INTERNATIONAL TRADITIONAL KNOWLEDGE PROTECTION AND INDIGENOUS SELF DETERMINATION

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Introduction

In February 2019, the World Intellectual Property Organization (WIPO) issued a "Proposal For a Study by the WIPO Secretariat on Existing Sui Generis Systems For the Protection of Traditional Knowledge in WIPO Member States."[1] This effort is a part of the organization's ongoing endeavors to assist indigenous people in protecting their Traditional Knowledge (TK) from misappropriation and outright theft. This Comment will answer WIPO's call by discussing history of indigenous TK in four countries and how the Indian Arts and Crafts Act (IACA) can offer a viable model for TK protection in light of this history.

I. A Primer on TK and "The World We Used to Live In"

In his study of indigenous oral histories, *The World We Used to Live In: Remembering the Powers of Medicine Men*, Professor Vine Deloria explores the "old ways" of knowing the world.[2] The world he describes is one where the spiritual and the physical are deeply intertwined,[3] where medicine men, their visions, and sacred knowledge could guide communities—spiritually, intellectually, and politically.[4] Medicine men were keepers and generators of knowledge to be enjoyed and utilized by the society.[5] The nature of this knowledge is deeply intertwined with the land and the spiritual and cultural context in which it arose.[6]

Indigenous knowledge is spiritual knowledge. Australian academic Peter Drahos provides an apt example of indigenous TK as spiritual knowledge in his discussion of the Aranda concept of "dreamtime":

> If there is one thing that unites indigenous systems of knowledge, it is the principle that most, or all, knowledge that is part of a group's system can be traced back to the acts of powerful ancestors in the Dreamtime. Dreamtime stories are the threads that connect different parts of an indigenous knowledge system. One can, for example,

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[1] Proposal for a Study by the WIPO Secretariat on Existing Sui Generis Systems for the Protection of Traditional Knowledge in WIPO Member States, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, World Intellectual Property Organization (Feb. 15, 2019) http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_12.pdf.

[2] *See generally* Vine Deloria Jr., The World We Used to Live In (2006).

[3] *Id.* at xxii–xxvi ("Every Indian Tribe had a spiritual heritage that distinguishes them from all other people").

[4] *See, e.g.*, *id.* at 13 (discussing "the nature of medicine men"). *See also* Cary Miller, Ogimaag: Anishinaabeg Leadership 1760–1845 (1st ed. 2010) at Ch. 1: Power in the Anishinaabeg World (describing how North American Indigenous linguistics and culture are intertwined with spiritual understandings).

[5] Lee Irwin, Dream Seekers: The Native American Visionary Traditions of the Great Plains 160 (1994) ("While power could be sought as a means to an explicitly and socially conceived end, the [medicine man's] calling is most frequently associated with a search for truth that in other societies is granted most often from wealthy patrons or achieved through stubborn rejection of social values by stubborn intellectuals").

[6] *See* Miller, *supra* note 4.

> give independent descriptions of a group's botanical taxonomies, but the ultimate origins of these taxonomies lie in the names and classifications that ancestral spirits created, along with the landscape and the animals and plants in it.[7]

Similarly, Professor Susy Frankel has described how the Maori of New Zealand have a knowledge system rooted in web of ancestral and spiritual information sharing that stretches across the cosmos.[8] For its part, the United Nations recognizes that "[i]ndigenous peoples have deep spiritual, cultural, social and economic connections with their lands . . . which are basic to their identity and existence itself."[9]

Across the world indigenous knowledge production shares this common thread identified by Deloria, Frankel, and Drahos: it is foremost a spiritual endeavor tied to the heritage of the indigenous group creating it. Heritage, in turn, is tied to the soil that allows it to grow, a landscape of knowledge that indigenous people call home; where their spiritual and intellectual relationships reside.[10] Indeed, as an indigenous elder from the Northern Territory of Australia put it, "[w]ithout the land, we are nothing."[11] These beautiful descriptions of indigenous knowledge systems provided by the academic literature across the world paint a picture of indigenous people as noble and spiritual. However, as Deloria aptly notes in the title of his book: this system of knowledge is part of a world we used to live in—the world we live in now is dominated by European notions of property and knowledge. These descriptions, while accurate in many ways, paint an incomplete picture of the state of TK today.

The nature of indigenous TK today cannot be discussed devoid of the history of colonialism. In the United States, Canada, Australia, and New Zealand, this history is filled with intentional and systematized efforts by English colonizers to obliterate indigenous people and their knowledge. In fact, the legal mechanisms that derogate indigenous property are foundational to the construction of these nationstates and remain essential parts of their legal regimes today.[12] In order to have a

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[7] Peter Drahos, *When Cosmology Meets Property: Indigenous People's Innovation and Intellectual Property*, 29 Prometheus 237 (2011).

[8] Susy Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements*, 1 Vic. U. Legal Res. Papers 6 (2011).

[9] *Indigenous Peoples' Collective Rights to Lands, Territories and Resources*, United Nations Permanent Forum on Indigenous Issues, http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Peoples-Collective-Rights-to-Lands-Territories-Resources.pdf (last visited March 20, 2019).

[10] Deloria, *supra* note 2.

[11] The Importance of Land, Australians Together, http://australianstogether.org.au/discover/indigenous-culture/the-importance-of-land (last visited March 20, 2019).

[12] *See, e.g.*, *Johnson v. Mcintosh*, 21 U.S. 543 (1823) (introducing the concept of the doctrine of discovery into American law); *Tee-hit-ton v. United States*, 348 U.S. 272, 279 (1955) (holding that aboriginal lands only confer a title of "mere possession . . . not a property right but . . . a right of occupancy" that does not require the payment of just compensation under the Fifth Amendment of the United States Constitution).

sound policy discussion regarding the protection of indigenous cultural knowledge at an international scale, an honest discussion about the nature of indigenous property and knowledge as they exist in law and history is necessary. Continuing to supplant the self-determination of indigenous people through an international instrument will only exacerbate the problems indigenous people have faced throughout history. WIPO should instead prioritize assisting member states in crafting national policy that (1) maximizes indigenous self-determination, (2) promotes indigenous control over cultural arts and practices, (3) seeks to remedy historic wrongs, and (4) builds capacity for cultural preservation.

