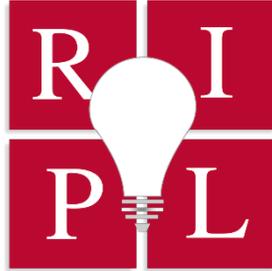


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REVIEW OF INTELLECTUAL PROPERTY LAW



LIVING HERITAGE, STOLEN MEANING: PROTECTING INTANGIBLE NATIVE AMERICAN CULTURAL RESOURCES THROUGH THE RIGHT OF PUBLICITY

SHANNON PRICE

ABSTRACT:

Persistent gaps in American intellectual property law and federal cultural resource legislation leave intangible Native American cultural resources almost wholly unprotected against unauthorized commercial appropriation. The results of this oversight are clear: Cultural appropriation remains both profitable and legally permissible, and Native communities have little remedy against outside appropriators. Inspired by a series of interviews conducted by the author with Alaska Native artists and allies, this article proposes a partial, state-based solution to the problem of unauthorized commercialization: the right of publicity. Building from previous scholarship on the potential and pitfalls of a common law, right-of-publicity shield to cultural appropriation, it focuses on the relatively-unexplored option of a statutory right, which can be passed by individual states and tailored to grant tribes a communal remedy for unauthorized commercialization. A well-crafted right-of-publicity statute would provide a valuable opportunity for state courts to recognize and defer to tribal law and custom. Most importantly, the right of publicity could provide legal remedy to Native communities where no remedy currently exists and meet an urgent need for protection against further exploitation of Native cultural heritage.

**UIC JOHN MARSHALL
LAW SCHOOL**



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PROTECTING INTANGIBLE NATIVE AMERICAN CULTURAL RESOURCES
THROUGH THE RIGHT OF PUBLICITY

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LIVING HERITAGE, STOLEN MEANING: PROTECTING INTANGIBLE NATIVE
AMERICAN CULTURAL RESOURCES THROUGH THE RIGHT OF PUBLICITY

SHANNON PRICE*

“Good artists copy. Great artists steal.”
-Attributed to Pablo Picasso

“Sometimes, all we have is our name.”
-Melissa Shaginoff, Curator of Contemporary Indigenous Art and Culture at the
Anchorage Museum and Member of the Ahtna / Paiute tribe

I. INTRODUCTION

Pablo Picasso’s oft-quoted maxim—“Good artists copy. Great artists steal.”—is so thoroughly absorbed into Western understandings of art and cultural development that, ironically enough, we don’t even know whether Picasso was the first one who said it.¹ As long as the ‘stealing’ is legally permissible, Americans typically regard “cross-cultural borrowing” not only as “inevitable . . . but also as vital to internal cultural growth and mutual cultural tolerance and understanding.”² But this attitude (much like Picasso himself) is arrogant. It ignores a long history of cultural imperialism and theft imposed by Westerners on indigenous peoples—and it enables continuing harm to those peoples today.

Appropriation of Native American cultural resources in the United States is ongoing, multi-faceted, and deeply harmful to Native American communities. Large-scale examples of this kind of appropriation include use of a sacred Navajo song into OutKast’s “Hey Ya!” performance at the 2004 Grammy Awards,³ incorporation of Native Hawaiian mele inoa (sacred name chants) in copyrighted Disney music,⁴ and even the marketing and sale of “Crazy Horse Malt Liquor.”⁵ For Native communities, lost control over cultural resources can be devastating. Centuries-old traditions,

* Shannon Price, J.D., is a 2020 graduate of Yale Law School with previous publications including: Shannon Price, *Remembering the CLASSICS: Impact of the CLASSICs Act on Memory Institutions, Orphan Works, and Mass Digitization*, 26 UCLA ENT. L. REV. 79, 80–113 (2019); John Fabian Witt, Ryan Martins, and Shannon Price, *Contract’s Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. (forthcoming 2020).

¹ See Quotersearch, *Good Artists Copy; Great Artists Steal*, THE QUOTE INVESTIGATOR (2013), <https://quoteinvestigator.com/2013/03/06/artists-steal/>.

² David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CAN. J.L. & SOC. 129, 150 (1995).

³ Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 70–72 (2005).

⁴ Nina Mantilla, *The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture*, 3 INTELL. PROP. BRIEF 26, 27 (2011).

⁵ Jessica R. Herrera, *Not Even His Name: Is the Denigration of Crazy Horse Custer’s Final Revenge*, 29 HARV C.R.-C.L. L. REV. 175, 176 (1994).

when sold and/or stolen, “become decontextualized, their meaning drained, and their value to the Native culture eroded.”⁶ Protection of cultural resources is recognized by scholars and tribes as “essential to the survival of Indian Nations as distinctive cultural and political groups.”⁷

Existing forms of American intellectual property and cultural resource protection, including federal intellectual property laws, the Native American Graves and Repatriation Act (NAGPRA), and the Indian Arts and Crafts Act (IACA), are demonstrably inadequate to address unauthorized appropriation and commercialization of Native American cultural resources.⁸ Although these laws provide some protection to tangible cultural resources, they fail to protect intangible resources, including Native “songs, rituals, ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs.”⁹ Even copyright law, the go-to avenue for protection of intangible intellectual property, requires that an “original work of authorship” be “fixed in [a] tangible medium of expression.”¹⁰ Historic resources, passed down through the generations, are not ‘original.’ Copyright jurisprudence does not recognize communal authorship,¹¹ nor the fact that “some forms of artistic expression may not be nor were ever intended to be set down in a fixed medium.”¹² As a result, “[t]he very nature of Native artistic expression—works that are created intergenerationally, built upon fluid conceptions of revision and creativity, and seldom recorded in a tangible medium (notwithstanding the collective memory of its peoples)—precludes copyright protection.”¹³

This Article proposes a partial, state-based solution to one facet of the appropriation problem. Specifically, it asserts that the right of publicity could provide a legal remedy for tribes faced with unauthorized commercialization of their intangible cultural resources. Some scholars have already identified the common law right of publicity as an avenue to protect Native American cultural property.¹⁴ However, the limited scope of the common law right of publicity—which is typically reserved for individual celebrities—presents sufficient challenges to this avenue that it has been little-discussed in recent literature.¹⁵ This Article, in contrast, proposes a statutory right of publicity, which can be passed by individual states and tailored to grant tribes a communal remedy for unauthorized commercialization.

From the outset, it is vital to recognize a major limitation of this Article. As a white woman of primarily European descent, I have never personally experienced the

⁶ Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 214 (2003).

⁷ Rebecca Tsosie, *ReClaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 300 (2002).

⁸ See, e.g., Howes, *supra* note 2; Riley, *supra* note 3; Osborne, *supra* note 6.

⁹ Riley, *supra* note 3, at 77.

¹⁰ 17 U.S.C. § 102 (2020).

¹¹ Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 184 (2000).

¹² Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected through Current Intellectual Property Law*, 7 J. HIGH TECH. L. 180, 187 (2007).

¹³ Riley, *supra* note 11, at 186.

¹⁴ See, e.g., Herrera, *supra* note 5, at 189–193.

¹⁵ See Sarah La Voi, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 898–907 (2003).

harm of cultural appropriation. I have attempted throughout the Article to defer to the voices of those who have—and especially to the Alaska Native artists and activists who were generous enough to speak with me during the 2019 trip to Alaska that serves as the foundation of this project.¹⁶ Even so, my account of these issues will inevitably fall short of what can be learned from the Native American communities and allies who have actively fought against appropriation for decades. Beyond a proposal to better leverage the right of publicity for Native communities, this paper is intended to serve as a reminder that cultural appropriation is not a creature of the past. It is a present, ongoing harm, to which Native communities continue to propose a variety of innovative and workable solutions.

