

# Fair Use as Cultural Appropriation

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*Over the last four decades, scholars from diverse disciplines have documented a wide variety of cultural appropriations from Indigenous peoples and the harms these have inflicted. Copyright law provides at least some protection against appropriations of Indigenous culture—particularly for copyrightable songs, dances, oral histories, and other forms of Indigenous cultural creativity. But it is admittedly an imperfect fit for combatting cultural appropriation, allowing some publicly beneficial uses of protected works without the consent of the copyright owner under certain exceptions, foremost being copyright’s fair use doctrine. This Article evaluates fair use as a gatekeeping mechanism for unauthorized uses of copyrighted culture, one which empowers courts to sanction or disapprove of cultural appropriations to further copyright’s goal of promoting creative production.*

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*As codified in the 1976 Copyright Revision Act, the fair use doctrine’s four-part test is supposed to help fact finders determine the reasonableness of an unauthorized appropriation. But, while the fair use test has evolved to address questions about the purpose behind an appropriation, the amount and substance of the work used, and the effects of the appropriation on the market for the work, the vital inquiry about the “nature” of the original work and the impact of unauthorized appropriation on its creative environment has been all but forgotten by lower federal courts. Combining doctrinal analysis, settler-colonial theory, and ethnographic fieldwork involving ongoing appropriations of copyrightable Indigenous culture, this Article shows how the “forgotten factor” in the fair use analysis is key to assessing the real impacts unauthorized appropriations have on culturally diverse forms of creativity. Thus, if we are committed to the development of creativity in all of its varieties and natures, a rehabilitation of the forgotten factor is both urgent and necessary.*

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## INTRODUCTION

In 2019, the Los Angeles-based fashion retailer MadHappy began selling sweatshirts featuring a remarkable new design. Alongside a “MadHappy” logo on the arm of the sweatshirt, the front of the sweatshirts displayed a circular rainbow with two psychedelically colored cornstalks shaped into a crest that enclosed four multicolored mountains bearing the names of Aspen, Colorado ski resorts.<sup>1</sup> Not long after the sweatshirts appeared in the Instagram feeds of celebrities, a Twitter storm from the Navajo Nation erupted chiding the retailer for appropriating what was immediately recognized as the Nation’s official seal.<sup>2</sup> The seal’s design, an original two-dimensional graphic work created in 1952 by Tribal member John Claw, Jr., is a cultural icon that, according to the Tribe, remains under copyright.<sup>3</sup> This latter consideration seems to have convinced MadHappy to stop production, divert proceeds from sales of the shirts to the Navajo Nation, and agree to undertake cultural sensitivity training for its staff.<sup>4</sup>

This instance of cultural appropriation ultimately ended amicably. But what result can Navajo Nation and other Indigenous peoples<sup>5</sup> expect in future

1. The details of this dispute and its eventual settlement can be found in Donovan Quintero, *Clothing Retailer Apologizes for Design Resembling Navajo Seal*, NAVAJO TIMES, Jan. 30, 2020, <https://navajotimes.com/reznews/clothing-retailer-apologizes-for-design-resembling-navajo-seal/> [<https://perma.cc/3LPU-XRYD>].

2. See Emma VandenEinde, *MadHappy Clothing Company Apologizes for Using Navajo Nation Seal Design*, KJZZ (audio recording) (Feb. 6, 2020), [<https://perma.cc/883A-8AN2>]. The four Aspen mountain resorts featured on the sweatshirts were originally depictions of Diné people’s four sacred mountains, and the circular, unclosed rainbow symbolizes the Nation’s sovereignty. See *Tribal Government*, NAVAJO NATION DEP’T OF ECON. DEV., <http://navajobusiness.com/fastFacts/FlagSeal.htm> [<https://perma.cc/J2CM-BM5G>] (last visited Sept. 30, 2020).

3. See 17 U.S.C. § 102; see also VandenEinde, *supra* note 2 (noting that the Navajo Nation’s Director of Economic Development contacted the retailer over claims of copyright infringement regarding the use of the seal). The seal was created in a design competition and was later adopted by the Navajo Nation as its official seal. See *Creator of Navajo Nation Seal, John Claw, Jr., 82, Passes on*, NAVAJO-HOPI OBSERVER (Mar. 14, 2017), <https://www.nhoneews.com/news/2017/mar/14/creator-navajo-nation-seal-john-claw-jr-82-passes/#:~:text=%20The%20Navajo%20Nation%20lost%20a,the%20Nation's%20identity%20is%20unequivocal> [<https://perma.cc/MFK8-DB96>].

4. See VandenEinde, *supra* note 2.

5. In this Article, I use the term “Indigenous peoples” to refer to political entities and their individual citizens that are native to a particular territory, in this case the present-day United States, as opposed to colonizing nations and their settler-citizens. The term “Native American” is used to reference the racial group that includes those whose lineal ancestors originated in the Americas. The term “Tribe”

copyright disputes should they be forced to litigate to protect their culture from unauthorized exploitation?<sup>6</sup> The answer to this question turns, in part, on whether courts will consider appropriations like MadHappy's to be infringements or will sanction them under equitable legal doctrines like "fair use."

Debates surrounding the unauthorized appropriation of Indigenous peoples' "intangible" culture—songs, dance forms, oral histories, designs—by those with power or privilege have been slowly unsettling the foundations of American copyright law for decades.<sup>7</sup> A growing stream of scholarship and news reports documenting cultural appropriations, from the seemingly innocent to the more intentional and obscene, have raised concern nationally and internationally, leading in some cases to protests and other forms of direct action.<sup>8</sup> In response,

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refers to an Indigenous political entity that is recognized by the United States. "Indian" is a term of art referring to members of federally recognized Tribes as well as those who qualify for federal benefits generally granted to members of Tribes.

6. For example, litigation in the federal District Court for the District of Alaska recently settled over the alleged appropriation of Tlingit artist and author Clarissa Rizal's *Ravenstail Knitted Coat* design by retailer Neiman Marcus. See Press Release, Sealaska Heritage, Sealaska Heritage, Rizal Family Settle Lawsuit Against Several Defendants (Mar. 3, 2021), <https://www.sealaskaheritage.org/node/1367> [<https://perma.cc/AKA8-KQXU>]. Sealaska Heritage Institute and the Rizal family sued the retailer for, among other things, violations of the Copyright Act, 17 U.S.C. § 501–05; First Amended Complaint ¶¶ 1–3, 7, 90–92, *Sealaska Heritage Inst., Inc. v. Neiman Marcus Grp. LTD*, No. 20-cv-00002 (D. Alaska Aug. 29, 2020).

7. Scholars have written extensively on the inadequacies of intellectual property law to combat the effects of cultural appropriation. See, e.g., Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANN. REV. L. & SOC. SCI. 393, 393–407 (2009); Pratima V. Rao, *Cultural Appropriation: A Selected Bibliography*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 321, 321–24 (Bruce Ziff & Pratima V. Rao eds., 1997) [hereinafter *BORROWED POWER*]. Influential literature from historians, social scientists, legal scholars, literary critics, scholars of American Indian studies, and many other fields, has examined the role of power and privilege as it relates to culture, including JAMES O. YOUNG, *CULTURAL APPROPRIATION AND THE ARTS* (2008); SUSAN SCAFFIDI, *WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* (2005); MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (Stanley Fish & Fredric Jameson eds., 1998) [hereinafter *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES*]; PHILIP J. DELORIA, *PLAYING INDIAN* (1998); *BORROWED POWER*, *supra*; WALLIS ROGER & KRISTER MALM, *BIG SOUNDS FROM SMALL PEOPLE: THE MUSIC INDUSTRY IN SMALL COUNTRIES* (1984); VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969).

8. Professor Adrienne Keene continues to document and hold accountable those who appropriate Indigenous culture through her Native Appropriations blog. See Adrienne Keene, *NATIVE APPROPRIATIONS BLOG*, <http://www.nativeappropriations.com> [<https://perma.cc/4XN4-XRNF>]. To give a sense for the range of cultural appropriations being documented, compare Vanessa Friedman, *Dior Finally Says No to Sauvage*, N.Y. TIMES (Sept. 13, 2019), <https://www.nytimes.com/2019/09/13/style/dior-sauvage-cultural-appropriation.html> [<https://perma.cc/492M-Q66E>] (reporting on Dior's Fall 2019 advertising campaign for its "Sauvage" cologne that depicted a Native American powwow dancer and a woman in buckskin emerging from a riverbank, which was ultimately scrapped after widespread condemnation), with Nadra Nittle, *These Costumes Objectify Native American Women. Retailers Won't Stop Selling Them.*, VOX (Oct. 1, 2018), <https://www.vox.com/the-goods/2018/10/1/17924088/halloween-costume-yandy-sexy-native-american-backlash-handmaids-tale> [<https://perma.cc/5GFZ-FNZE>] (describing the sale of sexually objectifying costumes depicting Indigenous women despite the overlapping experiences of racism, environmental injustice, and sexual violence experienced by the target of their burlesque), and Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property*, 17 INT'L J. CULTURAL

legal scholars working to theorize cultural rights have articulated what Indigenous peoples have intuited for centuries—that cultural appropriation functions as an extension of European-settler conquest, which has systematically dispossessed Indigenous communities of their lands, natural resources, family relationships, identities, and even their own bodies.<sup>9</sup>

Congress has failed to adequately curtail unauthorized appropriations of Indigenous cultural expressions and other forms of intellectual property, despite its duty to protect Native American Tribes within its jurisdiction.<sup>10</sup> To be sure, Congress has provided some limited solutions to curb appropriation or desecration of “tangible” objects that are culturally important to federally recognized Indian tribes (hereinafter “Tribes”).<sup>11</sup> And Congress enacted a truth in advertising law, the Indian Arts and Crafts Act, which prohibits selling and displaying arts and crafts or “Indian Products” while falsely suggesting they are “Indian” made.<sup>12</sup> But, there are currently no federal laws other than copyright

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PROP. 581 (2010) (discussing the appropriation and commodification of Quileute and other Tribes’ culture and oral literatures), and Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002) (documenting cases where filmmakers and novelists have appropriated characters and story lines from Indigenous histories and oral literatures and proposing an Indigenous “right to [] culture”), and Press Release, Ass’n on Am. Indian Affs., *The Metropolitan Museum of Art Ignores Responsibilities to Indian Tribes* (Oct. 29, 2018), [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-29\\_met\\_pr.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-29_met_pr.pdf) [<https://perma.cc/JNR9-QVU2>] (describing how the Metropolitan Museum of Art placed Indigenous ceremonial items on display, touting them as aesthetic objects and denying their originating communities rights to govern their use), and Anne Constable, *Hopis Say Boy Scout Performances Make Mockery of Tradition, Religion*, SANTA FE NEW MEXICAN (Jan. 2, 2016), [http://www.santafenewmexican.com/news/local\\_news/hopis-say-boy-scout-performances-make-mockery-of-tradition-religion/article\\_d548665e-5767-5132-93e9-5d041b935d42.html](http://www.santafenewmexican.com/news/local_news/hopis-say-boy-scout-performances-make-mockery-of-tradition-religion/article_d548665e-5767-5132-93e9-5d041b935d42.html) [<https://perma.cc/9H42-L7MA>] (reporting on the use of Hopi katsina ceremony by Boy Scout Groups). See generally PHILIP J. DELORIA, *PLAYING INDIAN* (1998) (providing a historical overview of white American appropriations of Indigenous culture).

9. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866–867 (2016); Tsosie, *supra* note 8, at 310–17.

10. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“[D]ue to the course of dealing of the Federal Government with [Native American tribes] and the treaties in which it has been promised, there arises the duty of protection . . . This has always been recognized by the Executive and by Congress . . .”); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (describing the federal trust responsibility expressed by Congress as “moral obligations of the highest responsibility and trust”). See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 35 (6th ed. 2015) (describing Congress’s trust responsibility as a “moral [or political] obligation[.]”).

11. These include statutes prohibiting looting of archeological sites, see Antiquities Act of 1906, 54 U.S.C.A. §§ 320301–320303 (West); Archeological Resources Protection Act (ARPA), 16 U.S.C. § 470ee, procedural statutes requiring consultation with Tribes when certain forms of culture may be impacted by federal projects, see National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347; National Historic Preservation Act (NHPA), 16 U.S.C. § 470f; 54 U.S.C. § 306108, and repatriation statutes requiring museums and other federally funded institutions to return Tribes’ cultural patrimony or sacred objects when they lack a proper right of possession, see Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001–3013.

12. See Indian Arts and Crafts Act, Pub. L. No. 101-644, tit. I, 104 Stat. 4662 (1990) (as amended). In addition, Congress has made policy statements about protections for Indigenous religions, see American Indian Religious Freedom Act, 42 U.S.C.A. §§ 1996, 1996a, and Indigenous languages, see Native American Languages Act, 25 U.S.C. §§ 2901–2906, but neither of these contain a private

that prohibit the appropriation of Indigenous songs, dances, or other forms of Indigenous cultural expression. This is despite emerging global consensus that such forms of cultural expression should be protected from appropriation absent the free, prior, and informed consent of the Indigenous groups who created them.<sup>13</sup>

Scholars have proposed a number of ways to remedy harmful cultural appropriations. Some have looked to human rights principles, treaties, and customary international law as a basis for protecting Indigenous culture from non-Indigenous exploitation.<sup>14</sup> However, the United States has yet to ratify any of the international treaties specifically protecting intangible Indigenous culture. Others have advocated for the creation of new property frameworks, or the adaptation of existing ones under domestic law, to provide Indigenous groups enforceable rights against those who misuse their expressive cultures.<sup>15</sup> These innovative proposals, however, have yet to be fully taken up by Congress or the federal courts.

While a comprehensive solution for protecting Indigenous culture from unauthorized exploitation remains elusive, a number of scholars have suggested that existing copyright law may provide Indigenous groups some limited rights

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right of action enforceable against members of the public. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (“Nowhere in the [American Indian Religious Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”); *Off. of Hawai’ian Affs. v. Dep’t of Educ.*, 951 F. Supp. 1484, 1494 (D. Haw. 1996) (holding that the Native American Languages Act “does not create a new set of regulations which might lend itself to enforcement through suits by private citizens”).

13. See G.A. Res. 61/295, annex, art. 11, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (stating in a non-binding declaration that Indigenous Peoples have the right to protect their intellectual property, cultural heritage, traditional knowledge, and other forms of intangible culture, and receive redress from nation-states for their non-consensual use). One hundred forty-four nations initially voted in favor of the declaration, with the United States, Canada, Australia and New Zealand expressing their support in subsequent years. See *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [<https://perma.cc/Q25V-FXLG>].

14. These include United Nations Educational, Scientific and Cultural Organization (UNESCO) treaties and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). See generally Ravi Soopramanien, *International Trade in Indigenous Cultural Heritage: What Protection Does International Law Provide for Indigenous Cultural Goods and Services in International Commerce?*, 53 STAN. J. INT’L L. 225 (2017) (reviewing human rights treaties, customary international law, and humanitarian law that may be applicable to Indigenous cultural heritage).

15. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1046–83 (2009) (arguing that the protection of Indigenous culture can be supported by property principles under a peoplehood theory of stewardship); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 839–40 (2001) (arguing that “cultural products,” including collectively produced forms of Indigenous culture, could be protected under current intellectual property laws if the authorship requirements and temporal limitations on these forms of culture were changed). Rebecca Tsosie has proposed an Indigenous right to culture based on Article 27 of the International Covenant of Political Rights. See Tsosie, *supra* note 8, at 333–34.

to remedy misuses of cultural materials they or their members own.<sup>16</sup> Copyright protects the original expressions of authors—*e.g.*, books, music, movies, fine art, dance, and other forms of “culture”—from unauthorized appropriation by granting copyright holders an enforceable property right to govern their use.<sup>17</sup> But, a number of exceptions limit the right, in part to ensure that culture is not completely “locked up” for future creators.<sup>18</sup> Determining copyright liability in instances of cultural appropriation from Indigenous peoples, then, requires robust analysis and careful balancing of Indigenous peoples’ interests in protecting their cultural contributions from misappropriation and the interests of society in having access to Indigenous culture.<sup>19</sup>

To date, while neither Congress nor the courts have dealt with the application of copyright law to Native Americans’ specific forms of cultural creativity,<sup>20</sup> both have provided several general mechanisms to assist in weighing the interests of copyright holders against the public’s interest in access to culture.<sup>21</sup> Foremost among these is copyright law’s fair use doctrine, which functions as a gatekeeping mechanism of sorts for unauthorized appropriations of culture.

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16. See, *e.g.*, Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 12–40 (1997) (discussing how, despite numerous limitations, copyright might be used to protect Indigenous folklore); DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY* 84 (1996) (stating that, while “limited in its usefulness,” copyright has been used as a tool in many countries to protect folklore from unauthorized uses).

17. See 17 U.S.C. § 106.

18. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*, at xiv (2004) (arguing that appropriately limiting the rights of copyright holders frees creators and innovators from “the control of the past”); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994) (noting that an unlimited copyright would effectively “put manacles upon science” (quoting *Carey v. Kearsley* (1803) 170 Eng. Rep. 679, 681 (K.B.))).

19. For example, some Indigenous groups may desire to prohibit offensive or harmful unauthorized uses of their ceremonial creativity, while looking favorably on the free circulation of their historical narratives, archival footage, traditional artwork, or other forms of culture for the purposes of commentary, public education, or artistic display.

20. Some copyright cases have indirectly involved Indigenous creativity. See, *e.g.*, *President & Fellows of Harvard Coll. v. Elmore*, No. CIV 15-00472, 2016 WL 7494274, at \*5–11 (D.N.M. May 15, 2016) (holding that copyrights in photographs of Hopi potter Nampeyo’s work did not include her “intricate pottery designs and forms,” only the creative elements contributed by the photographer); *Bell v. E. Davis Int’l, Inc.*, 197 F. Supp. 2d 449, 459 (W.D.N.C. 2002) (holding, *inter alia*, that the concept of a beaded craft imitating the appearance of a Native American head dress was not copyrightable).

21. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations.”). Fair use is one such mechanism, but many others exist, including the limitation of copyright protection only to expression (and not to ideas), the *scènes-à-faire* doctrine (allowing free use of necessary or expected creative elements, like a villain in a superhero film), and exceptions to copyright protection allowing for the limited use of works without permission in classroom instruction, archival and library preservation, and other purportedly publicly beneficial realms. 17 U.S.C. §§ 108, 110. Commentators have likewise taken issue with the way biases have crept into these doctrines. See, *e.g.*, Jasmine Abdel-khalik, *Scènes à Faire as Identity Trait Stereotyping*, 2 BUS., ENTREPRENEURSHIP & TAX L. REV. 241, 249–50 (2018) (describing how the *scènes-à-faire* doctrine may be working to propagate gendered, socioeconomic, and racialized stereotypes).

When assessing the fairness of an unauthorized appropriation of another's copyrighted work, courts generally apply a statutorily prescribed four-factor test.<sup>22</sup> Courts must examine the "purpose and character" of the use to determine how compelling the case is for the use in light of copyright's overarching goal of promoting the "[p]rogress of [s]cience and the useful [a]rts."<sup>23</sup> Also, courts must consider carefully the "effect" of the appropriation "upon the potential market" for the original work, assessing the economic harms an unauthorized use may inflict on the current copyright owner.<sup>24</sup> Additionally, courts will weigh "the amount and substantiality of the [work] used in relation to the copyrighted work as a whole," sometimes performing a line by line comparison of the original work to the purportedly infringing copy to see precisely how much (quantitatively and qualitatively) has been appropriated.<sup>25</sup>

Finally, courts must also inquire into "the nature of the copyrighted work"—what I call here the "forgotten factor."<sup>26</sup> While the other factors ask questions such as who is appropriating a work, why they are doing it, how much they are appropriating, and how the appropriation will affect the market for the work, the forgotten factor asks *what* is being appropriated—its creative or intellectual values—and whether allowing the appropriation would stifle future creativity.<sup>27</sup> Though the forgotten factor's utility was substantial enough for Congress to include it in the Copyright Act, the factor "has rarely played a significant role in the determination of a fair use dispute," particularly in isolation from the other fair use factors.<sup>28</sup> This is likely either the consequence of the factor being "only superficially discussed and little understood,"<sup>29</sup> or it may also reflect how courts often construe the factor narrowly as only encompassing two somewhat limited and largely duplicative considerations.<sup>30</sup> Whatever the reason, the factor has been all but erased from the fair use analysis in some circuits.

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22. See 17 U.S.C. § 107.

23. U.S. CONST., art. I, § 8, cl. 8; 17 U.S.C. § 107(1); see also *Campbell*, 510 U.S. at 579 ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.").

24. 17 U.S.C. § 107(4); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985) (explaining that the market effects portion of the analysis is meant to reveal unauthorized uses that "materially impair the marketability of the work which is copied").

25. 17 U.S.C. § 107(3); see, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 97–98 (2d Cir. 1987) (noting that the District Court judge had examined the works in question at the sentence level to look for copying); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1271–1272 (11th Cir. 2014) (requiring courts to examine the amount of a work copied "on a case-by-case/work-by-work basis" including both quantitative and qualitative copying).

26. 17 U.S.C. § 107(2); see discussion *infra* Part II.

27. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1201–02 (2021) (discussing as pertinent to the "nature of the copyrighted work" inquiry the function and value of declaratory computer code to computer programmers and the overall process of creating computer programs).

28. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

29. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

30. These include whether the work is published or unpublished, and whether the works are "factual" or "creative." For an extended discussion of these distinctions, see *infra* Part II.D.



This Article argues that the forgotten factor has the potential to play a pivotal role in providing more robust protections to copyrightable Indigenous works in the fair use analysis by requiring fact-finders to consider what a work is from the point of view of the community that creates it. Rather than forgetting this factor, as some courts have done, I propose reclaiming it in a manner consistent with both the fair use doctrine's ultimate purpose of fostering cultural progress and the need for copyright law to support the production of culture in all its diversity of forms and natures.<sup>31</sup> This entails reconceptualizing the factor's inquiry into the "nature" of a work as an ontological one, situating the work within its creative context and determining what impact, if any, unauthorized use of the work might have on this kind of creativity going forward. Thus, to help courts better determine whether a particular unauthorized use is "fair," the inquiry should direct a court to inquire into (1) the creative environment from which the work has been produced and (2) the potential impact of unauthorized appropriation on that creative environment.

Such a methodological change necessarily involves displacing the current distinctions relied on in most courts' analyses ("published" vs. "unpublished"; "factual" vs. "creative"). As I explain, not only have these distinctions been considerably narrowed by Congress and the courts, they also tend to privilege European-descended cultural forms and their creative-industrial complexes. The hope is that this shift will ultimately protect and catalyze creative growth across a much broader spectrum of cultural economies, both Indigenous and non-Indigenous. At the same time, this is admittedly a small contribution to resolving the overarching problem of cultural appropriation, which should ideally be addressed through congressional consultation with Indigenous and other marginalized peoples and subsequent legislative interventions. But a reclamation of the forgotten factor now should make fair use a more equitable gatekeeping device for unauthorized uses of culture, particularly that of Indigenous peoples.

This Article proceeds in four parts. In Part I, I examine the current stakes of cultural appropriation for Indigenous peoples, placing cultural appropriation within the broader project of settler-colonialism and Indigenous struggles for cultural sovereignty. In doing so, I highlight through a series of case studies how copyright, despite its current constitutional limitations, might still be helpful for Indigenous peoples seeking to combat cultural appropriation. In Part II, I discuss the fair use doctrine and its gatekeeping function for instances of cultural appropriation. I examine the historical importance of the forgotten factor, showing that this factor, far from being insignificant, played a crucial role in complex cases involving the value of a work within its creative environment. In Part III, I offer a new approach to the forgotten factor that may provide a more

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31. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–252 (1903). As discussed in Part I.C, Justice Holmes's view of what qualifies as copyrightable, and therefore worthy of protection, was quite broad, extending to works of diverse social groups.

robust analysis in instances of cultural appropriation, and apply that factor to the case studies discussed in Part I.

