CREATIVE SOVEREIGNTIES: SHOULD COPYRIGHT APPLY ON TRIBAL LANDS?

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ABSTRACT

The federal Copyright Act grants authors the exclusive right to use their original creative expressions in certain ways. At the same time, the Act pre-empts most equivalent rights to creative expressions established by States. However, the Copyright Act is silent as to its applicability on the lands of Native American Tribes and its preemptive effect on rights sovereign Tribal governments accord to creativity. With Tribes and Tribal members increasingly engaged in the global creative economy and in litigation to defend their intellectual properties, the status of the Copyright Act on Tribal lands has become a critical issue that Congress or the courts must now address.

Copyright's applicability on Tribal lands is certainly not a foregone conclusion. In the absence of clear direction from Congress and the Supreme Court, federal circuit courts of appeal have developed strikingly different doctrinal approaches for determining when a "generally applicable federal law" like the Copyright Act should be allowed to encroach on Tribes' self-governance over their territories and membership. On one hand, the Tenth Circuit and those that follow its reasoning, have adopted a presumption *against* applying general federal laws on Tribal lands without an express directive from Congress, out of respect for Tribal sovereignty. The Ninth Circuit, on the other hand, and those that follow its reasoning have adopted the opposite presumption, that general federal laws *do* apply on Tribal lands, unless such laws interfere with internal Tribal affairs or an existing Tribal treaty right. As a result, at least one federal court has suggested that the Copyright Act does not apply to Tribes under the Tenth Circuit framework, while two others appear ready to apply the Copyright Act on tribal lands under the Ninth Circuit's approach.

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The stakes of applying the Copyright Act on Tribal lands may be quite high for Tribes. Drawing on community-partnered ethnographic research conducted with the Hopi Tribe, I show how federal copyright law supports certain forms of Tribal creativity intended for off-reservation markets. But for locally circulating creativity — including forms of cultural or ceremonial creativity that help maintain Tribal identity, social relations, and traditional sources of authority — applying Copyright may very well disrupt the exercise of Tribal sovereignty and cause substantial harm to Tribal creative economies.

Based on this research, I argue that the Copyright Act should apply on Tribal lands, but only to the extent permitted by each Tribe. Individual Tribes would likely take distinct approaches to copyright policy. Presumably most Tribes would allow the Copyright Act to protect works created on Tribal lands that are intended for consumption by publics beyond the Tribe. In exchange, those Tribes would allow for enforcement of copyright infringement claims brought by non-members against Tribal members who misappropriate works created off-reservation. However, many Tribes might decide not to allow copyright to apply at all, or might allow copyright to be the exclusive body of law governing creative works.

What is crucial is that where Tribal intellectual property laws, protocols, or customary laws occupy the same field as the Copyright Act, Tribal entitlements and remedies, not federal ones, should govern creativity occurring on Tribal lands, with federal copyright law providing enforcement of Tribal intellectual property rights beyond a Tribe's borders. Otherwise, the unilateral imposition of the Copyright Act on tribal creativity, to the exclusion of Tribal laws, impermissibly invades Tribal sovereignty as articulated in both current federal policy and the international norms enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

CONTENTS

INTRODUCTION

When an Indigenous person writes a new song, creates a new sculpture, or makes a new film on Tribal lands, is it protected by the Copyright Act?[1] Elsewhere in the United States, authors and creators likely take for granted the Copyright Act's grant of property interests in their literary, musical, dramatic, choreographic, and other copyrightable creations. These entitlements provide authors a set of important, economically valuable rights, including the right to prevent others from reproducing, deriving new works from, distributing, public performing or displaying, and in some cases streaming their creations.[2] This certainty within the American copyright system arises, in part, from Congress's explicit directive that federal copyright law "exclusively govern[s]" works within copyright's subject matter, and preempts "the common law or statutes of any State" that might conflict with its scheme of rights, remedies, or limitations on liability.[3]

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[1] *See* 17 U.S.C. § 102(a) (granting copyright rights in "original works of authorship fixed in any tangible medium of expression . . . .").

[2] *Id.* § 106.

[3] *Id.* § 301(a).

But, what about works created within the territories of federally recognized Indian Tribes? Tribes are not States; they are sovereign, yet dependent, nations generally operating outside of the American constitutional structure.[4] As such, many Tribes historically possessed and continue to maintain aboriginal intellectual property laws and policies, many of which likely predate the United States. If Tribes have always exercised sovereignty over their cultural production and intellectual creations, and that sovereignty perpetuates today, should federal copyright law, then, govern creativity happening on Tribal lands?

As it turns out, this long-unanswered question is complex and creates significant uncertainty for Indigenous authors given the global nature of today's creative economy. Consider an Indigenous artist that incorporates traditional designs in her work — designs which are owned and controlled by her family or clan under Tribal law, but which are considered to be in the public domain under American copyright law. Does copyright relegate those designs to the public domain, where anyone — Tribal member or not — can freely use them without restriction? Or does Tribal law control these designs and this artist's use of them?[5]

Or perhaps consider a tourist that travels to Tribal lands and secretly takes an iPhone video of a culturally sensitive ceremony in disregard for Tribal laws, protocols, and clearly displayed warning signs prohibiting such recording. The tourist then posts the video on YouTube or Facebook, where the video circulates globally. Could the tourist be subject to the Copyright Act's anti-bootlegging statute for this kind of conduct occurring

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[4] U.S. CONST., art. I, § 8, cl. 3 (differentiating between "foreign nations," "the several states," and "the Indian Tribes."); *see* Cherokee Nation v. Georgia, 30 U.S. 1, 28 (1831) (deeming the Cherokee Nation's relationship to the United States not as a State of the union, but as "domestic dependent nations"); *see also* Worcester v. Georgia, 31 U.S. 515 (1832) (describing the Cherokee Nation as "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force . . . ."); *but see* Nevada v. Hicks, 533 U.S. 353 (2001) (denying Tribal jurisdiction over State police officers conducting searches on Tribal lands); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. At the same, time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" (Internal citations excluded.).

[5] Often these kinds of creative materials are considered to be in the public domain because they are not considered "original works of authorship." 17 U.S.C. § 102(a), (b) or because their age would exceed the duration of copyright protection. *Id.* §§ 302-304.

on Tribal lands?[6] What about civil liability under Tribal cultural property laws for the same behavior?[7]

How about a Native rock band that plays covers of widely known popular songs protected by federal copyrights at venues across Indian Country, most of which are unlikely to maintain blanket licenses with ASCAP, BMI or SESAC?[8] Can these musicians or the venues where they perform be sued for actual or contributory copyright infringement by the songs' composers or by the composers' performing rights organizations?

Finally, consider a Tribe that has created and documented a new set of original ceremonial songs and dances, and has registered them with the U.S. Copyright Office? Sometime later, upon learning that other Tribes are performing these songs and dances without permission, the Tribe contemplates bringing actions for copyright infringement against them. Can one Tribe bring suit against another Tribe for copyright infringements occurring within the other Tribe's territory?

Given the current state of federal law, the status of copyright rights and Tribal creative rights on Tribal lands remain precariously uncertain. This uncertainty exists for two reasons. First, Congress has remained silent as to whether or not it intended copyright to apply on Tribal lands, and whether it intended to preempt Tribal laws occupying the same field as copyright. Indeed, there is no mention of Tribes in either the text of the statute or its voluminous legislative history.[9] Second, the U.S. Supreme Court has yet to resolve a glaring division between the Federal Circuit Courts of Appeals as to the effect of general federal statutes, silent as to Tribes, on activities happening on Tribal lands. As a result, the applicability of the federal Copyright statute, and Tribal intellectual property laws, principles and protocols governing the same field, to creativity happening on Tribal lands remains unclear today.

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[6] *See id.* § 1101(a)(1) (making those who record "sounds and images of a live musical performance in a copy or phonorecord," or who reproduce it, transmit it to the public, or distribute it, without consent of a performer subject to federal remedies for copyright infringement).

[7] *See e.g.*, Res. H-70-94, Hopi Tribal Council (1994) (claiming all recordings of "esoteric ritual, ceremonial and religious knowledge" as tribal property).

[8] Some Tribal venues may purchase licenses from performing rights organizations (PROs) simply to avoid potential litigation. These may include entertainment or casino enterprises located on Tribal lands. *See* Bob Galombeck, *Performing Rights Organizations and the Casino Industry*, 24 INDIAN GAMING 26 (2014). The extent to which the federal Copyright Act may extend to creativity occurring at establishments regulated by the federal Indian Gaming Regulatory Act 25 U.S.C. § 2701 *et. seq.* is beyond the scope of this article.

[9] Multimedia Games v. WLGC Acquisition Corp., 214 F. Supp.2d 1131, 1135 (N.D. Okla. 2001) (finding that "the text of the Copyright Act of 1976 and the accompanying legislative history of the statute did not affirmatively contemplate the inclusion of Indian tribes.").

Only the Northern District of Oklahoma has so far directly opined on the Copyright Act's applicability on Tribal lands. It did so in a copyright infringement suit brought by a gaming equipment manufacturer against an economic development agency of the Miami Tribe of Oklahoma.[10] Drawing on a framework developed by the Tenth Circuit for other general federal laws, the court held that the Copyright Act's silence as to Tribes meant the Tribe could not be subject to copyright infringement claims under the Act. "[I]n order to conclude Congress intended to subject Indian tribes to the Copyright Act," the court reasoned, "this Court would need to infer such intent which does not unequivocally apply to tribal entities." Thus, at least in Northern Oklahoma, the Copyright Act apparently does not apply to Tribes.[11]

But not all courts follow the Tenth Circuit framework. Indeed, a majority of Circuits have espoused a competing framework established by the Ninth Circuit that presumes the opposite — that general federal laws *do* apply to Tribes, unless those laws interfere in a Tribe's internal self-governance or conflict with a relevant treaty right.[12] Some courts have hinted that the Copyright Act may be applicable on Tribal lands under this principle should such a question be squarely before them.[13] The result is that authors and creators working within the Navajo Nation, for example, whose landmass is split between the Ninth and Tenth Circuits, may theoretically have entirely different intellectual property rights depending on which side of the Nation they live on.

This uncertainty experienced by Tribal members in the field of copyright law is not unique to copyright law. It was only in 2014 that a federal district court for the first time ruled that the Lanham Trademark Act applied to the Navajo Nation's name, allowing the Tribe to defend that name against unauthorized commercial use by retailer Urban Outfitters.[14] But

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10 *Id.* at 1133.

11 *Id.* at 1137.

12 *See generally* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (stating the current test); *see also* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (dicta); Part I, *infra*.

13 *See, e.g.*, Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357-58 (2d Cir. 2000) (dismissing copyright infringement suit against Tribe on sovereign immunity grounds regardless of whether the Copyright Act applies, but citing cases upholding the presumption that general federal statutes apply on Tribal lands); J.L. Ward Assocs., Inc., v. Great Plaints Tribal Chairmen's Health Bd, 842 F. Supp. 2d 1163, 1178 (D.S.D. 2012) (same).

14 Navajo Nation v. Urban Outfitters, 214 U.S. Dist. Lexis 187452 (D.N.M. Sept. 19, 2014). Other legislation had been enacted to provide protection of Native American identifying marks. For example, the Indian Arts and Crafts Act was enacted in 1935 to prevent the unauthorized or illegitimate use of Indian identity in the sale of products, 25 U.S.C. § 305–305f, and the Indian Arts and Crafts Board created by the Act was empowered to secure trademarks for products and certifi-

the decision was a limited one: in an unpublished opinion, the court reasoned that the Act could apply to the Nation as a property owner, but reserved judgment on whether the Act displaced the Tribe's sovereignty over matters of trademark law.[15]

The applicability of the federal Patent Act to Tribes has also recently been raised, albeit in an indirect way. In 2017, the Federal Circuit affirmed a Patent Trial and Appeal Board decision that a portion of the Patent Act, its administrative inter-partes review (IPR) framework, applied to patents the St. Regis Mohawk Tribe had acquired from pharmaceutical company Allergan.[16] In a unanimous decision, the Circuit allowed IPR to proceed, rejecting the Tribe's argument that, as a sovereign Tribal government, it was immune from suit.[17] The ruling thus appears consistent with the notion that Tribes as owners of American intellectual property can be subject to federal laws governing that property, while not deciding the more complex question of whether federal intellectual property regimes supplant Tribal laws and regulatory frameworks occupying the same field.

In this article, I argue that the question of whether copyright should apply on Tribal lands is inseparable from broader questions about the nation-to-nation relationship between the United States and Tribes. Indeed, the answer turns on concerns much larger than federal doctrines used to resolve ambiguities left unresolved by Congress. Rather it turns on a more fundamental legal question that can no longer be ignored: whether the United States' colonization of Indigenous Peoples justifies its authority to control the policies of governments that are thousands of years its senior. I argue that it cannot. Absent a consensual transfer of Indigenous peoples' sovereignty over their creative expressions to the United States, the power to accept or reject copyright as a governing framework for Indigenous creativity should remain with Tribes, not federal judges or even Congress acting alone.

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cation marks for Indian tribes and groups, 25 U.S.C. § 305a (granting power to "create .... for an ... Indian tribe ..., trademarks of genuineness and quality for ... the products of [a] ... particular Indian tribe ...."). Thus, it seems reasonable to infer that Congress intended federal trademark law to apply to Tribes. However, the IACA was passed prior to the Lanham Act.

15 *Id.* The trademark dispute was eventually settled, and the ruling did not receive subsequent appellate review.

16 *See* Mylan Pharm., Inc. v. Saint Regis Mohawk Tribe, 2018 WL 1100950 at *5 (P.T.A.B. Feb. 23, 2018) (holding that inter-partes review was a generally applicable federal law, and was enforceable against the Tribe as it did not meet any of the *Coeur d'Alene* exceptions), *aff'd* Saint Regis Mohawk Tribe v. Mylan Pharm., Inc., 896 F.3d 1322 (Fed. Cir. 2018).

17 *Id.*

The stakes of this question are quite high for Tribes and their members, but also for the integrity of the United States and its intellectual property system. Thousands of Tribal artists, authors, and other creators, depend on the Copyright Act to protect their work as it circulates within domestic and international markets.[18] Many of the 574 federally recognized Tribal Nations in the United States as well as State recognized and unrecognized Indigenous groups[19] have vibrant creative industries which are significant drivers of local and regional economies.[20] Still, many Tribal creators produce and circulate their work according to established community norms, local protocols, and economic principles which provide the necessary legal infrastructure to support their work.

The potential harm to Tribal sovereignty if the Copyright Act is unilaterally imposed on Tribes is significant. On its surface, copyright is a grant of property rights to any author — regardless of their racial, ethnic or political identity — to incentivize creativity. But, as I explain in this article, copyright is at bottom a governance framework grounded in specific policy choices made by the people, the Congress, and the courts of

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18 The Indigenous creative sector in the United States has been woefully understudied. However, the limited data available show that a substantial number of individuals living on Tribal lands work in creative professions. The Bureau of Labor Statistics reports that approximately 14.7% of American Indian and Alaska Natives nationwide (236,000 individuals) are employed in "professional or other occupations," a subcategory of which includes "arts, design, entertainment, sports, and media occupations." Mary Dorinda Allard & Vernon Brundage, Jr., *American Indians and Alaska Natives in the U.S. Labor Force*, Table 4, U.S. BUREAU OF LABOR STATISTICS MONTHLY LABOR REV. (November 2019). Other studies suggest the number of Individuals producing art within Tribal communities may be much higher. One study reports that "an estimated 30 percent of Native peoples are practicing or potential artists." FIRST PEOPLE'S FUND, ESTABLISHING A CREATIVE ECONOMY: ART AS AN ECONOMIC ENGINE IN NATIVE COMMUNITIES 7 (2013). Others show that on specific reservations the number of practicing artists may be as high as 40-43%. FIRST PEOPLES FUND, INVESTING IN THE INDIGENOUS ARTS ECOLOGY 15 (2018).

19 This article deals exclusively with federally-recognized Tribal lands and thus leaves unresolved the status of works created on lands of state recognized and unrecognized groups.

20 According to the 2019 American Community Survey, the percentage of employed adults living within the boundaries of Tribal Nations working in the "arts, entertainment, and recreation, and accommodation and food services" industries regularly hovered around 10%. *See* U.S. Census Bureau, American Community Survey 1-year Estimates, Table S2405 (2019), https://data.census.gov/cedsci/table?q=S2405&g=0100000US.250000&tid=ACSST1Y2019.S2405&moe=false&hidePreview=true (Navajo Nation, 11%; Cherokee Nation, 10%; Cheyenne-Arapaho Nation, 9%; Chickasaw Nation, 9%; Choctaw Nation, 10%; Citizen Potawatomi Nation, 8%; Creek Nation, 10%; Ft. Still Kiowa, Apache, Comanche, 9%; Knik, 6%; Cher-O-Creek, 10%; Coharie, 11%; Lumbee, 12%; and United Houma Nation, 12%).

the United States. These policy choices include (1) the decision to only protect works that exist independently of bodies and collectives — works "fixed in a tangible medium of expression."[21] They also include (2) the choice to privilege primarily European-descended creative forms that can be easily abstracted from their material reality.[22] And, (3) they instantiate a particular form of economic relation to catalyze the production of creativity.[23] This form of economic relation encourages privatization of creativity for the benefit of individuals rather than promoting inclusivity and relationships of reciprocity for the purpose of achieving collective prosperity[24] —economic relations which may ground Indigenous creative economies.

Many other policy preferences could be added to this list, such as making copyright ownership interests finite;[25] excluding protection for histories, ideas, or traditional forms of creativity from the scope of copyright[26]; and allowing exceptions for parody, transformative creativity, criticism, and other uses that resonate with American free speech ideals.[27] Each of these policy preference is deeply rooted in facets of Euro-American culture, reflecting philosophies and ideologies Indigenous peoples may not share.

In an era when Indigenous Peoples' rights to self-determination, particularly in the domain of culture, have been reiterated time and time again through widely recognized international norms, Congressional legislation, and executive branch policy, it is vital that Tribal rights and policies governing ownership and circulation of creativity be given recognition and

21 17 U.S.C. § 101 ("fixed"); § 102(a); *see* Part II.B *infra*.

22 17 U.S.C. § 202; *see* Part II.B *infra*.

23 *See* Part II.B *supra*.

24 *See* Mazer v. Stein, 347 U.S. 201, 212 (1954) (stating that "the copyright law . . . makes reward to the owner a secondary consideration." However, "[t]he economic philosophy behind the [Intellectual Property Clause] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in Science and Useful Arts. [internal quotations and citations omitted.]).

25 *See* U.S. CONST. art I, § 8, cl. 8; 17 U.S.C. § 302-304; Eldred v. Ashcroft, 537 U.S. 186, 212-13 (2003) (explaining that setting the duration of copyright is a policy choice reserved for Congress to make.).

26 *See* 17 U.S.C. § 102(b); *see* MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.03[B][4] (2020) (describing the doctrine of scenes a faire, which "denies copyright protection to those elements that follow naturally from the work's theme, rather than from the author's creativity."); *see also* Hoeling v. Universal City Studios, 618 F.2d 972, 979-80 (2d Cir. 1980) (holding that the unauthorized use of a historian's theory of a particular historical event in another's documentary was not copyright infringement as a matter of public policy in encouraging historical research and dissemination).

27 *See* 17 U.S.C. § 107.

deference by the United States. Recognizing the weight of domestic and international policy in this area, I argue that the question of whether the Copyright Act should apply on Tribal lands ultimately should be a question for Tribes themselves to answer. Ideally, each Tribe should have the opportunity to negotiate a bilateral agreement with the United States, determining to what extent the Copyright Act should apply on Tribal lands, and to what extent Tribal protections for creativity should be enforceable within the United States. Such would seem to be the most appropriate mode of agreement between sovereign nations.

But until such agreements are in place, the Copyright Act should be enforceable on Tribal lands only where creative works are not already governed by Tribal law and policy. Where a Tribe has not established protections or regulatory frameworks for a given category of creativity, the Copyright Act should apply so as to provide protections for creative works until such Tribe has established policies and protections of its own. Finally, the United States should enact legislation allowing for the use of copyright remedies to enforce Tribal Nations creative' rights off of Tribal lands until formal agreements outlining reciprocal enforcement of Tribal and the United States' intellectual property laws have been solemnized.

This kind of reverse pre-emption framework makes sense in the context of federal Indian law. As sovereigns pre-existing the United States, Tribal Nations have long been understood to retain all attributes of sovereignty until such sovereignty has been conveyed to the United States by treaty or formal agreement,[28] has been diminished through cession of their territory,[29] or that sovereignty has been divested explicitly by Congress or through the imposition of colonizing structural constraints.[30] Presumably, the right to govern creative and cultural production has never been formally conveyed by Tribes or taken from them. Indeed, the United States continues to recognize that Tribes hold sovereignty in this area even after centuries of actively seeking to punish, appropriate or destroy Indigenous creativity.[31] And yet, colonization has kept Tribal Nations from enforcing their intellectual property rights within the borders of the United States and beyond, instead requiring them to become dependent on copyright to protect and promote their work. If we as a nation are firmly committed to

[28] *See* United States v. Winans, 198 U.S. 371, 381 (1905) (articulating the doctrine that aboriginal rights not granted to the United States by treaty are reserved to the Tribes).

[29] *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (explaining that "If Congress wishes to break the promise of a reservation, it must say so.").

[30] *See* Montana v. United States, 450 U.S. 544, 564 (1981) (asserting that certain attributes of Tribes' sovereignty had been implicitly divested "through their original incorporation into the United States as well as through specific treaties and statutes.").

[31] *See* Part III.A.

supporting Indigenous self-determination in matters of culture—reversing the intellectual injustices of the past—we need a federal copyright policy that recognizes and promotes this self-determination.

Before proceeding, I recognize that many who work in the area of intellectual property have not encountered issues surrounding Indigenous sovereignty, settler-colonialism, or federal Indian law. Indeed, some might find the question asked here unnecessary or perhaps even troubling. After all, there has never been a question as to whether federal copyright law applies to qualifying works authored within the territorial boundaries of individual States in the U.S. Why should Tribal lands be treated any different? And, if there were some doubt as to the applicability of the Copyright Act on Tribal lands, why have Tribes not raised the issue until now — nearly 230 years since the first federal Copyright Act was passed?

Intellectual property's silence regarding Indigenous peoples is a direct result of colonization. Indigenous nations governed the land currently known as the United States since time immemorial, and many maintained their own intellectual property systems, prior to European settlement.[32] Following the arrival of Europeans, some of the first resources exported to Europe were Indigenous intellectual properties: music and dance, agricultural products and techniques, artworks, traditional knowledge, and many others.[33] While settler empires clearly valued the tremendous resources they found on the lands of Indigenous peoples in the Americas — both tangible and intangible — they did not necessarily view Indigenous people's sovereignty as being exclusive over these resources, nor did they consider Indigenous laws as binding on them.[34] During the first century of

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[32] *See generally* WORLD INTELL. PROP. ORG., INTELLECTUAL PROPERTY & GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (2020), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf; Elizabeth Burns Coleman, Rosemary J. Coombe, Fiona MacArailt, *A Borken Record: Subjecting 'Music' to Cultural Rights in* THE ETHICS OF CULTURAL APPROPRIATION 173-210 (James O. Young & Conrad G. Bruk eds., 2009).

[33] Substantial collections of American cultural materials, biological specimens, and many others were acquired by European museums in the seventeenth through nineteenth centuries. *See, e.g.*, *Sir Hans Sloane*, THE BRITISH MUSEUM, https://www.britishmuseum.org/about-us/british-museum-story/sir-hans-sloane (last visited Dec. 26, 2020) (describing how Indigenous materials became part of the British Museum's North American collections.) Domesticated indigenous foods exported from the Americas to Europe include tomatoes and potatoes, wild rice (manoomin), pumpkins and other squash, cranberries, peanuts, cacao, and many others. *10 Indigenous Foods Thought to be European*, INDIAN COUNTRY TODAY (June 30, 2014), https://indiancountrytoday.com/archive/10-indigenous-foods-thought-to-be-european-uTmaPLGaLUa33WWgvgmSVQ.

