Square Pegs and Round Holes: Why Native American Economic and Cultural Policies and United States Intellectual Property Law Don't Fit

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We have now had 200 years of experience with the Age of Reason, and as reasonable people we ought to recognize that reason has its limitations. The time is ripe for developing a conceptual framework based on our fallibility. Where reason has failed, fallibility may yet succeed.

— George Soros

I. Introduction

Native American tribes and artisans have become world renowned for unique and high quality cultural "art." However, the pilfering and plundering of Native Americans and their environment that began 500 years ago continues today as Native Americans are robbed of their culture. Native American cultural and spiritual works, created by tribal artisans that learn techniques and designs passed down for generations, are exploited in the open market, duplicated by minimum wage workers or machines, traded at bargain basement prices created by the saturation of the market with cheap knock-offs, and dishonored and defaced by buyers and sellers that lack the proper respect that should be afforded to culture with such a deep heritage and tumultuous history.

All of this occurs in an era of self-determination. Native American tribes are encouraged, if not mandated, to take up the economic and cultural vitality of their groups internally. This charge is fueled by a domestic policy towards Native American tribes that is less about entitlements and integration and more about self-sustainment and sovereign control.

Intellectual property law, which recognizes the intellectual value of expression and creation apart from the tangible value of the medium itself, is a product of art and innovation. However, United States intellectual property law, because of its strong personal property and capitalist roots, is ill-equipped to address the unique cultural interests of Native American tribes. Intellectual property protection can act as a vehicle not only to
further Native American policies of self-determination by providing economic incentive to engage in the production of "art," but also to strengthen protection of the cultural assets of Native American tribes.

This article concludes, in Part II, that domestic intellectual property policy lacks respect for the moral and economic rights of artists, limits protection for authors as a market growth incentive, and values copyright as a welfare tax on the public instead of a private right of the author, and therefore limits the utility of intellectual property protection for Native American tribes. In Part III, this article illustrates that, despite international support for moral rights of indigenous groups, the United States has been lackluster in encouraging additional protection in the area of intellectual property towards Native American tribes. In Part IV, this article attempts to provide a foundation for legislation that will provide Native American tribes not only with the ability to preserve their cultural heritage, but to also develop an avenue for economic development for which Native American tribes are uniquely suited.

II. The Shortcomings of U.S. Intellectual Property Law

A. Inventory of Native American Intellectual Assets

The intellectual wealth of Native American tribes and its members is perhaps the greatest untapped, undervalued, and misappropriated asset retained by the Native American community. The intellectual wealth of tribes is an aggregation of tribal innovation and expression. The value of that innovation and expression is skewed by diametrically opposed societal values between Native American tribal communities and contemporary America. To the American capitalist, Native American expression can be valued based on its beauty, intrigue or history. To Native Americans, that expression exhibits spiritual and cultural value. As a result, an inventory of intellectual wealth of expression becomes a severed approach.

An inventory of the intellectual wealth of Native American expression would be exhaustive, especially regarding the different valuing schemes of tribal communities and contemporary Americans. However, to advocate for maximizing the utility of Native American intellectual assets, it is necessary to illustrate the scope of intellectual playing fields available to Native American tribes.

A survey of American museums would most certainly turn up evidence of Native American intellectual wealth. Museums have been acquiring Native American objects for display and resale since the 19th century. In fact, one commentator noted that by the end of the 19th century there was

3. See id.
"more Kwakiutl material in Milwaukee than in Mamalillikulla, more Salish pieces in Cambridge than in Comox . . . the city of Washington contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia itself." Not surprisingly, these museums probably contained carvings and paintings, beadwork and pottery, clothing and canoes, dream-catchers and pictures from "shadow-catchers." Record stores now contain traditional Native American music on compact disc, pumping traditional flute music and spiritual peyote songs into homes nationwide. Every toy store contains a replica of an Indian drum and war tomahawk, as does every collector of Native American cultural property own the real thing. Native American folklore, misappropriated and published by many who are non-Native Americans, represent a deep oral intellectual wealth. A recent Valley Guide Quarterly contained dozens of advertisements, gallery notices, art displays, pictures, and descriptions of Southwest Native American (and Mexican) artwork. These comments illustrate the economic market generated by the strength of the intellectual wealth of Native American tribes and artisans. This market value, tagged by the contemporary American culture, illustrates the economic viability of intellectual wealth within the Native American community.

