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Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?

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INTRODUCTION

What can the Navajos do to prevent non-Navajos from using Navajo rug patterns to produce rugs overseas using cheap materials and labor, thereby undercutting the Navajos themselves in a market for their famous rugs?¹ What can the Australian Aboriginal² peoples do when their sacred and secret imagery is reproduced on carpets they did not

* Associate, Rabinowitz, Boudin, Standard, Krinsky & Lieberman. I am deeply grateful to Jim Atleson, Jane Ginsberg, Alice Haemmerli, Frank Mfunger, Bill Ryan, and Adrienne Stone.

1. This hypothetical example was discussed in Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of the Law*, 17 COPY-RIGHT BULL. 10, 11 (1983).

2. This Article will use the term "Aboriginal" to refer to the indigenous populations of Australia and New Zealand, including Torres Strait Islander peoples. For the purpose of clarity, it will not be used, as it often is, interchangeably with the term "indigenous."

make, and sold to non-Aboriginals, who will inevitably walk on them?³ Do these communities have any legal rights to these pieces of their culture? Does the law provide any means for them to take back their culture or to prevent further poaching?

Due to the increasingly widespread commercial appropriation of indigenous images, patterns, designs, and symbols, indigenous rights groups have turned to intellectual property schemes for protection. But indigenous art and folklore⁴ present many problems for intellectual property protection, and existing western⁵ legal mechanisms may be ill-suited to protect certain types of indigenous art.

We are in a time when new digital technologies and digitally created properties are testing our existing intellectual property regimes, raising the questions of whether these regimes are able to offer protection to these new "properties" or whether, because of the fundamental notions that underlie the laws, they are inherently unsuitable. This Article poses similar questions, not in relation to a new technology, but instead to ancient art. The current use and misuse of indigenous art worldwide have raised the question of whether indigenous peoples⁶ can protect

3. This example is based on the case of *Milpurrurru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240 (Austl.). See *infra* notes 9-22 and accompanying text. Two incidents that bear a resemblance to this example were reported to the U.N. Working Group on Indigenous Populations. Australian Aboriginal tribal elders complained that an anthropological book depicted subjects of secret and sacred significance without their authorization. Similarly, North American Hopi Indians complained that foreign ethnologists secretly filmed their traditional ceremonies for commercial purposes. See *Information Concerning the Report of the Special Rapporteur on the Study of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. ESCOR, Hum. Rts. Comm., Sub-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. Working Group on Indigenous Populations, 11th Sess., Item 7 of the Provisional Agenda, at 3, U.N. Doc. E/CN.4/Sub.2/AC.4/1993/9 (1993) [hereinafter *Information Concerning the Report of the Special Rapporteur*].

4. Folklore, although not often defined, usually "comprises 'all literary and artistic works' mostly created by authors of unknown identity but presumed to be nationals of a given country, evolving from characteristic forms traditional in the ethnic groups of the country." WIPO, GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 119 (1980). It includes folk tales, legends, songs, music, musical instruments, dances, designs, and patterns. See *Information Concerning the Report of the Special Rapporteur*, *supra* note 3, at 6. In this Article, although I deal primarily with the visual arts, I will use the term "folklore" interchangeably with "indigenous art."

5. The term "western" is used here in its traditional sense to indicate a legal system of European origin, and not to refer to the legal systems of indigenous populations that first inhabited the western hemisphere.

6. There are many definitions of what constitutes an indigenous people. This Article uses the definition from the *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur*, U.N. ESCOR, Hum. Rts. Comm., 36th Sess., Agenda Item 11, at 50, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1993). The study

their art and culture under existing intellectual property laws. This Article will examine how application of these laws to this problem may achieve some of the indigenous peoples' goals, but may be at once both inconsistent with the underlying rationale of intellectual property laws and the purpose and nature of indigenous art.

Because intellectual property is becoming increasingly global, rather than territorial, it wrestles with new challenges internationally, which this Article will examine.⁷ This Article will compare national laws, primarily focusing on the United States, Canada, and Australia,⁸ and examine international efforts to respond to the problem. Although each indigenous tribe's art varies both across and within national borders, the focus here will be on the international context as it has become increasingly important to indigenous groups in asserting their rights in the world forum.

In Part I, the Article begins by recounting a recent incident of commercial use of indigenous art in order to both illustrate the harm caused by this phenomenon and to suggest the challenges in achieving meaningful protection. Part II of this Article describes the particular situation of the indigenous populations and the growing trend toward commercialization and commodification of their art forms. It also explains the particular nature of indigenous art and why this use is so troubling to them. Part III provides an in-depth analysis of the obstacles to copyright protection of folklore, including the duration of the rights, the originality requirement, the fixation requirement, the individual nature of the rights, the fair use exception, the economic focus of the remedies, and considers possible ways of overcoming these obstacles. Part IV evaluates international proposals to develop *sui generis*

defined indigenous groups as peoples, communities, or nations which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id.

7. This Article is therefore not intended to be a case study of any individual problem, but rather an analysis of the broader issues raised worldwide.

8. I am interested in how all nations protect folklore, but I will pay particular attention to the United States, Canada, and Australia because these countries all represent countries with indigenous populations that have been "conquered" by a people of a different culture and ethnic origin. Thus, in these countries the intellectual property issues are affected by their location within the colonial context.

rights to protect folklore. Part V appraises the possibility of coupling copyright with other laws to achieve protection of folklore. It analyzes moral rights, public domain statutes, and unfair competition laws. Finally, Part VI assesses these strategies with regard to the particular motivations of the indigenous peoples and concludes that the existing intellectual property regime is well-suited to protect those groups who want to participate in and control the marketing of their arts and crafts. But for those who want to preclude any use of their imagery, the existing intellectual property regime is deficient. Application of intellectual property laws, whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use.

I. A CASE OF PIRATING CULTURAL HERITAGE

The Australian carpet incident alluded to earlier presents an excellent illustration of the harm caused by the commercial poaching of indigenous art. In 1991, Mr. Bethune, an Australian entrepreneur, went into the business of importing hand-knotted, wool carpets into Australia. After a failed attempt to sell carpets with traditional Oriental designs, he decided to have Australian Aboriginal designs reproduced on the carpets, which he thought would generate more interest. After selecting ten designs from reproductions of Aboriginal artists' paintings,⁹ Bethune instructed a factory in Vietnam to produce carpets copying these designs, only making them "less busy."¹⁰ In all, he had 266 carpets manufactured.¹¹ These carpets were sold for up to \$4,252 each. Each carpet was affixed with a swing tag that read:

These unique wall hangings and rugs have been designed by Aboriginal artists from areas throughout Australia. These artists are paid royalties on every carpet sold As carpet weaving is not a tradition of the Aboriginal people, the rugs are produced in Vietnam where we can combine the artistic skills of the Aboriginal people with the weaving traditions of the Vietnamese [W]e have achieved a blending of the talents of

9. The works included bark paintings, acrylic dot paintings, and a lino cut. See *Milpurruru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240, 244 (Austl.).

10. *Id.* at 249. One of the paintings was reproduced only partially. The carpets were produced in Vietnam where Bethune was able to find an attractive combination of cheap labor and an absence of copyright legislation. See *id.* at 248.

11. See *id.* at 249.

these peoples to produce original artistic creations. Each carpet is a unique piece of art.¹²

But Bethune had no agreement with the Aboriginal artists whose paintings he copied. He neither had their authorization to reproduce the designs, nor did he pay them any royalties.¹³

Bethune's offense, however, goes beyond simply reaping where he has not sown. The designs that Bethune selected just happened to be some of the most sacred Aboriginal images. For the most part, these images depict creation stories and stories of the Dreamtime, that "indefinable period of past time which to the Aborigines is the source of all knowledge and of all living things."¹⁴ As these designs tell the stories of creation, it is crucial that they be depicted accurately. Traditionally, the Australian Aboriginal peoples have no written history. As a result, these designs are the main means by which culture is passed down through the generations. In order to ensure that these designs are accurately rendered, only fully trained and approved artists are permitted by the clan to reproduce them. Outsiders would never be permitted to execute them. Furthermore, because these designs are so sacred, they are viewed only during certain ceremonies, and only by those who have attained the requisite level of initiation.

Consider then the harm caused by Bethune: to reproduce these designs on commercial items intended for a non-Aboriginal market meant that the designs would both be depicted and seen by unauthorized persons.¹⁵ Furthermore, the designs would be uprooted from their familiar context and placed in one in which sacred symbols would become meaningless. As if that were not enough, reproducing these

12. *Id.* at 281.

13. Only afterward did he offer the Aboriginal artists a total of \$750 (Australian). *See id.* at 250. There was evidence that he had been warned that he should get the artists' permission and that he had attempted to inquire into the rights to the designs after he had received the first shipment. When he finally did contact the Aboriginal Arts Management Association, he was advised that permission to use the designs would not be granted. *See id.* at 249-50.

14. *Id.* at 245.

15. Interestingly, the "original" paintings were permitted by the clan elders to be displayed in certain well-respected museums. The Australian National Museum, for example, held a special exhibition in honor of the International Year for the World's Indigenous People in 1993 that included some of the paintings at issue. These museums made reproductions, presumably with the artists' permission. For instance, the Australian National Gallery had a portfolio published, among other items, to be used as a resource item for teachers and students. The museums indicated on these reproductions the cultural significance of these works to the Aboriginal peoples. *See id.* at 245. It was from these reproductions that the defendants gained access to the paintings. *See id.* at 244-45.

designs on carpets meant that these Aboriginal peoples' most sacred designs would be walked on.¹⁶ The carpets would serve as a display of the commodification of native culture. Not only were the designs plagiarized by Bethune, they were also robbed of their cultural significance. Bethune's offense was the ultimate act of appropriation. It was the co-opting of the Aboriginal peoples' spiritual traditions.

The artists whose paintings were copied¹⁷ sued Bethune, his company,¹⁸ and its two directors in federal court for copyright infringement.¹⁹ They claimed they had a valid copyright in the paintings and that Bethune had violated their exclusive rights under the Australian Copyright Act. The court agreed, and *Milpurrurru v. Indofurn Pty. Ltd.*²⁰ became the first case in which a court declared that Aboriginal artists must be compensated for the unauthorized use of their art.²¹ This case

16. In order to appreciate the reaction to this, one might recall the offense caused to the Christian community by artist Andres Serrano's *Piss Christ*. See, e.g., *Christ's Image: Minister Angry Over Public Funds for Art*, S.F. CHRON., Apr. 27, 1989, at E2, available in 1989 WL 7163155.

17. The three living artists represented themselves, while the Public Trustee represented the five deceased artists. See *Milpurrurru*, 54 F.C.R. at 243.

18. The company changed its name from Indofurn Pty. Ltd. to Beechrow Pty. Ltd. sometime during the course of the trial. See *id.* at 248.

19. Section 37 of the Copyright Act 1968 (Austl.) reads in pertinent part:

The copyright in [an] artistic work is infringed by a person who, without the license of the owner of the copyright, imports an article into Australia for the purpose of: (a) selling, letting for hire, or by way of trade offering or exposing for sale or hire . . . ; (b) distributing the article . . . ; or (c) by way of trade exhibiting the article in public; if the importer knew, or ought reasonably to have known, that the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright.

The artists also claimed relief under sections 52, 53(c) & (d), and 55 of the Trade Practices Act 1974 (Austl.) for false representations made on the swing tags. See *Milpurrurru*, 54 F.C.R. at 281. *Milpurrurru* was heard in Darwin Federal Court in General Division before Judge von Doussa alone. See *id.* at 240.

20. (1994) 54 F.C.R. 240 (Austl.).

21. The first case ever brought claiming copyright infringement of indigenous art was the 1989 Australian case of *Bulun Bulun v. Nejlam Investments*. See Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 14 EUR. INTELL. PROP. REV. 227, 228 (1992) (hereinafter Golvan, *Protection*). This case involved the large-scale production of T-shirts with unauthorized reproductions of Aboriginal paintings. Because this case was settled before trial, it does not provide any answers as to how well copyright law accommodates indigenous art. It did, however, do much to bring the issue of unauthorized exploitation of Aboriginal art to the attention of non-Aboriginal Australians. See *id.*

The next case to assert copyright infringement of Aboriginal art was the 1991 Australian case of *Bancroft v. Dolina Fashion Group Pty. Ltd.*, Dec. 12, 1991 (unreported). This case involved the manufacture of fabric that was decorated with Aboriginal paintings. But again, this case was settled and no decision was rendered.

The only other copyright case prior to *Milpurrurru*, was the 1991 case of *Yumbulul v.*

was seen as a big victory for Aboriginal peoples and as marking the end to the continued pilfering of their heritage. But has it solved the problem? Although the indigenous artists were able to assert copyright successfully, its requirements may still pose problems for other indigenous works. In addition, other copyright problems that are not present in this case have yet to be overcome.

In fact, this case raises more questions than it answers. For example, will indigenous art really find the protection it needs in copyright law, or is copyright law's protection too limited both in its scope and subject matter to adequately respond to the needs of the indigenous communities? And will translating indigenous art and authorship practices into western categories do more, in the end, to appropriate the local culture than straightforward pirating would?

By the time the *Milpururru* case reached the court, the problem of commercial exploitation of Aboriginal art had reached the national conscience of the general public. The court's opinion reflects an obvious concern with the effect of this type of plunder on the Aboriginal community. The first five pages of the opinion explain the importance of these images and the offense caused by their reproduction. The court then states: "It is against this background that the conduct of the respondents in question in the present case falls to be considered."²² This case represents an example of judicial creativity used to prevent continued cultural poaching of Aboriginal designs. It may not, however, resolve the problem.

II. THE USES AND ABUSES OF INDIGENOUS ART

The *Milpururru* case is not an isolated example. Instead, it is indicative of a trend. Over the last decade there has been a proliferation of reproductions of indigenous peoples' artworks.²³ Increasingly, indigenous designs are being appropriated and used commercially throughout the world. Technological advances have only fanned this

Reserve Bank of Australia, (1991) 21 I.P.R. 481 (Austl.). This case was also settled. For further discussion, see *infra* notes 119-25 and accompanying text.

22. *Milpururru*, 54 F.C.R. at 248.

23. See *Information Concerning the Report of the Special Rapporteur*, *supra* note 3, at 3; Erica-Irene Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, U.N. ESCOR, Hum. Rts. Comm., Sub-Comm. On Prevention of Discrimination & Protection of Minorities, 45th Sess., Item 14 of Provisional Agenda, at 7, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) [hereinafter *Study/protection*]; Dean A. Ellinson, *Unauthorised Reproduction of Traditional Aboriginal Art*, 17 U.N.S.W. L.J. 327 (1994).

fire. Indigenous motifs are used to sell everything from Japanese automobiles like the Mazda Navajo to Barbie dolls to back-to-school clothes. Indigenous art has been reproduced and sold as art reproductions and as craft items, but more commonly it has been reproduced and sold as cheaper commodities, such as T-shirts,²⁴ tea towels,²⁵ and other souvenirs. Indigenous art has also been reproduced and used in advertising and marketing.²⁶ Thus we are seeing indigenous designs more often and in new contexts.

It is safe to say that the indigenous peoples are not flattered by this use of their art. While marketers may view this strategy as an excellent way to sell products and increase tourism, indigenous rights groups are outraged. As the executive director of one of these groups sees it, "For the marketers, Aboriginal culture is merely a commodity, there to be strip-mined for commercial profits."²⁷ This large-scale pirating of indigenous art for commercial gain is seen as just the most recent attack on indigenous cultures—a form of cultural theft that will leave indigenous peoples further bereft.

Significantly, nearly all of these reproductions are unauthorized. Most are reproduced without so much as a request for permission. The consequence is that the indigenous peoples who created the art are not being compensated for its use.²⁸ Another consequence is that indigenous communities are not exercising control over how their art is being used. This lack of control means that they cannot refuse to have their work put to particular uses and that they cannot ensure that their work is reproduced in a way that maintains its integrity or the reputation of the creator. To better understand the consequences of this unauthorized

24. Americans can even purchase such T-shirts with religious Aboriginal designs over the Internet. See, e.g., *Australian Aboriginal Art T-Shirts* (visited Oct. 12, 1997) <<http://www.ex-ton.com/atg/gallery2.html>> (offering shirts adorned with Aboriginal designs for sale over the Internet).

