PERPETUATING CULTURES:
WHAT FAN-BASED ACTIVITIES CAN
TEACH US ABOUT INTANGIBLE
CULTURAL PROPERTY

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I. INTRODUCTION

In the heart of sprawling Tokyo, within the same municipality as the headquarters of the Metropolitan Government and the busiest train station in the world1 lies Kyouji Temple, a Shingon Buddhist compound that has seen the rise and fall of four national governments2 and the reigns of nineteen emperors.3 Representing cultural traditions in Japan spanning 1200 years,4 Kyouji’s wooden halls have hosted the sutric chanting of Buddhist monks for centuries. But while the words remain largely unchanged and recited by a monk dressed in a traditional brown and tan robe, today’s chance onlooker might be surprised to hear those ancient chants replaced by sutric rap5—and accompanied, at times, by contemporary hip hop performing artists.6 This juxtaposition, though perhaps indicative of the paradoxical mix of the ancient and the modern that has come to define 21st-century Japan,7 speaks to the eternal struggle that faces religions, associations, and cultures alike: the challenge of maintaining and expanding


4. See VARLEY, supra note 2, at 51 (noting that Shingon Buddhism was founded by the priest Kukai (774-835) after his mission to China in 804).


7. See VARLEY, supra note 2, at 351 (noting that Japan’s eclectic modern culture arose “within a context of a history of abundant cultural borrowing from China in premodern times and the West in the modern age, [while] . . . retaining[ing] a hard core of native, social, ethical, and cultural values by means of which they have almost invariably molded and adapted foreign borrowing to suit their own tastes and purposes”).
their membership. Kansho Tagai, also known as “Mr Happiness,” is
the monk responsible for this fusion of Buddhist sutras8 and rap mu-
9 sic. He describes his efforts as a way to “make [monks] accessible
and wave people closer so that they can understand Buddha’s
10 words.” In a country where dwindling interest and financial support
force hundreds of Buddhist temples to close each year,11 monks like
Tagai must increasingly choose between adaptation and extinction.
12 For Mr Happiness, the choice is clear.

And he is far from alone. Hogen Natori and his fellow monks
13 have taken their shomyo12 chanting skills to a local music club,
“creating a monthly tradition that has developed a following.”13
14 Monks from Tokyo’s Komyoji Temple have added café tables to their
compound, while the Tsukiji Hongwanji Temple has “hosted a fashion
show which featured monks and nuns strutting the catwalk in hip
clothes.”14 Jodo15 sect monks have opened a chain of bars called
Vowz,16 where the monks assume the traditional role of bartenders,
offering “not only stiff cocktails, but also advice on spiritual mat-
ters.”17 While some monks might disapprove of their methods,18
Tagai and his likeminded brethren have found tangible success in
their unorthodox approaches: attendance at the Kyouji Temple has in-
creased by fifty percent,19 and the Vowz bars were recently featured in
a Japan Times article highlighting Tokyo’s top theme bars.20

So what can intangible cultural property scholars learn from
these Buddhist monks? Ironically, help in discerning these contempo-

8. “A scriptural narrative, especially a text traditionally regarded as a discourse
browse/sutra (last visited Dec. 1, 2010).
9. Japanese Monk Sings Rap to Bring Buddhism to Young Audience, THE BUDD-
DHIST CHANNEL (Feb. 28, 2008), http://www.buddhistchannel.tv/index.php?id=44,5969,
0,0,1,0.
10. Id.
11. Singer, supra note 2.
12. A “classical chant of Buddhism in Japan. Both the Tendai and Shingon sects
maintain the tradition and use its theoretical books and notation systems as the basis
for other forms of Buddhist singing.” Shomyo Definition, DICTIONARY.COM, http://dic-
14. Id.
15. Meaning “Pure Land,” “a paradise believed by the followers of a Mahayana sect
(Pure Land sect) to be ruled over by a Buddha (Amida), whose hope it is to bring all
browse/jodo (last visited Dec. 1, 2010).
17. Singer, supra note 2.
18. See id.
19. Id.
20. Coldicott, supra note 16.
rary examples of cultural adaptation from the Far East may be found in the literary history of the West. Centuries ago, the Jacobean poet John Donne observed that “all mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated.”

Donne contemplated the interconnectedness of individuals, but his words can easily extend to cultures. Just as no individual “is an island, entire of itself,” no culture arises from a vacuum; instead, cultures are in equal parts products of the interactions between their constituent members as well as their collective interactions with those outside their respective communities.

The interactions between members of a culture often determine whether and in what ways traditions are carried on, reworked, or abandoned, or whether and when new traditions are established. When cultures themselves interact, peoples are intermingled, ideas are exchanged, resources are traded, and, at times, divergent values and world views are drawn into open conflict. Whether for good or ill, these interactions continually reshape and perpetuate a culture’s traditions, as its constituent members interpret influences from within and from without.

This process of perpetuation marks cul-

22. Id.
23. Without a doubt, the power dynamics at work between dominant and underrepresented cultures play a significant role in the ways in which these conflicts are resolved, most often to the disadvantage of the latter. See generally Robert A. Williams, Jr., Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 Ariz. L. Rev. 237 (1989). Writer and essayist Albert Memmi famously describes four essential elements of racist-imperialist discourse:

1. Stressing the real or imaginary differences between the racist and his victim.
2. Assigning values to these differences, to the advantage of the racist and the detriment of his victim.
3. Trying to make them absolutes by generalizing from them and claiming that they are final.
4. Justifying any present or possible aggressions or privilege.

ALBERT MEMMI, DOMINATED MAN: NOTES TOWARD A PORTRAIT 186 (1968).

However, not all cultural interactions are necessarily subject to these dynamics, and, even among those which are, the magnitude of their effect inevitably varies from one context to the next. Moreover, the aggressor-victim model of cultural interaction is, by its dualistic list of dramatis personae, limited to contexts involving two identifiable actors; its usefulness in contexts involving the interaction of more than two cultures, or in interactions that do not fit the paradigmatic aggressor-victim model, is accordingly limited. As a result, in the interest of exploring the core elements of cultural interactions in general—which will contribute a necessary foundation for subsequent contextual analyses—this Article will table concerns of power disparity between cultures for the particularized, nearly case-by-case consideration that such an inquiry necessitates.

ture as something ongoing and dynamic, defined by the same continual process of refinement and translation that Donne contemplated of humankind nearly four hundred years ago—and that those like Kan-sho Tagai exemplify today.

Recognizing the crucial roles that interaction and adaptation—on both an intra- and intercultural basis—play in the perpetuation of a culture, this Article takes the potentially controversial position that, as far as intangible\(^{25}\) cultural property is concerned, there is something inherently oxymoronic and self-defeating about the term “cultural preservation.”\(^{26}\) Members, in seeking to preserve the traditional intangible touchstones of their culture, often succeed only in estranging them from the future members on whom their perpetuation—and the culture’s very survival—solely depends.\(^{27}\) Attempts at using United States copyright law to lay exclusive claim to a culture’s intangible property for [a man’s] life, she needs a perhaps unreckonable series of generations, each of which passes its own enlightenment to its successor in order finally to bring the seeds of enlightenment to that degree of development in our race which is completely suitable to Nature’s purpose.”).

25. Intangible cultural property stands in clear contrast to tangible cultural property, in that the essence of the latter is finite, corporeal, and decayable. Intangible cultural property, like intellectual property in general, may be fixed in tangible media, but its essence remains potentially inexhaustible, incorporeal, and enduring. While this category also extends to forms of traditional knowledge or biological and genetic samples, the scope of “intangible cultural property” for the purposes of this Article is limited to semantic-based, collective-authorship-derived elements, such as traditional folklore and artwork.


gible properties inevitably suffer from a similar defect. Cultural intangibles either prove themselves products of too great a diversity of authorship to qualify for protection, or the communal, comingled, and perennial nature of their authorship is necessarily distorted to fit within the Westernized paradigm of copyrightable subject matter.\(^2^8\)

One way or the other, it seems the fight for recognition within existing legal frameworks is one that proponents of intangible cultural property cannot presently win—at least not without great cost.

A solution to this dilemma may arise from an admittedly unlikely source: the class of purportedly copyright-infringing activities best described as “fan-based.”\(^2^9\) These activities, born of today’s increasingly globalized fan communities, trace their descent from traditional folk culture,\(^3^0\) a lineage that portends both the subtle link between fan-based works and intangible cultural property, and how the unique attributes of the former may help the latter find its place in the grand scheme of copyright—and the law in general.

