Susan Scafidi, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005) (preface, chapters 1 and 12). *This year, 2023, marks exactly 2 decades since the manuscript for this book was completed. Sincere thanks to all of the readers who continue to engage its core question.*

PREFACE AND ACKNOWLEDGMENTS

IN WRITING *Who Owns Culture?*, I have found that questioning the ownership and authenticity of "cultural products"—whether cuisine, dress, music, dance, folklore, handicrafts, images, healing arts, rituals, performances, natural resources, or language—seems guaranteed to produce the sort of mild indignation often caused by the discussion of politics over a holiday dinner. One outraged soul will demand immediate justification: "Hold on! Why exactly doesn't the legal system protect our community against cultural appropriation? We've given a lot to this country, and we deserve to benefit from our contributions." At the other end of the table, someone is certain to interrupt: "Wait a second—it's the mix of cultures that makes America great! Are you telling me I can't borrow from other groups?" (In this vein, one of my more fashion-conscious students was overheard telling classmates in a horrified whisper, "I've read one of Professor Scafidi's articles. I don't think she believes in accessorizing!") From the family intellectual provocateur may come a semi-historical factoid such as, "You know, Marco Polo really brought spaghetti from China," a remark likely to spark debate over which aunt or uncle makes the best old-style tomato sauce to accompany the pasta—cooked al dente, of course. The practical peacemaker at the dinner table, level-headed and eager to move on to dessert, will remind everyone that culture is fluid and evolving, and, in any case, it would be quite difficult to establish restrictive forms of ownership or to police cultural borrowing of everyday art forms. And so back to the particular fish or fowl, sweets or savories, and especially family recipes that mark a particular cultural occasion. Whether they are called objects of cultural elaboration, traditional knowledge, folklore, cultural heritage, or intangible cultural

property, it is far easier to consume cultural products than to analyze them.

To address the threshold challenge of nomenclature, I have chosen the term "cultural products," which emphasizes the ongoing nature of the products' creation and the often controversial but significant role of the market in their life cycles. International interest in this category of cultural goods, in particular the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention for the Safeguarding of the Intangible Cultural Heritage, adopted on October 17, 2003, has emphasized documentation, education, and preservation.[1] If this convention is ratified, it will become the first binding multinational instrument for the protection of intangible expressions of culture. While the values associated with protection are of tremendous importance, especially given the current state of international and domestic law, the benefits of interaction and exchange in the service of cultural understanding are similarly compelling. Although the United States should strongly consider joining the UNESCO convention, mechanisms such as national inventories speak to the warehousing rather than the evolution of living culture. Ratification of the convention or a similar initiative is more likely if it appears sympathetic to concerns regarding trade and commercial interaction, while avoiding misappropriation or exploitation. In exploring possibilities for the balanced protection of cultural products, American law should be tailored to facilitate the initiative of old and new source communities—whether directed toward commodification or preservation of their cultural products—and their participation in the life of the nation as self-defining cultural groups.

The concept of "culture" itself, particularly as an object of ownership or as a locus of authenticity, offers an additional challenge. According to one literary theorist, "'Culture' is said to be one of the two or three most complex words in the English language. . . ."[2] Among academic disciplines, the concept of culture is originally the anthropologists' turf and even there is subject to widespread agnosticism.[3] Such persistent ambiguity is not necessarily a barrier to lawyers, judges, or even legal academics, however, as the law itself evolves along with understanding of its terms of art, as in the case of reasonableness, pri-

vacy, and even justice itself.[4] Although a definitive ruling must await another day, a working legal definition of culture might begin in the Habermasian "lifeworld" of everyday actions and beliefs.[5] Self-defined subsets of individuals who share particular beliefs, practices, experiences, or forms of expression thus form cultural groups.

Despite these complexities, *Who Owns Culture?* attempts to open a wider public, interdisciplinary conversation about the importance of cultural products in American life, as well as their nearly invisible status within our legal system. Now, more than ever, we are eager to bind ourselves into one nation—but, at the same time, to preserve our separate traditions and cultures. The early twenty-first century may be an *e pluribus unum* moment, and we may all love New York, but few of us wish to bring the homogenizing melting pot to a rapid boil. We instead celebrate our diversity (and demonstrate our individual savoir-faire) through consumer culture, as we eat, dress, dance, and speak in the idiom of our neighbors. Indeed, the tension-filled history of American immigration and even internal migration indicates that the cultural products of others are often easier to accept and assimilate than the individuals (or huddled masses) themselves.