The tribal value of Native American expression is much more cultural, and much more religious. Consider the plight of the Chilkat Indians who struggled to recover the "Whale House" artifacts. The Whale House artifacts were actually wooden posts depicting various cultural scenes. The Chilkat Indians valued the artifacts not because of their economic value but because of their cultural and ceremonial value. Another example of tribal value of intellectual wealth is evidenced by the tribal claimants under the Native American Graves Protection and Repatriation Act who are seeking from museums, universities, and others, the return to the tribe of cultural and sacred objects (as well as funerary objects and human remains)

4. Id.
5. Shadow catchers, commonly known as cameras, were regarded by Native Americans as devices that produced drawings that captured shadows.
6. See, e.g., VOICES ACROSS THE CANYON, VOLUME ONE (Canyon Records).
7. See generally the Winter 2000 issue of the Valley Guide Quarterly.
8. Interestingly, the guide contained a notice from the Indian Arts and Crafts Board of the Department of Interior noting the Indian Arts and Crafts Act and the requirement that "all products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the artist." Id. at 33.
10. See id.
11. See id.
because of the object's cultural value to the tribal community, despite economic loss to the museums and others. Although these Native American "expressions" themselves do not hold any intellectual wealth, the "expressors," retain the intellectual capital required to produce these economic, and of course cultural, expressions.

Native American intellectual property assets also include those concepts created by innovation, that is, regarded not for its aesthetic or artistic value but for its utility. Native American innovation is most often evidenced in the agricultural and pharmaceutical industries. A classic example often cited by commentators is the innovation of the Hopi and Zuni tribes in developing and maintaining traditional crops, plants and seeds as part of its agrarian past. Contemporary American society has drawn upon these innovations, creating an economic market for the Hopi and Zuni tribes in seed bank distribution and plant variety maintenance. One common illustration of the Hopi and Zuni tribes' crop innovation is blue corn. Blue corn has become a popular ingredient used in regional foods, as well as in traditional restaurants. The intellectual wealth associated with these products is attributed to the tribe: their experience, persistence, and knowledge.

Innovation and expression are protected by United States law in different ways — such as by patents, trademarks, and copyrights — primarily because of the difference in valuation discussed above, as well as the dissimilarities in the incentives that United States law presumes are required to further the constitutional mandates in furthering innovation and expression. As a result, the concept of maximizing innovation within the Native American community is beyond the scope of this comment; however, many of the discussions regarding the difference in societal values affecting expression are applicable to innovation as well. The bulk of this article discusses the U.S. framework for protecting Native American expression, and the ability of that protection to further Native American interests in economic development and cultural maintenance.

B. United States Copyright Law

1. Authorship

United States copyright law is the statutory vehicle responsible for protecting intellectual expression. Copyright protection in the United States provides a "bundle of rights" to authors of fixed expressions. These

14. See Guest, supra note 13, at 121.
15. See Greaves, supra note 13, at 32.
rights, extended to the original author, or her assignees, afford strong protection, and consequently, economic return for the "intellectual" property of authors. That bundle of rights includes the right to copying, the preparation of derivative works,\textsuperscript{17} the right to control sale and distribution and the right to control the public performance and display.\textsuperscript{18} An author is granted those rights upon the fixation of an expression upon a medium, and those rights can only be limited by the subsequent assignment of the rights to a third party, or by statute.

Copyright does not rely on registration, or notice, or government approval to reward authors for creative original works, instead, copyright vests immediately upon the creation of the work. Although Copyright law does provide incentives to supply public notice of copyright, as well as registering works with the copyright office, strong remedies are still available for an author claiming infringement of a work regardless of whether notice or registration took place.\textsuperscript{19} Those rights, in part, or in whole, can be transferred to third parties during the term of the copyright, or can be retained by the author and her beneficiaries until the expiration of the copyright.

The federal protection of copyrights apply only if the copyright can vest initially with the author of the work;\textsuperscript{20} that is, the work "owes it origin to the author."\textsuperscript{21} In addition, copyrights exist only for a limited time — the duration of the life of the "original" author (plus a period of years), regardless of whether the original author still owns the copyrights in the work. As a result, copyright protection is unlike real or personal property; copyrights are merely limited property interests granted by the public in return for flourishment of Art.

\textsuperscript{17} Derivative works are works that are based on the original work but in different or altered forms. \textit{See} ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN A NEW TECHNOLOGICAL AGE 325 (1997). For instance, a translation of a literary work written in the native Cherokee language would be a derivative of the original literary work. The right to create that translation would belong to the original author of the literary work, or her assignees. However, the translation itself is also copyrightable, to the extent that differs from the original work.

\textsuperscript{18} \textit{See} MERGES ET AL., supra note 17, at 325.

\textsuperscript{19} Failure to provide notice, otherwise known as copyright formalities, allows a defendant to assert a defense of innocent infringement which serves to limit the damages that a plaintiff might claim for infringement of a work. \textit{See} 2 NIMMER ON COPYRIGHT § 7.02(c)(3) (David Nimmer ed. 2000) [hereinafter NIMMER]. Failure to federally register a copyright deprives the plaintiff of an opportunity to seek statutory damages and attorney fees, as well as an opportunity to establish a prima facie case as to the validity of her copyright. \textit{See} id. § 7.16(C)(1).

\textsuperscript{20} \textit{See} id. § 201.