What is certain is that we cannot return to the world we used to live in. Vine Deloria Jr. was perhaps the most poignant thinker on the spirituality, legal status, and fate of indigenous people in the twentieth century. *The World We Used to Live In* was his final contribution to the future generations, capping a career of tireless work to advance tribal sovereignty and self-determination. His work begins with this lament:

> Sweat lodges conducted for $50, peyote meetings for $1500, medicine drums for $300, weekend workshops and vision quests for $500, two do-it-yourself practitioners smothered in their own sweat lodge . . . [N]othing seems to stem the tide of abuse and misuse of [Indigenous] ceremonies . . . the consumer society is indeed consuming everything in its path.[13]

Intellectual property regimes are ill suited to tackle the TK issues facing indigenous people worldwide. It is not commodification of knowledge that indigenous people seek. Indigenous people want control—not consultation nor coercion—over their destiny in the centuries to come.

II. What do Indigenous People Want in a TK Regime?

The question of what indigenous people seek in a TK protection regime is central to designing an effective one. WIPO defines TK as "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."[14] This definition emphasizes the sociocultural aspects of TK. Unlike customary owners of intellectual property, indigenous people are not seeking to monopolize and exploit their TK for strictly monetary gain. Instead, as Professor Frankel argues "indigenous peoples seek to preserve, control, use, and develop [their TK and] . . . Indigenous peoples may seek to revive their traditional and cultural [knowledge] where their traditions have been destroyed."[15]

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[13] Deloria, *supra* note 2, at xvii.

[14] *Traditional Knowledge*, World Intellectual Property Organization, http://www.wipo.int/tk/en/tk (last visited May 8, 2019).

[15] Andrew Armitage, Comparing the Policy of Assimilation: Australia, Canada and New Zealand 15 (1995).

Intergenerational information transfer is the central aspect of knowledge production in indigenous communities. Without the ability to transmit TK from one generation to another, that TK dies. This requires that children be present in communities where TK resides. For that to be a reality, indigenous communities need to be able to protect their children from a majoritarian society that may not understand, or that may actively hate, indigenous people. Often indigenous families are organized differently than a traditional nuclear family.[16] Around the world colonial power has exerted vast control over the form of family and childrearing tribal communities to the detriment of indigenous child wellbeing. It makes sense for a colonial power to seek to assimilate indigenous children and remove them from communities. It leads to the destruction of tribal polities under the guise of morally righteous religious conversion, education, and assimilation. The prize is greater access to indigenous lands and associated natural resources.[17] This has led to a crisis shared among many tribal peoples across the world: children are removed from their communities, often systemically, leading to a removal of a critical link in the TK chain. There is undoubtedly a connection between indigenous child welfare practices and the propagation and preservation of TK. The following Subparts will discuss the history of assimilation and indigenous self-determination in four countries to better understand the mistakes of the past and how they can inform WIPO today.

A. *Australia*

In 1787 Britain set out to establish a penal colony on the continent of Australia.[18] At the time, British law declared the whole of the Australian continent *terra nullius*, or "vacant, unoccupied land."[19] Australian farmers and settlers were authorized to simply take land—no treaty or compensation required.[20] Indeed, throughout Australian history there is a consistent "pattern of dispossession without negotiation, compensation, or recognition" resulting from the legal doctrine of *terra nullius*.[21] It was not without indigenous resistance, but the settlers generally prevailed—in one instance nearly wiping out all Tasmanian Aborigines aside from a small population on the Tasman Strait, who eventually also perished.[22] It goes without saying that from the very beginning the lifeways of indigenous Australians were disrupted as settlers expanded across

[16] Benita Y. Tam et al., *Indigenous Families: Who Do You Call Family?*, 23 J. Fam. Stud. 243–259 (2017) (discussing how indigenous family structure in Canada does not reflect nuclear family structure based on fifteen semistructured interviews).

[17] 1–1 Cohen's Handbook of Federal Indian Law § 1.04 (2017) (discussing allotment and assimilation policy goals in the U.S.).

[18] Armitage, *supra* note 15, at 16.

[19] *Id.* at 16.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 17 ("On the island of Tasmania nearly all the aboriginal inhabitants were hunted and shot. The few who remained were confined to a small island in the Tasmin strait").

their continent. The aboriginal people may not have had settlements in the conventional sense, but their lives were deeply intertwined with the land which they utilized for both physical and spiritual sustenance and the creation of TK.

In 1869 the state of Victoria enacted the Aborigines Protection Act, establishing "Board[s] for the Protection of Aborigines."[23] This legislation was mirrored in Western Australia in 1886, Queensland in 1901, New South Wales and Southern Australia in 1909, and the Northern Territory in 1910.[24] Life under these boards was tantamount to living in a concentration camp. Aborigines would be relegated to small communities where a board manager held an iron grip over all aspects of life—religion, dress, work, money, and identity.[25] This (of course) was seen as a benevolent cause of the enlightened to, as famed Australian Anthropologist Daisy Bates put it, "smooth[] the pillow of a dying race."[26] In this kind of environment, it is no wonder that Australian aboriginal people lost control over the continued propagation of indigenous TK. With no cognizable means of protecting this knowledge or even recording what was lost, the scar left by the protection board policy remains an unknown unknown.

Three decades after the establishment of the commonwealth of Australia in 1900, official policy shifted away from waiting for the aboriginals to die in concentrated communities toward assimilation.[27] Under this policy, the government sought to remove indigenous people from their "reservations" and into Australian towns and cities.[28] One policy "incentivizing" this assimilation was the promise of freedom from board oversight.[29] Aboriginal people could obtain an "exemption" if they were sufficiently Europeanized.[30] These exemptions were granted by local police and were based primarily on an assessment of the applicant's lifestyle.[31] Through this system, aboriginal people were forced to choose being sent far away from their homelands, their relatives, and the keepers of their culture, or continue to suffer under the jurisdiction of the protection board. Naturally, this "incentive" enticed many people to abandon their TK and make way for the city.[32] Those who were not sufficiently "incentivized" through exemptions were forced from their reservations.

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[23] *Id.* at 18–19.

[24] *Id.*

[25] *Id.*

[26] *Daisy Bates (1859–1951) Papers*, Univ. Adelaide, http://www.adelaide.edu.au/library/special/mss/bates (last visited May 8, 2019).

[27] Armitage, *supra* note 15, at n. 23.

[28] *Id.* (citing Peter Read, A Hundred Years War 98 (1988)).

[29] *Id.* at 20–21.

