

## NOTES

### INDIGENOUS ARTS AND CRAFTS AND COPYRIGHT LAW: A COMPARATIVE ANALYSIS OF THE UNITED STATES AND AUSTRALIAN LEGAL FRAMEWORKS

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#### INTRODUCTION

In 2019, the Federal Court of Australia delivered a landmark decision to impose a \$2.3 million penalty on Birubi Art (“*Birubi*”) for selling and profiting from fake Indigenous Australian art.<sup>1</sup> While the judgment was one of the first positive steps of the Australian legal system taking a stance for their Aboriginal community, the ruling did “not make it illegal to sell fake Aboriginal Art as long as misleading representations are not made about the authenticity of the products.”<sup>2</sup> This means Birubi Art could have sold the same products with the same art design derived from the Aboriginal community if it accurately labeled the products as being made in Indonesia.<sup>3</sup> In 2018 in Albuquerque, New Mexico, the first prison sentence was administered for counterfeit Native American jewelry.<sup>4</sup> While the sentence was six months imprisonment and a little more than \$9,000 fine for an international supply chain of Native American jewelry,

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1. Isabella Higgins, *Federal Court imposes \$2.3 million penalty on Birubi Art for selling fake Aboriginal art*, ABC NEWS (June 25, 2019), [https://www.abc.net.au/news/2019-06-26/federal-court-imposes-\\$2.3-million-penalty-on-birubi-art/11247904](https://www.abc.net.au/news/2019-06-26/federal-court-imposes-$2.3-million-penalty-on-birubi-art/11247904) [<https://perma.cc/7M9T-RG8A>].

2. *Federal Court rules against Birubi but Aboriginal artists need further protections*, COPYRIGHT AGENCY (June 26, 2019), <https://www.copyright.com.au/2019/06/federal-court-rules-against-birubi/> [<https://perma.cc/88WK-KA92>].

3. *Id.*

4. Alexandra Mondalek, *Fake turquoise jewelry is hurting Native Americans economically*, VOX (Oct. 24, 2018, 12:36 PM EDT) <https://www.vox.com/the-goods/2018/10/24/17995876/fake-turquoise-native-american-santa-fakes> [<https://perma.cc/GS9W-BVMC>].

it made a statement.<sup>5</sup> These two modern cases represent the continuously increasing issue of the exploitation of inauthentic Indigenous art.

According to the United Nations, every person is entitled to the right to life and liberty, and freedom of opinion and expression.<sup>6</sup> These core human rights, among many others, were established to recognize that all individuals and groups, regardless of background, should be accorded with at least these fundamental liberties.<sup>7</sup> Despite geographical differences, Indigenous culture globally is steeped in displaying their societal values and customs through various forms of artistic expression.<sup>8</sup> Indigenous art is sacred and personal, often used to honor family and tribal ancestry, and as means of religious and cultural expression.<sup>9</sup> Therefore, it can be seen as a violation of Indigenous human rights when their method of expression is replicated or distorted by others outside of their community. Not only are these art forms being appropriated, but these fake businesses greatly hurt Indigenous artists economically.<sup>10</sup> The United States recognized the issue and attempted to reconcile the harm through the establishment of the Indian Arts and Crafts Act of 1990.<sup>11</sup> Australia, however, has not caught up with its legal protection. Both countries can instill more protection towards their large indigenous communities by utilizing a legal field that is meant to protect original expression: copyright law.

At its core, copyright law is about the protection of original creative works.<sup>12</sup> However, once the copyright is sold or assigned to another party, that party is free to resell the work.<sup>13</sup> This is a current pressing issue in Australia with Aboriginal communities assigning their art away through unfair licensing agreements.<sup>14</sup> Further, the copyright laws in Australia do not fulfill the purpose of copyright law in protecting creative work because there is no law that says a person cannot produce fake art or misappropriate Aboriginal culture.<sup>15</sup> As for the United States, there is the Indian Arts and Crafts Act of 1990 intended to protect the Native American community from misrepresentation of Indigenous art. While beneficial, the act lacks enforcement and does not cover cultural

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5. *Id.*

6. *Human Rights*, UNITED NATIONS, <https://www.un.org/en/global-issues/human-rights> [https://perma.cc/LC6E-3TFY] (last visited May 11, 2024).

7. *Id.*

8. *How Does Art Function in Native American Culture?*, FAUST GALLERY (Aug. 19, 2019), <https://faustgallery.com/how-does-art-function-in-native-american-culture/> [https://perma.cc/2LRS-ZHH6].

9. *Id.*

10. Mondalek, *supra* note 4.

11. *The Indian Arts and Crafts Act of 1990*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/iacb/act> [https://perma.cc/ZR6F-8PNL].

12. *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> [https://perma.cc/UC9H-4T3V] (last visited May 11, 2024).

13. Olivia J. Greer, *Using Intellectual Property Laws to Protect Indigenous Cultural Property*, 22 N.Y. STATE BAR ASS'N BRIGHT IDEAS, no. 3, 2013, at 30.

14. Copyright Agency, *supra* note 2.

15. *Id.*

appropriation in literary works, films, audio recordings, and industrial products, to name a few.<sup>16</sup> This note will analyze the benefit of copyright in protecting indigenous community art through a comparison of the Australian Aboriginal community and the United States Native American community and propose recommendations to the legal system when the copyright laws fall short.

Part I of this note describes intellectual property and how it is currently used in protecting Indigenous culture. Part II expands deeper into the history of Indigenous communities in the United States and Australia. It details Australian Aboriginal culture and United States Native American culture and exposes the modern-day problem with misappropriation of Indigenous arts and crafts. Part III individually examines both countries' copyright laws as well as other laws that are being used to bring legal justice to these communities. Further, it analyzes the differences and similarities between the United States and Australia's copyright systems supported by relevant case law to illustrate and examine these differences. It will highlight the alternative legal mechanisms currently being used for these cases. Finally, part IV includes recommendations for copyright laws in light of the noted shortcomings.

## I. INTELLECTUAL PROPERTY

### A. *Generally*

Intellectual property is the umbrella term in law that aims to protect the original creator of creative works varying from artistic to literary works to inventions.<sup>17</sup> Intellectual property's purpose is to safeguard the creative product and allow the author to not only reap economic benefits, but gain exclusive rights over their creation.<sup>18</sup> It is divided into three segments of law that correlate to different methods of protection and purpose: patent, trademark, and copyright.<sup>19</sup> Even with their individual uses, patent, trademark, and copyright share that they are dependent on domestic laws. Thus, because intellectual property relies on domestic laws, international protection varies.

In the global market, trademark and patent law operate on how and where the product or mark is registered.<sup>20</sup> Copyright, however, is distinctive in its protection. Although there is no international copyright law, it is possible to

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16. *Should I Report a Potential Violation?*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/iacb/should-i-report-potential-violation> [<https://perma.cc/9CVA-QEK8>] (last visited May 18, 2024).

17. *What is Intellectual Property?*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/about-ip/en/> [<https://perma.cc/FPQ2-SKW7>] (last visited May 13, 2024).

18. Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual property rights: An overview and implications in pharmaceutical industry*, 2 J. OF ADVANCED PHARM. TECH. & RSCH., no. 2, 2011, at 88.

19. World Intell. Prop. Org., *supra* note 17.

20. Emily Heaslip, *How to Protect Your Intellectual Property Internationally*, U.S. CHAMBER OF COM. (March 18, 2020), <https://www.uschamber.com/co/start/strategy/protect-intellectual-property-internationally> [<https://perma.cc/75M2-W65A>].

enforce the copyright in another country if the country has signed on to any of the international intellectual property treaties or conventions.<sup>21</sup> Most countries are in agreement with these treaties or conventions making it easier for an author to feel at ease with their product being protected. While these treaties afford basic protections, there are holes for works, especially those with cultural significance.<sup>22</sup>

### *B. Indigenous Cultural and Intellectual Property*

In the Marvel Studios film *Black Panther*, the lead character, T'Challa, wore a Ghanaian kente stole.<sup>23</sup> In Ghana, the kente cloth is traditional cultural wear and protected as folklore under Ghanaian intellectual property law.<sup>24</sup> However, due to the territorial nature of intellectual property, that protection only applies in Ghana.<sup>25</sup> The international intellectual property agreements or conventions do not require American films “to recognize and protect folklore or cultural [intellectual property].”<sup>26</sup> Cultural intellectual property is referred to as “intangible cultural goods that could be protected” under modern intellectual property law like copyright or trademark.<sup>27</sup> Indigenous communities are steeped in heritage and tradition, displaying their customs through tangible and intangible forms.<sup>28</sup> For example, these customs encompass traditional, intangible cultural expressions such as stories, designs, and symbols to cultural—more tangible—objects such as arts, crafts, and jewelry.<sup>29</sup> Indigenous communities have been regarded as having such cultural distinctiveness because of their generational traditions and spiritual significance.<sup>30</sup>

The World Intellectual Property Organization (WIPO) defines traditional knowledge as “skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”<sup>31</sup> This cultural identity is comprised of the broad understanding of traditional knowledge. Traditional knowledge is rooted in the experience of ongoing generations, and it is made up of the community’s “land,

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21. *Id.*

22. J. Janewa Osei-Tutu, Harmonizing Cultural IP Across Borders: Fashionable Bags & Ghanaian Adinkra Symbols, 51 AKRON L. REV. 1197, 1198 (2017).

23. J. Janewa Osei-Tutu, *Cultural IP vs. Commercial IP*, A.B.A. (Apr. 01, 2020), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2019-20/march-april/cultural-ip-vs-commercial-ip/#ref26](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/cultural-ip-vs-commercial-ip/#ref26) [<https://perma.cc/EP4N-EML7>].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. AUSTRAL. COUNCIL FOR THE ARTS, PROTOCOLS FOR USING FIRST NATIONS CULTURAL AND INTELLECTUAL PROPERTY IN THE ARTS 5 (2019).

29. *Id.*

30. MAURO BARELLI, THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY RIGHTS 1 (2007).

31. *Traditional Knowledge*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/tk/en/tk/> [<https://perma.cc/HFM3-9ESX>] (last visited Oct. 27, 2022).

environment, region, culture and language.”<sup>32</sup> This knowledge is further expressed through traditional cultural expressions such as music, performances, handicrafts, symbols, and art.<sup>33</sup> It is all encompassing in an Indigenous community’s way of life.<sup>34</sup>

Indigenous Cultural and Intellectual property’ rights attempt to ensure traditional customs and the right to prevent misrepresentative uses of it are respected.<sup>35</sup> In ensuring this protection, the three pillars of intellectual property—copyright, trademark, and patent—attempt to control, restrict, and compensate for the damages suffered.<sup>36</sup> It is recognized that trademark and patent law have a place in the protection of Indigenous culture, however, it goes beyond the scope of this note.

## II. INDIGENOUS COMMUNITIES AND COPYRIGHT

In 2007, the Declaration on the Rights of Indigenous Peoples by the United Nations (UNDRIP) was adopted.<sup>37</sup> This was in response to a study done in 1982 by the Economic and Social Council (ECOSOC) that detailed ongoing global discrimination towards Indigenous communities.<sup>38</sup> The declaration internationally recognizes the historic injustices to Indigenous communities<sup>39</sup> and affirms that Indigenous persons have a right to self-determine and pursue their social and cultural development.<sup>40</sup> This social and cultural development correlates with a right to maintain and protect their culture with respect to designs, artifacts, religious and spiritual property, and overall traditional knowledge.<sup>41</sup> The right to regulate a person’s use, or remedy the exploitation of Indigenous traditional knowledge and cultural expressions, means that these communities can regain control over much of what has been taken from them or suppressed.

With cultural expressions holding great importance for indigenous communities, they have an eagerness and strong incentive to preserve their culture.<sup>42</sup> UNDRIP, while morally effective, stops there. Like many United

32. Naomi Palosaari, *Intellectual Property Rights and Informed Consent in American Indian Communities: Legal and Ethical Issues*, 41 AM. INDIAN L. REV. 125, 131 (2016).

33. *Id.* at 130; see text accompanying *infra* notes 172-76.

34. See *id.*

35. Stacy Slotnick, *Who Owns Culture? Indigenous Cultural Intellectual Property Rights*, FED. BAR ASS’N (Feb. 23, 2017), <https://www.fedbar.org/blog/who-owns-culture-indigenous-cultural-intellectual-property-rights/> [<https://perma.cc/6H53-QEU3>].

36. *Id.*

37. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, annex (Sept. 13, 2007).

38. *Historical Overview*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/indigenouseoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html> [<https://perma.cc/EAV9-GWUF>] (last visited Nov. 12, 2022).

