RECOVERING COLLECTIVITY: GROUP RIGHTS TO INTELLECTUAL PROPERTY IN INDIGENOUS COMMUNITIES

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INTRODUCTION

> Holding forth at the spacious treelines with the bears and the crows, the best tellers in the tribes peel peel peel peel their words like oranges, down to the last navel, Mimicked in written forms over winter now, transposed in mythic metaphors, the interior glories from oral traditions burst in conversation and from old footprints on the trail . . .
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> . . . The reader remembers footprints near the treeline, near the limits of understanding in written words, but the trail is never marked with printed words. The trail is made as a visual event between imaginative creators, tellers, and listeners: we hold our breath beneath the surface, the written word, but we know that respiration and transpiration are possible under water.[1]

Is it possible to navigate the "return to innocence" when it is surely not from that point which the journey began?

In 1996 the German rock group, Enigma, spent thirty-two weeks on *Billboard Magazine*'s International Top 100 Chart, turning the new genre of "world-beat" music into a household name. The United States, quick to recognize the mesmerizing quality and marketing potential of the music, selected Enigma's hit single, *Return to Innocence*,[2] as the background theme for television broadcast advertisements of the 1996 Olympic Summer Games. Meanwhile, far in the southern region of the island nation of Taiwan, the Ami people, Taiwan's largest surviving indigenous tribe, mourn the desecration and exploitation of a sacred tribal creation which has its roots in thousands of years of Ami tradition.[3]

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1 GERALD VIZENOR, EARTHDIVERS 165-66 (1981).

2 ENIGMA, *Return to Innocence*, *on* CROSS OF CHANGES (Charisma 1994).

3 *See* Renata Huang, *Golden Oldie: A Respected Ami Tribe Elder Seeks Recognition for His*

Lifvon Guo, an Ami tribal elder, has spent most of his life as a keeper of Ami traditional folksongs. Lifvon quit school at the age of ten to tend to the animals and the crops. He then committed his captivating voice to the preservation of the ancestral songs of his culture as a tribal singer for almost seventy years. He considers himself a messenger, who "work[s] to keep the chants alive."[4] Because the Ami language has not been transcribed in written form, oral tradition is the only method by which the tribe has transmitted cultural knowledge—religion, stories, personal narratives—for thousands of years. For his continued devotion to the passing down of Ami works, Lifvon is highly renowned within his tribe, but, until recently, he had little contact or familiarity with the world outside his indigenous community. That is, until he received a telephone call from a friend in Taipei, informing him that Taipei radio was broadcasting a song in which Lifvon was singing an Ami chant. Lifvon soon learned that a recording of him singing the Ami *Song of Joy* had been pirated and digitally incorporated into a popular "world beat" tune known as *Return to Innocence*, of which over five million copies were eventually sold world-wide.[5]

With the help of friends, Lifvon struggled to reconstruct the events leading up to the international fame of Enigma, and the Ami "contribution" that had made it possible. The answer lay in a performance invitation made by the Ministries of Culture of Taiwan and France in which Lifvon and his wife, along with about thirty other indigenous singers from Taiwan, were invited to perform their songs in music halls across Europe.[6] For a month they traveled, giving group performances of aboriginal music, which were recorded without their knowledge or consent. The recordings from the concerts were published on compact disc a year later, and eventually fell into the hands of German music mogul Michael

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Chart-Topping Chants, FAR E. ECON. REV., Nov. 2, 1995, at 62. The Ami, like each of Taiwan's ten officially recognized indigenous groups, are of Malay-Polynesian descent, and can trace their ancestry to the area of modern day Taiwan back more than 3,000 years, having arrived long before the Han Chinese. The tribes are threatened with assimilation, as members migrate to the cities for work and increased opportunities. Many members are now fluent in Mandarin and have been almost entirely assimilated into the Chinese culture.

Similar to other indigenous groups, the Ami live intergenerationally, and among the older Ami leaders, the traditional indigenous language is still spoken fluently. The Ami, like most aboriginal tribes, use oral traditions as a system of knowledge, and as the primary means of passing down their history and culture from older to younger generations of tribal members. *See* ROBERT STOREY, TAIWAN 19 (4th ed. 1998).

[4] Huang, *supra* note 3.

[5] *See id.*

[6] Jackie Chen, *Ami Sounds Scale Olympian Heights*, SINORAMA, Aug. 1998, at 6. Other indigenous performers have now come forward with claims of unlawful appropriation by the Ministry.

Cretu (known in the industry as "Enigma"), who was scouring recordings of "tribal performances" in hopes of finding the perfect piece to integrate into his own music. Cretu was immediately mesmerized with Lifvon's haunting voice, and he purchased the "rights" to the chant from an arm of the French Cultural Ministry. The Ami people never received recognition or payment for the use of the song. In fact, until the phone call, tribal members had no knowledge the appropriation had ever occurred.[7]

Thus, *Return to Innocence* was created—an ethereal song that mixes the Ami aboriginal chant, sung by Lifvon, and modern dance beats to create a new, cutting-edge sound in the record industry, now known as "world beat." *Innocence* appears on Enigma's second album, *Cross of Changes*.[8]

Thus, as Enigma gains increasing international fame, the Ami people grieve, having found themselves lost in a legal maze plagued with inequities. Though the Ami realize a serious injustice has occurred, they also know that current copyright law offers no protection for communally created indigenous works.[9] As a result, the tribe is constrained to observe a piece of its history and culture slip from its grasp. Not only must the Ami confront the futility of challenging the initial infringement, but they are also powerless to 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. In raising their voices against the institutions that deny them, the Ami now seek complete recognition of their rights as a tribe to cultural property—a recognition essential for justice and full restitution. This is the story of one indigenous group's search to recover collectivity.[10]

The account of the piracy of *Song of Joy* bears greater significance than merely an example of exploitation and oppression of indigenous peoples by powerful entities with capitalistic motives. Rather, it is a complicated commentary on the state of indigenous peoples across the globe, their relationship to formal legal systems, and the resulting gap that lingers between the Indian[11] world view and Western law. Indigenous works fail to fulfill individualistic no-

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7 *See* Huang, *supra* note 3.

8 ENIGMA, CROSS OF CHANGES (Charisma 1994).

9 *See* Huang, *supra* note 3, at 62. According to Robin Lee, the director of Taiwan's Association of Recording Copyright Owners: "The original authors of traditional folk chants have long been dead. And since performers are not authors, they have no copyrights." *Id.*

10 *See* Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

11 "Native American" and "Indian" are used interchangeably throughout this article.

tions of property rights that underlie the structure of Western law, and these works are thus omitted from intellectual property regimes. The focus of current copyright doctrine on rigid individualism devalues and trivializes conceptions of communal property that are deeply embedded in the institutions and norms of indigenous societies. This flagrant dismissal of non-Western viewpoints in the creation, consideration, and interpretation of copyright law keeps indigenous creations unprotected and vulnerable to mass appropriation and exploitation.

This paper contends that only a group rights model of ownership of intangible property will adequately protect the works of indigenous peoples from an ever-encroaching dominant society. The validation of communal property seeks to bring collaborative, inter-generational tribal creations within the scope of copyright protection. Although a group rights model of ownership may seem beyond the scope of existing legal theory, this article suggests such a model actually has a solid, legal foundation firmly rooted in the trust responsibility of federal Indian law, and is constitutionally authorized via the Indian Commerce Clause.[12]

Part II of this paper describes the historical emergence of the Romantic author, focusing on the concept's contribution to the development of Western legal systems and the persistent devaluation of group creativity. Additionally, Part II addresses the harsh limitations that the author construct has produced in copyright doctrine within the United States, and discusses modern scholarship of legal theorists and philosophers who have sought to deconstruct its foundations. Part III outlines the legal consequences of the application of the current Copyright Act[13] to the Ami situation. This demonstrates the complicated conflict which has arisen between indigenous peoples and Western law regarding conceptions of *ownership, authorship,* and *entitlement.* Specifically, Part III focuses on the inevitable distortion that occurs when works are removed from the tribal contexts in which they are powerful and sacred, and offered for sale on the Western market. Part IV concludes that there must be a full recognition of communal property rights for indigenous groups within the intellectual property regime. Part IV posits further that the foundation for the enactment of a copyright statute capable of protecting the intangible works of Native Americans is entrenched in a complex history of federal Indian policy and the ongoing trust responsibility that imposes mutual obliga-

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[12] U.S. CONST. art. 1 § 8, cl. 3.

[13] 17 U.S.C. §§ 101-1101 (1998) [hereinafter Copyright Act].

tions on the federal government and Indian nations. This paper explains the judiciary's recognition of Native Americans as group-rights holders, and contemplates the ideological implications of two recent Congressional statutes: the Indian Child Welfare Act[14] and the Native American Graves Protection and Repatriation Act.[15]

Finally, Part V proposes an "Indian Copyright Act" capable of accommodating the elusive nature of Native American oral literature. Part V asserts that constitutional authority to enact such a statute has been extended to Congress via the Indian Commerce Clause, and Congress' obligation to legislate in this area is mandated by the trust doctrine. Finally, this paper introduces an alternate, but crucial, justification for the transformation of existing copyright laws. With writing practices shifting towards a collaboration model in virtually all professional sectors, amending the Copyright Act to include group works is imperative in the technological age.

I. THE ROMANTIC AUTHOR

Modern copyright law derives its most fundamental principles from the Romantic conception of the author, a construct that emerged in the mid-eighteenth century amidst a pool of cultural, political, economic, and social forces.[16] As "authorship" became closely associated with the Romantic movement in literature and art, the value of the individual experience was heightened, as conceptions of self and ownership began to pervade the culture.[17] Emerging during this period was the Kantian notion of the individual as one who is not only unconstrained by social order and values, but also sovereign in terms of his/her ability to make choices.[18] It was within this context that the modern author was born—lone genius, independent inventor, creative rebel—and became the cornerstone for Western copyright law, establishing its structure and defining the parameters of the entitlements it extends to copyrightable works.

Social scientists and legal historians have painstakingly tracked the social and cultural transformation of *author* from its characterization as one actor collaborating among a team of thinkers whose

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14 25 U.S.C. §§ 1901-1963 (1983).

15 25 U.S.C. §§ 3001-3013 (1991).

16 *See* Woodmansee, *supra* note 10, at 279-87.

17 *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991).

18 *See* Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 357 (1998).

end goal was the production of a collective creation to the modern construct of the individual creative spirit whose work breaks with all tradition and previous works.[19] To fully comprehend the inadequacies of the current copyright scheme in the United States, it is essential to understand this transformation of the author archetype in the Romantic period, and to recognize the narrowness it has lent to Western copyright regimes.[20]

Social historian Martha Woodmansee has explored the emergence of the modern author with significant depth. She concludes that from the Middle Ages through the Renaissance, new writing derived its value from its connection to prior creations, and that its authority was a result of the relationship the writing maintained with traditional texts.[21] Collaborating and borrowing was the preferred method of production, as writers, preachers, and philosophers relied on one another as a resource for inventiveness.[22] Woodmansee determined that in Germany, as late as the 1750s, the writer remained "just one of the numerous craftsmen involved in the production of a book—not superior to, but on par with other craftsmen."[23] The *Allgemeines Oeconomisches Lexicon* for 1753 defines a "book" as:

> either numerous sheets of white paper that have been stitched together in such a way that they can be filled with writing; or, a highly useful and convenient instrument constructed of printed sheets variously bound in cardboard, paper, vellum, leather, etc. for presenting the truth to another in such a way that it can be conveniently read and recognized. Many people work on this ware before it is complete and becomes an actual book in this sense. The scholar and the writer, the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book-binder, sometimes even the gilder and the brass-worker, etc. Thus many mouths are fed by this branch of manufacture.[24]

The "writer" of this period was viewed, and largely viewed herself, as one of many artisans responsible for the completion of a book.

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19 *See, e.g.*, Woodmansee, *supra* note 10; Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L. J. 293 (1992); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996).

20 Because this history is generally credited and easily accessible, it is not the goal of this paper to recount with intricate detail the legal and social emergence of the author as construct, but, rather, to offer a somewhat cursory glance at that emergence, and to outline its role in setting the stage for modern copyright law.

21 *See* Woodmansee, *supra* note 10, at 281.

22 *See id.* at 283.

23 *Id.* at 279.

24 *Id.*

The pre-Romantic author was the "master of a craft, master of a body of rules, or techniques, preserved and handed down in rhetoric and poetics, for the transmission of ideas handed down by tradition."[25]

The first recorded copyright statute, the English Statute of Anne, was passed in 1709, marking the appearance of the terminology of "authorship" in Western law.[26] By the mid-eighteenth century, Romanticism began to emerge in literature and in general social thought, fueled by the philosophies of strict individualism found most prevalently in the works of Locke and Hobbes.[27] Woodmansee cites the essay written in 1759 by Edward Young, entitled *Conjectures on Original Composition,* as one of the first times the modern author construct appeared in literature.[28] The essay adumbrated a new way of thinking about writing, and was quickly followed by the works of a prominent group of emerging authors including Goethe, Coleridge, and Wordsworth. In fact, it was Wordsworth's 1815 essay, *Supplementary to the Preface,* which reconceptualized the modern notion of the author:

> Of genius the only proof is, the act of doing well what is worthy to be done, and what was never done before: Of genius in the fine arts, the only infallible sign is the widening the sphere of human sensibility, for the delight, honor, and benefit of human nature. Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised, or the employment of them in such a manner as to produce effects hitherto unknown.[29]

Wordsworth's essay captured contemporary sentiment about the creative genius, who received his inspiration for writing, not from The Divine, but from within.[30]

The author was no longer a craftsman, but an imaginative inventor, whose end product received its value and property entitlements from the element of originality that the author demonstrated in the text. Little or no recognition was given to the cumulative effect of writing, and authors sought solitary creativity, moving the emphasis from group works to individual epics. Writ-

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25 *Id.* at 280.