[30] *Id.*

[31] *Id. See also* Commonwealth and Social Services Consolidation Act § 111 (1947) ("An Aboriginal . . . shall not be qualified to receive [any] . . . benefits . . . unless the Director General is satisfied that by reason of character . . . standard of intelligence and social development of that native, it is desirable that this section should not be applied").

[32] *See* Armitage, *supra* note 15, at 20–21.

Children and youth in particular—as in all of the countries assessed in this Comment—were the target of coercive assimilation practices.

By 1911, nearly all boards in Australia had the legal authority to remove children and place them in dormitories on the reserves, remove children to residential institutions, and most preferably, remove children to provide farm labor and domestic servitude to white families.[33] The entire purpose of this policy was to, "to break the sequence of indigenous socialization so as to capture the adherence of the young and to cast scorn on the sacred life and the ceremonies which remained as the only hold on the continuity with the past," that is, to destroy TK.[34] Indeed by 1921, one board acknowledged that "it would be difficult to find any child over school age out of employment, or not an inmate of the board's homes."[35] This policy had the goal of "ultimate absorption."[36] By 1940—but one lifetime ago—around 40 percent of aboriginal children in the whole of New South Wales were institutionalized with the goal of acculturating them from their traditional lifeways.[37] These numbers only increased in the succeeding decades, and continued to climb even after aboriginal people were finally made Australian citizens in 1967.[38]

Since the Aboriginal citizenship amendment in 1967, indigenous Australians have been able to have a degree of "self-management" authority.[39] Traditional aboriginal governance structures are now responsible for administering aboriginal affairs through land councils.[40] National legislation such as the Aboriginal Land Rights Act of 1976 and the Native Title Act of 1993 establish and provide funding for these councils and recognize a limited right of indigenous people to govern themselves.[41] Moreover, the *Mabo* decision in 1992 rejected the theory of *terra nullius*, finding instead that Aboriginal people did have some form of native title over what is now known as Australia.[42] These legal and policy shifts can be seen as a functional admission that the policy of assimilation, acculturation, and ethnocide was wrong and a failure for all involved. Affording control to aboriginal people themselves can provide a way to preserve what knowledge remains for present and future generations. The aim of WIPO's TK policy should be to unwind the fascistic

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[33] *Id.* at 43.

[34] *Id.* (citing Richard Chisholm, Black Children: White Welfare? (1985)).

[35] *Id.* (discussing the annual report of the protection board in 1921).

[36] *Id.* at 44 (quoting A.O. Neville, Commissioner of Native Affairs, Western Australia, at Initial Conference of Commonwealth and State Aboriginal Authorities (Apr. 21, 1937)).

[37] *Id.* at 45.

[38] *Id.* at 48.

[39] *Id.*

[40] *See, e.g.*, *About Us*, Northern Land Council, http://www.nlc.org.au/about-us (last visited Feb. 14, 2019).

[41] *See Native Title Act* No. 110 1993 (Cth), Pt. II, Div. 4 (Austl.); *see also Aboriginal Land Act* 1974 (NT) (Austl.).

[42] *Mabo v. Queensland (No. 2)*, 175 CLR 1 (Austl., 1992) (holding *inter alia* that Terra Nullius was invalidly applied to Australia).

control of indigenous life, liberty, and property that was exerted for the past two-hundred years in Australia.

B. *New Zealand*

New Zealand is home to the indigenous Maori. The Maori principally inhabited the Island of Aotorea.[43] Archaeological evidence shows that the Maori have inhabited this island since around 800AD.[44] The Maori are made up of about two-dozen distinct tribes. While these tribes share language and culture, their TK and practices distinguish them from one another.[45] Captain Cook sailed to the island in 1769 mapping its shores.[46] Initially, the British crown chose not to proceed with settlement given the territory's remoteness and high density of indigenous people.[47] Trade colonies were established by private entities from France, Britain, and even the United States, in an ad hoc fashion.[48] In the 1830s, the New Zealand Association, a trade group formed in London, convinced the Crown that despite the islands' remoteness it was the moral imperative of England to establish a government.[49] Parliament and the Crown were resistant to the idea primarily because of the conflict that would be required in order to fully exploit the islands natural resources.[50] Therefore, negotiating treaties with the Maori was settled on as the preferred method of establishing a government.[51] In 1840, 550 Maori chiefs signed the Treaty of Waitangi with Britain.[52] While the treaty surrenders sovereignty over New Zealand to the Crown, in exchange the Maori received a perpetual right to "full exclusive and undisturbed possession of their lands, estates, forests and fisheries."[53] However, per usual in the context of British colonial history, it is a losing bet to rely on the text of a treaty.

The Treaty of Waitangi was implemented over the course of six years.[54] British officials attempted to establish courts, legal codes, and institutions within Maori societies.[55] However, these legal institutions were often seen by the Maori as interfering with the administration of their lands—and by extension interference with the transmission of TK.[56] Conflict led to a shift in policy toward assimilation. This policy was based on Article 3 of the Treaty, which rendered all indigenous Maori British

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43 *See* Armitage, *supra* note 15, at 138.
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 139.
50 *Id.*
51 *Id.*
52 *Id.*
53 Treaty of Waitangi, Art. 2, Feb. 6, 1840, available at: http://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf.
54 *See* Armitage, *supra* note 15, at 141.
55 *Id.*
56 *See id.*

subjects.[57] The early years of the assimilation policy were marked by violence. The "Maori Wars" lasted into the 1860s and ultimately resulted in the seizure of 3 million acres of Maori land.[58] The close of the war period heralded in a flurry of assimilationist legislation.[59] The Maori Land Act of 1862 effectively allotted land holdings, selling off "excess lands," and the Native School Act of 1867 established missionary-run schools in each Maori village that discouraged the use of the Maori language and focused on religious conversion.[60] Reactions to these policies varied among the Maori. Some favored resistance and advocacy for full implementation of the Treaty, while others saw a future where the Maori would abandon their TK and culture and fully assimilate.[61] Among the latter group were missionary educated youth who formed the Young Maori Party in 1897.[62] With its assimilationist bent, the group gained credibility and won seats in the New Zealand parliament in 1906.[63] The party advocated for hybridity between "modern" European policy and traditional governance in administering Maori affairs.[64] This approach was known as "Moaritanga" which means:

