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## OWNING THE SUN: CAN NATIVE CULTURE BE PROTECTED THROUGH CURRENT INTELLECTUAL PROPERTY LAW?

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Cite as 7 J. HIGH TECH. L. 180 (2007)

### I. Introduction

Intellectual property laws in the United States encourage great inventors, artists and performers to share their inventions, crafts and artistic expressions with humankind.<sup>1</sup> These laws illustrate the value associated with safeguarding original creations within a protective legal framework.<sup>2</sup> Typically, a specified artist or inventor must be aware of the duration of protection for their innovations as well as the control intellectual property laws impart upon their expressions.<sup>3</sup> However, this Western concept of a limited monopoly over a symbol, song or ceremony contradicts Native American conceptions of cultural property and what it means to them and their existence both as a sovereign community and as an individual.<sup>4</sup>

This paper asserts that while American intellectual property laws have been significant resources to preserve personal expression, the scope of these laws may be insufficient to adequately safeguard the unique structure of American Indian cultural property.<sup>5</sup> The struggle

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1. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 55 (2003) (discussing the European origins of current U.S. intellectual property law).

2. Suzanne Milchan, Note, *Whose Rights are These Anyway? A Rethinking of our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 162 (2003).

3. *Id.* at 163 (discussing the rights and restrictions associated with intellectual property laws).

4. *Id.* at 163. See also, Native American Indians, Quotes and Thoughts, (Crazy Horse (Tashunkewitko), war chief of the Oglala Sioux, "One does not sell the land people walk on") (Sept. 23, 1875) [http://itwillbethundering.resist.ca/issue\\_two/miningstealingtheland.shtml](http://itwillbethundering.resist.ca/issue_two/miningstealingtheland.shtml) (last visited April 19, 2007).

5. Nancy Kremers, *Speaking With a Forked Tongue in the Global Debate on*

for preservation of Native American identity is intimately linked to physical land, religious art and symbols, stories, music and medicines.<sup>6</sup> This paper explores how federal intellectual property laws apply to Native American cultural property, as well as the limitations the current legal regime encounters when applied to such property. This writing will also propose modifications to the legal regime in order to infuse the gaps between intellectual property laws and Native American cultural property. In doing so, it will examine the principles embodied in the concept of *droit moral*, or 'moral rights', how European states have incorporated this concept into their intellectual property laws, and how these principles may further the evolution of cultural protection through domestic law.

## II. The Significance of Culture for Native Americans

Recently, a major debate has emerged in the field of intellectual property over the issue of the protection of Native American cultural property.<sup>7</sup> The need for adequate safeguards of traditional knowledge, genetic resources and folklore (TKGRF)<sup>8</sup> by means of intellectual property is not a new concern for Indian peoples, but as Native voices have grown stronger in the international human rights arena, the demand for the protection of cultural property has been heard louder by federal governments.<sup>9</sup>

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*Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?* 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 12-13 (2004) (discussing the holistic quality of traditional Indian knowledge).

6. See Milchan, *supra* note 2, at 160 (highlighting Native American identity through culture).

7. See Kremers, *supra* note 5, at 3 (discussing the controversy between indigenous societies and effective protection for traditional knowledge, genetic resources and folklore, or "TKGRF").

8. Konrad Becker, *Report on the Information Meeting on Intellectual Property And Genetic Resources*, Geneva, Sept 15, 2004, available at [http://www.aippi.org/reports/q166/report\\_GRTKF\\_Sept04.pdf](http://www.aippi.org/reports/q166/report_GRTKF_Sept04.pdf) (last visited April 4, 2007).

9. Indigenous groups now have a presence in the United Nations, both in Geneva and New York, and at international meetings on human rights, the environment and globalization. December 31, 2004 marked the end of the First International Decade of the World's Indigenous People as declared by the U.N. General Assembly Resolution 48/163 [hereinafter *Decade*]. A significant accomplishment of the Decade was the addition of a Special Rapporteur on the situation of Human Rights of Indigenous People, where indigenous rights issues may be addressed by both the U.N. Committee on the Elimination of All Forms of Racial Discrimination and the U.N. Committee on the Rights of the Child. See G.A. RES. 163, U.N. GAOR, 48TH SESS., U.N. DOC. A/RES/48/163 (DEC. 21, 1993).

### A. The Concept of Cultural Property

There is a White River Sioux legend that somewhere among the Badlands of South Dakota hides a small cave.<sup>10</sup> Inside this cave, an elderly Sioux woman has lived for thousands of years.<sup>11</sup> Dressed in rawhide, she works on a blanket strip which will eventually be a part of a buffalo robe.<sup>12</sup> Her companion, a large black dog named Shunka Sapa, constantly watches over her as she makes her blanket strip from the quills of porcupine.<sup>13</sup> Near them, an earthen pot filled with *wojapi*, a traditional Indian berry soup, slowly cooks above an eternal fire.<sup>14</sup> Every now and then, the old woman slowly rises from her chair and goes to the pot to stir the *wojapi*.<sup>15</sup> In the moment her back is turned away from Shunka Sapa, he gnaws at her work and pulls the porcupine quills out of her blanket strip.<sup>16</sup> This way she never makes any progress, and her quillwork remains a project forever unfinished.<sup>17</sup> The Sioux people say that if she ever does finish the strip, at the very moment the last quill completes the design, the world will come to an end.<sup>18</sup>

This Sioux tale is not unlike countless other Indian legends which weave symbolism, ritual and religion into important cultural metaphors and messages.<sup>19</sup> This story may also fold into a metaphor that the existence of Indian culture will survive through a lengthy yet continuous balance between respect of cultural property and effective legal mechanisms to protect sovereign interests. The power and substance of such stories embody important and powerful spiritual principles that figure prominently in tribal, family and band-specific oral and cultural traditions.<sup>20</sup> Like many Indian stories, the author of this Sioux legend is unknown; its ownership interests exist as cultural

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10. RICHARD ERDOES & ALFONSO ORTIZ, *AMERICAN INDIAN MYTHS AND LEGENDS* 485 (Knopf Pub. Group 1984) (told by Jenny Leading Cloud at White River, South Dakota, recorded by Richard Erdoes in 1967).

11. Erdoes, *supra* note 10, at 485.

12. Erdoes, *supra* note 10, at 485.

13. Erdoes, *supra* note 10, at 485.

14. Erdoes, *supra* note 10, at 485.

15. Erdoes, *supra* note 10, at 485.

16. Erdoes, *supra* note 10, at 485.

17. Erdoes, *supra* note 10, at 485.

18. Erdoes, *supra* note 10, at 485.

19. Amina Para 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, 234 (2004) (describing the metaphoric and symbolic process of traditional Navajo sandpainting).