[34] In *Johnson v. M'Intosh*, 21 U.S. 543, 567-68 (1832), a case involving a dispute over the validity of a grant of real property from the Piankishaw Tribe to an American settler, the Supreme Court held that property rights established by Indigenous

the United States' existence most federal laws did not apply to Tribes,[35] nor did tribes have access to federal courts to defend their rights until well into the twentieth century.[36] As a result, interpretations of intellectual property statutes in tribal contexts have been rare until the last few decades. And when Tribal intellectual property issues have been litigated they have sometimes taken years to resolve due to their complexity.[37] Thus, ambiguities in the status of Tribal intellectual properties today arise not from a failure on the part of Tribes to bring timely legal action, but from the lethargy of the United States toward making courts and remedies available for the legal, political and economic harms caused by colonization. Thus, the time has finally arrived where Tribes have both the resources and access to courts necessary to vindicate their intellectual property rights.

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sovereigns could be superseded by land grants issued by European sovereigns. The court reasoned that, "the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized [sic] states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations . . . . The whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives . . . . A nation that has passed under the dominion of another, is no longer a sovereign state." *But see* Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 235 (1985) (holding that the Oneida Indian Nation, while owning property pursuant to aboriginal law, could enforce those rights through United States federal common-law claims).

35 *See* Part I *infra.*

36 *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 615-27 (2006) (explaining that several barriers have prevented Tribes from bringing concerted actions to defend their property rights until the 1960s, including the lack of attorneys specializing in Native American law, few financial resources to pay for attorneys, inability to hire attorneys to represent Tribes without first obtaining approval from the federal government until 2000, lack of federal question jurisdiction until 1875, lack of capacity to sue in federal courts until 1966 without the consent of the United States, and the availability of primary and remedial rights where Congress had not spoken on their availability for Tribes, etc.).

37 *See, e.g.*, Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 450 (E.D. Va. 2015) (noting that the dispute over whether the term "Redskins" as the Washington professional football team's name was in violation of the Lanham Act's prohibition on disparaging marks had been ongoing since 1992.); *see generally* Angela R. Riley and Kristen A. Carpenter, *Owning Red: Toward a Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2017) (discussing the range of legal challenges facing Tribes seeking to use intellectual property law to defend their rights to intangible culture.).

This article proceeds in three parts. Part I examines the current doctrines the federal circuit courts of appeal have established to answer questions about the applicability of general federal laws, like the Copyright Act, to Tribes. As I hope to show, these doctrines are remarkably blunt tools for parsing intersections of law as complex as the regulation of creative expression within the territories of Tribal sovereigns. Finding the prevailing doctrines to be inadequate to resolve the question of copyright's applicability to Tribes, I turn in Part II to an ethnographic study of the effects the Copyright Act on Tribal creative production and Tribal sovereignty. Using various forms of Hopi creativity as examples, I show how the Copyright Act may both benefit, and at times severely interfere with, Hopi sovereignty. In Part III, I propose a new approach to resolving the question at hand based on what appears to be growing global consensus over the role of Indigenous peoples in determining the futures of their cultures and creative expressions.

I. THE LEGAL EFFECT OF COPYRIGHT'S SILENCE AS TO TRIBES

Whether the United States' Copyright Act applies to creative works within the borders of Native American Tribes remains an unresolved legal question. Federally recognized Indian Tribes are understood to be sovereign nations,[38] possessing an inherent "right to . . . self-government" acknowledged by the United States.[39] It would seem that the imposition of United States copyright law within Tribal territories and without Tribes' consent would violate that sovereignty.[40] Indeed, such a theory was recog-

38 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 73, 75 (6th ed. 2014) (explaining that: "At the time of the European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended upon no outside source of power to legitimize their acts of government. . . . . Thus, a tribe's right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government. The relevant inquiry is whether any federal limitation exists to *prevent* the tribe from acting within the sphere of its sovereignty, not whether any authority exists to *permit* the tribe to act." (Internal citations omitted).

39 Exec. Order. No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

40 The Executive Branch has indicated that Tribes and the United States exist in a government-to-government relationship conceptualized as "domestic dependent nations." *Id.* § 2, 3(c) (recognizing the trust responsibility the federal government owes to Tribes and instructing federal agencies that "[w]hen undertaking to formulate and implement policies that have tribal implications" they should (1) encourage Tribes to develop their own policies, (2) defer to Tribal standards, and (3) consult with Tribes to determine if federal policies should be limited or rejected in favor of alternatives that "preserve the prerogatives and authority of Indian tribes.").

nized early on in the Supreme Court's federal Indian law jurisprudence. For example, in an 1884 suit brought by John Elk, a Native American man who sought to enforce what he believed was his statutory and constitutional right to vote in a federal election, the Court denied Elk the benefits of federal law stating that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[41] Thus, prior to 1884, it seems unlikely that the Copyright Act would have accorded rights to works created by Tribal members nor would it have been enforceable on Tribal lands absent a treaty or other agreement to the contrary.

But much has changed since John Elk was denied his federal rights. By 1924, all Tribal members were deemed U.S. citizens.[42] And between 1887 and roughly 1970, Tribes suffered through decades of often tragic, unilaterally imposed federal policies during which their territorial sovereignty was diminished,[43] reorganized,[44] terminated,[45] restored,[46] and more recently recognized as forming a "government-to-government" relationship with the United States.[47]

Coinciding with these extreme shifts in Congressional policy, federal courts have forged common law doctrines that have attempted to justify the increasingly invasive posture of the United States toward Tribes. In 1885, for example, the United States Congress imposed its Major Crimes

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[41] Elk v. Wilkins, 112 U.S. 94, 99-100 (1884) (rejecting the claim that John Elk, born within the boundaries of the United States and a member of an undisclosed Native American Tribe, was a citizen of the United States by virtue of the Fourteenth Amendment, and thus entitled to vote under the Fifteenth Amendment).

[42] Indian Citizenship Act, Public Law No. 68-175, 43 Stat. 253 (Jun. 2, 1924).

[43] General ("Dawes") Allotment Act (inaugurating a series of Acts in which reservations were parceled out in 40-80-acre parcels to Tribal members, with remaining lands (often in the thousands or millions of acres) acquired by the United States for settlement and other federal purposes. The sovereign status of these acquired lands remains a source of ongoing litigation. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[44] Indian Reorganization Act, 25 U.S.C. § 461 et seq.

[45] *See generally* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 106 (2020) (describing the process through which Congress between 1943 and 1961 terminated the federal-Tribal relationship between numerous Tribal governments, disposing of their lands and making them subject to State rather than Tribal and Federal jurisdiction).

[46] *See, e.g.*, Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (repealing prior termination of federal supervision over the property and members of the Menominee Tribe of Wisconsin and reinstituting the Tribe as a federally recognized sovereign Indian Tribe).

[47] *See, e.g.*, Executive Order 13175 § 2(b), Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000) (acknowledging that as a matter of federal policy the relationship between Tribes and the federal government is "government-to-government").

Act on Tribal lands.[48] This extension of federal law into Tribal territories brought about near immediate litigation over its constitutionality.[49] The United States Supreme Court ultimately upheld the Act under its newly crafted theory of federal plenary power over internal Tribal affairs, finding that Congress held a "duty of care" toward Tribes, which justified an extra-constitutional legislative power over them. [50] In 1903 the Supreme Court used that theory to justify Congress'unilateral abrogation of treaties with Tribes, denying Tribes both judicial review and just compensation for the loss of their treaty rights.[51] Federal judicial review has since been extended to claims for just compensation in the taking of recognized Tribal lands and natural resources.[52] But the perverse notion that Congress may do as it pleases with Tribes without their consent because it has a duty of care following centuries of colonization remains a precarious, yet-to-be-overturned doctrine that would tend to trivialize the federal government's characterization of the United States-Tribal relationship as truly "government-to-government."[53]

Following *Kagama* and *Lone Wolf*, general federal laws that Congress makes explicitly applicable to Tribes continue to be deemed enforceable by the United States on Tribal lands, whether or not Tribes consent to

48 Act of Mar. 3, 1885, 23 Stat. 385 (codified at 18 U.S.C. § 1153).

49 *See* United States v. Kagama, 118 U.S. 375 (1886).

50 *Id.* at 384 ("It seems to us that [applying the Major Crimes Act to Tribal members on Tribal lands] is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Depended for their political rights . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government and the treaties in which it has been promised, there arises the duty of protection, and with it the power." [emphasis in original].). The opinion then makes the remarkable claim, without citation, that such a power had always existed.

51 Lone Wolf v. Hitchcock, 187 U.S. 553, 565-67 (1903) (holding that an equitable action to remedy fraudulent misrepresentation, concealment, and violation of a federal-Tribal treaty by Congress could not be sustained by federal courts because Congress held "[p]lenary authority" over the treaties and property of Indian Tribes. As the treaty-making power "has always been deemed a political one, not subject to be controlled by the judicial department of the government," determinations of whether to abrogate a treaty lay "solely within the domain of the legislative authority," and therefore out of reach of judicial review.).

52 *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 413 (1980) (finding that *Lone Wolf*'s conclusion that "relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review" had "long since been discredited" in subsequent cases).

53 *See* Montana v. United States, 450 U.S. 544, 563-64 (1981) (theorizing that "through their original incorporation into the United States [i.e., colonization] as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty.").

those laws.[54] However, when Congress has remained silent as to whether a general law applies on Tribal lands — as is the case with the federal Copyright Act — the enforceability of that law depends on a patchwork of common law frameworks generated by the federal circuit courts of appeals. Some of these frameworks derive from a single-sentence Supreme Court dictum, while others draw from interpretive principles the Supreme Court has used for decades to construe provisions of treaties. What is remarkable is that these methods of statutory interpretation yield wildly differing results. Given how infrequently Congress has considered Tribes' interests when legislating on a national level, and how divergent these federal courts' methodologies are, it is perhaps no surprise that the federal circuits have often reached opposite conclusions on the application of a single statute to Tribes within the United States.

Recent scholarship has aptly restated the current doctrine on the applicability of general federal laws on Tribal lands in substantial detail.[55] Therefore, I give only a brief overview of contemporary Supreme Court and federal circuit courts of appeal approaches to this issue in the subparts that follow. I then conclude this Part by applying each approach to the Copyright Act.

A. The Supreme Court's Tuscarora *Dictum*

The Supreme Court has not directly addressed the applicability of general federal laws on Tribal lands for nearly 125 years. However, in 1960 the Supreme Court offered a single-sentence statement in *Federal Power Commission v. Tuscarora Indian Nation* suggesting a default rule that general federal laws typically apply to Tribes. The statement has since caused significant confusion among lower federal courts, leading to a substantial circuit split.

In *Tuscarora*, the Tuscarora Nation challenged the application of the Federal Power Act to land it owned. The Power Authority of the State of New York had obtained a license from the Federal Power Commission (FPC) to build a new hydroelectric project near Niagara Falls, which would have resulted in the intentional flooding of roughly one quarter of

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[54] A heightened burden of proof is required when Tribe's treaty rights are abrogated by a statute. As discussed, *infra*, Congress must express its intent to abrogate Tribal treaty rights, or the legislative history must show that Congress contemplated the treaty right and decided to abrogate that right. United States v. Dion, 476 U.S. 734, 738-40 (1986).

[55] *See,* Bryan R. Lynch, *Silence is Anything but Golden: Laws of General Applicability in Indian Country*, 42 AM. INDIAN L. REV. 207 (2017); Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIVIL RTS & SOC. JUST. 123 (2016); Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, 62 FED. LAW. 64 (Sep. 2015).

the Tuscarora Nation's land.[56] After receiving the license from the FPC over the Tribe's objection, the Power Authority used an eminent domain provision in the Federal Power Act to condemn the Nation's land. Tuscarora appealed both the FPC license[57] and the condemnation action, arguing in part that generally applicable federal laws like the Power Act did not apply on Tribal lands per *Elk v. Wilkins*.[58]

The argument was an odd one because the Act is *not* in fact silent as to Tribes' interests: its definition of "reservation," for example, explicitly refers to Indian Tribes.[59] Nonetheless, the Court proceeded to declare "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[60]

That sentence has since gone on to form the basis of the Ninth and several other Circuit's approaches to resolving questions of federal law on Tribal lands, while the Tenth Circuit (and nearly all commentators) reject these words as non-binding dicta.[61] As I discuss in Part I.B, the Ninth Circuit and others that follow its approach have established a presumption, following *Tuscarora*, that general federal laws apply to Tribes. But as I explain in Part I.C, the Tenth Circuit and those that follow its reasoning

56 362 U.S. 101, 105 (1960).

57 The Federal Power Act prohibits licenses that "interfere or be inconsistent with the purpose for which such reservation was created or acquired. 16 U.S.C. § 797(e). The term "reservation" is defined in the Federal Power Act as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws . . . ." 16 U.S.C. § 796(2).

58 362 U.S. at 115-16.

59 The Federal Power Act actually included "tribal lands embraced within Indian reservations" within its definition of "reservation," but since the Nation's land near Niagara Falls was owned by the Nation in fee simple rather than held in trust for the Nation by the federal government, the court held otherwise. Such a reading of the term in other federal statutes is not so limited. *See*, McGirt v. Oklahoma 140 S. Ct. (2020) (holding that a "reservation" for jurisdictional purposes under 18 U.S.C. 1151(a) can include land held in fee simple by a Tribe. This definition of "reservation" is broadly applied in both criminal and civil matters to define the boundaries of "Indian Country."); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (holding that "reservations" for jurisdictional purposes under 18 U.S.C. § 1151 may include both "formal" and "information" reservations).

60 362 U.S. at 116.

61 *See, e.g.*, 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 45, § 2.03 ("[W]hen the Supreme Court declared that 'a general statute in terms applying to all persons includes Indians and their property interests' . . . the statement was not part of the Court's holding or necessary to it, because ample evidence supported congressional intent to apply the particular statute to Indian property.").

holding that a contrary presumption exists — that general federal laws *do not* apply to Tribes.[62] Both approaches, however, provide a number of exceptions. Finding neither approach satisfying, some Circuits in recent years have begun to articulate alternatives to these approaches, discussed in Part I.D, but none of these have been widely adopted.

The Supreme Court has not yet clarified whether the *Tuscarosa* dictum is in fact the law, or whether any of the lower court approaches should be applied in cases where Congress is silent as to a federal law's applicability on Tribal lands. Consequently, as I show in Part I.E, lower courts' have reached seemingly opposing results regarding whether the Copyright Act applies on Tribal lands.

B. The Ninth Circuit Approach

The Ninth Circuit — and the Second, Sixth, Seventh, and Eleventh Circuits who follow its reasoning — have adopted *Tuscarora*'s dictum as thier general rule regarding enforcement of generally applicable federal laws on Tribal lands. However, most courts have substantially qualified the *Tuscarora* rule, developing a series of exceptions to make sense of longstanding contrary doctrine.[63] Three of these are articulated in *Donovan v. Coeur d'Alene Tribal Farm.*[64] At issue in *Coeur d'Alene* was whether a farm located on Tribal lands and owned by the Coeur d'Alene Tribe would be subject to the federal Occupational Safety and Health Act (OSHA).[65] The farm appeared to the court to function just like any other commercial farm, producing agricultural goods within standard, interstate commercial agricultural markets,[66] and there was no indication that the Tribe used the farm solely to provide employment for reservation-based

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[62] Indeed, in at least one judge's recent opinion, the so-called *Tuscarora* rule "is a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card." Nat'l Labor Relations Bd. v. Little River Band, 788 F.3d 537, 557-58 (6th Cir. 2015); *accord* Soaring Eagle Casino & Resort v. Nat'l Labor Relations Bd., 791 F.3d 648, 674 (6th Cir. 2015) (stating that the Ninth Circuit analysis "unduly shifts the analysis away from a broad respect for tribal sovereignty, and the need for a clear statement of congressional intent to abrogate that sovereignty and does so based on a single sentence from *Tuscarora.* We doubt *Tuscarora* can bear the weight placed on it [by the Ninth Circuit's] framework or the strain of the Court's more recent contrary pronouncements on Indian law.").

[63] *See, e.g.*, United States v. Ferris, 624 F.2d 890 (1980) (stating that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations," but qualifying that rule with "[t]here seem to be three exceptions to this rule . . . .").

[64] 751 F.2d 1113, 1115-16 (9th Cir. 1985). The original exceptions were first fashioned in *United States v. Ferris*, 624 F.2d 890, 893 (1980), but more fully addressed in *Coeur d'Alene.*

[65] 29 U.S.C. §§ 651-678.

[66] *Coeur d'Alene*, 751 F.2d at 1114.

Tribal members.[67] Due to alleged violations of numerous provisions of OSHA, the farm employees' safety was clearly in jeopardy.[68] The only potential barrier to drawing on OSHA to remedy work-place safety concerns was the Tribe's assertion of exclusive sovereignty over the regulation of its economic affairs and public safety policy within its borders.

While the *Coeur d'Alene* court established *Tuscarora's* dicta as the Ninth Circuit's general rule,[69] making Tribes and Tribal members subject to all generally applicable federal laws going forward regardless of congressional intent, the court etched out the following exceptions.

First, when a federal law conflicts with a Tribe's rights of self-government in "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations," a generally applicable federal law will not apply without an express Congressional statement to that effect.[70] But the meaning of "purely intramural" has remained a point of contentious debate. Some courts have defined "purely intramural" as having to do with whether the entity potentially affected by the federal law serves "a [Tribal] governmental function," as opposed to "primarily a commercial one."[71] This doesn't mean that private enterprises don't qualify for the exception, just that a Tribal enterprise must not make a significant number of open-market business and commercial transactions with non-Native purchasers in standard channels of interstate commerce.[72]

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[67] Clearly the markets, identities of employees, and methods of operation were important points of analysis for the Ninth Circuit. *See id.* at 1116 ("The *operation* of a farm that sells produce on the *open market* and *in interstate commerce* is not an aspect of tribal self-government. *Because the farm employs non-Indians as well as Indians*, and *because it is in virtually every respect a normal commercial farming enterprise*, we believe that its operation from of federal health and safety regulations is 'neither profoundly intramural nor essential to self-government" (emphasis added; internal citations omitted).").

[68] *Id.*

[69] *Id.* at 1115; Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

[70] *Id.* at 1116.

[71] *See* Snyder v. Navajo Nation, 382 F,3d 892, 895 (9th Cir. 2004) ("Tribal law enforcement clearly is part of a tribal government and is for that reason an appropriate activity to exempt as intramural.); Nat'l Labor Relations Bd. v. Chapa De Indian Health Prog. Inc., 316 F.3d 995 (9th Cir. 2003); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180-81 (2d Cir. 1996).

[72] *See* United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n, 935 F.2d 182, 184 (9th Cir. 1991) (Rejecting the claim that a tribal timber milling enterprise that did business with off-reservation purchasers through interstate commerce and employed both Native Americans and non-Native Americans was "purely intramural"); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government.").

Nor should it employ large numbers of non-Native Americans.[73] In other words, the exception works only when "the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly impacted."[74] When a general federal law touches "purely intramural matter[s]" like these, Congress must be explicit about its intentions to override Tribal sovereignty with its own regulatory scheme. Otherwise, the law does not apply.

Second, when Congress creates a general federal law that conflicts with Tribal rights established by treaty, effectively abrogating or diminishing those rights, it presumably must do so by making "specific reference to Indians" in the statute.[75] This exception was later affirmed by the Supreme Court in *United States v. Dion*, which held in part that general Congressional acts will not abrogate treaty rights absent "clear and plain" Congressional intent.[76] Litigation over the meaning of this exception has generally focused on questions of treaty interpretation. Normally a treaty must be construed not just according to its plain meaning, but in a manner that also takes into account the "history of the treaty, the negotiations, and the practical construction adopted by the parties," and, in cases where a treaty has been drafted by the United States, by giving the terms the ef-

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[73] *Coeur d'Alene*, 751 F2d at 1116 (rejecting application of tribal self-government exception citing the fact that "the Farm employs non-Indians as well as Indians"); *Occupational Safety & Health Review Comm'n*, 935 F.2d at 184 (rejecting application of the tribal self-government exception due in part to "[t]he mill empoy[ing] a significant number of non-Native Americans"); *but see Snyder*, 382 F.3d at 896 (upholding the tribal self-government exception allowing the Navajo Police Department to be exempt from the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, even though four of the officers were non-Navajo).

[74] *Snyder*, 382 F.3d at 895; *see also* Equal Opportunity Comm'n v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1080-81 (9th Cir. 2001) (rejecting the application of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, to the Karuk Tribe's housing authority under the self-government exception because it "occupies a role quintessentially related to self-governance" and "does not concern non-Karuks or non-Indians as employers, employees, customers, or anything else."); Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999) (allowing application of a federal law because the entity challenging the application of the law "does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members.").

[75] *Paraplegic Ass'n*, 166 F.3d at 1117.

[76] "We have required that Congress' intention to abrogate Indian treaty rights be clear and plain . . . . We do not construe statutes as abrogating treaty rights in a backhanded way; in the absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to Congress. . . . Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights . . . ." United States v. Dion, 476 U.S. 734, 738-39 (1986).

fects Tribal members would have understood them to have had.[77] However, courts differ on how broadly they are willing to interpret a Tribal treaty right, which in turn may affect whether a conflict actually exists between a treaty and a generally applicable federal statute.[78] For example, a core sovereign right still held by many Tribal Nations articulated in both treaties and in Supreme Court jurisprudence is the right to exclude non-members from Tribal lands.[79] Presumably, the exercise of this kind of right could prevent federal or state officials from entering Tribal lands to enforce federal or state intellectual property laws. However, the Ninth Circuit in *Coeur d'Alene,* and later the Supreme Court in *Nevada v. Hicks*, explained that the general right to exclude non-members does not by itself prevent federal or state authorities from exercising enforcement operations on Tribal lands.[80] Thus, this exception will only be available where a specific treaty right directly contradicts a general federal law.

Third, the *Coeur d'Alene* court suggested that the legislative history of an act or its surrounding circumstances may cast doubt as to its applicability on Tribal lands. One example is the Endangered Species Act.[81] Though the Act's text is silent as to its application to Tribes and Tribal members outside of Alaska, the District Court for the Southern District of Florida found that the chairman of the Florida Seminole Tribe could be

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77 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); *accord* Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009) (quoting United States v. Smiskin, 487 F.3d 1260, 1264 (9th Cir. 2007) ("The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor.")).

78 *Compare Matheson*, 563 F.3d at 434-36 (holding that a treaty provision requiring "tribes and bands . . . to free all slaves . . . and not to purchase or acquire others hereafter" provided no right to the Puyallup Tribe to exclusively regulate employment practices on Tribal lands); *OSHRC*, 935 F.2d at 186 (a treaty recognizing a Tribe's general right to exclude nonmembers from the reservation was insufficient to prevent the application of the OSHA to tribal lands); *with Smiskin*, 487 F.3d 1260, 1262 n.1, 1264 (9th Cir. 2007) (holding, in part, that applying the Contraband Cigarette Trafficking Act to cigarette transporters of the Confederated Tribes and Bands of the Yakama Nation violated their treaty right "in common with citizens of the United States, to travel on all public highways.").

79 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982). ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry . . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.)".

80 Donovan v. Coeur d'Alene Tribal Farm, 751 F2d 1113, 1118 (9th Cir. 1985); Nevada v. Hicks, 533 U.S. 353, 358 n. 8, 360 (2001) ("[T]he existence of tribal ownership [of land] is not enough to support regulatory jurisdiction over" police officers enforcing state law.).

