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WHOSE RIGHTS ARE THESE ANYWAY? — A RETHINKING OF OUR SOCIETY'S INTELLECTUAL PROPERTY LAWS IN ORDER TO BETTER PROTECT NATIVE AMERICAN RELIGIOUS PROPERTY

Suzanne Milchan*

I. Overview of Topic

In 1999, outrage among the Zia Pueblo peoples within New Mexico escalated over pervasive and unauthorized usage of their religious symbol, an image of a red circle and lines extending outward in four different directions — the Zia Sun.¹ This sacred symbol appeared on “snacks, [shirts], buildings and businesses,” and, what would be considered sacrilege to the most devout Christian, public toilets.² The appropriation of the Zia Sun appeared to be permissible because the image appeared on the flag of New Mexico.

In 1994, the Church of Scientology sued a group of former adherents who stole coveted scriptures used by the Church to bring in followers.³ Those members of the Church who gave of themselves financially would gain access to the scriptures. The Church sued under trade secret protection, alleging that the scriptures were valid intellectual property used for proprietary interests. Citing *Religious Technology Center v. Scott*, the United States Court of Appeals for the Ninth Circuit stated that the Church must prove some “actual economic advantage over competitors” as well as the existence of the other trade secret elements.⁴ On remand, the federal district court did not arrive at the issue of whether protectable trade secrets even existed in this particular case.⁵

There is manifest unfairness in the resolution of both cases. On one side, a resolution of the Church of Scientology case allows a broad application of

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

2. Julie Cart, *National Perspective American Album: A Culture Clash of Symbolism, Commercialism*, L.A. TIMES, July 15, 1999, at A5, available at 1999 WL 2177725.

3. *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306 (9th Cir. 1989).

4. *Church of Scientology Int'l v. Fishman*, No. 91 Civ. 6426, 1994 WL 467999, at 3 (9th Cir. Aug. 30, 1994).

5. *Id.*

intellectual property to organized religious expression. However, this application arguably rewards questionable religious practices in which the religious development of the Church's members becomes inseparable from the financial interests of the church. In the situation involving the Zia Sun, the interested parties seek protection for their most fundamental and sacred symbol; though the protection for other like symbols has increased over the last couple of years, the policies implemented have met with controversy.⁶

Some legal scholars offer criticisms concerning the application of intellectual property laws to protect indigenous peoples' cultural property, and in particular, religious property, opting instead, for a "traditional resource rights system."⁷ This note explores the numerous problems underlying the misappropriation of Native American symbols, particularly religious art and symbols. In reference to these problems, this note further argues that in order to provide some legal defense to these symbols, it is necessary to look into the protections offered under three intellectual property schemes which could provide the appropriate protection for Native American religious emblems and examine the discussions regarding these doctrines. This note first discusses the relationship between Native American peoples and Native American cultural and religious property as signifiers of cultural identity and connectedness between the people and the land. Second, this note provides a comment on current United States intellectual property policy and the differences between Western and non-Western conceptions of United States intellectual property policy. Third, and finally, this note discusses the relevant intellectual property doctrines and whether any of these doctrines should be rethought if they are to be applied to Indian religious art, rituals or symbols. It is necessary to support a combination of the utilitarian, Western model of intellectual property theory and the European intellectual property model, which focuses on morality rights to protect both the author's use of the

6. Christine L. Satory & Joey Doty, *Smoked Signals*, PRINT: AM. GRAPHIC DESIGN MAG., Jan. 1, 2000, available at 2000 WL 17669714 (discussing the graphic design trade's frustration with the Patent and Trademark Office's policing of potential infringement of Native American religious and cultural art through submissions for trademark protection).

7. DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIANS* 80, 92 (1996). See generally Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990). Yen writes that the inclusion of natural law into our copyright regimes will correct the already present shortcomings inherent in our copyright regime such as our regime's current misplaced reliance on economic incentives. *Id.* at 557. Professor Yen goes on to state that a regime supporting an author's labor must take into consideration a number of factors, including the author's culture. *Id.*

thing and the author herself. Furthermore, it is necessary to develop a system that accounts for the differentials between our society and the structure and system of Native American tribes and development of cultural symbols, illuminating issues that our current system of intellectual property laws cannot sufficiently safeguard.

