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Native American Intellectual Property Protection: Altering Federal IP Law and the Indian Arts and Crafts Act to Aid Tribal Economic Development

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Cover Page Footnote

I would like to thank Professors Reid LeBeau and Thomas Berg for their guidance on Native American law and Intellectual Property law, respectively. I would also like to thank the staff at the American Indian Law Journal for their editing, suggestions, and corrections throughout the publication process.

NATIVE AMERICAN INTELLECTUAL PROPERTY PROTECTION:
ALTERING FEDERAL IP LAW AND THE INDIAN ARTS AND
CRAFTS ACT TO AID TRIBAL ECONOMIC DEVELOPMENT

*Trey V. Perez*¹

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I. INTRODUCTION

Regardless of membership status, Native Americans experience higher rates of poverty than most groups within the United States.² Table 1 demonstrates the percentage of various groups who have lived below the poverty level within the United States in the past twelve months. Although understanding how the United States Census Bureau sets the various poverty lines is outside the scope of this article, it is worth noting briefly that the poverty line is exceptionally low—still using the same antiquated equation that it initially used in 1963.³ If a household’s pre-tax income falls below the poverty threshold, the Census will list all members of that household ‘in poverty’ within its data.⁴ Looking back to Table 1, 21.4 percent of Native Americans within the United States fell below the poverty threshold that aligns to their household composition, which takes account of the overall number of occupants and the number of related children under the age of eighteen.⁵

Many economic issues may stem from the period between 1887 and 1934,⁶ beginning with

Group	Percent Below Poverty Level (Past 12 Months)	Margin of Error
White alone	9.8	±0.1
Black or African American alone	21.8	±0.2
American Indian/Alaska Native alone	21.4	±0.6
Asian alone	10.2	±0.2
Native Hawaiian/Pacific Islander alone	17.6	±1.4
Some other race alone	19.0	±0.3
Two or more races	15.4	±0.2
Hispanic or Latino origin (of any race)	17.5	±0.2
White alone, not Hispanic or Latino	9.5	±0.1

Source: Data on poverty-level by race obtained from U.S. Census Bureau (2021). American Community Survey 1-Year Estimate, 2021 (Table ID: S1701). Data retrieved November 23, 2022.

² See Table 1; see also Trey V. Perez, *Determinants of County-Level Poverty Rates in 2017: An Upper-Midwest Comparison*, 16 UER Art. 21 (2019) at 16 (finding “the Native American population still seems to suffer from abnormal rates of poverty compared to other rac[ial] and ethnic groups.”).

³ *Id.* at 11 (noting that the Census Bureau determines the “average cost of food for all family compositions...and multiplies that value by three, based on evidence that families [in 1963] spent approximately one-third of their income on food.”). Small households (those consisting of only one or two people) are multiplied by a slightly larger factor due to the diseconomies of small scale.

⁴ *Id.*

⁵ *Id.*

⁶ Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1167 (2012) (noting that “the combined effect of the Dawes Act and the Supreme Court’s authorization of unilateral treaty abrogation resulted in a staggering loss of two-thirds of the tribal land base” between 1887 and 1934); see also ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 107 (4th ed. 2019) (stating that tribal lands were cut from 138 million acres to 48 million acres between 1887 and 1934).

the passing of the Dawes General Allotment Act⁷ and ending with the Indian Reorganization Act.⁸ With the significant loss of Native American-controlled land and resources, tribes have turned to alternative sources to obtain economic advancement within the United States. Federally recognized tribes fortunate enough to be located near large population centers and with little competition within their region could take advantage of the Indian Gaming Regulatory Act (“IGRA”). IGRA “is a complex statute that creates a universal framework” to regulate tribal gaming.⁹ IGRA divides tribal gaming into three classes, with Class I covering social games played for prizes of minimal value, which are solely subject to tribal regulation.¹⁰ Class II comprises games of chance and non-banking games which are authorized by the laws of the state.¹¹ Class II games are regulated at the tribal and federal level. Finally, Class III games, which include all other games, are subject to regulation at the federal, state, and tribal levels.¹² Though it may come with added state and federal oversight, “many casinos have made the difference between a poverty-stricken and flourishing economy” for tribes.¹³ In 2017, the Department of the Interior released a memorandum in which it recognized that “486 Indian tribes engage in some form of gaming activities in twenty-eight states, generating revenues estimated at \$28.5 billion.”¹⁴ Unfortunately, not all tribes are in geographic locations that allow them to operate a casino.¹⁵ A study conducted in 2005 by The Harvard Project on American Indian Economic Development concluded that non-gaming tribes and gaming tribes each saw a significant drop in family poverty rates between 1990 and 2000; however, non-gaming areas dropped by only seven percentage points while gaming

⁷ The Dawes Act, also known as the General Allotment Act, authorized the President of the United States to parcel out commonly held reservation land to individual Native Americans. *See generally* 25 U.S.C. § 331 *et seq.* (repealed). After providing land to tribal members, the Dawes act allowed “the sale of ‘excess’ land to settlers.” Maggie Lohmann, *Law of the Land: The Continuing Legacy of Indian Law’s Racist Roots and Its Impact on Native American Land Rights*, 125 W. VA. L. REV. 329, 349 (2022).

⁸ The Indian Reorganization Act, or the Wheeler-Howard Act (codified as amended in various sections of 25 U.S.C.) ended the practice of allotment and began a policy of Native American land retention. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 545 (2001).

⁹ Jacob Berman, *Such Gaming Causes Trouble: Constitutional and Statutory Confusion with the Indian Gaming Regulatory Act*, 23 SETON HALL J. SPORTS & ENT. L. 281, 297 (2013).

¹⁰ 25 U.S.C. § 2703(6).

¹¹ *Id.* at § 2703(7)(A)(i).

¹² *Id.* at § 2703(8).

¹³ Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Economic Development Amount to Cultural Assimilation?*, 25 N.M. L. REV. 23, 32 (1995).

¹⁴ Op. Solic. Dept. Int. M-37045, *Reaffirmation of the United States’ Unique Trust Relationship with Indian Tribes and Related Indian Law Principles* (Jan. 18, 2017) (citing NATIONAL INDIAN GAMING COMMISSION, FACTS AT A GLANCE (Aug. 2015)).

¹⁵ Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 723 (1996) (citing a Bureau of Indian Affairs (“BIA”) study that found “size of the regional market for gaming, the propensity of that market to gamble, and the extent of local competition were the most important factors” to successful bingo operations pre-IGRA); *see also* Kathryn R.L. Rand, Steven A. Light, *Sports Betting and Indian Gaming: Should Tribal Casinos Get in the Game?*, 9 UNLV GAMING L.J. 55, 58 (2019) (noting that IGRA only permits tribes to operate gaming “on [tribal] lands in states that permit such gaming for any purpose by any person.”) (cleaned up).

areas dropped by ten percent.¹⁶ These non-IGRA tribes, and even tribes with smaller casinos, may find themselves in a precarious situation, lobbying for interests that do not align with economically stronger neighboring tribes.¹⁷

Some tribes are unable to rely on gaming revenues for economic development, and the major loss of tribal reservation lands between 1887 and 1934 has left these communities with few options for commercial progress.¹⁸ Many tribes find themselves in extremely destitute financial situations, such as the Pine Ridge Reservation in Oglala Lakota County or the Lower Brulé Indian Reservation in Buffalo County, South Dakota.¹⁹ In order to take advantage of their limited options for commercial gain, tribes must seek alternative opportunities to generate revenue, and the federal government must fulfill its fiduciary duties to tribes by helping find new income.