81 16 U.S.C. § 1531 et seq.

convicted under the Act for killing a Florida panther despite the Tribe's sovereign right to hunt within its reservation boundaries.[82] As established by the Supreme Court in *Dion*, where there "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights [or other sovereign Tribal rights] on the other, and chose to resolve that conflict by abrogating" the right, the federal law applies on Tribal lands and abrogates the Tribal right.[83] Thus, the Endangered Species Act's "general comprehensiveness, its non-exclusion of Indians, and the limited exemptions for certain Alaskan natives," together with testimony during the consideration of a separate bill discussing the potential effect of the law on Native American treaty rights, were sufficient for the court to apply the Endangered Species Act on Seminole lands.[84]

Of course, instances where Congress has considered the applicability of a law to Tribes but did not include any mention of them in the text of an act are presumably rare; the more likely case is that Congress failed to consider any Tribal interests in the text of a general statute or its legislative history, and the reviewing court must decide what this silence implies. The Ninth Circuit has taken the position that a general federal law with no mention of Tribes in its legislative history should apply on Tribal lands per the *Tuscarora* dictum, unless one of the other exceptions is met.[85]

C. *The Tenth Circuit Approach*

In contrast to the Ninth Circuit, the Tenth Circuit, and to some extent the Eighth Circuit, have taken the opposite presumption when determining whether a general federal law is applicable on Tribal lands.[86] In these Circuits, the presumption is that general federal laws do not apply on Tribal lands unless Congress expressly makes them applicable, thus according

82 United States v. Billie, 667 F. Supp. 1485, 1487-88 (S.D. Fla. 1987) (citing authority establishing Tribal members' implied rights to hunt and fish on reservations established by Executive Orders as part of their rights of possession, unless those rights have been divested through treaty or by Congress.).

83 United States v. Dion, 476 U.S. 734 738-40 (1986).

84 *Billie*, 667 F. Supp. at 1490-92; *see also* Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991).

85 *See* United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) ("[S]ilence . . . does not manifest intent for the law *not* to apply to Indian tribes; rather the baseline is that federal statutes of nationwide applicability, where silent on the issue, presumptively *do* apply to Indian tribes.").

86 *See Donovan*, *infra* note 95. *See also* EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993) (finding the *Tuscarora* rule inapplicable when "a specific right reserved to the Indians" is at issue, and Congress has not expressly abrogated those rights.).

due respect to Tribal sovereignty. However, this general rule is tempered by exceptions for federal laws that (1) only impact property interests of Tribal members and not Tribal sovereignty, and (2) that implicate overriding national interests.

1. The Presumption Against Applying Federal Law on Tribal Lands

Beginning with *Donovan v. Navajo Forest Products Industries*, the Tenth Circuit has adopted an analysis that is both skeptical of the *Tuscarora* rule and insistent on maintaining traditional canons of statutory interpretation historically applied in Tribal contexts. Three years prior to the Ninth Circuit's landmark opinion in *Coeur d'Alene*, discussed *supra,* the Tenth Circuit was likewise tasked with determining whether OSHA applied to the operations of a Tribal enterprise, this one located within the Navajo Nation.[87] But unlike *Coeur d'Alene*, the court held that OSHA did not apply on Navajo Nation lands, citing the statute's potential interference with Tribal sovereignty.

The court began its analysis not with *Tuscarora*, but with the Navajo Nation's 1868 treaty with the United States in which the U.S. agreed to a provision limiting settler entry onto Navajo lands to only those authorized to discharge duties imposed by federal law.[88] The court broadly interpreted this treaty provision as a promise to "leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation."[89] The court explained that requiring Congress to expressly authorize intrusions into the affairs of Tribes maintained a long history of Supreme Court precedent in which Tribes "retain all aspects of tribal sovereignty not specifically withdrawn [by Congress]."[90]

The court circumvented the seemingly contrary Supreme Court precedent established in *Tuscarora* by pointing out that *Tuscarora* explicitly dealt with a conflict between Tribal land rights and a federal statute, not a conflict between a Tribal treaty (or other delineation of sovereignty) and a federal statute. [91] Thus, the court reasoned that the special canons of con-

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87 Donovan v. Navajo Forest Prods., 692 F.2d 702 (10th Cir. 1982).

88 *See* Treaty between the United States of America and the Navajo Tribe of Indians, art II., 15 Stat. 667 (1868).

89 *Donovan*, 692 F.2d at 712.

90 *Id.*

91 *Id.* at 711 ("The Court, in Tuscarora, applied this rule in upholding the taking of tribal lands . . . *Tuscarora* did not, however, involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the *Tuscarora* line of cases . . . ."); *see also* Nat'l Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1199 (10th Cir. 2002) ("*Tuscarora* dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land.").

struction used in treaty interpretation — particularly the canon interpreting treaty rights as the Indigenous group would have understood them — must be used in resolving the conflict between OSHA and the Tribe's sovereign right to be left alone.[92] Since the Navajo Nation at the time of the treaty would not have understood the treaty to give the United States the right to enter its lands and enforce its laws, much less enforce laws Congress never expressly intended to apply to the Navajo Nation, OSHA could not be enforced against a Navajo Nation enterprise within the Nation's borders.

Extending this logic, the court noted shifts in the Supreme Court's federal Indian law doctrines (not to mention Executive[93] and Congressional[94] policy) since *Tuscarora*,[95] which recognized that all Tribes held the inherent power to exclude non-members from their reservations, not just those with exclusionary language in their treaties.[96] That power, not

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92 *Id.*; *see also* United States v. Winans, 198 U.S. 371, 380-81 (1905) ("[W]e have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'" Further, treaties are are interpreted not as "a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."); Tulee v. State of Washington, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979) ("(I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties . . . . The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." [Original quotations and brackets omitted.))

93 Richard Nixon, Special Message on Indian Affairs (July 8, 1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions . . . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination."); Ronald Reagan, Statement on Indian Policy (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.").

94 *See generally* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301 et seq.

95 Donovan v. Navajo Forest Prods., 692 F.2d 702, 715 (10th Cir. 1982). The court went so far as to say that *Tuscarora* had been largely overturned.

96 *See generally* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 n.12 (1982) (explaining that the power to exclude is an attribute of Tribal sovereignty and not merely a landowner's right).

discussed in the *Tuscarora* opinion, was substantial enough that the Supreme Court relied on it 22 years later to uphold the Jicarilla Apache Tribe's sovereign taxing power over a non-Tribal oil company doing business on Tribal lands simply because it entered the Tribe's reservation.[97] While the United States has, at the apex of its colonialist history, implicitly divested Tribes of certain aspects of their sovereignty — the right to engage in foreign relations,[98] the right to alienate their land (except to the United States),[99] or the exclusive right to exercise criminal jurisdiction over non-Indians on Tribal lands[100] —implied limitations on Tribal sovereignty, at least for the Tenth Circuit, were limited to scenarios where "the exercise of tribal sovereignty would be inconsistent with overriding national interests."[101] Thus, "[a]bsent some expression of such legislative intent," the court argued, Tribal sovereignty could not be divested "merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons unless Indians are expressly excepted therefore."[102]

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97 *Id.*

98 *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1830) (describing Tribes as "domestic dependent nations" rather than "foreign nations," and "as being so completely under the sovereignty and dominion of the United States, that any attempt . . . to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.").

99 *See* Johnson v. M'Intosh, 21 U.S. 543, 587 (1823) ("The United States, then, have unequivocally acceded to that great and broad rule . . . that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; . . . . [T]he absolute title of the crown to extinguish [Tribal land rights] . . . is incompatible with an absolute and complete title in the Indians.").

100 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that inherent Tribal sovereignty does not extend to those who are not members of the Tribe on whose territory the crime was committed); *but see* United States v. Lara, 541 U.S. 193 (2004) (upholding a congressional expansion of Tribes' inherent sovereignty to try non-member Indians for crimes occurring on Tribal lands.).

101 Donovan v. Navajo Forest Prods., 692 F.2d 702, 713-14 (10th Cir. 1982) (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 147 n. 18 (1980)). The Tenth Circuit later explained that in some cases, a comprehensive federal statutory scheme is necessary to protect the land base within the United States, and Tribal lands may be included within that scheme even if not explicitly mentioned. *See* Phillips Petroleum v. United States Envt'l Agency, 803 F.2d 545, 556 n.14 (10th Cir. 1986) (citing Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116-118 (1960)) (Pointing to examples like the National Environmental Policy Act and the Resource Conservation and Recovery Act where general Congressional environmental statutes have been applied in the interests of public health and safety). While the court cited *Tuscarora* as authority in *Phillips Petroleum,* it acknowledged that the *Tuscarora* rule gives way when a Tribe exercises a specific right under treaty or statute that conflicts with a general federal law. *Id.*

102 *Donovan*, 692 F.2d at 714.

In other words, the Tenth Circuit had set up a general rule that was essentially the opposite of the *Tuscarora* rule: that generally applicable federal laws will not be construed so as to disrupt Tribal territorial sovereignty, absent some "overriding national interest."[103]

2. *The Tenth Circuit Exceptions*

The Tenth Circuit has since articulated two exceptions to its general rule that generally applicable federal laws, silent as to their effects on Tribes, do not apply on Tribal lands. One such exception is that general federal laws that only affect property interests of a Tribe or its members, and not the sovereignty of the Tribe, are enforceable.[104] Recently, the District of New Mexico applied this approach to determine whether the Lanham Trademark Act applied to the Navajo Nation's name, which the Tribe owned as a federal trademark.[105] Finding that the Lanham Act's grant of the trademark rights at issue only affected the Tribe's rights as a property owner, and not its sovereign right to govern, the Court held the statute could protect the Nation's name from trademark infringement under federal law.[106] It left for another day the broader question of

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[103] *Id.* at 713; *see* notes 60-80 and accompanying text, *supra* (noting the limited ways Congress had divested Tribal sovereignty). Post-*Coeur d'Alene* applications of the Tenth Circuit's doctrine include United States Equal Opportunity Comm'n v. Cherokee Nation, 871 F.2d 937-38 (10th Cir. 1989), in which the Tenth Circuit rejected arguments that the Age Discrimination in Employment Act applied on Tribal lands. Under standard statutory interpretation rules, the ADEA, though silent as to its effect on Tribal lands, seemed like it would apply within the Cherokee Nation: the ADEA did not exempt Tribes, while the Civil Rights Act of 1964's Title VII, upon which Congress explicitly modeled the ADEA, did include a Tribal exemption. *Id.* at 941-42. The Court held that in situations where a statute's silence produces ambiguity with respect to Tribes' sovereign rights, and Congress expresses no clear intent to abrogate Tribal sovereignty rights, "the court is to apply the special canons of construction to the benefit of Indian interests." *Id.* at 939.

[104] *See* Nat'l Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1199 (10th Cir. 2002) ("We are convinced [*Tuscarora*] does not apply where an Indian tribe has exercised its authority as a sovereign — here, by enacting a labor regulation — rather than in a proprietary capacity such as that of employer of land-owner."). Some courts have suggested that if a federal law does apply under the property interest exception, the Coeur d' Alene exceptions may still prevent it from being enforceable. *See, e.g.*, *Navajo Nation*, *infra* note 105, at *5 ("[I]f the tribe is acting in its proprietary capacity, the *Tuscarora* rule does apply and the Court must determine whether there is an exception to that rule.").

[105] Navajo Nation v. Urban Outfitters, Inc., 2014 U.S. Dist. LEXIS 187452 (D.N.M. Sept. 19, 2014).

[106] *Id.* at *5.

whether the Lanham Act governs trademarks generally within the Navajo Nation.[107]

Another exception to the presumption against applying general federal laws on Tribal lands is that "overriding national interests" may supersede Tribes' sovereign interests in certain narrow circumstances. Such was the case with the application of the Safe Drinking Water Act as originally passed, which granted no explicit authority to the Environmental Protection Agency or to Tribes to administer water quality on Native American reservations.[108] The Tenth Circuit held that, given the statute's national scope, its policy language that included Tribal interests in safe water, and the fact that the EPA's administration of water quality was supported by the sovereign Cherokee Nation, the law should apply to real property on Tribal lands.[109] Thus, laws of national consequence that carry out a " comprehensive statutory plan"[110] may rise to the level of an "overriding national interest" that can overcome Tribal sovereignty. The Tenth Circuit has subsequently narrowed this exception, however, holding that it only applies in situations where "an Indian tribe exercises its property rights" and not "in which it exercises its authority as a sovereign."[111] Otherwise, the Tenth Circuit's presumption of non-applicability of general federal laws applies.

It is important to note that while the Tenth Circuit has consistently upheld its view that "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory,"[112] the court has occasionally applied the *Tuscarora-Coeur d'Alene* framework. For example, the Tenth Circuit denied the ap-

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107 *Id.* ("A tribe's sovereign authority involves regulation of economic activity, self-government and territorial management. None of these types of activities is implicated in the substance of the underlying lawsuit." (internal citations omitted)).

108 Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. § 300f et seq.).

109 *See* Phillips Petroleum Co v. United States Env'tal Prot. Agency, 803 F.2d 545, 553-56 (10th Cir. 1986) ("It is readily apparent from the legislative history that the underground drinking water provisions of the SDWA apply throughout the country, border to border, ocean to ocean. It is triggered by area (state) designations by the Administrator, but its reach covers the country.").

110 United States Equal Opportunity Comm'n v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989).

111 Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1283 n.8 (10th Cir. 2010) (holding that subsequent Tenth Circuit precedent had only upheld *Phillips Petroleum*'s overriding national interests exception when the issue involved Tribal property interests) (internal quotations omitted).

112 Nat'l Labor Relations Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002); *see also* Dobbs, 600 F.3d at 1283 ("In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization.").

plication of two federal racial discrimination statutes to the Cherokee Nation's membership laws by drawing on the Ninth Circuit's *Coeur d'Alene* analysis rather than its own framework.[113] The Court ultimately took a hybrid approach, resting its opinion on concerns over the impact of the anti-discrimination laws on the Nation's sovereignty, which it argued "would in effect eviscerate the tribe's sovereign power to define itself," and thus would constitute an unacceptable interference "with a tribe's ability to maintain itself as a culturally and politically distinct entity."[114]

"But in this circuit," the court recently explained, "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."[115] Thus, in the Tenth Circuit and those that follow its reasoning, general federal statutes silent as to their applicability on Tribal lands are presumed to be inapplicable, unless they only affect the property interests of the Tribe and not Tribal sovereignty, or they serve an overriding national interest. And even if either exception is present, one of the *Coeur d'Alene* exceptions may still prevent the law from applying on Tribal lands.

D. Other Approaches

There has been a recent trend among circuit courts of appeals to create new tests and frameworks within the doctrinal vacuum left by Congress and the Supreme Court. These attempts reject the *Tuscarora* rule while recognizing that there are some instances where general federal laws should be applied on Tribal lands as a matter of judicial fairness to non-members of a Tribe.

The District of Columbia Circuit in 2007 adopted a fact-intensive test that seeks to determine whether the application of a federal statute on Tribal lands would affect "traditional acts governments perform," or merely affects governmental activities that are "primarily commercial" and any regulations "ancillary to that commercial activity."[116] The opinion, however, commits at least two fatal errors which have likely kept it from being used in other circuits.[117] First, it rejects the long-standing principles on which the Tenth Circuit approach is based, that general statutes

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113 Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989).

114 *Id.* at 1463 (quotations and citations omitted); *accord Pueblo of San Juan*, 276 F.3d at 1199 n.11.

115 *Id.*

116 San Manuel Indian Bingo & Casino v. Nat'l Labor Relations Bd., 475 F.3d 1306, 1313-15 (D.C. Cir. 2007).

117 Intermill, *supra* note 55, at 66.

silent as to Tribes should be interpreted to preserve Tribal sovereignty.[118] It does this, in part, by drawing inferences from the Supreme Court's failure to grant certiorari on the issue[119] and from cases determining the extent of *state* sovereignty over non-Tribal-members on Tribal lands and Tribal property interests off Tribal lands.[120] Perhaps more egregiously, it takes a narrow and overtly ethnocentric view of what Tribal sovereignty is: according to the D.C. Circuit, Indigenous peoples' sovereignty is preserved from invasion by settler law for the purpose of "giving them latitude to maintain traditional customs and practices," and seemingly evaporates when Tribes attempt to "operate in a commercial capacity without [settler] legal constraint."[121] As one commentator puts it, the D.C. circuit's sliding-scale test "effectively asks a court to determine whether a tribe's activity is 'Indian enough' and whether an incursion into tribal sovereignty or treaty rights is 'big enough' to warrant protection."[122] Such an unbridled test surely introduces opportunities for judicial bias.

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118 *See* Nat'l Labor Relations Bd. v. Litter River Band, 788 F.3d 537, 560 (6th Cir. 2015) (McKeague, J., dissenting) (noting that the D.C. Circuit "conspicuously avoided any reference to the Tenth circuit's analysis" in developing its new framework).

119 *San Manuel*, 475 F.3d at 1312 (asserting that the principle of statutory interpretation that ambiguities in a federal statute should be resolved in favor of Indian Tribes only applied to "a statute or a provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs," because there exists "no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application."); *but see* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009) (providing empirical evidence that "the Supreme Court's certiorari process harshly discriminates against the interests of Indian tribes and individual American Indians" by showing that between 1986 and 1993 the Supreme Court granted certiorari in 1/92 of cases filed by Tribal petitioners, but granted 14/37 of petitions from settler governments against Tribal interests, and 4/28 of private individuals against tribal parties.). As discussed earlier, the Supreme Court simply hasn't directly taken up the issue of whether a generally applicable federal law, silent as to Tribes, applies on Tribal lands for well over a century.

120 *Id.* at 1313 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (determining whether Arizona state taxes applied to non-Tribal-member business conducting logging operations occurring on Tribal lands); and Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (determining that the Tribe owed state sales taxes for ski resort revenue generated off-reservation).

121 *Id.* at 1314-15. In *San Manuel*, the D.C. Circuit noted that the Tribe already had established its own labor law governing employer-employee relations. Thus, the court's concern about the Tribe operating "without legal constraint" could only have been referring to the federal NLRA or other settler labor and employment laws.

122 Intermill, *supra* note 55, at 66.

The second example of judicial innovation in this area is the Sixth Circuit's proposed test. In 2015, a panel of the Sixth Circuit adopted the *Tuscarora-Coeur d'Alene* rule over a blistering dissent.[123] However, only one month later, another panel of the Sixth Circuit strongly criticized the ruling, and proposed a new framework for analyzing generally applicable federal laws on Tribal lands.[124] The framework consists of three steps, where the court would (1) begin by determining Congress's intent to apply the statute to the Tribe, and if no intent could be established, then (2) the court would continue on to determine whether applying the statute would "impinge on the Tribe's control over its own members and its own activities."[125] If the federal law does not impinge on the Tribes control over its own members, (3) the court then would determine whether the effects of the statute on non-members of the Tribe would fall within the Tribe's inherent civil jurisdiction (either arising within a consensual/contractual relationship with the Tribe, or those engaging in activities that directly affect the Tribe's political integrity, economic security, or health and welfare).[126] While this framework has yet to be adopted by the Circuit, the three-judge support for it suggests the Circuit may consider it in the future. In application, the framework presumably would function similarly to the Tenth Circuit's framework, with some nuance when primarily non-Tribal members are involved.

E. Applying the Copyright Act Under These Frameworks

1. Under Tuscarora-Coeur d'Alene

The majority of the federal circuit courts of appeal follow the *Tuscarora-Coeur d'Alene* doctrine: that a "general statute" silent as to its application on Tribal lands "includes Indians and their property interests," unless one of three exceptions articulated in *Coeur d'Alene* would prevent the statute from applying.[127] Thus far, only two federal courts appear to look approvingly on the *Tuscarora-Coeur d'Alene* methodology in the

123 Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 551 (6th Cir. 2015) ("We therefore adopt the *Coeur d'Alene* framework to resolve this case.").

124 Soaring Eagle Casino & Resort v. Nat'l Labor Relations Bd., 791 F.3d 648 (6th Cir. 2015).

125 *Id.* at 667.

126 *Id.*; *see also* Montana v. United States, 450 U.S. 544, 565-66 (1981) (articulating the contours of Tribal jurisdiction over non-members conducting business on non-Indian-owned fee lands); *compare* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (recognizing that a Tribe has "general authority, as sovereign, to control economic activity within its jurisdiction," which arises simply by entering onto a Tribe's trust lands.).

127 *See* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

context of copyright law. In *Bassett v. Mashantucket Pequot Tribe,* a filmmaker brought suit against the Tribe claiming that (1) that the Tribe was subject to the Copyright Act and (2) the Tribe committed copyright infringement when it allegedly copied her script without her permission in a film it produced.[128] The Second Circuit ultimately dismissed the claim on sovereign immunity grounds; but in doing so, the court seemed to concede that the Copyright Act is "a statute [that] applies to Indian tribes" under its precedents adopting *Tuscarora-Coeur-d'Alene.*[129] Likewise, the District of South Dakota dismissed the claim of a consulting firm who sued a multi-Tribal health organization for copyright infringement, alleging that the Tribal entity copied a grant application it had authored without its permission.[130] Using similar reasoning, the court assumed that the Copyright Act applied on Tribal lands per *Tuscarora*, but found the Act did not abrogate the Tribes' immunity from suit.[131] While both of these courts' embrace of the *Tuscarora-Coeur d'Alene* framework appear to be dicta, they both seem to have found the Copyright Act's application to Tribal creativity to be as unproblematic as the Federal Power Act applying to land owned by the Tuscarora Nation.

Importantly, the foregoing cases only dealt with Tribal government uses of works created off Tribal lands. Opinions addressing the application of copyright to individual Tribal creators on Tribal lands have yet to be written. As I explain below, applying federal copyright law to works created by Tribal members — individual artists, filmmakers, composers, authors, and other creators —would likely require additional depth. The Copyright Act clearly falls within the general scope of the *Tuscarora-Coeur d'Alene* framework: it is a federal statute that grants rights to any person who is an "author"[132] of a "work[. . .] fixed in a tangible medium of expression" within the United States.[133] However, nothing in the text of the statute specifically makes the statute applicable to Tribes, Tribal mem-

128 Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2d Cir. 2000).

129 *Id.* at 357; *see* Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir. 1996).

130 J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1169-70 (D.S.D. 2012).

131 *Id.* at 1178 ("The Supreme Court has stated that 'general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary.' [quoting *Tuscarora*] *That a general federal statute applies to Indian tribes* does not mean that Congress has waived tribal sovereign immunity . . . [internal citations omitted and emphasis added]).

132 *See* 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.").

133 *See id.* § 102 ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").

bers, or Tribal lands. Under the *Tuscarora-Coeur d'Alene* framework, unless the application of the Copyright Act to Tribal contexts triggers one of *Coeur d'Alene*'s exceptions, the Act would likely apply to all copyrightable works that are either created on Tribal lands or that circulate onto Tribal lands within these circuits. How some of these exceptions might apply to the Copyright Act unfortunately remains unclear.

The third *Coeur d'Alene* exception is perhaps the easiest to dispense with. When the legislative history of a general federal law indicates Congress intended it to apply to Tribes, it will apply even if the statutory text is silent on the matter. Because the Copyright Act's legislative history appears devoid of any mention of Tribes, Native Americans, reservations, or other similar terms of art associated with Tribal lands, we would presume that Congress did not consider Tribal interests of any kind when it passed the Copyright Act.[134] Thus, we presume the third exception does not prevent the Copyright Act from applying on Tribal lands.

The second *Coeur d'Alene* exception prevents a general federal law making no mention of Tribes from applying on Tribal lands when it conflicts with rights established by treaty. If a conflict with a Tribal treaty exists, the treaty rights will prevail unless Congress makes "clear and plain" its intent to abrogate those rights.[135] Importantly, as this exception has been interpreted by subsequent courts, the allegedly conflicting treaty right must be on point with the statute at issue; [136] a general treaty right to exclude non-members from reservation lands, for example, is by itself too general to prevent the enforcement of generally applicable federal laws on Tribal lands.[137]

It is beyond the scope of this article to generalize as to whether Tribal treaties with the United States contain terms that may conflict with the Copyright Act. There were literally hundreds of treaties made between Tribes and the United States,[138] and each treaty is generally interpreted

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134 *See* Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001) ("[T]his court finds that the text of the Copyright Act of 1976 and the accompanying legislative history of the statute did not affirmatively contemplate the inclusion of Indian tribes . . . ."). This finding is consistent with the research conducted on the Act's legislative history performed by me and my research assistants.

