

12-16-2019

THE FLOURISHING RACE: HOW THE SUCCESS OF AMERICAN INDIAN ARTIST-ENTREPRENEURS UNDERSCORES THE NEED FOR ENHANCED LEGAL PROTECTIONS FOR NATIVE INTELLECTUAL PROPERTY

Jessica Roberts
Seattle University School of Law

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I. INTRODUCTION

Welcome to the Fall 2019 issue of the *American Indian Law Journal*. This special issue's articles were selected to be in dialogue with Seattle University School of Law's acceptance of a gifted Edward Curtis photograph.¹ The administration, in conjunction with the Center for Indian Law and Policy and this journal, first deliberated if and how to host such a controversial piece. This issue uses the photograph as a springboard to address Curtis's ultimately unfounded thesis that American Indians were part of a "vanishing race." The following articles in this issue highlight Indian tribes' visibility and vitality in areas including environmental activism, tribal commerce, and indigenous self-determination.

A. *The Photograph*

The 1904 photograph shows seven figures on horseback set against Arizona's soaring Canyon de Chelly. The people, shadowy and faceless, are members of the Diné tribe and riding away from the camera.² The photographer, Edward Curtis, selected this image

* Jessica Roberts, Editor-in-Chief of the *American Indian Law Journal*, 2019-2020. I am a member of the Cherokee Nation of Oklahoma and a Douglas R. Nash Native American Law Scholar at Seattle University School of Law. I am interested in the intersection between business law and Indian law and specifically the means by which tribes and individual Indians pursue economic development.

¹ This paper is a foreword to the Fall 2019 special issue, contextualizing our law school's acceptance of an original Edward Curtis photograph from alumna Catherine Walker. We thank Ms. Walker for her generosity and the opportunity to discuss Indian artists as entrepreneurs.

² The Diné are more commonly known as "Navajo" or "Navaho," the name Spanish settlers gave to the tribe.

to be the first in his twenty-volume collection of photographs, *The North American Indian*.³ He named the photograph “The Vanishing Race – Navaho.”⁴ With this picture, Curtis developed the theoretical underpinning for his entire project: across the country white settlers were erasing America’s indigenous peoples and their myriad cultures at a rapid clip. As Curtis saw it, his task was to document the tribes’ pre-contact way of life before their cultures inevitably disappeared.⁵

Ms. Catherine Walker donated “The Vanishing Race-Navajo”⁶ to Seattle University School of Law.⁷ The orotone photograph was printed circa 1917-1924 from a negative dated from 1904. The law school and this paper’s author thank Ms. Walker for her generosity and for the opportunity to discuss the evolution of Indian artists and their art since and independent of Curtis.⁸

³ 1 EDWARD S. CURTIS, *The Vanishing race – Navaho*, in THE NORTH AMERICAN INDIAN, plate no. 1 (Suppl. vol. 1 1930).

⁴ *Id.* The photograph’s title is also referred to elsewhere as *The Vanishing Race-Navajo*.

⁵ Beth Ann Guynn, *Finding Aid for the Edward S. Curtis Papers, 1900-1978*, ONLINE ARCHIVE OF CALIFORNIA 3, https://oac.cdlib.org/findaid/ark:/13030/c8v69nrg/entire_text/ [<https://perma.cc/K4LC-23GH>] (last visited Sept. 13, 2019).

⁶ Seattle University School of Law created a plaque for the photograph using the spelling “Navajo.”

⁷ Ms. Walker is a graduate of Seattle University School of Law. She donated the piece in honor of her grandmother, Charlotte Howe, who received the photograph as a gift from Clara and Edward Curtis in recognition of their close friendship.

⁸ In this paper the terms “American Indian,” “Indian,” and “Native” are interchangeable and all refer to North American indigenous tribes. I specify when I am referencing a tribe that is not federally recognized.



B. *The Conversation*

The law school plans to publicly debut the Curtis photograph alongside the work of contemporary Indian artists, Wendy Red Star⁹ and Will Wilson.¹⁰ The event in part marks how Ms. Red Star and Mr. Wilson, like many Indian artists, reject many of the premises Curtis's work advanced: that tribes' cultures and Indians themselves were primitive; that Indians welcomed the intrusion of an outsider's camera; and that Indians were, as he put it, a *vanishing race*. As these artists make salient, even after the United States unfurled its

⁹ Wendy Red Star is an award-winning multimedia artist and member of the Apsáalooke (Crow) Tribe. Examples of her work are *available at* WENDY RED STAR, <http://www.wendyredstar.com/home> [<https://perma.cc/T3JX-9LN7>] (last visited Nov. 13, 2019).

¹⁰ William (Will) Wilson is a Diné photographer and was a coordinator for the New Mexico Arts *Temporary Installations Made for the Environment* (TIME) program on the Navajo Nation. His online portfolio is *available at* WILL WILSON, <https://willwilson.photoshelter.com/index> [<https://perma.cc/Q572-TJ3Z>] (last visited Nov. 13, 2019).

flag coast to coast, Indians and their cultures did not disappear.¹¹ Beginning in Part II, this article will discuss Indian artist-entrepreneurs, an example of a flourishing modern Indian community.

C. The Problematic Legacy

Long after Curtis's death, his portfolio reifies an unfounded notion that Native persons are inherently incompatible with modernity; that Indians and tribal culture will simply vanish into an irretrievable past. It is frustrating to observe the acceptance of Curtis's premise, particularly among Native youth, who may internalize their existence as fleeting.

While forced assimilation undeniably decimated American Indian populations and fractionalized their ancestral lands, they did not disappear. Native persons and their cultures have done more than survive – they are flourishing. One of the most prominent counterpoints to Curtis's vanishing theory is the critical and commercial success of American Indian artist-entrepreneurs. In this paper, the term “Indian artist-entrepreneur” refers to an individual who is (a) a member of a federal or state-recognized tribe, (b) a member of an unrecognized tribe, or (c) is unaffiliated with any tribe, who identifies as an artist for profit in one or more commercial art markets. This article will focus on Indian artist-entrepreneurs as viable participants in the art market and how existing legal protections, which currently marginalize their work, can be reformed to be more inclusive.

Part II of this article addresses the history of Curtis's work and controversy in modern Native communities. Section A offers insight into the genesis of Curtis's belief Indians were part of a vanishing race, a prevailing belief among late nineteenth-century white Americans. Section B profiles three contemporary successful Indian artist-entrepreneurs and how they challenge Curtis's legacy in their own work.

Part III traces the evolution of legal protections for Indian artist-entrepreneurs. It considers the difference between Native

¹¹ Indeed, there are 573 federally recognized tribes and nearly 250 non-federally recognized tribes in the contiguous United States. *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [https://perma.cc/9UHM-HC3A] (last updated Oct. 2019).

cultural and intellectual property. In addition, this section details how international law affords indigenous intellectual property far more legal recognition than the United States government. Then, it examines protection of Native intellectual property through tribal laws and policies. Further, the section analyzes existing federal protections for Indian artist-entrepreneurs under copyright law, trademark law, and the Indian Arts and Crafts Act (IACA). This section then draws the connection between these protections' shortcomings and the marginalization of Indian artist-entrepreneurs from the mainstream art market.

In Part IV, this article argues for reforms to existing laws to better include Indian artists as viable participants in the art market. This inclusion can be accomplished through the coordinated efforts of the federal government, tribal governments, and publicly-funded arts institutions.

II. NATIVE ARTIST-ENTREPRENEURS FLOURISHING IN A POST-CURTIS ERA

A. *Curtis*

Much has been written about Curtis¹² and it feels counterintuitive to yet again discuss his work when the purpose of this article is to shift the focus to modern Indian artist-entrepreneurs.¹³ However, it is worth exploring for a moment the genesis of Curtis's vanishing race thesis because this predicate to *The North American Indian* project was not his original thought. Rather, in the late nineteenth century, many white settlers believed tribal cultures, if not Indians themselves, would disappear within a few generations due to forced assimilation. Curtis did however play a significant role in freezing the vanishing race theory in time with his photographs. While tribes have evolved and modernized,

¹² See, e.g., CHRISTOPHER CARDOZO, SACRED LEGACY: EDWARD S. CURTIS AND THE NORTH AMERICAN INDIAN (2000); TIMOTHY EGAN, SHORT NIGHTS OF THE SHADOW CATCHER: THE EPIC LIFE AND IMMORTAL PHOTOGRAPHS OF EDWARD CURTIS (2012); MICK GIDLEY, EDWARD S. CURTIS AND THE NORTH AMERICAN INDIAN PROJECT IN THE FIELD (2011).

¹³ Several members of the Native community with whom I consulted in preparation for this article suggested minimizing any discussion of Curtis or omitting Curtis entirely. My intention in including this section is to put Curtis's (ultimately erroneous) thesis in historical context to juxtapose against the vibrancy of contemporary Native cultures.

Curtis's work presents stereotypes about authentic Indianness that remains stagnant.

Curtis, a Seattle-based photographer, took his first picture of an Indian person in 1896.¹⁴ His subject, Kikisoblu, was the eldest daughter of Chief Si'ahl and his last living descendent.¹⁵ After the Point Elliott Treaty of 1855 expelled the Duwamish and Suquamish from the city,¹⁶ Kikisoblu remained, destitute and reclusive. White residents derisively called her "Princess Angeline" and considered her an oddity but trotted her out to visiting dignitaries. Kikisoblu never cooperated on these occasions; although she understood plenty of English she was often quoted as merely saying, "*Nika halo cumtuv*" – I cannot understand.¹⁷

Curtis found Kikisoblu standing outside her shack on the Puget Sound shore. He was twenty-eight and a local celebrity; a photography studio owner wealthy enough to support his wife, children, mother, his siblings, and some of his wife's relatives under one roof.¹⁸ He pestered her to come pose for a portrait at his studio. She told him *Nika halo cumtuv*. Curtis produced a week's worth of coins and she followed him.¹⁹ He took the portrait and everyone who saw it agreed Kikisoblu looked regal. Too regal for Curtis; he paid Kikisoblu again to take pictures of her digging for clams.²⁰

¹⁴ EGAN, *supra* note 12, at 4, 15.

¹⁵ To learn more about Chief Seattle and historical responses to the Chief, consult Clarence B. Bagley, *Chief Seattle and Angeline*, 22 THE WASHINGTON HISTORICAL QUARTERLY 243 (Oct. 1931), available at <https://journals.lib.washington.edu/index.php/WHQ/article/view/7963/6999> [<https://perma.cc/M687-9DRR>]. Additionally, Chief Seattle's 1854 speech to Isaac Williams, the Territorial Governor of Washington, about ceding tribal lands to settlers to establish what became the city of Seattle, is often cited as an example of an Indian person articulating his fear of extinction. This reading is likely a mischaracterization of the Chief's meaning for two reasons. First, the speech was recorded in print for the first time thirty years after it was delivered in the Chief's native tongue through an interpreter. Denise Low, *Contemporary reinvention of Chief Seattle: Variant texts of Chief Seattle's 1854 speech*, 19 AMERICAN INDIAN QUARTERLY 407 (1995). Second, the Chief was known to be a realistic person and was probably telling Williams and other white settlers precisely what they wanted to hear to protect his tribe's economic and political interests. See William S. Abruzzi, *The Myth of Chief Seattle*, 7 HUMAN ECOLOGY REV. 72 (2000).

¹⁶ Treaty of Point Elliott, U.S.-Duwamish et al., Jan. 22, 1855, available at <https://goia.wa.gov/tribal-government/treaty-point-elliott-1855> [<https://perma.cc/XFU5-FRX6>].

¹⁷ EGAN, *supra* note 12, at 15.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 15.

²⁰ *Id.* at 17-18.

Curtis took to waiting at the outskirts of the city where Indian people now lived in exile, giving them money in exchange for photographing them as they worked, cooked, and lived.²¹ But Curtis's project was not organized; he took Indians' pictures for "his own amusement" and the ability to charge customers a premium for the prints.²²

In 1899 Curtis became acquainted on the Harriman Alaska Expedition with George Bird Grinnell, a conservationist, founder of the Audubon Society, and a student of Native American cultures.²³ Grinnell was thrilled to meet someone who shared his interest in America's Indians. The Pawnee had dubbed him "Bird" because he returned every spring and Grinnell enjoyed special status among the Plains Indians.²⁴ He loathed equally scholars who waved off the declining Indian populations as Darwinism in action, missionaries who plucked Indian youth from their families and sent them to schools where they were punished for speaking their native languages, and the government officials who compelled entire tribes' assimilation, usually through violent means.²⁵

After the expedition, Grinnell invited Curtis to join him on an upcoming trip to the Blackfeet Nation. As the two men took in the Sun Dance, Grinnell pressed Curtis to do more with his photography. Grinnell encouraged Curtis to capture the humanity of the Indians he photographed and to ask questions about Indian life from Indians themselves.²⁶ It was Grinnell who first articulated the urgency underpinning Curtis's work: white settlers were actively erasing Indian culture and the government's forcible assimilation policy was decimating the remaining populations. Curtis formed his plan. He would visit all known intact tribes and photograph "every phase of Indian life of all tribes yet in a primitive condition" and publish the collection as a multivolume work.²⁷ He also wanted to make audio and visual recordings to preserve the tribes' languages and rituals.