In 1985, the Native American arts and crafts market was estimated to generate between four hundred million and eight hundred million dollars annually.²⁰ More recent numbers are unknown, with the United States Government Accountability Office issuing a report finding that the “actual size of the Indian arts and crafts market, and extent of misrepresentation that is occurring, are unknown because existing estimates are outdated, limited in scope, or anecdotal, and no national sources contain the data necessary to make reliable estimates.”²¹ Though data may not allow the market to be quantified, the “sale of goods falsely represented as authentic Indian-produced arts and crafts have been a persistent and potentially growing problem in the United States.”²² In 2017, Meredith Stanton, the Director of the Indian Arts and Crafts Board, testified before the Senate Committee on Indian Affairs that the tribal arts and crafts industry was a billion-dollar market.²³

Along with issues facing individual artists, tribes possess little power to police their tribal names, which limits their ability to prevent others from using their names on products. Finally, and possibly most important from an economic perspective, many larger American and international companies have utilized traditional knowledge to generate billions of dollars in

¹⁶ See JONATHAN B. TAYLOR & JOSEPH P. KALT, *AMERICAN INDIANS ON RESERVATIONS: A DATABOOK OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES* 21 (2005), <https://hwpi.harvard.edu/files/hpaied/files/americanindiansonreservationsadatabookofsocioeconomicchange.pdf?m=1639579024>.

¹⁷ Peter Callaghan, *Future prospects for legal sports betting in Minnesota rests with tribes, horse tracks*, MINNPOST, (Aug. 1, 2022) (noting that tribes responded differently to potential sports betting legislation, stating that “[e]conomics and geography played into a lack of unanimity among the tribes. Those with casinos in more-remote locales and those that suffered from the closure of the Canadian border due to COVID-19 might benefit more from gambling on mobile platforms than those in population centers.”).

¹⁸ Mika, *supra* note 12, at 32 (noting that “[b]oth the Court and Congress [have] recognized that reservations without natural resources could develop few other sources of revenue.”).

¹⁹ Perez, *supra* note 1, at 14 (acknowledging the abnormally high poverty rates experienced on reservations within South Dakota).

²⁰ H.R. Rep. No. 101-400, pt. 2, at 5 (1990).

²¹ U.S. Gov’t Accountability Off., GAO-11-432, *Indian Arts and Crafts: Size of Market and Extent of Misrepresentation Are Unknown* at 9 (2011).

²² *Id.* at 1.

²³ Cultural Sovereignty Series: Modernizing the Indian Arts and Crafts Act to Honor Native Identity and Expression, Hearing before the S. Comm. On Indian Affairs, 115th Cong. (Jul. 7, 2017) (testimony of Dir. Meredith Stanton) (available at <https://www.doi.gov/ocl/indian-arts-crafts-0>).

profits.²⁴ Altering copyright, trademark, and patent law to allow tribes to protect these vital intangible assets could help economic development across the many tribes throughout the United States, regardless of their current reliance on gaming.

II. THE HISTORY OF THE INDIAN ARTS AND CRAFTS ACT (“IACA”) AND ITS RELATIONSHIP WITH FEDERAL INTELLECTUAL PROPERTY LAWS

Black’s Law Dictionary defines “intellectual property” as “[a] category of intangible rights protecting commercially valuable products of the human intellect...primarily trademark, copyright, and patent rights, but also includ[ing] trade-secret rights, publicity rights, moral rights, and rights against unfair competition.”²⁵ Brand Finance, a global leader in corporate valuation, estimated the total value of global intangible property to be \$74 trillion in 2021.²⁶ Allowing tribes greater control over such an incredibly valuable asset could be key to economic growth among non-IGRA tribes and could lead to greater diversification of income streams for tribes who currently rely solely on gaming. Though Congress has taken steps to protect intellectual property rights for individual artists,²⁷ they have failed to provide adequate protections to tribes as a whole and have left no options for tribes to control either traditional knowledge²⁸, traditional cultural expression²⁹, or tribal stories. The following sections will outline the IACA along with federal intellectual property laws and their applicability to Native American Tribes and individuals.

A. *The Indian Arts and Crafts Act*

Congress initially passed the IACA in 1990 in response to an uptick in the import and manufacture of counterfeit Indian-made goods throughout the 1970s and 1980s.³⁰ In passing the IACA, Congress hoped “to promote the economic welfare of the Indian tribes and Indian

²⁴ Emily Marden, *The Neem Tree Patent: International Conflicts over the Commodification of Life*, 22 B.C. INT’L & COMP. L. REV. 279, 287 (1999) (noting that developing countries could gain upwards of \$5.4 billion from multinational food, seed, and pharmaceutical companies if they paid royalties for local knowledge and plant varieties).

²⁵ *Intellectual Property*, Black’s Law Dictionary (11th ed. 2019).

²⁶ Brand Finance, *Global Intangible Finance Tracker (“GIFT”)—an annual review of the world’s intangible value* (2021).

²⁷ See generally IACA, 25 U.S.C. § 305a *et seq.*

²⁸ The World Intellectual Property Organization (“WIPO”) defines “traditional knowledge” as “knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.” Available at <<https://www.wipo.int/tk/en/tk/>>.

²⁹ WIPO defines “traditional cultural expressions” as “music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives or many other artist or cultural expressions.” Available at <<https://www.wipo.int/tk/en/folklore/>>.

³⁰ According to a 1985 Commerce Department Report within the IACA’s legislative history, “unmarked import imitations of Indian arts and crafts are siphoning off 10% to 20% of the market for genuine handicrafts produced domestically. This industry’s value has been estimated at \$400-\$800 million annually. This means that imitations of Native American handicrafts are siphoning an estimated \$40 to \$80 million from the genuine manufacturers’ markets.” H.R. Rep. No. 101-400, pt. 2, at 5 (1990).

individuals through the development of Indian arts and crafts.”³¹ The IACA was passed as a “truth-in-marketing law” to provide uniform national standards that protect Indian artists from unfair competition, guard consumers against false designations of Indian authenticity, and defend art as unique aspects of tribal cultures.³² In order to accomplish its congressionally prescribed goal, the IACA created the Indian Arts and Crafts Board (“IACB” or the “Board”).³³ The Board has the power to help market Indian products; create, assign, monitor, register, and defend trademarks; refer complaints to appropriate authorities for investigation; and promulgate regulations.³⁴

The IACA also imposes criminal and civil liability on individuals who offer, display for sale, or sell products that falsely suggest that they are an “Indian product.”³⁵ Penalties for first time violators reach up to \$250,000.00 in fines and up to five years imprisonment for individual offenders, while corporate offenders face fines up to \$1,000,000.00 for initial offenses.³⁶ Additional violations can increase fines to \$1,000,000.00 and up to a 15-year prison sentence for individuals, or up to \$5,000,000.00 in fines for corporate entities with multiple offenses.³⁷ Although these offer some protection to tribes and individual members, some scholars have noted that the IACA’s definition of “Indian” leaves little protection for non-Federally recognized tribes³⁸ or Native people who fail to meet specific tribal requirements for membership.³⁹

Although Congress demonstrated a clear intention to provide greater protections to Native artists by passing the IACA, the chosen definition of “Indian” leaves some artists no protection; Native artists are subject to unique tribal membership requirements or must acquire certification as an “Indian artisan” which can be equally difficult.⁴⁰ This can allow tribal members to prevent other non-member artists from marketing their goods as “Indian-made,” limiting competition in the marketplace and lessening the economic and cultural value of the art created by some individuals of tribal descent.⁴¹

³¹ 25 U.S.C. § 305a.