20. See Erdoes, *supra* note 10, at xiii (introducing and explaining Indian legends and the fluid folklore of the oral tradition).

property.<sup>21</sup>

Cultural property usually refers to “prehistorical and historical objects that significantly represent a group’s cultural heritage, whether the group is a tribe or other localized community, a cultural or ethnic group, or a nation *qua* political entity.”<sup>22</sup> Legal scholars characterize the range of cultural property as “all of the tangible materials... tangible forms of culture produced by humans to adapt to and exercise control over their environment . . . the technological and other associated knowledge considered significant by the members of a culture.”<sup>23</sup>

James A. Nason describes cultural property as an antiquated concept with a definition that has varied considerably over time.<sup>24</sup> Nason recounts the concept of cultural property of the ancient Western world, where such possessions were “essentially their politically centralized treasures, e.g., the ‘treasure hoard’ of King Priam of Troy, or the treasury collections of medieval European kings and emperors.”<sup>25</sup> In these societies, cultural property was important community patrimony; its loss through military defeat could further destroy the sense of community to which it was tied.<sup>26</sup> The nature between a sovereign group and cultural property can “be represented by tangible cultural property, and demoralized or destroyed by the removal of such property, [this issue] continues to be an important ideological and property concept today.”<sup>27</sup>

However, cultural property in the context of Native American culture is wider-ranging than the Western politically-focused application. In its broad view, it includes all material and intangible knowledge considered significant to protect spiritual, social and

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21. See Erdoes, *supra* note 10, at xv (introducing and explaining Indian legends and the fluid folklore of the oral tradition and describing these stories as accounts told at powwows and around campfires, never previously recorded in print).

22. James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL’Y REV. 255 (2001).

23. *Id.* at 256.

24. *Id.* at 255. James A. Nason is a member of the Comanche Tribe and Curator of Pacific and American Ethnology at the Thomas Burke Memorial Washington State Museum. He co-founded the American Indian Studies Center at the University of Washington. *Id.*

25. *Id.* at 256. Nason gives another example of community property “in the actions of ancient Assyrian armies. These armies would not only carry off the treasures of a conquered enemy after killing their warriors and destroying their cities but could go a step further by exhuming their dead and carrying off their bones.” *Id.* at n. 7 (citing ARNOLD C. BRACKMAN, *THE LUCK OF THE NINEVAH* 5-6 (1978)).

26. *Id.* at 256.

27. *Id.*

artistic interests of a community.<sup>28</sup> Special Rapporteur Erica-Irene A. Daes,<sup>29</sup> an advocate for the realization of self-determination for indigenous peoples, lends guidance on why Native Americans are closely bound to the concept of cultural property: “Indigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land; their kinship with the other living creatures that share the land.”<sup>30</sup>

### B. Concerns for the Protection of Cultural Property

When the balance between respect for cultural property and the legal safeguards surrounding these objects runs askew, tensions between property appropriators and property owners may intensify.<sup>31</sup> In 1999, the Zia Pueblo Indians of New Mexico voiced resentment over the unauthorized use of their religious symbol, an image of a crimson circle with lines extending outward in each of the cardinal directions – the same image which appears on the state flag of New Mexico.<sup>32</sup> This spiritual symbol of the Zia Pueblo, the Zia Sun, has appeared on food, buildings, automobile license plates and even public toilets.<sup>33</sup> The Sun symbol “reflects the pueblo’s tribal philosophy, with its wealth of pantheistic spiritualism teaching the basic harmony of all things in the universe.”<sup>34</sup> Isidro Pino, a leader of one of the tribe’s religious societies, testified in a public hearing that knowledge of the Sun symbol “is a community property;” it is used in Zia sacred rituals ranging from childbirth to funerals.<sup>35</sup>

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28. See Kremers, *supra* note 5, at 4 (discussing the expansive nature of Indian cultural property).

29. ERICA-IRENE DAES, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE, 5 U.N. Sales No. E.97.XIV.3 (1997). Erica-Irene Daes is a former Chairperson of the Working Group on Indigenous Populations which drafted the Draft Declaration on the Rights of Indigenous People. *Id.* See also DIANA KLY & YUSSUF KLY, IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION 50-62 (2006).

30. Daes, *supra* note 29, at 3.

31. See Brown, *supra* note 1, at 69-70.

32. See Brown, *supra* note 1, at 69.

33. Leslie Linthicum, *Zia Symbol Sparks Ownership Questions*, ALBUQUERQUE JOURNAL, July 9, 1999, at A1.

34. See Brown, *supra* note 1, at 69.

35. U.S. Patent and Trademark Office, *Hearing on Official Insignia of Native American Tribes*, 138-139 (July 8, 1999), available at <http://www.uspto.gov/web/offices/com/hearings/index.html#native>. Pino went on to say, “. . . to help you understand the importance of the Zia Sun symbol, I take personal risk in disclosing the following. . . [the samplings] have been disclosed in hopes that you will duly consider the full protection of the Zia Sun symbol as the official tribal symbol of the Pueblo of Zia.”

In 1994, the Zia peoples demanded reparations for the state's use of their Sun symbol, requesting one million dollars for each year that the symbol had been used by the state on their flag and letterhead.<sup>36</sup> Although New Mexico had been using the Sun symbol since 1925, this sudden compensatory demand was triggered by a trademark application submitted by a Santa Fe-based motorcycle tour company which used the symbol in its logo.<sup>37</sup> The Zia peoples objected to the idea that private businesses might profit from the use of a symbol strongly identified with the community's religious practices.<sup>38</sup> While the situation was eventually addressed by the U.S. Patent and Trade Office (USPTO) through public hearings, the issue of whether patent and copyright safeguards have adequately protected Indian culture remains insufficiently answered in federal legislative response.<sup>39</sup>

### American Intellectual Property Law and Cultural Property

While the significance of intellectual property continues to grow in our vastly expansive global market economy, innovations in policies for the protections of Native American cultural property have been less than prolific.<sup>40</sup> In a discussion of their relationship to Indian cultural property, we must first explore the doctrines of intellectual property most commonly applied to Native American cultural property – copyright, patent and trademark law.<sup>41</sup>

### Copyright, Patent and Trademark Law

United States intellectual property is based on an “economic incentive” theory; the intellectual property laws “impart a limited

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36. See Brown, *supra* note 1, at 70 (stating that by 2001, the demand had risen to \$76 million).

37. See Brown, *supra* note 1, at 71 (noting that in the face of unfavorable publicity, the touring company withdrew its trademark application).

38. See Brown, *supra* note 1, at 71. See also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* ch. 4 (1988).

39. See *Hearing, supra* note 35, at 34 (stating the USPTO's standards for unacceptable trademarks).

40. See generally Gelvina Rodriguez Stevenson, *Trade Secrets: The Secret to Protecting Indigenous Ethnobiological Knowledge*, 32 N.Y.U. J. INT'L. L. & POL. 1119 (2000).