25. These examples are deliberate as they were both the subject of controversies in Australia. See Golvan, *Protection*, *supra* note 21, at 228.

26. Perhaps the most well-known offense is the use of Aboriginal designs on one of Qantas Airline's jumbo jets. See Kalinga Seneviratne, *Australia: Aborigines Fight for Copyright on Cultural Heritage*, INT'L PRESS SERV., Jun. 8, 1995, available in 1995 WL 2261623. Indigenous art is also commonly reproduced for quasi-educational purposes. For example, often indigenous songs, dances, or other rituals are videotaped for documentaries. See Jabbour, *supra* note 1, at 12.

27. Seneviratne, *supra* note 26, at *2 (statement of John Ah Kit, executive director of the indigenous land council, Jawoyn Association).

28. Companies and non-indigenous persons are reaping substantial profits from indigenous designs without providing any compensation to the indigenous communities from which the art came. See *infra* note 213.

use, we need to better understand the traditional place of art in indigenous communities.

A. *The Nature of Indigenous Art*

Without attempting to describe any one community's art forms, this Article instead sets out to analyze those characteristics that are common to all folkloric cultures to determine their suitability to intellectual property protection. Toward this end, folklore may be said to have the following common characteristics: (1) it is passed from generation to generation, either orally or through imitation; (2) it is generally not attributable to any individual author or set of authors; and (3) it is being continuously utilized and developed within the indigenous community.²⁹

In indigenous communities,³⁰ art plays a central role in society. Through art, these communities pass on their knowledge and beliefs from generation to generation. Therefore, art may serve as their recorded history as well as their spiritual teachings. As such, the symbolism of the designs are of great significance. These symbols can be understood as mnemonics for the visual memorization of their history and beliefs.

Art is central to the practice of religion in most indigenous communities.³¹ Most spiritual rituals involve visual displays, dance, and/or music and song. In the words of one well-known Aboriginal artist, "In song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society."³²

29. See U.N. ESCOR, *Committee of Governmental Experts on the Safeguarding of Folklore*, 16 COPYRIGHT BULL. 27, 37 (1982).

30. This Article quite problematically attempts to discuss the artistic traditions of indigenous peoples throughout the world. This strategy may, however, be defensible in that it is the practice of the United Nations and its related organizations to similarly treat "indigenous peoples" on the whole. It is useful in this project because this Article deals with those issues in intellectual property that are common to all indigenous communities. Of course there are great disparities in traditions and beliefs of indigenous peoples across the world, but it should be noted that there are also great disparities among indigenous tribes within the boundaries of any given state.

31. In Australian Aboriginal culture "traditional designs and art forms are intimately connected with Aboriginal religion." Margaret Martin, *What's in a Painting? The Cultural Harm of Unauthorised Reproduction: Milpurruru & Ors v. Indofum Pty Ltd. & Ors*, 17 SYDNEY L. REV. 591, 593 (1995).

32. W. Marika, *Copyright on Aboriginal Art*, ABORIGINAL NEWS, Feb. 1976, at 7.

It is because of the sacred place of art in indigenous culture and the use of certain designs in rituals that its access outside of the clan must be restricted. Due to the role art plays in passing on beliefs through the generations, it follows that the production of artistic works should be carefully monitored. Indeed, in most indigenous communities there is customary law which controls who makes art, as well as when, how, and for whom art is made.³³ It controls what motifs are represented and how they are depicted.

Often, due to the spiritual connections to art, a song, dance, or image may be reserved for special ceremonies. Often "certain works of folklore . . . cannot be shown, nor can the themes in them be disclosed, except to those few who have been admitted to knowledge of ritual secrets and mysteries by undergoing initiation or other special ceremonies" due to the sacred nature of the work.³⁴ Only members of the community who have achieved a certain level of initiation may be permitted to observe these rituals.³⁵ Thus, the "law of art" will also dictate who may see these images and dances and who may hear these songs.

Given this special place of art in the indigenous community, one can appreciate the additional harm caused by the unauthorized reproduction of artworks. Use of these images by outsiders violates many of the principles governing the use and creation of art. Non-designated persons are producing the work, the work may be reproduced in an inaccurate or unfaithful manner, and the image may be viewed by the uninitiated so that secret texts will be revealed. Furthermore, the trivial use to which many sacred works are put denigrates the special significance of the art.³⁶

The struggle over these designs, therefore, is nothing less than the struggle over cultural meaning. It is the struggle to fix and transform meaning.³⁷ In their reproduction, these indigenous images become

33. *See id.*

34. Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 298 (1995).

35. *See Study/protection, supra* note 23, at 21.

36. Since many indigenous designs are connected to spiritual and ritual uses, the mere use of these designs in mass marketing is offensive. *Cf.* Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995) (discussing the harm caused by the use of the name of Crazy Horse, a proponent of prohibition, to market malt liquor).

37. Rosemary Coombe has theorized this phenomenon from the opposite vantage point. She has written about the resistance and redefinition in disempowered groups' use and reuse of cultural icons. For instance, she discusses the use of Nike by street groups, the use of Bart

unhinged from their "domain of tradition."³⁸ Thus detached, they are free of their original uses and understandings. They can then be recontextualized and their meanings "recoded"³⁹ "without any necessary awareness of an original or its historical situation."⁴⁰ Thus the value of an image in ritual is replaced with its exchange value in commodities.⁴¹

B. *The Poaching of Indigenous Culture*

The theft of cultural symbols and art must be placed in historical perspective to grasp its implications fully. Many would agree that the survival of indigenous folklore is threatened. For the indigenous communities, the theft of their folklore represents the final blow to their civilization from "invaders." It is simply an extension of the plunder mentality. It signifies "that culture is open to pillage in the same way that Aboriginal lands and resources have been for over 200 years. Survival for indigenous peoples the world over is not merely a question of physical existence, but depends upon maintaining spiritual links with the land and their communities."⁴² Protection of their culture has become recognized as a fundamental human right.⁴³

Simpson by the black community, and the use of the Olympic symbol by the gay community. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863-65 (1991) [hereinafter Coombe, *Object*]. But here I am interested in the subordinated groups struggle to retain their cultural symbols and prevent them from being recoded in the commodifying world.

38. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 221 (Hannah Arendt ed., 1968). Or it could be said that they are "decontextualized."

39. Hal Foster, *Re: Post*, in ART AFTER MODERNISM: RETHINKING REPRESENTATION 189 (Brian Wallis ed., 1984).

40. Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 374 (1992) [hereinafter Coombe, *Authorizing*].

41. See Benjamin, *supra* note 38; Coombe, *Authorizing*, *supra* note 40, at 374.

42. Puri, *supra* note 34, at 294.

43. See, for example, Article 27 of the International Convention on Civil and Political Rights, adopted by G.A. Res. 2200A (XXI), 16 Dec. 1966, entered into force 23 Mar. 1976, which requires parties to protect the rights of minorities to enjoy and develop their culture. Both Article 27.2 of the Universal Declaration of Human Rights, and Article 15.1 of the International Covenant of Economic, Social and Cultural Rights provide the right to protect the moral and material interests in any artistic production. Article 1 of both the International Covenant of Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights provides indigenous peoples with the right of "self-determination" and the right to pursue their cultural development. Article 4 of the ILO Convention on Indigenous Populations, No. 107 (1957) and its 1989 revision (No. 169), directs states to take "due account" of the cultural and religious values of indigenous populations and to promote the full realization of

Having lost their land and much of their way of life, indigenous peoples see their art as one of the only things they have left. As Suzan Harjo, former head of the National Congress of American Indians, observed, “[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There’s little left that’s tangible. Now they’re taking what’s intangible.”⁴⁴ Indigenous peoples therefore see their identity as depending on the survival of their art. “Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.”⁴⁵ Indigenous art is fundamental to the articulation of cultural identity.⁴⁶ The linkage between cultural theft and the vitality of indigenous populations has been noted by Tom Greaves:

The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.⁴⁷

III. COPYRIGHT PROTECTION FOR FOLKLORE

Over the last few decades there has been an outcry in the United States, Canada, and Australia for governments to do something to pro-

the cultural rights of indigenous peoples. Finally, *The Draft Declaration on the Rights of Indigenous Peoples* in Article 7 provides the right of indigenous peoples to have their cultural and intellectual property protected. See *Report of the Working Group on Indigenous Populations, Draft Universal Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Hum. Rts. Comm., 43d Sess., Annex II, Agenda Item 15, at 35, U.N. Doc. E/CN.4/Sub.2/1991/40/Rev.1 (1991) (emphasis added) [hereinafter *The Draft Declaration on the Rights of Indigenous Peoples*]. See also *infra* notes 160-61 and accompanying text. For analysis of the protections these instruments offer indigenous art, see Fleur Johns, *Portrait of the Artist as a White Man: The International Law of Human Rights and Aboriginal Culture*, 16 AUST. YEAR BOOK INT’L L. 173 *passim* (1995).

44. Leslie Sowers, *Going Native/Just a Trend, Heartfelt Seeking—or Cultural Theft?*, HOUSTON CHRON., Sept. 12, 1993, at 1.

45. *Study/protection, supra* note 23, at 4.

46. “Aboriginal people have a deep spiritual and emotional attachment to folklore and regard it as their communal property.” Puri, *supra* note 34, at 298.

47. INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK at ix (Tom Greaves ed., 1994).

tect indigenous communities from the poaching of their artworks.⁴⁸ Naturally, indigenous peoples and advocacy groups are concerned about this problem and have sought legal avenues of redress. In an effort to prevent the appropriation and manipulation of their cultural images and texts, indigenous peoples, fighting for their cultural survival, are increasingly turning to intellectual property laws to protect their cultural heritage from external poaching.⁴⁹ Significantly, indigenous groups are willing to participate in the western intellectual property rights scheme from which they feel they have been excluded and therefore disadvantaged. They have invoked intellectual property laws to use as a shield to prevent further intrusions into their already pillaged culture.

Indigenous peoples seek to use these intellectual property laws in an effort to control and restrict the flow of images, thereby securing the meaning of their art. They want to be able to deny certain uses of their art, especially those that would amount to spiritual violations. They also want the ability to authorize certain uses of their art. They want to end the current situation in which only non-indigenous peoples are making money off their culture. Therefore, they want the ability to license certain uses and to collect royalties.⁵⁰ They want to be able to

48. Intellectual property protection of indigenous art has received more attention in Australia and at the international level than it has in the United States. The United States has, however, been a leader in the debate over protection of indigenous cultural property. See, e.g., John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989). The Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (1994), protects indigenous peoples' rights to ceremonial objects, human remains, and the use of traditional religious sites. The issue of plunder and cultural patrimony continues to be controversial especially with respect to the continuing destruction and confiscation of indigenous peoples' burial artifacts and other objects of religious and cultural significance. See, e.g., Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the Unesco Convention?*, 15 U. PA. J. INT'L BUS. L. 469 (1994). There has also been a more recent discussion about the trademark aspects of the use of tribal names in the United States. See, e.g., Newton, *supra* note 36. These topics are, however, beyond the scope of this Article.

49. An additional, related issue that is currently getting a great deal of attention in North America is the intellectual property rights of indigenous peoples to their plant materials and medicinal knowledge. See, e.g., Mark Hannig, *An Examination of the Possibility to Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of the NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties*, 13 ARIZ. J. INT'L & COMP. L. 175 (1996).

50. The economic benefit of copyright protection is not a trivial matter. The sale of artworks is the main source of income for the peoples of many Australian Aboriginal tribes. See Golvan, *Protection*, *supra* note 21, at 228. Between 1987 and 1988, Aboriginal peoples received over \$7 million (Australian) from their art sales. See Puri, *supra* note 34, at 299. The stakes for this political and cultural struggle are at an all-time high now in Australia as it prepares for the 2000 Summer Olympic games, which will be held in Sydney. As Aboriginal

authorize those uses of their art that would celebrate their culture and to use certain mass media imagery as a means of articulating their community identity to the outside world. As the leader of one of the Aboriginal rights groups made explicit, they want to use copyright law to "tak[e] back" their culture.⁵¹

What to the consumer market may look like the same problem actually involves two different sets of concerns. First, some indigenous peoples want to be able to benefit from the economic rights provided by intellectual property laws. They want to be compensated for their contribution to the artwork through licensing, and they want to exclude non-indigenous competitors from the market by preventing unauthentic products from being marketed as made by indigenous people. Assuming that the circulation of indigenous art is inevitable, some indigenous artists want to be sure to participate in this celebration of indigenous culture. By gaining control over the circulation of their imagery, they want to ensure that the public gets an accurate account of indigenous culture and that the investment in that culture goes back to their communities. These concerns are illustrated in the first example described at the beginning of this Article involving the use of the Navajo rug patterns. Perhaps a subset of this group is the individual artists who want to be able to draw on and develop the imagery of their ancestors in a way that may lead to commercial success. Throughout this Article, I will refer to this first group as the "realist group."

But the second set of concerns is more profound. Some indigenous peoples also want to use intellectual property laws to prevent what may be characterized as a cultural or psychological harm caused by the unauthorized use of their art.⁵² They see intellectual property laws as

designs have been popular with marketing in the tourism industry, it is widely expected that the use of such designs in marketing campaigns surrounding the Olympics will be big business. It should be noted at the outset, however, that having legal rights to intellectual property does not necessarily translate into reaping the financial rewards of its exploitation. What it does mean is that marketers would be legally obligated to purchase the rights to use this property, although the price of such a license may more closely resemble the bargaining positions of the parties than the expected return on the use.

51. Seneviratne, *supra* note 26.

52. It has been said that indigenous peoples do not view their art as property that can be exploited commercially, but instead as a source of knowledge and beliefs that bind them to one another and to their land. See *Study/protection*, *supra* note 23, at 8. This study notes that [a] song, for example, is not a "commodity," a "good," or a form of "property," but one of the manifestations of an ancient and continuing relationship between the people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently

offering a means to control the circulation of their art. They want to be able to restrict its dissemination and, in some cases, prevent dissemination altogether.⁵³ They fear for the well-being of the indigenous community in the face of commercial exploitation, and they worry that the expropriation of their living culture will cause their imagery to lose its original significance which will lead to a disruption of their practiced religion and beliefs and a dissolution of their culture. These concerns are illustrated in the second example involving reproduction of sacred imagery on carpets. I will refer to this second group as the "traditional group."

Although both sets of concerns are likely to be operating simultaneously in some situations, because these two motivations are so different, it may be that the law will sometimes satisfy one while it frustrates the other. To consider the effectiveness of intellectual property protection properly, both of these sets of concerns must be analyzed.

It is said that indigenous communities are vulnerable to this kind of theft because their artworks do not enjoy comprehensive protection under existing intellectual property regimes.⁵⁴ Unfortunately, this claim has been made without supporting analysis.⁵⁵ Most commentators begin

or completely. . . . [I]ndigenous peoples do not view their heritage in terms of property at all—that is, something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility. . . . For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.

Id.

53. In fact, this group could be further subdivided into those that want to control the uses to which their art is put and those who want to forbid its use altogether.

54. See, e.g., *Information Concerning the Report of the Special Rapporteur*, *supra* note 3, at 5 ("For as long as the Berne Convention has been in force, the provisions adopted to date in the area of copyright have been found to be neither sufficient nor effective in ensuring the ownership . . . [of] expressions of folklore . . ."); International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General's Legal Practice, Commonwealth of Australia, Issues Paper, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (Oct. 1994), at v ("In the past, aspects of Aboriginal and Torres Strait Islander cultural expression have not always been adequately protected by the law."); *Yumulul v. Reserve Bank of Austl.*, 21 (1991) I.P.R. 481, 490 (Austl.) ("[I]t may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."). See also *infra* notes 119-25 and accompanying text.

55. See Brad Sherman, *From the Non-original to the Ab-original: A History*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 111, 116 (Brad Sherman & Alain Strowells eds. 1994) (suggesting that commentators neglected to analyze the individual case, being interested rather in "the more abstract level of policy or principle").

