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# AIMING STRAIGHT: THE USE OF INDIGENOUS CUSTOMARY LAW TO PROTECT TRADITIONAL CULTURAL EXPRESSIONS

Meghana RaoRane<sup>†</sup>

*Abstract:* Globalization has led to the propagation of traditional cultural expressions of indigenous peoples outside their communities. Consequently, the question of how these expressions should be protected has acquired heightened significance. Commentators have proposed using existing intellectual property regimes and sui generis solutions. This Comment advocates a third solution, the use of indigenous customary laws of indigenous peoples to protect their particular traditional cultural expressions.

Indigenous customary laws ensure effective protection of the traditional cultural expressions of indigenous peoples. The assumption that existing intellectual property regimes provide the only available protection is erroneous and constrains the development of effective solutions. Western intellectual property based regimes are incompatible with the goals underlying the protection of traditional cultural expressions and give rise to ineffectual solutions. However, indigenous customary law is law, and it is satisfactorily being used by communities to protect their expressions. It is a flexible solution in that communities can apply their particular customary laws to protect their cultural expressions. This Comment concedes that the application of indigenous customary laws will encounter challenges related to implementation. However, a true desire to protect the traditional cultural expressions of indigenous peoples can fuel the discovery of viable solutions.

## I. INTRODUCTION

In 1980, John Bulun Bulun, an Australian Aboriginal artist, created a painting titled *Magpie Geese and Waterlilies at the Waterhole*.<sup>1</sup> The painting incorporated images sacred to his clan (the *Ganalbingu* people),<sup>2</sup> and he created it with the clan's consent and according to its traditional laws and customs.<sup>3</sup> Under *Ganalbingu* customary law,<sup>4</sup> Mr. Bulun Bulun could use his artwork in restricted ways depending on the mode and purpose of

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<sup>1</sup> Terri Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*, Case Study 3, at 51-52 (2003), available at <http://wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>.

<sup>2</sup> The *Ganalbingu* people live traditional lifestyles on land near the Arafura Swamp, which is situated in Arhem Land in the Northern Territory of Australia. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE 44 (2003); see also IDIDJ Australia, *A Flower in the Swamp – the Life of Daphne Danyawarra*, <http://www.ididj.com.au/education/profiles/banyawarra.html> (last visited Apr. 14, 2006).

<sup>3</sup> Janke, *supra* note 1, at 51.

<sup>4</sup> This Comment argues in Part V.B. that indigenous customary law is indeed law.

reproduction.<sup>5</sup> Accordingly, he sold the painting to the Maningrida Arts and Crafts Centre, which resold it to the Northern Territory Museum of Arts and Science.<sup>6</sup> Mr. Bulun Bulun also gave his permission to reproduce the painting in a book about Australia's living heritage.<sup>7</sup> Roughly eight years later, he learned that a modified version of his painting<sup>8</sup> had been incorporated into some fabric.<sup>9</sup> The fabric, which was to be used to make uniforms, was produced without his consent.<sup>10</sup>

As a result, Mr. Bulun Bulun and a high ranking *Ganalbingu* member (on behalf of the clan) sued the textile company that had produced the fabric.<sup>11</sup> Mr. Bulun Bulun claimed that the textile company had infringed his copyright in the painting under Australia's Copyright Act of 1968.<sup>12</sup> The clan on the other hand claimed that it was the equitable owner of the copyright in the painting, or alternatively, that the artist's copyright created fiduciary obligations in favor of the clan.<sup>13</sup> Mr. Bulun Bulun obtained injunctions to prevent future infringement of his work because the defendants admitted to breaching his copyright.<sup>14</sup> However, the clan's claim was dismissed.<sup>15</sup> The clan argued that the *Ganalbingu* people "are the traditional owners of the body of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself."<sup>16</sup> According to the clan, the painting depicted sacred<sup>17</sup> knowledge concerning one of the two most important cultural sites for the *Ganalbingu* people, located in *Ganalbingu* country.<sup>18</sup> Moreover, under *Ganalbingu* customary law, the ownership of the land was tied to a responsibility to create accompanying cultural expressions.<sup>19</sup> Although Mr. Bulun Bulun was entrusted by his clan with the sacred duty to create images,<sup>20</sup> the unauthorized reproduction and misuse of the artwork interfered with the relationship among the *Ganalbingu* people, their ancestors, and

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<sup>5</sup> See Janke, *supra* note 1, at 56.

<sup>6</sup> See *id.* at 51.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 53.

<sup>10</sup> See *id.*

<sup>11</sup> *Id.* at 51.

<sup>12</sup> See *Bulun Bulun v. R & T Textiles Pty Ltd.* (1998) 86 F.C.R. 244-246.

<sup>13</sup> *Id.*

<sup>14</sup> See *id.*

<sup>15</sup> See Janke, *supra* note 1, at 51-53.

<sup>16</sup> *Id.* at 54.

<sup>17</sup> See BROWN, *supra* note 2, at 44-45.

<sup>18</sup> See Janke, *supra* note 1, at 54.

<sup>19</sup> See *id.* at 54.

<sup>20</sup> BROWN, *supra* note 2, at 44.

their land, and threatened the stability of their society.<sup>21</sup> In addition, the image had certain secret aspects to it, which necessitated controlling its reproduction. Mr. Bulun Bulun explained that his painting “has all the inside [secret] meaning of our ceremony, law and custom encoded in it. . . . To produce [the painting] without strict observance of the law governing its production diminishes its importance and interferes adversely with the relationship and trust established between myself, my ancestors, and Barnda [the long-neck tortoise, a creator being].”<sup>22</sup> Thus, the clan suffered harm as a result of the infringement. In dismissing the clan’s complaint, the court found that the clan and the artist did not share an equitable interest in the painting because they were not joint authors as required by Australian copyright law.<sup>23</sup> However, the court found that a fiduciary duty did exist between the artist and the clan, and if the artist had failed to protect the work, the clan could have brought legal action against the textile company.<sup>24</sup> Because Mr. Bulun Bulun had taken action to protect the painting, in this case, the clan had no need for a remedy.<sup>25</sup>

Cases such as Mr. Bulun Bulun’s raise important questions regarding the intellectual property rights of indigenous peoples<sup>26</sup> with respect to expressions of their traditional culture. Issues surrounding the adequate protection of traditional cultural expressions (“TCEs”)<sup>27</sup> have been raised in Australia and around the world.<sup>28</sup> Some resultant questions include whether communities own the cultural expressions, whether the cultural expressions should be owned at all, and if so, how they can best be protected. As the Bulun Bulun case illustrates, there are gaping holes in the protections afforded to TCEs by existing Intellectual Property Regimes (“IPRs”). Disciplines such as copyright, trademark, and trade secret have failed to provide adequate protection to TCEs. Australia, a country with a large indigenous population, has confronted these issues, and has taken a leading stance in their resolution. Australian courts have tried hard to bridge the gap between the needs of indigenous peoples and the protections current laws afford their TCEs.

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<sup>21</sup> Janke, *supra* note 1, at 56.

<sup>22</sup> BROWN, *supra* note 2, at 54.

<sup>23</sup> *See id.* at 63-64.

<sup>24</sup> *See id.* at 64.

<sup>25</sup> *See id.* at 64-65.

<sup>26</sup> *See infra* Part II.A for an explanation of the term “indigenous peoples.”

<sup>27</sup> *See infra* Part II.B for an explanation of the term “traditional cultural expressions.”

<sup>28</sup> *See generally* BROWN, *supra* note 2.

This Comment argues that the mainstream solutions proposed for the protection of TCEs, namely the use of existing IPRs and *sui generis*<sup>29</sup> solutions, are sub-optimal, and the indigenous customary laws of the communities seeking protection are more effective and should be implemented instead. This proposal is especially relevant in the Australian context given that Australia has led the way in dealing with the concerns of indigenous communities<sup>30</sup> and is more likely to consider the adoption of indigenous customary law in some form as a solution. Thus, although the issues presented are relevant to indigenous communities across the world, this Comment uses the Australian experience as a springboard for its proposal. Part II of this Comment introduces the terms “indigenous peoples” and TCEs. It also describes certain attributes of TCEs that impact their protection. Part III relates the mechanisms proposed for the protection of TCEs in mainstream literature and addresses their limitations, and Part IV presents significant developments relevant to TCEs in Australian law.