²¹ *Id.*

²² *Id.* at 42.

²³ *George Bird Grinnell*, PATUXENT WILDLIFE RESEARCH CENTER, <https://www.pwrc.usgs.gov/resshow/perry/bios/GrinnellGeorge.htm> [<https://perma.cc/ND7M-327B>] (last visited Sept. 27, 2019).

²⁴ EGAN, *supra* note 12, at 42.

²⁵ *Id.* at 47.

²⁶ *Id.* at 46-47.

²⁷ *Id.* at 50.

In 1905, he won President Theodore Roosevelt's endorsement,²⁸ something of a triumph given Roosevelt's prior remarks about Indians: "I don't go so far as to think that the only good Indians are the dead Indians, but I believe nine out of every ten are."²⁹ Roosevelt shared his concern about the disappearance of Indians, writing to Curtis about the project:

"The Indian, as an Indian, in on the point of perishing, and when he has become a United States citizen, through it will be a such better thing for him and the rest of the country, he will lose completely his value as a living historical document. You are doing a service... [the collection] would be a monument to American constructive scholarship and research of a value quite unparalleled."³⁰

Using this letter, Curtis secured a meeting with J.P. Morgan, one of the wealthiest persons in the country. Morgan initially dismissed Curtis, saying he could not give money to every person who asked. But he was moved by Curtis's portraits and agreed to donate \$75,000 for fieldwork.³¹ Curtis would have to find another patron to cover the publishing costs of the twenty-volume set Curtis envisioned.³²

Curtis never found funding after Morgan.³³ By 1912 and deeply in debt, Curtis developed the remarkably prescient idea of

²⁸ *Id.* at 101.

²⁹ Theodore Roosevelt, President of the United States of America, Speech in South Dakota (Jan. 1886), *quoted in* HERMANN HAGEDORN, ROOSEVELT IN THE BAD LANDS 354-56 (1921).

³⁰ Letter from Theodore Roosevelt to Edward S. Curtis (Dec. 16 1905) (on file with the Theodore Roosevelt Center at Dickinson State University), <https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record?libID=o193424> [<https://perma.cc/S45A-MTKA>] (last visited Sept. 30, 2019).

³¹ EGAN, *supra* note 12, at 114.

³² Carey N. Vincente, *21st Century Indians: Dilemma of Healing*, 2 J. CT. INNOVATION 284 (2009); *See American Indian in "Photo History": Mr. Edward Curtis's \$3,000 Work on the Aborigine a Marvel of Pictorial Record*, N.Y. TIMES, June 6, 1908, at BR316.

³³ In a letter to Harriet Lietch, a librarian at the Seattle Public Library, Curtis lamented about his financial difficulties: "You speak of quotas, and the raising

filming “a documentary picture” of the Kwakiutl.³⁴ Although the result was hardly a documentary, the sensationally named “In the Land of the Head Hunters” has since gained historical significance for showing an illegal *potlatch* to viewers.³⁵ The Canadian government had outlawed this ceremony in 1884 as part of its own assimilation policy.³⁶ Both Curtis and the tribal members he paid to perform were breaking the law when the Kwakwaka’wakw actors held a potlatch as part of the broader love-triangle story Curtis had scripted for the participating tribal members.³⁷

Between the years 1907 to 1930, Curtis worked on his seminal *The North American Indian*, a twenty-volume photographic essay he supplemented with descriptions of the tribes he visited.³⁸

of money, ...I was confronted with the North American Indian quota which was 1,800,000 plus. I have always thought that ignorance alone allowed me to tackle that task?” Letter from Edward Curtis to Harriet Leitch, 1 (Sept. 22, 1950) (on file with the Seattle Public Library Special Collections), <https://cdm16118.contentdm.oclc.org/digital/collection/p16118coll16/id/62/rec/3> [<https://perma.cc/JN85-73LM>].

³⁴ EGAN, *supra* note 12, at 221. Prescient because “actuality cinema” was in its infancy and wartime newsreels had yet to come into existence.

³⁵ Edward S. Curtis and World Film Company, IN THE LAND OF THE HEAD HUNTERS (1914), available at YOUTUBE (Jan. 23, 2016), <https://www.youtube.com/watch?v=73u7eugbbu8> [<https://perma.cc/F2RP-HHQB>]; compare J. Hoberman, “In the Land of the Head Hunters,” *A Recreated Artifact of Ancient Ways*, N.Y. TIMES, Feb. 19, 2015, <https://www.nytimes.com/2015/02/22/movies/homevideo/in-the-land-of-the-head-hunters-a-recreated-artifact-of-ancient-ways.html> [<https://perma.cc/2NU8-ZTG9>], with Christina Rose, *Return to the Land of the Head Hunters: 100 Years Later, Edward Curtis’ Movie Plays Again*, INDIAN COUNTRY TODAY (Feb. 19, 2015), <https://newsmaven.io/indiancountrytoday/archive/return-to-the-land-of-the-head-hunters-100-years-later-Igj6aPmEakKf1Um5ckjafg/> [<https://perma.cc/G7YM-E6XD>].

³⁶ “Every Indian or other person who engages in or assists in celebrating the Indian festival known as the ‘Potlatch’ or in the Indian dance known as the ‘Tamanawas’ is guilty of a misdemeanor, and shall be liable to imprisonment for a term of not more than six nor less than two months in any [jail] or other place of confinement ; and any Indian or other person who encourages, either directly or indirectly, an Indian or Indians to get up such a festival or dance, or to celebrate the same, or who shall assist in the celebration of the same is guilty of a like offence, and shall be liable to the same punishment.” Amendment to the Indian Act of 1880, ch. 27 § 3 (enacted Apr. 19, 1884), reprinted in 2 INDIAN ACTS AND AMENDMENTS, 1868-1975, CONSOLIDATION OF INDIAN LEGISLATION, available at http://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf [<https://perma.cc/K8DD-3R78>].

³⁷ Brad Evans & Aaran Glass, *In the Land of the Head Hunters*, NAT’L FILM PRESERVATION B. 1 (2013), http://www.loc.gov/static/programs/national-film-preservation-board/documents/land_head_hunters.pdf [<https://perma.cc/UKN2-ZS4F>].

³⁸ *Edward Curtis Meets the Kwakwaka’wakw: “In the Land of the Head Hunters,”* RUTGERS SCHOOL OF ARTS AND SCIENCES,

He exceeded his goal of photographing eighty tribes, traveling from the Mexican border to northern Alaska.³⁹ Curtis was often unwelcome and bribed the under resourced communities with food and money in exchange for photographing them.⁴⁰ He hounded tribes relentlessly for access to their private customs.⁴¹ As he had first done with Kikisoblu, Curtis often staged scenes that he presented in his collection as real Indians living their real lives.⁴² Comparing the negatives and the final photogravures, it is evident Curtis altered his images to remove signs of modernity such as an alarm clock sitting between two Piegan men.⁴³

However, Curtis also deeply appreciated Native cultures. Over the thirty years he spent with tribes, Curtis became an outspoken critic of the federal government's assimilation policy. In a magazine interview he indicted the white man's treatment of Indians: "In peace, we changed the nature of our weapons...we stopped killing Indians in more or less a fair fight, debauching them, instead, thus slaughtering them by methods which gave them not the slightest chance of retaliation."⁴⁴ Curtis never stopped believing Indians were a vanishing race and he cultivated images to express this belief.

Yet when he died in 1952 it was Curtis and his work that had nearly vanished. His last two decades of life were spent in obscurity and poverty.⁴⁵ Obituaries made little to no mention of the *North American Indian* project.⁴⁶ His photographs disappeared into a Boston bookseller's shop.⁴⁷ Curtis did not enjoy true commercial

<https://www.curtisfilm.rutgers.edu/home-footermenu> [<https://perma.cc/7U7D-B2SC>] (last visited Oct. 21, 2019).

³⁹ Gilbert King, Edward Curtis' Epic Project to Photograph Native Americans, *SMITHSONIAN MAG.*, Mar. 21, 2012,

<https://www.smithsonianmag.com/history/edward-curtis-epic-project-to-photograph-native-americans-162523282/> [<https://perma.cc/S26H-5TTQ>].

⁴⁰ EGAN, *supra* note 12, at 73, 124-126.

⁴¹ *Id.* at 124-26.

⁴² *Id.* at 321.

⁴³ Ken Gonzales-Day, *In a Piegan Lodge*, in *VISUALIZING THE "VANISHING RACE": THE PHOTOGRAVURES OF EDWARD S. CURTIS, PERFORMING ARCHIVES* (Jacqueline Wernimont, et al., Mar. 16, 2018),

<http://scalar.usc.edu/works/performingarchive/visualizing-the-vanishing-race-13> [<https://perma.cc/38CA-QTX8>].

⁴⁴ EGAN, *supra* note 12, at 218 (citing Interview with Edward Curtis, *Hampton Magazine* (May 1912), *reprinted in* EDWARD S. CURTIS AND THE NORTH AMERICAN INDIAN PROJECT IN THE FIELD (Mick Gidley ed., 2003)).

⁴⁵ EGAN, *supra* note 12, at 313.

⁴⁶ *Id.*

⁴⁷ *Id.* at 317.

success until the 1970's after photographer Karl Kernberger found over 200,000 original Curtis pieces in the bookshop.⁴⁸ Together with his artist friends and investors, Kernberger brought the Curtis collection to New Mexico and the pieces hit the mainstream market.⁴⁹ Although Curtis never profited from his work during his life, his work now fetches well over a million dollars, enjoys critical acclaim, and represents for many what authentic Indian culture looks like.⁵⁰

Three relevant implications of Curtis's legacy exist for modern Indian communities and especially for Indian artist-entrepreneurs seeking legal and economic parity for their work. First, Curtis did not invent the vanishing race theory but he did contribute enormously to perpetuating it during his life and through his photographs. Second, consumers conflate Curtisian imagery with authentic Indianness. Third, Curtis's work is in the public domain and contributes to an erroneous assumption that Indian imagery is also free use material.

First, Curtis dismissed early twentieth-century censuses suggesting Indian populations were rising, instead estimating based on his firsthand observations that maybe 100,000 "purebloods" remained.⁵¹ He insisted the threat of erasure was not so much to the number of Indians, but to their cultures. He was not wrong about this threat; the federal government was indisputably committed to assimilating Indians by fractionalizing tribal lands, sending Indian children to learn white culture in boarding schools, and creating blood quantum requirements for tribal membership.⁵² But Curtis's photographs, which he often staged and bargained for, have frozen

⁴⁸ *Id.*

⁴⁹ *Id.* at 318.

⁵⁰ *Id.* at 319.

⁵¹ *Id.* at 215.

⁵² Historian Russell Thornton has estimated that by 1800 the American Indian population decreased from over five million to just 600,000. By 1900 the number was reduced to 250,000. Meanwhile, the non-Indian population in America increased from five million in 1800 to seventy-five million in 1900. RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY*, 90, 133 (1987). But these figures are not the end of the story. The United States 2010 Census identified 2,870,645 American Indian and Alaska Native (AIAN) persons and 5,366,625 when including persons who identified as AIAN in combination with one or more other races. U.S. CENSUS BUREAU, C2010BR-10, *The American Indian and Native American Population: 2010*, in 2010 CENSUS BRIEFS 4 (2012) <https://www.census.gov/history/pdf/c2010br-10.pdf> [<https://perma.cc/3ZM3-594T>].

the vanishing race notion in time without relaying any optimism or confidence in Native communities' resilience, autonomy, and creativity.

The second and related implication of Curtis's work for Indian artist-entrepreneurs is the confusing and frequently oppressive dedication of the audience to Curtisian imagery as authentic Indianness. Consumers of Curtis's work, both in the early twentieth century and today, are often left with one-dimension impressions of Native persons. Viewers may assume Curtis's subjects are what real Indians look like, their clothing is how real Indians dress, and the rituals depicted are accurate performances of real Indianness. Keeping in mind Curtis often cherry-picked his subjects, their dress, and their activities, these images have since calcified into harmful stereotypes gatekeeping contemporary Indians from entering mainstream culture. In the context of Indian artists, can their art ever be considered fine art if they incorporate tribal imagery? Alternatively, can their art be regarded as Indian art if they do not use traditional tribal imagery? Can an Indian artist ever just be an artist, or is their identity always going to be qualified by their race?