³² *Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914 (N.D. Ill. 2001).

³³ 25 U.S.C. § 305a.

³⁴ *Id.*

³⁵ 18 U.S.C. § 1159.

³⁶ *Id.* at § 1159(b)(1).

³⁷ *Id.* at § 1159(b)(2).

³⁸ 25 U.S.C. § 305e(a)(1) (2019) (defining “Indian” as “a member of an Indian tribe; or [a person who] is certified as an Indian artisan by an Indian tribe.”); 25 U.S.C.A. § 5304(e) (defining “Indian tribe” as any “Indian tribe...which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”).

³⁹ *See generally* *Fontenot v. Hunter*, 378 F. Supp. 3d 1075 (W.D. Okla. 2019) (Native American artist of Cherokee descent and member of a non-Federally recognized tribe precluded from marketing her goods as “Indian made” based on IACA and Oklahoma state law); *see also* Olga B. Gonzalez, *Cultural Appropriation: The Native American Artist Struggle for Intellectual Property Protection in Canada, Mexico, and the United States*, 42 T. JEFFERSON L. REV. 1, 14-15 (2019) (demonstrating a particular Cree descendant artist’s struggle because of her status as six percent below the needed blood quantum to enroll in her tribe).

⁴⁰ Jon K. Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 503 (1993) (observing that “certification is up to the sole discretion of the tribes” and that some tribes “refuse to certify” nonmembers).

⁴¹ *Id.* at 502 (noting that the IACA “is unique in that it actually prohibits some people of the Indian race from claiming to be Indian.”).

B. *The Lanham Act and Native American Tribal Marks*

The Lanham Act provides protection for “any word, name, symbol, or device, or any combination thereof (1) used by any person, or (2) which a person has a *bona fide* intention to use in commerce” so long as they apply for protection with the United States Patent and Trademark Office (“USPTO”).⁴² Trademarks and service marks serve to identify a source of particular goods or services and prevent consumer confusion.⁴³ Typically, marks are classified in five distinct categories of marks:⁴⁴ (1) generic;⁴⁵ (2) descriptive;⁴⁶ (3) suggestive;⁴⁷ (4) arbitrary;⁴⁸ and (5) fanciful.⁴⁹

Marks that are suggestive, arbitrary, or fanciful can be classified as inherently distinctive and are protectable without a demonstration of secondary meaning.⁵⁰ Conversely, generic marks are those which describe the goods or services to which they are attached, and cannot be protected at all—the public policy basis for this rule is simple, granting an exclusive right for one firm to use a generic name for a product would “be equivalent to creating a monopoly in that particular product, something that the trademark laws were never intended to accomplish.”⁵¹ Finally, there are descriptive marks which immediately convey some significant quality or feature of the goods or services attached to the mark.⁵² However, these general rules are more applicable to business entities than sovereign governments.

Section 1052(b) of the Lanham Act outlines that the USPTO can refuse registration of a mark that is a “flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.”⁵³ Instead of entering tribal insignia into the USPTO’s Trademark Electronic Search System (“TESS”) database, which includes all registered and applied-for marks, the USPTO places these tribal marks into a separate database. Although tribes are not required to submit their marks to the USPTO, tribes recognized by either federal or state governments are encouraged to do so, as the USPTO then considers their insignia when examining other trademark applications. To qualify for the tribal insignia database, a “mark” must be adopted by tribal resolution and consist of a flag, coat of arms, or another emblem.⁵⁴

⁴² 15 U.S.C. § 1127.

⁴³ *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (noting that “[t]he fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of a particular source of particular goods.”).

⁴⁴ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753, 2757, 120 L. Ed. 2d 615 (1992).

⁴⁵ Generic example: a physical fitness center calling itself *The Gym*.

⁴⁶ Descriptive example: a company offering legal services, started by John Smith, using the mark *Smith Law*.

⁴⁷ Suggestive example: a company offering access to movies over the internet using the mark *Netflix*.

⁴⁸ Arbitrary example: a company offering software and computer products using the mark *Apple*.

⁴⁹ Fanciful example: a company offering watches using the mark *Rolex*.

⁵⁰ 2 *McCarthy on Trademarks and Unfair Competition* § 11:4. Inherently distinctive marks, (5th ed.).

⁵¹ *Id.* at § 12:2. The policy basis for the generic name rule.

⁵² *Id.* at § 11:16. What is a “descriptive mark”?

⁵³ 15 U.S.C. § 1052(b).

⁵⁴ *Native American tribal insignia*, United States Patent and Trademark Office (Nov. 30, 2022),

It is vital that tribes be able to control and police the use of their marks and official insignia, as the Shingle Springs Band of Miwok Indians (“Shingle Springs Band”) have learned throughout their decade-long fight to protect their sovereign identity. Beginning on August 23, 2010, the Shingle Springs Band suddenly stopped receiving its mail.⁵⁵ After initiating an investigation into the matter, they discovered that a non-member by the name of Cesar Caballero, who identified himself as a Miwok descendant, was able to submit a “Change of Address” form with the United States Postal Service in order to reroute the Shingle Springs Band’s mail to his own address.⁵⁶

Though the Shingle Springs Band, a federally recognized tribe, had used its name and marks for over thirty years to provide governmental, educational, and public services to its members, Caballero was able to pass himself off as the true owner of the tribe’s name and declared himself head of the tribe.⁵⁷ Although the tribe never authorized Caballero to do business on its behalf, Caballero established a website and issued publications under the name of the Shingle Springs Band, and offered the public “membership” to his purported “tribe.”⁵⁸ The Shingle Springs Band was able to correct Caballero’s fraudulent rerouting of its mail after only a brief time, though the battle is ongoing, as Caballero continues to argue that the Shingle Springs Band was improperly recognized by the federal government, and that his “Miwok Nation” should have been recognized instead of the Shingle Springs Band.⁵⁹

Caballero only appeared after the Shingle Springs Band took strides to begin operating a casino in an effort to pursue economic development. However, if the tribe had stronger mechanisms to police its mark, they could have avoided over ten years of litigation. Allowing unaffiliated individuals to misappropriate federally recognized tribal names defies both the Lanham Act’s express purpose of preventing false designations of origin along with “Congress’ prescription for the orderly administration of Indian affairs...”⁶⁰

C. *The Copyright Act and Protecting Native Creations*

Copyright law is the statutory vehicle for protecting original works of intellectual expression that have been fixed in a tangible medium. As a member of the Berne Convention, the United States has agreed to provide a global standard of protection to all authors, whether they be United States citizens, tribal members, or foreign citizens.⁶¹ However, the United States

https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

⁵⁵ Plaintiff-Appellee’s Answering Brief, *Shingle Springs Band of Miwok Indians v. Caballero*, 2010 WL 6201179 (C.A.9), *9.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1.