When it comes to disagreement about the ownership and authenticity of cultural products, however, or about their appropriate context and uses, there are few rules or even guideposts to ensure quality, prevent faux pas, or give credit where it is due. Although public awareness of the value of creative enterprise rose dramatically with the Internet Revolution, the legal protections of copyright, patent, and trademark do not ordinarily extend to cultural creations. In fact, group authorship creates legal unease, and communal or traditional artistry often goes unrecognized.

This lack of protection for cultural products does not automatically suggest that more laws are the answer, however. As both a legal historian and a professor of intellectual property, I share the concern of many of my colleagues that, in some areas, intellectual property protection has over the years expanded to a degree that threatens to impoverish the public domain and strangle creative enterprise.[6] This is not to suggest that intellectual property protection is unnecessary; even Hobbes warned that in the state of nature "there is no place for

Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth . . . no Arts; no Letters; no Society . . . ."[7] Nevertheless, community-based artworks, and the informal networks that produce them, receive no such expansive protection. It would be unfortunate if, in the rush to denounce congressional extension of copyright term limits or the judicial expansion of patentable subject matter, we were to overlook the lack of protection for cultural products—without even asking ourselves why. The choice to forego legal protection is as socially significant as the choice to expand protection, and the unregulated freedom to engage in cultural appropriation may be as powerful a stimulus to creativity as the promise of protected economic rewards.

When we consider the protection of cultural products, moreover, we must concurrently remain aware of the effect of such protection on the source communities themselves. International discussion regarding indigenous heritage underscores the importance of this inquiry.[8] Culture is naturally fluid and evolving, and well-intentioned legal protections may provoke ossification of a culture and its artifacts. In addition, a source community may include dissenting voices, and a grant of legal protection to those who speak on behalf of the community may silence those voices—always an issue when rights are vested in a group rather than an individual. Any determination regarding the ownership and protection of cultural products must thus proceed with caution, taking into account both cultural and economic effects on the source community, as well as the interests of the nation and world community as a whole.

National pride, communal identity, law, tradition, value, consumerism, appreciation, and habit all play a role in the production and adaptation of cultural products in the ongoing search for an authentic America.[9] At the end of the day, however, the central question, "Who owns culture?", can be answered only by its creators—all of us.

Chapter 1

The Commodification of Culture

> [S]he was surrounded by her garments as by the delicate and spiritualized machinery of a whole civilization.
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> —Marcel Proust

America is a nation of nations. Our imagined community rests not only on a unifying mythology of freedom and independence but also on intertwined tales of regional and ethnocultural character.[1] We are Italian-American mafiosi and African-American gangsta rappers, WASP country clubbers and Jewish intellectuals, gay decorators and Latin lovers, rednecks and computer geeks. These labels reek of stereotype and foment prejudice, yet they remain the signposts of multicultural America—often (although not always) with the advice and consent of the labeled.[2]

The origins of the ethnic, regional, social, and cultural groups that make up the American landscape are as diverse as the groups themselves. Some are the product of waves of immigration, as economic opportunity, war, natural disaster, the quest for religious freedom, and the rise and fall of immigration quotas prompted the relocation of groups large enough to form new communities on U.S. shores. Other groups, like African-American slaves and their descendants, Native Americans forced onto reservations, and gay and lesbian activists fighting for civil rights, take shape through domestic adversity. Still other communities, like the Daughters of the Confederacy or Maine lobstermen, coalesce through shared regional and historical ties; more recently, the poverty and violence of urban areas have produced a

distinctive culture of their own. Personal hardship, such as losing a loved one in the 9/11 terrorist attacks or living with a physical disability, can also bring individuals together as a recognizable group. Even shared avocations may produce distinctive cultural groups, such as science fiction enthusiasts, opera buffs, and sports-team fans.

While some cultural groups remain largely invisible to outsiders, others occupy significant territory in the majority consciousness. An announcement of Bavarian heritage or of support for a local badminton team is likely to draw a blank stare or, at best, a polite nod. By contrast, mentioning a childhood in Pennsylvania Dutch country or wearing a Yankees baseball cap leads to immediate recognition—in the latter case, not always positive.

Many characteristics affect public recognition or ignorance of particular cultural groups. These include the size of the group, its geographic concentration or distribution, its historical significance, the physical appearance or behavioral characteristics of group members, the group's collective interaction with the majority public, and its economic or political influence. The public identity of a cultural group and its variation over time are determined by a complex range of circumstances and interactions.