II. CULTURAL APPROPRIATION AS AN EXERCISE OF POWER

Before jumping into a proposal for a legal method to combat cultural appropriation, it is essential to engage with two questions. First, what is cultural appropriation? And second, how does cultural appropriation harm the individuals and communities whose culture is being appropriated? Inevitably, commentators disparaging cultural appropriation claims will assert that appropriation is no more than the exercise of artistic freedom, “cross-cultural borrowing” that imposes no ‘real’ damage on the (often unwilling) borrowees.¹⁷ At best, such a definition is ignorant. At worst, it actively enables continued harm to indigenous communities, for whom the maintenance of cultural resources and sovereignty is critical to survival.¹⁸

Cultural appropriation is broadly defined as the taking of intellectual property, cultural artifacts or expressions, and other forms of heritage from a culture that is not one’s own.¹⁹ Dr. Alan Boraas, a professor of anthropology at Kenai Peninsula College and honorary member of the Kenaitze Indian Tribe, adds that appropriation most often involves “taking symbols that represent the interest of a culture, redefining them, and giving them new meaning—and therefore marginalizing their original meaning.”²⁰ What it means to ‘take’ a piece of cultural heritage can be difficult for outsiders to comprehend, and not all cultural appropriation is intentional. Instead, appropriation “becomes an issue when an artist or a writer or whoever . . . take[s] things and images that have one context to indigenous people and use[s] that context” for their own purposes, in the process

¹⁶ In August 2019, I was fortunate enough to travel to Anchorage, Alaska and meet with a variety of Alaska Native artists, scholars, and allies. Although I have not been able to include direct quotations from every individual I met with in this Article, I am deeply grateful for the many people who shared their time and expertise, and I have tried to reflect the breadth and richness of their comments here. Special thanks goes to Dawn Biddison, Dr. Alan Boraas, Professor Angela Demma, Sonya Kelliher-Combs, Dr. Paul Ongtooguk, Melissa Shaginoff, Professor Gerald Torres, and Dr. Rosita Worl.

¹⁷ Howes, *supra* note 2, at 150.

¹⁸ Rebecca Tsosie, *Just Governance Or Just War: Native Artists, Cultural Production, and the Challenge of Super-Diversity*, 6 CYBARIS INTELL. PROP. L. REV. 56, 96 (2015).

¹⁹ Tsosie, *supra* note 7, at 300.

²⁰ Phone Interview with Dr. Alan Boraas, Professor of Anthropology at Kenai Peninsula College, in New Haven, Conn. (Sept. 16, 2019).

“marinaliz[ing] the people for whom the [original] meaning is very dear and important.”²¹

Lurking beneath the act of ‘taking’ a piece of cultural heritage is an assertion about the relationship between appropriator and appropriatee—specifically, an assertion about who gets to dictate norms and meaning, and who does not. As Melissa Shaginoff, Curator of Contemporary Indigenous Art and Culture at the Anchorage Museum and a member of the Ahtna / Paiute tribe, explains: “Cultural appropriation is about power. It’s about who has the power, who has the influence, and the ability to decide what parts of the culture they want to represent and reflect.”²² Appropriation involves “taking a bit of somebody’s identity and using it to tell a different story.”²³ By telling their own, different story, the appropriator asserts power over the original story and the community from which it came. Even a naive appropriator, Dr. Boraas states, is claiming a form of “control[] . . . essentially saying, we can change your story, we change the meaning of your images, and you can’t do anything about it.”²⁴ Dr. Paul Ongtogook, Director of Alaska Native Studies at the University of Alaska Anchorage and an Inupiat elder, goes a step further, describing Western systems of resource exploitation—cultural resources included—as “strip-mining, at a pace that is just stunning.”²⁵ Cultural appropriation is, in essence, a mechanism through which outsiders strip-mine away the heritage of indigenous communities, placing an immense burden on those communities to reassert control and keep their cultural heritage intact.

The harms of cultural appropriation are complex and multi-faceted. In my interviews and research, three harms—articulated here by Alaska Native communities—stand out. First, and perhaps easiest for Western legal systems to understand, cultural appropriation creates economic harm. Commercial exploitation of cultural heritage by outsiders dilutes the market for authentic uses, as when a non-native artist’s rendition of an Alaska Native design occupies gallery space that otherwise would be granted to an Alaska Native artist. This scenario not only limits the ability of the Alaska Native artist to commercially benefit from her rightful heritage, but according to Melissa Shaginoff, also “adds to that mystical element: that indigenous people are not real, not creating work.”²⁶ In an intellectual property system that privileges first publication, the tendency of outsiders to seize and commercialize pieces of cultural heritage that they ‘discover’ also creates perverse incentives for native communities to withhold their knowledge. As Dr. Ongtogook explains: “If we put our knowledge out there, some scientist is going to make it their discovery. Someone will get a PhD out of it, or a tenure track publication, or it will get copyrighted.”²⁷ Once the knowledge is published and/or copyrighted by an

²¹ *Id.*

²² Interview with Melissa Shaginoff, Curator of Contemporary Indigenous Art and Culture at the Anchorage Museum, in Anchorage, Alaska (Aug. 20, 2019).

²³ *Id.*

²⁴ Boraas, *supra* note 20.

²⁵ Interview with Dr. Paul Ongtogook, Director of Alaska Native Studies at the University of Alaska, in Anchorage, Alaska (Aug. 19, 2019).

²⁶ Shaginoff, *supra* note 22.

²⁷ Ongtogook, *supra* note 25.

outsider, its potential economic value to the tribe can be severely eroded, if not entirely eliminated.

Second, by trivializing and misrepresenting cultural heritage, cultural appropriation functions to erase both the heritage and the communities to whom that it belongs. Ted Mayac Sr., a member of the King Island Iñupiaq community, described this harm vividly in the essay: “How it Feels to Have Your History Stolen.”²⁸ Mayac wrote his essay in response to “King Island Christmas,” a 1997 oratorio still performed across the country today.²⁹ For Mayac, the oratorio caused “lasting and unforgettable” damage stemming from the fact that his community had “been cast in a false light, misrepresented, and arbitrarily characterized without permission and agreement.”³⁰ The oratorio ascribed several customs and practices to the King Island Iñupiaq that actually belonged to other Alaska Native tribes, “cast[ing] the islanders as usurpers of other tribes’ practices and customs.”³¹ By lumping the heritage of Alaska Native tribes together, it obscured the actual heritage of the King Island people, including their continued existence as a culturally distinct, living community. The myth of a dead or monolithic Alaska Native culture—the “quote unquote Eskimo experience,” Melissa Shaginoff calls it—is both a product and an enabler of cultural appropriation.³² As Dr. Boraas notes: “If [an appropriator] can create the mythology of there are no Natives here, or there were no Natives here, then [he] can feel good about what [he has] done.”³³ That appropriator can also ignore the centuries that Alaska Native communities struggled to preserve their distinct heritage against legal and religious oppression, only to see that same heritage mutilated by a children’s musical.

Finally, by removing cultural heritage from its context and commercializing it for an audience largely ignorant of its origins, cultural appropriation encourages the fetishization of native cultures. This effect of appropriation is eloquently articulated by Tlingit and Unangax̄ artist Nicholas Galanin in his 2012 work “I Looooove Your Culture! Fine Wood Working.” The work is a small, wooden carving modeled after a sex toy called a “pocket pussy.”³⁴ Galanin often displays it alongside a white performer, who sits in the gallery and carves a duplicate.³⁵ The message is clear: commercial reproduction of Alaska Native cultural objects for white consumption is equated with “a dehumanizing masturbatory tool.”³⁶ Romanticization

²⁸ TED MAYAC SR., HOW IT FEELS TO HAVE YOUR HISTORY STOLEN, in THE ALASKA NATIVE READER (Maria Sháa Tláa Williams ed., 2009).

²⁹ Theatrical groups interested in performing the oratio can obtain a license at <http://kingislandchristmas.com/to-obtain-a-license/>.

³⁰ MAYAC SR., *supra* note 28.

³¹ *Id.*

³² Shaginoff, *supra* note 22.

³³ Boraas, *supra* note 20.

³⁴ Sheila Regan, *Nicholas Galanin Suggests We’re Ready to Fight Back*, HYPERALLERGIC (Nov. 18, 2019), <https://hyperallergic.com/520552/nicholas-galanin-law-warschaw-gallery-macalester-college/>.

³⁵ *Id.* See also Jillian Steinhauer, *Nicholas Galanin remixes Native American identity at Phoenix’s Heard Museum*, THE ART NEWSPAPER (Aug. 6, 2018, 22:05 BST), <https://www.theartnewspaper.com/review/nicholas-galanin-remixes-native-american-identity-at-phoenix-s-heard-museum>.