Part II explores the injury that occurs when individuals appropriate or adapt intangible cultural property without the sanction of its source culture, and delineates both its intracultural and intercultural dynamics. Part III draws on preceding explorations of fan-based activities and interpretive rights to construct a cross-cultural appropriative framework capable of revealing a means of protecting source cultures from injury: the stamp of cultural canonicity. Part IV explores the design and implementation of the stamp, and tests its viability against established real-world examples. Part V concludes.

28. See, e.g., Kristen A. Carpenter et al., In Defense of Property, 118 Yale L.J. 1022, 1027-28 (2009) (noting the challenges that the classic view of property law present for the group-oriented claims of indigenous cultural property); Christine Haight Farley, Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, 30 Conn. L. Rev. 1, 56-57 (1997) (noting that strengthening existing protections “may inhibit free expression and upset the delicate balance that the copyright law has achieved,” and that, “even if copyright law were stretched to accommodate the needs of [indigenous groups], the result may be damaging to the integrity of [their] culture, as well as [their] development”).

29. As exemplified by fan-made comics (called doujinshi) and fan-subtitled anime episodes (called fansubs), an activity may be categorized as fan-based if it is “(1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the author’s economic and creative interests.” Nathaniel T. Noda, Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities, 20 Seton Hall J. Sports & Ent. L. 131, 139 (2010) [hereinafter Noda, Copyrights Retold]. See also id. at 134 n.10; Nathaniel T. Noda, Article, When Holding On Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities, 5 U. Denver Sports & Ent. L.J. 64, 64 (2008) [hereinafter Noda, When Holding On Means Letting Go].

II. EXPLORING THE UNASKED QUESTION IN INTANGIBLE CULTURAL PROPERTY

Much scholarly ink has been spilt on the subject of intangible cultural property: its scope, its integrality with regard to self and group identities, its distinctiveness from traditional conceptions of intellectual property, and its need for special protections beyond the present reach of United States intellectual property law. Despite these inquiries, one question at the heart of the discussion remains strangely unexplored: how exactly does the use of intangible cultural property by outsiders injure the members of a source culture? Put in another way, how does the appropriation and adaptation of intangible cultural property in itself injure the members of that culture?

A. SURVEYING THE INJURY: OutKast, Australian Carpets, and Chief Illiniwek

Examples of appropriation abound in intangible cultural property discourse as do lamentations of the injury suffered by members of the appropriated culture. The following three examples span the panoply of contexts in which cultural property has been put to uses that have given members of their source cultures cause for concern. Together, these examples offer a roadmap for charting and understanding the nature of the injury that occurs in cases of cultural appropriation.

In a performance for the 2004 Grammy Awards, the American hip-hop group OutKast unveiled a rendition of their hit song “Hey Ya” integrated with what could be described as emblems of Native Ameri-
can intangible cultural property.37 Introduced by a recording of the sacred Navajo “Beauty Way” song,38 OutKast’s performance involved a space-faring tipi backdrop, green buckskin-like39 costumes, feathered headdresses, and elements of choreography that “imitat[ed] a traditional Plains-tribe war cry.”40 Many Native Americans were upset at an “improper” use of the “Beauty Way” song,41 and expressed feelings of “violation over the use of Indian symbols reserved for ceremonial purposes, like feathers and war paint.”42 Others expressed outrage over the “stereotypical performance” reminiscent of the “fake Indians in bogus Hollywood production numbers in the 1940s big-band era,”43 declaring it “on par with white people dancing sexually in black face, or yarmulkes, or the vestments of the Catholic Church.”44

The Australian carpet incident involved Mr. Bethune, an Australian entrepreneur who produced carpets containing Aboriginal designs and subsequently—and fraudulently—marketed them as paid collaborations with Aboriginal artists.45 Bethune neither obtained authorization from the Aboriginal artists whose works he copied, nor actually paid them any royalties for the use of their works in his carpets.46 These aspects of Bethune’s behavior in the Australian carpet incident were patently illegal, contravening both copyright law and fair trade practices.47 However, those aspects have everything to do with the injuries suffered by the individual Aboriginal artists upon whose works Bethune infringed, and nothing to do with the injury which the Aboriginal people themselves suffered at Bethune’s hand. The latter injury lies in the fact that the designs he copied included “some of the most sacred Aboriginal images . . . depict[ing] creation stories and stories of the Dreamtime, that ‘indefinable period of past time which to

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37. See, e.g., Susman, supra note 36.
38. Riley, supra note 34, at 70.
40. Riley, supra note 34, at 70.
42. Riley, supra note 34, at 70 & n.8.
44. Adams, supra note 43.
45. See Farley, supra note 28, at 4-5.
46. Id.
47. See id. at 6.
the Aborigines is the source of all knowledge and of all living things." To ensure their accuracy, Aborigines only allow clan-approved artists to reproduce those images; outsiders would never be allowed to do so. The viewing of these sacred designs is limited within the Aboriginal community to select ceremonies, and even then, only by individuals who have proven themselves worthy. Thus, Aboriginal cultural members saw Bethune's appropriations as nothing less than "the co-opting of the Aboriginal peoples' spiritual traditions." "the designs would both be depicted and seen by unauthorized persons[,] . . . uprooted from their familiar context and placed in one in which sacred symbols would become meaningless."

Chief Illiniwek—portrayed by a college student wearing traditional Indian regalia such as buckskin clothing, a feathered headdress, and war paint, and who performed a dance described as "half powwow and half cheerleading"—presided as the mascot of the University of Illinois at Urbana-Champaign's "Fighting Illini" for more than eighty years, though not without controversy. While supporters of the Chief cited his decades-old existence as "a central symbol not just of a team or school, but of a community," and pronounced the performance "dignified and moving," many others decried the Chief as a form of "racial mockery and an appropriation of Native American culture." The NCAA ultimately agreed with the latter group, ruling Chief Illiniwek "an offensive use of Native American im-

49. Id.
50. Id.; but see id. at n.15 (noting that clan elders had allowed the "original" paintings to be displayed in certain museums, which in turn were allowed to make reproductions, including portfolios to serve as educational resources for teachers and students, evincing a desire to share those paintings with the larger academic community).
51. Id. at 6.
52. Id. at 5.
53. Interestingly, the regalia used by the mascot, purchased in 1982 from Sioux Chief Frank Fools Crow, originally incorporated sacred eagle feathers. Associated Press, Sioux Ask University to Return Chief Illiniwek Regalia, ESPN.COM (Jan. 19, 2007), http://sports.espn.go.com/ncaa/news/story?id=2736134. However, the Oglala Sioux Tribe's eventual demand for the physical return of the regalia—in particular the sacred eagle feathers—concerns matters of tangible cultural property, and thus extend beyond the scope of this Article.
57. Mezey, supra note 26, at 2004.
agery," and imposed sanctions on the University of Illinois that led to the university's retirement of the mascot.

The foregoing examples reveal that the injury in cases of intangible cultural property appropriation usually exhibits characteristics stemming from at least one of two distinct dynamics: an intracultural dynamic, regularly described as the violation of restricted or sacred cultural elements, and an intercultural dynamic, commonly characterized as the affirmation of abusive stereotypes—and sometimes both simultaneously. Each dynamic entails a host of complicated and multi-tiered issues, and accordingly warrants individual scrutiny.

B. THE INTRACULTURAL DYNAMIC: VIOLATING THE SACRED

The clearest example of the violation of sacred cultural property can be found where the cultural property in question is tangible: the bones of a progenitor displayed publicly in a museum; the relic displaced from its native people and surroundings; the burial ground disturbed or destroyed by burgeoning real estate development. The root of the injury in these cases lies in the dominion exerted over the property by cultural outsiders. Outsiders, rather than the members of the source culture, have determined the disposition of the property in question, often putting that property to uses antithetical to the source culture's sensibilities. The tangible nature of the cultural