Finally, the third implication of Curtis's work for Indian artist-entrepreneurs relates to his images existing in the public domain. In 1929 the copyright for Curtis's photographs expired and were never renewed.⁵³ Today, because traditional tribal imagery's authorship and year of creation usually cannot be identified, Indian artist-entrepreneurs often cannot secure protections for their work using tribal imagery and tribes find it difficult to challenge misappropriation.⁵⁴ Moreover, tribes find it difficult to stop the misappropriation of their tribe's imagery because as Curtis's posthumous success underscores, someone is profiting from depictions of Indian culture. In the past century, American Indians have become increasingly concerned with protecting their intellectual property rights from non-Indian corporations and artists who profit by appropriating indigenous images, knowledge, and

⁵³ *Edward S. Curtis Collection, Rights and Restrictions Information*, LIBR. OF CONG., PRINTS AND PHOTOGRAPHS DIV. (Mar. 2019) (photographs on file with Library of Congress), https://www.loc.gov/rr/print/res/369_curt.html [<https://perma.cc/5LML-Q73B>].

⁵⁴ Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. IND. L. REV. 111, 125 (1996).

practices.⁵⁵ Contemporary Indian artist-entrepreneurs are often at the forefront of this battle with the federal government, the art community, and consumers to stop “Native-inspired” pieces from entering the market while seeking legal protection for their own work.⁵⁶ Existing legal protections and their shortcomings are conditioned in part by the erroneous notion that Indian culture is somehow part of the public domain.⁵⁷

B. *Indian Artist-Entrepreneurs*

It makes little sense to castigate Curtis himself, a self-fashioned advocate for Indian tribes and outspoken opponent of forced assimilation. Indeed, there are many cases of tribes using his artistic and ethnographic work today to reconnect with their culture. For example, the Hopi used Curtis’s work to piece back together their alphabet and traditional songs’ lyrics and by 2011 nearly half of the Hopi Nation speaks some of their language.⁵⁸ Similarly, in 1999 the Makah wanted to revive traditional whale hunting rituals, which Curtis had documented in his book.⁵⁹ Additionally, Coast Salish tribes were able reconstruct traditional cedar vessels based on Curtis’s photographs and the boats he featured in *In the Land of the Head Hunters*.⁶⁰

But for modern Indian artist-entrepreneurs, stereotypes presented in Curtis’s and similar work often prove limiting. The following three artist-entrepreneurs’ experiences illustrate how a Curtisian perspective of authentic Indian culture impacts their work. Specifically, how their work is evaluated, vulnerable to appropriation, and often excluded from the mainstream art market.

1. Oscar Howe

Oscar Howe was born Mazuha Hokshina in 1915 on the Crow Creek Reservation in South Dakota. A member of the

⁵⁵ Michael F. Brown, *Can Culture Be Copyrighted?* 39 CURRENT ANTHROPOLOGY 193, 195 (Apr. 1998).

⁵⁶ See Suzan Shown Harjo, *Native Peoples’ Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. ST. L. J. 321, 328 (1992).

⁵⁷ Existing legal protections and their shortcomings are addressed more fully in Part III, *infra*.

⁵⁸ EGAN, *supra* note 12, at 320.

⁵⁹ *Id.*

⁶⁰ *Id.*

Yanktonai Dakota, he was sent away to a United States federal boarding school for his primary education. In 1935, he moved to New Mexico to study at the Santa Fe Indian Art School, an institution established by Dorothy Dunn two years prior. Dunn, a white woman, invented the “Studio Style” method modeled after traditional mural, pottery, and hide painting. Howe excelled and graduated as salutatorian in 1938.⁶¹ During World War II, Howe served as an artist in the South Dakota Works Progress Administration. Other South Dakota Indians were thrilled to see a tribal artist’s work on display in an area where some businesses posted signs “No Indians or Dogs Allowed.”⁶²

After earning his Bachelor of Arts and Master of Fine Arts degrees, Howe developed a signature style of abstract, brightly colored paintings based on Northern Plains Indian art and a marked departure from the Studio Style.⁶³ In 1958 Howe submitted a painting called “The War and Peace Dance to the Philbrook Museum in Oklahoma, known for its juried Indian art exhibit. The museum rejected Howe’s piece, explaining while the painting was striking, it was not done in the “traditional Indian style” and thus not Indian art. Howe responded to the Philbrook:

Whoever said that my paintings are not in the traditional Indian style has poor knowledge of Indian art indeed ... Every bit in my paintings is a true studied fact of Indian paintings. Are we to be held back forever with one phase of Indian painting, with no right for individualism, dictated to as the Indian always has been, put on reservations and treated as a child, and only the White Man knows what is best for him? Now, even in Art, ‘You little child do what we think is

⁶¹ *Oscar Howe*, UNIV. SOUTH DAKOTA ART GALLERIES, <https://www.usdartgalleries.com/oscar-howe> [<https://perma.cc/XK4D-MAE7>] (last visited Oct. 10, 2019).

⁶² Lance Nixon, *Dakota Life: Oscar Howe’s works still enchant*, CAP. J. (Dec. 17, 2015), https://www.capjournal.com/news/dakota-life-oscar-howe-s-works-still-entant/article_e8ac5a58-a53f-11e5-a552-dbd9d937bd9f.html [<https://perma.cc/GF2G-4BBM>].

⁶³ *Oscar Howe*, *supra* note 61.

best for you, nothing different.” Well, I am not going to stand for it. Indian Art can compete with any Art in the world, but not as a suppressed Art. I see so much of the mismanagement and treatment of my people. It makes me cry inside to look at these poor people. My father died there about three years ago in a little shack, my two brothers still living there in shacks, never enough to eat, never enough clothing, treated as second class citizens. This is one of the reasons I have tried to keep the fine ways and culture of my forefathers alive ... I only hope the Art World will not be one more contributor to holding us in chains.⁶⁴

Here, Howe makes powerful arguments that still resonate for Indian artists today. He maintains Indian artists are skillful enough to participate in the art market. He also recommends the “Art World” examine critically its role as an oppressive, colonizing force. Howe contends Indians are modern despite the immutable stereotypes insisting on their primitive nature. He explains his art intentionally subverts romanticized stereotypes about tribal life and draw attention instead to Indians’ suffering as a result of assimilation policies. Howe was persuasive; the Philbrook changed its policy the following year, so that any art by an Indian artist could qualify for the exhibit.⁶⁵

In 1960, Oscar Howe was a featured guest on the program *This is Your Life*.⁶⁶ The show was an early precursor to reality television; the guest was invited to Hollywood under some pretext and then surprised by creator and host, Ralph Edwards. Edwards

⁶⁴ Oscar Howe, Letter to Philbrook Indian Art Annuals Jurors *quoted in* Jeanne Snodgrass King, *The Preeminence of Oscar Howe*, in OSCAR HOWE: A RETROSPECTIVE; CATALOGUE RAISONNE, 17 (1982).

⁶⁵ Nixon, *supra* note 62.

⁶⁶ Edward K. Welch, *This is Your Life, Oscar Howe*, 47 THE J. OF POP. CULTURE 247, 247 (2014); THIS IS YOUR LIFE, OSCAR HOWE (Ralph Edwards Production 1960).

would announce, “This is your life!” before settling in for a half-hour discussion of the guest’s life story.⁶⁷ The show was intentionally diverse, showcasing famous and regular persons from different socioeconomic backgrounds with the objective of challenging viewer’s stereotypes.⁶⁸

Accordingly, it was ironic when the show selected Howe because he diverged from a 1960’s conception of “Indian” and then enacted every Curtisian stereotype of Indianness for his feature. The episode opened to a group of Indian men joining Edwards on stage dressed in buckskin and feathered headdresses. ⁶⁹ One of the men beat a handpainted drum.⁷⁰ Edwards explained the men were Sioux chiefs, arrived from South Dakota to welcome one of their own, Howe.⁷¹ But the men’s identities were inventions straight out of a Western film. For example, “Chief Ironshell Necklace” was actually Gus Knox and none of the men were chiefs.⁷² Howe took his place on stage in a suit and tie and spoke perfect, precise English.⁷³ He was an “Indian in an unexpected place,” standing out because he did not conform to the cultural stereotypes about authentic Indianness.⁷⁴ Yet he was also arguably the most authentic Indian on that stage.

Oscar Howe’s experience as a mid-century Indian artist-entrepreneur is significant because Curtisian stereotypes so often conditioned the reception of his work. Today, evaluations of Howe’s work and relative success depend on the framework applied. When art critics draw comparisons between Howe’s abstraction and Picasso’s Cubism, Howe’s work is pronounced derivative. But art scholars with an understanding of Native culture point to another source of Howe’s imagery. Jodi Lundgren, a curator at the South Dakota Art Museum, reminds critics indigenous Dakota art incorporated geometric patterns, bright colors, and storytelling through art long before Cubism. Howe himself credited his style to his traditional upbringing, influenced by Dakota women’s beadwork and porcupine quill embroidery and the men’s pictographic histories of battles.

⁶⁷ Welch, *supra* note 66, at 247.

⁶⁸ *Id.* at 247-48.

⁶⁹ *Id.* at 251.

⁷⁰ *Id.*

⁷¹ *Id.* at 252.

⁷² Welch, *supra* note 66, at 254.

⁷³ *Id.* at 256.

⁷⁴ PHILIP J. DELORIA, INDIANS IN UNEXPECTED PLACES 6 (2004).

Though his letter to the Philbrook Museum and appearance on *This is Your Life*, Howe protested white people enforcing their perception of authentic Indianness in the art world and beyond. These stereotypes are harmful, he argued, because by creating parameters for what constituted Indian art, they were also fencing out Indian artists from the mainstream art market. Indeed, Howe experienced firsthand how his divergence from the accepted Indian style resulted in rejection. However, Howe continued painting, challenging romanticized depictions of Indian life with his realist commentary. In doing so, he inspired subsequent generations of Indian artists to dismantle Curtis's vanishing race thesis even more overtly with their art. Howe's legacy lives on in Indian artist-entrepreneurs who use their work to assert the modern Indian experience.

2. Matika Wilbur

Matika Wilbur has been called "The Modern Day Curtis." Her response: "Each time I hear that, I want to throw up."⁷⁵ A member of the Swinomish and Tulalip Tribes, Wilbur has been creating award-winning art for over sixteen years.⁷⁶ In 2012 she devised Project 562, pledging to visit, engage, and photograph all 562 American Indian sovereign territories.⁷⁷ The parallel with Curtis's *North American Indian* project is there, certainly. But Wilbur emphasizes the humanity of her subjects, something she describes lacking in Curtis's work: "He titled his images as "Indian #3," "Chumash woman," and "Headhunter". He described his images as though the people in the photos didn't have names, as if they weren't worthy of distinction."⁷⁸

How can we be seen as modern
successful people when we are still
viewed as a one dimensional
stereotypes? How do we strengthen

⁷⁵ Matika Wilbur, *Edward S. Curtis...Again?* PROJECT 562, <http://www.project562.com/blog/edward-s-curtis-again/> [<https://perma.cc/PZ2D-XG2H>] (last visited Oct. 5, 2019).

⁷⁶ Yukio Lippit, *About*, PROJECT 562, <http://www.project562.com/about/> [<https://perma.cc/DG5D-7CZW>] (last visited Sept. 23, 2019).

⁷⁷ *Id.* (explaining that Ms. Wilbur has committed to visiting all 562 "plus" territories).

⁷⁸ Wilbur, *supra* note 75.

our nations and lobby for sovereignty
when most of people don't
understand basic indigenous
identities, concepts, and life
experiences?⁷⁹

Wilbur uses her work to update Americans' perceptions of Indians; she titles her photographs with the subjects' names and tribal affiliations. In the photograph's description she includes whatever they want to express about their experience as an Indian in America.⁸⁰ Some of the subjects are in traditional dress, others are in t-shirts and tank tops. They are musicians, educators, doctors, farmers, artisans, and activists in indigenous-led environmental and wellness movements.⁸¹ In each photograph Wilbur lets her subjects tell their own stories instead of imposing a narrative of her own creation.