> [A]n emphasis on the continuing individuality of the Maori people, the maintenance of such features of Maori culture as present-day circumstances will permit, the inculcation of pride in Maori history and traditions, the retention in so far as possible of old-time ceremony.[65]

Further, the Ratana Church was established in 1920 and changed the way that missionary education was instituted. Rather than a purely Christian education, the Ratana Church emphasized a Maori philosophical lens on theology.[66] It espoused that the Ratana Church had been appointed the "Mangai," or "mouthpiece of God" for the Maori people, and that assimilation should be rejected.[67] By 1928, Ratana Church members had integrated into the Young Maori Party and adherents were elected to the New Zealand legislature.[68] They formed a coalition with the New Zealand labor party which led to the closing of funding gaps in education, housing, and welfare among Maori citizens.[69]

By 1960, the New Zealand government admitted that its policy of assimilation had failed. Assimilation policy, and indeed New Zealand itself, had been transformed from the inside out by Maori resistance.[70]

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57 Treaty of Waitangi, *supra* note 53, at art. 3.
58 *See* Armitage, *supra* note 15, at 142.
59 *Id.* at 143.
60 *Id.*
61 *Id.* at 143–44.
62 *Id.*
63 *Id.*
64 *Id.* (citing Apirana Ngata & Ivan Sutherland, The Maori People Today (1940)).
65 *Id.*
66 *Id.* at 144–46.
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*

J.K. Hunn, Secretary of Maori Affairs reported that while the Maori were changed by the process of colonization, they would remain a political force in New Zealand for the foreseeable future:

> The Swiss (French, Italians, Germans) appear to be an integrated society; the British (Celts, Britons, Hibernians, Danes, Anglo-Saxons, Normans) are an assimilated society. In the course of centuries, Britain passed through integration to assimilation. Signs are not wanting that that too may be the destiny of the two races in New Zealand in the distant future. Integration . . . implies some continuation of Maori culture. Much of it, though, has already departed and only the fittest elements (worthiest of preservation) have survived the onset of civilization . . . . Only the Maori themselves can decide whether these features of their ancient life (language, arts, and crafts) are, in fact, to be kept alive; and in the final analysis, it is entirely a matter of individual choice . . . differentiation between Maoris and Europeans in statute law should be reviewed at intervals and gradually eliminated.[71]

Since 1960, the political power of the Maori has only increased. With it has emerged efforts to sustain Maori culture, a resurgence in the language, improved social policy, and an emphasis on preserving TK.[72] The experience of the Maori further emphasizes that indigenous people are the best suited to administer their own affairs. Without this power, TK dies. The Maori experience shows that when indigenous people are empowered politically, there are positive social and cultural outcomes for everyone. Self-determination allows colonial governments—indeed all nonindigenous governments—to more efficiently manage indigenous affairs, including TK. New Zealand's history shows us that it is true in every era that policies centered on self-determination—from within or without—are preferable to policies that center decisionmaking authority over indigenous property in nonindigenous institutions.

C. *Canada*

Canada is comprised of hundreds of indigenous groups spread from the Arctic to the Great Lakes.[73] Their history is diverse, but most experienced colonial acculturative policy in a similar fashion.[74] The early contact period (1534–1763) was marked primarily by European efforts to Christianize and trade with the Indigenous people of Canada along the Hudson River and in the Great Lakes region.[75] This period was marked by waxing and waning indigenous political power that shaped the establishment of the Canadian–U.S. border as it is today. This is a

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[71] *Id.*

[72] *Our Achievements*, Maori Party, http://www.maoriparty.org/our_achievements (last visited Feb. 14, 2020) (detailing the current initiatives of the Maori party rooted in Maori philosophy and thought).

[73] *See generally* Aboriginal Affairs and Northern Development Canada, First Nations of Canada (2013) (ebook).

[74] *See id.* at Part II.

[75] *Id.*

vast oversimplification of the discrete historical events that make up the early period, but the important point is that during this time tribal people were largely left to continue to develop their cultures and TK. This development was altered by European religion and technology, but it was by no means coercive. It is not until the Royal Proclamation of 1763 that any semblance of a unified indigenous policy emerged.[76] Based on notions of aboriginal title not being full title under Anglo-Saxon law, the Crown enacted a policy by which only it could alienate lands away from indigenous people.[77] All other title transfers between Indians and non-Indians were void *ab initio*. This policy initiated an era of plenary control of indigenous affairs by a centralized government.

By the time of the confederation of the modern Canadian state in 1867, Canada thought that assimilation through a Christian education was preferable to the former government-to-government approach.[78] Section 91(24) of the Canadian Constitution subsumed supreme authority over aboriginal affairs in the Federal Government of Canada.[79] In 1876, pursuant to this power, Canadian parliament adopted the Indian Act, which still governs today. The Act governs everything from the definition of "Indian" to the management and governance of reservations and the payment of treaty annuities.[80] While the Act did preserve some semblance of self-government, the central government has final say over "band" affairs and can impeach elected tribal leaders it perceives as "immoral." Further, the Act allows the government to limit hunting and fishing rights, religious practices, movement, and the education of indigenous children.[81] The education of indigenous children was often involuntary and carried out by the Catholic Church.[82] This process led to mass acculturation from traditional ways of life; what traditional life did remain was subject to the whim of a central government's perception of moral leadership. At their peak, one third of all aboriginal children were enrolled in government-run and church-administered residential schools.[83]

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[76] George William Frederick, King of United Kingdom of Great Britain and Ireland, Royal Proclamation of 1763 (Oct. 7, 1763) ("And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved without our especial leave and Licence for that Purpose first obtained").

[77] Cohen's Handbook of Federal Indian Law § 15.04 (Neil Jessup Newton ed., 2017).

[78] *See* Armitage, *supra* note 15, at 77.

[79] Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.) *reprinted* in R.S.C. Art. VI, § 91(24) ("[T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . . Indians, and Lands reserved for the Indians").

[80] *See* Armitage, *supra* note 15, at 78.

[81] *Id.* at 105.

[82] *Id.* at 108.

[83] *Id.* at 109.

First Nations now have more authority to govern their own affairs under the Canadian Constitution Act of 1982, which recognized that numerous treaty rights to territory remained extant.[84] Many tribal communities today function under a system of "municipal self-governance."[85] Social conditions in first nations communities have been greatly improved.[86] This goes to show, again, that external control of indigenous affairs is a fool's journey. Accordingly, WIPO should imbue its TK policy with self-determination to empower indigenous communities to manage their own affairs.