CULTURAL APPRECIATION

One of the most significant differences between recognizable and invisible cultural groups, and the most relevant factor for purposes of this study, is the degree to which a particular group has been commodified. As a nation of consumers, we define many of our experiences and associations through acquisition. When we travel, we purchase miniature replicas of Mount Rushmore or the Statue of Liberty; when we graduate, we collect diplomas; when we enjoy a concert or a sports event, we buy the T-shirt. Similarly, when we encounter other cultural groups, we are most likely to pay attention to those that offer us the potential to acquire distinctive merchandise, experiences, or souvenirs. If these cultural products are not readily available, we collectively lose interest and move on to the next opportunity for interaction.

Consumers respond to cultural products in the marketplace and

elsewhere much the way that decorator crabs gather seaweed and adorn their shells. In an educational exhibit at the Monterey Bay Aquarium, the marine biologists placed decorator crabs in separate tanks with different materials—not only the seaweed ordinarily found growing on the ocean floor but also brightly colored yarn available at local craft shops. Skilled in the art of camouflage, the crabs living with the yarn affixed bits of the foreign material to their shells in lieu of seaweed. When we decorate our homes, dinner tables, and persons with others' cultural products, we exhibit behavior similar to that of the decorator crabs, albeit with more complex motives.[3] Distinguished anthropologist Clifford Geertz notes that human intellectual capacities evolved in the presence of culture and require the presence of significant symbols in order to function; he concludes, "We are, in sum, incomplete or unfinished animals who complete or finish ourselves through culture."[4]

Similarly, when bohemians in 1920s Manhattan visited Italian restaurants in Greenwich Village or when modern gastronomes comb Chinatown for the perfect dim sum, the goal is not only to procure lunch but to add cosmopolitan luster to the identity of the diner.[5] In his critique of the role of taste in enforcing social-class distinctions, French sociologist Pierre Bourdieu refers to this selective version of cultural appreciation as the acquisition of "cultural capital."[6] When the transaction is voluntary, it may benefit both the source community and the general public.

In order for an ethnic, regional, social, or cultural group to register upon the American mental landscape, then, the nation as a whole first extracts what might be termed an identity tax. This tax is payable to the public domain in the form of distinctive cultural products, including cuisine, dress, music, dance, folklore, handicrafts, healing arts, language, and images. Chinese medicine, Ethiopian restaurants, Australian Aboriginal instruments used in the theme of the *Survivor* reality television series, and Andean street musicians all contribute to the national culture. In many cases, consumption of these cultural products is the first—or indeed only—contact that many Americans have with cultural groups other than their own. Were it not for their cultural products, many groups would remain largely invisible.

When cultural products enter the marketplace or otherwise become accessible to outsiders, society at large claims the right to sample them and in return recognizes a group identity constructed from a simplified set of defining characteristics. This identity is necessarily limited—an entire culture cannot be read in the gold embroidery of an Indian woman's sari or illuminated by the flames from a dish of American-style Greek *saganaki*. Cultural products do, however, provide a starting point for recognition of the source community as well as a means of allowing outsiders a degree of participation in and appreciation of that community.

Although the commercial availability of cultural products is one means of cultural exchange, payment of the identity tax can also involve the informal or even inadvertent contribution of images, aromas, superstitions, melodies, or spoken phrases. The locus of this exchange might be the street festivals and family-owned restaurants of immigrant America, the society columns and shelter magazines of urban society, or the home pages and bulletin boards of cyberspace. Wherever cultural groups or their everyday art forms come into contact with the general public, they enrich the public domain of American culture and work to establish their own communal identities within it.

The perceived advantage to American consumers of an ever-expanding range of cultural products is fairly straightforward. Nativist sentiments or certain strains of extreme social conservatism aside, we are cultural gourmands. The more parades, radio stations, publications, and decorative housewares are available, the greater our pleasure in the diversity of choice. This sentiment has echoes in classical antiquity: Herodotus praised ancient Greek society for its cultural acquisitiveness, noting that Greek and Libyan armies copied elements of one another's armor and that the Greeks borrowed many of their gods from Egypt. Even manners and morals could be borrowed, according to one scholar who notes that "nearly all the people on Herodotus's map shop around for the *nomoi* they find most useful or pleasurable."[7] Similarly, the European Renaissance owed much to open trade routes with the Islamic world and Asia. From the point of view of the American majority public today, the appreciation of others' cultural products—

although not necessarily the presence of the others themselves—is a fringe benefit of globalization, integration, and the commodification of culture.