³⁶ Regan, *supra* note 34.

and reproduction of Native culture without regard for living Native communities reduces that culture to decontextualized objects—objects that are no more respected, for Galanin, than sexual objects. Galanin’s commentary is especially poignant when viewed in the context of the scantily-clad dancers in Native American headdresses who performed at the 2004 Grammys,³⁷ or the countless “Sexy Indian” costumes sold each year at Halloween (some even referencing specific tribes).³⁸ Appropriation and fetishization work hand-in-hand, with one justifying and encouraging the other.

Understanding cultural appropriation as an exercise of power helps to explain not only what cultural appropriation is, but what it is not. Dr. Rosita Worl, president of the Sealaska Heritage Institute and a member of the Tlingit people, recalls an incident in which non-Native art instructors responded to a cultural appropriation scandal in Juneau by becoming “fearful of teaching Native art.”³⁹ This fear, Dr. Worl explains, was unfounded, because “Indigineous Peoples had gained the means to pay [non-Native teachers] to learn about our native arts . . . [and so] we had the right to give them permission to teach Native art in schools . . . [where we] lacked Native art teachers.”⁴⁰ In this instance, the non-Native instructors were clearly *not* engaging in cultural appropriation, because they were not asserting power over heritage that was not their own. Far from it: By teaching Native art with the explicit permission and encouragement of the Native community, the non-Native instructors were actually affirming Native power and control over Native cultural resources.

No one proposal can seriously contend the ability to address all forms of cultural appropriation. By its nature, cultural appropriation is often unintentional, subtle to outsiders, and heavily contextualized. To eliminate it may be impossible, or at least require heavy censorship—and censorship is not the goal of this author nor any of the Alaska Native individuals with whom I spoke. Instead, this Article attempts to develop a legal tool targeting one of the most clear-cut and harmful forms of appropriation: when outsiders knowingly take and exploit cultural heritage for purposes of commercial gain. As the law currently stands, tribes have little to no legal mechanism for combatting even this egregious form of appropriation. This status quo is wrong. Cultural appropriation causes real, legally cognizable harm to native communities. Those communities should have legal remedy.

III. SCOPE OF THE PROBLEM: A GAP IN LEGAL PROTECTION FOR INTANGIBLE CULTURAL RESOURCES

Existing protections for Native American cultural resources break down into two categories. First, we have legislation passed specifically to deal with Indian art, artifacts, and other material objects of cultural significance. The most relevant examples are the Native American Graves Protection and Repatriation Act

³⁷ Riley, *supra* note 3, at 70–71.

³⁸ See, e.g., *Sexy Indian Costumes*, COSTUME SUPER CENTER, <https://www.costumesupercenter.com/categories/sexy-historical-indians> (last visited Oct. 29, 2020).

³⁹ Written Interview with Dr. Rosita Worl, President of the Sealaska Heritage Institute, conducted remotely from Chapel Hill, North Carolina (July 30, 2019).

⁴⁰ *Id.*

(NAGPRA) and the Indian Arts and Crafts Act (IACA). Second, we have the intellectual property regimes, including copyright, patent, and trademark law. Neither of these categories of protection currently reaches unfixed and intangible cultural resources.⁴¹ Moreover, both categories fail to recognize any legal interest for Native communities in preventing commercialization altogether—an ability critical to the maintenance of cultural sovereignty.⁴²

A. *Specific Legislative Protection for Native American Cultural Resources: NAGPRA and IACA*

The history of legislative protection for Native American cultural resources in the United States generally evinces a “callous disregard for the property, history and culture” of Native peoples.⁴³ The first (and until 1966, the only⁴⁴) federal remedy available for tribes faced with looting and unauthorized excavation of their land was the 1906 Antiquities Act, which forbid the taking of “objects of antiquity” from federal lands without a government-issued permit.⁴⁵ In 1974, the Act was ruled unconstitutional for vagueness by the Ninth Circuit Court of Appeals, which noted that despite the 68 years that had passed since the legislation’s enactment, “[c]ounsel on neither side was able to cite an instance prior to this in which conviction under the statute was sought by the United States.”⁴⁶ The Antiquities Act remains significant as the source of the President’s power to declare and protect National Monuments,⁴⁷ but plays little role in modern protection of Native American cultural resources. The website for the National Park Service, for example, praises the act’s “support for the care and management of archeological sites, collections, and information” without ever mentioning Indian land, laws, or artifacts.⁴⁸

Worse, the Antiquities Act not only failed to stem the tide of Indian artifacts and remains being removed from Indian land, but in many cases enabled it. By classifying “objects of antiquity” as federal property that could be excavated by permit, the Antiquities Act undercut Indian claims to excavation sites and artifacts and created a direct pipeline for Indian remains and cultural patrimony to the

⁴¹ Riley, *supra* note 3, at 79.

⁴² See Tsosie, *supra* note 7, at 304–310.

⁴³ *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring).

⁴⁴ See Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 50–51 (2009) (In 1966, the National Historic Preservation Act became the second piece of legislation to offer protection to Native American cultural property.).

⁴⁵ Antiquities Act, ch. 3060, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431–433 (2020)). See also Phelan, *supra* note 44, at 49.

⁴⁶ *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

⁴⁷ The Act has been applied primarily to grant Presidents the power to declare national monuments. See, e.g., Congressional Research Service, *Antiquities Act: Scope of Authority for Modification of National Monuments* (2016), <https://heinonline.org/HOL/P?h=hein.crs/crsmthmavyx0001&i=3>.

⁴⁸ See National Park Service: U.S. Department of the Interior, *American Antiquities Act of 1906: Overview*, NPS, <https://www.nps.gov/articles/american-antiquities-act-of-1906.htm> (last visited Oct. 30, 2020).

nation's largest private and public museums.⁴⁹ Subsequent federal legislation, including the National Historic Preservation Act of 1966, the American Indian Religious Freedom Act of 1978, the Archaeological Resources Protection Act of 1979, continued to assert federal ownership over Indian artifacts (including ancient remains) and provided no mechanism for repatriation.⁵⁰ State looting laws were under-enforced; state repatriation laws were rare.⁵¹ In 1987, the U.S. General Accounting Office reported that “nearly 44,000 of the 136,000 archaeological sites in the Four Corners states of Arizona, Colorado, New Mexico, and Utah had experienced looting of Indian artifacts and cultural property.”⁵² By 1987, the Smithsonian Institution held the remains of 18,584 American Indians.⁵³

Passed in 1990, the Native American Graves and Repatriation Act (NAGPRA) is primarily a piece of human rights legislation. It was “designed to address the flagrant violation of the ‘civil rights of America's first citizens . . . [and viewed by the government] as a part of its trust responsibility to Indian tribes and people.’”⁵⁴ NAGPRA has three main functions. First, it establishes a system of statutory priority governing ownership of Native American cultural items discovered on federal land after 1990, assuring that lineal descendants (if they exist) and tribes (if they do not) will have first claim to new discoveries.⁵⁵ Second, it prohibits trafficking in Native American remains and cultural items acquired in violation of the act, regardless of when and where they were obtained.⁵⁶ Finally, it provides for a system of inventory and repatriation of Native American remains and other cultural patrimony in museum collections, with different requirements depending on the object in question and funding status of the museum.⁵⁷

For many observers, NAGPRA represented a long-overdue “consensus . . . [that the] sacred culture of Native Americans and Native Hawaiians is a living heritage”—a heritage that must be respected as more than a “remnant museum specimen.”⁵⁸ However, the law provides little assistance to Native communities outside the realm of material artifacts and remains. Even beyond NAGPRA's “onerous requirements to validate . . . ownership,” Dr. Worl emphasizes that the Act provides no protection for “the intangible attributes of sacred objects.”⁵⁹ An individual that removed funerary objects from Indian land without permission would be liable under NAGPRA.⁶⁰ An individual that recorded a performance of a

⁴⁹ Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits Is Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 509–512 (2010).

⁵⁰ *Id.* at 511.

⁵¹ *Id.* at 512.

⁵² *Id.* at 511 (citing U.S. Gen. Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archaeological Resources*, No. RCED-88-3, 22 (1987)).