26 *See* Jaszi, *supra* note 17, at 468.

27 *See id.* at 470.

28 *See* Woodmansee, *supra* note 10, at 280 (citing Edward Young).

29 *Id.* at 280 (quoting *Essay: Supplementary to the Preface, in* LITERARY CRITICISM OF WILLIAM WORDSWORTH 158, 184 (Paul M. Zall ed., 1966)).

30 *See* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUDIES 425, 443-44 (1984).

ten works no longer received elevated status in the literary world through links to prior compositions. By attaching novelty to the "raw materials provided by culture and the common pool," the law could then distinguish between the elements of the work that could be owned and those that could not.[31] The mood was changing: "The romantic author was defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry and the warrant for property rights."[32] *Authorship* had become an ideology.[33]

As Romanticism emerged historically, legal entitlements accompanied *ownership* only insofar as the work proved to be a "masterpiece"—the product of a unique individual whose writing had broken with all tradition and had succeeded in achieving true originality.[34] The Romantic vision of writing endured beyond the eighteenth century, consistently adhering to individualism's notions of creativity and self-production. The new author paradigm espoused the Wordsworthian author-genius model[35] to inform and direct current Anglo-American copyright law.

A. *Deconstructing the Romantic Author*

Its emergence complete, the Romantic conception of authorship pervaded modern thought about ownership of intellectual property and determined the entitlement one had in a "work." The full limitations of the socially created author had been wholeheartedly incorporated into law, protecting the product of the inventor(s) only as far as Western law's vision would extend. The Romantic individual was placed at the core of the ownership regime. But, the ideal could not last.

It was the legal philosophy of the modern age which led the movement to demystify *authorship*. In 1969, Michel Foucault wrote his groundbreaking essay, *What is an Author?*,[36] in which he suggests the key to understanding the modern idea of "authorship" is to examine the social and historical context in which it emerged. He contends that, "[t]he coming into being of the notion of the 'author' constitutes a privileged moment of individualization in the

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31 BOYLE, *supra* note 19, at 54.

32 *Id.*

33 *See* Jaszi, *supra* note 17, at 471.

34 *See* Woodmansee, *supra* note 10, at 280.

35 *See* Jaszi, *supra* note 17, at 462.

36 Michel Foucault, *What is an Author? in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (J. Harari ed., 1979).

history of ideas."[37] Foucault recognized that *author* in the modern sense was not only a relatively new invention of social construction, but, more importantly, was a model that did not reflect or serve contemporary writing practices.[38] Challenging the assumptions that underlie Western legal systems, Foucault asserted that authorship entitlements do not derive from natural law,[39] but are a direct reflection of society's own determinations about the proper allocation of entitlements to "works."[40]

Foucault was not alone in his observations. During the same period in which he lodged his challenge to the fundamental assumptions underlying copyright law, so too was the American author, Benjamin Kaplan, writing his seminal piece on copyright doctrine.[41] Kaplan specifically challenged the "inevitability" of legal rules that define copyright law, grounding his critical analysis in hundreds of years of historical charting, which demonstrated the emergence of the Anglo-American copyright system. Perhaps Kaplan's greatest contribution was his challenge to the "cult of originality"—the trend towards offering greater and further-reaching protections against copyright infringement. Kaplan placed its origins in the obsession with originality, a hallmark of the Romantic period.[42]

Kaplan recognized the changing tapestry of the "work" and charted a cross-cultural movement towards collaboration.[43] He predicted: "Such collaboration . . . may diffuse and diminish emotions of original discovery and exclusive ownership."[44] Kaplan understood that the forces that had sustained the "cult of originality" were undergoing substantial change, and he anticipated a transition away from the cult of originality to a copyright regime capable of adapting to an age of collaboration.[45]

Foucault and Kaplan remain among the most prominent modern thinkers whose innovative ideas provided a theoretical basis for the deconstruction of *authorship.* Their analyses of the authorship

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37 *Id.*

38 *See id.* at 159-60.

39 *Cf.* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession,* 51 OHIO ST. L.J. 517, 548 (1990) (arguing that property and intellectual property rights arise out of natural law).

40 *See* Foucault, *supra* note 36, at 159. *See also* Felix Cohen, *Transcendental Nonsense and the Function Approach,* 35 COLUM. L. REV. 809, 814-817 (1935).

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

42 *Id.* at 117.

43 "Much intellectual work including the distinctly imaginative is now being done by teams, a practice apt to continue and grow. The French have a word for it—traveaux d'equipe." *Id.*

44 *Id.* at 117.

45 *Id.*

construct fashioned a link, though clearly an unintentional alliance, between the *primitive* and the *post-modern.* The very "shift" in creativity—towards a group production model—of which they wrote had actually been in practice from time immemorial as the sole form of creative expression in indigenous communities. Their recognition of a social movement towards cooperation and coalition in creative expression was not only a validation of their intuition that creativity was returning to pre-Romantic notions of authorship, but also a confirmation that traditional, indigenous methods of productivity were forcing their way into the modern model. This push was as much a glance to the past as a reconsideration of the future.

The troubling reality, however, is that, in practice, the law has yet to be successfully challenged or swayed by their critique of the construct of authorship.[46] Regardless of the intensity of the conflicts that have arisen between the old model and new works, the law nevertheless clings tenaciously to the old ideals. In fact, one theorist argues: "as creative production becomes more corporate, collective, and collaborative, the law invokes the Romantic author all the more insistently."[47] Thus, the Romantic *author* has remained at the core of the present copyright statutory system, regardless of its inconsistency with current writing practices and the modes of intellectual creativity that define the modern era. Deconstructing *authorship,* then, means moving beyond the notion of a "privileged category of human enterprise,"[48] and redefining the concept toward the goals of flexibility, fluidity, and inclusion.

II. APPLYING THE COPYRIGHT ACT: REVISITING THE AMI DILEMMA

The circumstances surrounding the theft of *Song of Joy* involve many actors effectuating a complex sequence of events—events which, under a more inclusive copyright scheme, may give rise to a series of infringements. However, copyright jurisprudence in the United States is devoid of any statutory protection or relief for communal works;[49] thus, there is virtually no case law in existence that explicates this gap in the law. The implementation of and ad-

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46 *See* Woodmansee, *supra* note 10, at 291.

47 *Id.* at 292.

48 Jaszi, *supra* note 17, at 455.

49 Section 103(a) of the Copyright Act provides that the subject matter of copyright as specified by section 102 includes derivative works. Section 201(a) of the Copyright Act allows for co-ownership for authors who prepare a "joint work." Neither of these regimes are "communal" in the way this paper uses the term. *See* 1 NIMMER ON COPYRIGHT § 6.01, § 3.01 (1998).

herence to the current copyright scheme is intended to fulfill a specific function:

> In essence, copyright is the right of an author to control the reproduction of his intellectual creation. As long as he keeps his work in his sole possession, the author's absolute control is a physical fact. When he discloses the work to others, however, he makes it possible for them to reproduce it. Copyright is a legal device to give him the right to control its reproduction after it has been disclosed.[50]

Although articles abound as to the exact philosophical underpinnings of the establishment of copyright laws, most scholars agree that the purpose behind the Copyright Act is to balance authors' rights against the goal of public dissemination of literary and artistic works.[51]

Indigenous conceptions of 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.[52] Thus, this section focuses on what the law is *missing*, and discusses the gap in the Western paradigm that makes it impossible for *Song of Joy* to satisfy even the most rudimentary elements required to constitute a copyrightable work.

For a work to be eligible for copyright protection under current law, it must meet three principal requirements as laid out in the Copyright Act:

> Copyright protection subsists, in accordance with this title, in *original* works of *authorship* fixed in any *tangible medium* of *expression*, now known or later developed, from which they can be per-

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50 Report of the Register of Copyrights on the General Revision of the United States Copyright Law 3-6 (1961).

51 *See, e.g.*, Note, *An Author's Artistic Reputation under the Copyright Act of 1976*, HARV. L. REV. 1490, 1515 (1979); *cf.* James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 105 (1997) ("[I]ntellectual property is a particularly inappropriate area to talk about property rights as if they were both natural and absolute."). *See also* Jaszi, *supra* note 17, at 457 (noting legal scholars' failure to theorize copyright relates to their tendency to mythologize 'authorship,' leading them to fail (or refuse) to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one).

52 *See* Jaszi, *supra* note 17, at 502 n.139.

> Copyright is often rationalized in terms of its importance as an incentive, but it is not always clear what behavior it is designed to incite. It has been suggested that the legal security afforded by copyright may do far more to encourage the commercial distribution of copyrighted works than to stimulate their creation.

Id. See generally A. PLANTS, THE NEW COMMERCE IN IDEAS AND INTELLECTUAL PROPERTY 13-16 (1953) (arguing that copyright is an efficient way to encourage financial investment in the distribution of works to the public).

> ceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[53]

Copyright protection is geared towards the printed word, and societies that transcend this limitation through oral transmission fall entirely outside the sphere of Anglo-American copyright protection.[54] The failure to satisfy the rigid requirements of copyright law produces devastating effects in indigenous communities. The very nature of Native artistic expression—works that are created inter-generationally, 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. The result is an entire body of artistic and literary expression that is being generated by groups already surviving on the very margins of society, prevented from enjoying freedom from infringement, appropriation, and callous distortion.[55]

A. *Consequences for the Ami*[56]

The Ami's *Song of Joy* must satisfy the Copyright Act's three essential requirements in order to earn protection as a musical composition under the Act.[57] The work must demonstrate originality, production by a clearly defined "author," and must be ex-

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53 17 U.S.C. § 102(a) (1998) (emphasis added).

54 *See* Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 128 (1995). In fact, it is only recently that aural indigenous literatures have been classified as literature at all, and not limited to works considered to have only anthropological value. *See* Denise Low, *Contemporary Reinvention of Chief Seattle: Variant Texts of Chief Seattle's 1854 Speech*, AM. INDIAN Q., June 6, 1995, at 407.

55 *See* Devorah Knaff, *Artists on the Cutting Edge*, SAN DIEGO UNION & TRIB., March 9, 1997, at E1. Knaff cites famous indigenous poet Simon Ortiz:

> Oral traditions are the major form of transmission of cultural knowledge among Native American peoples, who either did not have forms of writing or did not use writing the way that English is used, to record things so that they may not be forgotten. Talking, telling stories, is the way that systems of knowledge are passed on from older people to younger people . . . . Stories are the basis of everything.

Id.

56 For the purposes of this paper I will use the Ami example by analogy only and focus my analysis exclusively on the Copyright Act. The actual Ami case would invoke Taiwanese and perhaps international law.

57 It is important to note that, because the Ami situation deals with a musical recording, the copyright discussion grows increasingly complex. The Copyright Act, as an initial matter, enumerates those works that may be copyrighted, one of which is "musical works, including any accompanying words." 17 U.S.C § 102(a)(2) (Subject Matter of Copyright: In General). It is the musical composition of *Song of Joy* with which this paper deals. Copyright law also allows for performers to obtain copyrights in the recorded performance of such a composition. *See id.* § 114 (Sound Recordings). The rights and duties attaching to the actual sound recording of *Song of Joy* are not the subject of this paper, and the Amis' rights as performers of the work will not be addressed.

pressed through a "fixed" and "tangible medium."[58]

1. Originality

Section 102 of the Copyright Act enumerates the types of creations that are subject to copyrightability, one of which is "musical works, including any accompanying words."[59] Thus, a musical composition clearly falls within the penumbra of United States copyright law. Once within the parameters, however, copyright protection subsists only in "original" works of authorship.[60] The Copyright Act itself leaves the term undefined, as did the original 1909 Act, which neither clarified the scope of originality, nor even expressly required it for copyright protection.[61] Yet, courts uniformly inferred the requirement from the fact that only "authors" can claim copyright protection.[62] Because the author is "the beginner . . . or first mover of anything . . . creator, originator," it follows that a work is not the product of an author unless it is original.[63] The originality requirement is normally met with relative ease, and "in the copyright sense means that the work owes its origin to the author, i.e. is *independently created*, and not copied from other works."[64] "Originality" mandates that the work be original at the moment of its inception, as the creation itself is the triggering mechanism for copyright protection.[65]

Feist Publication, Inc. v. Rural Telephone Service[66] is often cited as the Supreme Court's definitive statement on "originality" in copyright doctrine. The underlying lawsuit arose when the producer of a telephone directory, Feist, used a competing company's, Rural's, white pages listings without Rural's consent in efforts to compile a competing directory. The case required the Supreme Court to clarify the extent of copyright protection available to telephone directory white pages. In holding that no copyright infringement had occurred, the Court stated:

> The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author . . . . Original, as the term is used in copyright, means only that the

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58 *Id.* § 102(a).
59 *Id.* § 102(a)(2).
60 *Id.* § 102(a).
61 *See* NIMMER, *supra* note 49, § 2.01.
62 *See* U.S. CONST. art. 1, § 8, cl. 8.
63 NIMMER, *supra* note 49, § 2.01 (quoted in Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351-52 (1991)).
64 *Id.* (emphasis added).
65 *See* INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 324 (Merges et al. eds., 1997). A copyrightable interest is created at the moment the work is created. *See id.*
66 499 U.S. 340 (1991).