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58. Associated Press, supra note 56.
59. Id.
60. See Farley, supra note 28, at 5-6; Riley, supra note 34, at 71 & n.8.; Navajos, supra note 41.
61. See Micek, supra note 43; Associated Press, supra note 56.
64. E.g., Nihipali, supra note 27, at 28.
65. Cf. Carpenter et al., supra note 28, at 1031 (noting that "[b]ecause Native Americans had no property rights in the burial remains of their people, they were unable to direct what happened to the artifacts and remains housed within museums"); Moriwake, supra note 57, at 289-90 (describing how "[t]he statements of the Providence officials, focusing on property rights and the 'utilitarian' nature of the object, project a 'master narrative' of control and superiority over both the ki'i la'a'u and the culture that produced it," while "[t]he Hawaiian claim, in contrast, emphasizes the Hawaiians' cultural, religious, even familial bond to the ki'i la'a'u"); Nihipali, supra note 27, at 28 (noting that, prior to the State of Hawaii's involvement in the reinterment of na iwi kapuna (remains—literally the "bones"—of Hawaiian ancestors) at Honokahua, and federal legislation like the Native American Graves Protection and Repatriation Act (NAGPRA), "museums, State and private archeologists had carte blanche to do whatever they chose, often without the Hawaiian community even knowing what was happening").
66. See, e.g., Carpenter et al., supra note 28, at 1030-31 (describing how, contrary to the cultural burial practices of his people and personal wishes of his son, Minik, the remains of the Inuit named Qisuk "was turned over to the [American Museum of Natu-
property defines this injury; because the property exists only in a finite, particularized form, any measure of control exerted over it by outsiders only serves to divest it, by a commensurate degree, from the members of its source culture. Put another way, tangible cultural property, like all tangible property, can only be in one place at one time. If outsiders use it in one way, members of the source culture are precluded from using it themselves for the duration of that use. The injury, then, occurs because outsiders, in exerting control over tangible cultural property, take away more than mere possession. They undermine the members' ability to exercise the cultural beliefs and practices surrounding that property, and in that way, undermine the sanctity—and, ultimately, the very survival—of the source culture itself. It is this aspect of the injury that necessitates redress; without it, underrepresented cultures would have no defense against tangible appropriations by dominant cultures that could, ultimately and cumulatively, lead to the demise of their cultural identities.

Similarly, the injury perceived in cases of intangible cultural property appropriation also begins with dominion exerted by cultural outsiders. A rapper who juxtaposes a recording of a sacred Navajo song with the performance of his own artistic creation exerts a degree of dominion over that song, just as a carpet maker who assimilated History's superintendent, who then defleshed, preserved, and prepared Qisuk's skeleton for display at the museum); Moriwake, supra note 63, at 292-94 (describing contrast between the traditional use of a ki'i la'au "in a ceremonial manner by [a] chief to call upon his ancestors to protect and benefit the Hawaiian people that he ruled" and the Museum of Natural History's plans to "use the proceeds [of the ki'i la'au's sale] for an exhibit and companion publication of the objects in [their] Oceania collection") (internal quotation marks omitted); Nihipali, supra note 27, at 28 (describing the injurious results of construction digging for The Ritz Carlton, Kapalua: "Eleven hundred kupuna (ancestors) had been evicted from their moe loa (long sleep)!").

Interestingly, recent work by British mathematical physicist Sir Roger Penrose predicts that matter small enough to produce an insignificantly miniscule gravitational field can actually exist in more than one place at a time. See Roger Penrose, Road to Reality 856-60 (2005). However, unless we reach a point in the future where a microscopic system—an electron, for example—obtains the requisite distinctiveness and meaningfulness to qualify as an object of cultural property, this complication has no foreseeable bearing upon matters of tangible cultural property. 68. Cf. Carpenter et al., supra note 28, at 1125 (noting the importance of stewardship of cultural property in "enabl[ing] the continued cultural survival of indigenous peoples"); Nihipali, supra note 27, at 31-32 (lamenting how the process of cultural assimilation—of becoming "good Hawaiian[s]"—taught Native Hawaiians "to be ashamed of [their] native ways, and [their] language, cultural practices, and spiritual beliefs were banned," and "served as rationalization through biblical justifications for . . . appropriation by American colonization").

69. See Riley, supra note 34, at 70.
lates traditional Aboriginal iconography in his wares enacts a degree of dominion over those designs. To the extent that these appropriations run contrary to traditional, culturally determined uses, the members of each respective source culture may have every right to feel outraged. However, it is important at this step in the analysis to reiterate and distinguish the finite and particularized nature of tangible property from the inexhaustible and multiplicative nature of intangible property. Unlike its tangible counterpart, intangible cultural property is not linked to particular manifestations; intangible cultural property can be in multiple places—and put to multiple and disparate uses—at the same time. As a result, the dominion exerted on intangible cultural property by outsiders does not, in itself, divest cultural members of control over the same intangible cultural property, or prevent them from carrying on the cultural beliefs and practices associated with that property. Unlike the tangible commons in Garrett Hardin's "The Tragedy of the Commons," intangible cultural property by its very nature cannot be overgrazed or overharvested. Each additional use of intangible property, whether by cultural insiders or outsiders, does not intrinsically diminish the value of the property in question or its subsequent ability to be used by others, and thus engenders no negative externalities.

70. See Farley, supra note 28.

71. That there is some material—and, in that way, addressable—injury that results from some cases of intangible cultural property appropriation is beyond dispute. For an analysis that identifies the immediate cause of that injury as the cultural confusion that often results from appropriation, see infra Part II(C). However, so long as the immediate cause of the injury is distinct from the act of appropriation itself, there may be a means of preventing the appropriation from precipitating that immediate cause, and, correspondingly, a way to simultaneously protect source cultures and allow appropriations to continue. For a means of doing so, see infra Part IV.

72. While some might argue that the use of intangible cultural property by outsiders in of itself changes the very nature of that property—that is, affects the "sacredness" of that property—the perception of the property's sacredness is intrinsically under the control of the beholder. It is not the outside use itself that impacts the property's sacredness, but the perceptions of the source culture's members, who interpret that use as diminishing its inherent sacredness in some way.


74. It could be—and, indeed, has been—argued that the mere nonconforming use of intangible cultural property in ways that do not conform to traditional norms may degrade its cultural significance or distinctiveness. See, e.g., Riley, supra note 34, at 71 (noting several Native Americans' "feeling[s] of violation over the use of Indian symbols reserved for ceremonial purposes, like feathers and war paint," in OutKast's 2004 Grammys performance). This argument, however, rests upon at least one of two presuppositions: 1) that members of the source culture will allow or be compelled to allow their cultural views to be influenced by the nonconforming conduct, or 2) that the nonconforming conduct itself will altogether supplant—or, at least, be misinterpreted as a true reflection of—the source culture's traditional norms. A means of precluding either contingency—and thereby, any possibility of intangible cultural property degradation—is proposed infra Part IV.
Accordingly, OutKast’s use of the “Beauty Way” song in its performance of “Hey Ya” at the 2004 Grammy Awards, while perhaps repugnant to Native American cultural sensibilities—and, from the appropriate Native American perspectives, defiling the sacredness of cultural emblems—did not preclude Navajos from continuing to use the “Beauty Way” song in traditional and sacred contexts, or, indeed, in any other manner that the evolving needs of their culture required. Nor did Mr. Bethune’s mere use of altered Aboriginal images in his carpets, irrespective of its Australian copyright implications or Aboriginal perceptions of the defilement of those images, preclude Aboriginal cultural members from conducting the sacred practices and ceremonies with which those images are traditionally associated. In this way, divestment of control—the central injury that occurs in cases of tangible cultural property appropriation—is conspicuously absent where the cultural property appropriated is intangible. What remains at the intracultural level is a subjective sense of outrage at a use that does not conform to the norms of the source culture, the same indignation a Christian might feel toward the owner of a Darwin fish bumper ornament. While that Christian might, with due cause, protest the appropriation and conversion of the sacred Ichthys design into a tongue-in-cheek, symbolic mockery of Creationism, it would seem contrary to the constitutional principle of free expression—to say nothing of the freedom of religion—to enable that Christian to exclude others from using or modifying any design resembling the Ichthys, or compel the removal of the ornament, or extort an apology from the ornament’s owner. While one may see the Darwin fish as a corruption of a sacred emblem and a direct affront to one’s beliefs, one would be hard-pressed to demonstrate how its mere exhibition on another motorist’s vehicle has injured one in a way that demands redress. By the same token, to the extent that a nonconforming use of intangible cultural property occurs outside a source culture—that is, to the extent that the nonconforming user is a cultural outsider—no material harm is, nor can be, done. On the in-
tracultural level, the affront to cultural members seems, ultimately, no more than aesthetic.

C. THE INTERCULTURAL DYNAMIC: SOWING THE SEEDS OF CULTURAL DILUTION

The intercultural dynamic concerns the way that others, who themselves are often members of a larger, dominant culture, view the source culture and its constituent members. While this dynamic is most often framed as the perpetuation of harmful stereotypes, this nomenclature is at best imprecise, as it seems to indicate that the mere appropriation of intangible cultural property, in itself, automatically engenders harmful stereotypes. These stereotypes refer directly to ethnicity rather than to identifiable elements of intangible cultural property. Accordingly, if the appropriation of intangible cultural property eventually leads to the perpetuation of those stereotypes, some unidentified event must bridge the gap between the two—an event directly and immediately precipitated by the appropriation, which then induces the perpetuation of adverse ethnic stereotypes, and subsequently constitutes the intercultural injury. Conflating issues of racial discrimination with intangible cultural property runs the risk of allowing the formidable specter of racialized harm to obscure the underlying nature of this intercultural injury—and, by the same token, to potentially obfuscate a means of redressing it.