D. *United States*

Similar to Canada, the relationship between tribes and the United States in the early period was largely one of trade and military alliances.[87] After the British were defeated in the War of 1812, tribal alliances became far less important to the United States and colonial policy shifted toward removing Indians to the west.[88] It was in this policy period that the Supreme Court decided thee important cases that continue to define the relationship between tribes and the United States. In *Johnson v. M'Intosh*, John Marshall held that tribes were in a subordinate position to the United States, holding only incomplete title to their lands that was inalienable except through Congressional alienation.[89] In *Cherokee Nation v. Georgia*, Justice Marshall went on to characterize tribes as "domestic dependent nations."[90] The Court in *Worcester v. Georgia* then held that the states cannot assert criminal jurisdiction over tribes because of the special guardian–like relationship between tribes and the United States.[91] These cases established what is known today as "the trust responsibility," the responsibility of the Federal Government to treat fairly with tribes and act in their best interests. However, this policy rests on a historical fiction: that tribes were not powerful actors in their own right. Tribes exerted military dominance over vast swaths of territory in the west. The fledgling American republic, unlike its former British monarch, did not have the military capacity to overcome tribes.[92] What the Marshall trilo-

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[84] *Id.* at 81.

[85] *Id.* at 98.

[86] *Id.*; *see also* Office of the Auditor General of Canada, *Report 5—Socio-Economic Gaps on First Nations Reserves—Indigenous Services Canada*.

[87] David Treuer, The Heartbeat of Wounded Knee 49–58 (2019) (Kindle Version) (on file with author).

[88] *Id.* at 40–41.

[89] *Johnson v. M'Intosh*, 21 U.S. 543, 587, 5 L. Ed. 681 (1823) ("The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest").

[90] *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 2, 8 L. Ed. 25 (1831).

[91] *Worcester v. State of Ga.*, 31 U.S. 515, 595, 8 L. Ed. 483 (1832).

[92] *See* Treuer, *supra* note 87, at 46, 92–95.

gy did do was to set the legal foundation for removal of tribal people west under a theory that it was the responsibility of the government to protect tribes from state militias.[93] These removals consisted of the well-known Trail of Tears, as well as lesser known removals of Pottawatomi from the Michigan territory and the removal of the Sac and Fox from the Ohio river valley.[94] Removals were followed by the establishment of reservations in the Oklahoma and Kansas territory.[95] Few tribes remain today on reservation land in the East. Much like the reservations in Australia, reservations in the United States were headed by despotic Indian Agents who controlled everything from hunting, gathering, and the practice of religion.[96]

In 1887, Richard H. Pratt and the organization "Friends of the Indian" set out to establish institutions aimed at educating tribal people and eradicating the practice of tribal religion and culture to "kill the Indian, save the man."[97] At the time, this was seen by most as a benevolent cause. Nevertheless, this policy resulted in three generations of tribal people being raised in institutions where they suffered abuse, malnourishment, and acculturation.[98] These boarding schools still persist today in some form, but are largely more conventional educational institutions.[99] These schools existed under the Pratt model well into the 1970s up until the passage of the Indian Child Welfare Act.[100] Simultaneous with the federal efforts to eradicate tribal culture were efforts by state welfare agencies to remove tribal children from their homes on the reservation and place them into foster care.[101] Many reservation communities simply had no

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[93] *See generally Cherokee Nation*, *supra* note 90 (discussion of facts of Cherokee Nation conflicts with Georgia state legislature and enforcement of state law in Indian country throughout).

[94] Cohen's Handbook of Federal Indian Law § 1.03[4][a] (2017); Trueur, *supra* note 87, at 50–67 (discussing the Great Lakes and Ohio River Valley).

[95] *See id.*

[96] Comm'r Ind. Aff., Ann. Rep., S. Exec. Doc. No. 31–1 (1850) (as cited in Cohen's Handbook of Federal Indian Law § 1.03[6][a]) (detailing actions of Indian agents)).

[97] Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, extract, *Official Report of the Nineteenth Annual Conference of Charities and Correction, 1892*, excerpted in Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900 260–61 (Francis Paul Prucha ed., 1973). *See also* Richard H. Pratt, Battlefield and Classroom: Four Decades with the American Indian (Robert M. Utney ed., 1964) (as cited in Cohen's Handbook of Federal Indian Law § 1.04).

[98] Cohen's Handbook of Federal Indian Law § 1.04 (discussing coercive tactics in placing children in boarding schools).

[99] *See, e.g.*, *Homepage*, Flandreau Indian School, http://www.flandreauindianeducation.com (last visited Aug. 30, 2020).

[100] Cohen's Handbook of Federal Indian Law § 11.01 (discussing legislative history and purpose of the Indian Child Welfare Act). *See also* Emily Fox, *Native American Boarding Schools Nearly Killed Michigan's Native Language*, Michigan Radio (Sept. 28, 2015), http://www.michiganradio.org/post/native-american-boarding-schools-have-nearly-killed-michigans-native-language.

[101] *Id.*

children in them during this near century long period.[102] It goes without saying that this policy likely resulted in the loss of enormous amounts of TK. Without the ability to transmit this knowledge from one generation to the next, it dies. This was the central goal of this policy. It did not show signs of reversal until the United States began to pass legislation aimed at affording tribes primary control over child welfare, cultural development, and the administration of health and social services.[103] The policy of self-determination continues today and is based on the theory that tribes themselves know what is best for tribal people.

At bottom, indigenous people know what is best for their communities. As these histories show, when a well-meaning external actor seeks to impose its will on indigenous people, the result is often disastrous. Indigenous people want to preserve what TK and cultural practice remains through their own legal mechanisms. This entails allowing indigenous people—indeed trusting indigenous people—to manage their affairs. This should be the goal of the WIPO TK instrument.

III. Prioritizing Self-Determination, Cultural Revitalization, and Deterring Misappropriation Through Member State TK Legislation

A. *WIPO and Draft Instrument on TK Protection*

The WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC) has created a draft document on TK protection.[104] This draft instrument's primary focus seems to be maximizing "benefit sharing" between indigenous people and users of their signs, symbols, medicines and other resources.[105] The preamble of the draft instrument does acknowledge the need for indigenous control over TK, the varied political situation for indigenous communities in member states, and the importance of facilitating continued development and generational transmission of TK.[106] Article 5 details the scope of protection and has five alternatives that vary in their consistency with respect to indigenous self-determination.[107] While there are variances in their functioning, most agree that some form of the following should be included:

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[102] *See Id.*

[103] 25 U.S.C. §§ 1901–1963 (Indian Child Welfare Act); P.L. 101–644 (Indian Arts and Crafts Act); 25 U.S.C. § 5301 *et seq.* (Indian Self Determination and Education Assistance Act).