Cultural Appropriation

Far from an uncontested process, however, the movement of cultural products from subculture to public domain provokes both majority-minority struggles and fraternal conflict. Outsiders attracted by particular art forms are seldom content to limit themselves to recognition and appreciation of the source community or even to limited consumption at the invitation of the community. Instead, members of the public copy and transform cultural products to suit their own tastes, express their own creative individuality, or simply make a profit. This "taking—from a culture that is not one's own—of intellectual property, cultural expressions or artifacts, history, and ways of knowledge" is often termed "cultural appropriation."[8]

Some cultural products can be freely shared with the public; others are devalued when appropriated by the majority culture: consider the distinction between popularizing a Caribbean dance rhythm and secretly recording and distributing a Native American sacred chant. German philosopher Jürgen Habermas addresses the problem of cultural commodification and the distorting effects of commerce on tradition and culture, stating, "The media of money and power can regulate the interchange relations between system and lifeworld only to the extent that the products of the lifeworld have been abstracted, in a manner suitable to the medium in question, into input factors for the corresponding subsystem, which can relate to its environment only via its own medium."[9] The abstraction of a dance rhythm from its cultural lifeworld, whether via a market system or an intellectual property system that permits unfettered copying, may not severely harm either the source community or the cultural product itself. By contrast, the appropriation of a secret or sacred cultural product is much more likely to cause damage.

Even when voluntary, contributions to popular culture are subject to gross distortion: can Mexican national cuisine be faithfully represented by Taco Bell? The large-scale culture industry is perennially

under attack for its tendency to simplify and standardize, to the detriment of "authentic" culture or artistry. German scholars Max Horkheimer and Theodor Adorno, writing from Los Angeles during World War II, noted, "Pseudo individuality is rife: from the standardized jazz improvisation to the exceptional film star whose hair curls over her eye to demonstrate originality."[10] For Horkheimer and Adorno, cultural conformity raised the specter of fascism. In the realm of cultural appropriation, replacement of homemade tortillas or the small neighborhood *taquería* with a mass-market product or chain store may create a barrier to cultural identity and national diversity.

Within a cultural group, members may debate the authenticity of particular cultural products, a difficulty exacerbated by their constantly evolving nature. Which version of a recipe or folktale is the "real" one? In some cases, there may be a reasonably clear ur-product, like Neapolitan pizza, and competing regional versions, like those made with a thin crust in New York, in a deep-dish style in Chicago, and with unusual gourmet toppings in California. In other cases, the origin of a cultural product may lie in an obscure past, or splinter groups may exert competing claims to the true tradition. When claims of originality or authenticity move beyond good-natured rivalry, which may actually spur creativity, they can hamper the ability of certain members of a cultural group to participate in the creation of cultural products or distort the identity of the group as a whole.

Perhaps the most contentious internal issue of all is how to regulate the general public's access to the cultural goods of a particular community—and who should benefit economically from their distribution. Since cultural groups are often loosely organized networks with shifting membership or degrees of affiliation, they tend to lack a single authoritative voice that might channel cultural appreciation or prevent cultural appropriation. The power to control economic exploitation of cultural products is similarly decentralized; while source communities may lament the loss of profits to outsiders or the uneven sharing of economic benefits within the community, they cannot remedy the situation.

The commodification of culture, and especially the role of cultural products, is a mixed blessing for the general public and for source

communities. If the identity tax were not involuntary and automatic, cultural groups might choose to forego the benefits of potential public recognition in favor of protection against appropriation. Alternatively, they might exercise greater influence over the copying and reinterpretation of their cultural products, offering the public a guarantee of quality, historical knowledge, and the elusive promise of authenticity. At present, however, cultural products that catch the public eye circulate in a largely unregulated sphere of mixed appreciation and appropriation.

Legal Culture

Despite the significance of artistic and social conflicts over the nature of cultural products in American life, these disputes occur in a legal vacuum. Other forms of creative production receive extensive, even excessive, protection against copying under our system of intellectual property law. Cultural products, however, are indefinite works of unincorporated group authorship, and they present a particular challenge.

Intellectual property law is a relatively young discipline with a distinguished family tree. From its Romantic ancestry, intellectual property derives an emphasis on individual genius. From its Enlightenment parentage, it inherits a tremendous confidence in the ability of the rational mind to create, to solve, to progress, to assign value. So great is this confidence in the power of intellectual creation that intellectual property law challenges the market itself, granting limited monopolies and blocking access to otherwise public goods in order to ensure continued "Progress of Science and useful Arts," in the constitutional phrase.[11] With the late twentieth-century rise of the Information Age and the recognition of ideas as wealth-generating capital, intellectual property protection has risen dramatically in importance. Its limitations, consequently, are becoming apparent.

