

INDIGENOUS RIGHTS AND INTELLECTUAL PROPERTY LAW: A COMPARISON OF THE UNITED STATES AND AUSTRALIA

SYNOPSIS

“Works of art are the property of mankind and ownership carries with it the obligation to preserve them. He who neglects this duty . . . will be punished with the contempt of all educated people, now and in future ages.”—Attributed to J.W. von Goethe¹

“Much of what they want to commercialize is sacred to us. We see intellectual property as part of our culture. It cannot be separated into categories, as [Western] lawyers would want.”—North American Indian Congress, Ray Apoaka²

“The indigenous view of the world . . . is the antithesis to the Western paradigm: communitarian, not individual, focused on sharing rather than shielding things, respect for land and all living things as sacred rather than as objects ripe for exploitation and consumption.”³

These statements illustrate a fundamental tension between individualist, or “Romantic,” views of property rights typically associated with Western thought, and the communal view of property rights held by indigenous peoples. Goethe’s view of works of art is in keeping with the “Romantic” view of authorship, a perception that highly values the individual experience of artistic production.⁴ The traditional

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1. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 35 (1999).

2. DARRELL A. POSEY & GRAHAM DUTFIELD, BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 121 (1996) (quoting remarks at a seminar on intellectual property rights at the U.N. Human Rights Convention in Vienna, June 1993).

3. Siegfried Wiessner, Symposium, *Introduction in Sixth Annual Tribe Sovereignty Symposium, Defending Indigenous Peoples' Heritage*, 14 ST. THOMAS L. REV. 271, 272 (2001).

4. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 455 (1991) (“During the eighteenth century, ‘authorship’ became intimately associated with the Romantic movement in literature and art, expressing ‘an extreme assertion of the self and the value of individual experience . . . together with the sense of the infinite and the transcendental.’”) (citing THE OXFORD COMPANION TO ENGLISH LITERATURE 842 (M. Drabble ed., 5th ed. 1985)); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 179–84 (2000). See generally James D.A. Boyle, *The Search for an Author: Shakespeare and the Fram-*

indigenous view, in contrast, envisions property, knowledge and nature as part of an interconnected world.⁵

Indigenous concerns are common throughout the world. What qualifies as an “indigenous” concern? The United Nations (UN) defines indigenous peoples according to three general characteristics.⁶ First, indigenous peoples have a historical continuity with the societies that developed in particular territories before they were conquered or colonized. Second, they consider themselves to be a distinct and non-dominant sector of the present society of the territory. Third, they are “determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”⁷

The UN’s definition provides a starting point for analyzing indigenous concerns. But it should be kept in mind that other factors are also relevant. For example, a 1993 International Labour Organization (ILO)⁸ report revealed that, as compared to national populations, the world’s indigenous people have higher rates of infant mortality, unemployment, alcoholism, disease, ill health, and incarceration.⁹ Sadly, as a general rule, “indigenous and tribal peoples are always, always at the bottom of the social and economic heaps.”¹⁰

The historical backgrounds and unique characteristics of indigenous people require and justify special protection.¹¹ Can intellectual

ers, 37 AM. U. L. REV. 625 (1998) (providing a discussion of the “romantic conception of the author”).

5. Riley, *supra* note 4, at 190.

6. Jose R. Martinez-Cobo, Study of the Problem of Discrimination against Indigenous Populations, ¶¶ 379–81, U.N. ESCOR, U.N. Sub-Commission on Prevention of Discrimination and the Protection of Minorities (1986); U.N. ESCOR, 36th Sess., U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987) (Vol. V, Conclusions, Proposals and Recommendations).

7. *Id.*

8. The ILO, founded in 1919, is a specialized agency under the auspices of the United Nations. Its stated mission is to promote international human and labor rights. See ILO website, <http://www.ilo.org/public/english/about/index.htm> (last visited Nov. 25, 2002).

9. Robin Wright, *World’s Indigenous Peoples Are the Poorest, Study Says*, THE SACRAMENTO BEE, June 13, 1993, at A21.

10. *Id.* (quoting Michel Hansenne, ILO Director-General).

11. See *Debating Activities of International Decade of World’s Indigenous People, Third Committee Hears Calls for Sharper Definition of ‘Indigenous,’* reprinted in G.A. Press Release, U.N. Doc. GA/SHC/3595 (17 Oct. 2000).

property rights help rectify this problem? This paper addresses this essential question by analyzing and comparing the divergent legal systems of the United States and Australia. Although these legal regimes faced similar requirements relative to indigenous populations, they have responded quite differently. In this article I will closely examine the United States and Australia's diverging legal developments in order to illuminate the underlying factors that may shape legal responses in the future. Part I will compare and contrast the respective legal systems of the United States and Australia. Part II will identify key legal decisions from each of these countries and will analyze them with respect to the "individualist" and the indigenous, communal view of intellectual property. Part III will consider certain international approaches to indigenous intellectual property rights, and will compare this to U.S. and Australian experiences. Finally, Part IV will propose how the heritage and culture of indigenous peoples can indeed be preserved through expanded intellectual property rights.

I. DIVERGENT APPROACHES TO INDIGENOUS POPULATIONS: THE LEGAL REGIMES OF THE UNITED STATES AND AUSTRALIA

In certain respects, the United States and Australia share similar colonial histories. For example, indigenous peoples originally populated both countries, and both countries were colonized by the English. However, the legal systems in these two countries have dealt with indigenous rights in divergent ways. In general, the United States has always accorded recognition to its tribal peoples while Australia has not. The United States has a rich history of legal recognition of indigenous rights to land, but Australia has only considered the subject during the past few decades. The differing experiences of U.S. and Australian legal regimes are suggestive of the wide diversity among the various national approaches of countries with indigenous residents.¹²

Some implications of this divergence may be illustrated by comparing contrasting approaches to rights in land. During the 1990s, a major concern of indigenous peoples involved the reclamation of

12. Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the U.S. and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 534 (1997). Indigenous concerns are similar among aboriginal and native communities throughout the world, but the national approaches to these concerns differ greatly among the countries where indigenous peoples reside. *Id.*

autonomous control over traditional lands.¹³ Indigenous peoples are concerned with protecting land as a means of protecting their culture. Land ownership is “intertwined with the ideal of self-determination of indigenous peoples, along with their ability to choose the extent of their participation in the lives of the nations that have grown up around them, their ability to preserve their unique cultural heritage without outside interference, and their ability to choose the lifestyles that they desire.”¹⁴

A. Recognition of the Legal Status of the Indigenous Population in the United States

In the 18th century settlers in the United States made various treaties with the Indian tribes. The Northwest Ordinance of July 13, 1787 stated: “[t]he utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.”¹⁵ The U.S. Constitution has a specific Indian Commerce Clause: “The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.”¹⁶ The Trade and Intercourse Act of 1790¹⁷ made clear that only the federal government could authorize trade with the Native American Nations: “No person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license of that purpose under the hand and seal of . . . such . . . person as the President of the United States shall appoint for that purpose.”¹⁸

As the United States grew in strength, legislation and case law slowly evolved. Both areas of law recognized simultaneously that Native Americans had been conquered and subjugated, and that this subjugation should or would be continued. The United States originally recognized the independence of indigenous peoples and treated them as foreign nations.¹⁹ In 1832, the Supreme Court stated that,

13. *Id.* at 531–32.

