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# Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes

Dalindyebo Bafana Shabalala

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**INTELLECTUAL PROPERTY, TRADITIONAL  
KNOWLEDGE, AND TRADITIONAL CULTURAL  
EXPRESSIONS IN NATIVE AMERICAN TRIBAL CODES**

*Dalindyebo Bafana Shabalala\**

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#### ABSTRACT

*Indigenous peoples and nations have been making demands for protection and promotion of their intellectual property, traditional knowledge, and traditional cultural expressions in domestic and international fora. The power of the basic demand is one that lies in claims of moral duty and human rights. This Article argues that in order for such claims to have power, one of the necessary elements for success is that the demanders themselves need to provide such protection within whatever scope of sovereignty that they exercise. In the context of Native American tribes seeking protection for Native American intellectual property under federal law in the broader territory of the United States, this Article argues that a necessary condition for success may be ensuring such protection on their own tribal territory. This Article serves as an early contribution to a broader research agenda aimed at providing more data as a basis for tribal claims for protection of their traditional knowledge and traditional cultural expressions. It presents a survey of the nature and scope of legal and formal protection that tribal legislation in the United States has provided for traditional knowledge and traditional cultural expressions. It further surveys and analyzes the nature and scope of protection provided under federal law and assesses the gap between what tribal codes provide and what federal law provides. It then proposes a series of next steps as a research agenda.*

#### I. INTRODUCTION

On Friday, September 8, 2017, pharmaceutical company Allergan transferred ownership of all federal U.S. patents for its Restasis drug to the Saint Regis Mohawk tribe; the tribe then licensed them back to the company.<sup>1</sup> The aim was to shield the patents from the United States Patent and Trademark Office (USPTO) administrative inter partes review

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1. Meg Tirell, *Forget casinos: This Native American tribe is doing business in pharma patents*, CNBC (Sept. 8, 2017, 2:13 PM), [https://www.cnbc.com/2017/09/08/allergan-does-patent-deal-for-restasis-with-native-american-tribe.html?utm\\_content=buffer59e8a&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](https://www.cnbc.com/2017/09/08/allergan-does-patent-deal-for-restasis-with-native-american-tribe.html?utm_content=buffer59e8a&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer) [<https://perma.cc/MF26-U5X4>].

(IPR)<sup>2</sup> process by having the tribe claim sovereign immunity from the process. This action represents a new assertion and participation of Native American tribes in the United States federal system for protection of intellectual property (IP). This is in contrast to what has been the traditional experience of Native American tribe's experience with the way U.S. federal law has dealt with their intellectual and cultural property (i.e., enabling its misappropriation by non-tribal citizens).<sup>3</sup> This misappropriation has occurred either through use of the IP system where non-tribal citizens make patent, copyright, or trademark claims over tribal intellectual and cultural property,<sup>4</sup> or through claims that Native American intellectual cultural property is part of the public domain and free for all to use.<sup>5</sup> In either case, the common experience of Native American tribes has been one of victimization rather than active participation in the federal IP system.

The St. Regis deal and others like it draw attention to the core demand that Native American tribes make, in concert with indigenous peoples and nations worldwide, for the protection of their intellectual and cultural property, especially their traditional knowledge (TK) and traditional cultural expressions (TCEs). In particular, the deal raises two questions which, despite the long-standing demand for protection, have not received full attention. First, what are Native American tribes themselves doing to provide such protection to their citizens on their

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2. Inter partes review is a process set up by the America Invents Act to provide a mechanism for challenging the validity of a patent in post-grant review but prior to an infringement action. 35 U.S.C.S. §§ 311-319 (LEXIS through Pub. L. No. 115-169).

3. See, e.g., The use of the Quileute creation myth in Stephanie Meyer's *Twilight* series as described in Angela R. Riley, *Sucking the Quileute Dry*, N. Y. TIMES (Feb. 7, 2010), <https://www.nytimes.com/2010/02/08/opinion/08riley.html> [<http://perma.cc/QPR2-TFKL>]. Also described in Kristen Carpenter, Sonia K. Katyal & Angela Riley, *Clarifying Cultural Property*, 17 INT'L J. OF CULTURAL PROP. 581, 581-82 (2010); see also Amy Harmon, *Indian Tribe Wins Fight to Limit Research of its DNA*, N.Y. TIMES (Apr. 21, 2010), <http://www.nytimes.com/2010/04/22/us/22dna.html> [<https://perma.cc/SZ8D-LHPH>] (explaining misuse without consent of tribal genetic material); Levi Rickert, *The Hopi Tribe Gains Support of Arizona Congressional Delegation to Halt Sale of Sacred Items by Paris Auction House*, NATIVE NEWS ONLINE (May 23, 2015), <http://nativenewsonline.net/currents/the-hopi-tribe-gains-support-of-arizona-congressional-delegation-to-halt-sale-of-sacred-items-by-paris-auction-house/> [<https://perma.cc/RYC8-U6R6>] (explaining that the sale by Parisian Auction Houses of Hopi sacred katsinam or "Katsina friends" embodied in masks).

4. See, e.g., Complaint for Injunctive Relief and Damages, *Navajo Nation v. Urban Outfitters*, 935 F. Supp. 2d 1147 (2013) (No. 1:12-cv-00195), [https://turtletalk.files.wordpress.com/2012/02/uo\\_complaint\\_as\\_filed.pdf](https://turtletalk.files.wordpress.com/2012/02/uo_complaint_as_filed.pdf) [<https://perma.cc/TUS2-Q3RX>] (showing the Urban Outfitters use of the Navajo name as a mark for products in their store); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) (explaining that the use of the "Crazy Horse" name and trade mark is a violation of the descendants of Crazy Horse and the Rosebud Sioux Tribe).

5. See, e.g., Riley, *supra* note 3; Carpenter, Katyal & Riley, *supra* note 3, at 581-82.

territory, in the exercise of whatever scope of authority that they have as dependent sovereign entities<sup>6</sup> within the United States? This determination seems like a necessary precursor to making claims for protection under broader U.S. law as a means of giving notice of what the claim to protection entails. It is also a precursor to ensuring that Native American participation in the federal IP system, such as that of the St. Regis tribe, is consistent with tribal legislation. This, of course, also leads to the second question: what are the exact contours of the protection that U.S. law provides to Native American intellectual and cultural property? More specifically, what are the existing laws, what is the gap between the scope and nature of protection provided in tribal law versus what the federal government applies, and what is the gap between the protection that is being sought and what is actually being provided? In particular, this Article seeks to answer the question of whether any of the extant federal legislation acts can be seen to act as a means of providing protection for Native American intellectual and cultural property.

This Article is divided in two major sections. The first section conducts a survey of Native American tribal codes to describe and outline the scope and nature of protection for IP in the universe of tribal codes in the United States. The second section carries out an examination of specific laws addressed to Native American intellectual and cultural property and examines the legislative history to determine the extent of protection that they provide. The results of my analysis form a first step in a broader research agenda that is outlined in the conclusion to this Article, which will hopefully progress with a somewhat stronger descriptive basis for deciding which research paths and questions to follow.

## II. WHAT IS NATIVE AMERICAN INTELLECTUAL PROPERTY AND WHY DOES IT NEED PROTECTION?

In the context of this Article, the broad description of Native American IP I am using draws in two broad concepts. IP, as defined by U.S. and international law, covers not just patents, designs, trademarks, and copyrights, but also sui generis forms such as database protection and geographical indications. It is those sui generis forms which also open the door to the inclusion of TK, TCEs, and genetic resources (GRs). These three subject matter areas have significant overlap with those of traditional

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6. They were defined in this way in a series of Supreme Court cases sometimes referred to as the "Marshall Trio." *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

IP subject matter but have core characteristics that are directly relevant to the social and political structure and practices of Native American nations. The forum in which the TK, TCEs, and GRs of indigenous peoples have been most thoroughly addressed is the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).<sup>7</sup> This is the venue in which countries and indigenous nations and communities from around the world have been negotiating an international instrument or instruments providing for the protection and promotion of TK, TCEs, and GRs.<sup>8</sup>

WIPO bases much of its work on the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, which recognizes that “indigenous peoples and individuals are free and equal to all other peoples and individuals. . . .”<sup>9</sup> The declaration also establishes indigenous peoples’ rights to their cultural property:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>10</sup>

What are TK, TCEs, and GRs, and why are they different from IP as understood within the U.S. federal system? WIPO defines TK as “a living body of knowledge passed on from generation to generation within a

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7. For more background, see WORLD INTELL. PROP. ORG. (WIPO), *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2015), [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_2.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf) [https://perma.cc/D4QU-BP2E].

8. The current negotiating texts of the instruments are available at: WIPO, *THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES*, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=368218](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=368218) [https://perma.cc/9XDR-ZBQL] (last visited Apr. 18, 2018); WIPO, *PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES*, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=375036](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=375036) [https://perma.cc/V6P6-QV57] (last visited Apr. 18, 2018); WIPO, *CONSOLIDATED DOCUMENT RELATING TO INTELLECTUAL PROPERTY AND GENETIC RESOURCES*, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=368344](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=368344) [https://perma.cc/7XMP-N5YV] (last visited Apr. 18, 2018).

9. G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples 4* (Oct. 2, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [https://perma.cc/2QNG-3WSS].