One of the limitations of our current scheme of intellectual property protection, besides the often-cited narrow scope and great expense, is the treatment of group authorship. From high tech to low tech, from the Linux operating system to Native American folklore, our system struggles to assign intellectual property rights to authors

who fail to evoke the Romantic image of the solitary artist scribbling away in an unheated garret or the unkempt scientist waking from a fitful nap on a cot in the laboratory with a sudden flash of insight. Even a patent "owned" by a multinational conglomerate must list its humble human inventor. Lawmakers have been subjected to extensive criticism and even legal challenge for their expansions of intellectual property protection in other areas, yet our system continues to neglect the intellectual property rights of a group, especially one without a preestablished corporate identity.

This legal neglect of cultural products may be ascribed to the history of intellectual property law, the complex nature of cultural products and the concomitant difficulty of providing a legal framework, or simply cultural bias. Before proposing an extensive system of protection for cultural products, however, we should consider the possibility that the relative absence of law—like law itself—may spark creativity or even preserve national character. As we strive to maintain the rich texture and common goals of our heterogeneous polity, we must attempt to balance the tension between the public domain and private property, cultural appreciation and cultural appropriation.

Chapter 12

An Emerging Legal Framework

Life is not a having and a getting, but a being and a becoming. —Matthew Arnold

Shakespeare famously likened the world to a stage, and its inhabitants to players on it. Had he been a modern visual artist, however, he might have imagined instead an interactive art installation and a steady stream of visitors—or at least remembered to thank the set and costume designers. Society does not continually reinvent itself on an empty platform but is instead enmeshed in systems of property rights, market exchange, and material culture, tangible and intangible. The cultural contribution of voluntary immigrants, involuntary immigrants, and indigenous peoples to the American national project not only asserts the presence of those cultural groups, often well before their members are considered full citizens in a civil or political sense, but also serves as a catalyst for the construction of an "authentic" American culture.

This quest for authenticity in an era of impeccable, immediate copies reveals a peculiar anxiety of our age, to once again invoke T. J. Jackson Lears.[1] The invention of the printing press bypassed monastic scriptoria and ecclesiastical control over the reproduction of texts, prefiguring the Protestant Revolution. The Industrial Revolution removed production of everyday objects from craftsmen and created mass markets, prompting a yen for nature that produced both the Boy Scouts and the Arts and Crafts movement.[2] Our own Internet Revolution gives us ever-increasing access to commodified culture and digital clones of creative works, yet we remain suspicious of the value of these too-perfect, acontextualized forgeries even as we consume

them. The market recognizes our ambivalence and promises us goods that are "authentic," "original," "genuine," and even "retro." Meanwhile, starlets with unlimited access to couture creations tap into the *zeitgeist* by wearing "vintage" gowns on the red carpet, and world-class chefs offer "home cooking" in the form of gourmet mashed potatoes, meatloaf, and macaroni and cheese. A taste for the "cultural" joins this emphasis on the venerable, as we associate the products of communities outside the mainstream with more genuine, organic lifeways. We do not collectively aspire to belong to working-class, foreign, or transgendered communities, but we congratulate ourselves on our easy familiarity with trucker hats, sushi, and RuPaul.

No less an observer than Alexis de Tocqueville has noted that American society is defined by a central tension between individual and community, independence and interdependence.[3] In the arena of cultural appropriation, existing legal structures have focused on individual rights and on the nation as a whole at the expense of the subcommunities that constitute the American polity. It might be said that American law embraces the principles of *liberté* and *égalité* but neglects *fraternité*. Only through private means or the awkward invocation of analogous legal principles have source communities been able to protect their cultural products against misappropriation. At the same time, proponents and practitioners of cultural appropriation have overlooked its civic benefits and focused instead on individual autonomy and negative rationales for the exclusion of cultural products from legal notice. Perhaps it is time the law move to correct these omissions by striking a balance between protection and appropriation of cultural products in American life.