14. *Id.* at 532.

15. Ch. 8, 1 Stat. 50, art. III.

16. Art. 1, § 8, cl. 3.

17. Ch. 33, 1 Stat. 137.

18. *Id.* § 1.

19. U.S. CONST. art. 1, § 2, cl. 3.

“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”²⁰ This case also recognizes that the United States must honor treaties with indigenous peoples.²¹

Yet, in the same year, Justice John Marshall explicitly recognized the doctrine of discovery used to legitimize the taking of Native American land:²²

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title²³

At the time of this case, in 1823, Indian tribes were still granted “unlimited independence.” However, the independence of Indian tribes was rapidly diminished and, within less than a decade, indigenous people were demoted to the status of domestic dependent nations.²⁴ Congress’ decision to pass laws affecting the native tribes contributed to this loss of independence and to the decline in Indian tribal sovereignty.²⁵

From 1845 to 1887, the federal government forced Indians onto reservations.²⁶ By 1886, when the Marshall Court formally ruled on the relationship between Native Americans and the federal govern-

20. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832).

21. *Id.*

22. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

23. *Id.* at 572–73.

24. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12, 13 (1831).

25. SHIN IMAI, *ABORIGINAL LAW HANDBOOK* 116 (2d ed.) (1999).

26. Amy Sender, Note, *Australia’s Example of Treatment Towards Native Title: Indigenous People’s Land Rights in Australia and the U.S.*, 25 *BROOK. J. INT’L L.* 521, 540–41 (1999).

ment in *United States v. Kagama*,²⁷ U.S. military actions against the tribes had significantly reduced tribal land holdings. While Native American tribes lost their status as sovereign nations in the late 18th century, Native Americans did not become citizens of the United States until the passage of the Citizenship Act in 1924.²⁸ Before the Act's passage, Congress selectively extended citizenship to some Native Americans by treaty and statute. Because indigenous peoples were not U.S. citizens, no constitutional provisions directly addressed indigenous land or any other indigenous rights.

In fact, since tribal councils in the United States were exempted from the Bill of Rights, Native Americans were not given the same protection as other U.S. residents. Until 1968, the Bill of Rights was not applied to Native Americans. The 1968 Indian Civil Rights Act²⁹ requires tribal governments to abide by the individual rights of the Bill of Rights.³⁰ However, tribal councils are not permitted to operate wholly independently through tribal court. The U.S. Supreme Court technically cannot hear such cases stemming from tribal court proceedings, absent exceptional circumstances. However, the Supreme Court has consistently relied on a special federal responsibility to native peoples, described as the "unique obligation" of Congress to Indians as a suspect racial class under constitutional theory, to supervise Native Americans.³¹

Heightened constitutional protection of Indians has not alleviated the suffering of American indigenous peoples. This is becoming more apparent as the indigenous population grows. According to the 1990 census, 1,878,285 persons identified themselves as American Indians. This is an increase from 523,591 in 1960, and a great increase from the population of 1980.³² Despite its growth, the American Indian population suffers disproportionately compared to the general

27. 118 U.S. 375 (1886) (affirming Congressional power to assert criminal jurisdiction over Native Americans in their territories).

28. Citizenship Act of June 2, 1924, 8 U.S.C. § 1401(b) (1994).

29. 82 Stat. 77 (1988) (codified as amended at 25 U.S.C. §§ 1301–1303 (1994)).

30. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 38 (1995).

31. Gillian Triggs, *The Rights of "Peoples" and Individual Rights: Conflict or Harmony?*, in *THE RIGHTS OF PEOPLES* 151 (J. Crawford ed., 1988).

32. Joanne Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 *AM. SOC. REV.* 947, 947–51 (1995). Nagel's sociological study attributes this increase to the combination of three factors: "federal Indian policy, American ethnic politics, and American Indian political activism." *Id.*

population. Thirty-one percent of the total American Indian population and 51% of Indians residing on reservations live below the poverty level, compared to only 13% of the total U.S. population.³³ In 1997, of the 554 federally recognized tribes, 306 tribes (55%) are defined as small and needy, meaning with 1,500 or fewer members, and without sufficient funds to operate without further federal support.³⁴ The 1998 "Report of the President's Initiative on Race, Changing America," stated "the indigenous people of this Nation continue to suffer disproportionately in relation to any other group."³⁵ Despite the increased number of people identifying themselves as indigenous, "they have become America's most invisible minority."³⁶

B. Recognition of the Legal Status of the Indigenous Population in Australia

As in the United States, there is an upward trend in the number of Australians identifying themselves as indigenous. Estimates put the Aboriginal population between 1911 and 1966 at 80,000 to 100,000.³⁷ The census of 1981 showed 159,897,³⁸ and the 1996 census showed 386,000, up 55% from 1986.³⁹ During this time, the overall population growth in Australia was only 12%.⁴⁰ The national surge in the indigenous population is explained by "a greater willingness on the part of people with mixed ancestry to declare their heritage, as opposed to an indigenous baby boom."⁴¹ This willingness to identify with the indigenous community has grown in recent years due to Australia's "increasing action to enhance [the] status and rights of indigenous people in the community."⁴²

Despite recent improvements in status, Australia's aboriginals have suffered a long and painful history. Until recently, aboriginals in

33. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 65 (Spring 1999).

34. *Id.*

35. Martin E. Andersen, *Native American Rights*, WASH. TIMES, Nov. 25, 1999, at A19.

36. *Id.*

37. Wiessner, *supra* note 33, at 74 (citing Claire Miller, *Indigenous Numbers Increase By 55%*, in THE AGE, June 4, 1998).

38. *Id.* (citing Garth Nettheim, *Australian Aborigines and the Law*, 2 L.R. ANTHROP'Y 371 (1987)).

39. *Id.* (citing Miller, *supra* note 37).

40. *Id.*

41. *Id.*

42. *Id.*

Australia had no legal title to land.⁴³ In 1788, Captain Cook claimed sovereignty of the territory in the name of Britain. Aboriginal lands in Australia were acquired on the basis of a *terra nullius* doctrine, meaning that the land belonged to no one and the European settlers gained the title to the land by discovering it. Under *terra nullius*, the indigenous habitants of Australia had no recognized sovereignty or laws. The English common law was imposed on them, forcing them to give up their land without treaties or compensation.⁴⁴ In contrast to the United States, New Zealand⁴⁵ and Canada,⁴⁶ Australia was the only English colony that lacked treaties with its indigenous peoples.⁴⁷ Due to their lack of treaty rights, Australian aboriginals had the fewest rights and worst conditions of any of these countries.⁴⁸

43. *Mabo v. Queensland* (1992) 107 A.L.R. 1.