135 United States v. Dion, 476 U.S. 734, 738 (1986).

136 *See* Solis v. Matheson, 563 F.3d 425, 435 (9th Cir. 2009) (rejecting argument that treaty language requiring the tribe to "free all slaves" was sufficient to exempt the Tribe from the Fair Labor Standards Act, finding it not "directly on point" with issues of employment or wages and hours.); *see also* United States v. Ferris, 624 F.2d 890, 893 (9th Cir. 1980).

137 *See* United States Dep't of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 184 (9th Cir. 1991).

138 Between 1778-1871, 370 treaties between the United States and Indigenous communities were signed, with hundreds more treaty-like agreements in the years

according to what the particular Tribe understood it to mean at the time of its creation.[139] In situations where a Tribe had reserved a specific treaty right not to have their creative expressions regulated by federal law, such a right might prevent the operation of the Copyright Act under the *Tuscarora-Coeur d'Alene* framework. However, issues surrounding the ownership of creative expression were probably not among the terms most Tribes and Executive Branch negotiators were keen to resolve prior to 1871, when Congress ended treaty making with Tribes.[140] Tribes were simply fighting for survival against the militarized encroachments of the United States or negotiating for sufficient land and resources to sustain themselves and their people into subsequent generations. And, as discussed, *supra*, in the years prior to the passage of the Major Crimes Act in 1885, the federal government generally remained aloof from internal Tribal activities, and Tribes would have had no reason to believe that their culture would become subject to federal copyright.[141] In setting apart federal reservations for Tribes, the logic was that Tribal governments and Tribal cultures would remain segregated from the United States while under its supervision, and eventually Tribes would cease producing traditional cultural expressions.[142] Thus, silence in treaties as to which government

since. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES 16 (2020), http://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf.

139 *See* Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) ("A treaty is essentially a contract between two sovereign nations. Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians." (internal citations omitted); *but see* Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 772 (1985) (refusing to apply canons of Tribal treaty interpretation to a 1901 agreement negotiated by the Tribe's legal counsel).

140 25 U.S.C. § 71.

141 Federal law had limited application in Indian Country until 1883. This was made clear in Ex parte *Kan-gi-shun-ca* (Crow Dog), 109 U.S. 556 (1883), where the Supreme Court invalidated a federal criminal law making Tribal members subject to federal jurisdiction, and stating that offenses committed by Indians against Indians "were left to be dealt with by each tribe for itself, according to local customs .... [T]o uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians . . . ."). One exception to this congressional policy of not entering into Tribal affairs were the Nonintercourse Acts, which restricted, among other things, the purchase of land within the boundaries of Tribes. *See, e.g.*, 25 U.S.C. § 177.

142 The combined tactics of cultural segregation onto reservations, subsequent suppression of Indigenous cultural expression, and the forced practice of American culture were key components of cultural genocide waged against Native Americans in the United States in the nineteenth and twentieth centuries. *See* Kristen A. Carpenter & Angela R. Riley, *Owning Red: Toward a Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877-78 (2016).

would control creative expression on Tribal lands going forward should not be unexpected.

Future research may identify specific Tribal treaties with provisions that directly secure rights to creative expressions which would satisfy the second *Coeur d'Alene* exception. But even without an express treaty right reserving the right to govern Tribal cultural production, a general rule of treaty interpretation states that those rights not granted to the United States by Tribes are presumably reserved to the Tribes.[143] The Supreme Court's long-upheld approach to treaty interpretation, requiring Congress to be explicit about its extinguishment of Tribal sovereignty and property rights, raises fundamental problems that strike at the heart of the Ninth Circuit's framework.

Coeur d'Alene's first exception is even more difficult to address uniformly with respect to all Tribal Nations. This exception makes general federal laws, silent as to Tribes, inapplicable on Tribal lands when those laws "interfere" with (a) "exclusive rights of tribal self-government" in (b) "purely intramural matters."[144] Under this exception, federal statutes affecting things like Tribal membership, inheritance rules, domestic relations, and government employment decisions predominantly involving Tribal members have been held inapplicable, as their "immediate ramifications" are local to the Tribe's reservation and citizenry, and because they affect the operation of Tribal government. [145] However, certain federal safety and employment laws impacting Tribal businesses with predominantly non-Tribal-member employees and which provide goods and services to markets off-reservation have been held by courts following the *Tuscarora-Coeur d'Alene* rule to fall outside the exception and are therefore applicable on Tribal lands.[146]

As I will explore in more concrete terms in Part II, copyright is unusual in that it potentially affects both Tribal activities that may be "purely intramural" with direct effects on Tribal sovereignty and also activities involving primarily interstate/inter-nation commerce where few Tribal members are involved. Further, the nature of copyright law is unlike OSHA, FLSA, and other regulatory statutes. It can be argued that copyright merely creates personal property rights: it is at most a passive, indirect

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143 *See* United States v. Winans, 198 U.S. 371, 380-81 (1905) (holding that treaties are not "a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."); *see also* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

144 *Coeur d'Alene*, 751 F.2d at 1116.

145 *See* Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004); Equal Opportunity Comm'n v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1080-81 (9th Cir. 2001; Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989).

146 *See* Solis v. Matheson, 563 F.3d 425, 434 (9th Cir. 2009).

form of government regulation. Copyright frameworks are typically enforced through civil actions brought by copyright holders whose rights have been violated rather than through direct regulation of individuals by government, though the Copyright Act does contain some criminal enforcement provisions.[147] Copyrightable works can be produced, transferred, or licensed with virtually no government involvement.[148] Indeed, many Tribal creators have likely come to accept the ownership structures enshrined in the Copyright Act not because they are imposed on them, but because they provide a package of widely recognized creative rights that allow their work to circulate beyond the borders of their nation and into the global creative economy.

But while government may not necessarily control the day-to-day activities of creators through copyright law, copyright still alters social, political, cultural and economic relationships that produce creativity, expression and speech. Copyright establishes overarching government policy through its system of rights. It does so through the provision of positive rights — the right to use expressions one owns, and to fairly use expressions one does not own, for example — but also negative rights — exclusions from using expressions one does not own or does not have authorization to use. Through these rights, the Copyright Act restricts certain kinds of speech in ways that are consistent with the United States Constitution's First Amendment and Intellectual Property Clause.[149] Additionally, the Copyright Act produces a public domain from the works that do not qualify for protection, making them available for anyone to use freely in any kind of speech, even without the author's consent.

Thus, the design of a nation's creative rights regime may be an area of critical importance for a nation's self-governance in intramural matters — including Tribal self-governance.[150] Unless the policy choices undergirding the Copyright Act are aligned with Tribal policies regarding speech, governance structures, cultural integrity and privacy, it may have

147 *See* 17 U.S.C. § 501-505; *but see* 17 U.S.C. § 506 (describing criminal offenses for copyright infringement).

148 For example, the Copyright Act deems all federal government-created works to be in the public domain (though State works may not be). 17 U.S.C. § 105. It also provides a work-made-for-hire provision vesting works created by employees within the scope of their employment in their employer, *id.* § 201(b), in addition to granting rights to individual or joint authors, *id.* § 102(a).

149 *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles.").

150 *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that the diversity of expression generated through copyright supports a democratic society).

substantial — and potentially negative — impacts on Tribes, particularly for their autonomy and self-determination. Determining whether the Copyright Act fulfills the first *Coeur d'Alene* exception, thereby making it inapplicable on Tribal lands, is a complex inquiry that must be grounded in the realities of local Tribal sovereigns and cannot be universally resolved.

2. Under the Tenth Circuit Approach

In contrast, the Tenth Circuit and, to some extent, the Eighth Circuit, have rejected *Tuscarora-Coeur d'Alene* as the default approach for determining the application of general federal laws on Tribal lands. Instead, these courts hold that federal laws that conflict with a Tribal treaty or other sovereign rights do not apply absent express congressional intent. Ambiguities in a statute — including silences as to a statute's application on Tribal lands — are to be resolved so as not to divest Tribes of their sovereignty. However, as discussed *supra*, when a federal statute only implicates Tribal property interests, the federal law may apply, unless a *Coeur d'Alene* exception exists. Additionally, where the federal law creates a "comprehensive national scheme" affecting Tribal property interests, such as the national environmental protections contained in the Safe Drinking Water Act, overriding national interests may be sufficiently strong to abrogate Tribal sovereignty to fulfill that purpose for the safety and welfare of Tribal members as American citizens.[151]

The one case applying the Tenth Circuit framework to the Copyright Act has largely followed this framework. In *Multimedia Games v. WLGC Acquisition Corp,* the Northern District of Oklahoma rejected the argument that a Tribal entity was subject to a copyright infringement suit under the Copyright Act.[152] Instead of *Tuscarora*'s broad claim that general federal statutes should presumptively apply to Tribes, the court held that "application of federal statutes to Indian tribes must be viewed in light of the federal policies which promote tribal self-government, self-sufficiency, and economic development," with Tribes "retain[ing] all aspects of tribal sovereignty not specifically withdrawn."[153] Since the court found that "the text of the Copyright Act of 1976 and the accompanying legislative history of the Statute did not affirmatively contemplate the inclusion of Indian tribes,"[154] the court would "need to infer such intent" to overcome the Tribe's common-law immunity from suit.[155] The court held that "such an

151 *See* Phillips Petroleum Co v. United States Equal Prot. Agency, 803 F.2d 545, 555 (10th Cir. 1986).
152 Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1133 (N.D. Okla. 2001).
153 *Id.* at 1136 (internal citations omitted).
154 *Id.* at 1135.
155 *Id.* at 1137.

inference is inappropriate."[156] Thus, it appears that under the Tenth Circuit approach, the Copyright Act generally would not apply to the creative activities of Tribal governments, including those that might infringe another's copyright.

The more challenging question is how copyright rights apply to the creativity of individual Tribal members on Tribal lands. While the Tenth Circuit's default is that general federal laws don't apply on Tribal lands, it could be argued that the presumption against application should give way, because copyright rights are mere property rights. On the other hand, copyright involves more than just bare property rights. As previously discussed, it sets a balance between free speech and protected expression, sets criteria for what expression can be restricted from public use, establishes limited rights governing how protected expression circulates, and determines whether subsequent generations will have access to protected works. Of critical importance is the understanding that the policy choices underlying our federal Copyright Act derive from settler, not Indigenous, constitutional powers, economic principles and legislative priorities.[157] These policies reflect cultural norms surrounding what forms of shared culture are valued and protected,[158] and what modes of distributing culture should be encouraged or criminalized.[159] When one considers the application of the Copyright Act to Tribes is would essentially amount to a foreign government's re-engineering of another nation's systems for owning, regulating, and developing expression — to the potential exclusion of its own[160] — it seems that there may be much more at stake for the invaded nation's sovereignty than mere "property rights."

Finally, there may be an argument that copyright serves the "overriding national interest" of providing Indigenous and non-Indigenous creators alike with the necessary incentives to produce new work. Such a national interest might qualify the Copyright Act for an exception to the Tenth Circuit's non-applicability rule. But such a claim seems extraordinary in historical context. Given that the United States' for nearly two centuries actively suppressed and, in some cases, worked to forcibly erase Tribal creativity, and has only recently begun to take action to protect it, it seems impossibly fraught that a Euro-American incentive system now

156 *Id.*

157 For example, the United States Constitution articulates the purpose behind American copyright law: "to promote the progress of science and the useful arts."

158 *See generally* ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES (1998).

159 *See generally* LAWRENCE LESSIG, FREE CULTURE (2004).

160 17 U.S.C. § 301(a) (preempting State copyright rights (with limited exceptions) and making all rights to works within the subject matter of the Copyright Act subject to the statute).

should be imposed to foster cultural practices that survived in spite of American cultural genocide.[161]

In sum, while a significant circuit split makes determining the applicability of the Copyright Act on Tribal lands uncertain, the results under both of the leading tests seem equally unsatisfying. Under the Ninth Circuit framework, the Copyright Act would apply on Tribal lands so long as doing so would not interfere with a Tribe's internal self-governance — a determination that would likely depend on the specific role expression plays in Tribes' particular modes of governance. Under the Tenth Circuit framework, the Act would presumably not apply on Tribal lands, except to copyrightable works that could be considered mere property and whose circulation would have no effect on Tribal Sovereignty. Thus, neither framwork provides a definitive answer as to whether the Copypright Act applies on Tribal lands.

As answering the question of whether the Copyright Act should apply on Tribal lands under either framework turns on its impact on Tribal sovereignty, I next turn to ethnographic research conducted in partnership with the Hopi Tribe to see what impact the Act might have on sovereignty within an actual Tribal context.

II. THE IMPACT OF COPYRIGHT ON TRIBAL SOVEREIGNTY

In this Part, I explore the Copyright Act's potential impact on Tribal sovereignty, drawing from ethnographic work conducted on the Hopi Indian Reservation[162] (located in present-day northeastern Arizona) from 2009-2018. The Hopi Tribe, like many Indigenous communities, has always been a hotbed of creativity. Perhaps owing to its sustained creativity over centuries, Hopi has been the site of considerable cultural extraction since European settlers first arrived in the Southwest in 1540: missionaries,

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161 *See generally* Trevor Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. __ (forthcoming 2021) (describing the United States' history of under protecting Indigenous creativity).

162 President Chester Arthur established the Hopi Reservation in 1882, which designated a rectangular plot of land approximately seventy miles by fifty miles "for the use of the Moqui[sic], and other such Indians as the Secretary of the Interior may see fit to settle thereon." Moqui (or Hopi) Reserve, Executive Order (Dec. 16, 1882), *in* INDIAN OFF., EXECUTIVE ORDERS RELATING TO INDIAN RESERVES FROM MAY 14, 1855 TO JULY 1, 1902, at 9 (1902). The current Hopi Indian Reservation represents only a small fraction of the territory Hopi people continue to steward today. *See* Saul L. Hedquist, et al., *Tungwniwpi Nit Wukwlavayi (Named Places and Oral Traditions): Multivocal Approaches to Hopi Land*, *in* FOOTPRINTS OF HOPI HISTORY (HOPIHINTIWTIPUT KUKVENI'AT) 52-72 (Leigh J. Kuwanwisiwma, T.J. Ferguson & Chip Colwell eds., 2018) (discussing approaches Hopi people, government commissions, and others have used to identify their aboriginal territory).

federal agents, anthropologists, tourists, and many others have copied and appropriated significant amounts of Hopi visual art, song, architecture, oral literature, and many other forms of expression.[163] In recent years, Hopi joined a number of Tribes in defending their rights to cultural expressions created on their lands. They have done so, in part, by asserting claims under both federal laws like the Native American Graves Protection and Repatriation Act (NAGPRA) and their own laws, policies and protocols.[164]

In the sections that follow, I first explore how the Copyright Act is already a vital part of the Hopi creative economy today, providing protection and incentives for developing new creative works. However, copyright is also somewhat problematic when applied to Hopi creativity, owing to conflicts between copyright's underlying philosophies, goals and presumptions, and those espoused by the Hopi people. Thus, I argue that while the Copyright Act may "promote the progress" of certain kinds of Hopi creativity that are intended to circulate beyond Tribal lands, its potential effect on creativity intended for circulation within the Hopi community would be disruptive and may even be dangerous to the Tribe's sovereignty and wellbeing.

A. Copyright and Inter-National Hopi Creativity

Driving down Arizona's State Route 264, which runs through the middle of the Hopi Reservation, it doesn't take long to experience Hopi creativity. Turning on the radio, you might hear the Cajun Queen giving her Cajun and Zydeco show on KUYI Hopi Radio 88.1, pass by a country dance with local bands like the Hopi Clansmen happening at Kööotka Hall in the village of Polacca, or hear a rock or reggae concert with Ed Kabotie or Casper Lomayesva at the Moenkopi Legacy Inn. As you look out the window driving over majestic orange, brown and beige mesa tops, you will

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163 *See generally* W. DAVID LAIRD, HOPI BIBLIOGRAPHY: COMPREHENSIVE AND ANNOTATED (1977) (documenting the more than 3,500 published works on Hopi people, many of which contain Hopi expression); Lomayumtewa C. Ishii, *Western Science Comes to the Hopis: Critically Deconstructing the Origins of an Imperialist Canon*, 25 WICAZO SA REV. 65 (2010) (exploring the ways archeologists and other social scientists mobilized Hopi expression in the development of Western scientific paradigms); ERIKA BRADY, A SPIRAL WAY: HOW THE PHONOGRAPH CHANGED ETHNOGRAPHY (1999) (documenting the use of sound recording technology to collect Indigenous expression on Hopi and other Tribe's lands).

164 *See* Hopi Tribe Resolution H-70-94 (claiming cultural affiliation for NAGPRA purposes for a variety of materials, and designating ethnographic materials containing esoteric ritual, ceremonial and religious knowledge as the cultural property of the Tribe); MICHAEL BROWN, WHO OWNS NATIVE CULTURE? 14-15 (2003) (discussing the Tribe's demand letter requesting the return of Hopi cultural materials under the authority of the H-70-94 resolution).

see signs for the numerous art galleries, including Monogya Gallery and White Bear Hopi Arts near Orayvi and Kykotsmovi villages, Iskaskopu and Tsakurshovi Galleries and Qwa-holo Silvercraft near Shungopavi village, and a number of Hopi potters working out of First Mesa, to name just a few. You would see the recent architectural work of Red Feather Development and Hopi Tutskwa Permaculture, who have produced innovative home designs grounded in Hopi aesthetic principles that use local, sustainable materials.[165] If you stopped for a bite to eat at the Hopi Cultural Center, you might purchase T-shirts, katsina dolls, baskets and other works bearing original designs of Tribal members, and perhaps pick up the Hopi Tutuveni newspaper produced by an arm of the Hopi Tribe. As you drive down the highway you will also inevitably see hundreds of carefully tended green fields where Hopi people have produced corn, beans, squash, melons, and other foods without irrigation for centuries.[166] These fields, as I explore below, while likely not eligible for copyright protection, are inseparable from many forms of Hopi creativity you might see and experience along your journey.

Copyright is critical to many kinds of creativity happening on Hopi Tribal lands. Alph Sekakuku and Clark Tenakhongva, both visual artists and Hopi traditional composers, began producing commercial recordings of their Hopi traditional songs in the late 1990s and early 2000s. While a composer and singer for much of his life, Sekakuku began creating music for broader audiences after he started collaborating with non-Indigenous musicians while living off of Tribal lands.[167] The collaboration was picked up by the Colorado-based label Red Feather Music in 1998, which allowed him to produce his first album *Hopi Katsina Prayers for Life.*[168] Tenakhongva likewise had been a composer for many years when he started producing commercial albums. After KUYI Hopi Radio began operations in the early 2000s, Tenakhongva became a DJ with a regular traditional music show that exposed both local and off-reservation audiences to Hopi music, including songs of his own.[169] Tenakhongva signed a

165 *Past Projects for the Hopi, Navajo & Cheyenne Nations, Red Feather Development Corp.* RED FEATHER (Aug. 1, 2014), https://www.redfeather.org/past-projects-blog/category/new-straw-bale-house.

166 Even the cultivation of crops involves the creation of expression, as I explore in this section. Recently, a number of organizations have begun producing educational materials to assist in this important cultural process, which are also presumably copyrightable. *Education Programs*, HOPI TUTSKWA PERMACULTURE, https://www.hopitutskwa.org/education (last visited July 30, 2020); NATWANI COALITION, https://www.natwanicoalition.org (last visited July 30, 2020); HOPI FOOD COOPERATIVE, https://www.facebook.com/hopifarmersmarket (last visited July 30, 2020)

167 Alph Sekakuku, interview with author (Aug. 2009) (on file with the author).

168 ALPH SEKAKUKU, RAIN SONGS – HOPI KATSINA PRAYERS FOR LIFE (1998).

169 Clark Tenakhongva, interview with author (Sept. 3, 2009) (on file with author).

record deal with Phoenix-based Canyon Records and released his first album in 2003. He went on to produce five albums and was nominated for a Native American Music Award (NAMMY), a Canadian Aboriginal Music Award, and a GRAMMY award.[170] While Hopi people have recorded traditional songs since the 1890s,[171] both Sekakuku and Tenakhongva have been some of the first to use their copyright rights to negotiate with commercial record labels, thus enabling Hopi music to circulate into the global creative economy.

The overall effect of these musicians' entry into the commercial recording industry has been to catalyze creativity on reservation lands. As Tenakhongva explained, "my view is that Alph, Ferrell (another Hopi recording artist), and then me coming through, some of these recordings have opened the eyes of . . . people like Randall Mali, Sanford & Seymore, and . . . Sheri Lomatewyma (younger singer-songwriters), [who] have recorded some of these songs . . . . it has made an impact on the music of the Hopi nation — it's not just pow-wow up [here]."[172] Recognition of Hopi creativity has spread beyond Hopi lands: Tenakhongva has received copyright clearance requests to use his work at Hopi, around the country, and internationally.[173]

At the same time, entering the world of commercial music has meant sometimes being limited by the Copyright Act. As Tenakhongva described it, he has given up his copyrights to his record label in exchange for royalties and their production and distribution services. In the exchange he has also had to give up a certain amount of artistic control: "I try to tweak [my music] up a little bit in a different way by adding other [African] percussion music into it, but Canyon won't allow me to do it, because it's taking away from the element of 'being traditional.'" Since, in his understanding, he no longer owns the copyrights to his songs, he can only

170 *2008 Canadian Aboriginal Music Awards Entries,* NATIONTALK (Sept. 21, 2008), http://nationtalk.ca/story/2008-canadian-aboriginal-music-awards-entries-2; Rosanda Suetopka Thayer, *Clark Tenakhongva up for NAMMY Award,* Navajo-Hopi Observer (Sept. 16, 2008); *Proud to Announce This Year's Grammy Nominees!*, A TRAIN ENTERTAINMENT (Oct. 2016), http://www.a-train.com/wp/2016/10/proud-to-announce-this-years-grammy-nominees.

171 *See* ERIKA BRADY, A SPIRAL WAY: HOW THE PHONOGRAPH CHANGED ETHNOGRAPHY 103-05 (1999) (describing early recordings made by Hopi performers with the help of Jesse Walter Fewkes).

172 Tenakhongva, *supra* note 169.

173 Clark Tenakhongva, Gary Strautsos & Matthew Nelson, *Evoking a Spirit of Time and Place*, ÖNGTUPQA (2018), https://www.ongtupqa.com/about-moksha.

perform the songs publicly or make new recordings of them with his label's consent.[174]

Further, copyright sometimes directly conflicts with local principles governing ownership and circulation of creativity, raising challenges for creators like Secakuku and Tenakhongva. As Tenakhongva explained, when a Hopi composer shares a song with the local community "it belongs to the society." To give an example, in some Hopi villages, when a composer contributes a song for an upcoming *povoltiikivi* (butterfly dance) or other social dance, ownership of the song automatically transfers to the village as a whole and use of the song is subject to village authority. The composer is no longer the exclusive owner, and others may use it without their permission as long as local protocols are followed.[175] The Copyright Act does not necessarily recognize these sorts of implied transfers of ownership and deference to protocol established by Indigenous law.[176] Thus, for Tenakhongva, when "people [on or off the reservation] come to me and say, 'can I use this song?' I want to say yes, but . . . I can't because I'm bound by copyright terms with Canyon Records."[177]

This conflict between Hopi and copyright law has led some composers, like Secakuku, to believe that copyright doesn't or shouldn't apply to on-reservation uses of Hopi songs. Secakuku explained that when he visits

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[174] *See* 17 U.S.C. § 106(2), (4) (granting a copyright holder the exclusive right to prepare derivative works based on a copyrighted work and to publicly perform a musical or other qualifying work, respectively).

[175] This implied transfer of rights under Hopi law seems to follow a pattern established by Hopi *katsinam* — spiritual beings that visit Hopi villages each year. The *katsinam* share their powerful songs with village members during ceremonial performances, with the understanding that those songs may only be used according to local protocols or ceremonial authorities. Local composers similarly convey all their rights in the songs they create to the village, with the understanding that they will be used by those that hear them according to local protocols.