II. The Relationship Between Native American Tribes and Native American Intellectual Property

Native American religious intellectual property faces problems with protection from the Western intellectual property regimes. Our society's continued misuse, or misappropriation of Native American culture constitutes a cultural "poaching" of indigenous culture or property.⁸ The notion of existence for indigenous cultures possesses an intimate relationship with the land, their spiritual existence, and their identity as a people.⁹ The art, and particularly, the stories, of indigenous peoples — much of which is religious in nature — represent "the bedrock of cultural survival" for Native Americans because they contain the philosophical core of tribal cultures, including the norms and values that structure tribal world views.¹⁰ We preserve intellectual property of the Native Americans; thus, we preserve their culture and existence.

A. The Terminology of Native American Intellectual Property Discourse

Any discussion concerning the misappropriation of cultural and religious property should start by defining the terminology most commonly associated with this discourse. Many legal scholars have used the definition of cultural property as a starting point in which to place into context a discussion of Native American's rights in property.¹¹ These definitions fall within a culturalist trap; it emphasizes the language and meanings of one culture and does not contemplate the language and meanings inherent in another culture.¹²

8. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 11 (1997).

9. *Id.*

10. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 203 (2001).

11. See generally Richard Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995-96); 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).

12. Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S.*

James D. Nason discusses the importance in developing Native American intellectual property legislation, characterizing the terminology 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."¹³ Nason continues his discussion by further emphasizing the correlation between cultural property and Native American identity: "[t]his notion that a people's identity as a sovereign group could be represented by tangible cultural property, and demoralized or destroyed by the removal of such property, continues to be an important ideological and property concept today."¹⁴ A more simplified conception of cultural property might be characterized as "historical, archaeological, and ethnographical objects, works of art, and architecture that embody a culture."¹⁵ Once we determine that cultural property is the focus of the discussion centered on the development of intellectual property community rights for Native Americans, the discussion should turn to the issue of Native American religious property and whether Western ideologies concerning copyrights can accommodate them.

Certainly, our society has already legislated measures meant, in substantial part, to offer protection for Native Americans. The religious beliefs of the Native Americans are intimately bound together with the ideology 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, and with the spirit world."¹⁶ The relationship between the geography of their lands and their religious beliefs is fundamental to Native American religious worship, exemplified by specific religious sites used in ceremonies and other religious practices.¹⁷ The correlation between nature and religion for Native Americans is classic; "[a]mong indigenous peoples who choose to continue close physical, social, and emotional relationships

Legal Protection in Light of International Custom, 27 BROOK. J. INT'L L. 1105, 1109 (2002).

13. Nason, *supra*, note 11, at 256.

14. *Id.*

15. Guest, *supra* note 11, at 114.

16. ERICA-IRENE DAES, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE, ¶ 5, U.N. Sales No. E.97.XIV.3 (1997).

17. Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 376 (1993).

with their ancestral landscapes, the land creates a universe of shared meanings.”¹⁸

In addition to the development of these concepts, it becomes increasingly clear that further development of the term “appropriation” is needed; it is within the territory of this word that the entire struggle between the Western ideology and Native American property exists. Rebecca Tsosie uses Lenore Keeshig-Tobias’s definition of cultural appropriation in her essay: it constitutes a “taking, from a culture that is not one’s own, intellectual property, cultural expressions and artifacts, history and ways of knowledge.”¹⁹ The taking does not have to refer simply to one type of property; tangible or intangible property each have the potential to be appropriated by another culture.²⁰ Mainstream society has helped itself to Native American culture for entertainment and practical matters: our appropriation of indigenous medicines, school and sport club’s mascots and cultural and religious symbols reflects the influence that Native Americans have had on our entertainment and benefit. Their appropriation further exemplifies the history percolating beneath the current ideology — that the Native Americans “were to be ‘civilized,’ assimilated, and acculturated into American society.”²¹ Thus, mainstream’s exertion of power over the indigenous cultures of North America typify the struggle between both cultures.²² Rebecca Tsosie acknowledges that the misappropriation of Native American culture by society is particularly harmful to the preservation of Native American culture.²³ Although Tsosie’s article focuses on the development of native sovereignty, it is not wholly outside its context to apply the ideas proffered to the relationship between our intellectual property laws and Native American culture and religion. “[T]he conflicts between Native people and Europeans have always had a cultural as well as a political dimension.”²⁴ Therefore, to take control over a people’s things and property is, in effect, to have control over themselves.

18. Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. THOMAS L. REV. 127, 129 (2000).

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

20. *Id.*

21. Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1, 1 (2001).

22. See Tsosie, *supra* note 19, at 299-300.

23. See generally Tsosie, *supra* note 19.

24. *Id.* at 306.

B. Native Americans Religious Property as Cultural Property

The struggle of maintenance of the Native American identity is intimately linked to the property owned by Native Americans, their medicines, their religious arts and symbols, their stories and music.²⁵ Despite attempts by the United States to legislate protection his relationship between cultural identity and property is foreign to Western societies:

[M]any non-Indian people treat culture as an abstract concept, something that can be easily separated from everyday life. [N]on-Indians consider tribal sovereignty as yet another feature of America's "multicultural tradition." That is, they tolerate the distinctive status of Indian nations up to the point that this would appear to give them rights in excess of those enjoyed by other citizens, . . . [and] essentially holds all citizens to the same set of constitutional freedoms and protections.²⁶

Once this phenomenon takes place, it becomes harder to justify arguments supporting an increase in rights for one specific group, because our society unnecessarily conflates ourselves and our rights with those needed by different peoples.²⁷ Thus, if our society is to rectify the current intellectual property system to protect the culture of Native Americans, it will be necessary to broaden the scope of our law; only in this manner can they effectively protect Native American religious property.

III. A Critique of Current U.S. Intellectual Property Laws and Policy from the Non-Western Perspective

Intellectual property laws demonstrate the importance our society places on the rights of the author or creator to use their intellectual property within the proper legal framework. Typically, our current intellectual property laws

25. See generally Gelvina Rodriguez Stevenson, *Trade Secrets: The Secret to Protecting Indigenous Ethnobiological (Medicinal) Knowledge*, 32 N.Y.U.J. INT'L L. & POL. 1119 (2000) (discussing the need for trade secret protection for indigenous peoples' ethnobiological medicines); see also Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?*, 72 U. COLO. L. REV. 415 (2001) (discussing the ability of trademark laws to prevent mainstream society's use of disparaging words toward Native Americans for entertainment value). Blankenship cites *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999), which held that evidence presented by the petitioners demonstrated by a preponderance of the evidence, that the word "redskin(s)" could be disparaging toward those of American Indian decent.

26. Tsosie, *supra* note 19, at 309.

27. *Id.*

protect those things produced from the ideas of individuals.²⁸ Authors and inventors must be aware of the duration of protection for their creations; furthermore, those same authors and creators must also be aware that intellectual property laws impart a limited monopoly upon them.²⁹ This Western-oriented idea of owning a monopoly in a song, in a symbol, in any religious property, is antithetical to Native American culture and to their conception of what property means to them and their existence.³⁰ Indeed, our own idealization of a democracy as the model sociopolitical structure would not harmonize with monopolies, and particularly, monopolies on ideas.³¹ Yet, our society holds dear the “dominant view of intellectual property rights . . . economic incentive theory.”³² The different areas of intellectual property protection imparts a limited monopoly upon the author and creator, thus maximizing their protection of the economic investment of the work.³³ Such protection allows “[t]he 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”³⁴ In his article, “Square Pegs and Round Holes,” David Jordan attempts to resolve the conflict between domestic intellectual property laws and Native American conceptions of cultural property.³⁵ Jordan explains the struggle of the Chilkat Indians for their “Whale House” artifacts, valued among the tribe for their cultural value rather than their economic value.³⁶ His article lends truth to the notion that “[m]ost intellectual property law models are based on Western, capitalist philosophy, and indeed appear to be developed with such a world view in mind.”³⁷ Hence, our society would

28. DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY LAW 2 (1994).

29. KINNEY & LANGE, P.A., INTELLECTUAL PROPERTY LAW FOR BUSINESS LAWYERS § 1.1, at 1-4 (1996).

30. See generally Barsh, *supra* note 18 (discussing the meanings and spirit of Native American religion); David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?*, 25 AM. INDIAN L. REV. 93 (2000-01) (discussing the inability of U.S. copyright laws to offer substantial protection for Native American intellectual and cultural property).

31. KINNEY & LANGE, P.A., *supra* note 29, at 1.

32. *Id.* at 4.

33. *Id.*

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

35. Jordan, *supra* note 30.

36. *Id.* at 95.

37. Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 246 (1998).

expect some sort of economic compensation for the author or inventor of these devices, a reward system that holds no inherent value to Native American cultures.³⁸ Although the United State's copyright doctrines are structured to apply in different ways to different products and processes, they can be boiled down to their most basic foundation: protecting the economic incentives of the authors and inventors to create, write and produce.³⁹ As a result, contemporary intellectual property laws function within a free market paradigm, presenting many inadequacies with application to cultural and religious symbols.

IV. Relevant Doctrines in Intellectual Property and Rethinking the Current Paradigms

The increasing importance of intellectual property in our expanding global market economy has been a much-discussed issue between legal scholars and law review articles.⁴⁰ However, little U.S. policy and legislation enacted for the benefit of Native American cultural and religious property has been effective in reaching their objectives.⁴¹ Before discussing contemporary intellectual property theories and their relationship to Native American cultural and religious property, it is important to consider the applicable doctrines of intellectual property law. Each area of intellectual property — trademark, copyright, and trade secret — can be seen as a separate and distinct subject, potentially applicable to any and all categories of Native American cultural and religious property.

A. Western Intellectual Property Doctrines

Trademark law is normally associated with images of Western commercialism, notably your Coca-Cola can and Mickey Mouse. However, this area of intellectual property has recently joined the discourse focusing on Native American intellectual property rights.⁴² Trademark law offers protection of 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.”⁴³ Certainly, one could draw

38. Jordan, *supra* note 30, at 97.

39. See generally Long, *supra* note 37.

40. See generally Stevenson, *supra* note 25.

41. See Jordan, *supra* note 30, at 114.

42. See generally Blankenship, *supra* note 25.

43. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE

between the Zia Pueblo peoples and Suzan Shown Harjo and the Native Americans who brought the Washington Redskins in front of Justice Walters in 1999.⁴⁴ In the latter case, the administrative trademark judge found that: “[the] petitioners . . . clearly established . . . the word ‘redskin(s),’ as it appears in respondent’s marks in those registrations and as used in connection with the identified services, may disparage Native Americans, as perceived by a substantial composite of Native Americans.”⁴⁵

Similar analysis might be applied to the problem that the Zia Pueblo people faced in 1999.⁴⁶ In regard to the former situation, the Zia Sun is commonly used throughout New Mexico as a symbolic representation of the state, and has been seen on practically everything.⁴⁷ Indeed, the Zia Sun permeated mainstream New Mexican culture: “Zia, the name given the sun symbol found on the state flag and a staggering variety of snacks, T-shirts, buildings and businesses. Across the state the Zia name and symbol are affixed to companies offering pest control, plumbing, window cleaning and security services.”⁴⁸

The situation in both cases is similar; a Native American symbol is appropriated in some manner to entertain and engage in commercial transactions — i.e., football games, t-shirts, or food products.⁴⁹ The connotation arising from the association between our society’s consumptive needs and these representations of Native American culture is that Native American culture can and will be reduced to the lowest denomination possible within our own culture.⁵⁰

Backlash against Patent and Trademark Office’s standards of protection for Native American religious and cultural property arose in light of Harjo and the Zia Sun situation. The controversy surrounds the office’s current methodology of protection of Indian religious art and symbols.⁵¹ The controversy encompasses certain trade specialists in the field of graphic and multimedia designs.⁵² These specialists and experts are concerned with

566 (2000).

44. Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999), *reprinted in* MERGES ET AL., *supra* note 43, at 642-48.

45. MERGES ET AL., *supra* note 43, at 647.

46. Cart, *supra* note 2.

47. *Id.*

48. *Id.*

49. *Id.*; see Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999)

50. Cart, *supra* note 2.

51. See generally Satory & Doty, *supra* note 6.

52. *Id.*

overbroad protection of anything that is perceptively related to Indian religion.⁵³ However, in supporting this agenda, the arguments of these critics fall into a reductionist trap; rather than focusing on the mistakes of the Patent and Trademark Office in policing these new policies, the criticisms focus on the tribes themselves and their attorneys.⁵⁴ “There are many reasons not to change the Patent and Trademark laws. Consider the precedent that would be set for non-Indian cultures and ethnic groups seeking the same extraordinary trademark protection,” the article states.⁵⁵ Such a statement ignores the foundation behind the push for extended protection of Native American religious property; rather, the graphic design trade advocates represent those perceptions traditionally protected by our current intellectual property laws.⁵⁶