39. G.A. Res. 61/295, *supra* note 37.

40. *Id.* art. 3.

41. *Id.* art. 11(1).

42. See BARELLI, *supra* note 30, at 1.

Nations (UN) human rights declarations, the document is not legally binding and, like all international instruments, is viewed in light of the importance of state sovereignty.<sup>43</sup> It has little—if any—enforcement power. Therefore, it depends on the individual states to tackle the issues that arise. As stated, the concept of traditional knowledge incorporates intellectual property because of intellectual property's purpose of protecting creative works. Scholars currently debate—domestically and internationally—the suitable method of protecting traditional knowledge and cultural expressions through intellectual property.<sup>44</sup> The danger of using intellectual property as the method of protecting an Indigenous Community's traditional knowledge and cultural expressions lies in the way its scope can fall short for unique creative expressions. This begs the question of whether intellectual property is the best method for preserving Indigenous rights. Despite the dangers, however, there should be laws in place to protect Indigenous culture and traditional knowledge; Copyright law, in its current form, can be so used.

Although copyright laws were developed at different times in different countries, they were designed “to stimulate activity and progress in the arts for the intellectual enrichment of the public.”<sup>45</sup> Copyright laws intended to advocate a growth in knowledge and creative content, which serves an important public purpose in societal development.<sup>46</sup> Respectively, countries created a system of laws that would compensate authors for their inventions or creations.

Copyright protects the “expression of ideas in material form and includes literary, musical, dramatic, artistic, cinematography work, audio tapes, and computer software.”<sup>47</sup> Copyright does not manifest, however, on an idea but the fixed, tangible form that is created based on the idea.<sup>48</sup> The moment a piece of work is created, it inherits basic rights that endure for a given period of time.<sup>49</sup> While copyright specifics are dependent on domestic laws, generally, a piece of work does not need to be registered with a copyright office for the creator to obtain the basic rights of being the creator or author of the piece. In some

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43. *Indigenous Peoples*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/indigenous-peoples-0> [<https://perma.cc/LH7C-XHKB>] (last visited May 18, 2024).

44. Ugonma Nwankwo & Charles Kenny, *Their Knowledge, Their Rights: Using Traditional Knowledge and Intellectual Property to Protect Communities*, CTR. FOR GLOB. DEV. (Mar. 1, 2021), <https://www.cgdev.org/blog/their-knowledge-their-rights-using-traditional-knowledge-and-intellectual-property> [<https://perma.cc/Y5TL-D2RN>].

45. Pierre N. Leval, *Commentaries: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

46. *See id.* at 1109. “The copyright law embodies a recognition that creative intellectual activity is vital to the well-being of society. It is a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists (as it does for inventors), in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.”

47. *See Saha et al.*, *supra* note 18, at 89.

48. TERRI JANKE & MAIKO SENTINA, *INDIGENOUS KNOWLEDGE: ISSUES FOR PROTECTION AND MANAGEMENT* 6-7 (2018).

49. Greer, *supra* note 13 at 30.

countries, including the United States, registration of copyright, however, can offer additional exclusive rights to the author. Copyright law is an instrumental tool in safeguarding the expression of ideas, encompassing various forms of creative expression, including, but not limited to, the arts and traditional knowledge, which entail cultural expressions such as literary, music, and artistic works. It is this very purpose that makes this copyright law a primary candidate for providing protection.<sup>50</sup>

### A. Australian Aboriginal Community

#### 1. Aboriginal Art

After the human rights atrocities and mass discriminations of World War II, Australia began to reflect on their assimilation practices, recognizing that assimilation policies are often founded on racial classifications and disregard for human dignity. Australia recognized that Aboriginal people's advancement was contingent on their cultural identity and ability to make choices to preserve their identity.<sup>51</sup> Part of this identity is the arts.<sup>52</sup> Once this was embraced, Aboriginal art became a part of domestic and international tourism and cultivated a new Australian nationalism.<sup>53</sup> In the 1980s, government officials roughly doubled sales in the commercial markets for Aboriginal art.<sup>54</sup> In subsequent years, the Australian and French governments partnered to display permanent Aboriginal art, lining the ceilings of the museum Musée du quai Branly.<sup>55</sup> The Aboriginal art industry was developing faster than Australia's government could manage. It became a gold-rush, and an industry vulnerable to exploitation.<sup>56</sup>

According to the 2021 census data released by the Australia Bureau of Statistics (ABS), Aboriginal and Torres Strait Islander persons in Australia

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50. See Palosaari, *supra* note 32, at 137.

51. LAURA FISHER, *ABORIGINAL ART AND AUSTRALIAN SOCIETY: HOPE AND DISENCHANTMENT* 21 (2016).

52. *Id.* at 22 (“the arts were essential to the exercise of self-determination because they ensured the preservation and adaptation of cultural traditions . . .”).

53. *Id.* at 49 (“ . . . the Aboriginal arts had in the 1970s and 1980s, and in fact became a significant niche within the Australian Arts sector. This flourishing was undoubtedly connected to a growing public consciousness of Aboriginal cultural trauma, and with respect to arts subsidy, the state's need to publicly reconfigure the terms of Indigenous/non-Indigenous relations”).

54. *Id.* at 50.

55. *Id.* at 53; *Aboriginal Works on the Roof and Ceilings*, MUSÉE DU QUAI BRANLY JACQUES CHIRAC, <https://www.quaibrantly.fr/en/public-areas/aboriginal-works-on-the-roof-and-ceilings> [https://perma.cc/9US3-X4VB] (last visited June 03, 2024).

56. *Id.* at 140 (“the art trade had ‘become a gold-rush scene where money chases the dream of profit, where forgers, con men and thieves with plausible eyes greet you at the entrance of smart shopfronts, while Aboriginal artists sit cross-legged in back-yard sheds, daubing hack words for paltry sums”).

make up 3.2% of the total population.<sup>57</sup> While the percentage is a small number, the cultural and economic impact of the Aboriginal community is much larger. Through an economic lens, the Aboriginal art industry generates about AUD \$200 million each year, with surging demand for exporting the art internationally to places such as Berlin, London, and New York.<sup>58</sup> The bright colors and richness of the art appeal to people from all over, and “[s]ales to foreign tourists have been a significant driver of the industry.”<sup>59</sup> Aboriginal art is described as “Australia’s greatest cultural gift to the world.”<sup>60</sup> Indigenous artists express their culture and identity through their art and domestic and international economic streams provide opportunities for transmission of cultural knowledge and personal development. Through Aboriginal art, non-Indigenous Australians have gained a richer understanding of Indigenous culture and the Australian landscape, as well as insights into the impacts of colonization and the ongoing challenges of reconciliation.<sup>61</sup> Besides Aboriginal art being a large money-making industry, their work provides economic independence and serves as a powerful expression of their culture and resilience.<sup>62</sup>

## 2. Copyright Laws in Australia

“The Copyright Act 1968 grants automatic rights to the creators and owners of literary, dramatic, artistic or musical works and other subject matter . . . .”<sup>63</sup> These automatic rights are fixed without registration of the creative work.<sup>64</sup> However, there are still requirements to be met for the work to be protected under copyright law. In order for the work to qualify as copyrightable, it has to

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57. As of the latest release from ABS, the Aboriginal and Torres Strait Islander population is projected to grow significantly, underscoring the growing influence of Indigenous cultural expressions in Australia’s demographic landscape. *Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians*, AUSTL. BUREAU OF STAT. (Aug. 31, 2022), <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/2021> [https://perma.cc/6Z5X-EEW5].

58. Phil Mercer, *Australia’s Indigenous art: ‘An Economic colossus’*, BBC (May 1, 2013), <https://www.bbc.com/culture/article/20130426-australias-aboriginal-art-craze> [https://perma.cc/DD9P-XQGU].

59. *Id.*

60. AUSTL. SENATE STANDING COMM. ON ENV’T, COMM’NS, INFO. TECH. & THE ARTS, *INDIGENOUS ART – SECURING THE FUTURE: AUSTRALIA’S INDIGENOUS VISUAL ARTS AND CRAFT SECTOR 15* (2007).

61. *Recognising Aboriginal art, transforming Australian culture*, AUSTRALIAN ACADEMY OF THE HUMANITIES, <https://humanities.org.au/power-of-the-humanities/recognising-aboriginal-art-transforming-australian-culture/> [https://perma.cc/Q34V-49ZW] (October 2021).

62. *Id.*

63. MAIKO SENTINA, ELIZABETH MASON, TERRI JANKE & DAVID WENITONG, *LEGAL PROTECTION OF INDIGENOUS KNOWLEDGE IN AUSTRALIA*, Supplementary Paper 1, at 5 (2018).

64. *Copyright*, AUSTL. GOV’T: BUS. (Jan. 18, 2024), <https://business.gov.au/planning/protect-your-brand-idea-or-creation/copyright> [https://perma.cc/XB9C-JHSC].

be “original, have an identifiable author, and be in a tangible form.”<sup>65</sup> Once the work in question meets these requirements, copyright protection exists. From there, the rights granted to it depend on the class of work. For artistic works, the exclusive rights attached are found in section 31(1)(b); it provides that the author of an artistic work has the exclusive right to (1) reproduce, (2) publish, and (3) communicate the work to the public, which is popularly done by performance or by means of a broadcast device.<sup>66</sup>

Copyright protection does not last forever regardless of the medium. Generally, the copyright for creative works, including art, and for sound recordings and films after being made public is seventy years after the death of the author.<sup>67</sup> However, for television and radio broadcasts the protection is fifty years after being broadcast.<sup>68</sup> After the copyright term expires, the work is public and available for anyone to use for adaptation and exploitation.<sup>69</sup> Despite this time frame for protection, artists have gotten away with exploiting Aboriginal art for profit well before the seventy-year expiration. Copyright law in Australia also has some exceptions that allow the use of original creative work without permission. In the realm of art, public art, buildings and models, ‘incidental’ filming or televising, and publication of reproduction or film of artwork are all categories of exceptions.<sup>70</sup> Each category, however, has individual requirements to be exempted from enforcing protection.

## *B. The United States Indigenous Community and Copyright*

### *1. Native American Art*

During the St. Joseph’s parade in New Orleans in 2010, a member of the Yellow Pocahontas tribe—commonly known as the ‘Mardi Gras Indians’—watched as photographers took snapshots of his ornate, feathered suit.<sup>71</sup> While a person can be photographed in public, the real issue lies in the selling and advertising photographs of copyrighted subjects. The Yellow Pocahontas tribe has been around for more than almost two centuries and has been seen in their traditional suits on procession in the streets.<sup>72</sup> They have seen their suits in “photographs on calendars, posters, and expensive prints” all over New Orleans

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65. SENTINA ET AL., *supra* note 63, at 5.

66. *Copyright Act of 1968* (Cth) s 31(1)(b) (Austl.). Unlike the literary, dramatic or musical work subsection of the copyright act, s 31(1)(b) does not allow for adaptation of the work.

67. Austl. Gov’t: Bus, *supra* note 64.

68. *Id.*

69. SENTINA ET AL., *supra* note 63.

70. *Copyright Exceptions*, COPYRIGHT AGENCY, <https://www.copyright.com.au/about-copyright/exceptions/> [<https://perma.cc/7HZY-MB34>] (last visited May 18, 2024).

71. Campbell Robertson, *Want to Use My Suit? Then Throw Me Something*, N.Y. TIMES (Mar. 23, 2010), <https://www.nytimes.com/2010/03/24/us/24orleans.html> [<https://perma.cc/9BTB-TBRA>].

72. *Id.*

without getting anything in return.<sup>73</sup> If the suit had federal copyright protection and it was the focal point of any photograph, the sale of the picture could lead to a potential infringement lawsuit.

In an attempt to further prevent the unauthorized commercial exploitation of their suits, the Yellow Pocahontas tribe copyrighted their suits despite the general rule of copyright that does not protect clothing or costumes.<sup>74</sup> Instead, the suits were arguably protected because they satisfied originality, authorship, and fixation requirements. Some were even put on display in museums strengthening the argument that the suits are seen as more than articles of clothing.<sup>75</sup> Through this copyright protection, the Yellow Pocahontas tribe has the exclusive right to create or license the creation of derivative works such as photographs and receive proper compensation through copyright protection. The success of this Indigenous community perpetuates the idea that copyright has a place for protecting these communities from exploitation.