\textsuperscript{21} \textit{See} Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); \textit{see also} Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) ("Copyright ownership vests initially in the author or authors of the work."); Alfred Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529, 1531 (1994) ("Copyright inheres in authorship and exists whether or not it is ever registered.").
After the expiration of the copyright, the property becomes part of the public domain, for its exclusive use. The copyrights in the work cannot be "recaptured" by another party. Essentially, the economic value of the work itself is devalued, to the extent that it can be duplicated by competitors. In addition, each author may choose not to exploit a work, and withhold it from the marketplace completely. This non-economic choice of the author, one that could be described as a moral choice, is also abrogated; the work is still available at the end of the limited protection period for public consumption.

However, copyright law has provided for alternative approaches to the rule of original authorship. Those approaches include joint works, works made for hire, collective works and the transfer of rights. Joint works are works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unity whole." A work made for hire is defined under the Copyright Act as "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree" to consider it a work made for hire. The Supreme Court has narrowly defined this provision to allow for works made for hire in only the employer-employee or independent contractor setting. The collective work exception to authorship is applied by statute to "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."

Each of these exceptions to the concept of original authorship share a similar feature, the original author is identified as part of the ownership matrix, either as a hired creator, or as a participant in the ownership scheme as a joint or collective author. Each of these schemes were developed for particular authorship models that further the goals of specific relationships and industries; however none of these exceptions neatly fit into the needs of Native American tribes attempting to claim ownership in works that are centuries old.

22. Of course, a derivative work could be created, incorporating the prior art; however, the resulting copyright would only be in the derivations themselves and not the original work.

23. This choice is not necessarily non-economic; it is possible the work was withheld from the marketplace to protect the market niche of other works. However, the market avoidance prevents the economic devaluation of the other works, and is essentially, economic.


26. See id.


The American copyright system stumbles as it attempts to protect "group" rights that lack either identification of any actual original author, or alternatively, the requisite intent to enter into a legal relationship to create a joint or collective work. Tribal works are infrequently original individual creations. The works created in the tribal community are the result of group participation, as well as generational participation. Each tribal generation adds or takes away from the work, exhausting the opportunity to identify original authors.

Take, for instance, the case for the Hopi Tribe. The Hopi tribe has become well-known nationally, and internationally, for the work of Hopi kachina carvers. These carvers, through generations of instruction, fashion world renowned kachina dolls. The actual design for the carvings dates back centuries, developed by ancestors, generations ago; the design itself is quite similar to the learned design of present day carvers, altered only by the erosion of time. Because of the exquisite quality of the kachina dolls, the marketplace demanded comparable economic consideration. However, the kachina dolls and the Hopi Tribe fell victim to capitalism. The market, starved for similar products at a much lower price, opened its doors to several "kachina-like" doll manufacturers in northwestern New Mexico. As a result, the Hopi tribe suffered not only from the cultural diminishment of non-native production of spiritual "embodiments of deities," but also the devaluation of the economic worth of the hand-carved kachina dolls.

The alternatives for the Hopi tribe under the United States' copyright protection scheme were limited. The design for the kachina dolls, which certainly themselves fall within the defined subject matter for copyright,
lacks the original authorship element for valid copyright protection. The author\textsuperscript{35} of the original design, which is most likely centuries old, is long deceased. If any copyright protection existed at all, it existed during his lifetime and for a short period after words. The tribe itself cannot be considered an author, nor its teachers; copyright requires \textit{original} authorship; "a work must be original to the author."\textsuperscript{36} The copyright would have vested with the ancestor that, with creative spark,\textsuperscript{37} formed the independent design for a kachina doll. Any future kachina dolls made based on the original work — after the extinguishment of the copyright after the author's death — would only be protected by copyright to the extent that the later doll differed from the original doll; the original design for the kachina doll becomes part of the public domain. The economic value of the copyright for the later dolls becomes de minimus. The original design becomes the model for competitors, leaving a scarce market for copyrights in the derivative works. As a result, tribes and kachina carvers are unable to capture revenue from the work created by their ancestors, nor are they able to limit the cultural exploitation of the competitor's similar works.

Native American tribes are better served by allowing "tribal" ownership in ancient (and present) day expressions. In order for tribes to truly protect not only the economic, but also the cultural exploitation of tribal intellectual assets, a tribe should consider ways to maintain ownership of a portion of the copyrights. Could it be possible for a tribe to assert a joint works relationship with its tribal artisans in an effort to maintain authorship rights in the intellectual assets? Could the tribe and its artisans be viewed as a work made for hire; "a work prepared by an employee within the scope of his or her employment?"\textsuperscript{38} Consider the definition of joint works: works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unity whole."\textsuperscript{39} Perhaps it is conceivable to consider the tribe, the clearinghouse of tribal

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\textsuperscript{35} The reference to author instead of creator corresponds to the designation used throughout American jurisprudence on copyright. While one might envision a sculptor or designer as a creator, and a writer or artist as an author, all of the works which fall within the protectable subject matter of copyright as said to have originated with an "author."

\textsuperscript{36} \textit{Fiest} Publications v. Rural Tel. Serv., 499 U.S. 340 (1991) (noting that the "sine qua non of copyright is originality" (emphasis omitted)).

