

U.S. COPYRIGHT LAW AND TRADITIONAL CULTURAL EXPRESSIONS

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I. Introduction

The purpose of this paper is to examine the depth and adequacy of protection that U.S. copyright law allows for traditional cultural expressions (TCEs), also referred to as “traditional knowledge” or “folklore.”¹ I will evaluate the adequacy of protection in light of the distinct economic, representative, and religious functions of TCEs within their cultures of origin. I will also consider other avenues for protection that are currently available in this country on both the state and federal levels, as well as abroad. I will conclude by exploring whether turning to copyright law is the best approach to protect TCEs or whether there is a more appropriate and effective legal solution.

II. Analytical Framework

A determination of the adequacy of protection provided to TCEs under the Copyright Act depends on the criteria against which such protection is measured. While the purpose of U.S. copyright law is to “Promote . . . Progress,”² TCEs serve several unique functions within indigenous communities that also warrant consideration. My analysis is based on three such functions, which I refer to as economic, religious, and representative.

The significance of TCEs’ economic function to members of traditional cultures should not be underestimated. The sale of traditional artwork, for instance, is the primary source of income for many Australian Aboriginals.³ The revenue from such sales exceeded \$7 million in

¹I use the term “traditional cultural expression” as the World Intellectual Property Organization (WIPO) has defined it to include “music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives,” whether written or verbal. World Intellectual Property Organization, *Program Activities, Traditional Knowledge, Genetic Resources, TCEs/Folklore*, <http://www.wipo.int/tk/en/folklore/>, (accessed April 9, 2007).

² U.S. Const., Art. I, § 8, cl. 8.

³ Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 14 Eur. Intell. Prop. Rev. 227, 228 (1992).

Australian dollars between 1997 and 1998 alone.⁴ Members of traditional cultures within the U.S. also benefit from the sale of traditional artwork. Navajo artisans, for example, sell rugs, jewelry, and sand paintings depicting traditional designs. Selling their work makes it financially possible for artisans to continue these traditional practices.

The religious function of TCEs within their cultures of origin simply has no counterpart in contemporary western society where it is often said that “nothing is sacred.” In some traditional cultures certain TCEs are considered to be so sacred that only individuals who have attained a requisite level of spiritual enlightenment are permitted to view them.⁵ Other cultures prohibit the recording of certain TCEs due to their sacred nature.⁶ The importance of this proscription is underscored by the potential punishment for violations: banishment.⁷

For many Native American tribes that have lost their land and much of their traditional way of life, TCEs are all that remain of their culture. For this reason, TCEs have been described as “fundamental to the articulation of cultural identity.”⁸ It is this articulation that I have termed TCEs’ representative function.

III. U.S. Copyright Law

A. The Copyright Act

The Constitution grants Congress the power “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹ Pursuant to this authority, Congress enacted the

⁴ *Id.*

⁵ Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 *Intell. Prop. J.* 293, 298 (1995) (hereinafter “*Cultural Ownership*”).

⁶ *See e.g.* CNN, *Sacred dance essay prompts tribal banishment*, <http://www.cnn.com/2004/US/Southwest/02/06/tribal.banishment.ap/> (accessed April 15, 2007) (hereinafter “*Sacred dance*”).

⁷ *See id.*

⁸ Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 *Conn. L. Rev.* 1, 12 (Fall 1997) (hereinafter “*Protecting Folklore*”).

⁹ U.S. Const., Art. I, § 8, cl. 8.

Copyright Act, which delineates the subject matter of copyright as “original works of authorship fixed in any tangible medium of expression.”¹⁰ A work “consisting of sounds, images, or both, that are being transmitted,” qualifies as “fixed” under the Act, “if a fixation of the work is being made simultaneously with its transmission.”¹¹

A work need not be completely novel to meet the originality requirement.¹² However, a work that is based on a previous work already in the public domain must possess “distinguishable variation” from the preexisting work, or require “extreme skill” to produce, in order to qualify as original.¹³ A derivative work that meets the heightened originality requirement is only copyrightable to the extent of “the material contributed by the author[s] of such work, as distinguished from the preexisting material in the work,” which, if already in the public domain, remains in the public domain.¹⁴

Authors of a “joint work” share ownership of the copyright in the work.¹⁵ A joint work is defined in the Copyright Act as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁶ Each author’s contribution must be independently copyrightable in order for him or her to qualify as a joint author.¹⁷

¹⁰ 17 U.S.C. § 102(a).