> 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.[67]

Though it is clearly established that to be original, a work need only demonstrate a *de minimis* quantum of creativity,[68] *Song of Joy* nevertheless falls short of the applicable standard. The work simply cannot be said to be "independently created by the author." Placing the question of authorship aside,[69] even if Lifvon created *Song of Joy*, he indisputably did not create it independently. The very essence of the song's communal nature defies the notion of "originality."

Furthermore, the determination that *Song of Joy* is not "original," necessarily means that Enigma cannot be held liable for unlawful appropriation or infringement. The law is clear. In order to establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.[70] Even assuming that the "sampling" of the indigenous tune copied substantial elements of the work, it would be legally impossible to hold Enigma liable for infringement, as there is no valid copyright in *Song of Joy*.[71]

The Romantic-inspired conception of "originality" is in strict opposition to indigenous notions of creation. The current law, "with its emphasis on rewarding and safeguarding 'originality,' has lost sight of the cultural value of what might be called 'serial collaborations'—works such as those resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades."[72] For the Ami, ascertaining the creation instance is virtually impossible. The song might have existed for as long as the Ami peoples themselves. Lifvon's purpose is to carry the song to future generations of Ami members, thus conveying its significance and import to those who came after him, just as he learned it from the Ami tribal singers who came before him. Knowledge transmission in indigenous communities, a heritage involving centuries of maintaining culturally revered stories in song, implies that even the most basic elements of copyright law remain unfulfilled.

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67 *Id.* at 345.

68 *See id.*

69 *See supra* text accompanying note 15.

70 *See Feist Publications*, 499 U.S. at 361.

71 This discussion does not take into account the licensing requirements that must have been satisfied when Enigma purchased the "rights" to the song from the French Cultural Ministry.

72 Jaszi, *supra* note 17, at 304.

Lifvon, like other tribal singers, breathes continued life into his indigenous culture, just as his ancestors did for generations before him. Most importantly, in the seventy years in which Lifvon has been singing, his esteemed role in the Ami community has been defined not only by his inspiring voice, but by his ability to modify the chants, guaranteeing their endurance through time. The imagination of the storyteller in indigenous societies is integral to the transformation of the story in order to better meet the needs of a changing community and evolving world. The storyteller must be able to use his/her creativity to accommodate the change in rhythms, the demands of the seasons, and the tribal narrative itself. As Native author Leslie Marmon Silko writes:

> But after the white people came, elements in this world began to shift; and it became necessary to create new ceremonies. *I have made changes in the rituals . . . only this growth keeps the ceremonies strong.*[73]

Oral literatures of Native peoples capture the tales of the groups' creation—narratives that explain their origin on the earth and their connection to the lands they occupy. Storytelling to Native peoples is about more than entertainment, or even education. It is a vital and necessary component of continued life—the life of the tribe and the life of the world itself.[74] Creation stories are told ritually to ensure the continued existence of the world.[75] "A people is without identity until it has imagined itself one and has given that imagined identity form through the art of storytelling."[76] Storytelling in the Indian world occurs through songs, chants, narratives, and ceremonies which are kept sacred in the community, but which are not compelled to remain unchanged. Variation on the storytelling by the storyteller is the work of imagination, not contradiction.[77]

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[73] LESLIE MARMON SILKO, CEREMONIES 126 (1977) (emphasis added).

[74] *See* ROBERT J. CONLEY, THE WITCH OF GOINGSNAKE xii (1988). When Geronimo, the famous Apache leader and warrior was held prisoner at Fort Sill in Lawton, Oklahoma, he was approached by the school teacher S. N. Barret for his life story. Geronimo began by relating the Apache tribal creation story. *See id.*

[75] *See id.* at xiii.

[76] N. Scott Momaday, *The Man Made of Words, in* INDIAN VOICES: THE FIRST CONVOCATION OF AMERICAN INDIAN SCHOLARS 58 (1970).

[77] *See* GERALD VIZENOR, THE PEOPLE NAMED THE CHIPPEWA: NARRATIVE STORIES 7 (1993).

> The woodland creation stories are told from visual memories and ecstatic strategies, not from scriptures. In the oral tradition, the mythic origins of tribal people are creative expressions, original eruptions in time, not a mere recitation or a recorded narrative in grammatical time. The teller of stories is an artist, a person of wit and imagination, who relumes the diverse memories of the visual past into the experiences and metaphors of the present.

The indigenous model rejects European tropes of discovery, invention, naming, and originality, concepts which animate modern intellectual property laws. The European mission was satisfied when the colonizers arrived in "uninhabited" lands and "mapped the world in their own image. In doing so, the colonizers ignored the human ecologies of others and denied any value to the preexisting worlds of meaning in which such phenomena figured ontologically and spiritually."[78] The indigenous world view, which shaped models of invention and ownership within indigenous communities to that point, was devalued and dismissed by European colonization, which legitimated Western social values with the mask of "law."

In an indigenous society, concepts of creativity and originality rely on notions of fluidity not seen in the Western world. By its very nature, oral tradition is a passing down, a handing off, of creative expression. A work can be reborn and recreated each time it is sung; it takes on the needs of the tribe, defined and redefined by its keepers and by the purposes for which it is called upon. Without a recognition of group rights to communal property, it is virtually impossible to frame indigenous works in the monolithic scheme of current copyright law which entirely excludes non-Western conceptions of originality.

2. Authorship

The Copyright Act's treatment of the originality provision animates discussion of the remaining requirements as well. Once the potentially copyrightable work has demonstrated originality, the Act stipulates there must be a clearly identified author or authors with the requisite intent to create a work.[79] Because only an "author" is entitled to copyright protection, the meaning of the term is of great importance. In *Burrow-Giles Lithographic Co. v. Sarony*,[80] the Supreme Court defined the "author" as "[h]e to whom anything owes its origin; originator, maker."[81] Additionally, the Romantic archetype has lent to copyright doctrine a conception of the author as lone genius, whose work breaks from tradition and does not receive increased importance or validity through connections to prior creations. "Our laws of intellectual property are rooted in

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Id.

78 Rosemary Coombe, *Authorial Cartographies: Mapping Proprietary Borders In A Less-Than-Brave New World*, 48 STAN. L. REV. 1357, 1360 (1996).

79 INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 399-400 (Merges et al. eds., 1997).

80 111 U.S. 53 (1884).

81 *Id.* at 58.

the century-long reconceptualization of the creative process which culminated in high Romantic pronouncements like Wordsworth's to the effect that this process ought to be solitary, or individual, and introduce 'a new element into the intellectual universe.' "[82]

The resulting definition of *authorship* exists in direct opposition to the communal methods of creativity symbolizing the structure of Native communities, which place the origins of tribal works in the group, not the individual. The demonization of indigenous works as communitarian has further pushed collective creativity outside the Western, capitalistic legal infrastructure.

Designating a clearly identified "author" in the case of *Song of Joy*, as with most indigenous creations, is inconceivable. First, it is highly unlikely, given indigenous methods of production, that any individual tribal member ever claimed the role of "author" of the work. Even in the rare instance that circumstance did exist, the creator nevertheless has certainly passed on. The inevitable result of this analysis indicates that the song's original author is untraceable.[83] Under current doctrine, a work that is "untraceable" in terms of authorship cannot be granted copyright protection.

The most likely scenario is that there never existed a clearly delineated "author" or "authors" of the song. In indigenous societies, many members believe that ceremonies, music, and stories are communicated to the tribe by the Creator. "To Indigenous Peoples, our spiritual ties to Mother Earth and respect for all living creatures are . . . a way of life. *Our survival is dependent upon our inherent right to practice our traditional ways and teachings which have been given to us by the Creator* . . . . To us, the Earth and everything upon it is sacred."[84] Thus, in whatever manner the inspiration for *Song of Joy* was conceived, known methods of transmission among indigenous peoples indicates that the song does "belong" and has always "belonged" to the tribe as a whole.

The current Copyright Act does provide other avenues for acquiring copyright protection in cases that deviate from the standard model. Protection is available for "derivative works," where the "original" piece has been altered to the extent there is a new

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[82] Woodmansee, *supra* note 10, at 291.

[83] *See* Richard Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 124 (1995). Furthermore, the problem is even more complicated for indigenous groups, as copyright protection extends for a limited duration of time, so that the (communal) work could not be protected in perpetuity even if the original author's identity could be ascertained.

[84] *Summary of the Issues Affecting Indigenous Women: Fourth World Conference on Women*, Beijing, China (Sept. 4-15, 1995) (emphasis added), *available in* <http://www.honorearth.com/iwn/beijingsum.html>.

creation,[85] as well as for "joint works," where the work is produced by more than one "author."[86]

Section 103(a) of the Copyright Act provides that the subject matter of copyright as specified by section 102 includes derivative works. A derivative work is defined as:

> a work based upon one or more pre-existing works, such as a translation, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modification which, as a whole represent an original work of authorship, is a derivative work.[87]

It follows then, that any work based in whole, or in substantial part, upon a pre-existing work, that satisfies the requirements of originality, and is not an infringing work, is copyrightable.[88]

Thus, an author seeks a copyright in a derivative work when the author has produced a copyrightable product derived from a previously copyrighted work. *Song of Joy* was not, and has never been, copyrighted. Thus, if Lifvon himself had desired to put the song into written form, hoping to copyright it as a musical composition, he would not have done so pursuant to the "derivative work" provision. That provision is only applicable where there exists an underlying copyrighted work. That is, "a work will be considered a derivative work only if it would be considered an infringing work if the material it has derived from a preexisting work has been taken without the consent of a copyright proprietor of such pre-existing work."[89]

More importantly, the derivative work provision does not answer the question of how to address communal creations. Communally created works are not derivative works, because the creations from which they derive are not copyrighted. Even assuming, *arguendo*, that existing indigenous creations could be copyrighted today, and future "versions" protected as derivative works, this effort, too, is doomed to fail. First, there is still no "clearly defined author(s)" of the work. For one or more tribal members to come forward and claim authorship to a tribal story or ceremony or song for the sole purpose of obtaining copyright protection would undermine the very sanctity of communal cultural property.

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85 *See* 17 U.S.C. § 103(b).
86 17 U.S.C. § 201(a).
87 17 U.S.C. § 101(Definitions).
88 *See* NIMMER, *supra* note 49, § 3.01.
89 *Id.*

Secondly, the "originality" requirement, inextricably linked to "authorship," remains unmet.

Alternately, joint works are allowed under section 201(a) of the Act: "The authors of a joint work are co-owners of copyright in the work."[90] A "joint work" is defined as: "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[91] The law of copyright recognizes that each author is entitled to exclusive ownership of his/her own creations.[92] Thus, the principle of joint authorship is intended to accommodate each author's right to a work in two circumstances. First, the joint works doctrine applies when the contributions are inseparable—that is—not separately identifiable in the finished product. A second basis for the principle of joint authorship occurs where the respective contributions are interdependent. Here, although the contributions may be separately identifiable, each may be said to have created the work with the intention that each author's contribution would be jointly regarded as an indivisible whole.[93]

Once again, the inapplicability to the Ami situation is apparent. The cornerstone of the "joint works" doctrine is that the authors must have the intent at the moment of creation that their contributions will be combined to form a unitary whole. The doctrine embodies the individualistic bias of American copyright doctrine:

> In effect, "a joint work" has several individual "authors": Each "joint author" must possess the legal attributes and should retain the legal prerogatives associated with solitary, originary "authorship." Thus, only identified or identifiable individuals can receive legal recognition for their contribution to a "joint work," . . . [C]opyright law implicitly assumes the continued relevance of the Romantic visions of "authorship" to this domain.[94]

Identifying all tribal members who have contributed to, for example, a tribe's creation story, is entirely infeasible. Furthermore, the statute requires that each "individual author" have the *intent* to create a joint product at the time of the collaboration. As demonstrated by the Ami, cultural tribal property is created over a period of centuries, not days or even years.

When all possible avenues of copyright doctrine are ex-

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90 *Id.* § 201(a).
91 *Id.* § 101.
92 *See* 17 U.S.C. § 201(a).
93 *See* NIMMER, *supra* note 49, § 6.02.
94 Jaszi *supra* note 17, at 313.

amined, it is clear that no Western definitions of *authorship* are capable of accommodating communal works. Indigenous creations defy the concept of individual authorship, because the sanctity of the work itself derives, in part, from the import placed on the collective creation of the piece. The group product in the indigenous society is the medium through which all tribal members, living, dead and unborn, speak their voice and become a part of the tribal way. Artistic creations in a tribal society are not about individualized creativity, but are about community.[95] The very structure of tribal life is organized around the family, clan, or other extended unit. In such societies, focus is taken off the individual, and "ownership" rights, such as they exist at all, are held by chosen members of the group, who earn the right to "keep" the good. However, exclusive, individual ownership as seen in Western law, is rarely an element of indigenous ownership.[96]

The authorship requirement of the Copyright Act neglects the complex and nuanced methods of creation and production found in the non-Western world. Thus, lawmakers are blinded to collaborative methods of creativity, implemented both in and outside indigenous societies. The law devalues and, indeed, ignores "serial collaborations," developing over years, perhaps decades, by groups of creative workers.[97] The modern model of the *author*, as it exists so narrowly defined, works as a tool of tyranny in Western law, silencing and diminishing the meanings and interpretations of the "other." As legal theorist Rosemary Coombe writes:

> [I]t will be those who collect, classify, inscribe, enclose, codify, sequence, and cultivate these specimens who will be granted authorship and ownership rights. The maps and mapmakers will be privileged over those who occupy the spaces mapped, regardless of their own history of cultivations.[98]

Only a comprehensive reconception of *authorship* will successfully draw into copyright's penumbra the artistic and literary creations of disenfranchised Native groups, most of which currently survive on the periphery of the dominant society.