\textsuperscript{37} \textit{Fiest}, 499 U.S. at 345. The \textit{Fiest} Court agreed that a degree of creativity is what separates that which is original and that which is not. \textit{See id.} The obviousness of that statement should be tempered by an alternate theory, that labor is that which separates an original and the later work. This Lockean, or "sweat of the brow" theory, explains that labor performed on property can create ownership rights to the laborer. \textit{See MERGES ET AL., supra note 17, at 333. Although this theory is more often discussed in regards to compilations of facts (which are unprotected under copyright law), it raise interesting questions as to whether art can exist without creativity.}

\textsuperscript{38} 17 U.S.C. § 101.

\textsuperscript{39} \textit{See id.}
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knowledge, as an author, preparing a "work," with the intention of the tribal artisan and the tribe creating a united piece of art. If the tribe, as a community, could be viewed as, at least, a joint author in a work, then the tribe could assert proprietary control through copyright over the created work. In addition, if a tribal community can act as an author of a work, and copyright extends to the death of an author, could then tribal communities assert perpetual protection of their creative works? Finally, perhaps it is possible to create a statutory exception, providing tribes a communal copyright interest in tribal expressions. These concepts of communal property and perpetual protection will be discussed in further detail in below.

2. Limitations on Term Protection

Regardless of the drawbacks of original authorship, works in the United States are only given legal protection for a limited period of time. The maximum term of protection for copyrighted works is the life of the authors plus an additional 70 years. This limitation in protection is the necessary balance of an author's individual incentive to create and the constitutional goals to further the progression of the Arts. Without a limitation in the protection of works, future creators would be powerless to utilize previous works to create new "derivative" works. In addition, the limitation of works directly advances the Constitutional requirements. If an author can retain an entire "bundle of rights" in her works, future authors will be unable to further the progression of the arts. There is an additional concept of public welfare imposed by the Constitution. Limiting the protection of works creates a welfare benefit for the public, allowing for future unencumbered use of a previously protected work, in exchange for a limited property interest designed to incentivize the creation of the original work.


41. See U.S. CONST. art 1, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . "); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (discussing the purpose of the limited scope of copyright protection "reflects a balance of competing claims upon the public interest; [c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"); see also MERGES ET AL., supra note 17, at 327.

42. See U.S. CONST. art I, § 8, cl. 8.

43. See Aiken, 422 U.S. at 156 ("The sole interest of [copyright] . . . lie in the general benefits derived by the public from the labors of authors."); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543-46 (1985) (stating that copyright law is intended "to allow the public access to the products of [the author's] genius after the limited period of exclusive control has expired."); cf Sayre v. Moore, 102 Eng. Rep. 138, 150 (1801) ("We must take care to guard . . . that the world may not be deprived of improvements, nor the progress of the arts be retarded."); see also MERGES ET AL., supra note 17, at 327.
Additionally, failure to provide any term protection at all will disincentivize authors to create. The ability to retain term protection in a created work provides an author the ability to reap economic benefit for her economic and intellectual investment. This return on investment provides incentives for authors to continue to create, as well as encourage new authors to enter the market. Additionally, the return on investment is still restricted by traditional market forces, such as competition and demand, allowing for the production of both higher quality works as well as higher quantity works, both of which contribute to enhanced public welfare.

The resulting drawback from this term limitation on protection of works is that the author (actually, the assignees or beneficiaries of the author) lose all protective benefits at the expiration of the term. What was fully protected by force of law the day before the expiration of the copyright is now completely within the public domain, allowing for the public's complete dominion as well as exhaustion of the work and its accompanying rights.

The underlying force of the Constitutional balance of limited term protection and public welfare is inherently economic. Innovation and creativity, essential to a successful economy, can be spurred only by economic incentives to create. However, this capitalistic, Western European goal is not necessarily shared by Native American tribes. Individual property rights and market competition thrive in the Euro-American society; however, tribes, which are quite communal in nature, are much more utilitarian. As one commentator noted, Native American tribes are societal in nature, and the individual ownership of property, if it occurs at all, is founded in a value structure that creates for utilitarian purposes. The classic distinctions of commercial objects, aesthetic objects, functional objects, and sacred objects becomes blurred in tribal communities, recognizing and exposing a society that is far more communal, both socially and productively.

As such, the American copyright system is inherently contrary to the typical Native American tribal ethos. In addition, the American copyright scheme will continue to starve Native American tribes of cultural, spiritual,
and intellectual works as individual artists turn their backs on tribal communities for economic gain.

In response to a patchwork of lobbying interests and international pressures, the United States enacted a limited number of measures that altered the traditional framework of copyright authorship and term protection. The result of these measures is that Native American tribes have benefitted, although in extremely narrow circumstances, from a system that has become a little more communal, a little more perpetual, and even a little more moral.

