COPYRIGHT PROTECTION'S CHALLENGES AND ALASKA NATIVES' CULTURAL PROPERTY

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INTRODUCTION

There is something immediately distinctive about the Northwest Coast Barbie. While she shares the same impossible physique and high heels common to Mattel's iconic product line, the Northwest Coast Barbie sports a dark complexion, and her black hair falls onto an earthy, patterned "Chilkat blanket."[1] The box identifies this particular Barbie as a member of the Tlingit; a brief description of the Tlingit follows.[2]

This doll illustrates just one way in which Americans are familiar with Alaska Native art and imagery, even if they have never been to Alaska and do not know any Alaska Natives. The significance of some items, like totem poles, is common knowledge. A hawk designed in the artistic style native to the Pacific Northwest serves as the logo for the Seattle Seahawks. Trinkets and souvenirs in Alaska Native styles are regularly purchased by the thousands of tourists who visit Alaska each year.

Beyond its popular appeal, Alaska Native art enjoys attention from academics and art collectors. Museums around the country hold large collections of Alaskan art; the Smithsonian's National Museum of the American Indian boasts over a thousand Alaska Native objects.[3] Alaskan

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1. Liz Ruskin, "Tlingit Barbie, but Barbie Nonetheless," MILWAUKEE JOURNAL SENTINEL, Mar. 8, 2000, at 12B ("Her long, synthetic hair cascades over the fuzzy Chilkat blanket . . . . ").

2. For a picture of Northwest Coast Barbie and the text on the accompanying packaging, see *Northwest Coast Native American Barbie Doll*, BARBIE COLLECTOR, http://www.barbiecollector.com/shop/doll/northwest-coast-native-american-barbie-doll-24671 (last visited Nov. 11, 2012).

3. *See, e.g.*, *Collections and Research*, NAT'L MUSEUM OF THE AMERICAN INDIAN, http://www.americanindian.si.edu/searchcollections/results.aspx?catids =0&place=alaska&src=1-3 (last visited Oct. 7, 2012) (displaying thumbnail

art also features prominently in Native American art auctions, with a Tlingit rattle fetching $625,000 last year at Christie's.[4]

Given the popularity and economic importance of Alaskan arts and crafts, Alaska Native communities would benefit from the use and sale of their cultural property. Additionally, like other indigenous peoples, Alaska Natives seek to block the use of images and objects with sacred and religious significance. Therefore, some groups of Alaska Natives, most notably the Sealaska Heritage Institute, have taken measures to protect their cultural property and have begun to call for increased intellectual property protection.[5] Unfortunately, most of the works these groups seek to protect are not eligible for copyright protection because of conflicts with copyright requirements. For instance, the requirement of fixation in a tangible medium of expression[6] would preclude protection for oral folklore and songs. Additionally, many of the remedies these groups desire, such as the ability to block the use of sacred images, cannot be provided under current copyright laws. Therefore, Alaska Natives and other indigenous groups would have to obtain intellectual property-like protection through a *sui generis* regime, deviating from the existing framework.

This issue is not limited to Alaska. Indigenous intellectual property issues have attracted global attention. Despite many efforts to address indigenous communities' need and desire to protect their intellectual property, the international community has not reached a consensus about how to accomplish this goal.[7] The World Intellectual Property Organization (WIPO) continues to be involved in efforts to develop a framework to approach and address these issues.[8] Indigenous peoples'

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photos of the museum collection).

4. *Northwest Coast Ceremonial Rattle*, CHRISTIE'S, http://www.christies.com /lotfinder/northwest-coast-ceremonial-raven-rattle-probably-tlingit /5400615/lot/lot_details.aspx?from=salesummary&intObjectID =5400615&sid=d73d8283-3de0-4e1e-9ad1-79b57add7027 (last visited Oct. 7, 2012) (displaying a photo of the rattle and a brief description).

5. *See, e.g.*, *Cultural and Intellectual Property Rights Policy*, SEALASKA HERITAGE INST. (Jan. 16, 2004), http://www.wipo.int/export/sites/ www/tk/en/folklore /creative_heritage/docs/sealaska_cultural_policy.pdf (describing process implemented by the Sealaska Heritage Institute).

6. *See* 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . .").

7. Jane Anderson, issues paper, *Indigenous/Traditional Knowledge & Intellectual Property*, at 2 (2010), *available at* http://web.law.duke.edu/cspd /itkpaper (discussing the state of international efforts to protect traditional intellectual property, and referencing organizations working on the issue).

8. *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WORLD INTELLECTUAL

concerns range across all areas of the intellectual property spectrum, and, as will be discussed in more detail, the protection of any particular item may simultaneously raise questions that span many areas of intellectual property law.[9]

Outsiders commonly exploit the intellectual property of indigenous persons. Many medical discoveries have relied on indigenous people's knowledge of the properties of local plants.[10] From this body of knowledge ethnobotanists and other researchers have analyzed rainforest plants, hoping to identify chemical compounds to serve as active ingredients in pharmaceuticals.[11] Beyond serving as source material for pharmaceutical research, traditional cultural practices can become commodities themselves: Bikram Choudhury studied yoga, selected several positions, then copyrighted his arrangement of the poses to develop the yoga program that bears his name. Yoga studio owners who want to use the Bikram yoga sequence, or to use the name Bikram Yoga, must license from Choudhury.[12] Although the validity of his copyright has been challenged, lawsuits against infringing studios have settled, leaving questions over the validity of Bikram's copyright unresolved.[13]

The Bikram Yoga example highlights a greater issue: scholarly research on indigenous knowledge can receive copyright protection. Thus, if an academic catalogues dance series or rituals, that could be copyrighted. When indigenous groups seek to use the collections as source material, they may need to secure the permission of the copyright owners to make use of the indigenous groups' own historic cultural

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PROPERTY ORGANIZATION, at 4 (Oct. 5, 2011), *available at* http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_40/wo_ga_40_7.pdf (detailing a framework for the protection of traditional knowledge and folklore).

9. Anderson, *supra* note 7, at 2 (discussing how a single traditional piece could raise issues regarding copyright, trademark, design, and confidential information).

10. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 128 (1st ed. 1996) (describing two examples: tribal medicines being successful in killing the AIDS virus, and vinca alkaloids from Madagascar being used to treat diabetes).

11. *See id.*

12. Anderson, *supra* note 7, at 11–12 (discussing Bikram Choudhury's copyrights, licensing process, and aggressive enforcement of his copyright claim).

13. *See, e.g.*, Open Source Yoga Unity v. Bikram Choudhury, No. C 03-3182 PJH, 2005 WL 756558, at *10 (N.D. Cal. Apr. 1, 2005) ("[T]here are numerous questions of fact at issue which prevent the court from determining on summary judgment . . . ."); Anderson, *supra* note 7, at 12 (arguing that Choudhury's selection and arrangement of the poses would likely satisfy the criteria for copyrighting compilations of facts and ideas).

property.[14] Therefore, Bikram Choudhury's actions unsurprisingly prompted "a large scale effort to catalog the estimated 1500 asanas, yoga body positions, in order to prevent [future] cases."[15]

This Note will survey several topics pertaining to Alaska Natives' cultural property. Section I provides an overview of copyright, the area of American intellectual property law most related to the protection of artistic property, focusing on copyright's requirements and its theoretical grounding. Section II discusses generally Native American views on property and the difficulties encountered when seeking to apply copyright law to Native American works. This Section will contrast the United States' unwillingness to judicially recognize collective property rights with two Australian cases. Section III highlights two existing methods to accomplish some of the goals of Alaska Native groups: the Silver Hand authentication program, a collective mark, and Native American Graves Protection and Repatriation Act (NAGPRA), which allows tribes to seek trade secret-like protection for their sacred cultural property. Section IV surveys recent, or current, topics of interest to Alaska Natives, highlighting that disputes could be resolved without needing to alter intellectual property law.