Consequently, Part V of this Comment argues that the application of indigenous customary law is the ideal mechanism for the protection of TCEs. Indigenous customary law is indeed law, and it has been used effectively to provide the types of protections indigenous peoples desire. However, the mainstream approaches proposed for the protection of TCEs are based upon the occidental notion that existing IPRs exhaust all means of providing protection. This notion is fallacious and limiting, and does not account for the differences between TCEs and other forms of intellectual property. It leads to solutions that over-reach or under-reach in the protections they afford, resulting in an ultimate denial of protection. Accordingly, the ideal way to protect the TCEs of indigenous peoples is to travel outside the epistemic discourse produced by the occidental intellectual property regime and allow for a form of protection that has worked for indigenous communities—the enforcement of the indigenous customary laws that have always governed the fate of their TCEs. Part VI of this Comment argues that the challenges of effectively implementing indigenous customary law are no more difficult to surmount than those encountered in the implementation of other regimes of protection. Finally, Part VI also puts forth some solutions to the implementation-related concerns.

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<sup>29</sup> Defined by Black’s Law Dictionary as “Of its own kind or class; unique or particular.” BLACK’S LAW DICTIONARY 1448 (7th ed. 1999).

<sup>30</sup> See, e.g., *Mabo v. Queensland II* (1992) 175 C.L.R. 1; see also discussion *infra* Part IV (providing an overview of Australian law in this regard).

## II. INDIGENOUS PEOPLES' TCEs ARE THEIR LIVING CULTURAL HERITAGE AND PRESENT UNIQUE PROBLEMS FOR PROTECTION

Widely accepted definitions for the terms “indigenous peoples” and “TCEs” do not exist, and yet, there are certain commonalities among the existing definitions which provide an adequate basis for understanding them. Indigenous peoples are the living descendents of the pre-invasion inhabitants of lands now dominated by others and who were subject to some form of a colonizing experience.<sup>31</sup> TCEs, on the other hand, constitute all forms of the living and evolving cultural creations of a community, and possess certain attributes that raise unique issues regarding their protection.<sup>32</sup>

### A. *The Term “Indigenous Peoples” Is Highly Debated Upon, but Encompasses Certain Undisputed Aspects*

“Indigenous peoples” refers “broadly to the [culturally distinctive communities of the] living descendants of preinvasion inhabitants of lands now dominated by others.”<sup>33</sup> This Comment adopts the above definition because it is fairly expansive. The attempt to define indigenous peoples has been controversial.<sup>34</sup> Some states have challenged the need for a definition, while others have found it necessary.<sup>35</sup> Indigenous people themselves have expressed concerns regarding the idea of a formal definition for fear of excluding groups that are not encompassed by the definition.<sup>36</sup> In addition, there has been debate about the use of the term “peoples” due to its association with the right of self-determination.<sup>37</sup> Regardless, bodies like the United Nations, the International Labor Organization, and the World

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<sup>31</sup> See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 13 (2004).

<sup>32</sup> See generally Kamal Puri, *Protection of Traditional Culture and Folklore*, <http://www.folklife.si.edu/resources/Unesco/puri.htm> (last visited Jan. 13, 2006) (discussing “folklore” and the current regimes available for its protection).

<sup>33</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (2004).

<sup>34</sup> See Peter-Tobias Stoll & Anja von Hahn, *Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE*, 5, 8-9 (Silke von Lewinski ed., 2004); see also Jeremy Firestone & Jonathan Lilley, Isabel Torres de Noronha, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Law*, 20 AM. U. INT'L L. REV. 219, 223-231 (2005) (examining the term “indigenous peoples” and discussing their relevance in international environmental law).

<sup>35</sup> See Stoll & von Hahn, *supra* note 34, at 8; see also Benedict Kingsbury, *“Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998) (discussing controversies surrounding the term “indigenous”).

<sup>36</sup> Stoll & von Hahn, *supra* note 34, at 8-9; see Kingsbury, *supra* note 35, at 421-424.

<sup>37</sup> Stoll & von Hahn, *supra* note 34, at 12.

Bank<sup>38</sup> have attempted to formulate a definition. Although all the definitions differ from each other, certain commonalities exist—such as cultural distinctiveness, self-identification, the experience of subjugation, and an occupation of the land prior to outside settlers—that are significant to an understanding of the term “indigenous peoples.”<sup>39</sup> In Australia, the term refers primarily to the Aboriginal people of the mainland who arrived from Southeast Asia and have lived in Australia for at least forty thousand years.<sup>40</sup> It also refers to the Torres Strait Islanders who arrived at the Torres Strait Islands more recently, probably from Papua New Guinea.<sup>41</sup>

*B. The Term “Traditional Cultural Expressions” Is Expansive and It Constitutes the Living Cultural Heritage of Indigenous Peoples*

The terms “traditional cultural expressions,” “expressions of folklore,” “indigenous culture,” and “intangible and tangible cultural heritage,” are all used to refer to the traditional cultural creations of a community, notwithstanding a debate on their propriety and validity.<sup>42</sup> Since the term TCE is free of any negative connotations other terms may imply<sup>43</sup> and is used by the World Intellectual Property Organization (“WIPO”),<sup>44</sup> this Comment will refer to the subject matter constituting the traditional cultural creations of indigenous peoples as TCEs. No single, widely accepted definition of TCEs exists,<sup>45</sup> and despite valid concerns over the lack of a

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<sup>38</sup> See *id.* at 9-11.

<sup>39</sup> See *id.* at 11; see also *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of “Indigenous People,”* Sub Committee on Prevention of Discrimination and Protection of Minorities, 14th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) (discussing factors relevant to the understanding of the concept of “indigenous”).

<sup>40</sup> See Justice Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J. INT’L & COMP. L. 711, 713-714 (2003).

<sup>41</sup> See *id.*

<sup>42</sup> *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, at Annex 2, Annex 17, WIPO Doc. WIPO/GRTKF/IC/5/3 (May 2, 2003), available at [http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf); see also Michael Blakeney, *Intellectual Property in the Dreamtime—Protecting the Cultural Creativity of Indigenous Peoples*, OIPRC ELECTRONIC J. INTELL. PROP. RTS. Section 1(a) (1999), <http://www.oiprc.ox.ac.uk/EJWP1199.pdf>.

<sup>43</sup> The term “folklore” in particular has been criticized for implying an association with less developed societies and for its seemingly copyright-centric and Western bias. See *Global Intellectual Property Rights: Boundaries of Access and Enforcement, Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 757 (2002); see also Agnes Lucas-Schloetter, *Folklore*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 259, 262 (Silke von Lewinski ed., 2004).

<sup>44</sup> *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 42, at Annex 18.

<sup>45</sup> See *id.* at Annex 17-18.

consistent definition,<sup>46</sup> the existing definitions, being sufficiently expansive,<sup>47</sup> will suffice for this Comment. For example, a working description of TCEs set forth by the WIPO and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Model Provisions recognizes them as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community . . . or by individuals reflecting traditional artistic expectations of such a community.”<sup>48</sup>

In addition, the Model Provisions encompass four types of expressions that are considered TCEs:<sup>49</sup> 1) verbal expressions (folktales, folk poetry and riddles), 2) musical expressions (folksongs and instrumental music), 3) expressions by actions (dances, plays and artistic forms or rituals), and 4) tangible expressions (productions of various types of folk art, crafts, musical instruments, and architectural forms). Various other definitions constructed in the same expansive vein abound, and some are country-specific.<sup>50</sup> A noteworthy characteristic of TCEs is that they are living and constantly evolving.<sup>51</sup> The story underlying Mr. Bulun Bulun’s artwork constitutes a TCE as it is a manifestation of a form of traditional culture, contains elements of the artistic heritage of the *Ganalbingu* people, and is living and evolving due to its continued significance and application within the community.

### C. *Traditional Cultural Expressions Have Certain Distinct Attributes that Raise Unique Issues with Respect to Their Protection*

Certain attributes of TCEs distinguish them from other expressions of culture and raise unique issues regarding their protection. TCEs are based on traditions, associated with indigenous groups, and may be practiced in a traditional manner.<sup>52</sup> They are usually conveyed orally, visually, by

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<sup>46</sup> See Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred “Folklife Expressions”: Will Remedies Become Available to Cultural Authors and Communities*, 6 U. BALT. INTELL. PROP. L.J. 99, 101 (1998).

<sup>47</sup> See Jonathan Blavin, *Folklore in Africa*, section I, Jan. 8, 2003, <http://cyber.law.harvard.edu/openeconomies/okn/folklore.html>.

<sup>48</sup> United Nations Educational, Scientific and Cultural Org. (UNESCO)/World Intell. Prop. Org. (WIPO), *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* 9-10 (1985).

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 778 (1999).

<sup>51</sup> Puri, *supra* note 32, at Introduction.