10. *Id.* at 11.

community . . . [that] often forms part of a people's cultural and spiritual identity."11 TK can include:

Technical know-how, practices, skills, and innovations related to . . . biodiversity, agriculture or health. . . [TK] is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions [patents] and original works by named individuals or companies [copyright]. Its living and slowly developing nature also means that "traditional" knowledge is not easy to define.12

It can, in limited circumstances, be protected under the patent system.13 This is challenging, however, because TK often "has ancient roots" and is passed down across generations through the oral tradition with no formal recording, which places it outside of existing IP protection.14

TCEs tend to have more overlap with the subject matter of copyright and are also called "expressions of folklore" and "may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions."15 TCEs are seen as "integral to the cultural and social identities of indigenous and local communities, [embodying] know-how and skills, and they transmit core values and beliefs."16 TCEs are sometimes able to find protection under IP laws, especially copyrights and trademarks.17

An example of a TCE and how it can be misappropriated can be found in Margaret Leidy's example of the *Twilight* series, a fictional vampire romance that incorporates a real Native American tribe, the Quileute.18 Stephanie Myers, the author of *Twilight*, uses the Native American tribe's origin story without authorization and retells it incorporating werewolves in the tribe's ancestry.19 Leidy points out that, though the book/movie may have a valid copyright in the realm of federal

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11. TRADITIONAL KNOWLEDGE, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/> [<https://perma.cc/DZ6L-7HX3>] (last visited Mar. 14, 2018).

12. *Traditional Knowledge and Intellectual Property—Background Brief*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](http://www.wipo.int/pressroom/en/briefs/tk_ip.html) [<https://perma.cc/W8SR-2HAV>] (last visited Apr. 18, 2018) [hereinafter *Traditional Knowledge—Background Brief*].

13. *Id.*

14. *Id.*

15. TRADITIONAL CULTURAL EXPRESSIONS, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/folklore/> [<https://perma.cc/YAX9-LQQX>] (last visited Apr. 18, 2018).

16. *Id.*

17. *Id.*

18. Margaret Leidy, *Protecting Creation: The Twilight Series, Creation Stories, and The Conversion of Intangible Cultural Property*, 41 SW. L. REV. 509, 532 (2012); *Index to Legal Periodicals & Books Full Text* (H.W. Wilson), Web. 4 Feb. 2016.

19. Leidy, *supra* note 18, at 510-11.

property, the unauthorized use of the Quileute origin story may cause harm when outsiders begin viewing the unauthorized use of the cultural property as a true reflection of the source culture.<sup>20</sup> She notes:

For the Quileute, the creation story is most important to the tribe because it relates to the beginning of the tribal existence and explains the tribe's relationship with their creator, nature, other tribes, and also offers information on how the Quileute will continue to exist. This importance is apparent because the Quileute creation story has been preserved and passed down over multiple generations through storytelling.<sup>21</sup>

Leidy argues that Myers' appropriation and unauthorized reinvention of the tribe's cultural property with the inclusion of werewolves not only suggests to the audience that the tribe itself is fictionalized, but as a result, damages the very cultural identity of the tribe.<sup>22</sup>

Discussion of what, exactly, constitutes misappropriation of this cultural property can be unclear. There remain issues around where the boundary of the subject matter is, what it means to own in this context, and challenges to the very concept of property in this arena.<sup>23</sup> WIPO has attempted to work around this by focusing on the mechanism for "protection" and thus uses a problem-solving approach rather than one which attempts to provide a definition of ownership and misappropriation in isolation. WIPO establishes two different types of IP protection for indigenous cultures and their property: defensive protection and positive protection.<sup>24</sup> Defensive protection is meant to stop outside appropriation and acquisition of IP rights for communities' cultural property.<sup>25</sup> Defensive protection applies most specifically to GRs.<sup>26</sup> It is meant to inhibit the procurement of IP rights by unwelcome third parties.<sup>27</sup> Additionally, "[d]efensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words, from being registered as trademarks."<sup>28</sup> Positive protection, conversely,

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20. *Id.* at 517-19.

21. *Id.* at 517.

22. *Id.*

23. Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 868 (2016) (responding to such critiques by proposing a broad theory of property for indigenous ownership of traditional knowledge and cultural property).

24. *Traditional Knowledge—Background Brief*, *supra* note 12.

25. *Id.*

26. *Id.*

27. WIPO, INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 22 (2015) [hereinafter INTELLECTUAL PROPERTY AND GENETIC RESOURCES].

28. *Id.*

encompasses rights that enable communities to “promote their traditional knowledge, control its uses and benefit from its commercial exploitation.”<sup>29</sup> This protection allows holders of TK and TCEs to obtain IP or other exclusive or non-exclusive exploitation rights in their property, and to use the property commercially for community benefit.<sup>30</sup> Essentially, “positive protection is the granting of rights that empower communities to promote their TK and TCEs, control their uses by third parties and benefit from their commercial exploitation.”<sup>31</sup>

A major issue in defining and protecting this property from misappropriation is establishing the true owner of the property in question; but, at least at WIPO, “[i]t is generally agreed that protection should principally benefit . . . the indigenous peoples and local communities that develop, maintain and identify culturally with the [TK and TCE] and seek to pass them on between generations.”<sup>32</sup> This is not something which is agreed with at the domestic level.

From the standpoint of Native American nations<sup>33</sup> in the United States, the misappropriation of Native American tribes’ cultural traditions in American society has become an increasingly salient issue in concert with the new awakening and reassertion of sovereignty that began in the 1970s. The claim is that intellectual and cultural misappropriation has been and continues to be pervasive in the United States and is noticeably unchecked by the U.S. government.<sup>34</sup> The mainstream American society has taken valuable, sacred symbols and cultural property from Native American tribes through constant commodification and assimilation practices which have diluted the distinctive cultural identity of the Native American tribes and, as a result, deprived Native American tribes from asserting valid claims to their very property.<sup>35</sup> Much of Native American tribes’ property comes from intangible forms, such as folklore, tribal dances, and religious practices and, as such, Native American tribes are

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29. *Traditional Knowledge—Background Brief*, *supra* note 12.

30. INTELLECTUAL PROPERTY AND GENETIC RESOURCES, *supra* note 27.

31. *Id.*

32. *Id.* at 20.

33. Native American tribes fall within the broader definition of indigenous peoples and communities. However, they have their own specific set of relationships with the metropole state in which they are contained, variations which will be examined for their impact on the right to regulate in this area. I note also that their status as indigenous peoples provides for a very specific status in international law which allows them to draw on international legal authority in making claims to regulate their IP.

34. See generally Suzanne Milchan, *Whose Rights Are These Anyway?: A Rethinking of Our Society’s Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157 (2003).

35. *Id.* at 161.

unable to prevent this unlawful taking of their TK and may be unable to assert any claim to such property under the United States federal IP law framework.<sup>36</sup>

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. . . . 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. . . . Thus, if [the American] society is to rectify the current intellectual property system to protect the culture of Native American [tribes], it will be necessary to broaden the scope of our law.<sup>37</sup>

This is particularly important when considering the hundreds of Native American tribes in the United States, each of which has its own culture, traditions, and system of ownership for TK, TCEs, and GRs.<sup>38</sup> It is, at best, idealistic and, at worst, impossible to characterize Native American IP with an exhaustive list of examples.<sup>39</sup> Tribes have “socially and legally sanctioned methods in place” to “recogniz[e] the creation and transmission of ownership rights for esoteric knowledge.”<sup>40</sup>

With the above in mind, there is little certainty that the current framework of United States IP law can apply on a one-to-one basis to Native American IP as it has existed for centuries. This puts Native American tribes at great risk for misappropriation, as the “rights to do certain things and to prohibit others from doing certain things” that IP law grants do not effectively cover Native American property.<sup>41</sup> There are major issues with Native American IP rights when the legal elements of fixation and duration are considered—in Native American tribes, there is often no single recognizable owner, but instead there is “a tradition of holders and creators” that have developed this collection of knowledge.<sup>42</sup> Physical recordings in any form are often entirely prohibited, which significantly limits the ability to fulfill the fixation requirement.<sup>43</sup> In direct contrast to federal IP law, which is designed to “ensure that artistic,

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36. *Id.*

37. *Id.* at 161-62.

38. James D. Nason, Symposium, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 259 (2001).

39. *Id.*

40. *Id.* at 259.

41. Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 113 (1995-1996).

42. Nason, *supra* note 38, at 260.

43. *Id.*

literary, and other innovations are, by virtue of the protection of their creators' rights, made available for the enrichment of all in society," Native American IP laws "are designed to protect and preserve valued cultural heritage of lasting importance to the society. . . ."44 Native American protections are designed to enhance the longevity of what they protect; federal IP is only protected up to a certain point to allow for the progress of science and the arts.<sup>45</sup> Because these two ideologies differ so greatly, it may not be possible to reconcile the two as they exist today.

Federal legislation does not appear to address the "question of non-tangible, owned, and often sacred property in the form of songs, oral traditions of all kinds and other types of IP that have been traditionally created and controlled in accord with traditional community laws."<sup>46</sup> Federal law, in fact, has been a major cause of damage to Native American IP, and "the most significant losses of control . . . have come about as the result of research on Native Americans and their communities."<sup>47</sup> Much of this research was done in the midst of governmental efforts to displace Native American tribes and assimilate them into mainstream American culture, leading to losses or reductions of land, property, political status, and actual human lives, among other atrocities.<sup>48</sup> During all of this, pieces of IP were taken out of their original context and placed into works copyrighted by Western academics.<sup>49</sup> Other issues with Native American property have arisen on the basis of pharmaceutical firms, especially those doing ethnobotanical research, that have identified and patented "medicinally important plants" used by Native American tribes, with no compensation to the tribes and communities that located and began using these plants.<sup>50</sup>

While WIPO categorizes Native American IP into either TK, TCEs, or GRs, there are other ways of looking at the complex property of these communities. James Nason places Native American IP into at least two distinct categories: "(1) property which is essentially patrimonial esoteric knowledge, including oral literature of all kinds, and which was traditionally created, owned, and controlled by a communal entity; and (2) traditional IP of an esoteric type which was created, owned, and controlled by individuals and which could be inherited as property."<sup>51</sup> This

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44. *Id.*

45. U.S. CONST. art. I, § 8.

46. Nason, *supra* note 38.

47. *Id.* at 260.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 261.

distinction provides an interesting level of analysis to the WIPO categories, which do not themselves differentiate between property owned by the community as a whole and property owned by individual creators.<sup>52</sup> WIPO, Nason, and many other scholars, despite their differences in categorizing the property in question, recognize the weaknesses in current law for protecting Native American IP.