C. Native American Graves Protection and Repatriation Act

In November of 1990, Congress provided the first broad legislation protecting cultural property for Native Americans since the antiquated "Indian-Made" laws were passed in 1935. As a result, the Native American Graves Protection and Repatriation Act (NAGPRA) has given Native American tribes their first glimpse at opportunities for communal, as well as perpetual, ownership of certain tribal objects. NAGPRA was enacted to specifically protect "Native American burial sites and the removal of human remains, funerary objects, sacred objects and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands." Through the power of the federal legislation, cultural objects and remains throughout the country are finally being reunited with Native American tribes. Museums, dealers, universities, and private collectors have been forced or pressured to return various cultural objects to the tribal communities. Native American tribes, in their lobbying efforts for NAGPRA, managed to deflate the pressure of strong, traditional American property rights in the ultimate recovery, communally, of tribal cultural property. As a result NAGPRA itself begs the ultimate question, is their hope for Native American perpetual and communal intellectual property rights?

Although NAGPRA applies only to objects, and not intellectual property, it does provide insight into the framework and potential concerns of communal ownership of cultural property. The definition of communal property — actually described as objects of cultural patrimony — illustrates the potentiality of assigning (actually recognizing) intellectual property right ownership to tribes. Cultural patrimony is defined as:

47. See supra text accompanying notes 48-70.
50. 1990 U.S.C.C.A.N. 4367, 4367; see also Byrne, supra note 9, at 126-31 (discussing the implications of NAGPRA on communal property rights of Native American tribes).
[O]bjects having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe... and such object shall have been considered inalienable by such Native American group at the time the object was separated from the group.  

The definition of "cultural patrimony" is broad, allowing for both natural and manmade objects. Cultural patrimony most certainly covers "art" — at least as a capitalist would define it — to the extent that "art" is also cultural patrimony. As a result, there becomes a strangely woven quilt of contemporary intellectual property law and tribal cultural property law. Tribes are able to recapture the communal rights to the actual art itself, but are still shackled by the inability of U.S. copyright law to prohibit the production of "derivative" works.

Consider the following example: NAGPRA presumably applies to the Iroquois Wampum belts. The tribes, under the federal direction of NAGPRA can request for the return of these specific Wampum belts from, for instance, a public museum, who purchased these belts from a collector for a sizeable price. The federally funded museum cannot recover the cost of its investment. The museum is ultimately guilty of its implied insensitivity to Native American culture (and its receipt of federal funding, of course). However, as discussed above, the intellectual knowledge in creating these Wampum belts has long since entered the public domain and the tribe does not have the ability to limit the production of Wampum belts. Consequently, the design and style of the Wampum belts can be replicated, presumably close to perfect, by individual artisans and resold to the same museum for much less than its original purchase. The Iroquois tribe has recovered the actual cultural property, but only the physical manifestation of the cultural value of the property. The true cultural value of the Wampum belts is ultimately diminished by the subsequent exploitation of the replicas traded on the market to museums. This is also true for the property's economic features as well.

54. Cultural property, in this sense, as cultural patrimony.
55. Presumably, because Congress specifically referred to the Wampum belts as an example of what might be included under the definition of "cultural patrimony" in its legislative debates. See S. REP. NO. 101-473, at 1, 7-8 (1990); see also Byrne, supra note 9, at 128.
The enactment of NAGPRA was federal acknowledgment of a Native American culture that is noncapitalistic, secular, and communal. The framework of the statute provides tribes with the ability to sculpt what objects are considered alienable and which are not. In addition, the framework also clearly delineates the inability of individuals to convey ownership of certain objects unless under the direction of tribal leadership. The statute illustrates two communal property right maxims; the existence of cultural property within the tribe, and the subsequent inalienability of the same property. NAGPRA, although not an intellectual property scheme, provides unique insight into the adaptability of communal and perpetual rights to Native American intellectual property policy.


In 1989, the United States acceded to the Berne Convention for the Protection of Literary and Artistic Works. The 100-year-old Convention extended, through subsequent amendments, uniform international standards in the protection of literary and artistic works. Although the United States had a well developed body of Copyright law by 1989, the United States was, at least in part, fundamentally at odds with the extension of moral rights protection to Copyright law. As a result of the accession to the Berne Convention, and the resulting pressure to enact moral rights legislation that complied in spirit to the Berne Convention, Congress enacted the Visual Artist's Rights Act of 1990 (VARA). VARA represented the first time in the history of United States copyright law that moral rights were incorporated into the "bundle of rights" for authors.

56. See, e.g., Guest, supra note 13, at 115.

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author . . . shall, after his death, be maintained, at least until the expiry of the economic rights . . . . However, those countries . . . may provide that some of these rights may, after his death, be maintained.