Western regimes of copyright law protect the author’s monopoly from his or her works, or works created by a collective process.⁵⁷ The works protected under such a scheme require only originality and fixation of the work within a tangible medium.⁵⁸ The problems created by the potential applications of the statutory definition of copyrightable works to Native American religious or cultural works is two-fold. First, originality is seen as “*independent creation of a work featuring a modicum of creativity*.”⁵⁹ Second, the Western tradition of author is generally understood to mean an individual working in his or her own capacity, or other alternative such as seen in “joint works, works made for hire, collective works [seen in compilations, collections, or journals] and the transfer of rights.”⁶⁰ In a broader sense, copyright law provides a legal vehicle to “determine[] ownership of creative content and thus grants copyright owners authority to regulate how and under what terms protected information is sold, bought, used, and otherwise transmitted.”⁶¹ Neither of these perspectives properly conforms neatly to the Native American conception of religious property; indeed, “[t]he American copyright system stumbles as it attempts to protect “group” rights that lack either identification

53. *Id.*

54. *Id.*

55. *Id.*

56. See generally Jordan, *supra* note 30.

57. MERGES ET AL., *supra* note 43, at 348.

58. 17 U.S.C. § 102 (2000).

59. MERGES ET AL., *supra* note 43, at 354.

60. Jordan, *supra* note 30, at 98.

61. Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117, 118-19 (1999).

of any actual original author, or alternatively, the requisite intent to enter into . . . joint or collective works.⁶²

Conflicts arise between what those copyright laws protect and how Native American cultural and religious expressions are created.⁶³ Western copyright paradigms assume a single “author” of a work, an author that is identifiable and “who has generated something original, distinctive, or nonobvious.”⁶⁴ Furthermore, the scope of our current copyright laws are limited solely to the author’s lifetime; this factor is problematic because many times, the author of cultural religious art, symbols, stories, or songs is unknown or cannot be limited to a single identity.⁶⁵ Finally, the Western perception of copyrightable works translates into limited monopolies enjoyed by the author or authors of the works.⁶⁶ A tremendous portion of the importance that intellectual property laws would hold for Native American groups rests in their ability to protect and preserve “the expressions of their cultural identity and the embodiments of their indigenous heritage.”⁶⁷ The major issue facing the potential for copyright laws to accommodate the works of indigenous peoples is the ability of the laws to compensate for these substantial differences.

Though it is an area statutorily created to protect the economic interests of groups, trade secret law offers some usefulness as a safeguard to protect certain aspects of Native American cultural property. Trade secret is typically designed to protect works that must be kept a secret and that have some economic value.⁶⁸ The statutory definition of trade secret follows below:

. . . information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁶⁹

62. Jordan, *supra* note 30, at 99.

63. Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred “Folklife Expressions”*, 6 U. BALT. INTEL. PROP. L.J. 99, 102 (1998).

64. *Id.*

65. *Id.* at 103.

66. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

67. Guest, *supra* note 11, at 113.

68. MERGES ET AL., *supra* note 43, at 24-25.

69. UNIF. TRADE SECRETS ACT § 3426.1 (1979).

Trade secrets have been widely discussed as providing viable means to protect the ethnobiological medicines and remedies of indigenous peoples.⁷⁰ Indeed, the doctrine may also be considered when conceptualizing the struggle between the case law involving the Church of Scientology, illustrated above in "Overview of Topic," and the situation involving the Zia Pueblo peoples and the Zia Sun.

B. Rethinking the Current Paradigms

New approaches to instrument the protection of Native American religious property should be developed, or at least contemplated, to facilitate the protection of Indian religious property. Within the last half of the century, the United States has emerged as the leading nation "to develop a comprehensive legislative scheme for the protection of the cultural heritage of [this country's] indigenous peoples."⁷¹

While there is some substantial necessity to rework current intellectual property schemes in order to accommodate protection of Native American religious art and symbols, the Native American Graves Protection and Repatriation Act, or NAGPRA,⁷² was seen as the integral step taken in 1990 by Congress to "formally recogniz[e] the Native American culture as unique," and particularly in need of special protection by the laws of the United States government.⁷³ The purpose behind the statute was "to correct past abuses, guarantee protection for, the human remains and cultural objects of Native American tribal culture."⁷⁴ The statute applies to cultural items of Native American peoples, which it defines as "human remains", "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony."⁷⁵

Three federal court cases have arisen under NAGPRA, with the parties claiming that NAGPRA stood in violation of the Constitution of the United

70. See generally Stevenson, *supra* note 25 (discussing trade secret protection in relation to indigenous ethnobiological medicines).