This discussion on the nature and type of issues is only a basic introduction to the broad range of issues raised by claims regarding the protection of cultural property, TK, TCEs, and GRs by Native American nations. This Article is not meant to provide an exhaustive analysis of all of those issues, but rather act as a basis for the foundation of this Article by describing and analyzing what Native American nations have been doing themselves to provide formal mechanisms for protection.

### III. HOW HAVE NATIVE AMERICAN TRIBES LEGISLATED ON INTELLECTUAL AND CULTURAL PROPERTY?

This section will explore, through analysis of existing tribal codes, the following questions: (1) how do existing Native American tribal codes protect tribal nation state sovereignty over Native American IP?; and (2) how do these existing codes, on their own terms, interact with the current, broadly defined legislative IP framework in the United States? In many ways, I recapitulate the methodology of a study carried out by Angela R. Riley in 2005.<sup>53</sup> I sample fewer tribal codes compared to her 355. Her concern is with the broader question of means of protecting cultural property, including through institutions and cultural resource programs.<sup>54</sup> I primarily focus on the specific question of mainstream IP protection and the related question of specific protection for TK and TCEs within the WIPO framework. I limit myself to tribal codes, whereas, Riley's broader concerns led her to a deeper examination of tribal websites and other internet resources.<sup>55</sup> This Article therefore, both is a reflection on the results of Riley's study<sup>56</sup> but is also narrower in scope and ambition.

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52. See INTELLECTUAL PROPERTY AND GENETIC RESOURCES, *supra* note 27, at 35 for the distinction: "TK/TCEs are often held collectively by communities, rather than by individual owners—collective ownership of rights is often alien to most current IP systems. Certain adaptations or modifications to IP Law may be needed to better accommodate the interests of TK/TCEs holders."

53. Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

54. *Id.* at 94.

55. *Id.*

56. *Id.* at 93 (finding broadly that most tribes have not addressed intangible cultural property protection).

In examining legislation, it is important to understand that I am examining only the formal, codified mechanisms for addressing Native American IP and not the individual, non-codified customary law which is at least as extensive and directly addressed to individual tribal members. That this body of customary law exists does not negate the potential utility and assertion of the right to regulate and legislate in this arena but may actually bolster it.

There are 566 registered Native American tribes in the United States<sup>57</sup>, but not much information is available about how those tribes individually govern themselves. There is a distinct difference between tribal codes and “Indian Law.” Tribal codes are the laws enacted within a given tribe, comprising a systematic body of legislation; Indian Law is U.S. federal law governing the relationship with Native American nations.<sup>58</sup> Since at least as early as 1934, the United States government has recognized the power of Native American tribes to draft and enact their own laws while simultaneously ending new treaty formation.<sup>59</sup> Most tribes, however, did not begin writing down their laws until as late as the 1960s, and so the historical scope of official Native American law is limited.<sup>60</sup> Only recently have scholars beyond tribal borders begun to fully recognize that Native American nations have their own laws and systems of governance that have relevance to state and federal law and to actors in state and federal jurisdictions.<sup>61</sup> This is in part because codes were not written down until the past few decades, but also because tribal codes and tribal court decisions are rarely made accessible to people outside the tribal jurisdiction.<sup>62</sup> The earliest collection of tribal codes was published in 1981, but it only encompasses 94 codes.<sup>63</sup>

Tribes generally store their tribal codes in a binder or in another physical medium.<sup>64</sup> This legislation is amended regularly, usually by the tribal council.<sup>65</sup> Codes are generally not publicly available.<sup>66</sup> Code text is often repurposed from federal or state laws and other tribal codes and

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57. Notice 5019, Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indians Affairs, 81 Fed. Reg. 5019 (Jan. 29, 2016).

58. Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 30-31 (2008).

59. Tribes were granted sovereignty rights in 1934 with the Indian Reorganization Act (25 U.S.C. § 476 (2004)).

60. Cooter & Fikentscher, *supra* note 58, at 30-31.

61. *Id.* at 32.

62. *Id.* at 30-31.

63. INDIAN TRIBAL CODES: A MICROFICHE COLLECTION (Ralph W. Johnson ed.) (1981).

64. Cooter & Fikentscher, *supra* note 58, at 34.

65. *Id.*

66. *Id.*

simply reformatted to fit that specific tribe's needs.<sup>67</sup> Many codes are written in English and vary by tribe in length and density.<sup>68</sup> Preambles are considered part of binding law, and code structure is fairly analogous to the structure of federal and state law codes.<sup>69</sup> Codes are most frequently written by tribal councils, which are the tribes' forms of elected legislatures.<sup>70</sup> In every large tribe, there is at least one attorney, usually an outsider, who acts as a technical expert and assists the tribe in implementing decisions made within the tribe.<sup>71</sup>

Tribal court opinions are not usually written down, trials are not usually documented in transcripts or audio recordings, and decisions are not widely circulated.<sup>72</sup> Larger tribes are more likely to keep track of court decisions in writing and make those accessible to members of the tribe, and potentially also to outsiders.<sup>73</sup> Much like U.S. courts, tribal courts use decisions to create their own common law and there is, of course, a significant body of customary law that is applied in these courts and in other related venues within each tribe, including variations on leadership council structures.<sup>74</sup> Tribal courts tend to take a pragmatic approach to deciding cases, looking to context and what will provide the best outcome for the tribe.<sup>75</sup> These courts often take a liberal view when interpreting the laws.<sup>76</sup>

The scope of tribal law is indicative of general U.S. treatment of Native American tribes. Tribes are dependent sovereign nations, meaning that the tribes and the federal government work together to enable tribal sovereignty, but also overlap in areas of concurrent jurisdiction.<sup>77</sup> Tribes write codes to meet internal governmental needs, but also to assist in mediating issues with outsiders.<sup>78</sup> Tribal codes are only applicable within the tribe; however, when it comes to matters outside the tribe, tribes are required to follow any applicable federal statutes.<sup>79</sup> "Tribal conflicts of

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67. *Id.* at 31.

68. *Id.* at 35.

69. *Id.*

70. *Id.* at 34-35.

71. *Id.* at 36.

72. *Id.* at 34.

73. *Id.* at 36.

74. *Id.*

75. *Id.* at 32.

76. *Id.* at 66.

77. *Id.* at 37-38.

78. *Id.* at 61.

79. *Id.* at 37.

law” sometimes arise when there is a need for outside officials to decide a case by applying tribal law, which is often met with resistance.<sup>80</sup>

Though only a small amount of literature exists on the subject of Native American tribal codes, Robert D. Cooter’s comprehensive study of the subject in *American Indian Law Codes: Pragmatic Law and Tribal Identity* identifies nine types of tribal law codes that tribes use.<sup>81</sup> These include: membership; family law; substance abuse; land; environment, grazing, landmark protection, hunting, and fishing; tribal organization and the court system; traffic and some minor crimes; business; and casinos.<sup>82</sup> Some tribes aim to cover all areas of law over which they have jurisdiction, while others only legislate on certain issues.<sup>83</sup> Tribal codes rarely cover IP rights,<sup>84</sup> despite Cooter’s study, which found that tribal officials and outside experts overwhelmingly consider U.S. federal legislation on Native American IP rights inadequate for their purposes.<sup>85</sup>

#### A. Code Formation

The process of drafting tribal codes varies a great deal from tribe to tribe, and is often a semi-informal process.<sup>86</sup> In some tribes, there may be a required committee or subcommittee made up of tribal council members who oversee the process of code development and decide when the code is complete and ready for presentation to the tribal council.<sup>87</sup> Other tribes may assign code drafting to their tribal attorney(s), and others still may employ a tribal agency or committee of tribal employees to draft the code.<sup>88</sup>

It is interesting to consider how some tribes view creating law, and it is important to remember that “[t]he development of codes and laws is the supreme exercise of tribal sovereignty.”<sup>89</sup> For example, the Navajo and other tribes do not have constitutions and only govern through tribal codes.<sup>90</sup> Other tribes “have adopted or adapted constitutions provided

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80. *Id.* at 51.

81. *Id.* at 38.

82. *Id.* at 38-56.

83. *Id.* at 38.

84. *Id.* at 54.

85. *Id.* at 53.

86. Stephen Wall & Ada Pecos Melton, *Code Development: Process and Structure*, 1 AM. INDIAN DEV. ASSOCS. QUARTERLY 1, at 1 (2003). Note that this article’s focus is on the creation of a juvenile code, but its tenets apply universally to code creation.

87. *Id.* at 10.

88. *Id.* at 1, 10.

89. *Id.* at 10.

90. *Id.*

under the Indian Re-Organization Act (IRA) model.”<sup>91</sup> Still other tribes sometimes do not even write down laws and governmental structures because of religious beliefs.<sup>92</sup>

These tribal differences must be considered in the assessment process, because no two tribal codes are likely to be the same. Nevertheless, there may be general characterizations possible from the approaches they take. Individual codes have different needs to meet and cultures to which they must adapt seamlessly. The code development process is individual to each tribe, and focused on how to best assist that tribe, not necessarily harmonization or in implementing “best practices.”

### B. *Survey Methodology*

The method employed for this research involved a sample of the body of codes provided by the Tribal Court Clearinghouse.<sup>93</sup> A great number of the links to codes were broken. Many that were not broken explicitly stated that the codes presented might not be up-to-date, and the only way to be sure it was current law was to contact the tribe. When I did find a working code, I searched for the following terms: intellectual property; patent; copyright; trademark; cultural property; and research. I also used the search terms “traditional knowledge” and “folklore,” which returned no relevant results. I looked through over 100 codes for this project and did not document the codes with broken links. These 100 codes remain a subset of the 567 federally recognized tribes. It does not include tribes that are only recognized at the state level, but does include all the major, commercially active tribes. In our data sheet<sup>94</sup> those that were accessible have been sorted into two spreadsheet tabs: (1) Codes that Address IP; and (2) Codes with no Mention of IP. The first tab is further broken down into “Codes Addressing Patents” and “Codes Addressing Artistic Expression.” Each of these categories is broken down even further into “Codes Protecting from Misappropriation” and “Codes Creating/Protecting Usage Rights.”