Berne Convention, art. 6 bis.
59. See Dworkin, supra note 58, at 260 (noting that one reason for enacting VARA was perhaps to placate those people who thought that the United States had not honored its obligations under the moral rights section of the Berne Convention).
61. See Dworkin, supra note 58, at 239.
VARA provides for authors the right of attribution and integrity for works of visual arts. Visual arts are defined as paintings, drawing, prints, or sculptures existing in single copies. With many notable exceptions—enough to make moral rights the exception, and not the rule—the act establishes rights for authors that extend to the moral essence of the object, and not the economic valuation of the object. VARA first provides, subject to the limitations of the doctrine of fair use, that an author "shall have the right to claim authorship" of his or her work, and to "prevent the use of his or her name as the author of any work of visual art which he or she did not create," or otherwise known as a right of attribution. The Act also allows an author a right of integrity, that is, a right to prevent any "intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her honor or reputation." However, this right of integrity is limited by its initial scope—visual arts—as well as its waiver provisions.

The true query becomes the application of VARA to Native American tribes. Does this Act stimulate the ability of United States Copyright law to foster Native American goals relating to intellectual property? The query should be addressed at two levels. Does VARA provide Native American tribes the opportunity to economically benefit from tribal intellectual property? Does VARA allow Native American tribes to retain and enhance cultural development?

VARA does little to provide true economic benefits to Native American tribes. For instance, VARA does not provide additional intellectual property protection, including the rights of attribution and integrity, for any expression beyond visual art. The remaining economic value in the attribution of various objects to authors is certainly limited. The right of attribution merely provides an author, a tribe, or tribal artisan, for example, the opportunity to claim or disclaim authorship to a specific object. The economic benefit for tribes in a right of attribution is limited to transactions upon which future owners would pay additional consideration for the subsequent waiver of the ability of tribes to require the attribution of the tribal author, or the removal of the tribal author's attribution upon the

63. See id. § 101.
64. See id. § 106A, 113(d).
65. See id. § 106A(a)(1).
67. See § 106A(a).
68. See § 106A(a), (e). Questionably, the inability to transfer VARA rights and the inapposite ability to waive VARA rights begs the question. In a bargain between parties, the demand for waiver and the transfer are identical, beyond the differences in formalities. Consequently, the protection that the nontransfer clause provides to authors is annulled by the ability of an author to waive VARA rights.
mutilation, destruction, etc. of the object. As a result, the right of attribution coupled with the opportunity for statutory waiver provide little economic benefit to tribes.

In addition, the rights of integrity, which allow for tribal authors to prohibit the mutilation, destruction, etc. of visual arts is limited by statute to those visual arts that are "of a recognized stature" and, in addition must also be prejudicial to the "honor" of the author. Native American tribes must not only, to retain this right of integrity, show that a tribal object is of a stature that rises to a heightened threshold, and must also, in addition to previous requirement, demonstrate that the tribe's honor would be prejudiced by the destruction, modification, etc. of the tribal object. As a result, Native American tribes derive little economic benefit because of the concomitant narrow risk that bargainers will attribute to the value of demanding that Native American tribes waive their rights of integrity.

VARA does provide limited cultural protection for Native American tribes. The right of attribution in visual arts provides to Native American tribes the corresponding respect and dignity accompanying Native American objects, even after they have been sold, traded, or given to nontribal entities. The value of this right should not be discounted. Similarly to the Indian Arts and Crafts Act, the right of attribution prescribed by VARA allows tribal authors to maintain the integrity of the cultural tradition by publishing to those that come in contact with the object the proper attribution. Unfortunately, the right of attribution retained by the tribal authors would cease to exist along with the termination of the legal copyright protection seventy years after the death of the author. VARA essentially brings us back full circle to the original problems with identification of authorship and limited term protection. Regardless of the protection that is afforded for objects that are created within the author's life and shortly thereafter, the ability of tribes to protect attributional issues is eliminated, and the value of the cultural property is exposed for diminishment by outside sources.

The same is true for the right of integrity. The value to tribes and tribal artisans of the right to prohibit modification or destruction of property rights is a windfall for tribes that have watched the degradation of sacred and ceremonial paintings and drawings. VARA allows Native American authors to monitor and control the subsequent use of Native American visual arts.
so as to preserve the cultural integrity of the those arts. The cultivation of the cultural integrity provides for the harvest of additional intellectual works within the Native American community as well as provide the appropriate respect and honor that Native American communities might place on various works created within the Native American community.

VARA represents the high water mark for Congress in providing protective legislation allowing Native American tribal artisans to retain minimum moral rights in limited types of "expression." As a result, the cultural and economic benefit to tribes can best be anticipated as limited.