[176] The Copyright Act generally requires written transfer of copyright interests, see 17 U.S.C. § 204(a), though the Act does recognize that "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law," which may include Tribal customary law, 17 U.S.C. § 201(d)(1).

[177] This case aptly illustrates the potential conflicts of laws that arise between Hopi law and federal copyright law. If Hopi law takes priority over federal copyright law, then non-Hopi record labels like Canyon Records would have only limited rights to distribute songs like Teankhongva's as any rights Tenakhongva held at the time he signed his copyright transfer agreement with Canyon would be subordinate to local Hopi protocols and village authorities as this is all Tenakhongva would hold after sharing his songs with this village. However, if Copyright law takes priority, the Hopi villages would receive nothing and Canyon Records would maintain exclusive control, since the transfer of songs to the villages relies on the operation of Hopi village law, not on a written agreement as the Copyright Act requires. *See id.* I thank Stewart B. Koyiymptewa of the Hopi Cultural Preservation Office for this helpful insight.

other villages during social dances and hears them using songs he has contributed "it feels pretty good . . . you don't have to ask [the composer's] permission. . . nobody has a copyright on it." However, when those songs are used commercially off the Reservation, "then I oppose, they should ask my permission first if they are going to use my song." While for Secakuku those that use his songs locally without permission are not violating his copyright rights, he clearly believes those who do so off the Reservation are committing copyright infringement. Thus, even for commercial recording artists who have come to depend on copyright in the creation and distribution of their work, copyright's utility seems to end at the Reservation border.

Copyright has also played an important role in the creation and distribution of Hopi cultural materials in recent years. Anita Poleahla, the founder and president of Hopi-based Mesa Media, Inc., is one of a growing number of community leaders who have relied on the Copyright Act to facilitate educational and community-building efforts that preserve and perpetuate Hopi culture. In collaboration with other Hopi cultural experts, Poleahla has produced a remarkable catalog of activity books, calendars, crossword puzzles, language training materials, cookbooks, language apps, and many other kinds of copyrightable works to help children and adults learn Hopi language and incorporate it into their everyday lives. In particular, Poleahla has partnered with Hopi illustrators to create children's books written in the Hopi language in efforts to normalize its use and make culturally relevant materials user-friendly for parents.[178] Often, the illustrators she employs to create these books are teenagers just beginning their careers. By including their work in her publications, Poleahla helps students build their artistic portfolios to secure greater financial stability.[179]

Importantly, upon picking up a copy of Mesa Media's works, one can see a copyright notice prominently featured on the front cover. Keeping control of these materials by way of copyright law not only helps the organization receive revenue for the work it produces, which is then used to support local artists and produce additional educational materials. Copyright also helps ensure that, to some extent, Mesa Media will be able to have a say in the distribution of Hopi culture to the general public should these materials circulate to non-members or beyond the borders of the reservation.

These individuals and organizations are just a handful of the creatives working on Hopi lands. As explained, their work benefits directly from

178 Rosanda Suetopka, *New Children's Books from Salina Bookshelf Focus on Hopi Corn and Toys*, NAVAJO-HOPI OBSERVER (July 30, 2016).

179 *Supporting Hopi Artists*, MESA MEDIA, https://www.mesamedia.org/about-us/supporting-hopi-artists (last visited July 30, 2020).

the Copyright Act's grant of exclusive rights. For one, copyright rights allow tribal authors, creators, and designers to license their work through established distribution channels for circulation to broader publics. This enables actual Hopi voices to garner attention within the global creative economy rather than non-Hopi imitations crowding the field. And, while the ability to license copyright rights to record labels or publishers provides a modest income stream to the creators described above, copyright's real power for these artists and authors seems to come through the social recognition they obtain by having their work circulate in established distribution channels. Seeing these authors' works circulate within these channels encourages other Hopi creators to express and circulate their own creativity. Additionally, having marketable copyright rights gives these artists a certain amount of leverage with publishers, record labels, and the public, to ensure Hopi culture is circulated with dignity and care, and, where feasible, some degree of respect for community protocols.

But copyright isn't necessarily a panacea for Tribal creators, even though some might find it expedient for broadening their reach or protecting their work. Perhaps most importantly, these artists explain that while copyright should apply off of Tribal lands, Hopi law, custom and protocol should govern the ownership and circulation of creative works on Tribal lands and among Tribal members. As I discuss in the following section, if copyright were to control the circulation of Hopi traditional creativity, for example, it might hamper the way ceremonial practitioners create and perform their work to carry out their vital sovereign functions within the Hopi villages. Further, many Hopi people believe that individuals are not supposed to accumulate private wealth from Hopi traditional songs, Hopi language, cultural teachings or other forms of Hopi cultural expressions, as these are meant to benefit the community and the world. Thus, while Hopi people may see copyright as an important tool to protect and promote their work, they also recognize its potential for harm if imposed locally.

B. Copyright and Intra-National Hopi Creativity

The Copyright Act provides important rights to Tribal creators that enable them to circulate their work within the global creative economy. However, as I explore here, imposing copyright unilaterally on Tribal sovereigns may conflict with legal authorities, protocols, and principles that foster local cultural creativity and support tribal sovereignty. This is because rules and policies governing ownership and circulation of cultural expressions often go to the heart of a Tribe's modes of existence and self-governance. Regulation of expression and creativity inevitably reifies fundamental principles, political philosophies and cultural norms into concrete rules governing human activity within a shared sensory world. As

with other areas of Tribal governance like public safety or tribal membership, foreign regulation of expression on Tribal lands without regard to Tribal authorities and protocols runs the risk of flattening the remarkable normative structures already established by Indigenous communities, thereby inhibiting their self-determination.[180]

Among the most widely recognized forms of Hopi creativity are song and dance performances that occur during a *tiikive* (ceremonial dance day) in the twelve Hopi villages. While Hopi villages are home to relatively small populations (usually around 500 to 1,000 people), outside visitors numbering in the hundreds, and occasionally in the thousands, come to witness these events. While many visitors come for what they might consider to be exotic cultural performances, a *tiikive* is much more than a public festival celebrating Hopi culture. The designs visible on the dancers, the expressive choreography, the purposeful dialogue between those involved, and the sounds and texts of *taatawi* or traditional songs, are carried out at regular intervals in part as a mode of performing Hopi sovereignty.[181]

Since before the creation of the Hopi Tribe in 1936[182] — a federally recognized Tribal government organized under the Indian Reorganization Act[183] — Hopi traditional cultural expressions have been a key locus of sovereign authority at Hopi. These expressions function as a vital link among Hopi people, but they also connect Hopi people and the surrounding world. These expressions have a distinct ontology. On one level, the texts of *taatawi*, often generated anew for each *tiikive*, contain "the principles by which Hopi people have organized themselves,"[184] providing listeners with a kind of "sovereign sensibility" upon which their behaviors and actions can be evaluated. During a *tiikive*, members of the community with authority carry out their responsibilities; individuals whose behaviors

180 *See, e.g.*, Elizabeth Burns Coleman, Rosemary J. Coombe & Fiona MacArailt, *A Broken Record: Subjecting 'Music' to Cultural Rights*, *in* THE ETHICS OF CULTURAL APPROPRIATION (James O. Young & Conrad G. Brunk eds., 2009) (arguing that Indigenous and non-Indigenous approaches to ownership of songs may be incommensurable with copyright and showing how indigenous cultural forms may actually exist as modes of legal discourse).

181 *See generally* Trevor Reed, *Sonic Sovereignty: Performing Hopi Authority in Öngtupqa*, 13 J. SOC'Y AM. MUSIC 508 (2019) (discussing the linkage between Hopi taatawi performance and territorial sovereignty).

182 The Constitution and Bylaws of the Hopi Tribe were ratified on October 24, 1836, with only 30% of elgible Hopi people voting. *See* CONSTITUTION AND BYLAWS OF THE HOPI TRIBE (1936), https://narf.org/nill/constitutions/hopi/hopi_const_1993.pdf.

183 25 U.S.C. § 461 et seq.

184 Emory Sekaquaptewa & Dorothy Washburn, *They Go Along Singing: Reconstructing the Hopi Past from Ritual Metaphors in Song and Image*, 69 AM. ANTIQUITY 458 (2004).

are contrary to established norms can sometimes be reprimanded; and relations between individuals, families, and clans are given recognition. But a *tiikive* is also more than just a collage of texts and procedure. These cultural expressions are a means of bringing people and territory into generative relations; creation and expression of song, dance, design, and spoken word are meant to personally and collectively encourage collaboration between a multitude of actors that reside within Hopi territories through the fusion of their creative elements.[185]

Hopi modes of traditional creativity and their associated customary laws and protocols have been maintained to ensure these forms of expressive sovereignty perpetuate and are used in accordance with Hopi governance structures for the benefit of the community, territory and the world. As I explore in the following sections, Hopi creative modes and their legal infrastructures directly collide with several aspects of American copyright law embodied in the 1976 Copyright Act. These include the Act's disembodying "fixation" requirement, its protection of abstract "works" (rather than the material reality of a creative endeavor), and its grant of private, exclusive rights to individual "authors" as an economic incentive rather than to the networks of actors who produce creative works as a means of mutual support. As I explain, each of these conflicts interferes with the production of Hopi traditional cultural expression, and in doing so may cause harm to Hopi people's ability to self-govern.

1. Disembodiment

To receive protection under the Copyright Act, an author must first "fix" their "work" in a "tangible medium of expression" in such a way that it can be perceived, reproduced, or communicated with or without the aid of a machine.[186] In practical terms, this imposes a requirement that creativity become disembodied prior to qualifying for Copyright protection.[187] The reasoning behind this requirement may simply be that it reflects a narrow view of the Constitution's Intellectual Property Clause, which uses the term "writings" to describe the outer boundaries of copyright.[188]

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185 *See* Trevor Reed, *Sonic Sovereignty supra* note 101.

186 17 U.S.C. § 102(a).

187 One potential exception might be copyright in tattoos, in which the body is used as the "copy" upon which the "work" has been figured. *But see* 1 NIMMER & NIMMER, *supra* note 26, § 2A.15[C] (arguing that Congress never intended for the human body to be an eligible medium upon which a copyrighted work can be fixed) (citing S. Victor Whitmill v. Warner Bros. Entm't, Inc., No. 4:11-cv.752 (E.D. Mo. Apr. 25, 2011) (case in which plaintiff, Mike Tyson's tattoo artist, sued film distributor for featuring Mike Tyson's tattooed face and a character with an identical tattoo in the film *Hangover 2*. The case ultimately settled.).

188 *See* U.S. CONST. art. I, § 8, cl. 8 (delegating power to Congress to "Promote the progress of science and the useful arts, by securing for limited times to authors and

"Writings" are presumably things external to the body rather than those occupying the mind. Alternatively, the fixation requirement may arise out of concerns over judicial economy as verifying the existence of a copyrighted work or its similarity to an alleged copy presumably would be easier if it exists in documentary form than if it exists only within the bodies of individuals or collectives.[189] However, as James Leach has explained, the fixation requirement's goal of transforming creativity into an object prior to obtaining property rights may actually have more to do with prevailing Enlightenment-era notions of property in force as copyright emerged. Enlightenment philosophy imagined creativity as the laborious process of a solitary genius who assembles and materializes naturally occurring ideas, thereby creating a "work" that both contains the genius's personal attributes and is capable of being physically possessed to the exclusion of others.[190]

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inventors the exclusive right to their respective *writings* and discoveries"). *See also* NIMMER & NIMMER, *supra* note 185, § 2.03[B].

189 Creativity can be pinned down in time and space when fixed, allowing it to be "objectively" defined by providing verifiable boundaries and endpoints, though this only works if the kind of creativity in question can exist outside of bodies or collectives in some "stable" documentary form. This may allow copyright infringement suits to be resolved more efficiently. *See* Kelley v. Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011) (quoting 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 3:22 (2020) (arguing that one of the fixation requirement's roles is, "easing problems of proof of creation and infringement."). Even with the insistence on fixation, the law does recognize some remedial rights for those who do not fix their works. For example, unrecorded music performances may be protected from unauthorized recording, reproduction, and distribution under the anti-bootlegging statute contained in the Copyright Act. *See* 17 U.S.C. § 1101. Additionally, some states may provide protection for unrecorded or unwritten speeches and other non-fixed creativity.

190 As James Leach has explained, the detachment of copyrightable expression from the body was a pivotal move in the development of intellectual property law and of enlightenment notions of personhood:

> The relation that defines the self as a person is a subjective intervention within the world, which makes a difference to that world. This recreates the self in the same movement by which it objectifies something beyond the self. One knows one's capacity and one's 'self' through what one sees of oneself in the world. Each time a novel object is realized, as an element externalized from the person, the distinction between the self and the world is recreated. It is the very materiality of the expression that recreates the person as a locus of intelligence and agency.

James Leach, *Creativity, Subjectivity, and the Dynamic of Possessive Individualism*, *in* CREATIVITY AND CULTURAL IMPROVISATION 108 (Elizabeth Hallam & Tim Ingold eds., 2007). Under the labor theory of property attributed to John Locke, one comes to own property by appropriating common material and adding one's labor to it to create something of value. The acquisition of personal property by labor is, for Locke, a natural right, existing for both "wild Indians of north America" and in civil society. *See* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 26 (1690).

Whatever the intention behind the "fixation" requirement in copyright law, it runs counter to Hopi principles of creativity as well as a growing body of psychological and neuroscientific research. Both Indigenous and contemporary scientific approaches often reject models of creativity that conceptualize it as a purely individualistic enterprise resulting in discrete, bounded products.[191] Rather, many contemporary models of creativity view it as less a "thing" and more a node of ongoing social relations, encompassing activities like the circulation of "raw" intellectual materials across creative networks; negotiation between creative workers, trend setters, funders, or other stakeholders; and the perception and interpretation of creativity by those that experience it.[192] Importantly, under this model, creativity exists *in bodies* arranged in networks, with each actor's agency, perceptive peculiarities, positionality, experiences, and resources being vital to the creative endeavor.

Hopi *taatawi* or traditional songs provide a concrete example of this sort of embodied, network-oriented concept of creativity that resists copyright law's "fixation" requirement. It could certainly be argued that Hopi *taatawi*, like musical works in the European tradition, are attributable to

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In doing so, the laborer mixes his or her labor with objects existing in a state of nature, theoretically annexing those objects to the person in such a way "that excludes the common right of other men." *Id.* at § 27.

As Leach argues, the Lockean framework has been applied to intellectual property by making some important leaps. When one adds his or her creative labor to existing knowledge or cultural material, the resulting thoughts and expressions become property — but only if there is a way to "annex" something to those thoughts or expressions that could both differentiate them from "nature" and exclude others from their use. Requiring disembodiment and abstraction accomplishes both of these. Because material can be possessed by an individual, the fusion of idea and physical material provides a means for ideas to be transacted as property. By requiring abstraction of ideas from the material reality of the creation, the intellectual labor of the creator becomes distinguishable from that which exists in the "state of nature."

191 *See, e.g.*, MARK RUNCO, CREATIVITY THEORIES AND THEMES: RESEARCH, DEVELOPMENT AND PRACTICE 145 (2006) ("Very likely, no creative potentials would be fulfilled without social support of some kind."); JOSHUA WOLF SCHENK, POWERS OF TWO: FINDING THE ESSENCE OF INNOVATION IN CREATIVE PAIRS at xx (2014) (critiquing narratives of creativity that conceptualize humans as "self-contained, cut off, solitary."); 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, 60-62 (noting incongruences between Western notions of authorship and more community-oriented authorship structures of Indigenous Australian groups).

192 *See, e.g.*, Tom R. Burns, et al., *The Sociology of Creativity: Part I: Theory: The Social Mechanisms of Innovation*, 34 HUMAN SYS. MGMT. 179-99, 189 (2015) (identifying the ways a variety of social actors directly and indirectly account for creativity and innovation).

efforts of a single *yeewa* or "composer,"[193] but only one of the Hopi *yeeyewat* among the many I have worked with have ever made such a claim.[194] In reality, *taatawi* are composed and performed as a *means* of joining living things within the cosmos in productive relations. The Hopi word *yeewa* actually exists as simultaneously a noun and a verb — the latter referring to a visioning or planning process where humans and other living things are conceptually brought into musical relations over extended periods of time to achieve a particular purpose.[195] Collaborators in the generative process of producing *taatawi* often include, for example, corn plants — the traditional source of sustenance for Hopi people — as well as rain clouds, birds, insects, and even distant galaxies, in addition to the *yeewa* and his or her human collaborators.[196]

As Hopi *yeewa* Leigh Kuwanwisiwma explained it, having success as a Hopi composer requires not only a knowledge of Hopi song forms and spiritual or mental labor, but also spending time in the fields near Hopi villages over the growing season, singing to the plants there, encouraging them, paying close attention to the environment in which they live, witnessing their responses to one's singing, and incorporating into one's voice the aesthetic that best resonates with the plants and the local environment during that time. The composer certainly incorporates his or her own words of encouragement, vision, or warning into the *tawi* he or she has developed with the plants, and more experienced men and women in the *yeewa*'s family, clan, or ceremonial society often contribute to editing and refining of the song. But the intended effects of *taatawi* are realized only as those who create, perform, and listen to them exert metal labor and a "good heart" toward the production of collective prosperity. In this way, the creative "product" resulting from *yeewa* is much more than "music" or

193 *See Yeewa*, HOPI DICTIONARY: HOPIIKWA LAVAYTUTUVENI: A HOPI-ENGLISH DICTIONARY OF THE THIRD MESA DIALECT (Kenneth C. Hill et al. eds., 1998). The term, I think, more aptly describes someone who has the ability and temperament to envision *natwani* (collective prosperity, wellbeing) and can encode that vision into sound. *See* Trevor Reed, *Yeewa (Collaborative Creativity) as Research Methodology, in* KNOWLEDGE SYSTEMS AND RESEARCH METHODOLOGIES: LOCAL SOLUTIONS AND GLOBAL OPPORTUNITIES 204 (Elizabeth Sumida Huaman & Nathan Martin eds., 2020).

194 Even then the composer called himself "more of a song-maker" than a traditional composer.

195 As one Hopi elder explained it to me, at Hopi, "No one just sings around here." Trevor Reed, Itaataatawi: Hopi Song, Intellectual Property, and Sonic Sovereignty in an Era of Settler-Colonialism (2018) (unpublished Ph.D. dissertation, Columbia University). *Taatawi* are meant to do things in the world; they are created and sung for a purpose.

196 Lee Wayne Lomayestewa, *Podcast: Returning Hopi Songs—A Hopi Perspective*, HOPI MUSIC PROJECT (Feb. 5, 2011), https://hopimusic.wordpress.com/2011/02/05/podcasting-returning-hopi-songs-a-hopi-perspective.

even a "performance." Though they may sound like independent musical objects, in reality, *taatawi* are ontologically indivisible from the actors, places and purposes that interconnect to give them voice. Thus, in recent decades the Hopi Tribe and its sovereign villages have begun to strictly prohibit recording or other "fixations" of *taatawi* that "describe and depict esoteric ritual, ceremonial and religious knowledge," and have designated all existing fixations as the "cultural property of the Hopi people."[197]

Applying copyright's fixation requirement to the creativity associated with a Hopi *tiikive* would, in the words of Bruno Latour, "purify" it of its rich networks of social relations; and in doing so, this purifying move would make it more susceptible to settler appropriations. As Jane Anderson explains, the historical limitation on copyright ownership to only "fixed" creative "works" rather than to creativity existing in and among bodies has had the cumulative effect of "legally and socially reduc[ing] and exclud[ing] other cultural forms of articulation, expression and association with cultural knowledge products."[198] As European settlers were typically the ones who had the training, resources, and desire to document Indigenous creativity and convert it into tangible media, these settlers in many cases became the de jure owners of Indigenous "works" under settler copyright law. But they also became the de facto owners: when "fixed" in an object like paper, wax or tape — objects fully alienable from embodied creative networks — Indigenous peoples' creativity could then circulate in the global marketplace outside of their control. Thus, even today copyright's fixation requirement furthers the dispossessive work of colonization, not through the appropriation of land, but through the usurpation of community-based, expressive modes of connection to territory.

2. *Abstraction*

Ironically, while copyright law requires creativity to be excised from its embodied networks and physically fixed in a separate, tangible medium to receive protection, the actual "work" that copyright protects excludes the very material in which the creativity must be fixed. Thus, an "architectural work" is not blueprints or a building, but merely its abstract, intangible features; the physical words (paper and ink) that make a book are not the subject of copyright, but the intangible literature one reads in the words on a page is.[199] For some modes of creation — particularly European-descended ones — the fiction of abstraction is plausible and may

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197 Hopi Tribe, Resolution H-70-94 (1994).

198 Jane Anderson, *Anxieties of Authorship in the Colonial Archive*, *in* MEDIA AUTHORSHIP 229 (Cynthia Chris & David A. Gerstner eds., 2012).

199 *See* 17 U.S.C. § 101 (defining "copies"); Baker v. Libbie, 97 N.E. 109 (Mass. 1912) (holding that transferring ownership of a written letter does not transfer the copyright to the underlying literary work). In *Baker*, the court described Baker's

even be an expected aspect of the art form. But, as I suggest here, the concept of a "work" is neither natural nor neutral, though it has been normalized as such through copyright law. It is rather a reification of certain culturally valued aspects of creativity to the exclusion of others. As a result, European-descended creativity receives copyright protection while some forms of Indigenous creativity may not.

The term "work" is nowhere defined in the Copyright Act.[200] To give meaning to the concept of a "work," copyright jurisprudence has historically looked to certain features and internal relationships present in a creative endeavor, while excluding other features and relationships as external to the "work." In the case of "musical works," for example, judges have accorded ownership rights in the timing or frequency of certain groupings of air vibrations over time (i.e., what classical music theory applies the shorthand "pitch," "rhythm," and to some extent, "harmony").[201] But they seem to reject other aspects of musical creativity (volume, timbre, affect, resonance, perception, cognition, social meaning, etc.) — attributes that are all vital to the creative endeavor, but are much more likely to be inseparable from the material realities of the composer, performer, listener, and the physical materials used to create and convey sound. Of course, not all creative endeavors can be abstracted in this way. The creativity employed as professional basketball players labor within an arena has been denied copyright protection altogether because judges have been unable to find a meaningful way to abstract these creativities into "works" outside of their material realities.[202] Instead, these

right to her work as "an interest in the intangible and impalpable thought and the particular verbal garments in which it has been clothed." *Id.* at 112.

200 *See* Casa Duse, LLC. v. Merkin, 791 F.3d 247, 256 (2d Cir. 2015) ("The Copyright Act does not define the term 'works of authorship.'"); *Work* (2), BLACK'S LAW DICTIONARY (11th ed. 2019). ("An original expression, in fixed or tangible form (such as paper, audiotape, or computer disk), that may be entitled to common-law or statutory copyright protection. A work may take many different forms, including art, sculpture, literature, music, crafts, software, and photography.").

201 *See* Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 272 n.1 (6th Cir. 2009) (holding that "[a] musical work consists of rhythm, harmony and melody" along with accompanying lyrics, and thus finding that rhythmic panting like a dog in a hip-hop track could be successfully reified as "a stand-alone melody of one word" rather than just the sound-effect of a dog panting, which would not qualify for copyright protection.).

202 As the Second Circuit explained in *National Basketball Association v. Motorola*, "[u]nlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script." 105 F.3d 841, 846 (2d Cir. 1997). The court went on to suggest that even if it could abstract a particular basketball-playing endeavor into a "work," doing so would limit the possibilities for others to play the game themselves.

judges have relegated creativity of this type to the public domain where anyone can freely appropriate it.