## 2. *Copyright Laws in the United States*

U.S. copyright law has parallel attributes to that of Australia, yet they aren't completely consistent. Like Australia, the U.S. copyright system grants immediate protection the moment a piece of work is created.<sup>76</sup> The copyright owner then has exclusive rights to reproduce the work, prepare derivative works, and perform the work publicly if it applies.<sup>77</sup> These rights can also be granted to others if the owner so wishes. Yet, the most noticeable disparity is that in the United States, an author must register their work to obtain enhanced protection for potential legal action, whereas this is not required in Australia. In U.S. copyright law, a piece can be afforded greater protection through registration.<sup>78</sup> After filing and approval of the application, the federal registration not only provides the public with notice of the claimed copyright protection, but it allows for the owner to file an infringement suit in court.<sup>79</sup> Additionally, the registration permits the copyright owner "to establish a record with the U.S. Customs and Border Protection [] for protection against the importation of infringing copies."<sup>80</sup>

Further, the length of the copyright depends on when the work was created and what type of work it is. If it was on or after January 1, 1978, and the work was not work-for-hire, there is a general copyright term of life of the creator and

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73. *Id.*

74. *Id.*

75. *Id.* "I'm not so sure the Mardi Gras costumes are really articles of clothing. There is a case that they are really works of art."

76. *What is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> [https://perma.cc/R7YF-AGHV] (last visited May 18, 2024).

77. *Id.*

78. *Id.*

79. U.S. COPYRIGHT OFF., CIRCULAR 1, COPYRIGHT BASICS 5 (2021), <https://www.copyright.gov/circs/circ01.pdf> [https://perma.cc/4ZMJ-AABB].

80. *Id.*

seventy years after the creator's death.<sup>81</sup> This also applies to joint work with the copyright lasting seventy years after the "last surviving author's death."<sup>82</sup> For works that are made for hire and where the author is anonymous, the duration of copyright increases to ninety-five years from first publication or "120 years from creation, whichever is shorter."<sup>83</sup> If the work is created before 1978, the work is "guaranteed at least 25 years of statutory protection" on top of another forty-five years for works published before December 31, 2002.<sup>84</sup>

Even with these seemingly long terms, owners can be eligible to renew their copyright protection for up to two terms.<sup>85</sup> In order to do this, a work "must have secured federal copyright protection between January 1, 1964, and December 31, 1977," and "must have maintained that copyright throughout the original term."<sup>86</sup> For Indigenous persons, however, it can be a challenge to establish their work's age because much of the time their intellectual property is not in a tangible medium.<sup>87</sup> In 1989, the United States amended its copyright law to incorporate "moral rights" under the Visual Artist's Rights Act of 1990 (VARA).<sup>88</sup> The purpose of these rights is for the artist to further claim authorship, allowing them to object to misuse of their work such as mutilation, destruction, or even intentional distortion.<sup>89</sup> However, VARA has a narrow scope in its applicability and faces similar issues to copyright law in protecting Indigenous art.

### III. U.S. V. AUSTRALIA

Historically, the United States and Australia started off with a few parallels. They were both settled as colonies of Great Britain and as a result, their legal structures evolved from British common law before adopting their unique governing elements.<sup>90</sup> Unfortunately, they also share a history of forced, often violent colonization of large populations of Indigenous groups. In 2007, when the United Nations introduced the Declaration on the Rights of Indigenous

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81. U.S. Copyright Off., *supra* note 76.

82. *Id.*

83. U.S. COPYRIGHT OFF., CIRCULAR 15A, DURATION OF COPYRIGHT 1 (2022), <https://www.copyright.gov/circs/circ15a.pdf> [<https://perma.cc/K3XA-FKDK>].

84. *Id.*

85. U.S. COPYRIGHT OFF., CIRCULAR 6A, RENEWAL OF COPYRIGHT 5 (2021), <https://www.copyright.gov/circs/circ06a.pdf> [<https://perma.cc/D97A-DMLL>].

86. *Id.* at 2.

87. Jessica Roberts, *The Flourishing Race: How the Success of American Indian Artist-Entrepreneurs Underscores the Need for Enhanced Legal Protections for Native Intellectual Property*, 8 AMERICAN INDIAN L.J. 1, 31 (2019).

88. *Id.*

89. Visual Artist's Rights Act of 1990, 17 U.S.C. § 106A(a)(1) (1994).

90. Rebekah Durham, *Comparing Property Rights of Native Americans and Indigenous Australians*, UNIV. OF CIN. L. REV. (Nov. 10, 2020), <https://uclawreview.org/2020/11/10/comparing-property-rights-of-native-americans-and-indigenous-australians/> [<https://perma.cc/5RJU-U3YB>].

Peoples (UNDRIP), Australia and the United States were two of the four countries to vote against it.<sup>91</sup> The Declaration encouraged cooperative relationships between states and Indigenous communities, prohibited discrimination, and established a universal framework of minimum standards and freedoms for Indigenous persons.<sup>92</sup> In subsequent years, the United States and Australia reversed their positions and announced support for the Declaration.<sup>93</sup> While this is positive, there is still a prevalent problem with Indigenous treatment and policy approaches between the two countries.

One of those ongoing issues which both countries face is the misappropriation of Indigenous art, design, and crafts. Alongside this, the legal approach for the United States and Australia remains similar yet distinct with their respective uses of copyright law and additional legal mechanisms. The United States and Australia's copyright acts appear to be identical, at first glance, in their purposes and requirements. Both the United States and Australia acknowledge copyright protection as requiring a tangible, original piece with an identifiable author. As a result, both countries have an issue with rectifying the tangible component for their Indigenous communities. With a greater magnifying lens, there are distinct differences between the two systems which are essential to acknowledge.

#### *A. Differences in the Copyright Systems*

Both the United States and Australia provide intellectual property rights for their Indigenous communities, to protect creative works. Australia gives easier access to this through the absence of a copyright registration system. All the protections and legal enforcement afforded a piece of work in Australia are obtained automatically without needing to register the work; once the piece is created, the protection is "free and automatic."<sup>94</sup> In comparison, the United States grants legal enforcement, such as suing for infringement, only if the

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91. *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, UNITED S. & E. TRIBES, (Sep. 2, 2021), <https://www.usetinc.org/general/undrip/> [<https://perma.cc/RRK7-KS2D>]. Australia, Canada, New Zealand and the United States were the four countries that voted against UNDRIP. With shared colonial history, they each shared similar concerns that UNDRIP would "undermine the sovereignty of their own states." Also, the four countries argued they continuously upheld human rights standards and were leading players in doing so compared to other countries that signed UNDRIP. See Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDATIONS, [https://indigenousfoundations.arts.ubc.ca/un\\_declaration\\_on\\_the\\_rights\\_of\\_indigenous\\_peoples/](https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/) [<https://perma.cc/QR95-K8TY>] (last visited May 18, 2024).

92. United S. & E. Tribes, *supra* note 91.

93. *Id.* "Some critics believe that despite [Australia and the United States'] change in position, each nation's commitment remains lukewarm at best." See Hanson, *supra* note 91.

94. Austl. Gov't: Bus., *supra* note 64.

creative piece is registered in its federal system.<sup>95</sup> If there is no federal registration, there are limits on the author's remedies and course of legal action.

In addition, registration establishes a public record of the copyright for others to see, unlike in Australia where there is no formal record-holding place for people to check. Albeit a minor difference, Australia's copyright system might be more beneficial for their Aboriginal community because they do not have to go through the effort of registering their works, but they still receive the same benefits as United States copyright holders. The potential negative of Australia not having a public record of copyright holders does not outweigh the benefit of the lower burden for being able to sue for infringement.

### *1. Copyright Infringement Through the Registration System*

In 1995, a textile company used Indigenous designs on carpets without permission and sold them in the Australian market. The carpets were produced in Vietnam and had no connection to the Aboriginal community, yet they were labeled as designed by Aboriginal artists and claimed that the artists were paid royalties.<sup>96</sup> The carpet's artwork depicted parts of Banduk Marika's painting of sand goannas from her clan's creation site.<sup>97</sup> The company argued that there was no existent copyright in Banduk Mari's artwork because it stemmed from "pre-existing traditional designs," so it did not meet the originality requirement of copyright law.<sup>98</sup> Regardless, the court disagreed. It held that the artwork, while pre-existing and only partially reproduced, was original because of the "intricate detail and complexity, which was copyright work."<sup>99</sup>

To qualify as copyright infringement in Australia by importation for sale or hire, the infringer needs to have used the copyrighted works for the purpose of (1) selling, (2) letting for hire (renting or leasing) (3) or distributing for trade or another purpose that prejudicially affects the copyright owner.<sup>100</sup> Additionally, both sections thirty-seven and thirty-eight of the Copyright Act depend on if the infringer knew or reasonably should have known that the work was copyrighted and went through with the production or sale.<sup>101</sup> The court found that the importer—Mr. Beechrow—knew or ought to have known that the artworks were popular based on the fact that Mr. Beechrow attempted to obtain a license to use

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95. Elizabeth Weber, *Copyrights: To Register or Not to Register, That is the Question*, CTR. FOR ART L. (Mar. 31, 2016), <https://itsartlaw.org/2016/03/31/copyrights-to-register-or-not-to-register-that-is-the-question/> [<https://perma.cc/5BSL-96AF>].

96. JANKE & SENTINA, *supra* note 48, at 30-31.

97. *Id.* at 30.

98. *Id.* at 31.

99. The court used the copyright infringement by importation for sale or hire statute and the infringement by sale and other dealings statute to evaluate the action. JANKE & SENTINA, *supra* note 48, at 31.; *Copyright Act of 1968* (Cth) s 37, 38 (Austl.).

100. *Id.* s 37.

101. *Id.* ss 37, 38; see *Milpurruru v Indofurn Pty Ltd* [1994] FCA 1544, ¶ 66 (Austl.) (the level of knowledge is constructive and does not require the perpetrator to have knowledge of the law).

the work.<sup>102</sup> The license, however, was not approved before the company imported and sold the carpets.<sup>103</sup>

Although the carpets were not identical replications of the copyrighted artwork, the court examined its 'substantial reproduction' standard. For example, it found that the snake carpet portrayed similar colors and hues with a large portion of the carpet closely resembling the background of the Aboriginal painting.<sup>104</sup> Also, it had a unique depiction of the snake almost identical to the originator's artwork.<sup>105</sup> These facts together met the four-part test of substantial reproduction. Substantial reproduction of the copyright works is analyzed by the (1) volume in which the material was taken; (2) how much the material used was the subject matter of copyright; (3) whether there was *animus furandi* (intent to steal) on the part of the defendants; and (4) the extent to which the plaintiff's and defendant's products compete.<sup>106</sup> The case was pivotal in Australian courts and the indigenous community because it enforced that traditional and generational artwork could still constitute originality.<sup>107</sup> Without a registration system, the most applicable method of recourse is through copyright infringement as seen in this case.

Under Article 5, paragraph 2 of the Berne Convention international treaty, to which both the United States and Australia are parties, it explicitly states that countries participating in the treaty must establish laws that do not impose "any formality" on authors.<sup>108</sup> Formalities in copyright law include a registration system.<sup>109</sup> Among the member countries, the United States is one of the few members that enforces a mandate for authors and creators alike to register their works. This stipulation not only presents numerous challenges for authors seeking protection, but also directly contradicts the principles of the international treaty to which the United States is a signatory.

Australia's non-registration copyright system has the benefit of allowing any creator to bring forward a copyright infringement suit. By contrast, America's copyright system lacks full instantaneous copyright protection. Tribes in America could only sue for infringement if they federally registered

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102. *Milpurrruru v Indofurn Pty Ltd* [1994] FCA 1544, ¶ 67 (Austl.), <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1994/1544.html> [<https://perma.cc/SV8N-CJN8>].

103. *Id.* at ¶ 65.

104. *Id.* at ¶ 72.

105. *Id.*

106. *Id.* at ¶ 76 (*Animus furandi* directly translates to the intent to steal. The court found this element to be the most important factor of the test).

107. *Copyright Act of 1968* (Cth) s 31 (Austl.); *see also Milpurrruru v Indofurn Pty Ltd* [1994] FCA 1544, ¶ 82 (Austl.) ("It contains an important part of the story being told in my painting which contains some secret sacred stories . . . It is not right for my painting to be copied in a way where part of it has been altered and part of the painting left out").

108. Berne Convention for the Protection of Literary and Artistic Works art. 5, *amended July 24, 1971*, 828 U.N.T.S. 18338.