While it is true that indigenous peoples have made little use of intellectual property laws until now, the absence of such claims does not necessarily indicate that the law is inhos-

with the normative question of whether indigenous art should be protected with intellectual property laws. Few even get to the descriptive question of whether or not indigenous art is protected by simply assuming that it is not. By beginning from the standpoint that indigenous art *should* be protected by intellectual property laws,⁵⁶ and by accepting that it is not currently protected based on generalized notions of the originality of indigenous works as a unified group, commentators have failed to understand how indigenous peoples will best be able to meet their needs. Thus this Article will now proceed to that descriptive level and analyze whether some indigenous art is excluded from protection under existing intellectual property laws, whether the protection intellectual property laws offer is adequate and appropriate, or whether intellectual property laws must be reformulated to accommodate the unique challenges that folklore poses.

Of all the existing legal mechanisms, copyright law initially appears to be the best suited to protect indigenous folklore.⁵⁷ Copyright law is a logical choice because copyright law is designed to protect artistic works from unauthorized reproduction.⁵⁸ Likewise, indigenous groups are seeking to control the reproduction of their paintings, songs, and dances. Why shouldn't copyright law protect indigenous art? Indigenous artists feel that they should be protected to the same extent as non-indigenous artists. In one article, a well-known Aboriginal artist argued that Aboriginal artists should be accorded "the same recognition [as non-Aboriginal artists], that our works be respected and that we be acknowledged as the rightful owners of our own works of art."⁵⁹ Thus the question arises as to whether copyright law is capable of accommodating this art form and satisfactorily meeting the needs of the commu-

pitable to these claims. The lack of participation in the intellectual property regime by indigenous peoples may be due to other factors—factors that also need analysis.

56. As Brad Sherman notes, commentators inevitably conclude thus. *See id.* at 113.

57. The first attempts to grant legal protection to folklore were made under the rubric of various copyright laws in developing countries such as Kenya (1975), Tunisia (1967), Chile (1970), and Bolivia (Decree of 1978). *See Information Concerning the Report of the Special Rapporteur, supra* note 3, at 5. Other possible legal avenues to protect folklore include trademark, unfair competition, consumer protection laws, the common law tort of passing off, trade secrets, breach of confidence, and invasion of privacy. I will address these theories later in the Article. *See infra* notes 209-32 and accompanying text.

58. The owner of a copyrighted work has the exclusive right to reproduce and distribute copies of the work, to prepare derivative works, to display or perform the work, or to import copies of it, and to authorize others to do the same. *See* U.S. Copyright Act of 1976, 17 U.S.C. § 106 (1994); Australian Copyright Act, 1968, § 31(1)(a); Canadian Copyright Act, R.S.C., ch. C-42, § 3(1) (1985).

59. Marika, *supra* note 32.

nity.

The copyright doctrine,⁶⁰ however, presents a myriad of barriers to the full protection of indigenous art and folklore. These barriers include the duration of the protection, the originality requirement, the fixation requirement, the individual nature of the rights, the fair use exception, and the economic focus of the remedies. Each of these barriers will be analyzed in turn to understand whether they are preclusive or whether they can be overcome.

A. *The Duration of the Rights*

The first problem of affording copyright protection to folklore is the term of protection. In all Berne Convention⁶¹ member states, the term of the protection is the life of the author plus fifty years.⁶² In addition to the problem of identifying a particular author by whose life the term may be measured,⁶³ the more significant problem is that the term is insufficient. Many indigenous rights advocates argue that perpetual protection should be granted to folklore because "the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time."⁶⁴ Even assuming that works would be protected, say, for one hundred years as an unpublished anonymous work, that period is still insignificant in the life of artistic traditions that date back thousands of years.⁶⁵ One hun-

60. Because the United States, Canada, and Australia are all members of the Berne Convention and have very similar copyright schemes, I may, at times, speak generally of all three where they are in agreement.

61. Formed over 100 years ago, the Berne Convention attempts to reconcile the policies of the various nations regarding international protection of authors and artists. See Berne Convention for the Protection of Literary and Artistic Works (1886) [hereinafter Berne Convention].

62. See Berne Convention art. 7(1), Brussels Text 1948; see also U.S. Copyright Act of 1976, 17 U.S.C. § 302 (1994); Australian Copyright Act, 1968, § 33(2); Canadian Copyright Act, R.S.C., ch. C-42, § 6 (1985).

63. Section 302(c) of the U.S. Copyright Act provides a special term for anonymous and pseudonymous works: 75 years from publication or 100 years from creation, whichever is shorter. Copyright continues for 50 years from the death of the last surviving author in the case of a joint work. See 17 U.S.C. § 302(b) (1994). See *infra* notes 127-31 and accompanying text. Under Australian law, duration of protection lasts for 50 years after publication. See Copyright Act 1968, § 34. The Canadian Copyright Act makes no mention of anonymous or pseudonymous works. The question then arises as to how long the work is protected after publication—50 years or 50 years after the death of the publisher. See LESLEY ELLEN HARRIS, CANADIAN COPYRIGHT LAW 86 (1992).

64. *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (UNESCO-WIPO, 1985), at 22.

65. Some Australian Aboriginal designs date back more than 40,000 years. See Michael

dred years from now, indigenous peoples will not want to release their sacred texts to the outside to be exploited. Thus, this term of protection is insufficient for the "traditional group." It is also inadequate for the "realist group." This limited term of protection means that most folkloric works⁶⁶ may already be in the public domain⁶⁷ and may therefore be used without authorization. Therefore, the "realist group" will not be able to prevent outsiders from copying their works or their basic underlying symbols.

In order to fully meet the needs of both the "realist group" and the "traditional group," the copyright law must be reformulated so that (1) protection is retroactive for all works of indigenous folklore, and (2) protection is perpetual. The first problem with reformulating the law specifically for folklore is, of course, finding a way to define folklore in order to limit the amendment to these works. Assuming this problem is not insurmountable, the next problem is that, in the United States at least, such a modification may be unconstitutional. Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress the power to enact laws to secure for authors exclusive rights to their writings "for limited Times" The limitation on this monopolistic right is thought to be necessary to secure the delicate balance achieved by copyright. Any extension of these rights runs the risk of limiting speech and inhibiting innovation.

B. *The Originality Requirement*

The second barrier to the protection of folklore is that copyright law requires that a work be original to be eligible for protection. As the U.S. Supreme Court pronounced in its most recent decision concerning the subject matter of copyright: "The sine qua non of copyright is originality."⁶⁸ And, indeed, American (and Continental) copyright law is premised on the concept of authorship and the concomitant no-

Blakeney, *Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law*, 17 EUR. INTELL. PROP. REV. 442, 445 (1995). It is said that Aboriginal art is the oldest continuous living art tradition. See Puri, *supra* note 34, at 298.

66. That is, assuming they have satisfied the requirements of originality and fixation and they are in countries without formalities.

67. Works whose terms have expired are in the public domain. Most Aboriginal symbols and forms date back to the Dreamtime, or creation. See Ellinson, *supra* note 23, at 330. Therefore the underlying elements of most Aboriginal art is in the public domain.

68. *Feist Publications, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 345 (1991). Likewise, it has been said that "[i]t is authorship that is critical, limiting and determinative." *Kuddle Toy, Inc. v. Pussycat-Toy Co.*, 183 U.S.P.Q. (BNA) 642, 657 (E.D.N.Y. 1974).

tion of originality.⁶⁹ The Copyright Act provides protection only to "original works of authorship."⁷⁰

Canadian and Australian copyright laws closely track the Anglo-American system. Consequently, they also require that works demonstrate original authorship to be eligible for protection.⁷¹ The work must

69. Melville Nimmer, author of a leading copyright treatise, wrote, "the one indispensable element of authorship is originality . . . Originality [is] the essence of authorship." 1 MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS*, ch. 1 (1967). As one court reasoned, an author is "the beginner . . . or first mover of anything . . . [a] creator; originator." *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523, 531 (D. Neb. 1944) (citation omitted) (finding originality in musical compositions). The Supreme Court defined an author as "he to whom anything owes its origin; originator, maker." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (citation omitted). Thus, courts reasoned that a work is not the product of an author, as is constitutionally required, unless it is original. *See* U.S. CONST. art. I, § 8, cl. 8.

70. 17 U.S.C. § 102(a) (1994). Of course, this is not to say that a work must be unique or novel. *See* *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951). For instance, if one produces something exactly like something that already exists, it will be protected by copyright so long as it was produced without knowledge of the preexisting work. *See* *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) ("but if by some magic a man who had never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author'"). Nimmer explains that "[o]riginality means only that the work owes its origin to the author, i.e., is independently created, and not copied from other works." NIMMER, *supra* note 69, § 1.06. To illustrate this point he provides an example of a copy of a painting by Rembrandt that "even experts can't distinguish from the original." *Id.* This painting, he says, will not be protected by copyright because the second artist has failed to create anything which owes its origin to him. But what is original authorship for copyright purposes? Curiously the copyright statute neglects to define either "original" or "authorship"—as if to say it is too obvious. *See* H.R. REP. NO. 94-1476, at 51 (1976) (original authorship "purposely left undefined"). But perhaps most revealing is what the act declares is not an original work of authorship. Similarly, as Price and Pollack suggest, "[d]octrines such as work for hire, fair use, joint authorship . . . all inform us more readily about what the law thinks of authors than the interpretation of the word itself." Monroe E. Price & Malla Pollack, *The Author in Copyright: Notes for the Literary Critic*, 10 CARDOZO ARTS & ENT. L.J. 703, 717 (1992). A "derivative work" is not an original work of authorship. A derivative work is defined in the act as "a work based upon one or more preexisting works . . . [in] any . . . form in which a work may be recast, transformed or adapted . . ." 17 U.S.C. § 101. The "author" of the "original" has the exclusive right to prepare derivative works. *See* *id.* § 106(2). In order to be considered an "original work of authorship" then a work that is based on a preexisting work must show substantial variation from the "original" because otherwise it would not constitute an act of authorship. *See* *L. Ballin & Son v. Snyder*, 536 F.2d 486, 490-91 (2d Cir. 1976) (en banc) (holding copyright on plastic replica of antique "Uncle Sam" bank long in the public domain invalid where replica involved only purely trivial variations from original); *see also* *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983).

71. The Canadian Copyright Act also requires that works be original. Copyright Act, R.S.C., ch. C-42, § 4(1) provides that "copyright shall subsist . . . in every original literary, dramatic, musical and artistic work . . ." Copyright law in Australia is governed by the Copyright Act of 1968 and the Designs Act of 1906. Section 32 of the 1968 Act provides

“originate from the author.”⁷²

To be original a work must not be copied, but must be the product of original thought, skill, or labor of the artist.⁷³ Copyright law does not require absolute novelty.⁷⁴ As long as a work evidences individual skill and labor of the author, it will satisfy this requirement.⁷⁵ Where a work is based on a preexisting work, it must demonstrate substantial, and not merely trivial, variation.⁷⁶

Still, this requirement may present problems for folklore.⁷⁷ Folkloric work is most often ancient, many of the art forms having been developed generations ago. Australian Aboriginal art, for instance, “draw[s] upon custom and tradition” and “represent[s] a . . . continua-

that works must be original to receive copyright protection. Like the American Act, the Australian Act does not define originality. Australian originality doctrine has developed consistent with that in the United States. In fact, in explaining the doctrine, a treatise on Australian copyright law quotes and cites *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951) (holding that mezzotint engravings of paintings of old masters were sufficiently distinguishable to warrant granting of copyright). See JAMES C. LAHORE, *COPYRIGHT AND THE ARTS IN AUSTRALIA* (1974). Neither act mentions folklore or folk art. “Aboriginal works are not excluded from protection, but they are not given any special protection either. This means that a painting by Albert Namatjira is protected in the same way as a painting by, say, Brett Whitely.” Australian Copyright Council, *Aboriginal Arts and Copyright*, 75 BULL. 4 (1991) (comparing a well-known Aboriginal artist to a well-known white Australian artist). The Berne Convention does not define the requisite level of originality.

72. *University of London Press Ltd. v. University Tutorial Press Ltd.*, 2 Ch. 601, 609 (1916). In order to be protected by copyright, a work “must not be copied from another work” *Id.* at 609. Originality has been held to be “a matter of degree, depending on the amount of skill, judgement or labour that has been involved in making the work.” *Apple Computer Inc. v. Computer Edge Pty. Ltd.*, (1986) 161 C.L.R. 171 (Austl.).

73. See *Alva Studios, Inc. v. Winneger*, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).

74. See *Alfred Bell & Co.*, 191 F.2d at 102 (distinguishing the prerequisites of patent and copyright law).

75. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc).

76. See *id.* at 490; see also *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 (2d Cir. 1982) (citation omitted) (holding that changes that were made in producing a drawing based on a preexisting copyrighted sketch of Paddington Bear, which consisted of changed proportions of the hat, elimination of individualized fingers and toes, and overall smoothing of lines, were sufficiently significant to qualify the drawing as an original work); *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945) (holding that a drawing of the board used in playing the game “Acey-Ducey,” which was copied from the traditional backgammon board to which nothing new of substance or distinction was added was not original); MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 3.03 (1997) [hereinafter NIMMER ON COPYRIGHT].

77. In 1981, an Australian Government Working Party on the Protection of Aboriginal Folklore concluded that the Copyright Act “provides inappropriate and inadequate . . . protection for . . . folklore, due to its focus upon originality as a precondition to protection.” Johns, *supra* note 43, at 180.

tion of . . . time-honoured myths and legends.”⁷⁸ Although folklore can be entirely new, it is most often directly derived from preexisting works. Folklore is the product of a slow process of creative development. It is not stagnant, but evolves slowly.

Innovation is simply not what is valued in indigenous art. Rather, faithful reproduction is prized. For the most part, the notion of original authorship is foreign to indigenous art and culture. The production of artwork in indigenous culture can best be described as a process of reinterpretation. The emphasis on derivation, and not deviation, from preexisting works by indigenous artists is a result of the spiritual and educational nature of much indigenous art.

Because of indigenous art's function as a historical and sacred text, innovation is restricted. As a result, artists are often not free to express their inspiration either from God or nature. Rather, the production of traditional art is very restricted. Because the works are so closely connected to sacred thoughts, it follows that these designs must be reproduced faithfully and accurately. Since these art forms are the main means of passing down their religion and their history from generation to generation, it is important that any “artistic license” be kept to a minimum.⁷⁹ Because these are often oral cultures, there must be a firm relationship between patterns and iconography.⁸⁰ Indigenous art is meant to communicate ideas and beliefs and to be “read” as a kind of “visual literacy.” Thus the production of these works is closely supervised. In fact, in Australia, even the supervision is dictated by

78. Puri, *supra* note 34, at 298.

79. For example, in Australian Aboriginal art, creation stories form the subject matter of most artworks. One scholar has stated that

[t]he forms of the preexisting designs are believed to have been created in the Ancestral Past by the Ancestral Beings, and they have been handed down through the generations. A preexisting design may be made up of many design elements—various specific images, motifs or stylistic depictions—each of which may itself be said to be a preexisting design. According to traditional Aboriginal customary law, *preexisting designs cannot, and should not, be changed*. Their efficacy, in the form of activating Ancestral power, would be impaired if they deviated too widely from socially accepted norms.

Ellinson, *supra* note 23, at 330 (emphasis added).