The codes that are outlined in the spreadsheet are linked directly to that document. The name of the tribe links to the entire code, and where possible, I linked directly to the relevant section in the description.

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91. *Id.*

92. *Id.*

93. TRIBAL LAWS/CODES, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/codes.htm> [https://perma.cc/K458-24VQ] (last visited Apr. 20, 2018).

94. Available online at: Dalindybo Shabalala, *IP in Native American Tribal Codes: Data Sheet*, IP& (May 8, 2018), <https://dalishabalala.wordpress.com/native-american-tribal-codes-and-ip/> [http://perma.cc/FEM4-PNUE].

### C. Analysis

Exactly 100 tribal codes are documented in the study. Of the 100 codes, only 9 explicitly mention IP or something related to IP. Though this project involved a limited scope of research into the text of the codes, less than 10% of the sample of codes addressing the increasingly important topic of IP is concerning.

I studied a sample of 100 codes in this project, but it is important to note that this is not necessarily an indicator of the true number of codes addressing IP. However, it is likely that those most accessible are also those of tribes most likely to be most active in legislating and in having resources to both retain and distribute legislation. Additionally, the largest and most well-resourced codes, and therefore likely to be most relevant from a policy impact perspective, are likely to be included in the sample. Tribes that have publicly available codes often have very long and comprehensive laws, covering everything from land conservation to business development, but even in these clearly well-drafted and thoughtful codes, IP is more often than not nowhere to be found.<sup>95</sup> Many codes have provisions that protect cultural resources, but these only cover tangible objects.<sup>96</sup> Most codes cover “property” in some form, but again, these only cover tangible items; still others cover land and human remains without addressing research rights. It is clear that the tribes put a great deal of consideration and planning into how to protect their culture and property, but regardless of the level of depth many codes delve into,

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95. See the following examples of comprehensive codes that do not mention IP: LUMMI CODE OF LAWS, <https://www.lummi-nsn.gov/Website.php?PageID=393> [https://perma.cc/9AL4-B8GP] (last visited Apr. 20, 2018); NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, MI, <https://ecode360.com/NO3539> [https://perma.cc/47HU-DGDL] (last visited Apr. 20, 2018); REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, <http://www.mnchippewatribe.org/constitution.html> [https://perma.cc/95P9-LE2V] (last visited Apr. 20, 2018).

96. See the following examples of cultural resource that do not mention IP: LUMMI CODE OF LAWS, *supra* note 95; REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, *supra* note 95; LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, TRIBAL ORDINANCES, <http://www.ldftribe.com/pages/23/Court-Ordinances/> [https://perma.cc/9FBH-JL28] (last visited Apr. 20, 2018); SHOALWATER BAY TRIBE, TRIBAL GOV'T, <https://www.shoalwaterbay-nsn.gov/home/tribal-government/tribal-court/> [https://perma.cc/2BTS-RPSN] (last visited Apr. 20, 2018); SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, SWO LEGAL DEPARTMENT, [http://www.swo-nsn.gov/?page\\_id=851](http://www.swo-nsn.gov/?page_id=851) [https://perma.cc/W43V-PZ8G] (last visited Apr. 20, 2018); SNOQUALMIE TRIBE, TRIBAL LAWS, <http://www.snoqualmietribe.us/TribalCodes> [https://perma.cc/694D-U555] (last visited Apr. 20, 2018); SWINOMISH INDIAN TRIBAL COMMUNITY, TRIBAL CODE, <http://www.swinomish.org/government/tribal-code.aspx> [https://perma.cc/EF9U-NUDD] (last visited Apr. 20, 2018); YUROK TRIBAL CODE, NAT'L INDIAN LAW LIBRARY, <https://www.narf.org/nill/codes/yurokcode/> [https://perma.cc/JE52-MSG2] (last visited Apr. 30, 2018).

coverage of IP rights seems to entirely lack any focus on preventing misappropriation by outsiders.

In the nine codes I found that do address IP, discussion of IP rights remains limited. The most comprehensive protection of IP in any form was found in the Eastern Band of the Cherokee Nation's code,<sup>97</sup> which provides a section titled "Arts and Crafts Copyright"<sup>98</sup> and another titled "Truth in Advertising for Native Art."<sup>99</sup> The first of these provisions covers maintaining copyrights for original works of art created by members of the Cherokee Nation, as well as defining "Arts and Crafts" to mean "any traditional or contemporary skill or creative work of graphics, painting, sculpture, music, writing, basketry, jewelry, pottery, metalwork, photography, or other crafts or media that an artist chooses to produce works of art from."<sup>100</sup> The "Truth in Advertising" provision protects Cherokee craftspeople from appropriation of their cultural identity by establishing penalties for the advertising for sale or actual sale of works "that [are] produced by individuals who falsely claim, imply, or suggest that they are Indian."<sup>101</sup> The provision covers the definition of "art," as well: "For purposes of this act, 'art' also includes crafts, handmade items, traditional storytelling, contemporary art or techniques, oral histories, other performing arts and printed materials."<sup>102</sup> The act itself states its overall purpose as "intend[ing] to encourage and allow Cherokee artists to be diverse, creative as well as traditionally influenced and to continue the use of traditional materials as well as use new mediums."<sup>103</sup>

Another code that offers some coverage of IP is that of the Kalispel Tribe,<sup>104</sup> which authorizes a "Kalispel Tribal Economic Authority" to take full authority over dealings in inventions, copyrights, and trademarks.<sup>105</sup> This provision is limited, however, and somewhat vague. It does not make clear how those dealings take place, or what penalties exist for violations. The Little Traverse Bay Bands of Odawa Indians<sup>106</sup> have a code section that prohibits "patent[ing] or claim[ing] any exclusive

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97. See EASTERN BAND OF THE CHEROKEE NATION CODE art. 1 (2015).

98. *Id.* §§ 301-304.

99. *Id.* §§ 401-404.

100. *Id.* § 303(A).

101. *Id.* § 404(A).

102. *Id.* § 403(A).

103. *Id.* § 402.

104. KALISPEL LAW AND ORDER CODE, <https://www.kalispeltribe.com/government/tribal-law-order-code> [<https://perma.cc/HZH2-TS6M>] (last visited Apr. 20, 2018).

105. KALISPEL TRIBE CODE 17-2.04(8) (2016).

106. Shabalala, *supra* note 94, at 10. This information can be found in Row 10 under the "Codes that Address IP" tab.

property interest in the makeup of any organism.”<sup>107</sup> However, it also states that it only applies within the jurisdiction of the tribe.<sup>108</sup> Though the tribe’s overarching desire to protect its resources is clearly laid out in the following section of the preamble, it is only valid within the tribe’s ability to prosecute on its own terms.

The Tribe recognizes that scientists from firms and research facilities are mining indigenous communities for unique organisms that may be used for the creation of new agricultural and pharmaceutical products. Such firms and research facilities frequently attempt to acquire samples of organisms and obtain an exclusive property right in the organisms by patenting them. The Tribe finds that although the intent of the patenting is frequently to prevent competition by other firms and research facilities, the effects can be much more far-reaching. The Tribe recognizes that the patenting of organisms threatens the loss of biodiversity by limiting access to genetic variants through the enforcement of proprietary rights and by encouraging the spread of a single variant of an organism in place of other natural variations. For these reasons, the patenting of organisms threatens the Tribe’s health, welfare and economic security.<sup>109</sup>

Though, in theory, this code would protect the tribe from a great deal of misappropriation, there is not much to address the relationship with federal and state law. This is one of the major disconnects in tribes’ abilities to protect themselves and is probably a huge part of the reason so few tribes have codes attempting to protect IP rights.

The code of the Northern Arapaho Tribe<sup>110</sup> covers trademarks, but only in the context of not registering the same trademark as one already existing within the tribe.<sup>111</sup> It appears, though inconclusively, that the Northern Arapaho may have their own system for registering trademarks within the community. The Coquille Tribe<sup>112</sup> has a provision that is arguably a “pseudo-trademark.” It establishes procedures for selling items with the “Coquille Crafted” label, which seems like a trademark but is never explicitly referred to as such.<sup>113</sup> This code gives full information

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107. THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL CODE, Title VI, ch. 10 § 4.1003.

108. *Id.*

109. *Id.* § 4.1001.

110. Shabalala, *supra* note 94, at 5. This information can be found in Row 5 under the “Codes that Address IP” tab.

111. NORTHERN ARAPAHO TRIBE CODE, Title 2 § 106(a)(ii) (2006).

112. Shabalala, *supra* note 94, at 8. This information can be found in Row 8 under the “Codes that Address IP” tab.

113. COQUILLE TRIBE CODE Part 2, ch. 250 (2007).

about how to apply for the label and what usage rights a permit entails.<sup>114</sup> Again, however, this is only applicable within the tribe and its jurisdiction, and does nothing to prevent outsider misappropriation. The Rosebud Sioux Tribe has a code section covering the management of cultural resources, but even within this very comprehensive code that describes access to resources such as cultural plants, the terms “intellectual property,” “patent,” “trademark,” and “copyright” are all only mentioned once.<sup>115</sup> The tribe goes to great lengths to attempt to protect its cultural property but seems to omit any reference to intangible property in the definition of cultural property in the code.

Only one tribe has a code that comes close to successfully covering the sorts of IP rights related to cultural research that Native Americans should strive for to protect their valuable cultural property. This code is only applicable to human and cultural research, though, and the tribe’s overall code does not address other types of IP. The Colorado River Indian Tribes<sup>116</sup> Human and Cultural Research Code is designed to “create a uniform standard in how research on the Colorado River Indian Reservation is to be conducted.”<sup>117</sup> Chapter 6 of the code covers ownership of property and states that “all ownership, property, trademark, copyright, and other rights to cultural, linguistic, and historic information that is not the IP of Researcher. Non-CRIT employee participants or researchers or both in the research shall sign a Work-for-Hire Agreement for research projects that are designated as property of [the tribe].”<sup>118</sup> Chapter 7 of the code is the only place in all of my research where I found an entire section devoted to IP. Entitled “Intellectual Property,” this

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114. *Id.*

115. *See generally* ROSEBUD SIOUX TRIBE CULTURAL RESOURCES MANAGEMENT CODE, <https://narf.org/nill/codes/rosebudcode/rosebudcult.html> [https://perma.cc/4QFA-PNGU] (last visited May 14, 2018).