Before proceeding, a few caveats are in order. First, it goes without saying that cultural appropriation impacts intellectual property interests of many diverse ethnic, racial, religious, and other minority groups.<sup>32</sup> This Article focuses specifically on the ways cultural appropriation affects the creative, social, economic, and political interests of Indigenous peoples, and resists attempting to provide a global solution to all forms of cultural appropriation.<sup>33</sup> Second, this Article focuses on the appropriation of copyrightable cultural products and processes. It does not attempt to resolve the thorny issue of what James O. Young has termed “subject appropriation,” or the appropriation of cultural identities.<sup>34</sup> While copyright’s subject matter encompasses some aspects of an individual’s or group’s personhood or peoplehood,<sup>35</sup> the use of offensive caricatures or stereotypes of racial groups as sports mascots<sup>36</sup> or the names of deceased tribal leaders on products which they would have found repugnant<sup>37</sup> are modes of appropriation that have been more thoroughly debated within the domains of trademark and rights to privacy and publicity. Finally, this Article presumes that copyright law applies, at least to some extent, on Tribal lands—a presumption that is far from certain, and which I leave for future writing.<sup>38</sup> Many tribes

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32. See, e.g., Elizabeth L. Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 606–39 (2019) (discussing the widespread problem of one-way cultural appropriations from minority communities to dominant ones); Anjali Vats & Deidré A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 774 (2018) (discussing the problem of cultural appropriation in a variety of social contexts); Larisa Mann, *If It Ain’t Broke . . . Copyright’s Fixation Requirement and Cultural Citizenship*, 34 COLUM. J.L. & ARTS 201 *passim* (2011) (examining cultural appropriation in the context of improvisational jazz); BOATEMA BOATENG, *THE COPYRIGHT THING DOESN’T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (2011) (describing the complexities of applying copyright law to the production, circulation, and appropriation of adinkra and kente cloth in Ghana and the North American diaspora); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’NS & ENT. L.J. 339 (1999) (describing the history of appropriation from Black musicians in the commercial music industries).

33. Whatever benefit the aggregation of claims from diverse social and cultural groups might bring to arguments made here, I avoid speaking for these groups, believing that changing the landscape of intellectual property law necessitates empirical depth, sensitivity to diversity, and density of scholarly voices.

34. YOUNG, *supra* note 7, at 7.

35. See Carpenter et al., *supra* note 15, at 1046–60 (conceptualizing peoplehood as the “collective association of individuals” who belong to a particular political, religious, cultural, linguistic, racial or other entity).

36. See, e.g., *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 468–472 (E.D. Va. 2015), *vacated*, 709 F. App’x 182 (4th Cir. 2018).

37. See, e.g., *Estate of Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092, 1095 (D.S.D. 2001).

38. See *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1137 (N.D. Okla. 2001) (“In order to conclude Congress intended to subject Indian tribes to the Copyright Act, the Court would need to infer such intent which does not unequivocally apply to tribal entities.”); see also *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (arguing, without deciding, that even if the Copyright Act were applicable to tribes, Congress had not sufficiently implicated tribes to abrogate their sovereign immunity from suit). See generally Trevor G. Reed, *Creative Sovereignities:*

maintain and enforce laws, customs, and protocols governing the circulation and reproduction of culture that derive from authorities the United States Constitution cannot reach.<sup>39</sup> Whether Congress's assumed plenary power over Indigenous peoples could ever extinguish, preempt, or limit the inherent sovereignty of Indigenous peoples to govern the production, use, and circulation of culture remains a deeply contested issue even today.

## I.

### INDIGENOUS CULTURE AND THE LEGACY OF APPROPRIATION

Unauthorized cultural appropriation subsumes a wide variety of activities within its ambit, each involving some sort of transfer or use of something socially valuable to those who, from a particular point of view, should not be entitled to it.<sup>40</sup> Culture remains, for many Indigenous peoples, the very material of their sovereignty. Thus, when copyright fails to adequately protect Indigenous cultural creativity from unauthorized appropriations, it works particular harms on Indigenous peoples, potentially divesting them of their autonomy and self-determination.

This Section explores the tensions underlying appropriations of Indigenous peoples' culture. Part I.A acknowledges important arguments in favor of free access to culture<sup>41</sup>—arguments often leveraged against efforts to expand copyright protection to better protect Indigenous cultural creativity. Part I.B reviews recent scholarship that situates appropriations of Indigenous culture historically within the broader context of settler-colonialism in the United States.<sup>42</sup> These scholars point out that as the federal government was actively dispossessing Indigenous peoples of their lives, lands, and resources to provide space for growing settler populations, settlers actively participated in the pillaging, collection, and use of all imaginable forms of Indigenous culture.<sup>43</sup> Part I.C discusses how copyright law's subject matter has expanded from its origins, offering protection against unauthorized appropriations to increasingly diverse forms of cultural creativity. And yet, copyright law ultimately has

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*Should Copyright Apply on Tribal Lands?*, J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3736137](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736137) [<https://perma.cc/7DE8-BJR6>] (arguing that the Copyright Act should apply on Tribal lands to the extent permitted by tribes).

39. The United States Constitution grants power to the federal government only "to regulate [c]ommerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and, implicitly, through the Treaty Clause, *id.* art. II, § 2; *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (finding that Tribal governments are "separate sovereigns pre-existing the Constitution" and therefore unconstrained by most Bill of Rights limitations).

40. Some have described cultural appropriation as "the taking—from a culture that is not one's own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge and profiting at the expense of the people of that culture." *See* WRITERS UNION OF CAN., RESOLUTION (1992), *quoted in* Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation*, in *BORROWED POWER*, *supra* note 7, at 1, 1 & 24 n.1.

41. *See infra* Part I.A.

42. *See infra* Part I.B.

43. *See id.*

excluded many forms of Indigenous culture, relegating them to the public domain and thereby further divesting tribes of their autonomy and self-determination.<sup>44</sup>

Importantly, not all forms of Indigenous culture are excluded from copyright protection. I conclude this Section with three contemporary case studies of appropriations of copyrightable Indigenous culture that tease out the complex intersections of copyright policy and settler-colonialism. These examples are by no means exhaustive of the kinds of copyrightable works Indigenous peoples create, nor does it fully encompass the problems cultural appropriation presents for Indigenous creators. But as each case study turns, at least to some degree, on our normative views of what kinds of culture should or should not be available for appropriation, they provide a valuable entry point for discussing copyright's fair use doctrine in Parts II and III.

#### A. Cultural Appropriation as Social Necessity

The appropriation of culture is a fundamental aspect of human behavior. We all appropriate the culture that surrounds us, whether at home, at school, in our neighborhood, at social events, or in the workplace, to function as individuals within society.<sup>45</sup> As Rosemary Coombe has argued, “[c]ultural categories provide the very possibilities for perception.”<sup>46</sup> We draw on culture throughout our lives to contextualize our own experiences and communicate them to others. The ability to acquire, possess, or control culture is necessary for our personal and collective development and the establishment of our identities.<sup>47</sup> Given that “culture” covers a large swath of each person’s existence, it may be unsurprising that cultural appropriation has become somewhat normalized into the domain of intellectual property, particularly in copyright law.<sup>48</sup>

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44. See *infra* Part I.C.

45. See generally COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 7 (examining the ways the circulation of culturally salient symbols governed by intellectual property impacts personhood in a variety of social contexts).

46. *Id.* at 44.

47. As Margaret J. Radin argued, there are certain resources in which people have an ownership interest by virtue of their constitutive nature, either because they provide continuity of character or because they are bound up in a person’s future life plans. See Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957, 968 (1982). While the focus of Professor Radin’s essay sounds in tangible property possessed by individuals, the concept no doubt extends to intangible culture and its constitutive role in group identity. See, e.g., Carpenter et al., *supra* note 15, at 1028, 1048 (arguing that Indigenous identity relies in part on stewardship of cultural resources). Meaningful resistance against the imposition of identities may also require access to culture, even culture owned by another, though the form in which that access is provided may reinscribe inequalities. See Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377, 378 (2019).

48. Cultural appropriation is certainly facilitated through copyright’s fair use doctrine, as will be discussed throughout this Article. There are many other ways copyright law permits cultural appropriation, including exceptions for personal study and research, 17 U.S.C. § 108, classroom instruction and religious performances, 17 U.S.C. § 110, and the creation of sound-alike recordings, 17 U.S.C. § 114.

Having unrestricted access to “culture,” then, may seem an ideal public policy goal and one that our intellectual property laws should favor.<sup>49</sup> Lawrence Lessig has argued that, historically, the public’s ability to appropriate local culture has never been regulated by government<sup>50</sup>—at least not in European and predominantly European-settler societies. Government regulation, so the argument goes, has rarely encroached on even “ordinary” or “noncommercial” appropriations of mass-mediated commercial culture. For example, quoting an article, making a copy of a TV program for later viewing, and giving a copy of a book you own to a friend all seem to be exempt from government control.<sup>51</sup>

And, there may be good reason for this. As Professor Coombe explains, in a society where everyday culture is primarily encountered in commodity form, being able to appropriate or reference texts that make up our “cultural milieu”—YouTube videos, memes, tweets, etc.—enables us to develop a shared reality with others, to generate an individual identity, or to transform the social narratives these cultural texts come to represent.<sup>52</sup> In a “world of extraordinarily diverse creativity that can be easily and broadly shared” via digital means, limitations on the freedom to appropriate culture are often seen as censorship and, potentially, the loss of “an extraordinary amount of creativity [which] will either never be exercised, or never be exercised in the open.”<sup>53</sup>

### B. When Cultural Appropriation Harms

While some amount of cultural appropriation is necessary for individuals to develop within their particular social contexts, the unauthorized taking of Indigenous culture involves something more, particularly within the context of

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49. First Amendment scholar Alexander Meiklejohn, for example, argued that “literature and the arts” should be categorically exempt from government censorship under the First Amendment because of their “social importance”—in other words, their ability to help us understand human nature, influences and decision-making. “I believe, as a teacher, that the people do need novels and dramas and paintings and poems, ‘because they will be called upon to vote.’” Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262–63 (quoting Harry Kalven, Jr., *Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16).

50. LESSIG, *supra* note 18, at 7–8.

51. See 17 U.S.C. § 107 (listing “criticism” and “comment” as potential purposes for unauthorized use of a work under the fair use doctrine); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455–56 (1984) (finding that creating a recording device that makes viewing a television program at a later time possible did not constitute contributory copyright infringement); 17 U.S.C. § 109(a) (codifying copyright’s first sale doctrine, which permits the disposal of copies of a work without authorization of the copyright owner); LESSIG, *supra* note 18, at 8 (“[T]he law was never directly concerned with the creation or spread of [noncommercial] culture, and it left this culture ‘free.’ The ordinary ways in which ordinary individuals shared and transformed their culture . . . were left alone by the law.”).

52. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES*, *supra* note 7, at 50–51; see also LESSIG, *supra* note 18, at 186 (“[T]here is a highly regulated, monopolized market in cultural icons; the right to cultivate and transform them is not similarly free.”).

53. LESSIG, *supra* note 18, at 184–85.

settler-colonialism.<sup>54</sup> As I explain in this Section, the processes by which the United States and its European predecessors took control of the lands and resources of Indigenous peoples drew upon the mass appropriation of tangible and intangible Indigenous culture. This was both to inform strategies and policies of conquest and to generate legitimizing narratives about the new settler-state.<sup>55</sup> Paradoxically, while Indigenous culture became the target of destructive and assimilative federal policies,<sup>56</sup> American settlers took up Indigenous culture as a freely available resource from which the new American nation could draw for its identity.<sup>57</sup>

The historical record is replete with examples of unauthorized appropriations from Indigenous cultures by the American public that occurred concurrently with federal policies of conquest, removal, assimilation, and contained self-determination (multiculturalism).<sup>58</sup> Professors Angela Riley and Kristen Carpenter have coined the term “Indian appropriation” to denote categorically the way the U.S. legal system has “facilitated and normalized the taking of *all* things Indian for others’ use, from lands to sacred objects, and from bodies to identities.”<sup>59</sup> Indeed, the history of federal Indian policy taken as a whole reveals a process of consuming or repurposing nearly every aspect of Indigenous existence: the killing of Indigenous peoples and the mutilation of their bodies for bounties or scientific research; the acquisition of Tribal lands and natural resources for foreign settlement, often without consent or just compensation; the inhabitation of Indigenous identities, physical appearances

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54. Settler colonialism is defined as “a historically created system of power that aims to expropriate Indigenous territories and eliminate modes of production in order to replace Indigenous peoples with settlers.” Dean Itsuji Saranillio, *Settler Colonialism*, in NATIVE STUDIES KEYWORDS 284, 284 (Stephanie Nohelani Teves, Andreea Smith & Michelle H. Raheja eds., 2015).

55. See Lomayumtewa C. Ishii, *Western Science Comes to the Hopis: Critically Deconstructing the Origins of an Imperialist Canon*, 25 WICAZO SA REV. 65, 82 (2010) (discussing how anthropological study of Indigenous culture by major anthropological collectors was a necessary input for the United States in its development of policies that exerted dominion and intellectual hegemony over Native Americans); Robert H. McLaughlin, *The American Archeological Record: Authority to Dig, Power to Interpret*, 7 INT’L J. CULTURAL PROP. 342, 344 (1998) (conceptualizing American archeology as “express[ing] American nationalism insofar as [it] represents an effort to appropriate and unify Native American histories and to incorporate them into a coherent and comprehensive national history”).

56. See, e.g., Segments from the Circular No. 1665 and Supplement to Circular No. 1665, Letter from Charles H. Burke, Comm’r, Dep’t of the Interior Off. of Indian Affs. to Superintendents (Feb. 14, 1923), <https://www.webpages.uidaho.edu/~rfrey/PDF/329/IndianDances.pdf> [<https://perma.cc/MK98-K6TG>] (considering Sun Dance and any other “so-called religious ceremonies” to be “Indian Offences” subject to withholding of rations, imprisonment, or other forms of punishment); AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES, 1879–2000, at 16 (Margaret L. Archuleta, Brenda J. Child & K. Tsianina Lomawaima eds., 2000) (documenting the experiences of Indigenous children forcibly removed to boarding schools).

57. See generally DELORIA, *supra* note 8 (documenting the ways American settlers have drawn from Indigenous cultures and stereotypical representations of those cultures to work out their own national identity).

58. For a more detailed overview of the eras of federal Indian policy, see 1 FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §§ 1.01–1.07 (Nell Jessup Newton ed., 2012), LEXIS (database updated 2021).

59. Riley & Carpenter, *supra* note 9, at 866.

and vestments to stimulate settler political or social movements; the taking of ritual objects as national antiquities; the forced removal of children to boarding schools for intellectual, physical, religious, and/or sexual exploitation; the commodification of Indigenous expressions, histories and knowledges into settler intellectual, artistic or other kinds of private property; and, more recently, the re-appropriation of the vehicles used to inflict social harms on Indigenous peoples (stereotypes, racial slurs, narratives of conquest) for political or economic gain.<sup>60</sup> While some might view the unauthorized incorporation of Indigenous culture into mainstream American life as a step forward—making American society more “diverse,” “open” or “inclusive,”—cultural appropriation from Indigenous peoples without their free, prior, and informed consent can only be described as a continuation of the dispossessive work of settler-colonialism.<sup>61</sup>

In addition to furthering the dispossession of Indigenous lands and resources, unauthorized appropriations of Indigenous cultures have had a tendency to compound psychological, social, and political harms already experienced by Indigenous peoples. Failure to combat unauthorized appropriations risks perpetually inflicting these harms on current and future generations. As Professors Riley and Carpenter explain, cultural appropriation has long-term effects on Indigenous peoples individually and collectively:

Indian appropriation . . . has deep and long-lasting impacts, with injuries ranging from humiliation and embarrassment to violence and discrimination. [Collectively], it makes it difficult for tribes to foster religions, economies, and governance systems that reflect tribal values. All of these experiences diminish both tribal sovereignty and impede the [now] prevailing federal policy of advancing American Indian “self-determination” in socioeconomic, political and cultural life.<sup>62</sup>

Put differently, cultural appropriation has the potential to destroy Indigenous peoples’ political and territorial sovereignty. The ability to perform unique artistic, religious, or social practices is often what makes Indigenous communities culturally distinct. Cultural difference has in turn historically

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60. *Id.* at 869–91, 901–14 (discussing each of these episodes of federal Indian policy). See generally Benjamin Madley, *California and Oregon’s Madoc Indians: How Indigenous Resistance Camouflages Genocide in Colonial Histories*, in COLONIAL GENOCIDE IN INDIGENOUS NORTH AMERICA 95 (Andrew Woolford, Jeff Benvenuto & Alexander Laban Hinton eds., 2014) (quantifying the killing of Indigenous peoples in Oregon and California); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005) (depicting numerous examples of sexual violence against Indigenous peoples in the United States); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39–42 (1992) (describing the use of Indigenous bodies for scientific research); DELORIA, *supra* note 8 (describing the use of Indigenous identities and stereotypes in the development of American nationalism).

61. It is also a violation of norms enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, *supra* note 13 (recognizing Indigenous rights to persons, lands, resources, identities, and cultures).

62. Riley & Carpenter, *supra* note 9, at 866–67.

justified the recognition of Indigenous groups as independent sovereigns.<sup>63</sup> Still, while ownership of and control over a specialized expressive culture is clearly important to many Indigenous peoples today, both for cultural continuity and differentiation as independent political groups,<sup>64</sup> protecting Indigenous culture from unauthorized appropriation or misuse can be justified through more than just difference-based identity politics.<sup>65</sup>

As Rebecca Tsosie and Wallace Coffey have argued, Indigenous culture may itself be generative of sovereignty.<sup>66</sup> Indigenous peoples often draw from existing social structures and orders, relationships between members of a community, and understandings of shared belief systems rather than deferring solely to documents as a source of sovereign power.<sup>67</sup> Ceremonies continually reproduce and replenish social relationships and establish authorities; traditional and non-traditional modes of performance become spaces for political discourse; recitations of oral histories in all their many forms lay out precedents, adjudicative principles, and community norms. Creativity and expressive modes of safeguarding memory often generate authority within Indigenous communities, as they help produce and maintain the material that fuels Indigenous peoples' autonomy and self-determination.<sup>68</sup> To the extent that the kinds of Indigenous creative works just mentioned fall under the umbrella of

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63. For example, the federal government's criteria for acknowledging Indigenous peoples as federally recognized Indian tribes require that an Indigenous group "comprises a distinct community"—meaning that its "members are differentiated from and distinct from nonmembers." Legally salient social distinctions include having "[s]hared sacred or secular ritual activity" or "[c]ultural patterns shared among a portion of the entity that are different from those of non-Indian populations with whom it interacts," such as "language, kinship organization or system, religious beliefs or practices, and ceremonies." 25 C.F.R. § 83.11(b).

64. As George Yúdice explains, there is a strong impulse for tribes and other marginalized groups to use culture as what he has called an "expedient," a resource to be managed, developed, and converted into property so that the group has the exclusive ability to perform its differences in ways that empower the group under frameworks salient to a colonizing nation-state or the international capital economy. See GEORGE YÚDICE, *THE EXPEDIENCY OF CULTURE: USES OF CULTURE IN THE GLOBAL ERA* 8–21 (2003).

65. See Dylan Robinson, *Public Writing, Sovereign Reading: Indigenous Language Art in Public Space*, 76 *ART J.* 85, 96–99 (2017) (arguing that cultural texts declaring Indigenous sovereignty do not necessarily generate sovereignty as they can be misread by settlers as mere cultural expressions of othered groups; rather, Indigenous sovereignty is generated when Indigenous legal statuses and protocols established in these cultural texts are respected and followed by settler populations). See generally Trevor G. Reed, *Sonic Sovereignty: Performing Hopi Authority in Óngtupqa*, 13 *J. SOC'Y FOR AM. MUSIC* 508 (2019) (arguing that the performance of ceremonial song that reconnects Indigenous peoples with their relations and environments may be what generates territorial sovereignty for Hopi people, and therefore Hopi ceremonial song recordings must be protected using a higher degree of care); ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* (2002) (documenting and criticizing Australian courts' uses of performed traditional Indigenous culture as indices of difference to determine Aboriginal Australian land rights).

66. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 *STAN. L. & POL'Y REV.* 191, 197 (2001).

67. *Id.* at 196 (arguing that cultural sovereignty derives from these three elements).

68. *Id.* at 196–99.



“culture,” Indigenous sovereignty is, as Professors Tsosie and Coffey explain, perhaps best characterized as a “cultural sovereignty.”<sup>69</sup>

Thus, telling Indigenous peoples’ stories for them, singing their songs, and publishing their oral histories without permission diminishes Indigenous sovereignty, just as the dispossession of Indigenous lands and assimilation of Indigenous peoples into the settler-state diminished that sovereignty.<sup>70</sup> When all Indigenous peoples have left is their culture—when political autonomy has been destroyed, rights to land and resources diminished or taken outright, the right to practice Indigenous religions all but extinguished—the last place where Indigenous peoples can be sovereign and experience the real nature of their culture is through modes of expression. Those modes embrace shared symbols, stories, songs, performed social norms, and ways of relating with one another.<sup>71</sup>

Unless Indigenous peoples are able to control the production of their cultures, the possibility for continuing Indigenous sovereignty appears bleak. Counterfeits, parodies, state and corporate narratives, anthropological accounts, National Geographic photo essays, natural history museum exhibits, and History Channel documentaries begin to define what Indigenous sovereignty is or can be. Appropriators transform the material of sovereignty into aesthetic or historical objects or “style[s],”<sup>72</sup>—products to be owned rather than aspects of autonomous modes of existence. American settler-colonization historically deprived Indigenous peoples of their lives, lands, and resources, and then unilaterally transformed them into United States citizens.<sup>73</sup> However, the

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69. *Id.*; see also Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZ. ST. L.J. 1, 14 (2002) (“Cultural resources, both tangible and intangible, are of critical importance to Native peoples, because Native culture is essential to the survival of Indian nations as distinctive cultural and political groups.”).

70. See Coffey & Tsosie, *supra* note 66, at 201. Western views of intellectual property conceptualize copies of “intangible” works as non-rivalrous. In other words, each additional copy has no effect on the enjoyment or utility of the original owner’s use of her copy. However, such a view presumes an Enlightenment-derived ontological specificity of intellectual property that is not necessarily shared in Indigenous contexts. As I explore in Part III, copies of intangible Indigenous culture may very well be rivalrous, as they may be the source of political authority and may produce change or alter relations within Indigenous societies and environments. Thus, the ways Indigenous communities restrict the ability to copy, distribute, perform, or derive new works from existing cultural works may reflect very different economic assumptions, worldviews, and norms than those of our contemporary copyright system.

71. See Tsosie, *supra* note 8, at 310 (“Many Native people argue, however, that they must control representations of their cultures as a means to ensure cultural survival. The failure to protect Native cultures, they argue, perpetuates significant harm to Native people as distinctive, living cultural groups.”).

72. Some who have recently used aspects of Indigenous culture (in this case, a tribe’s name in connection with certain fabric prints) without permission have argued that Indigenous culture is merely a style, not protectable intellectual property. See *Navajo Nation v. Urb. Outfitters, Inc.*, No. CIV 12-0195 BB/LAM, 2016 WL 7404747, at \*1 (D.N.M. July 5, 2016) (holding that whether NAVAJO refers to a design style rather than the Tribe’s registered trademark was a question of fact that could not be decided on a motion for summary judgment).

73. See Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)) (“[A]ll non-citizen Indians born within the territorial limits of the United

conversion of the substance of Indigenous sovereignty into various types of settler property, each with their own peculiar limitations, is a form of conquest that seems remarkably out of place in the twenty-first century.<sup>74</sup>

### C. Copyright and Indigenous Culture

Copyright exists to promote cultural production,<sup>75</sup> regardless of the social group that creates it. As American society has grown and evolved over time, copyright has historically crept in to regulate the production and circulation of culture by granting exclusive rights to creators for the original works they produce.<sup>76</sup>

Consider the way the subject matter of copyright has expanded in step with changes in the ways Americans have defined culture. As professor Raymond Williams points out in his history of the term, culture at the time of the founding meant a “general process of ‘inner’ [intellectual, spiritual, and aesthetic] development,” one that had become nearly synonymous with term civilization (i.e., being “cultured”).<sup>77</sup> But, with the rise of the industrial revolution and public dissatisfaction with the changes it wrought on society, culture acquired a second definition, signifying a “set of higher standards” or intangible ideals often embodied in art, music, and literature, that pointed out civilization’s weaknesses.<sup>78</sup> In parallel, the original Copyright Act of 1790, passed by the first Congress, was narrow in its scope and protected only books, maps, and charts<sup>79</sup>—objects reflective of the new country’s cultural priorities, such as intellectual cultivation, political discourse, and Enlightenment science.<sup>80</sup> But,

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States . . . are hereby . . . citizens of the United States: *Provided*, [t]hat the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”).