<sup>52</sup> *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 42, at Annex 18-19.



imitation, or in performance, implying that the written tradition is less significant for TCEs.<sup>53</sup> The ownership rights of TCEs are based on communal notions, where the community owns the cultural expressions passed down by its ancestors, and no individual member has the authority to alienate them.<sup>54</sup> Certain forms of TCEs passed down over generations may be used by individuals in the community in creative ways, leading to a “dynamic interplay between collective and individual creativity” and the production of countless variations of the TCE.<sup>55</sup> Thus, although the expressions of TCEs may be tangible, intangible, or a combination of the two, the underlying traditional culture is usually intangible, and a separation of the two aspects has been compared to a separation of the body and the soul, and is artificial.<sup>56</sup> In addition, TCEs are based on traditions that have existed for long periods of time, often longer than the terms of protections offered by existing IPRs. Thus, questions arise regarding whether they should receive legal protection at all.<sup>57</sup> Certain forms of TCEs are considered sacred by the communities in which they exist, and knowledge of them by those unauthorized to know, as well as use of the knowledge in an unauthorized manner, leads to their desecration.<sup>58</sup> Finally, TCEs can be misappropriated<sup>59</sup> and serve as fodder for artistic inspiration to people outside the indigenous community, resulting in imitation and misuse of the culture.<sup>60</sup>

### III. MAINSTREAM SOLUTIONS PROPOSED FOR THE PROTECTION OF TCEs ARE INADEQUATE

Most efforts to protect TCEs have tended toward using existing IPRs and sui generis solutions. Although these solutions at first glance seem capable of adequately protecting TCEs, there are severe limitations inherent in them, and as such, they fail to constitute satisfactory solutions.

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<sup>53</sup> Puri, *supra* note 32, at Introduction.

<sup>54</sup> See Blavin, *supra* note 47, at section II.A.

<sup>55</sup> WORLD INTELL. PROP. ORG. (“WIPO”), *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, at Annex 13, WIPO Doc. WIPO/GRTKF/IC/8/4, (Apr. 8, 2005), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_8/wipo\\_grtkf\\_ic\\_8\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.pdf).

<sup>56</sup> See *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 42, at Annex 18.

<sup>57</sup> See *id.* at 7.

<sup>58</sup> Brown, *supra* note 2, at 54.

<sup>59</sup> See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 310-11 (2002).

<sup>60</sup> *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 42, at Annex 19.

A. *Existing Intellectual Property Regimes Provide Inadequate Protection*

Existing IPRs are well developed, and yet, they fail to satisfactorily protect TCEs. The laws that constitute existing IPRs are flexible and apply to a wide range of issues. However, they fall short of protecting TCEs due to their multiple requirements and misaligned foundations relative to TCEs.

1. *The Numerous and Incompatible Requirements of Copyright Law Limit Its Ability to Protect TCEs*

The philosophical premise underlying copyright law, one existing IPR proposed as a solution to protect TCEs, has been described as utilitarian, where the “purpose of copyright is to stimulate production of the widest possible variety of creative goods at the lowest possible price.”<sup>61</sup> Copyright law is associated with the common law world and can trace its roots to England.<sup>62</sup> The Crown wanted to control the first printing establishment founded in 1476, for both economic and political reasons.<sup>63</sup> It thus granted exclusive rights to some to publish certain books.<sup>64</sup> Years later in 1709, the Statute of Anne was enacted.<sup>65</sup> It was the world’s first copyright statute and was entitled, “An Act of the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.”<sup>66</sup> It gave the Stationers, the group that held monopoly over publishing at that time, the continued right to destroy unauthorized and unlicensed works, while entitling anyone to obtain a copyright for a limited term.<sup>67</sup> Thus, the Act “encouraged learning” by providing authors or publishers limited term copyrights.<sup>68</sup> Similarly, in France, sovereign printing privileges existed, but they ended with the French revolution.<sup>69</sup> Laws were passed in 1791 and 1793 which gave authors rights in their works.<sup>70</sup> The English and French laws formed the basis of future copyright laws and thus fixed the rights of economic exploitation.<sup>71</sup> Other nations then began developing their own copyright laws.<sup>72</sup> Australian

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<sup>61</sup> PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 3 (2001).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 5.

<sup>64</sup> *See id.*

<sup>65</sup> 1 Paul Edward Geller, *International Copyright Law and Practice* § 2.

<sup>66</sup> GOLDSTEIN, *supra* note 61, at 5.

<sup>67</sup> *See id.* at 5-6.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 8.

<sup>70</sup> *See id.*

<sup>71</sup> *See* GELLER, *supra* note 65, at §2.

<sup>72</sup> *See generally id.* (discussing the historical rise of copyright).

copyright law is based on the copyright law of England.<sup>73</sup> When the United Kingdom (“UK”) enacted a new copyright act in 1911, Australia adopted it by passing the Copyright Act of 1912.<sup>74</sup> Today, Australian copyright law is governed by The Copyright Act of 1968.<sup>75</sup> It too was influenced by the copyright laws of the UK, specifically, the 1956 UK Act.<sup>76</sup> Thus historically, economic and property development, as well as the cultural development of the state, have been the predominant considerations in the formation of copyright law.<sup>77</sup> Economic rights and protections have been given to authors in exchange for the creation of intellectual works that will eventually fall into the public domain, thereby enriching the state’s cultural heritage.<sup>78</sup> Therefore, the purpose of copyright is to balance the author’s rights against the state’s goal of disseminating intellectual creations.<sup>79</sup>

This common underlying purpose of copyright law results in certain basic criteria for copyright protection which can be generalized despite the differing copyright laws across nations. All copyright laws require some form of creativity or originality to prevent the slavish copying of works.<sup>80</sup> Additional requirements, such as “skill and knowledge,” “nontrivial variation,” “the imprint of personality,” or “individuality,” may also be applied.<sup>81</sup> Some copyright laws require works to be fixed in a tangible form, while others presuppose works to be embodied in a perceptible form, and do not require fixation.<sup>82</sup> Rights to control derivative works also exist.<sup>83</sup> Finally, in most countries, works can be protected for limited terms only.<sup>84</sup>

Due to the requirements copyright law imposes and its underlying premises, copyright law cannot adequately protect TCEs. First, copyright

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<sup>73</sup> See generally COPYRIGHT LAW REVIEW COMMITTEE, CROWN COPYRIGHT 20-24 (2005), available at [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~6+APRIL+full+version+crown+copyright.pdf/\\$file/6+APRIL+full+version+crown+copyright.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~6+APRIL+full+version+crown+copyright.pdf/$file/6+APRIL+full+version+crown+copyright.pdf) (discussing the development of copyright law in Australia).

<sup>74</sup> See *id.* at 22-23.

<sup>75</sup> See Attorney General’s Office, *Copyright Law in Australia* 5, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf/\\$file/Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf/$file/Copyright+Law+in+Australia+-+A+Short+Guide+-+June+2005.pdf) (last visited Feb. 13, 2006).

<sup>76</sup> See, e.g., COPYRIGHT LAW REVIEW COMMITTEE, *supra* note 73, at 23-24.

<sup>77</sup> See Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 297-98 (1994).

<sup>78</sup> See *id.*

<sup>79</sup> Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 185 (2000).

<sup>80</sup> GELLER, *supra* note 65, § 2[c][i].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See generally GOLDSTEIN, *supra* note 61, at 230-236.

law is based on the concept of individuality, and it confers rights on individual and joint authors.<sup>85</sup> However, due to the constantly evolving nature of TCEs, attribution to individual or joint authors within indigenous communities is not possible.<sup>86</sup> Moreover, ownership rights in indigenous communities are complex and nuanced,<sup>87</sup> and indigenous authors are subject to complex communal regulations.<sup>88</sup> The court in *Bulun Bulun* acknowledged these intricate rights, as explained in Mr. Bulun Bulun's affidavit which stated that:

I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such words, as part of my traditional Aboriginal land ownership obligation. A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law.<sup>89</sup>

Similarly, another Australian Aboriginal artist whose artwork had been misappropriated explained:

As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story.<sup>90</sup>

Thus, indigenous authors do not own their creations in the ways that Western authors do. Yet, Western notions of individual and joint authorship continue to exist as preconditions to copyright protection, and as a result, indigenous peoples cannot adequately protect their TCEs using copyright law.

Second, copyright law provides a limited duration for protection.<sup>91</sup> Many TCEs have existed and evolved for many generations.<sup>92</sup> Because copyright law provides protection for only a limited period, it cannot

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<sup>85</sup> See Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT'L & COMP. L. 747, 757 (2003).

<sup>86</sup> See *id.* at 757-758.

<sup>87</sup> See, e.g., PETER SUTTON, *NATIVE TITLE IN AUSTRALIA: AN ETHNOGRAPHIC PERSPECTIVE*, 111-34 (2003) (highlighting the complexity of Aboriginal land title, which is inextricably entwined with the TCEs of Aboriginal peoples in Australia).

<sup>88</sup> See WIPO, *supra* note 42, at Annex 36.

<sup>89</sup> *Bulun Bulun*, *supra* note 12, at 250.

<sup>90</sup> See *Milpururru v. Indofurn Pty. Ltd. and Others* (1994) 54 F.C.R. 240.