116. Shabalala, *supra* note 94, at 7. This information can be found in Row 7 under the “Codes that Address IP” tab.

117. COLORADO RIVER INDIAN TRIBES HUMAN AND CULTURAL RESEARCH CODE § 1-101(1).

118. *Id.* § 1-601(a).

segment of the code covers copyrighted works,<sup>119</sup> trademarks,<sup>120</sup> and patents.<sup>121</sup>

Overall, Native American tribal codes do not appear to be widespread at all. Where they exist, they appear focused on solving very specific issues, such as misuse of Native American names to indicate the source or quality of goods or to specifically address human and other research on tribal property. Those that do mention IP are often not fundamentally aimed at preventing outside appropriation. Even though 12 years later, these results reflect similar outcomes to those found by Angela Riley in her 2005 study.<sup>122</sup>

#### IV. WHAT IS THE SCOPE OF CURRENT FEDERAL LAW PROTECTING NATIVE AMERICAN INTELLECTUAL AND CULTURAL PROPERTY?

The relationship between Native American tribes and the government is managed by the U.S. Department of the Interior through the Bureau of Indian Affairs (BIA).<sup>123</sup> The BIA primarily functions as the lead agency, which “embodie[s] the trust and government-to-government relationships between the U.S. and the Federally recognized tribes.”<sup>124</sup> The nature of that “trust” relationship has yet to be fully tested in the realm of IP. This section is primarily concerned with the extent to which U.S. federal law has legislated to provide protection for Native American IP. This section was prepared by looking at several pieces of legislation that purport to address some of these issues. I then examined the legislative history, seeking to describe the extent to which the issue of Native American IP protection was considered necessary or appropriate.

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119. COLORADO RIVER INDIAN TRIBES HUMAN AND CULTURAL RESEARCH CODE § 1-701:

(a) Use of CRIT’s copyrighted works such as literary works, musical works including any accompanying words, dramatic works including any accompanying music, pantomimes choreographic, pictorial, graphic, audiovisual, architectural, motion pictures and sculptural works and sound recordings shall be granted on a case by case basis. (b) CRIT may permit use of its copyrighted works for the following purposes: criticism, comment, news reporting, teaching, including multiple copies for classroom use, scholarship, or research.

120. *Id.* § 1-702:

Use of CRIT’s trademark(s) such as words, phrases, symbols or designs, or a combination of words, phrases, symbols or designs, that identifies CRIT as the source may be granted on a case by case basis. CRIT shall enforce federal trademark rights afforded under the Lanham Act, 15 U.S.C. § 1051 - 1127, and common law trademark rights.

121. *Id.* § 1-703: “CRIT shall enforce its patent rights under United States and International patent laws.”

122. Riley, *supra* note 53.

123. BUREAU OF INDIAN AFFAIRS, MISSION STATEMENT, <http://www.bia.gov/WhoWeAre/BIA/> [<https://perma.cc/6NYL-YFQA>] (last visited Apr. 20, 2018).

124. *Id.*

Specifically, this section looks at the congressional record on the cultural property laws with respect to the: (1) Indian Arts and Crafts Act (IACA); (2) Native American Graves Protection and Repatriation Act (NAGPRA); and (3) Trademark Law Treaty Implementation Act of 1998 (TLTIA).

To conduct my research, I used ProQuest Legislative Insight, a database that compiles primary sources on legislative history. I specifically looked at the initial proposal for IACA, NAGPRA, and TLTIA and any related bills, subsequent amendments, and the current editions of each bill. Much of the information consisted of primary sources of published and unpublished bills, committee hearings, and legislative reports, in addition to exploring primary sources.

#### A. *Indian Arts and Crafts Act*

The Indian Arts and Crafts Act of 1990 was passed in an ostensible effort to “prevent fraud in the Indian arts and craft market and to preserve and foster traditional American Indian arts and crafts.”<sup>125</sup> The IACA makes it unlawful to “offer or display for sale, or sell any part of craft product in a manner that falsely suggest it is Indian produced, an Indian product, or product of a particular Indian or Indian tribe or tribal organization.”<sup>126</sup>

Before the introduction of the 1990 version of the IACA, in May of 1989, Senator John McCain of Arizona introduced Senate Bill S.917.<sup>127</sup> Many of S.917’s goals were similar to the 1990 version of the IACA.<sup>128</sup> The goal of S.917 was to expand the powers of the Board and to address the “growing problem” of the “sale of goods falsely represented as authentic Indian-produced arts and crafts.”<sup>129</sup> The unpassed Bill pressured Congress to allow the Board to pursue claims in the courts on final determinations of the USPTO, remove the Board’s power to license non-natives to use tribal trademarks, and increase penalties for counterfeiting “Indian-produced goods.”<sup>130</sup>

Though S.917 was not ultimately passed, many of the same objectives were echoed in the movement to enact the 1990 version of the

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125. 137 CONG. REC. § 18150 (1990).

126. 18 U.S.C.S. § 1159(a) (LEXIS through Pub. L. No. 115-169).

127. 101 S. 917, 101st Cong. (as introduced on May 3, 1989).

128. *See id.*; 18 U.S.C.S. § 101.

129. INDIAN ARTS AND CRAFTS, CULTURAL SOVEREIGNTY SERIES: MODERNIZING THE INDIAN ARTS AND CRAFTS ACT TO HONOR NATIVE IDENTITY AND EXPRESSION, <https://www.doi.gov/ocl/indian-arts-crafts-0> [<https://perma.cc/3ZJS-QVG8>] (last visited Apr. 20, 2018).

130. *Id.*

IACA.<sup>131</sup> The record is unclear regarding the reasons why S.917 was not enacted, but some insight might be gained from later hearings on August 17, 1989, when the Committee on Interior and Insular Affairs held a hearing on the IACA to expand the powers of the Indian Arts and Crafts Board.<sup>132</sup> The Committee received a total of 22 testimonies from witnesses representing the Indian Arts and Crafts Board, artisans, gallery owners, and various tribes.<sup>133</sup> In referring to the cultural property of the Native American tribes, Representative Ben Nighthorse Campbell<sup>134</sup> stated that the arts involved were more than just “paint, silver, and beads but people’s livelihoods . . . the very identity of individuals, not to mention the age-old traditions and customs of the American Indian.”<sup>135</sup>

### 1. Testimonies from Congressional Hearings

Vice Chairman of the Indian Arts and Crafts Board, Leo Calac, discussed the importance of strengthening the trademark powers of the tribes so that consumers can identify genuine Indian craftsmanship and promote the exports of Indian arts and crafts.<sup>136</sup> Even though Mr. Calac made a brief reference to trademark powers and overall support of the Bill, he did not address the broader issue at hand.<sup>137</sup> With respect to Mr. Calac’s dialogue with the Committee, one important concept that emerged from their conversation relating to cultural property was that the Board had a working definition of handcrafted items, though it did not have a definition of a non-handcrafted items.<sup>138</sup>

William Lutz, U.S. Attorney from the District of New Mexico representing the Department of Justice (DOJ), suggested that a civil remedy be added to the Bill due to the lack of complaints under the existing criminal statutes.<sup>139</sup>

I vaguely think we may have gotten one complaint maybe 6 or 7 years ago, but I honestly don’t remember. That’s why I was a little vague in my language. But a lot of them come in and they just aren’t corroborated.

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131. *Id.*

132. *To Expand the Powers of the Indian Arts and Crafts Board: Hearing on H.R. 2006 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. (1989).

133. *See generally id.*

134. Mr. Campbell presided over the hearing. Mr. Campbell is an enrolled member of the Northern Cheyenne Tribe. Craftsman received permission from the Committee of Ethics and Standards to speak at the hearing.

135. *To Expand the Powers of the Indian Arts and Crafts Board*, *supra* note 132, at 3.

136. *Id.* at 13.

137. *Id.* at 13-15.

138. *Id.* at 16.

139. *Id.* at 19.

Somebody is unhappy with a competitor. And those kind of complaints, frankly, we don't want to get into competitive issues and that type of thing. Certainly if the statute has been violated, we will enforce it.<sup>140</sup>

In addition, the DOJ made several recommendations to amend the proposed Bill.<sup>141</sup> The DOJ recommendations were to amend the language to have the Justice Department, and not the Interior Department, institute civil actions for counterfeit trademarks.<sup>142</sup> The DOJ also recommended amending § 4 of the Bill because, as stated, it did not require that there be a likelihood of confusion or false designation of origin resulting from the display of a non-Indian good as “an Indian product,” a requirement to bring a valid trademark infringement suit under the Lanham Act.<sup>143</sup>

John Nieto, a Native American artist, expressed his discontent with the “trademark process for products to be marketed as Indian,” and suggested that passage of the legislation would cause others to label his work as fake because of his refusal to pursue a trademark for his artwork.<sup>144</sup> Mr. Nieto's support for the Bill was tempered by his concern that, “Native Americans who are dependent on those art forms for their livelihoods might be benefited by a trademark only if the consuming public were made fully aware of the significance of such a trademark.”<sup>145</sup>

The Indian Arts and Crafts Board was intended to help Native American artisans obtain trademarks to distinguish their work from counterfeit artists. However, prior to the Indian Arts and Crafts Act of 1990, a Native American artist could only obtain a license under a government-owned mark and did not have the exclusive right to use the mark in commerce.<sup>146</sup> The DOJ further recommended that § 4 be amended to comply with § 1159 of the Lanham Act by making a distinction between first time and second time violators who misrepresented their work as tribal arts and crafts.<sup>147</sup>

Testimony from tribal members and artists raised the broader issue of misappropriation, suggesting that, at the very least, some of those testifying had a goal of establishing a broader protection for Native American TCEs beyond the relatively narrow trademark approach of the

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140. *Id.* at 22.