74. The harms associated by conversion of forms of sovereignty to property has been raised by scholars like Rebecca Tsosie, Bruce Ziff, and Pratima V. Rao, where the core of one nation’s sovereignty becomes subsumed under a dominant society’s legal structures. *See* Tsosie, *supra* note 8, at 313; *see also* Ziff & Rao, *supra* note 40, at 1, 8–9.

75. *See* COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 7, at 6 (“Intellectual property laws . . . create private property rights in cultural forms . . .”); *see also* Greene, *supra* note 32, at 354 (“The copyright regime converts cultural by-products such as art, dance, music, and literature into commodities, labeled generally as intellectual property.”).

76. JULIE E. COHEN, LYDIA PALLAS LOREN, RRUTH L. OKEDIJI & MAUREEN A. O’RROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 27–32 (4th ed. 2015) (showing how “as new technologies have emerged for disseminating creative products, Congress has revised the protections afforded by copyright law to reach these new distribution and communication media”). *But see* LESSIG, *supra* note 18, at 10 (arguing that with the advent of the Internet, copyright law “has massively increased the effective regulation of creativity in America”).

77. RAYMOND WILLIAMS, MARXISM AND LITERATURE 14 (1977) (“‘Civilization’ and ‘culture’ (especially in its common early form as ‘cultivation’) were in effect, in the late eighteenth century, interchangeable terms.”).

78. *Culture*, in NEW KEYWORDS: A REVISED VOCABULARY OF CULTURE AND SOCIETY 63, 65 (Tony Bennett, Lawrence Grossberg & Meaghan Morris eds., 2005); RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 87–89 (rev. ed. 1985).

79. Copyright Act of 1790, ch. 15, §§ 1–3, 1 Stat. 124, 124–25.

80. *See* R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in INTELLECTUAL PROPERTY STORIES 259, 260–61 (Jane C. Ginsburg & Rochelle

over the course of the nineteenth century, Congress added to the Act the “arts of designing, engraving, and etching” in 1802,<sup>81</sup> followed by musical compositions in 1831,<sup>82</sup> and plays and other dramatic works in 1856.<sup>83</sup> These expansions no doubt reflected the public’s new priorities as American culture developed in response to growing industrialization.<sup>84</sup>

Toward the turn of the twentieth century, growing resistance to a universal, European-descended “high culture” ultimately produced a third definition of “culture”: “the way of life . . . of a people.”<sup>85</sup> Scholars in the emerging social sciences began to focus on comparing and taxonomizing cultures in other parts of the world, at times defining some as primitive or ancient and others as modern.<sup>86</sup> With the diversity of cultural creativity happening in the United States by the beginning of twentieth century, American copyright law likewise evolved to cultivate much more than European-descended forms of “high culture.”<sup>87</sup> In *Bleistein v. Donaldson Lithographing Company*, the Court considered whether a set of circus posters could be considered copyrightable. Writing for the majority, Justice Holmes opined that works of “little merit or of humble degree” and those “addressed to the less educated classes,” at least from the point of view of elite judges, were eligible for protection under the copyright law.<sup>88</sup> He rejected the notion that copyright protects only the cultural creativity of certain social groups:

[I]f [the posters] command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.<sup>89</sup>

According to Justice Holmes, advertisements—such as those depicting the creative work of Barnum and Bailey—should be protected under the same

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Cooper Dreyfuss eds., 2006) (“Early U.S. copyright law particularly sought to foster the development of works that would help educate the public. The founders generally viewed an informed citizenry as a necessary condition for the successful establishment of the nation, and copyright was one means of promoting an educated populace. And by granting copyright only in works by citizens or residents of the U.S., early copyright law sought to foster a distinctly American culture.”).

81. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

82. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870).

83. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139.

84. See *Culture*, *supra* note 78, at 65 (noting that nineteenth and early twentieth century definition of “culture” involved a tension between “material progress best indexed by the development of industrial production” and a set of higher standards that indicted civilization “for its shallowness, coarseness, or incompleteness”—standards that emerged in the aesthetics of artworks from this period); see also WILLIAMS, *supra* note 78, at 88–89 (noting transitions in the meaning of the term “culture” from the seventeenth and eighteenth centuries to the nineteenth and twentieth).

85. WILLIAMS, *supra* note 84, at 90.

86. *Id.* at 90; *Culture*, *supra* note 84, at 68.

87. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903).

88. *Id.* at 251.

89. *Id.* at 252.

rationale as the “fine art” of Goya, Manet or Degas.<sup>90</sup> Effectively, copyright provided a means for “any public” to develop and protect its creative interests, regardless of whether its “tastes” or forms of expression conflicted with the “hopes” of the “higher classes” for society’s overall “civilization.” Thus, by the turn of the twentieth century, the scope of copyright had grown to include the creative products of any cultural group, as long as those products met the minimum constitutional requirement of being a “writing” of an “author.”<sup>91</sup>

But, while Justice Holmes’s broadly inclusive view of the nature of copyrightable works rejected any explicit distinction between various forms of culture, over the twentieth century Congress and the courts have perpetuated and developed limitations on the subject matter of copyright. These limitations have left Indigenous peoples’ and other marginalized groups’ cultural creativity significantly under-protected in comparison to other forms of culture.<sup>92</sup>

Commentators have generally located the source of the Copyright Act’s unequal treatment of Indigenous creative works in the three requirements for copyrightability that Congress and the courts have inferred from the Constitution.<sup>93</sup> First, copyright requires that all works be “written” or otherwise “fixed in any tangible medium of expression” to qualify for protection against unauthorized appropriation.<sup>94</sup> As many Indigenous creative works historically have not been written or recorded in physical objects, but instead have been retained in collective memory—such as songs, oral histories, stories, and

90. See *id.* at 251 (arguing that the circus posters could be defined not only as “pictorial illustrations” but also as “works connected with the fine arts”).

91. This broad view of copyright’s subject matter has carried forward into the present day. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (holding that works need contain only a “modicum of creativity” to meet copyright’s originality requirements); see also *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 48 (D. Mass. 1990) (rejecting arguments that a computer program is not copyrightable because it is not one of the “traditional works of authorship” enumerated in the Copyright Act, 17 U.S.C. § 102(a)).

92. See generally JANE ANDERSON, DUKE UNIV. SCH. OF L., CTR. FOR THE STUDY OF THE PUB. DOMAIN, INDIGENOUS/TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY (2010) (explaining how intellectual property law’s subject matter leaves Indigenous culture vulnerable to appropriation).

93. See Stuart Schüssel, *Copyright Protection’s Challenges and Alaska Natives’ Cultural Property*, 29 ALASKA L. REV. 313, 314 (2012); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 80 (2005); Tsosie, *supra* note 8, at 334–38, 357; James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL’Y REV. 255, 259 (2001); David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 102–03 (2000); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 186–87 (2000); Rebecca Tsosie, *Indigenous Peoples’ Claims to Cultural Property: A Legal Perspective*, MUSEUM ANTHROPOLOGY, Dec. 1997, at 5, 8; David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CAN. J.L. & SOC’Y 129, 144 (1995).

94. U.S. CONST., art. I, § 8, cl. 8 (granting Congress power “to promote the [p]rogress of [s]cience . . . by securing . . . the exclusive [r]ight to their respective [w]ritings . . .” (emphasis added)); 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . .”).

dances—the fixation requirement may render these works ineligible for copyright protection.<sup>95</sup> Second, copyright’s authorship requirement requires that all works be “original,”<sup>96</sup> meaning a work owes its origin to one or more authors<sup>97</sup> and is sufficiently creative to qualify as a “work of authorship.”<sup>98</sup> Thus, a ceremonial song or ritual object that has been faithfully performed or exactly replicated since time immemorial likely does not qualify for copyright protection, nor will one that does not have human origins.<sup>99</sup> Finally, copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery,” regardless of the form it takes; it protects only “expression.”<sup>100</sup> Often, Indigenous peoples value cultural products precisely for the histories, processes, or principles they contain. When they attempt to protect those aspects of creative works from unauthorized appropriation, they unfortunately find that copyright law explicitly makes these aspects of a creative work freely available to the public. Thus, owing to these three threshold requirements, many forms of Indigenous culture may be considered, at least from the perspective of U.S. copyright law, to be in the public domain and can be readily appropriated without permission.<sup>101</sup>

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95. See Schüssel, *supra* note 93, at 325 (“Fixation presents yet another hurdle for Native American works . . . [C]opyright protection is precluded for works which are unwritten but rather transmitted orally.”).

96. See 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in *original* works of authorship. . . .” (emphasis added)).

97. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (holding that photographs qualify as original works because they embody the “original intellectual conceptions of the author”). Susan Scafidi suggests that current theories of authorship may be what are limiting the extension of copyright and other intellectual property protections to Indigenous cultural products. See Scafidi, *supra* note 15, at 809 (explaining that “[t]he intangible products of these cultural groups, whether created deliberately or as a by-product of social interaction over time, tend to fail the tests of agency and novelty common to the utilitarian and ethical theories of intellectual property protection”).

98. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (holding that a telephone book was not a copyrightable work, lacking “the minimal creative spark required by the Copyright Act and the Constitution,” as the book’s alphabetical listing of names was “an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course,” and thus “practically inevitable”).

99. See *Jordan*, *supra* note 93, at 99. While a new transcription of such a song or sketch of this kind of object may be copyrightable, only the new creativity added in the process of writing the work down could ultimately qualify for a copyright, not the song or object itself, leaving the song or object vulnerable to unauthorized copying, performance, and distribution. See *Naruto v. Slater*, No. 15-cv-04324, 2016 WL 362231, at \*3–4 (N.D. Cal. Jan. 28, 2016) (denying standing to sue for copyright infringement of a photograph taken by a crested macaque, relying in part on the Copyright Office’s statement that “to qualify as a work of ‘authorship’ a work must be created by a human being” (quoting *Compendium of the U.S. Copyright Office Practices* § 313.2 (3d ed.)).

100. 17 U.S.C. § 102(b), (a).

101. While it might be argued that the Intellectual Property Clause of the Constitution imposes the limitations on copyright’s scope discussed here, it is unclear why this clause would in any way limit Congress from protecting *Indigenous* culture in these ways as presumably Congress’s power over the affairs of Indigenous peoples derives only from the Indian Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, or the doctrine of plenary power over American Indian affairs established in *United States v. Kagama*, 118 U.S. 375, 384 (1886), neither of which include these limitations.

But even with the burden these requirements place on Indigenous creators, a large amount of Indigenous cultural material *is* currently eligible for copyright protection. Indeed, in the following subpart, I explore three examples of copyrightable Indigenous creativity. And yet, while these works likely qualify for copyright protection, the fair use doctrine and other limitations on a copyright holder's rights as currently interpreted may allow for their unauthorized appropriation.

*D. Appropriating Copyrightable Indigenous Culture: Three Case Studies*

To evaluate how copyright law operates in instances of cultural appropriation, I explore three paradigmatic examples of Indigenous cultural works that are currently being used without permission. These case studies provide concrete examples of Indigenous cultural expressions that likely qualify for copyright protection. But they also show how easily non-Indigenous appropriators can disregard that protection.

Further, these cases point out just how difficult it is to generalize about the harms cultural appropriations cause. Often, the harms stemming from cultural appropriations depend on the nature of the culture in question, including the relationships and creative networks that support, develop, and produce it. As Bethany Yellowtail, a prominent Indigenous fashion designer recently explained, "It's so complicated trying to explain cultural appropriation because people are like, oh it doesn't matter, get over it. But I'm not going to get over it, this affects my family."<sup>102</sup> Given this complexity, I argue in Part III that analyses of copyright infringements involving cultural appropriations should include a more contextualized look into the nature of the culture in question and the impacts on the kinds of relations and environments that generate it and are affected by it.

*1. Educational Experimentation: Boy Scout Indigeneity*

The borrowing of Indigenous ceremonial culture for seemingly "educational" purposes is a perpetually common mode of cultural appropriation from Indigenous communities. For example, The Boy Scouts of America operates a number of youth programs, including the Venturing program for fourteen- to twenty-year-olds, which engage youth (organized into local Venture "Crews") in long-term team projects through which they develop life skills and personal ethics. Remarkably, a number of non-Indigenous Venture Crews focus on performing powwow, a form of Native American ceremonial and social

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102. POPSUGAR, *How Fashion Designer Bethany Yellowtail Celebrates Her Native American Heritage*, at 3:30, YOUTUBE (July 25, 2018), <https://www.youtube.com/watch?v=UKYvrc8XO20> [<https://perma.cc/DMG7-6DJS>].

dance, as their site of self-development.<sup>103</sup> Crews craft regalia, learn dance steps, and perform at public powwows.<sup>104</sup>

Over the course of anthropological fieldwork exploring Boy Scout appropriations,<sup>105</sup> I learned that unauthorized uses of powwow culture are widespread and take a variety of forms.<sup>106</sup> At one lodge I visited, nearly every Tuesday night, Venture Crew participants would sit at long wooden tables covered with sewing machines; hot clothing irons; white, black, red, and yellow feathers and ribbons; and images they had copied from the Internet.<sup>107</sup> Each Crew member worked for several hours at a time carefully creating their regalia for the next powwow. In preparation for their handiwork and performances, the Crew members I met dedicated their time to researching the history of American colonization and its devastating effects on Native American communities. But, they also spent

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103. Central to the developmental model of the Venturing program is its social-awareness component, which provides space for youth to deal with what Boy Scouts of America calls “ethical controversies.” In essence, leaders engage the youth in problem-solving situations that require them to “employ empathy, invention, and selection when they think through their position and work toward a solution.” See *What is Venturing?*, BOY SCOUTS OF AM., <https://web.archive.org/web/20141207125553/http://www.scouting.org/scoutsource/Venturing/About/venturing.aspx>.

104. Boy Scouting incorporates various aspects of Indigenous ritual and craft into its programming, many of which are far more objectionable than the case study presented here. One prime example is the Order of the Arrow ordeals and ceremonies, which include narratives formed by the hybridization of purportedly Delaware tribal histories and cosmology with excerpts from James Fenimore Cooper’s *Last of the Mohicans*. The ordeals and ceremonies also include storytelling, ceremonialized vestment and dancing patterned after Indigenous regalia and ritual performances. James G. Howes, *Order of the Arrow History*, U.S. SCOUTING SERV. PROJECT (2005), <http://usscouts.org/honorsociety/oahistory.asp> [<https://perma.cc/ZM4B-93PB>]. These performances establish and entrench stereotypes through complete decontextualization and detachment from Indigenous spaces and peoples.

105. This fieldwork took place from 2010–2011 in and around New York City’s urban powwow scene.

106. See, e.g., Rebecca Bennett, *Powwow to Celebrate Native American Culture*, HOUS. CHRON. (Jan. 5, 2012), <https://www.chron.com/neighborhood/champions-klein/news/article/Powwow-to-celebrate-Native-American-culture-9292360.php> [<https://perma.cc/V4CV-HV5F>]; Native American Weekend 2018, BOY SCOUTS OF AM. BAY AREA COUNCIL, <http://www.bacbsa.org/event/native-american-weekend/2396060> [<https://perma.cc/DRG8-AEW2>]. Some other Boy Scouts of America programs also incorporate Indigenous ceremony into their offerings. See Greetings to All Scouts and Scouters of the Picacho Peak District, from the Naala Tuukwi Chapter of the Order of the Arrow, BOY SCOUTS OF AM. GRAND CANYON COUNCIL, <http://www.bgbsa.doubleknot.com/oa-naala-tuukwi-chapter/9694> [<https://perma.cc/TH63-ZYNV>] (claiming that their “lodge, Wipala Wiki 432, bases its Native American functions on the Hopi Tribe of Northern Arizona . . . [t]he Lodge Chapters have Hopi Kachinas to represent themselves”). Interestingly, I have found no instances where a Boy Scout group, outside of those operated by and for Native American constituents, has actually consulted with or worked under the authority of local Indigenous groups to ensure their performances of Indigenous culture were appropriately authorized and non-offensive. See Samuel White Swan-Perkins, *Koshare Dancers and Their Wildly Offensive Cultural Appropriation*, INDIAN COUNTRY TODAY (Mar. 4, 2016), <http://web.archive.org/web/20190703172406/https://newsmaven.io/indiancountrytoday/archive/white-swan-perkins-koshare-dancers-and-their-wildly-offensive-cultural-JjxJjEES102wi6DKe7bwIA/> (describing the more than eighty-year tradition of Boy Scouts in La Junta, Colorado, performing Pueblo katsina dances without permission).

107. See Trevor George Reed, *Feeling Native: Tracing Indigenous Identity in Urban Powwow Performance* (Oct. 11, 2011) (M.A. thesis, Columbia University) (on file with the Center for Ethnomusicology, Columbia University).

considerable time researching and copying the themes, designs, and artworks of Indigenous and non-Indigenous creators they found in articles, on websites, and through various image searches, many of which they then incorporated into their own powwow regalia.

Crew members were keenly aware that some in the Indigenous communities in which they performed found their appropriations of Indigenous culture—including appropriations of at least some copyrightable pictorial or graphic works—deeply offensive. Beadwork, ornaments, and other conceptually separable designs affixed to or embedded in powwow regalia are often newly created, original, and fixed in the regalia by the dancer that wears them, likely qualifying them for copyright protection.<sup>108</sup> These works typically carry significant personal meaning for the dancer, not to mention they provide an important space for creativity within this vibrant cultural form. Nonetheless, many of the scouts and their leaders I spoke with pointed to powwow’s history of inclusion, community-building and sharing, and their own desires to respectfully support their local Indigenous community, as justifications for their assumption of powwow culture.

Over the course of my fieldwork, I also had the opportunity to speak with members of the Native American communities alongside whom the Boy Scouts danced. These communities took a variety of positions on the Boy Scouts’ appropriations of powwow culture. Some vehemently opposed it, while others welcomed the Scouts openly.<sup>109</sup> Most erred on the side of hesitant inclusion while acknowledging that these Scouts held the kind of privilege that made it possible for non-Indigenous suburban teenagers to “play Indian”<sup>110</sup> at regional powwows, including those hosted by the federally funded National Museum of the American Indian.<sup>111</sup>

Boy Scout appropriations of Native American powwow culture, then, may involve the unauthorized use of copyrightable materials owned by Indigenous artists and their fellow powwow participants. While these uses are offensive to some in the Native American community and less concerning to others, whether they give rise to a legally enforceable copyright infringement claim will likely depend on whether these Boy Scout appropriations fall within copyright’s fair use exception.

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108. While particular genre elements of powwow regalia design (such as the long streamers of grass dance regalia, the colorful fringe of a fancy dancer, the metallic bells of a jingle dress dancer, and others) most likely do not qualify for copyright protection as *scènes à faire*, those elements of powwow regalia that are “perce[ptible] as a two- or three-dimensional work of art” may be copyrightable though part of a useful article. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

109. See Trevor Reed, *Fabricating Identity at the Limits of Indigeneity*, ANTHROPOLOGICAL Q. (forthcoming) (on file with author).

110. For an overview of the history of Boy Scouting’s use of “Indian” culture, see DELORIA, *supra* note 8, at 109–10, 135–36.

111. See Reed, *supra* note 109. The National Museum of the American Indian is dedicated to providing the public “a more informed understanding of Native peoples.” *Vision & Mission*, NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/about/vision-mission> [https://perma.cc/QPQ6-429U].



## 2. *Commodifying the Exotic: The Music Hunter*

The unauthorized reproduction and distribution of Indigenous culture as an exotic commodity is a second paradigmatic form of cultural appropriation.<sup>112</sup> For example, Laura Boulton, the self-proclaimed “music hunter,”<sup>113</sup> collected a vast number of ceremonial songs from Indigenous peoples around the world from the 1920s until the late-1960s.<sup>114</sup> In 1929, she traveled to Africa together with her soon-to-be ex-husband, an ornithologist, to record Indigenous songs that she would later play for paying audiences as she traveled the public lecture circuit in the United States.<sup>115</sup> In 1933, she then traveled to Chicago to record Indigenous peoples hired to inhabit a troubling exhibit entitled “The Indian Villages” at the *A Century of Progress* exposition. This was a world’s fair of sorts displaying the most advanced American technological innovations of the day purposefully juxtaposed against exhibits of traditionally dressed, living citizens of Native American Tribes.<sup>116</sup> Seven years later, she traveled to the Southwestern United States to collect additional Indigenous songs from several Tribes<sup>117</sup> and then proceeded to record Indigenous peoples in Central America, Canada, Alaska, and several locations in Asia.<sup>118</sup> Altogether, she collected roughly 30,000 song recordings.<sup>119</sup>

Over her career, Boulton assembled numerous albums of these Indigenous song performances, which she then licensed to two commercial labels, Victor Records and Folkways Recordings.<sup>120</sup> These labels sold thousands of copies of Boulton’s albums to the public through 1986, after which the Smithsonian

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112. These kinds of appropriations may take a variety of forms, including the appropriation by the clothing retailers Madhappy and Neiman Marcus discussed, *supra* notes 1–5 and accompanying text.

113. Laura Boulton titled the autobiography of her career “The Music Hunter.” See LAURA BOULTON, *THE MUSIC HUNTER: THE AUTOBIOGRAPHY OF A CAREER* (1969).

114. See Alejandra Bronfman, *Sonic Colour Zones: Laura Boulton and the Hunt for Music*, 3 *SOUND STUD.* 17, 20 (2017) (marking her career as beginning in the 1920s and ending in the late 1960s).

115. See Damaris Colhoun, *The Socialite Who Stopped at Nothing to Hunt Down Ancient Music*, *ATLAS OBSCURA* (Sept. 2, 2015), <https://www.atlasobscura.com/articles/the-socialite-who-stopped-at-nothing-to-hunt-down-ancient-music> [<https://perma.cc/G8KE-DTJJ>]; BOULTON, *supra* note 113, at 4–5 (explaining how Boulton was invited to join the Straus African Expedition, with a specific invitation to record Indigenous songs for the first time in her career).

116. See OFFICIAL GUIDE BOOK OF THE FAIR 60, 64 (1933), [http://livinghistoryofillinois.com/pdf\\_files/Official%20guide%20book%20of%20the%20fair%20Chicago,%201933.pdf](http://livinghistoryofillinois.com/pdf_files/Official%20guide%20book%20of%20the%20fair%20Chicago,%201933.pdf) [<https://perma.cc/NYN9-GRR9>] (describing an exhibit where living Indigenous peoples were displayed as the descendants of a civilization at a prior stage of human development); Trevor George Reed, *Returning Hopi Voices: Toward a Model for Community-Partnered Repatriation of Archived Traditional Music* 16–17 (February 2010) (M.A. thesis, Columbia University) (on file with the Program in Arts Administration, Teachers College, Columbia University).

117. See Trevor Reed, *Who Owns Our Ancestors’ Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 *COLUM. J.L. & ARTS* 275, 288–91 (2016).

118. See generally BOULTON, *THE MUSIC HUNTER*, *supra* note 113 (documenting Boulton’s recording expeditions).

119. Laura Boulton, *The Laura Boulton Collection of World Music and Musical Instruments*, 14 *COLL. MUSIC SYMP.* 127, 127 (1974).

120. See Reed, *supra* note 117, at 290.

Institution purchased Folkways records and continued to produce its catalog.<sup>121</sup> Boulton sold the rights to her remaining recordings to Columbia University as part of a \$400,000 deal between the University and a wealthy octogenarian suitor.<sup>122</sup> Boulton's recordings remain the primary research collection for Columbia's Center for Ethnomusicology,<sup>123</sup> while Smithsonian-Folkways continues to sell or license Boulton's albums of Indigenous songs through physical sales, digital downloads, and streaming.<sup>124</sup>

Historical evidence in Boulton's papers suggests that she was an astute negotiator and understood copyright law at far more than a cursory level.<sup>125</sup> Yet, she, together with her labels, apparently managed to create tens of thousands of copies of Indigenous music without ever obtaining a copyright assignment or license from her Indigenous informants.<sup>126</sup> Such a transfer, explicit or implied, would have been necessary under the common-law rule of the day for her to reproduce and publish the recordings unilaterally. That is because sound recording copyrights—at least for the recordings made in the United States—

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121. *Id.*

122. See Aaron Fox, *The Archive of the Archive: The Secret History of the Laura Boulton Collection*, in THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 194, 210 n.12 (Jane Anderson & Haidy Geismar eds., 2017).