⁵⁸ *Id.*

⁵⁹ See *Caballero v. United States*, No. 20-17356, 2021 WL 4938112, at *1 (9th Cir. Oct. 22, 2021), *cert. denied*, 212 L. Ed. 2d 404, 142 S. Ct. 1416 (2022) (noting that the issue of recognition was a non-justiciable political question).

⁶⁰ Paula M. Yost et al., *Branding the Band: Protecting Tribal Identities Through Trademark Law*, FED. LAW., 48, 52 (2014).

⁶¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, arts. 2, 6-10; 17 U.S.C. § 101.

recognized copyright protection prior to becoming a member of the Berne Convention.⁶² Copyright law encourages the promotion of “Science and the useful Arts”⁶³ by providing artists and other creatives with a limited monopoly over the dissemination of their original works.⁶⁴ This limited monopoly comes with certain specified rights over their works during the term of the copyright. These so called “exclusive rights” include: (1) reproduction; (2) preparation of derivative works; (3) distribution; (4) public performance; (5) public display; and (6) public transmission.⁶⁵ In return for these rights, the works become part of the public domain at the end of the term of the “limited monopoly.”⁶⁶

An author need not register, provide notice, or obtain government approval to obtain a copyright.⁶⁷ Instead, the rights vest immediately upon creating the work. As with trademark law, certain incentives come along with providing public notice of the copyright and registering it with the United States Copyright Office (“USCO”); however, failure to do these things is not fatal to an author’s claim of infringement.⁶⁸ The only real requirements to obtain a copyright are that it be an “original work of authorship” that is “fixed in a tangible medium” that falls within a set of eight types of works. To qualify for protection within the United States, a work must categorize as either a: (1) literary work; (2) musical work, including any accompanying words; (3) dramatic work, including any accompanying music; (4) pantomime and choreographic work; (5) pictorial, graphic, and sculptural work; (6) motion picture and other audiovisual work; (7) sound recording; or (8) architectural work.⁶⁹

Copyright law is only applicable to individual Native artists. The author alone (along with key contributors) can hold a copyright within the United States. Although there are several examples in which more than one “author” can be recognized, no such protection has been offered to tribes as a whole, or to groups who claim ownership based on membership in a tribe. Additional issues arise when considering the traditional medium of passing down tribal stories—since spoken language is not protected under copyright law, some tribal history fails the requirement of being fixed in a tangible medium.

D. *The Patent Act and Traditional Tribal Knowledge*

Patent protection is designed to encourage innovation and disclosure of new inventions.

⁶² 17 U.S.C. § 102(a).

⁶³ U.S. Const. art. I, § 8, cl. 8.

⁶⁴ Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95 (2d Cir. 2014).

⁶⁵ 17 U.S.C. § 106.

⁶⁶ *Id.* at § 302(a) (noting that term for copyrights generally last 70 years after the author’s death).

⁶⁷ *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 914 (7th Cir. 2007) (“Generally, copyright protection begins at the moment of creation of ‘original works of authorship fixed in any tangible medium of expression...’”).

⁶⁸ *See* 2 Nimmer on Copyright § 7.02(c)(3) (noting that although notice is no longer a requirement, providing adequate notice is a complete bar to the defense of “innocent infringement,” even though “limited legal benefits accrue under current U.S. law from use of a copyright notice in proper form.”); *see also id.* at § 7.16(c)(1) (because of Section 412 of the Copyright Act, an owner must have registered the work to recover statutory damages and attorney’s fees).

⁶⁹ 17 U.S.C. § 102(a).

Unlike copyright and trademark law, which can exist sans registration, a patent does not exist until an inventor comes forward and makes a disclosure of their discovery to the public.⁷⁰ In the United States, this is done through registration with the USPTO.⁷¹ To qualify as “patentable” within the United States, discovery must be novel,⁷² non-obvious,⁷³ and useful.⁷⁴ Patents provide inventors with a limited, 20-year monopoly over their inventions or discoveries.⁷⁵ Though the term of a patent is significantly shorter than that of a copyright, the protections provided are greater in some respects. Patents provide the inventor the absolute right to exclude others from making, using, or selling the patented invention or method.⁷⁶

Although requiring a showing of novelty, non-obviousness, and utility of an invention are useful measures for governing when an inventor deserves exclusive rights in their invention, “these criteria result in discrimination toward indigenous groups,” especially in developing countries.⁷⁷ Companies today will send researchers from the United States or other developed countries to developing countries for the purpose of gathering scientific knowledge from indigenous people, particularly their uses for local plants and animals.⁷⁸ This process, known as “biopiracy,” became popular after a 1980 United States Supreme Court decision authorizing the patentability of biological living organisms that were specially developed by researchers.⁷⁹ In response, many developing countries have begun limiting researchers’ access to their diverse ecosystems.⁸⁰

In 2011, the United States patent system was amended by the America Invents Act (“AIA”).⁸¹ Prior to the AIA, the United States followed a first-to-invent system, allowing inventors to argue who “invented” their patentable device first.⁸² Additionally, the United States was less likely to recognize foreign inventions. The United States would still issue a patent domestically unless there is (1) prior knowledge of the invention by others in the United States; (2) prior use of the invention in the United States; (3) a prior patent of the invention in any country; or (4) a printed publication describing the invention in any country.⁸³ Though traditional knowledge among the

⁷⁰ 35 U.S.C. § 112(a) (patent applications must “contain a written description of the invention, and [] the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains...[could] make and use the same...”).

⁷¹ *Id.* at § 101 (“Whoever invents or discovers any new or useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions of this title.”).

⁷² *Id.* at § 102.

⁷³ *Id.* at § 103.

⁷⁴ *Id.* at § 101.

⁷⁵ *Id.* at § 154(a)(2).

⁷⁶ *Id.* at § 271(a).

⁷⁷ Leanne M. Fecteau, *The Ayahuasca Patent Revocation: Raising Questions About Current U.S. Patent Policy*, 21 B.C. THIRD WORLD L.J. 69, 73 (2001).

⁷⁸ *Id.* at 70-71.

⁷⁹ See *Diamond v. Chakrobarty*, 447 U.S. 303, 309 (1980); see also Andrew J. Pollack, *Biological Products Raise Genetic Ownership Issues: Governments Are Demanding Share of Profits*, N.Y. TIMES, Nov. 26, 1999, at C4.

⁸⁰ Fecteau, *supra* note 76, at 71.

⁸¹ See generally Pub. L. 112-29.

⁸² *Id.* at § 3.

⁸³ 35 U.S.C. § 102(a); see also *Star Fruits S.N.C. v. United States*, 280 F. Supp. 2d 512, 514-15 (2003), *aff’d*, 393 F.3d 1277 (Fed. Cir. 2005) (“only the public use or sale of an invention in the United States will bar patentability”).

tribes within the United States fell under this protection, traditional knowledge for foreign indigenous peoples remained unprotected.