Abstraction has the potential to do considerable violence to Indigenous creativity as, from within many Indigenous worldviews, the divisions established by copyright between a copyrightable "work" and its material reality are entirely arbitrary. Take for example a *kooyemsi* (mudhead kachina) ceremonial performance early ethnomusicologist Laura Boulton recorded during her 1940 visit to Hopi lands. The sound recording, a copyrightable work,[203] captures a number of things — voices singing a *tawi*, the sound of a drum, and other incidental sounds *kooyemsi* or those that assist them might make during a ceremonial performance. But the abstract notion of a "sound recording" hardly encompasses the creative endeavor as a whole, especially the aspects that are typically most valuable from a Hopi point of view. The *kooyemsis*' acts of generating *taatawi*—their unique way of producing expressive movements, conveying messages through symbols, giving meaningful gifts to the people, teaching specific principles, all for the purpose of bringing collective prosperity and hope — certainly produce remarkable sounds. But merely claiming ownership in the waveforms,[204] as Laura Boulton did through her sound recording copyright, rather than the material reality of their creativity as a whole leaves the *kooyemsis*' creative endeavor vulnerable to decontextualization, misrepresentation, and misuse outside of Hopi authority. If no complementary body of law exists to pick up the pieces of a creative endeavor copyright brushes aside — or if protection of these pieces is preempted by the Copyright Act — the remainder of the creative endeavor beyond the waveform falls into the public domain where anyone can imitate, sell, perform or otherwise recreate it.

The problem here may seem at first blush to be the same as what many players in the creative industries face. Filmmakers, magazine publishers, hip-hop producers, and opera houses, for example, often must aggregate a diverse bundle of copyright rights from individual contributors to safeguard a large-scale project from piracy and realize its social or economic value. The difference here, though, is that even if Hopi people made video recordings of their *kooyemsi* ceremonies, transcribed the *kooyemsis*' songs into a musical score and their movements into labanota-

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203 This is assuming copyright existed in sound recordings created on Tribal lands in 1940. Under the Copyright Act, entitlements pertaining to recordings made prior to 1972 do not arise from federal copyright law but are instead a product of State (and presumably Tribal) copyright or equivalent laws. 17 U.S.C. § 301(c). However, all sound recordings created post-1978, and those published post-1972, are subject to the Copyright Act.

204 *See id.* §§ 102(a), 106, 1401. Further, the sounds captured are only protected against exact duplication, remixing, distribution, or digital streaming. *Id.* § 114.

tion, documented the designs and marks on their bodies, and wrote ethnographic accounts of *kooyemsi* ceremonies, these abstractions of *kooyemsi* creativity do not add up to what a *kooyemsi* ceremony actually is and does in the world. Copyright at best offers ownership of snapshots of Hopi creative endeavors from a variety of European-descended lenses. But Hopi and presumably many other Indigenous ownership systems may not separate the expressive aspects of creativity from the material means by which their creativity happens in the world. Without keeping ownership of both the meaning-producing and material aspects of a creative endeavor intact in an intellectual property regime, that which the Hopi people most value and take pains to protect may be marginalized and left unaccounted for.

If the Copyright Act exclusively governed expression on Hopi tribal lands, Laura Boulton (now her estate) as sound recording owner could reproduce *kooyemsi* ceremonial sounds at will, with no obligation that listeners experience them with a good heart, as Hopi protocols might necessitate. As the first to capture the *kooyemsis'* melodies, Boulton, as a musical work owner, could substitute her discretion for that of the *kooyemsi*, dictating when songs are performed and for what price. Boulton as ethnographic author could recontextualize *kooyemsi* knowledge and expression and disclose it to the public according to her preferences, diverging from established authorities, protocols, and acceptable purposes required on Hopi lands. Indeed, Boulton as the copyright owner—and even members of the general public under the doctrine of fair use—can mash up, parody, or make transformational use of *kooyemsis'* voices regardless of the effect such a manipulation might have on Hopi people, their environments, or their ability to self-govern.[205]

The risks from this kind of abstraction are not just theoretical. Without consent, Laura Boulton released the *kooyemsi* song discussed above, along with the ritual songs of several other Tribes, on a number of commercial albums. To Boulton, fixing the sounds of these ceremonies in an acetate disk gave her the absolute right use the resulting sound recordings as she pleased, allowing her to copy them, edit them, create her own racist and primitivist notes to accompany them, and then make them available for purchasers' enjoyment in complete derogation of Hopi ceremonial authorities.[206] She is, of course, not alone. Nationalistic organizations like Boy Scouts of America and fraternal organizations like the Smokis have

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[205] *Cf. id.* § 107 (exempting "fair use" of a copyrightable work from the ambit of copyright protection); Campbell v. Acuff Rose Music, 510 U.S. 569 (1994) (permitting "fair use" of copyrightable works in cases where the character of the use is "transformative," including parodies).

[206] *See, e.g.*, LAURA BOULTON, INDIAN MUSIC OF THE SOUTHWEST (1941) (Folkways Recordings 1957) (sound recordings and accompanying liner notes).

infamously and dangerously appropriated and recontextualized abstract aspects of Hopi rituals (primarily dance steps and regalia designs) without taking into account the material effects of their actions.[207] Significant time and financial resources had to be expended by Hopi people to pressure these organizations to shut down their practices, not to mention the cost of shame that accompanies such ersatz performances.[208] Now, Hopi villages, once welcoming to non-Hopi visitors, are often closed off during ceremonial performances, and abstractions of Hopi ceremonies such as sketches, audio or video recordings — while potentially useful mnemonics for local preservation and teaching purposes — are now completely prohibited for all attendees.

Severing an abstract "work" from its material reality, like Boulton did, may be completely appropriate for many kinds of expression we encounter today. But when Indigenous creativity is unilaterally abstracted according to settler forms and philosophical paradigms, Indigenous peoples may be forced to forfeit control over the material networks within which their ceremonies operate, and to some extent, the relationships and authority they maintain within their own territory.

3. Privatization of Creativity

Perhaps the most serious divergence between Indigenous regulation of creativity and present-day copyright law lies in their incentive structures. Presumably Native American Nations, like the United States, actively promote the intellectual and creative progress of their citizenry. However, they may accomplish this through different means. The United States incentivizes creativity through a temporary privatization of newly created works. As I explain here, some Indigenous societies like Hopi do not privatize their creativity but have developed a collective ownership structure that has sustainably incentivized creation and innovation for millennia.[209] Indeed, for some Tribes, privatizing creativity may actually disrupt creative economies already established and functioning well on Tribal lands, not to mention the overall health and welfare of Tribal members.

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207 *See* Angela R. Riley & Kristen A. Carpenter, *Owning Red: Toward a Theory of Indian (Cultural Appropriation)*, 94 TEX. L. REV. 859, 882 (2016) (describing Boy Scout appropriations Hopi rituals, and subsequent Hopi efforts to prevent the misuse of those rituals.) ; Peter Whiteley, *The End of Anthropology (at Hopi)?*, 35 J. Sw. 125 (1993) (describing Smoki appropriations of Hopi rituals, and Hopi protests at Smoki events.).

208 *Id.*

209 A growing body of scholarship also takes issue with this notion. *See, e.g.*, MICHAEL BROWN, WHO OWNS NATIVE CULTURE? (2003).

Fig. 1. Copyright's Creative Model: Incentivizing Individual Authors

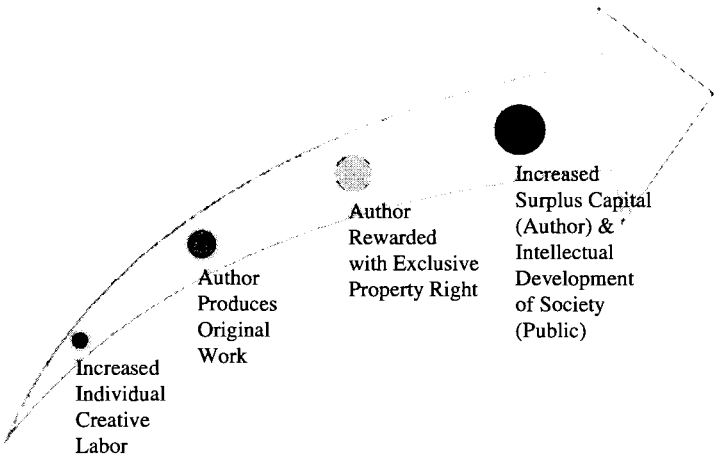
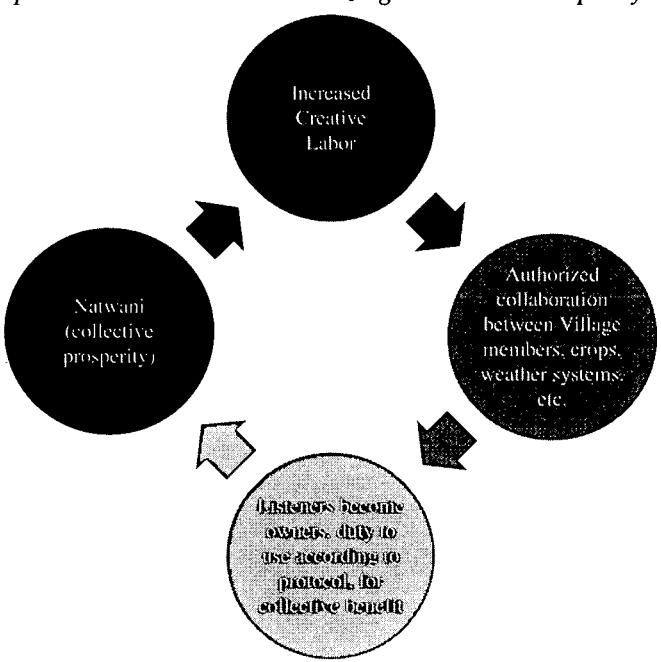


Fig. 2. Hopi Creative Model: Incentivizing Collective Prosperity



American copyright law has historically operated under the assumption that creativity is best stimulated by granting individual creators a monopoly on the right to use "works" they create. Under this model, the presumption is that [1] as individuals exert their labor to create, [2] they tend

to produce original "works" that may ultimately benefit society. To incentivize the production of more publicly beneficial works, copyright law rewards the laborer who produces an original, creative "work" with [3] a private, federal property right to prevent others from using that work in certain ways without the creator's permission for a period of time — essentially creating a monopoly on economically viable uses of that work. The individual creator can then [4] use the work for his or her own purposes or, more likely, license or sell the work to players in the creative industries in exchange for capital. With the prospect of capital as a carrot, the individual creator is incentivized to create more new works, develop new markets for existing works over the lifetime of her monopoly, and/or refine her craft in light of shifts in market demand. Thus, copyright's privatization of creativity has been viewed as a necessary mechanism for incentivizing creative and intellectual progress for society as a whole.[210]

Hopi creativity, on the other hand, may be generated under very different economic assumptions, but with the same goal of social wellbeing. As a preliminary matter, it is important to point out to that the pursuit of individual wealth accumulation in disregard of others has been rejected at Hopi as contrary to traditional values. Rather, the welfare of Hopi society has been supported over hundreds of years through relationships of mutual reciprocity and obligation toward members of one's clan, related clans, one's village and its ceremonial societies. If you were to map all the relationships each Hopi person has to others, you would see a densely packed web of reciprocity, where no one is supposed to go hungry or lack necessary resources because each person's welfare becomes the responsibility of others.[211]

Creativity, particularly creativity in the production of traditional song and dance forms, plays an important role within this economic structure because it is a catalyst for bringing networks of people, environmental actors, and other entities into productive relation in ways that benefit society as a whole. Take, for example, the generative work a Hopi *yeewa* (traditional composer) does within the Hopi economy.[212] As discussed, *supra*, the creation of a traditional song often begins with a *yeewa* planting seeds in his or her field rather than sitting at a piano or writing down lyrics. As the *yeewa* raises his or her plants, he or she encourages the plants to grow

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210 U.S. CONST. art. I, § 8, cl. 8; Feist Publ'ns v. Rural Tel. Serv., 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts. . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.").

211 For a more detailed review of the literature on Hopi kinship structures, *see* PETER WHITELEY, RETHINKING HOPI ETHNOGRAPHY 49-79 (1998).

212 For a discussion of the role of a Hopi *yeewa*, *see* Part II.B.1.

by metaphorically "feeding" them with the voice, and they respond to the *yeewa*'s vocalizations by their gradual movements, coloration, and growth patterns over the growing season. Once a *yeewa* has [1] collaboratively created a good song, one that is full of meaning and produces positive effects on his or her plants, the *yeewa* will share this song with other singers or dancers without compensation. These shared songs, when performed in a *tiikive* or other community event authorized by local authority and heard by audiences with a good heart will [2] bring humans, weather systems, plants, animals and other actors into productive relation. In the process of preparing for and carrying out the *tiikive*, [3] the *yeewa* and performers give ownership of the songs over to members of the village who witness them, which not only brings the composer recognition as one who increases the welfare of the community; the composer benefits directly when good songs are sung by the village, because [4] the village as a whole, including the composer, experiences *natwani* or good crops and greater prosperity. As a result, the composer is incentivized to continue to produce more songs and to share them without need of personal remuneration. Indeed, others in the village are sometimes motivated to "out-do" him or her by composing their own songs for the benefit of the community.[213]

It may be unsurprising, then, that the ownership interest one has in Hopi ceremonial song under Hopi village law is often more of an inclusive right rather than an exclusive one, like Copyright. While any member of a village who desires it can obtain an ownership interest in a traditional song by listening to and remembering it, those that do take ownership carry an obligation of reciprocity to use it for the benefit of the community (not selfishly), which includes following local protocol and authority regarding the performance of the song. Some community members call this right *nasimokyaata* ("to borrow" or "to adorn oneself"), though in some Hopi villages this term is only used with physical objects, while others suggest the term *no'i'yta* ("to share" or "give the right to use"). Some have suggested the phrase *tuuwat akw mongvistoti* ("to benefit when complete"), which explains how *taatawi* will become beneficial to those that own them only when they are "completed" through sincere, good-hearted ceremonial performance — emphasizing how integral material relationships are to the Hopi creative process.

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213 As Shaul explains it, "There are several successive contexts in which a songpoem may exist. First of all, there is the composer's mind. Second of all, there is the rehearsal-editing context of the kiva. Thirdly, there are one or more public performances; and finally a songpoem may stick in anyone's mind for future use and savoring." DAVID LEEDOM SHAUL, HOPI TRADITIONAL LITERATURE 190-91 (2002).

While Hopi villages seem to differ in the words they use to describe the right to use *taatawi*, these concepts make clear that ownership of Hopi creativity is not rooted in a logic of *exclusion* like that of American copyright. Forcing Indigenous communities like the Hopi villages to adopt the Copyright Act as the basis for ownership and circulation of creativity risks severely altering the creative economies Tribes have sustained for millennia and significantly disrupting or even severing some of the bonds that bind Indigenous societies together.[214]

C. *Why Some Tribes Adopt Copyright Law*

With all the potential problems disembodiment, abstraction and privatization of creativity impose on Indigenous communities, it may be surprising that many Tribes continue to advocate for American intellectual and cultural property protections for their creative works. Some even adopt copyright as their own.[215] But it is important to point out that Indigenous peoples, though sovereign, are usually the ones that must make accommodations to the legal frameworks imposed on them by colonizing states. Asserting dominion over creativity through intellectual property rights may be a powerful move within a colonial structure that, as of right now, is unlikely to recognize Indigenous ownership systems as equal or superior to its own system of property rights outside of reservation boundaries.

And yet, in an era of ongoing colonization and globalization, there is a strong incentive for Tribes and other marginalized groups to use culture as what George Yúdice has called an "expedient": a resource to be managed, developed, and converted into property so that the marginalized group has the exclusive ability to perform its differences in ways that empower it under frameworks salient to a colonizing nation-state or the international capital economy.[216] Yúdice argues that as growing world economies increasingly turn to the production of easily circulating, immaterial goods like digital music, movies, or software, minority groups are leveraging their "cultural resources" in like manner as they fight for greater political autonomy. Negotiations over cultural "rights" between Indigenous groups and settler-states (and now, cultural institutions) create economic, political, and social fields of force, which act to secure and tra-

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214 For an argument that tribes should avoid using copyright as a means for protecting tribal culture, see MICHAEL BROWN, WHO OWNS NATIVE CULTURE? 287 (2003).

215 *See, e.g.*, Human and Cultural Research Code of 2009, Colorado River Indian Tribes Tribal Council Ordinance 09-04 (as amended), *infra* note 264 (recognizing copyright and intellectual property interests in various types of Tribal creativity and knowledge).

216 GEORGE YUDICE, THE EXPEDIENCY OF CULTURE (2003).

ditionalize culture while at the same time restricting or privileging certain forms for the sake of meeting these groups' political needs. In other words, by claiming Indigenous creativity as copyrightable works, a Tribe may be able to assert its authority much more deeply and powerfully into the infrastructure of the settler-state, which may send a strong message to the creative industries, government institutions, and stakeholders within the global information economy, that Indigenous rights must be respected.

But converting Indigenous creativity into a property resource to assert or reinforce political sovereignty may have some negative implications. When Tribes assert claims to what they deem cultural or intellectual property, they may be re-deploying the settler-state's logics while marginalizing their own.[217] As political moves, these claims may reverse the tide of colonial power in a language power understands. However, dependence on property logics as a basis for reclaiming ownership over Indigenous creativity may reinforce the legitimacy of the settler-state. As James Leach has warned, treating ritual songs as property, for example, may enact a modern conceptual colonialism over Indigenous groups, requiring them to rely on Enlightenment divisions of what is "natural" and inanimate, and what is "cultural" or agentive in the world, while ignoring the diverse kinds of actors and networks that contribute to Indigenous creativity and innovation.[218] Thus, even if Tribes have taken the step of seeking out property-based protections for their creativity, such a move does not necessarily mean Tribes believe Copyright is value-neutral or that it's structures aren't harmful to them. Imposing Copyright on Tribal lands, even if expedient for Tribes politically, brings with it the potential for further colonization of Indigenous peoples, by dispossessing Indigenous peoples of their ability to govern their own voices and expressions.

III. RETHINKING HOW COPYRIGHT APPLIES ON TRIBAL LANDS

As discussed in Part I, with the Copyright Act silent — both in its text and legislative history — as to its applicability on Tribal lands, we are faced with considerable uncertainty as to what that silence might mean for federally recognized Indian Tribes. Under the Tenth Circuit's framework, the federal Copyright Act would likely not apply on Tribal lands without "express congressional authorization," out of "respect for Indian sover-

217 Richard Handler, *Who Owns the Past?: History, Cultural Property, and the Logic of Possessive Individualism*, *in* THE POLITICS OF CULTURE 70-71 (Brett Williams ed., 1991).

218 James Leach, *Creativity, Subjectivity and the Dynamic of Possessive Individualism*, *in* CREATIVITY AND CULTURAL IMPROVISATION 99 (Elizabeth Hallam & Tim Ingold eds., 2007).

eignty."[219] However, in the Ninth Circuit and those which follow its framework, the Copyright Act likely would apply to Tribal members and their creative works, so long as it does not invade tribal self-governance in "purely intramural matters" or Tribal treaty rights. As discussed in Part II, the Copyright Act has very real implications for Tribal sovereignty, affecting not only broad economic, educational, and cultural goals of Indigenous societies, but also the very modes through which Indigenous sovereignty is exercised. So far, only one court has specifically ruled on the question of Copyright's applicability on Tribal lands, finding under the Tenth Circuit's approach that it does not apply. Others have suggested that the Ninth Circuit's *Tuscarora-Coeur d'Alene* rule might apply, presumptively making the Copyright Act applicable on Tribal lands. The impending Circuit split means the question of copyright's applicability will continue to trouble Indian Country until resolved by the Tribes and Congress or by the Supreme Court.

This Part offers what I believe is an approach to this question that best upholds current federal policy toward Indigenous peoples, accounts for current international norms recognizing Indigenous peoples' rights to govern intellectual property as a fundamental aspect of their sovereignty and incentivizes Tribes and the United States to work together to protect and promote Indigenous creativity. There may also be constitutional justifications for Congress taking the proposed approach to copyright on Tribal lands — an argument that I briefly discuss, but save for future writing. While the focus of my proposal is on the application of Copyright to creativity occurring on Tribal lands, this approach may provide a viable methodology for any context in which courts are faced with the fundamental question at the heart of both the *Tuscarora-Coeur d'Alene* and the Tenth Circuit approaches: whether a general federal law should apply on Tribal lands.

A. Intellectual Property Regulation as Sovereign Right

The Hopi examples in Part II show just how integral the ownership and circulation of expression is to an Indigenous communities' political, economic and cultural self-determination. Though configured in a strikingly different way than the United States' intellectual property system, the Hopi intellectual property system reflects policy choices the Hopi people as a nation have made to integrate incentives for creators within the overall design of its public sphere and creative economy, while ensuring its collective longevity as a society. Because these kinds of policy decisions go directly to the heart of a nation's political integrity, economic security,

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[219] *See* Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010).

and overall health and welfare, they directly implicate a Tribe's inherent sovereignty and self-determination.[220] Just as the drafters of the United States constitution found the power to grant (or deny) temporary ownership rights over individuals' expressions to be fundamental enough to include in the country's founding documents,[221] Indigenous communities have — often since time immemorial — maintained and exercised their fundamental powers to determine when and how expression should be owned and circulated. As I show in the following pages, the international community, the Executive Branch, and Congress each have adopted policies deferring to Indigenous governments on matters involving the ownership and use of their culture. Thus, following this trend, federal courts should likewise defer to the policy judgments of sovereign Tribal governments in considering the extent to which the Copyright Act should apply on Tribal lands.

The notion that creative expression is inseparably connected with widely recognized principles of Indigenous sovereignty is found both in international and domestic policy and law. The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), adopted in 2007 with the support of 140 (now 144) nations, is perhaps the most complete statement of this principle.[222] The UNDRIP provides that:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and culture, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.
>
> In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[223]

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220 *See* Montana v. United States, 450 U.S. 544, 566 (1981) (explaining that federally recognized Indian Tribes maintain inherent sovereignty to regulate the conduct of individuals on Tribal lands. That power extends even to non-members of a Tribe residing on non-Tribally owned lands when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."); Chilkat Indian Village v. Johnson, No. J84-024 Civ., Slip Op. at 2-3, 13 (D. Alaska, Oct. 9, 1990) (holding that a Tribal ordinance restricting the unauthorized purchase of "artifacts, clan crests, or other traditional artwork" could be applied to a non-member under the Tribe's "retained, inherent power" per *Montana*.).

221 *See* U.S. Cost., art. I, § 8, cl. 8.

222 U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (hereinafter UNDRIP).

223 UNDRIP arts. 31(1), (2).

As the UNDRIP makes clear, Indigenous peoples have a fundamental right to "maintain, control, protect and develop" all "manifestations of their sciences, technologies and culture." The breadth of the creative expressions covered by this article is expansive, encompassing and exceeding Copyright's subject matter.[224] And, in recognizing Indigenous peoples' rights to control and protect both copyrightable and noncopyrightable forms of culture, the UNDRIP does not create a distinction between "traditional" and "contemporary" forms of expression. Rather, Indigenous peoples, as a feature of their sovereignty, should have complete control over virtually any creative production happening within their territories, whatever form or nature that creative production may take.

Also essential to this UNDRIP provision is the assertion that policy judgements over what laws, principles and protocols will best maintain, control and protect Indigenous cultural expression are reserved for Indigenous communities to make, not for colonizing nations like the United States to unilaterally impose. Colonizing states are, however, under a duty to work with Indigenous peoples to "take effective measures to recognize and protect" Indigenous peoples' rights to govern these forms of expression within their legal systems.

As a United Nations declaration, the UNDRIP is not necessarily binding on member states. However, it does reflect "the commitment of states to move in certain directions, abiding by certain principles."[225] Numerous nations have adopted some or all of the UNDRIP into their domestic law, either through constitutional provisions, legislative action or judicial decisions; in fact, Canada, Australia and New Zealand have each embarked on comprehensive efforts to incorporate the UNDRIP into their national legal systems.[226] This movement toward recognizing Indigenous peoples rights to regulate intellectual property on their own terms has resulted in the recent adoption of sui generis protections for Indigenous traditional knowledge and cultural expressions by twenty-four countries — rather than requiring that Indigenous Peoples seek protection

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224 *See* 17 U.S.C. § 102(a). For example, as discussed in Part II.C, sports may not be copyrightable, but they are declared to be within the ambit of Indigenous people's fundamental rights per the UNDRIP.