123. See *About the Center*, THE CTR. FOR ETHNOMUSICOLOGY AT COLUM. UNIV. (2017), <http://www.ethnocenter.org/about> [<https://perma.cc/T65M-K9F4>]. The research objectives for this collection have since shifted focus to repatriation.

124. See, e.g., LAURA BOULTON, INDIAN MUSIC OF THE SOUTHWEST (Folkways Records & Service Corp. 1957); *Laura Boulton-Indian Music of the Southwest*, DISCOGS, <https://www.discogs.com/Laura-Boulton-Indian-Music-Of-The-Southwest-/release/4868965> [<https://perma.cc/6566-V247>].

125. This observation is based on my review of her correspondence and a number of contracts and licenses she negotiated (often including drafts she saved with penciled annotations), including agreements with CBS for her public lecture circuit agency agreement, and her licensing agreements with Victor and Folkways Records. See Letter Agreement between Laura Boulton and RCA Manufacturing Company (Nov. 1, 1939) (on file with the Archive of Traditional Music, Indiana University Bloomington) (including penciled edits to the granting clause of a copyright agreement); Letter Agreement between Laura Boulton and Folkways Records and Service Corp. (Feb. 20, 1956) (on file with the Archive of Traditional Music, Indiana University Bloomington) (containing handwritten edits to the royalty clause of a copyright agreement); Memorandum of Agreement between Laura Boulton and Rinehart & Co. (Jul. 16, 1947) (on file with the Archive of Traditional Music, Indiana University Bloomington) (containing typed and pasted alterations to a form copyright agreement).

126. This observation is based on the lack of any such agreements or even manifestations of her Indigenous informants' intent to have Boulton publish the recordings they made with her in her voluminous archive at the Archive of Traditional Music, or in her autobiography, see BOULTON, *supra* note 113. The only indication that Boulton may have compensated her informants is in a 1933 research funding proposal for a recording project at the A Century of Progress Exhibition in Chicago, which lists a \$150 line item for "Informants." See Plan of Research Problem: Project for a Study of the Music of an American Indian Group at the Century of Progress Exposition, June 1–November 1, 1933 (on file with the Archive of Traditional Music, Indiana University Bloomington). Whether she considered the performers informants or just those who translated the songs for her is unclear, and how those funds were to be distributed is likewise unclear; but whatever the case, it is difficult to infer any intent on the part of the Indigenous peoples she recorded to transfer their rights to Boulton to publish the recording they made with her based on this alone.

generally vested in performers rather than recordists.<sup>127</sup> Boulton likely knew that at least some of the recordings she made were of original compositions, and that the sound recordings of her Indigenous informants' musical performances were copyrightable.<sup>128</sup> She also likely knew that some of her recordings were subject to special Tribal protocols or local laws governing their circulation and performance, and in at least one documented instance she agreed to uphold those protocols.<sup>129</sup>

Boulton's unauthorized use of her Indigenous informants' copyrightable musical works and sound recordings, and the Smithsonian's continued sale of these recordings, demonstrates either a doubtful ignorance or a complete disregard for the intellectual property rights and local protocols of these Indigenous peoples. But whether it amounts to copyright infringement likely depends on whether her use of the recordings falls within the contours of copyright's fair use doctrine.

### 3. *Indigenous Renaissance: Reclaiming Ancestral Voices*

Finally, consider a contrasting, contemporary example of Indigenous artists who are actively re-appropriating their ancestors' cultural works, sometimes against the copyright interests of non-Indigenous individuals and institutions who own them. One of the most prominent examples of this Indigenous renaissance is First Nations artist Jeremy Dutcher,<sup>130</sup> who recently won the prestigious Polaris Prize for best Canadian music album of the year, based on

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127. See Reed, *supra* note 117, at 282–84 (explaining that common-law copyrights in sound recordings prior to 1972 generally vested in the performers captured on the recording, and implied transfers from performer to sound recordist generally required evidence of intent); see also BOULTON, *supra* note 113, at 402 (admitting that some Northwest Coast First Nations' songs Boulton recorded were owned by specific leaders in those communities under local law). Whether common-law sound recording rights existed for the recordings Boulton made in other countries is beyond the scope of this paper.

128. See, e.g., BOULTON, *supra* note 113, at 418 (describing a moment in her visit to Zuni Pueblo when she recorded a song “which had been learned in the kiva the night before,” explaining that “[t]hus new songs are added to the repertoire”); see also Laura Boulton, *Southwest American Indians: Field Notes*, 15-8, 15-18, 16-1, 16-2, 16-5, 16-6, 16-11, 16-12, (1933) (on file at the Center for Ethnomusicology, Columbia University) (documenting several of the Hopi songs as “composed” by contemporary Hopi individuals, and were not merely anonymous folk melodies); Letter from R.P. Wetherald, Recording & Rec. Sales, Victor Records, to E.P. Hunt, Stanford Univ. Sch. of Hygiene & Physical Educ. (Dec. 20, 1940) (on file with the Archive for Traditional Music, Indiana University Bloomington) (explaining that Boulton was securing federal copyright registration on the recordings, which she presumably could only do if the recordings were copyrightable and she held a common law copyright in them).

129. BOULTON, *supra* note 113, at 417, 429.

130. Though Dutcher is Canadian, and Canadian copyright law has a fair dealing rather than a fair use provision, many of the underlying principles are the same. Additionally, the Wabinali confederacy and Maliseet aboriginal territory straddles what later became the international border between the United States and Canada, raising important underlying questions about whose copyright laws, if any, should actually apply.

artistic merit.<sup>131</sup> The album, titled *Wolastoqiyik Lintuwakonawa*, showcases Dutcher singing his original compositions that reinterpret and reincorporate traditional Wolastoqiyik (Maliseet) songs recorded by William Mechling, an anthropologist who visited the Wolastok First Nations in the early 1900s. Dutcher, who is Wolastoqiyik from the Tobique First Nation in present-day New Brunswick, traveled to the Canadian Museum of History in Gatineau, Quebec, after being directed by an elder in his community to learn more about his community's songs held in the Museum's archives.<sup>132</sup>

Dutcher's reanimation of the Mechling recordings is a striking manifestation of contemporary Maliseet culture. Dutcher, an operatic tenor and classical composer by training, spent nearly five years transcribing and internalizing the recordings in preparation for the album—a creative process he refers to as “deep listening.”<sup>133</sup> Meanwhile, Dutcher consulted with his Tobique First Nation community about the meaning of the songs, the language used, and his intended uses of the song recordings.<sup>134</sup> Dutcher's use of the recordings included copying and deriving new works from the musical material contained in them and directly sampling excerpts from the recordings in his album and live performances.

The resulting work is impressive. Dutcher elongates and develops the sweeping melodies contained in the recordings, layering in powerful chord progressions that help generate new tension and drama. The looped samples from the Mechling recordings help to create a sung dialog between Dutcher and his ancestors as they sing in canonic counterpoint in the Wolastoqiyik language.<sup>135</sup> The piece demonstrates, in an emotional and powerful way, cultural continuity

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131. See Sean Brocklehurst, ‘Deep Listening’: How Jeremy Dutcher Crafted His Fascinating *Polaris Prize-Winning Album*, CBC NEWS (Sept. 18, 2018), <https://www.cbc.ca/news/Indigenous/national-jeremy-dutcher-interview-polaris-prize-wolastoq-1.4820825> [https://perma.cc/BD3K-2D29].

132. See *Voices from the Past: Musician Jeremy Dutcher Gives New Life to Wax Cylinder Recordings of His Ancestors*, CBC RADIO (Mar. 9, 2018), <https://www.cbc.ca/radio/unreserved/lost-and-found-Indigenous-music-culture-language-and-artifacts-1.4563023/voices-from-the-past-musician-jeremy-dutcher-gives-new-life-to-wax-cylinder-recordings-of-his-ancestors-1.4569534> [https://perma.cc/DX4W-23PM].

133. See Brocklehurst, *supra* note 131.

134. See Jeremy Dutcher, *Eqpahak*, YOUTUBE (Apr. 5, 2018), <https://www.youtube.com/watch?v=KiD8uiI3UEk> [https://perma.cc/8K8L-KP7Z] (containing an excerpt of a consultation Dutcher conducted with Wolastoq song-keeper and mentor Maggie Paul); Catalina Maria Johnson, *Jeremy Dutcher, the Newest Light in Canada's Indigenous Renaissance*, NPR (Sept. 24, 2018), <https://www.npr.org/2018/09/24/650563184/jeremy-dutcher-the-newest-light-in-canadas-Indigenous-renaissance> [https://perma.cc/N4DR-D85T] (describing Dutcher's apprenticeship with Paul); see also DYLAN ROBINSON, HUNGRY LISTENING: RESONANT THEORY FOR INDIGENOUS SOUND STUDIES 175 (2020) (describing Dutcher's concern over his community's reactions to his use of traditional songs: “when people hear [Lintuwakon ‘ciw Mehcinut] in my community they're just so excited to hear the songs, period. For them, protocol maybe becomes a little less important and audience becomes less important. It's just about getting song out there and trying to revive it within and for the community”).

135. See Johnson, *supra* note 134.

across the intervening decades in which the Canadian government suppressed and criminalized performances of Indigenous culture.<sup>136</sup>

I draw on Dutcher's work because it represents an increasingly common and important mode of Indigenous cultural creativity happening across North America and around the globe. This mode of creativity involves the re-appropriation and creative development of previously captured Indigenous culture in deliberate and decolonizing ways.<sup>137</sup> These appropriations often explicitly copy and derive new works from documentary works owned by non-Indigenous collectors or the institutions for whom they worked, and thus may constitute copyright infringement, unless copyright law provides a viable exception.<sup>138</sup>

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While cultural appropriations may be necessary for normal human development and the progress of creativity generally, unauthorized appropriations of Indigenous culture carry the prospect of causing significant harm through further dispossession of critical aspects of Indigenous lives. While some Indigenous works do not qualify for copyright protection, many do, such as those at issue in the case studies just discussed. In some cases, copyrighted

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136. See David B. MacDonald, *Genocide in the Indian Residential Schools: Canadian History Through the Lens of the UN Genocide Convention*, in COLONIAL GENOCIDE IN INDIGENOUS NORTH AMERICA, *supra* note 60, at 306, 313–14 (describing the culture of suppression in Canada from the 1880s until the 1960s that included bans on potlaches, give-away ceremonies, the Thirst Dance, and the Sun Dance).

137. See Johnson, *supra* note 134. Another prominent example in the Indigenous music world is Alison Warden, a.k.a. Aku Matu, who draws from sound recordings of her ancestors in a number of her hip-hop beats. See Brian Adams, *Breaking Stereotypes of Alaska's Inuits*, N.Y. TIMES BLOGS (Mar. 8, 2017), <https://www.nytimes.com/slideshow/2017/03/08/blogs/breaking-stereotypes-of-alaskas-inuits.html> [<https://perma.cc/9A5A-UL4X>] (highlighting Warden's sampling of traditional song recordings in her raps); see also Tara Paniogue, *Meet Bethany Yellowtail, a Native American Fashion Designer Who's Inspiring a Whole Generation of Women*, L.A. TIMES (June 9, 2017), <https://www.latimes.com/fashion/la-ig-bethany-yellowtail-los-angeles-designer-20170609-htmlstory.html> [<https://perma.cc/6MFN-QXNG>] (describing fashion designer Bethany Yellowtail's use of her Tribe's original prints); Vernon Ah Kee, *Transforming Tindale*, STATE LIBR. OF QUEENSLAND (2012), <https://www.slq.qld.gov.au/discover/past-exhibitions/transforming-tindale/gallery> [<https://perma.cc/G83U-Y6G6>] (exhibiting 3D renditions of anthropologist Norman Tindale's photographs by artist Vernon Ah Kee). See generally Av Monater, *How Contemporary Native American Artists Counter Cultural Appropriation with Artistic Appropriation*, KIVA GALLERY (Dec. 12, 2017), <http://www.kivagallery.se/2017/12/12/native-american-artists-counter-cultural-appropriation-artistic-appropriation/> [<https://perma.cc/4RF6-8NMG>] (exploring the history of Indigenous artistic appropriation and re-appropriation).

138. See Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 399–415 (2019) (reviewing applications of the fair use doctrine to instances of appropriation in the fine arts and music and noting a circuit split exists on whether digital sampling of sound recordings without a license can ever constitute fair use); see also Jane Anderson, *Anxieties of Authorship in the Colonial Archive*, in MEDIA AUTHORSHIP, at 229, 232 (Cynthia Chris & David A. Gerstner eds., 2013) (detailing that much of the recorded cultural material of Indigenous peoples is “authored” and therefore owned by non-Indigenous people, such that Indigenous peoples must secure permission from the “authors” to use products of their own cultures).

Indigenous works are owned by Indigenous peoples themselves, who seek to defend them from unauthorized use by non-Indigenous appropriators. In others, non-Indigenous individuals or institutions hold the copyrights with Indigenous artists and traditional practitioners seeking to use them without permission. As these and other Indigenous works are appropriated, questions remain as to whether copyright law can effectively balance the public benefits of those appropriations against the interests of the copyright owners.

## II.

### FAIR USE'S FORGOTTEN FACTOR

Given that many Indigenous works are copyrightable, Indigenous peoples should be able to rely on copyright infringement claims as a means of defending their creative works against cultural appropriations. Importantly, however, not all unauthorized uses of a copyrighted work constitute infringement. Copyright is a porous form of protection, allowing unauthorized uses of a creative work under certain exceptions.<sup>139</sup> Foremost among these is copyright law's fair use doctrine.<sup>140</sup>

Now codified in 17 U.S.C. § 107, the fair use doctrine is a “flexible,” “equitable rule of reason” that permits the unauthorized use of a copyrightable work when four factors, applied variably depending on context, lead a court to believe that the public interest in the specific use outweighs the copyright holder's interest.<sup>141</sup> In practice, fair use prevents culture from being completely “locked up” for follow-on creators.<sup>142</sup> But, in doing so, it also weakens cultural creators' ability to control uses of their expressions by others, allowing others to exploit the culture they create for certain publicly beneficial purposes. In its role of balancing the public's interest in creative progress against the rights of copyright holders, fair use acts as a gatekeeping mechanism for cultural appropriations. Whether copyrightable Indigenous creativity can be protected against appropriation may turn on how a court balances the statutory fair use factors.

This Section provides an overview and history of the fair use factor test, focusing specifically on a critical part of the test for cases involving cultural

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139. These include exceptions for library and archival reproduction, 17 U.S.C. § 108; the “first sale” doctrine, § 109; exceptions for certain performances and displays by educational, fraternal, religious and other organizations, § 110; and many others.

140. 17 U.S.C. § 107.

141. *Google LLC v. Oracle, Inc.*, 141 S. Ct. 1183, 1196–97 (2021) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). The statutory factors in the fair use analysis are indicative of the doctrine, but not exhaustive. *Id.*

142. See LESSIG, *supra* note 18, at xiv (arguing that appropriately limiting the rights of copyright holders frees creators and innovators from “the control of the past”); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994) (noting that an unlimited copyright would effectively “put manacles upon science” (quoting *Carey v. Kearsley* (1803) 170 Eng. Rep. 679, 681 (K.B.))).

appropriation. Part II.A gives a brief overview of the four statutory factors.<sup>143</sup> It shows why the second fair-use factor—the “nature of the copyrighted work”—is of particular importance to Indigenous creators seeking to defend their cultural works from appropriation. As the second factor has rarely played a significant role in copyright cases since its codification in 1976, Part II.B reviews the common-law development of the second factor to recover its underlying purposes, its early role helping judges understand the nature and value of a work, and the reasons behind its seeming demise. Part II.C discusses the codification of the second factor and its apparent import to Congress at the time. Part II.D explains how the factor’s scope narrowed through subsequent interpretations by the Supreme Court. Part II.E then shows why the current second factor test fails to adequately assess the nature of certain forms of cultural creativity. This Part sets the stage for the factor’s proposed rehabilitation in Part III.

#### A. *The Fair Use Doctrine, In Brief*

A copyright holder generally has the right to prevent others from reproducing, making derivative works from, distributing, publicly performing or displaying, or (if the work is a sound recording) digitally transmitting a work she owns.<sup>144</sup> But the right is limited. Fair use is among the devices courts and Congress have developed to temper a copyright owner’s rights. It allows members of the public to use copyrighted material without the owner’s permission when the benefits of the use to the public outweigh the private benefits to the copyright holder. Ad hoc fair use assessments are part of everyday life in many fields: activities like news reporting, criticism, academic research, classroom teaching, and similar uses would be difficult or impossible without the doctrine of fair use.

But finding a balance between the public’s interest in access to culture and the private rights of authors who produce it has been elusive. Not long after the first Copyright Act became law in 1790, American courts borrowed and further developed the common law doctrine we know today as fair use.<sup>145</sup> In 1976, Congress codified its understanding of the fair use doctrine in a fact-seeking four-factor test.<sup>146</sup> The test is not a checklist, but a balancing test, with each of the factors weighed together to determine whether an unauthorized appropriation of a copyrighted work is an infringement of the copyright owner’s rights, or a use permitted by law.

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143. The test codified by Congress does not limit the fair use analysis to four factors; however, in practice, courts have relied almost exclusively on the four factors outlined in the statute. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 563–64 (2008).

144. 17 U.S.C. § 106.

145. See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

146. See 17 U.S.C. § 107.

Courts typically focus most of their analysis on the first, fourth, and third factors, respectively.<sup>147</sup> The first of the four fair use factors, “the purpose and character of the use,” seems to be the most influential, as it assesses how compelling an unauthorized use may be.<sup>148</sup> It raises questions such as whether the use of the work is transformative in a way that advances the goals of copyright law,<sup>149</sup> whether the sole purpose for the use is commercial exploitation without a public benefit,<sup>150</sup> and whether the use of the work serves non-profit educational purposes.<sup>151</sup> The fourth factor, “the effect of the use upon the potential market or value of the copyrighted work,” is also highly influential.<sup>152</sup>

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147. The Supreme Court has recently rejected the notion that some factors must be prioritized over others, instead asserting that the organization and use of the fair use factors “depends on the context.” *Google LLC v. Oracle America*, 141 S. Ct. 1183, 1199 (2021).

148. 17 U.S.C. § 107(1); *see Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (“The first statutory factor to consider, which addresses the manner in which the copied work is used, is ‘[t]he heart of the fair use inquiry.’” (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006))). *But see Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (asserting that the fourth fair use factor usually is the most important); *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 109 (2d Cir. 2021) (noting that all four of the statutory factors “are to be explored and weighed together”).

149. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”). Applying *Campbell*, courts have asked whether the use “adds something new and important” to an existing work, such as making functional elements of a commonly used programming environment available to programmers in a different computing environment. *Oracle*, 141 S. Ct. at 1202–04. Others have asked whether the new work uses “copyrighted material itself for a [different] purpose, or imbues it with a [different] character . . . [than] that for which it was created.” *TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016) (citing *Campbell*, 510 U.S. at 579); *see also Authors Guild v. Google, Inc.*, 804 F.3d 202, 215–16 (2d Cir. 2015) (“[C]opying from an original for the purpose of criticism or commentary on the original or provision of information about it, tends most clearly to satisfy *Campbell*’s notion of the ‘transformative’ purpose involved in the analysis of Factor One.”). Other courts have asked whether the use adds new character, meaning or message to the original work, or simply substitutes for the original. *See Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141–43 (2d Cir. 1998).

150. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (stating that the essence of the commercial/nonprofit inquiry is whether the user stands to profit from using the copyrighted material without paying the customary price); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). A related question is whether the unauthorized use of the work directly generates profits for the follow-on user, or whether the use is incidental to the creation of a larger work. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13, 615 (2d Cir. 2006) (holding that reproductions of concert posters and tickets in a coffee table book’s historical timeline were marginal contributions to a larger project and thus fair use); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014) (holding that where there is no evidence that the user captures “significant revenues as a direct consequence of copying” the original work and the use provides a broader public benefit, such a use is not considered “commercial exploitation”).

151. *See* 17 U.S.C. § 107 (stating that some of the purposes for which fair use exists are “teaching (including multiple copies for classroom use), scholarship, or research” and specifically including “nonprofit educational purposes” as a point of evaluation under the first factor); *see also Cambridge Univ. Press*, 769 F.3d at 1263 (“[A]llowing some leeway for educational fair use furthers the purpose of copyright by providing students and teachers with a means to lawfully access works in order to further their learning in circumstances where it would be unreasonable to require permission.”).

152. 17 U.S.C. § 107(4); *see Kienitz*, 766 F.3d at 758 (suggesting that of all four fair use factors, “the most important usually is the fourth (market effect”).



It addresses the potential changes in economic value an unauthorized use would impose on the current copyright owner<sup>153</sup> and whether the use will preempt future *authorized* uses of the work,<sup>154</sup> and compares these to the public benefits of the use of the work.<sup>155</sup> The third factor, “the amount and substantiality of the portion used [without permission] in relation to the copyrighted work as a whole,” may also play a significant role, particularly when the copied proportion of the work seems excessive in comparison to any publicly beneficial use being claimed,<sup>156</sup> or when the unauthorized use captures the “heart” of the original work.<sup>157</sup>

Finally, courts give surprisingly little attention—that is typically only a few sentences—to the second factor, or “the nature of the copyrighted work.”<sup>158</sup> This is remarkable, considering that analysis of the nature of the work being appropriated seems to have played a vital role from the earliest American fair use cases through fair use’s codification in 1976.<sup>159</sup> For many Indigenous cultural works, such as the ones discussed in Part I, their nature should play a significant role in determining whether or not their unauthorized appropriation can be justified. For example, the unauthorized use of an Indigenous song might be treated differently if it is sacred or ceremonial, like a Diné blessingway song,

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153. See *Oracle*, 141 S. Ct. at 1206 (explaining that the fourth factor “can require a court to consider the amount of money that the copyright owner might lose”). Other questions might include, does the use “supplant[] any part of the normal market for a copyrighted work”? *Harper & Row*, 471 U.S. at 568. Namely, does the use deprive the copyright holder of “significant revenues,” *Authors Guild*, 804 F.3d at 223, interfere with the marketing of the work, or usurp the market for the specific parts of the work used? See *Cambridge Univ. Press*, 769 F.3d at 1278. Another question might be, is there a “ready market or means” by which a license to use the work (or the desired portion of the work) could be purchased? *Id.* at 1276–77. Where there is no means to license the desired portion of the copyrighted work, the fourth factor may weigh in favor of fair use as it implies a substantial market does not exist.

154. For example, would the use usurp the copyright holder’s exploitation of “traditional, reasonable, or likely to be developed” markets? *Am. Geophysical Union*, 60 F.3d at 929–30. Or would the use only impact future fair uses of the work (criticism, parody, etc.)? See *Bill Graham Archives*, 448 F.3d at 612–613, 615 (holding copyright owners may not preempt others from entering transformative or other fair use markets); *Castle Rock Ent.*, 150 F.3d at 145 n.11 (explaining that copyright owners may not “preempt exploitation of transformative markets,” such as parody or news reporting, simply by licensing their work for those purposes).

155. *Oracle*, 141 S. Ct. at 1206.

156. 17 U.S.C. § 107(3); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994). However, the use of an entire work does not necessarily weigh against fair use. See *Authors Guild*, 804 F.3d at 221–23 (weighing the copying of entire works for the purposes of enabling public search of a document and providing excerpts that cannot substitute for the original in favor of fair use); cf. *Bill Graham Archives*, 448 F.3d at 613 (“[C]opying the entirety of a work is sometimes necessary to make a fair use of the [work].”).

157. *Harper & Row*, 471 U.S. at 564–65 (holding that the third factor weighs against fair use when the most powerful or distinctive passages of a memoir were used without permission). A use that requires copying the “character” of the work (for parody for example), may necessitate copying entire works. See *Campbell*, 510 U.S. at 586–89.

158. 17 U.S.C. § 107(2); see Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 529 (2008) (“[C]ourts address this factor with remarkable efficiency and frugality, often distilling its unique perspective into a concentrated sentence or two.”).