By enacting the AIA, the United States acknowledged the importance of global collaboration within the patent arena, recognizing foreign knowledge, use, or sale of products as a bar to patentability within the United States.⁸⁴ Yet even with these new restrictions on patentability based on foreign use, companies continue to exploit developing countries, the traditional knowledge of their Indigenous people, and their resources. For example, some scholars have pointed out that the growing alternative medicine industry within the United States has increased the incentives for companies to patent recipes containing plants and herbs that have provided healing properties to Indigenous people for generations.⁸⁵

III. FEDERAL TRADEMARK AND COPYRIGHT LAW FAILS TO PROTECT NATIVE ARTISTS' CREATIONS

As shown by the Shingle Springs Band case, federal trademark law leaves much to be desired when it comes to allowing tribes to protect their names from non-members. Moreover, many tribes “suffer significant economic loss from unauthorized copying of their traditional designs.”⁸⁶ The lack of action to protect intellectual property among tribes is jarring. Tribes and individual Native artists are, as previously mentioned, not well-off economically, and are unlikely to successfully defend an action for copyright or trademark infringement. Although the IACA is a fine start, it cannot be Congress’s last action on the intellectual property rights of Native American tribes and their members.

Congress has taken steps to protect tangible aspects of tribal property.⁸⁷ Passing legislation to protect historically important artifacts “established a fundamental principle of Native American ownership of their cultural property.”⁸⁸ Even so, there remains no recourse for the appropriation of cultural aspects of tribes that are intangible. This has led some tribes to protect its intangible

⁸⁴ Mark Schafer, *How the Leahy-Smith America Invents Act Sought to Harmonize United States Patent Priority with the World, A Comparison with the European Patent Convention*, 12 WASH. U. GLOBAL STUD. L. REV. 807, 818 (2013) (“Although there is seemingly no change between prior art patents and publications, after the America Invents Act, prior public use and prior sale will now bar patentability if this activity is conducted outside of the United States, so long as it does not fall within the prescribed exception in [35 U.S.C.] § 102(b)(1).”).

⁸⁵ Tiffany N. Palmer et al., *Millennial Demand for Alternative Medicine and Its Effects on Biopiracy*, 9 LANDSLIDE 26, 28 (2017) (noting that the alternative medicine industry is worth upwards of \$30 billion, and “many companies have increased incentives to commercialize and patent alternative medicines”).

⁸⁶ Nancy Kremers, *They Thought it First: Indigenous Peoples Push to Protect Their Traditional Knowledge, Genetic Resources, and Folklore*, Legal Times, Mar. 24, 2003 (quote from a Navajo representative), <https://plus.lexis.com/api/permalink/97adbea3-4d64-4c3b-a536-ebf612f79ee4/?context=1530671>.

⁸⁷ See Native American Grave Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001-3013 (provides tribes the right to repatriate remains, funerary or sacred objects or objects of cultural patrimony from federal agencies and museums funded or owned by the federal government); see also Archaeological Resources Protection Act, 16 U.S.C. § 470aa, et seq. (prohibits excavation, removal, alteration, or destruction of archaeological resources from federal and Indian lands without a permit).

⁸⁸ Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 Am. Indian L. Rev. 111, 114 (1996).

cultural property of significance from outsiders.⁸⁹ As both tangible and intangible elements of tribal culture are “essential to the survival of Indian Nations as distinctive cultural and political groups,” Congress must act by altering the current intellectual property schemes within the United States.⁹⁰

The distinction between typical trademark protections and Native American tribes was challenged in *Navajo Nation v. Urban Outfitters, Inc.*⁹¹ In this decision, the Court determined that the Navajo Nation was not entitled to summary judgment because the NAVAJO mark was not famous, and therefore could not be diluted or tarnished.⁹² Despite the Navajo Nation possessing a trademark and spending over 3.8 million dollars annually to promote their marks in areas ranging from oil, gas, gaming, publishing, arts and crafts, and other areas of economic development, the Court determined that the mark was “niche” and therefore did not qualify for the added protection of a famous mark.⁹³ The Navajo Nation, one of the largest tribes in the United States and producer of a well-known “Navajo blanket” style which the tribe claims generated seventeen million dollars per year as of 2014,⁹⁴ did not qualify for the protections granted to famous marks.

Later within the *Navajo Nation* docket, the District Court granted the Navajo Nation’s motion for summary judgment and determined that the NAVAJO trademarks had not become generic, even noting that a “strict construction of trademark forfeiture is especially appropriate given the origin of the “Navajo” mark and the fiduciary duty the United States owes the Indian Tribes.”⁹⁵ The Court noted that Urban Outfitters failed to show that the NAVAJO trademarks had become generic in the minds of consumers or that the Navajo Nation abandoned the marks. For those reasons, the tribe successfully had Urban Outfitters’ affirmative defenses and counterclaims of genericness, and abandonment, thrown out with prejudice.⁹⁶ The parties would eventually agree to an undisclosed settlement.⁹⁷ Though it was not a trial win for the tribe, the *Navajo Nation* case demonstrates that tribes can and should monitor and regulate third-party use of their names. It also reveals that courts are willing to evaluate the fiduciary role that the United States maintains with tribes when dealing with tribal intellectual property rights.

Unfortunately for most tribes, many of their designs and creations have already entered the public domain, and there is no method to reclaim their rights after designs and creations enter that sphere. Additionally, many forms of “traditional cultural expression” in Native cultures are

⁸⁹ See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L. J. 299, 312 (2002) (noting that Native Americans “feel violated when the most sacred elements of their culture are manipulated by outsiders... For Native people, the objects, and the rituals (inclusive of songs, ceremonies, medicines, etc.) are considered holistically as sacred components of tribal culture.”).

⁹⁰ *Id.* at 300.

⁹¹ No. 12-195 BB/LAM, 2016 WL 3475342, (D.N.M. May 13, 2016).

⁹² *Id.* at *5.

⁹³ *Id.* at *2, *5.

⁹⁴ *Id.* at *3.

⁹⁵ *Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098, 1102 (D.N.M. 2016) (citing *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)).

⁹⁶ *Id.* at 1106.

⁹⁷ Nicky Woolf, *Urban Outfitters settles with Navajo Nation after illegally using tribe’s name*, *The Guardian*, (Nov. 18, 2016), <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement>.

presented orally and fail to meet the requirement of being “fixed in a tangible medium” to obtain copyright protection.⁹⁸ Although copyright law does offer alternatives to the traditional “author” through recognition of joint works, works made for hire, collective works, and the transfer of rights,⁹⁹ none of these current exceptions meet the needs of Native American tribes attempting to claim ownership of works created centuries ago. Thus, there is a tension between the traditional Western purpose of intellectual property law—exploiting the full commercial potential of a work for a particular author—and tribal creations, which are often the result of communal and intergenerational participation.¹⁰⁰

There is a large gap in protection for tribes, who often hold no copyright and thus have no control over their traditional art or stories. This is especially problematic since “art plays a central role” in many indigenous communities.¹⁰¹ Moreover, “indigenous designs are being appropriated and used commercially throughout the world” to sell goods ranging from ‘Navajo style rugs’ to ‘Apache motorcycles’ to the ‘Jeep Cherokee,’ generating significant revenue for large multinational companies. Allowing tribes to reclaim their names through added trademark protections, along with salvaging rights in those copyrightable creations that are tribally generated, will help produce economic development for every tribe within the United States.