225 Declaration on the Rights of Indigenous Peoples: Frequently Asked Questions at 2, United Nations Department of Economic and Social Affairs, https://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf (last visited Aug. 3, 2020).

226 *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 4 STATE OF THE WORLDS INDIGENOUS PEOPLES 9-16 (2019), https://social.un.org/unpfii/sowip-vol4-web.pdf.

exclusively under existing intellectual property regimes.[227] Another sign that UNDRIP's principles have established global deference toward Indigenous people's intellectual property rights is the World Intellectual Property Organization's decision to expedite three international legal instruments for the protection of Indigenous peoples' genetic resources, traditional knowledge and traditional cultural expressions.[228] After thirteen years functioning as a guiding principle for the international community, the Declaration has become a statement of growing global consensus around the rights Indigenous peoples should have in their cultural expressions viz a viz colonizing governments.

While it has not formally adopted UNDRIP as binding law, the United States government's statements of support, coupled with a growing body of federal law reflecting UNDRIP principles, show that as a matter of policy, the United States recognizes that the governance of Indigenous culture should remain with Tribes. Initially resistant to UNDRIP, the U.S. Department of State formally announced in 2011 that "the United States . . . proudly lends its support to the United Nations Declaration on the Rights of Indigenous Peoples."[229] In doing so, it expressed support for the "Declaration's call to promote the development of a new and distinct international concept of self-determination specific to indigenous peoples" — one that is "consistent with the United States' existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance."[230] In the view of the State Department, the United States "supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial

227 World Intell. Prop. Org., Compilation of Information on National and Regional *Sui Generis* Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions (May 7, 2020), https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf?utm_source=WIPO+Newsletters&utm_campaign=3f1afe4971-EMAIL_CAMPAIGN_2020_07_24_01_20&utm_medium=email&utm_term=0_bcb3de19b4-3f1afe4971-256688297.

228 Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Decision—Agena Item 20, 59th Series of Meetings, Assemblies of the Member States of WIPO (Sept.-Oct. 2019), https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf ("The Committee will [during] 2020/2021, continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument(s) . . . . relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).").

229 U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm.

230 *Id.*

affairs," which includes "culture, religion, . . . information, . . . economic activities . . . as well as ways and means for financing these autonomous governmental functions."[231] Sovereign rights over "culture," as the State Department went on to explain, include "traditions and arts," which are among Indigenous peoples' individual and collective rights that "need to be protected, as reflected in multiple provisions of the Declaration."[232] While the State Department's statement of support for the UNDRIP has not yet resulted in an explicit implementation of the UNDRIP, it does indicate that Executive Branch policy supports leaving decisions regarding rights to Tribal culture and creative expression in the hands of Tribal sovereigns and offering its support in the protection of those rights. [233]

The federal government's support for UNDRIP's intellectual property principles is further reflected in recent federal laws recognizing Indigenous sovereignty over culture and cultural production, including the Native American Graves Protection and Repatriation Act (NAGPRA), the Indian Arts and Crafts Act (IACA), the National Historic Preservation Act (NHPA), and the Native American Languages Act (NALA). In perhaps its most striking recognition of Indigenous self-governance over the ownership and circulation of culture, Congress passed the NAGPRA in 1990, which requires the return of a Tribes' cultural items held by federally funded institutions when the institution does not hold a proper right of possession under Tribal law or other applicable law.[234] Deference to Tribal law in matters of local culture was central to NAGPRA's repatriation

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231 *Id.*

232 *Id.*

233 *See* Isaac v. Sigman, No. 16-5345 (FLW) (DEA), 2017 WL 2267264 at *6 (D.N.J. May 24, 2017) (collecting cases where federal courts have refused to imply a federal private right of action in UNDRIP). Federal agencies that administer intellectual property rights have certainly taken notice of the principles contained in UNDRIP. *See, e.g.*, *Request for Information Related to Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, U.S. PATENT AND TRADEMARK OFFICE (Mar. 23, 2016), https://www.uspto.gov/ip-policy/patent-policy/request-information-related-intellectual-property-genetic-resources-and (seeking comment from the public on how, if at all, the UNDIP should inform the U.S. position on the World Intellectual Property Organization treaties involving Traditional Knowledge); Press Release #04-09, *USPTO Supports Greater Protection of Traditional Knowledge and Folklore*, U.S. PATENT AND TRADEMARK OFFICE (Mar. 23, 2004), https://www.uspto.gov/about-us/news-updates/uspto-supports-greater-protection-traditional-knowledge-and-folklore (explaining how the USPTO advocated for greater protections for traditional knowledge and folklore at the World Intellectual Property Organization in the years leading up to the passage of UNDRIP).

234 *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3), 3005(a)(2),(5). An ongoing scientific study of major benefit to the United States may delay the return of the object; but it must ultimately be returned no later than 90 days after the completion of the study. *Id.* § 3005(b).

framework. To make a successful claim for repatriation under NAGPRA, a Tribe may show under its own laws and customs that it or one of its members "owned or controlled" the cultural item in question.[235] Further, a museum or other institution seeking to defeat a Tribe's repatriation claim must prove that ownership of the cultural item was transferred "with the voluntary consent of *an individual or group with authority* to alienate such object . . . ."[236] Thus, in articulating its defense, a museum would likely need to rely on Tribal statutory, common, or customary law to determine who held the authority to alienate a cultural item eligible for repatriation, and whether under Tribal law that individual actually transferred ownership of the item away from the Tribe.[237]

In addition to recognizing Tribes' rights to govern cultural items, Congress recognized through its passage of the Indian Arts and Crafts Act that Tribal members, Tribal institutions and other qualifying individuals, should have an intellectual property right in the use of words or symbols that suggest an art, craft, or "Indian product" was made by an "Indian."[238] This truth-in-advertising law not only vests rights to use such indicators of source in Tribal members, it also recognizes Tribes' sovereignty over determinations involving who may exercise this right.[239] Congress has also passed laws recognizing Tribes' "inherent right . . . to take action on, and give official status to, their Native American languages" and "to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior."[240] And finally, Congress has recognized Indigenous peoples' rights to consultation when federal agencies undertake projects on federal lands that affect historic properties of traditional religious and cultural significance to Native American tribes.[241]

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235 *Id.* § 3005(a)(5)(B), (C) (articulating the ownership requirement for Tribes to request repatriation of sacred objects and objects of cultural patrimony under NAGPRA).

236 *Id.* § 3001(13); 43 C.F.R. 10.10(a)(2) (emphasis added).

237 25 U.S.C. § 3005(a)(5), (c). (requiring "sacred objects and objects of cultural patrimony" to be "expeditiously returned," unless, among other things, the federal agency or museum can "prove that it has a right of possession to the objects.").

238 Indian Arts and Crafts Act, P.L. 101-5644, 104 Stat. 4662 (1990) (as amended); 25 U.S.C. § 305e(b) (creating a private right of action to enforce federal prohibitions on "offer[ing] or display[ing] for sale or sell[ing] a good . . . in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.").

239 *Id.* § 305e(a) (defining Indian as both a member of a qualifying Indian Tribe, and those who an Indian tribe certifies as "Indian").

240 *See* Native American Languages Act of 1990, 25 U.S.C. § 2903.

241 *See* National Historic Preservation Act, 54 U.S.C. § 302706(a) (as amended).

As has become clear in both international and domestic policy, Indigenous peoples have a right to "maintain, control, protect and develop" their creative expressions and culture as an inherent aspect of their sovereignty. Such a right is to be "recognized and protected," but not usurped, by colonizing nations, so that Indigenous peoples can effectively govern themselves.

B. Proposed Rule: Deference to Tribes on Applicability of the Copyright Act

As a matter of federal policy and established international norms, Indigenous sovereigns, not colonizing governments, should exercise ultimate control over the ownership and circulation of creative expressions within their territories. While this principle is seemingly straightforward, implementing it within the field of copyright law poses certain challenges, particularly given the federal government's dominance in the field of copyright law today and the uncertainty in the law surrounding the Tribal-Federal relationship. At one extreme, unilaterally imposing the Copyright Act on Tribal lands would, as articulated by the UNDRIP, impermissibly invade Tribes' inherent sovereignty. But the opposite extreme — completely eliminating federal protection for all works created on Tribal lands — also makes little sense as it would potentially deprive Tribal members (who are U.S. citizens) of a kind of valuable property right otherwise available to other Americans. The status of copyright on Tribal lands may also have implications for those who aren't members of the Tribe residing off of tribal lands: if the Copyright Act were not enforceable on Tribal lands, copyrightable works—made by Tribal members and non-members alike—could be exploited there with impunity, unless Tribes protected these works under principles of comity or their own intellectual property frameworks.

To remedy this dilemma, the United States ideally should enter into bi-lateral agreements with each Tribe establishing mutually agreed upon protections for creative expressions. This is how the United States has historically engaged in negotiations with Tribes where both property rights and sovereignty are at stake.[242] Such agreements would allow Tribes and the United States to determine how the Copyright Act would apply on

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[242] *See* Solem v. Bartlett, 465 U.S. 463 (1984) (describing how Congress and Tribes negotiated surplus land acts during the allotment era with numerous Native American Tribes "on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise."); McGirt v. Oklahoma, 140 S.Ct. 2452, 2460 (2020) (describing "a series of treaties" through which "Congress not only 'solemly guarantied' the land but also 'establish[ed] boundary lines'" forming the territory of the Muscogee (Creek) Nation over which it exercised sovereignty).

Tribal lands so as to avoid intrusion on Tribal sovereignty while potentially providing opportunities for reciprocal federal recognition and enforcement of Indigenous intellectual property laws off of Tribal lands. Such agreements already pervade Indigenous-settler relations in the United States, beginning with treaties,[243] and persisting now through government-to-government agreements, such as Indian Self-Determination and Education Assistance (ISDEAA) contracts. These contracts allow Tribes to regulate and operate local schools, hospitals, and other institutions previously regulated by the federal government, with the purpose of increasing Tribal self-determination in areas critical to Tribal sovereignty.[244] The end result would be a robust intellectual property framework that protects both Indigenous and settler creative interests, while upholding the national intellectual property policies of both the United States and sovereign Tribal nations.

Establishing comprehensive intellectual property agreements between Tribes and the United States will likely take time and political will to effectuate.[245] Indeed, such agreements may not arise without a catalyzing force. At the same time, maintaining the current uncertainty regarding intellectual property rights on Tribal lands in the absence of such a comprehensive agreement may continue to stifle Tribal creativity. Therefore, until such time as these agreements are entered into by Tribes and ratified by Congress, I argue that a set of default rules should be employed by courts. These default rules should (1) account for the diverse creators and forms of creativity happening on Tribal lands, (2) ensure Tribes have the right to exercise their sovereignty in the domain of creative expression,

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243 Authority for entering into treaties with Indian Tribes is provided in the Constitution. *See* U.S. CONST., art. II, § 2, cl. 2. The practice of entering into treaties with Tribes was ended by the Act of Mar. 3, 1871, 25 U.S.C. § 71, however the practice of entering into agreements with Tribes that have the same force as a treaty continues. *See* Antoine v. Washington, 420 U.S. 194, 203-04 (1975) (stating that the end of treaty making in 1871 "meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty . . . . Once ratified by Act of Congress, the provisions of the agreement become law, and like treaties, the supreme law of the land.").

244 *See* 25 U.S.C. § 5301 et seq.

245 Certainly, delegating the tasks of negotiation to a competent agency experienced in Tribal consultation, such as the Bureau of Indian Affairs, may help advance this process. Assembling Tribal coalitions who have similar intellectual property structures and interests to be recognized by the United States would likely also aid in the process. Fortunately, significant work has been done to identify common packages of rights Tribes might already maintain. *See Local Contexts*, GROUNDING INDIGENOUS RIGHTS, https://localcontexts.org/about/about-local-contexts (last visited Apr. 26, 2021) (providing a series of traditional cultural labels representing rights frameworks already in use within Indigenous legal systems around the world).

while (3) incentivizing the United States and Tribes to negotiate when their interests in the governance of creative expressions on Tribal lands diverge. I propose that, *unless an agreement between a Tribe and the United States provides otherwise, the Copyright Act should apply on Tribal lands only to those copyrightable works that are not already regulated by Tribal sovereigns.*

This proposed default rule can be defended in a number of ways.[246] First, giving primacy to Tribal intellectual property laws and policies over federal copyright law allows Tribes to make their own determinations about how best to balance distribution of ownership interests in intellectual properties against the principles and structures undergirding their public spheres. As discussed, many Tribes already have regulatory frameworks in place that differentiate between creativity meant to circulate freely within the global creative economy and creativity that should circulate only according to Tribal laws, principles, and protocols.[247] Affording deference to Tribes when they have already established their own policies, regulations, restrictions, or ownership structures regarding creative expression upholds federal policies and international norms favoring Indigenous self-determination in matters of cultural stewardship and production.

Second, establishing an "opt-out" framework in which Tribal law and policy determines the reach of the Copyright Act on Tribal lands sets a bright-line standard for when copyright law should regulate creativity occurring on Tribal lands. The currently inconsistent circuit court tests outlined in Part I, which attempt to divine a given federal law's impacts on

246 Several scholars have called for Tribal laws to govern uses of creative work. *See, e.g.*, Rebecca Tsosie *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 229 (2002); Angela Riley, Straight Stealing: *Towards an Indigeonous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 101 (2005). This default rule attempts to build on these scholars' proposals by providing a guideline for when Tribal law should take primacy in the regulation of Indigenous creativity.

247 While Tribes have begun to codify these, see Dalindyebo Bafana Shabalala, *Intellectual Property and Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1140 (2017) (finding that only nine of the 100 tribes in an online survey of Tribal codes had provisions mentioning or related to intellectual property), many Tribes already regulate Tribal culture to some degree, whether through costmary law or through governmental mechanisms. *See* Angela Riley, *Straight Stealing: Towards and Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 101 (2005) (finding that sixty-two of 192 tribes with websites indicated they maintain programs dedicated to preservation of cultural resources). While publicly available data on the number of Tribes who maintain customs regarding intellectual property is sparce, anecdotally speaking, I have yet to encounter a Tribe that does not have some form of law, protocol or custom governing the circulation of culture, including song, dance, ceremonial expressions, or traditional knowledge.

Tribal sovereignty based on a foreign judge's understanding of it, are arbitrary at best, leaving Tribal authors, artists and other creators guessing about what intellectual property rights they might hold. Indeed, these tests re-entrench settler-colonial power over Indigenous peoples by usurping their prerogatives on what is or is not an intrusion on their sovereignty.

The approach proposed here presumes that federal copyright law will *always* interfere with Tribal sovereignty and self-determination whenever it conflicts with an established Tribal law or policy. Federal courts would simply need to inquire whether Tribal law or policy already regulates a particular creative subject matter. If the Tribe has spoken as to the protection of a particular kind of creativity legislatively, via common-law, or through established Tribal protocols and norms, that creativity will be exempt from the application of the Copyright Act on Tribal lands. Thus, by tethering Tribes' own positive enactments (or lack thereof) to the status of federal copyright, I argue that Tribal self-determination in the area of intellectual property will be encouraged.

Of course the reality is that not all tribes have adopted comprehensive intellectual property policies governing ownership and circulation of every kind of creative expression on Tribal lands, though many are actively developing policy in this area.[248] As the development of Tribal intellectual property policy is happening, Tribal members, businesses, institutions, and Tribal government entities creating copyrightable material for distribution within the global information economy should still be able to rely on the Copyright Act for access to markets, leverage in negotiating transactions, and for protections the Act offers against unauthorized appropriations. Thus, where Tribes have not yet determined their own intellectual property policies, the default rule provides that those creative works which Tribal sovereigns do not yet regulate would be eligible for protections the Copyright Act affords, unless and until the Tribe affirmatively determines otherwise.

I acknowledge that the "opt-out" framework I propose may still interfere with Tribal sovereignty, and that an "opt-in" framework — where Tribes must affirmatively adopt copyright before it would be efficacious on Tribal lands — would lessen the risk that Tribal autonomy might be usurped by the United States. However, the "opt-out" framework would lessen the possibility that Tribal authors would be left without any rights to their creations if their Tribal government has not yet developed their own intellectual property protections or negotiated a bi-lateral agreement extending copyright onto Tribal lands or tribal intellectual property laws off Tribal lands. Given the complexity of creating intellectual property systems and negotiating bi-lateral agreements, Tribes and their members

248 *Id.*

could experience an intellectual property vacuum, leaving works created on Tribal lands vulnerable to exploitation both on and off Tribal lands if an opt-in framework were employed. Thus, an "opt-out" rule is preferable.

Finally, this framework provides a territorial approach to copyright law that will hopefully bring at least some clarity and stability for Tribal creators regarding the rights they have in their work. When Tribal creators want their work to be protected under Tribal law, they can choose to create on Tribal lands knowing their work is so protected. Likewise, if a Tribal member wants to take advantage of federal copyright law, they may ask their Tribal legislative body to allow copyright to apply to their particular kind of work, or alternatively, they may travel off Tribal lands to create. Indeed, Tribes might attract certain creatives or creative industries to Tribal lands by establishing favorable copyright policies.

Of course, taking a territory-based approach to copyright policy may not be convenient for some Tribal members. For one, many Indigenous creators do not live or create on Tribal lands. Tribal members who live off Tribal lands make up 78% of those who self-identify as American Indian and Alaska Native in the United States.[249] While Tribes generally have jurisdiction over their membership and territory,[250] Tribal members who are not on Tribal lands are generally subject to State or Federal regulation just as any other American citizen would be (except, perhaps, in their exercise of certain treaty rights or special rights under federal statutes).[251] Thus, Indigenous peoples creating work off-reservation likely would not benefit from the particular mix of copyright and tribal intellectual property laws Tribes might set under this proposed framework.[252] This same problem would also prevent Native Hawai'ian, State-recognized and unrecognized Indigenous groups who are not able to exercise territorial sovereignty from being able to take advantage of this default rule. But, at least *some* place would exist where Tribal laws, protocols and norms gov-

249 *See* TINA NORRIS, PAULA L. VINES, AND ELIZABETH M. HOEFFEL, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 12 (Jan. 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

250 Montana v. United States, 450 U.S. 544, 564 (1981) (noting the long history of Supreme Court precedent recognizing Tribes' inherent sovereignty over their members and their territory).

251 *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02 [1][c] (noting that Tribal jurisdiction may extend off Tribal lands to matters such as the exercise of off-reservation treaty rights; membership, inheritance and other internal affairs; and ownership of Tribal property).

252 This may be yet another incentive for Tribes to enter into bi-lateral agreements with the United States. Such an agreement could extend Tribal intellectual property protections to off-reservation Tribal members.

ern a federally-recognized Tribe's creativity, whereas the current status and enforceability of Tribal intellectual property laws *everywhere* in the country is uncertain. Additional legislation is clearly needed to restore the sovereign rights of non-federally recognized Indigenous peoples so they may also govern their members' creativity.

1. Examples Applying the Proposed Default Rule

At the beginning of this article, I provided four current examples of uncertainty arising out of federal copyright law's silence regarding Tribes. To illustrate how the proposed default rule would help remedy this uncertainty, I discuss the application of the default rule to each scenario in turn. These examples also provide important entrypoints for addressing potential criticisms of the default rule.

The first example asked, what if an artist has an ownership interest in a creative work — perhaps a traditional clan symbol, design motif, or cultural product — under Tribal law, but U.S. Copyright law provides conflicting rights or relegates the work to the public domain? Does the Copyright Act preempt the artist's rights under Tribal law? As discussed in Part II, some kinds of tribal creativity are owned under laws and principles that differ substantially in scope from the Copyright Act. Some Tribes accord rights to designs, motifs, or story narratives that might be considered *scènes à faire* within the U.S. copyright system and are therefore not copyrightable. Other Tribes restrict the rights available to owners of Tribal creativity, including restrictions on distribution via commercial sale or restrictions on the forms a derivative work can take. Some Tribes allow for perpetual ownership of creative work, where the Copyright Act limits the duration to a finite period of time.[253] If the Copyright Act were to apply on Tribal lands, federal rights may very well displace local tribal law where the two conflict.[254]

Applying the default rule, we would look to Tribal law to determine whether the kind of creativity at issue is already subject to regulation by the Tribal sovereign. If the Tribe has established its own ownership framework that accords special rights to a type of creative work or imposed restrictions on its circulation or use, copyright law would not attach to that work and the creator's interest would be governed exclusively by Tribal law. However, if the Tribe has set no policy governing the kind of creativ-

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253 For example, copyright typically subsists in works authored by a single individual for the life of the author plus seventy years following the author's death. *See* 17 U.S.C. § 301(a).

254 *See id.* (stating that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed *exclusively* by this title." (emphasis added)).

ity at issue, and does not grant rights to own, use or circulate it, copyright *would* apply by default, absent an agreement between the Tribe and the United States to the contrary.

The second example involved a tourist who travels to Tribal lands and secretly takes iPhone videos of culturally sensitive ceremonies without permission from the performers, and then circulates those videos through social media. Presumably both the Copyright Act and Tribal law would be aligned in such situations: if the Copyright Act were applied unilaterally on Tribal lands, the tourist might be subject to liability under the Copyright Act's anti-bootlegging statute for their copying and distribution of the Tribal members' musical performance.[255] However, if the Copyright Act did not apply on Tribal lands, a potential remedy would need to arise from Tribal law, which might provide a more nuanced set of rights protecting this kind of expression.[256] The proposed default rule would make liability for surreptitious recording of a performance like this subject to applicable Tribal laws first; and if no such laws existed, the federal bootlegging statute would provide a useful backstop or would apply where a Tribe had no regulatory jurisdiction over a non-member.

The third example involved cases of copyright infringement by Tribal members on Tribal lands. The example of rock bands playing covers of copyright-protected songs without permission is just one of many potential situations where off-reservation creativity may be appropriated by Indigenous peoples today. Other examples might include Tribal-member hip-hop producers sampling tracks without permission, or Tribal retailers copying copyrightable fashion designs without permission. The fourth example, Tribes performing the original ceremonial songs and dances of other Tribes without their permission, likewise raises the question of who should remedy cultural appropriations occurring on Tribal lands. Applying copyright unilaterally on Tribal lands would mean Tribal members using the copyrighted works of others without authorization might be subject to suit for copyright infringements just like any other American. Not applying the Copyright Act on Tribal lands, on the other hand, would leave all copyrightable works circulating onto Tribal lands potentially vulnerable to unauthorized exploitation.

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255 *See id.* § 1101(a)(1) (making those who record "sounds and images of a live musical performance in a copy or phonorecord," or who reproduce it, transmit it to the public, or distribute it, without consent of a performer subject to federal remedies for copyright infringement).

256 Hopi Tribal law, for example, provides a cultural property right, vesting in the Hopi People, in any recording of "esoteric ritual, ceremonial, and religious knowledge." Hopi Tribal Council, Resolution H-70-94 (1994). Presumably that right could be exercised by any Hopi person in a claim for misappropriation against the recordists, not just the performer(s).

The proposed default rule would allow for enforcement of federal copyright rights on Tribal lands only where a Tribe has not established its own copyright enforcement policies and remedial mechanisms. Admittedly, this default rule may not be satisfying for some as Tribes could develop remedial rights or standards different from the copyright infringement framework established under U.S. copyright law. It is worth pausing, though, to point out that the Copyright Act's particular remedies, and limitations on those remedies, reflect policy choices made by Congress and by the ratifiers of the United States Constitution — not by Tribal Nations and *their* founders. As discussed earlier, Tribal sovereigns, as masters of their own public spheres, must have the right to establish their own policies determining under what conditions the use of others' creative expressions will result in financial liability or criminal penalties. Imposing intellectual property policy choices on Tribes, especially policies as contested as the United States' civil and criminal penalties for copyright infringement,[257] deprives Tribes of their sovereign right to establish their own balance between making expression accessible and incentivizing the production of new work, both on and off Tribal lands.