⁵³ *Id.* at 508.

⁵⁴ 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, 59–60 (1992).

⁵⁵ 25 U.S.C. § 3002 (2020).

⁵⁶ 18 U.S.C. § 1170 (2020).

⁵⁷ *Id.*

⁵⁸ RENNARD STRICKLAND, *TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY* 85-86 (1997).

⁵⁹ Worl, *supra* note 39.

⁶⁰ 18 U.S.C. § 1170 (2020); 25 U.S.C. § 3002 (2020).

ceremonial dance on Indian land without permission—even if he sold and profited from the recording—would not.⁶¹ In the age of the Internet, stolen cultural resources can be exposed to the world in a matter of moments.⁶² The resulting harm to the community can never be undone: an intangible resource cannot be repatriated.

While NAGPRA governs trade and repatriation of certain Native American artifacts, the Indian Arts and Crafts Act of 1990 (IACA) protects the market for art and crafts produced for sale by Indian artisans. IACA is often characterized as a “truth-in-advertising” law that attaches fines and potential jail time to the display and sale of items falsely (and knowingly) identified as “Indian produced.” On its face, IACA “protect[s] market share, not tribal identity, through preventing the flooding of the market with fake products.”⁶³ In action, however, IACA grants significant authority to federally recognized tribes to assert, via membership and certification criteria, what an authentic ‘Indian’ product is.⁶⁴

Commentators disagree on IACA’s effectiveness. Some have asserted that IACA’s non-definition of “Indian products” creates a valuable opportunity to expand the Act’s reach beyond “art and crafts in the literal sense.”⁶⁵ Others have highlighted IACA’s deference to tribal membership and certification criteria as a valuable grant of “economic and cultural protection.”⁶⁶ IACA can be understood as “creat[ing] a kind of property right” in ‘authentic’ Indian identity, which can then be leveraged to profit from ‘authentic’ Indian products.⁶⁷ But this property right is only as useful as it is enforceable; Dr. Worl considers IACA wholly ineffective for protecting cultural resources because “enforcement by the federal government is near non-existent and the penalties do not deter repeat offenders.”⁶⁸

Even if NAGPRA and IACA were interpreted and enforced in the manner most beneficial to Native communities, an enormous gap would still exist in the law for protection of intangible Native American cultural resources. The two acts “extend no protection to non-material cultural resources such as stories or ceremonies.”⁶⁹ Despite its strong trade and repatriation requirements for tangible artifacts and remains, NAGPRA offers no remedy for appropriation of intangible resources. IACA protects the commercial value of ‘authentic’ Indian products by excluding imitators from the market, but offers no mechanism to keep cultural resources out of the market in the first place. The exclusively materialistic orientation of both laws leaves intangible resources wholly unprotected, making intellectual property law the only remaining avenue for tribes seeking to prevent appropriation.⁷⁰

⁶¹ 25 U.S.C. § 3001 (2020).

⁶² Riley, *supra* note 3, at 79.

⁶³ Osborne, *supra* note 6, at 221.

⁶⁴ *Id.*

⁶⁵ Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 136 (1996).

⁶⁶ Osborne, *supra* note 6, at 222.

⁶⁷ 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).

⁶⁸ Worl, *supra* note 39. *See also* William J. Hapiuk, Jr., *supra* note 67, at 1027.

⁶⁹ Osborne, *supra* note 6, at 209.

⁷⁰ Osborne, *supra* note 6, at 208.

B. *Failure of Intellectual Property to Protect Native American Cultural Resources*

The lack of federal legislation specifically addressing Native American intangible cultural resources does not leave such resources entirely unprotected: instead, “Native Americans can and do use patent, trademark, and copyright laws to protect their intellectual property.”⁷¹ Like existing Native American cultural resource legislation, however, American intellectual property regimes fail to recognize Native American interests in preventing unauthorized commercialization. Lack of recognition for unfixed and/or communal resources means that these regimes—in their current form, at least—will inevitably fall short of providing adequate protection for Native American communities.

At their core, United States intellectual property regimes are “designed to help individual authors profit, not to help collective cultures survive and develop.”⁷² Courts have been adamant in their “conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”⁷³ In most cases, American IP law does not concern itself with the personality interests, or “creative soul,” of an artist or work.⁷⁴ Instead, United States intellectual property regimes are shaped and directed toward the ultimate end of providing economic “rewards commensurate with the services rendered.”⁷⁵

A conflict immediately arises between the goals and assumptions of United States intellectual property law and the nature of the intangible resources that tribes often seek to protect. Typical Western focus on “the lone originator, the free agent, the creative genius often conflicts with the more communal focus of native peoples, in which identity and rights derive from membership in clan, kinship and tribal networks.”⁷⁶ Copyright law, for example, protects “original works of authorship fixed in any tangible medium of expression.”⁷⁷ It envisions artistic expression as the product of a lone, profit-motivated creator and uses a limited-duration monopoly to incentivize creative production. American copyright law does not recognize the fact that “some forms of artistic expression may not be nor were ever intended to be set down in a fixed medium.”⁷⁸ It does not distinguish between works that entered the public domain after purposeful commercial exploitation by their creators and works that were recorded, shared, or published without their creators’ consent.⁷⁹ This reality is painfully apparent for indigenous artists such as Ami elder Lifvon Guo, whose performance of the Ami *Song of Joy* was digitally incorporated into Enigma’s 1994

⁷¹ Osborne, *supra* note 6, at 223.

⁷² Osborne, *supra* note 6, at 209.

⁷³ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁷⁴ Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 801 (2001).

⁷⁵ *Mazer*, 347 U.S. at 219.

⁷⁶ Osborne, *supra* note 6, at 223.

⁷⁷ 17 U.S.C. § 102 (2020).

⁷⁸ Kelley, *supra* note 12, at 187.

⁷⁹ *Id.* at 188 (Kelley in particular notes the long history of “explorers, missionaries, anthropologists and scientists [who] have documented various types of indigenous cultural life, including art mediums, medicines and sacred rituals.”).

hit, *Return to Innocence*.⁸⁰ Lifvon Guo’s performance of *Song of Joy* was recorded and incorporated in *Return to Innocence* entirely without his (or the Ami’s) knowledge, but the song itself is a communally created chant passed down by the Ami for generations.⁸¹ As a consequence, Guo and the Ami have no power “determine the fate of the recordings, reap the rewards of their own creation, or control resulting violations of tribal law and blatant distortions of their work.”⁸² So far as indigenous cultural resources remain intangible, unfixed, or communally owned, no copyright protection is available.

Patent and trademark protection for Native American cultural resources suffer a similar fate to copyright. The novelty requirement in 35 U.S.C. § 102 means that “patenting [for] centuries-old cultural knowledge is unavailable.”⁸³ Time bars for public use deny patent protection to techniques and practices “considered new by the larger world, yet long used within the confines of” Native American communities.⁸⁴ The utility of trademark protection for tribes is likewise limited by “its commercial basis and focus.”⁸⁵ To bring a trademark claim, “a party must be a competitor in the market.”⁸⁶ Native communities that wish to keep intangible cultural resources out of the market are left with self-contradictory claims: they are asked to demonstrate commercial harm when the real harm felt is commercialization itself. Their primary remedy has been to petition the United States Patent and Trademark Office (USPTO), challenging the registrability of an appropriated mark rather than its actual use.⁸⁷ Even when a tribe is victorious before the USPTO, however, an appropriator need not stop using the now-unprotected mark: the Washington Redskins, for example, continued to sell Redskins gear for years despite cancellation of their trademarks in 2014 as “disparaging to Native Americans.”⁸⁸

Through its focus on the commercialization of fixed, tangible works, “the American legal system has bifurcated Native claims . . . negat[ing] the cultural value of resources to Native people.”⁸⁹ As the examples above—along with countless others—illustrate, intangible cultural resources are no less vulnerable to

⁸⁰ Riley, *supra* note 11, at 176.

⁸¹ *Id.* at 176.

⁸² *Id.* at 177.

⁸³ Kelley, *supra* note 12, at 187.

⁸⁴ Kelley, *supra* note 12, at 187 (quoting Michael Elkind, *The Cultural Dimensions of Patents*, Intellectual Property Today, Aug. 1996, at 26).