80. Of course, there is a strict iconography that can be read in much western art as well. See, e.g., ERWIN PANOFSKY, *RENAISSANCE AND RENASCENCES IN WESTERN ART* (1960); ERWIN PANOFSKY, *STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE* (1962). The main difference is that most Western art accompanied written texts, such as the Bible, that were the principal means of recording and preserving religious teachings. Despite this difference, European art of the middle ages, like much indigenous art, strove to be veracious in its account of the scenes it represented.

what is known as “the law of the art,” which ensures accuracy in the reproduction of Aboriginal art.⁸¹ However, not all works are restricted to the same extent. The most sacred texts are obviously the most restricted. In less significant works, artists have freer rein.⁸²

All this is not to say, however, that each new reproduction is an exact replica of a prior work. Instead, much like European artists of the Middle Ages and the Renaissance, indigenous artists draw from the folklore and refine and enrich those motifs.⁸³

While it is true that the originality threshold is low, many works of indigenous art, because of their similarity to preexisting works, will still not be able to satisfy this requirement. That is, many works will be found wanting in fresh authorship because they differ only trivially from their predecessors. However, it is possible that some indigenous artworks will demonstrate sufficient variation or skill to be worthy of copyright. The problem is that if the work is based on a preexisting work, as it invariably would be, only the variation from that work is protectable.⁸⁴ That is, the underlying work may be in the public domain, and it is only what that artist adds, a background or a change in medium, for example, that would be protected. This is what is referred to as a “thin” copyright.⁸⁵ Thus, an outsider could still use the underlying folklore without authorization. It is this use which is troubling to indigenous communities. Although copyright may provide partial coverage for the original authorship, it is really the unoriginal features—the sacred symbols—that the clan elders want to protect. Thus, the protec-

81. Anna Ward, *Blind Justice or Blinkered Vision?*, ARTS & ENT. L. REV. 6 (1994).

82. See Puri, *supra* note 34, at 308.

83. One commentator has written that

[t]he preexisting designs are in the minds of their traditional owners, and as they are handed down through the generations, changes, which are not made consciously, are incorporated into the preexisting designs themselves. External influences, including the introduction of new media and materials, result in changed forms of preexisting designs.

Ellinson, *supra* note 23, at 339.

84. See *Kuddle Toy, Inc. v. Pussycat-Toy Co.*, 183 U.S.P.Q. (BNA) 642 (E.D.N.Y. 1974) (finding teddy bear design drawn from public domain and not plaintiff's own authorship, therefore can not enjoin copying).

85. This phrase is used to refer to the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are dictated by functionality, or are in the public domain. See, e.g., *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1348 (5th Cir. 1994); *United States v. Thomson Corp.*, 949 F. Supp. 907, 926 (D.D.C. 1996). The idea is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author's rights.

tion that copyright provides is inadequate for the "traditional group."

But this level of protection is also problematic for the "realist group." If outsiders can copy these public domain works, they can, through mass production, close the indigenous artists out of the market for these works. The only consolation is that they will not be able to make a replica of the particular derivation developed by the indigenous artist.

Therefore, to protect folklore adequately, copyright would need to be extended "beyond the borders of originality."⁸⁶ Furthermore, because the underlying work is unprotected, an outsider could adapt a public domain work and copyright her new translation, thereby obtaining a monopoly over the use of those designs.⁸⁷ This would obviously be very problematic for indigenous groups.

As a result, there is also a scope of rights problem in addition to the subject matter problem. Under copyright law, if a work is in the public domain, then anyone is free to reproduce it, either exactly or in modified form. If this modification creates a new and original work, then the artist can obtain copyright for the new work. But even if the underlying work is copyrighted,⁸⁸ if the modified work is substantially different, then it will not only be allowed, but it can itself be copyrighted. Therefore, any scheme that allows for adaptations may not grant enough protection to indigenous art because the underlying elements may be used in new works. Moreover, the harm suffered by the indigenous peoples is greater when their work is adapted than when it is copied exactly, but the Copyright Act may encourage the former by the grant of a copyright to such "new" works.

Given the disjunction between the copyright law's insistence on originality and the indigenous peoples' emphasis on accuracy in repro-

86. Jane C. Ginsburg, *Surveying the Borders of Copyright*, 41 J. COPYRIGHT SOC'Y U.S.A. 322, 324 (1994) [hereinafter Ginsburg, *Surveying*].

87. Once again, only the additions can be copyrighted, not the underlying work. Still, these new versions are one of the biggest problems for Aboriginal artists in Australia today. "Most tourist shops today are replete with examples of T-shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art." Golvan, *Protection, supra* note 21, at 229. These works are no doubt copyrighted by the producers of the T-shirts.

88. Any derivative work which does not differ substantially from the original is an infringement because the copyright owner has the exclusive right to prepare derivative works. See U.S. Copyright Act, 17 U.S.C. § 106 (1994); Australian Copyright Act, 1968, § 31(1)(a)(vi); Canadian Copyright Act, R.S.C., ch. C-42, § 3(1). However, the distinction between a derivative work and a new translation "may be more elusive when applied to works of visual art." Jane C. Ginsburg, *Exploiting the Artist's Commercial Identity: The Merchandizing of Art Images*, COLUMBIA-VLA J.L. & ARTS 1, 4 (1995) [hereinafter Ginsburg, *Exploiting*].

duction, one may wonder how the plaintiffs in the *Milpurrurru* case were able to satisfy the originality requirement. Were those designs original works of authorship?⁸⁹ That is, did they owe their origins to those individual artists who were the plaintiffs in that case? After all, evidence was produced at trial that tended to show that the designs that the carpets were based on were, in fact, reinterpretations of preexisting themes and motifs. For example, the court accepted from an expert witness testimony that the creation stories depicted are allowed to be reproduced by Aboriginal artists only after

the attainment of skills which permit the *faithful reproduction* of the stories in accordance with Aboriginal law and custom. . . . Artworks are an important means of recording these stories, and for teaching future generations. *Accuracy* in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of an artwork can cause deep offense⁹⁰

Thus, the fact that these creation stories were even allowed to be depicted indicates that minimal variation exists between these designs and those on which they are based.

Undoubtedly these statements were made in order to emphasize the wrongfulness of the offense done to the Aboriginal community by the defendants' actions. But they also serve to raise the question of whether these works, which are closely based on preexisting images presumably within the public domain, satisfy the originality requirement. To this question the judge curiously responded: "In the present case that

89. And what of the defendants' creations? At the minimum they changed the designs by simplifying them and by converting them into a new medium. As their accompanying tag suggests, the reproduction of these designs in woven carpets requires significant artistic skill. This alternative analysis was not considered by the court. Other courts have held that a reproduction of a work of art in a different medium requiring great artistic skill constitutes an act of authorship. See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951) (mezzotint engravings of paintings of old masters were sufficient variations from paintings that they purportedly copied to entitle them to copyright); *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) (replica of Rodin's "Hand of God," requiring a reduction from 37 to 18 1/2 inches, and produced to scale required great skill and originality). But see *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983) (painting resembling a photograph not original enough to copyright); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (finding necessary originality lacking despite the fact that the replica was of slightly different dimensions than the original and made of plastic rather than cast iron). On the other hand, it is a well-known maxim in copyright law that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (L. Hand, J.).

90. *Milpurrurru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240, 245 (Austl.) (emphasis added).

issue has not arisen.”⁹¹ And in a 91-page opinion, he devoted only two sentences to “that issue” (or non-issue). First he stated that, “Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and *originality*.”⁹² He chose not to demonstrate this conclusion with a description of the innovations in any of the designs except in one instance. Because designs depicting the *Wititj* (python) are ubiquitous in Aboriginal artworks, the judge was forced to explain how the *Wititj* design in this case was original. He explained that, “Whilst the dreaming of the *Wititj* is often told in Aboriginal artwork, the particular depiction of the tail and the rarrk [cross-hatching of the snake] used in this artwork is original and distinctive.”⁹³ Other than these assertions, there is nothing to explain the ease with which the judge overcame the problem of originality in these Aboriginal designs.

Perhaps the court was impressed with the skill involved in producing the Aboriginal artworks. There is a line of cases both in the United States and in Australia that holds that where copying a preexisting work requires significant independent skill, the requirement that the work originates with the creator is satisfied because the skill itself is original—“the ‘authorship’ lay in the very art of the copying”⁹⁴ The rationale is that the copying itself requires new and genuine “authorship.” Such authorship may be found in a laborious process requiring a high degree of skill.⁹⁵ Often, Aboriginal paintings are painstaking in their detail.⁹⁶ Often when non-Aboriginal persons have praised the

91. *Id.* at 247.

92. *Id.* at 248 (emphasis added).

93. *Id.* at 260.

94. *Kuddle Toy, Inc. v. Pussycat-Toy Co.*, 183 U.S.P.Q. (BNA) 642, 658 (E.D.N.Y. 1974) (discussing *Alfred Bell & Co.*: “[T]he mezzotint craftsmen were the authors of what it was that they brought to the art of making excellently veracious copies, and so much they could copy-right.”).

95. *See L. Ballin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (holding copyright’s requirement of originality not satisfied where plastic “Uncle Sam” bank copied from cast iron original in the public domain by demonstration of “physical skill” or “special training” required for production of plastic molds used in production of plastic replica). Australia also employs this theory of originality. *See Robertson v. Lewis*, (1976) R.P.D. & T.M. 169 (Eng.) (to write down the musical notations of a song from ear requires sufficient skill and labor for the purposes of establishing originality).

96. Bark paintings from the Arnhem Land, for example, are very intricate. *See* Colin Golvan, *Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun*, 11 EUR. INTEL. PROP. REV. 346, 350 (1989) [hereinafter Golvan, *Bulun Bulun*]. Dot paintings from central Australia are similarly detailed.

artistic quality of Aboriginal artists, it is these qualities that they emphasize.⁹⁷ The problem with this type of originality is that when a derivative work gains its copyright protection based on the originality of the skill it took to copy the original, it is hard to separate out the originality of the copy for protection.⁹⁸ That is, a copyist merely has to go to the original to produce a similar work. For instance, if the defendants had based their carpets on similar images from the public domain, the harm to the community would be the same and yet there would be no recourse under copyright law.

Or perhaps the court was impressed with the status of the plaintiffs in this case and this fact influenced the court's determination of the skill involved. After all, these particular plaintiffs were none other than the Aboriginal artists who have received the most western acclaim. This fact did not escape the judge. Information about the status of the plaintiffs was featured prominently in the first full paragraph of the opinion where the court wrote, "The skill of each of the artists is recognised nationally and internationally as exceptional; their works are represented in national, State and other major collections of Australian artworks."⁹⁹ In fact, as the court noted, the artist from whom the case bears its name, George Milpurrurru, was the first Aboriginal artist ever to have a solo exhibition at the National Gallery of Australia.¹⁰⁰ Another artist in the suit sits on the boards of the Australian National Gallery and the Northern Territory Museum and Gallery.¹⁰¹ Put simply, as the court stated, "Each work [in this suit] is recognised as one of

97. For instance, in the *Bulun Bulun* case, a museum curator testified, on the issue of originality, that *Bulun Bulun's* "works are clearly products of considerable skill I note, for example, the fineness and detail of the cross-hatching" *Id.* at 349-50. Similarly, another expert witness testified that

bark paintings of the size and complexity which the Applicant usually produces are invariably very time-consuming works to produce. . . . The very fine cross-hatching in the Applicant's work requires an immense amount of precision. People who produce this kind of work often complain of back ache from sitting over a painting, as well as eye strain. The quality of the cross-hatching work is often the feature which appeals most readily to art buyers. Few artists are able to produce cross-hatching of the fineness and precision of the Applicant.

Id. at 350.

98. See *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983).

99. *Milpurrurru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240, 243 (Austl.). Not until the 1980s had Aboriginal art been accepted as "fine art" by western audiences. See Puri, *supra* note 34, at 299 (citing Altman report).

100. See *Milpurrurru*, 54 F.C.R. at 244; Virginia Trioli, *Australia: Record Damages for Illegal Aboriginal Images*, REUTER TEXTLINE, Dec. 14, 1994, at 5.

101. See *Milpurrurru*, 54 F.C.R. at 244.

the major works of a very important artist.”¹⁰²

Perhaps with such credentials it was a foregone conclusion that these artists were capable of nothing other than authorship. Thus, it was easier for these artists to fill the mold of the individual author. It may, however, be more difficult for other copyright claimants in the indigenous community to fill this mold. For this reason this case may not be very helpful to future claims of copyright for indigenous art if the claimants cannot show those indicia of authorship.¹⁰³ Thus, this case illustrates the far end of the spectrum of indigenous art production.¹⁰⁴

C. *The Fixation Requirement*

Indigenous authors have argued that the fixation requirement is a barrier to protection for indigenous art. Copyright law usually requires that an expression be fixed in a tangible medium.¹⁰⁵ Often folklore

102. *Id.* Indeed three of the works in question are “owned” by the Australian National Gallery, and not by the Aboriginal clans. *See id.* Additional works involved in this case are owned by the National Museum of Australia. *See id.* And many of the works had been included in exhibitions at the Australian National Gallery and the National Museum of Australia. In fact, one of these works was one of only two works selected to be hung in the foyer of the Australian National Gallery when it was opened in honor of Queen Elizabeth II. *See id.*

103. *See* Monroe E. Price & Aimee Brown Price, *Custom, Currency, and Copyright: Aboriginal Art and the \$10 Note*, CARDOZO LIFE 19, 21-22 (Fall 1996) (questioning whether the classification of the work as “art” affects the analysis of ownership and control).

104. Not coincidentally, each case that has made it to the courts has involved the most celebrated indigenous artists. Johnny Bulun Bulun has his work in the collections of the Art Gallery of New South Wales, the Art Gallery of Western Australia, the Museum of Contemporary Art, the National Gallery of Australia, the National Gallery of Victoria, and the Parliament House Art Collection among others. *See Maningrida Arts and Culture Bark Painting Catalogue* (last modified May 31, 1996) <<http://www.peg.apc.org/~bawinanga/bp.html>>. Terry Yumbulul’s rendering of the Morning Star Pole which was the subject of his case was originally commissioned to be exhibited in the Australian Museum in Sydney. *See* Price & Price, *supra* note 103, at 20.

105. *See, e.g.*, 17 U.S.C. § 102 (1994). The requirement that a work be fixed in a tangible form is not mentioned explicitly in the Australian Copyright Act, although it exists by implication. For instance, section 32(1) states that copyright subsists in an unpublished, original work at the time the work is made. Section 22(1) states that any reference in the Act to the time at which a work is made means the time when the work was “first reduced to writing or to some other material form.” STANFORTH RICKETSON, *THE LAW OF INTELLECTUAL PROPERTY* 94-95 (1984) (quoting the Australian Copyright Act, 1968, § 22(1)). Likewise, the Canadian Copyright Act does not explicitly mention the fixation requirement, but the doctrine has been developed through case law. *See* Canadian Admiral Corp. v. Rediffusion Inc., [1954] Ex. C.R. 382 (Can.) (holding that copyright subsists in works that are “expressed . . . in some material form, capable of identification and having a more or less permanent endurance”). Roman sys-

will be unable to satisfy this requirement because the art forms may never be fixed. Song and dance, for instance, may be passed down from generation to generation through memorization, but may never be recorded in any tangible form. In essence, folklore is the antithesis of recorded culture.¹⁰⁶

Often it may be an outsider who first fixes an indigenous work in a tangible medium—a documentary film maker who videotapes a ritual, or a researcher who notes the steps of a dance, or a musician who writes down the words or notes of a song for the first time. These persons, however, are not the authors, and therefore not the initial copyright owners just as a stenographer is not the “author” for copyright purposes of what he or she transcribes.¹⁰⁷ Under the copyright doctrine, the author is the party who actually “creates” the work.¹⁰⁸ The “fixer” is the author in only the original expression that originates with her. That is, the film-maker is the author of the film, not of the underlying dances or music that she captures on film. Furthermore, the U.S. Copyright Act, for example, requires that the work be fixed “by or under the authority of the author.”¹⁰⁹ So, unauthorized fixation will not result in copyright, nor will it preclude indigenous artists from thereafter fixing and copyrighting the work.

tems, however, usually do not require fixation. Article 2(2) of the Berne Convention permits each State party to determine whether a work must be fixed. The U.S. Copyright Act defines a work as “fixed” in a tangible medium of expression when “its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (defining the term “fixed”).

106. Folklore may be created out of natural materials like mud and grass that decompose or wither away after a short period of time. Much indigenous art is not meant to be permanent. It is instead meant to be used in ceremony, to be danced on for example, and then destroyed afterward. See Puri, *supra* note 34, at 298. Body paintings, for instance, are only meant to last a short time. See Ellinson, *supra* note 23, at 333. But fixation does not mean that a work needs to be permanent. Indeed, in these examples the work has been fixed longer and more definitely than when a computer program is loaded onto a computer’s random access memory or “RAM.” Yet this uploading constitutes a fixed copy under the law. See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (holding that transferring software from a permanent storage device to a computer’s RAM constitutes copying).