[104] The Protection of Traditional Knowledge: Draft Articles Facilitators' Rev. 2, World Intellectual Property Organization (Aug. 31, 2018), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_facilitators_text_tk_rev_2.pdf.

[105] *See, e.g.*, *id.* at § 9.6(c).

[106] *Id.* at 2.

[107] *Id.* at Art. V.

> Member States [should/shall] [safeguard] [protect] the economic and moral [interests] [rights] of the beneficiaries concerning [protected] TK as defined in this instrument, as appropriate and in accordance with national law, [taking into consideration exceptions and limitations, as defined in Article 9, and in a manner consistent with Article 14] [in a reasonable and balanced manner.][108]

Alternative two provides that indigenous people should have "the exclusive and collective right to maintain, control, use, develop, authorize, or prevent access to and use/utilization of their TK; and receive a fair and equitable share of benefits arising from its use."[109] This alternative is most consistent with maximizing the self-determination of indigenous people. The other alternatives provide rights of access alone or simply eliminate the exclusive right to maintenance and control of TK.[110] In the place of the maintenance and control provisions are provisions that direct member states to secure the rights of indigenous people "as appropriate and in accordance with national law."[111]

The draft articles go on in Article 6 to detail sanctions and remedies.[112] The act emphasizes that national legislation should have civil and criminal enforcement procedures and provide for dispute resolution.[113] Indigenous people are guaranteed the right to initiate these proceedings and "where appropriate [apply] sanctions and remedies [that] reflect the sanctions and remedies that indigenous people and local communities would use."[114] Article 7 requires disclosure where TK is used.[115] Article 8 deals with administration but, curiously, it does not afford administrative authority to indigenous people themselves, instead directing member states to establish administrative authorities, preferably with the approval of TK holders.[116] Article 9 allows for member states to permit exceptions where necessary, so long as the use acknowledges indigenous people, is not offensive, is compatible with fair practice, and does not conflict with use by indigenous people.[117] There are other exceptions for use in teaching, research, and preservation.[118] Still further, there is an exception for works that were "inspired" by TK or created independently of the TK holder community.[119] The remaining Articles deal with term of protection, formalities, transitional measures and national treatment.[120]

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at Art. VI ("Sanctions, Remedies and Exercise of Rights/Application").
[112] *Id.*
[113] *Id.*
[114] *Id.* at Art. VII.
[115] *Id.* at Art. VIII.
[116] *Id.*
[117] *Id.* at Art. IX.
[118] *Id.*
[119] *Id.*
[120] *Id.* at Art. X–XVI.

These draft articles are a good start to creating an international regime for TK protection. However, they still do not acknowledge the great power imbalance between indigenous groups and member states and they do not fully incorporate the lessons of history. By focusing on benefit sharing, dissemination, and consultation, the draft articles miss the mark in remedying the effects of colonialism on the indigenous groups discussed in this Comment. What's more, these articles can be improved by maximizing indigenous control over intellectual resources, a normatively beneficial strategy, as history shows. Rather than focus on the benefits of TK, the emphasis of WIPO's TK protection regime should be on maximizing self-determination and control over TK in indigenous polities. This means placing the primary avenue for certification, enforcement, and defensive protection of TK with indigenous peoples. In the United States, the Indian Arts and Crafts Act (IACA) provides one example of a framework that sought to accomplish this.[121] While IACA has issues with enforcement, it is an honest effort to try to make tribes in the United States the primary entities responsible for administering a regime of protection of indigenous intellectual property. WIPO should learn from the example of IACA in formulating and reframing how TK protection should be implemented on a global scale.

B. *The Indian Arts and Crafts Act*

IACA is a "truth in marketing" statute that is rooted in trademark and American Indian law.[122] IACA was passed in 1990 and modified an earlier version of the Act that was part of the Indian New Deal legislative package of the 1930s.[123] The Act responds to importation of fake Indian products from overseas that imitate tribal handicraft work. According to the United States Commerce Department, these fakes displaced 10–20 percent of the market of genuinely manufactured Indian handicrafts.[124] This resulted in the loss of about $40–$80 million in revenue to manufacturers of indigenous-made goods in the United States.[125] To remedy this, the Act provides that only that artwork or handicraft that has been produced by a member of a federal or state recognized tribe can be denoted as a "genuine Indian-made" product.[126] Further, federally recognized tribes may certify artisans under the Act who are then authorized to produce "genuine Indian goods."[127] As a result of the Act (at least in theory), American consumers are not misled about the origin

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[121] Indian Arts and Crafts Act of 1990, P.L. 101–644, 104 Stat. 4662 (1990).

[122] Cohen's Handbook of Federal Indian Law § 20.02[5], Lexis Nexis (2012).

[123] *Indian Arts and Crafts Act of 1990*, U.S. Dep't of the Interior, http://www.doi.gov/iacb/act (last visited May 8, 2019) (detailing the history of IACA).

[124] U.S. Gov't Accountability Off., Indian Arts and Crafts: Size of Market and Extent of Misrepresentation 9 (Apr. 2011), http://www.gao.gov/assets/320/317826.pdf.

[125] *See id.*

[126] 25 C.F.R. § 209.2(a).