BEYOND THE LIMITS OF INTELLECTUAL PROPERTY

Extending limited intellectual property protection to intangible cultural products would involve several stages. To begin, the law must reconceive the concept of "authorship" or creation to reflect the reality of unincorporated group collaboration, malleable Foucaultian notions of authorship, and the value of cultural products.[4] This process would

harmonize with both utilitarian and ethical theories of intellectual property protection. Cultural products would fall under the utilitarian constitutional classification of "Science and useful Arts," which Congress is empowered to promote by securing exclusive rights to their "Authors and Inventors," the source communities.[5] Similarly, "moral rights" would as easily apply to a source community as to an individual genius; claims of authenticity, in particular, could easily be assimilated to a limited moral right of attribution. Under either theory, source communities would receive a bundle of property rights similar to those of their individual counterparts, albeit with more robust exceptions for fair use designed to promote the civic benefits of limited appropriation.

Next, the law must alter its temporal restrictions on intellectual property protection. The maximum term of protection could reflect the life span of a source community, in place of the life of the author or a simple term of years, or could be divided into shorter terms renewable on a periodic basis. While many source communities endure almost infinitely, some disband or expire. Any cultural products left behind by the American Whig party are long abandoned; likewise, Minnesota Vikings fans need not seek permission to don horned helmets. The novelty and originality requirements of patent and copyright law, respectively, are meaningless in the case of continually evolving cultural products. Instead, the law might adopt a trademark-like emphasis on current use, drawn from the Commerce Clause, or a trade secret–like requirement that the source community continue to derive benefit from the cultural product. In order to preserve the flow of creations and inventions into the public domain, especially in light of the longevity of source communities, the exclusiveness of ownership should be established in rough inverse proportion to the duration of protection, taking into account the relative cultural significance of particular artifacts or rituals.

In addition, the legal system must revise its common law emphasis on the reduction of cultural products to concrete form as a requirement for protection. While individual or defined groups of authors and inventors generally anticipate embodiment or reduction of their work to tangible form prior to its legal recognition, cultural groups may have longstanding preferences and practices regarding intangibil-

ity and orality. Since material form is a useful but not strictly necessary precursor to intellectual property protection, as apparent from the protection of aural and olfactory trademarks and the absence in civil law of any requirement of tangibility in copyright, source-group election in favor of intangibility should not affect the availability of protection for cultural products.

These modifications to the class of beneficiaries, as well as to the temporal and material limitations of intellectual property law, would serve to establish the broad outlines of a category of cultural-product protection. This is not necessarily to suggest that current intellectual property law statutes be modified to include cultural products, a process that might result in overprotection of cultural products at the expense of beneficial cultural exchange, particularly in light of current international minimum standards for the established categories of intellectual property protection. Instead, the current system of intellectual property law provides a functional template that can be modified to address the concerns of source communities regarding intellectual property protection and societal concerns regarding cultural development and the public domain. Such protection would complement the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which calls upon nations to engage in protective and educational activities such as documentation and education.[6]

DEGREES OF CULTURAL-PRODUCT PROTECTION

Protection of cultural products ideally should involve not merely the expansion of intellectual property law, but also an institutionalized mechanism to facilitate cultural exchange. One method of promoting a balance between source-community interests and the civic role of intangible cultural products might be for intellectual property law to develop multiple levels of protection corresponding to the nature of the protected good. Such differentiation among protected works within the separate intellectual property categories of copyright, trademark, and patent occurs in only a few cases, and it is generally disfavored or forbidden by international treaty. Cultural products as yet enjoy no such worldwide recognition, despite growing global

concern. A *sui generis* legal regime of cultural-product protection could therefore be more narrowly tailored to different types of cultural production on a national basis. As indicated in the table, the type of protection afforded each cultural product would depend on its source-community classification as a private good or public good (in the sense of a product voluntarily released outside the community, rather than a noncompetitive good) and on whether or not the source community has voluntarily commodified the product. As in defining the scope of property itself, the law may choose to exclude elements such as human life and aspects of human sexuality from the rubric of cultural-product ownership altogether.

Cultural-Product Protection

	Private	Public
Noncommodified	Enhanced trade secret –style protection	©/Patent-style protection
Commodified	©/Patent-style protection	®-style/"Authenticity-mark" protection

Private, Noncommodified Cultural Products

Sacred, secret, or exclusive products that would otherwise risk destruction through cultural appropriation, such as the ceremonial dance of the Pueblo of Santo Domingo described in Chapter Eight, could receive a high level of protection in a manner similar to that of trade secrets. The source community would bear reasonable responsibility for excluding the general public from the cultural product or placing strict limitations on access, and outside appropriation in violation of these community restrictions would be strictly forbidden. A sacred song entrusted to a particular individual, a set of scriptures intended only for initiates, or the use of a particular plant ingested in the context of a religious ritual could each be protected in this manner. Unlike trade secrets, however, disclosure of the private, noncommodified product by a single dissenting or careless insider should not result in loss of protection and thus harm the entire community.