107. See *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 135 (3d Cir. 1991) (real estate agent who assembled series of street maps and turned them over to printing firm for preparation of a composite qualifies as “author” for copyright purposes, while printer may have acted as his amanuensis). The rule is the same in Australia. See *Donoghue v. Allied Newspapers Ltd.*, 1 Ch. 106, 109-10 (1938).

108. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (sculptor, not association to combat homelessness, was party who translated idea into a fixed, tangible expression).

109. 17 U.S.C. § 101 (1994).

In fact, the lack of fixation may actually provide more protection to folkloric works. The copyright term of protection begins to run when an original work is fixed (with authorization).¹¹⁰ Therefore, if a work is unfixed, the term does not commence until it becomes fixed. An unauthorized fixation will not start the clock ticking.¹¹¹ However, an unfixed work is not subject to federal copyright law and is therefore not protected.¹¹²

Moreover, a fixed work that is derived from an unfixed work, but which demonstrates substantial variation from that work, will be able to be copyrighted. Therefore, an outsider may profit by, for instance, adapting an unfixed folksong and copyrighting it. This will be problematic for both the "realist group" and the "traditional group." The problem is, again, that it is really a scope of rights problem, not a fixation problem. Even if the folksong were able to enjoy copyright protection without fixation, adaptations would still be allowed.

D. Group Rights

The fourth problem for the application of copyright to folklore is more fundamental. Copyright law is premised on individual rights, and recognizes group rights only in limited situations. At its core, copyright is intended to reward individual authors for their creation of intellectual property. Indigenous art, in contrast, is not thought to be owned by the particular artist who created it.¹¹³ Instead, it is seen as

110. See *id.* § 102(a); Australian Copyright Act, 1968, § 22(1).

111. This is because a work is not fixed and therefore subject to copyright unless it is embodied in a copy "by or under the authority of the author." 17 U.S.C. § 101; 1 NIMMER ON COPYRIGHT, *supra* note 76, § 9.01. Note that there are no notice formalities in the United States, Canada, and Australia, as they are all Berne signatories.

112. The problem is that others may copy work when released in this way and own no copyright unless fixed. The work may, however, receive common law copyright for unpublished works or be protected by state law. See, e.g., CAL. CIV. CODE § 980(a)(1) (West Supp. 1997); 1 NIMMER ON COPYRIGHT, *supra* note 76, § 2.02. In addition, Article 6 of the Dec. 20, 1996 WIPO Performances and Phonogram Treaty provides performers the exclusive right to authorize and to broadcast their unfixed performances. Unfixed works may also be protected under unfair competition laws. See *infra* notes 209-32 and accompanying text.

113. As the *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* described:

Although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people's heritage. Such individual responsibilities should not be confused with ownership or property rights. Traditional custodians serve as trustees for the interests of the community as a whole

Study/Protection, *supra* note 23, at 9.

the property of the group or clan. That is, it is something passed down through the generations for the enrichment of all.

Even if an artist adds something new to an artistic work, the artist is not considered to have a privileged relationship with that work. It is not seen, as in the thinking of eighteenth century Romantic authors, as the product of one's mental conception and thus akin to one's child.¹¹⁴ Instead, the artist is understood to be in a position of increased responsibility to the work. She is but one participant in a complex group effort to produce the work. There is also the person who keeps the knowledge of what is to be depicted, the person who authorizes its depiction, the person who dictates how it is to be depicted, the person who displays or performs the art in ceremony, etc.¹¹⁵ As the *Milpurrurru* court explained, in order to reproduce an Aboriginal design one must seek authorization from the clan, not from any individual artists.

The right to create paintings and other artworks depicting creation and dreaming stories, and to use preexisting designs and well recognised totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people¹¹⁶

Moreover, most artwork is actually executed by a group. The making of art in the indigenous community is not the lonely, secluded, individual process idealized in the west, but instead a group process in which many people participate at various levels.¹¹⁷ Because indigenous art is not seen as something created by an individual genius, but instead is seen as something that belongs to the entire clan, it is the clan as a whole who owns the art and designs, not the individual artist who executes the work. No individual owns the work because no one indi-

114. See, e.g., EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION (1759).

115. See Golvan, *Protection*, *supra* note 21, at 230; Kenneth Maddock, *Copyright and Traditional Designs—An Aboriginal Dilemma*, in 2 ABORIGINAL L. BULL. 8 (1988).

116. *Milpurrurru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240, 245 (Austl.).

117. In Johns, *supra* note 43, the author states that

[i]n producing paintings, individuals lay claim to aspects of the [a]ncestral realm Painting tends to be a social activity, directly involving several individuals and catching the interests of many others Designs are discussed, and the layout of the painting is determined through consultation and negotiation A proper painting is one that well reflects the collective Walpiri vision of reality.

Id.

vidual is thought to have created it.

This custom poses a problem for copyright law since copyright law vests the rights in the one who executes the work.¹¹⁸ It is this owner alone who has the exclusive right to reproduce the work. But this formulation is contrary to indigenous custom where the art is seen as something owned by the community.

Western notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions. In indigenous society, the work is produced for the benefit of the group and the group owns and controls it. There may not be an adequate analog in the western world, but consider this: giving rights to one individual author in the indigenous community may be akin to letting one individual control the use of the Star of David or the image of Jesus on the cross.

The Australian case of *Yumbulul v. Reserve Bank of Australia*¹¹⁹ illustrates how the individualistic tendency of copyright law causes problems for the indigenous peoples. In this case, Aboriginal artist, Terry Yumbulul, sued the Reserve Bank of Australia because it had used the image of his sculpture of a "Morning Star Pole"¹²⁰ on a new Australian ten dollar note issued to commemorate the bicentennial of the European settlement of Australia. The Bank claimed that the artist, who, significantly, had a valid copyright,¹²¹ licensed the Bank to use the image.¹²² The artist claimed that he did not have the authority to

118. The Act does not require that the owner be an individual. As I note below, the act provides for joint ownership and corporate ownership. In fact, in the United States, the majority of copyright owners are corporations. Anonymous and pseudonymous works are also protected under the act. See 17 U.S.C. § 302 (1994).

119. (1991) 21 I.P.R. 481 (Austl.).

120. Morning Star Poles have a central role in ceremonies commemorating the deaths of important members of the clan. The Galpu clan, of which Yumbulul was a member, jealously guarded the right to reproduce these images. See Blakeney, *supra* note 65, at 442. Because of their importance to the clan, they are ordinarily kept from view, even from clan members. Morning Star Poles are generally about five feet long, wrapped with strings, and colored with earth tones. See Price & Price, *supra* note 103, at 20. This particular Morning Star Pole was carved from cottonwood, adorned with lorikeet and white cockatoo feathers, and painted with a yam leaf design. See Blakeney, *supra* note 65, at 442.

121. Significantly, the court found that the sculpture was an original artistic work created by Mr. Yumbulul within the meaning of the Copyright Act. See Blakeney, *supra* note 65, at 442.

122. Apparently, the Aboriginal Artists Agency had Yumbulul sign a blanket license. The court found the license to be valid. See Price & Price, *supra* note 103, at 20. Yumbulul argued that he had been fraudulently induced into signing the agreement, that it was unconscionable, and that he did not appreciate the fact that he was the only person who had the right to grant permission to use the image. See Golvan, *Protection*, *supra* note 21, at 229.

grant such a license as approval was also required, under Aboriginal customary law, from the elders of the Galpu people, to whom the underlying motif belonged.¹²³ This case therefore demonstrates the fundamental conflict between Aboriginal understanding of the rights in artworks and that advanced by the copyright act. Under customary law, the right to depict a design does not mean that the artist may permit its reproduction. Rather, under customary law, artworks are subject to layers of rights and many individuals may need to grant permission to use an image.

Although the case against the Bank settled out of court,¹²⁴ the case against the government agent who obtained the license continued until it was finally dismissed by the court. There the court wrote in dictum that

[t]here was evidence that Mr. Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the [design] And it may . . . be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.¹²⁵

It is not so simple, however, to say that the indigenous peoples want nothing to do with individual rights. It should be noted that in both the *Yumbulul* and the *Milpurrurru* cases, the plaintiffs had already been individualized and separated from their clans. Instead of seeking group protection when they registered their copyrights, these artists each sought individual protection as the authors of the artworks. Significantly, these are the only two cases in which the courts found valid copyrights in indigenous art. Thus, these cases announce that the protection of copyright adheres most successfully when artists claim for themselves the rights to their creations. But such an approach will force indigenous peoples to translate their story into the language of individualism, and therefore isolate and amplify one voice among many legiti-

123. Yumbulul was authorized by his clan to make this Morning Star Pole for educational purposes. See Price & Price, *supra* note 103, at 20.

124. The Bank made a payment to Yumbulul without an admission of liability. See Golvan, *Protection*, *supra* note 21, at 229.

125. *Yumbulul v. Reserve Bank of Austl.*, (1991) 21 I.P.R. 481, 490 (Austl.). Another issue in the case was whether sections 65 and 68 of the Copyright Act of 1968 permit the reproduction of a sculpture which is on permanent public display, such as the piece of art in this case.

mate participants.¹²⁶ It may, in the long run, be destructive to traditional indigenous culture to mandate that the work be thought of as the property of individuals. This cost of copyright protection may prove to be too high.

Three mechanisms in copyright law could be utilized to attempt to overcome this problem: (1) joint authorship; (2) the transfer of rights; and (3) the work made-for-hire provision. These mechanisms may, however, in the end, be unsatisfactory. The most logical possibility is the provision for joint authorship.¹²⁷ This provision is the only nod to collective ownership in the acts. It allows the multiple authors of a work to be co-owners of the copyright in the work. Unfortunately, this provision is very narrow. In order to be deemed a joint author, two requirements must be satisfied. First, the joint authors must in fact collaborate in the work's preparation, and second, they must intend, at the time the work is prepared, that their contributions be merged into "inseparable or interdependent parts of a unitary whole."¹²⁸ Thus, under the first requirement, joint authorship vests the rights only in the persons who actually make the work (or their designees). That is, only those clan members who are involved in the creation of the work can be joint authors. The rest of the clan or community could not be considered co-owners unless they actually contributed to the creation of the work.¹²⁹ Furthermore, to be a joint author each person's contribution

126. See Amanda Pask, *Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture*, 8 INTELL. PROP. J. 57 *passim* (1993) (arguing that in its inability to account for anything between the individual and the universal public, the law silences First Nations cultures).

127. See, e.g., 17 U.S.C. § 201(a) (1994); Australian Copyright Act, 1968, § 10(1); Canadian Copyright Act, R.S.C., ch. C-42, § 2. There is no limit as to the number of persons who may be considered joint authors so long as they meet the definition of a joint author.

128. 17 U.S.C. § 201. Furthermore, even joint authors can alienate their rights in the work without their co-author's permission, subject to a duty to account. See 1 NIMMER ON COPYRIGHT, *supra* note 76, § 6.10. The ability of one author to alienate rights in the work against the interests of the entire community would be inappropriate in the indigenous community.

129. Because of the second requirement, those artisans who do contribute to the work cannot even be considered joint authors with their ancestors who had also developed the work since each author must intend that it be part of a joint work at the time they make their contribution. Thus, the initial artists, whose work is later modified, cannot be considered joint authors. Furthermore, under *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir. 1972) (contributing to lyrics and music of a song, where there was no direct collaboration and no intent to create a joint work, did not create joint ownership), something more than the minimal copyright standard of "distinguishable variation" must be added by a later contributor in order to permit a finding that the resulting product constitutes a joint work. So an artist cannot merely add minor embellishments to an existing work and be considered a joint author.

must be copyrightable.¹³⁰ Thus, a clan elder who dictates the composition to an artist who executes it will not be a joint author with the artist.¹³¹

A more feasible means of overcoming this problem is the provision to allow the transfer of rights. That is, the individual artist may transfer her rights to the clan elders or to the clan as a corporate entity.¹³² The problem here is that, conceptually, it may be problematic for clans to have individuals initially have this authority over them. Moreover, it may be that some artists would not transfer their rights to the clan. Therefore, applying this provision of the copyright act to the indigenous community may fundamentally alter the relationship between the artist and the community.

The most appropriate possibility, however, is the work-made-for-

130. *See* M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990) (house builder that submitted thumbnail sketches of house floorplan to drafting company, reviewed work in progress, and had final approval authority was not a joint author of copyrighted final floorplan); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989) (copyright licensee's employee was not a joint author of computer software where she merely told licensor's programmers, on behalf of licensee, what tasks software was to perform); Ashton-Tate Corp. v. Ross, 728 F. Supp. 597, 601-02 (N.D. Cal. 1989) (handwritten list of labels for user commands given by programmer to another programmer did not contribute something protectable under copyright to the development of an interface system for a computer spreadsheet program since list was only an idea); *see also* 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.2 (1989); WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 116 (6th ed. 1986). *But see, e.g.*, Fisher v. Klein, 16 U.S.P.Q.2d (BNA) 1795 (S.D.N.Y. 1990) (one author's giving suggestions in the execution of the work was protectable contribution where the dominant author intended to be sharing authorship); 1 NIMMER ON COPYRIGHT, *supra* note 76, § 6.07.

In Australia they follow the English case law holding that to be a joint author, each person must contribute something copyrightable. *See, e.g.*, Kenrick & Co. v. Lawrence & Co., 25 Q.B.D. 99, 106 (1890); Cummins v. Bond, 1 Ch. 167 (1927); Tate v. Thomas, 1 Ch. 503, 511 (1921). On the other hand, courts have also held that a person who contributes something uncopyrightable will be a joint author where the other author agrees to this. *See* Prior v. Landowne Press Pty. Ltd., (1977) V.R. 65 (Austl.); Mitchell v. Brown, (1880) 6 V.L.R. (E) 168 (Austl.).

131. *See* Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991) (holding that an actress who conceived of and researched the story for a play was not the joint author with the author who actually wrote it). There is a series of Australian cases that hold that where one person supplies information and ideas to another person who then fixes them into a copyrightable work, only the latter can be considered the author. For the same holding in English cases, *see*, for example, *Walter v. Lane*, 1900 App. Cas. 539 (reporter who wrote down the *ex tempore* speeches of Lord Rosebery was the sole author of the edited reports); *Kenrick & Co.*, 25 Q.B.D. 99 (person who drew another person's ideas for a card explaining how to mark a ballot for illiterate voters is the sole author).

132. *See generally* 17 U.S.C. § 201(d). The Australian Copyright Act requires that any assignment be in writing. *See* Australian Copyright Act, 1968, § 196(3).

hire provision. Some copyright laws permit corporate entities to claim authorship rights when they are the employer for whom the work was prepared.¹³³ Under the U.S. Copyright Act, a work made for hire is "a work prepared by an employee within the scope of his or her employment."¹³⁴ The difficulty here is that the artists are not strictly thought of as the employees of the clan elders. Therefore, the more successful the clan is in characterizing this relationship as one of employment, the more likely they will be found to own the copyright.

To determine whether artists are employees, courts use the general common law of agency and consider the hiring party's right to control the manner and means by which the product is accomplished.¹³⁵ Thus, the courts consider factors such as the skill required, the source of the instrumentalities, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects, the extent of the hiring party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, and the provision of employee benefits.¹³⁶

It is not clear how courts will view the relationship between indigenous artists and their tribes. The only factor that would clearly favor a finding of an employment relationship in almost all cases is the fact that clan elders often exercise a high degree of control over the execution of the work. But "the extent of control the hiring party exercises over the details of the product is not dispositive."¹³⁷ One can also be fairly certain that the high degree of skill that most indigenous artists possess would tend toward a finding of an employment relationship.

133. *See, e.g.*, U.S. Copyright Act, 17 U.S.C. § 201(b); Australian Copyright Act, 1968, § 35(6); Canadian Copyright Act, R.S.C., ch. C-42, § 13(3).