109. Peter B. Hirtle, *Copyright Services: Copyright Term and the Public Domain*, CORNELL UNIV. LIBR., <https://guides.library.cornell.edu/copyright/publicdomain> [<https://perma.cc/PRE4-7MWC>] (last visited May 18, 2024).

their works.<sup>110</sup> The Sealaska Heritage Institute case is an example of when a tribe in America that was able to sue for infringement despite the requirement of federal registration for their works. Sealaska Heritage Institute, a nonprofit corporation founded by the Tlingit, Haida, and Tsmshian people of Alaska, federally registered a robe called “Discovering the Angles of an Electrified Heart”<sup>111</sup> for its traditional weaving design referred to as the “Ravenstail.”<sup>112</sup> In August of 2019, the members of Sealaska Heritage Institute were made aware that Neiman Marcus and a few online stores were selling a coat called the “Ravenstail Knitted Coat” for \$2,500.<sup>113</sup> Not only was the “Ravenstail Knitted Coat” falsely affiliating the garment to Native artisans, but the design was almost an exact replica; at a minimum, it was a substantial copy of the copyrighted artwork.<sup>114</sup>

The criterion for determining copyright infringement under U.S. law is the assessment of substantial similarity.<sup>115</sup> Initially, the court starts with whether the copyright owner, generally the plaintiff, has a registered copyright.<sup>116</sup> Next, the first prong of the substantial similarity analysis has the plaintiff demonstrate that the alleged infringer substantially copied the copyright owner’s work in their own actions or work.<sup>117</sup> The court determines this through viewing (1) evidence of the infringer’s access to the copyrighted work and (2) similarities between the original and the infringing piece.<sup>118</sup> The second prong of the analysis is questioning whether the infringer engaged in misappropriation.<sup>119</sup> This prong evaluates what was taken and if those elements are protected. The court in *Sealaska Heritage* found that the institute sufficiently pled copyright infringement because it established the garment held a valid copyright registration and that the defendants sold, offered to sell, marketed, and

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110. Hence, in America, due to the prerequisite of copyright registration for pursuing copyright infringement cases, this avenue is less frequently employed to address the misuse of Native American art. Copyright Act of 1976, 17 U.S.C. § 101 (2012).

111. First Amended Complaint at 3-4, *Sealaska Heritage Institute, Inc. v. Neiman Marcus Group LTD, LLC*, No. 1:20-cv-00002-SLG, 2020 WL 6817129 (D. Alaska Aug. 29, 2020).

112. *Sealaska Heritage Sues Neiman Marcus Alleging Unlawful Use of the Term “Ravenstail,” Copyright Infringement*, SEALASKA HERITAGE (Apr. 20, 2020), <https://www.sealaskaheritage.org/node/1211> [https://perma.cc/JR4B-QEU6].

113. *Id.*

114. *Id.*

115. Shyamkrishna Balganes, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 267 (2014) (in proving copyright infringement a court must determine if the defendant’s copying is substantial enough to be considered a violation, both in terms of quantity and quality).

116. *Id.* at 269.

117. Clark D. Asay, *An Empirical Study of Copyright’s Substantial Similarity Test*, 13(1) U.C. IRVINE L. REV. 35, 43 (2022).

118. *Id.*

119. *Id.* at 45.

advertised a direct copy of the work.<sup>120</sup> Despite the potential strong argument by the institute for copyright infringement, the case was dismissed on jurisdictional grounds.<sup>121</sup>

The basic rights granted to copyright owners without a federal registration in the United States do not include bringing illegal actions to court. As a result, copyright infringement suits are not typically pursued by Native American tribes. Instead, when it comes to an infringement, misappropriation or misrepresentation of Native American tribes' arts or crafts, tribes file the action as an alleged violation of the Indian Arts and Crafts Act of 1990. Luckily, in this case, the institute was able to sue for infringement and a violation of the Act of 1990. However, copyright infringement is the only method of recourse in Australia. In comparison, the copyright infringement language in Australian courts considers the sale of the copyrighted works as part of the infringement. The lack of need to register material automatically benefits the Indigenous community in Australia, but it can lend itself to a greater problem as the analysis between copyright systems exposes weaknesses.

## 2. Copyright Ownership

The communal ownership of arts and crafts is common among Indigenous communities due to the cultural significance of these pieces, which often embody generational stories and the identity of the tribe as a whole.<sup>122</sup> In Australia, it is not explicitly written in the copyright text that a copyright can be owned by more than one author. Instead, the copyright is attributed to a single owner.<sup>123</sup> Case law, however, established otherwise. In *Bulun Bulun v. R & T Textiles*, the court acknowledged communal ownership in copyright law through the equitable obligations of the plaintiff.<sup>124</sup> The court's reasoning was that if the plaintiff did not take action against the infringer, the tribe would have been able

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120. On the day it was discovered, a member of the Tribal Courts Administration for the Central Council of the Tlingit and Haida Indian Tribes of Alaska notified Neiman Marcus through their customer service system. Despite this notice, Neiman Marcus continued to sell the infringing product. Hirtle, *supra* note 109, at 14. The same actions followed for the other two businesses which sold the coat, and the same lack of responses ensued. In a motion to dismiss for failure to state a claim, the defendants asserted that the copyright claim was 'insufficiently detailed.' In determining a failure to state a claim, the court views all allegations of material fact as true and "construed in the light most favorable to the nonmoving party." Plaintiff's Response in Opposition at 19-29, *Sealaska Heritage Institute, Inc. v. Neiman Marcus Group LTD, LLC*, No. 1:20-cv-00002-SLG, 2020 WL 6817140 (D. Alaska Oct. 9, 2020).

121. Defendants' Motion to Dismiss, *Sealaska Heritage Institute, Inc. v. Neiman Marcus Group LTD, LLC*, No. 1:20-cv-00002-SLG, 2020 WL 6817135 (D. Alaska Sept. 14, 2020).

122. "Indigenous Knowledge is constantly evolving and is dynamic not static. Indigenous cultural expressions may refer to ancient designs, stories and songs created by authors unknown, brought into existence by the ancestral beings or developed communally." JANKE & SENTINA, *supra* note 48, at 20.

123. *Copyright Act of 1968* (Cth) s 35 (Austl.).

124. JANKE & SENTINA, *supra* note 48, at 33.

to take legal action against the plaintiff due to their fiduciary obligation.<sup>125</sup> After this conclusion, the Australian courts continue to uphold this notion of communal ownership.

Conversely, in the United States, the copyright act explicitly permits a single piece of copyrighted work to have multiple authors.<sup>126</sup> In the Act, there is a section dedicated to contributions to collective works. This section describes the ability of other authors to contribute to the collective work.<sup>127</sup> However, the original copyright owner has the ultimate authority to reproduce and distribute the collective work.<sup>128</sup> The privilege exemplifies the notion that there is still a greater weight on individual ownership over communal. Additionally, the issue of copyright ownership can be complicated by the fact that identifying the owner of a work may be difficult due to its generational context. This highlights the significance of copyright timing.

### 3. Copyright's Timing

What seems to be a simple comparison of numbers has a pivotal role in successfully protecting Indigenous art and is a reason the copyright system falls short. The United States' copyright terms are determined by three indicators: 1) if the work was created before 1978, 2) if the work was published, and 3) what kind of work the piece is; if the work was created before January 1, 1978, regardless of if it wasn't published or copyrighted, the law automatically grants federal copyright protection.<sup>129</sup> As noted above, the longevity of copyright protection is for the life of the author plus 70-120 years depending on the authorship.

The duration of a copyright term in Australia is typically determined by three factors: the identity of the creator, the date and manner of publication, and the type of work.<sup>130</sup> While both countries adopt slightly varying copyright terms, the United States and Australia share the idea that copyright terms, regardless of the facts that affect them, eventually expire. Indigenous communities within these countries are steeped in history, and they base their art on centuries-old traditions.<sup>131</sup> The expiration of copyright protection removes the safeguard both legal systems provide for these works.

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125. *Id.*

126. "Copyright in a work protected under this title vests initially in the author or authors of the work." Copyright Act of 1976, 17 U.S.C. § 201.

127. *Id.*

128. *Id.*

129. U.S. Copyright Off., *supra* note 83.

130. For art in which the author is known, the work was published, and the work hadn't already expired before Jan. 1, 2005, the piece benefits from an extended term of seventy years. *Duration of Copyright*, COPYRIGHT AGENCY (Sept. 17, 2020), <https://www.copyright.com.au/about-copyright/duration/> [<https://perma.cc/L9JA-CKVZ>].

131. Palosaari, *supra* note 32, at 130.

In the Blue Mountains of Australia, a gallery placed a sculpture for public display.<sup>132</sup> The sculpture crudely depicted a sacred creator spirit called ‘Wandjina’ that is originally and solely owned by the Mowanjum community made up of the Worrora, Wunumbal and Ngarinyin Aboriginal people.<sup>133</sup> For the Mowanjum community, the figure represents elements of “torrential rains, lightning and thunder” but it also brought the culture and language of their people.<sup>134</sup> Traditionally, the Wandjina spirit, dating back almost 4,000 years, is depicted in the vague shape of a person with a headpiece to crown the face.<sup>135</sup> The face has large circular eyes with lines sticking out to represent the thunderstorms and a line between the eyes that “resembles a nose, but is actually a power line which is used to transfer energy.”<sup>136</sup> The Wandjina has no mouth and is never depicted with such because the spirit is seen as “too powerful” – but the sculpture displayed in the studio did have a mouth.<sup>137</sup> The Aboriginal community took offense to the misappropriation of their cultural figure and sued for copyright infringement.<sup>138</sup> However, the current copyright laws were unable to protect this painting.<sup>139</sup>

Although the Wandjina was “instantly recognizable,” the gallery’s depiction of the Wandjina was identified as possibly not a direct copy, so it met the requirement of originality.<sup>140</sup> Additionally, since the Wandjinas were painted thousands of years ago, the original author died past the 70-year limit of copyright protection.<sup>141</sup> Blue Mountains’ City Council ordered the sculpture by the gallery to be removed.<sup>142</sup> Despite the result, the intensive lobbying and removal of the statute do not constitute binding legal precedent.<sup>143</sup>

In a more recent incident, a famous British comedian, Ricky Gervais, was accused of featuring a piece of fake Aboriginal art in his new television series

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132. JANKE & SENTINA, *supra* note 48, at 33-34.

133. David Wroth, *Wandjina Dreamtime Story*, JAPINGKA ABORIGINAL ART (July 2022), <https://japingkaaboriginalart.com/articles/wandjina/> [<https://perma.cc/W8LF-BUQ2>]. Under the customary law of Australia, these Aboriginal tribes are the only ones permitted to produce the Wandjina figure. JANKE & SENTINA, *supra* note 48, at 33-34.

134. Wroth, *supra* note 133.

135. *Id.*

136. *Id.*

137. *Protecting the Sacred Wandjina: the Land and Environment Court goes to the Blue Mountains*, ARTS & L. (July 11, 2011), <https://www.artslaw.com.au/article/protecting-the-sacred-wandjina-the-land-and-environment-court-goes-to-the-b/> [<https://perma.cc/DMS2-QCDU>]. In the Blue Mountains, the ‘Wandjina’ that was unknowingly erected for public display by the gallery had a mouth with sharp teeth. The Aboriginal people never depicted the spirit to have a mouth because their power to Earth is seen to travel down their nose. With spirits holding a religious significance to the Aboriginal people, this kind of mutilation is gravely upsetting.

138. JANKE & SENTINA, *supra* note 48, at 34.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

‘After Life’.<sup>144</sup> In a scene, Gervais is sitting on a couch in a living room in front of a large, hard-to-miss dot-painting.<sup>145</sup> It was then discovered the artist behind the painting was a British artist who replicated the famous Papunya style.<sup>146</sup> A chairperson of the Papunya Tjupi art center—an organization devoted to the exaltation of dot-paintings created by the Indigenous tribes of the Papunya region in the Northern Territory of Australia—firmly believed the artwork was not only a stylistic replica but a replica of an actual piece created by an Aboriginal community.<sup>147</sup> It was not copyrightable however, because the original piece is collectively owned by the community and the style could not be protected under current laws.<sup>148</sup> Yet, the style is renowned and recognized for its association with Indigenous culture.<sup>149</sup>

As stated before, Australia’s lack of copyright registration grants the ability to enforce protection through the legal system. The issue with this, however, is exemplified in the Wandjina and Gervais incidents. Indigenous art is generational and therefore struggles to fit within copyright’s time limits. Plus, copyright law allows creators to be inspired by other pieces of art. Since Wandjina was not a direct copy and the style of the painting in Gervais’ show is not copyrightable, these sacred symbols are exploited. If the legal claim does not constitute as copyright infringement, what are the alternative legal avenues for recourse? If there is no intention to extend or create a provision specifically for Indigenous art in copyright laws, this is where the benefit of other laws comes into play.