**III. International Position on Intellectual Property Rights for Indigenous Peoples**

**A. United Nations Draft Declaration on the Rights of Indigenous Peoples**

Internationally, moral rights are given much more credence, as to both nationalist and aboriginal "expressions." In addition, the concept of tribal / communal ownership, as well as perpetual protection of certain moral rights are being utilized and debated in various parts of the world. Besides the Berne Convention's treatment of moral rights in Article 6 bis, the most noted document advocating moral rights, as well as the rights of indigenous peoples is the United Nations Draft Declaration on the Rights of Indigenous Peoples (Declaration). The Declaration was the 1994 product of a

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1. Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

2. Affirming that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

3. Affirming that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

4. Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

5. Insuring that indigenous peoples have not been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

6. Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,
subcommittee of the United Nations Committee on Human Rights and represents the culmination of years of work in developing, albeit controversially, an authoritative declaration of the rights of indigenous peoples. The Declaration was developed by representatives of indigenous peoples all over the world. These representatives included the Indian Law Resource Center, the American Indian Law Alliance, Plain Indians Cultural Survival, Pro-Hawaiian Sovereignty Working Group, Teton Sioux Nation Treaty Council, Conic Navajo Nation Working Group on Human Rights, the Western Shoshone Nation, the Muskogee Creek Nation, as well as numerous other continental Native American groups. The Declaration was submitted for debate and adoption as a comprehensive declaration of numerous rights of indigenous peoples. Article 12 of the draft declaration states that:

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

[7] Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

[8] Insuring that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

[9] Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

[10] Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

[11] Recognizing that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect.

Id.


75. Draft Declaration, supra note 72, art. 12.
The declaration also states in Article 29 that "[i]ndigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property." 76

The international community is coming together to address and solve some of the very concerns facing indigenous peoples world wide that I have addressed previously in reference to Native American tribes here in the United States. The international community has at least recognized the importance, not only of preserving, but revitalizing the cultural heritage of Native Americans. In addition, the international community has pointed out that, despite closet assimilationists in the United States, Native American tribes can possess spiritual and cultural foundations regarding property, political structure, and social order that are far different than many nation-states. As a result, their intellectual and cultural property must be recognized and protected, not by the nation-state, but by the sovereign Native American tribes.

The draft declaration alludes to many of the moral rights contained in the Berne Convention treaty, as well as many of the communal and perpetual rights discussed above. Article 12 speaks to the protection of the past and future cultural objects, including the manifestations of these works. 77 This protection is precisely what U.S. copyright law fails to provide. In the discussion of U.S. copyright law above, federal law failed to provide perpetual intellectual property protection for tribal expressions because of both lack of identifiable authorship and the limitations on term protection for fixed expressions. The draft declaration also provides for the ability of indigenous peoples to maintain past and future manifestations of their cultural and spiritual property. 78 This language is similar to the rights of integrity recognized in a moral rights scheme, allowing for one to manage the use of one's expression, regardless of ownership. The declaration also uses language that seems to support communal ownership. This communal ownership extends to the ownership of cultural and spiritual expressions, and their underlying intellectual property rights, by the tribal community as a whole. In article 29, the language in the declaration states that the ownership of cultural and intellectual property rights should remain with the indigenous peoples. 79

The United States, in a response to a similar draft by the Organization of American States, noted that the United States could not accept an open-ended obligation allowing for repartition of cultural property. 80 The United

76. Id. art. 29.
77. See Draft Declaration, supra note 72, art. 12.
78. See id.
79. See id. art. 29.
States, however, proposed a revision that would require nation-states to provide a legal framework for the "protection of indigenous culture." It is unclear whether this revision could be interpreted to mean that the United States might be open to alternative legal methods, similar to NAGPRA, in the protection of Native American economic and cultural intellectual property. In addition, the United States emphasized the present U.S. framework that provides ample protection of intellectual property through trademarks, patents, and copyrights. However, as discussed above, this legal framework does little to address the cultural and economic needs of Native American tribes.

B. Le Droit Morale (Moral Rights)

The doctrine of moral rights has its roots in the common law of many European countries. Many European countries, in the past or presently, rely on moral rights, to varying degrees, to protect the moral value of an author's creation. Those countries include France, Germany, Spain, Rumania, Bulgaria, Switzerland, Finland, Poland, Czechoslovakia, Italy,
Belgium, Norway, Portugal, Greece and Denmark. In some instances, those common law rights have been legitimized by statutes.

For the most part, moral rights have generally been regarded as "perpetual, inalienable and imperscriptible [sic]". In addition, those rights have been stated as protecting the "personal, intellectual, and spiritual interests of authors." As a result, authors of various types of expressions have the ability to control the decisions regarding the "moment, place, extent, destination and time of dissemination," configuration, form and content, and "under what name." their expressions might take, as well as the quality and form of derivatives of original expressions. Moral rights can be described much like we describe copyright, as a bundle of rights. Those rights include the right to paternity, or right of attribution, the right of integrity, the right of divulgation, and the right to repent.

The right to paternity invests in the author the right to claim authorship of the work. The right to 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." The right of divulgation allows an author to "release work from private sphere and to expose it to the public" Finally, the right to repent allows an author the withdraw a work from the public sphere, as well as to refuse to attribution to one of the author's works.

