected as property. When the cultural resource is intangible, evolving, growing like a living oral tradition and culture, its meaning must not be fixed and confined by some reified notion of “genuineness,” nor reduced to a static commodity. Its protection should be in the hands of the group that produced it and understands it.<sup>213</sup> This protection will probably consist not in locking songs and stories in the strongbox of “genuine tradition,” but in their creative application of core cultural insights to solving the problems presented by evolving historical contexts.

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212. As Sherry Hutt and Timothy McKeown have eloquently stated, “The preservation of cultural property rights is essential to give meaning to human existence and as a bond against enslaving a people by diminishing the definition of their existence.” Hutt & McKeown, *supra* note 90, at 364.

213. See Harjo, *supra* note 17, at A5 (advocating that Native peoples “avoid adopting the term intellectual property and its mechanisms altogether,” and instead inventory and declare paramount rights to inalienable *cultural* resources, and undertake treaties with the federal government and other tribes for protection of those resources); Nason, *supra* note 36, at 262 (proposing ten steps tribal governments can take to assert control over intangible cultural resources).