While many decried OutKast's 2004 Grammys performance as perpetuating racial stereotypes, that criticism seems inaccurate insofar as the specific elements that commentators protested most vocally—the bright-green, buckskin bikini and feather-clad dancers, space-faring tipis, and "bop-and-grind" choreography—cannot, by any stretch of the imagination, be considered harmful stereotypes of Native American culture. The bright-green, buckskin bikini and feather-clad dancers, space-faring tipis, and "bop-and-grind" choreography—cannot, by any stretch of the imagination, be considered harmful stereotypes of Native American culture.
Likewise, while it seems likely that something about the Chief Illiniwek mascot proved injurious—or at least distasteful—to a multiplicity of Native Americans, it nevertheless seems similarly inaccurate to assert that Illiniwek’s mere donning of Indian regalia or his eclectic cheerleading and dancing, in themselves, harmfully stereotyped Native American culture. Instead, the immediate intercultural injury stemming from cases of appropriation, like those involving OutKast and Chief Illiniwek, lies in the fact that their performances, by appropriating Native American cultural elements and juxtaposing them with distinctly non-Native American influences, sowed seeds of cultural dilution not only for outsiders—especially those viewing the appropriated Native American cultural elements for the first time—but for the next generation of Native American cultural initiates. The problem with OutKast’s or Chief Illiniwek’s culturally amalgamated performances lies not in the act of appropriation itself, but in the subsequent danger that onlookers will mistake the performances for true reflections of the cultures from which those Native American elements were sourced. These misinterpretations, if left unchecked, could then lead those onlookers to adopt a distorted and caricatured view of the source culture and its members, a perspective that, given sufficient time and ubiquity, eventually bears fruit in the formation of harmful ethnic stereotypes. Those stereotypes then

85. “Stereotype” is defined as “a conventional, formulaic, and oversimplified conception, opinion, or image.” Stereotype Definition, DICTIONARY.COM, http://dictionary.reference.com/browse/stereotype (last visited Dec. 1, 2010). Thus, while “[t]he cowboy and Indian [in the context of the Hollywood western] are American stereotypes,” bright-green, buckskin bikini and feather-clad dancers, space-faring tipis, and “bop-and-grind” choreography are in no way conventional or formulaic oversimplifications of Native American culture. See id.

86. Interestingly, Andrew Brother Elk’s assertion that, if OutKast’s performance “had been white people dancing in black face or dancing in yarmulkes, people would be suitably outraged” also depends on the likelihood that onlookers would have interpreted a blackface makeup performance as deriding African American culture, as opposed to the African race; or, on the other hand, that the mere presence of yarmulkes would transform the entire performance into a reflection of Jewish culture, rather than traditionally observant Jewish fashion norms. See MacFarland, supra note 84. This dependence on interpretation has been clearly evinced where even blackface makeup, as quintessentially associated with racism as it is in American culture, has been used not to impugn or exploit African Americans, but to cast an angry reflection on the American social and cultural mores that gave rise to its use as a theatrical practice in the first place. See generally BAMBOOZLED (New Line Cinema 2000) (satirizing the use of blackface and stereotyped treatment of African Americans in American cinema and television); accord Kenneth Turan, Bamboozled: Satire, Rage Add Up to Audacious ‘Bamboozled,’ L.A. TIMES, Oct. 6, 2000, http://www.calendarlive.com/movies/reviews elmovie001005-8,0,4372327.story (describing director Spike Lee’s thesis in Bamboozled as asserting “that what’s truly disturbing is . . . the reality behind those awful images, that from the 19th century to the 21st, American society has only wanted to see black people as buffoons”).

induce outsiders to regard and treat cultural members in a discriminatory fashion. They can also influence the next generation of cultural members—whose cultural identities are still plastic and formative—to adopt negative views of their cultural heritage, or, at worst, to renounce their cultural ties altogether. These misinterpretations are both a source of the outrage felt by cultural members on the intracultural level, and the resultant intercultural injury that demands redress—an injury which, if left uncorrected, threatens more than the well-being of individual cultural members. It threatens the very survival of the source culture itself.

III. REDRESSING THE INJURY: LESSONS FROM FAN-BASED ACTIVITIES

Many have proposed methods of addressing the source culture's injury in cases of intangible cultural appropriation. However, by failing to direct sufficient scrutiny toward the precise nature of the injury itself, analyses thus far have missed the mark, undervaluing distinctions between intangible and tangible cultural property and accepting prima facie the causality of the injury at one extreme, and relegating the injury to the realms of historic, economic, and racial equity in favor of unrestricted cultural hybridization at the other. Of these approaches, Kristine A. Carpenter, Sonia K. Katyal, and Angela R.

"is a normal and ordinary form of categorizing engaged in by all people as part of the sorting and organization needed to manage large quantities of information. . . . [I]ndividuals give substance to a stereotype by creating a prototype of the typical category member based on 'a person's accumulated knowledge, beliefs, experiences . . . and expectancies.' This culturally-generated prototype, or 'social schema,' operates as a filter that biases in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.“). See generally Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993).

88. See, e.g., Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489 (2005) (exploring “racial mechanics”—the ways in which race alters intrapersonal, interpersonal, and intergroup interactions”); Levinson, supra note 82; Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345, 350 (2007) (summarizing the results of the author's empirical study that "illustrates that . . . memory-driven biases can occur in a systemic fashion . . . that susceptibility to misremembering facts based on race cannot be attributed simply to more overly racist people").

89. For the originating discussion of the concepts and arguments introduced infra Parts III(A-C), see Noda, Copyrights Retold, supra note 29.

90. See, e.g., Riley, supra note 34, at 78 (oversimplifying the appropriation of intangible cultural property as essentially a two-party dynamic that "continues the systems of dominance and subordination that have been used to colonize, assimilate, and oppress indigenous groups"); id. at 79 (claiming that performances like OutKast's "depriv[e] Native people [of] control over sacred cultural elements" without addressing the lack of divestment in cases of intangible appropriation, or the inexhaustible and multiplicative characteristics of intangible property in general).

91. See, e.g., Mezey, supra note 26, at 2044-45 (advocating cultural hybridity).
Riley, in their recent article In Defense of Property, come closest to intuiting the intracultural and intercultural dynamics of the injury and to proposing an effective legal reconceptualization, in the form of their stewardship model of property. They stop short, however, of offering a specific means by which indigenous groups may “share in decisions regarding the way their indigenous cultures are displayed in the world” without “unduly advancing their interests . . . at the expense of others.” Considering the complexity of the issues involved in balancing the interests of cultures, especially in intangible properties whose ownership is at best mixed, and at worst ambiguous, the difficulty of formulating a ubiquitous remedy is both evident and understandable.

Proponents of intangible cultural property, however, may find unexpected guidance in this endeavor from the realm of fan-based activities. These activities involve ostensibly infringing uses of copyrighted material that ultimately benefit both the public at large and copyright holders alike, and which, as a result, have occupied a kind of unspoken gray area where some copyright holders have tolerated—and, at times, actively supported—the use of their intellectual property by fans. This tacit arrangement between copyright holders and fans arose from the unique characteristics of fan-based activities, but the mechanisms involved in balancing the interests of copyright holders, the fans, and the public at large to the mutual benefit of all may be

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93. Id. at 1067-88.
94. Id. at 1110, 1112.
95. In doing so, fan-based activities further both of the dual—and usually diametrically opposed—goals of copyright. See U.S. CONST. art. I, § 8, cl. 8.
97. See, e.g., COMIC MARKET 73 CATALOG 1169-80 (2007) (on file with author) (listing more than one hundred commercial vendors' booths participating in a convention centered on the sale of fan-made comics or doujinshi, the majority of which would constitute unauthorized derivative works under Article 28 of the Japanese Copyright Act (Chosakuken)—or, if they had been produced and sold on United States soil, § 106(2) of the United States Copyright Act).
98. Activities are “fan-based” if they are (1) undertaken as a compliment to, rather than in competition with, the original copyrighted work, and (2) enhance, in aggregate, the creative and economic incentives of the copyright holder. This particular class of purported copyright infringement is unique in the way that it actually serves to bolster the usually diametrically opposed interests of the copyright holder and the public at large, indicating that the realm of copyright law is not always a zero-sum game. For the originating discussion of this class of fan-based activities, see Noda, When Holding On Means Letting Go, supra note 29, at 84-89.
applicable, with a modicum of adaptation, to intangible cultural property contexts.