41. *Id.* at 1999. Trade secrets have also been discussed as providing practical means for protecting ethnobiological medicines and indigenous medicinal remedies; however, this doctrine has not generally been integrated in the discussion of cultural property, as most property for which protection is sought is not classified as ‘trade secrets’ within its statutory parameters. *Id.*

monopoly upon [the work of] the author and creator, thus maximizing their protection of the economic investment of the work.”<sup>42</sup> Such protection allows the “economic philosophy behind the clause empowering Congress to grant patents and copyrights... the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.”<sup>43</sup>

The rights allocated through copyright laws apply solely to original works, fixed in a tangible medium of expression by individual authors, for a limited period of time.<sup>44</sup> A copyright grants to the owner the limited rights to: (i) reproduce the work; (ii) display or perform the work; (iii) make derivative works; and (iv) distribute the work.<sup>45</sup> These rights may be abrogated by particular exceptions such as the “fair use” doctrine and compulsory licensing.<sup>46</sup> Recent amendments to U.S. copyright laws have extended narrowly-defined rights of attribution and integrity to creators of visual works of art; therefore, such creators have the waivable power to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”<sup>47</sup> Copyright laws were intended to lead to the eventual release (upon expiration) of the copyrighted work into the public domain for the full use by and enjoyment of the public.<sup>48</sup> Copyright laws cover the vast majority of conventional forms of artistic expression.<sup>49</sup>

Patent law protects intangible property one cannot see or feel.<sup>50</sup> In the U.S., it includes the right “to exclude others from making, using

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42. See Milchan, *supra* note 2, at 163.

43. Mazer v. Stein, 347 U.S. 201, 219 (1954).

44. See 17 U.S.C. §§ 102, 201, 302 (2003).

45. See 17 U.S.C. § 106 (2000).

46. See Brown, *supra* note 1, at 57; 239-240 (discussing the fair use doctrine and suggesting anyone may quote from copyrighted material as long as the borrowed text does not harm the financial interests of the copyright holder; the doctrine essentially balances the rights of authors against the social benefits that flow from open public discourse).

47. See Brown, *supra* note 1, at 57.

48. See generally Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 1 (1990).

49. The duration of a copyright is the author’s lifetime plus seventy years; works-for-hire are protected for ninety-five-years from the date of publication of the work, or 120 years from the date of creation of the work. 17 U.S.C. §302 et seq. Trade secrets remain protected until they are publicly disclosed. Patents are protected for twenty years from the date of filing. 35 U.S.C. §154(a)(2). Trademarks/dress have a perpetual period of protection, so long as the mark, symbol, etc. does not fall into disuse. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 566 (2000). See also 17 U.S.C. §106 (2000).

50. Michael S. Elkind, *The Cultural Dimensions of Patents*, *Intellectual Property Today*, Aug. 1996, at 26.

or selling something that is somehow described, fenced in, and determined by words, drawings, formulas, etc. that are set forth in a document, a granted patent.”<sup>51</sup> From a TKGRF perspective, patent protection can be problematic because patenting centuries-old cultural knowledge is unavailable due to the novelty and other statutory requirements of patent regimes.<sup>52</sup> Time bars for public use would also work against indigenous communities “who might otherwise apply today for patents incorporating such knowledge considered new by the larger world, yet long used within the confines of the traditional community.”<sup>53</sup>

Trademark law protects identifying marks, words, symbols, or images either “used by a person, or which a person has a bona fide intention to use in commerce and to identify and distinguish his or her goods... and to indicate the source of the goods... even if that source is unknown.”<sup>54</sup> In application to the issue of the Zia Pueblo Sun symbol, this mark is found on countless objects in New Mexico; this symbol has been appropriated to entertain commercial operations with little regard to the Pueblo Native American culture.<sup>55</sup> This situation illustrates the U.S. Patent and Trademark Office’s substandard methodologies for the protection of Native American symbols.<sup>56</sup>

In application, Native American TKGRF tends to remain unprotected by U.S. intellectual property laws.<sup>57</sup> This occurs because both tangible and intangible forms of this cultural property “[such as pre-existing motifs displayed in artworks, songs, dances and folklore] are frequently the direct result of cumulative knowledge.”<sup>58</sup> Such cumulative knowledge is formed by ‘a tradition of holders and creators who, through time, have created a particular body of knowledge.’<sup>59</sup> Additionally, some forms of artistic expression may not be nor were ever intended to be set down in a fixed medium.<sup>60</sup> Furthermore, explorers, missionaries, anthropologists and scientists

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51. *Id.*

52. *See* Kremers, *supra* note 5, at 26.

53. *See* Elkind, *supra* note 50, at 27.

54. *See* Merges, *supra* note 49, at 566.

55. *See* Brown, *supra* note 1, at 70 (discussing Pueblo reaction to the appropriation of the religiously powerful Sun sign).

56. *See* Brown, *supra* note. at 80-94 (arguing that while the USPTO takes the problem seriously by refusing to register demeaning trademarks, their statutory reach is too short to protect cultural property).

57. *See* Kremers, *supra* note 5, at 13.

58. *See* Matlon, *supra* note 19, at 215 (stating that intellectual property laws do not protect works already in the public domain).

59. *See* Matlon, *supra* note 19, at 215 (quoting Nason, *supra* note 22, at 60).

60. *See* Matlon, *supra* note 19, at 215.

have documented various types of indigenous cultural life, including art mediums, medicines and sacred rituals.<sup>61</sup> Intellectual property laws are not equipped to protect works already in the public domain, those considered to be unoriginal, and those having an intangible, unfixed form.<sup>62</sup> The “owners” of indigenous property may be the community in general, or a particular group of individuals (such as a family or clan).<sup>63</sup> While intellectual property laws do provide protection for joint authors or owners, this is different from the concept of communal ownership as associated with cumulative knowledge.<sup>64</sup>

### B. Appropriation of Cultural Intellectual Property

The central tension between Western ideologies and Native American cultural property originates from the concept of appropriating another’s intellectual property.<sup>65</sup> Many Native American artistic forms of expression are considered to fall under Indian laws, which often do not permit intellectual property to be “appropriated or alienated by others without the approval of its owners;” oftentimes the “owners” are the community in general.<sup>66</sup> The term “appropriation” has been defined as a “taking, from a culture that is not one’s own, cultural expressions and artifacts, history and ways of knowledge.”<sup>67</sup> Appropriation may be exercised by the procurement of either real or intangible property.<sup>68</sup>

Unfortunately, the appropriation of Native American names, medicines and spiritual and cultural symbols is a familiar exercise of major American institutions, including professional sports, television and movie characters, schools and universities.<sup>69</sup> Some tribes have

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61. See Kremers, *supra* note 5, at 13 (this is not an inclusive list of all objects and expressions that may be categorized as cultural property).

62. See Kremers, *supra* note 5, at 13.

63. See Nason, *supra* note 22, at 261 (discussing how indigenous communities are concerned with the infringement of traditional ownership rights held by individuals, families or communities).

64. See Nason, *supra* note 22, at 256-59.

65. See Milchan, *supra* note 2, at 161 (discussing the term “appropriation” and how Native American property feuds evolve from this contemporary concept).

66. *Id.*

67. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 300 (2002).