IV. U.S. PATENT LAW HAS ALLOWED COMPANIES TO EXPLOIT INDIGENOUS PEOPLES AND THEIR TRADITIONAL KNOWLEDGE, CAUSING ECONOMIC HARM TO TRIBES

Scholars have pointed out the unjust and inequitable way in which companies have seemingly wrapped the discovery doctrine¹⁰² into intellectual property law to exploit tribal knowledge.¹⁰³ As expressed above, patents can be unbelievably valuable for companies, and to obtain them, many multinational enterprises are not afraid to identify and utilize traditional tribal knowledge. One such example would be the neem tree patent. In 1959, a German entomologist traveled to India and witnessed a swarm of locusts devour everything in their wake but for a lone

⁹⁸ Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 Conn. L. Rev. 1, 9 (1997) (noting that folklore generally has common characteristics, including being passed down generation to generation, either orally or through imitation, that it is not attributable to an individual author or set of authors, and that it is continuously utilized and developed within an indigenous community).

⁹⁹ 17 U.S.C. § 201; *see also* Farley, *supra* note 97.

¹⁰⁰ David B. Jordan, *Square Pegs and Round Holes: Why Native American Economic and Cultural Policies and United States Intellectual Property Law Don't Fit*, 25 Am. Indian L. Rev. 93, 99 (2001).

¹⁰¹ Farley, *supra* note 97, at 9 (noting that tribal works are “the result of group participation, as well as generational participation.”).

¹⁰² Robert J. Miller & Olivia Stitz, *The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery*, 32 Duke J. Comp. & Int'l L. 1, 3 (2021) (explaining that the discovery doctrine is a principle of international law developed by European nations in the fifteenth century to justify colonization of the non-European, non-Christian world).

¹⁰³ Tsosie, *supra* note 5, at 1163 (noting that pharmaceutical companies can profit from patenting products derived from indigenous peoples’ knowledge of plants, yet tribes have no recourse or method to protect against misuse or misappropriation of their traditional knowledge, because “U.S. intellectual property law protects only new ‘innovations’ and ‘discoveries,’ and they do not protect the longstanding knowledge held by cultural communities.”).

tree. Since then, researchers have investigated the neem tree and found many useful properties.¹⁰⁴ Long before researchers arrived, aboriginal groups in India used the tree for a variety of health and wellness benefits, including an antidote for malaria.¹⁰⁵

One of the few problems with the plant was that the azadirachtin did not keep well, decaying quickly after being extracted from the plant.¹⁰⁶ In the 1990s, American researchers traveled to India to study the neem tree and found an innovative way to alter the active ingredient to make it stable in storage and thus make it last longer.¹⁰⁷ The researchers then went back to the United States and applied for a patent on the new strain, selling Patent No. 5,124,349 to W.R. Grace & Co., an agricultural chemical company in Florida.¹⁰⁸ In 1995, a collection of agriculture, science, and trade groups, along with over one hundred thousand Indian farmers, petitioned the USPTO to cancel the neem tree patent.¹⁰⁹ Although they demanded revocation of the patent on the grounds that it was not novel, they had no success, and the USPTO did not revoke the patent.¹¹⁰ As noted above, prior to passing the AIA in 2011, the United States did not recognize foreign knowledge or the use of an invention as a bar to patentability.¹¹¹ Many Indians expressed frustration “at the fact that [multinational companies] seem to continually reap tremendous economic benefits from India, while the country as a whole remains very poor.”¹¹²

Yet another example can be seen through a patent obtained in 1986 on a strain of ayahuasca. For generations, healers, and religious leaders among the indigenous people of the Amazon used ayahuasca to treat sicknesses, contact spirits, and see into the future.¹¹³ An American researcher named Loren Miller traveled to the Amazon Rain Forest and filed a patent application for ayahuasca. After discovering Miller’s patent, many local Amazonians were furious, believing a foreigner was exploiting a plant that they had worshipped for hundreds of years.¹¹⁴ The indigenous tribes of South America organized, opposing the patent along with other support groups.¹¹⁵ In this case, the tribes were successful, obtaining a rejection of Miller’s patent on November 3, 1999.¹¹⁶ While the ayahuasca patent was successfully rejected, multinational companies continue to exploit traditional knowledge for profit while intellectual property regimes do little to support indigenous peoples.

¹⁰⁴ Marden, *supra* note 23, at 283.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 284.

¹⁰⁹ *Id.* at 285.

¹¹⁰ Oliver Krackhardt, *Beyond the Neem Tree Conflict: Questions of Corporate Behaviour in A Globalised World*, 21 N.Z. Univ. L. Rev. 347, 353 (2005).

¹¹¹ Leahy-Smith America Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011).

¹¹² Marden, *supra* note 23, at 294.

¹¹³ Fecteau, *supra* note 76, at 69.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.*

V. POSSIBLE SOLUTIONS AND INSIGHTS FROM ABROAD

Unfortunately for many tribes, “[t]he IP regime in the United States is primarily designed around a framework of ‘commercial exploitation of the works and knowledge ... [and] the maintenance of their control.’”¹¹⁷ Several modifications to federal intellectual property law, or modifying the IACA, would provide greater economic and cultural protections for Native American artists, inventors, and their tribes. Congress could amend the definition of “Indian” to be more inclusive of non-member Native American artists. Tribes could utilize the Lanham Act to hold companies accountable for using their tribal names. Intellectual property law could adopt communal ownership as a possibility.¹¹⁸ Finally, Congress may mandate restitution from companies benefitting from indigenous knowledge, repaying the exploited communities.

A. *Modifying the Definition of “Indian” within the IACA*

First, Congress could change the definition of “Indian” within the IACA. Although the current definition, “a member of an Indian tribe; or [a person who] is certified as an Indian artisan by an Indian tribe,”¹¹⁹ provides significant protections to tribes as a whole, it may leave many individuals of Native American descent unprotected and unable to classify their creations as “Indian-made” under the IACA. Some scholars have argued that changing the definition of who qualifies as “Indian” could saturate the market with counterfeit products, thus leading to less money flowing through tribes and their members.¹²⁰ However, many Native individuals do not qualify for membership in certain tribes due to each tribe having specific membership requirements.¹²¹ Each tribe may choose its own membership requirements, whether it be based on blood quantum,¹²² lineal descent,¹²³ or other cultural practices and norms.¹²⁴ Broadening the

¹¹⁷ Naomi Palosaari, *Intellectual Property Rights and Informed Consent in American Indian Communities: Legal and Ethical Issues*, 41 Am. Indian L. Rev. 125, 134-35 (2016) (citing Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 Temp. L. Rev. 433, 447 (2008)).

¹¹⁸ Although communal ownership may seem problematic with copyright typically lasting the “life of the author and 70 years after the author’s death,” corporate entities holding copyright are already limited to a term of 95 years after publication or 120 years after creation, whichever expires first. 17 U.S.C. § 302(c).

¹¹⁹ 25 U.S.C. § 305e(a)(1).

¹²⁰ Gonzalez, *supra* note 38, at 14 (2019) (noting that the *Fontenot* decision could have “catastrophic repercussions for many Native artists...as the market will be flooded with counterfeit products.”).

¹²¹ See generally Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 Wash. & Lee J. Civil Rights and Social Justice 61, 73 (2005) (discussing the complex history of tribal membership systems, many of which are based on colonial schemes in some regard).