I. THE EXISTING AMERICAN INTELLECTUAL PROPERTY FRAMEWORK: INHERENT BIASES OF COPYRIGHT PROTECTION

Understanding the potential for conflicts between Alaska Natives' concerns and the American legal system requires an understanding of the existing copyright framework. Copyright is the dominant paradigm for the protection of cultural property in the United States. This system incentivizes and rewards artists and authors by granting time-limited exclusive rights, including the rights to make reproductions and adaptations. These rights allow the author to block certain uses of his work.[16] Copyright intends to balance incentives for authors with the public's interest in having unfettered access to a comprehensive inventory of cultural property.[17] Thus, once the copyright protection

14. Anderson, *supra* note 7, at 24 (proposing a copyright exception for indigenous people for works derived from their cultural knowledge).

15. *Id.* at 12 (discussing a potential legal challenge to Bikram's copyrights as a misappropriation of cultural knowledge).

16. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 2 (5th ed. 2010) (discussing that copyright law creates property rights for intangible products or "works of authorship").

17. JAMES BOYLE, THE PUBLIC DOMAIN 48–49 (1st ed. 2008) (discussing the theoretical framework of the public domain). In a famous dissent, Justice

term ends for a given work, that work permanently enters the public domain.[18]

By comparison, many European countries protect literary and creative expression using an analogous system, *droit d'auteur*. In contrast to the common law copyright system, *droit d'auteur* emphasizes authors' moral rights, chiefly the right of authors to control and protect their works.[19] These rights evidence a philosophical starting point that is more strongly supportive of authors. For instance, under this system authors may object to any action that would abridge, distort, or prejudicially alter their works.[20]

Since the enactment of the 1976 Copyright Act, artistic expression has, by default, received copyright protection.[21] Works obtain automatic protection upon the moment of fixation in a tangible medium of expression.[22] This protection lasts for seventy years after the life of the author to allow the author and his heirs to benefit financially.[23]

A. Requirements for Copyright Protection

To be eligible for copyright protection, an item must be more than simply an idea or concept. Traditionally, explanations and expressions receive copyright protection, while the concepts and ideas do not; the

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Brandeis articulated that "[t]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 250 (1918) (discussing the copying and dissemination of wire source news articles by third parties).

18. BOYLE, *supra* note 17, at 48–49 (noting, however, that the public domain of "facts and ideas" is being enclosed, and the idea of common intellectual property is under assault).

19. LEAFFER, *supra* note 16, at 389 (two fundamental components of this system include the rights of integrity and paternity).

20. *See* Gilliam v. Am. Broad. Cos., 538 F.2d 14, 26 (2d Cir. 1976) (abridging episodes of *Monty Python* was an action that impermissibly and prejudicially altered the authors' work).

21. BOYLE, *supra* note 17, at 184 (placing liberal requirements on copyright creation with no formal notice or application). This is a contrast from the prior 1909 Copyright Act, under which copyright protection was only obtained upon publication and only if an author complied with the requisite formalities, such as notice. *See* 1909 Copyright Act, 17 U.S.C. § 10 (1926) (requiring copyright notice, registration, and deposit).

22. BOYLE, *supra* note 17, at 184; *see* 17 U.S.C. § 101 (2012) ("A work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.").

23. Copyright Term Extension Act, 17 U.S.C. § 302(a) (2012) (the Copyright Term Extension Act added an additional twenty years from fifty to seventy).

latter instead enter the public domain.[24] In certain contexts, there may be only limited ways to express a particular idea. This situation, called the merger doctrine, precludes copyright protection, lest the idea receive backdoor copyright.

1. Fixation

First and fundamentally, a work must be fixed. Fixation occurs as soon as an idea is manifest in a tangible medium, such as writing a sentence or drawing an image.[25] This requirement relates to the constitutional bases of intellectual property protection; the intellectual property clause affords protection to "writings."[26] Thus, a work must be embodied in some stable format, a requirement that can be met once the work is recorded or written. This leads to an important distinction: performances cannot qualify for copyright, but recordings of the performance as well as scripts written in advance of the performance, can support copyright.[27]

2. Originality

A work must also be original.[28] In order to be original, a work must be more than a trivial variation on something already existing, either currently under copyright or in the public domain.[29] The originality inquiry focuses on whether an author has contributed any identifiable artistic expression; absent any originality, a work cannot be considered the product of the author seeking copyright.[30]

The two elements of originality are some modest amount of creative authorship and independent creation. In the definitive case in this area, *Feist v. Rural Telephone Service*,[31] the Supreme Court articulated the rule that only a modicum of creativity is required for a work to be

24. BOYLE, *supra* note 10, at 208 (highlighting the fundamental distinction between the underlying idea and the copyrightable product).

25. LEAFFER, *supra* note 16, at 49 ("The Supreme Court has construed the 'writings' requirement to mean any physical rendering of the fruits of intellectual activity.").

26. *See* U.S. CONST. art. I, § 8, cl. 8 (promoting "Science and the useful Arts").

27. LEAFFER, *supra* note 16, at 49–51 (stating that "mere performance of a work does not qualify under this provision").

28. *See* 17 U.S.C. § 102(a) ("Copyright subsists . . . in original works of authorship.").

29. *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 488–89 (2d Cir. 1976) (no originality in plaintiff's bank design, which was virtually identical to an existing public domain bank design).

30. *See* 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (rev. ed. 2009) (distinguishing novelty and originality).

31. 499 U.S. 340 (1991).

considered sufficiently original to merit copyright protection.[32] Similarly, independent creation sets a relatively low bar. Unlike patent law, which requires novelty and non-obviousness, two works may be substantially similar or even identical, yet if both were independently created, each can qualify for copyright protection.[33]

3. Authorship

The concept of authorship provides a theoretical grounding for copyright law.[34] Notions of authorship have varied widely across Western history;[35] as recently as the medieval period, authors were viewed as divinely inspired craftsmen.[36] It was not until the eighteenth century that theorists began to regard inspiration as "emanating not from outside or above," but rather "from within the writer himself."[37] This Romantic notion of authorship viewed writing as "an extreme assertion of the self."[38] Authors became viewed as innovators, who, using the raw materials of culture and prior knowledge, added original ideas and expression to create distinct works.[39] This view essentially considers writing a manifestation of the author's personality, regardless of the aesthetic quality or purpose of the work.[40] In turn, the Romantic

32. *Id.* at 345–46 (distinguishing novelty from creativity, and stating that similarity between two works does not defeat originality so long as the similarity is not the result of copying).

33. LEAFFER, *supra* note 16, at 57 (stating that "nothing prevents a valid claim of copyright on two or more substantially similar works so long as they were independently created"). This situation may be increasingly unlikely in an increasingly connected world; questions of access to works have decided copyright infringement actions. *See, e.g.*, Three Boys Music v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (inferring access on basis of popular song's airplay).

34. BOYLE, *supra* note 10, at 53 (noting that authorship was historically devalued in favor of those who could copy and interpret old texts).

35. *See id.* (pointing to medieval church literature, where the "real task of the scholar was not the vain excogitation of novelties but a discovery of great old books").

36. *Id.* at 53–54 (authors were viewed on the same level as a publisher or typesetter, another machine element in the production of written material).

37. *Id.* at 54 (for example, prior to the rise of the Romantic view of authorship, the English language lacked a word for plagiarism).

38. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 455 (1991) (discussing the view of authorship during the eighteenth century).

39. BOYLE, *supra* note 10, at 54–55 (arguing that the originality of the form of the work shapes the ideas contained therein, thus the author must retain the right to exclude others from altering the form of the work).

40. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903). Though the work in question was used in advertising, Justice Holmes considered it a work of authorship: "The copy is the personal reaction of an individual upon nature. Personality always contains something unique . . . . [Even] a very modest grade of art has in it something irreducible, which is one

view of authorship justifies rewarding authors' efforts in producing literary and artistic works with the right to control the use and distribution of their works.[41]

This Romantic notion of authorship also provides a strong platform for the moral rights seen in Continental Europe.[42] In these legal systems, authors have the right to withdraw works from circulation, to claim attribution (the "paternity" right), and to prevent destruction or mutilation of their works (the "integrity" right).[43] These rights clearly derive from a view "that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality."[44]

Despite their prominence in European law, moral rights have never fully caught on in the United States.[45] As these moral rights are generally inalienable and can be invoked even after sale of intellectual property rights, some consider moral rights to "represent a charter for private censorship,"[46] which is incompatible with the public interest. However, Congress has given some limited recognition of moral rights. Because of certain foreign treaty obligations,[47] Congress eventually enacted the Visual Artists Rights Act of 1990 ("VARA").[48] VARA allows creators of works of "fine art" to obtain the rights of attribution, integrity, or protection from distortion.[49] It also protects works of "recognized stature" against destruction.[50] Determining whether a work of art is of the requisite "recognized stature" requires judges to assess its

man's alone. That something he may copyright . . . ." *Id.* at 249–50.