68. See Milchan, *supra* note 2, at 161.

69. See generally Vernon Bellecourt, *Wahoo-Chant-Chop...Bad Medicine for Cleveland and Atlanta Baseball?* (October 27, 1999), available at <http://www.aimovement.org/moipr/mascotsoct99.html> (last visited February 20, 2007).

viewed appropriation as a hurtful disregard for Indian culture because it carelessly mimics sacred Indian rituals, names and images and inaccurately reflects true Native American identities.<sup>70</sup> In fact, Native Americans established the National Coalition on Racism in Sports and the Media (NCRSM) to address concerns regarding the use of Indian symbols and images for economic gain and image recognition by the American sports industry.<sup>71</sup>

Additionally, under Indian laws, ownership interests over cultural property sometimes must be “held in perpetuity unless otherwise assigned or transferred in a manner culturally appropriate to the specific property.”<sup>72</sup> This is based on the idea that certain works are of unique cultural significance and their value is best preserved through continual control of their use.<sup>73</sup> As mandated through federal legislation, copyrights in the U.S. may only be granted for the author’s lifetime plus seventy years and interests will eventually move into the public domain.<sup>74</sup> Thus, U.S. intellectual property laws

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70. *Id.* See also The National Coalition on Racism in Sports and Media (NCRSM) Homepage, <http://www.aimovement.org/ncrsm/index.html> (last visited February 20, 2007). NCRSM is an Indian group which works to challenge the influence of major media who choose to promulgate messages of oppression. The impetus which formed NCRSM was the issue of media coupling imagery with widely held misconceptions of American Indians in the form of sports team identities resulting in racial, cultural, and spiritual stereotyping. NCRSM formed in October of 1991 at a meeting of American Indian dignitaries and activists held at Augsburg College, Minneapolis, Minnesota.

NCRSM, while best known for its front-line demonstrations outside sports stadiums across America, has been responsible for an educational effort which has made the issue of racial stereotyping a household discussion. NCRSM takes a long term view of the struggle against learned hatred and disrespect. In their opinion, components of major media which form public and government opinion include the following: film, video, sports entertainment, and educational institutions, publications, news organization, television, cable satellite, internet, retail practices and merchandising, marketing and radio.

71. *See Id.*

72. *See* Nason, *supra* note 22, at 259 (discussing intellectual property conditions and how western copyright laws are ideologically intended to ensure that artistic, literary, and other innovations are, by virtue of the protection of their creators’ rights, made available for the enrichment of all of society). By contrast, Native American protections for intellectual property are designed to protect and preserve valued cultural heritage of lasting importance to the society, as well as ensuring its appropriate use or performance in society. *Id.* It is significant to note the 1999 decision by the USPTO to ask Native Americans about establishing a list of official tribal insignia that would be protected as trademarks. *See* Rebecca Lopez, *Tribes Ask the Patent Office to Help Protect Their Symbols*, THE SEATTLE TIMES, July 11, 1999 at A10 (noting that several California tribes, for example, were seeking protection of symbols contained in pictographs, baskets dance regalia and even tribal songs).

73. Nason, *supra* note 22, at 260.

74. Nason, *supra* note 22, at 261. U.S. CONST. ART. I, §8; 17 U.S.C. §302.

conflict with Indian laws and are essentially inadequate to protect the intellectual works of Native Americans.<sup>75</sup>

Even more frustrating for Indian cultures following non-Western ideologies is that Native “creative works that are unprotectable in their cultural context often find copyright protection in the hands of non-Natives when the latter use them in academic and commercial use.”<sup>76</sup> For a notoriously familiar example, “the American public has been conditioned by sports industries, educational institutions, and the media to trivialize indigenous culture as common and harmless entertainment.”<sup>77</sup> Many of these institutions have copyrighted Native American images and expressions now associated with distinctly different industries than their creators ever intended, often with a pejorative reflection of the culture from which it was appropriated.<sup>78</sup> For over fifty years, Indian organizations have worked to eliminate images and names like The Cleveland Indian’s mascot ‘Chief Wahoo’; The Washington Redskins, The Kansas City Chiefs, The Atlanta Braves and sport chants like the ‘Tomahawk Chop.’<sup>79</sup> The use of such mascots and team names is hurtful and confusing,

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75. Nason, *supra* note 22, at 260.

76. See Matlon, *supra* note 19, at 216 (discussing inconsistencies between conventional copyright laws and tribal laws and policies, and, as structurally interpreted, their incapability to adequately protect indigenous intellectual works from misuse). See also Nason, *supra* note 22, at 260.

77. See NCRSM, *supra* note 70.

78. See NCRSM, *supra* note 70. See also Gary Brouse, *Team Logos are an Insult to Indians*, The Record (Bergen County, NJ) Oct. 23, 1997 at L09. Brouse quotes Charlene Teters, “Our people paid with their blood for our culture and our religious beliefs, and we should guard and protect those beliefs for the Indian children unborn.” *Id.*

79. While a Chief is the highest political position one can attain in Indian society, the National Football League team the Kansas City ‘Chiefs’ have trademarked their name. See Kansas City Chiefs’s Website, <http://www.kcchiefs.com/copyright/> (last visited April 22, 2007). See generally all registered trademarks reserved by NFL Enterprises, LLC, including, NFL and the NFL shield design, team names (including Washington “Redskins”), logos and uniform designs. NFL Website, <http://www.nfl.com> (last visited April 22, 2007). For information on the Washington Redskins case, see *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q. 2d (BNA) 105 (T.T.A.B. 1999). Similarly, Major League Baseball Properties, Inc. has registered the following trademarks or service marks to their corporation or the relevant Major League Baseball entity: Major League, Major League Baseball, MLB, the silhouetted batter logo, World Series, National League, American League, Division Series, League Championship Series, All-Star Game, and the names (including the team names ‘Atlanta Braves’ and ‘Cleveland Indians’), nicknames, logos (including insignia, uniform designs, color combinations), slogans designating the Major League Baseball clubs and entities, and their respective mascots (*i.e.*, ‘Chief Wahoo’), events and exhibitions. See MLB homepage, at <http://mlb.mlb.com/NASApp/mlb/index.jsp>.

especially to young Indian people.<sup>80</sup> Moreover, they perpetuate historically erroneous, racist images of the past.<sup>81</sup> “In 1998, during the media hype that surrounding baseball games between the New York Yankees and the Cleveland Indians, the *New York Post* covered its front page with the headline, ‘Take the Tribe and Scalp ‘Em’.”<sup>82</sup> Little concern was shown for the Indian children, or for Indian communities living in New York City or around the country.<sup>83</sup>

Such exertion of power by mainstream American cultural institution exemplifies the tension between the cultures, the issue of appropriation and the disparities between Indian and intellectual property laws. This misappropriation of Native American culture is exceptionally damaging to the integrity and preservation of a culture that has survived unique historical devastation and collective loss of society.<sup>84</sup> While “the conflicts between Native peoples have always had a cultural as well as a political dimension,” a taking of a peoples’ cultural symbols is akin to a taking of control over the people.<sup>85</sup>

#### IV. Current Protections of Native American Culture through Intellectual Property Law

The diverse range of intellectual expressions embodied in TKGRF serves to defy its precise categorization into any distinct body of Western intellectual property.<sup>86</sup> While Congressional legislation aimed at the protection of Native American cultural property has been enacted, many legal scholars assert that current legislation has been under-reaching to adequately protect cultural property.<sup>87</sup>

##### A. Origins of Federal Power and Obligations to Safeguard Indian

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80. See generally Bellecourt, *supra* note 69. See also NCRSM, AIM Ministry for Information, *supra* note 70.