134. 17 U.S.C. § 101. A work that is commissioned in certain circumstances will also be considered a work made for hire. *See id.*

135. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752-53 (1989) (sculptor was independent contractor where he supplied his own tools, worked in his own studio in another city, was retained for less than two months, had absolute freedom to decide when and how long to work, was paid a sum dependent on completion of specific job, and had discretion in hiring and paying assistants, and hiring party did not pay payroll or social security taxes, was not a business, and did not provide any employee benefits).

136. *See id.*; *see also* *Aymes v. Bonelli*, 980 F.2d 857, 861-64 (2d Cir. 1992); *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1550-52 (3d Cir. 1992).

137. *Community for Creative Non-Violence*, 490 U.S. at 752.

E. *Fair Use*

Under most copyright regimes, the monopoly on speech that the law permits is balanced by a provision that allows the unauthorized use of a copyrighted work where that use is fair—the so-called “fair use” exception.¹³⁸ Whether or not an unauthorized use is deemed fair is determined on a case-by-case basis by considering various factors such as the purpose of the use, the nature of the copyrighted work, the amount of the copyrighted work used, and the effect of the use on the value of the copyrighted work.¹³⁹ Thus, where a copyrighted work is used for comment or criticism or for an educational purpose, the author of the work may not be able to preclude its use.

But what constitutes fair use where sacred and secret images are concerned? How would the analysis look? Certainly, much indigenous art will be represented for the purposes of education. Indeed, the indigenous groups themselves have acquiesced to the display of their artwork in certain museums in order to educate the general public as to the richness of their culture.¹⁴⁰ But one may not purloin indigenous images under the guise of fair use for commercial profit. And the uses of the artwork that the indigenous peoples are most concerned with are those where the purpose is not education, but commercial profit. In fact, most uses of indigenous art would probably be found to be moti-

138. See, e.g., 17 U.S.C. § 107 (“the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright”); Australian Copyright Act, 1968, § 40(1) (“fair dealing”); Canadian Copyright Act, R.S.C., ch. C-42, § 27(2)(a) (“any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary”).

139. See, for example, 17 U.S.C. § 107, which states in pertinent part:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. The Australian Act similarly sets out an inclusive list of factors to consider. See Australian Copyright Act, 1968, § 40(2). In fact, four factors are the same, but an additional one is included: “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.”

140. In both *Milpurruru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240 (Austl.), and *Yumbulul v. Reserve Bank of Australia*, (1991) 21 I.P.R. 481 (Austl.), the offending copiers gained access to the artworks as a result of their public display for purposes of educating the general public.

vated by profit rather than a desire to comment on the work, and thus lean away from a finding of fair use.¹⁴¹

But what of the harder cases where sacred images are used for the purposes of critiquing or even parodying the religion or the clan rituals?¹⁴² In these cases where the purpose is legitimate criticism, the presumption may be different. For example, if an artist of Native American descent, but not a member of the traditional community, makes use of her tribe's designs to comment on how her identity as a Native American makes her feel, the use looks more fair. It will, however, be just as troublesome to the traditional community if the designs she incorporates are sacred and she reveals them to an outside audience. This use may not be found to be fair, however, unless she is commenting on the designs themselves—she may not comment on the culture in general for the purpose of fair use.¹⁴³

In all instances, the nature of the copyrighted work also makes a harder case for fair use because creative works are thought to deserve more protection than informational works.¹⁴⁴ Even though most indigenous art is used to communicate information to the community, as in the case of art that depicts creation stories, the work itself will still be judged to be creative. Original songs, dances, and paintings, unlike most databases, have a creative element that is impossible to separate from their underlying facts. That is, it is impossible to take only the information about the creation without also taking the design or expres-

141. Copies made for commercial purposes are presumptively unfair. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (holding that "time-shifting" for private use enabled by the manufacturer of home video tape recorder must be characterized as a noncommercial, nonprofit activity).

142. Compare *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995) (newspaper's publishing parts of works owned by religious organization constitutes fair use where used for purposes of news reporting), and *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995) (ex-members of a religious group's posting of secret religious texts on the Internet for the purposes of comment or criticism fall within the fair use exception), with *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (instructor's copying of literary works and sound recordings in course that she offered for sale is not fair use).

143. See *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992) (sculptor's "String of Puppies" could not be deemed a parody of photographer's "Puppies" for the purposes of fair use doctrine where the photograph was not the object of the alleged parody).

144. Where the nature of the copyrighted work is found to be factual, and not a work of fiction or fantasy, courts are more likely to allow unauthorized use. See, e.g., *New Era Publications Int'l v. Carlo Publ'g Group*, 904 F.2d 152, 157 (2d Cir. 1990) (finding that the writings of Church of Scientology founder, L. Ron Hubbard, such as his views on his life and religion, are factual or informational); *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1262-63 (2d Cir. 1986) (finding that a collection of verbatim interviews is necessarily factual in nature).

sion. Moreover, courts are more prone to protect works that are not yet published.¹⁴⁵ Thus, where unpublished sacred texts are used, it will mitigate against a finding of fair use.

The amount of the copyrighted work used involves both a quantitative as well as qualitative analysis.¹⁴⁶ It may be that most commercial uses would involve substantial copying. But even if they do not exactly duplicate the work, if they take the essence of the work—the basic design or composition, for instance—this factor would also tend toward a finding of unfair use. Ordinarily, that is precisely what the poachers are trying to do—to produce a product that captures the essence of indigenous art, something that is recognizable as indigenous art.

Finally, the effect of the use on the copyrighted work's market would depend on which group is concerned. For the "realist group," it is very likely that outside imitations will negatively affect the market for the indigenous peoples. But for the "traditional group," the reverse conclusion may be drawn. Since this group has no economic market to consider it is impossible to harm it.

Ultimately as the above analysis demonstrates, it seems unlikely that any standard commercial use would be found to be fair. Fair use will not be found where the unauthorized use could take the place of the copyrighted work in the marketplace.¹⁴⁷ Therefore, indigenous peoples who want to market their arts and crafts—the "realist group"—need not fear that competitors will undercut them in this way. The "traditional group," however, may not be content with this exception to protection. Although freedom of speech is a major tenet of our culture, it may not be so esteemed in indigenous cultures. There, control over imagery plays a larger role.¹⁴⁸ Since it is conceivable that the fair use exception will allow some uses of their secret imagery and thus permit those secrets to be revealed to outsiders, this doctrine will be problematic as applied to the indigenous context.

145. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568-69 (1985) (magazine's unauthorized publication of verbatim quotes from essentially the "heart" of Nixon's unpublished memoirs, which was intended to supplant the copyright holder's commercially valuable right of first publication, was not fair use).

146. See *New Era Publications Int'l*, 904 F.2d at 158.

147. See *Harper & Row*, 471 U.S. at 562.

148. This conclusion is evidenced by the fact that a person can be speared for permitting an unauthorized reproduction in certain circumstances. See *Milpurruru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240, 246 (Austl.). There, the court explained that, under Aboriginal law, punishment for allowing an unauthorized reproduction of a design can be severe. This punishment can include death, spearing, ostracism, and preclusion from the right to participate in ceremonies. See *id.*

F. Damages

Lastly, some copyright laws may not provide adequate remedies for the unauthorized use of indigenous art. Surely, injunctive relief and the impounding and destruction of infringing works would be helpful.¹⁴⁹ However, the threat of injunctions and destruction of infringing goods may not be enough to deter individuals and companies from using indigenous art without authorization. Damages may be the only way to ensure that outsiders will respect the copyright in indigenous art. For instance, a small company that manufactures infringing T-shirts at a profit may deliberately do so, knowing that the worst that can happen is that it may be ordered to cease at some point. If it were threatened with surrendering its profits, it might not embark on that plan.

Recovering significant damages, however, may not be possible for infringement of indigenous art. Under some copyright laws, only actual damages are awarded for economic harm caused by infringement.¹⁵⁰ The “realist group” will not be negatively affected by this regime since it will be able to show economic harm. But the “traditional group” will fare worse. Where indigenous art would never be put to a economical use by the copyright owners, it may not be possible to prove that the infringement caused any economic loss. That is, where a work is a sacred text, reproduction of which would never be allowed for commercial gain, an infringing use of their work would not deprive the copyright owners of any financial gain. Thus, the true harm done to the copyright owners—the denigration and release of sacred texts—would go unpunished, although it would be halted. This lack of punishment may not adequately deter future infringements.

The *Milpurruru* case is a real victory in this regard. There the court was successful in employing a reconception of harm in order to award satisfactory damages.¹⁵¹ The court applied an English case¹⁵² to

149. See, e.g., 17 U.S.C. §§ 502, 503 (1994); Australian Copyright Act, 1968, §§ 115(2), 116(1); Canadian Copyright Act, R.S.C., ch. C-42, §§ 34, 39.

150. See, e.g., Australian Copyright Act, 1968, § 115(2). The U.S. Copyright Act, on the other hand, allows for actual damages or statutory damages. See 17 U.S.C. § 504. If the plaintiff elects statutory damages, the court may award what it considers just up to \$20,000 per infringing work. See *id.* Where the court finds willful infringement, however, the court may award damages up to \$100,000 per infringing work. See *id.* In order to obtain these statutory damages, however, the work must not only be copyrightable, but it must also be registered with the copyright office. See *id.*

151. Justice von Doussa showed great sensitivity to the Aboriginal plaintiffs throughout the case. Another instance of his attempts to accommodate their customs was to refer to the de-

reach the result that "anger and distress suffered by those around the copyright owner constitute part of that person's injury" ¹⁵³ As an alternative method of recovery to the minimal amount that would be dictated by commercial compensation, the court also permitted special damages for "flagrant infringement." ¹⁵⁴

Although this problem may not appear to be a conceptual problem for folklore, as is the originality requirement, it also shows the cognitive dissonance between copyright protection and the type of protection sought for sacred images. Copyright is meant to prevent others from usurping an owner's economic rights and control. It is because of this economic interest that copyright adheres. Where the interest is spiritual and not economic, copyright's remedial force may be inadequate.

Thus, copyright law, as it is currently formulated, may not be entirely adequate to protect indigenous peoples from the unauthorized use of their art to the extent they deem necessary.

IV. INTERNATIONAL PROPOSALS

Copyright law has often been stretched to accommodate new works. ¹⁵⁵ Indeed, the Australian cases suggest that, in fact, copyright may be able to accommodate *certain* works of indigenous art. Another possibility, however, is that copyright law be reformulated to accommodate indigenous art. Toward this end, indigenous rights groups have called for an examination of national legislation protecting intellectual property to determine whether it provides sufficient protection of indigenous culture. ¹⁵⁶ For example, numerous articles have been written advocating the reformulation of Australian copyright law to accommodate

ceased plaintiffs only by their "skin names" in keeping with the Aboriginal custom that the name of the deceased person not be spoken or written for a period of time after death. *See Milpurrurru*, 54 F.C.R. at 243; *see also Puri*, *supra* note 34, at 303. He also awarded damages in a lump sum to be divided amongst the clan themselves. *See Milpurrurru*, 54 F.C.R. at 280-81. Although the judge was unable to recognize the collective ownership of the copyright, he was able to make this small concession. *See Puri*, *supra* note 34, at 303.

152. *See Williams v. Settle*, 1 W.L.R. 1072, 1086-87 (1960) (Eng.).

153. *Milpurrurru*, 54 F.C.R. at 277.

154. The court awarded \$1,500 (Australian) per artwork for commercial loss, and the additional sum of \$70,000 under special damages. *See id.* at 276, 280.

155. This is especially true for those works produced by new technology. *See, e.g., Peter Jaszi, On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 *passim* (1992) (arguing that authorship is a malleable concept which publishers have always used to serve their interests).

156. *See, e.g., Information Concerning the Report of the Special Rapporteur*, *supra* note 3, at 5; Marika, *supra* note 32; *Study/protection*, *supra* note 23, at 9.

Aboriginal art.¹⁵⁷

It may be that the copyright mold is fundamentally inappropriate for folklore, especially with its emphasis on the individual, innovation, and economic value.¹⁵⁸ That is, the premise and purpose of copyright law may be inappropriate to the kind of protection needed for folklore. The premises of copyright law may force indigenous peoples to make their claims using categories that are antithetical to their needs, and foreign to their aspirations.¹⁵⁹ Perhaps to truly protect folklore without corrupting it, what is needed is a *sui generis* legislative scheme. Indeed, the limited success of western legal mechanisms has provoked indigenous groups to seek *sui generis* rights at the international level, and some international effort has been exerted to devise such protection for folklore.

The assault on indigenous cultures has rightly received international attention. The United Nations Scientific and Cultural Organization (UNESCO) has been successful in devising conventions dealing with the protection of cultural property¹⁶⁰ although the issue of intangible cultural property has not yet been resolved internationally. In 1982, the United Nations Economic and Social Council (ECOSOC) created the United Nations Working Group on Indigenous Populations whose Draft

157. See, e.g., Blakeney, *supra* note 65; Ellinson, *supra* note 23; Golvan, *Bulun Bulun*, *supra* note 96, at 350; Golvan, *Protection*, *supra* note 21; Colin Golvan, *Tribal Ownership of Aboriginal Art*, 3 ARTS & ENT. L. REV. 15 (1992) [hereinafter Golvan, *Tribal*]; Steven Gray, *Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?*, 9 COPYRIGHT REP. 10 (1991); Puri, *supra* note 34; Ward, *supra* note 81.

158. Western legal mechanisms "are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable." Puri, *supra* note 34, at 295.

159. "In . . . these arenas aboriginal peoples must articulate their interests within frameworks which obliterate the position from which they speak." Pask, *supra* note 126, at 64; see also Rosemary I. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 280 (1993) [hereinafter Coombe, *Properties*].

160. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 U.N.T.S. 240. The terms of the Convention apply only to "movable and immovable property" and not intangible property. See *id.* at 236. The unnatural divide that these legal regimes force on indigenous communities between cultural property and intellectual property has been noted by scholars and advocates. See, e.g., Coombe, *Properties*, *supra* note 159. At its forty-fourth session, in 1992, the Sub-commission expressed the conviction, in its resolution 1992/35 of 27 August 1992, that "there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development." *Study/protection*, *supra* note 23, at 5.

Universal Declaration on Rights of Indigenous Peoples (1989) identified the concept of indigenous peoples' collective rights as of paramount importance: "It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the most important purposes of this Declaration."¹⁶¹ The Draft Universal Declaration states that "[i]ndigenous peoples have the right to *special* measures for protection, as intellectual property, of their traditional cultural manifestations, such as their literature, designs, visual and performing arts"¹⁶²

The following documents make proposals for *sui generis* rights to protect folklore at the international level.

A. *The Berne Convention*

The Paris Act (1971) of the Berne Convention¹⁶³ added a provision in order to encourage developing countries to ratify. Article 15(4) deals with anonymous works—folklore, although that term is not used. It provides that, through national legislation, a member state may designate a representative to enforce the rights to anonymous works.¹⁶⁴ To qualify as folklore under this provision, the work must meet three conditions: (1) it must be unpublished;¹⁶⁵ (2) its author must be unknown; and (3) that author must be presumed to be a national of the member country. The requirement that the work be unpublished will prevent

161. Indigenous Peoples' Preparatory Meeting, Comments on the First Revised Text of the Draft Declaration on Rights of Indigenous Peoples (July 28, 1989).

162. *The Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 43, at 35. This document is still in the drafting stages and currently carries no legal force.

163. Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971) [hereinafter Paris Act].

164. Countries that designate a representative for authors of works of folklore must notify the Director General of the WIPO. The Director General must then inform all other Union countries as to the name of the representative. *See id.* art. 15(4)(b). The United Kingdom has a similar provision in its copyright act. The Act protects folklore as anonymous works and allows designated authorities of other Berne Member States to sue in the UK for infringement of copyright in their countries' folklore works. *See* Copyright, Designs and Patents Act, 1988, § 169 (Eng.).