Wilbur identifies the true harm of Curtis's work is its legacy on Americans' collective consciousness of Indians. Wilbur launched her fine-arts career with a photo collection of Coast Salish Tribes in Washington state. The Seattle Art Museum featured her work alongside Curtis images.⁸² The exhibit was incredibly successful. Soon Wilbur was fielding requests from dozens of museums to do similar shows. She turned them all down, frustrated that her work had to be contextualized by "a dead white man's perspective and creativity."⁸³ Today, in addition to her art, Wilbur is an active advocate for Indian artist-entrepreneurs, committing to wresting control of the indigenous image out of the hands and bank accounts of non-indigenous people. She directs museum boards to contemporary Native artists, noting no indigenous photographer has ever had a standalone exhibit at a major art gallery.⁸⁴ Wilbur also speaks out against major publications like *The New York Times* and *National Geographic* selecting non-Indian photographers to do photographic essays of Indian communities.⁸⁵ It is not so much that

⁷⁹ *Id.*

⁸⁰ See *Project 562 Gallery*, PROJECT 562, <http://www.project562.com/gallery/> [<https://perma.cc/N46W-5M65>] (last visited Nov 4, 2019).

⁸¹ *Id.*

⁸² Wilbur, *supra* note 75.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Indians lack any representation, she argues, but that the colonizers continue to control how Indians are portrayed in art and the media.⁸⁶

Sometimes Native friends express to Wilbur their appreciation for Curtis's images and recordings when trying to piece back together nearly-lost traditions. Wilbur then reminds them this enormous task of recovering parts of their culture is only necessary because "our culture was purposely attacked and, in some cases, eradicated."⁸⁷ For her part, Wilbur is using art to show new generations examples of positive Indian role models. Whereas Curtis used his photography to tell a story about Indian extinction, Wilbur partners with her subjects so that they may tell their own stories of permanency, vitality, and success.

3. Louie Gong

Louie Gong is a self-taught artist turned entrepreneur who wants to make other Indian artist-entrepreneurs visible in the art market.⁸⁸ In 2008 Gong began making customized shoes in his living room as a vehicle for statements about identity.⁸⁹ Gong himself grew up in his grandparents' home in the Nooksack Tribe and is also part Chinese, French, and Scottish.⁹⁰ Today he is the owner and CEO of Eighth Generation, the fastest-growing Native-owned business in the United State and Canada, with a brick-and-mortar store in Seattle's Pike Place Market.⁹¹

Gong created Eighth Generation as an alternative business model for artists.⁹² Traditionally, artists approach a gallery, hoping at least one agrees to display and sell their pieces. The artists then receive some portion of the sale. Gong instead designed and

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Prior to art, Gong worked as a child and family therapist, in higher education, and as an advocate for mixed race peoples and families. *Louie's Bio*, EIGHTH GENERATION, <https://eighthgeneration.com/pages/bio> [<https://perma.cc/KRG3-8WT4>] (last visited Oct. 4, 2019).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Telephone Interview with Louie Gong, Founder and CEO, Eighth Generation (Sept. 4, 2019). Mr. Gong stated the Pike Place location sells the work of over twenty-five Indian artists, many of whom were trained directly as artist-entrepreneurs through Eighth Generation's Inspired Natives Project. *See Inspired Natives Project by Eighth Generation*, EIGHTH GENERATION, <https://eighthgeneration.com/pages/inspired-natives-project> [<https://perma.cc/EVR5-EGAV>] (last visited Nov. 4, 2019).

⁹² Telephone Interview with Louie Gong, *supra* note 91.

financed sustainable product development methods that allowed him to directly distribute his art to multiple markets around the world.⁹³ For example, Eighth Generation was the first Native-owned company to sell wool blankets. ⁹⁴ To Gong, the blankets represent the intersection of business, art, education, and social justice. ⁹⁵ Traditionally, blankets in tribal communities are given as gifts in recognition of someone’s community service and the patterns and design were meaningful. Prior to Eighth Generation, most “Native” blankets available through big-name companies were fakes.⁹⁶ Through Gong’s business, Indian-made blankets are now making their way to the global market so artists and their tribes profit and the consumer is receiving a Native-made, rather than a “Native-inspired,” product.⁹⁷

In 2014, Gong launched Eighth Generation’s Inspired Natives Project (INP) (“Inspired Natives, not Native-inspired”) to share his business approach with other Indian artists.⁹⁸ INP selects skilled artists who have the goal of selling their art on the global market and gives them the resources to create their own self-directed businesses.⁹⁹ Gong perceives the connection between the

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* For example, Pendleton wool blankets, a staple among Native communities, originated with a British founder. Pendleton Woolen Mills initially created machine-woven blankets using tribal patterns specifically for Indian markets. William F. Willingham, *Pendleton Woolen Mills*, OREGON HISTORY PROJECT, https://oregonencyclopedia.org/articles/pendleton_woolen_mills/ [<https://perma.cc/URX5-ENZD>] (last updated Jul. 16, 2018). Today, Pendleton frequently collaborates with Native artists to sell authentic Indian-made blankets but the company also still profits from its “Native-inspired” lines. *Trading Blanket History*, PENDLETON, <https://www.pendleton-usa.com/trading-blanket-history.html> [<https://perma.cc/3FAL-56VN>] (last visited Nov. 7, 2019). Another example of appropriating Native designs is Beacon Linens’ signature “Native American Indian Design Blankets.” *About: Beacon, America’s Iconic Blanket and Textile Fashion*, BEACON LINENS, <https://www.beaconlinens.com/pages/about> [<https://perma.cc/W7AW-9GVM>] (last visited Nov. 7, 2019). The line includes the “Wigwam Blanket,” “Navajo Beacon Blanket,” and “Inca Beacon Blanket.” *Beacon Blankets*, BEACON LINENS, <https://www.beaconlinens.com/collections/beacon-blankets> [<https://perma.cc/3C9Q-AJR3>] (last visited Nov. 7, 2019). A November 7, 2019 phone call to Beacon Linens confirmed these blankets are “inspired” by Native designs and not Indian-made blankets.

⁹⁷ Telephone Interview with Louie Gong, *supra* note 91.

⁹⁸ *Inspired Natives Project*, *supra* note 91.

⁹⁹ Telephone Interview with Louie Gong, *supra* note 91.

development of Indian-made art and tribal economic welfare lies within artists becoming self-sufficient artist-entrepreneurs:

Art is an area of entrepreneurship that almost every native person is connected to. So by modeling how to make a sustainable living from art, we are reaching almost everyone in Indian Country. Not everyone can make a living but art and business can be a training ground that whets people's appetite for becoming entrepreneurs.¹⁰⁰

The artists in INP are paid commensurate with the value of their art, name, personal story, and their tribal community's story, all of which go into selling an artist's work.¹⁰¹ Gong wants other Indian artists to appreciate how the true market value of their work is when they align their cultural background with unique art forms.

Gong's greatest obstacle as a retailer is the impact of Curtisian stereotypes on both customers and his artists.¹⁰² Consumers, he believes, want to do the right thing but most simply are not aware of the legal definition of "Indian-made" arts and crafts.¹⁰³ Furthermore, publicly-funded institutions like museums continue to anchor their Native art shows with Edward Curtis's name, perpetuating the link in consumers' minds between Curtis, Indians, and how the two connect in art.¹⁰⁴ Gong, like artists Wilbur and Howe, grew up experiencing the story of American Indians through a Western cultural lens. He knows the quickest way to get his customers to reach into their pockets is to offer products that enact Curtis imagery.¹⁰⁵ But he refuses to reinforce outdated,

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Federal law does not in fact have a finite legal definition of "Indian-made products. *See, e.g.,* Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305 (1990). The Act does not define the term "Indian products"; it "has the meaning given such term in regulations which may be promulgated by the Secretary of the Interior." *Id.* at § 305e(d)(2). IACA is discussed more fully in Part III, *infra*.

¹⁰⁴ A list of current Curtis exhibits around the United States is updated on the Christopher Cardozo Fine Art's website. *Exhibitions and Lectures*, CHRISTOPHER CARDOZO FINE ART, <https://edwardcurtis.com/exhibitions-lectures/> [<https://perma.cc/GP7G-TTT6>] (last visited Nov. 21, 2019).

¹⁰⁵ Telephone Interview with Louie Gong, *supra* note 91.

harmful stereotypes. Gong insists, “We can’t build Native stars [in the art world] unless we act in ways consistent with our ethics, and not just out pocketbooks.”¹⁰⁶

III. HOW EXISTING LEGAL PROTECTIONS MARGINALIZE INDIAN ARTIST-ENTREPRENEURS FROM THE MAINSTREAM MARKET

Under the current American legal system, the rights to “cultural objects” are generally held by the federal government for the public’s enjoyment and education about historic and archaeological sites of significance. Artists, however, hold the right to protect their work through copyrights and trademarks.¹⁰⁷ This dichotomy is particularly pronounced when comparing indigenous and Western perceptions of art. The latter considers art a commodity and a luxury. It is in people’s lives but it does not play a role in a person’s day-to-day life. Conversely, in many indigenous cultures, art is part of the community’s everyday life. Some tribes do not have a word for “art” equivalent to the Western meaning of “luxury commodity.”¹⁰⁸ Instead, they call person-made objects “that-which-has-been-made” and do not distinguish objects as aesthetic, sacred, functional, public, or commercial.¹⁰⁹ While indigenous communities routinely engage with art as creators, most people in Western society experience art solely as consumers.¹¹⁰

This section will discuss how international law, tribal law, and United States federal law address Native intellectual property and how their limited scopes are frequently insufficient to protect individual Indian artist-entrepreneurs’ work from misappropriation. In the case of federal law, the existing protections of copyrights, trademarks, and the IACA also gatekeep these artists from participating fully in the mainstream market.

¹⁰⁶ *Id.*

¹⁰⁷ Rebecca Tsosie, *Who Controls Native Cultural Heritage?: “Art,” “Artifacts,” and the Right to Cultural Survival*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE, 5 (James A.R. Nafziger & Ann M. Nicgorski, eds. 2009).

¹⁰⁸ Tsosie, *supra* note 107.

¹⁰⁹ 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).

¹¹⁰ GARY WITHERSPOON, LANGUAGE AND ART IN THE NAVAJO UNIVERSE (1977).

A. *Native Intellectual Property*

Native intellectual property (Indian-made art) must be understood in its cultural context, but it is not the same as cultural property (Indian objects of culture).¹¹¹ Cultural property has been called the “fourth estate,” in addition to real, chattel, and intellectual properties.¹¹² This fourth estate refers to objects that embody a culture: archaeological, ethnographical and historical objects, works of art, and architecture.¹¹³

The history of legal protection of Native cultural property in the United States started with the Antiquities Act of 1906, when the federal government created national monuments in Indian Country and required permits for non-Native persons to conduct excavations at the sites.¹¹⁴ However, the Act was rarely enforced and the federal government claimed ownership of human remains and artifacts found on federal lands.¹¹⁵ However, since Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, the federal government has shown a commitment to recognizing Native ownership over five types of cultural items: (1) human remains; (2) associated funerary objects; (3) unassociated funerary objects; (4) sacred objects; and (5) cultural patrimony.¹¹⁶ Cultural property does not involve putting items into commerce, but rather, Native communities maintaining ownership over items they regard as historically or religiously significant.¹¹⁷

Meanwhile, intellectual property refers to a bundle of rights in intangible objects. These rights either authorize or prohibit others with regard to “novel expressions or embodiments of ideas” into the

¹¹¹ Tsosie, *supra* note 107, at 4.

¹¹² Steven Wilf, *What is Property’s Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT’L L. 177 (2001).

¹¹³ J.H. Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 341 (1989).

¹¹⁴ Antiquities Act of 1906. 16 U.S.C. §§ 431-433 (1988).

¹¹⁵ Guest, *supra* note 54, at 114.

¹¹⁶ Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§ 3001-3013 (1990).

¹¹⁷ This paper focuses on Native intellectual property. For more background on Native cultural property refer to Strickland, *supra* note 109; Tsosie, *supra* note 107; Isabella Alexander, *White Law, Black Art*, 10 INT’L J. OF CULTURAL PROP. 185 (2001); compare Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 8 (2007), with Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009).

market for profit.¹¹⁸ Among others, the United States offers legal protection for intellectual property in the form of patents, copyrights, and trademarks. These protections are designed to give the author a defined period of exclusive rights of use while encouraging innovation.¹¹⁹

Indian tribes' intellectual property includes their rituals and ceremonies, traditional imagery, the tribes' names and symbology, and knowledge of medicinal uses for indigenous flora and fauna.¹²⁰ Indian nations and their members may find defining their intellectual property challenging because in addition to individuals, tribes can also hold rights.¹²¹ Where an individual Indian person may want to put their work in commerce for a profit, tribes sometimes have an interest in keeping certain information secret to avoid commercial exploitation of their resources.¹²²

Legal scholar Richard Guest summarized three main differences between Native cultural property and Native intellectual property.¹²³ First, tribes seek protection for Native cultural property in a historical-sacred context and for Native intellectual property in an economic context. Second, Native cultural property protections are designed to limit non-Indians' access to certain sites and artifacts. However, Native intellectual property protections aim to expand the market for Native artists. Third, the underlying policy for the protection of Native cultural property is respect for the sacred aspects of tribal cultures. Meanwhile, the underlying policy for protecting Native intellectual property is economic development; Native artist-entrepreneurs are encouraged to continue producing commodities for the market and consumers are incentivized to buy guaranteed authentic Indian pieces.