141. *Id.* at 19.

142. *Id.*

143. *Id.* at 20.

144. *Id.* at 47-48, 50.

145. *Id.* at 48.

146. *See* H.R. REP. NO. 101-400, at 4 (1990).

147. *Id.* at 11.

IACA. In this vein, Billy Irving, Vice Chairman of the Navajo Tribal Council, voiced his concerns about the need to not only protect the integrity of Native American arts and crafts through creation but also the need to protect and preserve the Native American culture generally.<sup>148</sup> Mr. Irving also spoke with optimism about what the passage of the Bill would mean for the future of the Navajo culture:

This endeavor means educating people about our product, which is, the history of our unique culture, our people, and the scenic and colorful Navajo land. . . . The sale of imitation arts and crafts damages the integrity of not only our arts and crafts product, but also damages our culture by diluting the marketing with non-authentic arts and crafts.<sup>149</sup>

John Gonzalez's testimony, as treasurer and secretary of the All Indian Pueblo Council, echoed a similar tone as that of Mr. Irving.<sup>150</sup> Mr. Gonzalez attested that it is the position of the Pueblo tribe to "guard our culture and heritage from those greedy individuals who wish to profit from and exploit our culture for their profit."<sup>151</sup>

On the side of those concerned by the possible negative impact was Edson Way, representing the Wheelwright Museum, who requested that the Committee delay any further action with the Bill due to the impact it would have on exhibits that "bring a public awareness to the existence and the value . . . of Native American effects."<sup>152</sup> This echoes concerns raised by museums and others in the context of NAGPRA, discussed further below.

The most relevant testimony before the Committee regarding TK can be found in Mr. Honganozat's testimony.<sup>153</sup> Mr. Honganozat proposed that the Committee:

Seriously consider an expanded language or an added amendment in this bill which would broaden the scope and impact and influence this legislation to an area affecting a far larger segment of the Indian population, as well as the majority culture, in an area heretofore neglected, much abused, distorted and exploited. This the performing arts. By rationale and traditional culture of the American Indian, approximately 75 percent of the tribal group were active participants in ceremonial, social, musical, drama, storytelling and other aspects of the performing arts. This ontological or real time influence stemmed from

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148. *To Expand the Powers of the Indian Arts and Crafts Board*, *supra* note 132, at 55-57.

149. *Id.* at 56-57.

150. *Id.* at 131-32.

151. *Id.* at 131.

152. *Id.* at 138.

153. *Id.* at 226-30.

myth, religion, and tradition and is an integral part of the integral man known as the American Indian. Distortions of this integral man proliferate, and you have heard this. . . . This is why I ask, I plead, with a reasoning committee of civil servants to consider a change of language, a change of scope and the consideration of a group which has been totally ignored but yet the crux of the life, the style, the spirituality of a people that are not here and have not submitted the testimony and who will never hear from because they're the singers, the people who have kept it alive, kept this culture alive, who have been the *raison d'être* for these arts and craftspeople.<sup>154</sup>

The Committee responded to Mr. Honganozat's concerns by acknowledging that the problem exists, however ultimately holding that it was not within the "purview of the Bill."<sup>155</sup> Though the Committee ultimately declined to amend the language to include Mr. Honganozat's suggestion, Mr. Campbell stated that he would be "happy to try to find some avenues to proceed with the concerns."<sup>156</sup> This suggests that despite there being an existing opportunity, the IACA was not primarily targeted at anything beyond the subject matter of arts and crafts and specifically the misidentification of and false claims of source. This means that so long as the product or art does not claim to be Native American in terms of creation or source, then actual replication, adaptation, use, or appropriation of Native American arts and crafts cannot be prevented. Thus, people who claim to incorporate and be inspired by Native American arts and crafts, but do not claim that the art or craft they produce is actually sourced from or done by Native American artists, remain free to appropriate the TCEs for their own uses, including uses which may be culturally inappropriate or offensive.

Months before the enactment of the IACA, Delegate Eni Faleomavaega addressed the House of Representatives, where he stated the reasons for the IACA.<sup>157</sup> Among the reasons cited was that the misrepresentation of authentic Native American crafts constituted "unfair marketing practicing" which ultimately threatened cultural traditions. Native American artists were unable to compete with the fast-paced competition of counterfeiters producing inauthentic crafts, crippling Native American artisans and businesses.<sup>158</sup> Furthermore, the 1985 Congress report was cited wherein the Commerce Department estimated

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154. *Id.* at 227-28.

155. *Id.* at 228.

156. *Id.*

157. 101 CONG. REC. H8293 (daily ed. Sept. 27, 1990) (statement of Eni Faleomayaega).

158. *Id.*

that about 10% to 20% of the craft market was inundated with fraudulently unmarked crafts, resulting in a \$40 to \$80 million loss to Native American artists.<sup>159</sup>

The IACA defines an Indian tribe as a “tribe, band, nation, Alaska Native village” that is recognized by the United States or has been formally recognized as an Indian tribe.<sup>160</sup> Though the purpose for providing an official definition for Indian was to protect and maintain integrity among the Indian artisans, this definition has proved problematic. Upon the passage of the IACA, there were several reports about the misapplication of the legislation due to the stringent requirement that Indian artisans produced certifications certifying their tribal affiliation upon immediate request.<sup>161</sup> One year after the passage of the IACA, Speaker Jesse Francis, a New Mexico senator, addressed the Senate with his concerns over the Act. Among Senator Francis’s concerns was the implication of First Amendment violations the IACA would inherently enforce upon Indian artisans, for “even truthful comments about one’s cultural heritage could be unlawful if the speaker—the artist—does not back his comments and work with an Indian census card or certificate.”<sup>162</sup>

As a result of the bureaucratic prosecutions, legitimate Indian artisans felt ridiculed by the law, for not only were they confronted with the severe penalty of paying \$250,000 and five years of jail time, they feared being ridiculed as “fake Indians.”<sup>163</sup> “When it comes to making and selling Indian arts and crafts, a non-enrolled Indian ceases to be Indian,” because even a person of Indian ancestry is not considered to be an Indian for legal purposes.<sup>164</sup> For example, prior to his political career, Ben Nighthorse Campbell, a famed Indian jeweler, would have been subjected to IACA penalties because, during the majority of his career, he did not identify with a specific Indian tribe.<sup>165</sup> This reflects the broader issue of boundary delineation regarding the beneficiaries of protection of TCEs and TK. To the extent that the sovereignty of the tribes determines tribal membership and the basis of protection is tribal sovereignty, limiting protection to those who can show tribal affiliation is an easy and well-settled boundary. However, there remains a tension with a broader

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159. *Id.*

160. 18 U.S.C.S. § 1159(c)(3) (LEXIS through Pub. L. No. 115-169).

161. 137 CONG. REC. § 18150 (Nov. 7, 1991).

162. *Id.*

163. *Id.*

164. William J. Hapiuk, *Of Kitsch and Kachinas: A Critical Analysis of the “Indian Arts and Crafts Act of 1990”*, 53 STAN. L. REV. 1009, 1064 (2001).

165. *Id.* at 1013.

concept of “Indian-ness” that reflects broader historical concepts of who and what an “Indian” is, along with attendant concerns about allowing outsiders and the federal government to decide. This also raises real concerns about the uses of racialization to “dilute” or define downward the nature of Native American citizenship and identity that are likely unresolvable by the federal government and federal legislation.

2. Did the IACA Contemplate Providing Protection of TK, GR, and TCE?

As evidenced in the IACA testimony, some witnesses identified a need to protect Native American tribes’ cultural heritage more broadly. In general, the Committee expressed approval of providing protection to Native American tribes’ “traditional culture,” though ultimately holding that it was not the purpose of the IACA to address the issue at that time. Though the IACA could be amended to insert language to incorporate protection for these forms of cultural property, the chances of this happening are rather slim given the immense pushback and stark criticism the Committee faced from anthropologists, artisans, and museums. A more feasible solution would be to seek new legislation that will provide the appropriate protection for the forms of knowledge at play. In short, the IACA trademark system does not provide sufficient, and arguably any, protection for Native American tribes’ cultural property, nor was it ever intended to.

*B. The Native American Graves Protection and Repatriation Act*

In 1990, Congress enacted NAGPRA, the purpose of which was to assist federally recognized Indian tribes—Native American<sup>166</sup> and Native Hawaiian<sup>167</sup>—with the protection, return, and repatriation of Native American remains and artifacts found on federal or tribal lands.<sup>168</sup> NAGPRA sought to address the following issues: (1) the failure of museums to represent Native American culture accurately and appropriately; (2) museums’ possession and display of Native American human remains; (3) the presence of sacred and culturally sensitive

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166. NAGPRA’s definition of Native American is much broader than the IACA. For purposes of NAGPRA, a Native American means “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” 25 U.S.C.S. § 3001(9) (LEXIS through Pub. L. No. 115-169).

167. “Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” 25 U.S.C.S. §3001(10).

168. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as 25 U.S.C.S. §§ 3001-3013).

material in museum collections; and (4) the illicitness, even violence, with which most of the objects in these collections had been obtained.<sup>169</sup>

NAGPRA also directs federal agencies<sup>170</sup> and museums<sup>171</sup> to aid with identifying the human remains, funerary objects, sacred objects, and objects of cultural patrimony to the appropriate Native American tribe.<sup>172</sup> Upon discovery of the cultural items, the federal agencies are to compile an inventory of all collections that are in its control and establish cultural affiliation.<sup>173</sup> If the cultural affiliation can be made, then the agency or the museum must notify the affected tribe no later than six months after completion of the inventory and provide the Secretary of Interior with a copy of the notice.<sup>174</sup> If the tribe to which the remains belong is unable to be identified, then NAGPRA provides a list of what agency should be given the remains.<sup>175</sup> NAGPRA also required that the agencies consult with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders to complete the inventories within five years of the passage of the Act.<sup>176</sup> In addition, each agency or museum was to prepare a written summary of its collection no later than three years after the enactment.<sup>177</sup> Upon receipt of a valid claim by an agency or museum, a notice of intent to repatriate is to be published in the Federal Register followed by actual repatriation.<sup>178</sup> Lastly, NAGPRA requires that a committee monitor and review the inventory with respect to identification and repatriation.<sup>179</sup> NAGPRA defines cultural patrimony as:

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169. D. S. Pensley, *The Native American Graves Protection and Repatriation Act (1990): Where the Native Voice Is Missing*, 20 WICAZO SA REV. 37 (2005).