⁸⁵ Osborne, *supra* note 6, at 226.

⁸⁶ Osborne, *supra* note 6, at 226.

⁸⁷ For an example of a successful trademark challenge, see *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999). For further discussion of the case, see La Voi, *supra* note 15, at 882–884.

⁸⁸ See Michele Riley, *Hail to the . . . Redskins? How the TTAB’s Cancellation of a Historic Mark Impacts Brand Value and the NFL*, STOUT (Sept. 1, 2014), <https://www.stout.com/en/insights/article/hail-the-redskins-how-ttabs-cancellation-historic-mark-impacts-brand-value-and-nfl/>. See Lee Carpenter, *Washington’s NFL team to retire Redskins name, following sponsor pressure and calls for change*, WASHINGTON POST (July 13, 2020, 2:48 PM), <https://www.washingtonpost.com/sports/2020/07/13/redskins-change-name-announcement/>.

UPDATE: This article was written prior to the Washington Football Team’s decision to retire the Redskins name.

⁸⁹ Tsosie, *supra* note 7, at 306.

appropriation than tangible cultural resources.⁹⁰ By privileging the tangible, American intellectual property law gives its de facto blessing to appropriation of the intangible. It asserts that intangible cultural resources are fundamentally different than tangible resources, when in fact “[b]oth are necessary for the continued survival of Indian nations.”⁹¹ Moreover, intellectual property regimes have proven just as likely to harm or reduce native interests in cultural property as to protect them. The mismatch between these regimes and Native American understandings of creation and ownership results in situations where “creative works that are unprotectable in their cultural context often find copyright protection in the hands of non-Natives when the latter use them in academic and commercial use.”⁹² Consider the example of Disney’s “He Mele No Lilo,” a 2002 single written for the movie *Lilo & Stitch*. The song incorporates sacred Hawaiian naming chants, which cannot themselves be copyrighted or generate royalties—but assuming that “He Mele No Lilo” is a work-for-hire, Disney is now entitled to royalties until 2097.⁹³

Some commentators have suggested that “a sui generis intellectual property law, which take[s] into account diverse interests of Native American peoples, may be the most effective long-term solution for overcoming the pitfalls of the current regime.”⁹⁴ Such sui generis protection could mimic *droit moral*, or moral rights, which are recognized by the European Union and understood to protect the personality interests of an artist in her work. Under Article 6bis of the Berne Convention, moral rights exist “[i]ndependently of the author's economic rights, and even after the transfer of the said rights.”⁹⁵ In France, “droit moral are perpetual and exist for as long as the work survives in human memory.”⁹⁶ A moral rights framework could support Native American claims asserting the inalienability of cultural resources, as well as a perpetual personality interest in those resources. Koren Kelley argues that application of moral rights principles “would protect the personality of the author(s), and perhaps more significantly, could justify an extension in the protection given to cultural property due to the ‘community's interest in the work, [rather than] the reputation of the artist.’”⁹⁷ If such a framework truly could protect communal, inalienable, and perpetual personality interests in Native American art, it would be a significant improvement for tribes over the current intellectual property regimes.

⁹⁰ For further discussion of the forms that appropriation of Native American cultural resources takes, see Tsosie, *supra* note 7, at 312.

⁹¹ Tsosie, *supra* note 7, at 306.

⁹² Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 COLUM. J.L. & ARTS 211, 216 (2004).

⁹³ 17 U.S.C. § 302 (2020).

⁹⁴ Kelley, *supra* note 12, at 197 (proposing a moral rights framework). See also Riley, *supra* note 11, at 214–224 for an alternative proposal (with some moral-rights-esque elements) for an Indian Copyright Act.

⁹⁵ Berne Convention for the Protection of Literary and Artistic Works Art, 6bis(1), July 24, 1971, 828 U.N.T.S. 222.

⁹⁶ Kelley, *supra* note 12, at 198.

⁹⁷ Kelley, *supra* note 12, at 201 (quoting Suzanne Milchan, *Whose Rights are These Anyway? A Rethinking of our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 170 (2003)).

Beyond the political difficulty of implementing such a moral rights regime, however, any system of federal, sui generis intellectual property protection may be ill-suited to combat unauthorized commercialization of intangible cultural resources. As Stephen Osborne argues in *Protecting Tribal Stories: The Perils of Propertization*, “[h]eavy-handed federal legislation might well destroy—or at least devalue—the very resources it seeks to preserve.”⁹⁸ Moral rights protections, for example, are often justified by the belief that artists “infuse their creations with their experiences and emotions . . . [as] creative geniuses.”⁹⁹ Moral rights protect the artist’s personality interest in a fixed product of her genius, even after she has transferred economic rights. Communal moral rights could similarly grant tribes control over the fixed products of their genius—but the requirement that these cultural resources *be* fixed may turn moral rights into a double-edged sword. Asserting uniform intellectual property protection for “stories, songs, and ceremonies creates the danger of preserving a static ‘culture’ at the expense of a living one.”¹⁰⁰ This danger could be mitigated, as Angela Riley suggests in *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, by deferring to tribal laws and customs for designations of communal and/or inalienable cultural resources.¹⁰¹ Any federal solution would need to strike a delicate balance recognizing tribal interests in cultural resource protection without endorsing a “frozen-in-amber” ideal of the cultural resources themselves.

Further discussion of the potential advantages and drawbacks of sui generis, federal intellectual property protection is beyond the scope of this paper. It is worth noting, however, that even if such legislation were unanimously agreed to be desirable, the “blunt instrument of a uniform federal law” may take decades to mobilize.¹⁰² Scholars disagree on the shape that this legislation should take¹⁰³; tribes may be justifiably hesitant to embrace additional federal involvement in management of cultural resources.¹⁰⁴ In the meantime, an enormous gap continues to exist in the law for appropriation of intangible Native American cultural resources. The following section explores a partial, state-based mechanism that could be used to fill the gap: the right of publicity.

⁹⁸ Osborne, *supra* note 6, at 207.

⁹⁹ Jeanne C. Fromer, *Expressive Incentives in Intellectual Property Law*, 98 VA. L. REV. 1745, 1770 (2012).

¹⁰⁰ Osborne, *supra* note 6, at 233.

¹⁰¹ Riley, *supra* note 3, at 86–91.

¹⁰² Osborne, *supra* note 6, at 234. *See also* Riley, *supra* note 3, at 73 (stating (in 2005) that despite her support for the creation of federal laws protecting Native American cultural property, “it does not appear likely that Congress will enact such legislation, at least not anytime in the near future.”).

¹⁰³ *See, e.g.*, Riley, *supra* note 11, at 214–224 (outlining her proposal for an Indian Copyright Act); Osborne, *supra* note 6, at 233 (advocating against uniform federal legislation); Kelley, *supra* note 12 (advocating for moral rights protection).

¹⁰⁴ *See, e.g.*, Riley, *supra* note 3, at 87 (“Some scholars claim that extending Westernized intellectual property rights to indigenous communities constitutes neo-colonialism, 98 in that it simply borrows the language and methods of the oppressors and, in doing so, further empowers the oppressors.”).

IV. USING THE RIGHT OF PUBLICITY TO COMBAT UNAUTHORIZED COMMERCIALIZATION

Many federally recognized tribes are already engaged in extensive cultural resource preservation efforts.¹⁰⁵ Federal law, however, provides no mechanism to recognize or enforce tribal designations of communal and/or inalienable resources against non-Indian appropriators.¹⁰⁶ I argue that the right of publicity, properly tailored, could be employed to provide Native communities with a legal claim and remedy against appropriators—without subjecting those communities to additional state or federal interference with cultural sovereignty. The following Part outlines the right of publicity, its advantages for combatting unauthorized commercialization, and how it could be implemented to protect Native American cultural resources at common law or (preferably) in statute.