B. *International Law*

International law identifies a political policy for the protection of Native intellectual property: indigenous peoples'

¹¹⁸ Guest, *supra* note 54, at 113.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 114.

¹²¹ FELIX S. COHEN, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 20.02 [6(a)] (2019 ed.).

¹²² *Id.*

¹²³ Guest, *supra* note 54, at 115-16.

rights to self-determination and economic independence.¹²⁴ The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore includes traditional knowledge (TK) and traditional cultural expressions (TCEs) as forms of indigenous intellectual property.¹²⁵ In doing so, WIPO draws on the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which provides indigenous peoples' rights to generate intellectual property based on their cultures:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹²⁶

The Declaration also requires States provide redress when indigenous peoples' cultural, intellectual, religious and spiritual

¹²⁴ Guest, *supra* note 54, at 111 (citing Statement of the International Alliance of the Indigenous-Tribal Peoples of the Tropical Forests in Penang, Malaysia (Feb. 15, 1992)).

¹²⁵ Dalindyabo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1129 (2017). Refer to Shabalala for an in-depth discussion of TK, TCEs, and Genetic Resources (GRs), the latter of which is related to a patent discussion beyond this article's scope.

¹²⁶ United Nations Declaration on the Rights of Indigenous Peoples, art. 31, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 at 22-23 (Sept. 13, 2007), <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [<https://perma.cc/MFZ9-R3A2>].

property is taken without their consent or in violation of their laws, traditions, and customs.¹²⁷

Here, the focus is on collective, rather than individual, property rights. While the Declaration and WIPO's interpretation expand the scope of Native intellectual property, both conceptualize the property at issue as tribally-owned. Specifically, the Declaration provides a basis for the State's positive obligations when outsiders misappropriate indigenous intellectual property but only toward the collective indigenous community. Additionally, WIPO explains "[r]ecognizing traditional forms of creativity and innovation as protectable intellectual property may enable indigenous and local communities as well as governments to have a say over their use by others."¹²⁸ Consequently, international law frames indigenous intellectual property rights as communal and does not expressly provide rights for those of individuals.

C. Tribal Law

Very few tribes provide intellectual property protections in their tribal codes. Legal scholar Dalindyabo Bafana Shabalala conducted a survey of 100 tribes and found only nine had any sort of intellectual property protections.¹²⁹ Like international law, tribal laws contemplate Native intellectual property broadly, to include TK and TCEs.¹³⁰ They also frame the rights as tribally-held without reference to those of individual members. Even fewer codes are designed to prevent misappropriation by non-Indians; provisions

¹²⁷ *Id.*

¹²⁸ WORLD INTELL. PROP. ORG. (WIPO), Traditional Knowledge and Intellectual Property, Background Brief – No. 1 (2016), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf [<https://perma.cc/4WEU-LZQL>].

¹²⁹ Shabalala, *supra* note 125, at 1140-41.

¹³⁰ For example, the Cherokee Nation defines art as "an object or action that is made with the intention of stimulating the human senses as well as the human mind and/or spirit regardless of any functional uses. For purposes of this act, Art also includes crafts, handmade items, traditional storytelling, oral histories, other performing arts and printed materials." A Legislative Act Requiring Truth In Advertising For Native Art, LA-01-08, 2008 Council of the Cherokee Nation, *available at* <https://cherokee.legistar.com/LegislationDetail.aspx?ID=215304&GUID=1E88B7B5-F5F8-4E7E-B0C0-176F5938D691&Options=&Search=> (attachment LA-01-08) [<https://perma.cc/4XN5-8Y6F>].

that reference outsiders misappropriating Indian intellectual property generally do not provide for legal remedies to violations.¹³¹

An example of a more comprehensive tribal policy on Native intellectual property can be found in the laws of the Cherokee Nation and the Eastern Band of the Cherokee Nation. Both codes have a “Truth in Advertising” provision, originally enacted to “to establish guidelines for the purchase, promotion and sale of genuine Native American arts and crafts within the Cherokee Nation and by Cherokee Nation entities” as well as encourage Native artists to use traditional influences and mediums in their work. The Cherokee Nation’s rules around misappropriation include,

(a) The Cherokee Nation shall not knowingly offer for sale art that is produced by individuals who falsely claim, imply, or suggest that they are Indian.

(b) The Cherokee Nation shall not host, sponsor, fund, or otherwise devote or contribute any resource to Art exhibits allowing the exhibition of works by Artists who falsely claim, imply, or suggest that they are Indian.

(c) The Tribal Employment Rights Office (T.E.R.O.) shall maintain a voluntary registry of Cherokee Artists and their contact information.

(d) The Principal Chief shall cause to be published an inventory of all Indian art owned by the Cherokee Nation, and such listing shall be accessible to the public.

(e) The Principal Chief shall cause to be developed a label or other form of identification to be placed upon or

¹³¹ See Shabalala, *supra* note 125, at 1141-44.

with any Indian Art or Craft sold by the Cherokee Nation or its entities. This is to ensure and identify the object being sold as authentic Indian Art.

(f) The Principal Chief shall cause to be published an inventory of all Indian art owned by the Cherokee Nation, except for art held for resale in retail stores or warehoused for such purpose, and such listing shall be public record pursuant to the Freedom of Information and Rights of Privacy Act, Title 75, Ch. 1.¹³²

This provision maps well onto both existing international and federal law for two reasons. First, it contemplates Native intellectual property as tribally-held and individually-held. Second, it provides for its own versions of copyrights (section d) and trademarks (section e).

D. *United States Federal Law*

The United States government does not recognize TK, TCEs, and GRs as distinct forms of Native intellectual property.¹³³ The existing federal legal protections for intellectual property are patents, copyrights, and trademarks.¹³⁴ Indian artist-entrepreneurs rely on the latter two to protect their original work from misappropriation from non-Indians.

¹³² Council of the Cherokee Nation, *supra* note 130. Notably, the draft version of the Act contained a different subsection (f) that provided for the Act's enforcement through civil action by any Cherokee citizen for injunctive relief and/or damages

¹³³ James D. Nason, *Symposium, Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 259 (2001); Tsosie, *supra* note 107, at 9.

¹³⁴ For a discussion of patent law in the context of plants as Indian intellectual property see Guest, *supra* note 54 at 116-23.

1. Copyright Law

Copyright law gives authors of fixed expressions rights including the right to copying, preparation of derivative works, to control sales and distribution, and to control the public performance and display. These rights are transferrable and may be limited by assignment to a third party or by statute.¹³⁵ Although copyrights vest immediately and do not depend on registration with the federal government, they expire fifty years after the original author's death.¹³⁶ To qualify for a copyright, the work must be original¹³⁷ and "fixed in a tangible medium of expression."¹³⁸ Here, "fixed" is defined as, "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹³⁹ Copyrights serve both the public's interest in the advancement of arts, while protecting the authors' rights to any economic return on their creations. But tribes often cannot identify a single author or owner, much of their intellectual property is not fixed in a tangible medium, and it can be impossible to establish the property's age.¹⁴⁰

In 1989, the United States incorporated "moral rights" into its copyright protection under the Visual Artist's Rights Act of 1990 (VARA).¹⁴¹ These moral rights for authors of visual art include the right to attribution and the right to integrity.¹⁴² The right to attribution entails the right of an artist to claim authorship and to

¹³⁵ 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, 96-97 (2000-2001).

¹³⁶ 17 U.S.C. § 106 (1994). *See also* Guest, *supra* note 54, at 127, n.75 ("In a joint work, the copyright continues for 50 years from the death of the last surviving author. *Id.* § 302(b). In the case of anonymous authors, pseudonymous works and works made for hire, the copyright endures for 75 years from its publication or 100 years from its creation, whichever expires first. *Id.* § 302(c)").

¹³⁷ 17 U.S.C. § 102(a).

¹³⁸ *Id.*

¹³⁹ *Id.* § 101.

¹⁴⁰ Shabalala, *supra* note 125, at 1133.

¹⁴¹ Visual Artist's Rights Act of 1990, 17 U.S.C. §§ 106A, 113(d) (1994).

VARA was the result of the United States acceding to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last amended at Paris Sept. 28, 1979), *available at* <https://wipolex.wipo.int/en/text/283698> [<https://perma.cc/9XK6-BFHE>]. For more on the history of the Berne Convention refer to Jordan, *supra* note 135.

¹⁴² VARA defines visual art as single copies of paintings, drawings, prints, or sculptures. 17 U.S.C. § 106A, 113(d).

prevent another person from using that artist's name as the author of visual art the artist did not create.¹⁴³ The right to integrity refers to a right to prevent "intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her honor or reputation."¹⁴⁴ In essence, moral rights give artists the rights to claim authorship and to object to certain enumerated misuses of their work apart from their economic rights, even in the event they transfer those economic rights to another.¹⁴⁵ VARA's narrow scope may not afford much protection for tribally-held intellectual property, but the Act does imbue individual Indian artist-entrepreneurs with the rights of attribution and integrity vis-à-vis their tangible work.

2. Trademark Law

Trademark law at the federal level is codified under the Lanham Act.¹⁴⁶ Trademark refers to any word, name, symbol, or device, or any combination thereof that is either currently being used by a person, or which the person has a bona fide intention to use in commerce, "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."¹⁴⁷ A person's right to a trademark begins with the trademark's first commercial use, although someone who files an intent to use has up to three years before actual use is required.¹⁴⁸ The main benefit of registering a trademark with the federal government is registrants can prove (a) through their use the mark now has a secondary meaning and (b) ownership over the trademark's use.¹⁴⁹ Other benefits include a ten-year right to use that is renewable

¹⁴³ 17 U.S.C. § 106A(a)(1).

¹⁴⁴ 17 U.S.C. § 106A(a)(3)(A).

¹⁴⁵ Berne Convention, *supra* note 141, at art.6*bis* § 1.

¹⁴⁶ Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051-1127 (1946)). The majority of states also have trademark registration statutes.

¹⁴⁷ 15 U.S.C. § 1127 (2019).

¹⁴⁸ 15 U.S.C. § 1051(d) (2019). Guest explains "[t]he applicant must file a statement of use with specimens within six months of his intent-to-use application. This section allows for an automatic six-month extension upon request by the applicant and an additional two-year extension in six-month increments upon a showing of good cause by the applicant. Guest, *supra* note 54, at n. 96.

¹⁴⁹ See 15 U.S.C. § 1057(b), (c) (2019); 15 U.S.C. § 1115(a) (2019).

indefinitely;¹⁵⁰ after five years the trademark is incontestable and cannot be canceled; the registrant has jurisdiction in federal court and has access to legal remedies including lost profits, treble damages, and costs.¹⁵¹ The purpose of trademark rules is to create brand identity while avoiding consumer confusion, as well as to protect the owner from brand infringement or dilution.¹⁵²

Tribes are no longer able to bring a claim on disparagement grounds. Section 2(a) of the Lanham Act provides for denying or canceling a trademark if it “consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute....”¹⁵³ Over the past twenty years, Native American organizations petitioned the U.S. Patent and Trademark Office (USPTO) to cancel the trademark of “Washington Redskins” held by the owners of the Washington Redskins football team. In 2014 the Trademark Trial and Appeal Board determined in *Blackhorse v. Pro Football, Inc.* the term “Redskins” was in fact disparaging to Native Americans and cancelled the Redskins trademarks.¹⁵⁴ Pro Football, Inc. appealed the decision in federal court and lost.¹⁵⁵ But in 2017, the Supreme Court ruled the “disparaging clause” was unconstitutional on First Amendment grounds in *Matal v. Tam*, 137 S. Ct. 1744 (2017).¹⁵⁶ In doing so, the Court rendered moot the ongoing *Blackhorse* litigation and eliminated the disparaging clause as a legal avenue for protecting Native intellectual property.

Alternatively, the Lanham Act also provides a civil cause of action under section 43(a) for,

¹⁵⁰ See 15 U.S.C. § 1059(a) (2019).

¹⁵¹ See 15 U.S.C. § 1117 (2019); 15 U.S.C. § 1065 (2019).

¹⁵² Mark Conrad, *Matal v. Tam - A Victory for the Slants, a Touchdown for the Redskins, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 90-91 (2018).

¹⁵³ 15 U.S.C. 1052(a) (2019).

¹⁵⁴ *Blackhorse v. Pro Football, Inc.*, No. 92046185 (P.T.A.B. Jun. 18, 2014) available at <https://www.uspto.gov/about-us/news-updates/blackhorse-v-pro-football-inc-decision> [<https://perma.cc/8ULQ-DPWW>]. For more background on the *Blackhorse* cases, see Angela R. Riley and Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016).