¹¹ 17 U.S.C. § 101.

¹² *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

¹³ *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc) (a reproduction of Uncle Sam mechanical banks was not sufficiently original to qualify for copyright protection even though the reproduction was made out of plastic as opposed to metal, was two inches shorter than the originals, and contained a differently shaped carpetbag, among other variations).

¹⁴ 17 U.S.C. § 103(b).

¹⁵ 17 U.S.C. § 201(a).

¹⁶ 17 U.S.C. § 101.

¹⁷ *E.g. Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994).; *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989); *but see* Melville B. Nimmer & David Nimmer, *1 Nimmer on Copyright*, § 6.07 (advocating the “de minimus” test requiring only that the work as a whole be copyrightable).

Alternately, where a work is made for hire, “the employer or other person for whom the work was prepared is considered the author” of and thus the owner of any copyright in the work, unless the parties expressly agree otherwise in a signed writing.¹⁸ “Work for hire” is defined loosely in the Act as “a work prepared by an employee in the scope of his or her employment.”¹⁹ In determining whether a hired party is an employee, the non-exhaustive list of factors courts may consider includes,

the hiring party’s right to control the manner and means by which the product is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.²⁰

The duration of most U.S. copyrights is currently 70 years plus the life of the author.²¹ In the case of joint works, the last surviving author is the measuring life.²² For anonymous works, pseudonymous works, and works made for hire, the duration is the shorter of 120 years from the work’s creation or 95 years from its publication.²³

The Copyright Act grants owners of copyright the exclusive rights

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyright;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works . . . to perform the copyrighted work publicly; [and]

¹⁸ 17 U.S.C. § 201(b).

¹⁹ 17 U.S.C. § 101.

²⁰ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

²¹ 17 U.S.C. § 302(a).

²² 17 U.S.C. § 302(b).

²³ 17 U.S.C. § 302(c).

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly. . . .²⁴

In addition, the Visual Artists Rights Act of 1990 (“VARA”) extends two so-called moral rights to authors of visual art: the rights of attribution and integrity.²⁵ The former entitles artists to control the degree of recognition they receive for qualifying works and the latter empowers them to prevent the mutilation, distortion, or destruction of such works.²⁶ “Visual art” is defined to include paintings, drawings, prints, sculptures, and still photographic images produced for exhibition purposes, but the definition explicitly excludes works made for hire.²⁷ Furthermore, moral rights protection is limited to works that exist either in a single copy (which, if a photographic image, must be signed) or in a limited edition of 200 copies or fewer signed and consecutively numbered by the author.²⁸

In general, the Copyright Act preempts state copyright laws.²⁹ However, laws governing subject matter outside the scope of the Act are not preempted.³⁰ For example, laws governing “works of authorship not fixed in any tangible medium of expression” are not preempted.³¹ Nor are state laws conferring rights that are not equivalent to the rights outlined in § 106 of the Act.³² Because the moral rights of visual artists are set forth in § 106A, not § 106, the Act’s general preemption provision does not apply to moral rights. Instead, the Act specifically provides that VARA’s moral rights provisions only preempt state laws to the extent that the rights conferred

²⁴ 17 U.S.C. § 106.

²⁵ 17 U.S.C. § 106A.

²⁶ 17 U.S.C. § 106A(a).

²⁷ 17 U.S.C. § 101.

²⁸ *Id.*

²⁹ 17 U.S.C. § 301(a).

³⁰ 17 U.S.C. § 301(b)(1).

³¹ *Id.*

³² 17 U.S.C. § 301(b)(3).

under state law are equivalent to those conferred under VARA *and* are limited to the life of the author.³³

B. Application to TCEs

Many TCEs fail to meet the basic elements of copyrightable subject matter and are therefore completely vulnerable to exploitation. Particularly in their religious and representative functions, TCEs are valued for their faithfulness to prior TCEs³⁴ which may themselves have originated thousands of years ago,³⁵ thus placing them in the public domain. Although the requisite originality required to render a work copyrightable is ordinarily low, it is unlikely that TCEs will meet the heightened standard of “distinguishable variation” required of derivative works of public domain works.³⁶ Furthermore, even if TCEs *are* determined to possess “distinguishable variation” from preceding TCEs (or to require “extreme skill” to produce, otherwise satisfying the test of originality for derivative works based on public domain works)³⁷ they are only copyrightable to the extent of the authors’ original contributions to the works; the underlying TCEs remain in the public domain.³⁸

In addition, many TCEs lack fixation in a “tangible medium of expression” as required by the Copyright Act. For example, a live dance performance lack fixation unless it is simultaneously recorded. However, “[m]any tribes prohibit sacred dances from being recorded in stories or photographs because they believe doing so detracts from the ritual’s spiritual significance.”³⁹ Here again, copyright law is at odds with the religious function of TCEs.