41. Jaszi, *supra* note 38, at 466 (challenging the notion of authorship as it relates to copyright).

42. *Id.* at 496 (discussing the entrenched Romantic notion of authorship in Continental European legal systems).

43. *Id.* (discussing generally the rights-based approach to copyright).

44. *Id.* at 497 (quoting JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed. 1987)).

45. LEAFFER, *supra* note 16, at 392–93 (stating that "Congress justified its decision not to adopt specific moral rights legislation, claiming that the United States already gives de facto recognition to moral rights when the entirety of American law is considered").

46. Jaszi, *supra* note 38, at 497 (discussing the suppressing effect of assigning moral rights to authorship).

47. Berne Convention for the Protection of Artistic and Literary Property, Art. 6*bis*, 1971.

48. Pub. L. No. 101-650, 104 Stat. 5128 (1990).

49. *See* 17 U.S.C. § 106A. VARA-eligible works can include paintings, drawings, and sculptures, so long as the work is produced in no more than 200 numbered and signed copies. *Id.*

50. *Id.*

aesthetic merits,[51] which deviates from copyright's otherwise established principle that judges should not make decisions about artistic and aesthetic quality.[52]

B. Rights of a Copyright Holder and Limitations to the Exclusive Rights

During the term of copyright protection, the owner of a copyright in a work enjoys a bundle of certain exclusive rights.[53] These rights include reproduction, adaptation, distribution, performance, display, and the right to transmit digital sound recordings.[54] Violating any of these exclusive rights constitutes copyright infringement.[55] Because the rights may overlap in certain contexts, the same act may simultaneously infringe multiple exclusive rights.[56]

Despite these exclusive rights, the Copyright Act contains several exceptions.[57] One of the most important, fair use,[58] allows certain privileged uses in situations where the public interest in access to a work outweighs the interest in protecting the work under copyright law.[59]

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51. *See, e.g.*, Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999) (demonstrating a rigorous standard for assessing whether a work is "of recognized stature," including expert testimony, critical acclaim, and journalistic coverage).

52. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903) (articulating that the granting of a copyright should not be premised on a work's artistic merit or intended use).

53. *See* 17 U.S.C. § 106 (2012) (defining the exclusive rights of copyrighted works, including right to reproduce, create derivative works based upon original, distribute copies, and perform or display publicly).

54. *Id.* (enumerating rights granted under statute).

55. *See* § 501(a) (defining one who infringes a copyright as any person who violates those rights exclusive to the owner of the copyright).

56. LEAFFER, *supra* note 16, at 294 (stating that "the same act may simultaneously infringe both the reproduction and adaptation rights").

57. *See* §§ 107–122 (exemptions on exclusive rights include provisions for fair use, restrictions for media outlets, recordings, visual displays, and computer programs).

58. § 107 (detailing the factors considered when determining whether a use of copyright material falls within the fair use exception).

59. Jerome Reichman & Ruth Okediji, *The Fair Use Approach in the United States*, 96 U. MINN. L. REV. 1362, 1393–94 (2012). *See, e.g.*, Time, Inc. v. Bernard Greis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding that the public interest in accessing the only existing footage of the Kennedy assassination supported a fair use defense); *but see* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985) (rejecting a fair use defense where a publisher excerpted the "heart of the book" from Gerald Ford's memoir shortly before its forthcoming publication.).

Litigating copyright disputes requires proving both ownership of a valid copyright and infringement by violation of at least one of the exclusive rights. Litigation is a costly process and may be very time consuming. As a result, many individuals choose to comply with licensing arrangements rather than expose themselves to potential liability, even in situations where exceptions, such as fair use, could have applied.[60] Intellectual property law may thus stifle creativity and burden the very artistic and creative processes it seeks to encourage.[61]

II. COMMON INDIGENOUS VIEWS OF PROPERTY OWNERSHIP AND TENSIONS WITH THE INTELLECTUAL PROPERTY REGIME

Aspects of indigenous groups' cultural property do not always coincide with the assumptions that underlie both the copyright and *droit d'auteur* systems. Because of these potential incompatibilities, many indigenous groups view intellectual property regimes with deep skepticism.[62] Some indigenous people view adopting intellectual property laws as acquiescing to the legacy of colonialism.[63]

A. Baseline approaches to cultural property

The Anglo-American copyright system grants exclusive rights as an incentive to encourage authors and artists to create. Like most western property law systems, copyright is a bundle of rights including rights to absolute possession, to exclude others, and to dispose of property freely.[64] Thus, copyright fits neatly into the western legal paradigm.

By contrast, indigenous communities have different conceptions of property ownership. Exclusive ownership is rare among North American tribes.[65] Tribes nevertheless may recognize ownership in intangible items like songs, stories, or even practices such as fishing or

60. *See, e.g.*, BOYLE, *supra* note 17, at 158 (citing the music industry's compulsory licensing scheme).

61. *See id.* at 158–59 (noting, however, that there is a potential shift to recognize that copyright laws do stifle the creativity they purport to protect).

62. ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 245 (1st ed. 1998) (arguing that reducing communal relationships in Native tribes to copyrights would degrade the social fabric of the society).

63. *See id.* (describing the assertion of rights over traditional art forms as a part of self-determination).

64. 17 U.S.C. § 201 (2012) (defining copyright ownership).

65. Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 132 (1995) (contrasting Native American and Anglo-American conceptions of individual ownership).

gathering plants.[66] Some compare ownership in these cultural practices, such as oral storytelling, as responsibilities more akin to stewardship rather than "rights,"[67] since often ownership of the practices or rituals reflects a member's role in the group.[68]

Thus, the incentive rationale that underlies copyright may be irrelevant to the concerns of indigenous societies, where cases about intellectual property have more often focused on "the sanctity of a process or idea, . . . and in particular, [efforts] to preserve the sacredness of an object."[69] Tribes typically do not concern themselves with the disposition of knowledge within the tribe, but consider impermissible the dissemination of knowledge and cultural patrimony to outsiders.[70] Incidentally, NAGPRA specifically seeks to address this problem by facilitating the repatriation of sacred objects and cultural patrimony to Native American tribes.[71]

B. Difficulties of meeting the eligibility requirements for copyright protection

Many aspects of indigenous cultural property conflict with the theoretical grounding and legal requirements of copyright law. On a theoretical level, copyright operates in "the private realm of artistic activity."[72] Intellectual property law protects private actors, who draw on a public culture to produce private, tangible works.[73] In one view, the

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66. *Id.*

67. COOMBE, *supra* note 62, at 245 n.164 ("Those so-called 'rights' are the result of traditional people fulfilling responsibilities . . . through traditional ceremony and lifestyle . . . ." (quoting D. Alexis, *Obscurity as a Lifestyle*, 23 BORDERLINES 15 (1991–92))).

68. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 184 (1992) (An individual's power may be manifest in "implements, fetishes, medicine bundles, charms, songs, dances, and rituals. Sacred power, or medicine, was obtained through spirit visitations during visions, supernatural gifts, ceremonial transfer, or inheritance.").

69. Gana, *supra* note 65, at 134 (citing *Milpurrurru v. Indofurn Party, Ltd.* (1994) 54 FCR 240, 240 (Austl.) (finding that the sale of art portrayed on rugs damaged not only the individual artists, but also the community)).

70. *Id.* at 133 (discussing ownership paradigms of various indigenous populations).

71. *See, e.g.*, Strickland, *supra* note 68, at 180–81 ("NAGPRA has placed the primary task of factual determination in the Native culture itself.").

72. Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 374–75 (1998) (contrasting "private artistic activity" with "public cultural production").