A. ELEMENTS OF THE INTERPRETIVE RIGHTS FRAMEWORK

The dynamics underlying fan-based activities are most clearly perceivable under the lens of the interpretive rights framework, which acknowledges that authors cede an implicit right of interpretation\(^\text{99}\) to the public upon publication, broadcast, or other action intended to make the author's work available for a general audience. This right, embodied in and evidenced by recognized "fair uses" like criticism and parody,\(^\text{100}\) allows the members of that audience to appropriate certain copyrighted aspects of a creative work and use them in subsequent works that interpret the underlying creative work. Critical reviews and parodies contribute to the public's stores of knowledge and carry the potential to augment awareness of, or interest in, the underlying work. These benefits could not be realized without allowing the appropriation—at least in reference—of some copyrighted elements of the work being reviewed or parodied. Accordingly, courts have come to carefully balance the social and artistic value of these uses against their potential effect on the market for the underlying work when determining the "fairness" of those uses under section 107 of the Copyright Act,\(^\text{101}\) and deem those uses fair when the benefit to society sufficiently outweighs the detriment to the rights of the copyright holder.

Fan-based activities contribute similarly to the public's stores of knowledge and potentially increase exposure to and awareness of the underlying work. However, they differ from uses like criticism and parody in that they are inextricably dependant on both the underlying

99. Some might contend that this distinguishes fan-based activities from appropriations of intangible cultural property, in that source cultures make no such cession. That contention, however, only applies to those source cultures who have assiduously kept their intangible cultural property out of the stream of public consciousness. The moment a source culture places that property into the stream, however—by public display, performance, etc.—it cedes a similar, appropriative right to the members of on-looking cultures. Naturally, the members of a source culture may come into conflict when one member places intangible cultural property into the stream without the consent—or even contrary to the expressed intent—of other members. Depending on the malfeasance of that member's actions vis-à-vis those other members, those members may be entitled to some form of restitution from the offending member. The precise delineation of those issues, however, falls beyond the scope of the present Article.


101. See, e.g., Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 n.14 (1994) ("If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives . . . it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original.").
creative work and fan discourse—namely, other fan works based on the same underlying copyrighted material—and, as such, are objects of inherently intermingled authorship. Insofar as his or her work is neither sufficiently original nor the direct product of his or her own authorship, the fan-author cannot claim a copyright over a fan-based work, and the work thus falls outside the realm of copyrightable subject matter. This means that anyone can freely appropriate elements from one fan-based work for use in another—or, in the case of the author of the underlying work, for use in subsequent derivative works.

The resemblance between fan-based works and intangible cultural property runs deep: both are objects of inherently intermingled authorship, to the extent that neither qualifies for traditional copyright protection. Both are deeply steeped in, and serve as a reflection of, the traditions and views of a distinct group of individuals who are allied by their shared history and interests. Both contain narratives that speak equally to their group identity and to their collective values, the perpetuation of which is central to their respective cultural or sub-cultural survival. In the case of traditional cultures, these narratives undergo a long-term and perennial process of revision, both augmenting and pruning elements as successive iterations pass the narratives on to the next. In fan subcultures, while

102. Note that every subsequent fan-based work, like the fan-based work or works upon which it is based, is equally incapable of bearing a copyright. Regardless of how many fan-based works are created in the image of a given original, copyrighted work, the only individual who holds a copyright is the original copyright holder.

103. In this way, the original author's—or copyright holder's—creative and economic interests are actually augmented by the emergence of fan-based works.

104. Compare Riley, supra note 34, at 178 (noting that "a group rights model of ownership," which underlies "collaborative, inter-generational tribal creations," "seem[s] beyond the scope of existing legal theory"), with Noda, Copyrights Retold, supra note 29, at 143 (citing 17 U.S.C. § 103(b)) (describing a fan-based work as "so profoundly dependent on copyrighted elements from the underlying work, and so inextricably bound up with other fan-based discourse, that it falls outside the realm of copyrightable subject matter").

105. See Tushnet, supra note 30 (quoting Jenkins, Textual Poachers 272-73) ("Fan culture, like traditional folk culture, constructs a group identity, articulates the community's ideals, and defines its relationship to the outside world.").

106. Compare Carpenter et al., supra note 28, at 1028 (describing cultural property as "integral to the group identity and survival of indigenous peoples"), with Henry Jenkins, Transforming Fan Culture into User-Generated Content: The Case of FanLib, Confessions of an ACA-FAN: The Official Weblog of Henry Jenkins (May 22, 2007, 09:27 EST), http://www.henryjenkins.org/2007/05/transforming_fan_culture_into.html (describing fan activities as "emerging from a social network of fans who have their own aesthetics, politics, and genre expectations"—"pre-existing communities with their own traditions of participatory culture").

107. See Tushnet, supra note 30 (quoting Jenkins, Textual Poachers 272-73) ("Fan texts, like many folk texts, often do not achieve a standard version but exist only in process, always open to revision and appropriation.").
central narratives are often the product of identifiable authorship or the intellectual property of an identifiable copyright holder, those narratives undergo a process of interpretation and reinterpretation at the hand of fan-based activities that resembles in microcosm the revisionary—or perhaps evolutionary—process that perpetuates traditional cultures. In this way, concepts that aid our understanding of the interpretive and reinterpretive core of fan subcultures may also lend insight into the revisionary processes at the heart of traditional cultures, and the ways in which elements of intangible cultural property susceptible to cross-cultural appropriation may be better protected—or, at least, better stewarded—by source cultures.

B. Teleology

Teleology is a philosophical concept that entails the study of design or purpose in nature. In the context of fan-based activities, I have used the term “creative teleology” in reference to both a source creator’s vision for his or her work and the multiplicity of viewpoints that often exist within fan subcultures, viewpoints that then serve as impetuses for the creation and proliferation of fan-based works interpreting and expanding upon the original. Creative teleology also serves as a first step toward explaining the unique characteristics exhibited by fan-based activities, namely how those divergent viewpoints can borrow freely from both the source work and other fan-based works without harming one another in the manner typified by the intercultural confusion sown in cases of intangible cultural appropriation.


109. For the postulation of a group-rights, peoplehood-based stewardship model of property, see Carpenter et al., supra note 28, at 1046-88.

110. “Teleology” is derived from the Greek telos, meaning end or purpose. I previously proposed the concept of “creative teleology” to denote a given individual’s authorial take on a particular creative work—in essence, the way that individual believes that work should develop and, ultimately, end. “Cultural teleology” serves to denote a similar concept for cultures: a given cultural member’s take on his or her own cultural emblems and works.

111. See supra Part II(C).

112. The concept of canonicity, discussed infra Part III(C), completes this explanation.
In the context of intangible cultural property, an analogous concept, “cultural teleology,” can be used to denote a given viewpoint on how intangible properties ought to be used in a culture’s perpetuation. Just as there can be as many perspectives on a given subject as there are vantage points, there can be as many teleologies for any given culture\textsuperscript{113} as there are cultural members. In aggregate, these individual cultural teleologies form what may be considered the culture’s mainstream teleology. The individual teleologies of established, traditional cultures tend to polarize around the dictates of tradition and precedent,\textsuperscript{114} and as a result, those matters usually form the crux of a culture’s aggregated, mainstream teleology.\textsuperscript{115} The more members’ individual cultural teleologies overlap one another, the more unified\textsuperscript{116} the culture’s collective teleological vision becomes—and, in turn, the more likely its perpetuation becomes.

When one cultural member performs a countercultural act that offends another member or members, the primary sociological conflict is not between a cultural outlier and a traditionalist, or even between

\textsuperscript{113} The intrinsic difficulty in delineating the precise metes and bounds of what constitutes a distinct culture must be acknowledged here.

\textsuperscript{114} Interestingly, while fan subcultures tend to lack the history necessary to give rise to the traditions and cultural precedents of established cultures, the creative teleology of the author of the subculture’s underlying work tends to serve a similar polarizing role. See Paul Joseph & Sharon Carton, The Law of the Federation: Images of Law, Lawyers, and the Legal System in “Star Trek: The Next Generation,” 24 U. Tol. L. REV. 43, 44-45 (1992) (describing Gene Roddenberry’s vision of the future as a “guiding light,” and the events in “Star Trek: The Next Generation” as “present[ing]...a vision of what we should do and who we should strive to become”: “it becomes reasonable to ask whether the Star Trek future has anything to teach us about our present reality and the directions which our society should or should not take”).