<sup>91</sup> See von Lewinski, *supra* note 85, at 759.

<sup>92</sup> See Sackville, *supra* note 40, at 725-26.

adequately protect the long lasting and continuously evolving TCEs.<sup>93</sup> Third, copyright law requires some form of originality.<sup>94</sup> Because TCEs have existed for long periods of time and have likely already fallen into the public domain, the small changes they are subject to as a result of their evolution are not likely to fulfill the originality requirement.<sup>95</sup> Fourth, some countries require “fixation” of the material sought to be protected.<sup>96</sup> Even when the culture is “fixed” in a form adequate to meet the copyright requirements, which may not always occur, because TCEs constantly evolve, newer forms or versions not yet fixed will not be eligible for protection.<sup>97</sup> Therefore, copyright law either imposes very narrow requirements or does not impose any requirements in areas where TCEs need protection.

## 2. *Trade Secret Law Cannot Protect TCEs Because of Its Commercial Basis*

Trade secret law, another mainstream IPR proposed as a solution for protecting TCEs, attempts to protect valuable commercial information that has been conveyed in confidence.<sup>98</sup> A trade secret is a piece of information that has commercial value, is necessary to carry out the business of the organization, and is conveyed to employees or others in confidence.<sup>99</sup> The owner of the trade secret is required to have made reasonable efforts to protect it.<sup>100</sup> However, trade secrets may be protected indefinitely.<sup>101</sup>

Despite its seemingly expansive range of protection, trade secret law cannot satisfactorily protect TCEs of indigenous peoples. At first glance, this body of law may be considered useful to protect sacred or secret TCEs.<sup>102</sup> However, it requires that the information protected be of a commercial nature, which is not always the case with TCEs. Moreover, it only protects information so long as it is not already public, and many TCEs do not meet this criterion.<sup>103</sup> Finally, it provides remedies only once the

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<sup>93</sup> *See id.*

<sup>94</sup> *See von Lewinski, supra note 85, at 758.*

<sup>95</sup> *See id.* at 758-59.

<sup>96</sup> *See id.* at 759.

<sup>97</sup> *Id.*

<sup>98</sup> Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 *CARDOZO J. INT'L & COMP. L.* 633, 665 (2003).

<sup>99</sup> *See id.* at 665-66.

<sup>100</sup> *See* Michael Hassemer, *Genetic Resources, in* INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, 151, 176 (Silke von Lewinski ed., 2004).

<sup>101</sup> *See id.*

<sup>102</sup> von Lewinski, *supra note 85, at 764.*

<sup>103</sup> *See id.*

secret has been disclosed. Many TCEs are secret and sacred and their very disclosure to the uninitiated violates their sanctity.<sup>104</sup> Therefore, providing a remedy after the expression has been disclosed and the damage done does not satisfactorily protect the TCE.

### 3. *Trademarks, Certification Marks, Geographic Indicators Provide Limited Protections and Cannot Protect TCEs*

Trademark law, the third mainstream IPR proposed to protect TCEs, identifies the source of goods, and protects commercial investment in symbols, names, and other indicators of source.<sup>105</sup> Other protective marks with similar functions also exist. Collective trademarks identify the source of products or services of the members of a group.<sup>106</sup> Certification marks guarantee that the associated product or service has certain qualities,<sup>107</sup> while geographic indicators identify the territory from which a product originates, and indicate the existence of a characteristic associated with that territory.<sup>108</sup> Thus, trademarks, certification marks, and geographic indicators serve as a stamp of authenticity and an indicator of source for consumers.

While these marks can provide some valuable protections for TCEs, they cannot provide the thorough protection TCEs require. Although trademarks and geographic indicators serve well as indicators of source and authenticity, the protections they provide do not extend to the actual expression of the TCEs.<sup>109</sup> Similarly, certification marks suffer from this same limitation of trademarks and geographic indicators. In addition, the effective use of these marks by indigenous groups is barred by practical limitations such as the financial investment involved and a lack of knowledge of how to best use them.<sup>110</sup>

### B. *Sui Generis Solutions Are More Progressive in the Protections They Provide but Still Have Implicit Limitations*

*Sui generis* solutions are approaches that create new intellectual property categories for the protection of TCEs.<sup>111</sup> They aim to protect TCEs

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<sup>104</sup> See, e.g., Sackville, *supra* note 40, at 724-25.

<sup>105</sup> See Paterson & Karjala, *supra* note 98, at 666.

<sup>106</sup> See Lucas-Schloetter, *supra* note 43, at 308.

<sup>107</sup> See *id.* at 308.

<sup>108</sup> See *id.* at 311.

<sup>109</sup> See von Lewinski, *supra* note 85, at 762-63.

<sup>110</sup> von Lewinski, *supra* note 85, at 763.

<sup>111</sup> See Daniel Wuger, *Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws*, in POOR PEOPLES KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 183, 191 (J. Michael Finger & Philip Schuler eds., 2004).

by working in conjunction with existing IPRs or by replacing them.<sup>112</sup> Although most countries have created and implemented sui generis solutions within their copyright laws, some have established them as stand-alone IP-like systems.<sup>113</sup> Some sui generis solutions recognize and incorporate indigenous customary laws within their mechanisms of protection.<sup>114</sup> Examples of sui generis systems include the Tunis Model Law on Copyright, the Model Provisions, the Bangui Agreement of OAPI, the Panama Law No. 20, and the South Pacific Model Law for National Laws.<sup>115</sup>

Although sui generis solutions afford greater protections to TCEs when compared with existing IPRs, they still fall short of providing an adequate level of protection. Some sui generis solutions take a step in the right direction by incorporating indigenous customary laws, and thus, recognize the ability of indigenous customary laws to provide adequate protection to TCEs.<sup>116</sup> However, as discussed below, sui generis solutions are based on existing IPRs, and therefore suffer from many of the same limitations of existing IPRs.<sup>117</sup> It has also been suggested that sui generis solutions have no more than a regional reach and that the WIPO-UNESCO Model Provision, for instance, has become “de-facto, a strictly regional instrument.”<sup>118</sup>

#### IV. AUSTRALIA HAS TAKEN A PROGRESSIVE APPROACH TO THE PROTECTION OF TCEs

While colonial Australia did little to protect indigenous peoples' rights,<sup>119</sup> the country has made significant changes through its developing body of indigenous law.<sup>120</sup> The government has paid attention to the issue of

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<sup>112</sup> See *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, *supra* note 42, at Annex 34.

<sup>113</sup> See *Information Booklet on Intellectual Property and Traditional Cultural Expressions/Folklore*, 19, WIPO Publication No. 913, [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf) (last visited Apr. 7, 2006).

<sup>114</sup> See *Cultural Expressions/Expressions of Folklore: Legal and Policy Options*, 10, WIPO Doc. WIPO/GRTKF/IC/6/3, (Dec. 1, 2003), [http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf\\_ic\\_6\\_3.pdf](http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3.pdf); see also von Lewinski, *supra*, note 85, at 765.

<sup>115</sup> See generally *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*, WIPO Doc. WIPO/GRTKF/IC/5/INF/3, (Apr. 28, 2003), [http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_inf\\_3.pdf](http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_inf_3.pdf).

<sup>116</sup> See, e.g., von Lewinski, *supra* note 85, at 765.

<sup>117</sup> Discussed in detail, *infra* Part V.C.1.

<sup>118</sup> Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 145 (2001).

<sup>119</sup> See Sackville, *supra* note 40, at 712-13.

<sup>120</sup> Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 63 (2004)

indigenous rights for at least the last twenty years through the establishment of committees and working groups and by commissioning various reports to deal with the concerns of indigenous peoples.<sup>121</sup> However, the development of Australian case law with respect to indigenous peoples' rights has been significant. In this regard, the *Mabo*<sup>122</sup> decision of the Australian High Court is an especially momentous one in the development of indigenous rights in Australia.<sup>123</sup>

In contrast with the United States, where the colonizers entered into treaties with the Native Americans, British colonial powers in Australia considered the land uninhabited, with no prior claims other than their own.<sup>124</sup> Therefore, the issue of treaties is connected to the question of land title,<sup>125</sup> which in turn has significant implications with respect to cultural expressions.<sup>126</sup> In *Mabo*, the Australian High Court overturned a law that extinguished native land titles in the Torres Strait Islands on the grounds that the traditional owners had a "compelling common law claim to their land by right of ancestral occupation."<sup>127</sup> As a result, the government has the burden of proof to show that there are no prior occupants on land it claims or that the traditional occupants have abandoned the land.<sup>128</sup> The case was significant in many ways, one of which was that the court acknowledged that indigenous laws and customs gave rise to native title, and thus native laws and customs were part of Australian Law.<sup>129</sup>

A sampling of other Australian cases illustrates the courts' trend of acknowledging indigenous customary law. In *Foster v. Mountford*,<sup>130</sup> the court restricted publication of a book it deemed "magnificent" because the Aboriginal people whose sacred and confidential information was presented in the book (and had been shared with the author in confidence) would suffer damage if the uninitiated became privy to the information contained within.<sup>131</sup> In *Yumbulul v. Reserve Bank*,<sup>132</sup> an Aboriginal artist's design of a Morning Star Pole was reproduced on a banknote. The court, among other

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<sup>121</sup> See Lucas-Schloetter, *supra* note 43, at 359-63.