73. *Id.* (noting that art produced by "public cultural production" is viewed

public domain supplies cultural raw materials, such as beliefs and common symbols, which are considered to be created by "collectivities" rather than any particular individual.[74] Many of the objects Alaska Natives are concerned about protecting, such as crests and symbols, would fall into this category of collective property, material more typically regarded as cultural inputs rather than outputs. Therefore, in theory these materials belong in the public domain, and are accordingly ineligible for copyright protection.

Similarly, copyright's emphasis on authorship presents additional hurdles for indigenous works. The 1976 Act requires an identifiable author or group of authors, who evidence intent to create a work.[75] As discussed above, authorship is rooted in Romantic ideals of authors as individuals. This stands in stark contrast to Native communities' attitudes, where tribal works originate "in the group, not the individual."[76] Furthermore, in the case of many works, such as songs or stories, it is "unlikely, given indigenous methods of production, that any individual tribal member ever claimed the role of 'author.'"[77] Often, knowledge of a specific creator will have passed on, rendering the work untraceable.[78] Last, even if the original author is known or discoverable, since copyright is a time-limited regime, any potential copyright likely would have expired in works that are generations old.[79]

Native works with collective authorship could also be considered joint works.[80] Joint works are "work[s] prepared by two or more authors

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to be owned by the public rather than particular individuals).

74. *Id.* (making it nearly impossible to identify a distinct author).

75. 17 U.S.C. §§ 101–02 (2012) (discussing that copyright protection extends to "original works of authorship," as compared to an "anonymous" work in which no natural person can be identified as author); *see also* Angela Riley, Note, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 190 (2000) (highlighting the importance of defining authorship in light of the Act's explicit requirement of a discreet author or group of authors).

76. Riley, *supra* note 75, at 191 (noting the demonization of communal work in western, capitalist culture).

77. *Id.* (noting that works with untraceable authors cannot receive copyright protection).

78. *Id.* (stating that even if the creator were identified, he or she would most likely have passed away, with the relevant result that the work is "untraceable" in terms of authorship and therefore may not be granted copyright protection); *see also* Richard Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 124 (1995) (enumerating the requirements for copyright protection under the Copyright Act).

79. Riley, *supra* note 75, at 191 n.83 (copyrighted works cannot be protected in perpetuity).

80. *Id.* at 192 (describing the requirements under the Copyright Act to be classified as a "joint work").

with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[81] Similar difficulties arise when attempting to apply this framework to Native works. First, the parties must have intended, at the moment of creation, that their contributions be merged into a joint work.[82] Second, the authors must have been known, which is often infeasible.[83] Thus, indigenous works will fail to be eligible for copyright even as joint works.

Indigineous works might also not qualify as original. Instead, many works could be considered "serial collaborations," with elaboration on ideas by a series of authors, "occurring perhaps over years or decades."[84] These serial collaborations reflect the centrality of stories to group identity.[85] However, because it may be difficult to identify any element of a work that is an author's distinct and original contribution, indigenous works may thus fail to satisfy this requirement.[86]

Fixation presents yet another hurdle for Native American works. Copyright is generally "geared towards protecting the printed word,"[87] a baseline exemplified in the fixation requirement. Thus, copyright protection is precluded for works which are unwritten but rather transmitted orally.[88] Fixing oral traditions in writing isolates a particular version of a story, and forces tribes to abandon the traditional medium of expression.[89] However, even works that satisfy the fixation requirement, such as sculptures or drawings, may still be precluded from copyright protection on other grounds.

Since many Native works are not eligible for copyright, the owners of the works or the tribes will be unable to avail themselves of

81. 17 U.S.C. § 101 (2012); *see also* § 201(a) (making authors of a joint work co-owners of the copyright).

82. NIMMER, *supra* note 30, § 6.02.

83. Riley, *supra* note 75, at 193 (also noting that joint intent at the time of creation is also often infeasible in tribal art).

84. *Id.* at 188 (noting that tribal art such as traditional songs have an unknown origination point).

85. *Id*. at 189 (highlighting the importance of traditional creation stories to tribal cultures).

86. *See* COOMBE, *supra* note 62, at 229 (discussing a difficulty in separating "texts from ongoing creative production, or ongoing creativity from social relationships" as intellectual property law strives to do).

87. Riley, *supra* note 75, at 186 (noting that the emphasis on the printed word derives from Anglo-American culture).

88. *Id*. (stating that oral transmissions "fall entirely outside the sphere of Anglo-American copyright protection"); *see also* Gana, *supra* note 65, at 128 (discussing other works and practices which could fail to meet the fixation requirement, such as the Yoruba "talking drums").

89. Riley, *supra* note 75, at 195 (proposing that indigenous philosophies should be incorporated to deal with Tribal works).

copyright's remedies. If no copyright is recognized in a work, there is no right to block reproductions or derivative works based on that underlying work.[90]

III. COLLECTIVE RIGHTS

Native groups are not only concerned with the outright infringement of their cultural property,[91] but are also concerned with the translation and resulting distortion of their works,[92] as well as the misuse of sacred objects,[93] harms which NAGPRA strives to avoid.[94] These concerns seem apt for protections provided in a moral rights framework.

Nevertheless, American courts have faced difficulties in cases involving Native American cultural property. In order to arrive at outcomes in line with the interests of tribes, courts must be able to assess collective rights. *Chilkat Indian Village v. Johnson*[95] demonstrates the federal courts' failure to recognize collective rights.[96] This Alaska case involved the Chilkat tribe's efforts to recover cultural artifacts after their sale by caretakers.[97] The artifacts in question, the Whale House of the Chilkat, four wooden carved posts and a partition, were considered "the finest example of Native art, either Tlingit or Tsimshian, in Alaska."[98]

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90. *Id.* at 179 (discussing the parameters of contemporary copyright law, in which narrowly defined boundaries are drawn).

91. *Id.* at 197 (discussing the appropriation and manipulation of Native cultural art).

92. Strickland, *supra* note 68, at 185. "A non-Indian viewer of a Hopi figure, a Tlingit mask, or a Shoshone-painted hide translates the object into the familiar framework of his own culture. In doing so he confronts the same distortion as the English-speaking reader of a translated Cherokee love song . . . . No longer a linguistic reflection of its maker, the song becomes a carnival mirror, distorting the delicate thought patterns of its creator's culture." *Id.*

93. *Id.* (comparing non-Native perceptions of Native linguistic art and the viewing of Native objects, asserting that the distortions are equivalent).

94. *See* H.R. Rep. No. 877, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368 ("The purpose of H.R. [NAGPRA] is to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands.").

95. 870 F.2d 1469 (9th Cir. 1989).

96. *Id.* at 1476 (holding that claims of conversion of Native property did not arise under federal law).

97. *Id.* at 1471 (describing the articles in question, four wooden posts and a wooden partition called a "rain screen").

98. George T. Emmons, *The Whale House of the Chilkat*, *in* RAVEN'S BONES 68, 81 (Andrew Hope III ed., 1982) (1916) ("It is unquestionably the finest example of native art, either Tlingit or Tsimishian, in Alaska, in boldness of conception—although highly conventionalized in form—in execution of detail, and in the selection and arrangement of colors.").

For years, outsiders engaged in efforts to purchase or steal the Whale House.[99] Defendant Johnson, a Native American art dealer, successfully made a deal with the artifacts' caretakers.[100] The Chilkat tribe claimed the artifacts were communal property, or property owned in trust, and thus the artifacts could neither be owned nor transferred by the caretakers. Although the Chilkat Village had previously passed an ordinance forbidding the removal of tribal cultural property,[101] the artifacts were removed and shipped to Johnson, the purchaser. The tribe sued to recover the artifacts, but the Ninth Circuit upheld the district court's dismissal of the Chilkat claims.[102] The court refused to consider communal property rights, since they were (and remain) unrecognized in federal law.[103] Dismissing the remaining claims, the Ninth Circuit agreed with the district court that federal courts lacked jurisdiction to rule on claims grounded in the Chilkat Village ordinance, since those claims did not arise under federal law.[104]

While the study of American intellectual property law reveals a bias against collective rights,[105] this does not mean American law is blind to collective rights. Even as far back as the so-called "Indian Commerce Clause,"[106] tribes have been uniquely recognized "as quasi-

99. *Chilkat*, 870 F.2d at 1471 ("On April 22, 1984, several defendants removed the four posts and the rain screen from Klukwan and delivered them to defendant Michael Johnson, an Arizona art dealer.").