[127] *Id.*

of "Indian-made" products, Native American artisans are protected from unfair competition, and tribes are provided with the legal tools to protect and revitalize their cultural heritage. Under the 1990 IACA and the 2000 "enforcement amendments," the Attorney General can bring both criminal and civil enforcement actions.[128] The 1990 Act and 2000 Amendments permit tribes, individual Indians, and Indian arts and craft associations to petition the Indian Arts and Crafts Board (IACB) for suspected violations of the act.[129] The IACB then assesses complaints and refers credible claims for investigation by the FBI which then, in theory, turns a report over to the Department of Justice for either prosecution or civil action.[130] Criminal penalties under the act vary based on the price that a forged Indigenous good is being offered for sale and whether an individual or an organization fabricated the Indigenous product but can be as high as $250,000 fines and a five-year prison sentence.[131] Section 105 of the Act permits the attorney general and federal or state recognized Indian tribes to initiate civil suits.[132] Recovery under this section is "not less than $1000 for each day on which the offer or display . . . for sale continues" and is payable to the Indian tribe and attorney's fees "may" be awarded by the court.[133] The structure of the Act promotes indigenous self-determination because it empowers tribes to take action without government consent and recover damages that can be used to reinvest into building up the arts and traditional handicrafts within their community—all while protecting the economic security of tribal artisans. While the Act applies more narrowly to TK associated with traditional arts and handicrafts, there is no reason that this framework could not be adopted to apply to all manner of sale or misappropriation of traditional knowledge—such as sound recordings and medicines. Further, the Act could be widened to restrict not just the marketing of goods as "Indian-made" but the sale of such goods—marketed as "genuine" or not. WIPO should propose model legislation encouraging member states to adopt the basic structure of IACA: ensuring that indigenous people themselves can certify what constitutes protectable TK. Further, indigenous people should be able to define the scope of misappropriation under the model legislation. Given the spiritual nature of TK this could encompass use of religious symbols (say, eagle feathers) in a derogatory way that disparages indigenous people in a similar manner to past policy eras. Model legislation should encourage member states to establish a dispute resolution system as well that conforms to traditional tribal dispute resolution systems. Often these systems to do not mirror the adversarial process and can be more consensus oriented.[134] Moreover, member states may need to

[128] 25 U.S.C. 305e. *See also* PL 106–49.
[129] *See id.*
[130] *Id.* at § 305e(c)(1)(A).
[131] 18 U.S.C. § 1159 (2000).
[132] 25 U.S.C. § 305e(a) (2000).
[133] *Id.* at § 305e(a)(2)(B), (b) (2000).
[134] April Wilkinson, *A Framework for Understanding Tribal Courts and the Application*

establish a whole different kind of forum, and WIPO should incorporate adaptable provisions with this in mind. One solution would be to offer a model for an administrative dispute resolution body where none at the tribal or federal level exists. What is most essential to WIPO model legislation is that it should encourage legal mechanisms for indigenous people to exercise their powers of self-determination.

IACA is not without its critics—some point to the underenforcement and less than robust implementation of IACA by the federal government and tribes.[135] Others decry IACA's definition of "Indian," which depends on tribal enrollment, as misguided at best and unconstitutional at worst.[136] Further, not all WIPO member states identically mirror the U.S. Indian law regime. Despite these criticisms, the Act is a comprehensive indigenous-traditional-artisanal-knowledge statute that creates enforceable mandates that aim to protect indigenous TK through a pro-indigenous-self-determination framework. The criticisms are not without merit, which is why if WIPO adopts model legislation similar to IACA it will have to be changed in some respects. First, implementation challenges will need to be overcome. Second, the definition of indigenous groups needs to be more inclusive than the U.S. definition, while not sacrificing indigenous control over what constitutes TK.

C. *Implementation and Identity*

In 2010 the Tribal Law and Order Act, a hallmark of the Obama administration's Indian policy, amended IACA to strengthen the power of tribes to seek recovery for fraudulent marketing of their traditional artwork or handicraft by non-indigenous entities.[137] WIPO can learn from and build upon these amendments in crafting model legislation.

Prior to these amendments, the enforcement statistics of the original act were abysmal. To illustrate, the first and only reported appellate case on IACA is *Native Am. Arts, Inc. v. Waldron Corp*.[138] This is due by and large to the centralization of enforcement authority, bureaucratic barriers between raising a complaint and judgment on the merits, and the inability of tribes and individual Indian artists to bring claims against misappropriated Indigenous art or handicraft.[139] The government accountability office reports between FY 2006 and FY 2010 the IACB

of Fundamental Law: Through the Voices of Scholars in the Field of Tribal Justice, 15 Tribal L.J. 67 (2014) (discussing how customary law is applied in tribal courts in the United States).

[135] *See, e.g.*, William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 Stan. L. Rev. 1009, 56 (2001) (arguing the act is ineffectual for lack of enforcement, under implementation at the federal and tribal level, and defining "Indian" underinclusively).

[136] *See, e.g.*, Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275, 315 (2001).

[137] P.L. 111–211.

[138] 399 F.3d 871, 873 (7th Cir. 2005).

[139] *See* U.S. Gov't Accountability Off., *supra* note 124, at 1 (detailing enforcement challenges).

received 649 complaints of alleged violations and it referred 117 of these complaints to the Department of Justice (DOJ).[140] No cases were filed in federal court as a result. The lack of enforcement can be traced to several reasons. One is that federal officials often have limited understanding of the legal requirements of IACA because there are precious few cases. Further, building an appropriate factual record to establish that the artwork or handicraft alleged to be fraudulent is "[a] product in the style of an Indian art or craft product originating from a commercial product, without substantial transformation provided by Indian artistic or craft work labor" would be quite onerous.[141] Expert fees galore. In addition, given the costs of enforcing the law—training AUSAs, expert witness fees, and limited investigative resources—it is not a wonder why DOJ has placed IACA enforcement on the backburner.

TLOA attempted to increase enforcement of IACA through two reforms: (1) expanding who can investigate and (2) increasing penalties.[142] Now, all federal officers may investigate violations of the act, including Interior officials.[143] This, theoretically, will allow more investigative resources available for IACA violations. The second reform, increasing penalties, provides only a marginal added deterrence value to the criminal penalties of IACA. This may incentivize tribes to initiate litigation, but tribes have limited resources and indigenous artists have even less. Indeed, there is no guarantee that if a tribe sues, say, Urban Outfitters, that they will be successful. Further still, there is little chance they will get punitive damages or attorney's fees under the permissive § 305e(c) (2010) standard. Since these amendments have passed, there is little indication that enforcement of IACA has increased, and tribes and indigenous artists have continued to express their frustration with the inability to recover civil damages.[144]

Further, these amendments fail to take account of the intergenerational character of traditional art, handicraft, and knowledge. While the Indian Child Welfare Act remains a stalwart against a return to regressive assimilation policy, its continued vitality is in question in court.[145] ICWA established a system to redress the twentieth century assimilationist policies in the United States. The act aims to ensure that Indian

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[140] *Id.*

[141] 25 C.F.R. § 309.2.