In the United States, most cases dealing with Indigenous misappropriation of arts and crafts are dealt under the Indian Arts and Crafts Act of 1990.<sup>150</sup> One reason for this could be that in the United States copyright system, legal recourse for infringement can only be achieved if the Indigenous group has a valid registered copyright.<sup>151</sup> Although there is no formal copyright registration system in Australia and Aboriginal groups often rely on copyright infringement claims, there is still a need for legal provisions to address areas beyond the scope of copyright protection.

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144. Isabella Higgins, *Netflix series After Life, from Ricky Gervais, features 'unethical' piece of 'fake' Aboriginal art*, ABC NEWS (Mar. 19, 2019), <https://www.abc.net.au/news/2019-03-19/netflix-after-life-ricky-gervais-fake-piece-aboriginal-art/10916382> [<https://perma.cc/RFR4-2ME4>].

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See id.*; text accompanying *infra* notes 172-76. Copying Indigenous style stands apart from copying Picasso’s style. The major difference is that Picasso’s style is a person’s artistic expression whereas for Indigenous communities it is a connection to their land, their people, their customs, and laws.

150. *See* Jada Boggs, *Protecting Indigenous Artists Against Infringement and Appropriation*, COPYRIGHT ALL. (Nov. 17, 2022), <https://copyrightalliance.org/protecting-indigenous-artists-infringement-appropriation/> [<https://perma.cc/VB9Q-QXC9>].

151. Copyright Act of 1976, 17 U.S.C. § 101 (2012).

#### 4. Other Legal Mechanisms

##### a. Consumer law

##### i. The Indian Arts and Crafts Act of 1990

Around 80% of Aboriginal art in the Australian market is presumed to be fake.<sup>152</sup> Specifically, from 2017 to 2018, the House of Representatives Standing Committee on Indigenous Affairs in Australia noticed a growing presence of fake art in the market.<sup>153</sup> In 2016, law enforcement in the United States seized over \$35 million in counterfeit art.<sup>154</sup> In an attempt to get around copyright laws in Australia, non-Indigenous artists began marketing their own style of Indigenous artwork and crafts.<sup>155</sup> Since themes and styles do not qualify as copyrighted work, businesses will replicate the geometric styles and shapes and advertise them as authentic. Indigenous artists had to explore alternative legal options as the imitations of their art closely resembled the original works. Despite the themes or styles not falling under copyright protection, the misrepresentation and unauthorized reproduction by non-Indigenous individuals were deemed disrespectful.

Shortly after the increasing presence of inauthentic art was acknowledged by the Standing Committee on Indigenous Affairs in Australia, the Federal Court of Australia released a landmark judgment against a company that created inauthentic Indigenous boomerangs, didgeridoos, message stones, and bullroarers and sold them for profit.<sup>156</sup> However, this case did not qualify as an infringement case because the art pieces mimicked styles and themes equivalent to Aboriginal artists but were not copyrighted art; rather, it was tried under consumer law because of the misleading and deceptive labeling of the art pieces.<sup>157</sup> The court determined that the evidence of the art being misleading to consumers relied not only on its appearance but also on the accompanying label description.<sup>158</sup> In American consumer law, they take it a step further.

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152. Stephen Stockwell, *'A bloody lot' of fake Indigenous art is being sold. Here's how you can spot it*, ABC NEWS (May 30, 2018), <https://www.abc.net.au/triplej/programs/hack/how-to-spot-fake-indigenous-art/9817052> [<https://perma.cc/W33J-TJVM>].

153. Stephanie Parkin, *The Exploitation of Culture Through Fake Aboriginal 'Style' Art and Craft Products in the Australian Market*, J. ART CRIME, Spring 2021, at 17 (2021).

154. "Ripping off Native American artwork is a multi-million dollar business." PJ Randhawa, *'I will change this federal law in my lifetime': Knockoff Native art law faces renewed criticism*, KING5 (Mar. 1, 2022), <https://www.king5.com/article/news/community/facing-race/knockoff-native-art-law-renewed-criticism/281-dce7ef6f-e41a-44b7-9a04-aefd834b34c6> [<https://perma.cc/3GLJ-7BR8>].

155. JANKE & SENTINA, *supra* note 48, at 35.

156. *Australian Competition and Consumer Commission v Birubi Art Pty Ltd.* [2018] FCA 1595 (Austl.).

157. *Id.*; see Parkin, *supra* note 148, at 14.

158. *Id.*

After a prolonged period of generating a market for Native American art and products in the 19<sup>th</sup> century, the Indian Arts and Crafts Act was established in 1935 (IACA) which made it illegal to exploit Indigenous culture through the selling of fake Indigenous art and laid out the consequences and remedies for those individuals who violated this law.<sup>159</sup> Initially, it functioned through a board of five commissioners to “promote economic welfare of Indian tribes” through the development and “expansion of the market for the products of Indian art and craftsmanship.”<sup>160</sup> The IACA of 1990 maintained this purpose.

The IACA 1990 prohibits the misrepresentation and exploitation of Native American art and craft products within the United States through serious civil and criminal penalties.<sup>161</sup> Under the IACA, an individual who falsely suggests, offers, or sells an Indian tribe product produced after 1934 can face civil and criminal penalties; up to a \$250,000 fine, a 5-year prison term, or both.<sup>162</sup> For a business that violates the IACA by offering or selling goods for \$1,000 or more, they can be prosecuted and fined up to \$1,000,000<sup>163</sup> with future violations climbing to \$5,000,000.<sup>164</sup> Indian product is defined as any “product of a particular Indian tribe or Indian arts and crafts organization.”<sup>165</sup> What is not included, however, are items like literary works, films, and songs.<sup>166</sup>

As noted above, within the United States copyright system, Indigenous tribes are required to register their works to pursue recourse for copyright infringement. Without registration or ensuring their pieces were copyrightable material, their art is left vulnerable. The holes in American copyright law lead to a lack of accountability and create expansive channels of ingenuine Indigenous artwork that the country is still attempting to dismantle today. It perpetuates the cycle of mistreatment and indifference towards Native Americans and does little to rectify our country’s harrowing colonialist history.<sup>167</sup> A way to cut off those ingenuine art channels without going through copyright law is alleging consumer fraud.

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159. Aurora Kenworthy, *Defining Authentic: The Relationship Between Native Art and Federal Indian Policy, 1879-1961* (Feb. 18, 2019) (B.A. thesis, University of Nebraska-Lincoln).

160. Indian Arts and Crafts Act of 1935, Pub. L. No. 74-355, 110 Stat. 3009 (1935).

161. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (1990).

162. *Id.*

163. *Id.*

164. Nw. Just. Project, *The Indian Arts and Crafts Act*, WASH. L. HELP, <https://www.washingtonlawhelp.org/resource/the-indian-arts-and-crafts-act#h> [<https://perma.cc/VDS9-5SZE>] (last visited May 16, 2024).

165. *Id.* (common items this refers to are jewelry, woven baskets, rugs, paintings, and carved stones).

166. *Should I Report a Potential Violation?*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/iacb/should-i-report-potential-violation> [<https://perma.cc/9CVA-QEK8>] (last visited May 18, 2024).

167. “By flooding the market with counterfeit Native American art and craftwork, these crimes cheat the consumer, undermine the economic livelihood of Native American artists, and impair Indian culture.” Associated Press, *2 Artists have been charged with faking Native American Heritage*, NPR (Dec. 10, 2021), <https://www.npr.org/2021/12/10/1063289291/artists-charged-fake-native-american-heritage> [<https://perma.cc/5UZ4-ZAU3>].

The IACA 1990 makes businesses liable for falsely labeling, advertising, and selling products as “Native made.”<sup>168</sup> The IACA has proven successful on some occasions. In 2018, a person involved in creating one of the largest international and illegal supply chains of fake Native American jewelry in the United States was caught for violating the IACA by advertising and selling counterfeit goods as made by Native Americans or even by specific Native individuals (who turned out to be fictitious).<sup>169</sup> As a result, he was required to forfeit 5,268 pieces, pay a \$500 fine, and spend two days imprisonment with a year of supervised release.<sup>170</sup> For a person who was a part of one of the largest organized supply chains of counterfeit Indigenous jewelry, a minor fine of \$500 with insignificant imprisonment time does not reflect a sense of severity by the court. This punishment has also been coined as the most severe punishment under the IACA to date because it is the only one where a defendant was given a prison sentence.<sup>171</sup> For some, this case displayed strength in the justice system, yet for others, this was another example of one of the few shortcomings of the Act.

(a) *Problems with the IACA*

The IACA’s biggest issue lies in enforcement. For catching perpetrators of the IACA, an individual needs to report them to the board.<sup>172</sup> Between 2006 and 2010, there were about 150 flagged cases of potential violations of the IACA by businesses with about 78% of those cases needing further investigation by law enforcement officers.<sup>173</sup> Yet, none of those cases were filed in federal court.<sup>174</sup> There is no internal committee within the board charged with this responsibility.<sup>175</sup> This relies on a person’s ability to identify fake Indigenous art. Further, there is no process in which a business desiring to sell Indigenous art and crafts is required to present tribal identification. In 2021, two artists in Washington were charged with violating the Indian Arts and Crafts Act by misrepresenting themselves as tribal members and selling Native American crafts under the false pretense that they were made by Native Americans from

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168. To avoid violating the IACA, businesses must clearly label their products as “Native American inspired” or “Native American style”. Nw. Just. Project, *supra* note 164.

169. Alexandra Mondalek, *Fake turquoise jewelry is hurting Native Americans economically*, VOX (Oct. 24, 1028), <https://www.vox.com/the-goods/2018/10/24/17995876/fake-turquoise-native-american-santa-fakes> [<https://perma.cc/UCE9-CZUL>].

170. *Id.*

171. *Id.*

172. *Id.*

173. “Federal and state agencies have relied largely on educational efforts rather than law enforcement actions to curtail misrepresentation of Indian arts and crafts . . . .” U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 13 (2011).

174. Higgins, *supra* note 1.

175. Mondalek, *supra* note 169.

the tribe they claimed membership to.<sup>176</sup> The reality is that there is no heightened inspection for business owners and individuals wanting to sell Indigenous art. Even if they don't claim ownership to a tribe, they could be claiming counterfeit goods are "Native made" for years before someone in the community reports them to the IACA's board.

Lastly, the IACA of 1990 does not necessarily cover the large gap that copyright leaves in the United States and Australia when it comes to mimicking Indigenous style. In copyright, if the vendor uses the same style as the Indigenous artist but makes their own interpretation, this is not illegal. Style, like ideas, is not copyrightable:

The law of copyright is clear that only specific expressions of an idea may be copyrighted, that other parties may copy that idea, but that other parties may not copy that specific expression of the idea or portions thereof. For example, Picasso may be entitled to a copyright on his portrait of three women painted in his Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not *substantially copy* Picasso's specific expression of his idea.<sup>177</sup>

As for using the IACA within consumer law, it hones in on evidence of false or misleading advertising and misrepresentation. Misrepresentation is not defined under the Act but states that it is "unlawful to offer or display . . . in a manner that falsely suggests it is Indian produced . . . or the product of a particular Indian or Indian tribe."<sup>178</sup> The mere style of a piece of art, in the absence of clear labeling indicating its Native origin, may perpetuate the false impression that it was produced by Indian artisans. Most of the time, vendors will at least label "Native inspired" or "Native designed," which is permitted and encouraged by the Act for those who are non-Native persons, but selling Native-made designs.<sup>179</sup> Further, the IACA board clarified in 2000 that it would not be dictating within the plain language of the law how Indian-designed but non-Indian-made products are to be marketed because it fell outside the scope of the Act.<sup>180</sup> The use of the phrase "Indian designed" creates ambiguity in the market with consumers confusing Indian design with being an Indian product when that is not an Indian product. The requirement that Native persons use the labels "native inspired" or "native designed" is not only limiting to them, but it

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176. Nw. Just. Project, *supra* note 164.

177. *A Guide to Copyright Infringement*, THE ILLUSTRATOR'S GUIDE, <https://theillustratorsguide.com/copyright-infringement/> [<https://perma.cc/3BFF-REHW>] (last visited May 18, 2024); *Dave Grossman Designs, Inc. v. Bortin*, 347 F. Supp. 1150, 1157 (N.D. Ill. 1972).

178. U.S. Dep't of the Interior, *supra* note 11.

179. *Id.*

180. *Id.* For more information, see Roberts, *supra* note 87, at 40-42.

also perpetuates a misleading narrative to consumers who lack an understanding of the nuances of these terms.