165. Under most copyright systems publication means the distribution of copies to the public. *See, e.g.*, 17 U.S.C. § 101 (1994). According to Nimmer, publication occurs when, by the consent of the copyright owners, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public. *See* 1 NIMMER ON COPYRIGHT, *supra* note 76, § 4.04 (footnotes omitted). Under the Universal Copyright Convention (Paris text) Article VI publication means "reproduction in a tangible form and the general distribution to the public of copies of a work." Universal Copyright Convention, July 24, 1971, art. VI.

many works of folklore from enjoying protection. Furthermore, some commentators have questioned whether this provision, since it deals with anonymous individuals, would protect works that are created by the community and not an individual.¹⁶⁶ Of course, the additional hurdle is that member states must enact domestic legislation that protects folklore.¹⁶⁷ Only if a state's national copyright legislation includes folklore can the state seek international copyright protection under the Berne Convention. For these reasons, protection of folklore under this provision is deficient.

B. *Model Law on Copyright*

The Tunis Model Law on Copyright (1976) was written to provide a model for developing countries to enact comprehensive copyright legislation. This model act explicitly refers to folklore¹⁶⁸ at several places "because in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible of economic exploitation, the fruits of which should not be denied to those countries."¹⁶⁹ In Section 6(2) the act provides that "[w]orks of national folklore are protected by all means in accordance with subsection (1), without limitation in time." Thus it seems that the protection of folklore is perpetual under this act.¹⁷⁰ There is, however, no mention of retroactivity of protection. Therefore, although newer works will be protected forever, much folklore will already be in the public domain.

The Model Law also overcomes the fixation problem. Under the Anglo-Saxon version,¹⁷¹ which requires that works be fixed in a tangi-

166. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 313 (1987).

167. Compliance is dependent upon notification of the WIPO. See Paris Act, *supra* note 163.

168. Folklore is defined in the Act as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage." TUNIS MODEL LAW ON COPYRIGHT § 18 (1976).

169. Commentary, *Tunis Model Law on Copyright*, 12 COPYRIGHT 165, 166 (1976).

170. Curiously, though, the Model Law contains a provision for "Domaine Public Payant," implying that folklore can fall into the public domain, perhaps referring to works already in the public domain. See TUNIS MODEL LAW ON COPYRIGHT, *supra* note 168, § 17. Under this provision the user of a work in the public domain "shall pay to the competent authority . . . [a] percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore." *Id.*

171. The Model Law provides both an Anglo-Saxon version and a Roman alternative. The Roman version does not require fixation at all. See Commentary, *supra* note 169, at 167.

ble medium of expression, there is an exception for works of folklore.¹⁷² Commentary accompanying the model law states that

the fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage of peoples and their very nature lies in their being handed on from generation to generation orally or in the form of dances whose steps have never been recorded; the fixation requirement might, therefore, destroy the protection of folklore Consequently, . . . the authors of the Model Law have made an exception to the fixation rule, particularly since, if this rule were sustained, the copyright in such works might well belong to the person who takes the initiative of fixing them.¹⁷³

The Model Law, however, protects derivative works as original works including "works derived from national folklore."¹⁷⁴ If translations of folklore are allowed, however, it would seem that an author outside the indigenous community could simply rework a preexisting work and then be the owner of that work and the rights to it.¹⁷⁵ Thus, this scheme does not offer enough protection for either the "realist group" or the "traditional group." Furthermore, authorization to use works of folklore is not made by the indigenous groups themselves, but by "the competent authority," presumably designated by the state. Thus, although the individualistic nature of copyright is not present, the vesting of authority in the colonial state is surely problematic.

C. *Model Provisions*

In 1973, at the urging of many developing countries, UNESCO began to explore the legal issues implicated in the protection of folklore. UNESCO and WIPO agreed to collaborate and convened a working group of experts to study the matter and propose a model law. The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982)¹⁷⁶ were developed.¹⁷⁷ The Model Provisions, however,

172. See TUNIS MODEL LAW ON COPYRIGHT, *supra* note 168, § 1 (5bis).

173. Commentary, *supra* note 169, at 167. Thus, the Model Law does not privilege western notions of artistic creativity but gives recognition to other models of artistic creation. See *supra* notes 105-06 and accompanying text.

174. TUNIS MODEL LAW ON COPYRIGHT, *supra* note 168, § 2(1)(iii).

175. See *supra* notes 87-88 and accompanying text.

176. *Model Provisions for National Laws on the Protection of Expressions of Folklore Against*

have never been adopted by the UN or any nation and have no legal force.¹⁷⁸

The Model Provisions enable the collective ownership and control of folklore, grant perpetual protection,¹⁷⁹ and do not require fixation. The major tenet of the Model Provisions is that utilizations¹⁸⁰ of folklore are subject to authorization by the competent authority "when they are made . . . with gainful intent and outside their traditional or customary context."¹⁸¹ According to the Working Group on the Intellectual Property Aspects of Folklore Protection, three criteria should be used to determine whether a use is unauthorized: (1) whether the intent is gainful; (2) whether the use was made by members or non-members of the community where the expression is derived from; and (3) whether the use is outside of the traditional context of the usual use.¹⁸²

This aspect of the law raises the question of whether urban Aboriginal artists, for example, will be constituted as infringers under the Model Provisions when they use works of folklore without authorization. The urban Aboriginal art scene is a recent phenomenon and is of great concern to traditional Aboriginal communities in Australia.¹⁸³

Illicit Exploitation and Other Prejudicial Actions (Geneva, June-July 1982), reprinted in 16(4) COPYRIGHT BULL. 62 (1982).

177. The Model Provisions were designed to facilitate application of copyright laws within developing countries. As the result of the discussions that the Model Provisions provoked, WIPO and UNESCO formulated the Draft Treaty for the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985). See *Draft Treaty for the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, reprinted in 19 COPYRIGHT BULL. 34 (1985). The emphasis of this treaty is on the increasingly global nature of the exploitation of folklore. The protective scope of the treaty is thus limited to export of folklore and does not effectively protect the integrity of folkloric works. The Model Provisions espouse collective expressions protected by licensing fees and criminal penalties for those who pirate folklore. See *id.* §§ 7-8.

178. See Darrell A. Posey, *International Agreements and Intellectual Property Rights Protection for Indigenous Peoples*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 225, 231 (Tom Greaves ed., 1994). But see *Study/protection*, *supra* note 23, at 32 ("some African States have adopted legislation based on the WIPO model"). The Australian Federal Attorney General's Department issued a Discussion Paper which proposes the creation of a statutory custodian of Aboriginal folklore along the lines of the Model Provisions. See Blakeney, *supra* note 65, at 445.

179. See U.N. Working Group on the Intellectual-property Aspects of Folklore Protection, 15(2) COPYRIGHT BULL. 19, 22 (1981).

180. So-called "utilizations" include publication, reproduction, distribution (including transmission), and performance. See Model Provisions § 3.

181. Model Provisions § 3.

182. See U.N. Working Group on the Intellectual-Property Aspects of Folklore Protection, 15(2) COPYRIGHT BULL. 19, 21 (1981).

183. See *Study/protection*, *supra* note 23, at 18 ("An emerging complication is the incorpora-

These urban artists may not be considered "members of the community" because they may be of mixed heritage or because they have been estranged from their Aboriginal community.¹⁸⁴ Under traditional Aboriginal customary law, urban artists, even though they are Aboriginal, are not entirely free to exploit works of folklore in the creation of new derivative works.¹⁸⁵ Their use may not be found to be authorized because their intent is gainful and their use of the art is outside the domain of tradition. Additionally, the so-called "competent authority" makes these decisions, not the indigenous peoples themselves.

However, in addition to what practically amounts to a fair use exception, the other exception is for "borrowing of elements of expressions of folklore for creating an original work of an author, provided such utilization is compatible with fair practice."¹⁸⁶ These new works must, however, acknowledge their source "by mentioning the community and/or geographic place from where the expression utilized has been derived."¹⁸⁷ Thus, it would appear that derivative works based on works of folklore are allowed where they are "original." But according to this doctrine, the underlying work will not be adequately protected either for the "realist group" or the "traditional group" since others may make adaptations based on it.

D. *The Mataatua Declaration*

In June 1993, over 150 representatives from indigenous populations of fifteen countries convened in New Zealand for the first International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples. There they passed The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.¹⁸⁸ The Declaration

tion of traditional art images and designs into 'modern' artworks, both by indigenous and non-indigenous artists."); see also Ellinson, *supra* note 23, at 341.

184. See *Gallery Gabrielle Pizzi* (visited Dec. 6, 1996) <<http://www.home.aone.net.au/gabrielle-pizzi/pizzi2.htm>>. Much of the work produced by urban Aboriginal artists is overtly political and has strong European influences.

185. A recent dispute, occurring in 1988, involved the depiction of Tiwi burial poles in the artwork of an urban Aboriginal artist from Sydney to which the Tiwi Land Council objected. See *Study/protection*, *supra* note 23, at 19.

186. Model Provisions § 4(1)(iii).

187. *Id.* § 5(1).

188. *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, Hum. Rts. Comm., Sub-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. Working Group on Indigenous Populations, 12th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1994/12 (1994).

states that existing intellectual property regimes are inadequate to the needs of indigenous peoples and calls for, among other things, new intellectual property mechanisms that provide for collective ownership, retroactive coverage of historical works, protection against debasement of culturally significant items, and multigenerational coverage span.¹⁸⁹ Moreover, the Declaration urges indigenous peoples to define for themselves their own intellectual property and develop a code of ethics that outsiders must observe when interacting with that property.¹⁹⁰ This document thus identifies the key challenges in reconciling the copyright regime with the needs of the indigenous community. However, because it is more a call to action than a proposal, it offers little guidance as to how to achieve a reconciliation. Unfortunately, no action has been taken in response to this declaration thus far.

V. STRETCHING THE BOUNDARIES OF COPYRIGHT LAW

Another possibility in the protection of folklore may be to look beyond copyright law. Without reformulating the copyright law, it may be that the law, when coupled with other rights, provides sufficient protection to folklore. The following mechanisms may provide a means to stretch and strengthen copyright law's protection of folklore.

A. Moral Rights

Moral Rights,¹⁹¹ although distinct from economic rights, are usually

189. *See id.* § 2.5.

190. *See id.* §§ 1.1, 1.3.

191. This is essentially an English translation of the French "droit moral." The Berne Convention provides for moral rights in *6bis*. Australia, even though it is a member of the Berne Convention, does not have moral rights legislation. Australian artists must therefore be content with common law actions of defamation and misrepresentation. Because the Berne Convention does not mandate the method of enforcement of moral rights, common law countries have the flexibility to limit protection to existing laws such as defamation and misrepresentation. *See* STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 883-905 (1989). The United States, in order to come into compliance with the Berne Convention, enacted the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (1990). This act limits moral rights protection to authors of "work[s] of visual art." Works of visual art are defined essentially as paintings, drawings, prints, photographs, and sculpture in limited editions. *See* 17 U.S.C. § 101. Artists may also seek protection under state moral rights legislation. Although, again, limited to "works of fine art," *see, e.g.,* CAL. CIV. CODE § 987; N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1984), protection is nonetheless expanded to include reproductions of works of fine art. In Canada, moral rights are protected in the Copyright Act, R.S.C., ch. C-42, § 14.1(1).

grouped in with copyright. Moral Rights basically consist of the rights of divulgation,¹⁹² paternity,¹⁹³ and integrity.¹⁹⁴ These rights, which are usually inalienable,¹⁹⁵ allow artists to protect their artwork from being denigrated. Indigenous artists may be protected under this doctrine from having their work first published without their authorization, published without attribution, reproduced in poor quality, reproduced only partially causing the message to be distorted,¹⁹⁶ or put to a use which would be inappropriate to the nature of the original work.

Moral rights provide a public service by preventing distortions of indigenous works, they assure the public of accurate and authentic examples of indigenous culture.¹⁹⁷ However, these rights, like copyright, are directed at individual authors and not collectives. Even more so than copyright, these rights derive from the Romantic author tradition. The underlying rationale is that these rights inhere in and protect the personality of the author. Thus, ordinarily, a claimant must show that the distortion of his or her artwork will be likely to cause damage to their reputation.¹⁹⁸ As their focus is on the reputation of the author, moral rights may not address the harm done to a community.

The term of protection may also be a problem for folklore, as protection may be extinguished upon the death of the author, or after a set time.¹⁹⁹ The indigenous community, however, would want to ensure

192. The right of publication is the author's right to determine if and when her work will be made public.

193. The right of paternity is the author's right to be known to the public as the creator of a work and the right to prevent others from usurping the work by naming another person as the creator. It also prevents others from wrongfully attributing to the artist a work the artist did not create. See Pub. L. No. 100-568, 1988 U.S.C.C.A.N. (102 Stat. 2853) 3706, 3714.

194. The right of integrity in a work is the right of an artist to prevent distortions of the work. It gives an artist the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, her work. See *id.* §§ 3706, 3714-3715

195. Although in many countries moral rights are considered inalienable, the Berne Convention does not prohibit alienation. Under the Canadian Act, moral rights cannot be assigned, but they can be waived. See Canadian Copyright Act, R.S.C., ch. C-42, § 14.1(2).

196. For example, in bark painting, each color holds important symbolic significance, therefore altering the color scheme would distort the message intended by the artist. See, e.g., *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 138-39 (S.D.N.Y. 1990) (pamphlet containing photocopied fragments of artist's multi-imaged works of visual art, which excised only the sexually explicit images without labeling them as incomplete reproductions, distorted artist's political message and impaired his professional reputation).

197. See Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 319 (1994) (noting that a country's "justification for granting . . . moral rights must extend beyond the author's own reputational needs").

198. See, e.g., 17 U.S.C. § 106A (1994); Canadian Copyright Act, R.S.C., ch. C-42, § 28.2.

199. Even if the rights were to be perpetual, the rights would vest in the descendants of the

the integrity of the work beyond this limited time since it is the community's interest in the work and not the reputation of the artist with which they are concerned. The community's interest in the work is perpetual. On the other hand, moral rights, if applied too zealously, may frustrate the interests of the "realist group" by protecting sacred imagery from any commercial exploitation.

B. *Public Domain Statutes and Domaine Public Payant*

Public Domain statutes basically provide moral rights in perpetuity.²⁰⁰ Public Domain legislation is intended to "prevent or sanction use of public domain works in such a way as to prejudice their authenticity or identity."²⁰¹ Public domain works can be used as the basis of derivative works so long as the use does not violate the work's essence, cultural value, or reputation.²⁰² Thus, this scheme appears to provide the appropriate safeguard to the indigenous community's cultural interests, especially those who want to protect sacred imagery. Protection is extended, however, only to works whose copyright protection has expired and to works that would have qualified for copyright protection had the legislation existed at the time they were created.²⁰³ For these reasons, folklore will have the same difficulties that it does with copyright law. Namely, the originality and fixation requirements may prevent it from enjoying protection. Furthermore, authority to control public domain works rests with a designated state agency. Public Domain legislation therefore does not present the problem of individual ownership for indigenous peoples, but it may be problematic to have the state exercise this degree of control over indigenous folklore, especially where the state is not representative of the indigenous community.²⁰⁴

Another related mechanism is *Domaine Public Payant*. *Domaine*

work's creator and not the community as a whole.

200. See, e.g., *UNESCO's Draft Recommendation to Member States on the Safeguarding of Works in the Public Domain*, Item 7.5 of the Provisional Agenda, U.N. Doc. 25 C/32 (1989) [hereinafter *UNESCO's Draft Recommendation*].

201. *U.N. Working Group on Works in the Public Domain*, 13(4) COPYRIGHT BULL. 33, 34 (1979).

202. See Berryman, *supra* note 197, at 304. This is to ensure that "cultural evolution is not retarded." *Id.* at 317.

203. See, e.g., *UNESCO's Draft Recommendation*, *supra* note 200.

204. Thus, public domain legislation may be more appropriate in developing countries than it would be in the United States, Canada, or Australia, where indigenous populations maintain that they have sovereignty.

Public Payant is a legislative scheme that imposes a fee for the use of works in the public domain.²⁰⁵ In other words, when no author can be identified, one who uses an otherwise copyrightable work must pay a royalty to the state. The funds raised usually will go to support arts organizations and could therefore be directed at indigenous arts councils.²⁰⁶ *Domaine Public Payant* does not apply to the use of public domain works that constitute derivative works of sufficient originality. No common law country has ever experimented with this type of legislation.²⁰⁷

C. *The Law of Unfair Competition*

Combining copyright protection with an additional source of intellectual property protection may be a means of providing adequate protection to folklore. Trademark law may provide additional protection against some kinds of unauthorized copying.

In the United States, Canada, and Australia, indigenous arts and crafts have faced competition in their market from cheaper imitations made by non-indigenous persons, often from overseas.²⁰⁸ The problem is that as soon as any of their art forms gains popularity with the general public, the market is flooded with imitations. Each of these governments has taken special measures to ensure the authenticity of indigenous products.²⁰⁹

In the United States, for example, the Indian Arts and Crafts Act of 1935²¹⁰ was enacted to protect Native American Arts and Crafts. The Act attempts to assure authenticity of Native American works by issuing certification marks²¹¹ through the Indian Arts and Crafts Board to

205. See WIPO, GLOSSARY OF TERMS OF LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 86 (1980).

206. See Berryman, *supra* note 197, at 307-08.

207. See MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul E. Geller gen. ed., 1990).

208. For example, the Inuit in Canada face competition in their sales of stenciled prints, the Navajo and the Hopi face competition in their sales of silver jewelry, and the Australian Aboriginal peoples face competition in their sales of bark paintings. See *Study/protection, supra* note 23, at 17.

209. In Australia, the Aboriginal Arts Management Association has developed a labeling scheme to ensure authenticity. See *id.* Similarly in Canada, the government has organized cooperatives to adopt distinctive trademarks for First Nation Products. See *id.*

210. Act of Aug. 27, 1935, ch. 748, § 1, 49 Stat. 891 (codified as amended at 25 U.S.C. § 305 (1994)).

211. Certification marks, as distinct from trademarks, indicate a characteristic of a good, not the source of a good. Certification marks, as well as collective marks, are protected under the

be registered in the Patent and Trademark Office.²¹² Congress saw this as an important policy objective as a result of the growing industry in unauthentic "Indian" products.²¹³ Under the Act, the Board is empowered to assist tribes and individuals to obtain registration of their trademarks.²¹⁴ The Act provides civil and criminal penalties for counterfeiting the Board's marks and for misrepresenting the works as "Indian made."²¹⁵ The Act, however, appears to be "only a paper tiger"²¹⁶ since there has never been a single prosecution in the history of the Act.²¹⁷ In fact, after more than sixty years on the books, the Interior Department has not even promulgated any regulations for its enforcement.²¹⁸

Furthermore, even if this act had teeth, it would prevent only some

Lanham Act. See 15 U.S.C. § 1054.

212. See 25 U.S.C. § 305(a)(3).

213. Textiles, rugs, jewelry, and other artwork and handicrafts that are made by non-indigenous persons are being marketed as "Indian made" either implicitly or explicitly. Imports from East Asia make up an estimated 20% of the \$800 million worth of "Indian" crafts sold each year. See *On the Warpath*, *ECONOMIST*, Sept. 5, 1992, at 94. Likewise, in a 1994 state investigation, the state of Alaska found that 75-80% of artwork sold as "native-made" were fakes. This is in a state in which summer visitors in 1993 spent over \$77 million on souvenirs. See *Counterfeit Art; Unsuspecting Tourists Get Taken*, *ANCHORAGE DAILY NEWS*, Apr. 23, 1996, at 6B.

214. The problem is that the Board has not been adequately funded to fulfill this role. Thus the Board's role has been limited to "certifying" that particular artists and groups of artists are "Indian" and thus permitted to use the certification mark. Once this determination has been made, the artists are on their own to register a certification mark with the Patent and Trademark Office. Telephone Interview with Meredith Stanton, Deputy Director, Indian Arts and Crafts Board (Jan. 30, 1997). Furthermore, even their assistance with certifying artists as "Indian" artists has not been warmly received by the Native American tribes. The Oklahoma Cherokees, for example, have complained that the Board's certification of artists as members of the Cherokee tribe has the effect of granting citizenship to their sovereign nation. See *id.* Moreover, many artists who identify themselves as Native American are not only denied protection under this Act, but are themselves prevented from labeling their work as "native-made" if they are not officially enrolled in federally recognized tribes.

215. 18 U.S.C. §§ 1158-1159. The 1990 amendment to section 1158, Pub. L. No. 103-322, increased the maximum fine for counterfeiting to \$250,000. Section 1158 already provided for a maximum prison sentence of five years, which can be imposed in conjunction with a fine. See 18 U.S.C. § 1158.

216. Leonard D. DuBoff, *500 Years After Columbus: Protecting Native American Culture*, 11 *CARDOZO ARTS & ENT. L.J.* 43, 57 (1992).

217. See *id.*

218. In the United States, indigenous artists may have recourse under similar state statutes. See, e.g., *ALASKA STAT. §§ 45.65.010-070* (1986); *N.M. STAT. ANN. §§ 30-33-1 to -11* (Michie Supp. 1991). Other statutes create a more general warranty of authenticity, whereby the seller will be liable for any artwork sold that does not conform to its description. See *MICH. STAT. ANN. § 19.410(15)* (Callaghan Supp. 1991); *N.Y. ARTS & CULT. AFF. LAW §§ 13.03 to .07* (McKinney Supp. 1992).

uses of indigenous art. Nothing in the Act would prevent non-indigenous persons from making new products that merely incorporate indigenous motifs. As long as these products are not marketed as "Indian made," they will be permitted.²¹⁹ And again, if those elements which are incorporated happen to be sacred or secret symbols, they may cause as much offense as a replica would.²²⁰

Another possible means of supplementing copyright law's protection is through general unfair competition laws.²²¹ Unfair competition laws are designed to protect consumers and competitors from the misrepresentation of products on the market. Indigenous groups may use these laws to prevent outsiders from marketing goods as "Indian made" or as being produced on indigenous lands.²²² Trademark law has the advantage of granting rights collectively²²³ and of providing perpetual protection.²²⁴ To gain protection under these laws, however, folklore must qualify as a commercial good or service.²²⁵ Some aspects of folklore, however, such as rituals or dance, may not generally qualify as commercial activities.²²⁶ Thus this law would benefit the first group of concerns more than it would the second.

219. Of course many products, without being explicitly marketed as such, are designed to look like they are indigenous works. Although such works may not be prevented by the copyright law, they may be prevented by trademark law. If a buyer's attention is arrested because she thought that the work was an indigenous product, it may be a trademark violation. See Ginsburg, *Exploiting*, *supra* note 88, at 18 (analyzing how a work "in the style of" a famous artist, but which does not copy any particular work, may still be a trademark violation because consumers would be confused).

220. In fact, they may cause more offense if they are inexact because they then may distort or misrepresent important teachings.

221. See, for example, section 43(a) of the Lanham Act, which imposes civil liability upon "any person who shall . . . use in connection with any goods . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same." The Act provides a cause of action to "any person who believes that he or she is likely to be damaged" by any such acts of false description or representation. 15 U.S.C. § 1125(a)(1) (1994).

222. See *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746 (8th Cir. 1980) (holding that the phrase "Black Hills Gold" was geographically descriptive and could not be used to describe jewelry not made in the Black Hills of South Dakota).

223. Trademarks are usually granted to corporate entities. Additionally, collective marks are used to indicate that the source of goods is a group. The owner of the mark is the group, not the particular producer who uses the mark. See 15 U.S.C. § 1054(5).

224. Under the Lanham Act, trademarks may be renewed every ten years. See 15 U.S.C. § 1059(a).

225. See, e.g., Lanham Act § 43(a), 15 U.S.C. § 1125(a).

226. See Berryman, *supra* note 197, at 317.

D. Trade Secrets

An additional means of supplementing copyright law's protection is through trade secret law.²²⁷ Trade secret law may be capable of protecting the interests of the "traditional group" by protecting the folklore that has special spiritual significance and has been revealed only to properly initiated clan members. Trade secret laws, because they usually protect corporate entities, would accommodate collective rights. To prove misappropriation of a trade secret, an indigenous group must prove that its art constitutes a trade secret, and that it was acquired through improper means.²²⁸ To be a trade secret, a work must be secret, and have some economic value. Where works have been in the public domain for an extensive period of time, they cannot be deemed to be trade secrets.²²⁹ Thus, only those works that have been safeguarded from the outside, commodifying world will be covered. The second requirement, that the work have economic value, will prove difficult for the "traditional group." But where the clan has taken reasonable efforts to protect the secrecy of the work, the work will be deemed to be secret.²³⁰ If the clan either sold or licensed the use of

227. Compare to the Australian cause of action for breach of confidence.

228. The Uniform Trade Secret Act defines a trade secret as "information, including a formula, pattern, compilation, . . . that . . . derives independent *economic* value, actual or potential, from not being generally known to [the public] . . . and . . . is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." UNIFORM TRADE SECRET ACT §

1(4). Misappropriation of a trade secret is defined as

[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or . . . disclosure or use of a trade secret of another without express or implied consent by a person who . . . used improper means to acquire knowledge of the trade secret; or . . . at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . derived from or through a person who had utilized improper means to acquire it; . . . acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use; or . . . derived from or through a person who owned a duty to the person seeking relief to maintain its secrecy or limit its use; or . . . before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Id. § 1(2) (emphasis added). The Restatement of Unfair Competition similarly provides that "[a] trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential *economic* advantage over others." THE RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39, at 425 (1995) (emphasis added).

229. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974) (holding that state trade secret laws do not conflict with the federal patent act).

230. Allowing artists to depict and then display these works in the major museums in Austra-

these religious texts, then they would be found to have economic value.²³¹ But is unlikely that the clan would ever put sacred artworks to that use. The misappropriation aspect of this law will also cause trouble in its application to indigenous art, for it must be proven that the exploiter of the trade secret knew that it was improperly acquired.²³² Those who purloin indigenous art may not be aware of the sacred significance of the works or that they are secret. Therefore it is unlikely that they will have committed any impropriety in acquiring them. Indeed, in the Australian cases, those who used the sacred designs acquired them quite easily and overtly.²³³ Thus, the trade secret law will benefit only a minority of cases.

VI. ARRIVING AT THE NORMATIVE QUESTION

Finally, with the benefit of an analysis of the extent to which indigenous art and folklore are currently protected by intellectual property regimes, we can now ask the normative question: Should indigenous art and folklore be protected by intellectual property regimes? The answer to this question should not be assumed. Along with it one might ask: What are the implications of the application of existing intellectual property laws to folklore? Stated otherwise, what are the consequences of fitting folklore into the existing scheme?

One consequence is that these artistic traditions will be forced to conform to a set of assumptions that are at odds with their traditions. The underlying rationale of intellectual property law privileges individual ownership, economic exploitation, and the dissemination of new expressions of ideas. Intellectual property rights are driven by the economics of free enterprise and profit. The objective is the creation of a limited monopoly right as an incentive for individuals to disseminate their original expressions. However, indigenous art, especially in its sacred forms, is not something that can be owned by any individual, is not something that should be commercially exploited, is not some-

lia, as was the case in *Milpurrruru v. Indofurn Pty. Ltd.*, (1994) 54 F.C.R. 240 (Austl.), will probably not be seen as reasonable means to protect the secrecy of the works.

231. The only case holding that religious texts are trade secrets is *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993). In that case the religious texts were found to have economic value because they were sold to subsidiaries in order to raise funds for the church. *See id.* at 633.

232. *See* THE RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40, at 452 (1995).

233. *See Milpurrruru*, 54 F.C.R. 240; *Yumbulul v. Reserve Bank of Austl.*, (1991) 21 I.P.R. 481 (Austl.).

thing that can be freely disseminated, and is not something that can be reinterpreted or adapted. These works, which are often sacred in nature, are unlike the types of works anticipated by the copyright law and may require different types of protections. Thus, in some cases, indigenous groups may seek to use intellectual property laws, which imply dissemination, to withhold the circulation of their art. Although they may use the intellectual property regime to get partial protection, they are using it for a purpose that is alien to it.

The *Yumbulul* case demonstrates clearly the disjunction between the rationales of the Copyright Act and of those seeking to protect their cultural symbols. The fundamental objective of the copyright law is to promote artistic evolution.²³⁴ Therefore, any control over a work is for a limited time so that future artists can build on the work. Thus, the Morning Star Pole motif either is or will be in the public domain so that other artists may make derivative works based on it. These artists can then receive economic rights to their transformations, but they also have no rights in the underlying work. In contrast, the Galpu clan does not want control over those new modifications, but instead over the underlying work. They want to prevent precisely what the Act encourages: they want to prevent new artists from adapting and then selling the rights to the work. But the copyright law, as it presently exists, will not protect indigenous peoples from adaptations and commercial use of their traditional artworks.

For these reasons, *sui generis* rights have been proposed for folklore. According to these proposals, protection should be perpetual and retroactive, and derivative works should be strictly controlled. But there may be consequences for the implementation of these rights. By overprotecting folklore, the public domain diminishes, which means that there are fewer works to use to build on. Therefore, indigenous artists who want to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and want to compete in the arts and crafts markets may be inhibited by these regimes. The consequence is that these laws may "freeze" the culture in a historic moment, allowing us to think of indigenous peoples as romantic relics from a lost time, and to deny them a contemporary voice.

Those who advocate for protection against what they see as a continuing colonizing or poaching of indigenous culture welcome the ex-

234. See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

tension of intellectual property law's protection. But the application of intellectual property may itself be seen as a colonizing domination in that it forces an assimilation of indigenous culture. On the other hand, those who decry this assimilation tendency of western legal regimes may welcome the development of *sui generis* rights, especially those that draw on customary law.²³⁵ But again, the problem with protecting indigenous culture in this way is that it may preserve it at the risk of pronouncing it dead.

CONCLUSION

Is indigenous art protected by intellectual property laws? When one begins with this question instead of proceeding straight to the conclusion that it is not, the resulting analysis reveals that there are no easy solutions to the problem of the commercial exploitation of indigenous culture. The analysis reveals that the problem is far more complicated than a legal regime that discriminates against one culture's art. The question leads to another question: protection for whom? It becomes evident almost immediately that there are different interests and diverse motives involved. Therefore, to answer the question for one group without regard for another may not be accurate.

The first revelation that the analysis unveils is that those indigenous peoples who want to gain control of their imagery in order to participate in its circulation are, in fact, adequately protected by the existing legal regime. Certainly their protection could be strengthened, but anything more may inhibit free expression and upset the delicate balance that the copyright law has achieved. To the extent we want to grant special protection to these works, this goal may be better achieved through unfair competition law.

As was anticipated, those indigenous peoples who want to prevent their art from being used at all in the commercial world are not satisfactorily protected by the existing intellectual property regimes. What they actually want to use the law for is to prevent any dissemination of their art. But this use is antithetical to copyright law, whose primary goal is to facilitate dissemination. Furthermore, even if copyright law

235. It should not be forgotten that indigenous peoples already have their own system of laws and procedures for dealing with these issues. See *Study/protection, supra* note 23, at 9. These laws are, however, extremely complicated and vary by tribe. Usually, there are no general rules about the use of traditional motifs. Instead, the rules will vary depending upon the particular design in question. See *id.* at 20.

were stretched to accommodate the needs of this group, the result may be damaging to the integrity of its culture, as well as its development.

The problem is a compelling one. Its solution, however, may be beyond the scope of intellectual property. The real problem is the lasting effects of colonization. My project, however, is not so ambitious as to propose a solution. It is merely to add a relevant analysis to the consideration of the problem. My conclusion is that the presumption that indigenous art is not protected by intellectual property law is inaccurate as it fails to distinguish the diversity of interests within the indigenous community. Furthermore, the rushed judgment that copyright law should be reformulated in order to provide greater protection to indigenous art may be misguided. Short of protecting folklore *per se* and prohibiting adaptations, tinkering with the copyright law will not address the underlying problems and may, in fact, impede the goal of maintaining the integrity of indigenous cultures.

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