\textsuperscript{116} Just as it is often difficult to demarcate where one culture ends and another begins, or where two subcultures should actually form the constituency of a larger, encompassing culture, so too is it difficult—and perhaps even impossible—to develop a precise formula for determining when a particular teleology becomes pervasive enough within a cultural membership to constitute the aggregate teleology for the culture itself. Such an inquiry seems fated to fall to a case-by-case analysis, and therefore extends beyond the scope of the generalized principles and concepts this Article explores.
two individuals. The heart of the dispute lies in a clash between cultural teleologies: the one proposed by the offender and the one upheld by the offended. Insofar as this conflict and its outcome may influence the aggregated teleology of the culture as a whole, then every other cultural member may have an identifiable stake—and a distinct role to play—in the controversy's resolution.

Perhaps one of the most visible historical examples of a clash of individual cultural teleologies arose in 17th-century Italy between Galileo Galilei and members of the Roman Catholic Church, most notably Pope Urban VIII. Driven by his astronomical observations, Galileo published his Dialogue Concerning the Two Chief World Systems in 1632, a work that advocated heliocentrism in contrast to the Aristotelian geocentrism constituting the Church's traditional view of the cosmos. After being tried before the Inquisition and found "vehemently suspect[] of heresy," Galileo was forced to recant his views and spend the remainder of his life under house arrest.

In this example, Galileo performed a countercultural act—namely, the publishing of his pro-heliocentric views in the Dialogue—that proposed a teleology antithetical to the Church's established, geocentric doctrine. The clash between Galileo's teleology and the traditional teleology of the Church offended numerous members, and ultimately resulted in Galileo being brought before the Inquisition, an institution vested with the authority to defend the Church's traditional teleologies. In Galileo's time, the individual teleologies of the members of the Roman Catholic Church, as embodied in the Inquisition, overlapped sufficiently on the issue of Earth as the center of the universe as to render geocentrism a part of the Church's aggregated, mainstream teleology. To the extent that Galileo was himself a member of the Church, and that his advocacy of heliocentrism threatened the perpetuation of Roman Catholicism's geocentric

117. While there are noteworthy sociological distinctions between religion and culture, the two are sufficiently similar within teleological contexts as to render the examination of the former illuminative of the latter. As a result, for the purposes of this Article, the spheres of religion and culture are examined as one and the same.


119. The astronomical theory that the Sun is stationary, and that the Earth and other planets of the Solar System revolve around it.

120. The astronomical theory that the Earth is the center of the universe and that all other celestial bodies revolve around it.


traditions—and, in that way, the perpetuation of its aggregated teleology—the Church’s members were entitled to censure him via an appropriate cultural institution. In equal measure, as centuries passed, and as old Catholic members and their individual teleologies died and new members and teleologies took their place, the aggregated teleology of the Catholic Church evolved to the point where Galileo’s heliocentric views largely supplanted Aristotelian geocentrism, heralded by the removal of heliocentric works from the Index Librorum Prohibitorum in 1758. The Catholic Church that exists today is a far cry from the Church that existed in Galileo’s time, in ways extending far beyond its views on the positioning of the cosmos. However, both the modern Church and its 17th-century counterpart are a part of a single teleological continuum perennially shaped—and, thereby, perpetuated—by the efforts of each successive generation of members, and by the interactions between their individual teleologies.

This model of culture as an aggregation of a multiplicity of individual cultural teleologies proves even more illuminative of the intangible cultural appropriation dilemma when one includes cross-cultural interactions, which entail exchanges between several multiplicities. When a member of one culture performs an appropriative act that injures a member of another culture, the resultant teleological clash involves more than the individual teleologies of the injurer and the injured, or even the aggregated teleologies of their respective cultures. Instead, the conflict also extends to the ways in which the members of each culture perceive the members of the other culture—and, by extension, the way in which cultural members view themselves. Moreover, depending on the extent to which either culture interacts with members from other third-party cultures, these clashes may alter the way that one or both cultures may be perceived amidst the global fellowship of cultures. On the intracultural level, clashes between individual teleologies—no matter how traumatic they may prove to specific cultural members—are essentially a culture’s growing pains, part and parcel with its natural evolution. On the intercultural level, clashing teleologies can, whether wittingly or not, sour percep-

123. Whether the Inquisition or the Church’s membership was entitled to pursue Galileo’s imprisonment—or any heresy-related penal sentence, such as the burning at the stake of Giordano Bruno in 1600—is an entirely different question, one that posterity and modern perspectives on human rights have answered in the negative.

124. This “List of Prohibited Books” was promulgated by the Catholic Church until formally abolished by Pope Paul VI in 1966. See Index Librorum Prohibitorum (Roman Catholicism), Britannica Online Encyclopedia, http://www.britannica.com/EBchecked/topic/285220/Index-Librorum-Prohibitorum.

125. As previously noted, Galileo Galilei and Giordano Bruno are prime examples of the injustice that is sometimes leveled on an individual basis in intracultural teleological clashes.
tions of the source culture on a global scale, potentially damaging its likelihood of survival by stigmatizing or maligning membership in the eyes of the public and dissuading potential future members.

For example, the offense that Native American cultural members found in OutKast's use of tipis, feathered headdresses, and buckskin clothing arose from the disparity between traditional Native American uses of those intangible cultural elements and OutKast's eclectic use of the same.\textsuperscript{126} Regardless of OutKast's intent in using those elements, in the absence of a dependable means of differentiating traditionally accurate uses from hybridized ones, there is an inherent danger that OutKast's use could be mistaken—by outsiders, undis-cerning Native American cultural members, or even the next generation of potential initiates—as an accurate reflection of the ways in which those intangible properties are used in Native American cultures.\textsuperscript{127} Accordingly, the real danger—and the actual injury—in cases of intangible cultural appropriation like OutKast's lies in the possibility that the cultural teleology represented by the appropriator may undermine, dilute, or even supplant the source culture's teleology—at least in the eyes of the unsuspecting beholder.

With so much of an individual's cultural identity dependent on the way in which his or her culture is perceived by outsiders and their cultures, the ability to distinguish a culture's own aggregate teleology—in counterpoint to the ways in which outsiders may interpret its cultural elements through their own individual teleologies—is revealed as the crucial function in averting injury in cases of intangible cultural appropriation. Here, principles derived from fan-based activities may once again illuminate a solution. Among fan-based activities, the process of distinguishing between the source work and the fan-based work occurs as an intrinsic part of the definitive characteristics of the fan-based class itself: the fans' preoccupation with delineating between canon (what is "official," or thought to have actually happened within a fictional narrative) and non-canon (that which is not).\textsuperscript{128}

\textsuperscript{126} See Micek, supra note 43.
\textsuperscript{127} See MacFarland, supra note 84.
\textsuperscript{128} See, e.g., Canon (fiction), \textsc{Wikipedia.org}, \url{http://en.wikipedia.org/wiki/Canon\_\(\text{-fiction}\)} (last visited Dec. 5, 2010). It should be noted that, insofar as source cultures find it important to delineate between what is culturally proper and what is not, they are similarly preoccupied with matters of canonicity.
C. Canonicity

In the context of fan-based activities and their resultant works, the concept of canonicity draws a clear and nigh impenetrable barrier between the works of the original author and the fan works based upon it. This distinction is observable in fandoms where the fans construct and maintain expansive databases distinguishing canon from non-canon, such as the one surrounding the Star Trek franchise. The premium that fans inherently place on the creative output of the source author compels them to vest that author's works with inherent economic and creative superiority over fan-based works. As a result, regardless of how many creative teleologies are brought to bear on a single fictional universe, the source author's creative teleology retains its primacy and legitimacy over all fan-based works.

While no implicit mechanism exists in the analogous realm of intangible cultural property to vest a source culture's teleology with primacy or legitimacy over other teleological uses of its intangible

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129. The term "canon" was originally used by Christian churches to describe the books of the Bible considered "genuine and inspired" (as opposed to the Apocrypha, which, as apocryphal works, are not). Compare Canon Definition, DICTIONARY.COM, http://dictionary.reference.com/canon (last visited Dec. 2, 2010), with Apocryphal Definition, DICTIONARY.COM, http://dictionary.reference.com/apocryphal (last visited Dec. 2, 2010). In fan subcultures, elements in a fictional universe are often categorized as "canon" or "non-canon," the former being considered "official" or "what actually happens" in the storyline, and the latter comprising elements that form an alternate set of events considered "unofficial" or separate from "official" events. Canonical works are usually comprised of the works by or overtly authorized by the author of the original, underlying work, while works set in the same milieu but penned by a different author or transcribed in a different medium are usually counted among the non-canonical.