44. Wiessner, *supra* note 33, at 72.

45. The legal rights of indigenous peoples in New Zealand revolve around the Treaty of Waitangi, signed on Feb. 6, 1840, between the British Crown and the Maori Peoples of New Zealand. Interpretations of the Treaty have varied according to public opinion. In 1878, the court in *Wi Parata v. Bishop of Wellington* stated,

the Maori tribes were incapable of performing the duties and therefore assuming the rights of a civilised community . . . so far as it is purported to cede sovereignty[.] [The Treaty] must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could such a thing itself exist.

3 NZ Jurist (N.S.) SC 72, 78. More recently the Treaty of Waitangi has been acknowledged as giving indigenous peoples the right to self-determination.

To fail to recognize Maori as 'peoples' entitled to self-determination is to deny their inherent rights as an indigenous people; it is to deny the guarantees given in the Treaty of Waitangi; it is to deny the rich and ancient tapestry of Maori culture that has endured in this country [New Zealand] for a thousand years. It is also to deny their right to preserve, practise and enhance their culture in accordance with their own customary laws.

Maui Solomon, *The Context for Maori (II)*, in *RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES* 65–66 (Alison Quentin-Baxter ed., 1998).

46. Treaties with aboriginal peoples made with the British Crown, before the Confederation of Canada, were considered treaties with the Canadian Crown after Confederation. See THOMAS ISAAC, *ABORIGINAL LAW: CASES, MATERIALS, AND COMMENTARY* 99 (1995). The British Crown recognized North American Indian nations as self-governing by stating,

And whereas it is just and reasonable, and essential to our Interest . . . that the several Nations or Tribes of Indians . . . should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them . . . as their Hunting Grounds—We do therefore . . . declare . . . that no Governor or Commander in Chief in any of our Colonies . . . do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments.

Royal Proclamation of Oct. 7, 1763, R.S.C. 1970, App. II, No. 1, *id.* at 6.

47. Wiessner, *supra* note 33, at 72.

48. In August 1999, the Australian Parliament passed a motion of reconciliation expressing deep and sincere regret over injustices suffered by indigenous peoples. Nonetheless, Prime Minister John Howard stressed the importance of national unity as the reason for not signing a treaty with indigenous peoples (a treaty would create two distinct nations). *Rights of Indige-*

Until 1967, Aborigines were constitutionally excluded from the Commonwealth government.⁴⁹ In a 1967 constitutional referendum, 92% of Australians voted in favor of removing the discriminatory provision.⁵⁰ This gave the Commonwealth government power to legislate aboriginal affairs.⁵¹ As late as 1975, courts in Australia affirmed the doctrine that all Australian land “[belonged] to the Crown until the Crown chose to grant it.”⁵² In 1976, the Aboriginal Land Rights (Northern Territory) Act was passed. The Act recognizes traditional claims to land in the Northern Territory based on spiritual ties. The 1989 Lands Acquisition Act allows the Australian government to compel the sale of land to meet native claims.

In 1992, under *Mabo*, the notion of *terra nullius* was overruled and native title to land was finally recognized in Australia.⁵³ The court in *Mabo* concluded “the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.”⁵⁴ In another recent case, *Wik v. Queensland*,⁵⁵ the court extended this doctrine to hold that pastoral leases did not extinguish Native title.

The courts have not been the sole mechanism for improving indigenous rights. The 1993 Native Title Act⁵⁶ established a method to determine whether Native title exists over particular areas of land or water, and addressed claims of compensation. The National Native Title Tribunal administers the Act, which is a negotiating, mediating and research body whose determinations are not binding. However, the Federal Court of Australia decides contested aboriginal claims and the state still has authority to decide matters of indigenous title and rights.

nous *People Transcend Question of Land Ownership Australia Tells Social Committee*, U.N. Press Release, 51st Sess., U.N. Doc. GA/SHC/3542 (1999).

49. The Commonwealth government in Australia is equivalent to the U.S. federal government.

50. See MARC GUMBERT, *NEITHER JUSTICE NOR REASON: A LEGAL AND ANTHROPOLOGICAL ANALYSIS OF ABORIGINAL LAND RIGHTS* 23 (1984).

51. *Id.*

52. *The Seas and Submerged Lands Case, New South Wales v. The Commonwealth*, (1975) 135 C.L.R. 336, 438–39 (quoting *Williams’ Case*, (1913) 16 C.L.R.I. at 37).

53. (1992) 107 A.L.R. 1.

54. *Id.* at 2.

55. (1996) 141 A.L.R. 129.

56. Native Title Act, 1993 (Austl.).

The Australian government's power to determine aboriginal issues has been harshly criticized. The recognition of the existence of indigenous law in *Mabo* was groundbreaking, but limited since "it was confined to land tenure rather than Indigenous law generally; it accepted the ability of Indigenous law to be overborne and displaced by colonial law; and it forced Indigenous claimants into framing their entitlements in only those terms and concepts accepted by the dominant legal system."⁵⁷ Another critic demonstrates how "White" principles of justice, applied in *Mabo* and *Wik* and subsequently enshrined in the Native Title Act, force indigenous peoples into satisfying "White" rules:

Tragically and ironically, even though we were dispossessed of our lands by White people, the burden of proof for repossession of our lands is now placed on us, and it must be demonstrated in accordance with the White legal structure in courts controlled by predominantly White men. As the written word is generally regarded as more realistic by courts, all claimants must be able to substantiate their oral histories with documents written by White people such as explorers, public servants, historians, lawyers, anthropologists and police Whiteness is centred by setting the criteria for proof and the standards for credibility.⁵⁸

Although rapid progress has been made in Australia in recent years, legal procedures could be improved to better serve indigenous peoples in Australia. In deciding *Mabo*, the High Court stated that Australia's legal treatment towards indigenous peoples "should neither be nor seen to be frozen in as an age of racial discrimination."⁵⁹ The Court encouraged the use of comparisons between Australia's laws and those of other countries: "Australia can use *Mabo* to make a clean break with the past and learn from the successes and failures of countries sharing a significant cultural and legal bond."⁶⁰ Recent copyright cases involving indigenous claims illustrate that Australia has done so.

57. Janet Ransley and Elena Marcetti, *The Hidden Whiteness of Australian Law: A Case Study*, 10 GRIFFITH LAW REVIEW 139, 144 (2001).

58. Aileen Moreton-Robinson, *Witnessing Whiteness in the Wake of Wik*, 17 SOCIAL ALTERNATIVES 11 (1998).

59. (1992) 107 A.L.R. at 28.

60. Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1240 (1993).