Equally important is the right of Tribes as sovereign nations to determine, through diplomatic dialogue, whether they will harmonize their intellectual property systems with those of other nations, or face the potential costs of being excluded from now entrenched global intellectual property norms.[258] It may very well be that an Indigenous nation may desire to make copyrighted expressions freely available for appropriation for a period of time to jumpstart their creative economies, educational institutions, or government agencies after centuries of colonization deprived them of the ability to cultivate and maintain their own intellectual resources.[259] Or perhaps a particular Tribe might decide to join the Berne Convention for the Protection of Literary and Artistic Works and adopt its copyright structure so as to receive reciprocal protections for their mem-

257 *See generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

258 The United States is just one example of a nation that initially resisted adopting global copyright norms out of resistance to some of the policy choices espoused by other countries, namely, the removal of formal requirements to obtain copyright protection. *See* Berne Convention Implementation Act of 1988 §§ 7-9, P.L. 100-568, 102 Stat. 2853 (eliminating the requirements for notice, deposit, and registration as conditions for copyright protection).

259 *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1346-54 (2004) (discussing how a robust public domain in the developing countries of the East containing Western nations' intellectual properties historically acted as a counterbalance to Western nations' appropriation of traditional knowledge from these countries).

bers' creative works.[260] Allowing Tribes this prerogative would not necessarily lead to immediate indulgence in widespread piracy: one must keep in mind that Tribes have for centuries been the victims of appropriating settlers who pirated, and in some cases continue to pirate, Indigenous creative expressions, traditional knowledges, and genetic resources in derogation of Tribal laws, principles and protocols.[261] Rather than dictating what Tribal intellectual property policy should look like, the proposed default rule incentivizes Tribes to incubate and develop an intellectual property infrastructure of their own that will best support their particular values and policy choices regarding creative ownership and the circulation of expression. Such policy development will likely be most effective if done in partnership with the United States and international organizations tasked with developing global intellectual property mechanisms.

Some might persuasively argue that allowing Tribes to set their own copyright policies risks creating an unduly complex patchwork of intellectual property rights within the United States, which would militate against inclusion of Tribal artists and other creators in the global creative economy. Eliminating inconsistency and increasing certainty across a nationwide copyright system was certainly one of the central arguments advanced in favor of the recently passed Classics Protection and Access Act ("CPAA") in 2018.[262] The law made pre-1972 sound recordings, initially only protectable through a hodgepodge of state laws, eligible for fed-

260 Berne Convention for the Protection of Literary and Artistic Works, 25 U.S.T. 1341, 1161 U.N.T.S. 3 (July 24, 1971) (as amended). Some might argue that Tribes engaging in diplomatic relations with other nations runs counter to the U.S. Supreme Court's conclusion in *Cherokee Nation v. Georgia*, that Tribes effectively lost their right to engage in foreign relations through colonization. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17-18 (1831) ("[Tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.") Whether such a conclusion would bar a Tribe from acceding to a multi-lateral intellectual property treaty is beyond the scope of this Article.

261 *See generally* Angela R. Riley & Kristen A. Carpenter, *Owning Red: Toward a Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016).

262 Pub. L. No. 115-264, tit. II, 132 Stat. 3728 (2018); *see* UNITED STATES COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 82-83, 85-86 (2011) (discussing how the majority of respondents in a copyright office study mentioned the "importance of certainty and consistency as policy lodestars" in determining whether to bring pre-1972 sound recordings under federal law, and noting that user groups preferred uniform laws while recording industry groups preferred the status quo of individual state protections).

eral copyright remedies.[263] But while the CPAA certainly demonstrated Congress's support of national uniformity in copyright law, unfortunately, no balancing of Tribal interests was involved in that legislation.[264] As discussed in Part I, outside of the copyright arena, consistency and uniformity in national regulatory schemes like the Occupational Safety and Health Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, Safe Drinking Water Act and the National Labor Relations Act, have at times been prioritized while in others they have taken a back seat to concerns over upholding Tribal sovereignty, often producing uneven application of national regulatory laws in Indian Country.[265] The Ninth Circuit, for example, under the *Tuscarora-Coeur d'Alene* framework has held that the Fair Labor Standards Act is in some situations enforceable on the lands of certain Tribes, while on the lands of others it might not be, depending on how much the Act invaded Tribal self-governance.[266] As each Tribe is a different nation with different policy priorities and relationships with the United States, it should be expected that United States copyright law should be applied in distinct ways within their territories.

2. *How Judges Might Apply the Proposed Default Rule*

Whether a Tribe should or should not be subject to the Copyright Act and other generally applicable federal laws should be a question of law certified to tribal sovereigns rather than an ad hoc question of fact to be adjudicated by a foreign federal judge. When the question of the Copyright Act's applicability is raised in litigation, the initial inquiry a federal court should make is whether the relevant Tribal Nation has already exer-

263 PETER JASZI, PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS 23-101 (2009).

264 *See* Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 84 Fed Reg. 14242, 14249 (Apr. 9, 2019) (explaining that "prohibiting the use of Pre-1972 Sound Recordings of American Indian and Alaska Native tribes" or other special treatment of works created on Tribal lands was beyond the Copyright Office's regulatory authority established in the Classics Protection and Access Act, since the Act made no explicit mention of Tribes within its framework).

265 *See* Part I *supra*. The need to maintain a comprehensive national scheme for protecting the healthy environment of both Tribal and non-Tribal members has specifically provided support for imposing the Safe Drinking Water Act on Tribal lands, though in that case, the application of the national regulatory framework was supported by the relevant Tribal sovereign. *See* Phillips Petroleum v. United States Env'tal Agency, 803 F.2d 545 (10th Cir. 1986).

266 In *Snyder v. Navajo Nation*, the court denied the application of the FLSA to wage policies set by the Navajo government for its police force. But, in *Solis v. Matheson*, the same Circuit upheld the FLSA as applied to wage policies set by a Tribal smoke shop employer.

cised its sovereignty over the particular domain of creative expression. If so, the court would further inquire whether that exercise of sovereignty would be disrupted by the imposition of the federal copyright law within the same field. If a Tribe has already adopted the Copyright Act as its own law governing creative expression on Tribal lands, the application of Copyright within its territory is straightforward. Conversely, if the Tribe has completely rejected the application of the federal Copyright Act by legislation or by treaty, the question is likewise answered. Where Tribes have only legislated over particular forms of creativity,[267] and where the Copyright Act would plainly interfere with that legislation, Tribal law should prevail. Importantly, in some cases, Tribal laws governing the domain of creative expression or cultural production have not yet been codified — the ownership principles and norms for circulating creativity or the remedies made available within the Tribal governmental structure may not be codified or otherwise publicly available, even though they may be widely known within the community. In such cases, a federal court would need to certify a question to the relevant Tribal adjudicative or regulatory body, typically a Tribal court, seeking a determination as to whether federal copyright would interfere with the Tribe's sovereignty within the given creative domain.

Take, for example, a work of authorship made by a researcher and a Tribal member in the course of performing cultural research within the Colorado River Indian Tribes ("CRIT") reservation, located in the present-day border region between California and Arizona. The CRIT Human and Cultural Research Code recognizes copyright and other intellectual property interests in certain "cultural, linguistic, and historic infor-

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[267] *See, e.g.*, Human and Cultural Research Code of 2009, Colorado River Indian Tribes Tribal Council Ordinance 09-04 (as amended).

> **Section 1-601. Ownership of Property.**
>
> (a) CRIT shall retain all ownership, property, trademark, copyright, and other rights to cultural, linguistic, and historic information that is not the intellectual property of Researcher. Non-CRIT employee participants or researchers or both in the research shall sign a Work-for-Hire Agreement for research projects that are designated as property of CRIT. . . .
>
> (c) Individuals on whom research will be conducted have the right to the information and intellectual property that is provided to Researcher. . . .
>
> **Section 1-701. Copyrighted Works.**
>
> (a) Use of CRIT's copyrighted works such as literary works, musical works including any accompanying words, dramatic works including any accompanying music, pantomimes choreographic, pictorial, graphic, audiovisual, architectural, motion pictures and sculptural works and sound recordings shall be granted on a case by case basis.
>
> (b) CRIT may permit use of its copyrighted works for the following purposes: criticism, comment, news reporting, teaching, including multiple copies for classroom use, scholarship, or research.

mation" generated in the course of conducting research, and requires researchers to enter into work-made-for-hire agreements with the Tribe recognizing the Tribe's exclusive interest in the information.[268] A court should have little difficulty recognizing a federal copyright in a sound recording, literary work, choreographic work, or other work created in the course of research conducted on Tribal lands as the Tribe has expressly permitted copyright to govern this aspect of Tribal creativity. However, that does not necessarily mean copyright would govern Tribal creative expressions not produced in the course of research. (Doing so would likely relegate many Tribal creative works to the public domain if they are, for example, not fixed in a tangible medium of expression or are older than the duration of copyright presently allows.[269]) As nothing in the code discusses the status of non-research-related copyrightable works, questions about those would likely need to be certified to the relevant tribal high court or another appropriate branch of the Tribal government for determination.

In contrast to the CRIT Research Code's adoption of copyright in certain creative domains, the Pascua Yaqui Tribe established in 2008 a sui generis Tribal right to "traditional Indigenous intellectual property." This right differs in significant ways from the Copyright Act. The Code defines the subject matter of this form of intangible property as "indigenous cultural information, knowledge, uses, and practices unique to the Tribe's ways of life maintained and established over tribal homelands and aboriginal areas since time immemorial."[270] Given that the Copyright Act does

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268 *Id.* § 1-103 (applying the Code to "all research done within the boundaries of the Reservation"); 1-601(a) (discussing the ownership of copyrightable cultural linguistic and historic information not owned by the researcher and requiring the work-made-for-hire agreement for non-CRIT-employees.).

269 17 U.S.C. § 102(a); §§ 302-304.

270 8 Pascua Yaqui Tribal Code (PYTC) § 7-1-40(A)(13). The Tribe provides a nonexhaustive list of such intellectual properties including:

> (a) Knowledge of remembered histories and traditions; (b) Details of cultural landscapes and particularly sites of cultural significance; (c) Records of contemporary events of historical and cultural significance; (d) Sacred property (images, sounds, knowledge, material, culture or anything that is deemed sacred by the community); (e) Knowledge of current use, previous use, and/or potential use of plant and animal species, soils, minerals, objects; (f) Knowledge of preparation, processing, or storage of useful species; (g) Knowledge of formulations involving more than one ingredient; (h) Knowledge of individual species (planting methods, care for, selection criteria, etc.); (i) Knowledge of ecosystem conservation (methods of protecting or preserving a resource); (j) Biogenetic resources that originate (or originated) on indigenous lands and territories; (k) Tissues, cells, biogenetic molecules including DNA, RNA, and proteins, and all other substances originating in the bodies of Tribal members, in addition to genetic and other information derived therefrom; (l) Cultural property

not extend "to any idea, procedure, process, system, method of operation, concept, principle, or discovery," and that its coverage is limited in duration, the Tribal law affords rights to a much wider scope of works than federal copyright would protect.[271] Indeed, copyright might relegate to the public domain some works that the Tribal law protects.

Further, the kinds of unauthorized activities the Research Code prohibits also diverge significantly from the federal copyright act. The Tribe prohibits "alter[ing] . . . remov[ing], or desecrate[ing]," "inventory, collection, research, or filming related to any . . . . traditional indigenous intellectual property," as well as "sell[ing], purchas[ing], exchang[ing], transport[ing], receiv[ing], or possess[ing]" intellectual properties obtained in violation of the Code.[272] The Copyright Act, on the other hand, only prohibits unauthorized reproduction, distribution, public performance and display, streaming, and the derivation of new works, and has carve outs for fair uses (including parodies) and other uses that support American public policy, but which are not found in the Pascua Yaqui Tribal Code.[273] Given the strong divergence between Pascua Yaqui law and federal law in this area, the proposed default rule would uphold the Pascua Yaqui intellectual property code's governance over any potentially copyrightable material that falls within the scope of the Code, and exclude the protections, limitations and remedies afforded by the federal Copyright Act. As the Tribe has not addressed the status of non-traditional intellectual properties in its Code, but may provide other common-law or customary law protections, determining the status of these other kinds of copyrightable works would likely need to be determined by the Tribe's high court or other governing body.

In cases where Tribal intellectual property rights are ambiguous, including cases where a legislative code is silent on the matter, certification to the Tribal sovereign is necessary. Certifying questions to Tribal sovereigns regarding the scope of copyright on their lands allows for the kind of "respect for Tribal sovereignty" the federal circuit courts of appeals have indicated they are committed to uphold, while better aligning existing circuit court doctrines with current domestic and international policy favor-

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(images, sounds, crafts, art, symbols, motifs, names, performances); . . .
(m) Knowledge of systems of taxonomy of plants, animals, and insects[;]
(n) Knowledge of the Hiaki language.

Id. While some of these might fall within the scope of federal trademark, patent, or common-law trade secret protection, presumably many would not qualify for any of the current forms of federal intellectual property protection.

271 17 U.S.C. §§ 102(b); 302-304.

272 PYCE § 7-1-200(E), (F).

273 17 U.S.C. § 106(a), § 107.

ing Indigenous self-governance over creative expression.[274] Indeed, such a procedure has been common for federal courts deciding cases involving pre-1972 sound recordings, where for decades these courts have certified questions about the scope and limitations of common-law copyrights to state high courts.[275] Why should Tribes be treated any differently in matters of Tribal law? Indeed, affording this respect to Tribal law and policy would appear to be consistent with current federal policy and international standards advocating for government-to-government relations with Tribes.

C. *Inter-National Circulation of Expression*

Still unresolved is the challenge of protecting Indigenous works protected only by Tribal law when they circulate off Tribal lands. The proposed default rule, even if adopted by federal courts, would not necessarily resolve this complex jurisdictional issue.

Tribes may in some cases exercise their inherent regulatory jurisdiction over non-Tribal members. For example, when non-Tribal-members enter a reservation comprised of Tribal-member owned land or land held in trust for the Tribe by the federal government, Tribes may generally assert regulatory authority over those non-members. [276] This authority would presumably include any regulations governing the use of creative expressions owned or otherwise restricted by the Tribe and its members. Additionally, when non-Tribal-members enter land owned by other non-members within a Tribe's reservation, the Tribe may regulate their activi-

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274 Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010); *see also* Snyder v. Navaho Nation, 382 F,3d 892, 895 (9th Cir. 2004) (preventing the application of federal law when "the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated.").

275 *See, e.g.*, Flo & Eddie, Inc. v. Sirius XM Radio, 821 F.3d 265, 271 (2d Cir. 2016) (certifying a question of whether a public performance right existed at common law to the New York State Court of Appeals after the court determined that no conclusive authorities on the matter existed); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 827 F.3d 1016, 1024 (11th Cir. 2016) (certifying a question of whether common law copyright extends to pre-1972 sound recordings made in Florida, and if so whether there is a public performance or reproduction right, as no authorities existed that would resolve the questions).

276 *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (recognizing the inherent power of Indian Tribes to regulate the activities of non-members on Tribally controlled lands, and also to condition non-member entry onto Tribally controlled lands on their compliance with Tribal law), *but see* Nevada v. Hicks, 533 U.S. 353, 359-60 (2001) (stating in dicta that the general rule of *Montana*, divesting Tribes of regulatory jurisdiction over non-members on non-Tribally owned land, might apply in some cases also to tribally controlled lands. The Court, however, agreed to limit the holding to "the question of state officers enforcing state law" on Tribally controlled land, *id.* at 358 n.2.).

ties when (1) the non-member enters consensual relations (commercial dealings, contracts, leases, or other arrangements) with the Tribe or its members, or (2) when the non-member's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[277] At least one federal court has allowed enforcement of a Tribal cultural property law against a non-Tribal-member, which prohibited the purchase or sale of "clan crests, or other traditional Indian art work" on Tribal lands without authorization from the Tribal government.[278] The court reasoned that the non-Tribal-member's actions in the domain of Tribal culture "would constitute conduct that would have some direct effect on the welfare of the tribe."[279] Presumably other similar Tribal intellectual or cultural property laws may also be enforceable against non-members.

But are Tribal intellectual property laws enforceable against those who never enter Tribal lands? Would those who purchase an Indigenous artwork from an art dealer off reservation, or who copy an Indigenous literary work off of a social media platform and then reproduce it or manipulate it in their own social media creations be subject to Tribal law? The answer is generally no. Tribal laws are not enforceable against non-members located off Tribal lands, absent federal legislation applying those laws to them. And yet, there are numerous examples of federal legislation that *does* apply Tribal laws or policy preferences to non-Tribal-members off of Tribal lands — particularly in the area of environmental law. For example, water quality standards set by Tribes can be enforceable against non-members located upstream under a delegation of Congressional authority to Tribes under the Clean Water Act.[280]

Bilateral agreements made between Tribal Nations and the United States to enforce Tribal laws governing Indigenous creative expression off Tribal lands would provide the most straightforward resolution to this challenge. Indeed, federal enforcement of such agreements would seem quite reasonable against the backdrop of unfettered historical taking of Indigenous cultural creativity from tribal lands since the commencement of colonization.[281] And, of course, the enforcement of Tribal intellectual property laws against members of the public who misappropriate Tribal creativity seems only fair if the American public desires the equal right to protect its copyrightable works on Tribal lands.

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277 Montana v. United States, 450 U.S. 544, 565-66 (1981).

278 Chilkat Indian Village v. Johnson, No. J84-024 Civ., Slip Op. at 2-3 (D. Alaska, Oct. 9, 1990).

279 *Id.* at 14.

280 *See* City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

281 *See* Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 869-91 (2017).

An immediate objection some might have to such a framework is that many Tribal laws do not comport with the limitations of the Intellectual Property Clause of the United States Constitution. While I leave this dilemma for future writing, Congress need not be constrained by the limitations of the Intellectual Property Clause when legislating over the circulation of expression between Tribal members and the American public. Rather, protecting Indigenous cultural expression from misappropriation beyond Tribal borders seems more germane to the Indian Commerce Clause, or perhaps even Congress's assumed duty of care toward Tribes and their members.

The Constitution's grant of power to Congress to regulate "commerce . . . with the Indian tribes" may provide limited authority to grant rights to expressions that enter a State from Tribal lands.[282] As recent scholarship has pointed out, the term "commerce" used in the Indian Commerce Clause was likely understood expansively when originally ratified, to mean not only "buying, selling, trading, exchanging, and gifting items," but also "diplomacy and politics."[283] At the time of ratification trade was, from the settler point of view, the primary mode of engaging with and ultimately securing the compliance of Tribes to achieve settler goals.[284] Where the Intellectual Property Clause might not allow for the protection of works not "fixed in a tangible medium of expression" for a duration beyond "limited times," the Indian Commerce Clause may allow Congress to constrain the actions of those within the territorial boundaries of the United States *as a matter of diplomacy* when they interfere with the intel-

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282 U.S. CONST. art. I, § 8, cl. 3. In addition to the Indian Commerce Clause power, the Supreme Court has recognized that Congress may in fact hold plenary power over Tribal affairs. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (allowing the United States to convert one form of Tribal property to another under the reasoning that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). Talton v. Mayes, 163 U.S. 376, 384 (1896) ("[A]lthough possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States."); *but see* Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ."); *see also* Part I *supra*.

283 Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1029-30 (2015); *but see* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2570-71 (2013) (Thomas, J., concurring) (holding that the Indian Commerce Clause grants federal authority only over the narrow category of trade with Indian tribes).

284 *Id.*

lectual property rights and policies established by Tribal Nations — with whom the United States is in a perpetual government-to-government relationship.[285]

Using its Indian Commerce Clause power, Congress might, for example, consider making the Copyright Act's remedies available to creative expressions protected by Tribal law, even if they might not otherwise fall within the scope of the Copyright Act. Congress has already adopted a similar framework with the Classics Protection and Access Act. Under that framework, pre-1972 sound recording rights established under a wide variety of state statutes and common law were made eligible for federal copyright remedies. Essentially, the State creates the property entitlement (which may differ in scope from jurisdiction to jurisdiction), while federal law provides remedial rights and limitations on those rights. Alternatively, Congress might expand Tribes' inherent regulatory jurisdiction to allow Tribal intellectual property laws to apply beyond Tribal lands and to allow Tribal members to bring civil actions against non-members for violations of Tribal intellectual property laws in Tribal or Federal courts.

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Upholding Indigenous rights to govern creativity occurring on Tribal lands is best achieved through government-to-government agreements between the United States and individual Native American Tribes. Such agreements should establish the extent to which federal copyright law may apply on Tribal lands, while recognizing and providing enforcement mechanisms for Tribal intellectual property rights off of Tribal lands. Until such agreements are negotiated and ratified by Congress, I argue that courts should only extend the rights and remedies afforded by the Copyright Act to those creative works created or circulating on Tribal lands that Tribes do not already regulate. Where a Tribe has not regulated certain categories of creativity on Tribal lands, the Copyright Act should act as a backstop, affording protections to Indigenous and non-Indigenous creators alike.

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285 The Indian Commerce Clause has at times been read expansively. *See* Cotton Petroleum Corp v. New Mexico, 490 U.S. 163, 192 (1989) (viewing the Indian Commerce Clause as granting "plenary power to legislate in the field of Indian affairs" to Congress); *see also* United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."). However, the Indian Commerce Clause alone was insufficient to extend the Major Crimes Act onto Tribal lands. *See* United States v. Kagama, 118 U.S. 375, 378-79 (1886) ("[W]e think it would be a very strained construction of [the Indian Commerce] clause" to make Tribal members subject to federal criminal laws "without any reference to their relation to any kind of commerce . . . .").

CONCLUSION

Native American Tribal lands are hotbeds of creativity. Some tribal members create works intended to circulate into domestic and international creative economies, while others create with the intention that their work will flow within local or predominantly Indigenous creative networks. Many engage in both modes of creation. As explored in this article, government policies regulating the ownership and circulation of creative expression may affect whether or not creativity can circulate through its intended networks. Indigenous groups often have developed and maintained systems of rights to support and promote their creativity to serve their particular goals. However, those systems may conflict with, function differently than, or may be rooted in economic or cultural principles that are incongruent with American copyright law. Unilaterally applying Copyright on Tribal lands may not only disrupt Tribes' diverse creative economies, it may also disrupt the exercise of Tribal sovereignty.

Nations of the world are increasingly recognizing Indigenous peoples' sovereignty over the expression and circulation of their culture. Indeed, upholding these sovereign rights to balance incentives for creativity and access to the public sphere is vital if we are committed to Indigenous peoples' self-determination and autonomy following centuries of colonization. While current federal doctrines disagree in their approach to the question of whether copyright should apply on Tribal lands, what is clear from each of the methodologies developed by the federal circuit courts of appeal is that none of them allow Tribal sovereigns to decide for themselves whether a given federal law applies on their lands. I have argued here that decisions about copyright policy within Tribal Nations should be left solely to Tribal governments to decide. Shaping the application of Copyright on Tribal lands around this core principle will encourage Tribes to develop their own policies governing creative expression to satisfy their particular priorities — whether that means adopting copyright wholesale or developing a sui generis framework — while also encouraging the federal government to engage with Tribes over the needs of Indigenous creators in the shaping of copyright policy going forward.

law, despite its statutory nature, relies heavily in places upon common law development.[93]

Whatever the reasons for this shift, the opinion in *Georgia v. PRO*, combined with some of the other recent Court cases on copyright law, suggest that the Court may be moving to a more constrained and narrow view of its own role in interpreting the Copyright Act, one that is at odds with the text, structure, and history of copyright law in general.

[93] Along these lines, the Court's decision in Stewart v. Abend, 495 U.S. 207 (1990), is a nice example of an opinion that straddles these two statutory eras. The Court in that case had to decide how the 1909 Act's renewal provisions affected the ability of assignees to exploit derivative works based on the original copyrighted work. At the same time, the Court had to decide how, if at all, the 1976 Act's new termination provisions affected this same question.