Furthermore, based on the statutory definition of “fixed,” it is unclear whether a live

³³ 17 U.S.C. § 301(f).

³⁴ *Id.* at 14-15.

³⁵ Michael Blakeney, *Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law*, 17 Eur. Intell Prop. Rev. 442, 445 (1995) (some Australian Aboriginal designs are over 40,000 years old).

³⁶ See *L. Batlin & Sons, Inc.*, 536 F.2d at 491.

³⁷ *Id.*

³⁸ 17 U.S.C. § 103(b).

³⁹ See *Sacred dance*, supra note 6.

performance must also be simultaneously transmitted in order for its recording to satisfy the fixation requirement.⁴⁰

For TCEs that do manage to qualify for copyright protection, identifying the appropriate copyright owners can be problematic given the opposing attitudes toward intellectual property ownership embodied in the Copyright Act and existing in traditional cultures. The Copyright Act only recognizes the rights of individual authors or, in the case of works for hire, their employers. Traditional cultures, on the other hand, do not conceive of TCEs as being capable of individual ownership.⁴¹ Rather, they view TCEs as inalienable elements of collective identity belonging to the tribe as a whole.⁴²

Often, indigenous artwork is actually created by a group.⁴³ Although such works might qualify as joint works under the Copyright Act, because courts require that an individual's contribution to a joint work be independently copyrightable in order for the person to be deemed a joint author, key participants in the process, such as tribal elders who dictate compositions from dream sequences, are excluded from obtaining copyrights in the work.⁴⁴ Moreover, vesting joint authors with copyrights does not resolve the inherent tension between the individual rights approach of U.S. copyright law and the communal property perspective of traditional cultures.

It is unclear whether under certain circumstances TCEs might qualify as "works for hire," and their tribes of origin as employers. Tribal elders often possess a high degree of control over the production of TCEs.⁴⁵ In addition, indigenous artists are likely to be highly skilled.⁴⁶ Of all

⁴⁰ *I Nimmer on Copyright*, supra note 11, at § 1.08[C][2].

⁴¹ Erica-Irene Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, U.N. ESCOR, Hum. Rts. Comm., Sub-Comm. On Prevention of Discrimination & Protection of Minorities, 45th Sess., Item 14 of Provisional Agenda, at 8-9, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

⁴² *Id.*

⁴³ *Protecting Folklore*, supra note 8, at 30.

⁴⁴ *Id.* at 33.

⁴⁵ *Protecting Folklore*, supra note 8, at 35.

⁴⁶ *Id.*

of the factors set forth in *Reid*, these most clearly support the finding of an employment relationship between indigenous artists and their tribes. However, considering the Court's caution that "the extent of control the hiring party exercises over the details of the product is not dispositive," other factors will probably need to weigh in favor of finding of an employment relationship in order for a court to conclude that a TCE is a "work for hire."⁴⁷

The most plausible way for tribes to obtain copyrights in TCEs is for individual artists to transfer their rights to the tribes. But this may present conceptual difficulties in cultures where individuals are not thought to possess ownership rights in TCEs in the first place. There is also the possibility that in some cases artists will not want to transfer their copyrights.

Finally, the limited duration of copyrights is incompatible with the religious and representative functions of TCEs. The Constitution mandates that copyrights only be granted to authors "for Limited Times." This is consistent with copyright law's purpose of promoting progress because disseminating works of authorship has been understood to provide the public with the necessary fodder for innovation.⁴⁸ However, disseminating certain TCEs publicly actually violates the religious precepts of some indigenous cultures. Clearly, the limited duration of U.S. copyrights, and the resulting dissemination of all works of authorship, conflicts with the religious function of TCEs that are intended to remain sacred indefinitely. Moreover, because TCEs also serve the important function of articulating cultural identity, many indigenous peoples consider the faithful preservation of their TCEs to be critical to the survival of their cultures. The ultimate placement of TCEs in the public domain where they may take on any number of derivations thus not only runs contrary the representative function of TCEs but also, some fear, threatens the future existence of traditional cultures.