¹⁵⁵ *Pro-Football, Inc., v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va 2015).

¹⁵⁶ See Conrad, *supra* note 152, for a thorough analysis of the case and its possible effects on subsequent trademark claims under section 2(a) and 43(a) of the Lanham Act.

(1) Any person who, *on or in connection with any goods or services*, or any container for goods, *uses in commerce* any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities....¹⁵⁷

However, historically tribes have struggled to establish the standing required to bring a section 43(a) claim. Although 28 U.S.C. § 1362 gives tribes the right to sue, tribes themselves cannot be sued in federal court without an express waiver of their sovereign immunity.¹⁵⁸ Moreover, since the provision applies only to commercial parties, a tribe would need to demonstrate how the misuse of their intellectual property damages it as a commercial

¹⁵⁷ 15 U.S.C. § 1125 (2019). Emphasis added.

¹⁵⁸ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (explaining that waivers of sovereign immunity “cannot be implied but must be unequivocally expressed”).

player in the marketplace.¹⁵⁹ One could contemplate how individual Indian artist-entrepreneurs may be more successful at bringing a claim since such individual may sue in federal court and is operating as a commercial party.

3. Indian Arts and Crafts Act

As an alternative route to seeking recourse under copyright and trademark law, Congress passed the Indian Arts and Crafts Act (IACA) in 1935 and 1990. The government designed IACA as a response to outsiders misappropriating Native Americans' cultural and intellectual property for profit. However, IACA has instead actively hindered Indian artist-entrepreneurs from entering the Indian handicrafts and broader art markets.

The Department of the Interior first created the Indian Arts and Crafts Board in 1935 to “promote the economic welfare of Indian tribes and the Indian wards of the Government through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.”¹⁶⁰ The Board was also empowered to create government trademarks of “genuineness and quality” of Indian products and of certain tribes, to regulate their use and licensing, and to register the trademarks with the USPTO.¹⁶¹ The 1935 act also created misdemeanor penalties for persons who knowingly marketed and sold goods as Indian-made when the goods were not created by Indians.¹⁶²

¹⁵⁹ Guest, *supra* note 54, at 132. For more discussion of this element consult *Johnson & Johnson v. Carter-Wallace Inc.*, 631 F.2d 186 (2nd Cir. 1980). Here, the court construed section 43(a) language, “any person who believes that he or she is or is likely to be damaged” as applying only to “commercial parties.” *Johnson & Johnson.*, 631 F.2d at 189. The court also clarified that “[w]hile this does not require proof of monetary loss, it certainly requires some demonstration of adverse impact on the plaintiff’s business by evidence that is ‘something more than a plaintiff’s mere subjective belief that he is injured or likely to be damaged.’ ” *Id.*

¹⁶⁰ *Indian Arts and Crafts Act of 1935*, U.S. DEPT. OF THE INTERIOR, INDIAN ARTS AND CRAFTS BOARD, <https://www.doi.gov/iacb/indian-arts-and-crafts-act-1935> [<https://perma.cc/SY5H-GS3M>] (last visited Nov.4, 2019). For a direct citation to the Indian Arts and Crafts Act of 1935 session law see Indian Arts and Crafts Act of 1935, ch. 748, 49 Stat. 891 (1935) (codified as amended at 25 U.S.C. § 305 (1990)), available at <https://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch748.pdf> [<https://perma.cc/V8LA-JMFD>].

¹⁶¹ INDIAN ARTS AND CRAFTS BOARD, *supra* note 160.

¹⁶² Indian Arts and Craft Act of 1935, *supra* note 160, at §§ 5, 6.

However, due to large amounts of counterfeit Indian products on the market, Congress revitalized IACA in 1990 with the two-prong goal of supporting tribes' economic self-reliance as well as protecting the integrity of their cultural heritage.¹⁶³ Amended in 2000 and 2010, IACA is a truth-in-advertising law designed to protect Indian manufacturers and consumers from imitation goods.¹⁶⁴ Each amendment has increased the severity of penalties: violators are currently subject to fines up to \$250,000 and up to five years in prison.¹⁶⁵ The process for filing a complaint starts with submitting an alleged violation to the Board. The Board itself does not have the authority to determine what constitutes sufficient proof of false advertising.¹⁶⁶ Instead, it may refer the complaint to the Federal Bureau of Investigation. Alternatively, the Board may recommend to the Secretary of the Interior that the claim be referred to the Attorney General of the United States as a civil matter. The Board also may recommend to the Attorney General directly that criminal proceedings begin.¹⁶⁷

IACA has failed to be the robust protection Congress envisioned for Indian intellectual property in three key ways. First, the Act's scope, like copyright and trademark law, does not cover TK and TCEs, such as ceremonial dances or basket weaving processes, despite the commonplace misappropriation of these art forms by non-Indians for profit. A 2011 U.S. Government Accountability Office (GAO) report found the sale of imitation arts and crafts has been a "persistent and potentially growing problem in

¹⁶³ 25 U.S.C. §§ 305-309 (1988). For a history of IACA, see Jon Parsley, *Comment, Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487 (1993). The 1990 amendment followed a 1985 U.S. Department of Commerce report that found around 20% of the Indian handicrafts market represented sales of imitation goods. These goods undersold their authentic counterparts by as much as 50%. INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, STUDY OF PROBLEMS AND POSSIBLE REMEDIES CONCERNING IMPORTED NATIVE AMERICAN-STYLE JEWELRY AND HANDICRAFTS (1985). The report also placed the Indian handicrafts market between \$400 million and \$800 million, meaning between \$80 million and \$160 million was diverted from Indian artisans. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN L. REV. 1009, 1017 (2001).

¹⁶⁴ Parsley, *supra* note 163, at 495-97.

¹⁶⁵ 18 U.S.C. § 1159 (2019); see also *Native American Arts, Inc. v. Waldron Corp.*, 253 F.Supp. 2d 1041, 1044 (N.D. Ill. 2003) (acknowledging the right of Indian organizations and individuals to bring civil claims under IACA).

¹⁶⁶ *Native American Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 874 (2005).

¹⁶⁷ Guest, *supra* note 54, at 135; 25 U.S.C. §305d(3)(a).

the United States.”¹⁶⁸ The GAO recommended the federal government consider expanding IACA’s scope to TK and TCEs based on international examples of legal protections for indigenous intellectual property.¹⁶⁹

Second, although Congress enacted IACA to promote the economic development of Indian artisans, the Act’s definition of “Indian” gatekeeps many Indian artist-entrepreneurs from entering the market.¹⁷⁰ IACA defines “Indian” as a member of any federally or state recognized tribe or is certified as an Indian artisan by an Indian tribe.¹⁷¹ “Indian product” means any art or craft product made by an Indian.¹⁷²

Some scholars criticize IACA’s legal definition of “Indian” obstacle as both underinclusive and overinclusive. Underinclusive because only persons in recognized tribes qualify and overinclusive because it includes state tribes as well.¹⁷³ Additionally, only an Indian tribe, Indian, or certified Indian artisan may initiate a cause of action for misrepresentation of Indian produced goods.¹⁷⁴ Consequently, IACA’s protections are only available to some, but not all, Indian artist-entrepreneurs.

Critics also find problematic tribes hold the power to certify or reject a non-member as an Indian artisan, effectively deciding whether certain individuals may place their goods in the Indian handicrafts market.¹⁷⁵ The risk exists that tribes, already competing

¹⁶⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN (2011).

¹⁶⁹ *Id.* at 29-30.

¹⁷⁰ The Act applies to the marketing of arts and crafts produced after 1935 by any person in the United States. INDIAN ARTS AND CRAFTS BOARD, *supra* note 160.

¹⁷¹ 25 U.S.C. § 305e(a)(1). The individual applicant must be of Indian lineage of one or more members of such Indian tribe. Certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated this function by the governing body of the Indian tribe. 25 C.F.R. §309.25 (2019).

¹⁷² 25 C.F.R. § 309.2(d).

¹⁷³ Cohen, *supra* note 121. The federal government defines “Indian” as a person who is a member of a federally recognized tribe and “tribe” means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust. 25 U.S.C. § 2201 (2) (2019).

¹⁷⁴ 25 U.S.C. § 305(d). An Indian arts and crafts organization may also bring a claim.

¹⁷⁵ *See, e.g.*, GAIL K. SHEFFIELD, THE ARBITRARY INDIAN: THE INDIAN ARTS & CRAFTS ACT OF 1990 95, 105–115 (1997); Andrew W. Minikowski, *The Creation of Tribal Cultural Hegemony Under the Indian Arts and Crafts Act and*

for federal resources and space on the arts market, will not want to admit more competition. Tribal efforts to lessen the competition are evident in the Inter-Tribal Council of Northeastern Oklahoma's support for a 2016 bill enacting Oklahoma's version of IACA.¹⁷⁶ The Council is comprised of the Cherokee Nation, Chickasaw Nation, the Choctaw Nation, the Muscogee Nation and the Seminole Nation. Under the bill, anyone who markets goods as "Indian" must be a member of a federally recognized tribe. This law is markedly more restrictive than IACA, which includes members of state recognized tribes. In 2019, a federal judge ruled Oklahoma's American Indian Arts and Crafts Sales Act unconstitutional after a member of a state recognized tribe brought a suit against the Attorney General of Oklahoma.¹⁷⁷

The difficulty of discerning under IACA whether Indian artists lacking tribal membership may call their goods "Indian-made" is illustrated by Jimmie Durham's career. Durham, an artist with Cherokee heritage and associated with the 1970s American Indian Movement, refused to apply for tribal membership or certification.¹⁷⁸ Subsequently, art galleries began canceling his shows.¹⁷⁹ Several scholarly and newspaper articles from the early 1990s decry the tribal world's rejection of Durham.¹⁸⁰ In 2017, Cherokee artists, scholars, and educators published an editorial entitled, "Dear Unsuspecting Public, Jimmie Durham Is a

Native American Graves Protection and Repatriation Act, 92 N. DAKOTA L. REV. 397 404-05, 411 (2017).

¹⁷⁶ *Judge rules Oklahoma Native American art law too restrictive*, ASSOCIATED PRESS, Apr. 1, 2019, <https://apnews.com/d40ab44807cd4509a49f915a80998303> [<https://perma.cc/GNL9-PT3Z>].

¹⁷⁷ *Fontenot v. Hunter*, 378 F.Supp.3d 1075 (W.D. Okla. 2019). The plaintiff was a member of the Patawomeck Indian Tribe of Virginia, which is recognized by the Commonwealth of Virginia but not by the federal government. *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGISLATURES (2019), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [<https://perma.cc/YC5U-4A4B>].

¹⁷⁸ Hapiuk, *supra* note 163, at 1034.

¹⁷⁹ Jesse Hamlin, *Indian Artists Need ID*, S.F. CHRON., July 9, 1991, at E2, available at 1991 WL 419587.

¹⁸⁰ *See id.*; Lisa Balfour Bowen, *Native Artists Step Out in National Gallery Exhibit*, FIN. POST, Oct. 19, 1992, at S1; Editorial, *Rubber Tomahawks*, WALL ST. J., Nov. 4, 1992, at A14. Hapiuk, *supra* note 163, was the first article to present the examples of Jimmie Durham and Bert Seabourne as two Native artists rejected by tribes and have since been cited repeatedly as the primary examples of tribes gatekeeping Indian artisans from the market. But the narrative has evolved since then and deserves fresh reconsideration, as I suggest in this paper.

Trickster.” The authors explain why Durham cannot call himself an Indian or his work “Indian-made”:

Historically, there are individuals who are of Cherokee descent but who are not eligible to enroll as tribal citizens. These include Cherokees who fled Indian Territory during the violence of the Civil War and chose not to return to participate in the Dawes Rolls from 1898 to 1914. There are also members of other tribes who have Cherokee descent but whose relatives did not wish to sign onto multiple tribes’ rolls. Some non-enrolled Cherokee descendants are engaged with and contribute to Cherokee communities. These individuals can prove their Cherokee heritage and are known to their relatives and the tribal governments....

No matter what metric is used to determine Indigenous status, Durham does not fulfill any of them. Jimmie Durham is not a Cherokee in any legal or cultural sense. This not a small matter of paperwork but a fundamental matter of tribal self-determination and self-governance. Durham has no Cherokee relatives; he does not live in or spend time in Cherokee communities; he does not participate in dances and does not belong to a ceremonial ground.¹⁸¹

¹⁸¹ Cara Cowan Watts, Ph.D., et al., *Dear Unsuspecting Public, Jimmie Durham Is a Trickster*, INDIAN COUNTRY TODAY (Jun. 26, 2017), https://newsmaven.io/indiancountrytoday/archive/dear-unsuspecting-public-jimmie-durham-is-a-trickster-Rk7_oZ6TPkmIIQLNjN-gPw/ [<https://perma.cc/4QF9-WFTL>].