159. See *infra* Part II.B.

than if it is a popular Navajo country song meant to circulate in the local or global entertainment economy.<sup>160</sup> While lower courts have struggled to find a meaningful use for this factor in recent years, understanding its historical development and the variety of purposes it has served may prove insightful for those seeking to understand when unauthorized uses of Indigenous culture, or Indigenous re-appropriations of their culture owned by others, is “fair.”<sup>161</sup>

*B. The Common-Law Development of the Second Fair Use Factor*

The Supreme Court locates the origins of the contemporary fair use doctrine in the mid-nineteenth century case *Folsom v. Marsh*, which “distilled the essence of law and methodology” of prior English common law rules to the four-part fair use framework we have today.<sup>162</sup> Admittedly, few cases prior to the codification of the fair use factor test in 1976 cited *Folsom* as supplying the scope and methodology for the fair use analysis.<sup>163</sup> Indeed, some commentators have gone so far as to reject *Folsom* as creating “fair use” in American copyright law, arguing instead that it represents a “redefinition” of copyright infringement itself.<sup>164</sup>

Still, this subpart takes the Supreme Court at its word and performs a close reading of *Folsom* to flesh out what the essence of the second fair use factor might be. Then, it proceeds to track the factor’s common-law development through its codification in the 1976 Copyright Revision Act. Finally, this subpart gives an overview of the ways the second fair use factor has been interpreted in more recent cases through its recent demise in some federal circuit courts of appeal.

1. *Folsom v. Marsh*

The Copyright Act’s second fair use factor traces its roots to the American common law doctrine, whose factors were first articulated by Justice Story in his

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160. Compare, e.g., Barre Toelken, *The Yellowman Tapes, 1966–1997*, 111 J. AM. FOLKLORE 381, 385 (1998) (describing how Navajo protocol limits the circulation of ceremonial songs and oral histories), with Simon Romero, *Navajo Country Music Shatters ‘Cowboys and Indians’ Stereotypes*, N.Y. TIMES (Nov. 30, 2019), <https://www.nytimes.com/2019/11/30/us/navajo-country-music.html> [<https://perma.cc/Y5S8-XGJV>] (describing the burgeoning Navajo country music scene, where bands “largely play covers, paying tribute not just to outlaw country singers but to legendary Diné country bands”).

161. Importantly, some commentators have argued that the analysis of the nature of a work in early copyright cases actually represented a redefinition of copyright infringement itself. See, e.g., L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431 (1998) (“The first myth is that *Folsom* created fair use, when in fact it merely redefined infringement. The second myth is that *Folsom* diminished, and therefore fair use diminishes, the rights of the copyright owner.”).

162. See *Campbell*, 510 U.S. at 576; see also *Oracle*, 141 S. Ct. at 1183 (finding that the contemporary fair use factors are “similar to that used by Justice Story in *Folsom*”).

163. See Reese, *supra* note 80, at 290–92.

164. See, e.g., Patterson, *supra* note 161, at 431; see also *infra* text accompanying notes 161–64.

1841 opinion in *Folsom v. Marsh*.<sup>165</sup> The *Folsom* litigation came about when Jared Sparks and Charles Folsom, publishers of a twelve-volume set of George Washington's papers,<sup>166</sup> brought a copyright infringement action<sup>167</sup> against Rev. Charles W. Upham and his publisher for allegedly duplicating a few hundred pages from the set in their much shorter, two-volume biography of Washington made for school libraries.<sup>168</sup> A fair use defense was never raised in the litigation.<sup>169</sup> However, the court in *Folsom* established what the Supreme Court later referred to as the doctrine of fair use, an exception to a copyright holder's exclusive rights justified by copyright law's overriding purpose of supporting cultural and intellectual development.<sup>170</sup>

A core challenge Justice Story faced in this case was deciding how to assess the nature of George Washington's letters, memos, and other documents, and then determining whether their nature made them more or less susceptible to Upham's educational but unauthorized use. Given the "peculiar nature and character" of the issues presented in the case, Justice Story famously penned:

it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases . . . to what may be called the metaphysics of the law. . . .<sup>171</sup>

Though clearly laced with humor, Justice Story's preoccupations over the ontological complexities at the core of copyright law certainly linger today as courts seek to understand the proper scope of the fair use analysis.

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165. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass 1841) (No. 4,901); see *Campbell*, 510 U.S. at 576–77.

166. *Folsom*, 9 F. Cas. at 345.

167. *Id.* As a joint copyright holder in the late Washington's papers—along with Washington's nephew, Justice Bushrod Washington and Chief Justice Marshall, who both sat on the U.S. Supreme Court with Justice Story at the time of the case—Sparks sought relief in the form of Upham's profits, the surrender of remaining copies of the book, destruction of the printing plates, attorney's fees, and an injunction against selling or otherwise disposing of any remaining copies. Reese, *supra* note 80, at 262, 289.

168. See Reese, *supra* note 80, at 276–77.

169. Instead, the defense raised was the English common law fair abridgement doctrine, which permitted non-copyright holders to create condensed versions of published works under certain circumstances. See Reese, *supra* note 80, at 280–82. The court ultimately rejected this defense. See *Folsom*, 9 F. Cas. at 345, 347.

170. See *Campbell*, 510 U.S. at 576 (citing *Folsom* as a distillation of "the essence of law and methodology from earlier cases" into the judge-made fair use doctrine codified by the 1976 Copyright Act); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985) (citing *Folsom* as the earliest judicial recognition in United States courts of the fair use doctrine); see also *Campbell*, 510 U.S. at 575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . .'" (quoting U.S. CONST., art. I, § 8, cl. 8)); *Stewart v. Abend*, 495 U.S. 207, 236 (1990) ("The fair use doctrine . . . is an 'equitable rule of reason,' which 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" (internal citations omitted)).

171. *Folsom*, 9 F. Cas. at 344.

Justice Story explained that the test for whether an unauthorized but educational use infringes another's copyright turns on "the nature and objects of the selections made [by the unauthorized user], the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."<sup>172</sup> As he applied this framework to Upham's unauthorized use of Sparks's documents, Justice Story articulated each of the four contemporary fair use factors. To start, Justice Story suggested that the *purpose and character* of Upham's copying from Sparks's volume for use in school libraries would be, in the absence of the other factors, a "lawful and justifiable use."<sup>173</sup> But, the *amount and substantiality* of the work copied by Upham, in proportion to his work as a whole, outweighed that educational purpose.<sup>174</sup> The copied material amounted to more than one third of Upham's work and unabashedly copied the documents "of most interest and value to the public."<sup>175</sup> According to Justice Story, those key documents incorporated into Upham's secondary work the "essential value" of the original.<sup>176</sup> And, having copied the most important parts of Sparks's work, the resulting *effect on the market* for the original work would be that "the plaintiff's copyright be totally destroyed."<sup>177</sup>

In addition to these considerations, Justice Story's analysis of *the nature of the copyrighted work*, or the second fair use factor, was also key to the outcome of the case.<sup>178</sup> The *Folsom* opinion instructs that whether an unauthorized appropriation of another's work is justifiable hinges on "not only quantity, but value" being appropriated: the "nature . . . of the selections made," the "value of the materials used," and "the degree in which the use may . . . supersede the objects, of the original work."<sup>179</sup>

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172. *Id.* at 348.

173. *Id.* at 349; *cf.* 17 U.S.C. § 107(1).

174. *See Folsom*, 9 F. Cas. at 349; *cf.* 17 U.S.C. § 107(3).

175. *Folsom*, 9 F. Cas. at 349.

176. *Id.*

177. *Id.*; *cf.* 17 U.S.C. § 107(4).

178. It is important to note that this view of Justice Story's opinion is not universally shared. For one, the analysis of the nature of the Washington's papers appears before the pronouncement of the test in the opinion. However, the application of the test following its pronouncement incorporates or presumes much of the discussion on the nature of Washington's papers occurring earlier in the opinion. Other scholars, including Robert Kasunic, have argued that "Justice Story failed to consider what would later become the second fair use factor" because he did not look at the "contours and unique characteristics" of Washington's papers and the incentives that might have caused Washington to write them in the first place. *See Kasunic, supra* note 158, at 534. However, as Justice Souter noted in *Campbell*, for Justice Story, the nature of a work in the fair use test involved much more than just looking at the characteristics of a work, but rather assessed the value of the works being appropriated, presumably to those who supported its creation. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) ("The second statutory factor, 'the nature of the copyrighted work,' . . . draws on Justice Story's expression, the 'value of the materials used.'"). Judge Pierre Leval likewise locates the present-day second factor in Justice Story's opinion in *Folsom*. *See Leval, supra* note 29, at 1117.

179. *Folsom*, 9 F. Cas. at 348 ("Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not . . . . It is not only quantity, but value, that is always looked to.").

For Justice Story, the analysis of the nature of the work involved the relationships George Washington had to the documents he produced and to the publics who would ultimately use and value them. Justice Story suggested that Washington's letters were, to some degree, an extension of his persona and genius; they "illustrat[ed] the life, the acts, and the character of Washington," and were thus as singular as he was.<sup>180</sup> But while they "show[ed] his style and his mode of constructing sentences, and his habits of composition,"<sup>181</sup> they perhaps more importantly demonstrated Washington's contributions to American culture and the intellectual networks of which he was a part.<sup>182</sup> Thus, in assessing the "nature" and the "value" of the material copied, Justice Story took into account the relationship of the papers to their creator and their value to the creative sphere in which the papers circulated.

Importantly, the nature of Washington's papers—at least for the purpose of evaluating the justness of their unauthorized appropriation—had little to do with whether he intended for them to be published or even valued as "literary compositions."<sup>183</sup> Washington likely knew at the time he authored each document that he had generated something of expressive and intellectual value for those to whom the documents would circulate. Also, he continued to value them even after they had served their original, information-conveying function. As the court explained, their preservation and bequest by Washington demonstrated their nature as "a subject of value to himself and to his posterity."<sup>184</sup> Thus, even in the nascent stages of fair use in the United States, the nature of a work being copied—its mode of production, its relationships to existing intellectual and cultural networks, and its value to those networks—were key sites of inquiry for adjudicating the justness of an unauthorized use against the rights of the copyright holder. At the same time, the *Folsom* Court rejected methods for understanding the "nature" of a work which fixated on the work's publication potential or level of creativity.

Not all would agree with this reading of *Folsom* and the importance of the nature inquiry to the fair use analysis. Some commentators have taken particular issue with the way Justice Story accounts for the value of a creative work to the author. Professor Patterson, for example, argues that such a move incorporated into federal copyright law the notion that works could receive protection simply because the author exerted effort to create them and not because a copyright was needed to encourage their dissemination.<sup>185</sup> A copyright system premised on

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180. *Id.* at 349.

181. *Id.* at 346.

182. Perhaps this is most evident in Justice Story's repeated mention of how Congress purchased the documents for \$25,000 (roughly \$500,000 in today's dollars). *See id.* at 347.

183. *Id.* at 345–46.

184. *Id.* at 346 ("Even in compositions confessedly literary, the author may not intend, nay, often does not intend them for publication; and yet, no one on that account doubts his right of property therein, as a subject of value to himself and to his posterity.").

185. *See* L. Ray Patterson, *supra* note 161, at 442, 451 (explaining that "*Folsom's* legacy is that it made the claim that copyright is a natural law property right a part of copyright culture," and describing

granting property rights to reward an author's labor was not the intention of the drafters of the Intellectual Property Clause, who were more concerned with maintaining a robust public domain free of censorship.<sup>186</sup>

But Justice Story's inclusion of the nature of a work, and its value to the author and her creative networks, need not be read as only according undue private property interests to authors on account of their labor. Rather, exploring the nature of a work in the manner articulated by Justice Story in the fair use analysis may usefully show how a given unauthorized appropriation impedes creative progress.<sup>187</sup> It might highlight, for example, the way unauthorized appropriation stifles the incentives to create and disseminate cultural expression. Or it may reveal how an appropriation violates protocols and norms necessary for creative production in some communities. As I explore in Part III, these concerns are particularly salient to Indigenous peoples and their cultural creativity, and they must be accounted for in the fair use analysis if copyright law is to promote the progress of science and the useful arts in all their diversity of forms and natures.

However legitimate Justice Story's underlying theory may have been from our contemporary vantage point, it is clear that the second fair use factor as originally articulated in *Folsom* included an analysis of how authors and the networks within which they operate understand and value the work they create.

## 2. *Subsequent Common-Law Development*

It took well over a century after *Folsom* for Congress to codify the doctrine of fair use as we know it today. Still, as Professor Reese points out, fair use was regularly relied on in copyright disputes in the intervening years.<sup>188</sup> During those years, the fair use doctrine entered a period of somewhat erratic development.<sup>189</sup> In fact, in 1961, a Senate subcommittee study identified roughly eight factors that courts had been using to conduct fair use analyses, any of which could be

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Story's conception of copyright as relying on the "natural law" concept known as "the sweat-of-the-brow doctrine," which was later rejected by the Supreme Court).

186. *Id.* at 445 ("The lesson the framers learned was that the natural law proprietary copyright prevented the development of the public domain and its return would undermine, if not destroy what its demise created. This explains why in 1841, the constitutional principle of copyright was that one is entitled to only a limited monopoly of material taken from the public domain and then only if its use benefits society."); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351–55 (1991) (detailing the Constitution's originality mandate and the constitutional flaws of the sweat-of-the-brow doctrine).

187. *See infra* Part III.

188. Professor Reese explains that a thirty-page chapter on fair use involving twenty five separate decisions on the doctrine was published in a copyright treatise in 1936. *See* Reese, *supra* note 80, at 291.

189. Professor Latman described the fair use doctrine in those intervening years as "not a predictable area of copyright law." STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUD. PREPARED FOR SUBCOMM. PATENTS, TRADEMARKS & COPYRIGHTS 14 (Comm. Print 1960) (written by Alan Latman).

determinative.<sup>190</sup> Thus, it is quite remarkable that, less than a decade later, the House, Senate, and the Federal Court of Claims, citing that same study, were able to reduce the fair use doctrine to the four factors initially introduced by Justice Story.<sup>191</sup>

Courts' approaches to the "nature of the copyrighted work" factor in the fair use analysis during this time often intersected with other fair use factors. Courts used language like "[the] effect on the original work," "the nature of the works involved," or the "relative value" of the appropriated work in relation to the original work to describe their methodology.<sup>192</sup> In some cases, courts would use this factor to compare the function of the original work to the copy to assess the level of actual or potential harm posed by an appropriation—such as whether making unauthorized copies effectively substituted for or competed with the original work or actually reduced demand for it.<sup>193</sup>

An important line of cases that emerged in the early twentieth century relied on the nature inquiry as a potentially deciding factor. Courts of this era considered some works to be more susceptible to fair uses than others due to the purpose behind their creation, their methods of construction, or the value and importance of the work for future developments within certain creative and intellectual networks. Publications of "the arts and sciences," for example—

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190. See *id.* at 15. Although the second fair use factor codified in the 1976 Act was not explicitly listed among the "primary" factors typically relied on by courts between 1841 and 1976, it often buttressed those factors. See Comment, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L.J. 73, 88–92 (noting that the primary fair use factors included (1) whether the unauthorized use in question had or would result in diminution in demand for the original work, and (2) whether the nature of the unauthorized use advances the progress of the arts and sciences).

191. See H.R. REP. NO. 89-2237, at 58 (1966) ("These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which were stated in the 1964 bill and have been adopted again in the committee's amendment of section 107 . . ."); see also *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 88, 130 n.10 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (the majority and dissent agreeing that, while not binding on the courts, the four-factor test as described in the House Report, H.R. REP. NO. 90-83, at 29 (1967), was the state of the law governing fair use prior to the passage of the 1976 Copyright Act, but disagreeing on the application of the factors to photocopying of medical journal articles by the National Institutes of Health).

192. See Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. 43, 53 (1953).

193. See *id.* at 63, 67. Note that determinations about whether a copy can substitute or compete with the original are now addressed by the fourth fair use factor. See 17 U.S.C. § 107(4). In some pre-1976 Copyright Act cases, whether or not a copy could count as a substitute for the original appears to have been based in part on whether the copy was in the same aesthetic form (such as, literary text vs. musical composition) as the original. For example, the Eastern District of Wisconsin dismissed a claim that the Green Bay Packer's fight song had been infringed when the Saturday Evening Post printed its chorus in its newsmagazine. *Karll v. Curtis Publ'g Co.*, 39 F. Supp. 836, 837–38 (E.D. Wis. 1941). The court found that the Post's use was fair, owing in part to the fact that the article had no accompanying music, and therefore did not compete with the song or diminish its value by being published. *Id.*; see also *Broadway Music Corp. v. F-R Publ'g Corp.*, 31 F. Supp. 817, 818 (S.D.N.Y. 1940) (holding that printing the lyrics to a copyrighted song in an obituary that a deceased Broadway actress had previously sung was a fair use of the song, because there was significant doubt that the published portion "could be used for plaintiff's copyrighted song"); *Kennedy v. McTammany*, 33 F. 584, 584–85 (C.C.D. Mass. 1888) (distinguishing piano rolls and sheet music, finding that they served different functional purposes and thus a piano roll did not infringe a copyright in sheet music).

works circulated “not only for their own pecuniary profit, but for the advancement of science”—were just the sort of works for which fair use existed.<sup>194</sup> One variant on this logic looked to the “nature of the [copyrighted] materials” to determine “whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter.”<sup>195</sup> These courts examined how the particular appropriation at issue would either hamper or further the kinds of relations and modes of intellectual production that existed within a particular creative field. For example, in a case involving the unauthorized appropriation of biographical writing on Howard Hughes, the court looked at what was “reasonable and customary” among biographers to determine the appropriation’s fairness, noting that it was common for biographers “to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works.”<sup>196</sup> Other courts relied on the nature of the work to suggest that if an appropriation actually furthered the goals of the original work’s authors, it would tend to favor fair use.<sup>197</sup>

Despite its marginalized status in fair use cases today, the “nature” of a copyrighted work played a significant role in the fair use analysis at common law. Courts looked to this factor to reveal formal differences between an original work and unauthorized copies, to discuss the necessity of freely disseminating the work to serve public purposes, and as a support for the other fair use factors. But its evolution certainly did not diminish its importance. Indeed, these cases show that inquiring into the aesthetic form of a creative work and its function and intellectual value within its creative networks remained integral to the nature inquiry.

### C. Codification of the Second Fair Use Factor

There is relatively little written about why Congress ultimately included the “nature of the copyrighted work” in the fair use provision of the 1976 Copyright Revision Act. And yet, the available House and Senate subcommittee reports suggest that Congress found this factor to be integral to the fair use doctrine at the time of the Copyright Revision Act’s passage. As I discuss below, these subcommittee reports reveal that Congress intended to maintain the fair use

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194. See *Greenbie v. Noble*, 151 F. Supp. 45, 67–68 (S.D.N.Y. 1957) (arguing that for works in the “arts and sciences,” “publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped” (quoting *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905))); see also *Cohen*, *supra* note 192, at 67 (theorizing that fair use would be more broadly available for scholarly works than for commercial publications due to difference in their natures).

195. See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

196. *Id.* at 307–09.

197. *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 99 (1973), *aff’d by an equally divided court*, 420 U.S. 376 (1975) (finding that for authors of medical articles, the dissemination of their work by unauthorized photocopying was favorable as it advanced science and knowledge).



framework as it existed at common law while considering technological issues pertinent to the era.

Codifying the fair use doctrine involved decades of complex negotiation. A major overhaul of the copyright law passed in 1909, but Congress could not garner sufficient agreement on the scope of a fair use provision to include one into statutory law.<sup>198</sup> From the 1920s to the 1940s, numerous fair use amendment bills were introduced but were never passed.<sup>199</sup> Ultimately, the Supreme Court's 4-4 split over the fairness of the National Institutes of Health's unauthorized photocopying of medical journal articles appears to have increased the urgency of codifying the fair use doctrine.<sup>200</sup>

For roughly a decade, the House and Senate subcommittees debated what factors, if any, should be included in the new fair use provision. In early versions of the 1976 Copyright Revision Act, the House of Representatives inserted a much more abbreviated fair use provision, containing one straightforward line: "the fair use of a copyrighted work is not an infringement of copyright."<sup>201</sup> But after receiving significant criticism for its bare-bones approach, Congress instead sought to codify specific factors that could provide both courts and the public a rubric for making everyday decisions about the use of copyrighted works.<sup>202</sup> Instead of developing its own fair use factors based on its contemporary policy priorities, the congressional subcommittees who drafted the provision made clear in their reports that the 1976 Act restated the judicially created principle of fair use while not changing, freezing, narrowing nor enlarging it in any way.<sup>203</sup> Thus,

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198. See STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., *supra* note 189, at 6.

199. See *id.* at 18–24. Congress failed to pass bills that would have characterized fair use as (1924) a set of specific exceptions, such as for "study, research, criticism, or review," "[p]ermanently exhibited works of art," and "[s]hort passages from published literary works . . . intended for school use"; (1931) a blanked exception for "fair use of quotations from copyright matter," (1932) fair use of quotations, if "credit [is] given to the [copyright owner]"; (1935) charitable, religious, or educational performances of works and the "incidental and not reasonably avoidable inclusion" of copyrighted works in motion pictures or broadcasts of "current events"; (1936) fair use of quotations, performances for charitable purposes, and publication of photographs "as an item of public or general interest in the dissemination of news." *Id.* at 18–20.

200. See *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975). This urgency is perhaps ironic, as both the majority and the dissent in that case actually agreed on the specific criteria for the fair use test. See *id.*; see also DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 51 (2009) ("Congress had already determined to codify the fair use doctrine when the decision in *Williams & Wilkins* was announced. But its interest was now heightened by the cries of fear and outrage from the copyright industries, who warned that fair use might play a new and dangerous role as sophisticated copying technologies came into their own.").

201. H.R. REP. NO. 89-2237, at 59 (1966).

202. See *id.*

203. *Id.* at 61 ("Section 107, as revised by the committee, is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."). The committees also recognized that the fair use factors "are necessarily subject to qualifications," as they "must be applied in combination with the circumstances pertaining to other criteria, and because new conditions arising in the future may alter the balance of equities." *Id.* Exactly what other criteria might be added to the fair use analysis was not made explicit by the committee. A nearly identical statement was made by the

Congress likely presumed that the common law fair use doctrine's focus on assessing the mode of creation of a work, its function within its creative networks, and its creative or intellectual value to those networks previously undertaken by courts would continue on under the new statute.

While asserting that the new fair use provision was merely a restatement of the common law fair use doctrine, the House and Senate subcommittees that drafted the second fair use factor also provided some limited commentary on ways it might be used. The subcommittees explained that the second factor could shed light on both (1) the character of the work being copied and (2) its availability to the public.<sup>204</sup> It is important to note, however, that these comments were made in response to very narrow debates about fair use in the classroom and were unlikely to have been intended as a limitation on what the "nature" factor could embody.<sup>205</sup>

To elucidate what they meant by the "character" of a work, the subcommittees used an example of a teacher making copies of two different kinds of work for their classroom: "[A] news article from the daily press would be judged differently [under the second factor] from a full orchestral score of a musical composition."<sup>206</sup> To explain this distinction, the subcommittees posited that "by their nature" musical compositions, dramas, and movies, are "intended for performance or public exhibition," while newspaper articles contain material that is "of current interest to supplement and update the students' textbooks."<sup>207</sup> While concrete, the distinction the subcommittees attempted to draw regarding the nature of these two kinds of works did little to clarify what method or standard, if any, courts were to use for the second factor.<sup>208</sup>

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Senate committee, along with this proviso: "It should be emphasized again that . . . there is no purpose of either freezing or changing the doctrine." S. REP. NO. 93-983, at 115 (1974).

204. H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974).

205. See H.R. REP. NO. 90-83, at 30-32 (1967); S. REP. NO. 93-983, at 117 (1975). The House and Senate subcommittee reports are virtually identical in their rationales for the second fair use factor. The focus on educational fair uses was in response to both the 1975 Supreme Court decision in *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), and several subsequent hearings featuring heated debates between educators and the educational publishing industry. See generally H.R. Rep. No. 89-2237 (1966) (describing the arguments made by educators and publishers for and against an educational copying exemption in the fair use doctrine, respectively).

206. H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974).

207. H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974).

208. For example, is the second factor supposed to assess the amount appropriated from the original work (one article in a newspaper vs. the score of an entire symphony)? See H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974). This kind of question is already captured in the third fair use factor. See 17 U.S.C. § 107(3) ("amount and substantiality of the portion used in relation to the copyrighted work as a whole."). Or is the second fair use factor supposed to focus on the functional aspects of the works (a purely aesthetic creation to be enjoyed and contemplated vs. a literal depiction of the facts of the day to inform the public)? If it is the latter, how would these differences be weighed, given that Justice Story in *Folsom* seemed to reject any distinction between "literature" or creative writing and the more factual, utilitarian writing contained in George Washington's papers? See *supra* Part II.A.1. Neither interpretation seems completely satisfying.