A. Background

The right of publicity in the United States developed as an offshoot of privacy rights.¹⁰⁷ As a result, it protects an interesting hybrid of property and privacy interests—a hybrid that is well-suited to address the harms of cultural appropriation. On one hand, courts have justified the right of publicity as a way to prevent “unjust enrichment derived from the unauthorized commercial misappropriation and exploitation of a celebrity’s popularity.”¹⁰⁸ This characterization matches the definition of the right of publicity in the *Restatement (Third) of Unfair Competition*, which subjects an appropriator to liability only when he has appropriated “the commercial value of a person’s identity . . . for purposes of trade.”¹⁰⁹ In this way, the right of publicity protects a celebrity’s right to generate maximum commercial benefit from her person by preventing others from leeching off profits—a similar strategy to that employed by IACA to protect tangible Native American art. It is a property interest in the profits generated by one’s own persona, which can be used to exclude imitators from the market.¹¹⁰

On the other hand, the right of publicity is articulated in the *Restatement (Second) of Torts* primarily as a privacy right—a right that is invaded when an individual “appropriates to his own use or benefit the name or likeness of another.”¹¹¹ This privacy right is “not limited to commercial appropriation,” and a plaintiff need not be engaged in commercialization of her own identity to assert a right of publicity

¹⁰⁵ Riley, *supra* note 3, at 102–109.

¹⁰⁶ See, e.g., Riley, *supra* note 3, at 118 (discussing OutKast’s incorporation of a sacred Navajo song into their Grammy performance. Even if the Navajo had passed a tribal ordinance declaring that the song was community cultural property that could not be publicly performed or recorded, only members of the tribe would be bound by the ordinance.)

¹⁰⁷ DAVID TAN, *THE COMMERCIAL APPROPRIATION OF FAME* 40 (2017); see also Corinna Coors, *Morality, Utility, Reality: Justifying Celebrity Rights in the 21st Century*, 44 SYRACUSE J. INT’L L. & COM. 215, 230 (2017).

¹⁰⁸ Coors, *supra* note 107, at 232.

¹⁰⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995).

¹¹⁰ In this way, the right of publicity employs a strategy to that used by IACA to prevent imitation goods from crowding out the market for “authentic” Indian art.

¹¹¹ See RESTATEMENT (SECOND) OF TORTS §§ 652A, 652C (AM. L. INST. 1977).

claim.¹¹² Instead, a defendant may be found liable when he has “appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff’s name or likeness.”¹¹³ The right of publicity thus protects an individual’s right *not* to commercialize her image, and further to prevent others from doing so. It recognizes “[a] celebrity’s persona [as] a distinct expression of one’s self, which other persons should not be able to exploit commercially without consent.”¹¹⁴ This privacy right exists “in the nature of a property right” because it can be transferred and assigned to another, but it is justified primarily by “the protection of [the individual’s] personal feelings against mental distress.”¹¹⁵ The *Restatement* acknowledges that most invasions of this right will be for “commercial purpose,” but clarifies that the right applies (unless modified by statute) whenever “defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit . . . [even when] the benefit sought to be obtained is not a pecuniary one.”¹¹⁶

For Native American communities seeking to prevent cultural appropriation, this combination of a property and privacy right—the right to reserve profits of commercialization for themselves and the right to prevent commercialization altogether—could be a powerful tool. The right of publicity, unlike other American intellectual property rights, recognizes that unauthorized commercialization of identity is, in and of itself, harmful. It offers “more comprehensive protection against misappropriation than the law of copyright, for it can be used to prohibit the copying of intangible as well as tangible expressions.”¹¹⁷ Although right of publicity suits most often involve a celebrity plaintiff, right of publicity claims have historically been available to celebrities and non-celebrities alike.¹¹⁸ Moreover, as Mark P. McKenna asserts in “The Right of Publicity and Autonomous Self-Definition,” the right of publicity for a non-celebrity is most compellingly justified by the plaintiff’s “interest in autonomous self-determination . . . in controlling uses of her identity that affect her ability to author that meaning.”¹¹⁹ Appropriation and unauthorized commercialization of Native American cultural resources robs tribes of the ability to author and control their own identity, to determine for themselves which aspects of that identity are and are not for sale.¹²⁰ The right of publicity evolved specifically to protect this ability; it could be employed to help bolster the Native American appropriation claims that Western intellectual property has for so long ignored.

¹¹² RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977).

¹¹³ *Id.* § 652C cmt. b.

¹¹⁴ Coors, *supra* note 107, at 228 (citing Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 292 (1988) (Note that, in this way, the right of publicity is similar to *droit moral*)).

¹¹⁵ RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (AM. L. INST. 1977).

¹¹⁶ *Id.* § 652C cmt. b.

¹¹⁷ Howes, *supra* note 2, at 147.

¹¹⁸ See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2020) (defining the right of publicity as a “right inherent to everyone to control the commercial use of identity and persona. . .”).

¹¹⁹ Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 279 (2005).

¹²⁰ For further discussion of how cultural appropriation undermines cultural sovereignty, see Tsosie, *supra* note 7, at 306–310.

Expansion of the right of publicity in the context of entertainment law has been met with substantial criticism. In fact, it is difficult “to find a property right more vilified in the legal academy than the right of publicity.”¹²¹ Critics justly point out the manner in which the right of publicity “confer[s] a source of additional wealth on athletes and entertainers who are already very handsomely compensated,”¹²² and worse, “strengthen[s] the already potent grip of the culture industries over the production and circulation of meaning.”¹²³

High-profile right of publicity suits typically pit an established, wealthy celebrity (or her estate) against less-powerful or up-and-coming artists.¹²⁴ Consequently, “[m]uch right of publicity litigation could . . . be characterized as abusive in nature—plaintiffs bringing claims where there are no real damages or significant non-economic damages, either as rent-seekers or to send a ‘message’ regarding boundary intrusion on a property right.”¹²⁵ As it exists now, the right of publicity frequently redistributes upward. The additional property and privacy interests it protects are most often litigated by the already-wealthy, who in turn receive “the capacity to chill expression and reduce the public domain.”¹²⁶

That the right of publicity has been abused by already-entrenched and powerful groups, however, does not justify denying its protection to other groups that the law has left behind. Upward redistribution and cultural lock-in are far from unique to the right of publicity: they exist, in some form, in every American intellectual property regime. In “Copynorms, Black Cultural Production, and the Debate over African-American Reparations,” K. J. Green recounts how “[t]he structure of copyright law, grafted upon broad and pervasive social discrimination, resulted in the widespread denial of copyright protection to black music artists.”¹²⁷ He argues that anti-piracy amendments to the Copyright Act should be used as an opportunity for the industry “to atone for its past injustices to Black artists” and adopt a new set of “copynorms.”¹²⁸ Green cites Native Americans as another “outsider group” that has suffered from mass cultural appropriation and could benefit from additional, atonement-driven intellectual property protection.¹²⁹ Existing gaps in intellectual property and cultural resource law do not simply under-protect Native American cultural resources: they are also an affirmative part of the system that makes appropriation of cultural resources by outsiders profitable. So far as the right of publicity has already proven to be an effective redistribution mechanism, it may be

¹²¹ Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 303 (2011).

¹²² Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 137 (1993).

¹²³ *Id.* at 141.

¹²⁴ See, e.g., *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003) (pitting artist Rick Rush against the licensing agent for golfer Tiger Woods).

¹²⁵ K. J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 535 (2008).

¹²⁶ *Id.* at 543

¹²⁷ K. J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1200 (2008).

¹²⁸ *Id.* at 1222.

¹²⁹ *Id.* at 1218 n. 256 (citing Tsosie, *supra* note 7).

exactly the tool that Native Americans need to reclaim control over cultural resources.

B. *Right of Publicity at Common Law*

Several scholars have already identified the right of publicity as a potential avenue to protect Native American cultural property.¹³⁰ However, the common law elements of the right of publicity—which vary across jurisdictions—pose substantial challenges for Native American communities to state a claim and demonstrate legally cognizable harm. These challenges do not mean that the common law right of publicity should be abandoned as a mechanism to protect Native American cultural resources. They do mean, though, that a statutory right of publicity (as discussed below) could be better tailored to address the harms of cultural appropriation for Native communities.