3. Tangible Medium

In examining closely the Copyright Act, its harsh borders and strictly limiting parameters are unabashedly evident. Perhaps no

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95 *See* Gana, *supra* note 54, at 134.
96 *See id.* at 132; HAROLD E. DRIVER, THE INDIANS OF NORTH AMERICA 221 (1962).
97 Jaszi, *supra* note 17, at 304.
98 Coombe, *supra* note 78, at 1362.

essential factor for copyright protection so distinctly excludes the works of indigenous communities, however, as the requirement that the potentially copyrightable work be "fixed" in a "tangible medium of expression."[99] This condition for copyright protection is derived from the constitutional requirement that Congress protect "writings," even though the word has been munificently construed.[100] Only rarely has the vast enlargement of the word "writings" been questioned.[101]

The "fixation" condition of copyright places an immense burden on indigenous communities seeking to protect their intellectual property. The requirement, by definition, excludes all oral literature of indigenous peoples from the paradigm of Western law. In order to satisfy this standard for copyright protection, indigenous peoples would be forced to abandon the method of knowledge transmission that goes to the very essence of Native life. Communicating cultural works from generation to generation in a written format is foreign to most indigenous societies, many of which have relied for thousands of years on oral tradition as a means of documenting history and culture. Oral traditions are the "other side of the miracle of language"; they are older and more universal than writing.[102] The written word isolates, and requires putting spoken language into contrived, articulable rules.

Denying copyright protection to works not "fixed in a tangible medium" results in the devastating exclusion of an entire realm of indigenous creations, as the use of oral tradition spans almost every Native community in existence. Western law has failed to grasp the

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99 In order for "works of authorship" to be eligible for statutory copyright, they must be "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a).

100 *See* NIMMER, *supra* note 49, § 2.03. Nimmer argues that the "fixation" requirement is not merely a statutory condition to copyright, it is a constitutional necessity. Unless a work is reduced to tangible form it cannot be regarded as a "writing" within the meaning of the constitutional clause authorizing federal copyright legislation. Nimmer's argument is discussed *infra* Part IV.B.

101 Justice Douglas did so, however, in a concurring opinion in Mazer v. Stein, 347 U.S. 201, 221 (1954), arguing that it was not obvious to him that "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy bank, sundials, salt and paper shakers, fish bowls, casseroles, and ash trays," all of which had been registered for copyright in the Copyright Office are "writings" in the constitutional sense. Despite Justice Douglas's doubts, there is no question that today these objects are eligible matter for copyright protection. *See* ROBERT A. GORMAN, COPYRIGHT LAW 13 (1991). Furthermore, courts have been willing to interpret the "fixation" requirement ever more broadly since the inception of the technological age. *See, e.g.*, Stern Elecs., Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983).

102 Kathleen Nortensent, *Poet Carries on Oral Tradition*, THE IDAHO STATESMAN, Sept. 21, 1996 (quoting N. Scott Momaday).

significance of the spoken word in indigenous cultures, thus making no effort to incorporate such elements into current statutory schemes. As N. Scott Momaday wrote of the oral culture of his ancestors:

> Language was their element. Words, spoken words, were the manifestations of their deepest belief, of their deepest feelings, of their deepest life. When Europeans first came to America, having had writing for hundreds of years and lately the printing press, they could not conceive of the spoken word as sacred, could not understand the American Indian's profound belief in the efficacy of language.[103]

Although indigenous groups have acknowledged the harsh limitations posed by existing law, and have, therefore, considered transferring their works into a "tangible medium," such endeavors are rarely available and seldom desirable. For example, many indigenous languages have never been recorded in print.[104] This was often done to maintain the secrecy of the language's vibrance as a means of insulating the group from increased prejudice and violence. Thus, unwritten Indian languages would have to be transcribed in a written form, then, most likely, translated again to the language of the colonizer.

In reality, many Native peoples reject the written model altogether, contending that the written form simply cannot capture the nuances of a spoken text.[105] Translation efforts are further hindered by problems of interpretation, distortion, and the fluid nature of the stories themselves. These stories often defy being "captured" in one form.[106] Leaders in the American Indian Movement ("AIM") have spoken out against the dissemination and "mainstreaming" of Indian cultures, arguing such practices diffuse

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103 N. Scott Momaday, *The Becoming of the Native: Man in America Before Columbus, in* AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS 18 (Alvin M. Josephy, ed., 1992).

104 *See* Kirke Kickingbird, *"In Our Image, After Our Likeness": The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 677 (1976). "[M]ore than 400 Indian nations and lands did not have a written language as we know it today . . . ." *Id.* (discussing the possibility of reconstructing Indian Nations' laws and customs without a written code).

105 *See* GERALD VIZENOR, THE PEOPLE NAMED THE CHIPPEWA 16 (1993) (discussing the "naming" of the Chippewa by non-Indians, who first translated the name "Anishinaabe" (the name the "Chippewa" call themselves) to "Ojibway," reasoning that the root meaning of the word Ojibway described the peculiar sound of the Anishinaabe voice). *See also* THE WORLD TURNED UPSIDE DOWN: INDIAN VOICES FROM EARLY AMERICA (Colin G. Calloway, ed., 1994).

106 *See* Marshall Leaffer, *Protecting Authors' Rights in a Digital Age*, 27 U. TOL. L. REV. 1, 8 (1995) (arguing that the digital age returns us to an earlier time when stories were passed on from mouth to ear, constantly evolving and adapting to their surroundings).

and weaken ancient traditions.[107] Among those seeking inclusion of indigenous works in the copyright scheme, law reform efforts have been waged, but with only marginal success.[108]

B. *Distortion: The Persistent Infringement*

A mere glance at the foundations and considerations of the Copyright Act illuminates Native peoples' struggle to prevent appropriation and theft of their cultural property. The devastating reality, however, is that the initial infringement marks only the first violation against Native peoples in the battle for ownership. Beyond appropriation lies the distortion and misrepresentation of tribal creations as they are freely picked up by non-Natives and openly exploited for capital gain, playing into Westerners' fetishism with Native works, but without recognition or compensation going to the Native communities.[109] There are neither ethics nor laws that prevent this type of manipulation and falsification, as tribal custom and cultural understanding, which would normally govern the way in which powerful, sacred, and valuable creations are passed from generation to generation, no longer apply.

A poignant example of this type of denigration within the indigenous context is the account of the mass marketing of the speech of the famous Chief Seattle.[110] This speech, which has been extensively disseminated by non-Indians since its delivery in the

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107 *See* Cheri Dimaline, *Stealing Voice or Raising It?*, ABORIGINAL VOICES, March/April 1999, at 28. "[AIM] passed a resolution at its 1984 Southwest Leadership Conference condemning the 'laissez-faire' use of Native ceremonies and/or ceremonial objects by anyone not sanctioned by traditional indigenous spiritual leaders." *Id.* at 28-29. Further, a resolution was passed at a Traditional Elders' Circle in 1980 that condemns "Indians who engage in the use of spiritual ceremonies with non-Indian people for profit." *Id.* at 29. Many Natives believe this would include the copyright and dissemination of Native works.

108 *See* Kevin Griffin, *Minority Writers' Conference Claims 'Revolutionary' Success*, VANCOUVER SUN, July 4, 1994, at A2 (reporting Native participants at indigenous writers conference passed a variety of resolutions, one of which dealt with changes in the Canadian Copyright Act to account for protections for First Nations storytellers due to the fact that the Act doesn't cover aural works).

109 *See* Richard Covington, *Ethnic Music is Blowing Its Horn*, INT'L HERALD TRIB., June 30, 1997, at 13 (discussing the emergence of world music into mainstream pop, taking for granted that western bands experiment with traditional music sources, following the lead of Enigma "which freely lifted folk tunes from the Ami, Taiwan's principle indigenous ethnic tribe").

110 *See What Chief Seattle Really Said*, <http://www.chebucto.ns.ca/~ab006/gff/seattle.html>. I felt it appropriate to include the "original" text of the speech of Chief Seattle. The following text claims to be an exact reproduction of the first newspaper account of the speech published in 1887. It was transcribed and "corrected" by Dan and Patricia Miller of Santa Cruz, California, who went to the Washington State Archives and photocopied the original newspaper. Thus, it is the third "version," having been translated twice linguistically prior to publication:

> Yonder sky that has wept tears of compassion on our fathers for centuries untold, and which, to us, looks eternal, may change. To-day it is fair, to-morrow it may be overcast with clouds. My words are like the stars that never set. What

Seattle says, the great chief, Washington, can rely upon, with as much certainty as our pale-face brothers can rely upon the return of the seasons.

The son of the white chief says his father sends us greetings of friendship and good will. This is kind, for we know he has little need of our friendship in return, because his people are many. They are like the grass that covers the vast prairies, while my people are few, and resemble the scattering trees of a storm-swept plain.

The great, and I presume also good, white chief sends us word that he wants to buy our lands but is willing to allow us to reserve enough to live on comfortably. This indeed appears generous, for the red man no longer has rights that he need respect, and the offer may be wise, also, for we are no longer in need of a great country. There was a time when our people covered the whole land as the waves of a wind-ruffled sea cover its shell-paved floor. But that time has long since passed away with the greatness of tribes now almost forgotten. I will not mourn over our untimely decay, nor reproach my pale-face brothers for hastening it, for we, too, may have been somewhat to blame.

When our young men grow angry at some real or imaginary wrong and disfigure their faces with black paint, their hearts, also, are disfigured and turn black, and then their cruelty is relentless and knows no bounds, and our old men are not able to restrain them.

But let us hope that hostilities between the red-man and his pale-face brothers may never return. We would have everything to lose and nothing to gain.

True it is that revenge, with our young braves, is considered gain, even at the cost of their own lives, but old men who stay at home in times of war, and old women who have sons to lose, know better.

Our great father, Washington, for I presume he is now our father as well as yours, since George has moved his boundaries to the north; our great and good father, I say, sends us word by his son, who, no doubt, is a great chief among his people, that if we do as he desires, he will protect us. His brave armies will be to us a bristling wall of strength, and his great ships of war will fill our harbors so that our ancient enemies far to the northward, the Simsiams and Haidas, will no longer frighten our women and old men. Then he will be our father and we will be his children.

But can this ever be? Your God loves your people and hates mine; he folds his strong arms lovingly around the white man and leads him as a father leads his infant son, but he has forsaken his red children; he makes your people wax strong every day, and soon they will fill the land; while our people are ebbing away like a fast-receding tide, that will never flow again. The white man's God cannot love his red children or he would protect them. They seem to be orphans and can look nowhere for help. How then can we become brothers? How can your father become our father and bring us prosperity and awaken in us dreams of returning greatness?

Your God seems to us to be partial. He came to the white man. We never saw Him; never even heard His voice; He gave the white man laws but He had no word for His red children, whose teeming millions filled this vast continent as the stars fill the firmament. No, we are two distinct races and must ever remain so. There is little in common between us. The ashes of our ancestors are sacred and their final resting place is hallowed ground, while you wander away from the tombs of your fathers seemingly without regret.

Your religion was written on tables of stone by the iron finger of an angry God, lest you might forget it. The red man could never remember or comprehend it.

Our religion is the traditions of our ancestors, the dreams of our old men, given by the great Spirit, and the visions of our sachems, and is written in the hearts of our people.

Your dead cease to love you and the homes of their nativity as soon as they pass the portals of the tomb. They wander off beyond the stars, are soon forgotten, and never return. Our dead never forget the beautiful world that gave them being. They still love its winding rivers, its great mountains and its seques-

mid 1800s, was given by Chief Seattle in 1855. At that time, Seattle was to sign the Point Elliot Treaty on behalf of the Suquamish and Duwamish people of the Washington territory.[111] Since his famous oratory, the speech has not only become so obscured and manipu-

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tered vales, and they ever yearn in tenderest affection over the lonely-hearted living, and often return to visit and comfort them.

Day and night cannot dwell together. The red man has ever fled the approach of the white man, as the changing mists on the mountain side flee before the blazing morning sun.

However, your proposition seems a just one, and I think my folks will accept it and will retire to the reservation you offer them, and we will dwell apart and in peace, for the words of the great white chief seem to be the voice of nature speaking to my people out of the thick darkness that is fast gathering around them like a dense fog floating inward from a midnight sea.

It matters but little where we pass the remainder of our days. They are not many. The Indian's night promises to be dark. No bright star hovers about the horizon. Sad-voiced winds moan in the distance. Some grim Nemesis of our race is on the red man's trail, and wherever he goes he will still hear the sure approaching footsteps of the fell destroyer and prepare to meet his doom, as does the wounded doe that hears the approaching footsteps of the hunter. A few more moons, a few more winters, and not one of all the mighty hosts that once tilled this broad land or that now roam in fragmentary bands through these vast solitudes will remain to weep over the tombs of a people once as powerful and as hopeful as your own.

But why should we repine? Why should I murmur at the fate of my people? Tribes are made up of individuals and are no better than they. Men come and go like the waves of the sea. A tear, a tamanamus, a dirge, and they are gone from our longing eyes forever. Even the white man, whose God walked and talked with him, as friend to friend, is not exempt from the common destiny. We may be brothers after all. We shall see.