170. NAGPRA defines a federal agency as “any department, agency, or instrumentality of the United States except for the Smithsonian Institution.” 25 U.S.C.S. § 3001(4). These agencies include the Department of the Interior’s Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, U.S. Fish and Wildlife Service, and National Park Service; the Department of Agriculture’s U.S. Forest Service; the U.S. Army Corps of Engineers; and the Tennessee Valley Authority.

171. For purposes of NAGPRA, a museum is described as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.” 25 U.S.C.S. § 3001(8).

172. NAGPRA, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as 25 U.S.C.S. §§ 3001-3013).

173. *See* 25 U.S.C.S. § 3004.

174. *Id.* § 3004(d).

175. *Id.* § 3006(a)(2).

176. *Id.* § 3004(b)(1)(B).

177. *Id.* § 3005(b)(1)(C).

178. *Id.* § 3004(d)(3).

179. *See id.* § 3007.

An object 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 any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.<sup>180</sup>

As can be seen from the definition above, NAGPRA is not directed at what would traditionally be considered IP, as it is focused on tangible artifacts and objects. Nevertheless, such objects, because they carry cultural meaning and represent cultural ideas, can serve as repositories of TK and TCEs. By analogy, one can think of some of these objects as master tapes—original recordings and specific embodiments of specific cultural ideas and practices, some of which, due to custom, religion, or other practice, may only be allowed to be represented within that specific object. Thus, it seems important to see whether the intangible aspects of these objects were under consideration for protection under NAGPRA and whether NAGPRA’s development ever considered and included protection of intangible cultural property, TK, and TCEs.

#### 1. Testimonies from Congressional Hearings

Discussion regarding the enactment of a possible bill providing for the return of Native American sacred artifacts began in 1987, when the Indian Affairs Committee held a hearing on the Native American Cultural Preservation Act, the precursor bill to what finally ended up as NAGPRA.<sup>181</sup> At the 1987 hearing, Edward Able, Director of the American Association of Museums (AAM) expressed concerns with how the Committee perceived the work of the museums.<sup>182</sup> The AAM believed that the Committee inaccurately assumed, and worked on the premise, that the museums had not worked with Native Americans “in a cooperative spirit to preserve, interpret and work toward the resolution of questions of repatriation of Native American materials.”<sup>183</sup> The AAM noted several successful cooperative projects<sup>184</sup> and concluded that

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180. *Id.* § 3001(3)(D).

181. *Native American Cultural Preservation Act: Hearing on S. 187 Before the S. Select Comm. on Indian Affairs*, 100th Cong. (1987) (statement of Edward Able, Director, American Association of Museums).

182. *Id.* at 216-22.

183. *Id.* at 218.

184. *Id.* at 219.

rather than through legislation, the issue of “repatriation of Native American other artifacts of museum collections should be resolved on a case-by-case basis through direct negotiations among the principal parties involved.”<sup>185</sup> The AAM’s description of successful, ongoing collaborative voluntary mechanisms was contradicted by testimony from two representatives of Native American tribes describing significant difficulties in accessing and repatriating remains and artifacts.<sup>186</sup>

On May 14, 1990, a hearing took place before the Select Committee on Indian Affairs of the Senate concerning the enactment of NAGPRA, a bill that would provide for the repatriation of human remains and cultural patrimony for Native Americans tribes.<sup>187</sup> In these hearings, the Committee received a total of 52 testimonies varying from live testimonies to letters that were read before the Committee.<sup>188</sup> The testimonies were from witnesses representing different points of view, such as senators, museums, art dealers, and Native American tribes.<sup>189</sup> Chairman Daniel Inouye presided over the Committee.<sup>190</sup> At the beginning, Senator Inouye acknowledged the AAM concerns expressed in the 1987 hearing, though ultimately stating that the current discussion was about “human rights” and not “validity of museums or the value of scientific enquiry.”<sup>191</sup>

Several issues were at the core of disputes surrounding the passage of NAGPRA, which resulted in several amendments during the process.<sup>192</sup> The main issue related to the work and collections of archeologists and anthropologists.<sup>193</sup> Many archeologists felt that the government was forcibly destroying their hard earned collections and possibly eradicating the entire field of archeology.<sup>194</sup> At the other spectrum, testimony was given that the Native American tribes’ intent was

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185. *Id.* at 222.

186. *Id.* at 29 (statement of Bill Tall Bull, Elder and Religious Leader, Northern Cheyenne Tribe, Inc., Lame Deer, MT); *id.* at 37 (statement of Chief Nelson Walliuiatum, Chief, Wasco Tribe and Tribal Council Member, Confederated Tribes of Warm Springs. Representing the Affiliated Tribes of Northwest Indians, Portland, OR).

187. *Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearing on S. 1021 and S. 1980 before the S. Select Comm. on Indian Affairs*, 101st Cong. (1990) (statement of Daniel, Inouye, Chairman).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1.

192. *Finding Our Way Home: Achieving the Policy Goals of NAGPRA: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 112-157 (2011).

193. *See generally id.*

194. *See generally id.*

not to impede scientific study but rather that the “dead, once disturbed, must be reburied as soon as possible so that their spirits may rest” and return to the rightful owner so that their remains will be properly buried in accordance with tribal traditions.<sup>195</sup> One archeologist stated, “Natives are generally uninterested in findings generated via archaeological curiosity because their own oral traditions adequately explain the past.”<sup>196</sup>

William Boyd, President of the Field Museum of Natural History, testified as to his dissatisfaction of the term “cultural patrimony” as defined in the legislation, given how interrelated the sacred objects are to Native American tribes’ culture.<sup>197</sup> Mr. Boyd stated, “[b]ut as now defined, I believe that the term cultural patrimony has a different meaning than we are used to in the museum field and begins to blur into a great number of other objects.”<sup>198</sup>

The American Indian Religious Freedom Act Report was also submitted for the record.<sup>199</sup> The report included in the Task Force recommendation a stipulation that federal museums return objects that have “religious significance to American Indian, Aleut, and Eskimo or Native Hawaii tradition religions.”<sup>200</sup> The Task Force also recommended that museums facilitate “periodic ritual treatment” of the sacred objects in their possession.<sup>201</sup> Much of the Native American tribes’ testimonies revolved around the need for the museums to return sacred objects and human remains so that the deceased can have the proper burials consistent with their traditions.<sup>202</sup> The testimonies’ focus on human remains is understandable as a core concern of the historically fraught relationship between museums’ so-called “collectors” and the Native American tribes from whom objects were obtained, sometimes through transactions, but in many cases through the use of state power, violence, fraud, or disregard of tribal laws and norms. This is compounded by a history of careful and sometimes deliberate elision of the provenance of many artifacts, objects, and remains in museum collections. Nevertheless, this focus on human

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195. *Id.* at 2-19 (statement of Anu Mittal, Director of Natural Resources and Environment, GAO).

196. Pensley, *supra* note 169, at 52.

197. *Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearing on S. 1021 and S. 1980 before the S. Select Comm. on Indian Affairs*, 101st Cong., at 42 (1990).

198. *Id.*

199. *Id.* at 230.

200. *Id.* at 236.

201. *Id.*

202. *See generally id.*

remains in particular significantly affected the design of NAGPRA away from aspects that might have been able to be extended to intangible cultural property.

## 2. Congressional Report from Committee on Interior and Insular Affairs

In response to concerns raised in the 1990 hearing, the Committee amended the language of the proposed bill.<sup>203</sup> The definition of “sacred objects” consists of objects “practiced by traditional Native American tribes’ religious practitioners and objects needed to renew ceremonies that are part of traditional religions.”<sup>204</sup> The Report also provided that the “intent of the Committee to American religious leaders to obtain such objects as are needed for the renewal of ceremonies that are part of their religions.”<sup>205</sup> The Report also included amended language where a Native American tribe can request the return of items based on evidence of “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.”<sup>206</sup>

## 3. Did NAGPRA Contemplate Providing Protection of TK, GR, and TCE?

Looking at the Congressional Record for NAGPRA, the Committee did not explicitly consider providing protection to Native American tribes for TK, GR, and TCE. However, arguably, the language of NAGPRA could be interpreted to at least provide protection to some aspects of a Native American tribe’s TK. NAGPRA’s definition of “sacred objects” is closely correlated with WIPO’s definition of “tradition knowledge” for they both relate to historical customs that transmit oral traditions that are attributed to Native American tribes. However, in order for TK to be considered a “sacred object” under NAGPRA, the language must be amended to recognize intangible forms of property, such as folklore, as legitimate “sacred objects.” Congressional recognition of Native American tribes’ unique status and the need to protect Native American tribes’ cultural artifacts suggests that NAGPRA could possibly be amended to encompass Native American tribes’ cultural property by

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203. COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES, AND FOR OTHER PURPOSES REPORT. H.R. REP. NO. 101-877 (1990).

204. *Id.* at 14.

205. *Id.*

206. *Id.* at 6.

affording the same protection as other traditional property. Again, the chance of this happening is dependent upon a number of factors which are likely to disrupt the function of NAGPRA and cause a series of unintentional consequences.