¹²² For example, the Fort Sill Apache Tribe, and other tribes around the country, require members to be 1/16th or higher blood quantum for their particular tribe. See Art. II, Sect. 1 of the Fort Sill Apache Tribe of Oklahoma Constitution (noting that membership is open to “All persons of at least one-sixteenth (1/16) degree Fort Sill Apache blood born on/or after April 9, 1977, who file applications for enrollment and who have at least one natural parent who is a member of the Fort Sill Apache Tribe of Oklahoma.”).

¹²³ The Cherokee Nation requires an applicant for tribal membership to show a direct lineal ancestor “listed on the Dawes Commission Rolls” Art. IV, Sect. 1 of the Constitution of the Cherokee Nation 1999.

¹²⁴ See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978) (allowing the Santa Clara Pueblo tribe to grant membership to children of tribal men who married outside the tribe though the tribe denied membership to children of tribal women who committed exogamy).

definition of “Indian” within the IACA would allow more Native individuals to obtain the full economic and cultural value of their work.

Although modifying the definition of “Indian” within the IACA may generate a slight uptick in counterfeit products entering the market if done incorrectly, the proposed modification should not lead to any such increase. The IACA created the IACB to “promote the economic welfare of the Indian tribes and *Indian individuals* through the development of Indian arts and crafts and the expansion of the market for the products of Indian arts and craftsmanship.”¹²⁵ The IACB already allows tribes to recognize “Indian artisans” and permits such individuals to classify their goods as “Indian-made.” Allowing the IACB to receive applications and determine whether any Native artist, regardless of their membership status, may still classify their goods as “Indian-made” does not seem that drastic a step. If a Native artist does not meet their tribe’s standards but can show a certain standard level of blood quantum or direct lineage to a tribal member, the IACB should be able to certify “Indian artisans” themselves, allowing Native artists to no longer be subject to tribal membership rules but still providing the necessary protections to prevent counterfeit goods from entering the market. Notably, non-member artists are not being deemed tribal members in this exercise, as that would circumvent tribal sovereignty. Instead, the IACB is determining that certain individuals of indigenous descent are allowed to classify themselves as “Indian artisans,” thus enabling them to label their goods as “Indian-made.”

B. *Federal Law May Imply Tribal Names are Protected under the Lanham Act*

Congress has also indicated through express legislative action that it is important that tribes be designated accurately by their federally recognized names.¹²⁶ By passing the Federally Recognized Indian Tribe List Act of 1994 (“List Act”), Congress directed the executive branch to provide a full and accurate list of the tribes recognized by the federal government.¹²⁷ The List Act demonstrates express legislative intent from Congress to recognize and protect tribal names and may support the idea that the Lanham Act, therefore, prohibits third parties from doing business as federally recognized tribes or in a way that might imply approval from tribes to use their name.¹²⁸ Allowing tribes to retain control of their name through the protections offered by the Lanham Act would create new dynamic, compelling companies to seek out and communicate with tribes whose names they would like to use on their products.

For example, a company like Jeep would enter negotiations with the Cherokee Nation in order to use the tribe’s name on their products. Jeep would send part of the profits from their Jeep Cherokee sales to the tribe as compensation for using their name, and the tribe could then use those

¹²⁵ 25 U.S.C. § 305a (emphasis added).

¹²⁶ An Act of Nov. 2, 1994, Pub. L. No. 103-454, § 103(2), 108 Stat. 4791 (finding “the United States has a trust responsibility to recognized Indian Tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes...”).

¹²⁷ 25 U.S.C. § 5131(a) (“The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”).

¹²⁸ Paula M. Yost et. al, *supra* note 59, at 52.

funds for any purpose, including public health, housing, or community and cultural outreach. Although some companies will still hold considerable bargaining positions, this interpretation would level the playing field and allow tribes to begin capitalizing on their names to generate much-needed revenue for tribal programs. Returning to the Shingle Springs Band, the United States District Court for the Eastern District of California found that “as a matter of law, a federally recognized Indian tribe cannot be enjoined from using its own federally recognized name, under the guise of trademark law or otherwise.”¹²⁹

C. *The Bulun Bulun Equity—Australia’s Communal Copyright Protection*

Courts from overseas have also found unique and interesting ways to ensure Native artists provide adequate recognition to the art they use as reference work. In *Bulun Bulun v. R & T Textiles Pty Ltd.*, the Australian Federal Court recognized a tribe’s communal ownership interest in artistic paintings involving sacred images.¹³⁰ In 1978, John Bulun Bulun, an Aboriginal artist, received permission from senior members of his tribe, the Ganalbingu People, to create a painting drawing upon the sacred and ritual knowledge of the Ganalbingu People.¹³¹ After selling the painting, an Australian textile company reproduced substantial portions of the work on clothing without the consent of Bulun Bulun or the tribe.¹³² The copyright owner, Bulun Bulun sued, arguing copyright infringement, and the textile company conceded their infringement, stopped producing the items, and withdrew their remaining stock from sale.¹³³

However, following the first trial, another Ganalbingu member, George Milpurrurru, sued the textile company, arguing that the tribe held equitable ownership of the copyright in the painting.¹³⁴ Moreover, Milpurrurru argued that “the community’s power under its customary laws to control the reproduction of such ritual knowledge placed the artist either in the position of a fiduciary holder of the copyright or as trustee owner of the copyright.”¹³⁵ Justice von Doussa of the Federal Court of Australia did not recognize the Ganalbingu’s communal title in the copyright, as he instead agreed with their fiduciary argument, holding that Bulun Bulun had:

“...obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu People and, in the event of infringement by a third party, to take reasonable and appropriate action

¹²⁹ *Shingle Springs Band of Miwok Indians v. Caballero*, No. 2:08-CV-03133-JAM-DAD, slip op. at 2 (E.D. Cal. May 20, 2009) (dismissing counterclaims).

¹³⁰ *Bulun Bulun v. R & T Pty Ltd.* (1998) 157 ALR 193, 194 (Austl.).

¹³¹ *Id.* at 200.

¹³² *Id.*

¹³³ *Id.* at 193.

¹³⁴ *Id.* at 193.

¹³⁵ Amina P. Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 *Colum. J.L. & Arts* 211, 222 (2004).

to restrain and remedy infringement of the copyright in the artistic work.”¹³⁶

Although Bulun Bulun holds a copyright to the work, he relied on the important cultural aspects of his heritage to create the work. By receiving permission to create the work, Bulun Bulun steps into the role of a fiduciary, exercising copyright ownership for the benefit of the Ganalbingu people as a whole. He owes his tribe the traditional fiduciary duties of good faith, loyalty, due care, and disclosure. However, Justice von Doussa also held that Bulun Bulun had taken appropriate action to stop the infringement, thereby eliminating any additional remedies by the Ganalbingu as a community.¹³⁷

Similar to the United States, Australian copyright law has no provision to assert communal title in a work.¹³⁸ The Australian Court determined that customary indigenous law would play a role in the case,¹³⁹ and although it could not operate “in opposition to or alongside Australian law,” it could “be used as a basis for the foundation of rights recognized within the Australian legal system.”¹⁴⁰ The United States has recognized that tribal legal systems operate alongside state and federal systems, with courts requiring that even non-tribal members exhaust the tribal court system before proceeding to federal court in civil matters.¹⁴¹ Given the similarity of our copyright systems, the United States could implement the Australian system of placing fiduciary duties onto Native artists who create work using religious or culturally important images from the tribe.