Challenges for Native American communities asserting a common law right of publicity begin with the various legal standards used to define the right. Some states, like New York, simply do not recognize a common law right of publicity.¹³¹ Others recognize a common law right of publicity of limited duration: in Wisconsin, for example, the right is only available during the lifetime of the plaintiff.¹³² Many states have adopted some version of the common law invasion of privacy tort,¹³³ but its relationship to the right of publicity—especially when a right of publicity statute is in play—can be murky.¹³⁴ Moreover, even the broad right of publicity outlined in Section 652(C) of the Restatement (Second) of Torts protects “the interest of the *individual* in the exclusive use of *his own* identity.”¹³⁵ The right of publicity has been extended (in the statutory context) to groups, on the basis that “[a] group that develops market value in its persona should be as entitled as an individual to publicity rights in its name.”¹³⁶ Extending the right of publicity to an entire *community*, however, would require a significant doctrinal leap by the courts—a leap without much foundation in current case law.

¹³⁰ See Howes, *supra* note 2; Herrera, *supra* note 5.

¹³¹ *Stephano v. News Group Publications*, 64 N.Y.2d 174, 183 (1984).

¹³² *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 397–98, (1979); *Heinz v. Frank Lloyd Wright Foundation*, 85-C-482-C, 1986 WL 5996, at *7 (W.D.Wis. Feb.24, 1986).

¹³³ See REPORTERS NOTE FOR RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977) (“The tort action for invasion of the right of privacy, in one form or another, is presently recognized in Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. It has also been recognized by a federal court in Minnesota.”).

¹³⁴ See Kenneth S. Abraham & G. Edward White, *The Puzzle of Dignitary Torts*, 104 CORNELL L. REV. (forthcoming 2018) (manuscript at 23–39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150483 (for further discussion of the historical development of invasion of privacy torts (and their uncertain relationship to other dignitary torts)).

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

¹³⁶ *Bi-Rite Enterprises v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983).

Potential applications of the common law right of publicity for Native American communities faced with cultural appropriation can be more clearly illustrated by use of a state-specific example. California, a recognized leader in common law right of publicity protection, employs a four-element test for a common law claim:

The elements of a right-to-publicity claim under California common law are:

- (1) the defendant's use of the plaintiff's identity;
- (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise;
- (3) lack of consent; and
- (4) resulting injury.¹³⁷

Consider a hypothetical appropriation analogous to Disney's 2002 incorporation of sacred Native Hawaiian name chants in *Lilo and Stitch* (discussed above). This time (to avoid jurisdictional problems) we will say that Disney used sacred chants unique to a Native Californian tribe. The tribe sued for injunctive relief in California state court, asserting an irreparable harm if its sacred chants are exposed to the world and trivialized by Disney. To survive a motion to dismiss, the tribe would need to plausibly plead each of the four elements of the California common law right of publicity claim.¹³⁸

First, the tribe would have to establish that Disney's appropriation of the sacred chant was, in fact, a "use of plaintiff's identity."¹³⁹ Generally speaking, the personal attributes protected by the right of publicity are broad: they can include "a person's nickname, signature, physical pose, characterizations, singing style, vocal characteristics, [distinctive] body parts, frequently used phrases, car, performance style, mannerisms and gestures,' and even expressions which are merely associated with the claimant."¹⁴⁰ If a "singing style" can be protected by the right of publicity, why not a specific, identifiable religious chant? The problem for the tribe is twofold. It must convince the court not only that the specific chant or chants should be a protected attribute of the tribe's identity, but that the tribe's identity should *be* a protected "identity" in the first place. California courts have never recognized a communal right to publicity (nor have any other state courts, for that matter). To succeed, then, the tribe will have to convince the court to accept a novel claim about a communal privacy/property right.

¹³⁷ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273 n. 4 (9th Cir. 2013).

¹³⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹³⁹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1273 n. 4.

¹⁴⁰ Howes, *supra* note 2, at 147.

Substantial support for this claim exists if the court is willing to look outside the realm of state right of publicity precedent. As Jessica Herrera notes in “Not Even His Name: Is the Denigration of Crazy Horse Custer's Final Revenge?,” “American Indian law has long recognized communal property interests.”¹⁴¹ The tribe could ask the court to look to tribal law and custom as it decides whether the tribe’s communal identity 1) should possess legally recognized privacy/property rights, and 2) should include, as a protected attribute, sacred chants. Recognition of tribal law by Anglo-American courts is rare, but not unheard of.¹⁴² In *Chilkat Indian Village v. Johnson*, for example, the Ninth Circuit Court of Appeals referenced an Artifacts Ordinance passed by the Tlingit people as the basis of the Chilkat Indian Village’s proprietary interest in a set of sacred artifacts.¹⁴³ In *Natural Arch and Bridge Society v. Alston*, the United States District Court for Utah included substantial discussion of Navajo customary law in its opinion upholding the National Park Service’s management plan for the Rainbow Bridge National Monument.¹⁴⁴ Angela Riley, author of “Straight Stealing: Towards an Indigenous System of Cultural Property Protection,” urges tribes to develop and clarify their standards for cultural resource preservation, arguing that “non-Indian courts may look to the moral authority of tribal law to broaden their conceptions of indigenous justice and non-Western ownership.”¹⁴⁵ If the tribe in our hypothetical appropriation case had clear standards governing public performance of sacred chants, it could compellingly argue that California state courts should consider—and defer to—tribal custom.

The tribe could also turn to federal law to bolster its claim of communal property rights in cultural resources. Specifically, NAGPRA’s “acknowledgment of a communal right to certain resources central to Native American culture provides one legal toehold for constructing a protective scheme not predicated . . . on individual creativity and ownership.”¹⁴⁶ NAGPRA defines “cultural patrimony” as “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . . which, therefore, cannot be alienated, appropriated, or conveyed by any individual.”¹⁴⁷ It defines “cultural affiliation” as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”¹⁴⁸ In short, NAGPRA recognizes that some Native American cultural resources are inalienable, communal property, and it defers to tribal custom to establish those particular resources.¹⁴⁹ NAGPRA, moreover, is not the only federal law to recognize inalienable, communal resources for Native

¹⁴¹ Herrera, *supra* note 5, at 190 (citing John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989)).

¹⁴² Riley, *supra* note 3, at 124.

¹⁴³ *Chilkat Indian Villange v. Johnson*, 870 F.2d 1469, 1470 (9th Cir. 1989).

¹⁴⁴ *Natural Arch and Bridge Society v. Alston*, 209 F. Supp. 2d 1207, 1209–15 (D. Utah 2002).

¹⁴⁵ Riley, *supra* note 3, at 129.

¹⁴⁶ Osborne, *supra* note 6, at 219.

¹⁴⁷ 25 U.S.C. § 3001 (3)(D) (2020).

¹⁴⁸ 25 U.S.C. § 3001 (2) (2020).

¹⁴⁹ Osborne, *supra* note 6, at 219–220.

American communities: the Indian Child Welfare Act explicitly created a communal right to the “resource” of Indian children.¹⁵⁰

Finding support for communal identity and property interests in tribal and federal law, however, is a far cry from establishing those interests in state law. Recognition of tribal law by state courts remains nonexistent in most states, and it is unclear how and whether the language of ICWA or NAGPRA—both of which apply to tangible cultural resources—ought to be employed in the context of the common law right of publicity. Even if our hypothetical tribe is able to convince a California court that Disney had engaged in a “use of [the tribe’s] identity,” it would still have to demonstrate that the appropriation worked to Disney’s advantage, that the tribe did not consent to the use, and that the resulting injury would be severe enough to justify injunctive relief (or, failing that, money damages).¹⁵¹ Here, the tribe would likely be confronted with the same set of Anglo-American assumptions about individual, profit-motivated creators and acceptable artistic “borrowing” that drive the current gap in law. Some Native communities, specifically those in states that already recognize a strong, common law right of publicity, may be able to clear these hurdles—but others will be left with weak or non-existent common law claims.