100. Rachael Grad, Note, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT'L L. 203, 215 (2003) ("Upon hearing that Johnson had reached a deal with one of the elderly caretakers, Chilkat tribal members blocked the village road and passed an ordinance forbidding the removal of cultural property without tribal permission.").

101. *Chilkat*, 870 F.2d at 1471 (The ordinance stated, "[n]o person shall enter on to the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange the removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.").

102. *Id.* at 1472–73 ("We agree that section 1163 provides no right of action.").

103. *Id.* ("We also agree with the district court that the Village's first and fifth causes of action amount to claims for conversion, and that they do not arise under federal law.").

104. *Id.* Thereafter, a case was brought in the Chilkat Indian Village Tribal Court. Tribal Court Judge Bowen upheld the validity of the ordinance and ordered the return of the artifacts. Chilkat Indian Village, IRA v. Johnson, 90-01 (Chilkat Tr. Ct., 1993) ("The artifacts are to be returned to the Whale House in Klukwan.").

105. *See generally* Riley, *supra* note 75, at 194 ("When all possible avenues of copyright doctrine are examined, it is clear that no Western definitions of authorship are capable of accommodating communal works.").

106. U.S. CONST. art. 1, § 8, cl. 3. (Empowering Congress "[t]o regulate

sovereign nations-within-a-nation."[107] In a more recent legislative development, the passage of the Indian Child Welfare Act[108] by Congress displayed sensitivity to the unique aspects of tribal culture and values that tribal children learn in the home.[109] Congress determined that the "collective nature of tribal life itself" required efforts to keep children within tribal families.[110] To achieve this goal, Indian child welfare proceedings must give preference to placing children with members of their extended families or families chosen by the tribe.[111] Another important statute, NAGPRA, discussed in greater detail in Section IV, recognizes the collective nature of tribes and the group interest in seeking return of sacred property.

By contrast, Australian courts have taken a broader view of collective rights when assessing indigenous intellectual property rights. In *Milpurrurru v. Indofurn Party, Ltd.*,[112] an Australian company manufactured carpets in Vietnam that reproduced the designs of several prominent indigenous artists.[113] The artists sold some paintings to the Australian National Gallery, which produced posters of the paintings; Indofurn obtained the images from these posters.[114] The plaintiffs brought a copyright infringement action against Indofurn, seeking compensation, as well as acknowledgement of the communal harm resulting from unauthorized use of aboriginal designs."[115]

Accepting the artists' arguments, the court awarded plaintiffs

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Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

107. Riley, *supra* note 75, at 205. However, there has not been continuous recognition of sovereignty. *Id.* at 206 n.143.

108. 25 U.S.C. §§ 1901–63 (1983) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to the Indian people, Congress finds . . . .").

109. Riley, *supra* note 75, at 211–12 ("In evaluating a proper scheme for the Indian child welfare system, Congress focused on the 'values of Indian culture,' rather than the Anglo-American model, which is heavily centered around preferencing the rights of the individual over the community.").

110. *Id.* at 212 ("Congress recognized that Indian communities place a profound emphasis on 'collective rights' thinking, in which Indians are taught to conceive of themselves as part of the larger cultural group, in which every child belongs to its family as well as to the tribe"); *see also* Jennifer Nutt Carleton, *The ICWA: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 38 (1997) ("Many Indians are taught to think of themselves as part of the larger group, where every child belongs to both its family and to the tribe.").

111. 25 U.S.C. § 1915(a)–(b) (2012).

112. (1994) 54 FCR 240, 240 (Austl.).

113. *Id.* at 240 ("In 1991, the first respondent commenced importation of carpets manufactured in Vietnam which reproduced Aboriginal artworks, the copyright in which was owned by the applicants.").

114. *Id.* at 244–50.

115. Gana, *supra* note 65, at 134.

damages for copyright infringement and injunctions to prevent the further use of the images.[116] The defendants' actions threatened to distort the paintings' meanings.[117] The use of the paintings as images for carpet was considered particularly offensive to the indigenous people.[118] However, despite the court's deference to the indigenous community, the decision, which rested on copyright principles, awarded compensation only to the individual artists.[119]

More recently, in the case of *Bulun Bulun v. R&T Textiles Party, Ltd.*,[120] an indiginous artist who owned a valid copyright in his work sued after discovering that his paintings were being used in textiles produced by the defendant. The plaintiff argued that the "unauthorised reproduction of [the image] threaten[s] the whole system and ways that underpin the stability and continuance of Yolngu society," by interfering with relationships between artists and their community and thwarting generations of custom.[121] The court agreed, finding that a fiduciary relationship exists between artists and their communities: "the interest of Ganalbingu people in protection of that ritual knowledge from exploitation which is contrary to their law and custom is deserving of the protection of the Australian legal system."[122]

Thus, Australian courts have recognized the need for indigenous people to be able to protect their communities' intellectual property. Nevertheless, these cases may be less applicable in the context of Native American communities. Both *Milupurrurru* and *Bulun Bulun* involved identifiable artists whose works were protected under copyright. Additionally, the works were copied wholesale.

While *Chilkat* was not an intellectual property dispute, the court's

116. *Milpurrurru*, 54 FCR at 272–83.

117. *Id. See* Gana, *supra* note 65, at 134 ("Inaccuracy, or error in the faithful reproduction of painting, can cause deep offence to those familiar with the dreaming.").

118. Grad, *supra* note 100, at 218 ("This practice was particularly offensive to the aboriginal people because carpet is a medium for walking on, and its use is inconsistent with traditional aboriginal cultural practices.").

119. *Id.* Arguably, though, the broader community benefitted from the issuance of injunctions.

120. (1998) 157 ALR 193 (Austl.).

121. *Id*. at 199.

122. *Id*. at 210–12 ("Central to the fiduciary concept is the protection of interests that can be regarded as worthy of judicial protection . . . . The evidence is all one way. The ritual knowledge relating to Djulibinyamurr embodied within the artistic work is of great importance to members of the Ganalbingu people. I have no hesitation in holding that the interest of Ganalbingu people in protection of that ritual knowledge from exploitation which is contrary to their law and custom is deserving of the protection of the Australian legal system.") (citation omitted).

unwillingness to recognize collective property rights hints at the difficulty that would face Native American tribes seeking to copyright collectively produced cultural property absent specific statutory action. Some commentators have called for a *sui generis* intellectual property law that, like ICWA, "would give tribal governments primary jurisdiction over claims concerning their culturally important work."[123] Such legislation would need to address the different modes of cultural production, such as serial collaboration, that frustrate efforts to apply federal intellectual property law to Native American works.[124]

IV. PROGRAMS AND LEGISLATION CURRENTLY IN PLACE TO RECOGNIZE NATIVE AMERICAN BELIEFS AND PROTECT SIGNIFICANT WORKS

Despite the difficulties of obtaining copyright protection, Alaska Native groups may take advantage of other programs currently in place to protect their intangible cultural property. Two of these avenues, authentication programs and NAGPRA, offer rights that reflect concepts similar to intellectual property protection, and are discussed below.

A. Authentication Programs

The sale of counterfeit goods is a global problem, and Native Alaksan arts and crafts are no exception. In 1996, the Federal Trade Comission took its most aggressive action in this area, after years of investigation, by filing complaints against two Seattle-based companies, Ivory Jack's and Northwest Tribal Arts. These stores logged hundreds of thousands of dollars in profit by selling carvings created by Ngoc Ly, a Vietnamese carver, as authentic Alaskan works.[125] In addition to stocking the artwork, the defendants provided false biographical information for the supposed carvers, and furnished the works with

123. Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 197 (2007) ("Ultimately, proposals for a *sui generis* intellectual property law, which take into account diverse interests of Native American peoples, may be the most effective long-term solution for overcoming the pitfalls of the current regime.").