The authors' argument against classifying Durham as "Indian" under IACA or for any purposes is bolstered by Durham himself. In a 2017 interview, he stated, "I am perfectly willing to be called Cherokee. But I'm not a Cherokee artist or Indian artist, no more than Brancusi was a Romanian artist."¹⁸² In the case of Durham, it seems the public, more so than the artist himself, insists on Durham's Indianness because his paintings and sculptures are so aligned with its conception of authentic Indian culture.

Yet, the authors' letter also provides insight into which legitimate Indian artisans lacking tribal memberships are at risk for being excluded from the Indian art market. These include individuals whose Indian ancestors could not or choose not to include their names on the tribal roll but nonetheless continue to engage with their culture and self-identify as Indian. The difference between these persons and Durham, the letter indicates, is the former is inherently Indian even if not legally "Indian": "it is not who you claim, it is who claims you."¹⁸³

The third way IACA hinders Indian artisans from entering the art market is by allowing non-Indian manufacturers to play with semantics and consumers' assumptions. In the only reported appellate decision addressing IACA, Judge Richard Posner states in his opinion,

A non-Indian maker of jewelry designed to look like jewelry made by Indians is free to advertise the similarity but if he uses the word "Indian" he must qualify the usage so that consumers aren't confused and think they're buying not only the kind of jewelry that Indians make, but jewelry that Indians in fact made.¹⁸⁴

¹⁸² Jori Finkel, *The Artist Jimmie Durham: A Long Time Gone, but Welcomed Back*, N.Y. TIMES, Mar. 10, 2017,

<https://www.nytimes.com/2017/03/10/arts/design/the-artist-jimmie-durham-a-long-time-gone-but-welcomed-back.html> [<https://perma.cc/6TNF-U6KX>].

¹⁸³ Watts et al., *supra* note 181.

¹⁸⁴ *Native American Arts Inc. v. The Waldron Corp.*, 399 F.3d 871, 874 (2005).

Yet “Native-inspired,” “Native design,” and “Indian Maid” is a permissible way for manufacturers to market inauthentic goods.¹⁸⁵ So too is marketing using imagery that evokes Curtisian stereotypes; headdresses, teepees, and dreamcatchers all play into the collective consciousness of authentic Indian-ness.¹⁸⁶ One of the biggest offenders are new age retailers that appropriate Indian culture into “a kind of secular mysticism” for commercial gain.¹⁸⁷ Additionally, currently there are no legal obligations for third-party sellers, such as Amazon or eBay, to investigate the authenticity of products sellers on their websites as “Indian-made.”¹⁸⁸

As a result, consumers are either unknowingly deceived by marketing and therefore purchase imitation goods, or, preferring the low price point afforded by a mass manufacturer, knowingly choose to buy the imitation. IACA’s failure to more closely regulate the language and imagery associated with Indian-made goods means individual Indian artisan-entrepreneurs cannot compete in terms of production volume, speed, and manufacturing costs with companies using cheap imports to imitate Indian-made art. Moreover, subsequent generations are deterred from learning Native artistic traditions when they see who is and who is *not* profiting from Indian culture.

Tribes themselves may already be providing the impetus for strengthening IACA. In 2016, the Navajo Nation and Urban Outfitters reached a settlement in a landmark case for protecting authentic Indian goods on the market. Starting in 2012, The Navajo Arts and Crafts Enterprise, a Navajo Nation entity and owner the trademark and rights to license the “Navajo” name brought a claim under IACA against retailer Urban Outfitters and its subsidiaries, Anthropologie and Free People.¹⁸⁹ NACE also alleged trademark

¹⁸⁵ Dirk Johnson, *Indians Complain of Religious and Cultural Theft*, N.Y. TIMES, June 12, 1993, at A7. A Flagstaff, Arizona retailer sold Indian jewelry under the brand “Indian Maid” so that when he told customers about the goods, it sounded like he was saying “Indian-made.” *Id.*

¹⁸⁶ Alexander, *supra* note 117, at 189.

¹⁸⁷ *Id.*

¹⁸⁸ However, the Native American Arts (NAA) has added eBay as a defendant in a 2015 complaint against several retailers, including Wal-Mart, Sears, and Overstock.com. Brendan Johnson, *The Indian Arts and Crafts Act – A Powerful Tool*, LAW360 (Jun. 30, 2015) available at <https://www.law360.com/articles/673518/the-indian-arts-and-crafts-act-a-powerful-tool> [<https://perma.cc/ST8G-F7U5>].

¹⁸⁹ *Id.*

dilution and false advertising claims under the Lanham Act.¹⁹⁰ The retailers had been manufacturing marketing clothing and apparel items as “Navajo,” “Zia,” “Zuni,” “Pueblo,” “Apache,” “Cheyenne,” “Hopi,” and “Crow”.¹⁹¹ They also appropriated traditional tribal designs, selling products such as the “Navajo-patterned flask” and the “Navajo hipster panty.” The Navajo Nation objected to the use of their name and traditional designs on non-Indian-made goods.

This case is significant because the Navajo Nation urged the court to interpret IACA’s damages clause as providing for a maximum amount of damages. IACA states damaged parties are entitled to recover the greater of treble damages or in the case of each aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization, not less than \$1,000 for each day on which the offer or display for sale or sale continues.¹⁹² The plaintiff sought \$1,000 per product type, per day that the product type is sold or displayed, per defendant. The defendant argued the court should interpret the provision as allowing \$1,000 per day per product. The court denied the defendant’s motion for summary judgment on damages.¹⁹³ The court reasoned the goals of promoting Indian self-sufficiency, protecting Indian culture, and stopping counterfeit products from misleading consumers were best advanced by allowing for the plaintiff’s interpretation of the \$1,000 penalty.¹⁹⁴ Additionally, in the 2016 settlement the Navajo Nation negotiated a deal where the Navajo would make and sell its authentic products in Urban Outfitters’ stores.¹⁹⁵

Individual Indian artist-entrepreneurs are in a challenging legal space as creators. International law, although broader in scope and tailored to indigenous culture, focuses on tribes’ rights to their intellectual property and not on those of individual members. Likewise, American Indian tribes themselves rarely enact codes

¹⁹⁰ Navajo Nation v. Urban Outfitters, Inc., No. Civ. 12-195 LH/WDS, 2013 WL 12161826 at *1 (D. N.M. Nov. 6, 2013).

¹⁹¹ Navajo Nation v. Urban Outfitters, Inc., 191 F.Supp.3d 1238, 1240 (2016).

¹⁹² 25 U.S.C. § 305e(b).

¹⁹³ Navajo Nation v. Urban Outfitters, Inc., 191 F.Supp.3d. at 1242.

¹⁹⁴ *Id.*

¹⁹⁵ Alysa Landry, *Navajo Nation and Urban Outfitters Reach Agreement on Appropriation*, INDIAN COUNTRY TODAY (Nov. 22, 2016), [https://newsmaven.io/indiancountrytoday/archive/navajo-nation-and-urban-outfitters-reach-agreement-on-appropriation-hmU7yHNu606ffn1OOeFRpw/\[https://perma.cc/EB3C-D9BB\]](https://newsmaven.io/indiancountrytoday/archive/navajo-nation-and-urban-outfitters-reach-agreement-on-appropriation-hmU7yHNu606ffn1OOeFRpw/[https://perma.cc/EB3C-D9BB]).

protecting intellectual property. When they do, these codes focus on tribal-owned, rather than member-owned intellectual property, and do not address misappropriation by outsiders. Meanwhile, existing United States federal law's emphasis on tangibility disadvantages Native intellectual property, resulting in a too-narrow definitions of "art." Indian-made art will continue to be devalued in the broader art market as long as the manufacturers of imitation products manipulate their language and employ Curtisian stereotypes. Additionally, both tribal laws and federal law protect only Indian artists who are members of federally and state-recognized tribes, leaving Indian artisans without tribal affiliations no legal recourse under IACA. Ways to improve the legal protections for Indian artist-entrepreneurs must be pursued.

IV. HOW THE LAW MAY BETTER INCLUDE INDIAN ARTISTS AND INDIAN ART AS VIABLE MARKET PARTICIPANTS

As previously discussed, Indian artist-entrepreneurs still struggle to achieve artistic and legal parity with non-Indian artists. One hundred and fifty years of Curtisian imagery in the public domain, underpinned by the notion that Indians are a "vanishing race," has made it difficult for Native communities to defend ownership over its tribal names, designs, knowledge, and cultural expressions. The Art World reifies "Indian art" as a particular style and frequently fails to credit tribal traditions (rather than European predecessors' work) as the inspiration for Indian artists. Major media outlets assign non-Indians to photograph Native communities when there are qualified Indian photographers available. Mass manufacturers of commercial products manipulate language, deliberately evoking in consumers Curtisian stereotypes of Indianness when marketing imitation goods as "Native-inspired" or "Native design." Some retailers more blatantly misappropriate, using a tribe's name or traditional imagery for its products.

Meanwhile, the lack of comprehensive legal protections available for Native intellectual property and Indian artists allows non-Indian manufacturers to continue evading federal copyright and trademark laws, as well as IACA. Thus, individual Indian artist-entrepreneurs have found themselves marginalized from the Indian handicrafts and broader art market. The following section presents some solutions to this problem and offer suggestions for how the

law may better include Indian artist-entrepreneurs as viable participants in the art market.

A. Legislation Redefining “Art” to Include Tangible and Intangible Creative Expressions

While international law and tribal law already recognize TK and TCEs as forms of intangible art, United States federal law does not. This is problematic for Indian tribes and their members who have valuable interests in intangible resources including oral histories, traditional stories, ceremonial dances, custom craftwork, and tribal names and symbols. These works often cannot meet the authorship, fixation, and duration requirements for copyrights or run aground the First Amendment in trademark disputes. At present, people are profiting from intangible Native creative expressions, but it is usually not tribes or Indian artists. For example, non-Indians sell vision quests, an Indian spiritual exercise, and charge others for participating in Indian-like ceremonies of their own creation.¹⁹⁶

Equally problematic, museums, universities, and other institutions are now digitizing tribal songs, stories, and ceremonies. Digitization makes available on a mass scale these types of intangible intellectual property.¹⁹⁷ However, the intangible aspect of each is their sacred nature and much of that sanctity arises from the tribe’s secrecy about the information each song, story, or ceremony conveys.¹⁹⁸ Consequently, institutions profit while facilitating further exploitation of these Native intangible creative expressions.

One approach would be to modify existing federal law to achieve protection of TK and TCEs according to WIPO’s recommendations.¹⁹⁹ The first step for the United States government is to develop a defensive protection system, which stops third parties

¹⁹⁶ Johnson, *supra* note 185.

¹⁹⁷ Chante Westmoreland, AN ANALYSIS OF THE LACK OF PROTECTION FOR INTANGIBLE TRIBAL CULTURAL PROPERTY IN THE DIGITAL AGE, 106 CAL. L. REV. 959, 962 (2018).

¹⁹⁸ *Id.*

¹⁹⁹ WORLD INTEL. PROP. ORG. (WIPO), DEVELOPING A NATIONAL STRATEGY ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES, BACKGROUND BRIEF NO. 3 1-4 (2016), *available at* https://www.wipo.int/export/sites/www/tk/en/documents/pdf/background_briefs-e-n3-web.pdf [<https://perma.cc/MJN6-9NT4>].

from acquiring the intellectual property rights over subject matters appropriating TK and TCEs.²⁰⁰ The next step is to then provide positive protection for Native intellectual property by granting rights in TK and TCEs.²⁰¹ The federal government should work directly with tribes and reference international law to develop policies and legislation providing legal protection for specific Native TK and TCEs, including civil causes of action and aggressive financial penalties for violators.²⁰² Additionally, a database inventorying protected Native intellectual property, tangible and intangible, should be created and posted on the Indian Arts and Crafts Board website. The federal government similarly should include this database on its copyright and trademark websites.

B. Modifying Legislation to Include Indian Artists Without Tribal Affiliations

Another major hindrance of Indian artist-entrepreneurs from becoming viable participants in the art market is IACA's definition of "Indian." Recall IACA adopts a more expansive definition of "Indian" than most government agencies because it includes both federal and state tribes. However, the only alternative route to certification for Indian artisans without tribal affiliations is through federally or state recognized tribes. This tribal mechanism is problematic because the decision makers do not necessarily want more competition for already scarce federal resources and perceived limited market space. As a result, some Indians may be kept out of the market because they are not, according to the U.S. government, "real" Indians.