⁴⁷ *Community for Creative Non-Violence*, 490 U.S. at 752.

⁴⁸ See e.g. Jessica Litman, *The Public Domain*, 30 Emory L.J. 965, 976 (1990) ("every new work is in some sense based on the works that preceded it").

IV. Other Avenues for Protection

Outside of copyright law, other legal avenues for protection of expressive intellectual property in general include common law unfair competition theories, federal trademark law, and state moral rights laws. In addition, the Indian Arts and Crafts Act of 1990 (IACA) and Alaska's Silver Hand Program were intended to supplement protection for TCEs specifically. While these alternate avenues for protection may further the economic and representative functions of TCEs, like copyright law they fail to adequately account for the religious function of TCEs.

A. Unfair Competition

The Restatement (Third) of Unfair Competition provides that “[o]ne who, in connection with the marketing of goods or services, makes a representation relating to the actor’s own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another” may be liable to the other.⁴⁹ The misrepresentation must be material and must have caused or be reasonably likely to cause “a diversion of trade from the other or harm to the other’s reputation or good will.”⁵⁰

Returning to a previous example, TCEs serve an economic function for Navajo artisans who sell rugs depicting traditional designs. However, when non-Navajos use these designs to produce similar but inferior products which they market as “Indian made,” they not only threaten to price Navajos out of the rug market but they also threaten the demand for Navajo products.⁵¹ Unfair competition laws adequately address this sort of misrepresentation but they do not prevent merchants from using TCEs if they are honest in doing so. Accordingly, unfair competition laws will not stop merchants from using TCEs in a manner that frustrates their religious function.

⁴⁹ *Restatement (Third) of Unfair Competition* § 2 (1995).

⁵⁰ *Id.* § 3.

⁵¹ See Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of the Law*, 17 Copyright Bull. 10, 11 (1983).

B. Trademark Law

Federal trademark law has been recognized to offer TCEs two potential avenues for protection: certification marks and collective marks.⁵² A certification mark may be used “by a person other than its owner . . . to certify regional or other origin, . . . material, mode of manufacture, . . . or other characteristics of such person’s goods or services or that the work or labor on the goods or services was performed by members of a[n] . . . organization.”⁵³ A collective mark, on the other hand, may be used to identify either members of a particular group who produce particular goods and services or simply members of a group regardless of whether or not they produce goods and services.⁵⁴

Again, these avenues facilitate the economic and representative functions of TCEs by promoting market integrity. They do not, however, protect TCEs from being used in a manner that is inconsistent with their religious function. They also require the payment of a registration fee⁵⁵ and most likely attorney’s fees and thus may be financially prohibitive for tribes.

C. State Moral Laws

A number of states have enacted moral rights statutes. These states include California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Dakota, and Utah.⁵⁶ State moral rights statutes tend to

⁵² Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 1, 93 (Autumn2004) (hereinafter “*Speaking with a Forked Tongue*”).

⁵³ 15 U.S.C. § 1127.

⁵⁴ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 19:99.

⁵⁵ See Basic Facts About Trademarks, Application Filing Fee, at <http://www.uspto.gov/web/offices/tac/doc/basic/appcontent.htm#fee>.

⁵⁶ See Cal. Civ. Code §§ 987-89 (West 1982 & Supp. 1996); Conn. Gen. Stat. Ann. §§ 42-116t (West 1992 & Supp. 1996); 815 Ill. Comp. Stat. Ann § 320/0.01 (West 1985); La. Rev. Stat. Ann. §§ 2151-56 (West 2004); Me. Rev. Stat. Ann. tit. 27, § 303 (1985 & Supp. 1995); Mass. Gen. Laws ch. 231, § 85s (West 1989 & Supp. 1996); Nev. Rev. Stat. Ann. 597.720-760 (Michie 1994); N.J. Stat. Ann. § 2A:24A (West 1987 & Supp. 1996); N.M. Stat. Ann. §§ 13-4B-1 to -3 (Michie 2002); N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 1984 & Supp. 1996); Pa. Cons.