In addition to the orchestral score vs. newspaper article distinction, the subcommittees provided two other distinctions relevant to assessing the “nature of the copyrighted work.” One distinction looked at the extent to which a copy takes the same form as the original, mirroring the existing common law.<sup>209</sup> Another looked at whether an original work is “out of print,” as this may justify fair use in some cases, unless the author intentionally chose not to publish the work.<sup>210</sup> This distinction has since been subsumed under the fourth factor.<sup>211</sup> Neither of these distinctions shed any additional light on what should be encompassed by the second fair use factor. Thus, perhaps the primary takeaway from a contemporary reading of the legislative history of the 1976 Copyright Revision Act is that, as Robert Kasunic has pointed out, Congress left significant room in its construction and interpretation of the second fair use factor for a host of potential inquiries.<sup>212</sup>

#### D. Contemporary Interpretations

Notwithstanding the potential Congress left for a broad range of inquiries under the second fair use factor, federal courts have used its analytical power sparingly. This may owe in large part to the way it was first articulated in *Harper & Row v. Nation Enterprises*. The Supreme Court in that case recognized two basic distinctions on which the “nature” of a work might rest: (1) whether the work is published or unpublished, and (2) whether a work is creative (“fictional”) or factual.<sup>213</sup> As I explain below, these distinctions have been significantly narrowed by Congress and lower courts, effectively hollowing out the second factor.

In *Harper & Row*, the Court considered whether the news magazine *The Nation* fairly used Gerald Ford’s then unpublished memoir, *A Time to Heal*, when it reproduced portions having to do with Ford’s pardon of Richard Nixon in a “scoop” of the book.<sup>214</sup> The courts below had taken distinct approaches in applying the second factor. The Southern District of New York analyzed the nature of Ford’s memoir by looking only to its publication status, noting that the manuscript was soon-to-be-published and, therefore, was generally protected against unauthorized pre-publication uses.<sup>215</sup> On review, the Second Circuit rejected that approach and instead looked to the proportion of factual content

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209. See H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974); see also *supra* note 193 and accompanying text.

210. H.R. REP. NO. 89-2237, at 63 (1966); S. REP. NO. 93-983, at 117 (1974).

211. See *supra* Part II.A and accompanying notes.

212. See Kasunic, *supra* note 158, at 562–64. According to Kasunic courts might thus look to the characteristics of the original work, how it is used and consumed, the target markets for the work, and the intended manner of exploitation. See *id.*

213. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 594–95 (1985).

214. *Id.* at 542.

215. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983), *aff’d*, 779 F.2d 35 (2d Cir. 1985).

contained in the work.<sup>216</sup> Examining the content of Ford's memoir, the Second Circuit majority noted that because facts are not copyrightable, fact-laden historical works like memoirs are generally accorded thinner copyright protection.<sup>217</sup> Ford's memoir was thus more susceptible to fair use.<sup>218</sup>

The Supreme Court seemingly found both the District Court and Second Circuit's inquiries worthwhile under the second factor, and proceeded to provide further guidance on both.<sup>219</sup> First, the Court explained that the unpublished status of a work was "a critical element of its 'nature'"<sup>220</sup> and that an author's interests in "confidentiality and creative control" prior to publication would generally outweigh other fair use considerations.<sup>221</sup> The special treatment of unpublished works in the statutory fair use analysis was necessary because, prior to the Copyright Revision Act, unpublished works had not been protected automatically by federal copyright law.<sup>222</sup> By distinguishing unpublished works from published ones in the fair use analysis, the Court hoped to embed values previously embodied by the common law right of first publication, such as an author's pre-publication interest in deciding "whether and in what form to release his work."<sup>223</sup>

Following the Court's adoption of the published-unpublished distinction in *Harper & Row*, subsequent lower court opinions placed "special emphasis on the unpublished nature" of a work for at least a short period of time, when such work was appropriated without the copyright owner's permission.<sup>224</sup> But this approach produced a number of anomalies, such as a biographer becoming subject to a copyright infringement suit for drawing quotes from a major literary figure's papers that had been donated to publicly accessible archive.<sup>225</sup> Shortly

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216. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 208–09 (2d Cir. 1983).

217. *Id.*

218. *Id.*

219. *Harper & Row*, 471 U.S. at 563, 569 (concluding that the Second Circuit's review of the District Court's second factor analysis erred, *inter alia*, in that it "overlook[ed] the unpublished nature of the work" as the District Court below had done while adopting the logic of the Second Circuit on the facticity of the work as being an important point of analysis).

220. *Id.* at 564. This also reflects an important aspect of common-law copyright jurisprudence, the right of first publication, that was incorporated into the 1976 Act in various ways.

221. *Id.* ("A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to characterize as 'fair.'").

222. See Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 589–92 (2010) (describing the bifurcation of copyright into common-law and statutory regimes prior to the 1976 Copyright Revision Act).

223. *Harper & Row*, 471 U.S. at 552–53.

224. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) ("Following the Supreme Court's approach in *Harper & Row*, we place special emphasis on the unpublished nature of Salinger's letters . . ."); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989) (upholding the "strong presumption against fair use of unpublished work"). But, note the concurrence of Oakes, C.J., *New Era Publ'ns Intern.*, 873 F.2d at 593, arguing that both Second Circuit precedent and *Harper & Row* did not create a bright line rule against fair use of unpublished materials.

225. See *Salinger*, 811 F.2d at 93, 99–100 (noting that the biographer obtained the copyrighted letters from various libraries including that of the University of Texas, a public university, and that such use of those materials did not constitute fair use).

after the *Harper & Row* decision, Congress cast doubt on the published-unpublished distinction when it passed an amendment to the Copyright Act's fair use provision, clarifying that the unpublished status of a work "shall not itself bar a finding of fair use."<sup>226</sup> While still material to the second factor analysis, publication status would no longer be a deciding factor in fair use cases.<sup>227</sup>

The *Harper & Row* Court's second distinction, whether the copyrighted material is creative or factual in nature, has survived much longer. In assessing the nature of the Ford memoir, the Supreme Court began by observing that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."<sup>228</sup> Still, when analyzing Ford's work, the Court resisted relying on categorical characterizations like "factual" or "creative."<sup>229</sup> While it characterized the memoir as "an unpublished historical narrative or autobiography," the Court's assessment of the book's nature focused on the author's craftsmanship—the "inseparab[ility]" of Ford's expressions from the facts, his "portraits of public figures"—and the cultural power that craftsmanship conveyed to the audience.<sup>230</sup>

The Court further refined the factual-nature assessment of the second fair use factor in *Campbell v. Acuff-Rose Music*. There, the Court was asked to determine whether the hip-hop group 2 Live Crew's parody of Roy Orbison's song, *Pretty Woman*, qualified as a fair use.<sup>231</sup> The Court framed its inquiry into the "nature" of *Pretty Woman* as an assessment of how "close[] to the core" of copyright the original work might be.<sup>232</sup> Without providing guidance on its methodology, the Court strung together a list of distinctions it had drawn between different types of works in prior fair use cases: "fictional works," "soon-to-be-published memoirs," "motion pictures," and "creative works," the Court suggested, would require more compelling support from the other fair use factors than "factual works," "published speeches," "news broadcasts," and "factual compilations" for a claim of fair use by an unauthorized appropriator to be successful. In applying its framework to the case at hand, the Court held simply that *Pretty Woman* was the kind of expressive work copyright was designed to protect, but that its expressive nature was ultimately of little consequence in an instance of parody—which the Court argued generally requires appropriation from an original, expressive work to carry out its special kind of criticism and commentary.<sup>233</sup> Thus, the second factor analysis adopted by the Court in *Campbell* at most increases reliance on the other fair use factors, but does little

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226. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified as amended at 17 U.S.C. § 107).

227. See Linford, *supra* note 222.

228. *Harper & Row*, 471 U.S. at 563.

229. See *id.*

230. *Id.*

231. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–72 (1994).

232. *Id.* at 586; accord *Google LLC v. Oracle, Inc.*, 141 S. Ct. 1183, 1202 (2021).

233. See *id.* at 583, 579, 586.

to inform courts about what aspects of the “nature” of a work might foreclose unauthorized uses.

Courts have subsequently reduced considerations over the “need to disseminate factual works” in *Harper & Row* and the protection of works that are at the “core of” copyright in *Campbell* to a binary question of whether the appropriated work is “creative” or “factual.”<sup>234</sup> In contemporary practice, courts have been reluctant to permit unauthorized appropriation when a work is more “creative” than “factual.”<sup>235</sup> Still, these cases reveal the inherent subjectivity of the factual-creative distinction as courts often must either exert their own creativity to find a work is non-factual, or simply dismiss the utility of the second factor altogether.<sup>236</sup>

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234. *Harper & Row*, 471 U.S. at 563; *Campbell*, 510 U.S. at 586. *See also Oracle*, 141 S. Ct. at 1197 (describing the current fair use doctrine as affording stronger copyright protection “where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function.”). As Professor Beebe summarized it, “[a]ccording to this framework, creative works ‘of fiction or fantasy’ stand at the core of copyright protection, making a finding of their fair use less likely, while factual works stand at the periphery, making a finding of their fair use more likely.” Beebe, *supra* note 143, at 611.

235. Professor Beebe’s initial study of copyright cases confirmed that in instances where a work was determined to be more creative than factual, only 34.1% of those cases resulted in a finding of fair use. On the other hand, when the work in question was factual in nature, the court found fair use 54.0% of the time. *See* Beebe, *supra* note 143 at 611. Subsequent analysis by Professor Beebe has shown that whether a work is creative or factual has a statistically significant correlation with the outcome of the case. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTEL. PROP. & ENT. L. 1, 31 (2020).

236. *See, e.g., Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 62 (1st Cir. 2012) (holding that an English translation of ancient Greek texts “reflected creativity, imagination, and originality in their language, structure, word choice, and overall textual translation” and were thus “closer to the creative end of the copyright spectrum” and therefore less susceptible to fair use); *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (holding that a photograph of a husband and wife holding a litter of puppies, reproduced without permission by a sculptor, was “creative and imaginative” and “[closer to] fiction” than being “based on facts,” which therefore “militates against a finding of fair use”); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 309 (3d Cir. 2011) (holding that a partially nude photograph of two radio personalities used by a radio station on its website was “more creative expression than factual work,” which weighed against fair use); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 266–67 (4th Cir. 2019) (holding that a stock photograph of a street scene had relatively “thick” rather than “thin[]” rights owing to creative choices such as “lighting, camera angle, depth of field, and selection of foreground and background elements” (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1120–21 (9th Cir. 2018))); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012) (holding that an online video parodied by the TV show *South Park* was “creative and expressive” in nature and thus “within the core of copyright protection,” yet still susceptible to a fair use defense); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1270 (11th Cir. 2014) (holding that course materials copied to a university website that contained “evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author’s experiences or opinions” were more creative than factual, which typically weighs against fair use); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015) (noting that “[w]hile each of the three Plaintiffs’ books in this case is factual, we do not consider that as a boost to Google’s claim of fair use”); *W. Publ’g Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1580 (D. Minn. 1985) (holding that the pagination and organization of a law reporter, while not the kind of original work generally accorded higher protection, nonetheless did not weigh in favor of fair use).

*E. Why the Current Distinctions Fail*

It isn't yet clear why the now-forgotten second factor has failed to develop beyond the published-unpublished and factual-creative distinctions since its codification. It may be that few instances of copyright infringement have been litigated involving works that, by nature, should not be susceptible to unauthorized uses. Whatever the case, as Indigenous and other marginalized groups begin to assert their rights to cultural creativity, the current fair use test will likely be of little benefit to judges who must decide the fairness of complex cultural appropriations.

The inadequacy of the second factor has already been seen in the case of sacred religious works that have been used without permission. For example, in *Religious Technology Center v. Lerma*, the district court hearing the case struggled to identify the "nature" of the Church of Scientology's Advanced Technology documents after the Washington Post claimed in an infringement suit that its copying and proposed publication of the documents was a fair use.<sup>237</sup> The Southern District of California and the Second Circuit had reached opposite conclusions about the nature of the very same works.<sup>238</sup> Ultimately, the court looked to the Church's understanding contained in its historical records and found the "nature" of the documents to be factual, supporting the Washington Post's fair use defense.<sup>239</sup>

Other cases have turned out the opposite way. In *Worldwide Church of God v. Philadelphia Church of God*, one church had appropriated and published a racially intolerant religious book owned by another without the latter's permission (the church had attempted to use the work's copyright to keep it out of the public eye). As with *Lerma*, the District Court in *Worldwide Church* also struggled with the factual-creative distinction. The court reasoned that the book might appear "'factual' by readers who share [the author's] religious beliefs," but ultimately held that "the creativity, imagination and originality embodied in [the book] tilt the scale against fair use."<sup>240</sup> As these cases demonstrate, sacred or spiritual works are often left in appropriation limbo as judges try to figure out their proximity to copyright's "core" by attempting to compare them to genres that they believe are inherently "factual" or "creative."<sup>241</sup>

The ambivalence of the forgoing opinions raises serious doubts that the current second factor analysis could fairly weigh the specific harms appropriation causes to Indigenous creators against the public interest. For example, how would a court classify the expression of a tribe's origination story

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237. *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 264 (E.D. Va. 1995); *accord* *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1366–67 (E.D. Va. 1995).

238. *Id.*

239. *See id.*

240. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000).

241. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (holding that it will be more difficult to establish fair use for works that are closer to the "core" of copyright); *supra* Part II.C.

by a tribal elder? As more creative or more factual? And which way should such a determination weigh, particularly if Tribal protocols or community norms heavily restrict who can create such expressions and how they circulate? To better address such ambiguities in the case of sacred works, the “nature” inquiry should do much more.

In his Second Circuit opinion in *Author’s Guild*, a 2015 case deciding whether Google Books’ “snippets view” feature could be considered a fair use of millions of copyrighted books, Judge Pierre Leval cast significant doubt on the second fair use factor’s continuing relevance, holding that the factual nature of a work “should not imply that others may freely copy it.”<sup>242</sup> Then, in a 2018 opinion he went so far as to say that the second factor is only relevant when considering the first fair use factor’s “transformative use” test<sup>243</sup>—rejecting it as an independent source of analysis. The second fair use factor, at least in the Second Circuit,<sup>244</sup> has been all but written out of the Copyright Act.

And yet, the forgotten factor has received renewed prominence in the Supreme Court’s most recent exposition of the fair use doctrine. In *Google LLC v. Oracle, Inc.*, the Court was tasked with determining whether Google’s copying of a portion Oracle’s Java API code was a fair use.<sup>245</sup> The court relied on the second fair use factor to show that the copied code functioned differently than other kinds of computer code within the broader programming environment.<sup>246</sup> Because the code in question was not intended to be innovative, but instead provided programmers a well-known package of commands organized in a familiar way, the Court found it did not merit the same level of protection from unauthorized appropriation afforded to other kinds of code protected by the Copyright Act.<sup>247</sup> Thus, the Court fell back on the factual-creative distinction previously established in *Campbell* to support its holding that Google’s unauthorized use of Oracle’s code was fair.<sup>248</sup>

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While Justice Story originally framed the inquiry into the nature of a work as one analyzing the value of a work within its creative or intellectual milieu,

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242. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015).

243. *See Capitol Recs. v. ReDigi Inc.*, 910 F.3d 649, 661–62 (2d Cir. 2018) (“Except to the extent that the nature of the copyrighted work is necessarily considered alongside the character and purpose of the secondary use in deciding whether the secondary use has a transformative purpose, it rarely, by itself, furnishes any substantial reasoning for favoring or disfavoring fair use.”).

244. *See id.* At least one court since *Author’s Guild* has found the second fair use factor still open to new considerations, moving beyond the published-unpublished and creative-factual distinctions into questions about the function of a work. *See Am. Soc’y for Testing & Materials v. Public.Resource.Org.*, 896 F.3d 437, 451 (D.C. Cir. 2018) (“Courts often reduce this inquiry to the question of whether the work is factual or fictional . . . . But, of course, the factual or fictional nature of a work is just one heuristic for assessing whether the work ‘falls within the core . . . of copyright’s protective purposes.’” (quoting *Campbell*, 510 U.S. at 586)).

245. 141 S. Ct. 1183, 1190–94.

246. *Id.* at 1202.

247. *Id.*

248. *Id.*



subsequent articulations of the factor, including by Congress, have left the factor open to numerous interpretations. And yet, the Supreme Court has in recent years seemingly limited the factor to two narrow distinctions—its publication status and its level of facticity. The result is that the current fair use analysis has little space in its current form to address the unique harms cultural appropriations pose to the creativity of Indigenous and other marginalized communities.

### III.

#### REHABILITATING THE FORGOTTEN FACTOR

If the purpose of American copyright law is to incentivize production of culture as that term has evolved over time, how might we rehabilitate fair use in a way that accomplishes this goal without enabling the patterns of settler-colonial cultural appropriation identified in Part I within our copyright jurisprudence? As Part II revealed, the portion of the fair use analysis that was supposed to shed light on the impact of appropriation by looking at the particular nature of the work being appropriated has been all but written out of the Copyright Act by some courts or greatly narrowed in others. This is deeply problematic for all creators, but particularly for creators of Indigenous cultural works. In this Section, I propose a rehabilitation of the second fair use factor, reconceptualizing it in a way that gives “nature” its due meaning.

At the outset, I acknowledge that there may be other ways to reorient the fair use doctrine to combat cultural appropriations without transforming the second factor. Congress did not limit the fair use analysis to just those factors included in the Copyright Act’s section 107.<sup>249</sup> Indeed, Congress left the possibility of adding additional factors open to courts applying the fair use doctrine,<sup>250</sup> and commentators have taken this leeway to propose numerous alternative factors.<sup>251</sup> A new fair use factor that evaluates an unauthorized use of Indigenous culture in terms of its effects on the community that produced it may certainly make fair use more responsive to the interests of Indigenous groups.

But the underlying problem is not that Indigenous peoples’ (or any other group’s) cultural products are incommensurable with the underlying concept of fair use and, therefore, should be relegated to some alternative universe of

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249. Section 107 reads, in pertinent part, “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include*—,” 17 U.S.C. § 107 (emphasis added).

250. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“The factors enumerated in the section are not meant to be exclusive . . .”). In discussing its formulation of § 107 of the Copyright Act, the House of Representatives explained, “Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.” H.R. REP. NO. 94-1476, at 66 (1976).

251. Pamela Samuelson aggregated many of these proposed factors in *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2540–41 (2009), including “likelihood of market failure, the plaintiff’s rationale for insisting that the use must be licensed, chilling effects on free speech, chilling effects on innovation, the impact of network effects, whether the defendant’s use was reasonable and customary in her field of endeavor, how ‘old’ the work is, distributive values, and even the fairness of the use.”

analysis. Indigenous peoples, after all, make sculptures, hip hop albums, poetry, building blueprints, and feature films—works that fit easily within copyright’s landscape. Rather, the fundamental problem is that fair use currently fails to account for the ontological diversity of culture being produced in the United States today, instead privileging European-descended cultural forms and their creative environments. Copyright must respond and evolve as it has in the past, even if this means disrupting the settled expectations of our established creative-industrial complexes.

Thus, this Section advocates for letting the second factor do the work for which it was historically designed but which it has never fully realized. Part III.A begins by reviewing applicable commentary on the second fair use factor. Part III.B then proposes how the second fair use factor might be rehabilitated to better address the needs of Indigenous peoples. After Part III.C makes some brief notes on how this rehabilitated factor might be implemented, Part III.D concludes by applying it to the case studies discussed in Part I.

#### A. *Commentary on the Forgotten Factor*

Scholarly commentary has begun to develop alternative approaches to the second fair use factor. Some advocate for drawing on the second factor to assess the effects of an unauthorized use on creative production.<sup>252</sup> Others suggest using the second fair use factor to inquire about the fair user’s engagement with Indigenous peoples’ laws and protocols.<sup>253</sup> These approaches inform my proposal for a rehabilitated second factor in the following Section.

##### 1. *Using “Nature” to Assess Effects on Creative Production*

Roughly twenty years before Judge Leval penned the Second Circuit’s *Authors Guild* opinion, his formulation of the second factor seemed full of analytical possibilities, some of which have yet to be fully explored. At that time, the second factor had been “only superficially discussed and little understood,” and merited much deeper consideration than the bright-line rules regarding publication status and facticity courts adopted post-*Harper & Row*.<sup>254</sup> In an article extensively cited by the Supreme Court in *Campbell*,<sup>255</sup> Judge Leval argued that the primary focus of the second factor should be on “protecting the incentives of authorship” including “protect[ing] the reasonable expectations of one who engages in the kinds of creation/authorship that copyright seeks to encourage,”<sup>256</sup> while also providing space for authors to “practice the craft in the privacy of the laboratory” without running the risk of premature critique.<sup>257</sup>

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252. See, e.g., Leval, *supra* note 29, at 1116–22.

253. See discussion *infra* Part III.A.2.

254. See Leval, *supra* note 29, at 1116.

255. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–92 (1994).

256. Leval, *supra* note 29, at 1116, 1122.

257. *Id.* at 1121. The latter consideration has been curtailed in some ways by Congress, as discussed in Part II.D.1.

For Judge Leval, there were two analytical questions the second fair use factor was supposed to help answer. The first was whether the original work “is the type of material that copyright was designed to stimulate,” and the second, whether the unauthorized appropriation of a work “would interfere significantly with the original author’s entitlements.”<sup>258</sup> The type of work was key to his framework, as those works considered to be “creative endeavor[s] for the public edification” should be afforded greater protection from unauthorized uses than those that “are, at best, incidental beneficiaries.”<sup>259</sup> Thus, works “created for publication”—works “of the creative or instructive type that the copyright laws value and seek to foster”—would be more resistant to unauthorized appropriation while shopping lists and personal calendars, for example, could be made more vulnerable.<sup>260</sup> Still, Judge Leval’s framework resisted any bright-line rules: “no category of copyrighted material is either immune from use or completely without protection.”<sup>261</sup>

Though Judge Leval seems to have backed away from a categorical approach to the second fair use factor in his *Author’s Guild* opinion,<sup>262</sup> his second point of analysis—whether a use might interfere with an original author’s entitlements—may be a point of productive development for the fair use doctrine in cases of cultural appropriation. Building on Judge Leval’s approach, Robert Kasunic suggests that “[o]nce we understand the work and the reasonable and customary expectations of authors for that type of material, we can better understand how various uses might affect the incentive to create such works.”<sup>263</sup> In other words, the “nature” that the second factor is meant to reveal to the fact finder should include the economic drivers for a work—including the networks of publishers, producers, and performers, as well as the funding sources and licensing regimes that incentivized its creation—and the potential harms an unauthorized use may cause to those drivers.<sup>264</sup>

Rather than a bright-line rule, this sort of approach seems to suggest two analytical steps. First, a court would examine the creative environment for a work to understand the “reasonable and customary expectations” under which an

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258. *Id.* at 1119.

259. *Id.* at 1117.

260. *Id.* at 1117, 1119. Judge Leval’s articulation of the second fair use factor makes a remarkable shift from both Justice Story’s formulation in *Folsom*, which Judge Leval cites as the origin of the second fair use factor, *id.* at 1117 (“The statutory articulation of this factor derives from Justice Story’s mention in *Folsom* of the ‘value of the materials used.’”). As in *Folsom*, Judge Leval rejected publication status as a primary focus of the second fair use factor, *see Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); *see also supra* Part II.A.1. But he also seems to have disagreed with the *Folsom* court’s reasoning that works not originally intended for publication as “literature,” like George Washington’s personal papers, shouldn’t receive any less protection from unauthorized appropriation. *See Leval, supra* note 29, at 1116–17. *Contra Folsom*, 9 F. Cas. at 344.

261. Leval, *supra* note 29, at 1122.

262. *See supra* Part II.E.