The National Congress of American Indians (NCAI) could serve as the independent, intertribal body to certify goods made by Indians without tribal affiliations as Indian-made.²⁰³ The NCAI is a non-profit organization founded in 1944 devoted to advancing unified policies among tribal governments in several key areas, including economic development in Indian and Alaska Native

²⁰⁰ *Id.* at 1.

²⁰¹ *Id.*

²⁰² *Id.* at 2-3.

²⁰³ My proposal of the NCAI acting as an accreditation body builds on Andrew Minikowski's suggestion of creating a "pan-Indian" IACA Certification Board. *See* Minikowski, *supra* note 175, at 412.

communities.²⁰⁴ The NCAI is already actively petitioning Congress to strengthen IACA. In 2010, the NCAI passed a resolution urging Congress to amend the Act to allow for concurrent federal-tribal prosecutions of violations, to recover triple damages from violators, and to amend IACA so that it covers musicians, performers, writers, and academic scholars.²⁰⁵

Although the NCAI defines “Indian” in a similarly limited way as IACA (“recognized as a member by an Indian tribe or band, or combination of tribes and bands, recognized by the Department of the Interior, the Indian Claims Commission, Court of Claims, or a State.”), the NCAI also provides “Individual Associate Membership” to the Congress for persons who do not qualify as Indian “for lack of Indian ancestry.”²⁰⁶ Although it seems unlikely the NCAI would expand its Indian membership to include individuals without tribal affiliations, another option is to offer such individuals associate membership after broadening the category to read “Individuals that do not qualify for membership for lack of Indian ancestry *or Indians who lack affiliation with a federally or state recognized tribe.*”²⁰⁷

The NCAI could form an IACA certification board comprised of representatives including Indians without tribal affiliations. Although typically Individual Associate Members are non-voting, each representative on the IACA certification board would have one vote. The board would hear from Indians without tribal affiliations (a) direct petitions for why their goods should be certified as “Indian-made” and (b) appeals from tribal decisions ruling against such individuals. The latter would undoubtedly be controversial because it allows an intertribal body to question a tribe’s judgment and authority but it may act as the precise kind of safety net necessary for ensuring Indian artist-entrepreneurs are not

²⁰⁴ National Congress of American Indians, *About NCAI*, NCAI.ORG, <http://www.ncai.org/about-ncai> [https://perma.cc/UMN3-WGDH] (last visited Nov. 4, 2019).

²⁰⁵ National Congress of American Indians, *Urging Congress to Amend the Indian Arts and Crafts Act (IACA)*, Resolution ABQ-10-066 (2010), available at http://www.ncai.org/attachments/Resolution_JkKONuktPyUipVFWkvgifzbWSRYPfxNTMKAOemiBFOEAjwyZQyk_ABQ-10-066_rev.pdf [https://perma.cc/7UBZ-FYRE].

²⁰⁶ National Congress of Indians, *About Membership*, NCAI.ORG, <http://www.ncai.org/get-involved/membership> [https://perma.cc/46KN-Q947] (last visited Nov. 4, 2010).

²⁰⁷ *Id.* Italicized text is my suggested modification to the existing definition of an Individual Associate Member.

kept out of the market because of one tribe’s bias, prejudice, or concerns about resource scarcity.

C. Tribes and Government Agencies Creating Government-to-Government Consultation Policies Facilitating Indian Artists’ Entrepreneurship

In 2000 President Bill Clinton issued Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The order requires federal agencies engage with federally recognized tribes on a government-to-government basis. Its purpose was to establish collaboration between the federal and tribal governments in developing federal policies with tribal implications.²⁰⁸ Each federal agencies’ policy on government-to-government consultation states when consultation is required. For example, the Office of Natural Resources Revenue requires a consultation between ONRR officials and tribal officials “[f]or actions involving Tribal mineral or energy revenues, or Tribal mineral or energy resource management” ²⁰⁹ that may have a *substantial direct effect* on a federally recognized tribe.²¹⁰ Similarly, the Advisory Council on Historic Preservation consults with tribal leaders “in its consideration and development of policies, procedures, or programs that might affect the rights, cultural resources, or lands of federally recognized Indian tribes.”²¹¹

Government-to-government consultations may be leveraged to further the legal protection for Indian artist-entrepreneurs’ work.

²⁰⁸ Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67249, 67249 (Nov. 9, 2000) (““Policies that have tribal implications’ refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes”).

²⁰⁹ OFF. OF NAT. RESOURCES REVENUE, OFFICE OF NATURAL RESOURCES REVENUE POLICY ON CONSULTATION WITH INDIAN TRIBES, 1 (adopted Dec. 2017), *available at* <https://www.onrr.gov/IndianServices/pdfdocs/ONRR-Tribal-Consultation-Policy.pdf> [<https://perma.cc/44K8-T8JN>].

²¹⁰ *Id.* at 3.

²¹¹ ADVISORY COUNCIL ON HISTORIC PRESERVATION, POLICY STATEMENT REGARDING THE COUNCIL’S RELATIONSHIPS WITH INDIAN TRIBES 3 (adopted Nov. 17, 2000), *available at* <https://www.achp.gov/sites/default/files/policies/2018-07/ACHPPolicyStatementRegardingtheCouncilsRelationshipswithIndianTribes.pdf> [<https://perma.cc/7ANL-WVDV>].

First, government agencies should acknowledge TK and TCEs as forms of Native intellectual property along with copyrights, trademarks, and patents. This acknowledgement would increase the number of instances where agencies would be obligated to consult with tribes in developing policies and ideally result in enhanced federal protection for the resources essential for Indian artist-entrepreneurs to continue creating.

Second, agencies should analyze the impact of its activities on tribes and members from multiple angles, including a Native intellectual property angle. A good example for what this broad scope would like in practice can be found in the Bureau of Land Management's (BLM) Tribal Relations Manual:

Interdisciplinary team members will share their knowledge of known sensitive and significant resources based on inventory data, ethnographic or historic literature, or other documentation.

a. Special techniques may be needed to supplement existing BLM databases to identify resources potentially affected by BLM land use decisions. These techniques may include—

- Review of natural or heritage resource literature, including credible ethnographic sources;
- Interviews with knowledgeable members of the Native American community, who may or may not be official representatives of the tribal government or ANCSA Corporation; and

- Problem-oriented research focusing on Native American land use.

b. Interviews and new ethnographic fieldwork must incorporate appropriate safeguards for collection and use of, and access to, potentially sensitive information acquired through interviews and direct ethnographic techniques. This may include locational information, tribal requirements for ethnographic studies, details concerning sacred sites or properties of traditional religious and cultural importance, cultural uses of plants and animals on the public lands, and the names of interview subjects or other contacts who are not official governmental representatives of affected groups.²¹²

Here, the BLM applies a panoramic approach by identifying any potential Native cultural property that may be impacted by its activities. If federal agencies had TK and TCEs on their radar as forms of Native intellectual property, this same provision would also protect Native intellectual property as well. All federal agencies should include in their government-to-government consultation policies similar commitments to using interviews, ethnographic fieldwork, and problem-oriented research when determining whether Native intellectual property stands to be affected by its activities. Likewise, tribes, who also routinely craft their own government-to-government policies, should use comparable language to insist on federal agencies' collaboration in protecting Native intellectual property.

²¹² BUREAU OF LAND MGMT., 1780 TRIBAL RELATIONS MANUAL 1-45 (issued Dec. 15, 2016), *available at* <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf> [<https://perma.cc/YFE6-DHV7>].

D. Publicly-funded Institutions Must Correct Curtisian Stereotypes

Publicly-funded arts institutions are on the frontlines for either perpetuating or correcting Curtisian stereotypes currently impeding Indian artist-entrepreneurs' full participation in the fine arts world. The legacy of Curtis's work and the stereotypes it reinforces, lives on every time a museum, library, and university relate the experience of American Indians through a Curtisian lens. Even when these institutions place contemporary Native artists' work alongside Curtis's, they are tacitly perpetuating his version of what authentic Indianness looks like. As this article has discussed, the impact on Indian artist-entrepreneurs includes parameters on what their art is supposed to look like; an insistence on putting their work in dialogue with Curtis's rather than as the sole focus; and marginalizing these artists from the Indian handicrafts and fine arts market when modern Indians are either not Indian enough according to the federal government or too Indian for the fine arts world.

One response is for the federal government to approach publicly-funded arts institutions²¹³ as a means through which it may comply with its obligations toward American Indians it assumed under the United Nations Declaration on the Rights of Indigenous Peoples in 2010.²¹⁴ Article 13, Section 1 provides indigenous peoples with right to “*revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.*”²¹⁵ Article 15 states indigenous peoples have the right to “*the dignity and diversity of their cultures, traditions, histories and aspirations which shall be*

²¹³ There are three categories of United States arts funding: direct public funding (NEA; state, regional, and local arts agencies); other public funding, direct and indirect (various federal departments and agencies); and private sector contributions (individuals; foundations; corporations). NATIONAL ENDOWMENT FOR THE ARTS, 3 HOW THE UNITED STATES FUNDS THE ARTS 1 (Nov. 2012), <https://www.arts.gov/sites/default/files/how-the-us-funds-the-arts.pdf> [<https://perma.cc/JN6U-TM3Y>]. Although I direct my suggestions to the federal government, state and local governments also stand to play a role as well.

²¹⁴ UNITED STATES DEPARTMENT OF JUSTICE, NATIVE AMERICAN POLICIES: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, <https://www.justice.gov/otj/native-american-policies> [<https://perma.cc/L5HA-VJ4P>] (last updated Oct. 18, 2018).

²¹⁵ Art. 13, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 126, at 12-13.

*appropriately reflected in education and public information.”*²¹⁶ The State is obligated to take “effective measures” to ensure the protection of these rights and to do so through consultation and cooperation with indigenous communities.²¹⁷

One effective measure would be the federal government actively incentivizing public arts institutions to dismantle the Curtis narrative. These institutions can play a role in correcting Curtisian stereotypes in several ways. American Indian artists can anchor their own exhibits. Tribes can be brought in to consult on exhibits involving the Indian experience and, when necessary, provide essential context if the artist’s perspective is non-Indian.²¹⁸ When showing Curtis’s photographs, do so in a way that critiques his work from a twenty-first century point of view and takes into account his legacy on Indian voices and Indian reality.²¹⁹ Alternatively, curators and directors can resist public demand for Curtis’s work altogether and dare its patrons to consider a new-to-them perspective of authentic Indianness.

V. CONCLUSION

Seattle University School of Law is grateful to Ms. Catherine Walker for her generous gift of an Edward Curtis photograph. Curtis’s collection is a valuable archive for America’s indigenous peoples and others to access photographs of ancestors, hear nearly-lost languages, and recover cultural practices.

The photograph is also an opportunity to push back critically on Curtis’s thesis of American Indians as a vanishing race. Although this theory was not his original idea, Curtis’s work has frozen in time a fabricated notion of Indianness for the American collective consciousness. Accordingly, it is important to acknowledge the other part of his legacy: the one that makes it challenging for contemporary Indians, and especially Indian artist-entrepreneurs, to define themselves in a world (and world market) of long-crystallized stereotypes.

²¹⁶ Art. 15, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 126, at 14.

²¹⁷ *Id.*

²¹⁸ Interview with Barbara Brotherton, Curator, Seattle Art Museum (Sept. 10, 2019). Ms. Brotherton curated the “Double Exposure” exhibit in 2018 which juxtaposed Curtis’s work and work of contemporary Native artists.

²¹⁹ *Id.*

These Curtisian stereotypes have had a detrimental effect on legal protections available to Indian artist-entrepreneurs. Until the federal government expands the scope of Native intellectual property to include TK and TCEs, its copyright law, trademark law, and IACA will continue to fail tribes and individual Indian artists. The problems are multi-faceted. The term “Indian” is defined too narrowly. IACA and the Lanham Act are traditionally underenforced, leading to the devaluation of genuine Indian-made goods when non-Indian corporations misappropriate Native culture for profit. Publicly-funded arts institutions insist on displaying Curtis’s photographs alongside contemporary Indian artists’ work, suggesting the latter is the continuation of the Curtisian legacy, rather than its antithesis.

This article has posited the avenues for strengthening Native intellectual property exist within the federal government, tribal governments including intertribal collaboration, and publicly-funded arts institutions. Each of these bodies can harness international law and traditional tribal understandings of Native intellectual property to strengthen existing federal laws, policies, and practices connected with Indian art. Whether Indian artist-entrepreneurs may be fully integrated into the art market depends on increased protection for Native intellectual property, which in turn depends on subverting harmful Curtisian stereotypes about who and what is authentically Indian. Indian artist-entrepreneurs are already doing their part to show Indians never vanished – they have been here all along and are now visibly flourishing.