be based on either California's or New York's law.⁵⁷ The California Art Preservation Act ("CAPA") extends moral rights protection fifty years after the life of the author.⁵⁸ In addition to recognizing the moral rights of authors, CAPA also recognizes a public interest in art by granting California arts organizations standing to seek injunctions to protect the integrity of works of fine art.⁵⁹ The New York Artists Authorship Rights Act ("NYAARA") by contrast does not recognize a public interest in art⁶⁰ and implicitly only provides protection during the life of the author.⁶¹

Some state moral rights statutes are more suitable than VARA for protecting TCEs. For example, in addition to providing moral rights in works of fine art, New Mexico allows protection for craft items⁶²; New York, Louisiana, and Nevada extend protection beyond original works of art to reproductions⁶³; and Louisiana's moral rights law grants moral rights in works falling within certain classes of fine art irrespective of their date of creation.⁶⁴ Permitting moral rights in reproductions could be beneficial for TCEs that, in keeping with their religious and representative functions, are intended to be duplicative of previous TCEs. Also, disregarding the date art was created could open the door to protection for ancient TCEs. Furthermore, California's public interest element could solve the difficulties that arise in trying to identify the appropriate owner or owners of U.S. copyrights.

Stat. Ann. tit. 73 § 2101 (West 1993); R.I. Gen. Laws § 5-62-2 (1995); S.D. Codified Laws § 1-22-16 (Michie 1992); Utah Code Ann. § 9-6-409 (1996).

⁵⁷ *Speaking with a Forked Tongue*, supra note 52, at 117.

⁵⁸ Cal. Civ. Code § 987(g)(1) (West 1982).

⁵⁹ *Id.* § 989.

⁶⁰ See N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 1984 & Supp. 1996).

⁶¹ See *id.* § 14.03.01 (author must assert his moral rights himself).

⁶² N.M. Sate nn. § 13-4B-2.

⁶³ N.Y. Arts & Cult. Aff. Law § 14.03; La. Rev. Stat. Ann. & 51:2153; Nev. Rev. Stat. Ann. 597.740.

⁶⁴ La. Rev. Stat. Ann. § 51:2155(G).

D. IACA and Alaska's Silver Hand Program

The IACA and Alaska's Silver Hand Program are best conceptualized as "truth-in-advertising" statutes that apply specifically to TCEs.⁶⁵ The IACA prohibits the "offer or display for sale [of] any good . . . in a manner that falsely suggests it is Indian produced."⁶⁶ The Act also establishes an Indian Arts and Craft Board ("the Board") that is empowered to certify qualifying Native American products as genuine ("the certification program") and to create and register trademarks on behalf of Native American products and assign them to individual Indians, Indian organizations, or tribes ("the assignment program").⁶⁷ Alaska's Silver Hand Program is analagous to the IACA's certification program except that it is administered on the state level and only native Alaskans are eligible to participate.⁶⁸

Ironically, the IACA's assignment program has never been implemented because under the Lanham Act, the applicant for registration of a trademark – in this case, the Board – must itself use, or in good faith intend to use, the trademark in commerce; it may not assign the trademark.⁶⁹ Accordingly, the only real protection the IACA offers is by way of its certification program. Under both the IACA's certification program and Alaska's Silver Hand Program it is the government that determines whether an article qualifies as authentic. For this reason, the programs have been criticized as being paternalistic.⁷⁰ In addition, IACA regulations imply that Native American artists must first register their own trademarks, thus raising a financial barrier

⁶⁵ See *Speaking with a Forked Tongue*, supra note 52, at 73 (quoting U.S. Dep't of the Interior, Indian Arts & Crafts Bd., The Indian Arts and Crfts Act of 1990, at <http://www.doi.gov/iacb/act.html>).

⁶⁶ 18 U.S.C. § 1159(a).

⁶⁷ See 25 U.S.C. § 305a(g)(1)-(3).

⁶⁸ Alaska Stat. §§ 45.65.010-.070 (Michie 2003).

⁶⁹ See 15 U.S.C. § 1051.

⁷⁰ *Speaking with a Forked Tongue*, supra note 44, at 78.

to participation.⁷¹ Finally, by failing to define the terms “Native American” or “genuine Native American handicraft products,” IACA regulations offers little guidance as to which products qualify for certification.⁷² Moreover, the dual purposes of the IACA, which courts have interpreted to be protecting Native American artists from unfair competition and protecting consumers from unknowingly purchasing counterfeit goods,⁷³ do not address the religious function of TCEs that, as discussed above, may militate against the distribution of certain TCEs, authenticity aside.

E. Foreign Law

TCEs often enjoy greater protection in other countries than they do under U.S. copyright law. For example, an Australian court found that a fiduciary relationship may exist between an Aboriginal artist and his or her tribe requiring the artist to prevent his or her work from being exploited in a manner that would violate tribal law or custom.⁷⁴ Australia has also recognized “cultural harm” as a potential source of damages in copyright cases.⁷⁵ Panama permits collective ownership of copyright-like rights in certain creative works,⁷⁶ while Tunisia provides special copyright protection for works of national folklore.⁷⁷ Finally, in Nigeria, the intentional distortion of TCEs is actually a criminal offense.⁷⁸

⁷¹ See 25 C.F.R. § § 308.2(a) (“[The Board] offers each [qualifying] enterprise the privilege of attaching to its trademark a certificate declaring that it is recognized by [the Board] as an Indian enterprise dealing in genuine Indian-made handicraft products, and that its trademark has the approval of the Board”).

⁷² See *id.*

⁷³ See *e.g.* *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 2d 876, 880-82 (N.D. Ill. 1998).

⁷⁴ *Bulun Bulun v. R&T Textiles Pty. Ltd.*, 157 A.L.R. 193 (1998).

⁷⁵ *Milpurrurru v. Indofurn Pty. Ltd.*, 54 F.C.R. 240 (1993).

⁷⁶ Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, Republic of Panama, Law No. 20 of June 26, 2000.

⁷⁷ See *Speaking with a Forked Tongue*, *supra* note 52, at 43-44.

⁷⁸ *Id.*

V. Conclusion

Some scholars argue that despite the applicability of copyright law to TCEs in certain situations, copyright is actually not the most appropriate legal avenue for protecting TCEs.⁷⁹ Practically speaking, their argument is supported by the difficulties TCEs have in meeting the authorship and related originality requirements of U.S. copyright law, which are firmly rooted beyond the Copyright Act in the Constitution itself. Similarly, the limited duration of U.S. copyrights, though inadequate to protect the religious and representative functions of TCEs, is not only embedded in the Intellectual Property Clause but also consistent with copyright's constitutional purpose of promoting progress. Theoretically speaking, it is precisely this purpose that makes copyright law ill-suited to protect TCEs, which, in traditional cultures, are just as spiritually significant as they are economic, and are not even conceptualized as property to which individual ownership rights can attach.

What, then, is the solution? TCEs appear to be better protected by systems based on moral rights theory than they are under systems based on economic theory because moral rights are premised on the idea that “some part of the artist’s own being or personality is incorporated into [his or her] work.”⁸⁰ This comports with the perception of many tribal members that TCEs embody the identity of the tribe itself. Although VARA does make certain moral rights available to the authors of some visual works of art, the majority of our federal copyright scheme is rooted in economic theory.

One scholar, Nancy Kremers, therefore, suggests expanding state moral rights protection for TCEs.⁸¹ Specifically, she recommends enacting broad coverage to include “indigenous-made jewelry, weavings, pottery, kachina and Eskimo dolls, Native dance and dress paraphernalia,

⁷⁹ See *id.*; see also *Protecting Folklore*, supra note 8.

⁸⁰ See *Speaking with a Forked Tongue*, supra note 52, at 108.

⁸¹ *Id.* at 125.

etc.”⁸² She also advocates for a public interest element, such as the one embodied in CAPA.⁸³ This would not only promote enforcement but also help avoid preemption by providing for a right outside the scope of VARA.⁸⁴ Finally, Kremers counsels that the moral right of integrity could be used to prevent the dissemination of certain TCEs where dissemination in violation of tribal norms could be argued to damage the tribal artists’ reputation.⁸⁵

Another possibility is enacting federal sui generis legislation specifically aimed at protecting the integrity of TCEs. Whether Congress has the authority to enact such a law is beyond the scope of this paper but perhaps the Commerce Clause could be a source of such authority. The fact that Congress passed the IACA suggests that they understand the importance of protecting TCEs. It remains to be seen whether they will acknowledge that this objective has yet to be achieved.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 126.