We will ponder your proposition, and when we have decided we will tell you. But should we accept it, I here and now make this the first condition: That we will not be denied the privilege, without molestation, of visiting at will the graves of our ancestors and friends. Every part of this country is sacred to my people. Every hill-side, every valley, every plain and grove has been hallowed by some fond memory or some sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent seashore in solemn grandeur thrill with memories of past events connected with the fate of my people, and the very dust under your feet responds more lovingly to our footsteps than to yours, because it is the ashes of our ancestors, and our bare feet are conscious of the sympathetic touch, for the soil is rich with the life of our kindred.

The sable braves, and fond mothers, and glad-hearted maidens, and the little children who lived and rejoiced here, and whose very names are now forgotten, still love these solitudes, and their deep fastnesses at eventide grow shadowy with the presence of dusky spirits. And when the last red man shall have perished from the earth and his memory among white men shall have become a myth, these shores shall swarm with the invisible dead of my tribe, and when your children's children shall think themselves alone in the field, the shop, upon the highway or in the silence of the woods they will not be alone. In all the earth there is no place dedicated to solitude. At night when the streets of your cities and villages shall be silent, and you think them deserted, they will throng with the returning hosts that once filled and still love this beautiful land. The white man will never be alone. Let him be just and deal kindly with my people, for the dead are not altogether powerless.

Id.

111 *See* Low, *supra* note 54, at 407.

lated as to contradict its original intended meaning,[112] Chief Seattle himself has undergone so many revisions that he is "a two dimensional emblem of an Indian" who is a steward of the earth—a noble savage without a distinct culture or history.[113] The generalization of Chief Seattle has transformed him into a Pan-Indian figure, an Indian leader who is not a member of any specific tribe, but represents the white man's "American Indian Tribe" to which all Indians, living and dead, are thought to belong.[114]

The process of distortion that occurs once a work has been stolen from its cultural and historical context entails preparing it for commodification so that it becomes more "accessible" to the non-Indian, Western audience. Seattle's speech itself underwent a series of translations. It was originally delivered in Lushotseed, a dialect of the Salish language, and was then translated into Chinook Jargon, a language used by whites and Indians at the time for the purposes of trade. Then, the speech was translated again, this time into English, at which point it was written down and printed in the *Seattle Sunday Star.* That version of Seattle's speech, twice removed from his own Native language, is thought to be the most accurate translation of any that has been provided to the public since.[115]

Distortion is a common problem, as translators attempt to move indigenous creations from the oral, historical, Indian context from which they originated, to the printed expression of the non-Indian world.[116] In many cases, the written word has limited capacity to capture the essence of speech that is available through oral tradition. As the renowned Native American scholar, Rennard Strickland, writes:

> Many non-Indians have a problem in the cultural translation of Native works. A non-Indian viewer of a Hopi figure, a Tlingit mask, or a Shoshone-painted hide translates the object into the familiar framework of his own culture. In doing so he confronts

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112 *See id.* "Published variations of the speech, especially since 1971, include excerpts and revisions that obscure and sometimes contradict the original speech." *Id.*

113 *See id.* at 407.

114 *Id.* at 413. In the "speech" there are many distortions, from blurring of the description of the geographical region in which Chief Seattle actually lived, to including introductions of animals like sheep, whose wide use by indigenous peoples is specific to southwestern tribes like the Navajo. *Id.* at 414.

115 *See id.* at 409.

116 New versions of Seattle's speech have been made entirely by non-Indians, who reshape the image of Seattle into one more viable for the corporations that control the technology of mass distribution—and mass profits. In 1855 a non-Indian government appropriated land; in the 1990's a non-Indian mass culture industry appropriates image.

Id. at 416.

> the same distortion as the English-speaking reader of a translated Cherokee love-song. The song, translated into English, has its syntax transposed, verb tenses approximated, and inflections altered. No longer a linguistic reflection of its maker, the song becomes a carnival mirror, distorting the delicate thought patterns of its creator's culture.[117]

The reproduction of oral works by non-Natives distances the texts from the historical and cultural context from which they arose. In the case of Seattle's speech, critics argue that after analysis of the different versions that have been produced over the years, there exists substantial evidence of interpretations of the speech that omit historical context entirely and include evidence of contemporary politics. Modern versions of Seattle's speech make him appear a prolific prophet of the contemporary ecological movement, a noble savage and steward of the earth. The removal of the speech from the Indian world and its historical context transforms the work into a tool of rhetorical domination.[118]

As indigenous groups push for greater protection under copyright laws, there is a growing recognition of the damage that occurs in the process of distortion itself. In the case of *Milpurrurru v. Indofurn Pty Ltd.*,[119] a group of internationally recognized Aboriginal artists brought an action for copyright infringement in Australia against a company that was selling rugs bearing unauthorized copies of the artists' work. In deciding in favor of the artists, the court recognized the inherent, fundamental value in the Aboriginal world of keeping a work sacred. In determining that the paintings had "deep cultural and religious significance to Aboriginal people" the court stated: "[A]ccuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of painting, *can cause deep offence to those familiar with the dreaming.*"[120] At a minimum, the court acknowledged the travesty of

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117 Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 185 (1992).

118 *See* Low, *supra* note 54, at 418.

119 December 13, 1994, Federal Court of Australia, *reported in* 17(3) EUR. INTELL. PROP. REV., March 1995, at D-61. *See also* Margaret Martin, *What's in a Painting? The Cultural Harm of Unauthorized Reproduction: Milpurrurru & Ors v. Indofurn Pty Ltd. & Ors*, 17 SYDNEY L. REV. 591 (1995). In Australian Aboriginal culture "[t]raditional designs and art forms are intimately connected with Aboriginal religion." *Id.* at 593.

120 Martin, *supra* note 119 (quoting Milpurrurru v. Indofurn Pty. Ltd. (emphasis added)). For further discussion and full citation of *Milpurrurru*, see Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

perverse translation—a harm inflicted long after the initial infringement.

Distortion is the common thread that runs through each account of appropriation of indigenous works, and the resulting adversity is all too familiar to the Ami. Beyond the invitation to France and the phone call from Taipei remains the burden the Ami people must bear knowing that the world hears their aboriginal music removed from the people and history that made it powerful. In this, the infringement of indigenous property continues, as the sanctity of the ideas and the sacredness of meaning are lost on a non-Indian world.[121]

III. An Argument for Communal Rights[122]

Indigenous peoples throughout the world have faced a long history of discrimination, oppression, and genocide. As minority cultures existing in occupied states, indigenous peoples are often ostracized and excluded from the central legal infrastructure and economic development policies, which are devised by and for the dominant group. Indigenous peoples, specifically, have been confronted with additional resistance, as their collective identity and, often, territorial sovereignty must be identified as distinct from, but still a part of, the state system. This division itself is often seen as threatening to the legitimacy of the state. Thus, positioned in opposition to the state from the inception, the indigenous groups must then defend their communal nature and traditional existence against the call for "progress."[123]

History shows that states seldom guard against encroachments upon indigenous cultures, and any legal protections that are available focus on the rights of the individual. The hybrid Western scheme, a mix of individualistic and utilitarian perspectives, struggles to balance utilitarian or societal rights against individual rights. By positioning the individual's interest against the interest of the state, the legal system undertakes to produce the greatest good for society with minimal infringement on individual citizens. The individual rights perspective implicit in Western jurisprudence

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121 *See* Covington, *supra* note 109, at 13. In an interview, American music producer Sam Mills said that despite the surge in interest in blending indigenous music with contemporary Western forms, some producers warn against the hit and run mentality that exploits the sound yet ignores the spirit of ethnic music: "[U]sing these ancient styles as sound effect only is a very superficial approach to the music." *Id.*

122 The remainder of this paper will focus entirely on United States domestic law and legal systems.

123 *See* Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 Va. L. Rev. 691, 697 (1993).

does not fully address the concerns of those intent on preserving the integrity of their groups, and it is inadequate to ensure the survival of indigenous cultures.[124] The philosophical underpinnings of Western law ignore the stake that a group might have in a particular issue, and fail to adequately recognize a group's communal claim to continued existence.[125] The only way for states to prevent the continued cultural disruption of indigenous peoples, then, is through swift recognition and implementation of a group-rights model, which will acknowledge the rights that inhere in indigenous groups as such.[126] A paradigm more focused on the protection of the group as an entity would recognize rights from the perspective of Native peoples, rather than from an alien, Eurocentric viewpoint.

The introduction of a community-based rights scheme into the current Western framework will be challenging, given that the existing legal structure focuses almost entirely on the individual, and does not concede value inherent in groups *per se.* In the Western world, if groups are addressed at all, it is only as a conglomerate of individuals, each with a distinct, particularized identity. Society itself is understood as the result of a compact occurring among independent individuals and the state.[127] This individual-based system is foreign to Native peoples. They understand their place in the world as that of a people born into a network of group relations, and whose rights and duties in the community arise from, and exist entirely within, the context of the group. For these groups, one's clan, kinship, and family identities make up personal identity. The individual sees his/her rights and responsibilities as arising exclusively within the framework of such familial, social, and tribal networks. Rights are part of group membership; individual rights exist in contemplation of how they may be suited to the larger political group.[128]

The community focus found in Native communities bears on conceptions of rights and defines communal-based notions of property. For indigenous peoples, cultural property and tribal ways are constitutive of the group's collective identity. This signifies the world view of most tribal people, who define their individual identity largely based on their identification with the group. To

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124 *See id.* at 697. For a discussion of a group-rights perspective for cultural survival, see Dougherty, *supra* note 18, at 368-72.

125 *See* Herz, *supra* note 123, at 697.

126 *See id.*

127 *See id.*

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

fully embrace the group rights model, implicit in which there is a profoundly non-Western conception of *ownership*, there must exist a common belief among group members that they are "normatively bound to each other such that each does not act simply for herself or himself but each plays her or his part in effectuating [a] shared normative understanding."[129] For many Native peoples, tribal affiliation is precisely this sort of commitment. For them, denial of a tribal right does not interfere with aggregated individual claims, but with their integrity as rights-holding members in a community that defines in some sense what their lives are about.[130] This is especially true for members of tribal groups for whom an essential part of individual self-expression will be thwarted unless there is an avenue for political self-definition of the tribal identity in which individual identity is rooted. For individuals within these distinct groups, flourishing in the world as a person is intimately related to cultural identity.[131]

Identity in the indigenous world is inextricably linked to community structure. But identity for tribal peoples reaches further, to form a forceful nexus between the group and its cultural property. For a tribe, the authority to control that property is essential for group survival, as it links its very existence to collective creations. Cultural property situates indigenous people in a historical context, tying them to the place from which they came and the point of their creation.[132] Tribal members become linked to the goods of the tribe—turtle rattles, trickster narratives, religious bundles—often resulting in a commitment to the objects outside of themselves; this commitment is the Native peoples' definition of what life is about.[133]

For a tribe, determining the destiny of collective property, particularly that which is sacred and intended solely for use and prac-

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[129] Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURIS. 217, 218 (1991).

[130] *See* John S. Harbison, *The Broken Promise Land: An Essay on Native American Tribal Sovereignty Over Reservation Resources*, 14 STAN. ENVTL. L.J. 347, 349 (1995).

[131] *See id.* at 349.

[132] *See* PETER MATTHEISSEN, INDIAN COUNTRY 5 (1984).

> In our own history, we teach that we were created there, which is truer than anthropological truth because it was there that we were given our vision as the Cherokee people . . . . In the language of my people . . . there is a word for land: Eloheh. This same word also means history, culture, and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor from our meaning as a people . . . . So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown. We are speaking of something truly sacred.

Id.

[133] *See* LESLEY A. JACOBS, RIGHTS AND DEPRIVATION 70 (1993).

tice within the collective, is a crucial element of self-determination. The legal enforcement of a group model of invention and ownership would support self-determination principles, not only by protecting indigenous works from theft and exploitation, but by placing the sanctity of tribal cultural property back into the hands of indigenous peoples, affirming their ability to determine themselves as a people through their culture. When a group has exclusive authority to prescribe the employment of its most valuable creations, the entire community flourishes and benefits. Most importantly, the group-rights model of ownership takes into account the Indian world view by providing a foundation for "intergenerational justice."[134] Preserving the divine nature of cultural works and sheltering them from the market demonstrates Indian respect for those who have walked on, and sets the work aside for use and honor by future generations.

A. *Communal Rights: An Argument Based in Federal Indian Law*

Federal Indian law provides substantial support for the recognition of a group-rights model in the indigenous context, firmly rooted in the United States' treatment of Indian peoples, going back to the first instances of European-Indian contact on this continent. The United States Constitution, this country's primary political treatise, acknowledges Indian Nations' unique status through the "Indian Commerce Clause."[135] The Indian Commerce Clause extends a grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution. Just as the Foreign Nations Clause[136] provides for federal control of commercial relations with foreign nations, the Indian Commerce Clause in effect recognizes the tribes' unique position as quasi-sovereign nations-within-a-nation, and shields them from state and local interference.[137] The Indian Commerce Clause verifies the philosophical underpinnings of a group-rights model in two ways: first, by demonstrating that Indian Nations are quasi-sovereigns, who exist separate and distinct from the majority state; and second, by recognizing that Congress' power to regulate trade extends not to individual Indians, but to Indian Nations. The Constitution itself manifests the group-rights

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134 John Moustakas, *Group Rights In Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1208-09 (1990).

135 U.S. CONST. art. I, § 8, cl. 3.

136 *Id.*

137 *See* Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47, 85-86 (1996).

approach the United States would take in Indian relations, and confirms that the majority government has and must continue to deal with Native peoples' communal existence.