263. Kasunic, *supra* note 158, at 540 (2008).

264. *See id.*

author created it.<sup>265</sup> Second, a court would analyze how the unauthorized use in question would impact the incentives on which participants within that creative environment rely. The second factor would weigh against fair use when actual or potential harms to the work's creative environment were found. However, where the creative environments would suffer no harm from unauthorized appropriation—perhaps the environments incentivizing doodles during long meetings, selfies, or text messages—such a fact might weigh in favor of fair use.<sup>266</sup>

## 2. Using “Nature” to Determine Alignment with Indigenous Protocols

Other commentary on the second fair use factor points to the factor's unique capacity for incorporating Indigenous customs, norms, and protocols into the fair use analysis. Recent debates in Australia over whether to adopt a fair use doctrine to replace its current doctrine of fair dealing have specifically looked at fair use's potential impact on Indigenous peoples.<sup>267</sup> In 2013, the Australian Law Reform Commission (ALRC) recommended to the Attorney General of Australia that a fair use provision—with a second factor nearly identical to that found in U.S. copyright law—be incorporated into the Australian copyright act.<sup>268</sup> Importantly, the ALRC's recommendation was tempered with an overarching proviso that stated “cultural considerations, in particular issues relating to Indigenous culture and cultural practices, need always to be considered, alongside economic rights.”<sup>269</sup> Unlike U.S. copyright law, Australian copyright

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265. *Id.*

266. Kasunic also advocates for a number of additional considerations that could be incorporated into the fair use analysis where appropriate. For example, he posits that an inquiry into whether a work is freely available or subject to protections may inform whether the author is inclined to relinquish control over the work. *Id.* at 559. While not always conclusive, an author's decision to safeguard a work or circulate it only on a limited basis may provide clues as to the potential harms to creativity that may result from an unauthorized use. *See id.* at 555 (“Other forms of classification of the nature of works may be appropriate. The size of a work might be a relevant characteristic . . . . The tangible form of [the distribution] of a work . . . . [T]here is no limit to the ways in which a work's nature may be categorized or classified into relevant inquiries.”).

267. Australian copyright law does not currently have a doctrine that is equivalent to American copyright's fair use. Instead, exceptions to copyright protection are provided under the doctrine of fair dealing. These include research or study, criticism or review, parody or satire, reporting news, and for giving professional legal advice. *See Copyright Act 1968* (Cth) § 40(1), 41, 41A, 42, 43(2), 103C(1), 103A, 103AA, 103B (Austl.).

268. AUSTRALIAN L. REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY 144 (2013). It based this proposal on a number of findings, including the ALRC's determination that fair use could apply “to new technologies and new uses” in a more efficient way than the current doctrine of fair dealing's list of “detailed prescriptive rules,” which could only be updated by the legislature. *Id.* at 87. To date, the Australian legislature has not incorporated the fair use doctrine into Australia's copyright law.

269. *Id.* at 42. The report also claimed that incorporating the fair use provision and the report's other recommendations into Australian law would be “consistent with the requirements of Indigenous artists, custodians and communities as they can incorporate, as appropriate, Indigenous cultural protocols.” *Id.*

law affords some explicit protection to Indigenous creativity, owing in part to the 1998 *Bulun Bulun* opinion from Australia's high court.<sup>270</sup>

While the proposed fair use provision has not yet been adopted in Australia, commentators Natalie Stoianoff and Evana Wright argue that the Australian fair use doctrine's second factor, if adopted as proposed, may play a key role in ensuring Indigenous peoples' rights and interests relating to copyrightable culture are respected:

Any fair use exception needs to take into account the special relationship between Aboriginal and Torres Strait Islander communities and their cultural production . . . . [T]he application of fair use provisions to use of traditional cultural expressions should be subject to the rights and interests of the relevant Aboriginal or Torres Strait Islander community.<sup>271</sup>

Given the ALRC's proviso, and Australia's recognition of the copyrightability of some Indigenous cultural expressions, Stoianoff and Wright interpret the second fair use factor as potentially requiring appropriators to consult with Indigenous communities before a use of their cultures can be considered "fair."<sup>272</sup> Consultation would allow potential fair users (and courts, *ex post*) to determine what the work is from an Indigenous point of view, and then take the necessary precautions to ensure Indigenous interests are protected.<sup>273</sup> In effect, this interpretation of the second factor would mean fair users likely would have to comply with existing protocols adopted by Indigenous communities prior to making publicly beneficial use of their cultural materials without express permission.

While scholarship dedicated to the second fair use factor is sparse, commentators recognize the factor's continued importance in assessing its potential impact on creative networks and its potential to account for Indigenous protocols governing the creation and circulation of culture.

### *B. Identifying the "Nature" of Culture*

Given these insights, how should courts shape the forgotten factor going forward, particularly in cases of cultural appropriation from Indigenous peoples? Based on the commentary just discussed, the second factor should at least reveal an unauthorized appropriation's impact on the specific drivers supporting the

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270. See *Bulun Bulun v R&T Textiles Pty Ltd* (1998) 157 ALR 193, 194 (Austl.) (recognizing a fiduciary duty on the part of Indigenous artists to their communities when they draw on collectively held cultural expressions in their artworks).

271. Natalie P. Stoianoff & Evana Wright, *Fair Use and Traditional Cultural Expressions*, in *MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONISATION WITH FLEXIBILITY* 75, 84 (Susan Corbett & Jessica C. Lai eds., 2018).

272. See *id.* at 84–85.

273. See *id.*

particular kind of cultural production at issue.<sup>274</sup> But it should also be grounded in the actual relationships involved in producing cultural creativity—relationships that may be governed by local community protocols and cultural norms. By looking at the “reasonable and customary expectations” of creators within their particular creative networks, a court may be able to assess whether an unauthorized use will disrupt motivation to create similar works.<sup>275</sup>

But developing a methodology that actually takes stock of how culture is produced and accurately assesses the effects of appropriation on creative production without incorporating cultural bias poses significant challenges. Take, for example, Kasunic’s taxonomic approach to the second factor, which suggests that courts afford greater protection to works that fit within the categories listed in section 102 of the Copyright Act than those that do not. Section 102 provides a non-exhaustive list of creative works that presumably fall within the subject-matter of copyright. However, the list contains predominantly European-descended cultural forms that Congress has periodically expanded to meet industry demands.<sup>276</sup> If we were to apply his proposed framework, unless a cultural form conforms to the characteristics of these cultural categories, the works produced might be at an elevated risk for unauthorized appropriation. In effect, creators of copyrightable Indigenous works (e.g., copyrightable songs, dances, ceremonies, or visual works) would be compelled either to create their works in such a way that they could be read by a court as being part of a European-descended creative tradition, industry, or class, or otherwise face

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274. Importantly, the impact being assessed should not be limited to settler economic structures or the priorities of global creative industries, which tend to commodify creativity into property forms for the purpose of facilitating transactions between cultural producers and consumers. See James Leach, *Creativity, Subjectivity and the Dynamic of Possessive Individualism*, in *CREATIVITY AND CULTURAL IMPROVISATION* 99 (Elizabeth Hallam & Tim Ingold eds., 2007). While Indigenous cultural economies may be structured to support commodification of creativity, as many settler cultural economies are, they may also be structured in collective-oriented and non-transactional ways to support a particular community’s governance structures or way of life. See, e.g., Robin R. R. Gray, *Ts’msyen Revolution: The Poetics and Politics of Reclaiming 186* (Sept. 2015) (Ph.D. dissertation, University of Massachusetts Amherst) (explaining that Ts’msyen participate in “both a capitalist economy and a traditional economy,” and that ceremonial feasting and giving of names, songs and other forms of traditional knowledge, while transactional and accumulative, also involves distribution in ways that reject the capitalist system); Trevor Reed, *Itaataatawi: Hopi Song, Intellectual Property, and Sonic Sovereignty in an Era of Settler-Colonialism* 143–46 (Oct. 2018) (Ph.D. dissertation, Columbia University) (on file with the Center for Ethnomusicology, Columbia University) (differentiating the Hopi creative economy for traditional songs from the capitalistic creative economy espoused by mainstream copyright theory); see also Carpenter et al., *In Defense of Property*, *supra* note 15, at 1067 (“Indigenous peoples, rather than holding property rights delineated by notions of title and ownership, often hold rights, interests, and obligations to preserve cultural property irrespective of title. That is why the language used within these approaches draws upon the themes of custody, care, and trusteeship, rather than comparably more fungible conceptions of property.”).

275. See Kasunic, *supra* note 158, at 540 (“Once we understand . . . the reasonable and customary expectations of authors for that type of material, we can better understand how various uses might affect the incentive to create such works.”).

276. See *id.* at 552 (“There is an obvious starting point to the inquiry into the nature of the work—the eight statutory categories of copyrightable authorship.”). These categories currently include things like “literary works,” “musical works,” “choreographic works,” etc.

legally sanctioned appropriations going forward. Such a result seemingly would run counter to the broadly inclusive approach to copyright enunciated by Justice Holmes more than a century ago.<sup>277</sup>

Ascertaining the “nature of the copyrighted work” for fair use purposes must be more than an exercise in taxonomy. This is because determining the nature of a thing it is not strictly an empirical question or one that can be answered by applying a single standardized metric. Relying on a taxonomy of creative works, like whether a work fits within the categories codified in section 102 or whether a work is “factual” or “creative,” can only give us information about how a work differs from others, not specific information about how a creative work is generated. Rather, framing the “nature” question as an ontological one reveals the position of a thing *in relation* to others in the world, allowing the fact-finder to examine the work in the context of the creative networks that produce it and depend on it.<sup>278</sup>

For example, a taxonomic approach might make assumptions about the nature of a work based the work’s features. It might ask questions like: does it seem like a sculpture, a painting, or a musical score based on one’s perception of it?<sup>279</sup> But taxonomies always seem to privilege certain distinctions over others. They depend on the priorities and values of those with power to produce their underlying categories and their units of analysis. At bottom, taxonomies are maps of socially salient differences or distinctions; they actualize the prevailing

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277. See *supra* Part I.C.

278. See BRUNO LATOUR, *AN INQUIRY INTO MODES OF EXISTENCE: AN ANTHROPOLOGY OF THE MODERNS* 48–49 (Catherine Porter trans., 2013). Determining the nature of a thing that does not fit into established categories requires more than a more penetrating evaluation based on existing characteristics. Rather, the critical inquiry is how to develop the categories to analyze it. This is especially true in the case of copyright where existing categories fail to encompass the whole range of potentially copyrightable works.

279. Apparently, flower gardens and singing telegrams were too far afield from copyright’s traditional cultural categories to qualify for copyright protection, while flatulent novelty plush dolls made the cut. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 290 (7th Cir. 2011) (denying copyright protection to two elliptical flowerbeds created by Chapman Kelley); *Conrad v. AM Cmty. Credit Union*, 750 F.3d 634, 634 (7th Cir. 2014) (denying copyright protection to a theatrical performance of a singing telegram by a woman dressed in a banana costume). *But see* *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 921 (7th Cir. 2007) (upholding copyright protection for a doll named Pull My Finger Fred).

epistemes in which the taxonomy is created.<sup>280</sup> Thus, they inescapably derive from a particular cultural point of view and moment in history.<sup>281</sup>

A taxonomic approach to the second fair use factor based on section 102 would be especially ill-suited to meet the needs of the increasingly diverse creative environments copyright is meant to serve.<sup>282</sup> Perhaps, at the time of the first Copyright Act in 1790, assessing the “nature” of a creative work by comparing it to European-descended cultural categories might have passed muster as a viable focal point for determining whether a work should or should not be widely appropriated.<sup>283</sup> But, as *Folsom* and its progeny make clear, the “core of copyright” cannot easily be defined without reference to the networks producing creative works and the intellectual value those networks place on them.<sup>284</sup> Defining the nature of a creative work in terms of set categories that inherently favor European-settler culture seem out of step with the trajectory of copyright law since the early twentieth century.<sup>285</sup> Indeed, Congress codified the second fair use factor in 1976, well after theories of unilinear (European-

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280. As David Hull explains, a fundamental element of any taxonomy is its theoretical commitments, basic units, and criteria for ordering those basic units into classifications. David L. Hull, *Taxonomy*, in 9 ROUTLEDGE ENCYC. OF PHIL. 272 (Edward Craig ed., 1998). The ultimate goal for scientific classifications, for example, is to support the most “powerful, accurate and inclusive” scientific theories. *Id.* But as initially limited perspectives expand through a broader range of data points, the theoretical commitments relied on and/or the measures used may become suspect; thus “the major point of contention in taxonomy is epistemological.” *Id.* See generally MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Random House, Inc. 1970) (1966) (providing a history of the development of human sciences and demonstrating how each period’s epistemology determined how scientific categories were organized).

281. While taxonomies may tend to conceptualize the “nature” of things in terms of their cultural identity, it is also important to consider how artificial the construct of “nature” is, particularly when it comes to cultural phenomena. As Professor Ana María Ochoa Gautier explains, “not all cultures and not all peoples in different historical moments of Western history consider ‘nature’ as the given and ‘culture’ as the made.” ANA MARÍA OCHOA GAUTIER, *AURALITY: LISTENING AND KNOWLEDGE IN NINETEENTH-CENTURY COLOMBIA* 21 (2014).

282. See *supra* Part I.C.

283. Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 282–86 (listing those bodies of knowledge likely understood as “Science” which the Intellectual Property Clause of the U.S. Constitution was meant to further).

284. See *supra* Part II.B.1.

285. Indeed, a growing body of anthropological literature makes clear that the concept of nature is not universal, and that what constitutes “nature” is contingent on one’s ontological position. See Eduardo Kohn, *Anthropology of Ontologies*, 44 ANN. REV. ANTHROPOLOGY 311, 319 (2015). While a unilinear notion of culture lost favor in the mid-nineteenth century, see WILLIAMS, *supra* note 78, at 89–90, its remnants remain, including in political policies that promote “multiculturalism” (in other words, policies that designate modes of existence into presumably equal “cultures”) and in the resulting politics of recognition (where Indigenous sovereigns are granted special “cultural rights” rather than accorded political sovereignty and autonomy). See generally GLEN SEAN COULTHARD, *RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION* (2014) (arguing that recognition of Indigenous cultures as minority communities within “multicultural” Canada sidesteps more fundamental questions about Indigenous sovereignty in the wake of colonization); POVINELLI, *supra* note 65 (showing how judges in Australia relied on the performance of cultural differences to determine whether aboriginal land and resource rights could be recognized within the Australian property system).



descended) cultural development had been abandoned and Indigenous cultures and worldviews had been widely recognized as worthy of state recognition.<sup>286</sup>

If the “nature of the copyrighted work” analysis is not about how comfortably the work fits into our present-day section 102 categories, how do we assess it in a way that helps us know when a work should or should not be available for unauthorized appropriation for a publicly beneficial purpose? Building on Judge Leval’s and Robert Kasunic’s proposals for assessing the creative environment for a work, I argue that the second fair use factor should examine:

- (1) the ontological nature of the work, including the creative environment from which the work is produced, and
- (2) the potential impact of unauthorized appropriation on that creative environment.

An ontological approach to assessing the nature of a thing would avoid categorical declarations to justify or reject a fair use claim, and instead examine the relations surrounding the original work in question. First, this approach would take stock of its inputs and mode of production, such as remixing existing cultural materials, adding new content to current cultural forms, or synthesizing abstract artistic motifs. Also, it would consider how the work functions within its creative networks and ask whether the work is, for example, an object to be contemplated by others, a means of communicating an idea, a mode of governmental proceeding, or an expressive tool meant to cause an effect. Finally, it would consider how the work’s creativity is valued within those networks, considering questions like whether the work is an asset within a film distribution network, a political commentary to be shared on social media, a major work for the international art market, or a ceremony meant to connect a community to the land. Once the court understands the nature of the work, it would then ask what potential loss of creativity would likely result from the unauthorized appropriation. This might include loss of creative inputs and production capability, loss of the ability to serve its intended expressive function, and loss of creative and intellectual enrichment to the environment that produces it. These are among the questions a fact finder would need to ask to really understand the scope of the creative environment and the potential effects an unauthorized use of a work would have on current and future cultural production.

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286. In the same year that the Copyright Revision Act became law, Congress also passed the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996, setting forward a policy to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise” their traditional religions through ceremonial performances and other expressive forms. While the statute was deemed to have no cause of action to constrain government uses of public lands that impede Indigenous religious practices, the policy itself has never been repudiated. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455 (1998) (“Nowhere in the [American Indian Religious Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”).

The Supreme Court's majority opinion in *Google LLC v. Oracle Inc.* seems to indicate the Court's movement toward such an approach. There the court attempted to analyze the nature of a presumably copyrightable "user interface" created for computer programmers.<sup>287</sup> Instead of merely categorizing the computer code in question as a "literary work," or even a "computer program"—two terms defined by the Copyright Act<sup>288</sup>—and granting greater protection to it against unauthorized uses, the court looked instead to the ontological nature of the work, examining what the work is from within the work's creative environment. First, the court examined the inputs and outputs that created the interface, including the different kinds of computer code that made up the interface and the kinds of programming (creative, problem-solving vs. more functional or organizational) necessary to produce each component.<sup>289</sup> Second, the Court spent considerable space describing how the user interface functions within the creative environment for computer programming. It found that the code at issue effectively acted as a system of "file cabinets, drawers, and files" for programmers, organized with labels that "would prove intuitively easy to remember."<sup>290</sup> Finally, the court examined the value of the work to the creative environment for computer programming. It noted that the value of the code in question derived not necessarily from the creative investments of the authors of the user interface, but from users of the interface who invested their time learning how to use the code's various commands and who continued to use it to create new programs.<sup>291</sup>

As the Supreme Court demonstrated, observing how a work is generated, how it functions, and how it is valued should be privileged over considerations of form. This is because a fact finder's evaluation of the form a work takes may not coincide with the work's actual nature from the perspective of the creative networks that produced it. For example, a ceremonial song might sound like "music," short samples of which might be reasonably "mashed up" or remixed with other songs to form a new musical work primed for the global entertainment economy, when in fact it functions as the conveyance of land rights or the transmission of secret knowledge. An appropriation of such a song might disrupt governance within an entire community.<sup>292</sup> Reconciling a work with the Copyright Act's historical subject matter categories may do little to tell us about

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287. *Google LLC v. Oracle*, 141 S. Ct. 1183, 1201 (2021).

288. 17 U.S.C. §§ 101, 102(a).

289. 141 S. Ct. at 1201.

290. *Id.* at 1201–02.

291. *Id.*

292. See, e.g., Elizabeth Burns Coleman, Rosemary J. Coombe & Fiona MacAraill, *A Broken Record: Subjecting 'Music' to Cultural Rights*, in *THE ETHICS OF CULTURAL APPROPRIATION* 173, 193 (James O. Young & Conrad G. Brunk, eds., 2009) (describing how in Gitxan and other Indigenous societies ceremonial songs are "considered essential to the maintenance of a group's social identity as a distinct people and to their self-determination" and "should properly be regarded as 'law,'" so non-Indigenous expressive rights "should not . . . be permitted to degrade the authority of legal records, or to extinguish a community's political future").

the actual impact appropriation has on the creative environment for a work. An ontological approach allows us to see how a work is valued within its actual network of relations—relations that establish the work’s function, mode of existence, and efficacy.

Admittedly, a framework that delves deeper into actual or potential harms to the author or their creative environments may not sit well with advocates for an expansive public domain.<sup>293</sup> As Professor Lessig and others have argued, culture is typically conceived of as a social text, a shared referent between individuals in a society that grows in meaning and value as it is freely used.<sup>294</sup> The more a cultural referent is used and reused, the more it is enriched, diversified, and increased in value.<sup>295</sup> While in theory fair use should balance the public’s interest in access to cultural referents against the incentives necessary for creators to produce and develop them, these commentators believe fair use’s fact-intensive inquiry “in practice becomes the right to hire a lawyer,” thus stifling creative progress.<sup>296</sup> Thus, these scholars advocate for a fair use test that minimizes consideration of the potential harms to authors in favor of greater public access.<sup>297</sup>

While arguments for expanding the settler public domain may dismiss or refocus the second factor by making broad assumptions about the nature of authorship, these arguments may not fully account for the loss of creativity that may result as creators and their creative networks—particularly Indigenous ones—lose confidence that their investments in creativity will be protected.

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293. Not all advocates for an expanded public domain will view the second fair use factor as a roadblock to innovation. Scholars exploring ways to make “orphan works” (works whose copyright owner cannot be readily located) more available for public use have argued that the second factor should be expanded to include discussion of an author’s continued attachments to a work. Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379, 1394 (2012).

294. See Lawrence Lessig, *Re-crafting a Public Domain*, 18 YALE J.L. & HUMANS. 56, 64 (2013) (“[A]s technologies and experience increase the depth and frequency of the connections that bind cultures together, the value to all within that culture increases as more get to use, and reuse, that culture.”); Rosenblatt, *supra* note 32, at 649–60 (advocating for stronger limitations on authorship interests and greater legitimization of transformative appropriations of works of people of color to more fully recognize the dialogic and cumulative nature of creation, facilitate semiotic disobedience, prevent hegemonic empowerment of dominant groups, and protect the public domain).

295. See Lessig, *supra* note 294, at 64.

296. *Id.* at 60–61.

297. For example, Professor Lessig advocates for a default rule where “any actor using work as commentary or criticism in a matter of public import” is granted immunity from copyright infringement, as long as the user is not acting maliciously. *Id.* at 73. Such a rule would make no accounting of potential harms to the creator and their creative networks. Professor Rosenblatt’s approach is more nuanced: as all works are at bottom dialogic, appropriators should be accorded rights in their appropriations based on the amount of creativity added to the work of others, rather than being subject to liability for infringing a supposed “original” work when a judge or jury finds their appropriation unfair or intolerable. Taking this approach would presumably incentivize greater creative progress by facilitating dialogue between actors while at the same time reducing the likelihood of aesthetic biases inflicting copyright liability on minority creators. Rosenblatt, *supra* note 32, at 657–58.

The proposed approach to the second fair use factor would provide greater analytical power than our current frameworks, particularly for works of Indigenous and other marginalized groups. If the normative thrust of fair use is to balance the public benefit of an appropriation against the potential harms to copyright's incentives to create, this inquiry would ably inform both sides of that equation. If the creative environment for a work were stifled, rendered inoperable, or destroyed due to unauthorized uses of the work, the author(s), their networks of support, and the public would ultimately suffer loss of future creativity, and the "nature of the copyrighted work" inquiry should weigh against fair use. However, if the creative environment for the work thrives or benefits from modes of appropriation (e.g., open source software, tweets), is structured so that the appropriation would have little impact on creativity (e.g., shopping lists, standard form contracts, perhaps even academic articles), or the work's production has little need for the kinds of controls against appropriation copyright offers (e.g., Facebook posts, online reviews), an unauthorized use might not impact the creative environment at all, and the "nature of the copyrighted work" inquiry might support fair use.

The second factor, of course, must be weighed together with the other fair use factors, which may very well counterbalance it in favor of a particularly beneficial use of a given work.<sup>298</sup> But this proposed analysis should provide a more useful way of inserting the "nature" of a work into the fair use calculus in a way that serves the overarching purpose of copyright law, particularly within Indigenous cultural contexts.

### C. *Evaluating Nature*

While an ontologically grounded second factor may improve the accuracy of the fair use analysis for many kinds of Indigenous works, it alone is not a panacea for resolving disputes over which cultural appropriations should be tolerated and which should result in infringement liability. There are two key reasons for this. First, evaluating the nature of a copyrighted work may admittedly be a daunting task for federal judges or juries who have no familiarity with the creative relationships or environments from which Indigenous works are generated. For example, it might be difficult or impossible for fact finders to fully understand or value an Indigenous creative work and discern what might constitute harm to its creative environment without having cultivated a perspective that is inclusive of Indigenous peoples' worldviews. Given the pervasiveness of anti-Indigenous stereotypes in American culture, having a non-Indigenous fact finder determine the fairness of an appropriation of an

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298. Some scholars have expressed concerns that such a second fair use factor might potentially limit parodies—a form of mocking discursive expression beloved in both settler and Indigenous societies. This rehabilitated second fair use factor, however, would merely balance the appropriator's parodic "purpose" with the potential impact of the use on the creative environment that produced the appropriated work, which presumably would be minimal, particularly if the appropriator has taken into account the cultural protocols of the "source" community.

Indigenous work may introduce opportunities for bias that could skew the fair use analysis.<sup>299</sup>

Second, the American copyright system currently makes no special normative considerations for dealing with the cultural creativity of Indigenous peoples. Thus, federal judges and juries are left to make their own formulas for how to appropriately balance harms to Indigenous creative environments against the expressive interests of the American public. Given the United States' legacy of disastrous attempts to unilaterally reconcile settler interests with the rights of Indigenous peoples,<sup>300</sup> deriving appropriate normative frameworks from historical federal precedent or existing federal Indian policy is unlikely to achieve a fair balance.