Before moving on to discuss the benefits of a statutory right of publicity, it is worth emphasizing that there are far stronger versions of a common law right of publicity claim than the hypothetical discussed above. Melissa Shaginoff recalls a memorable experience in which, during a visit to Times Square in New York City, she looked up to see an advertisement for a “Yu’pik Parka” flashing across one of the digital screens.¹⁵² The coat pictured, of course, was not an actual Yu’pik Parka; the Yu’pik name was used as a part of the advertisement, an ‘exotic’ label for the jacket intended to attract a customer’s eye. This use lies at the intersection of all three harms of cultural appropriation identified at the start of the Article: it undercuts the ability of the Yu’pik to market authentic parkas if they so choose; it erases the Yu’pik as a living, breathing community by reducing their name to a decontextualized coat label; and it exploits white fascination with Native words and names to market an object. As Ms. Shaginoff states, “Sometimes all we have is our name . . . and the fact that somebody could use it to sell a coat is pretty discouraging.”¹⁵³ The right of publicity, even in its most bare-bones, common-law form, evolved to protect the integrity of names. Commercial exploitation of the specific name of a Native community without the community’s consent provides, in this author’s opinion, a clear and strong common-law right of publicity claim.

¹⁵⁰ Osborne, *supra* note 6, at 230 (“Congress in ICWA [the Indian Child Welfare Act] created a communal right in that “resource” [of Indian children].”).

¹⁵¹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1273 n. 4.

¹⁵² While Ms. Shaginoff does not recall the specific name of the company whose advertisement she saw, an online search reveals at least one major jacket-making company that sells a purportedly “Yu’pik Parka.” See <https://www.fjallraven.com/us/en-us/men/jackets/parkas/yupik-parka-m>.

¹⁵³ Shaginoff, *supra* note 22.

C. *Right of Publicity Statutes*

Many states currently employ a statutory right of publicity, either in addition to¹⁵⁴ or preempting¹⁵⁵ the common law right. The clearest advantage of such statutes is that they allow the state legislature to make—and if necessary, alter—specific policy judgements about the reach and remedies that the right of publicity should offer. In Arkansas, for example, the right of publicity protects an “individual’s name, voice, signature, photograph, or likeness”¹⁵⁶ and offers, as exclusive remedies, “damages and disgorgement of profits, funds, goods, or services.”¹⁵⁷ Arkansas also codifies a set of exemptions to the right of publicity, including qualified uses “[i]n connection with a news, public affairs, or sports broadcast, including the promotion of and advertising for a sports broadcast, an account of public interest, or a political campaign” and some educational uses.¹⁵⁸ Critics of the right of publicity often assert that it infringes on First Amendment freedoms, or at least chills valuable creative expression.¹⁵⁹ Statutory exemptions offer state legislatures (and other involved parties) an opportunity to weigh and address possible disadvantages of right of publicity protection, and further to direct chilling effects toward activity that the state *wants* to chill—like cultural appropriation.

A statutory right of publicity protecting intangible Native American cultural resources would need to possess several core characteristics. First, the right of publicity must empower Native communities to decide for themselves which cultural resources should, in fact, be protected attributes of their identity, lest the solution fall victim to the same sort of cultural imperialism that has helped produce the status quo. Second, the right of publicity must explicitly belong to Native *communities*, rather than individuals, so that a community has standing to assert its claim. Third, the right of publicity must be available regardless of whether a Native community has previously commercialized, or intends to commercialize, attributes of its shared identity; otherwise, it could not be effectively employed to prevent commercialization. Finally, the right of publicity must be available as long as the community endures—it cannot be limited, as many state rights of publicity are, by the lifetime of a particular author.

A right of publicity statute could meet these four criteria in a number of ways, and should be shaped by the distinct needs and preferences of Native communities in the state. Existing right of publicity statutes demonstrate that this kind of tailoring is possible. Arizona and Louisiana, for example, have right of publicity statutes designed to exclusively protect soldiers.¹⁶⁰ South Dakota goes so far

¹⁵⁴ See, e.g., California’s statutory right of publicity at CAL. CIVIL CODE § 3344 (2016).

¹⁵⁵ See, e.g., Illinois’ statutory right of publicity at 765 ILL. COMP. STAT. 1075/1-60 (2020).

¹⁵⁶ ARK. CODE § 4-75-1104 (2016).

¹⁵⁷ *Id.* §§ 4-75-1111, 4-75-1108.

¹⁵⁸ *Id.* § 4-75-1110.

¹⁵⁹ See, e.g., David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 665–666 (2005); Alex Vlisides, *Video Games and NCAA Athletes: Resolving a Modern Threat to the First Amendment*, 45 U. BALT. L. REV. 1, 24 (2015).

¹⁶⁰ ARIZ. REV. STAT. §§ 12-761, 13-3726 (2020); LA. STAT. § 14:102.21 (2020).

as to protect an individual's distinct gesture or mannerism.¹⁶¹ The possibility that tribes in a particular state may not have developed clear standards for cultural resource management should not be a barrier to a right of publicity statute enabling future claims. Just as "[t]he 1990 passage of NAGPRA likely inspired tribes to address the issue of burial grounds," state right of publicity legislation could inspire tribes to address and clarify standards for appropriate use of intangible cultural resources.¹⁶² These standards could be established through historical records, tribal codes or ordinances, tribal customary law, and other sources.¹⁶³ In "The Tipi With Battle Pictures: The Kiowa Tradition of Intangible Property Rights," Candace Greene and Thomas Drescher outline a long history of intangible property rights passed down orally in the Kiowa tribe. Although it is difficult to imagine a state court applying Kiowa law in a right of publicity case,¹⁶⁴ a state court could cite this history as compelling evidence that the Kiowa consider the Tipi with Battle Pictures to be an inalienable attribute of their communal identity—and that any reasonable appropriator would have known this to be the case.

An enormous advantage of a statutory right is that the decision to bring suit is always elective; a right of publicity statute could empower Native communities to assert appropriation claims without imposing any kind of state or federal regulation. Currently, tribal courts' inability to assert jurisdiction over non-Indian appropriators means that, no matter how clear and developed a tribe's standards for cultural resource management may be, those standards will struggle to combat large-scale appropriation. A right of publicity statute would open the door for tribes to bring appropriation claims in state courts, which are far better-equipped to assert jurisdiction over defendants across the nation and the world. By encouraging state courts to defer to tribal designations of communal property and identity, a right of publicity statute could further serve to combat the risk of cultural lock-in, as "[t]ribally formulated laws governing the protection of traditional knowledge are free to evolve outside the constraints of Anglo-American intellectual property doctrine."¹⁶⁵ Such legislation would simultaneously provide much-needed legal remedy for appropriation and "reinforce[tribes'] status as independent, self-governing entities . . . [and] stewards of their own destiny."¹⁶⁶

V. CONCLUSION

For too long, gaps in American intellectual property law and federal cultural resource protection have left intangible Native American cultural resources without

¹⁶¹ S.D. CODIFIED LAWS § 21-64-1 (2020).

¹⁶² Riley, *supra* note 3, at 115.

¹⁶³ Tribes may not choose to codify customary laws for a number of reasons. For discussion, see Riley, *supra* note 3, at 97.

¹⁶⁴ See, e.g., *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999) (Application of tribal law outside of tribal court is extremely rare. This author is aware of only one example in which federal law requires that tribal law be applied: when an FTCA claim is made for injury occurring on tribal land.).

¹⁶⁵ Riley, *supra* note 3, at 91.

¹⁶⁶ Riley, *supra* note 3, at 120.

legal protection. The results of this oversight are clear: appropriation remains both profitable and legally permissible, and Native communities have no legal remedy against outside appropriators. Proposals for *sui generis*, federal protection face significant political and normative hurdles. Rather than rely on the remote (and potentially undesirable) possibility of federal legislation, this Article outlines a case for the state-based right of publicity as a potential tool to empower Native communities to successfully assert appropriation claims.

The right of publicity is far from a perfect solution to the problem of cultural appropriation. Like the rest of Anglo-American intellectual property law, the common law right of publicity remains individualistic in focus. Even a statutory right of publicity raises First Amendment concerns and would undoubtedly pose political challenges. Still, the unique hybrid of privacy and property interests that the right of publicity protects is well-suited to recognize and remedy the harms of cultural appropriation. A well-crafted right of publicity statute would provide a valuable opportunity for state courts to recognize and defer to tribal law and custom. Most importantly, the right of publicity could provide legal remedy to Native communities where no remedy currently exists. Future research and scholarship should engage directly with Native American artists, leaders, and advocates on the specific forms that a right of publicity statute could and should take.