<sup>122</sup> *Mabo v. Queensland II* (1992) 175 C.L.R. 1.

<sup>123</sup> See BROWN, *supra* note 2, at 47.

<sup>124</sup> See Tressa Berman, "As Long As the Grass Grows": *Representing Indigenous Claims*, in *INDIGENOUS INTELLECTUAL PROPERTY RIGHTS: LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS* 3, 8 (Mary Riley ed., 2004).

<sup>125</sup> *See id.*

<sup>126</sup> See BROWN, *supra* note 2, at 46.

<sup>127</sup> *See id.* at 46-47.

<sup>128</sup> *See id.* at 47.

<sup>129</sup> See Sackville, *supra* note 40, at 734-35.

<sup>130</sup> See *Foster v. Mountford* (1976) 29 F.L.R. 233.

<sup>131</sup> See Sackville, *supra* note 40, at 737-738.

<sup>132</sup> See *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481.



things, observed that current law may be inadequate to recognize the claims of aboriginal communities to regulate the use of works that are “essentially communal in origin.”<sup>133</sup> Finally, in the *Bulun Bulun* case discussed previously, the court opened up the possibility that the creation of an express trust between an artist and his or her community, or a third party’s knowing involvement in a copyright owners breach of fiduciary duty towards his or her community, might allow the community to succeed against a third party for copyright infringement.<sup>134</sup> Thus, Australian courts have recognized the interests of indigenous communities and the lack of adequate safeguards to protect their culture, while identifying possible means of protection in future cases.

These developments indicate that Australia has begun to acknowledge indigenous customary law in a significant manner. Although indigenous customary law has not yet been directly applied to protect TCEs in Australian courts, it is being given serious consideration as a possible basis for protection. Australian courts have acknowledged that under the right circumstances, the application of indigenous customary law might indeed be appropriate. Therefore, the leap from where the law is today to the application of indigenous customary law for the protection of TCEs might not be a very large one.

#### V. INDIGENOUS CUSTOMARY LAWS SHOULD BE IMPLEMENTED BECAUSE, UNLIKE OTHER REGIMES, THEY PROVIDE EFFECTIVE PROTECTION

The preceding discussion shows that existing IPRs provide ineffective resolutions to the problem of protecting TCEs; therefore, another solution—the application of indigenous customary law<sup>135</sup> of indigenous peoples—should be implemented. The application of indigenous customary law is the most effective resolution, given the inadequacies of solutions based on incompatible Western ideals of intellectual property protection. The assumption that existing IPRs alone can protect intellectual property is erroneous and ultimately constrains the solutions proposed for protecting TCEs. Indigenous customary law is law that has been used satisfactorily by indigenous peoples.<sup>136</sup> It is a flexible solution, in that the indigenous customary law of each diverse indigenous group around the world can be applied to that group to protect its own TCEs. Mainstream solutions

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<sup>133</sup> See Sackville, *supra* note 40, at 739.

<sup>134</sup> See *id.* at 744.

<sup>135</sup> See discussion *infra* Part V.B.

<sup>136</sup> *Id.*

(existing IPRs and sui generis solutions) are based on a Western intellectual property paradigm which fundamentally differs from the notions underlying the need to protect TCEs. This causes mainstream solutions to either over-reach or under-reach in the protections they afford, leading to a denial of protection for TCEs. Thus, they are sub-optimal as solutions, and the application of indigenous customary law is a more effective resolution.

A. *The Presumption that Existing IPRs Exhaust All Possible Means of Effective Protection Is Fallacious and Limiting*

A belief that existing IPRs, on which sui generis solutions are based, provide the only avenue to protect cultural expressions is misleading and handicaps the goal of achieving effective protection for TCEs. Intellectual property has been described as “nothing more than a socially-recognized, but imaginary, set of fences and gates” that “[p]eople must believe . . . for it to be effective.”<sup>137</sup> Existing IPRs, which are based on Western intellectual property ideals, are so well established today that most of the world has accepted their set of defined “gates and fences.” For instance, the 149 member nations<sup>138</sup> of the World Trade Organization (“WTO”) have agreed to ensure that their laws conform to the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) agreement.<sup>139</sup> The TRIPS agreement enforces the basic precepts of Western intellectual property protection, such as copyright, on all the member nations of the WTO.<sup>140</sup> In essence, 149 nations have accepted Western intellectual property ideals and are in the process of implementing them. Amid this widespread confirmation, it is easy to forget that existing IPRs are no more than one convention of protection, rather than the only possible convention. It has been proposed that “the tradition which attracts the most adherence will be the one . . . [that] is the most persuasive.”<sup>141</sup> Existing IPRs can thus be seen just a predominant paradigm of protection that most of the world has affirmed and considers persuasive.

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<sup>137</sup> Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996).

<sup>138</sup> World Trade Organization, Understanding the WTO: The Organization, Members and Observers, Dec. 11, 2005, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). The WTO had 149 members as of December 11, 2005.

<sup>139</sup> See World Trade Organization, Understanding the WTO: The Organization, Intellectual Property: Protection and Enforcement, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm). Since the TRIPS agreement took effect in January 1995, member nations were given a time schedule to ensure that their laws conformed with the agreement.

<sup>140</sup> See generally *id.* The TRIPS agreement among other things seeks to “encourage[ ] creation and invention” for the benefit of society and “contribute to technological innovation and the transfer of technology”—all of which are principles underlying Western intellectual property ideals.

<sup>141</sup> See H. PATRICK GLEN, LEGAL TRADITIONS OF THE WORLD 37 (2000).

Despite the widespread acceptance of existing IPRs, other regimes of protection based on different underlying philosophies continue to exist and may be better suited to protecting TCEs. The application of the distinct indigenous customary laws of indigenous peoples for the protection of their particular TCEs is one such regime. These laws have proved satisfactory to the indigenous groups that apply them and should be considered seriously. Ignoring other regimes and imposing predominantly Western-ideal based solutions upon cultures extraneous to those ideals does not allow for an accounting of the differences between the needs of the various cultures seeking protections. Because many of these differences fall outside the scope of Western based regimes of protection, the protection achievable for TCEs remains limited. Australia acknowledged the existence and applicability of indigenous customary laws in a significant way when it linked indigenous customs and laws with native land title.<sup>142</sup> Moreover, while Australian courts are mindful of the existence of indigenous customary laws and have often taken them into account to varying degrees in their decisions, they continue to analyze the problem of protecting TCEs largely within the framework of existing IPRs. For instance, the *Ganalbingu* clan's claim was dismissed in *Bulun Bulun* because the clan had no applicable rights under existing IPRs. Thus, the clan received no remedy despite having valid ownership of the artwork under indigenous customary law. One of the Justices of the High Court of Australia acknowledged these limitations:

Difficulties with extending Australia's intellectual property law to the styles and nuances of the artistic creations of Aboriginal and other indigenous people of Australia suggest that there may be a need to look specifically at the express adaptation of that law to the needs of indigenous peoples so that the law can respond to the problem and not simply impose its view of what the problem is upon all people uniformly.<sup>143</sup>

Thus, the application of existing IPRs, and to a certain extent *sui generis* solutions based on them, to the protection of TCEs "imposes [a Western world] view of what the problem is upon all people uniformly"<sup>144</sup> and thus, fails to respond with an effective solution.

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<sup>142</sup> Mabo, *supra* note 122.

<sup>143</sup> Hon. Justice Michael Kirby, The University of Waikato CNZI Workshop APIA Western Samoa: Protecting Cultural Rights: Some Developments (Oct. 12-13, 1998), [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_culture2.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_culture2.htm) (last visited Apr. 7, 2006).