The doctrine of the "trust responsibility" has largely framed the history of tumultuous relations between the federal government and Indian Nations. While perhaps the most useful instrument in navigating the complex relationship between Indians and the federal government, the doctrine remains, nevertheless, amorphous.[138] At its essence, it imposes a fiduciary obligation on the federal government in dealing with Indian tribes, and commits the government to promoting the preservation and self-governance of sovereign Indian nations.[139] Though subject to increasingly varying interpretations, the "trust responsibility" has been recognized by the courts, Congress, and the executive branch throughout the history of federal Indian law.[140]

Both courts and Congress have implemented the doctrine in acknowledgment of Native Americans' unique right to communal property and collective ownership. The evolution of the trust doctrine judicially, and the introduction of the concept of aboriginal title—a group model of land tenure exclusively available to Indian nations—pointed to the judiciary's recognition that only a promise of collective ownership would be sufficient in dealing with Native Americans in the treaty-making process.[141] Congress followed suit, treating Indians as distinct nations with territorial sovereignty, and enacting laws addressing the rights available to them as group entities.[142] Current legislation confirms the unique treatment of Native peoples by the federal government, as Congress passes laws designed to consider and accommodate Native Americans' communal ways and cultural property.[143]

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138 *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495 (1994).

139 *See id.* at 1472.

140 *See id.* Between 1790 and 1834, Congress passed a series of Trade and Intercourse Acts which prohibited non-Indians from entering Indian territories, provided for the removal of intruders, regulated white man's trade with the tribes, and denied non-Indians and local governments the right to purchase Indian lands. The Acts were viewed as the federal government's broad duty of protection of Indian nations—not an exercise of power over them. *See id.*

141 *See infra* part IV.A.1.

142 *See infra* part IV.A.2.

143 *See* AMERICAN INDIAN LAW 1184-89 (Clinton et al. eds., 1996). While there is a current trend toward respecting group rights in federal Indian law, and a historical grounding for such a trend, this has not always been the case. The period of 1940-1962, known as the Termination Era in federal Indian law, began a momentum of a policy of termination that destroyed tribal sovereignty in specific cases, and called for the total assimilation of Indians into dominant society. *See id.*

1. Judicial Evolution of the Trust Doctrine

The foundation of the trust doctrine is traceable to the first cessions of land by tribes to the federal government. The tribes' relinquishment of vast parcels of Indian territory was conditioned on federal promises that Indian nations could continue their traditional way of life on plots of land of smaller size, where Indians would be free from intrusions by the dominant society.[144] The essence of the relationship originated in a strong belief in Indian self-governance and Native separatism. The "trust relationship" developing between the tribes and the federal government during this period imposed mutual obligations on both parties. Often expressed through treaties negotiated between the federal government and the tribes, the treaties expressly recognized the sovereignty and, indeed, the power of Indian nations.[145] Many treaties also incorporated "assurances" that the federal government would insulate Indian nations from mass invasion by the immigrant population while still preserving Indian self-determination.[146]

> While individual treaties differed from tribe to tribe, all were oriented toward ensuring the perpetual availability of a sustained, land-based, traditional existence for the native nations. Nearly all promised a permanent homeland, and many included assurances of continued rights to fish, hunt, and collect plants for subsistence and trade.[147]

It soon became clear that such separatism would have to be "policed" by the federal government, as a growing society encroached on Indian territory. The ceded Native land served as consideration for the federal government's obligation to oversee and protect Native sovereignty.[148]

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144 *See* Wood, *supra* note 138, at 1497-98.

145 *See id.* at 1498-99.

146 *See id.* at 1497.

147 *Id.*

148 *See id.* at 1498. There is a second line of cases that focuses on the "flip side" of the trust responsibility—the plenary power doctrine, which emphasizes the power of the federal government to control Indian affairs and unilaterally diminish sovereign tribal rights. *See* United States v. Kagama, 118 U.S. 375, 384 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Tee-Hit-Ton Indian v. United States, 348 U.S. (1955).

> Kagama brought forth what is now known as the 'plenary power' doctrine to justify nearly total federal authority over tribal lands and internal tribal governance .... The doctrine is essentially a judicial ratification of what, as a practical matter, mounted to considerable federal power over the tribes after decades of relentless subjugation.

Wood, *supra* note 138, at 1502. However, the early Marshall decisions, coupled with the canons of construction mandating a liberal interpretation of treaties, have served to establish the current existence of a trust relationship between the federal government and the tribes. *See* Gary D. Meyers, *Different Sides of the Same Coin: A Comparative View of Indian*

Legal recognition of the trust relationship evolved judicially, and first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia.*[149] In that case, Marshall implicitly confirmed the doctrine of federal trusteeship over Indian affairs.[150] *Cherokee Nation* was an original action filed by the Cherokee Nation in the Supreme Court to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. While Marshall agreed with the Cherokee Nation's contention that it was a "state" in the sense of being "a distinct political society . . . capable of managing its own affairs and governing itself,"[151] the Court nevertheless held that it did not have original jurisdiction over the matter.[152] The Court found the tribe was neither a state of the United States nor a foreign state, and therefore was not entitled to bring the suit initially in the Supreme Court.[153] Marshall likened Indian nations to "domestic dependent nations . . . in a state of pupilage."[154] Marshall added that the relationship of the tribe to the United States resembles that of a "ward to his guardian," further articulating the judicial expression of the trust responsibility between the federal government and the tribes.[155]

Perhaps the most pivotal legal consequence of Marshall's guardianship/trusteeship concept was the judicial recognition and integration of Indian occupancy and ownership of land into the system of American land tenure.[156] Writing for the Court in *Johnson v. M'Intosh,*[157] Marshall defined the principles that have remained cornerstones of the concept of original Indian title. *Johnson* involved disputed claims to parcels of land that from time immemorial had been inhabited by the Illinois and Piankeshaw Indians. The plaintiffs claimed title through purchases and conveyances directly from the tribes to certain British subjects. Subsequently, the tribes ceded the same lands to the United States

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Hunting and Fishing Rights in the United States and Canada, 10 UCLA J. ENVTL. L. & POL'Y 67, 90-91 (1991).

149 30 U.S. (5 Pet.) 1 (1831).

150 *See* Felix Cohen, HANDBOOK ON FEDERAL INDIAN LAW at 220-28 (Rennard Strickland et al. eds., 3d ed. 1982). Scholars still debate whether Marshall intended to create an enforceable trust responsibility between Indian nations and the federal government, but it is certain that such a relationship does exist. *See* United States v. Mitchell, 463 U.S. 206 (1983) (holding that the federal government owed compensation to the Quinault tribe for violations of its fiduciary duty in the management of Indian property).

151 *Cherokee Nation,* 30 U.S. at 16.

152 *See id.* at 79.

153 *See id.* at 16, 19-20.

154 *Id.* at 16.

155 *Id.* at 17.

156 This method of land tenure came to be known as Aboriginal Title.

157 *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823).

by treaty, and the defendants claimed title by a patent from the United States. The Court was required to determine the validity of the earlier conveyances from an Indian tribe to individuals.[158]

In holding that only the European sovereign held "ultimate dominion" in the land, the Court nevertheless recognized the "Indian right of occupancy," known as "aboriginal Indian title."[159] Chief Justice Marshall defined the status of Indian inhabitants as "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."[160] Although *Johnson* clearly held that tribes lack the power to convey lands held by aboriginal title to third persons, the recognition of a land-base upon which Indians could live and govern themselves was affirmed. The threads of a complex tapestry of a mutual trust obligation can be seen as extending from judicial recognition of aboriginal title.[161]

The Marshall Trilogy[162] confirmed that tribal sovereignty still existed over reserved lands in the United States, and the judiciary's acknowledgment of aboriginal title indicated federal recognition of group rights in the United States domestic system. Aboriginal title granted Indian nations the right to occupy, enjoy, and use a homeland as a fundamental element of Native Americans' self-preservation. As a collective right, it works to ensure that Indian tribes can preserve their "different-ness"[163] by maintaining a distinct culture and an independent system of laws and tribunals to govern members. Land recognized by aboriginal title cannot be alienated by the tribe; rather, as land held in trust for the tribe by the federal government, the land stays within the Indian community, collectively owned.[164]

In *Journeycake v. Cherokee Nation*,[165] decided in 1894, the Court of Claims reaffirmed the existence of Native Americans' unique communal right of occupancy to the land and the significance in preserving the distinctive nature of communal cultural property. In deciding the case, which involved a dispute between the Cherokee and Delaware Nations regarding payments for land, the court

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158 *See id.*

159 *Id.* at 574.

160 *Id.* at 574. Marshall reiterated this principle in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832).

161 *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STANFORD L. REV. 1213, 1218-19 (1975).

162 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

163 *See* Meyers, *supra* note 148, at 82.

164 *Johnson v. M'Intosh* also made it clear, however, that the government has the power to unilaterally extinguish Indian title. *See Johnson*, 21 U.S. at 587.

165 28 Ct. Cl. 281 (1893), *aff'd* 155 U.S. 196 (1894).

recognized the distinctive nature of Native Americans' communal property rights:[166]

> [T]he distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes it from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and *yet he 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.*[167]

This case illustrated that federal Indian law can, and does, recognize group rights, and it reasserted the importance of keeping communal property within the tribe to ensure that the property (tangible or intangible) may be enjoyed by all members of the group.[168] "It is clear that in the area of federal Indian law the courts have long distinguished individual from communal Indian property."[169]

2. A Legislative Response

From the passage of the Indian Trade and Intercourse Acts[170] of the late eighteenth and early nineteenth centuries, Congress has recognized the sovereignty, and indeed, the communal nature of Indian ownership, and its own duty to Indian nations of preservation, pursuant to the trust responsibility. The congressionally created United States American Indian Policy Review Commission analyzed the legal history of the relationship between the United States and Native Americans.[171] The Commission found that the federal trust responsibility emanates from the "unique relationship between the United States and Indians in which the federal government undertook the obligation to ensure the survival of Indian tribes."[172] The Commission grounded the trust responsibility in a number of sources, including treaties, laws of Congress, and judicial rulings, and defined the broad purpose of the trust as the duty

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166 *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 BOSTON UNIV. L. REV. 559, 571 (1995).

167 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 (1986) (emphasis added) (citing Journeycake v. Cherokee Nation, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894)).

168 *See* Moustakas, *supra* note 134.

169 Echo-Hawk, *supra* note 167, at 442.

170 *See* AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT TASK FORCE No. 9, at 39 (Comm. Print 1977) [hereinafter FINAL REPORT].

171 *See* H.R. REP. No. 93-1420 (discussing establishment of the Commission).

172 FINAL REPORT, *supra* note 170.

"to protect and enhance the people, the property, and the self-government of Indian tribes."[173] In furtherance of its acknowledgment of a recognized trust between tribes and the federal government, Congress has initiated and passed legislation in the modern era that focuses on the rights of Indian peoples as groups, with particular emphasis on the preservation of fundamental aspects of communal society—family and cultural property.

The Indian Child Welfare Act ("ICWA")[174] was passed in 1978 in response to devastating evidence of the mass removal of Indian children from their homes and tribes in the last century. Sustained extrication of Indian children had been used as a tool of assimilation and cultural genocide, as congressional reports confirmed that twenty-five to thirty-five percent of all Indian children had been taken from their families and tribes with nearly ninety percent of placements made into non-Indian homes.[175] In reaction to this genocidal phenomenon, Congress formally recognized its trust responsibility to Native Americans, concentrating on the preservation of Indian tribes and families.[176] Under authority derived from the Indian Commerce Clause, Congress enacted the ICWA, whose goal is:

> to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will *reflect the unique values of Indian culture* . . . .[177]

In evaluating a proper scheme for the Indian child welfare system, Congress focused on the "values of Indian culture," rather than the Anglo-American model, which is heavily centered around preferencing the rights of the individual over the community. As the House Report accompanying the ICWA confirmed: "[ICWA] seeks to protect the rights of the Indian child as an Indian and the *rights of the Indian community and tribe* in retaining its children in its soci-

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173 *Id.*

174 25 U.S.C. §§ 1901-1963 (1983).

175 *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)(citing *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs*, 93d Cong., 3 (1974)).

176 *See* Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 3 (1990).

177 25 U.S.C. § 1902 (emphasis added). *See also* Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 LAW & INEQ. 311, 323-324 (1992); Patrice Kunesh-Hartman, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 132 (1989).

ety."[178] Congress recognized that Indian communities place a profound emphasis on "collective rights" thinking, in which Indians are taught to conceive of themselves as part of the larger cultural group, in which every child belongs to its family as well as to the tribe.[179] Though the dilemma between Native American and Anglo philosophies concerning collective rights and community responsibility for children is apparent, Congress resolved the conflict in favor of Indian nations. Congress made the determination that the collective nature of tribal life itself required that the future of Indian child welfare no longer be based in an inconsistent, individual-centered model.[180]

In an attempt to reflect tribal values, the ICWA establishes federal standards for Indian child welfare proceedings that give preference to the placement of the child with a member of the child's extended family, another Indian family, or a family chosen by the child's tribe.[181] The ICWA embodies the belief that the "best interest" of an Indian child is for that child to maintain connected to its tribal community, and for that community to have substantial input into the child's future.[182] Thus, Congress has acknowledged the existence and necessity for the implementation of group rights for Native Americans. This has resulted in a statute designed to comport with actual tribal methods of decision making and a determination that the collective rights of the tribe must not be subordinated to the rights of individual tribal members.[183]

Since the passage of ICWA, Congress has continued enacting legislation premised on group-rights philosophies for Native peoples. The year 1990 marked a landmark legislative victory for Native Americans when Congress adopted the Native American Graves Protection and Repatriation Act ("NAGPRA").[184] The Act, which sets out to protect human remains, sacred objects, and cul-

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178 H. R. Rep. No. 95-1386 at 23 (emphasis added), *cited in* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).