II. COMPARISON OF RELEVANT U.S. AND AUSTRALIAN CASE LAW

Cases involving indigenous and intellectual property rights are ideal subjects for comparative analysis. Indigenous and intellectual property issues cross national borders, making them international in scope, structure and importance.⁶¹ Further, intellectual property, by its very nature, is well suited to a comparative approach: “recent developments in international intellectual property litigation demand an intensified commitment to comparative work [T]he acceptance that courts might apply foreign copyright law introduces the potential for comparative analysis to play its most practical role of supplying information about foreign law.”⁶²

The scholar Basil Markesinis encourages the comparative case method, in particular, for cross-country analysis. While Markesinis compares torts cases in Europe, his framework is helpful for making case comparisons between Australia and the United States. He explains:

I have always maintained that finding exact factual equivalents facilitates the teaching of foreign law and the receptions of foreign ideas simply because it puts the foreign user of such material at ease. For, it takes him out of the theoretical and conceptual discussion, which is appropriate to one system but not to another, and puts him at a factual level where the similarity of the problems and the answers can be tested in a very tangible way. Often, the underlying policies pursued by the different systems can also be easily discovered hidden behind the conceptualism appropriate to each system and shown to be the same across national borders.⁶³

In explaining the case method analysis, Markesinis tries “to show how, starting from decisions, we can come to appreciate the common factual backgrounds and the remarkable similarity of solutions.”⁶⁴ Studying foreign law through cases offers “a chance to compare judicial styles, reflect on the sources of law and the use made of them by various courts.”⁶⁵ Markesinis’ analysis involves the use of cases to

61. As a result, indigenous peoples around the world face similar challenges due to the shared experiences of colonization. See Wiessner, *supra* note 3.

62. Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 450–51 (2001).

63. Basil S. Markesinis, *Foreign Law and Foreign Ideas in the English Courts*, in ALWAYS ON THE SAME PATH: ESSAYS ON FOREIGN LAW AND COMPARATIVE METHODOLOGY 2, 51 (2001).

64. *Id.* at 99.

65. *Id.*

compare the similarities and differences between the systems, the influence of legal background on the outcome of these cases and the different reasoning used by the courts in each country.⁶⁶ Markesinis' analysis concludes with a discussion on the utility of such a comparative study. In the following sections I will compare similar cases from two different countries, altering Markesinis' framework to include aspects of international law. The cases described below demonstrate differences in the approach to indigenous peoples' rights in the United States and Australia. I will examine the similarities between the cases and what they reveal about the countries' attitudes towards individual property rights and indigenous communal rights. I will also analyze the differing roles of the states in dealing with indigenous rights through intellectual property interests.

A. United States Case Law

The American case *Chilkat Indian Village v. Johnson*⁶⁷ illustrates the clash between the interests of the art market with those of the Chilkat tribal community. The case addresses the issues of communal versus individual property rights in regard to cultural artifacts, and the degree to which recognized tribes might impose their own cultural preservation laws on non-members.

Chilkat involved religious and cultural artifacts of the Chilkat tribe. The artifacts were four carved wooden posts and a wood partition that art dealers and museums had repeatedly attempted to purchase. To the Chilkat tribe, the artifacts represent an irreplaceable part of their cultural heritage that helps to maintain cultural identity. The objects "mean[] a lot to people as far as their identity goes You can't go into a library and read about our history. Every one of the artifacts has a story to it. It *is* our history."⁶⁸

The objects also have value to those not affiliated with the Chilkat tribe. In the late 1870s, a U.S. naval officer, Lieutenant Emmons, wrote "The Whale House of the Chilkat," and described the artifacts as "the finest example of Native art, either Tlingit or Tsimshian, in Alaska."⁶⁹ Attempts to buy or steal the Whale House began shortly

66. *Id.* at 80–101.

67. 870 F.2d 1469 (9th Cir. 1989).

68. Dean Katz, *Two Worlds Collide*, SEATTLE TIMES, Dec. 9, 1984, at K1 (quoting Lani Strong-Hotch).

69. GEORGE T. EMMONS, THE WHALE HOUSE OF THE CHILKAT (1916), reprinted in RAVEN'S BONES 68, 81 (Andrew Hope III ed., 1982).

after publication of Emmons' paper. These attempts were unsuccessful until the appearance of the defendant, Michael R. Johnson, described as "one of the world's most respected Native American art dealers."⁷⁰ Johnson had been trying to buy the artifacts since the early 1970s.⁷¹ He approached three elderly Whale House Group women, caretakers of the artifacts, and offered them financial and legal assistance to assert individual ownership rights over the artifacts.⁷² However, the tribe claimed that the artifacts were communal property and, as such, could not be "owned" by the caretakers.⁷³

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. The ordinance stated:

No person shall enter on 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 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. No traditional Indian artifacts, clan, crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.⁷⁴

Several tribal members later removed the artifacts from the Whale House and shipped them to Johnson, who had arranged for their sale to a New York art dealer. The Chilkat Indian tribe sued to recover the artifacts, claiming that Johnson violated the village ordinance and federal law by removing Tlingit Native artifacts from the tribe's land. The court ruled against the Chilkat claims, holding that federal statutes cannot give rise to private rights of action.⁷⁵ The dissent wrote

70. Christopher S. Byren, *Chilkat Indian Tribe v. Johnson and NAGRPA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENV. L. & LITIG. 109, 114 (1993).

71. *Id.*

72. *Id.*

73. *Id.*

74. Chilkat, 870 F.2d 1469, 1471 (quoting Chilkat Indian Village, Alaska, Ordinance of May 12, 1976).

75. *Id.* at 1476.

that the court should imply a private remedy since Indian property right claims have basis in federal law.⁷⁶

The Chilkat controversy “represents a stark example of the conflicting values between tribes and the tribal art market, and reveals the legal difficulties involved with recognizing a category of property owned in perpetuity by an autonomous cultural group, inalienable by individual group members.”⁷⁷ The Chilkat valued the artifacts not for their economic value but for their cultural and ceremonial value.

Neither the U.S. courts nor the federal Indian laws were able to help the Chilkat reclaim their religious artifacts. The Court showed reluctance to rule on matters outside of its enumerated powers, particularly on matters concerning Native Americans. Similarly, the Court refused to rule on the validity of the tribal ordinance or to consider communal property rights, as federal law does not recognize them. However sympathetic the Court may have been to Indian concerns, it was powerless to rule outside of its jurisdiction.

B. Australian Case Law

Courts in Australia appear more prone than the American courts to extend intellectual property rights to protect indigenous cultural works. Three famous Australian cases illustrate the increasing willingness of this country’s courts to consider indigenous beliefs and values.

In *Yumbulul v. Reserve Bank of Australia*, the Australian federal court rejected a claim of communal harm caused by the unauthorized use of sacred images.⁷⁸ Representatives of the Galpu Clan sued to prevent the Reserve Bank from reproducing the design of a Morning Star Pole on a commemorative banknote. A clan member who had obtained his authority and knowledge through tribal initiation and other sacred ceremonies created the pole. The Galpu claimed that the communal obligation of the artist to the tribe precluded him from granting permission to an outside entity to replicate the pole in a culturally offensive manner. The court found that the artist had duly transferred his intellectual property rights to the Reserve Bank through a legally binding agreement.⁷⁹ The court lamented that Aus-

76. *Id.*

77. Byren, *supra* note 70, at 116.

78. 21 I.P.R. 481, 492 (1991) (Austl.).

79. *Id.* at 490.

tralian copyright law did not provide protection of the rights of the aboriginal community as a whole to regulate the reproduction and use of communal works.⁸⁰ Courts in subsequent cases did more than just lament; instead, these courts took a proactive approach to the law of indigenous intellectual property rights.

