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The views expressed in *The Trademark Reporter* (TMR) do not necessarily reflect those of the International Trademark Association (INTA). To fulfill its mission of delivering cutting-edge scholarship on trademarks, brands, and related intellectual property to its readers, the TMR sources content reflecting a diversity of viewpoints; the views expressed in any given article, commentary, or book review are those of the individual authors.

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EDITOR'S NOTE

As our readers are aware, the International Trademark Association (INTA) annually presents the Ladas Memorial Award to outstanding papers in the field of trademark law or on matters that directly relate to or affect trademarks. The award is presented in two categories—with two Student[1] winners and one Professional winner. Many members of *The Trademark Reporter* (TMR) Committee volunteer to serve as judges for the Ladas Memorial Award Competition. I look forward to the opportunity each year to review papers presenting cutting-edge scholarship, often expanding the scope of debate, as well as seeing what our future colleagues are thinking and writing.

In this issue, we are proud to publish both winning 2021 Student papers: "Cultural Misappropriation: What Should the United States Do?" by Lauren M. Ingram, and "The Lanham Act's Immoral or Scandalous Provision: Down, but Not Out" by Michael Stephenson.

In "Cultural Misappropriation," Ms. Ingram, who graduated in 2021 with a L.L.M. from American University Washington College of Law (and is now in private practice), addresses the current debate on cultural misappropriation, generally understood to be the aping or commodification of some unique cultural aspect of a marginalized community by members of the dominant culture, without consent or against the will of the original community. There are currently few legal frameworks on which marginalized cultures can rely to protect against such misappropriation, particularly in the United States, nor is there a consensus on what constitutes cultural misappropriation. Ms. Ingram surveys legal structures, including trademark law, around the world, and considers whether such structures provide effective protection. After considering the laws of other countries, including Tunisia, the Philippines, and Panama, she concludes by proposing the creation of a *sui generis* right that can be exercised by indigenous and other marginalized communities.

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[1] INTA defines the "Student" category as meaning those in the United States who are "enrolled as either full- or part-time law or graduate students." For international students, "university enrollment is acceptable." *See* Ladas Memorial Award Competition Rules & Requirements, https://www.inta.org/wp-content/uploads/public-files/about/awards/2021_LADAS_FLYER-012521.pdf.

Michael Stephenson, a 2021 graduate of the University of Pittsburgh School of Law (and now in private practice), considers the potential for a "Wild West" of obscene, profane, and vulgar trademarks used and registered in the United States following the Supreme Court's decisions in *Matal v. Tam* and *Iancu v. Brunetti*, which struck down, on First Amendment freedom of speech grounds, first the disparagement clause and then the prohibition on registration of immoral or scandalous marks in Section 2(a) of the Lanham Act. Mr. Stephenson argues there is a place for Congress to reinstate a bar to registration of certain categories of marks that reflect a presumed consensus as to immorality or scandalousness. Mr. Stephenson's argument relies on the dissenting opinions in *Iancu*; he also surveys modern First Amendment jurisprudence, positing that, as there are exceptions to an absolute Constitutional free speech right, such categories may provide a road map for specifying non-registrable marks, supporting both the government's interest in not being involved in protection of unseemly trademarks, as well as a greater degree of certainty as to what marks will or will not qualify as scandalous or immoral. Mr. Stephenson argues that the categories selected can be considered in a value-neutral fashion.

Both articles address topics as to which there is a wide range of viewpoints and will undoubtedly spur further debate on how to treat these increasingly prominent topics in trademark law. The TMR is honored to be able to publish these pieces for the benefit and edification of our members and others interested in these topics. N.B.: While both pieces have been lightly edited, largely for conformance to TMR's style requirements, we have endeavored to leave the articles in a form close to that reviewed by the Ladas judges.

The TMR Committee congratulates this year's Student Ladas Memorial Award winners. We think that after you read the winning pieces you will agree that the future of trademark jurisprudence is bright.

Glenn Mitchell
Editor-in-Chief
Chair, The Trademark Reporter *Committee*

CULTURAL MISAPPROPRIATION: WHAT SHOULD THE UNITED STATES DO?

By Lauren M. Ingram[*]

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* Winner, 2021 Ladas Memorial Award, Student Category. Associate, Aronberg Goldgehn Davis & Garmisa, Member, International Trademark Association; LL.M., American University Washington College of Law, (2021). All opinions, errors, and omissions are the author's own.

I. INTRODUCTION

What will satisfy the public outcry for cultural misappropriation in the United States? So far, the current solutions include celebrity apologies,[1] company statements,[2] and the rare legal remedy if the misappropriation claim fits within the criteria of copyright or trademark law. The general public does not understand that there are few solutions within the current legal system to address cultural misappropriation. There are characteristics of cultural misappropriation[3] that do not fit into the current intellectual

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1 Rania Aniftos, *Cardi B Apologizes for Appropriating Hindu Culture: 'Maybe I Should Have Done My Research,'* BILLBOARD (Nov. 12, 2020), https://www.billboard.com/articles/columns/hip-hop/9483234/cardi-b-apologizes-appropriating-hindu-culture. (The rapper Cardi B was called out for cultural appropriation for her cover of *Footwear News* magazine. On the cover she was holding a red sneaker and was depicted as the Hindu goddess Durga). Morgan Hines, *'Stupid doesn't even cut it': Florence Pugh apologizes for cultural appropriation*, USA TODAY (June 27, 2020), https://www.usatoday.com/story/entertainment/celebrities/2020/06/27/florence-pugh-apologizes-cultural-appropriation/3270209001/ (Actress Florence Pugh posted to her Instagram page apologizing for her previous incidents of cultural appropriation, when she wore her hair in cornrows and bindis.) Christina Careaga, *British model issues lengthy, sincere apology for cultural appropriation*, MASHABLE (Nov. 21, 2016), https://mashable.com/2016/11/21/emily-bador-blackhair-magazine-apology/ (British model Emily Bador apologized for her appearance on the cover of *Blackhair Magazine*; as a white model, Bador was accused of cultural appropriation of black culture, since in the picture her hair is styled to look as if it has the same texture as a woman of color).