Private, Commodified Cultural Products

Cultural products intended for use and market exchange primarily among members of the source community, or private, commodified products, could receive a slightly lesser degree of protection analogous to patent or copyright. This category might include an object used in the practice of religion, like a menorah, rosary, or prayer rug. In such cases, it is important that the form of the cultural product and perhaps even the process of its creation follow community specifications. The source community could exercise the usual rights to exclude, to transfer, and to use or possess its embodied cultural products, subject to limited outside appropriation analogous to the fair use of copyrighted material or experimental use of a patented invention. Outsiders might legitimately possess, display, or critique these objects, or even copy or use them in an expressive fashion to invoke or criticize the source community. This limited appropriation, however, would not extend to outside commodification of the cultural products, which must retain a degree of purity or objective authenticity in order to instantiate the values of the source community.

Public, Noncommodified Cultural Products

As in the example of open-source code discussed in Chapter Nine, some source communities choose to make their cultural products public without commodifying them. While the principal open-source standards organization, OSI, has worked within existing trademark law to create a certification mark, and the use of licenses to protect the free distribution of open-source software is commonplace, hackers and similarly situated source communities could have significantly more control over their cultural products if a regime similar to copyright or patent law were to protect those products. The open-source software community's situation is unusual in that few outsiders have the technical capacity to appropriate and commodify its cultural products. If that circumstance were to change, or if other source communities wished to share their cultural products on the condition that they remain uncorrupted and virtually free of charge, stronger protection could assist in both enforcing the creators' wishes and ensuring the continued vitality of their cultural products. Source communities

would not have absolute control under such a regime, which would be subject to broad limitations analogous to fair use, but would retain an affiliation with their products.

Public, Commodified Cultural Products

The largest category of cultural products, those both deliberately commodified and made available to the public, should theoretically enjoy the least protection against outside appropriation. These intangible goods are likely to be more durable than their protected, private counterparts, and their appropriation is least likely to seriously damage the source communities. The pervasive civic benefits bestowed on a heterogeneous polity through cultural group contributions in the form of distinctive cuisine, popular music, habits of dress, and elements of language, moreover, are too extensive to support legal elimination of cultural appropriation.

Nevertheless, the law should not continue to deny source-community interest in these creations. The Australian Aboriginal didgeridoo, for example, is a sacred instrument traditionally made from a tree hollowed out by insects and painted with designs that vary according to region and intended ceremonial use. Knockoffs for the tourist trade are made of artificial materials and incorporate non-Aboriginal designs, to the distress of the source community. While the Australian government makes no attempt to halt the trade in didgeridoo copies, it has instituted a program for the labeling of authentic Aboriginal art destined for the market, including musical instruments.[7]

A general program for the creation, registration, and placement of "authenticity marks" on commodified, tangible cultural products that originate from within the source community would preserve the relationship between community and product and create an affiliative ownership without halting the fertile exchange inherent in much cultural appropriation. This balance could be facilitated through specially designed laws or programs, as in the case of protection of indigenous handicrafts in the United States and Australia, or through source-community adaptation of existing trademark provisions.[8] Periodic renewal of the grant of an authenticity mark according to evolving community standards could avoid reifying the communal culture.

Even fraternal disputes over authenticity could be addressed through a trademark-style system of authentication. The possibility of multiple or competing grants of product recognition analogous to kosher certifications would permit the public expression of multiple points of view from within the source community. As with each suggested degree of cultural-product protection, existing federal administrative agencies would provide a suitable forum for source communities seeking the assistance of law.

BOTH OUR DIVERSE nation and our postmodern consciousness have taught us to appreciate commodified cultural products. Intellectual property law should reinforce this lesson not by allowing unlimited appropriation of these intangible goods, but instead by protecting them. While the above schema represents only one attempt to balance the interests of communal creation and the public domain and to systematize a complex pattern of exchange steeped in history and habit, culture and pride, it is a balance central to the past and the future of American national culture.

THE ROLE OF LAW IN CULTURAL PERSPECTIVE

The problem of unincorporated group authorship invokes issues of cultural evolution versus authenticity, constructed communal identity versus free expression, ownership versus appropriation, privacy versus collaboration. Resolution of these tensions now occurs on an ad hoc basis, if at all. Absent a jurisprudence of cultural protection or even the shared understandings that undergird customary law, each source community and its intangible cultural products are largely subject to the values of the general public. Although the social cohesion of a heterogeneous nation rests in part on cultural groups' payment of an identity tax in the form of these cultural products, the social contract that should in turn protect cultural groups resembles instead an exaction of tribute. Intellectual property law may provide the mechanism to balance the scales, to temper cultural contribution with cultural protection.