179 *See* Jennifer Nutt Carleton, *The ICWA: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 38 (1997).

180 *See* Goldsmith, *supra* note 176, at 7.

181 25 U.S.C. § 1915 (a)-(b).

182 *See* Goldsmith, *supra* note 176, at 4.

183 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), in which the Supreme Court favored group rights by deciding that the Indian Civil Rights Act of 1968 did not give the federal courts jurisdiction to decide whether a gender-discriminatory tribal membership rule deprived an Indian woman and her children of equal protection.

184 25 U.S.C. §§ 3001-3013 (1991). Congress' power to enact NAGPRA, like ICWA, arose through the constitutional authority of plenary power created by the Indian Commerce Clause. *See* Diana Dee Thomas, *Indian Burial Rights Issues: Preservation or Desecration*, 59 UMKC L. REV. 737 (1991).

tural patrimony of indigenous peoples, reflects a growing consensus in the United States:

> The sacred culture of Native American and Native Hawaiians is a living heritage. This culture is a vital part of the ongoing lifeways of the United States, and as such, must be respected, protected, and treated as a living spiritual entity—not as a remnant museum specimen.[185]

Thus, one of NAGPRA's primary purposes is to establish an inventory and consultation process by which federal agencies and federally-supported museums are mandated to work with Indian tribes, with the end goal of tribal repatriation of cultural artifacts and human remains.[186]

In enacting NAGPRA, Congress recognized that sacred communal property (including human remains) that had been stolen from indigenous communities had deep religious and cultural significance for Native Americans. The Act reaffirms the federal government's obligation pursuant to the trust responsibility to preserve and protect Indian communities and tribal rights. NAGPRA illustrates the unique connection that exists between the federal government and the Indian tribes.[187]

The very essence of NAGPRA derives from notions of group rights, in that its focus remains entirely on sacred communal property, and it emphasizes the role of the tribe in the repatriation process. NAGPRA symbolizes the federal government's acknowledgment of indigenous communal property—that which is created by a group for long-term use within the community and whose value is not fully materialized unless the property is available to the group as a whole.[188] Premised on a belief in tribal property, the Act stipulates that indigenous cultural objects, which belong to the tribal unit will be presumed to be attained by third parties through invalid conveyance, even if purchased in good faith from individual

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185 Strickland, *supra* note 117, at 176.

186 *See* Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109, 126 (1993).

> This legislation does not include every basket, every pot, and every blanket ever made by Indian hands. It refers to human remains, funerary objects, and only the most sacred of religious items which were taken from a tribe without permission. It affords current day Indians the opportunity to determine the proper way that their ancestors be treated.

136 CONG. REC. H.10988 (daily ed. Oct. 22, 1990) (statement of Rep. Campbell).

187 *See* Jack F. Trope & Walter R. Echo-Hawk, *The NAGPRA: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992). *See also* Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 152 (1996).

188 *See* Byrne, *supra* note 186, at 117.

Native Americans. These objects fall within the category of "cultural patrimony," and are presumed to be communally owned and inalienable by individual tribal members.[189]

Furthermore, if the tribe seeks to repatriate an object, NAGPRA requires that the object satisfy one of the categories in its classification scheme.[190] NAGPRA designates existing Indian tribal courts as the proper jurisdiction for adjudication of classification schemes and ownership disputes.[191] In turning the focus towards the tribe, the Act places the primary task of making factual determinations in the hands of the group, and leaves the classification of artifacts to Native interpretations and traditional knowledge. NAGPRA seeks to take the focus off the individual, and place the power of repatriation in the tribe. Thus, it is not surprising that only a tribe may make a claim for repatriation of an object or human remains, using Indian interpretations of federal definitions, which are to be delineated in tribal courts. Repatriated property is returned to the tribe and not to the individual tribal members.

The ICWA and NAGPRA are merely two examples of a growing recognition in the legislature that even in an era of self-determination, the federal government and Indian nations must honor their mutual, ongoing trust relationship.[192] Implicit in that obligation is the federal government's promise to recognize, value, and ensure the continued preservation of the communal property of Indian nations, which is integral to tribal existence.

IV. Recovering Collectivity

A. *The "Indian Copyright Act": A Proposal*

Since the era of Discovery and Conquest,[193] Native Americans have waged a four hundred year struggle for territorial sovereignty and political autonomy. All too often, "native interests have been

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189 *See* Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional "Taking?"* 6 Hofstra Prop. L.J. 1, 67 (1993).

190 *See* Strickland, *supra* note 117, at 181-90 (arguing that Western classification schemes are out of touch with the Native world view and fail to address what is sacred and secular in a holistic society).

191 *See id.* at 181.

192 *See* Vine Deloria, Jr. & Clifford M. Lytle, American Indian, American Justice 2-24 (1983).

193 *See id.* at 2-24. Deloria and Lytle divided United States Indian policy into six eras: Discovery, Conquest, and Treaty-Making, from 1532-1828; Removal and Relocation, from 1828-1887; Allotment and Assimilation, from 1887-1928; Reorganization and Self-Government, from 1928-1945; Termination, from 1945-1961; and Self-Determination, from 1961-present.

overwhelmingly subjugated to the political will of the majority."[194] Despite lip-service given to a federal policy of Indian self-determination, communal Indian existence is constantly threatened by an encroaching non-Indian world. The federal government's continued belief in and adherence to the trust doctrine is absolutely essential to Native cultural survival:

> The promise of a viable separatism forms the heart of the federal government's continuing trust responsibility toward the native nations. The continuing entitlement of tribes to maintain a separate existence, however, has been obfuscated by a modern trend to address native needs through the legal structure developed for a non-Indian society—a structure consisting primarily of constitutional and statutory protections. Such legal protections, geared as they are toward non-Indian needs and values, are often inadequate to protect the distinctive sovereign character of native nations. Now, with much of the native land base and corollary resources on the verge of irrevocable deterioration, renewed attention to the trust doctrine is critical.[195]

Congressional action, espousing the obligations embodied in the trust responsibility, has been critical to the preservation of Native Americans' tribal existence and cultural survival. The incorporation of indigenous philosophies into legislation that deals specifically with Native peoples, as demonstrated by the ICWA and NAGPRA, aids in remedying inequities manifested in Western law. The recognition of injustice, which initiated the enactment of those statutes, must be extended to the intellectual property arena as well.

A group approach to intangible property is essential in protecting the works and, in fact, the very survival of indigenous groups. Recognition of group rights to property would give Native Americans control over cultural patrimony, allowing them, as groups, to diminish the destruction of Native culture and sacred objects.[196] Further, this validation of Native rights will integrate Native conceptions of property into formal legal systems, requiring the politics of *ownership* to recognize the historical circumstances in which a claim arises.[197] The communal approach to entitlements in cultural property will not only preserve group property gener-

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194 Wood, *supra* note 138, at 1567.

195 *Id.* at 1567.

196 *See* Dougherty, *supra* note 18, at 356.

197 *See* Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. LAW & JURIS. 249, 272 (1993). *See also* Dougherty, *supra* note 18, at 376.

ally, but it will secure the work in the cultural context from which it arose, ensuring that the creation endures through time to be enjoyed by individuals whose identity is inextricably bound to the cultural work.[198]

The incorporation of indigenous perspectives into formal legal systems is essential to guaranteeing Native peoples' continued existence as groups, and would reaffirm their freedom to define themselves through their own culture.[199] As one scholar has posited:

> [A]ll of us have a duty towards cultural property because of its relative scarcity and its profound significance. *Cultural property takes on a life and meaning of its own; it acquires something like a soul and it is this soul, not a specific human end, which shapes our relationship with cultural property.*[200]

As the soul of the tribe, the cultural property of indigenous communities—around which creation, life, ceremony, and ritual are focused—must be preserved, consistent with Native peoples' own value systems, to ensure the continuation of culture and the "different-ness" of Native peoples.[201]

This paper seeks to generate a radical reconception of copyright laws as they relate to Native Americans. By its very nature, the Copyright Act blatantly omits and denigrates the intangible creations of indigenous communities. In order to prevent the complete annihilation of indigenous cultures, the Copyright Act must be adapted to accommodate the oral, collective, and inter-generational works of Indian peoples. This paper proposes a copyright law which: (1) is flexible enough to include the oral works of indigenous groups, which means significantly altering existing copyright requirements; and (2) mandates that disputes over the construction of the term "collective indigenous work" be resolved in tribal court, subject to interpretation by tribal law and custom.

This proposal is premised on the belief that a copyright statute specifically geared towards Indian peoples—one which encom-

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198 For a complete discussion of the economic affects of strict inalienability of cultural property see Moustakas, *supra* note 134, at 1203-21. *See also* Guest, *supra* note 83, at 124.

Not addressed in this paper are concerns regarding the suppression of individual rights in favor of group rights. For a discussion of such concerns, see Herz, *supra* note 123, at 713 (arguing that communal rights should not always prevail, but should always be given substantial consideration). *See generally* Clinton, *supra* note 128, at 739; Goldsmith, *supra* note 176.

199 *See* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L. J. 723 (1997). *But see* Moustakas, *supra* note 134, at 1206 (arguing for recognition of group ownership of cultural property granted under a regime of strict inalienability).

200 Harding, *supra* note 199, at 760 (emphasis added).

201 Meyers, *supra* note 148, at 82.

passes inter-generational, oral traditions, as well as indigenous perspectives—must be crafted expeditiously to ensure the continued survival of Native Americans' existence. The anticipated copyright scheme would define the parameters of a "collective indigenous work"; once such work is defined, copyright protection would attach. Strict definitions of "originality," "authorship," and the "fixation" requirements would no longer apply. Ownership of tribal intangible property would remain solely in the tribe forever, inalienable by individual tribal members. As rights-holders of intangible tribal property, Indian nations would be better equipped to navigate formal legal systems set up to insulate *owners* of intellectual property from infringement. The validation of collective indigenous works would allow tribes to exercise their rights by enjoining the marketing and dissemination of infringing works. Additionally, the proposed copyright protection would grant sole authority to the tribes themselves to make determinations about licensing and dissemination of works to the public for profit.

Disputes are certain to arise intra-tribally over the construction and interpretation of the term "collective indigenous work." The scope of the term should be left to the tribes themselves, who are in the best position to determine what works must be protected as collective creations. Congress has previously authorized similar methods of interpretation with prior statutes. Both ICWA and NAGPRA embody federal justifications for laws specifically tailored to ensure the survival of Native groups and Indian cultures. Both statutes combine federal legislation with indigenous perspectives to devise a "classification" and "preferencing" scheme that serves the needs of both sovereigns.

For example, in the child placement preferencing procedures of the ICWA, the tribe is granted jurisdiction to decide the fate of an Indian child if the child must be removed from his/her biological parents.[202] Similarly, NAGPRA designates existing Indian tribal courts as the proper jurisdictional forum for adjudication of classification schemes and ownership disputes.[203] It is the responsibility of the tribe to make factual determinations regarding artifacts, using Native interpretations and traditional knowledge.[204] As with ICWA and NAGPRA, the copyright proposal would grant the tribes exclusive jurisdiction to define "collective indigenous work." Factual determinations would be made within the tribal court system,

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202 *See* 25 U.S.C. § 3001.

203 *See* Native American Graves Protection and Repatriation Act ("NAGPRA") 25 U.S.C. §§ 3001-3013 (1991).

204 *See id.*

where tribal law and custom would govern the parameters of interpretation.[205]

B. *An Objection and Response*

An amendment to modern intellectual property laws to allow the copyrightability of oral literature must face its most profound criticism: that is, such a proposal is beyond the scope of the United States Constitution. David Nimmer, who has helped to shape the law of copyright through his renowned treatise,[206] relates that the "fixation" requirement of the Copyright Act is not only statutory, it is constitutional. The Copyright Clause of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[207] Although Nimmer himself notes that there are no decisions directly so holding, courts have followed the premise that in order for a work to constitute a "writing," it must be embodied in some tangible form.[208] Nimmer argues: "If the word 'writings' is to be given any meaning whatsoever, it must, at the very least, denote 'some material form, capable of identification and having a more or less permanent endurance.'"[209] Therefore, Nimmer concludes, without tangible form there can be no writing; with no writing comes no constitutionally authorized copyright protection.[210]

Nimmer has articulated a forceful objection to altering the "fixation" requirement underlying copyright law. There are two possible responses to Nimmer's argument. First, courts have been incredibly amenable to efforts to expand the definition of the "writing" requirement in the technological age.[211] Perhaps that flexibility results from a desire to encourage production of intangi-

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205 Any constitutional objection based on Equal Protection serves as ineffectual opposition to the proposed statute. As Native Americans are a distinct political group within the United States, legislation geared specifically towards them does not trigger strict scrutiny. *See* Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

206 NIMMER, *supra* note 49. I, like many, have relied extensively on his work in my study of copyright.

207 U.S. CONST. art. I, § 8, cl. 8.

208 *See* NIMMER, *supra* note 49, § 1.08.

209 *Id.* (quoting Canadian Admiral Corp. v. Rediffusion, Inc., [1954] Can. Exch., 382, 383).

210 *See id.* § 2.03.