81. See generally NCRSM, *supra* note 70.

82. See generally Bellecourt, *supra* note 69. See also NCRSM, *supra* note 70. See also George Willis, *Wright’s Oh So Wrong – Yankees Scalp Indians’ Headhunter*, *The New York Post*, October 7, 1998; see also Press Release by the National Coalition on Racism and Sports in Media, November 20, 2001 available at <http://www.aimmovement.org/moipr/Ncrsmpr.html>.

83. See Brouse, *supra* note 78. Brouse interviews Sammy Toineeta, a Lakota and a director at the National Council of Churches regarding the N.Y. Post article. Toineeta said, “Take the Tribe and . . . Scalp ‘Em! Do you know what it is like for your child to have to go to school after something like that?” *Id.*

84. See generally NCRSM, *supra* note 70.

85. See Milchan, *supra* note 2, at 161 (quoting Tsosie, *supra* note 67, at 300).

86. See Kremers, *supra* note 5, at 13.

87. See Kremers, *supra* note 5, at 13.

## Rights

A brief background on the origins of Congressional power and duties to provide specific legislation for the sole benefit of Native Americans begins with the establishment of the doctrine of discovery.<sup>88</sup> The discovery doctrine states that European nations' "discovery" of America gave them ownership of all Indian lands; those nations eventually transferred title to the United States.<sup>89</sup> In the present interpretation of this doctrine, the United States has the exclusive right to buy or sell Indian lands, while the Indians retain "aboriginal title," the right to use and occupy their lands.<sup>90</sup> As a result, many treaties between tribes and the United States called for the Indians to surrender their ancestral land and to move to reservations, where the land is held in trust by the federal government.<sup>91</sup> In exchange, the government promised to protect the tribes' safety and quality of life. Under the system, tribes are quasi-sovereign wards of the federal government, for which they receive health, education, housing and other social benefits.<sup>92</sup> Similarly, the doctrine of plenary power gives Congress the exclusive right to manage affairs with Indian tribes.<sup>93</sup> However, the Supreme Court has interpreted the plenary power doctrine to also give Congress unlimited power over the tribes themselves.<sup>94</sup> Courts have mitigated

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88. See generally FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW: CHAPTER TWO, THE FORMATIVE YEARS (1789-1871)* (1982).

89. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The "Marshall Trilogy" grounded this doctrine. Its powerful influence in domestic and international law is still felt today. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 672-73 (1990).

90. See generally Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

91. The idea of a trust relationship comes from Chief Justice John Marshall's opinion in *Cherokee Nation*, which said that Indian tribes do not have the status of a foreign nation nor a state of the union, but are "domestic dependent nations" resembling "that of a ward." *Id.* See also 30 U.S. (5 Pet.) at 170. The next year in *Worcester v. Georgia* Marshall referred to tribes as being "under the protection of the United States." 31 U.S. (6 Pet.) at 536. Like any guardianship, the trust relationship implies rights and benefits, obligations and duties for both the trustee and the beneficiary.

92. Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1753 (2003).

93. *United States v. Kagama*, 118 U.S. 375 (1886) (stating that the status of indigenous national governments has been subordinated to that of the federal government).

94. See generally, INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT, THE TWENTY YEAR RECORD (W. Kelly, ed., 1954).

the strength of the plenary power doctrine to some extent through the trust doctrine, which views Congress as the trustee of tribal interests acting for the benefit of Indian peoples.<sup>95</sup> In furtherance of their duty to protect Native American cultural property and human remains and objects, Congress has passed legislation specifically designated to the protection of Indian property.<sup>96</sup> For example, the 1990 adoption of the Native American Graves Protection and Repatriation Act, or NAGPRA, was seen as an important movement by Congress to “formally recognize[e] the Native American culture as unique” and in special need of protection by Congress.<sup>97</sup> NAGPRA was passed as a product of persistent hard work by Native Americans as their demands for justice grew from actual cases to state legislation and then on to federal law with international implications.<sup>98</sup> NAGPRA’s statutory intent is to “correct past abuses, guarantee protection for... the human remains and cultural objects of Native American tribal culture.”<sup>99</sup> The legislation pertains to Native American cultural

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95. Because statutes and treaties are considered equal in legal hierarchy and the more recent of the two takes precedence, a statute may abrogate a treaty with an Indian tribe. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Further, in 1972 in *Affiliated Ute Citizens v. United States*, the Court ruled that Congress even has the power to unilaterally sever the trust relationship. *Affiliated Ute Citizens v. U.S.*, 406 U.S. 128 (1972). Congress has exercised “plenary” authority over Indian affairs in administering the government of the territories since the 1700s. See also *United States v. Washington*, 384 F. Supp. 312, 354-57 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

96. These include the following: the Native American Languages Act of 1990, 25 U.S.C. 2903 (1994 & Supp. 1997) (stating “[i]t is the policy of the United States to . . . (1) preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.”); Native American Graves and Reparation Act, 25 U.S.C. §§ 3001-3013 (2000); 18 U.S.C. §1170 (2000); Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (1990); and the indigenous handicraft certification scheme embodied in the Alaska Silver Hand Program, Alaska Stat. § 45.65.010 (2005). Another frequently cited tool is the Database of Native American Tribal Insignia maintained by the USPTO. See <http://www.uspto.gov/web/offices/tac/tribalfaq.htm> (last visited April 5, 2007).

97. See generally, NAGPRA, 25 U.S.C. §§ 3001-3013 (2000). See also Robert H. McLaughlin, Comment, *The Native American Graves Protection and Repatriation Act: Unresolved Issues Between Material Culture and Legal Definitions*, 3 U. CHI. L. SCH. ROUNDTABLE 767, 786 (1996) (noting that private auction house sales of Native American masks underscore that “apart from its trafficking provisions, NAGPRA does not apply to private citizens, including collectors and dealers of Native American material culture whose businesses require them to view objects as commodities or investments”).

98. Kathleen Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA* (2002) at 47.

99. See Suzanne Milchan, Note, *Whose Rights are These Anyway? A Rethinking of our Society’s Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 162 (2003).