<sup>144</sup> *See id.*

B. *Indigenous Customary Law Is Law and Constitutes a Satisfactory and Flexible Solution that Will Provide Effective Protection to TCEs*

Indigenous customary law refers to the “body of rules, values and traditions accepted in traditional . . . societies as establishing standards and procedures to be followed and upheld.”<sup>145</sup> Indigenous peoples often have their own set of traditions and practices that have evolved over the years and constitute their customary law.<sup>146</sup> Indigenous customary law transforms over time to account for the changes in the needs of the peoples it seeks to govern.<sup>147</sup> It derives its legitimacy from social acceptance by the members of the community it governs<sup>148</sup> and is based on norms that may be understood only by members of the community.<sup>149</sup> Communities may possess institutional structures and mechanisms to implement and enforce their laws.<sup>150</sup> Indigenous customary law is so entwined with the way of life of indigenous peoples, and is such an integral part of their culture, that it has, independent of the customs it governs, been claimed to be deserving of protection as an element of the culture.<sup>151</sup> Indigenous customary law has also governed the use of TCEs in indigenous communities. It determines who in the community is authorized to permit their use and reproduction.<sup>152</sup> Thus, indigenous customary law focuses on a “bundle of relationships rather than [the] bundle of economic rights,” which Western intellectual property laws emphasize.<sup>153</sup> In addition, it focuses on community ownership and involvement rather than on personal rights.<sup>154</sup> Under Aboriginal law in Australia, the right to use a clan’s symbols and stories resides in the traditional owners, who are considered custodians of the images.<sup>155</sup> The traditional owners collectively determine whether and how the clan’s images can be used.<sup>156</sup> Unfortunately, indigenous customary law is often viewed as

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<sup>145</sup> Sarah Pritchard, *The Significance of International Law, in* INDIGENOUS PEOPLES, AND THE UNITED NATIONS AND HUMAN RIGHTS 2, 14 (Sarah Pritchard ed., 1998).

<sup>146</sup> See Int’l Labor Org. (“ILO”), ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual, at 26 (Dumas-Titoulet Imprimeurs 2003), <http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/manual.pdf>.

<sup>147</sup> See Mattias Ahren, *Indigenous Peoples’ Culture, Customs, and Traditions and Customary Law - the Saami People’s Perspective*, 21 ARIZ. J. INT’L & COMP. L. 63, 63 (2004).

<sup>148</sup> See *id.*

<sup>149</sup> Kuruk, *supra* note 50, at 786.

<sup>150</sup> See ILO, *supra* note 146.

<sup>151</sup> See Anaya, *supra* note 31, at 49.

<sup>152</sup> See Lewinski, *supra* note 85, at 765.

<sup>153</sup> *Id.* at 765-66.

<sup>154</sup> See MARIE BATISSE & JAMES [SA’KE’J] YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE 150 (2000).

<sup>155</sup> Janke, *supra* note 1, at 14.

<sup>156</sup> See *id.*

subordinate to other more prevalent legal traditions, and has not been accorded the legitimacy that those traditions enjoy.<sup>157</sup>

Indigenous customary law is law although it might not conform with Western notions of what constitutes law.<sup>158</sup> Max Gluckman, a social anthropologist who has studied indigenous peoples, has found that systems of law do indeed exist in indigenous societies.<sup>159</sup> While addressing the question of what law is, Gluckman argues that “we must accept that all words which deal with important social facts [such as law] are bound to have many meanings,” and that “it is sterile . . . to argue that such words can only be applied in one sense and not in another.”<sup>160</sup> Therefore, law must be thought of more expansively than Western notions of what constitutes law. Law can be thought of as “the process of social control by which any society maintains order and discourages disorder.”<sup>161</sup> Because indigenous customary law is a body of rules that establishes standards and procedures within a community,<sup>162</sup> it is indeed law and has been recognized as such to a limited extent. In European colonies, where native and European courts functioned in parallel, European courts applied native law in exceptional cases.<sup>163</sup> The Australian High Court in *Mabo* recognized indigenous customary law and bolstered its significance by using it as a basis for land title.<sup>164</sup>

Indigenous customary law has satisfactorily governed the use of TCEs, and is flexible enough to protect the diverse cultural expressions of indigenous communities around the world. Indigenous customary law continues to exist today. Various Australian court decisions can be found where questions relating to indigenous customary law have arisen.<sup>165</sup> In some cases, such as *Bulun Bulun* and *Yumbulul*, claims based on indigenous customary law were even made. However, because there are large numbers

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<sup>157</sup> Ahren, *supra* note 147, at 63-64.

<sup>158</sup> Many countries list indigenous customary law as part of their law, e.g., THE JUDICATURE ACT, LAWS OF KENYA Ch. 8 (rev. ed. 1988) (1983). See also H. PATRICK GLEN, LEGAL TRADITIONS OF THE WORLD 65 (2000).

<sup>159</sup> See generally MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 169-215 (1965). Gluckman refers to “tribal societies” which when explored in his book, translates roughly to indigenous societies.

<sup>160</sup> See *id.* at xxii.

<sup>161</sup> LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 85-86 (2002). Malinowski, a prominent anthropologist, provided this view of the law under which all societies can be deemed to have law.

<sup>162</sup> Pritchard, *supra* note 145.

<sup>163</sup> See ALISON DUNDES RENTELN & ALAN DUNDES, FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA 14 (1994).

<sup>164</sup> See P.G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION 340 (2004).

<sup>165</sup> See, e.g., Milpururru, *supra* note 90; Bulun Bulun, *supra* note 12; Yumbulul, *supra* note 132.

of diverse indigenous groups across the world, no single indigenous position on the issue of folkloric protection exists.<sup>166</sup> Hence, a single solution cannot ensue. The application of community-specific indigenous customary law allows for a flexible solution that rejects the one-size-fits all approach. Australian courts have often struggled to understand the significance of TCEs to indigenous communities while attempting to fashion fair solutions. Misunderstandings about the needs of indigenous communities often result from efforts by outsiders to comprehend the role of TCEs in a community.<sup>167</sup> Because the principles underlying the protection of TCEs are embodied in the indigenous customary laws themselves, their application eliminates the possibility of misunderstandings that lead to ineffective solutions. Indigenous peoples have declared that “they want to create a system that is their own, and not a modification of ‘mainstream’ intellectual property law.”<sup>168</sup> Indigenous people want to take control over their cultural expressions and define how these expressions can be used.<sup>169</sup> The application of indigenous customary law will allow them to do so.<sup>170</sup> It will also allow them to control the fate and development of their cultures, which has been argued to be the most effective way to counter forces that threaten to destroy the customary practices of indigenous peoples.<sup>171</sup>

C. *Mainstream Forms of Protection Are Sub-Optimal as They Are Founded Upon an Incompatible Western Intellectual Property Paradigm*

Existing IPRs and sui generis systems are rooted in Western concepts of intellectual property protection which are fundamentally distinct from the notions underlying the need for protecting TCEs. This gap in the underlying precept for protection is magnified when an attempt is made to apply the fundamentally unsuitable IPRs and sui generis systems to TCEs. It results in misaligned and inadequate solutions that over-reach or under-reach in the

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<sup>166</sup> See Angela A. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J.L. & PUB. POL'Y 155, 161 (2004).

<sup>167</sup> See *id.* at 160.

<sup>168</sup> Michael Halewood, *Indigenous and Local Knowledge in International Law: A preface to Sui Generis Intellectual Property Protection*, 44 MCGILL L.J. 953, 992 (1999).

<sup>169</sup> See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer*, 30 CONN. L.R. 1, 46-47 (1997) (referencing the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples).

<sup>170</sup> *Global Intellectual Property Rights: Boundaries of Access and Enforcement, Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 762-63 (2002).

<sup>171</sup> Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 201, 227 (2005).

types of protections they provide, as well as unintended consequences, which ultimately deny TCEs the protections required. Such consequences cannot be rectified but for a realignment of the subject matter being protected and the regime used to protect it.

*1. The Western Intellectual Property Paradigm Is Fundamentally Incompatible with the Impetus to Protect TCEs*

Western notions of intellectual property protection that are deeply entrenched in existing IPRs and sui generis solutions are incompatible in significant ways with notions underlying the need to protect TCEs.<sup>172</sup> In contrast with other traditions, western European culture, to which existing IPRs can trace their roots,<sup>173</sup> has been thought of as materialistic and individualistic, placing a great emphasis on the consumption of goods and resources.<sup>174</sup> Eurocentric societies have been identified with certain cultural attributes that are infused with this materialistic perspective and that color their thought processes and epistemological values and logic.<sup>175</sup> Some attributes stemming from the Eurocentric perspective that may be at odds with the cultures of indigenous peoples include analytical thought, objectification, abstraction, extreme rationalism, and desacralization.<sup>176</sup> Eurocentricity is thought to delineate all the outputs of Eurocentric culture, including the arts, sciences, and even the society's concept of the law.<sup>177</sup> Western notions of intellectual property, anchored in these epistemic frameworks, provide incentives for the progress of the arts and sciences, and for the commercialization and dissemination of intellectual works for the benefit of society. In essence, they are "based on a capitalistic philosophy designed to serve a market economy."<sup>178</sup> The very idea that intellectual

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<sup>172</sup> See, e.g., Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-Modification of Culture*, 40 HOW. L.J. 737, 761 (2005). Danielle Conway-Jones calls them "diametrically opposed"; however, the author does not take that position as some synergies exist within specific contexts.