211 *See, e.g.*, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (computer source code and object code); Tandy Corp. v. Personal Micro Computers, Inc., 524 F. Supp. 171 (N.D. Cal 1981) (computer program imprinted on a silicon chip). Congress has agreed with the courts' broad reading of the constitutional "writing" requirement, expanding the definition of "works of authorship" in the Copyright Act to include, among other things, pantomimes, sound recordings, and motion pictures. *See* 17 U.S.C. § 102.

ble property by ensuring ownership rights for capitalistic vendors. Whatever its source, the contention that copyright law extends only to traditional "writings" is comical, if not absurd. Second, Nimmer's treatise deals with copyright as it is applied in the United States generally, grounded in Congress' authority to legislate in this area, which is based in the Constitution's Copyright Clause. However, Nimmer does not address whether constitutional authority for a copyright statute might also be vested in the Indian Commerce Clause. Given Congress' constitutional authority to "regulate trade with the Indians" and its historical inclination to do so, Congress has the power to enact copyright laws specific to Native Americans through the Indian Commerce Clause.

1. "Writings" Redefined

Although the Copyright Clause of the Constitution initially vested authority in Congress to grant copyright protection only to "writings," changes in technology have prompted revisions to the Copyright Act. "By many amendments, and by complete revisions in 1831, 1870, 1909, and 1976, authors' rights have been expanded to provide protection to any 'original works of authorship fixed in any tangible medium of expression,' including 'motion pictures and other audiovisual works.'"[212] When the Supreme Court has been called upon to determine the scope of a "writing" under the Constitution, the Court has acknowledged the broad power vested in Congress to construe the Constitution broadly to encourage "useful arts."[213]

In *Goldstein v. California*,[214] the Supreme Court delineated the scope of Congress' power to interpret "writings" under the Constitution:

> [A]lthough the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor .... *[W]hether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress* .... As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.[215]

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212 Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 460-61 (1984).
213 *See, e.g., id.* at 429.
214 412 U.S. 546 (1973).
215 *Id.* at 561-62 (emphasis added).

Where technological innovation and capitalistic motives dictate, courts have consistently supported the expansion of the term "writing" for copyright purposes. The "fixation" requirement served as the pivotal factor in several cases involving claimed infringement of copyrighted video games.[216] Defendants in a number of cases claimed that they were free to copy the plaintiffs' games because the inevitable variations in the appearance and sound of the games, that result from the differing skill and judgment of the persons playing them, prevent any kind of consistent pattern necessary for "fixation."[217] These arguments have consistently been rejected. The Second Circuit held in *Stern Electronics, Inc. v. Kaufman*[218] that the audiovisual game was "permanently embodied in a material object, the memory devices, from which it can be perceived with the aid of the other components of the game."[219] As to the claim that a player's participation presents the fixing of particular audiovisual patterns, the court in *Williams Electronics, Inc. v. Arctic International, Inc.*,[220] concluded:

> Although there is player interaction with the machine during the play mode which causes the audiovisual presentation to change in some respects from one game to the next . . . many aspects of the display remain constant.[221]

Admittedly, oral traditions are not "fixed" in the way that the Constitution envisioned. But recent cases interpreting the "fixation" requirement in relation to modern technological innovations have shed new light on the potential scope of "writings." As seen in these cases involving disputes over video games, which remain lifeless and intangible until life is breathed into them by use of a machine, the "authors" are extended monopoly rights in the creation. Even variations in the games, influenced by player skill level, speed, and judgment, are insufficient to redefine the work as transitory, or ineligible for copyright protection. The analogy to oral traditions—lifeless until animated by the narrator, varying by circumstance, style, and skill of the story teller—is apparent and persuasive. It is not a great leap to assume Congress' authority to expand the definition of "writings" beyond that which has already been accomplished.

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216 *See, e.g., Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Williams Elecs., Inc. v. Arctic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

217 *See* COPYRIGHT FOR THE 90's 95 (Gorman et al. eds., 4th ed. 1993).

218 669 F.2d at 852.

219 *Id.* at 856.

220 685 F.2d at 870.

221 *Id.* at 874.

2. Indian Commerce Clause

From the early days of the Republic, Congress has exercised its power over commerce with Indian tribes by regulating all manner of relations between non-Indians and Indians in Indian Country.[222] This practice was embodied in the Constitution, wherein Congress was granted the exclusive right to govern commerce with Indian nations through the Indian Commerce Clause.[223] The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.[224] Pursuant to this constitutional grant of authority, Congress has passed numerous statutes that govern Indian affairs in Indian Country, including the Indian Gaming Regulatory Act,[225] the Indian Arts and Crafts Act,[226] the ICWA,[227] and NAGPRA.[228]

Two of these statutes, the Indian Arts and Crafts Act ("IACA") and NAGPRA, were enacted specifically with the goal of protecting and preserving Native cultural property. As discussed above, the primary objective of NAGPRA is to establish a legal mechanism through which Indian tribes and federally-funded museums work towards the classification and repatriation of sacred cultural artifacts and human remains.[229] Taking a more individualistic approach, the IACA seeks to protect and promote the art of Native artisans, advance tribal self-sufficiency, guard Native American cultures, and insulate consumers against imitations.[230]

The passage of NAGPRA by Congress in 1990 demonstrated "renewed interest in and [a] more enlightened view toward Native American cultures and established a fundamental principle of Native American ownership of their cultural property."[231] During this

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222 *See, e.g.*, Trade and Intercourse Acts, 1 Stat. 137 (1790), 2 Stat. 139 (1802), 4 Stat. 729 (1834).

223 U.S. CONST. art. I. § 8, cl. 3.

224 *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

225 25 U.S.C. § 2710(d). *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)(construing application of the Indian Gaming Regulatory Act).

226 Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. § 305-305(e) (Supp. II 1990)); 18 U.S.C. §§ 1158, 1159 (Supp. II 1990).

227 25 U.S.C. § 1902.

228 Pub. L. No. 101-601, 104 Stat. 3048 (1990). *See also* Dean Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 125 (discussing the National Historic Preservation Act, 16 U.S.C. § 470; and Archeological Resources Protection Act, 25 U.S.C. § 3001).

229 *See supra* Part III.A.2.; Byrne, *supra* note 186, at 126; *see also supra* note 190.

230 *See* Guest, *supra* note 83, at 133. *But see* Farley, *supra* note 120. Despite Congress' efforts in this area, however, enforcement of the Act has been virtually nonexistant. "The Act, however, appears to be 'only a paper tiger' since there has never been a single prosecution in the history of the Act. In fact, after more than sixty years on the books, the Interior Department has not even promulgated any regulations for its enforcement." *Id.* at 51.

231 Guest, *supra* note 83, at 133 (internal quotes omitted).

period of revitalized interest in Native American cultures, Congress also overhauled the Indian Arts and Crafts Act to expand the protection of Native American arts and crafts by encouraging tribes to register their trademarks and by assisting Native American artisans in marketing their works.

The enactment of various congressional statutes dealing with Indian affairs and commerce confirms Congress' role in defining laws and protections in Indian Country. Nevertheless, despite Native opposition to non-Native influences over tribal matters, existing jurisprudence supports the proposition that Congress has the authority to enact legislation for the benefit and advancement of commerce with Indian tribes. Moreover, Congress' recent and particular fascination with the protection of Native cultural property, tangible and intangible, reinforces the foundation for enacting an "Indian Copyright Act." The proposed legislation, even if prohibited by the Copyright Clause of the United States Constitution, finds ample authority via the Indian Commerce Clause.

C. *An Alternate Justification*

Even beyond the preservation of Indian law and culture, an additional, profound justification persists for the recognition of group rights to intangible property: such recognition is crucial to facilitating collaborative creations of the technological age. As the obsolescence of the Wordsworthian author-genius becomes ever more apparent, collective "authors" wrestle with the borders and boundaries of the copyright law. The designation of the writer as lone inventor has shown itself to be outdated, inappropriate, and entirely inadequate to deal with the collaborative creations of the technological age. The essence of writing is shifting, forcing the dissolution of boundaries set up by the Romantic ideal of the "sole creator."[232] Modern writing is about cooperation and the integration of ideas, fueled by the ease with which intellectual musings and textual discourse can be bounced from innovator to innovator through advanced technology. Modes of authorship have become not only cooperative, but, with the accessibility of the personal computer and the addiction to the electronic message, writing has also become an interactive experience. The reader receives electronic messages written by another, then adds to the message, moving towards the "unending process of reading and writing which reverses the trajectory of print, returning us to something very like the expressly collaborative writing milieu of the Middle Ages and

232 *See* Woodmansee, *supra* note 10, at 288-89.

the Renaissance with which we began."[233] The old (indigenous) methods of collaboration, rooted in another age, are being revived by electronic technology.[234]

Scholars have taken modern group productions and attempted to situate them into the existing copyright scheme, but with little success. "By relying on traditional models of originary, clearly individuated authorship and creation, we may distort or stifle undreamed-of creative possibilities and block new directions in which innovative technologies and their applications may lead us."[235] The current system altogether fails to encompass new forms of authorship and creation represented by the wide-ranging collaborative, serial, and "polyvocal practices" made possible by digital communications technologies.[236] The formation of a more inclusive copyright paradigm would successfully complement the emergence and solidification of modern creative techniques and processes. Such reformation would serve as an incentive to the modern, interactive writer to continue to dream in a technological world, devoid of boundaries.[237]

However, this paper does not postulate that a group right in cultural property be extended to all groups immediately, or for the same reasons. Despite the applicability of group-rights arguments for all creators working within the paradigm of the outmoded Copyright Act, entitlements must be extended first and immediately to Native peoples. As demonstrated through the ICWA and NAGPRA, the federal system has undertaken to ensure the continued communal existence of Native peoples. The obligation of trust that has existed between Indian nations and the federal government, since the drafting of the Constitution, compels the enactment of laws that guarantee the cultural and political survival of indigenous groups. The disenfranchisement of Native Americans in formal legal systems must move Congress to act swiftly and specially to protect cultural property in furtherance of its trust respon-

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233 *Id.* at 290.

234 *See id.*

235 Keith Aoki, *Forward: Innovation and the Information Environment: Interrogating the Entrepreneur*, 75 OR. L. REV. 1, 9 (1996).

236 *Id. See* Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works and Entrepreneurship*, 75 OR. L. REV. 257 (1996).

237 For a discussion of challenges of "authorship" made prevalent by new technologies, see Pamela Samuelson, *Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Questions They Raise*, 53 U. PITT. L. REV. 685 (1992); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 1 (1993); Jaszi, *supra* note 17, at 319-20; Woodmansee, *supra* note 10, at 289-91; Timothy L. Butler, *Can a Computer Be an Author: Copyright Aspects of Artificial Intelligence*, 4 HASTINGS COMM. & ENT. L.J. 707 (1982).

sibility to Indian nations. Congress' authority via the Indian Commerce Clause is clear; the prompt introduction of an "Indian Copyright Act," a necessity.

CONCLUSION

> Anthropologists have predicted the end of the indigenous people of the Americas for a long time. Yet this year my father was amazed to see how many deer dancers there were in the plaza at Old Laguna. Seventy-five or eighty deer dancers, more deer dancers than my father had ever seen before.[238]

Cultural property is the very soul of Indian tribes. These creative works—whether creation stories, ceremonial songs, or medicine pouches—provide a window through which the Native world can be viewed. In a holistic society, an object's meaning is defined by the context in which it is used. The world is not divided up into distinct pieces, but is interdependent, organic, and cyclical. Native peoples imagine the world—natural and supernatural, mundane and magical—as balanced, alive, and ever changing. Where Europeans found inconceivable inconsistency, Native Americans find compatibility and divine interconnectedness.[239] The religious and the secular are one in Indian culture, with changing texts and contexts and realities. One mythology generates the spiritual and the communal. These values exist interchangeably in the Indian world. Thus, when historical memory is destroyed, everything in the Native world is threatened.[240]

For Native Americans, the Western legal infrastructure is the narrative of "white law"—a system devoid of indigenous values, concepts, and lifeways. Native peoples remain outside of most formal legal systems in the United States and continue to be surrounded by dehumanizing images of the Indian, supporting the myth that Native peoples are inhuman, timeless, and essentialized.[241] Placing the destiny of cultural property, which is so inextricably bound to the communities from which it arises, back into the hands of Native peoples, helps to ensure that the cultural symbols and intangible property of indigenous peoples are respected and understood, making Indian cultural survival more certain.

Losing a piece of the tribal story, like *Song of Joy*, is a depriva-

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238 LESLIE MARMON SILKO, YELLOW WOMAN AND A BEAUTY OF THE SPIRIT 200 (1996).
239 *See* Strickland, *supra* note 117, at 181-82.
240 *See* VINE DELORIA, JR., GOD IS RED 218 (1973).
241 *See* Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1036 (1995).

tion that cannot be satisfied by payment or apology. The Ami lifeway belongs to all tribal members, living and dead and unborn, and must be kept sacred by the community from which it emerged. The appropriation of indigenous works degrades Native life on every level, illustrating the vast distance that continues to separate the Native from the non-Native world. Disturbing the tribal creation means removing the work from the Native world in which it has meaning, power, and endurance.

Preserving intangible property through a progressive group-rights framework may prove to be the most powerful tool available for indigenous groups' cultural survival, as the songs and stories represent the collective memory of Native peoples, reinforcing their existence through time and distance. As Silko wrote, anthropologists have predicted the end of indigenous peoples for a long time, but we are still here.[242] The adoption of indigenous values into the current legal infrastructure will perhaps aid in proving anthropologists wrong for many generations to come.

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[242] *See* SILKO, *supra* note 238.