2 Avery Matera, *People Are Accusing H&M of Cultural Appropriation for Selling Socks That Appear to Feature the Word "Allah": Will H&M ever learn?*, TEENVOGUE, https://www.teenvogue.com/story/handm-cultural-appropriation-arabic-socks (Jan. 30, 2018) (H&M was selling a pair of socks with images of yellow figurines with jackhammers exuding squiggles that shoppers have said look like the word "Allah"). Briana Arps, Susanna Heller, and Amanda Krause, *18 controversial clothing items that were pulled from stores*, INSIDER (Oct. 30, 2019), https://www.insider.com/clothing-items-pulled-from-stores-2017-6#before-being-sold-to-boohoocom-nasty-gal-was-criticized-for-appropriating-black-culture-with-a-50-faux-leather-do-rag-8 (Nasty Gal sold a vegan leather durag and was accused of appropriating black culture. H&M had to remove a faux feather headdress from U.S. and Canadian stores when Native Americans addressed the retailer. Nordstrom and Gucci faced backlash in May for selling an $800 "Indy Full Head Wrap," which looked to appropriate the Sikh community.)

3 Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, *in* BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 1, 1 (Bruce Ziff & Pratima V. Rao eds., 1997) [hereinafter Ziff & Rao, *Introduction to Cultural Appropriation*]; *see* Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 188 (2007) (quoting Ziff & Rao); Sally Engle Merry, *New Direction: Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 585-86 (1998) [hereinafter Merry, *New Direction*]; Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 73 (2000) [hereinafter Sunder, *Identity Politics*] (same); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 300, 310 (2002) (same); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016). Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 5 (1997) (citing U.N. ESCOR, *Committee of Governmental Experts on the Safeguarding of Folklore*, 16 COPYRIGHT BULL. 27, 37 (1982)). WIPO, Revised Draft Provisions for the Protection of Traditional

property system's mold. The first problem is who should the law protect? A city? A country? An entire ethnic group? It is not clear as to who needs legal protection. If a community requires protection, who is credited as the author? The innovator? The owner? If a community recognizes its members as the author or owner, it is challenging to establish authorship in the current system. And if the original author is not identifiable, who can claim authorship? Other countries have acknowledged the current system's shortcomings and have established new laws to answer the questions above.[4] Meanwhile, the United States has not.

In the United States, the intellectual property system[5] is the primary source for misappropriation of intangible property. At this point, there are no cultural appropriation or misappropriation laws in the United States, so the copyright system has been the primary source for solutions. Most of the current scholarship is based on working within the confines of the copyright system.[6] More recently, there has been the development of scholarship around remedial use of the trademark system. The current literature explores legal solutions to cultural misappropriation within the context of the current intellectual property system. Still, it has not provided a sui generis[7] proposal outside of the established system, in the United States.

In Part I, this article will discuss the definition of *cultural misappropriation* and explore how the current U.S. intellectual property system fails to address cultural misappropriation adequately. Part II will analyze suggestions from the World Intellectual Property Organization ("WIPO") and provide examples of other countries' sui generis cultural misappropriation systems.

Cultural Expressions/Expressions of Folklore, § III, Art. 1, in WIPO/GRTKF/IC/9/4 (January 9, 2006). Rosemary J. Coombe & Nicole Aylwin, *The Evolution of Cultural Heritage Ethics via Human Rights Norms*, *in* DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE 201, 201-02 (Rosemary J. Coombe, Darren Wershler & Martin Zeilinger eds., 2014).

4 Law for the Safeguarding of the Elements of Culture and Identity of Indigenous, Afro-Mexican and Equivalent. Esquivel & Martin Santos, Mexico to Pass Law Against Cultural Appropriation, ESQUIIVEL & MARTIIN SANTOS (Feb. 2, 2020). https://www.emps.es/post/mexico-legislates-cultural-appropriation (The Mexican Senate has approved the law to "protect the rights of indigenous peoples over their collective cultural work.")

5 In the United States, intellectual property laws are put in place for the protection of patents, copyright, industrial design rights, plant varieties, trademarks, trade dress, and trade secrets.

6 This can rarely be applied, due to the fact that copyright law expects the original holder, or author, to own the work. Copyright Act, 17 U.S.C. § 201. The United States allows copyright protection for the life of the author plus seventy years. Copyright Act, 17 U.S.C. § 305.

7 *Sui generis* is Latin for "of its own kind." It is used to describe a form of legal protection that exists outside typical legal protections. *Sui generis*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/sui_generis.

Part III of this article will conclude with my recommendation on implementing a sui generis cultural misappropriation solution in the United States, which is my contribution to this literature.