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property which is categorized as “sacred objects, cultural patrimony, human remains [and] associated [and unassociated] funerary objects.”<sup>100</sup>

NAGPRA is not only about repatriating current holdings; ‘it also includes procedures for dealing with future inadvertent discoveries of human remains and relevant artifacts, and it explicitly prohibits the unauthorized trafficking in Native American cultural items and human remains’.<sup>101</sup> Offenders may find themselves paying civil or criminal penalties of \$100,000 to \$250,000 and/or facing prison time of one to five years.<sup>102</sup> Aside from taking inventory of Native American cultural property and human remains, NAGPRA legislation is also important because it has “opened new dialogues concerning the maintenance and further creation of just practices, attitudes and laws vis-à-vis aboriginal human remains, cultural property and knowledge.”<sup>103</sup> While NAGPRA encounters various rudimentary problems such as good-faith compliance and conflict of interest issues with federal branches like the National Park Service, NAGPRA remains compelling legislation because it represents an attempt to provide more protection for Native American cultural property, including sacred sites and entities.<sup>104</sup>

#### B. Cultural Property Falls Outside of the Intellectual Property Legal Shield

In the Zia Pueblo hearings regarding the Sun symbol, Zia governor Amadeo Shije stated that, “Even using Western logic alone without using any kind of compassionate understanding of our culture, the official insignia or symbols of the sovereign tribes should be protected as much as the symbol of insignia of municipalities, states, foreign states and so forth.”<sup>105</sup> Native American cultural property legislation has therefore come under fire by legal scholars as too constricted in its application. For example, NAGPRA has been described as “under-inclusive in its application... [because] [n]on-federal institutions such as art auction houses, dealers and private collectors are not bound by the Act.”<sup>106</sup> Even though NAGPRA is

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100. See NAGPRA, 25 U.S.C. §§ 3001-3013 (2000).

101. Fine-Dare, *supra* note 98, at 125.

102. Fine-Dare, *supra* note 98 at 134.

103. Fine-Dare, *supra* note 98, at 140.

104. Fine-Dare, *supra* note 98, at 166.

105. See Brown, *supra* 1, 81-82 (*quoting* Transcript of USPTO hearing in San Francisco on 12 July 1999, 15-21). See also Sherren Hamdy, Official Marks, [http://www.dww.com/articles/official\\_marks.htm](http://www.dww.com/articles/official_marks.htm) (last visited Feb. 20, 2007).

106. Kristen Ann Mattiske, *Recognition of Indigenous Heritage in the Modern*

useful in the protection of cultural items that are currently held and controlled by federal agencies and museums, it does not cover private institutions that contain Native American religious possessions.<sup>107</sup>

Despite these legal shortcomings, the United States has been described as a leading nation in the development of a comprehensive legislative scheme for the protection of indigenous cultural heritage.<sup>108</sup> With the inclusion of indigenous peoples' rights in authoritative international instruments and a unique trust relationship with federally-recognized Indian tribes, the United States has a duty to continue to consider and implement more protective intellectual property laws for the benefit of Native Americans.<sup>109</sup> While legislative efforts like NAGPRA have facilitated the formal recognition that Indian culture is unique, new approaches to increase the protection of Native American cultural intellectual property must be considered.<sup>110</sup> To avoid the frustrations of reinventing the legislative wheel, altering current paradigms through a blend of European intellectual property standards may be a viable avenue to the expansion of U.S. intellectual property policies.

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*World: U.S. Legal Protection in Light of International Custom*, 27 BROOK J. INT'L LAW 1105, 1131 (2002); see also Kate Morris, *Strategies and Procedures for the Repatriation of Materials from the Private Sector*, (2003) available at <http://www.repatriationfoundation.org/mtc.html> (last visited March 18, 2006).

107. See Milchan, *supra* note 2, at 169 (discussing the constitutionality of NAGPRA and the under-inclusiveness of the statute).

108. See Mattiske, *supra* note 106, at 1107.

109. *Decade*, *supra* note 9. One goal of the Decade was stated as "the promotion and protection of the rights of indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic, and social life, with full respect for their cultural values, languages, traditions and forms of social integration." See *id.* This statement focuses attention on a key point of any discussion regarding indigenous intellectual property rights: the fundamental human right of these groups to have and preserve intellectual and other property rights in accordance with their own laws. A key concept in the discussion of indigenous rights is the right to "self-determination", which among many enumerated rights, includes the right to protection of cultural integrity. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 5, 97 (1996). Self-determination, which at its core means the ability to control one's destiny, has been classified by some nations as customary law, especially after the U.N. Charter gave self-determination a textual soundness. See U.N. Charter art. 1, para 2. Self-determination's continuing evolution into legal structures is evidenced by its adoption into other international instruments after the U.N. Charter. Some noteworthy sources include the International Covenant on Civil and Political Rights (ICCPR) G.A. Res. 2200A (XXI) ¶1, U.N. Doc. A/6316 (March 23, 1976); and the International Covenant on Economic, Social and Cultural Rights. International Covenant on Civil and Political Rights (ICCPR), ). See International Covenant on Economic, Social, & Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) ¶, U.N. Doc. A/6316 (Jan. 3, 1976).

110. See Milchan, *supra* note 2, at 168-170.

## V. Proposed Resolutions

Native American concerns over access to cultural property revolve around four issues: (i) inappropriate use of culturally significant information; (ii) unauthorized exploitative use of this property; (iii) infringement of ownership rights held by Native American communities by those who have gained access to information; and (iv) the interest in actively managing harms that result in misappropriation.<sup>111</sup> Some legal scholars have viewed TKGRF as simple variants of the commonly accepted forms of intellectual property, requiring only the same modes of protection given to other qualified information.<sup>112</sup> However, with the understanding that there are inherently different traits of TKGRF, a more acceptable resolution may involve the adoption of amended forms of modern intellectual property laws through an application of the European “moral rights” approach to the current U.S. intellectual property regime.<sup>113</sup>

### A. Adopting Native American Intellectual Property Legislation

The correlation between cultural property and the Native American identity must be acknowledged in order to implement appropriate legal protections that promote the understanding of cultural property.<sup>114</sup> As noted earlier, in establishing federally-recognized Native American cultural property interests, “Congress may consider legislation similar to the Indian Child Welfare Act<sup>115</sup> which would give tribal governments primary jurisdiction over claims concerning their culturally important work.”<sup>116</sup> Likewise, new legislation could

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111. See Nason, *supra* note 22 at 261. See also Thomas Greaves, *Tribal Rights*, in *Valuing Local Knowledge*, 25-40 (Stephen B. Brush et al eds., 1996).

112. See Kremers, *supra* note 5, at 4-5.

113. Ory Sandel, *Dastar Through European Eyes: Effects of the Public Domain on Transatlantic Trade*, 12 *UCLA ENT. L. REV.* 93, 98 (2004).

114. See Milchan, *supra* note 2, at 159.

115. 25 U.S.C. § 1911 (2007).