130. For an exploration of a hypothetical—though highly implausible—situation in which the stamp of canonicity enjoyed by the original author could be revoked or lost, see Noda, Copyrights Retold, supra note 29, at 158-61.

131. While there is no identifiable "original author" for intangible cultural properties, the source culture itself—though admittedly elastic and ever-changing—serves in the same role, at least insofar as the source culture controls the ways in which those properties are perpetuated within itself.


133. The source author's economic superiority lies in the fact that fans will always opt for the original author's works over near-identical fan-based works, if forced to choose between them. For further discussion of the source author's economic superiority vis-à-vis fan-based works, see Noda, Copyrights Retold, supra note 29, at 147-48.

134. The source author's creative superiority lies in the fact that the source author is—by his status as the originator of the work's copyrighted elements—presumptively the greatest authority on those elements and the story they comprise. For further discussion of the source author's creative superiority vis-à-vis fan-based works, see Noda, Copyrights Retold, supra note 29, at 148.
cultural emblems, this absence does not necessarily preclude the members of a source culture from constructing and employing a functionally similar mechanism themselves. If the example set by fan-based activities is any indication, a stamp of cultural canonicity could insulate the source culture's aggregated teleology from confusion, dilution, or supplantation when the source culture's intangible cultural properties are appropriated and used by a cultural outsider in a way that does not accurately reflect the properties' use in—or relationship with—the source culture.

D. FROM INTERPRETIVE RIGHTS TO A CROSS-CULTURAL APPROPRIATIVE FRAMEWORK

With the elucidative support of adapted concepts like teleology and canonicity from fan-based activities and interpretive rights, one can devise a similar conceptual framework for intangible cultural property appropriation. This cross-cultural appropriative framework recasts the conflict central to the injury sustained by source cultures in cases of intangible cultural appropriation as a clash between cultural teleologies. In doing so, the framework illustrates strong parallels between intangible cultural property and fan-based activities and reveals one possible means of insulating source cultures from harm while preserving the free flow of cultural content necessary for the healthy evolution and perpetuation of all cultures. Just as canonicity prevents the author of a source work from being harmed by the appropriative acts involved in the creation and proliferation of fan-based works, so too might it help to insulate a source culture from the injury typically associated with intangible cultural appropriation.

IV. DELINEATING CULTURAL TELEOLOGIES: HOW THE STAMP OF CULTURAL CANONICITY CAN PROTECT SOURCE CULTURES FROM THE PERILS OF INTANGIBLE APPROPRIATION

Constructing a cultural mechanism that performs for intangible cultural property the same function that canonicity does for fan-based

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135. Cf., e.g., Danielle Conway-Jones, Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Commodification of Culture, 48 How. L.J. 737, 757 (2005) (noting how efforts to universalize intellectual property laws, such as the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), favor "strong intellectual property protection according to the Western narrative of intellectual property," while allocating "no commensurate protection for other valued information, like . . . cultural heritage, according to an Indigenous perspective").

136. The design, implementation, and application of this stamp are discussed infra Part IV.

137. E.g., Mezey, supra note 26, at 2043.
activities would be fruitless if it did not also instill in the public the same interest in distinguishing canon from non-canon that fans inherently possess. A corresponding legal mechanism that incentivizes or mandates cultural source identification and proscribes dilution, akin to several imperatives of trademark law,\textsuperscript{138} could fulfill that role; however, it may also be unnecessary. As source cultural members increasingly lend a voice to their concerns about the perception and use of their cultural properties in the global marketplace of ideas, prevailing trends across academic disciplines and global communities as a whole evince a burgeoning desire to recognize the multiplicity of cultural perspectives and traditions.\textsuperscript{139} These trends also reflect the pervasive and underlying human aspiration to gain an incrementally fuller understanding of the world around us.\textsuperscript{140} Undergirded by this fundamental need, these trends indicate that both scholars and the public at large have grown progressively interested in obtaining an accurate understanding of cultures outside their own. In lockstep with fan communities, the interest in distinguishing canon from non-canon is already out there; beyond that, a ready means of source identification is the only tool that source cultures require.

A. DESIGNING THE STAMP: REVERSE-ENGINEERING CANONICITY

Fan-based activities once again prove able pathfinders for plotting the course toward a mechanism for cultural canonicity. Illustratively, the growing concern with accuracy in the portrayal and attribution of intangible cultural properties resembles the shift in pri-

\textsuperscript{138} See, e.g., 15 U.S.C. § 1125 (2006) (detailing forbidden forms of false designation or origin and false descriptions, including actions leading to the dilution of a trademark).


\textsuperscript{140} Cf. Kant, supra note 24 (describing, in nine sequential theses, the natural direction of history toward a "universal cosmopolitan condition," a coadjutant moral culture in which "all the original capacities of the human race can develop"); JOHN STUART MILL, UTILITARIANISM, ch. 2 (1863), available at http://www.leopoldwilson.info/library/authors/john_stuart_mill/utilitarianism/chapter2.html (arguing that "[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party knows both sides." (emphasis added)).
orities that the advent of the printed word exerted on the audiences of creative narratives. Whereas oral narratives are by their nature freely reimagined and reinterpreted as passed from person to person, a process that often sets the original versions adrift amid a sea of alternate versions or even supplants them completely, the fixated and source-identifying aspects of publication—that is, the clear placement in time and attribution of the original work to its author—provide interested parties with a ready means to trace narrative lines back to their sources, and to give those sources due attribution.

This ease of source identification allows individuals within fan-based communities to act upon their instinctive desire to obtain an accurate—and in that way, “correct”—view of the original author’s creative teleology, and to subsequently judge all alternate creative teleologies against that standard. That ability, in turn, enables fans to collectively distinguish between canonical and non-canonical works.

Similar to the state of creative narratives prior to the printed word, at present most source cultures’ intangible properties exist in a kind of attributive limbo. Appropriation and adaptation commonly occur beyond the source culture’s boundaries, in a manner that renders elements borrowed from the source culture and elements added by the borrower difficult to discern from one another. Set adrift amid these hybridized renditions with no dependable means of differentiation, the probability that the source culture’s intangible property may be diluted or even displaced by those renditions is too likely to ignore.

141. The free-flowing and reinterpreted nature of oral narratives is well epitomized in the Homeric Question, which concerns the controversies clouding the authorship and historicity of works like the Illiad and the Odyssey. Some scholars believe that breadth of historical details within the Homeric poems indicate that they could not have been the composition of a single individual. See, e.g., The Homeric Question, http://www.varchive.org/dag/homer.htm (citing M. P. NILSSON, HOMER AND MYCENAE 158-59 (1933)). While some maintain that Homer was indeed a historical poet, others have proposed that Homer may simply be the name used to identify the compilation of generations of Greek oral tradition that resulted in the “Homeric” poems. See, e.g., William Harris, Homer the Hostage: A Bicultural Epic Poet, http://community.middlebury.edu/~harris/hostage.html (“Whoever Homer was, if he wrote the Iliad or recited it as a bardic poet, if a collection of pseudo-ballads was collected and put together by Homer, or under the name of Homer . . . these things have been under discussion for more than two centuries now.”). However the Question may eventually be answered, it nevertheless encapsulates the fluidity of interpretation and uncertainty of attribution endemic to oral narratives.

142. One need only peruse any given citation manual to appreciate the source-identifying, attributing, and locating function that publication provides. See, e.g., The Bluebook: A Uniform System of Citation (18th ed. 2005) (providing citation rules that generally require, where applicable: the name of the author; the title of the source; the name of the publication in which the source appeared; the page or section number indicating the location of the cited source in its original publication; the date of publication).
B. FORGING THE STAMP: CERTIFICATION AND DISSEMINATION

Because the stamp of canonicity arose spontaneously in fan-based contexts, one must turn to analogous examples for guidance on how a stamp of cultural canonicity might best be constructed. For those intangible properties for which cross-cultural appropriation results in a marketable good, source cultures may be able to borrow a page from the small-scale organic farmers who have formed non-profit groups like Certified Naturally Grown, Inc. in the United States and the Wholesome Food Association in the United Kingdom. Akin to many indigenous source cultures, the member farmers of these groups find themselves too small, resource-strapped, or otherwise ill-situated to avail themselves of the legal processes and protections laid out by national “certified organic” legislation. As a result, these farmers have banded together to develop their own “Participatory Guarantee System” certification process and “Certified Naturally Grown” logo to identify their organically farmed products and prevent them from being confused with or diluted by other non-organically farmed produce.