II. WHAT IS CULTURAL MISAPPROPRIATION?

One of the significant problems with a cultural misappropriation legal claim is its lack of clear definition. It is challenging to classify cultural misappropriation, which has led to confusion as to how to best remedy it. This section explores the meaning of *cultural misappropriation* and its divulsion from *cultural appropriation*.

The terms "cultural appropriation" and "cultural misappropriation" are often used interchangeably.[8] However, not all forms of cultural appropriation are cultural misappropriation.[9] The term "cultural appropriation" first appeared in academic writings about colonialism and Western expansionism.[10] The earliest iteration of cultural appropriation derives from *cultural repatriation*[11] or *cultural looting*.[12] Cultural looting is the act of physically stealing cultural property from other people.[13]

The definition of "cultural appropriation" has been explored for twenty years in legal literature. However, there is no legal standard of cultural appropriation. The most cited definition of "cultural appropriation" in intellectual property comes from Sally Engle Merry, PhD.[14] Merry describes cultural appropriation as "the process by which dominant groups take, and often profit from, the artistic, musical, and knowledge productions of subordinate

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8 Nadra Nittle, *The cultural appropriation debate has changed. But is it for the better?*, THE VOX (Dec. 18, 2018, 4:10 PM EST), https://www.vox.com/the-goods/2018/12/18/18146877/cultural-appropriation-awkwafina-bruno-mars-madonna-beyonce.

9 *Id*.

10 In 1979, sociologist Dick Hebdige wrote the book *Subculture: The Meaning of Style*, which is about "how White subcultures in Great Britain constructed 'style' to reinforce communal identity and borrowed cultural or revolutionary symbols from other marginalized groups, particularly groups who have even less social or economic power." This is one of the first references to cultural appropriation in literature. *Cultural Appropriation v. Appreciation | What I Hear When You Say: Viewing Guide*, PBS, https://bento.cdn.pbs.org/hostedbento-prod/filer_public/whatihear/9-Cultural_Approp-Viewing_Guide.pdf.

11 Repatriation's definition is the return or restoration of money, historical artefacts, etc., to their country of origin; an instance of this. *Repatriation*, OXFORDENGLISHDICTIONARY.com.

12 "Cultural property" is defined as art, artifacts, etc., of cultural importance or interest, especially those regarded as belonging collectively to a particular country or people. *Cultural property*, OXFORDENGLISHDICTIONARY.com.

13 *Id*.

14 Sally Engle Merry (Ph.D., Brandeis, M.A., Yale, B.A., Wellesley) was a Silver Professor of Anthropology at New York University and Faculty Co-Director of the Center for Human Rights and Global Justice at New York University School of Law. *Sally Engle Merry,* N.Y.U. | LAW.

groups."[15] It is also described as "outsiders borrow[ing] cultural products not only for their intrinsic value, but also [to] invoke, describe, or caricature the source community."[16] According to Professor Merry, power dynamics are fundamental to this definition.[17]

The most accepted legal definition of cultural appropriation is "taking from a culture that is not one's own of intellectual property, cultural expressions or artifacts, history and ways of knowledge."[18] Professor Susan Scafidi[19] has expanded on this definition by identifying the "person or group of a certain culture as "the appropriator," and the tangible or intangible objects that are taken from the different culture as "cultural products."[20]

"Most people who carry out cultural appropriation do [not] understand what cultural appropriation is."[21] "Cultural misappropriation occurs when a cultural fixture of a marginalized culture/community is copied, mimicked, recreated, or [commodified] by the dominant culture against the will of the original community."[22] The use of the term "misappropriation" "assumes that there are 1) instances of neutral appropriation, 2) the specifically referenced instance is non-neutral and problematic, even if benevolent in intention, 3) an act of theft or dishonest attribution has taken place, and 4) moral judgement of the act of appropriation is subjective to the specific culture from which [it] is being engaged."[23] The two terms often seem to be conflated. However, the difference between the two terms describes a systematic level of oppression, and the other is more of day-to-day oppression. Cultural appropriation is the "loose idea of borrowing, sharing, and being inspired by other cultures," day-to-day.[24] In contrast, "[c]ultural misappropriation distinguishes itself from the

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15 Merry, *New Direction*, *supra* note 3, at 586.

16 Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 824 (2001).

17 Merry, *New Direction*, *supra* note 3, at 586.

18 Ziff & Rao, Introduction to Cultural Appropriation, *supra* note 3.

19 Susan Scafidi (J.D., Yale, B.A., Duke) is currently the Academic Director of the Fashion Law Institute at Fordham University School of Law.

20 Sari Sharoni, *The Mark of a Culture: The Efficiency and Propriety of Using Trademark Law to Deter Cultural Appropriation*, STANFORD LAW SCHOOL, 1, 4.

21 Anastasiya Sytnyk, *Cultural appropriation and misappropriation, why is it important and what does it mean?*, STAND (July 11, 2020). https://stand.ie/cultural-appropriation-importance/

22 Devyn Springer, *Resources On What 'Cultural Appropriation' Is and Isn't*, MEDIUM (Sept. 11, 2018). https://medium.com/@DevynSpringer/resources-on-what-cultural-appropriation-is-and-isn-t-7c0af483a837.

23 *Id*.

24 Jessica Metcalf, *quoted in id.*

neutrality of cultural exchange, appreciation, and appropriation because of the instances of colonialism and capitalism."[25]

Before outsiders can appropriate a cultural product, they must first recognize its existence, source community, and value. The next section will examine the problems that occur with cultural misappropriation.

Problem

"Cultural groups often want to be able to control, restrict, authorize, or license uses of their cultural products by non-group members."[26] Some wish to receive economic compensation for the use of their cultural products through licensing fees.[27] Others demand restrictive use of their cultural property.[28] These objectives are challenging to accomplish without some regulation or at least some remedy of cultural product misuse.

Cultural misappropriation can be challenging to identify, thus difficult to remedy. Due to these difficulties, it often faces disparagement for its restraints. Current scholarship criticizes the limitations of cultural misappropriation because of the lack of defined membership and source communities. Membership standards should include a test of group belonging, another measure to determine whether the cultural product belongs to that particular group, and a legitimacy requirement to assess whether the use of the culture's product conforms with the rules they set out to govern it.[29] However, these clearly defined standards "may 'freeze' a culture at a particular moment."[30] Opponents believe that those restraints would not benefit the source community. Scholars suggest that defining cultural products may "insulate cultures that reinforce traditions through law"[31] or that monetization of a cultural product may diminish the importance of the cultural product.

WIPO members have expressed a need for Traditional Cultural Expressions ("TCEs")[32] or cultural product protection against unauthorized use and to prevent insulting, derogatory, culturally, or spiritually offensive use. This also includes protection from misleading or false indications as to authenticity or origin, lack of

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25 Devyn Springer, *Resources On What 'Cultural Appropriation' Is and Isn't*, MEDIUM (Sept. 11, 2018). https://medium.com/@DevynSpringer/resources-on-what-cultural-appropriation-is-and-isn-t-7c0af483a837.

26 Sharoni, *supra* note 20, at 11.

27 *Id.*

28 *Id.*

29 Rebecca Tsotsie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 349-50 (2002).

30 Sharoni, *supra* note 20, at 12.

31 Sunder, *Identity Politics*, *supra* note 3, at 170.

32 Traditional Cultural Expression as defined by WIPO.

acknowledgement of the TCE's source, and unauthorized disclosure of confidential or secret TCEs.[33] Due to the lack of consensus among WIPO members, the countries have developed their own methods to handle cultural misappropriation. The United States' law to address cultural misappropriation is discussed in the next section.

Law

In the United States, there is only one law to combat any sort of misuse of cultural products from a source community, and that is the Indian Arts and Crafts Act ("IACA").[34] Created by the Indian Arts and Crafts Board, it is an example of a truth-in-advertising law.[35] The Indian Arts and Crafts Board's purpose is "to promote American Indian and Alaska Native economic development [by expanding] the Indian arts and crafts market."[36] The 1990 Act made it "illegal to offer or display for sale, or sell, any art or craft product in a manner that falsely suggests it is *Indian* produced, an *Indian product*, or the product of a particular Indian tribe."[37] An *Indian-made* product does not include an Indian product designed by an Indian but produced by a non-Indian.[38] A complaint should be filed with the Indian Arts and Crafts Board to remedy a violation of the IACA.[39] Due to this Act, there are now criminal[40] and civil[41]

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33 WIPO, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WIPO/GRTK/IC/37/7 3, 8 (2018) [hereinafter *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/37/7].

34 In this article, the word "Indian" is used as a defined term under the IACA; the use of that term does not represent the author's view.

35 *See* Know the Law: Indian Arts and Crafts Act, WIPO, https://www.wipo.int/edocs/lexdocs/laws/en/us/us207en.pdf.

36 Richard Awopetu, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY L. REV. 745, 767 (2020) [hereinafter Awopetu, *In Defense of Culture*] (citing Cultural Sovereignty Series: Modernizing the Indian Arts and Crafts Act to Honor Native Identity and Expression: Field Hearing Before the S. Comm. on Indian Affairs, 115th Cong. 12 (2017) testimony of Meredith Stanton, Director, Indian Arts and Crafts Board, U.S. Department of the Interior).

37 *See Know the Law: Indian Arts and Crafts Act*, *supra* note 35.

38 The Indian Arts and Crafts Act, 25 U.S.C. § 305-305(e).

39 The Indian Arts and Crafts Board ("IACB") is within the U.S. Department of Interior. The IACB investigates complaints of alleged IACA violations and recommends the prosecution of violators for a first-time violation of the Act. Violators can face civil or criminal penalties up to a $250,000 fine or a five-year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to $1,000,000. *Id.*

40 Only the U.S. Attorneys' Office can file these criminal actions in Federal Court. *Id.*

41 Only the U.S. Attorney General, on the request of the Secretary of the Interior on behalf of an Indian, Indian tribe, or Indian arts and crafts organization; an Indian tribe on its own behalf or on behalf of a trial member or Indian arts and crafts organization; and an Indian and an Indian arts and crafts organization can file a civil action in Federal Court. *Id.*

penalties for falsely advertising that products are "Indian Made."[42] The Indian Arts and Crafts Board also maintains the Source Directory of American Indian and Alaska Native Owned and Operated Arts and Crafts Businesses.[43]

There are no specific cultural appropriation or misappropriation laws in the United States. In fact, after a preliminary search on LexisNexis®, the only case to involve cultural appropriation was the infamous *Navajo Nation v. Urban Outfitters, Inc.* case.[44] The Navajo Nation filed suit against Urban Outfitters for illegally using the tribe's name for its products, the "Navajo hipster panties" and a "Navajo print flask."[45] Ultimately, the Navajo Nation settled. But this cultural misappropriation issue is not new to Urban Outfitters. Previously, the retail store sold an "anti-war woven scarf"[46] that many believed was exactly like a Palestinian-style keffiyeh.[47] Navajo Nation was able to file suit against Urban Outfitters under the Lanham Act.[48] A trademark infringement claim is not an option for most source communities. The next section focuses on legal protection for cultural products under the current intellectual property system.

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42 "Indian Made" is defined as "work marketed as authentic Indian art and craftwork…produced by an artist or artisan who is an enrolled member of a federally or officially State recognized Indian tribe, or an Indian artisan certified by the tribe of their direct descent." *Id.*

43 These businesses include Indian arts and crafts cooperatives and tribal arts and crafts enterprises; businesses and galleries privately owned and operated by individuals, designers, artists, and artisans who are enrolled members of federally recognized tribes; and a few nonprofit organizations, managed by enrolled members of federally recognized tribes, that develop and market art and craft products. *Source Directory of Arts and Crafts Businesses*, DEPARTMENT OF INTERIOR: INDIAN ARTS AND CRAFTS BOARD, https://www.doi.gov/iacb/source-directory.

44 A LEXISNEXIS Boolean search for "cultural appropriation" gave five results. Navajo Nation v. Urban Outfitters, Inc., 2016 U.S. Dist. LEXIS 111459; EEOC v. Catastrophe Mgmt. Sols., 876 F.3d 1273 (11th Cir, 2017) (Catastrophe Mgmt. Sols. Rescinded an offer to employee who refused to remove her dreadlocks. The EEOC sued on behalf of the former employee. The court compared the EEOC's argument to cultural appropriation claim.); Hiramoto v. Goddard College Corp., 184 F. Supp. 3d 84 (D.C. Vt. 2016); Edwards v. Dep't of State Hospitals-Coalinga, 2014 U.S. Dist. LEXIS 176365 (E.D. Cal. 2014); In re Marriage of Ray.

45 Nick Woolf, Urban Outfitters settles with Navajo Nation after illegally using tribe's name, THE GUARDIAN, (Nov. 18, 2016 at 7:22 PM). https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement.

46 *Id.*

47 The *keffiyeh* is a traditional Middle Eastern headdress fashioned from a square meter scarf. It is most commonly used to protect the neck. During the British Mandate, Palestinian rebels used the keffiyeh to hide their identity to avoid arrest. The British mandate authorities banned the keffiyeh; however all Palestinians started to wear it to make it difficult to identify the rebels. The keffiyeh turned into a symbol of resistance for the Palestine people. *The History of Keffiyeh: A Traditional Scarf from Palestine*, HANDMADE PALESTINE, (Sept. 24, 2018), https://handmadepalestine.com/blogs/news/history-of-keffiyeh-the-traditional-palestinian-headdress.

48 The Navajo Nation registered the Navajo name as a trademark in 1943. *Id.*

Copyright Protection

Current intellectual property scholars look to the copyright system to remedy cultural misappropriation claims. U.S. copyright law addresses the copyright of literary and artistic works under the Berne Convention.[49] The policy goal of copyright law is t authors to control the exploitation of their intellectual creations.[50] The Copyright Act protects:

> original works of authorship fixed in any tangible medium of expression, now known or later developed. They can be perceived, reproduced, or otherwise communicated, either directly or with [a machine's aid.][51]

"Under [United States] law, [cultural products] that do not satisfy the requirements … of intellectual property protection are, by default, part of the public domain."[52] Most cultural products fail both the "originality and fixation requirements, [do not fulfill] the term [requirements] of the copyright, the concept of the public domain, the focus on sole authors, … [and] fair use."[53] The originality requires the work must be "independently created by the author" and possess "at least some minimal degree of creativity."[54] "Much of cultural [intellectual property] is comprised of intergenerational literary and artistic works, or words and symbols that are not protectable under [*classic* intellectual property] law."[55] Due to the difficulty to fulfill copyright protection, some source communities look to trademark law to receive some sort of protection for their cultural products.

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49 The Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886. It is a treaty among countries that deals with the protection of works and the rights of their authors. It provides creators with the means to control how their works are used, by whom, and on what terms. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. *Berne Convention for the Protection of Literary and Artistic Works*, WIPO, https://www.wipo.int/treaties/en/ip/berne/.

50 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/37/7, *supra* note 33, at 3, 7.

51 17 U.S.C. § 102(a).

52 Awopetu, *In Defense of Culture*, *supra* note 36, at 752 (citing Tzen Wong & Claudia Fernandini, *Traditional Cultural Expressions: Preservation and Innovation*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT 175, 185 (Tzen Wong & Graham Dutfield eds., 2011).

53 Awopetu, In Defense of Culture, *supra* note 36, at 770 (citing Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, 3 INTERCULTURAL HUM. RTS. L. REV. 199, 201 (2008).

54 Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 347 (1991).

55 J. Janewas Osei-Tutu, *Cultural IP v. Commercial IP*, AMERICAN BAR ASSOCIATION: LANDSLIDE (Apr. 1, 2020) [hereinafter Osei-Tutu, *Cultural IP v. Commercial IP*]. https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/cultural-ip-vs-commercial-ip/

Trademark Protection

The trademark tools used to combat cultural misappropriation include the use of collective marks[56] and certification marks.[57] The source communities who own these marks do not have to offer goods or services identified by the mark, only that the mark is used in group membership.[58] Registration is not a prerequisite for an infringement action. If the source community has a known mark, it could file a suit based upon the likelihood of confusion or dilution.[59] However, few cultural products qualify for trademark protection, either by certification marks or collective marks. "Trademark law protects commercial symbols but not words or symbols that are primarily cultural in nature."[60]

As much as the United States intellectual property system wants to work within their current system, it ignores cultural products that are not used within commerce, which applies to most of them.[61] The Indian Arts and Crafts Act allows for a cause of action in infringement cases and imposing civil and criminal penalties on infringing parties, analogous to Section 2(a) of the Lanham Act.[62]

If the United States could incorporate a concise definition of cultural misappropriation, that would be the first step to identify effective legal solutions to cultural misappropriation, instead of the alternative of trying to remedy the claims within the copyright and trademark system. And the use of the IACA applies only to select cultural products. WIPO has looked to create a concise definition of cultural misappropriation and to develop cooperation among

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56 Collective mark means a trademark or service mark—(1) used by the members of a cooperative, an association, or other collective group or organization, or (2) which cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this [Act], and includes marks indicating membership in a union, an association, or other organization. 15 U.S.C. § 1127.

57 "Certification mark" means any word, name, symbol, or device, or any combination thereof—(1) used by a person other than its owner, or (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act, to certify regional or other origin material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that he work or labor on the goods or services was performed by members of a union or other organization. 15 U.S.C. §§ 1054, 1127.

58 Dariush Aldi, *Countering Cultural Appropriation Through Trademark Laws*, IP WATCHDOG (July 31, 2019), https://www.ipwatchdog.com/2019/07/31/countering-cultural-appropriation-trademark-laws/id=111746/

59 *Id.*

60 Osei-Tutu, *supra* note 55.

61 *Id.*

62 Provides that no trademark shall be refused registration on account of its nature unless it consists of matter that may disparage persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. Section 2(a) of the Lanham Act, 15 U.S.C. 1052(a).

national WIPO members to address cultural misappropriation claims.

III. WIPO GUIDELINES

WIPO would like to find a solution to cultural product protection because cultural product protection is incompatible with the current intellectual property system. According to WIPO's *Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*,[63] cultural products, as defined above, are called Traditional Knowledge ("TK") and "TCEs,"[64] as defined above. WIPO's increased attention to cultural misappropriation protection comes from other countries that have developed their own cultural misappropriation sui generis systems. TK is collaboratively known as the "know-how skills, innovations, and practices developed by indigenous peoples and local communities."[65] TCEs are tangible knowledge and intangible forms in which traditional knowledge and cultures are expressed.[66] For this article, the focus is solely on legislation regarding TCEs, not TK. TCEs are most similar to the cultural products at the epicenter of cultural misappropriation in the United States. The author also acknowledges some overlap in both categories—for example, making traditional handicrafts. The method of making a handicraft could be considered TK, and the handicraft's external appearance would be considered a TCE.[67]

WIPO has yet to negotiate an international legal instrument for the protection of TK and TCEs. As described above, this incompatibility has led WIPO to create frameworks for the legal protection of cultural products. WIPO's policy goals behind cultural product protection include the creative and distinctive expressions themselves, the reputation or distinctive character associated with them, and their manufacturing method.[68] Both TK and TCEs were around long before the current intellectual property system was created and not considered when it was developed.

WIPO suggests implementing a sui generis system if the country's intellectual property system is incompatible with cultural product protection. Based upon its policy goals, WIPO created a framework for a sui generis cultural product protection system based on the following questions:

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63 *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, WIPO, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf.

64 An example of TK is the knowledge indigenous peoples and local communities developed regarding the use of plants for medicinal purposes. *Id.* at 9.

65 Examples of TCEs include traditional dances, songs, and designs. *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 6. Handicrafts, musical instruments, and textiles. *Id.*

> (i) What is the policy objective of the protection? (ii) What is the subject matter? (iii) What criteria should this subject matter meet to be protected? (iv) Who owns the rights? (v) What are the rights? (vi) How are the rights acquired? (vii) How to administer and enforce the rights? and (viii) How are rights lost or how do they expire?[69]

Other countries and WIPO members have implemented sui generis measures based upon the questions presented above. Their implementation of their respective sui generis systems is explored in the next section.

Other Laws Outside of the United States

The Tunis Model Law was drafted by the Secretariat of United Nations Educational, Scientific and Cultural Organization ("UNESCO") and the International Bureau of WIPO to "facilitate countries' access to foreign works protected by copyright while ensuring appropriate international protection for their works."[70] Under the Tunis Model Law, cultural products, or "folklore" (as described in the model law),[71] should receive sui generis protection. Under this protection, an author would have exclusive rights to reproduce, translate, adapt, arrange, transform, and communicate work to the public through performance or broadcasting. Infringement of cultural products' rights is considered a violation of national cultural heritage and may be curbed by legitimate means.[72] There is no fixation requirement to receive this protection.

The Tunis Model Law for cultural product protection distinguishes itself from copyright law by its unlimited term duration.[73] Most copyright provisions across the globe allow protection for only a certain duration, as in the United States, where the protection duration is only the author's life plus seventy years.[74]

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69 WIPO, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WIPO/GRTK/IC/3/8 (2002). [hereinafter *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8].

70 Tunis Model Law on Copyright for developing countries. Tunis Model Law on Copyright was adopted by the Committee of Governmental Exports convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO.

71 *Folklore* as defined by the Tunis Model Law is 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. WIPO, Tunis Model Law on Copyright for developing countries Section 18.

72 Tunis Model Law on Copyright for developing countries Section 15(2).

73 Tunis Model Law on Copyright for developing countries Section 6(2).

74 U.S. copyright protection is the life of the author plus 70 years. Copyright Act, 17 U.S.C. § 305.

If the use of folklore work is derivative, it could qualify as copyright work and have limited-term protection.[75]

In 1997, the Philippines, a WIPO member, created its traditional knowledge law, *The Indigenous Peoples Rights Act. The Indigenous Peoples Rights Act of 1997* allows for its source community (Indigenous Cultural Communities/Indigenous Peoples, or "ICCs/IPs"[76]) to protect their right to practice and revitalize their own traditions and customs.[77] The Act entitles those under its protection to recognized full ownership, control, and protection of their cultural and intellectual rights.[78] This protection is automatic if the cultural product comes from an ICC/IP. This is in contrast to the United States, whose source communities receive protection only for their cultural products sold in commerce that comply with the Indian Arts and Crafts Board mentioned above.[79]

Another WIPO member, Panama, created a separate office to protect its source communities' cultural products, the Directorate General of the Industrial Property Registry Ministry of Commerce and Industries ("DIGERPI"). Panama's sui generis system is based upon Panama's Law No. 20, Article 15:

> The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation of each indigenous communities [sic], approved and registered in DIGERPI or the National Copyright Office of the Ministry of Education, according to the case.[80]

This Panamanian law "[h]elps confine protected subject matter [that is] within . . . (a) the expression of the cultural identity of a given community, and (b) the susceptibility of commercial exploitation."[81] Only elements of traditional knowledge that remain

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75 *Id.*

76 "ICC/IPs are a group of people identified by self-ascription and ascription by others, who have continuously lived as an organization community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed, and utilized such territories, sharing common bonds of language, customs, traditions, and other distinctive cultural traits, or who have, through resistance to political, social, and cultural inroads of colonization, non-indigenous religions, and cultures, become historically differentiated from the majority of Filipinos." The Indigenous Peoples Rights Act of 1997, Republic Act No. 8371.

77 *Id.*, Chapter VI, Section 32 (Phil.)

78 *Id.*

79 *Know the Law: Indian Arts and Crafts Act*, *supra* note 35.

80 Law No. 20 of June 26, 2000, on Special System for the Collective Intellectual Property Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge [hereinafter Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act 20], Chapter III, Article 7, available at https://wipolex.wipo.int/en/text/497286.

81 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 18.

intrinsically linked to the community that originated them deserve legal protection.

The DIGERPI has dual roles as an "examiner and auditor for all matters involving intellectual property rights and interests of indigenous peoples (including, but not limited to, the filing of indigenous knowledge-based applications in the area of patents by third parties)."[82] The DIGERPI's role is already similar to the current system developed within the United States Patent and Trademark Office ("USPTO"). The United States does not always implement WIPO guidelines, regardless of other WIPO members' application of them.[83] In the final part of this article, the author will address WIPO's recommendations and its applications to the United States.

IV. AUTHOR RECOMMENDATIONS

"An intellectual property system becomes [a] sui generis one if its modification of some of its features [is] to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system."[84]

The author recommends that the U.S. establish a sui generis system to protect its source communities' cultural products. The system should be based upon the recommendations of WIPO and the model laws of other countries. Creating a sui generis system should begin with creating a database of source communities in the United States and then ensure that the system fits the criteria to adapt to WIPO's policy goals discussed in Part II.

The system should first ensure which source communities are protected by expanding the database created by the United States Patent and Trademark Office's Native American tribal insignia database.[85] It would be nearly impossible to assume that every innovator is aware of every cultural product. Thus, it is necessary to create a database for source communities that need protection. For a sui generis cultural product system, "[t]he inventory, compilation, or database [s]hould describe in detail the knowledge of traditional communities, without separating its components."[86] This is vital, especially in a vast multicultural country like the United States.

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82 *Id.* at 22.

83 WIPO administers 26 treaties, including the WIPO Convention. The United States is a member to only seventeen of the twenty-six WIPO treaties. *WIPO-Administered Treaties*, WIPO, https://www.wipo.int/treaties/en/.

84 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69.

85 Awopetu, *In Defense of Culture*, *supra* note 36, at 763; In 2001, the USPTO "established a database containing the official insignia of all State and federally recognized Native American tribes which cannot be registered as trademarks." Trademark Law Treaty Implementation Act, Pub. L. 105-330, § 302, 112 Stat. 3071 (1998).

86 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 14.

After determining the appropriate source communities, it is essential to determine what attributes for this new sui generis system can be established. Based upon WIPO's suggestions, the author has identified six key attributes of a successful sui generis system in the United States. These attributes include definitive criteria, collective ownership, specific ownership rights, acquisition of ownership rights, administration and enforcement of rights, and possible termination of rights.

A. Criteria

The initial step in identifying the attributes of a cultural product protection system would be creating criteria. The purpose of the criteria is not to limit the elements of the scope of cultural products but to "operate as 'no trespassing' signs" as suggested by WIPO.[87] The first criteria should apply only to cultural products with commercial utility. Cultural products that are not susceptible to commercial utility should not be covered. The author acknowledges the difficulty of separating cultural products into those that have commercial utility and those that do not. Thus, the protection should apply only to cultural products used in interstate and international commerce.

The second criteria would apply protection only to cultural products that are documented and fixated.[88] The documentation and fixation do not have to occur when the cultural product was created, especially if facts surrounding the documentation and fixation prove that its origin occurred before documentation and fixation were possible. The next attribute is determining ownership of the cultural product.

B. Ownership

It is important to establish criteria for ownership based upon the customs within that specific source community. Ownership should be based on the collective source community, not a single individual. A source community must define its cultural product because community membership may extend beyond national borders.[89] That would mean learning from and receiving information about customs in that community, about whether or not the cultural

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87 *Id.*

88 This is the same as the fixation requirement in copyright law. A work is fixed in a tangible medium of expression "when its embodiment in a copy or phonorecord, 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. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101.

89 *Id.*

product comes from one person, and about who may represent the community or identify knowledge passed down to everyone in the community.[90] WIPO suggests that "lawmakers establish co-ownership of rights or leave it up to communities to apply for separately and obtain rights in jointly held [cultural products]."[91]

I recommend the creation of co-ownership rights in this sui generis system. It is not clear to the author of any detrimental effects of incorporating co-ownership rights into the current intellectual property regime. Thus, in the sui generis regime that protects indigenous groups' cultural products, it is recommended that co-ownership rights be created. WIPO also mentions that "competition between traditional communities for assigning or transferring knowledge susceptible of industrial application would lead to a reduction of prices and benefits to be paid for such knowledge, hence to the ultimate benefit of customers."[92] The next criteria are to determine which rights need protection.

C. What Are the Rights?

Based upon the recommendations from WIPO, the rights of a sui generis system on intellectual property protection of cultural product should be a combination of features from copyright law and industrial property features.[93] These two rights include moral rights and licensing rights. The first right from the current IP system that should be applied to the new sui generis system are moral rights.[94] WIPO says strong moral rights are "a crucial component [to a] sui generis system [due] to the … protection and preservation of the cultural identity of traditional communities."[95] Moral rights apply only to visual arts[96] under the current copyright system. Nonetheless, in this proposed sui generis system, moral rights should apply to any cultural product that fits the criteria discussed in this section.

The next right is "the right to assign, transfer and license the [cultural products]."[97] The owner or owners of the cultural product have "the right to say 'no' to third parties" and to say "yes" to those who request permission to reproduce, fix, or use the protected

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90 *Id.*

91 *Id.* at 19-20.

92 *Id.* at 20.

93 *Id.* at 20.

94 Moral rights are the rights "to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to this honor or reputation." 17 U.S.C. § 106A.

95 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 21.

96 17 U.S.C. § 101.

97 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 20.

subject matter.[98] This right is integral to most intellectual property rights in the United States and should continue with the cultural product protection.

D. How Are the Rights Acquired?

WIPO recommends multiple options for a sui generis system to establish a community's rights. One option is to establish rights based upon the filing of the compilation of traditional knowledge data with a governmental agency.[99] Another option is to create a formal system, similar to the USPTO, which allows the "establishment of subsequent mechanisms of control over the legitimacy of claims."[100] This formal system could be based upon the DIGERPI office in Panama, which would also help administer the rights, as discussed in the next section.

E. How Are the Rights Administered and Enforced?

"Traditional knowledge protection would not be effective without the availability of effective and expeditious remedies against their unauthorized reproduction or use."[101] This proposed sui generis system should be analogous to the Indian Arts and Crafts Board,[102] wherein complaints can be filed and evaluated by a board and would be optimal to administer and enforce cultural product owners' rights. Or a separate governmental agency, such as the DIGERPI in Panama, could be created.[103] This board or agency could evaluate the best remedy for an infringement of the rights or whether the remedy would require civil or criminal sanctions. Ultimately, the United States should create an intellectual property office similar to the DIGERPI office that focuses on administration and enforcement of the appropriate source communities' cultural products. After determining how the rights are enforced and administered, it is important to know if and how the rights can terminate.

F. How Are the Rights Lost? How Do They Expire?

There might be a need for defining the public domain in connection with traditional knowledge.[104] Many national laws

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98 *Id.*

99 *Id.* at 22.

100 *Id.* at 23.

101 *Id.*

102 *Know the Law: Indian Arts and Crafts Act, supra* note 35.

103 Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act 20, *supra* note 80.

104 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 24.

attempt to protect traditional knowledge through an indefinite period.[105] This allows source communities to receive protection in perpetuity, preserving their community's culture. Limiting the amount of time for rights could allow for someone else to make money off of a source community's culture. I recommend creating an indefinite period of protection due to the "intergenerational and incremental nature of [cultural products]."[106]

The United States is not limited to protections solely under its current IP system and should consider the WIPO guidelines for cultural product protection. A sui generis system is the best option to protect the country's vast cultural misappropriation claims.

V. CONCLUSION

It is arduous to change the balance of the current intellectual property regime in the United States. Its focus is to foster creativity, not limit innovation. The author acknowledges the impediments to innovation that adapting a sui generis system would have in the United States. However, the author believes that a new system would provide economic freedom to others whose innovations began long before the IP system existed. Many of the recommendations mentioned in this article are based upon elements that are already part of the IP system and should be implemented into cultural product legal protection in the United States.

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105 Rights are indefinite (not unlimited). Panama Law No. 20, Article 7. Moral Rights and traditional cultural rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred. South Pacific Model Law for National Laws Section 9 and 13(4) without limitation in time. Tunis Model Law on Copyright Section 6(2).

106 *WIPO IGC on IP, GR, TK, and FK*, WIPO/GRTK/IC/3/8, *supra* note 69, at 24.