Moral rights, as a rule, in Eastern Europe, are inalienable. Leaving moral rights protection to the negotiations of parties over contract terms begs the question: What effect will this hollow protection have on a party with limited bargaining power? There still remains a similar question regarding the waiver of moral rights. Moral rights, as a rule, are typically not waivable. To allow moral rights to be waived is counterproductive with the inalienability element. However, waiver of moral rights in many jurisdictions is common. In addition, the ability for industry to adapt works of art is widespread, and to not allow for waiver of these rights seems incompatible with the current trend of adaptation contracts. It also

85. See id. § 8.94-.101.
86. See id.
88. Dietz, supra note 83, at 207.
89. Id.
91. Dietz, supra note 83.
92. Id. at 208.
93. Cf. Dworkin, supra note 58, at 236.
94. Dietz, supra note 83, at 221.
appears clear that the Berne Convention is generally silent regarding the assignment or waiver of moral rights.95 Internationally, the treatment of an author's moral rights as perpetual is scattered, and typically turns on which parties are able to enforce violations of moral rights.96 A moral rights scheme that provides protection to the moral rights of the author perpetually can be enforced by family members, or legal successors and to a limited extent, public interests that could be affected by infringement.97 This approach is evidenced in several European countries, including Spain, Italy, France and Belgium.98 In other European countries, including Germany, the moral rights of an author end at the death of the author.99

Several U.S. states have enacted various forms of moral rights. Much of this legislation is similar to VARA, protecting the rights of attribution and integrity in visual arts. For instance, California provides for rights of attribution and integrity in "fine arts" for a limited duration.100 New York, Arizona, Georgia, Iowa, New Mexico, Massachusetts, Maine, New Jersey, and Rhode Island also have similar types of legislation to that of California, all providing limited rights of attribution and integrity for narrow classes of visual arts.101

IV. A Proposed Framework

As illustrated above, U.S. copyright law is ill-equipped to address the cultural and economic concerns of Native American tribes. With respect to those concerns, the following represent the fundamental deficiencies in U.S. intellectual property law:

— U.S. intellectual property law does not provide tribes, as opposed to individual tribal artisans, intellectual property rights in fixed expressions.
— U.S. intellectual property law does not provide intellectual property protection for expressions created beyond the last century.
— U.S. intellectual property law does not provide rights of integrity and attribution for a broad category of fixed expressions.

These deficiencies limit the ability of Native American tribes to achieve two goals: (1) protect the cultural and spiritual integrity of tribal heritage

95. See 3 NIMMER, supra note 19, § 8D.01(B).
96. Dietz, supra note 83, at 216.
97. Id.
98. Id.
99. Id.
100. See CAL. CIV. CODE 987 (1995); see also 3 NIMMER, supra note 19, § 8D.08.
by limiting the exploitation of cultural and spiritual works; and (2) realize the potential economic benefit of managing the creation and trade of those cultural and spiritual works.

Enacting legislation to cure the deficiencies noted above would further Congress' goal of providing a legal and political self-determination framework for Native American tribes. The legislation could provide an alternative avenue for economic development as well as foster stronger relationships between the federal government and Native American tribes in the context of cultural sensitivity towards Native American issues.

Such federal legislation could include:

— Provisions for recognizing communal intellectual property rights vested in the Native American tribes. This vesting of intellectual property rights in the tribe itself could be the result of a shared or "joint" ownership between the individual artisan and the tribe. Alternatively, intellectual property rights could escheat to the tribe upon the death of the artisan. Another alternative could be to condition membership in the tribe to agreement to certain covenants, including the assignment of intellectual property ownership of any cultural or spiritual works to the tribe.

— Provisions for providing perpetual intellectual property protection for works created by Native American artisans. The provision could be carried out by eliminating the term expiration for works that are created, or certified, by Native American tribal artisans. As a result tribes could retain not only the intellectual property rights in the work, but also in any derivative works that might be created in the future. Outside manufacturers would be required to license with tribes for the rights to produce works for which the tribes retained intellectual property rights.

— Provisions allowing Native American tribes to "recapture" intellectual property rights retrospectively for works that are part of the tribal heritage. This provision would take works that were in the public domain and vest them with tribes, allowing tribes to benefit from the present exploitation of Native American cultural and spiritual property.

— Provisions creating, in Native American cultural and spiritual property, rights of attribution and integrity to be retained by Native American tribes for the existence of the tribes. This provision would allow not only the retention of cultural honor in works, through the right of attribution, but also the management and maintenance of the integrity of cultural and spiritual works by allowing tribes to prohibit unauthorized use, modification, or destruction of those works. These provisions would forbid the alienation or prescription of the rights of integrity and attribution.

V. Conclusion

Native American tribes and artisans have developed a world renowned reputation for "Art." United States intellectual property law, because of its strong personal property and capitalist roots, is ill-equipped to address the
unique cultural and economic interests of Native American tribes, lacks respect for the moral rights of artists, limits protection for authors as a market growth incentive, and values copyright as a welfare tax on the public instead of a private right of the author. Despite international support for moral rights of indigenous groups, the United States has been lackluster in encouraging additional protection in the area of intellectual property towards Native American tribes.

A framework does exist for providing Native American tribes the ability to manage their cultural integrity and honor, as well as create additional avenues of economic development in a field that Native American tribes are acutely prepared. All that remains is the United States to recognize the broader obligations of a true trust relationship.