### C. *Trademark Law Treaty Implementation Act*

Congress enacted the Trademark Law Treaty Implementation Act on October 30, 1998 to amend the Trademark Act of 1946.<sup>207</sup> The primary goal of the TLTIA was to provide international uniformity of trademark registration requirements by amending the American law.<sup>208</sup> TLTIA requires that owners of trademarks have a bona fide intention to use a trademark in commerce, requiring verifying statements that the trademark is used in commerce.<sup>209</sup> In addition, § 104 states that the failure of an owner to file an extension will result in the abandonment of an application unless the person can show the Commission that the delay was not intentional.<sup>210</sup>

Section 302 requires that the Commissioner of Patents and Trademarks conduct a study of issues “surrounding the protection of the official insignia of Native American tribes” and to “submit a report . . . to the chairman of the Committee on the Judiciary of Senate and the chairman of the Committee on the Judiciary of House of Representatives.”<sup>211</sup>

The USPTO published two Federal Register notices requesting comments on how to best conduct the study and “the public’s views on all aspects of trademark protection for the official insignia of Native American tribes.”<sup>212</sup> According to the official report submitted on November 24, 1999, 33 different people submitted written comments and the USPTO held public hearings thereafter in three different locations.<sup>213</sup> Various groups submitted comments, ranging from Native American tribes to the American Intellectual Property Group to senators.<sup>214</sup> The USPTO stated that it received several comments outside the scope of the study relating to issues regarding other “legitimate social ills having real

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207. Trademark Law Treaty Implementation Act, Pub. L. No. 105-330, 112 Stat. 3064 (1998) (15 U.S.C.S. § 1051 (LEXIS through Pub. L. No. 115-169)).

208. *See generally id.*

209. *Id.* § 1051(b).

210. *Id.* § 1051(d).

211. *See id.*

212. Q. TODD DICKINSON, U.S. PATENT AND TRADEMARK OFFICE, OFFICIAL INSIGNIA OF NATIVE AMERICAN TRIBES: STATUTORILY REQUIRED STUDY 3 (1999).

213. *Id.*

214. *Id.*

consequences for the welfare of Native Americans.”<sup>215</sup> However, the USPTO did not provide the content of these comments in the study.<sup>216</sup> According to the report, the USPTO has “taken steps to ensure that third parties do not register trademarks that give a false impression of the true origin or services.”<sup>217</sup> For example, the USPTO has refused several applications with the name of “Zia” on the reasoning that it will cause a likelihood of false association with the Pueblo of Zia.<sup>218</sup> The USPTO also stated that it had other systems in place, such as the “Letter of Protest” procedure, that allows third parties to challenge trademark applications or protest to cancel trademarks.<sup>219</sup>

The USPTO report stated that the amendment to the Trademark Act prohibits the registration of marks that consist of or comprise matter which, with regards to persons, institutions, beliefs, or national symbols: (1) disparages them; (2) falsely suggests a connection with them; (3) brings them into contempt; or (4) brings them into disrepute.<sup>220</sup> Section 2(b) of the Trademark Act bars the registration of marks which consist of the flag, coat of arms, or other insignia of the United States, any U.S. state, any foreign nation, and the official insignia of federally and state recognized Native American tribes.<sup>221</sup> Section 2(b) also has additional elements for the decision to deny a trademark, such as disparagement or false suggestion of connection.<sup>222</sup>

Included in the USPTO precautionary steps is to have an attorney who has expertise in the area who can examine each application that “suggests an association with Native Americans.”<sup>223</sup> According to the report, it was the original intent of Congress to limit the term “insignia” to flags, coat of arms, or designs formally adopted by the government.<sup>224</sup> However, “in light of [the] significant body of case law” limiting the definition of “insignia,” the USPTO proposed its own definition of “Insignia of Native American Tribes.”<sup>225</sup> The proposed definition stated, “Official Insignia of Native American Tribes means the flag or coat of arms or other emblem or device of any federally recognized tribe.”<sup>226</sup>

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215. *Id.* at 12.

216. *See generally id.*

217. *Id.* at 14.

218. *Id.*

219. *Id.* at 15.

220. *Id.* at 34 (citing 15 U.S.C.S. § 1052 (LEXIS through Pub. L. No. 115-169)).

221. *Id.* at 17.

222. *Id.* at 18.

223. *Id.* at 14.

224. *Id.* at 25.

225. *Id.* at 24.

226. *Id.*

The USPTO was opposed to the amendment of § 2(b) of the Trademark Act stating that the mere identification of Native American tribes through words would “create gross unfairness to trademark owners using names that happen to intersect with those of Native American tribes.”<sup>227</sup> “These entities have no intention of falsely associating themselves with Native American tribes and are no way actually associated with Native American tribes in the mind of the consuming public.”<sup>228</sup>

As a solution, the USPTO proposed a compilation of an “accurate reference list of the Official Insignia of Native American tribes” so that the USPTO can provide a basis for the refusal of applications containing “official insignia.”<sup>229</sup> Additionally, the USPTO provided that the law as it stood was adequate protection to Native American tribes and any “additional procedural or statutory protection for the official insignia of Native American tribes is unnecessary and might risk violation of U.S international treaty obligation if it offers exclusive trademark protection to a particular indigenous group.”<sup>230</sup> Not only did the PTO claim that the “[f]ederal trademark system is not ‘broken’ with respect to official insignia of Native American tribes,” but the PTO also suggested that amending the statute was unwarranted due to a general lack of understanding.<sup>231</sup> As such, the proper solution would be providing “education about the [existing] options available to Native American tribes to . . . protect their cultural heritage.”<sup>232</sup>

### 1. House Hearings

On May 22, 1997, a hearing was held before the House’s Subcommittee on Courts and Intellectual Property regarding the Trademark Law Treaty Implementation Act.<sup>233</sup> Of the nine testimonies the Committee heard, none of the speakers discussed the topic of Native American TK or extending protection to intangible property.<sup>234</sup> Although Speaker Coble mentioned the preservation of Native American tribes’ trademarks, he failed to fully commit to the cause by omitting any forms of protection that could be used to safeguard Native American

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227. *Id.* at 26.

228. *Id.*

229. *Id.* at 38.

230. *Id.* at 45.

231. *Id.* at 46.

232. *Id.*

233. *Madrid Protocol Implementation Act; and Trademark Law Treaty Implementation Act: Hearing on H.R. 567 and H.R. 1661 Before the Subcomm. on Courts and Intell. Prop., 105th Cong. (1997).*

234. *See generally id.*

cultural heritage.<sup>235</sup> In addition, after review of the Senate and House Reports on the TLTIA, I was unable to find any authority relating to the overall topic this Article seeks to address.

2. Did the TLTIA Contemplate Providing Protection to TK, GR, and TCE?

The Congressional Record regarding TLTIA is absent of any authority or mention of providing protection to Native American tribes. In fact, the Committee had very little to say about Native Americans tribes' IP in general. Given that the Congressional Record for TLTIA is devoid of any indication or any contemplation of providing protection of Native American tribes' cultural property, it seems unlikely that the Act can be amended to protect the kind of property at play.

#### V. SOME SUGGESTIONS FOR FUTURE RESEARCH

The issue of the protection of TK and TCEs has yet to find significant purchase in IP discourse in the United States. Part of this may be due to a general isolation of Indian Law from issues surrounding IP. In general, the IP scholarship has been skeptical<sup>236</sup> of the prospect of providing protection of Native American IP. Those authors who have addressed the issue (Angela Riley and Kristin Carpenter, in particular) have focused on the fight to establish a stronger theoretical basis for claims of property and ownership by Native American nations.<sup>237</sup> This Article has posited that one of the barriers to further discussion is that not much is known about what the tribes are actually doing themselves to provide protection for Native American IP, TK, and TCE's. That evidentiary base may be a necessary, but not sufficient condition for reawakening interest in addressing the very real problems faced by Native American nations in acting as sovereign entities to protect, preserve, and promote their TK and TCEs. Thus, a useful research agenda should be focused on the generation of some of this evidentiary base. Such a base will require much more collaboration between scholars of Indian law and scholars of IP, sometimes in inter-disciplinary concert with anthropologists.

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235. See generally *id.* (statement of Speaker Coble).

236. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L. J. 37 (2009); see also Michael F. Brown, *Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's In Defense of Property*, 17 INT'L J. OF CULTURAL PROP. 569 (2010).

237. See in particular, Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

One example of a need for such tripartite collaboration is the major gap in knowledge about the nature and scope of Native American customary law on tribal TK and TCEs. Characterizing and analyzing this law may provide a strong basis for: first, codification in each tribe; second, mutual recognition of tribal law between tribes; and finally, for federal recognition and willingness to apply such law to violations of such subject matter. At a minimum, such information may better establish the argument that Native American tribes are engaged in active and evolving processes of IP preservation and innovation that deserve further analysis for how to accommodate such processes under U.S. federal law.

Another area ripe for further research is the need to move from anecdotal evidence to data collection of the misappropriation of Native American TK and TCEs. This does not necessarily require doing inventories of every single piece of cultural property and then seeking examples of misappropriation. A more limited piece of the puzzle may be gained from identifying the specific vectors by which misappropriation takes place and then searching the forum for Native American TK. A key example is the manner in which the patent system uses such concepts as novelty and inventive step to allow actors who make some small changes to TK to obtain patent protection. A study could be done to find each instance where prior art (for the purposes of inventive step) of patents in a specific sector, such as pharmaceuticals, refer to Native American sources or knowledge. A series of studies in several sectors could begin to provide a stronger evidentiary basis for describing the scope of the problem. This type of project may be simpler in the context of patents, rather than copyrights, given how pervasive the adoption of Native American themes and tropes is in mainstream culture.

Finally, there remain some key theoretical questions that may pose insurmountable barriers to Native American tribes pursuing protection of their IP on their own territory and in territory under federal and state jurisdiction. Describing the exact nature and scope of Native American tribal sovereignty to regulate and legislate on IP (especially novel subject matter such as TK and TCEs) may be the first step towards establishing model codes and later legal relationships to federal law. There remains significant work to be done and this Article is a small contribution to the existing work that may help to set some direction for future work in this area.