71. Mattiske, *supra* note 12, at 1107.

72. 25 U.S.C. §§ 3001-3013 (2000); 18 U.S.C. § 1170 (2000).

73. Mattiske, *supra* note 12, at 1128.

74. Deborah F. Buckman, Annotation, *Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act* (25 U.S.C.A. §§ 3001-3013 and 18 U.S.C.A. § 1170), 173 A.L.R. FED. 585 (2001).

75. 25 U.S.C. § 3001 (2000).

States.⁷⁶ *United States v. Tidwell*⁷⁷ and *United States v. Corrow*⁷⁸ both held the statute is “not unconstitutionally void for vagueness.”⁷⁹ Furthermore, NAGPRA has not been found yet to violate the Fourteenth Amendment “right of equal protection of the law”⁸⁰ in the case of *Bonnichsen v. United States Department of Army*.⁸¹

However, the law has come under criticism by some legal scholars as being “underinclusive in its application . . . [because] [n]on-federal institutions such as art auction houses, dealers and private collectors are not bound by the Act.”⁸² Thus, while the statute is effective as a protective measure for “culturally significant” items that “are currently held and controlled by federal agencies and museums,” it does not, and possibly cannot, cover all those institutions — auctions, dealers, and collectors that contain some form of Native American religious property.⁸³

A new way to re-conceptualize Native American religious property is by combining the United States’ view of intellectual property law as something granting monopolies and protecting economic incentives with the European model of natural, or moral, rights.⁸⁴ Though the terminology typically refers to copyrightable works, the general principals supporting moral/natural rights could potentially be applied to all areas of intellectual property, becoming particularly relevant when discussing Native American religious property.⁸⁵ Moral rights are generally composed of divulgation,⁸⁶ paternity,⁸⁷ and

76. Buckman, *supra* note 74, § 3.

77. 191 F.3d 976 (9th Cir. 1999).

78. 119 F.3d 796 (10th Cir. 1997).

79. Buckman, *supra* note 74, § 3.

80. *Id.* § 4.

81. 969 F. Supp. 628 (D. Or. 1997).

82. Matiske, *supra* note 12, at 1131; *see also* Kate Morris, *Strategies and Procedures for the Repatriation of Materials from the Private Sector*, <http://www.repatriationfoundation.org/strat.html> (accessed Jan. 20, 2003).

83. Matiske, *supra* note 12, at 1129-30.

84. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 12 (2002). This text discusses natural, or moral rights, in regard to copyright law. For a general discussion of the moral rights doctrine, *see* Yen, *supra* note 7.

85. Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 846 (1999). Kuruk discusses “the proposal in Australia [] to draw a distinction between the customary user [] and traditional owner, [] of Aboriginal folklore as a way of tackling the tensions between the concepts of ownership inherent in modern intellectual property laws and traditional rights.” *Id.*

86. Divulgation allows an author to “release work from [the] private sphere and to expose it to the public.” *Id.* The idea of moral rights is not necessarily foreign to this country.

integrity.⁸⁸ These rights 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.⁸⁹ The rights within the moral right construct “inhere in and protect the personality of the author [or authors].”⁹⁰ Furthermore, while traditional modes of copyright law offer only limited duration of protection,⁹¹ the application of a moral rights system to indigenous peoples’ religious property would require an extension of the term for protection because “the community’s interest in the work, [rather than] the reputation of the artist with which they are concerned.”⁹²