<sup>173</sup> See Riley, *supra* note 166, at 159; see also PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (1996) (for a general background on the history, philosophy and development of intellectual property).

<sup>174</sup> See Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 324 (1997).

<sup>175</sup> See *id.* at 331-33. The term "eurocentricity" has been adopted here in the form used by Kenneth B. Nunn—as the core cultural values of European Culture that are profoundly materialistic both in the sense that the nature of reality is perceived in material terms and in the sense that the acquisition of objects is the primary social goal.

<sup>176</sup> See *id.* at 334-37.

<sup>177</sup> See *id.* at 338.

<sup>178</sup> Riley, *supra* note 166, at 159; see also Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 BERKELEY TECH. L.J. 1613, 1631 (2005); see generally Susan Sell, *Intellectual Property and Public Policy*

creations are deserving of individualistic protections akin to property is a Western world view.<sup>179</sup> In fact, the use of the term “intellectual property” to refer to the culture of indigenous peoples has significant implications because it requires their culture to be reduced to a list of features, as opposed to the flourishing and evolving creature that it is.<sup>180</sup>

There is a chasm between these Western Eurocentric notions that underline existing IPRs and the notions underlying the need to protect TCEs. Indigenous societies are built on community-based economies that focus on collective creations that do not inherit a corresponding right of alienability.<sup>181</sup> One Aboriginal Australian artist, whose artwork was reproduced without the requisite permission of the clan explained, “[i]t’s like the Queen and the monarchy. They have their symbols and uniforms and [they are] passed down through one line of the family. *It doesn’t go anywhere else.* That is what Aboriginal art is about.”<sup>182</sup> Indigenous peoples do not believe that consumerism will ultimately benefit humanity.<sup>183</sup> The incentives and rewards of Eurocentric societies do not hold much value within indigenous culture.<sup>184</sup> To indigenous peoples, TCEs are not an art or a science to be shared or disseminated, but an integral part of daily life with specified functions. No incentive is required for their creation. Mr. Bulun Bulun explained, “[m]y ancestors had a responsibility given to them by Baranda [the creator ancestor] to perform the ceremony and to do the paintings which were granted to them. This is part of the continuing responsibility of the traditional Aboriginal owners handed down from generation to generation.”<sup>185</sup> Until recently, TCEs were not commercially valuable; and even if opportunities for commercial exploitation cease, their creation will continue. Their inherent value to indigenous communities is in

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*in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004) (discussing the development of intellectual property law and the relationship between intellectual property policies and economic development).

<sup>179</sup> Riley, *supra* note 166, at 159; see also Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C.J. INT’L L. & COMM. REG. 229, 246-249 (1998).

<sup>180</sup> Edward F. Fischer & Avery Dickens, *Development and Hegemony: Cultural Property and Cultural Propriety in the Maya Region*, 19 CONN. J. INT’L L. 319 (2004); see also Rachel Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT’L LAW. 203, 230 (2003).

<sup>181</sup> Riley, *supra* note 166, at 159.

<sup>182</sup> Janke, *supra* note 1, at 15.

<sup>183</sup> Daes, *supra* note 118, at 143.

<sup>184</sup> Suzanne Milchan, *Whose Rights Are These Anyway? A Rethinking of Our Society’s Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157, 164 (2004).

<sup>185</sup> Janke, *supra* note 1, at 54.



their creation and existence. Therefore, a scheme of protection rooted in providing incentives to create and disseminate is inapplicable to TCEs.

Similarly, *sui generis* systems, though more expansive in the protections they avail TCEs, were developed with reference to existing IPRs, and as a result, have inherent shortcomings as well. The approach to the creation of *sui generis* systems can be seen as an effort to patch the holes exposed when attempts were made to apply existing IPRs to TCEs. Such a reactionary tactic, meant to address the inadequacies of exiting IPRs, can hardly result in the most suitable form of protection for TCEs. Ideally, protection should stem from a proactive, comprehensive evaluation of the particular needs of a group of people, notwithstanding the existence of other regimes, including possibly conflicting ones.

A brief examination of some of the *sui generis* systems in existence today illustrates their shortfalls. The Panama Law, hailed as a possible model for protection,<sup>186</sup> only covers subject matter capable of commercial use.<sup>187</sup> For example, the rights do not apply when national TCEs are used by public entities for non-commercial purposes.<sup>188</sup> Thus, the needs of TCEs that have no commercial use, but significance to the communities that need protection, are not provided for by the law. In addition, the Panama Law requires registration of TCEs,<sup>189</sup> which can defeat the purpose of protection, especially with regard to expressions that are sacred or secret. The Bangui Agreement allows the author to be the first holder of economic and moral rights, and provides for certain collaborative and collective works, yet fails to incorporate provisions dealing with needs specific to TCEs.<sup>190</sup> The Model Provisions provide for fair use type exceptions. They do not require authorization to use works for educational purposes, illustrations in original works, where TCEs are “borrowed” to create an original work, and other “incidental utilizations.”<sup>191</sup> Such exceptions are very valuable within the context of existing IPRs. However, the provisions can easily defeat the purpose of protection with regard to certain expressions, especially those that are sacred or secret. The South Pacific Model Law too provides for fair use type exceptions and therefore, it has similar shortcomings.<sup>192</sup>

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<sup>186</sup> Lewinski, *supra* note 85, at 766.

<sup>187</sup> WORLD INTELL. PROP. ORG. (“WIPO”), COMPARATIVE SUMMARY OF SUI GENERIS LEGISLATION FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS, at Annex page 3-4, WIPO Doc. WIPO/GRTKF/IC/5/INF/3, (Apr. 28, 2003), [http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_inf\\_3.pdf](http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_inf_3.pdf).

<sup>188</sup> *See id.* at Annex 7.

<sup>189</sup> *See id.* at Annex 10.

<sup>190</sup> *See id.* at Annex 5.

<sup>191</sup> *See id.* at Annex 7.

<sup>192</sup> *See id.* at Annex 9.

2. *The Protections Needed for TCEs Cannot Be Addressed by Solutions Based on Western Intellectual Property Ideals Due to Fundamental Gaps in the Paradigms of Protection*

The fundamental principles underlying existing IPRs and sui generis solutions are not expansive enough to encompass the protections needed for TCEs, and consequently, both solutions fall short of providing the necessary level of protection. Western intellectual property notions are rooted in ideas based on economic benefit and commercialization. Solutions based on such concepts cannot capture the cultural significance inherent in the need to protect TCEs and fail to guarantee systems of cultural perpetuation.<sup>193</sup> The aim of these solutions is misplaced at times and they often miss their mark. This is not surprising given that concepts such as the protection of sacred information do not exist in Western intellectual property laws. In *Yumbulul v. Reserve Bank*,<sup>194</sup> copyright law could not prevent a person outside the indigenous community from reproducing a sacred Morning Star pole or from using ideas based on traditional designs.<sup>195</sup> Copyright law does not protect ideas, and yet the ideas sought to be protected were sacred to the clan and deserving of protection under indigenous customary law. Thus, solutions based on Western intellectual property ideals cannot account for the various unique aspects of TCEs when compared with other types of expressions, and they fall short of providing TCEs with the necessary protections.

3. *Mismatched Paradigms of Protection Cause Solutions Based on Western Intellectual Property Ideals to Impose Unnecessary Requirements on TCEs, Further Limiting the Protections Available*

Gaps in the bases underlying existing IPRs and sui generis solutions on the one hand and TCEs on the other hand lead to an imposition of extraneous and unnecessary requirements for the protection of TCEs, which are ultimately counter productive. The cultural developments in Europe that influenced the development of law are not so universal and transcendent that the law can be lifted out of context and applied successfully to the diverse cultural traditions of indigenous peoples around the world.<sup>196</sup> Yet, Western legal requirements are applied to TCEs. The result is that TCEs are often denied protection because they fail to meet the requirements imposed by the extrinsic laws, such as the requirements of authorship, originality, or fixation

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<sup>193</sup> Riley, *supra* note 166, at 159.

<sup>194</sup> *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481.

<sup>195</sup> See Sackville, *supra* note 40, at 726.

<sup>196</sup> Kenneth B. Nunn, *Law As a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 359-360 (1997).

under copyright law. These requirements are not imposed by the indigenous peoples themselves and are inconsequential to the type of protection they desire. Imposing such requirements only leads to the denial of protection of TCEs. For instance, Mr. Bulun Bulun's clan was denied an equitable interest in his painting because under Australian law, equitable interest can be gained only through joint authorship "defined as a collaboration 'in which the contribution of each author is not separate from the contribution of the other author.'"<sup>197</sup> In precluding clan ownership, the court stated that "[a] person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist. Joint authorship envisages the contribution of skill and labour to the production of the work itself."<sup>198</sup> Thus, authorship, as defined by extraneous Australian copyright law, obstructed the court from providing relief to the clan which owned the images under indigenous customary law. If TCEs are being protected for the benefit of indigenous communities, then they should be protected in the manner those communities desire. Why then the need for extraneous requirements?