The suggestion that law cease to ignore cultural products, what-

ever the benefits of unregulated cultural appropriation, should not be interpreted as tantamount to an encouragement of more lawsuits or other means of formal dispute resolution. Contrary to popular belief, not all lawyers aspire to run late-night commercials informing unsuspecting members of the public that they may have been harmed and should pursue (potentially lucrative) justice. Except in cases of demonstrable harm to a source community, courts should not be at the forefront of the everyday business of regulating culture.

Admittedly, the association of even limited, associative property rights with cultural products bears the risk of distorting relations within source communities and altering cultural products, as their value as both signifiers and economic resources increases. In cases of misappropriation, outside intervention may already have harmed communal artistry, and the law is less likely to do additional damage. For examples of cultural appropriation more generally, the proposed creation of authenticity marks attempts to avoid trapping culture in the corridors of legal formalism by establishing ownership rights only in the marks themselves rather than in the cultural products they legitimate. Still, even this *via media* is not free of risk.

The function of law is nevertheless not only to decide cases, but also to establish values and reasonable expectations around which citizens can order their interactions. If the law states that cultural products are valued creations of their source communities, should be treated with respect according to the norms of those source communities, and yet should in most cases be accessible in the public domain for civic reasons, then well-intentioned members of society are afforded guidelines for civil interaction. Similarly, internal community disputes regarding cultural products may not be resolved through the application of statutes, but the law can at least provide a vocabulary and framework for discussion that acknowledges the significance of the matters at hand. This role of law as pedagogue, rather than exclusively as judge and jury, is a feature of Western jurisprudence dating back at least to Aquinas, who attributes many of his insights on this matter to Aristotle. Humanity "has a natural aptitude for virtue, but the perfection of virtue must be acquired by man by means of some kind of training," whether through social interaction or the mechanisms of law.[9] For a

heterogeneous polity in which differing community norms may exist in relative ignorance of one another, law is called upon to facilitate the development of a national culture, not least in the matter of cultural appropriation.

According to Oscar Wilde, "'Know thyself' was written over the portal of the antique world. Over the portal of the new world, 'Be thyself' shall be written."[10] An authentic American society in the subjective philosophical sense consists not only of autonomous individuals or of separate communities defined by consanguinity or a multitude of affinities, but also of a would-be nation continually striving to create itself. Much of this interaction takes place in the world of material culture, property, and now virtual property, as we exchange, borrow, create, and construct a common—or at least aspirational—identity. Legal recognition of cultural products is a totemic element of this project.

WHEN I FIRST concluded a series of arguments for the limited regulation of cultural appropriation, I was sitting in a West Coast café named for an Italian city. Outside the window, the sun shone on a university campus where the student body no longer includes a majority of any single cultural group. Around me were patrons of every race and multiple nationalities, several displaying symbols or head coverings of different religious groups and many with T-shirts proclaiming additional cultural affiliations. The multilingual buzz of conversation competed with the periodic hiss of the industrial-strength espresso machine downstairs, expertly operated by a Latino and a woman of northern European descent. At the time I blithely concluded, if this scene were to any extent a dividend of the appropriation of one of my ancestral cultural products, "Let them drink coffee!"

Since that time, the postmodern era in America has ended—or rather, we are all postmodernists now. The watershed moment of our generation is, of course, 9/11. While the liberal project of toleration and the postmodern emphasis on diverse perspective still pervade our national consciousness, perhaps with more urgency than before, we aspire to reclaim a unity of purpose that would fulfill the promises of our national myth. Whether through the adoption of a prophetic

pragmatism, a revival of nineteenth-century idealism, or some other emergent projection of unity in diversity, America seeks not only to absorb the authenticities of its constituent communities but also to achieve its own internal authenticity.[11] As Lionel Trilling reminds us in the context of artistic culture, the quest for authenticity is an inherently powerful and even violent project, requiring an extreme exercise of personal will to overcome the sentiment of nonbeing.[12] If we are to succeed, our collective performance of America will both appropriate and preserve its constituent cultures and their contributions to the project of nationhood. And, as companions in this quest, we will not only break bread or matzoh or pita or naan or tortillas or *injera* together, but also share that cup of coffee.