The IACA of 1990 is a significant legislative instrument that aims to protect the rights of Indigenous communities and combat the proliferation of counterfeit and falsely labeled products. However, despite its noble intentions, the Act has not yet been fully tested in the context of consumer law, particularly with regard to determining whether it is effective at identifying and penalizing instances where a product is not explicitly labeled as Indian, but its style and design suggest otherwise. This lack of case law raises important questions about the efficacy of the IACA in providing adequate protection for Indigenous communities and their cultural heritage, highlighting the need for further research and analysis in this area.

*ii. The 'Fake Art' Bill*

As of 2024, in Australia there is no specific law that makes it illegal to sell inauthentic Aboriginal art.<sup>181</sup> In 2019, there was an attempt to amend the Australian Consumer Law with the Prevention of Exploitation of Indigenous Cultural Expressions bill, publicly referred to as the 'Fake Art'<sup>182</sup> bill ("the Bill").<sup>183</sup> The objective of the Bill was to combat the sale of counterfeit Indigenous art by mandating a transparent agreement with an Indigenous artist or requiring the Indigenous artist to be the supplier of the art.<sup>184</sup> The Bill's scope was not limited to only the realm of arts and crafts. It protected Indigenous cultural expressions, often referred to as traditional cultural expressions, which included forms of art, music, dance, storytelling, and more.<sup>185</sup>

As for penalties, an individual can be fined no more than \$500,000, and for or a business, it can be fined no more than \$10 million or, if determined by the court, three times the value of the benefit obtained directly or indirectly to the commission of the offense.<sup>186</sup> One of the key features of the proposed legislation was its approach to the evaluation of alleged offenses. The Bill imposed strict liability, meaning that the defendant would be held accountable for the alleged offense regardless of their intent or knowledge.<sup>187</sup> The decision to include strict liability to review offenses levies a severity intended on deterring individuals from taking advantage of the fake Aboriginal art scene.

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181. Copyright Agency, *supra* note 2.

182. *Id.*

183. Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) sch 1 (Austl.)

184. THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, COMPETITION AND CONSUMER AMENDMENT (PREVENTION OF EXPLOITATION OF INDIGENOUS CULTURAL EXPRESSIONS) BILL 2019: EXPLANATORY MEMORANDUM 3 (2019).

185. Competition and Consumer Amendment sch 2 subs 1.

186. *Id.* sch 2 subs 50AB.

187. *Id.* sch 2 subs 50AB(6).

As of July 25, 2022, however, the Bill has lapsed with no indication if it will be restored.<sup>188</sup> In the Scrutiny Digest, the document draws attention to concerns about the reversal of the evidentiary burden of proof and strict liability.<sup>189</sup> First, provisions of the Bill stipulated that the defendant must produce evidence to rebut the charges, effectively inverting the traditional principle of “innocent until proven guilty.”<sup>190</sup> These provisions seeking the reversal of evidentiary burden reflect the urgency to better protect Indigenous communities. Second, the committee did not approve of the application of strict liability to subsection 50AB(1) of the Bill because they believed there was not enough justification for its application.<sup>191</sup> Again, the attempt at assessing an offense through strict liability further amplifies the need to tackle the unique challenges Indigenous communities face in preserving and promoting their cultural heritage.

##### 5. *The IACA v. The Bill*

While the Bill failed, its provisions and language were highly innovative and held the potential to bring about significant and positive change. The Bill had a similar purpose to the IACA in preventing the sale of fake Indigenous art but had a different approach to achieving this goal. The first noticeable difference between the IACA and the Bill is the title. The IACA utilizes the phrase “Indian arts and crafts,” while the Bill employs a broader and more inclusive terminology, referring to it as “Indigenous cultural expressions.” Indigenous cultural expressions derive from the term traditional cultural expressions [TCEs]. As noted above, Indigenous communities place a significant value on preserving their traditions and heritage, and TCEs serve as the embodiment of these traditions and cultural identity.

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188. *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019*, PARLIAMENT OF AUSTRALIA, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs1170%22#ems> [https://perma.cc/3U9L-JRZU] (last visited May 18, 2024). According to the Standing Orders of the Australian Senate, a lapsed bill can be restored and proceed from the place it stopped, but it will need agreement to the Notice Paper. *See* Standing Orders of the Australian Senate, ch. 20 s 136 (2024).

189. THE AUSTRALIAN SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS, SCRUTINY DIGEST 2 OF 2022, at 30-31 (2019).

190. *Id.* Ultimately, this was met with great discord by the committee and a reason for not letting it move forward.

191. Competition and Consumer Amendment sch 1 subs 50AB.

“A person commits an offence if the person, in trade or commerce:

- (a) supplies or offers to supply a good to a person that includes an Indigenous cultural expression; or
- (b) creates, provides or seeks to rely on a document for the purposes of subsection 50A(3), that the person knows or believes is false in any material respect.”

TCEs are defined as the “forms in which traditional culture is expressed,” and are linked to all Indigenous communities around the world.<sup>192</sup> This is often referred to as “expressions of folklore,” which includes a range of expressive mediums such as song, dance, designs, art, ceremonies, handicrafts, and stories.<sup>193</sup> Since TCEs have tangible forms, some TCEs—like art and handicrafts—can be naturally protected by a country’s copyright and trademark law depending on their overall characteristics. Therefore, the distinction between Australia’s Bill and the IACA highlights the different countries’ perspectives on the problem. In Australia’s title, the use of the words “cultural expressions” represents a crucial step forward in acknowledging the breadth and depth of Indigenous cultural expressions and the demand for comprehensive legal measures to safeguard them. In using this language, the Bill asserts to protect more Indigenous cultural art than the IACA.

In contrast, the IACA broadly protects arts and crafts goods. This legislation does not explicitly provide examples of the Indian products that fall under the IACA. In 2003, it was proposed and denied for the language of the act to include examples of Indian products.<sup>194</sup> The purpose of this request is to clarify and increase visibility of the specific items that receive protection, facilitating greater awareness and understanding among others. The Bill, however, took this into consideration, defined an Indigenous cultural artifact, and listed what falls under it.<sup>195</sup> It does the same for Indigenous cultural expressions. It was suggested that the IACA also include cultural expressions like symbols, patterns, and designs in its amendment of 2003.<sup>196</sup> While the Board acknowledge that it was of “significant concern,” these examples of TCEs fell beyond the scope of the Act’s protection unless “misrepresentation was involved.”<sup>197</sup> Although the lists in the Bill are not all-inclusive, the Bill

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192. *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/folklore/> [<https://perma.cc/Q6KS-4RP9>] (last visited May 18, 2023); “T[raditional Knowledge (“TK”)] and TCEs are important elements of the cultural heritage and identity of many indigenous peoples and local communities, as well as of many countries and regions. They may contribute to the welfare, sustainable development and cultural vitality of those communities. Moreover, TK and TCEs were historically...recognized as part of the “common heritage of humanity”, meaning that their benefits belong to all mankind.” Ikenna U. Ibe & Chukwubikem I. Obianyo, *Traditional Knowledge, Traditional Expression and Intellectual Property in Nigeria*, 1 DE JURISCOPE L.J., no. 2, 2021, at 132 (2021).

193. *Id.*

194. The decision for not granting this request is because the Indian Arts and Crafts Board have already stated that Indian products refer to arts and crafts and “not all products generally.” That their decision follows the IACA’s first legislation from 1935. Protection of Products of Indian Art and Craftmanship, 68 Fed. Reg. 35164, 35166 (proposed June 12, 2003) (codified at 25. C.F.R. pt. 309).

195. Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) sch 2 subs 1 (Austl.).

196. Protection of Products of Indian Art and Craftmanship, 68 Fed. Reg. at 35166.

197. *Id.* Yet in cases of misrepresentation of Indigenous symbols and designs, there is currently no legal recourse. See Higgins, *supra* note 144; p. 27. The 2011 GAO report recognized

explicitly encompasses a larger range of Indigenous items and artifacts than the IACA.

Another distinction between the IACA and the Bill lies in their individual approaches to the commercialization of Indigenous products. For example, the Bill states that a good including Indigenous cultural expression is made by the Indigenous person themselves, and the reproduction of the product by a non-Indigenous person must be properly licensed for that reproduction.<sup>198</sup> Further, the good or licensed reproduction needs to attribute its origin to the Indigenous artist or Indigenous community. The IACA only refers to licenses in the context of trademark licensing agreements and does not include such language in the commercial provisions of the Act.<sup>199</sup> Instead, the IACA makes it clear that sellers can use the words “native inspired.”<sup>200</sup> Under the IACA, a non-Indian can even “make and sell products in the style of Indian art,” so long as the products don’t misleadingly suggest they are Indian products.<sup>201</sup>

Moreover, the Bill also addresses the issue of businesses relying on international suppliers by including a provision that prohibits the provision or offer of an Indigenous cultural artifact<sup>202</sup> unless it is produced in Australia.<sup>203</sup> The involvement of international suppliers in the fake Indigenous art industry is a persistent problem in both the United States and Australia.<sup>204</sup> This provision was an attempt to suppress those international channels. However, the IACA is silent on this idea by not including any provision mentioning that specific Indigenous products must come from the United States.<sup>205</sup>

Lastly, the Bill and the IACA share similarities in the offenses they outline. Both the Bill and the IACA were denied the implementation of strict liability

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that cultural expressions were susceptible to misappropriation and distortion, suggesting there’s existing evidence of misrepresentation of TCEs. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 166, at 23.

198. Competition and Consumer Amendment div 6 subs 50A. The Bill defines Indigenous cultural expressions to include anything expressing Indigenous culture “whether through images, form, or any other medium.”

199. U.S. Dep’t of the Interior, *supra* note 11.

200. Copyright Act of 1976, 17 U.S.C. § 101 (2012).

201. 25 C.F.R. § 309.9.

202. A cultural art[i]fact includes carvings, boomerangs, traditional weavings, paintings on bark, didgeridoo and more. Competition and Consumer Amendment sch 2 subs 1.

203. “[I]f the good is an Indigenous cultural art[i]fact, the good is made in Australia by an Indigenous artist or Indigenous community with whom the Indigenous cultural expression contained on the Indigenous cultural art[i]fact is connected.” *Id.* div 6 subs 50A.

204. Referring to the cases discussed in the beginning of the analysis, *Milpurrru* dealt with carpets imported from Vietnam. Carpets, under the Bill’s definition would be classified as a cultural art[i]fact meaning it’s required to have derived from Australia. United S. & E. Tribes, *supra* note 91. Another case was *Birubi* art where the company imported the crafts from Indonesia. Higgins, *supra* note 1.

205. The only piece of legislation close to this idea is the Safeguard Tribal Objects of Patrimony Act of 2021 that became law on December 21, 2022. This law prohibits the exportation of burial sites, human remains, and funerary objects and facilitates the international repatriation of these items, not on arts and crafts or cultural expressions. *See* H.R. 2930, 117th Cong. (2022) (enacted).

review.<sup>206</sup> Both pieces of legislation include financial penalties for individuals and businesses and impose large fines.<sup>207</sup> The noteworthy difference is the Bill's decision to reverse the evidentiary burden of proof. Rather, the IACA evaluates its cases where the petitioner bears the burden of proof through a preponderance of the evidence.<sup>208</sup> This difference, among the others mentioned in this section, highlight the Bill's recognition of the intricate difficulties Indigenous communities face in getting legal remedies for their losses.

Although the Bill's language and structure are strong, the IACA's advantage is that it is currently implemented. Had the Bill been enacted, Australia would have aligned itself with the international trend toward preserving TCEs and taken a leading role in the global community's efforts to protect these valuable cultural assets. But despite these efforts on behalf of both countries, what Australia's consumer law and copyright law and the United States' copyright and Indian Arts and Crafts Act all have in common is their limited abilities to fully protect Indigenous art.

#### IV. RECOMMENDATIONS

Indigenous communities often face challenges when attempting to establish copyright ownership of their work, as copyright requires the work to exist in a fixed tangible form of expression. If these issues are overcome, Indigenous communities face the challenge of how to protect generational pieces of work under copyright's time limitations, which then could subject the art to public domain laws and are thus not afforded protection under copyright laws. Even if the copyrightable material is successfully copyrighted, it remains vulnerable to imitation and misappropriation due to copyright's leniency with an artist taking inspiration. Furthermore, the limitations of consumer laws further compound these issues. Overall, these challenges highlight the systemic gaps in protection for Indigenous communities and the need for alternative approaches to safeguard their intellectual property rights.

Current Western copyright and intellectual property laws fall short of holistically protecting Indigenous cultural expressions because of the varying value systems of Western and Indigenous cultures.<sup>209</sup> The Western concept is

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206. THE AUSTRAL. SENATE STANDING COMM. FOR THE SCRUTINY OF BILLS, *supra* note 181, at 30-31; Protection of Products of Indian Art and Craftmanship, 68 Fed. Reg. 35164, 35165.