The Australian court determined that fiduciary duties were in play partly because of Mr. Bulun Bulun’s own words. In that case, he stated:

“My creator ancestor passed on to me the elements for the artworks I produce for sale and ceremony. Barnda not only creates the people and landscape, but our designs and artworks originate from the creative acts of Barnda....Barnda handed the painting to my human ancestors. They have been handed from generation to generation ever since...I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such works...”¹⁴²

¹³⁶ *Bulun Bulun v. R & T Pty Ltd.* (1998) 157 ALR 193, 211 (Austl.).

¹³⁷ *Id.*

¹³⁸ *Id.* at 195 (citing Austl. Cultural Dev. Off. et. al., *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, 6 (1994) (“While joint authorship of a work by two or more authors is recognized by the Copyright Act, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of its members is not recognized.”)).

¹³⁹ *Id.* at 197.

¹⁴⁰ *Id.* at 197.

¹⁴¹ *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 849, 105 S. Ct. 2447, 2450, 85 L. Ed. 2d 818 (1985) (“petitioners had a duty to exhaust their Tribal Court remedies before invoking the jurisdiction of a federal court”); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987) (“At a minimum, exhaustion of tribal remedies means that tribal appellate courts have the opportunity to review the determinations of the lower tribal courts.”).

¹⁴² *Bulun Bulun* (1998) 157 A.L.R. at 200.

Not every artist will feel this way about holding fiduciary duties to their tribe. Yet, if they are creating artwork using their ancestral style and culture as a foundation, they too may wish to honor their heritage, and a piece of that may be identifying their artwork as “Indian-made.”

Placing an equitable trust over art created by Native artists using culturally significant imagery or other precious knowledge provides tribes a layer of protection for their communally held intangible property. In the rare instance where a Native American artist may try to exploit their own cultural heritage to obtain a higher price for their artwork, an equitable trust could allow the tribe to step in and acquire injunctive relief where artists violate community guidelines by misappropriating sacred designs or images. Yet, as previously noted in the Governmental Accountability Office report, the “sale of goods falsely represented as authentic Indian-produced arts and crafts have been a persistent and potentially growing problem in the United States.”¹⁴³ As Non-Native corporations and individuals continue to exploit tribal communities (as seen in the *Navajo Nation* case), providing tribes with additional protections for their art will strengthen their culture, their economy, and in turn, their sovereignty.¹⁴⁴

D. Remedial Measures for Companies Exploiting Traditional Knowledge

Another potential method of economic growth within Native American communities could be repatriating funds from companies that have attained the benefits of traditional knowledge. Again, the United States could find inspiration from overseas. In 2002, India passed the Biological Diversity Act (BDA) to protect its biological diversity by creating an equitable benefit-sharing scheme and establishing the National Biodiversity Authority, which implemented regulations and opposed intellectual property applications of foreign entities within India.¹⁴⁵ The BDA blocks patent applications for any invention based on research or information on India’s biological resources obtained without prior approval.¹⁴⁶ India used the BDA to send out notices in 2015 to several companies seeking a share in the profits from products using their biological resources.¹⁴⁷

If the United States were to pass similar legislation instead of intending to prevent domestic companies from exploiting the traditional knowledge of either Native American tribes or indigenous peoples in developing nations, it could lead to a major decline in biopiracy.¹⁴⁸ For those that continue the practice, the U.S. could instate heavy penalties and send any fines into a general pot that could be distributed to Native American tribes who have been impacted by the practice,

¹⁴³ U.S. Gov’t Accountability Off., *Indian Arts and Crafts: Size of Market and Extent of Misrepresentation Are Unknown*, 1 (2011).

¹⁴⁴ Ryan D. Dreveskracht, *Native Nation Economic Development Via the Implementation of Solar Projects: How to Make it Work*, 68 Wash. & Lee L. Rev. 27, 37, (2011) (arguing that practical sovereignty and economic development go hand-in-hand, allowing tribal culture, perceptions, and interests to guide tribal growth).

¹⁴⁵ Biological Diversity Act, No. 18 of 2003, India Code (2002), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=185798.

¹⁴⁶ *Id.*

¹⁴⁷ Palmer et. al, *supra* note 84, at 29 (discussing BDA and its use for preventing biopiracy in India).

¹⁴⁸ Fecteau, *supra* note 76, at 71 (“Protected by their patents, [] researchers are not bound to share in the profits from their patented items with the indigenous tribes from whom they gained the critical knowledge. This activity has come to be known as ‘biopiracy.’”).

whether it be recently or in the past. Additionally, tribes that demonstrate a company obtained and utilized their traditional knowledge to acquire a patent and profited from that monopoly could potentially be repaid a percentage of profits from those ill-gotten gains.

With our current patent system, it is unlikely that any of the companies would be held accountable for continuing to practice biopiracy. However, attorneys for the Center for International Environmental Law, the organization that successfully challenged the ayahuasca patent, argued that disclosing prior art that consists of traditional knowledge (thereby making it unpatentable) promotes the progress of science in multiple ways.¹⁴⁹ First, it “provides an incentive for continued use and maintenance of indigenous knowledge systems” by recognizing those who possess knowledge of local biological resources.¹⁵⁰ Additionally, supporting traditional knowledge systems with positive incentives helps “maintain high levels of biodiversity in their regions over many centuries.”¹⁵¹ It is beneficial to recognize traditional knowledge when possible in order to maintain it and foster a more ecologically diverse planet, and it is equally important to allow indigenous people to benefit economically from that traditional knowledge. We could theoretically implement a dual-pronged biopiracy regime whereby those who do not disclose that their patent application was founded on traditional knowledge are subject to penalties, with restitution going to a general pot or those they have harmed where it is possible to identify a particular group. For those who disclose traditional knowledge as a basis for their prior art, we can provide a slight incentive by registering a new class of patent, lasting a shorter term than the typical twenty-year monopoly, and allowing indigenous peoples to liberally use the product.

VI. CONCLUSION

The relationship between federal intellectual property laws and Native American tribes and artists is a unique and sacred one—the United States owes a duty to protect tribes through treaty obligation and as “domestic dependent nations”¹⁵² and must take steps to amend federal trademark, copyright, and patent law to better protect the interests of tribes and boost economic development. Additionally, amending the IACA to provide broader protection for Indigenous artists who fall outside the Act’s definition of “Indian” could further strengthen tribal fiscal growth. Laying a strong foundation for growth in tribal arts can pave the way for both economic and cultural development across the many tribes throughout the United States and should be a priority moving forward to support tribes reclaiming their sovereignty.

¹⁴⁹ *Id.* at 96 (citing Ctr. for Int’l Envtl. L., Comments on Improving Identification of Prior Art: Recommendations on Traditional Knowledge Relating to Biological Diversity Submitted to the United States Patent and Trademark Office § I (1999) at <https://www.ciel.org/wp-content/uploads/2015/03/IdentificationofPriorArt.pdf>).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 2, 8 L. Ed. 25 (1831).