116. See Matlon, *supra* note 19 at 247. For a review of the structure of the Indian Child Welfare Act [hereinafter *ICWA*], see *Amending the Indian Child Welfare Act (ICWA): Hearing on S.569 and H.R.1082 Before the S. Indian Affairs Comm.*, 105<sup>th</sup> Cong. (1997) (statements of Thomas L. LeClaire). LeClaire stated, “ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state court proceeding to place an Indian child outside the home, ICWA requires notice to the Indian parent or custodian and the child’s tribe, and imposes a ten-day stay of proceedings . . . ICWA also establishes a right to counsel for indigent parents and a right to examine

be designed in terms comparable to concepts and agents used in developing NAGPRA.<sup>117</sup> For example, the same parties would be involved: federal agencies, federally-recognized tribes, Native Americans, Hawaiians and Alaskans, and repositories including museums, educational institutions, libraries and archives.<sup>118</sup> Additionally, issues of possession and cultural affiliation would be relevant, as would rights of ownership.<sup>119</sup>

Such legislation must begin with acknowledgement of traditional patrimonial intellectual property, which states that in some circumstances the tribe could collectively own property rights.<sup>120</sup> Legislation must also recognize the inherent difference between current copyright laws and property cumulatively created by more than one individual in a family line or by a group of individuals in a social institution.<sup>121</sup> Finally, the laws should expressly address retroactive application to products of knowledge, art and other relevant property.<sup>122</sup> Ultimately, proposals for a sui generis intellectual property law, which take into account diverse interests of Native American peoples, may be the most effective long-term solution for overcoming the pitfalls of the current regime.<sup>123</sup>

#### “Moral Rights” Intellectual Property Model

While European law cannot be simplified into a unitary code, it is possible to refer to “European IP law” as those laws regarding intellectual property required by member states in the European Union’s constituent bodies.<sup>124</sup> A class of rights recognized by the

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records, and it requires state child welfare agencies to make remedial efforts to prevent the breakup of the Indian family.” *Id.* See also *Fisher v. District Court*, 424 U.S. 382 (1976) (holding that tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

117. See Nason, *supra* note 22, at 261 (discussing the issue of Native Americans continuing to seek not only enforcement of existing federal laws relating to their cultural property, like NAGPRA, but the development and implementation of tribal and non-tribal laws and policies which will protect their control over intellectual property).

118. See Milchan, *supra* note 2, at 171.

119. See Milchan, *supra* note 2, at 171.

120. See Nason, *supra* note 22, at 261-62.

121. See Nason, *supra* note 22 at 261.

122. See Nason, *supra* note 22 at 262.

123. See Matlon, *supra* note 19 at 247.

124. THE EUROPEAN CONVENTION, CONV 234 /02, Art. 9 (2002), available at <http://register.consilium.eu.int/pdf/en/02/cv00/00234en2.pdf> (last visited April 22, 2007) (stating that the Council of the European Union, the European Commission, the European Parliament, the Court of Auditors and the Court of Justice comprise the European Union’s constituent bodies).

European Union at large, “moral rights”, also known as the “*droit moral*,” reflect a view that a creator deserves respect for ingenuity and entitlement of inalienable rights to: be recognized as the author of a work; enjoy identification as the author; and to prevent others from modifying, distorting or otherwise interfering with the integrity of that work.<sup>125</sup> These rights vest in the artist independently of the physical object; for example, even if an artist sells a painting, he or she retains moral rights.<sup>126</sup> These moral rights of “divulcation, paternity and integrity...are said to be granted generally because there is a moral component to them; essentially, it is wrong, in and of itself, to take, to misappropriate the work.”<sup>127</sup> Moral rights protect the personal value of a work to its creator, rather than solely the monetary value.<sup>128</sup>

In France, the *droit moral* are perpetual and exist for as long as the work survives in human memory.<sup>129</sup> This right is independent of economic rights and seeks to protect the creator’s reputation.<sup>130</sup> French jurist Claude Colombet described them as “attached to the author of a creative work like the glow is to phosphorus.”<sup>131</sup> The *droit moral* are preserved in the international Berne Convention, the heart of the international copyright regime.<sup>132</sup> Article 6bis of the Convention states that, “[i]ndependently of the author’s economic rights... the author shall have the right to claim authorship of the work and to object to... [any] derogatory action in relation to the said work... [these] rights granted shall, after his death, be maintained.”<sup>133</sup> The right to integrity prohibits any mutilation or distortion that would prejudice the author’s reputation.<sup>134</sup> The right of attribution states that the true author has the right to have his or her name on the

125. See Intellectual Property Guide: Moral Rights, <http://www.caslon.com.au/ipguide18.htm> (last visited April 22, 2007).

126. *Id.*

127. See Milchan, *supra* note 2, at 169-70.

128. See Betsy Rosenblatt, *Moral Rights Basics*, <http://cyber.law.harvard.edu/property/library/moralprimer.html> (last visited April 4, 2006).

129. See Intellectual Property Guide: Moral Rights, <http://www.caslon.com.au/ipguide18.htm> (last visited April 22, 2007).

130. See Sandel, *supra* note 113, at 98 (discussing the rights protected under the moral rights approach to intellectual property).

131. See Caslon, *supra* note 125.

132. Berne Convention for the Protection of Literary and Artistic Works Art. 6Bis(1), July 24, 1971, 828 U.N.T.S. 222 [hereinafter *Berne Convention*], available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) (last visited April 5, 2007).

133. *Id.* at 235.

134. Robert B. Standler, *Moral Rights of Authors in the USA* (1998), <http://www.rbs2.com/moral.htm> (last visited April 5, 2007).

work.<sup>135</sup> The Convention makes the minimum postmortem term for moral rights correlated with the economic rights granted by the signatory state; however, each state is free to safeguard moral rights by the method of its choosing.<sup>136</sup>

Europe jurisdictions are not the only ones that recognize moral rights in intellectual property legislation. In Australia, the Copyright Amendment Act was passed in 2000, which included the rights of attribution and integrity.<sup>137</sup> The right of integrity includes the author's right not to have the work subjected to derogatory treatment; this includes anything resulting in a "material distortion of, the mutilation of, or a material alteration to the work."<sup>138</sup> The period of protection matches current Australian copyright laws, which is the creator's life plus fifty years.<sup>139</sup>

In the United States, moral rights receive narrow protection through the judicial interpretation of several copyright, trademark and defamation laws, as well as the Visual Artists Rights Act of 1990 (VARA).<sup>140</sup> Federal interpretation of moral rights in the United States has presently been limited to the right of an author to prevent revision, alteration or distortion of their work.<sup>141</sup> According to VARA, the author of a visual work may avoid being associated with works that are not her own, as well as prevent defacement of her works.<sup>142</sup>

Prior to VARA, courts also extracted moral rights from various domestic laws, including the "derivative work" provision of the Copyright Act, the doctrine of misappropriation, and the Lanham Act, which involves trademarks and unfair competition.<sup>143</sup> During the passing of the Berne Convention Implementation Act, Congress asserted that the United States is in compliance with the 6bis in the Berne Convention without any changes to its domestic copyright

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135. *Id.*

136. *See* Pub.L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. § 106A (2000)) (ratifying Berne Convention without specific recognition of moral rights). *Id.* Subsequently, a very limited recognition of moral rights was granted. *Id.* Moral rights in the federal statute are limited to "works of visual art." 17 U.S.C. § 106A (2000).

137. *See* Intellectual Property Guide: Moral Rights, <http://www.caslon.com.au/ipguide18.htm> (last visited April 22, 2007).

138. *See* Intellectual Property Guide: Moral Rights, <http://www.caslon.com.au/ipguide18.htm> (last visited April 22, 2007).

139. *See* Intellectual Property Guide: Moral Rights, <http://www.caslon.com.au/ipguide18.htm> (last visited April 22, 2007).

140. *See generally* Visual Artists Rights Act of 1990, 17 USC § 106A (2006).

141. *See* Caslon, *supra* note 125.

142. *See* Caslon, *supra* note 125.

143. *See generally* Gilliam v. Am. Broad. Co., 538 F.2d 14 (2d Cir. 1976).

law.<sup>144</sup> However, 17 U.S.C. § 104(c) expressly prohibits any person in the United States from relying on the protection of any right or interest in the Berne Convention, and when the issue of moral rights have come to federal courts, these issues have been consistently avoided or condemned.<sup>145</sup> Therefore, further legislation is necessary in order to recognize and protect moral rights for intellectual property not protected under VARA.

#### Constitutional Limitations within the “Moral Rights” Model

American intellectual property law embraces the sentiment that the public domain is an essential part of American creative discourse.<sup>146</sup> Moreover, the U.S. Constitution expressly limits the extent to which protection may be afforded for copyright work.<sup>147</sup> Since applying moral rights to U.S. law could potentially interfere with constitutional protections for both the public domain and an individual’s freedom of expression, a modified duration of moral rights interests specifically tailored to indigenous cultural property would be compatible with federal interests.<sup>148</sup> This “modified duration specifically geared to Native American cultural property, under the same justifications employed by legislative mandates such as NAGPRA,” would protect cultural property without defying constitutional limits against perpetuity.<sup>149</sup>

Legislation designed to protect cultural property, like NAGPRA, has already been defended as constitutionally acceptable by several judicial decisions.<sup>150</sup> In *United States v. Corrow*<sup>151</sup> and *United States v. Tidwell*,<sup>152</sup> the Court in each case held that the NAGPRA statute is “not unconstitutionally vague.”<sup>153</sup> Additionally, in *Bonnichsen v. United States Department of Army*,<sup>154</sup> a federal district court held that NAGPRA also did not violate the Fourteenth Amendment right of

144. See S. Rep. No. 100-352 (1988).

145. See *Seshadri v. Kasraian*, 130 F.3d 798, 803 (7<sup>th</sup> Cir. 1997). The court said, “We don’t know what [the remedy] would be under: possibly the law of contracts; in Europe it might be a violation of the author’s ‘droit moral’, the right to the integrity of his work; and there are glimmers of the moral-rights doctrine in contemporary American copyright law.”

146. See Conley, *supra* note 48, at 4.

147. U.S. CONST. art. 1, § 8, cl. 8.

148. See Sandel, *supra* note 113, at 99-100 (discussion of public domain interests).

149. See Milchan, *supra* note 2, at 171.

150. See Milchan, *supra* note 2, at 168-169.

151. 119 F.3d 796 (10<sup>th</sup> Cir. 1997).

152. 191 F.3d 976 (9<sup>th</sup> Cir. 1999).

153. *Id.* at 979.

154. 969 F. Supp. 628 (D.Or. 1997).

equal protection of the law.<sup>155</sup>

### The Fusion of American and European Views of Intellectual Property Law

Concerns over the misappropriation of cultural property have brought about new efforts for resolution, including international agreements and national agency efforts to reclaim such objects.<sup>156</sup> Once it is established that cultural property is a principal element of the development of Native American intellectual property community rights, the next issue is to determine whether current intellectual property laws can be modified to accommodate such rights.

As mentioned, legal scholars have suggested that a new way to reconceptualize Native American cultural property is to combine the American model of intellectual property law as something protecting economic motivations with the European view of natural and moral rights.<sup>157</sup> The general principles supporting moral and natural rights are not only applied in the area of copyright, but in all facets of intellectual property law.<sup>158</sup> The moral rights theory would protect the personality of the author(s), and perhaps more significantly, could justify an extension in the protection given to cultural property due to the “community’s interest in the work, [rather than] the reputation of the artist.”<sup>159</sup>

Lucy M. Morgan suggests a compounded framework for cultural property which would require that “regenerated folk-life expressions... falling within the copyright category of ‘derived work’ at the end of a statutorily defined time period, such as one hundred years, automatically registered to a ‘new’ author... [This would create] several subsequent generations of a regenerated folk community.”<sup>160</sup> Under this method, presumably it would be the duty

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155. See Milchan, *supra* note 2, at 169.

156. Such concerns emerged on a global scale after World War II, when international agencies worked to reclaim Jewish art that had been seized by the Nazis. These efforts include the 1978 formation of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin and its Restitution in Case of Illicit Appropriation (*available at* [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2634&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2634&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited April 22, 2007)).

157. See Milchan, *supra* note 2, at 169.

158. See Milchan, *supra* note 2, at 169.

159. See Milchan, *supra* note 2, at 170, quoting Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 11 (1997).

160. See Milchan, *supra* note 2, at 171, citing Lucy M. Moran, *Intellectual*

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of the copyright holders within the Indian community to ensure that others do not misuse their property.<sup>161</sup>

A moral rights-infused structure would ensure that tribes have access to the protections of intellectual property rights and would enable Indian peoples to extract their work from the public arena in the event that their works are misused.<sup>162</sup> Such amendments to current federal laws would also advance cultural preservation initiatives by giving Indian peoples greater leverage to shape their cultural destinies by controlling the use of their sacred items.<sup>163</sup> Regardless of whether such a proposal comes to fruition, tribal governments should start taking affirmative steps to create and enforce policies for the conduct of research within their communities in order to ensure Native American control over *future* requests for the access to indigenous intellectual property.<sup>164</sup>

## VI. Conclusion

In order to effectuate expansive legislation to protect Native American cultural property, society must respect the concept of cultural property and its significance to Native American societies. This struggle for acknowledgement and respect towards distinct cultural differences between the dominant mainstream and indigenous cultures has moved from the battlefields into the courtrooms, corporate boardrooms, and classrooms of the land we share. It is important to enact intellectual property legislation that protects cultural property to permit Native Americans to maintain or regain control over sacred artifacts, symbols and stories which sustain their Indian identity and promote mutual respect of culture. Protection of these interests will ensure us that Shunka Sapa may continue to do his job and the woman of the Badlands will forever piece together her robe.

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*Property Law Protection for Traditional and Sacred "Folklife Expressions"*, 6 U. Balt. Intell. Prop. L.J. 99, 102 (1998).

161. See Milchan, *supra* note 2, at 171.

162. See Milchan, *supra* note 2, at 171.

163. See Nason, *supra* note 22, at 262.

164. See Matlon, *supra* note 19, at 247.