124. *Id.* ("Legislation must also recognize the inherent difference between current copyright laws and property cumulatively created by more than one individual in a family line or by a group of individuals in a social institution.").

125. *Ivory Jack's and Northwest Tribal Arts to Settle FTC Charges that they Sold Fake Native American Artwork*, FEDERAL TRADE COMMISSION (Apr. 12, 1996), *available at* http://www.ftc.gov/opa/1996/04/ivory-j.shtm (Ly sold his wares under the Native-sounding alias "Eddie Lyngoc.").

hangtags proclaiming the carvings to be Native-made.[126] In settlement, the parties agreed to measures to prevent the further sale of falsely labeled goods, such as clearly labeling pieces as "Native style" instead of "Native made," and ceasing to use Native-sounding names.[127]

The Ivory Jack's case illustrates some of the reasons behind authentication programs. Alaska Natives produce arts and crafts to supplement income or to support themselves.[128] Economics aside, arts and crafts are also "a cultural gift and a source of self-esteem and identity within the Native community."[129] Native crafts have been heavily promoted by government officials "not so much as a way to improve the economic situation of Native artisans as for the benefit of the state's fastest growing industry—tourism."[130] As the trade in Native-produced crafts has flourished, sales of knockoffs and other problems of misrepresentation have also increased.[131] In some cases, the quality of non-Native goods may be very high, with some artists struggling to match the quality of imitations.[132]

In an attempt to clearly distinguish authentic Native crafts, Alaska

126. *Id.* ("In addition to providing the artwork, the complaint alleges, the defendants provided shopowners with biographies describing Ron Komok's Native-American heritage and training in carving, and hangtags stating that the carvings sold by Ivory Jack's are Native-made.").

127. *Id.* ("The proposed consent decrees settling these charges, subject to court approval, would prohibit the defendants, in connection with the sale of Native-American style art objects, from representing that any such object is Native-made or that any such object is made in Alaska or made from materials of Alaskan origin, unless such is true and from misrepresenting the source of such objects, their country of origin, or the materials from which they are made.").

128. Julie Hollowell, *Intellectual Property Protection and the Market for Alaska Native Arts and Crafts*, *in* INDIGENOUS INTELLECTUAL PROPERTY RIGHTS 55, 57 (Mary Riley ed., 2004) ("Over half of all Alaska Natives live in mixed cash and subsistence economies, and, for many of them, locally produced arts and crafts act as vital supplements to income and one of the only sources of cash not dependent on government programs.").

129. *Id.* ("But arts and crafts are more than just a safety net; they are, as one carver described, a cultural gift and a source of self-esteem and identity within the Native community.") (citation omitted).

130. *Id.* The state's apparent objectives were consumer protection and also a desire to "minimize the economic impact of products made elsewhere [i.e., out of state] that were flooding the tourist market." *Id.* at 87 n.14.

131. *Id.* at 60. Studies estimate that as much as 50% of "all Native or Indian arts and crafts sold in the United States may not have been made by American Indian people." *Id.* Consumers have a clear preference for Native-made goods; FTC research indicates that consumers will pay 30-40% more for Native crafts. *Id.*

132. *Id.* at 62 ("Second, they don't produce enough work on a consistent basis or of consistent quality to supply the growing tourist demand.").

developed the "Silver Hand" program.[133] Administered by the Alaska State Council on the Arts,[134] the state-sponsored program is available to Natives free of charge.[135] The Silver Hand seal indicates to consumers "that the artwork on which it appears is created by hand in Alaska by an individual Alaska Native artist."[136] The Silver Hand is essentially a trademark, specifically a collective mark, which serves to identify the origin of goods. It provides no information, however, about the quality of the artwork or the authenticity of the craft's design or form.[137]

The Silver Hand program's efficacy has been questioned.[138] Some retailers have been hesitant to carry goods with the Silver Hand, in some cases even illegally[139] removing stickers "so that non-Native items in their stores would not suffer from this 'implication of inauthenticity.'"[140] At the same time, enforcement is questionable, and there have even been reports of goods marked with tags designed to imitate the Silver Hand, thereby directly competing with and diminishing the Silver Hand's ability to "distinguish Native-made goods."[141]

Despite these concerns, the program has been revised and expanded, and is considered the most successful state-implemented authentication program, with high rates of adoption among Native

133. *See* ALASKA STAT. §§ 45.65.010–45.65.070 ("The identification seal may be affixed only to original articles of authentic Alaska Native art created and crafted in the state.").

134. *See Silver Hand Program*, ALASKA STATE COUNCIL ON THE ARTS, http://www.eed.state.ak.us/aksca/native.htm (last visited Oct. 5, 2012) ("The Silver Hand image . . . may only be used by individuals or organizations with the Alaska State Council on the Arts' explicit permission.").

135. Hollowell, *supra* note 128, at 65. A certain number of tags are provided to artists for free; if more are needed, they are available at a nominal rate. *See Alaska Native Arts Program*, ALASKA STATE COUNCIL ON THE ARTS, http://www.eed.state.ak.us/aksca/native.htm (last visited Oct. 5, 2012).

136. *Id.* ("The seal indicates that the artwork on which it appears is created by hand in Alaska by an individual Alaska Native artist.").

137. Hollowell, *supra* note 128, at 65 ("The Silver Hand emblem has nothing to do with quality or with the authenticity of Native designs or art forms.").

138. *See id.* ("Many people consider the Silver Hand virtually meaningless without adequate enforcement and public education for tourists and shop owners.").

139. *See* ALASKA STAT. § 45.65.060 (stating that misuse or abuse of the Silver Hand constitutes a Class B felony).

140. Hollowell, *supra* note 128, at 66. This same concern has been echoed by artists, who worried that "tourists might assume anything sold without a Silver Hand is not Native made," which would "be unfair to artists who [had not] registered for the program." *Id.* at 67.

141. *Id. See also* Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, 3 INTERCULTURAL HUM. RTS. L. REV. 199, 212 (2008) ("These mechanisms are not fool-proof; however, the Alaska State employee who heads the Silver Hand program indicated that the Silver Hand tags have been reported counterfeited and sold to non-Natives for profit.").

artisans.[142] Official discourse has shifted from protecting consumers to protecting Alaska Native artists.[143] Most recently, blood quantum requirements were removed; now only citizenship in Alaska and membership in an Alaska Native tribe are required.[144] The bill also replaced provisions that required the use of natural, traditional materials, with a broadened definition of "work of art" that essentially encompasses traditional and contemporary Alaska Native works.[145] Of course, such an authentication program is effective only if consumers understand the meaning and importance of the Silver Hand program, so consumer education efforts, coupled with increased adoption of the symbol by artisans, are necessary for its functioning.

The Silver Hand program, as noted above, essentially creates a trademark to identify Alaska Native-produced goods. In this sense, the intellectual property system promotes improvement for Alaska Native artisans' economic situations. Importantly, however, the Silver Hand mark protects only the designation of origin. It does not prohibit or in any way impact the use of Native symbols, imagery, and art forms by non-Native craftsmen. The Silver Hand program thus does not prohibit the use of this cultural property by non-Natives, which may be an unsatisfactory solution for Alaska Native groups concerned about the use of their intellectual property.

B. NAGPRA and the Recognition of Collective Rights

The Native American Graves Protection and Repatriation Act ("NAGPRA)"[146] explicitly recognized tribal interests by facilitating the return to tribal possession of human remains, sacred objects, and cultural patrimony.[147] Congress enacted NAGPRA in response to issues

142. Hollowell, *supra* note 128, at 75 ("In spite of all its problems, the Silver Hand is considered one of the best Native arts authentication programs in the United States. The geometric growth in artisans who have registered to use the emblem over the past five years attests that Native artists value its use, whether for material or symbolic reasons.").

143. *See id.* ("In general, the wider the use of the Silver Hand by artisans and retailers, the more protection it provides to both consumers and Native artists.").

144. S.B. 97, 25th Legislature, 25th Sess. (Alaska 2008) (considering identification seals on items created by Alaska Natives). The legislation previously required the artist to be at least one-quarter "Indian, Aleut, or Eskimo." *Id.* Eliminating this requirement will allow Alaska Native tribes to use their own requirements for membership as the basis of Silver Hand eligibility.

145. *See* ALASKA STAT. § 45.65.070(9) (2012) ("'work of art' means a creation or crafting of . . . traditional Alaska Native materials, including ivory, bone, grass, baleen, animal skins, wood, furs . . . .").

146. 25 U.S.C. §§ 3001–3013 (2012).

147. § 3001. This goal is evidenced, for instance, in the definition of cultural

that surfaced in *Chilkat*, providing tribes with a mechanism to facilitate the return of objects taken from the tribe without permission.[148] NAGPRA focuses solely on sacred communal property.[149] Transactions involving these protected objects are presumptively invalid, because the objects are presumed to be inalienable and owned by tribes as communal property.[150] NAGPRA's proceedings also focus on tribal action: NAGPRA requires museums and other institutions to inventory their Native American holdings, and make this inventory available to tribes.[151] Tribes may make requests for the repatriation of cultural property, after which the museums must transfer the materials back to the tribe. Individual members may not invoke NAGPRA and may not be the recipients of tribal property.[152]

Because NAGPRA provides a comprehensive framework for the repatriation of Native American artifacts, some scholars have hailed the statute as a "core piece of human rights legislation."[153] Other scholars, however, were originally concerned about how NAGPRA would impact museums and the public domain.[154] Instead, NAGPRA did not have the effect that its strong language would indicate; despite provisions mandating compliance, the University of California, Berkeley's Phoebe

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patrimony: "'cultural patrimony' [] shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, *rather than property owned by an individual Native American*." § 3001(3)(D) (emphasis added).

148. H.R. REP. NO. 877, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368, 1990 WL 200613 ("The Act also sets up a process by which Federal agencies and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.").

149. *Id.* ("The purpose of [NAGPRA] is to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands.").

150. 25 U.S.C. § 3002. *See also* Riley, *supra* note 75 at 213–14 ("These objects fall within the category of 'cultural patrimony,' and are presumed to be communally owned and inalienable by individual tribal members."). An exception is made, however, in the case of transactions by a governing body. § 3002(e).

151. §§ 3003, 3004 ("Each Federal agency and each museum . . . shall compile an inventory . . . [and] shall provide a written summary of such objects . . . .").

152. Riley, *supra* note 75, at 217 ("Ownership of tribal intangible property would remain solely in the tribe forever, inalienable by individual tribal members.").

153. Kristin Carpenter, Sonia Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1089 (2009) (citing Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39 (1992)).

154. *See id.* at 1094–97 (discussing and responding to critics of NAGPRA).

A. Hearst Museum of Anthropology continues to resist repatriating the remains of thousands of Native Americans.[155] NAGPRA also does not apply to non-federal institutions such as art dealers and private collectors.[156]

NAGPRA has the potential, through its provisions about cultural patrimony, to help tribes in intellectual property disputes. Through NAGPRA, tribes may seek the return of sacred objects and their removal from public display. Limiting the public display of objects allows tribes to obtain an analogue of trade secret protection.[157] Preventing the dissemination of cultural patrimony allows the tribes to obtain essentially perpetual protection. However, once objects enter the public domain, they cannot leave, absent specific legislation to the contrary.[158] Thus, in the case of objects of cultural patrimony, such as crest symbols that have already entered the public domain through distribution and replication, tribes have no remedy under NAGPRA or trade secret law against imitators.

Both the Silver Hand program and NAGPRA provide intellectual property-like tools to tribes. Serving a trademark purpose, the Silver Hand program seeks to prevent the passing off of non-Native-made goods as Native arts and crafts. NAGPRA allows tribes a greater degree of control over their artifacts and cultural patrimony, which would otherwise be free for the taking. Unfortunately, both NAGPRA and the Silver Hand program provide Alaska Natives with only limited remedies.

V. SELECTED CASE STUDIES

This Section provides a variety of scenarios that illustrate different

155. *Id.* at 1097 ("[R]emains of some twelve thousand American Indians [are] currently stored in archives beneath the Hearst Gymnasium swimming pool.").

156. Kelley, *supra* note 123, at 197 ("For example, NAGPRA has been described as 'under-inclusive in its application . . . [because] [n]on-federal institutions such as art auction houses, dealers and private collectors are not bound by the Act.'").

157. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."). Trade secret protection is under state law. *See* ALASKA STAT. § 45.50.471(b) (2012) (defining trade secret law in Alaska).

158. *See* Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007) (holding that restoring copyright to foreign works which had entered the public domain for failure to comply with American copyright's pre-1976 formalities was permissible because there was a "rational basis" for the legislation, chiefly to bring the United States into compliance with the Berne Convention).

solutions to the inevitably enduring discussion of Alaska Native cultural property. Notably, none of these cases were decided using intellectual property law.

A. "Tlingit Barbie" Revisited

Although "Tlingit Barbie"[159] may have raised eyebrows among consumers, her introduction did not raise tensions with the Tlingit tribe. On the contrary, Mattel developed this doll, aimed at the collectors' market, in collaboration with the Sealaska Heritage Institute and with the support of tribal leaders. The doll reflects some concessions to Mattel's marketing concerns, such as the choice of colors, but otherwise imitates the look and feel of Tlingit design.[160] "Tlingit Barbie" provides an example of constructive cultural collaboration between Alaska Natives and non-Natives. Working in an advisory role, the Sealaska Heritage Institute provided input on the doll's presentation.

Such partnerships could represent an option for Alaska Natives frustrated with the production and marketing of non-Native souvenirs; by working with outside manufacturers, tribes could license particular styles and images, and also provide guidance (or refuse to provide information) on what sacred images they *do not* want to see adorning souvenirs. While the goods would no longer be produced by Alaska Natives, and thus would not qualify for the Silver Hand program, a licensing arrangement could still prove beneficial. A particular trademark, similar to the Silver Hand, could be developed to identify these "Native-advised" goods, with percentages of the proceeds of their sale going to the tribes. However, creating another trademark may lead to consumer confusion, as is already true of the Silver Hand and its widespread imitation. Additionally, this solution does not address the displacement of Alaska Native carvings and other crafts resulting from the availability of cheaper knockoffs.

B. The Sitka Totem Poles

True to its name, Sitka's Totem Square showcases a large totem pole. The pole commemorates an 1805 peace treaty between Russian settlers and the Tlingits, and its carvings include symbols of all parties

159. For a description of "Tlingit Barbie," see *supra* note 1 and accompanying text.

160. Ruskin, *supra* note 1, at 12B. ("Of course, the earth tones on her outfit didn't look right, said the dancers, who were wearing traditional red and black dance garb. And the designs didn't look very Tlingit to them.").

involved. The U.S. Forest Service commissioned the totem pole during the 1940s at the suggestion of Sitka's Kiks.ádi clan, a Tlingit people, with the intent of mitigating local unemployment.[161] Controversially, the work was assigned not to the Kiks.ádi, but rather to workers with the Civilian Conservation Corps.[162] Further angering locals, the top figure on the totem pole, a representation of Aleksandr Baranov, then-governor of Russian America, appears to be naked.[163] This unflattering depiction has the effect of making the pole seem, to some viewers, like a shame pole, a special category of totem pole carved to ridicule their subject.[164] Even as soon as the totem pole was unveiled, Native leaders expressed concern that this depiction would have the effect of "dishonoring the great man who was in charge at the time of war and [peace]."[165]

The Sitka Totem pole has proven controversial because, aside from the original suggestion, tribal leaders had little input in its construction.[166] In some Natives' view, the government paid non-Natives to carve in a style imbued with deep meaning, the results conveyed a message contrary to local sentiment, and the totem pole was placed on prominent display.

By contrast, the federal government avoided many of these mistakes with a recently constructed totem pole, commissioned by the Census Bureau to boost awareness and encourage participation in the 2010 Census.[167] Featuring symbols of the two Tlingit moieties, the Eagle

161. Anne Sutton, *Top Man on Totem Pole Could Get His Clothes Back*, ANCHORAGE DAILY NEWS, June 8, 2008, http://www.adn.com/2008/06/08/v-printer/430035/top-man-on-totem-pole-could-get.html ("The pole was a project of the Civilian Conservation Corps, a work program that was part of Franklin D. Roosevelt's 'New Deal.' It was launched during the Depression to put people to work.").

162. *See id.* ("In Southeast Alaska, Civilian Conservation Corps jobs included the carving and repair of totem poles.").

163. *Id.* ("Hope wrote that the pole did not represent the true story of the peace treaty, noting that Baranov was placed at the top of the pole 'naket, dishonoring the great man who was in charge at the time of war and pease [sic].'").

164. *Id.* ("'The local Tlingit community didn't want that to happen to Baranov,' he said. 'They wanted to make peace, but the Wrangell carver carved him naked and that was kind of a shameful thing to do.'").

165. *Id.*

166. *See* Ed Ronco, *Controversial Totem Pole Returns to Sitka Square*, KCAW (Nov. 28, 2011), http://www.kcaw.org/2011/11/28/controversial-totem-pole-returns-to-sitka-square/ ("Designed by George Benson in the early 1940s, the pole was actually carved in Wrangell by workers with the Civilian Conservation Corps. That caused some hard feelings among the locals.").

167. Shannon Haugland, *Sitka Totem Pole Adds Stature to U.S. Census*, SITKA

and the Raven,[168] the totem pole was constructed by a local Native carver, Tommy Joseph.[169] By consulting with tribes and employing an Alaska Native to direct the project, the Census Bureau avoided offending the Alaska Natives, while also using awareness of totem poles' significance to heighten visibility of the Census.

C. Contemporary Alaska Native Artists, Appropriation Art, and Remix Culture

Several contemporary Alaska Native artists, including Donny Varnell, Nicholas Galanin, Da-ka-xeen Mehner, and Stephen Jackson, are actively developing styles that blend traditional motifs and imagery with modern influences.[170] In 2005, Donny Varnell, a carver who is part Haida, created some controversy when he unveiled plans for a commissioned totem pole that featured Japanese manga-style figures.[171] After some discussion with community members, Varnell modified his design slightly, but still maintained the basic stylistic ideas, hoping to both appeal to and inspire young students.[172]

Appropriation art is nothing new, and has generally prevailed in court challenges.[173] Thus far, none of these artists have faced legal challenges, but their provocative work has sparked some dialogue about the changing roles of artists in Alaska Native communities. Whether tribes will object to, and mount legal challenges to block, the use of their traditional imagery in non-traditional media remains to be seen. Tribes may even benefit from the enhanced exposure which could result.

SENTINEL, Feb. 21, 2010, *available at* http://www.adn.com/2010/03/06/v-printer/1171521/sitka-carvers-totem-pole-adds.html.

168. *Id.*

169. *Id.* ("Sitka carver Tommy Joseph completed the pole in 15 days, and it had its first public viewing atop a truck in Tuesday's Elizabeth Peratrovich day parade down Lincoln Street."); *see also Tommy Joseph*, ALASKA NATIVE ARTISTS, http://www.alaskanativeartists.com/tommy_joseph.htm (last accessed Oct. 5, 2012) (including under recent pole commissions, "20-foot pole for Shee Atika Inc., Sitka").

170. Aldona Jonaitis, *A Generation of Innovators in Southeast Alaska*, 33 AM. IND. ART MAGAZINE 56–67 (2008).

171. Peter Porco, *Southeast Carver Combines Influences to Inspire Elementary Students*, ANCHORAGE DAILY NEWS, Oct. 31, 2005, *available at* http:// juneauempire.com /stories/103105/sta_20051031010.shtml.

172. *Id.*

173. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006) (holding artist's use of a photograph was fair use). *But see* Rogers v. Koons, 960 F.2d 301, 313–14 (2d Cir. 1992) (holding that copying imagery and entering into direct competition with the original is not a fair use but rather infringement).

D. The Return of Alutiiq Songs

Among colonization's many negative impacts, cultural suppression has proven to be one of the most enduring and damaging. For instance, by creating a Roman-based alphabet for the Vietnamese language, the French suppressed the traditional Vietnamese script, effectively cutting off the Vietnamese people from a great body of historical culture.[174] The colonial legacy in Alaska has had similar effects on Alaska Native tribes. During the Russian period, a number of Alutiiq songs and dances were lost outright.[175] Through the loss of their cultural patrimony, the Alutiq lost this connection to their heritage.

Well over a hundred years later, however, the Tlingit continued to sing these songs. A member of the Kiks.ádi clan of the Tlingit married an Alutiiq woman in Kodiak and learned the songs while living in the Alutiiq community.[176] After his wife's death, the man returned to his clan in Sitka, where he taught the songs to his community.[177] Amazingly, despite minor changes and all the years, the songs remained understandable to the Alutiiq.[178] In a June 2010 festival, members of the two tribes gathered in Sitka, where the Kiks.ádi taught the five songs to the Alutiiq, formally presenting the Alutiiq with a piece of their cultural heritage.[179]

This event illustrates the potential for tribal collaboration in protecting cultural history. Rather than pursuing any kind of legal claims against the Tlingit for copying their songs, the Alutiiq were able to strengthen a bond with the Tlingit. Recounting the episode, Steve Henrikson, curator at the Alaska State Museum commented, "sometimes the only reason things survive is because they are stolen."[180]

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174. PAMELA A. PEARS, REMNANTS OF EMPIRE IN ALGERIA AND VIETNAM: WOMEN, WORDS, AND WAR 18 (2004) ("However, Gail Kelly points out that the reformed script of the Vietnamese alphabet, Quoc-Ngu, instituted by the French, effectively separated ensuing generations of Vietnamese students from their own national literature, because they could no longer read it.").

175. Dusty Kidd, *Alutiiq & Tlingit Cultural Sharing 2010*, U.S. NAT'L PARK SERV. (June 25, 2010), http://www.nps.gov/sitk/2010-june-cultural-sharing.htm.

176. *Alutiiq Songs Return*, ALUTIIQ MUS., http://alutiiqmuseum.org/exhibits/electronic-exhibits/5 (last accessed Oct. 7, 2012).

177. *Id.*

178. *Id.*

179. *Id.*

180. Telephone interview with Steve Henrikson, Curator, Alaska State Museum (Nov. 23, 2011).

CONCLUSION

Because Alaska Native works will typically fail to satisfy copyright protection's threshold requirements, they will generally be unprotected by intellectual property laws. This leads to several possible conclusions. Some parties seek to confer copyright protection onto indigenous cultural property by lessening the restrictive requirements of copyright law. Accordingly, some scholars have called for the establishment of self-contained *sui generis* statutory schemes to provide an exception to an otherwise default rule. While adapting intellectual property laws to better accommodate indigenous interests could yield results going forward, this may prove difficult to implement. Furthermore, the constitutionality of removing material from the public domain has been challenged,[181] so retroactive application of any broadened intellectual property laws would likely draw constitutional scrutiny.

An alternative approach, which this Note cautiously advocates, is to preserve what is essentially the status quo. Some evidence suggests that greater copyright protection does not necessarily incentivize production.[182] Alaska Natives can seek to avail themselves of other remedies, like NAGPRA, and programs such as the Silver Hand, to monitor and protect the use of sacred imagery and traditional styles. The presented case studies highlight the lack of litigation resulting from the use of Alaska Native artwork. Instead, and particularly important in an age of remix culture, Tlingit Barbie and the contemporary artists illustrate the benefits of collaboration and discussion.

In order to effectuate a rebirth of Native arts and culture, it may be better to allow access to the bulk of cultural property, reserving only the sacred elements through trade secret-like protection.

181. *See* Golan v. Holder, 609 F.3d 1076, 1082 (10th Cir. 2010) (challenging a provision that restored copyright protection to foreign works that had fallen into the public domain), *aff'd*, 132 S. Ct. 873 (2012).

182. *See, e.g.*, Commission of the European Communities, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases 24, (Dec. 12, 2005) (unpublished working paper) (*available at* http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf) ("The second problem with the 'sui generis' right is that its economic impact on database production is unproven. Introduced to stimulate the growth of databases in Europe, the new instrument has had no proven impact on the production of databases.").