Frederick Hart, who won renown for his “Three Soldiers” bronze statute displayed at the Vietnam Veterans Memorial, spent a painstaking thirteen years designing the “Ex Nihilo, the Creation of Mankind out of nothing, as Narrated in the Book of Genesis,” now on display at the National Cathedral in Washington D.C. (After completing the sculpture, he converted to Catholicism.) Warner Bros. spent a couple of days desecrating the message behind the sculpture, using it as an erotic depiction of hell featured in the Devil’s apartment in “Devil’s Advocate.” Due to the problems that this depiction created for the artist and the cathedral, a judge ordered a two-day delay on the release of “Devil’s Advocate” to videotape. Four days later, a settlement agreement was reached between the parties wherein Warner Bros. would attach disclaimers on the videocassettes stating there was no relationship or endorsement between Hart and the cathedral to use the sculpture, and that the studio agreed to make changes to certain portions of the film to eliminate any perceived confusion in future distribution of the movie. The studio was also required to edit approximately twenty minutes of the film, in which the sculpture would be visible to the audience. The studio digitally removed the images of the people from the sculpture on the final cable and video versions. This represents, in particular, one instance where a party confessed to their wrongdoing, where it exceeded infringement and it went more toward the author’s integrity and the sculpture’s integrity. *Copyright Casebook — “Devil’s Advocate” — Warner Bros. and Frederick Hart*, <http://www.benedict.com/visual/devil/devil.asp> (last visited Jan. 20, 2003).

87. Paternity, under a moral right structure, “invests in the author the right to claim authorship of the work.” Jordan, *supra* note 30, at 112.

88. Integrity “allows an author ‘to object to any distortion, mutilation of, or other derogatory action in relation to, the . . . work which would be prejudicial to honor or reputation.’” Jordan, *supra* note 30, at 112 (citing Paris Text to the Berne Convention for the Protection of Literary and Artistic Works art. 6 bis., S. Treaty Doc. No. 27, 99th Cong. 37 (1986)).

89. COHEN ET AL., *supra* note 84, at 13.

90. Farley, *supra* note 8, at 48.

91. The duration for a copyright is the author’s lifetime plus seventy years; works-for-hire have a ninety-five-year minimum after publication of the work, or 120 years after the creation of the work. Trade secret enjoys a period of protection until it is publicly disclosed. Patents enjoy a protection period of twenty-five years from filing, with possible extensions of up to five years for ethnobiological medicines. Trademarks/dress have a perpetual period of protection, so long as the mark, symbol, etc. does not fall into disuse. MERGES ET AL., *supra* note 43, at 25.

92. Farley, *supra* note 8, at 49.

However, the Constitution of the United States expressly limits the extent to which protection may be afforded protection for copyright work extends only for “limited [t]imes”⁹³ and because, in the traditional sense, moral rights protect from the mutilation or destruction of the underlying work, an infusion of moral rights into the intellectual property infrastructure of the United States interferes with the constitutional protections for both the public domain and an individual’s freedom of expression. Thus, it would be reasonable for our system of intellectual property laws to employ a modified duration specifically geared to Native American religious property, under the same justifications employed by legislative mandates such as NAGPRA.⁹⁴ For copyrightable, even patentable, religious property, Lucy M. Moran suggests that for “regenerated folklife expressions as falling within the copyright category of ‘derived work’ at the end of a statutorily defined time period, such as 100 years, automatically registered to a ‘new’ author, [which are] the several subsequent generations of a regenerated folk community.”⁹⁵ Religious property that might be able to enjoy trademark protection without fear of violating the constitutional limits against perpetuity would, presumably, need not worry about modifications of the statutory time limits as long as there was careful monitoring among the indigenous community to ensure the mark, sign, or word does not fall into misuse or disuse.⁹⁶ Finally, a moral rights infrastructure would help ensure that tribes gain access to some degree of intellectual property rights, as well as allow tribes themselves, the right to preserve the integrity of their works, such as the sculptor Frederick Hart was allowed to do, by giving them the opportunity to withdraw their work from the public sphere if their works are being abused.⁹⁷

V. Conclusion

If we ever hope that our intellectual property laws are changed to meet the needs for protecting Native American religious property, society must first come to some understanding of the cultural differences between the dominant culture and the indigenous cultures that share in our land. Currently, it is difficult for our society to fathom the intimacy with which our identities can be linked to intellectual property. As we enter a new century with a new hope of reaching a multicultural understanding with different peoples of different

93. U.S. CONST. art. 1, § 8, cl. 8.

94. Moran, *supra* note 63, at 115.

95. *Id.*

96. MERGES ET AL., *supra* note 43, at 559.

97. Jordan, *supra* note 30, at 112.

ethnicities, we should only hope that our minds can understand the differences between the cultures. Only then can society, and our laws, truly change.