In *Milpurrurru v. Indofurn Party Ltd.*, aboriginal artists in Australia sued to prevent the importation of carpets manufactured in Vietnam by a company based in Perth.⁸¹ The carpets reproduced the designs of several prominent aboriginal artists without their permission. The designs had been copied from a portfolio of artworks produced by the Australian National Gallery. In their argument, the plaintiffs declared that: (1) they wanted to be compensated for their original designs through a licensing arrangement; (2) they wanted to exclude non-indigenous competitors from the market; (3) they wanted to establish that such unauthorized use of intellectual property violates not just the economic rights of the individual author, but could potentially expose him to larger community sanctions, such as the preclusion from the right to participate in ceremonies, removal of the right to reproduce stories of the clan, and the expulsion from the community, and (4) they required compensation for the communal harm which resulted from the unauthorized use of aboriginal designs.⁸²

The federal court awarded the aboriginal artists damages for copyright infringement and granted injunctions against further infringement.⁸³ The court acknowledged that the replication of the artwork was commensurate with the pirating of cultural heritage and furthermore, that the infringement of copyright could have far-reaching effects given the cultural environment in which aborigines live.⁸⁴ Aboriginal sacred images had been used on carpet. 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. Ultimately, despite the culturally offensive nature of the business activities, the court's decision rested on traditional copyright law. Only the individual authors were compensated, and not the greater aboriginal community.

80. *Id.*

81. 54 F.C.R. 240 (1994) (Austl.).

82. *Id.* at 241–43.

83. *Id.* at 272–83.

84. *Id.* at 283.

The most recent case, *Bulun Bulun v. R&T Textiles Party Ltd*, involved a leading aboriginal artist who was the legal owner of copyright in his own artwork.⁸⁵ The defendant, R&T Textiles, imported and sold fabric in Australia using Bulun Bulun's designs, thus infringing the aboriginal artist's copyright. The artist sued R&T Textiles for infringement of his copyright.

Another party in the case was Milpurrurru, an aboriginal artist, who sued as a representative of the tribal people under the claim that the tribal members were the equitable owners of the artwork's copyright.⁸⁶ Bulun Bulun was responsible for creating paintings in accordance with the laws and rituals of the Ganalbingu people. His painting depicted a waterhole that was the principle totemic well for this artist's clan. Milpurrurru claimed that the unauthorized reproduction of the image threatened the stability and continuance of the artist's role through its interference with the relationship between people, their (creator) ancestors and the land given to them. Furthermore, all of the traditional owners of the Ganalbingu land would have to agree on the use of artworks depicting a sacred site. Bulun Bulun described his position as artist within the tribal community:

My work is closely associated with an affinity for the land. This affinity is the essence of my religious beliefs. The unauthorized reproduction of art works is a very sensitive issue in all Indigenous communities. The impetus for the creation of works remains very important in ceremonies and the creation of art works is an important step in the preservation of important traditional custom. It is an activity which represents an important part of the culture; continuity of the tribe. It is also the main source of income for my people.⁸⁷

The court found the existence of a fiduciary relationship between Bulun Bulun and the Ganalbingu people that arose from the trust and confidence of his people that his art would be made to preserve the sacred sites, customs, culture and ritual knowledge of the Ganalbingu peoples.⁸⁸ Thus, the Australian legal system recognized the relationship between the Ganalbingu tribe and Bulun Bulun as being of a fiduciary character arising from the law and customs of the tribe.

85. (1998) 157 ALR 193 (Austl.).

86. *Id.* at 210–12.

87. Cate Banks, *The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators*, 9 GRIFFITH L. REV. 334, 338 (2000) (Austl.) (citing an affidavit sworn by Johnny Bulun Bulun).

88. *Bulun Bulun*, *supra* note 85, at 210–11.

These three cases show the most recent progression in the ability of indigenous peoples in Australia to use the court system to protect their intellectual property rights, particularly their copyrights. These prominent cases have moved Australian copyright law towards the greater protection of indigenous rights and to an improvement in mainstream Australia's understanding of the cultures of aboriginal people.⁸⁹

III. INTERNATIONAL APPROACHES TO INDIGENOUS PROPERTY RIGHTS

A. International Legal Instruments

In recent years, the focus of international organizations has expanded to include indigenous land claims and cultural rights. The self-determination of indigenous peoples is integral to asserting both types of rights. Self-determination of peoples is a generally accepted rule of customary international law, referring to a collective rather than an individual right.⁹⁰ The right of self-determination has traditionally been asserted in the context of decolonization, and has been used to advance a broad spectrum of political goals, including the formation of new states.⁹¹ Without precisely defining the limits of the principle, various international instruments recognize the right of self-determination of peoples.⁹²

89. Andrew T. Kenyon, *Copyright, Heritage and Australian Aboriginal Art*, 9 GRIFFITH L. REV. 303 (2000).

90. U.N. CHARTER art. 1, para. 2, art. 55.

91. Douglas Graham, *The New Zealand Government's Policy*, in *RECOGNIZING THE RIGHTS OF INDIGENOUS PEOPLES* 3, 9 (Alison Quentin-Baxter ed., 1998).

92. *See, e.g.*, International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 999 UNTS 171; International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 UNTS 3; Western Sahara Advisory Opinion, 1975 I.C.J. 12; *The Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960) (stating "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). The principle was amplified ten years later in a declaration stating,

By virtue of the principle of equal rights and self-determination enshrined in the Charter of the United Nations, all peoples have the right freely to determine without external interference their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of this Charter.)

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1970). These instruments also

In the past, the UN focused on the importance of assimilating indigenous peoples into the communities of their respective countries.⁹³ The UN now recognizes the right of indigenous peoples to maintain their own institutions, cultures and identities within the framework of existing nations.⁹⁴

The International Labor Organization Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989 requires governments to “develop co-ordinated and systematic action to protect the rights” of indigenous peoples and “to guarantee respect for their integrity.”⁹⁵ Article 1 of the ILO Convention No. 169 recognizes that indigenous groups are “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national communities, and whose status is regulated wholly or partially by their own cultural patterns, social institutions and legal systems.”⁹⁶

The granting of intellectual property rights to indigenous peoples has been seen by states as a way to rectify their reluctance to allow for indigenous self-governance. The issue of indigenous intellectual property rights has attracted attention on the international level. This approach elevates the role of comparative analysis, whether in developing substantive private international copyright law or in interpreting the provisions of international treaties. Two legal instruments specifically advocate the increased recognition of indigenous intellectual property rights: the UN Draft Declaration on the Rights of Indigenous Peoples and the Berne Convention. Both advocate for stronger rights than are currently available in either the United States or Australia.

1. *The United Nations Draft Declaration on the Rights of Indigenous Peoples.* In 1989, the UN Working Group on Indigenous Populations began composing a UN Draft Declaration on the Rights

conveyed that the right could not be exercised in a manner that could undermine the territorial integrity of independent and democratic states that conducted themselves in accordance with international human rights standards.

93. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107) [hereinafter *Indigenous and Tribal Populations Convention*], June 26, 1957, ILO, available at <http://www.ilo.org/ilolex/ilolex.htm?ILOLEXNO=1567&ILOLEXID=1567> (last visited Dec. 2, 2002).

94. International Labour Conference, 28 I.L.M. 1382 (June 27, 1989) (entered into force Sep. 5, 1990) [hereinafter *ILO Convention No. 169*].

95. *Id.* pt. I, art. 2.

96. *Id.* art. 1.

of Indigenous Peoples. By 1993, the UN Draft Declaration had been formulated to address indigenous cultural, economic, social and land rights.⁹⁷ The UN Draft Declaration was submitted to the Commission on Human Rights (CHR), which in 1995 organized an inter-sessional working group to review the text.⁹⁸ The General Assembly has not yet ratified the UN Draft Declaration, and the UN member states are currently considering the draft.⁹⁹

The UN Draft Declaration establishes a comprehensive right to self-determination. Article 8 of the UN Draft Declaration states that indigenous people are to have the collective *and* individual right to identify themselves as indigenous and to be recognized as such.¹⁰⁰

Article 3 of the UN Draft Declaration states that “indigenous peoples have the right of self-determination” which includes the right to freely determine their political status and the ability to pursue their economic, social and cultural development.¹⁰¹ The standards for self-governance “are regarded as the necessary minimum to safeguard the cultural diversity represented by indigenous peoples.”¹⁰² Article 12 of the UN Draft Declaration states:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free

97. *Report of the Working Group on Indigenous Populations on Its Eleventh Session*, Working Group on Indigenous Populations, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex I, Agenda Item 14, at 50–51, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter U.N. Draft Declaration]. The U.N. Subcommission on Prevention of Discrimination and Protection of Minorities adopted the U.N. Draft Declaration in 1994. The Draft Declaration was adopted by its resolution 1994/45, Aug. 26, 1994, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994).

98. Press Release, Commission on Human Rights, Commission on Human Rights Begins Discussion of Indigenous Issues (Apr. 3, 1997), available at http://www.un.org/news/press/docs/1997/19970402_hrcn785.htm (last visited Dec. 3, 2002).

99. Office of the United Nations High Commissioner for Human Rights, <http://www.unhcr.ch/indigenous/main.html> (last visited Oct. 4, 2002) (stating that “[t]his draft declaration on the rights of indigenous peoples is currently working its way up through the U.N. system to the General Assembly, where it will be considered as an aspirational document for Nation States and the Indigenous peoples of the world.”).

100. *Id.*

101. U.N. Draft Declaration, *supra* note 97, art. 3.

102. *Id.*

and informed consent or in violation of their laws, traditions and customs.¹⁰³

Furthermore, Article 29 states “indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.”¹⁰⁴ The UN Draft Declaration language also provides for the ability of indigenous peoples to maintain past and future manifestations of their cultural and spiritual property. This language is similar to the rights of integrity recognized in an intellectual property “moral rights” scheme, which allows for the artist to manage the use of his expressions, regardless of ownership.¹⁰⁵ In contrast to intellectual property regimes in Western countries, however, the UN Draft Declaration uses language supporting communal ownership.¹⁰⁶

Indigenous peoples are hoping to use the UN Draft Declaration to seek recognition for and application of their unique value systems within the legal systems of their residential states.¹⁰⁷ The states, on the other hand, have been reluctant to cede control over segments of their population, especially in regards to granting indigenous self-rule. Consequently, defining the scope of self-determination has proven to be highly controversial.¹⁰⁸ According to Erica-Irene A. Daes, Chairperson of the UN Working Group on Indigenous Populations:

[G]overnments have remained sceptical regarding the right to self-determination of Indigenous Peoples . . . a majority of governments have continued to express fear and uncertainty about self-determination, and, in particular, about Article 3 of the UN Draft Declaration. This fear and uncertainty by governments regarding this important and multifarious point has been the main factor de-

103. *Id.* art. 12.

104. *Id.* art. 29.

105. Berne Convention for the Protection of Literary and Artistic Works, S. Treaty Doc. No. 99–27, 99th Cong., 2d Sess. (1986), Art. 15(4). See Part III.B.2. *infra*.

106. “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.” U.N. Draft Declaration, *supra* note 97, art. 9. “Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” *Id.* art. 8.

107. Alison Quentin-Baxter, *The International and Constitutional Law Contexts, in RECOGNIZING THE RIGHTS OF INDIGENOUS PEOPLES 4* (Alison Quentin-Baxter ed., 1998).

108. See U.N. Rights: U.N. Still at Odds over Indigenous Rights, INTER PRESS SERVICE, Dec. 14, 1998.

laying the completion of the elaboration of the draft declaration¹⁰⁹

It is therefore unlikely that a sufficient number of states will adopt the UN Draft Declaration, thus preventing it from entering into the corpus of customary international law.¹¹⁰

2. *The Berne Convention for the Protection of Literary and Artistic Work.* The UN Draft Declaration alludes to many of the moral rights contained in the Berne Convention, which explicitly recognizes “moral rights” in intellectual property. Moral rights include the “right of publication,” the right to decide whether a work will be made public, the “right of paternity,” the right to claim authorship, the “right of integrity,” the right to object to distortions of the work that would harm honor or reputation.¹¹¹ Moral rights protect the distinctive qualities of created works, recognizing that “a painting or a book is different from other kinds of property because of the intensely personal nature of its creation.”¹¹² The created work comes from within the author and is a part of its creator. The term “right of paternity” indicates that such “moral rights” work is linked by a family-like tie to its creator.¹¹³ Of all the moral rights, the right of integrity is considered to offer the most potential to protect indigenous creators.¹¹⁴

Unfortunately, moral rights pertain only in certain situations and thus offer limited protection for indigenous peoples. The resulting copyright law is generally “ill-suited for adequately protecting folklore” since the laws “recognize solely an individual author’s creative expression as the authorship in a work and normally require fixation of the work in a tangible medium before limited durations rights will

109. Erica-Irene A. Daes, *The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 14 ST. TH. L. REV. 259, 262 (2001).

110. Rosemary J. Coombe, Symposium, Sovereignty and the Globalization of Intellectual Property, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL STUD. 59, 83 (1998).

111. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 105.

112. Lenora Ledwon, *Native American Life Stories and “Authorship”: Legal and Ethical Issues*, 9 ST. THOMAS L. REV. 69, 78 (1996).

113. *Id.*

114. Banks, *supra* note 87, at 337.

vest.”¹¹⁵ This position is further complicated by the fact that most indigenous folklore is communal in nature and not necessarily fixed in a tangible medium of embodiment.

B. Copyright Conflicts and Partial Solutions: The Effects of International Instruments in the United States and Australia

The UN Draft Declaration and the Berne Convention have both produced responses in the United States and Australia. These two countries, however, have responded differently. The next section describes the varying approaches to expanding indigenous intellectual property rights in the United States and Australia.

1. *Barriers: Copyright Law Conflicts.* Six problems come between American copyright law and indigenous intellectual property rights: (a) Individual authorship, (b) Originality, (c) Public domain, (d) Duration, (e) Fixation, and (f) Fair use.

a. Individual Authorship. In *Burrow-Giles Lithographic Co. v. Sarony*, the U.S. Supreme Court defined the “author” as “[h]e to whom anything owes its origin; originator, maker.”¹¹⁶ This conception of authorship reflects the “Romantic archetype” of the author, which:

[H]as lent to copyright doctrine a conception of the author as lone genius, whose work breaks from tradition and does not receive increased importance or validity through connections to prior creations The resulting definition of authorship exists in direct opposition to the communal methods of creativity symbolizing the structure of Native communities, which place the origins of tribal works in the group, not the individual. The demonization of indigenous works as communitarian has further pushed collective creativity outside the Western, capitalistic legal infrastructure.¹¹⁷

Western definitions of authorship are thus in tension with indigenous communal works. U.S. copyright law is premised on individual rights for the individual creator. In contrast, indigenous artistic creations “defy the concept of individual authorship, because the sanctity of the work itself derives, in part, from the import placed on the collective creation of the piece.”¹¹⁸ In indigenous societies, the group product is

115. Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 315–16 (1994).

116. 111 U.S. 53, 58 (1884).

117. Riley, *supra* note 4, at 191.

118. *Id.* at 194.

“the medium through which all tribal members, living, dead and unborn, speak their voice and become a part of the tribal way.”¹¹⁹ Indigenous artwork thus cannot fit into the constraints of western individual authorship.

b. Originality. U.S. copyright law requires originality for protection to subsist.¹²⁰ Yet most indigenous folklore is ancient and evolving. Originality is contrary to Native American traditions of passing ancestral teachings from generation to generation. Originality thus blocks protection of such folklore.

c. Public Domain. Much of the indigenous material has been around for hundreds, if not thousands, of years. The material is thus already in the public domain and could therefore not be protected under American copyright law.

d. Duration. Existing copyright law provides protection for a limited period of time.¹²¹ After this period, the work passes into the public domain and can be freely used without permission from the creator or artist. Indigenous peoples are seeking perpetual rights for their religious and cultural work. This type of infinite protection is inconsistent with the limited terms of western copyright law.

e. Fixation. American copyright law also requires fixation in a tangible medium of embodiment.¹²² Fixation is not conducive to traditional forms of indigenous culture, which is primarily oral and expressive. By their very nature, most indigenous songs, myths, stories, customs and other expressions, are not in transcribed form.

119. *Id.*

120. 17 U.S.C. § 102(b) (2002) (providing that “[i]n no case does copyright protection for an *original* work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, illustrated, or embodied in such work.” (emphasis added)).

121. *Id.* § 302(a) (providing that a “[c]opyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author’s death.”). *See also id.* § 302(c) (providing that “[i]n the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years the year of its creation, whichever expires first.”).

122. Under the Copyright Act: “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101 (2002).

f. Fair Use. The fair use exception in U.S. copyright law would also pose problems to indigenous intellectual property. Under American law, copyrighted works can be used for educational purposes, commentary and news information.¹²³ Yet certain types of indigenous work cannot be shared outside of the community for religious and/or cultural reasons. Secrecy is an integral part of the sacred nature of indigenous artwork. Accordingly, “many indigenous peoples consider certain objects, as well as certain knowledge, limited goods that cannot be shared and disseminated without a corresponding loss in power, significance, and meaning. Thus, certain objects and information must remain concealed from the uninitiated either within or outside the cultural group.”¹²⁴ There has already been much controversy over the use of certain indigenous artifacts in public museums.

To summarize, the six copyright law conflicts show that U.S. copyright law does not protect tribal expressions because they lack identifiable authorship. Tribal expressions further require perpetual protection, which also conflicts with the limitations on term protection for fixed expressions under the U.S. copyright law. Additionally, U.S. intellectual property law does not bestow tribes, as opposed to individual artisans, with intellectual property rights. Nor does it allow intellectual property protection for expressions created beyond the last century. U.S. intellectual property law also fails to provide rights of integrity and attribution for a broad category of fixed expressions.¹²⁵ These deficiencies limit the ability of Native Americans to protect the cultural and spiritual integrity of their tribal heritage, as they cannot limit the exploitation of their cultural and spiritual works under U.S. copyright law. Native Americans are also unable to realize the potential economic benefit of managing the creation and trade of their cultural and spiritual works.¹²⁶

123. *Id.* § 107 (2002).

124. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 314 (1999).

125. David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?*, 25 AM. INDIAN L. REV. 93, 113 (2001).

126. *Id.* at 113–14.

D. Partial Solutions

1. *Australia.* Unsurprisingly, similar conflicts appear in the Australian approach to intellectual property law. A thorough review of the limitations would be repetitive, and it can be stated simply that Australian copyright law presents similar challenges to indigenous peoples due to the requirements of individual authorship, originality, public domain, duration, and fixation. Like the United States, Australia has been reluctant to adopt the robust language of the UN Draft Declaration.¹²⁷ However, unlike the United States, Australia has been more welcoming to the provisions of the Berne Convention. To an extent, moral rights are now recognized in Australia.

The Copyright Amendment Act of 2000¹²⁸ includes a moral rights regime in Australia for filmmakers and authors of literary, dramatic, musical and artistic works in which copyright subsists.¹²⁹ The Act contains only two moral rights: (1) the right of integrity (i.e., the right to object to derogatory treatment of one's work that may prejudicially affect one's reputation), and (2) the right of attribution (i.e., the right to be identified as the author of the work). Despite this expansion of moral rights in Australia, indigenous peoples still face problems similar to those posed under U.S. law. The rights provided by the Australian Act are only conferred to individuals, and thus indigenous peoples would still face problems claiming protection for their communal works. Thus, moral rights pose aboriginals with the same problem: the need to recognize an individual, "Romantic" author.¹³⁰ In addition, the right of integrity has a limited duration—life of the creator plus 50 years.¹³¹ The works would eventually fall into the public domain, thus presenting further problems for advocates of indigenous intellectual property rights, who seek protection in perpetuity for indigenous religious works. Australia's solution has been to work through the courts as described in Part II.B. The United States, however, has chosen to enact limited federal legislation.

127. Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT'L LEGAL STUD. 205, 229–30 (1999).

128. Copyright Amendment (Moral Rights) Act 2000 (Austl.).

129. *Id.*

130. See Jaszi, *supra* note 4, at 497 ("The connection between 'moral rights' and the complex values associated with the Romantic conception of 'authorship' is clear").

131. Copyright Act 1968 § 33 (Austl.).

2. *The United States.* The UN Draft Declaration and the Berne Convention contain provisions that American copyright law fails to provide.¹³² The United States has refused to adopt the UN Draft Declaration, primarily due to the strong provisions on self-determination for indigenous peoples. Although the United States is a party to the Berne Convention, it has ratified the Convention in such a way that minimizes its effect on current American intellectual property law.¹³³

a. *Native American Graves Protection and Repatriation Act.* Due to the United States' strong personal property and capitalist roots, American law is ill equipped to address the unique cultural and economic interests of Native American tribes. Attempts have been made to change this situation, though the progression in the United States is slow and careful. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)¹³⁴ was enacted as a response to issues raised in *Chilkat*, which are 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."¹³⁵ The Act applies to both the removal of cultural objects already on federal or tribal lands and to objects in museums or federal agencies, including universities. The Act thus allows Native American Indian tribes to reclaim these cultural objects.

NAGPRA was enacted, in part, to counter the appropriation of indigenous religious items. Western museums and "New Age" adherents have created a market for the "culture theft" of Indian prayer pies, drums, flutes and even Native American ceremonies.¹³⁶ To traditional Native American spiritual authorities, this selling of religion is

132. The U.N. Draft Declaration recognizes a right of self-determination for indigenous peoples, while the Berne Convention recognizes "moral rights" in intellectual property. Compare U.N. Draft Declaration, *supra* note 97, art. 3, 12 with Berne Convention for the Protection of Literary and Artistic Works, *supra* note 105, art. 15, ¶ 4.

133. The Architectural Works Copyright Protection Act of 1990 (implementing Berne Convention), extends protection to building design. 17 U.S.C. § 101 (2002). Protection does not extend to individual standards features, such as common windows or other staple building components.

134. 25 U.S.C. § 3001 (1990).

135. H.R. Rep. No. 877, 101st Cong., 2d Sess., at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367.

136. Ledwon, *supra* note 112, at 76.

“akin to having holy communion served at McDonalds.”¹³⁷ NAGPRA “speaks specifically to the issue of illicit trade in certain tribal artifacts and demonstrates an implied recognition of communal property rights in cultural objects, but appears structurally unprepared to enforce those rights.”¹³⁸ As a result, many of the negotiations for the reclamation and protection of cultural objects might take place privately, in the form of alternative dispute resolution. Since such settlements would not occur in the courts, there would be little creation of legal precedent. Thus, while the settlements could satisfy the parties to particular disputes, the lack of precedent might prove detrimental to future Native American concerns, particularly if there is a backlash to Indian cultural rights.

b. Indian Arts and Craft Act. Since NAGPRA applies only to “objects,”¹³⁹ no federal law protects Indian control over the intangibles associated with cultural ceremonies, such as symbols. The Indian Arts and Crafts Act gives the federal Indian Arts and Crafts Board authority to create distinctive trademarks for Indian tribes and individual Indian arts, and prohibits the misrepresentation of tangibles as “Indian-made.”¹⁴⁰ Individuals who become commercial artists or sell handicrafts without meeting blood-quantum criteria may be subject to penalties for claiming to be “Indian.”¹⁴¹

Traditional Indian custodians of cultural knowledge cannot use copyright laws to protect their privacy, since copyright only applies to new works by individual authors, not to old collective traditions or “folklore.”¹⁴² Current U.S. copyright law fails to address the cultural

137. *All Things Considered* (NPR radio broadcast, Nov. 24, 1993).

138. Byren, *supra* note 70, at 111.

139. See 25 U.S.C. § 3002(a)–(d) (1994).

140. See 25 C.F.R. § 309.2 (2000) (defining “Indian product”). Most Indian tribes retain “blood quantum” criteria for membership. Federal officials originally inserted minimum blood quantum criteria in tribal constitutions in the 1930s, as a way of limited federal expenditures on newly “reorganized” Indian communities. Russel L. Barsh, Symposium, *Fifth Annual Tribal Sovereignty Symposium, Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. THOMAS L. REV. 127, 139 (2000). Indian tribes have the authority to eliminate blood quantum criteria, but very few tribes have done so. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (establishing Indian tribes’ broad power to control their membership). Tribes support this practice today as a legitimate test of eligibility to share in tribal assets and services. Yet blood quantum is arguably unjust as a limitation on individuals’ rights to practice their religion and draw upon their own cultural traditions as artists. Barsh, *supra* at 139.

141. Barsh, *supra* note 140, at 152.

142. *Id.* at 141.

and economic concerns of Native American tribes. American intellectual property law has been criticized as lacking respect for the moral rights of artists, limiting protection for authors as a market growth incentive, and valuing copyright as a welfare tax on the public instead of a private right of the authors.¹⁴³ Despite international support for granting indigenous peoples' moral rights, the United States has been reluctant to provide additional protection to the intellectual property of Native American tribes.¹⁴⁴

V. CONCLUSIONS

Intellectual property law as it stands is not sufficient to fully protect and respect indigenous cultural beliefs. International instruments, most notably the UN Draft Declaration and the Berne Convention, propose language that would satisfy indigenous concerns. However, countries like the United States and Australia are reluctant to adopt such provisions in full force. Instead, these countries are slowly expanding indigenous intellectual property rights, though in different ways.

A fundamental tension between Western ideals of individuality and indigenous communal beliefs gives rise to problems in both American and Australian laws. The very expression "intellectual property rights" makes it appear as if the property and the rights are products of individual minds. "This is part of a Western epistemology that separates mind from body, subject from object, observer from observed and that accords priority, control, and power to the first half of the duality. The term 'intellectual' connotes as well the knowledge side and suggests that context of use is unimportant."¹⁴⁵ Many indigenous peoples view intellectual property rights as "Western" in that they are foreign, threatening, and exploitative of indigenous beliefs.¹⁴⁶ They see intellectual property rights as a "new form of colonization" and "a tactic by the industrialized countries of the North to confuse and to divert the struggle of indigenous peoples from their rights to land and resources on, above, and under it."¹⁴⁷ Thus, the very notion

143. Jordan, *supra* note 125, at 114–15.

144. *Id.*

145. Stephen Gudeman, *Sketches, Qualms, and Other Thoughts on Intellectual Property Rights*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 103 (S.B. Brush & D. Stabinsky eds., 1996).

146. Coombe, *supra* note 110, at 79.

147. POSEY & DUTFIELD, *supra* note 2, at 219–20.

of intellectual property is contrary to indigenous perceptions of communal property.

Subsequently, perhaps intellectual property is not the solution to improving the status and rights of indigenous peoples. Quite possibly, molding the *Chilkat*, the *Ganalbingu* or the *Galpu* decisions into protection for “Romantic” authors is contrary to indigenous beliefs. Bulun Bulun may not want to be Goethe, that is, Bulun Bulun may not want the individual recognition and remuneration accorded to Goethe through Western intellectual property law. Bulun Bulun may just want the freedom to practice his religious beliefs and to exercise his tribal responsibilities, without fearing that his work will be reproduced on carpets or currency. Because of their origins in the Western tradition of protection for individual intellectual property rights, the laws of Australia, the United States, and the international community may not be sufficient to ensure respect for indigenous peoples and their culture.

The recent court decisions in Australia show a willingness of the courts to modify the law to accommodate indigenous beliefs. In the United States, the courts have been unwilling to expand the law in the manner of Australian courts. Nonetheless, the U.S. legislature has responded to perceived injustices of American law toward Native Americans. NAGPRA was enacted as a response to the *Chilkat* case. The Indian Arts and Crafts Act further expanded indigenous intellectual property rights. Thus, through the courts in Australia, and the enacting of federal legislation in the United States, indigenous people are slowly gaining stronger recognition of their intellectual property rights. Though current inequities still exist between indigenous peoples and other members of society, both the United States and Australia appear to be attempting to rectify past wrongs through the granting of expanded legal intellectual property rights.

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