In addition, efforts to satisfy extraneous requirements sometimes lead to unintended consequences that defeat the goal of adequately protecting TCEs. The creation of public databases<sup>199</sup> containing protected information is being considered to meet the requirement of notice—a Western legal construct. These databases make public the secret and sacred information contained within them. Consequently, their existence leads to a contemporaneous combustion of the sanctity of the information they seek to protect, thereby defeating their purpose. Indigenous rights advocates have called such processes "entirely wrong headed"—and appropriately so.<sup>200</sup>

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<sup>197</sup> BROWN, *supra* note 2, at 64.

<sup>198</sup> Janke, *supra* note 1, at 15.

<sup>199</sup> See WORLD INTELL. PROP. ORG. ["WIPO"], INFORMATION BOOKLET ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE, WIPO Publication No. 913, at 20, available at [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf); see also, e.g., Thomas J. Krumenacher, *Protection for Indigenous Peoples and Their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge*, 8 MARQ. INTELL. PROP. L. REV. 143 (2004); Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 283 (2001). Although these articles refer to traditional knowledge, the same concerns apply to TCEs.

<sup>200</sup> Riley, *supra* note 166, at 160.

## VI. CHALLENGES TO EXECUTING AN EFFECTIVE IMPLEMENTATION OF INDIGENOUS CUSTOMARY LAW ARE SURMOUNTABLE

The adoption of customary law as the mechanism for the protection of TCEs does pose certain challenges; nevertheless, they are not insurmountable. The greatest objection to the use of indigenous customary law concerns the challenges of achieving effective implementation. However, implementation-related obstacles are not particular to indigenous customary laws, and exist with other solutions as well. In fact, the challenges posed are no more difficult to surmount than those posed by other proposed regimes. A genuine desire to adopt indigenous customary laws and the political will to do so can lead to effective implementation.

### A. *Challenges to Executing an Effective Implementation of Indigenous Customary Law Exist but They Are No More Difficult to Surmount than Those Posed by Other Proposed Solutions*

The effective implementation of indigenous customary law for the protection of TCEs will face challenges; however, the challenges are at most different, if not identical to, those posed by other proposed solutions, and not necessarily more difficult to overcome. First, in order to comply with indigenous customary laws, outsiders will need to ascertain the laws, which may pose a challenge. However, certain *sui generis* solutions incorporate aspects of indigenous customary laws and there too, an understanding of the group's laws is required.

A similar problem is presented with existing IPRs where, even outside the spectrum of TCEs, an understanding of the laws is necessary and yet, is not always achieved. Altering the scheme of protection to be based on indigenous customary law simply reverses which group of people will need to strive to understand the laws. Given that the intent of the law is to protect the TCEs of indigenous peoples, it is not unfair to ask outsiders to carry some of the burden of protection. Hence, the first challenge nets out when compared to the other proposed solutions.

A second potential challenge to the implementation of indigenous customary laws is that there is no means by which to enforce an international regime of acceptance.<sup>201</sup> At present, because there is no mechanism under which indigenous customary law can be enforced internationally, it may simply become a regional or state-specific solution. However, *sui generis*

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<sup>201</sup> Daes, *supra* note 118, at 146.

regimes have suffered the same fate.<sup>202</sup> Thus, the use of indigenous customary law at worst preserves the status quo when compared with sui generis solutions.

A final potential challenge to the implementation of indigenous customary law concerns whether it will be applicable to individuals outside the indigenous community. Since indigenous customary law is already incorporated in certain sui generis regimes, it is already applied in some form to those outside the indigenous community. In addition, if unfamiliar indigenous customary law is applied to outsiders to protect TCEs, it is no different from applying unfamiliar existing IPRs to indigenous groups. A concern about the applicability of indigenous customary laws to outsiders is not founded on any stronger a basis than a reciprocal concern about the application of existing IPRs to indigenous peoples.

### *B. Indigenous Customary Law Can Be Effectively Implemented*

Despite the existing challenges, an effective implementation of indigenous customary law for the protection of TCEs can be attained. First, solutions exist to educate outsiders about indigenous customary laws. One illustrative mechanism would be to create a presumption that the use of TCEs by outsiders is unauthorized unless explicit authorization is granted by the community that owns the TCE. Thus, a user of a TCE will only be expected to investigate the law particular to the use desired and will be relieved of learning about all potentially applicable indigenous customary laws. For instance, in Australia, parties wishing to use Aboriginal art would have the burden of obtaining explicit authorization from the community to which the artwork belongs. Thus, they will be in compliance with both the indigenous customary law, as well as Australian copyright law. States can also create education programs to disseminate information about appropriate processes for the use of TCEs. Such a prospect may seem unwieldy at first. However, its goal—achieving an understanding of indigenous customary laws—is identical to getting a layman to understand basic copyright laws, which is realistic and achievable. In fact, it has been argued that a lot can be accomplished in this area through education and sensitization of people to the issues, because people are generally willing to do the right thing.<sup>203</sup>

Second, the enforcement of indigenous customary laws across borders can be achieved through the addition of appropriate provisions to the applicable multinational agreements. The TRIPS agreement, which covers a

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<sup>202</sup> *Id.* at 145.

<sup>203</sup> Interview with Michael F. Brown, *Who Owns Native Culture?*, 3 J. HIGH TECH. L. 1 (2003-04).

broad range of intellectual property protections,<sup>204</sup> permits states a certain degree of freedom to implement particular policies within their borders,<sup>205</sup> while still requiring them to meet certain agreed upon minimum standards.<sup>206</sup> A failure to comply with the agreement can lead to sanctions by other states.<sup>207</sup> An agreement similar to TRIPS, or a provision within TRIPS, which permits state-specific implementation of indigenous customary law while requiring that laws be respected across borders can solve the cross-border implementation problem. Indigenous customary law can then be comprehended with a state's laws, and jurisdiction can be gained within a state's national courts. The implementation of TRIPS is expensive.<sup>208</sup> The implementation of indigenous customary laws within TRIPS, or through a TRIPS-like agreement, will potentially also be expensive. Hence, the political will to achieve implementation will be necessary. Yet if an effective solution is to be achieved, such an approach should be given serious consideration. In addition, if indigenous customary laws can be imbued as the norm for protecting TCEs, then arguably their use can be deemed a part of customary international law, and will be enforceable. Consequently, a genuine desire to protect TCEs through use of indigenous customary laws can lead to creative solutions that surmount perceived challenges.

## VII. CONCLUSION

Indigenous customary laws, when compared with existing IPRs and sui generis solutions, more effectively protect the TCEs of indigenous peoples and should be implemented. Indigenous peoples have the right to "practice and revitalize their cultural traditions," which includes the right to "maintain, protect and develop the past, present and future manifestations of their cultures."<sup>209</sup> Indigenous customary law is law, and it has effectively

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<sup>204</sup> Adebambo Adewopo, *The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection*, 33 U. TOL. L. REV. 749, 759 (2002).

<sup>205</sup> Subha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 86 (2003).

<sup>206</sup> See generally Elaine B. Gin, *International Copyright Law: Beyond WIPO & TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 782 (2004) (discussing copyright law within the framework of WIPO and TRIPS).

<sup>207</sup> Edward Lee, *The New Cannon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 7 (2005).

<sup>208</sup> Daniel J. Gervais, *Intellectual Property, Trade & Development: The State of Play*, 74 FORDHAM L. REV. 505, 530-531 (2005).

<sup>209</sup> UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (UNHCR), DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, art. 12, Doc. E/CN.4/SUB.2/RES/1994/45 (Sept. 6, 1994), available at [http://ap.ohchr.org/documents/sdpage\\_e.aspx?m=120&t=11](http://ap.ohchr.org/documents/sdpage_e.aspx?m=120&t=11).

protected the TCEs of indigenous communities. It is fallacious and limiting to presume that existing IPRs, and the sui generis solutions based on them, encompass all possible solutions when other viable options such as indigenous customary laws exist. Existing IPRs and sui generis solutions are based on a paradigm that is inapplicable to TCEs. Hence, they either fail to encompass aspects of TCEs that should be protected, or impose needless requirements that burden the process of protection to the extent that protection is denied.

Challenges to the implementation of indigenous customary laws exist, but they are not insurmountable and the solution itself should not be rejected because of them. The challenges are either identical to, or no worse than those posed by existing IPRs or sui generis solutions. Viable solutions to the challenges do exist, and can be implemented with a genuine desire to protect the TCEs of indigenous peoples.