207. Although, the Bill definitely has the largest fine for a business of no greater than \$10 million. Competition and Consumer Amendment sch 1 subs 50AB.

208. *United States v. Sterling Islands, Inc.*, 491 F. Supp. 3d 1010 (D.N.M. 2020). The Safeguard Tribal Objects of Patrimony Act of 2021 has similar language of switching the evidentiary burden of proof on the respondent. *See* H.R. 2930, 117th Cong. (2022) (enacted).

209. "The main problem of enforcing rights for contemporary indigenous groups stems from the dichotomy between the value systems of Western and indigenous culture. The values of indigenous culture do not fit within the European concept of the egocentric individual that is the current focus of the legal regime today." In other words, the egocentric idea leans more towards

based on an egocentric idea in which the work belongs to a singular individual and the notion of communal ownership is not recognized as equivalent.<sup>210</sup> Its time limitations are intended to provide equal opportunity for others to create similar works in the market, which is often contradictory to Indigenous values. Their work that is central to their livelihood, culture, and laws can potentially fall under intellectual property protection. Thus, given the distinctive protection this community needs, it calls for a legislative solution that is also distinct to them and their way of life.

#### A. *Sui Generis Laws*

According to WIPO, the protection of TCEs can be ensured through two different approaches: (1) defensive and (2) positive. A defensive protection approach is using the power of intellectual property to prevent individuals outside the community from obtaining intellectual property rights over a creation or product.<sup>211</sup> A positive protection approach uses its own set of specific rights to give communities the ability to support their traditional knowledge, regulate its utilization, and reap financial benefits from its commercialization. In short, positive protection is a way to bestow the rights to Indigenous communities to protect and promote their TCEs by controlling their uses by third parties. A common way the positive approach is achieved is through *sui generis* laws.<sup>212</sup>

*Sui generis* is translated to mean “of its own kind.”<sup>213</sup> Due to the adaptability of *sui generis* law to mold around the issue in need of protection, it has been proposed that they could adequately protect what copyright cannot.<sup>214</sup> In a legal framework, *sui generis* is used to create an independent section of laws dedicated to items or subjects that do not fit in the standard categories. They offer a particular defense by using specific language uniquely tailored to the

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exclusive rights while Indigenous values lean for collective rights. Sabine Sand, *Sui Generis Laws for the Protection of Indigenous Expressions of Culture and Traditional Knowledge*, 22 U. QUEENSL. L.J. 188, 189 (2003).

210. *Id.*

211. India presents as a popular example for compiling a searchable database of traditional medical knowledge for patent examiners to use before approving a patent application on a new medicine. *Traditional Knowledge and Intellectual Property – Background Brief*, WORLD INTEL. PROP. ORG., [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](https://www.wipo.int/pressroom/en/briefs/tk_ip.html) [<https://perma.cc/RS89-8U5F>] (last visited Feb. 6, 2023).

212. “Some uses of traditional knowledge can be protected through the existing intellectual property system, and a number of countries have also developed specific legislation.” *Id.* “While positive protection of traditional knowledge requires a sui-generis law to allow effective economic exploitation, defensive protection of traditional knowledge can be provided for within the intellectual property framework.” REPUBLIC OF RWANDA MINISTRY OF TRADE & INDUS., REVISED POLICY ON INTELLECTUAL PROPERTY IN RWANDA 24 (2018).

213. [*Sui generis*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/sui\\_generis](https://www.law.cornell.edu/wex/sui_generis) [<https://perma.cc/88T3-PUU2>] (last visited Feb. 6, 2023).

214. World Intell. Prop. Org., *supra* note 211.

thing needing protection. *Sui generis* laws are not a novel solution, and they are widely used in tandem with the intellectual property framework. Namely, the United States and Australia—alongside many other countries—protect semiconductor chips under *sui generis* laws using a combination of patent and copyright characteristics.<sup>215</sup> The *sui generis* law specifically protects a pattern laid out in the semiconductor chip. In copyright, patterns are not copyrightable. The argument then lends itself to the question of why can't there be a *sui generis* law for Indigenous designs.

A law “of its own kind” specifically protecting TCEs could greatly protect Indigenous communities on a domestic and international scale. These laws give credence to more Indigenous cultural artifacts than standard copyright laws. Some countries have already adopted their own versions of *sui generis* laws either within their established intellectual property laws or decided to create a separate law entirely dedicated to the various issues encompassing Indigenous communities. By analyzing the language and methods of Congo, Nigeria, and Panama’s *sui generis* laws on the topic, Australia and the United States can learn from their approach.

### 1. Congo’s Sui Generis Law

Despite the number of countries that have implemented *sui generis* laws covering TCEs, Congo is one of the few countries that has no time limit for works of “national folklore”.<sup>216</sup> The chapter mentions folklore as “all literary and artistic productions created on the national territory” by authors of Congolese ethnic communities that are passed down by generations.<sup>217</sup> In article 16 of the law, these folklore works are protected “without limitation in time.”<sup>218</sup> The importance of not having a time limit is to emphasize the continuity of protection under the law and to ensure that traditional cultural expressions will

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215. Semiconductor Chip Protection Act of 1984, H.R. 5525, 98th Cong. (1984). This United States Act extends *sui generis* protection particularly to the layout of a semiconductor chip. Semiconductor chips contain a “mask” which is defined as “the two- and three-dimensional features of shape, pattern, and configuration of the surface of the layers of a semiconductor chip product . . . .”

216. In Congo’s law, it refers to TCEs as folklore since TCEs technically embody such folkloric works. Folklore is understood by the Congolese government as belonging to its national heritage, thus it is socially recognized with more importance. Many other countries which implement TCE provisions either in their present copyright laws or a separate law entirely refer to TCEs as folklore. Law on Copyright and Neighboring Rights, No. 24/82 (1982), ch. 3 art. 15 (Congo), <https://www.wipo.int/wipolex/en/text/152625> [<https://perma.cc/5RS2-Q772>].

217. *Id.* ch. 3 art. 15.

218. *Id.* ch. 3 art. 16. Another way to approach time constraints is seen in Mali, where all creative works enter the public domain after a certain period by taking on Mali’s solution, while the work would still enter the public domain, the requirement to get approval could help impose control over what can be reproduced. Emily Cox, Adrienne Baker, Ariel Rosthstein & Miriam Weiler, *Module 8: Traditional Knowledge*, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y AT HARV. UNIV., [https://cyber.harvard.edu/copyrightforlibrarians/Module\\_8:\\_Traditional\\_Knowledge](https://cyber.harvard.edu/copyrightforlibrarians/Module_8:_Traditional_Knowledge) [<https://perma.cc/46AX-D7DC>] (last visited Dec. 1, 2022).

not become part of the public domain. In an opening statement in the forty-fourth session at Geneva for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, the Arts Law Centre of Australia testified that when TCEs enter the public domain, it creates further trauma and cultural harm.<sup>219</sup> The concern with entering the public domain is the loss of control over the piece.<sup>220</sup> By removing the possibility for TCEs to enter the public domain for free use, Indigenous artists have greater protections in reducing the risk of misappropriation.

Moreover, Congo prevents the misrepresentation of folklore by prohibiting copies of folklore, translations, or other transformations of such works without authorization.<sup>221</sup> Even adaptations of folklore or “use of elements” cannot be borrowed unless they are approved by the representing body of officials.<sup>222</sup> Article 20 and article 18 tackle two things; first, copyright’s broad definition of inspiration permits artists to use elements from existing works in their own creations. And second, the “use of elements” language may pertain to prohibiting utilizing designs. With copyright’s limitation in protecting tangible works, styles and designs are examples of intangible cultural expressions that frequently get overlooked by traditional intellectual property law.<sup>223</sup> In Poland, an artist used the geometric designs of an Aboriginal artist—Bibi Barba—to style the interior of a hotel.<sup>224</sup> While the hotel designer used similar designs and was aware they were of Aboriginal origin, the designer claimed the work was just an inspiration.<sup>225</sup> This was further complicated by the fact that Barba’s work was in the public domain.<sup>226</sup> The difficulty with styles being copyrighted is limiting the market to other creators. However, as stated, designs by Indigenous artists are distinct and tie directly with their heritage. Misappropriating this style

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219. Arts Law Centre of Australia, Opening Statement at the 44th session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Sept. 12, 2022), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_44/wipo\\_grtkf\\_ic\\_44\\_statement\\_arts\\_law\\_centre.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_44/wipo_grtkf_ic_44_statement_arts_law_centre.pdf) [<https://perma.cc/JHV8-ZTBG>].

220. *Id.*; see text accompanying *supra* notes 211-15. The Polish artist argued that they used the design fairly because it entered the public domain.

221. Law on Copyright and Neighboring Rights ch. 3 art. 20.

222. *Id.* ch. 3 art. 18.

223. Rooted in Indigenous art and craftwork, styles hold equal importance to Indigenous individuals as the art piece does alone. Indigenous designs tell a story about tradition and customs.

224. JANKE & SENTINA, *supra* note 48, at 38. Barba’s use of icons and designs told a story her grandmother used to tell her.

225. *Id.*

226. *Id.* Although this case was tried under Polish copyright laws, Australia’s copyright also does not protect style.

is like using someone else's story as your own.<sup>227</sup> Congo's law seems to address this with this provision.<sup>228</sup>

To address the challenge of communal ownership, Congo has included language in Chapter 3, Article 15 that specifies that TCEs are created by "authors presumed to be Congolese nationals or by Congolese ethnic communities."<sup>229</sup> The key word in this phrasing is "authors." This emphasis on communal ownership is reinforced in Article 25, which states that "co-authors" of a cinematographic work can dispose of their individual contributions, as long as it does not harm the integrity of the work as a whole.<sup>230</sup> By using the term "co-authors" and "authors," Congo is acknowledging the concept of shared ownership. By recognizing communal ownership, it can provide broader protection for the item in question. The exceptions to this protection include using the protected works for personal, educational, or informational purposes without the need for consent from the original authors.<sup>231</sup> However, if there is a violation of this provision, Congo's board will impose a fine based on the harm caused.

## 2. Nigeria's Sui Generis Law

In Nigeria, its TCE provision is embedded within its copyright law. The folklore provision starts off by stating that folklore is protected against reproduction, adaptations, or other transformations.<sup>232</sup> Nigeria also does not permit unauthorized communication of TCEs to the public through broadcasting and cable transmission unless it falls under fair use.<sup>233</sup> In contrast, Congo allows the use of TCEs in these mediums unless the work specifically states otherwise.<sup>234</sup> While Nigeria has a more restrictive approach when it comes to broadcasting TCEs, they accept the use of TCEs as inspiration for creating new

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227. "In truth, much traditional clothing is not simply functional or ornamental but is infused with meaning and is part of the identity of the Indigenous communities that use it. That is why copying designs without consideration for their underlying cultural significance can erode the identity of a whole community." Brigitte Vézina, *Curbing cultural appropriation in the fashion industry with intellectual property*, WIPO MAGAZINE (Aug. 2019), [https://www.wipo.int/wipo\\_magazine/en/2019/04/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html) [<https://perma.cc/35Y5-QGL3>].

228. Another solution is for the law to contain specific language to protect designs sacred to ethnic communities, as done in Rwanda. The Protection of Intellectual Property, No. 31/2009 (2009) art. 6(24) (Rwanda).

229. Law on Copyright and Neighboring Rights, No. 24/82 (1982), ch. 3 art. 15 (Congo).

230. *Id.* ch. 3 art. 25.

231. Also allows an exception for when folklore is used by a public agency or for a non-profit. Law on Copyright and Neighboring Rights, *supra* note 208, tit. III ch. 3.

232. Copyright Act (2004) Cap. (C28), § 31(1) (Nigeria).

233. *Id.* § 31(3).

234. Law on Copyright and Neighboring Rights, No. 24/82 (1982), tit. III ch. 3, § 2 (Congo).

and original works as long as it's fair use.<sup>235</sup> This provides more opportunities for new works using Indigenous designs, unlike in Congo where the exceptions are much more limited. Notwithstanding, Nigeria imposes criminal liability for those who misrepresent or willfully distort the expression of folklore.<sup>236</sup> An individual guilty under this section is subject either to a fine not exceeding \$217.01 in U.S. currency or to one year imprisonment or to both.<sup>237</sup> Corporations are subject to a fine of \$1085.05.<sup>238</sup>

Lastly, it goes on to define folklore as a “group-oriented and tradition-based creation . . . reflecting the expectation of the community as an adequate expression of its cultural and social identity.”<sup>239</sup> This language of “group-oriented creation” supports the notion of communal ownership and clearly implies that folklore is considered a shared and protected resource within the community.

### 3. *Panama's Sui Generis Law*

Panama distinguishes itself by enacting a separate *sui generis* law specifically towards protecting its TCEs. Since the law is not fixed within copyright legislation, it greatly details its purpose, definitions, registration system, and scope of application. A definition that Panama's law focuses on is collective Indigenous rights and collective intellectual property registration. Collective Indigenous rights are defined as “intellectual property rights relating to art, music, literature . . . and other subject matter and manifestations that have no known author or owner and no date of origin.”<sup>240</sup> This language, including the phrases “no known author” and “no date of origin,” directly contradicts copyright legislation. Collective intellectual property registration is defined as the “exclusive right granted by the State . . . to prohibit third parties from the exploitation of collective rights deriving from [traditional knowledge (TK)] or an expression of folklore.”<sup>241</sup> Firstly, the legislation directly addresses these qualities by basing the legal instrument on these definitions. Secondly, the definition of collective intellectual property registration embodies the proactive stance that *sui generis* laws aim to take.

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235. This provision allows the “borrowing of expressions of folklore for creating an original work of an author” so long as the utilization is compatible with fair use practices. This paper does not dive into the fair use element of copyright and its relationship with further harming TCEs. Copyright Act (2004) § 31(2).

236. *Id.* § 33(1).

237. *Id.* § 33(2a).

238. The amount owed in Nigerian currency is 100,000 for an individual and 500,000 for a corporation. *Id.* § 33(2b).

239. The provision continues to list examples of types of folklore that warrant protection. *Id.* § 31(5).

240. MINISTRY OF TRADE & INDUS., EXECUTIVE DECREE NO. 12 (OF MARCH 20, 2001) ch. 1 art. 2(v) (2001), <https://www.wipo.int/wipolex/en/text/179591> [<https://perma.cc/RT8J-M5CS>].

241. *Id.* ch. 1 art. 2(ix).

One key difference between Panama's *sui generis* law and Congo and Nigeria's laws is Panama's registration system which was established for Indigenous groups to register their works in a database.<sup>242</sup> A database makes the public aware of what cannot be used. The registration of the TCEs or TKs is not mandatory to be protected under the law, however, the database allowing for Indigenous communities to collectively register their traditional knowledge and TCEs takes it a step further in recognizing communal rights over exclusive rights.<sup>243</sup>

The law lays out what subject matter is eligible for protection including an exhaustive list of cultural pieces such as jewelry, art, material used for craftwork and artwork, baskets, and clothing.<sup>244</sup> Panama established a Department of Collective Rights and Expressions of Folklore to help coordinate and register expressions of folklore.<sup>245</sup> This department provides technical support and training on intellectual property laws, monitors non-Indigenous compliance with existing laws protecting TCEs, and coordinates with international organizations to ensure indigenous persons are benefitted.<sup>246</sup> Including language about international involvement also sets this law apart from many others. As mentioned, corporations that sell Indigenous art most often use suppliers from other countries with weak enforcement.<sup>247</sup> By keeping a close eye on international developments, it ensures more robust protection for Indigenous communities.

Additionally, Panama's law strictly prohibits the use of TCEs for copying or reproduction without the proper documentation. Anyone interested in using TCEs for their commercial benefit would need to receive authorization by the Directorate General of National Handicraft of Ministry of Commerce and Industry, a record and signed express consent from the Indigenous community or Indigenous council, a copy of the license contract for use, and a description on what the folklore will be used for.<sup>248</sup> Should non-Indigenous artists want to produce Indigenous artwork and craftwork, they would need to get a permit and

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242. Peru also has a register to protect traditional knowledge or customs. Nicolás Gutiérrez, *Latin America – How Latin America countries protect their traditional knowledge through IP*, EUR. COMM'N (Jan. 16, 2020), [https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/how-latin-america-countries-protect-their-traditional-knowledge-through-ip-2020-01-16\\_en](https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/how-latin-america-countries-protect-their-traditional-knowledge-through-ip-2020-01-16_en) [<https://perma.cc/NFB6-H7PP>].

243. MINISTRY OF TRADE & INDUS., *supra* note 240, ch. III art. 6.

244. *Id.* ch. II art. 3.

245. *Id.* ch. III art. 14.

246. *Id.*

247. JANKE & SENTINA, *supra* note 48, at 37.

248. The section then goes on to detail what needs to be included in the licensing contract. MINISTRY OF TRADE & INDUS., *supra* note 232, ch. VI arts. 17-18.

authorization.<sup>249</sup> If a third-party does not comply with the rules set out, they are subject to four to six years of imprisonment.<sup>250</sup>

### *B. Is Sui Generis Enough?*

In analyzing the three countries' *sui generis* laws on TCEs, the variety and scope of protection differ based on government structures, economic means, and levels of importance. Countries, like the United States and Australia, can observe what works in these countries and what does not in creating their own *sui generis* laws. And although these protections have seemingly laid down a strong foundation for protecting TCEs, there are some scholars who believe that *sui generis* laws are not the best solution.

For starters, the success of a *sui generis* system is dependent on the recognition and enforcement by the country that's implementing it. In the 2013 GAO report on the misrepresentation of Indian arts and crafts in the United States, it was stated that Nigeria believed their law protecting TCEs has never been used.<sup>251</sup> Some countries have also based their *sui generis* law on customary law, however, this runs into enforcement and acknowledgement problems. The countries that base their *sui generis* law on customary law need to have strong enough customary law provisions for there to be successful protection. For example, Australia strongly recognizes its customary law in tandem with its copyright law. This was exemplified in a case *Bulun Bulun v R & T Textiles*. The court ruling in the case of *Bulun Bulun v R & T Textiles* stated that the painting contained ritual imagery of utmost importance to the Ganalbingu community and that Mr. Bulun Bulun had customary law obligations to his clan to not take any actions that could harm the communal interests of the clan.<sup>252</sup> Yet, in the United States, customary laws are not commonly used in tandem with intellectual property cases.

Furthermore, *sui generis* laws can present new administrative problems. In Nigeria and Congo, fines are administered through the government for unauthorized use of Indigenous work. However, this shift to centralized management could provide little economic benefit and cultural protection.<sup>253</sup> This remains true in similar alternative scenarios today. A large issue with the United States' IACA is enforcement. The governing board in charge of cracking down on the misappropriated art and craftwork rarely pursues charges. This

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249. *Id.* ch. VII art. 27.

250. The code penalizes any person who reproduces, copies, modifies in whole or in part a work or who stores, distributes, exports, assembles, installs, manufactures, imports, sells, alters, or releases any other unlawful reproduction of a work protected by the collective right. Código Penal [Penal Code] arts. 270-271 (Pan.).

251. Despite these concerns, the GAO report has not been updated and there is limited access to verify this statement. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 173, at 30.

252. JANKE & SENTINA, *supra* note 48, at 32-33.

253. N.Y.C. BAR ASS'N AFR. AFFS. COMM., LEGAL FRAMEWORKS FOR PROTECTING TRADITIONAL CULTURAL EXPRESSIONS IN WEST AFRICA 10 (2016).

pattern persists to this day, where the reporting process relies on community members, and the Board's investigations can be slow-moving or result in charges being dropped.<sup>254</sup> Alternatively, if the government were to entrust Indigenous communities with royalties, there is an issue of multiple Indigenous communities coming forward to claim the same piece of folklore due to the broad language of folklore materials in the laws.

Finally, scholars are hesitant in general to write in *sui generis* laws into intellectual property provisions or at least in relation to them because of their varying principles. Intellectual property's purpose is to inspire creativity and innovation. The public domain is essential to this purpose. Restricting access to works that should enter the public domain can perpetuate the idea that knowledge is not a communal or public good.<sup>255</sup> With their varying purposes, it is not a surprise that intellectual property laws do not sufficiently protect TK and TCEs. From inception, they were not aimed at protecting these areas. And since *sui generis* laws complement the intellectual property system, it may not necessarily be the most effective solution. Regardless, a law that is of its own kind is better than no law at all.<sup>256</sup>

### *C. Current Efforts in Australia and the United States to Protect Indigenous Knowledge and Cultural Expressions*

Recently, Australia released an Indigenous Knowledge initiatives page within the government's intellectual property website.<sup>257</sup> The initiatives section details a workplan for 2022-2023 outlining six main objectives for better protecting TCEs. One of the objectives is to create guidance materials that incorporate consultation feedback for the respectful use of Indigenous knowledge.<sup>258</sup> Another objective is to create stand-alone legislation that adequately supports traditional knowledge.<sup>259</sup> In the United States, the White House has issued guidance on Indigenous knowledge, aimed at helping agencies comprehend its nature and promising to involve Indigenous communities in

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254. Mondalek, *supra* note 4.

255. J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15(1) MARQ. INTELL. PROP. L. REV. 149, 191 (2011).

256. "Notwithstanding the issues with a *sui generis* rights framework, an instrument giving rise to enforceable traditional knowledge rights is necessary, because: voluntary measures such as codes and protocols are most effective for those parties interested in and committed to compliance; international laws provide guidance but rarely enforceable measures; and private law remedies are most effective for parties with bargaining chips firmly in hand." Erin Mackay, *Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and An Alternative Approach*, 32 U. N.S.W. L.J. 1, 24 (2009).

257. *Indigenous Knowledge initiatives*, IP AUSTRALIA, <https://www.ipaustralia.gov.au/About-us/ip-australia-overview/our-research/indigenous-knowledge-project> [<https://perma.cc/Y6AN-ETPG>] (last visited Mar. 4, 2023).

258. IP AUSTRALIA, *IP AUSTRALIA INDIGENOUS KNOWLEDGE WORK PLAN (2022-2023)*, at 1, 3 (2022).

259. *Id.*

implementing statutory requirements.<sup>260</sup> The guidance further includes an illustrative list of statutes where the incorporation of Indigenous knowledge could be useful.<sup>261</sup> Yet, this list does not include the intellectual property statute.<sup>262</sup> The substitution of traditional knowledge for traditional cultural expressions may not be a straightforward solution, but it may eventually suggest that TCEs are subsumed under traditional knowledge. When considering Australia's work plan and a dedicated page on their government website, it can be inferred that while they may lack legislation comparable to the IACA, their efforts towards protecting Indigenous communities are more progressive than those of the United States.

## V. CONCLUSION

All forms of property rights inherently restrict accessibility in some way and there is no perfect solution to honor TK and TCE while also allowing for artists to be inspired by these same ideas and works. While *sui generis* laws have concerns, their mere existence where law did not already exist is beneficial. In a 2013 GAO report analyzing the extent of misrepresentation in Indian arts and crafts, the United States recognized that a way of addressing the complex issues surrounding the sale of fake Indigenous art is the implementation of TCE law or provisions.<sup>263</sup>

As observed through the law of the three countries above, the United States and Australia could create their own *sui generis* laws within their intellectual property legislation, or in a separate code section altogether. Copyright terms in both countries already are adjusted by the type of material. Whether it is through having no limit or extending the protection in perpetuity, the statute could cover other forms of art such as ancient rock art and the *Wandjina* figure.<sup>264</sup> The TCE law also would need to include language prohibiting the reproduction or adaptation of sacred styles and recognize communal ownership. Additionally, utilizing a database system could help ensure protection for such styles and would reinforce the concept that these styles are a part of Indigenous culture.

The misappropriation of Indigenous art not only negates the purpose of copyright but violates the Declaration on the Rights of Indigenous Peoples. Although the Declaration is not legally binding, countries pledge to it for accountability purposes. Additionally, misappropriating Indigenous art places a large economic disadvantage on an already marginalized community. This

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260. See Memorandum from Joseph R. Biden on Uniform Standards for Tribal Consultation to the Heads of Executive Departments and Agencies (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/> [<https://perma.cc/6XRB-SURA>].

261. *Id.* § 5-8.

262. *Id.*

263. See generally U.S. Gov't Accountability Off., *supra* note 166.

264. JANKE & SENTINA, *supra* note 48, at 6.

economic disadvantage is compounded when the industries they thrive in the most are taken away by counterfeit sellers.

Not only does this place an obvious economic hindrance, but more importantly, the stories passed down from generation to generation that are told within the designs of an art piece are destroyed. In a community with limited influence and voice, copyright legislation is not effective in preserving their cultural heritage. As such, *sui generis* laws can provide a tailored solution that protects Indigenous cultural heritage and ensures the survival of traditions for future generations.