The solution, I argue, is for Tribal law (including statutes, common law, and customary law) and tribal adjudicative bodies (courts, administrative agencies, or cultural authorities where empowered) to provide the normative frameworks and adjudicative mechanisms for resolving questions of fair use involving Indigenous culture, rather than federal common law and federal courts. Normative questions surrounding the use of Indigenous culture may hinge on factors that are unique to individual Indigenous communities. Indeed, debates over whether a particular appropriation of Indigenous culture is fair should be resolved by the communities who produce and perpetuate that culture, not externally imposed by a foreign government.

Thus, questions about how to balance the nature of an Indigenous cultural work against the public interest should be certified to the relevant Tribal authority. Presumably, local Indigenous courts will be well equipped to balance these kinds of complex, ontologically diverse questions through established mechanisms that already apply the policies and norms of Indigenous communities to questions of property use, unfair competition, and cultural resources management.<sup>301</sup> Tribal courts or other tribal adjudicative bodies will

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299. See Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 276, 281 (2015) (summarizing social science research on racial bias in jury decision-making and pointing out the “pervasive tendency to show ingroup favoritism by making more lenient judgements of ingroup defendants” in criminal trials and that in tort cases “beliefs about what constitutes an injury, who is responsible for causing it, and whether and how it should be remedied can vary across cultures”). Additionally, as a growing body of literature has made clear, our conceptualizations of expressive forms we perceive through our senses is deeply shaped by our cultural identity. See generally Thomas Porcello, Louise Meintjes, Ana Maria Ochoa & David W. Samuels, *The Reorganization of the Sensory World*, 39 ANN. REV. ANTHROPOLOGY 51, 52 (2010) (providing a bibliography of recent work showing how sensory perception is culturally constructed); Gustavus Stadler, *On Whiteness and Sound Studies*, SOUNDING OUT! (July 6, 2015), <https://soundstudiesblog.com/author/gstadler/> [<https://perma.cc/9XCQ-ZA3R>] (arguing that judgements about the true nature of a sound made without taking into account differences in identity is no better than believing that a “white middle-class” person can “really hear” what a police siren sounds like “while a [B]lack person’s perception of the sound is inaccurate because burdened (read: biased) by the weight of history and politics”).

300. See *supra* Part I.A.

301. But see Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1039 (2020) (arguing that, given their lack of funding and federal oversight, local courts may not be in any better position than federal courts to carry out the work of normative decision-making). Indeed, tribal

be able to determine whether a work is of such a nature that it should be available for a particular unauthorized appropriation or subject to the same norms as other copyrightable works, as well as whether a cultural protocol or culturally specific standard of use should be applied.

Even if determinations of fair use are left to federal judges, courts can take steps to mitigate potential bias. In applying the second fair use factor analysis, courts should focus on evidence of a work's actual ontology and harm to the work's creative environment rather than basing their decisions on the fact finder's subjective inferences about the work's predisposition to being appropriated.<sup>302</sup> To do this, stakeholders in a given work could be called on to testify as to the mode of creation and value of a work within its creative environment and the effect unauthorized appropriation has or would have on future creative output. Where the original creators are no longer participating in that creative environment, those who carry such creativity forward can be called on to testify. Evaluating some creative contexts will be more complex, including those where a variety of actors are implicated in a work's creation (such as an environment like powwow, where culture is shared across communities) or where a creative environment is ontologically challenging for the fact finder (such as in the realm of Indigenous ceremonial creativity). In these situations, a tribal leader or other community member knowledgeable about the cultural context or a social scientist with both knowledge and binding relationships to the community might be among those to provide expert testimony regarding the effects of unauthorized appropriation on the particular creative environment. Ultimately, courts should give deference to the views of Indigenous communities when assessing and weighing the "nature" of their copyrightable works against the other fair use factors.

#### *D. Application to Case Studies*

To understand how the proposed second fair use factor might work in concrete instances of cultural appropriation involving copyrighted Indigenous works, this subpart briefly applies the fair use test to each of the cultural

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courts may not be any more representative of a given cultural community than state or federal courts might be, as Tribes themselves are rarely culturally homogenous and are sometimes made up of historically distinct political groups. However, as adjudicative bodies of sovereign Tribal governments, Tribal courts may be empowered by Tribal governments to consider and give proper weight to evidence regarding Indigenous ontologies and worldviews.

302. See *supra* Part II.B; see also 17 U.S.C. § 102(a) (listing the Copyright Act's nonexclusive categories of copyrightable works). As discussed in Part II.B., historically, courts relied on a work's formal attributes to infer its purpose and social value based on a common-sense taxonomy of creative works. Judges then relied on that inferred purpose and social value to determine a work's predisposition for unauthorized appropriation. More recent iterations of the second fair use factor test have instead looked to facticity as a proxy for a work's purpose and social value. But while the quantity of facts in a work may have been intended as a quantitative measure, it has quickly reverted back to a more formal analysis, where works that fit into certain formal categories are deemed more factual or creative and therefore appropriable or not by others.

appropriation case studies I articulated in Part I. These include educational appropriations of powwow culture, reproduction and distribution of ceremonial songs in violation of Indigenous protocols, and reclamation of the voices of one's ancestors presently owned by others.

*1. The Nature of Powwow Creativity*

As described in Part I, some Boy Scout Venture Crews have taken up powwow regalia construction and dance performance as part of their educational activities, copying potentially copyrightable designs from artwork they find on the internet as well as sculptural ornaments or expressive beadwork on others' regalia.<sup>303</sup> Assuming the copying by the Venture Crew members is unauthorized, and the extent of the copying is actionable, the Crew members would be liable for copyright infringement, barring a defense of fair use or some other exception.

Under the standard fair use analysis, the first and fourth factors would most likely favor the Venture Crew members, with the third depending on the facts on the ground. The first fair use factor asks why the unauthorized use is occurring, with a preference for those uses that are transformative in a way that advances the goals of copyright or that serve educational purposes.<sup>304</sup> While probably not transformative in a way that alters the meaning of the original design, the purpose behind the Venture Crew's copying and use of others' artwork and powwow regalia elements is for the intellectual and social development of youth. Such a purpose would likely be characterized as non-commercial and educational, which would typically weigh in favor of fair use.<sup>305</sup> The fourth fair use factor, which looks at how an unauthorized use will affect the market for the work, would likely also weigh in favor of fair use. This is because Boy Scout appropriations are unlikely to have much of an impact on the market for powwow regalia—who, after all, would buy powwow regalia from a non-Indigenous Boy Scout? The third factor, the amount and substance copied, would likely vary depending on how much of the original was copyrightable and how much of that copyrightable material was copied. But given the weight typically accorded to the first and fourth factors, unless there is something about the nature of the original works that strongly weighs against fair use, the Crew's unauthorized uses of these Indigenous works might be considered fair.

As explained above, the second fair use factor's assessment of the nature of the copyrighted work should take stock of (1) its ontological nature and creative environment (such as its inputs and mode of production, the function of the work within its creative networks, and the way the work is valued by those networks) and (2) the potential impact of unauthorized appropriation on that creative environment.

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303. See *supra* Part I.D.1.

304. See *supra* Part II.A.

305. For a discussion of the fair use factors and their current interpretation, see *supra* Part III.A.

Examining the ontological nature of powwow creativity reveals that it is a living and varied cultural form practiced in distinct ways by Indigenous communities and individuals across North America. It is also an appropriation-based creative form by nature. Powwow culture is said to have originated among the Omaha people in the present-day upper Midwestern United States, but quickly developed as it spread to other regions as individuals learned the form and contributed new content to its musical, choreographic, design, and literary styles.<sup>306</sup> During times when the United States prohibited certain forms of Indigenous dance,<sup>307</sup> powwow creatives often took professional positions with Wild West shows to participate in, perpetuate, and develop the form.<sup>308</sup> And, when Indigenous youth across North America were removed from their homes by the federal government to attend mandatory boarding and trade schools, students would come together to share and dance powwow as a means of developing common ground and unity.<sup>309</sup> The same is true today in the urban Indigenous environments within which I have conducted research, where powwows become the only “Native-sanctified spaces” around.<sup>310</sup> Thus, while powwow may have originated as a purely ceremonial form, it is articulated and valued as a mode of collective resilience and community-building throughout North America, sometimes retaining its ceremonial function while in other contexts becoming a mode of artistic expression or a demonstration of cultural virtuosity.

While powwow is an inclusive creative environment, appropriations of powwow culture that violate local protocols regulating relationships among participants impair incentives to create. Powwow culture circulates within an economy grounded in respect, attribution, reciprocity, and, in some cases, capital

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306. Robin Ridington, Dennis Hastings, and Tommy Attachie argue that powwow as a genre can be traced back to the Omaha Dance form, which was subsequently widely appropriated by other tribes. See Robin Ridington, Dennis Hastings & Tommy Attachie, *The Songs of Our Elders: Performance and Cultural Survival in Omaha and Dane-zaa Traditions*, in POWWOW 110, 110–16 (Clyde Ellis, Luke Eric Lassiter & Gary H. Dunham eds., 2005). Tara Browner argues that powwow is also partially the result of settler appropriations of Indigenous rituals by small-town New England folk medicine practitioners (those practicing “powwowing”), who advertised their services using parade like spectacles that included “Indian [] shows.” Indigenous powwow appropriated the term and likely some of the celebratory nature of those early spectacles. TARA BROWNER, HEARTBEAT OF THE PEOPLE: MUSIC AND DANCE OF THE NORTHERN POWWOW 27–28 (2002); see also Chris Goertzen, *Powwows and Identity on the Piedmont and Coastal Plains of North Carolina*, 45 ETHNOMUSICOLOGY 58, 70 (2001) (explaining that powwows in North Carolina draw on dance forms and regalia styles originating in the Great Plains.). Similarly, in the New York powwow scene, people draw from a variety of Indigenous cultures and traditions to create their powwow identity. See Reed, *supra* note 109.

307. Letter from Charles H. Burke, Comm’r, Dep’t of the Interior Off. of Indian Affs. to Superintendents, *supra* note 56.

308. Clyde Ellis, “*The Sound of the Drum Will Revive Them and Make Them Happy*,” in POWWOW, *supra* note 306, at 3, 14.

309. Reed, *supra* note 109, at 10.

310. BROWNER, *supra* note 306, at 98; see also CHRISTOPHER A. SCALES, RECORDING CULTURE: POWWOW MUSIC AND THE ABORIGINAL RECORDING INDUSTRY ON THE NORTHERN PLAINS 27 (2012).



accumulation. Given its tradition of open sharing, there is—as far as I am aware—no absolute bar to non-Indigenous Boy Scouts drawing from the forms and styles of powwow to participate in powwow events. One need not be Indigenous to sing, dance, create regalia, or buy goods at a powwow, though preference is sometimes given for Indigenous people to sing or dance in certain powwows to the exclusion of non-Indigenous powwow goers.<sup>311</sup> That said, powwow creators do generally rely on expectations that those who use or borrow the specific instances of powwow culture they or their community create (songs, beadwork, etc.) will follow established protocols that govern the use of that culture.<sup>312</sup> These protocols create an economy that demands payment in the form of attribution, honor, and respect, and may sometimes require financial compensation for those who expend significant effort to create meaningful or powerful new works. Competition powwows, for example, provide an important income stream for participants, motivating them to produce some of their most creative and innovative expressive culture while at the same time rewarding those who follow protocols of decorum and adherence to established values and aesthetic principles.<sup>313</sup> Thus, when local protocols of respect are broken, or powwow creativity is used without providing the appropriate compensation, the social and economic incentives to create new work are diminished.

Uncompensated appropriation of powwow culture, which could result from a violation of cultural protocols or the failure to pay the appropriate price for use, thus negatively affects the networks that create powwow culture and the Indigenous communities that foster these creative environments. If the Boy Scouts disregarded existing protocols and negatively impact the ability of other powwow goers to participate and create within this environment, this would clearly weigh against fair use. If the negative impact were significant enough, it might be sufficient to outweigh the other factors. In sum, whether established protocol has been followed with respect to the use of an existing cultural work should be at the heart of the second factor analysis for these sorts of “educational” appropriations of Indigenous culture.

## 2. *The Nature of Recorded Ceremonial Songs*

Laura Boulton and other early field workers gathered thousands of copyrightable works from Indigenous peoples around the world. As discussed in

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311. Certain powwows are limited only to Indigenous participants. The reasons for this are likely too varied to generalize but may include a desire to encourage local participation or to keep Indigenous participants from being under the burden of performing for the settler gaze.

312. See Lisa Alred, *Dancing with Indians and Wolves: New Agers Tripping Through Powwows*, in POWWOW, *supra* note 306, at 258, 262–63 (arguing that non-indigenous individuals can “learn,” “observe/participate,” and “absorb [powwow performance] without usurping” it by “be[ing] made aware of their roles, and possible limitations,” showing “honor, true respect, and understanding of [a] particular tribe’s belief” and following established “cultural protocols”).

313. See generally SCALES, *supra* note 310 (describing the creative economy for competition powwow, which focuses not only on economics, but also reputation with following established protocol).

Part I, copyright protected some of these recordings and, in some cases, the literary, musical, or dramatic works they contained.<sup>314</sup> But given the power imbalances present in these early recording encounters, many recordists, including Boulton, considered it unnecessary to secure written, oral, or even implied licenses from their Indigenous collaborators to use their recordings and other works.<sup>315</sup> Without securing the appropriate rights to use these recordings, the question now is whether unauthorized uses of these recordings can be justified under the doctrine of fair use.

Without a rehabilitated second factor, Laura Boulton's unauthorized commercial release of thousands of Indigenous ceremonial song recordings through her labels, Victor and Folkways, may perhaps be justified under the doctrine of fair use. Looking at the first fair use factor, it is clear that the purpose and character of Boulton's use of the recordings was primarily educational, which would generally favor fair use. Additionally, in terms of the fourth factor, the effect of Boulton's release on the market for the recordings was probably quite small. It is very unlikely that Boulton's release of the recordings has usurped or would in the future usurp the market for the recordings. In fact, but for Boulton's sale and distribution of them, the public may never have had access to these recorded ceremonial performances.<sup>316</sup> On the other hand, Boulton did use entire recordings rather than only small samples, which would typically weigh against fair use. But, given the significant weight the first and the fourth factors typically have on the fair use analysis, it is reasonable that they might be sufficient to tip the scale in favor of fair use.

Taking into account the second fair use factor, including an assessment of the ontological nature of the work and its impact on the creative environment, one sees the extent of the impact unauthorized uses might have on the creative networks that generate the ceremonial performances Boulton and others recorded. Ceremonial song recordings like the ones Boulton copied and distributed are often ontologically distinct from other kinds of sound recordings, like music albums, film soundtracks, audio books, or oral history interviews. The networks that produce these kinds of recorded performances often extend far beyond typical industry players, such as a composer or songwriter, a performer, a sound engineer, and perhaps a record label, music publisher, or distributor. As I learned during fieldwork among Hopi ceremonial performers, producing the kinds of songs Boulton recorded required spending months vocalizing in the corn fields below the Hopi villages over a growing season, laboring to perfect the aesthetic of each song they sang. They then engaged in months of collaborative editing with cultural experts, collectively memorizing and rehearsing the songs.

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314. *See supra* Part I.D.2.

315. *See supra* Part I.D.2.

316. During my fieldwork with several of the Indigenous communities Boulton recorded over her career (2013–2018), I have only encountered one individual that had any recollection of recordings being made with non-tribal-members in the years surrounding her visit.

In some cases, performers must obtain specific authorization from political or cultural leaders before the songs can be performed in public.

These performers take these steps because, unlike a typical music performance, the function of ceremonial song performances is not merely to entertain: they are not representations of abstract musical works. Rather, these are voices of Hopi communities doing performative and generative acts which have direct effects on Hopi society and the environment, even in recorded form.<sup>317</sup> Hopi ceremonial performances are authoritative within their territory; they are the material of Hopi sovereignty.<sup>318</sup> Each step in the process of creation and performance triggers established expectations of reciprocal payment, adherence to ceremonial protocols and authorities, and other community obligations.

If appropriation of ceremonial sound recordings outside of established protocols were permitted, the economy for the creation of these kinds of ritual performances would be severely disrupted. Each actor in the creative network for a ceremonial song depends on the others for a successful ritual performance. Removing the incentives to create ceremonial performances or allowing ceremonial creativity to be used in violation of local protocols or without proper authority, harms the integrity of the entire creative network and diminishes Tribal sovereignty.<sup>319</sup> Even now, while sound recording has become a useful tool for Hopi Tribal members to develop and preserve their cultural creativity, Hopi villages have been forced to severely restrict documentation of ceremonies out of concerns about unauthorized appropriations. One can only imagine the harms experienced by creators when they invest in a lengthy, collaborative effort to create, perform, and document a new ceremonial performance, meticulously following community protocol, only to have that recording suddenly turn up on iTunes for sale without permission and out of its appropriate cultural context.

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317. See Reed, *supra* note 274, at 158–59 (discussing how recorded ceremonial songs continue to perform their community-building and encouraging functions, bringing people, clouds, crops, and other entities in the environment into productive relation).

318. An argument might be made that expressions contained in authoritative ceremonial songs are, in effect, government edicts. See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020) (“Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the ‘authors’ of the works they produce in the course of their official duties as judges and legislators.”). But such a view, that “no one can own the law” and therefore “‘*whatever work* [officials] perform in their capacity’ as lawmakers” must be “free for publication to all,” *id.* at 1507, is derived from settler political thought, and not necessarily shared by Indigenous communities where neither knowledge nor culture are necessarily “free.” See Justin B. Richland, *Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty*, 36 LAW & SOC. INQUIRY 201, 213–14, 223 (2011) (noting that “in actual practice, navoti [knowledge owned by clans] does not pass equally to all members of the same clan” but is often vested in clan leadership; indeed, “navoti is not some inert body of information, but is actually constitutive of Hopi power”). Whether potentially politically disruptive copyright doctrines such as this extend onto Tribal lands is an issue germane to federal Indian law that I take up elsewhere. See Trevor G. Reed, *supra* note 38.

319. Similar connections between song production, distribution, and sovereignty have been noted among Indigenous groups in Northwestern Canada. See Rosemary J. Coombe et al., *supra* note 292, at 192–93.

Thus, in applying the rehabilitated second fair use factor to Boulton's appropriations of Hopi ceremonial culture, the nature of the song recordings and the harms that would be occasioned by their unauthorized public sale should weigh heavily against fair use, perhaps overcoming the other fair use factors.

### 3. *The Nature of Reclaimed Ancestral Voices*

Standing in stark contrast to Laura Boulton's appropriations of ceremonial songs, Indigenous artists have begun to generate new work from museum and archival collections which they do not own.<sup>320</sup> Thus, not only are Indigenous peoples concerned about the appropriation of their work by non-Indigenous creators; they also employ appropriation in their creative process to help reverse the dispossession of cultural creativity occasioned by colonization and to promote the progress of Indigenous cultural production on their own terms. But an artist's unauthorized use of a copyrighted work owned by a museum or archive would be considered an infringement unless justified under an exception like fair use.<sup>321</sup>

A full fair use analysis of Jeremy Dutcher's use of William Mechling's anthropological recordings would be somewhat specious, given that Dutcher's use of the recordings occurred in a jurisdiction that does not rely on the Copyright Act's fair use factors. But evaluating the Mechling recordings under the rehabilitated second fair use factor may provide a useful example of how the analysis might function in the context of cultural re-appropriation. Dutcher sampled, reworked, and then integrated into his own creative material musical works and sound recordings that his Wolastoq community generated, but whose copyrights it no longer owns. For example, Dutcher's song *Lintuwakon 'ciw Mehcimut*, samples material from a Maliseet death chant performance recorded with the assistance of anthropologist William Mechling. In some Indigenous communities, a death chant like this would be restricted to only certain creative networks as determined by local law and protocol.<sup>322</sup> But, as Dutcher learned through long-term consultations with his community, while the songs are highly valued in the Wolastoq community,<sup>323</sup> colonialism has dispossessed his people of their knowledge of the songs' meanings and any historical protocols governing their use.<sup>324</sup> By re-appropriating and reanimating them in a ballad-like style that speaks powerfully to Indigenous and non-Indigenous audiences, he is,

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320. See *supra* Part I.D.3.

321. See *supra* note 138 and accompanying text.

322. In an interview in ROBINSON, *supra* note 134, at 173–74, Dutcher describes how he received considerable pushback from Indigenous individuals from other First Nations who found it offensive that he would remix a death chant.

323. As Dutcher explains, “We are at such a stage in Maliseet territory that people are really hungry for [the songs] and are happy to hear in whatever form it comes.” *Id.* at 175.

324. See Johnson, *supra* note 134 (describing how Dutcher's mother has seen the Wolastoq language “become nearly extinct over the course of her life”); see also ROBINSON, *supra* note 134, at 174 (noting that for East Coast First Nations in Canada, “we've lost so much” and that “we're at the point now where we're hanging on to whatever we can” in terms of protocol.)

from the perspective of song-keepers in his community, serving the urgent goal of re-connecting generations of Wolastoq community members to their culture in new ways and laying the foundation for the community's resumed cultural growth and development.<sup>325</sup>

It seems likely, then, that Dutcher's appropriation of Wolastoq culture will have positive effects on his Indigenous community's creative environment from whence the original songs came, thus weighing in favor of fair use. Indeed, the reasonable expectations of those Indigenous peoples who authored the songs he sings and the recordings they made in those early anthropological encounters may very well have been fulfilled through Dutcher's re-appropriations. The recordings took place in an era when ceremonial practice was prohibited or actively discouraged by colonizing governments. Thus, those who recorded for anthropologists like Mechling might have anticipated that their work would one day be used by future generations to perpetuate their Indigenous cultures again. If copyright claims were to be brought by the collectors or institutions who now claim ownership over these materials to stifle that creativity, the foreclosure of a valid fair use exception would likely discourage and preclude the production of many emerging forms of Indigenous creativity going forward.

Thus, a *per se* rule excluding all appropriations of Indigenous culture from fair use will not always be beneficial to Indigenous peoples. A rehabilitated fair use factor that accounts for the ontological nature of a work and the impact of appropriation on the creative environment will provide a much fuller picture of the potential harms occasioned by an unauthorized use.

#### CONCLUSION

Cultural appropriations may be an ordinary and ubiquitous part of human life, but they also hold significant power. For Indigenous peoples—whose colonization included simultaneous dispossession of land and resources alongside the widespread exploitation of their bodies, identities, and creativity—cultural appropriation can compound experiences of settler-colonial violence while further eroding sovereignty and political autonomy. Fortunately for Indigenous groups, copyright law provides some limited protection against unauthorized appropriations of some forms of culture. But copyright protection is not absolute, owing in large part to doctrines like fair use. Fair use serves as a critical gatekeeping mechanism for cultural appropriations. Still, the doctrine's interpretation over the last forty years may prevent judges from considering some of the most salient reasons for protecting Indigenous culture from unauthorized appropriations.

Can we imagine a decolonized fair use doctrine, one that serves not only settler-cultural traditions and their creative-industrial complexes, but cultural

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325. See Johnson, *supra* note 134 (“When you bring the songs back, you will bring the dances back, you are going to bring the people back, you are going to bring everything back.”).

production in all its varieties and natures? While new legislation that recognizes and protects the unique interests of Indigenous cultural producers is urgently needed, this Article argued that copyright law can be made more fair by reorienting judicial interpretations of the fair use factor test to better account for the impact of cultural appropriations on the creative environments that generate today's diverse cultural forms. While each factor could be adjusted to better understand the unique harms cultural appropriations impose on colonized peoples, the second prong of the fair use analysis—the “nature of the copyrighted work”—is already poised to take on much of this analytical work. A decolonized second fair use factor would assess a work's function and value within its particular creative environment and the impact cultural appropriation might have on that environment going forward.

It is unclear why the second fair use factor has not been doing this important work all along. What is certain, however, is that as Indigenous and other marginalized racial, ethnic, and religious groups begin to contemplate copyright infringement claims against cultural appropriators, fair use undoubtedly will play a key role as they assess their claims' likelihood of success. The ability of courts to thoroughly analyze the natures of appropriated works in a methodologically sound way will be critical to accomplishing the constitutional goal of copyright law—to promote cultural production in all its varieties. Otherwise, fair use may remain yet another open door for further harmful cultural appropriations.