The problems plaguing these small-scale organic farmers are sufficiently analogous to those endangering source cultures as to lend their example didactic value. Like these farmers, source cultures cannot avail themselves of existing forms of legal protection, at least not without great cost and compromise. Like them, many source cultures lack the legal, political, or economic wherewithal to fend off the potential confusion and dilution of their intangible properties—at least not unaided. Finally, like the farmers, source cultures can adopt the legal

145. But see Creative New Zealand Statement on Disinvestment in toi iho, TOIO.COM, http://www.toiiho.com (noting that, while Māori artists once attempted to use the “toi iho” trademark to authenticate genuine works of Maori art, Creative New Zealand, the entity tasked with managing and promoting the mark, subsequently disinvested the trademark after finding that “many more Māori artists are making successful careers without the need for the toi iho trademark”). While toi iho seems to stand as an example where an authenticating emblem failed to perform its intended function, it is important to note that its implicit purpose—namely “increasing sales of Māori art by licensed artists and stockists”—stands in stark contrast to the stamp of canonicity’s goal of insulating a source culture from cultural dilution. See id.
mantle of a non-profit association or corporation and develop a kind of cultural certification process and identifying emblem—a literal stamp of canonicity—by which they can endorse authentic or representative uses of their intangible properties and distinguish them from nonconforming ones. Just as the “certified naturally grown” logo, like the stamp of canonicity in fan-based contexts, diminishes confusion and enables the distinguishing of conforming uses from nonconforming ones, so too can a cultural stamp prevent confusion on the part of the cultural initiate or outsider, and enable them to delineate between those appropriative uses that accurately reflect the values and traditions of a source culture from those that do not.

For those intangible properties that are put to noncommercial or intangible uses, press releases, a cultural or community homepage, or even social networks can function where a physical stamp cannot—distinguishing, for example, performances that incorporate cultural elements canonically from those that do so noncanonically. Ultimately, the specific mechanisms of delineating cultural canonicity can—and must—be varied and many. The only requirement is that those distinctions be made clearly, consistently, and in a readily accessible and ascertainable fashion. As peoples across the globe grow increasingly connected each day, these requirements become easier and easier to fulfill, if only the members of a source culture seize the opportunity to do so.

149. By forming a legally recognizable entity, a source culture can maintain a copyright in its cultural emblem, and control its use through that right. Compare Santa Clara Cnty. v. S. Pac. R. Co., 118 U.S. 394, 396 (1886) (noting in a headnote that corporations, as legally recognized entities, are persons under the Fourteenth Amendment) and Minneapolis R. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (agreeing that “corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or prohibit legislation injuriously affecting it”), with 17 U.S.C. § 201 (2006) (detailing copyright ownership: initially, for works made for hire, and transfers of ownership). While the notion that Fourteenth Amendment protections to extend to legal in addition to natural persons may be controversial, see First National Bank of Boston v. Bellotti, 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting) (noting that “it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist”), the notion that a corporation may hold copyrights is not. See, e.g., Stewart v. Abend, 495 U.S. 207, 212 (1990) (noting that petitioners, including Patron, Inc., a production company formed by Jimmy Stewart and Alfred Hitchcock, held the copyright for “Rear Window,” a motion picture derived from Cornell Wollrich’s “It Had to Be Murder”).


151. See, e.g., MÔ'ILI'I MATTERS, http://www.molilimatters.com/ (a community blog maintained by Derek Kauanoe “designed to bring the MÔ'ILI'I community together . . . [and to] ensure that MÔ'ILI'I, Hawai'i is a thriving and neighborly community”).

C. Applying the Stamp: OutKast, Australian Rugs, and Chief Illiniwek Revisited

Perhaps the best way to gauge the effectiveness of the stamp of cultural canonicity is to test it against the very examples that served to parse out the injury arising from intangible cultural appropriation in the first place. If, for example, stamps of canonicity for respective Native American cultures had been established prior to OutKast’s 2004 Grammy performance, then their absence from the performance or the Grammy Awards itself would have put viewers on tacit notice that any of the elements within the performance sourced from Native American culture had been appropriated without the endorsement of the Native American community and, as such, had no material bearing on or connection with that culture. The rare viewer who recognized the appropriated elements of OutKast’s performance as Native American but remained ignorant of the stamp of Native American canonicity—or the significance of its absence—would, through interaction with those aware of the stamp, inevitably learn of his or her mistake and, like one who fumbles embarrassingly into a faux pas, strive not to repeat it in the future.

The elements of the Australian carpet incident involving the appropriation of Aboriginal intangible cultural property—as opposed to the intellectual property of the Aboriginal artists whose works Bethune infringed upon—also change in the face of the stamp of cultural canonicity. The use of a stamp of Aboriginal canonicity would have rendered Bethune’s attempt to co-opt the cachet of Aboriginal culture in the sale of his carpets futile from the onset. Lacking that stamp, a sophisticated consumer would have had no doubt that—whatever their origins, and regardless of what Bethune or his company might claim—the designs on those carpets were anything but Aboriginal.

153. This presupposes, of course, that those viewers would be sufficiently related to or cognizant of Native American cultures as to be aware of those cultures, their stamps, and their respective significance. For those who lack sufficient relatedness or cognition, the absence of a stamp or stamps in relation to OutKast’s performance would admit- tedly have no meaning. However, for those particular individuals, it need not mean anything: their nominal relatedness to or cognition of Native American cultures would also render them patently incapable of recognizing the appropriated elements of OutKast’s performance as being sourced from those cultures. This incapacity effectively inoculates them to the cultural confusion that OutKast’s performance would seed—and which the stamp would ameliorate—insofar as the bare recognition of Native American cultures as the sources of the appropriated elements is a necessary condition for that confusion. In this context, ignorance is indeed bliss—or at least immunity to cultural confusion.

154. As in the OutKast example, an undiscerning consumer might purchase Bethune’s carpets in complete ignorance that their designs were based upon elements of Aboriginal culture, and, as a result of that ignorance, be insulated from any cultural confusion those carpets might otherwise seed.
Moreover, Aborigines and their future cultural initiates alike would know that, when outsiders view, purchase, or even walk on the carpets purveyed by Bethune, they do not encounter the sacred Aboriginal art of the Dream Time but rather pale and differentiable simulacra. They can also rest safe in the knowledge that, due to the absence of the stamp of Aboriginal canonicity on Bethune's wares, others will be equally cognizant of that fact.

Last but by no means least, Chief Illiniwek may offer the clearest insight into the impact the stamp of cultural canonicity can make on cross-cultural appropriations. The stamp insulates Native American cultural members from the potential cultural dilution that could have stemmed from onlookers mistaking Illiniwek or his signature performance for traditional Native American cultural elements. By doing so, the stamp also allows the sub-cultural members of the University of Illinois's sports teams to continue to partake in the Chief's eighty-year tradition. In this way, the stamp protects not only the interests of source cultures, but those of the appropriating cultures as well, thereby facilitating the open exchange upon which the healthy evolution of cultures sorely depends.

V. CONCLUSION

As surprising and paradigm-shifting as they may be, Japan's su-tra-rapping, catwalk-strutting, and bartending monks are not as novel as one might think. In truth, they are 21st-century manifestations of a millennia-old Japanese tradition: an ethnic legacy of cultural appropriation, adaptation, and amalgamation that threads its way through at least two thousand years of Japanese history. As exemplified by the millennia-long evolution of Japanese culture and delineated through the cross-cultural appropriative framework, intangible cultural appropriation in all its varied forms is as integral and inextricable a part of humanity and its cultures as intangible cultural property itself; they are two equally luminous facets of the same glistening gem. To deface either inflicts a cutting blow upon all cultures dire enough to shatter their collective chances of survival—and, by extension, our own.

As demonstrated by the effectiveness of the analogous stamp of creative canonicity in the realm of fan-based activities, the stamp of

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155. Varley, supra note 2, at 5 (noting that the cultural practice of wet-rice agriculture had been transmitted from China to Japan by 400-300 B.C.); id. at 351 (describing Japan's culture as "a history of abundant cultural borrowing from China in premodern times and the West in the modern age," but noting that the Japanese "have nevertheless retained a hard core of native social, ethical, and cultural values by means of which they have invariably molded and adapted foreign borrowing to suit their own tastes and purposes").
cultural canonicity may offer source cultures a way to allow the time-
immemorial free flow of cultural elements while empowering them to
steward their cultural distinctiveness and identity amid the churning
currents of intercultural exchange. It charts a course toward one pos-
sible solution to the problem presented by intangible cultural appro-
priation that requires neither legislative lobbying nor judicial reform.
All the members of a source culture need do to safeguard its perpetua-
tion is take up their own stamp of canonicity and—in the spirit of
those who came before and the interest of those yet to come—wield it
wisely.