[142] Press Release, United States Department of the Interior, New Law Promotes Authentic Indian Arts and Crafts, Cracks Down on Fraudulent Art (July 30, 2010), http://www.doi.gov/news/pressreleases/New-Law-Promotes-Authentic-Indian-Arts-and-Crafts-Cracks-Down-on-Fraudulent-Art.

[143] *Id. See also* 25 U.S.C. 305d(c)(1)(B).

[144] Press Release, Senator Tom Udall, Udall Holds Field Hearing on Need to Crack Down on Counterfeit Indian Art (July 7, 2017), http://www.tomudall.senate.gov/news/press-releases/udall-holds-field-hearing-on-need-to-crack-down-on-counterfeit-indian-art.

[145] *See, e.g.*, *Brackeen v. Zinke*, No. 4:17-cv-00868-O (N.D. Tex. 2019). *See also* Goldwater Institute, *Ensuring Equal Protection for Native American Children*, http://goldwaterinstitute.org/indian-child-welfare-act (last visited May 8, 2019).

children who are removed from their home are placed in families that reflect their cultural heritage—the act preferences family placements first, then families within the child's tribe, and then any Indian family.[146] In this way, the act preserves the intergenerational knowledge transfer channels that are essential to the survival of traditional knowledge in Indigenous communities. Preserving ICWA and ensuring that it remains law in the United States is essential to the protection of TK; without it knowledge dies out with the passing of generations because no children are present in the community to receive the knowledge. While the courts are currently contending with whether the act is constitutional under the Tenth Amendment's anticommandeering doctrine, it is important to remember that IACA and ICWA share the mission of preserving indigenous culture.[147] Amendments to IACA should also include strengthening enforcement mechanisms in ICWA through funding increases and expansion of tribal child welfare programs.

WIPO should understand that enforcement resources are scarce and suggest that member states should spread authority to enforce TK encroachment across multiple agencies. It is understandable that government officials themselves will not prioritize TK protection, even less when investigative authority is centralized. Additionally, WIPO should also seek to not only authorize indigenous-initiated remedies but actively encourage indigenous people to seek these remedies. One solution would be to authorize recovery of attorney's fees or advocate fees recoverable by outside counsel. This fee-shifting framework is used in the United States civil rights context to promote suits on behalf of underserved communities.[148] The same logic can be applied to implementing an indigenous self-determination policy with respect to TK protection on behalf of underresourced indigenous communities. Finally, the WIPO legislation must promote the adoption of restorative indigenous child welfare practices in member states—especially in those discussed in this Comment. WIPO should affirmatively endorse the notion that indigenous children are served best when they are raised in their communities and that indigenous communities are served best when they—not majoritarian fora—can determine the best interests of indigenous children. Finally, there is one area that WIPOs draft instrument gets right: defensive measures. WIPO should promote the ability of indigenous people to collect and store TK kept in their communities in databases. WIPO could strengthen this by including in model legislation provisions related

[146] 25 U.S.C. 1915(b)(i)–(iv).

[147] *See Brackeen v. Bernhardt*, No. 18-11479, (5th Cir. 2019); 25 U.S.C. 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs").

[148] 42 U.S.C. § 1988(b).

to how these databases can be structured and funded in member states. One suggestion would be to place a portion of the damages obtained in civil suits or administrative contested cases into a fund to establish and administer these databases. This will deter greed-driven litigation while promoting positive measures to promote indigenous knowledge production and protection.

Finally, the very point of protecting TK is to prevent misappropriation and misuse of TK which is often sacred and spiritual. If anyone is permitted to say that they are indigenous, the notion of tradition vanishes. In order to protect traditional indigenous knowledge, there has to be some coherent way to define indigenous people. IACA does so broadly because it includes those artists that have been recognized by a tribe as "artisans" whether they are enrolled in a tribe or not, ethnically indigenous or not. This system prioritizes indigenous self-determination because it centers power over who is indigenous with democratically elected bodies of indigenous people. Individual artists aggrieved by the fact that they do not meet the definition of "Indian" under IACA have to lobby the tribe for an artisan certification; surely, it would be granted if these critics are as genuine as they say.

Alternatives to this system proposed by critics of IACA's Indian-determination provisions fall short of protecting self-determination and TK. Ethnic or individual-based identifiers for "indigenous," such as self-identification or genetic testing, fail to acknowledge that indigenous people maintain distinct sociocultural and political structures today and instead assumes that tribal identity—including political identity—has vanished into the melting pot. Even worse, third-party certification of indigeneity by private actors or member-state governments through some type of anthropology board would place too much power to determine who is indigenous in a body that can be influenced and bribed.[149] What is to stop capture by an international company that seeks to benefit from the use of traditional designs paying the board to certify them as "traditional"? WIPO should reject these alternatives. Instead, WIPO should look to the definition of "indigenous" used by the World Bank:

> [A] distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees: [(a)] self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories[;] (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an

[149] Andrew W. Minikowski, *The Creation of Tribal Cultural Hegemony Under the Indian Arts and Crafts Act and Native American Graves Protection and Repatriation Act*, 92 N.D. L. Rev. 397, 412 (2017) (arguing that certification of genuine Indian arts and crafts be stripped from tribes and placed in a "pan-Indian" government body).

> indigenous language, often different from the official language of the country or region.[150]

This definition is similar to the one in IACA because it centers the locus of control of indigenous identity within bodies of indigenous political organizations, thereby maximizing self-determination.

Conclusion

This Comment has attempted to answer WIPO's call for study on *sui generis* systems of TK protection through encouraging the organization to think historically. Through examining the history of indigenous policy in four states, we can learn that self-determination for indigenous people has been a normatively desirable policy for both indigenous and non-indigenous governments alike. WIPO should seek to maximize indigenous self-determination in issuing model legislation for member states to adopt to protect TK. This entails centering control over indigenous traditional knowledge within indigenous communities, which includes control over child welfare and intergenerational knowledge transfer. IACA provides a framework for this to be accomplished. WIPO should adopt this framework with the modifications suggested in this Comment to overcome implementation and indigenous-identity based criticisms. The goal of any TK instrument should be to enable indigenous people to repair what they have lost to the assimilationists policies of the past and build resiliency for the future.

[150] World Bank Group, *World Bank Operational Manual*, at OP-4.10—Indigenous Peoples (2013), http://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf.