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A Proposal for a Model Indigenous Intellectual Property Protection Tribal Code (MIIPPTC)

Tomasz G. Smolinski[1]

ABSTRACT

The appropriation of Native American[2] cultural and intellectual property has become commonplace in the United States. At the same time, mainstream, Western cultural/intellectual property laws are inadequate to properly protect traditional Indigenous knowledge. To address this problem, scholars have begun to advocate for a three-tiered system, in which, in addition to national and international legal protections, tribal laws would play a fundamental role in the fight against cultural appropriation. Alas, few Native American tribes explicitly address cultural and/or intellectual property rights in any of their legal instruments. This is especially true with respect to intangible intellectual property, such as traditional ecological knowledge (TEK). In an attempt to fill this gap, this Article aims to distill both historical and contemporary Indigenous "best practices" in protecting traditional knowledge into a model tribal code that could be adopted by various American Indian nations, with appropriate tribe-specific modifications.

INTRODUCTION

From Indian sports mascots, to musical performances incorporating Indigenous motifs without permission, to "Native-inspired" clothing, to genetic reverse-engineering of generations-old corn landraces, appropriation of Native American cultural and intellectual property has become commonplace in the United States.[3] Some examples of such appropriation include the hip-hop duo OutKast's infamous performance at the 2004 Grammy Awards, which used the sacred Navajo (Diné) "Beauty Way" song,[4] and the Urban Outfitters company's sale of goods bearing the Navajo name and symbols without the Navajo Nation's

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[2] In this Article, the terms "Native American," "American Indian," and "Indian" are used interchangeably to describe Indigenous peoples in the United States. While the first one of these terms has been widely accepted in the mainstream parlance in the United States, the other two are commonly used in the context of Federal Indian Law. The author's intent is to use these terms with the utmost respect, while being cognizant of the varying personal preferences of Indigenous peoples.

[3] *See*, *e.g.*, Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 72 (2005).

[4] Jan-Mikael Patterson, *Grammy TV Show's Use of Sacred Song Causes Outrage*, NAVAJO TIMES, Feb. 12, 2004, at A-1.

permission.[5]

Although some efforts have been made over the past few decades, on the domestic as well as the international level, to protect Indigenous folklore and art through copyright law, symbols and insignia through trademark law, and biotechnology and genetic resources through patent law, Western cultural and intellectual property legal regimes remain inadequate to protect traditional knowledge and cultural expression.[6]

Recently, scholars have begun to advocate for a three-tiered system, in which, in addition to national and international protections, tribal laws would also play a significant—in fact *central*—role.[7] Despite the admittedly limited applicability of tribal laws to non-Indians,[8] scholars argue that the development of such *sui generis* laws is critical for Indigenous peoples as an act of sovereignty, and a necessary condition for success in this uphill battle. Some scholars insist that only when Indigenous peoples themselves develop and implement adequate protections for their own cultural and intellectual property rights, can the laws of the dominant legal system be properly influenced.[9] Unfortunately, research conducted on this topic has demonstrated that few Native American tribes explicitly address cultural and/or intellectual property rights in any of their legal instruments, such as constitutions, codes, ordinances, or tribal court decisions.[10] This is especially true with respect to intangible intellectual property (IP) rights in the context of traditional ecological knowledge (TEK),[11] an area presently commonly referred to as *natural sciences*.

In an attempt to fill this gap, this Article explores the legal mechanisms aimed at the protection of such intellectual property rights, not only contemporarily but also historically, adopted by tribal nations located in what is now the United States. Upon an extensive survey of these mechanisms, while being mindful of the cultural diversity among Native American nations, this Article attempts to distill "best practices" into a model code that could be adopted, with appropriate modifications, by various American Indian tribes.

Part I of this Article supplies the necessary foundation and context for the understanding of the unique requirements for the protection of Indigenous intangible cultural and intellectual property. Part II briefly examines the inadequacy of the Western cultural/intellectual property regimes to protect

[5] *See* Navajo Nation v. Urb. Outfitters, Inc., No. 12-0195 BB/LAM, 2016 WL 7404747 (D.N.M. July 5, 2016).
[6] Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge through Intellectual Property Law*, 21 MICH. ST. INT'L L. REV. 751, 753 (2013).
[7] Riley, *supra* note 3, at 73-74.
[8] *See, e.g.*, Montana v. United States, 450 U.S. 544, 564-66 (1981) (finding that, with limited exceptions, tribes generally lack inherent tribal sovereignty to regulate civil conduct of non-Indians, even within reservation boundaries).
[9] Riley, *supra* note 3, at 74.
[10] *See id*. at 101.
[11] *See id*. at 101, 108-09 (describing the efforts of a select few tribes to protect intangible property).

traditional Native American intellectual property rights, and discusses the fundamental incompatibility between those legal regimes and traditional, Indigenous cultural values. This incompatibility lies at the very core of the inadequacy. Part III comprises a survey of selected historical and contemporary intellectual property protection mechanisms utilized by American Indian tribes. The survey is based on an extensive review of a multitude of traditional stories and recorded interviews with, and/or accounts of the lives of, Native American elders, and especially tribal and spiritual leaders, as well as an examination of contemporary tribal constitutions, codes, ordinances, and case law, supplemented with comments from legal scholars presently working in the area of Indigenous cultural and intellectual property rights protection. The research performed for the purposes of Part III forms the foundation for the Model Indigenous Intellectual Property Protection Tribal Code (MIIPPTC), whose actual provisions are listed in the Appendix. The Article concludes with an evaluation of some of the advantages and limitations of the proposed model code, and a discussion of the possible next steps that the Native American legal community may need to take in order to improve the protections of Indigenous intellectual property rights.

I. Background: What Is Indigenous Intellectual Property And Why Must It Be Protected?

In the spirit of tribal sovereignty and self-determination, which at least in theory drives the current policy of the United States federal government towards Indian tribes, Native American nations must have the right to choose their own future.[12] However, without economic independence, such a choice is simply not possible.[13] Many tribal nations are the stewards of vast amounts of traditional ecological knowledge with respect to, for example, edible and medicinal plants, natural insecticides and repellents, fertility regulating drugs, or forest management techniques.[14] Sadly, tribes receive a small fraction, if anything at all, of the profits that such knowledge generates, after being all but hijacked by Western corporations.[15] In addition, much of this knowledge, wrestled out of the caring hands of the Indigenous peoples, is being lost to the tribal communities. "[Y]oung people no longer learn the methods by which their ancestors maintained fragile regions."[16] Accordingly, there is an urgent need for the implementation of *adequate* protections for Indigenous intellectual property, and not only for economic reasons, but also—and perhaps more importantly—for the very survival of tribal traditions and cultures.[17] Importantly, as mentioned in the previous

[12] Darrell Posey, *Intellectual Property Rights: And Just Compensation for Indigenous Knowledge*, 6 Anthropology Today 13, 15 (1990).
[13] *Id.*
[14] *Id.* at 13.
[15] *Id.* at 15.
[16] *Id.* at 14.
[17] *See generally id.*

section, the laws enacted by tribes themselves, reflecting each tribe's unique belief system and traditional knowledge, should play the central role in the efforts to protect Indigenous intellectual property.

A. Tangible vs. Intangible Indigenous Property

Since the earliest stages of the development of Federal Indian Law, which generally governs the legal relations between Indians and non-Indians,[18] the rights of Native Americans to even the most tangible kind of property, i.e., land, have been deemed inferior to those of European colonizers. In 1823, the Supreme Court decided that tribes only held a "right of occupancy" over their territories (also known as "Indian title" or "Aboriginal title"), subject to the United States' power of extinguishment, "either by purchase or by conquest."[19] Although tribes and tribal members can now own land with full Western legal title, in addition to having land held "in trust" by the U.S. government, the specter of this early policy is still clearly perceptible today.[20]

Historically, and to the present, Native Americans have found themselves in a disadvantaged position with respect to even tangible property, such as land. Not surprisingly, then, effective protection of *in*tangible property, which is generally more esoteric and harder to define, tends to be even more difficult to achieve.[21] Complicating the matter even further is the fact that Indigenous intangible property, such as traditional knowledge, is often inexorably intertwined with the natural environment, to which Indians generally have a non-proprietary attitude. As aptly explained by John (Fire) Lame Deer, a Lakota Holy Man, "deep down within [Native Americans] lingers a feeling that land, water, air, the earth and what lies beneath its surface cannot be owned as someone's private property."[22]

Nonetheless, the next section describes two main types of Indigenous intangible property, which possibly could and certainly should, be afforded legal protections.

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[18] *See generally* Riley, *supra* note 3, at 95.

[19] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-588 (1823).

[20] For example, following the inexplicable standard set forth in Carcieri v. Salazar, 555 U.S. 379 (2009), the U.S. Department of the Interior disestablished, and revoked the "trust land" status of, a reservation of the Mashpee Wampanoag Tribe in Massachusetts. *See, e.g.*, Dalton Walker, *Interior takes reservation away from Mashpee Wampanoag Tribe*, Indian Country Today (Mar. 28, 2020), https://indiancountrytoday.com/news/interior-takes-reservation-away-from-mashpee-wampanoag-tribe-ecXdz5OqvUydjr0vLtK83Q [https://perma.cc/PV2P-S366]. Since then, the Department of the Interior has reaffirmed the trust status of the Tribe's reservation. *See* Letter from Bryan Newland, Assistant Sec'y for Indian Affs., to Hon. Brian Weeden, Chairman, Mashpee Wampanoag Tribe (Dec. 22, 2021) https://static1.squarespace.com/static/59ca33c0f09ca4a9c58455a9/t/61c3b131da04fe1f100f16e9/1640214857741/IA11147+Mashpee+Wampanoag+Tribe+Land+into+Trust+Decision+FINAL+ASIA+12.22.21.pdf [https://perma.cc/EM7G-XDBA].

[21] Riley, *supra* note 3, at 117.

[22] John (Fire) Lame Deer & Richard Erdoes, Lame Deer, Seeker of Visions 46 (Simon & Schuster ed., 2009).

B. Selected Types of Indigenous Intellectual Property

Indigenous cultural and intellectual property encompasses a multitude of modalities, such as beliefs, spirituality, arts, as well as traditional ecological knowledge and innovation.[23] A brief discussion of two main categories of such property that are pertinent to this Article follows.

1. Traditional Ecological Knowledge

First, traditional knowledge (TK) is the knowledge developed over generations to sustain a community.[24] TK consists of "experience, culture, environment, local resources, animal knowledge, or plant resources."[25] Communities expand their TK over many years through research, development, and innovation in farming and medicine.[26] TK is generally subject to the collective ownership of the community and is transmitted through stories to those chosen within the community.[27] Thus, traditional ecological knowledge (TEK) can be understood as a subset of TK that deals specifically with ecology, i.e., the study of the relationships between organisms and their environment.[28]

2. Genetic Resources

Genetic Resources (GR) can be seen as a subfield of TEK concerned explicitly with plant and animal genetics, i.e., the study of heredity in general, and of genes in particular.[29] Native Americans have engaged in the management of their genetic resources since time immemorial, creating a multitude of various plant landraces, each with distinct properties and practical uses.[30]

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[23] Schuler, *supra* note 6, at 753.
[24] Stephen A. Hansen & Justin W. VanFleet, Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting Their Intellectual Property and Maintaining Biological Diversity 3 (2003).
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Ecology*, Encyclopædia Britannica (Feb. 7, 2019), https://www.britannica.com/science/ecology [https://perma.cc/U778-W6PP].
[29] *Genetics*, Encyclopædia Britannica (Feb. 4, 2020), https://www.britannica.com/science/genetics [https://perma.cc/P64U-MCJ9].
[30] *See, e.g.*, Abdullah A. Jaradat, *Perceptual distinctiveness in Native American maize (Zea mays L.) landraces has practical implications*, 11 Plant Genetic Resources 266 (2013).

II. Inadequacy Of The Western Cultural/Intellectual Property Protection Regimes To Properly Guard Native American Traditional Knowledge And Cultural Expression

As mentioned above, Indigenous cultural and intellectual property encompasses much more than the Western legal protection regimes are capable and willing to protect. Simply put, Indigenous traditional knowledge and cultural heritage do not conform to the economics-driven "Western tendencies toward protecting scientific, technological, artistic, and literary innovation through hardline tests" of modern intellectual property law and its heavy reliance on "hard copy documentation."[31] A short discussion of the central principles of this mainstream law follows.

A. Brief Overview of the Current Western Cultural/Intellectual Property Protection Mechanisms

Intellectual property law in the United States has emerged over the years as an amalgam of three distinct, yet sometimes overlapping, areas dealing with copyrights, trademarks, and patents. These areas are summarized below, along with a fourth, specialized, and potentially relevant here, doctrine of trade secrets.

1. Copyright Law

Copyright affords authors legal protection for certain types of work, such as literary, dramatic, or musical works, artistic works and works of applied art (e.g., paintings, ceramics, carvings, etc.), motion pictures, or computer programs and databases.[32] However, this protection only covers the "expression" of the ideas contained in the works, and not the ideas themselves.[33] Copyright gives the owners exclusive rights to sell copies of their work in whatever tangible form (e.g., print, sound recording, broadcast, etc.), usually for the life of the author, plus 50 (or 70) years.[34]

2. Trademark Law

A trademark is a marketing tool that is typically used by a company to claim that its products are "authentic" or "distinctive" as compared to similar products offered by competitors.[35] A trademark usually consists of a recognizable design, word, or series of words, typically placed on the product label or displayed in

[31] Schuler, *supra* note 6, 753-54.
[32] Darrell A. Posey & Graham Dutfield, Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities 83 (1996).
[33] *Id*.
[34] *Id*.
[35] *Id*. at 84.

advertisements.[36] Although a trademark does not have to be registered, doing so enables the owners of the trademark to sue parties infringing upon it, and to license the use of the trademark.[37]

3. Patent Law

A patent is a legal certificate that affords an inventor exclusive rights to foreclose others from producing, using, or selling the invention for a fixed period of time, usually 17-20 years.[38] A patent application must satisfy stringent requirements as to the invention's usefulness, novelty, and nonobviousness.[39] Importantly, a patent typically cannot be obtained for a naturally occurring organism or a gene that has not been isolated and/or modified in some significant way.[40]

4. Trade Secrets

Practical "know-how," as long as it is known only to a few people, may be legally protected as a trade secret, even if it fails the requirements of patentability.[41] Such protection, if available to an enterprise, may give it an advantage over its competitors.[42] However, trade secrets acquired by others through "proper" means, such as independent discovery, accidental or actual disclosure, or reverse-engineering, will not be protected under this regime.[43]

B. Incompatibility of the Western Cultural/Intellectual Property Protection Mechanisms with Traditional, Indigenous Cultural Values

The incompatibility between traditional, Indigenous cultural values and the Western cultural/intellectual property protection mechanisms is multi-dimensional. First, traditional knowledge is typically transmitted through "songs, proverbs, stories, folklore, community laws, common or collective property and invention, practices, and rituals."[44] Given that physical recordings, in any form, of such practices or rituals are often entirely prohibited in Native American communities, meeting the hard copy fixation requirement of the Western IP protection regimes is virtually impossible.[45] Second, while Western

[36] *Id*.
[37] *Id*. at 84-85.
[38] *Id*. at 76-77.
[39] *Id*. at 84.
[40] *Id*. at 78.
[41] *Id*. at 87.
[42] *Id*.
[43] *Id*.
[44] Tonina Simeone, *Indigenous Traditional Knowledge and Intellectual Property Rights*, PARLIAMENT OF CAN., PRB 03-38E (Mar. 17, 2004).
[45] Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional*

approaches "incentivize creation for a market economy," and see intellectual property mainly as a means for an individual or a company to accumulate wealth, in the "communitarian, gift-based culture" of many Native American tribes, such property is considered a common good, to be shared in by all of the members of the community.[46] John (Fire) Lame Deer vividly explained this incompatibility by stating that while "[f]or a white man each blade of grass or spring has a price tag on it," Indians generally refuse to live in the "Green Frog Skin World," green frog skin meaning the U.S. dollar.[47] Accordingly, in the context of intellectual property protections, rather than achieving commercialization, the goal of many Indigenous communities is to "preserve the integrity of the knowledge and to keep it safe from appropriation, destruction, deformation, and extinction."[48]

Obviously, the mainstream Western IP protection mechanisms fall short of this goal. Copyright law, designed to protect the *expression* of certain ideas, is of little use in protecting the knowledge itself. Trademarks, although arguably potentially useful for protecting genuine, Native-made handicrafts, are similarly of little help in sheltering traditional knowledge. Patents, due to their strict novelty requirements and short protection timeframes, similarly are ill-suited to protect the generations-old Indigenous knowledge. Finally, trade secret protections, although on the surface quite appealing (assuming that an argument could be made that only a few tribal members possess the relevant knowledge), in practice turn out to be quite powerless, especially against reverse-engineering; a technique which large companies certainly have at their disposal.[49]

C. The Need for Sui Generis Tribal Laws Governing Indigenous Intellectual Property Rights

As the previous two sections demonstrate, the current, mainstream IP protection regimes are insufficient to adequately protect the uniqueness, vastness, and complexity of Indigenous traditional ecological knowledge. Accordingly, there undoubtedly is a need for *sui generis* legal regimes designed to protect Indigenous intellectual property rights that fall outside of the standard patent, trademark, copyright, and trade secret doctrines.[50]

Importantly, despite the otherwise valid criticisms about their potential unenforceability on outsiders, these intellectual and cultural protection regimes

Cultural Expressions in Native American Tribal Codes, 51 AKRON L. REV. 1125, 1133 (2017).
[46] Riley, *supra* note 3, at 87-89.
[47] Lame Deer, *supra* note 22, at 36-37.
[48] *Id*. at 88.
[49] *See, e.g.*, Vandana Shiva, *The Seeds of Suicide*, ASIAN AGE AND GLOBAL RESEARCH (Apr. 5, 2013), https://www.ghttps://www.globalresearch.cathe-seeds-of-suicide-how-monsanto-destroys-farming/5329947[https://perma.cc/D6CQ-GQA3].
[50] Schuler, *supra* note 6, at 755; *see also Prof. Rebecca Tsosie: Current Issues in Intellectual Property Rights to Cultural Resources*, NATIVE AM. RTS. FUND (June 25, 2017), https://www.narf.org/tsosie-intellectual-property/ [https://perma.cc/NLQ5-G38Q].

must be driven by tribal laws.[51] After all, tribes "are in the best position to determine whether and/or how to reveal culturally sensitive information."[52] Importantly, not only would this "allow [I]ndigenous peoples . . . to finally control the integrity, disposition, and appropriation of their sacred knowledge,"[53] but also to "exercis[e] their inherent authority to define tribal laws and be governed by them."[54] If properly implemented, such tribal laws *could* be incorporated into the Anglo-American jurisprudence, which would not only afford "weight and legitimacy to [these] tribal law[s]," but also "provide[] an opportunity to infuse the dominant legal system with [I]ndigenous conceptions of justice," specifically in the context of the protection of Indigenous intellectual property.[55]

The next part of the Article provides a survey of selected historical and contemporary IP protection mechanisms utilized by American Indian tribes.

III. Survey Of Historical And Contemporary Native American Legal Mechanisms Aimed At The Protection Of Intellectual Property Rights

A. Historical (Traditional) Mechanisms Adopted by Native American Tribes in North America

1. Methodology

In order to survey the legal mechanisms that Native American tribes have historically adopted to protect their cultural and intellectual property rights, an extensive review of various books and online resources was conducted. Special care was taken to include tribes representing as much of the continent as possible, without limiting the survey to a particular cultural or linguistic group. The review is divided into two main subsections: (1) traditional stories, and (2) recorded interviews with, and accounts of the lives of, Native American elders, especially tribal and spiritual leaders.

2. Sources of the Traditional Tribal Law

a. Traditional Native American Stories

Traditional Native American stories, which have been passed on orally through generations, not only entertained, but also often relayed important knowledge about the inner workings of their respective societies.[56] The stories also provided inspiration and enabled entire Native American cultures to

[51] Riley, *supra* note 3, at 131.
[52] *Id.* at 100.
[53] *Id.* at 131.
[54] *Id.* at 74.
[55] *Id.*
[56] Joseph M. Marshall III, The Lakota Way: Stories and Lessons for Living, at xiii (2001).

survive.[57] Although such stories have always dealt with a wide range of topics, such as courtship, respect for elders, reciprocity with the environment, etc., some of them could also be seen as explicitly establishing certain legal principles.[58] In fact, as explained by Professor John Borrows, Canada Research Chair in Indigenous Law at the University of Victoria, Canada, and a member of the Chippewa of the Nawash First Nation, First Nations "frequently access their historic experiences and cultural epics in order to formulate and apply their own law."[59] Below, a few of such stories, particularly relevant in the context of intellectual property rights, are shortly summarized. Importantly, while only several stories have been selected for this review, the themes, which they represent, appear to be remarkably consistent across many tribes.

Tail Feather Woman, a Dakota woman, in the aftermath of an attack on her village by American soldiers, had a vision about the construction of a Great Drum, "designed 'to bring unity and healing' among [Indian] peoples."[60] In her vision, she also received instructions for how to conduct the proper drum ceremony. After being nursed back to health by her family, Tail Feather Woman traveled east, disseminating her teachings to the Ojibwe in Minnesota and elsewhere. After that, the spread of the Great Drum continued, and by now, has reached many more tribal nations.[61]

To this day, ceremonies in honor of Tail Feather Woman are organized by tribes throughout the country, some serving important, healing purposes for their respective communities. Notably, Tail Feather Woman is always acknowledged as the originator of the Great Drum, which highlights the importance of the maxim "give credit where credit is due" in Indigenous cultures.

There are many traditional Lakota stories about the trickster Iktomi. In one such story, Iktomi duped Mato, the Bear, into a contest of coughing up arrowheads and lance points, by which the contestant had been wounded.[62] According to the rules of the contest, he who could cough up more of such items would be deemed braver. Mato, boastful, arrogant, and sure of his inevitable victory, began coughing up the arrowheads and lance points, unaware of the fact that as soon as he did, Iktomi quickly picked up and swallowed them one by one, only to cough them up later, claiming them as his own. Accordingly, in his arrogance-fueled blindness, the mighty Mato lost the contest.

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[57] *Id.* at xiii-iv.
[58] *See* John Borrows, *Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education*, 61 McGill L.J. 795, 819 (2016) (recognizing Anishinaabe "narratives [that] contain resources for regulating behaviour and resolving disputes" as also serving "as legal resources").
[59] John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 McGill L.J. 629, 653 (1996).
[60] Bruce White, *Honoring Wiyaka Sinte Win/ Tail Feather Woman and her vision*, MinnesotaHistory.net, http://www.minnesotahistory.net/wptest/?page_id=882 [https://perma.cc/6VBH-LSDW] (last visited Feb. 11, 2022).
[61] *Id.*
[62] Marshall, *supra* note 56, at 13-16.

This story seems to imply that in accordance with the Lakota virtue of humility, one should avoid being boastful, lest one's accomplishments may end up being claimed by someone else.

Interestingly, this principle seems to be in contrast, at least at first glance, with the Lakota tradition of Waktoglaka (i.e., "to tell of one's victories"). According to the tradition, fighting men were encouraged to "publicly recount their exploits in battle."[63] However, the tradition was regulated by two essential elements. First, "every action recounted had to be verified by at least one witness," which corroborated the veracity of the account.[64] Second, once the story was told, it was not to be repeated, unless explicitly requested, in order for the warrior to remain humble.[65]

Taken together, the two principles seem to suggest that while a person should be able to assert his or her virtues, in order to enhance good reputation and gain status, and perhaps also to claim credit for his or her accomplishments, the person should be humble about it.

The story of Brings the Deer recounts the exploits of two Lakota men who embarked on a hunting expedition, during a harsh winter period, complete with a great scarcity of food. After many trials, the hunters finally managed to kill and capture a deer. On the way back to the village, however, one of the hunters, Brings the Deer, feeling sorry for several other hungry beings who asked him for a slice of his prize, gave away the meat piece by piece, to the dismay of his hunting partner, Left Hand. Nevertheless, the big-hearted hunter was ultimately rewarded for his generosity, as, upon his return to the village, the small remnant of the animal's carcass mysteriously turned back into a whole deer, which fed the entire village. As a result of his actions, Brings the Deer became a well-respected member of the community, in contrast to the difficult life that Left Hand led from this point forward, as if being punished for his ungenerous attitude.[66]

This story clearly emphasizes the virtue of generosity, and it also seems to suggest that such generosity is always rewarded, while stinginess could lead to suffering.

The many Lenape (Delaware) stories of Wehixamukes (also known as Kupahweese or "Crazy Jack") follow the adventures of a well-intentioned, but rather dim-witted young Indian boy. Wehixamukes tends to take everything literally, which often causes him, as well as those around him, much grief. For example, when once told to start a fire on the flattest surface he could find, Wehixamukes decided to light it on a frozen lake, which obviously did not end well.[67] In another instance, charged with the task of notifying his comrades, who were lying in wait, when the enemy war party passed *over* them, Wehixamukes,

[63] *Id.* at 7.
[64] *Id.*
[65] *Id.*
[66] *See id.* at 180-90.
[67] Richard Calmit Adams, LEGENDS OF THE DELAWARE INDIANS AND PICTURE WRITING 144 (Forgotten Books 2017).

disappointed with the enemy's unexpected decision to take a different path, called out to them to come back, thus alerting them to the presence of the Lenape warriors.[68] Invariably, admonished for his misdeeds, and told what he was actually to do, in his defense, Wehixamukes always exclaimed "if you had told me *that*, I would have done so."[69]

The stories of Wehixamukes seem to exemplify two lessons. First, one should never take things too literally, but use common sense instead. Second, one should always try to be as explicit as possible in his or her statements, in order to avoid misunderstandings.

b. Recorded Interviews with, and Accounts of the Lives of, Native American Elders and Tribal/Spiritual Leaders

In the book titled "Fools Crow," Thomas E. Mails provided an account of his interviews with Frank Fools Crow, a Lakota elder and religious leader, and nephew of the famed Lakota spiritual leader, Black Elk.[70] Among many other topics, Fools Crow discussed some aspects of his journey to becoming a healer, and the rules governing the practice as well as the sharing of his knowledge.

Early on in the process, Black Elk warned the still-young Fools Crow that as the "word of [his] healing and prophetic power would spread," many would "do their best to discover why and how [he] heal[s]" and would "attempt to learn everything about [him]."[71] Black Elk counseled Fools Crow to never disclose his secret knowledge, which he had largely obtained through vision quests, to those people.[72] On the other hand, while speaking about who could engage in traditional, religious dances, Fools Crow himself asserted that "[a]nyone who knew how to do it, and who was considered worthy in the eyes of the people, could join in."[73] While it is not clear whether these rules applied to Indians and non-Indians alike, it is obvious that Indians themselves should have the sole control over their traditional knowledge and practices, and the sole discretion to determine who is "worthy" of receiving them.

As observed by Shawn Wilson, a Manitoba Cree researcher, "knowledge transfer is . . . all about continuing healthy relationships."[74] This view is congruent with what Stirrup, another Lakota Holy Man and Fools Crow's mentor, had told Fools Crow about his future vocation. Not only did Stirrup forewarn Fools Crow that he should not expect to be paid for his services, but that he "could never argue openly with any Indian," "stand up and debate with [his] own people," "engage in war or in a personal fight," or "hate anyone or indulge in

[68] *Id*. at 176.
[69] *Id*. at 94.
[70] Thomas E. Mails, FOOLS CROW (Bison Books 1990).
[71] *Id.* at 88.
[72] *Id*.
[73] *Id*. at 78.
[74] Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* 125 (2008).

jealousy or revenge."[75] These traditional tribal rules should certainly help in maintaining healthy relationships between the practitioner of traditional knowledge and his or her community, but they also quite clearly impose rather strict criteria for who may become a possessor of such knowledge. Again, the decision as to whom traditional knowledge may be transferred remains, as it should, in the purview of Indians.

B. Contemporary Mechanisms Adopted by Federally Recognized Native American Tribes

1. Methodology

In order to survey the legal mechanisms presently employed by federally recognized Native American tribes in the United States, an extensive review of various online resources was performed. Both websites belonging to individual tribes, as well as general repositories, such as the National Indian Law Library's "Tribal Law Gateway,"[76] were consulted. Multiple tribal constitutions, codes, and ordinances, as well as pertinent tribal case law, were reviewed. Again, special care was taken to include tribes representing as much of the country as possible, regardless of the date of federal recognition of a particular tribe, or the size and complexity of the tribe's legislative and judicial bodies. In addition, several contemporary legal scholars active in the area of protecting Indigenous intellectual property rights were contacted and asked for feedback and guidance. The following sections describe the results of this survey.

2. Sources of Contemporary Tribal Law

a. Tribal Constitutions, Codes, and Ordinances

In response to the utter failure of the assimilationist policies of the federal government towards Indians, in 1934, Congress passed the Wheeler-Howard Act, better known as the Indian Reorganization Act (IRA).[77] Among other provisions, Section 16 of the IRA authorized Indian tribes to adopt "an appropriate constitution and bylaws."[78] After the Indian Reorganization Act was passed, 181 tribes adopted the Act, and 77 tribes chose to reject it.[79] Even though the tribes that voted to accept the Act were not required to adopt tribal constitutions or bylaws, many were interested in doing so.

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[75] Mails, *supra* note 70, at 87.
[76] *Tribal Law Gateway*, Nat'l Indian L. Libr., https://www.narf.org/nill/triballaw/index.html [https://perma.cc/H697-A6GS] (last visited Feb. 11, 2022).
[77] Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).
[78] 25 U.S.C. § 476(a).
[79] Felix S. Cohen, On the Drafting of Tribal Constitutions, at xxii (David E. Wilkins ed., 2007).

Although there is some disagreement as to the extent to which the constitutions enacted by Indian tribes under the IRA were forced upon them by the Bureau of Indian Affairs (BIA), many of those constitutions did follow the Western-styled outline provided to the tribes by the BIA, and in some cases even the "model" constitution, which was supposedly mailed to them in error.[80] Interestingly, although perhaps not surprisingly, while dealing with Indian property quite extensively, the outline and the model only considered tangible types of property, and most prominently land (e.g., in the context of land inheritance, leases, or permits for grazing, quarrying, hunting, fishing, or the cutting of timber).[81] Irrespective of the rather strong uniformity of the initial tribal constitutions, since 1934, many new tribal constitutions have been adopted, and old constitutions amended, in some cases departing quite significantly from the original templates. Of course, Indian tribes have also enacted a multitude of various tribal codes and ordinances.

The aforementioned National Indian Law Library's Tribal Law Gateway lists "240+ tribal codes and 400+ constitutions."[82] The resource also provides an easy-to-use keyword search functionality. Unfortunately, but in agreement with the results seen in prior work discussed earlier, very few documents were found in response to a search for "intellectual property." Out of the seven returned legal documents, none were tribal constitutions, but rather were codes and ordinances. The scarcity of the results, while disappointing, seems to indicate that it is still true that "[t]he vast majority of cultural preservation codes . . . relate specifically to tangible property."[83]

In addition, not all of the seven discovered documents were relevant to the scope of this article. For example, the two chapters of the Ho-Chunk Nation's Code discuss some general considerations of intellectual property in the context of the Ho-Chunk's federally chartered corporation, rather than in the meaning of traditional knowledge. In particular, Section 12 of Title 5, Chapter I, subsection 2.d.10, of the Nation's Business and Finance Code merely lists intellectual property as one of the several areas in which the corporation may attempt to "further the economic development of the Nation's resources."[84] The second document, the Ho-Chunk Nation's Personnel, Employment and Labor Code, simply lists intellectual property as one of the areas in which an employee should refrain from committing a violation while performing "[computer] [s]ystem and [n]etwork [a]ctivities."[85]

[80] *See id*. at xxii-xxiii.
[81] *See id*. at 67, 182.
[82] *Tribal Law Gateway: Researching Tribal Codes and Constitutions*, NAT'L INDIAN L. LIBR., https://www.narf.org/nill/triballaw/codes.html [https://perma.cc/88DW-VKYG](last visited Feb. 11, 2022).
[83] Riley, *supra* note 3, at 107.
[84] 5 HCC § 12(2)(d)(10) (2015), https://narf.org/nill/codes/hochunkcode/5HCC12_Section17.pdf [https://perma.cc/Z2QP-EZRB].
[85] 6 HCC § 4(9)(b)(1) (2008), https://narf.org/nill/codes/hochunkcode/6HCC04_Internet.pdf

Among the relevant documents, Ordinance 2006-02 of the Rosebud Sioux Tribe (RST), enacting Title 18 of the RST Law and Order Code, which includes Chapter 26, the Cultural Resources Management Code of the Tribe, explicitly states that the "[m]aintenance of histories, ethnographies, site locations, stories, cultural intellectual property, oral narration or chronicle, will be held in confidentiality" by the Tribe, unless the Rosebud Sioux Tribe's Tribal Historic Preservation Office (RST-THPO) "determines that the integrity and dignity of the RST will not be harmed by access to such information."[86] The same section also states that "no literary for profit research may be conducted on the Rosebud Reservation without the expressed written permission of the RST-THPO."[87] In addition, the ordinance also allows the RST-THPO to, "dependent upon funding, provide a program concerning Cultural Resources to the general public," and specifies that "the dissemination of such information will be at the discretion of the THPO and all applicable federal, state, and customary tribal intellectual property laws, including trademarked, copyrighted, and patent laws."[88] The same section also specifies that "[s]ubject to approval, the THPO may investigate and provide recommendations to the Tribal Council about alleged violations of those laws' [sic] violated by individuals or institutions infringing upon the cultural integrity of the Rosebud Sioux Tribe."[89] Unfortunately, a subsequent Internet search did not reveal any past or pending legal action pursuant to these sections of the Rosebud Sioux Tribe's code.

Another relevant document discovered in this research was the Human and Cultural Research Code of the Colorado River Indian Tribes (CRIT).[90] The Tribes enacted the Code to "create a uniform standard in how research on the Colorado River Indian Reservation . . . is to be conducted" and to "create a specific and formal authorization body to provide protection of the Colorado River Indian Tribes' . . . property including physical, real, cultural and intellectual property and communal property such as blood and tissue samples from the Tribe in large scale human subjects research."[91] Importantly, the Tribes provided for specific remedies against a "[r]esearcher or other person or entity" acting in violation of the Code, which includes a "ban[ishment of] the researcher(s) from any future research at CRIT, [and the] assess[ment of] civil penalties of up to five hundred dollars ($500) per violation."[92] However, the Tribes seem to have firmly framed

[https://perma.cc/RGD7-LQNW].
[86] 18 RST Law and Order Code, ch. 26, § 103(A)(9) (2006), https://www.narf.org/nill/codes/rosebudcode/title18chapter26.pdf [https://perma.cc/PW63-V92Z].
[87] *Id*.
[88] *Id*. § 202(G)(2).
[89] *Id.*
[90] Colorado River Indian Tribes Human And Cultural Research Code, https://www.crit-nsn.gov/crit_contents/ordinances/Human-and-Cultural-Research-Code.pdf [https://perma.cc/2WMC-P2VD].
[91] *Id.* § 1-101(1)-(2).
[92] *Id.* § 1-801.

the possible violations in the context of the three mainstream intellectual property protection legal regimes discussed above: copyrights, trademarks, and patents.[93]

By far the most relevant to the scope of this work document discovered in this research was the Cultural Resource Protection Act of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.[94] Not only does the Act specify the requirements that must be satisfied before any "publication, commercialization, or release of [] research findings" related to the Tribe may happen,[95] but it also provides a very comprehensive definition of what is considered Indigenous intellectual property. According to the Act, such property "means the [I]ndigenous cultural information, knowledge, uses, and practices unique to the Tribe's ways of life maintained and established over protected lands and aboriginal areas."[96] The Act also explains that such knowledge is "based upon observation, habitation, and experience, and is often a communal right held by the Tribe, but in some instances by individuals."[97] Finally, the Act lists some specific types of such property, including "[k]nowledge of remembered histories and traditions"; "[d]etails of cultural landscapes and particularly sites of cultural significance"; "[k]nowledge of current use, previous use, and/or potential use of plant and animal species, soils, minerals, objects"; "[k]nowledge of preparation, processing, or storage of useful species"; "[k]nowledge of individual species (planting methods, care for, selection criteria, etc.)"; "[k]nowledge of ecosystem conservation"; "[b]iogenetic resources that originate (or originated) on [I]ndigenous lands and territories"; and even "[t]issues, 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 there from."[98] Clearly, many of these enumerated categories are directly related to traditional ecological knowledge and natural sciences. Importantly, the Act vests the Tribe's Preservation Board and the Tribal Court with the ability to enforce the Act and to impose penalties for any violations thereof, including civil fines of up to $5,000 per violation.[99]

b. Tribal Case Law

Tribal courts, or any European-like tribal justice systems for that matter, are a "relatively new phenomen[on] in Indian [C]ountry."[100] Native Americans "have

[93] *See id*. §§ 1-701, 1-702, 1-703.
[94] Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Cultural Resource Protection Act, SWO Code, ch. 73 (2005), https://www.narf.org/nill/codes/sisseton_wahpeton/Chapter73.pdf [https://perma.cc/J8XK-KWS8].
[95] *Id.* § 73-07-04(I).
[96] *Id.* tit. 2.
[97] *Id.*
[98] *Id*. §§ (A), (B), (E), (F), (H)-(K).
[99] *Id*. §§ 73-11-01(A), 73-12-01.
[100] MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 61 (2d ed. 2020).

always dealt with antisocial [or] criminal behavior in accordance with the needs of their communities," but the imposition of formal tribal courts, mostly modeled after American-style courts, "has all but supplanted customary and traditional [Native] justice."[101]

Traditionally, the primary goal of the American Indian judiciary system was simply to "mediate the case to everyone's satisfaction," rather than to "ascertain guilt [or] bestow punishment upon the offender."[102] Rarely would a dispute be resolved by a "judge," but rather, "[t]he two conflicting parties would call upon a chief, elder, medicine man, or religious leader more for his assistance in keeping the situation within the bounds of tribal customs than for his decision as to who was 'right' and who was 'wrong' in a given situation."[103] The "major objective was more to ensure restitution and compensation than retribution."[104]

Obviously, these traditional views were not entirely compatible with the Western, adversary judicial system, based on which the first Courts of Indian Offenses (also known as CFR courts because they operated under a set of guidelines spelled out in the Code of Federal Regulations) were established.[105] Although the CFR courts were "staffed by Indian judges, they served at the pleasure of the [Indian] agent, not the community."[106] As a result, the Courts of Indian Offenses were directly responsible for the "increasing application of the white laws over the Indians."[107]

Presently, most tribal courts appear to be amalgams of American law, as well as customary, traditional, and intertribal law.[108] However, tribal courts vary in the ways that they find, analyze, and apply tribal customary law.[109] There are different reasons for tribal courts not to rely upon traditional laws. As a result of centuries of cultural genocide and forced assimilation, they may simply not be aware of the pertinent customary law, or the law of which they are aware may not be directly applicable to the fact pattern at issue.[110] Nevertheless, great strides have been made over the past few decades in terms of incorporating traditional systems of justice into modern tribal courts, including the creation of Peacemaker Courts, which tend to adhere to the principles of traditional, restorative justice.[111] Following these historical developments, Western-style court opinions can be found where the court uses traditional intra- or inter-tribal laws to reach its verdict.

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[101] *Id*.
[102] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111 (1983).
[103] *Id*. at 112.
[104] *Id*. at 111.
[105] *See id*. at 115.
[106] *Id*.
[107] *Id*. at 114.
[108] FLETCHER, *supra* note 100, at 83.
[109] *See id*. at 95.
[110] *Id*.
[111] *See id.* at 79-83 (describing various models of traditional justice practices).

Unfortunately, with respect to intellectual property, tribal case law appears to be even scarcer than legislative materials. The first issue here is that, as explained by Professor Rebecca Tsosie, Regents Professor of Law and Faculty Co-Chair of the Indigenous Peoples Law and Policy Program at the James E. Rogers College of Law at the University of Arizona, "any case litigated under tribal law will likely be brought in tribal court, and it is difficult to find a case where the tribal court would have jurisdiction over such a violation when committed by a non-Indian."[112] A prime example of such a situation was the dispute between the Estate of Tasunke Witko (also known as "Crazy Horse") and the Hornell Brewing Company, which manufactured and distributed on the Rosebud Sioux Reservation an alcoholic beverage called "The Original Crazy Horse Malt Liquor."[113] The case was ultimately dismissed for lack of tribal court jurisdiction.[114]

The second problem at the core of the lack of relevant case law, as explained by Professor Trevor Reed of the Sandra Day O'Connor College of Law at Arizona State University, an expert in both Indian law and intellectual property law, lies in the fact that issues pertaining to Indigenous intellectual property, at least with respect to tribal members, "have typically been resolved through other mechanisms, such as excluding the individual from association with the Tribe, direct action/protest/shaming, or through repatriation mechanisms."[115] Accordingly, there are no judicial opinions per se that would elucidate these mechanisms.

As a result, unfortunately, not a single directly applicable judicial opinion from a tribal court has been found in this research.

c. Words of Wisdom from Contemporary Legal Practitioners

As mentioned earlier, other than the efforts on the tribal level discussed in this paper, some advances in advocating for the protections of Indigenous intellectual property have been made on the international level. One of the main "players" in this arena has been the World Intellectual Property Organization (WIPO).[116] Some practitioners utilize such international fora to advocate for tribal perspectives. For example, Mr. Preston Hardison, Policy Analyst for the Tulalip Tribes of Washington at the time, delivered a talk titled "Accounting for the Legal

[112] E-mail from Rebecca Tsosie, Regents Professor of L., James E. Rogers Coll. of L., Univ. of Ariz., to Tomasz G. Smolinski, Mitchell Hamline Sch. of L. (May 15, 2020, 15:02 EST) (on file with author).
[113] Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1089 (8th Cir. 1998).
[114] *Id.* at 1093-94.
[115] E-mail from Trevor Reed, Assoc. Professor of L., Sandra Day O'Connor Coll. of L., Ariz. State Univ., to Tomasz G. Smolinski, Mitchell Hamline Sch. of L. (May 14, 2020, 11:27 EST) (on file with author).
[116] *See generally* WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), https://www.wipo.int/portal/en/index.html [https://perma.cc/SZE2-MSPM] (last visited Feb. 11, 2022).

and Social Ecology of TK/TCEs in IP Instrument(s)" at the WIPO Indigenous Panel Meeting in 2014.[117]

In his presentation, Mr. Hardison advocated for a direct application of customary, tribal laws at the very center of intellectual property protection mechanisms. In particular, Mr. Hardison emphasized the context of such customary laws against the backdrop of self-determination and tribal sovereignty, the customary law nature of Indigenous traditional knowledge itself, and the custodian and stewardship obligations of Indigenous peoples.[118] Mr. Hardison also highlighted the importance of the worldviews held by many Indigenous communities, such as holistic thinking, the "seventh generation" perspective, spirituality, general well-being, the attitude of "do no harm," as well as "humility, modesty, and prudence."[119] Importantly, all of these attitudes appear to be consistent with the ideas extracted from traditional stories and memoirs cited earlier in this Article. Accordingly, it is not surprising that practitioners at the forefront of the fight for adequate protections of Indigenous intellectual property are also strongly advocating for their utilization.

C. Considerations Pertaining to Cultural and Economic Diversity Among Native American Tribes, the Influence of the Dominant Legal Systems, and the Civil, as Opposed to Criminal, Nature of the Proposed Model Code

1. Impact of the Cultural and Economic Diversity on Indigenous Approaches to Intellectual Property Protections

Clearly, not all Native American tribes are alike. Although perhaps not as pronounced presently as it was before European contact, mostly as a result of colonization, forced assimilation, but also due to Pan-Indianism, the diversity among Native American tribes still exists.[120] Especially now, in an era of Indigenous language revitalization, and other efforts directed at restoring specific tribal traditions and cultures, the question arises: can a "common ground" model code be successful? In other words, are the rules proposed to protect tribal intellectual property flexible enough for tribes to bend them to their particular needs?

Admittedly, tribal laws reflect each tribe's particular "economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways."[121] On the

[117] Preston Hardison, *Accounting for the Legal and Social Ecology of TK/TCEs in IP Instrument(s)*, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_indigenous_panel_preston_hardison.pdf [https://perma.cc/6RVC-Y4VY] (last visited Feb. 11, 2022).
[118] *Id*. at 9.
[119] *Id*.
[120] For a brief discussion of Pan-Indianism, *see Pan-Indian Movements*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=PA010 [https://perma.cc/J5CX-9AU2] (last visited Feb. 11, 2022).
[121] Riley, *supra* note 3, at 74.

other hand, as mentioned earlier, for various reasons, many tribal courts are now looking to intertribal laws to supplement their own. This could be at least partly explained simply by the convenience of seeking "inspiration" in a judicial system that has gone through a similar recent history, from the Courts of Indian Offenses to the modern assertions of self-determination and tribal sovereignty, but as the review of the traditional stories conducted in this research reveals, there is actually much commonality between the various American Indian tribes. Indeed, the virtues of humility, perseverance, respect, honor, love, sacrifice, truth, compassion, bravery, fortitude, generosity, and wisdom, are not unique to the Lakota peoples, and the "seventh generation" perspective has not only been practiced by the Lenni Lenape (Delaware) Indians. In fact, all of these beliefs and values appear to be uniformly shared by most, if not all, Native American tribes. Accordingly, a model tribal code that takes such universal values into consideration, but at the same time allowing a certain degree of flexibility, should have a chance of being effective.

Native American tribes also vary in terms of their economic resources and financial needs. With this in mind, the proposed model code has been designed to afford the greatest level of customization with respect to, for example, the monetary fines imposed for infringement, or the types of intellectual property covered by the code, which each tribe may modify as needed.

Importantly, according to the Tribal Court Clearinghouse, a project of the Tribal Law and Policy Institute, several tribal model codes have already been proposed, and successfully adopted by different tribes, over the recent years.[122] These model codes include a Model Tribal Sex Offender Registration Code, a Model Indian Juvenile Code, and a sample Tribal Judicial Code.

Accordingly, there is no reason to believe that the Model Indigenous Intellectual Property Protection Tribal Code proposed in this Article would be thwarted as a result of the cultural and/or economic diversity among Indian tribes.

2. Impact of the Codification of Previously Unwritten Legal Rules

Another possible risk of advocating for a model tribal code lies in the fact that "[c]odification may be daunting for tribes that have maintained an oral tradition and have not bound themselves to the confining nature of the written word."[123] An argument could certainly be made that written laws are much more static than oral traditions, which are "more fluid and capable of accommodating changing circumstances."[124] In addition, "a written code may feel culturally foreign," and the process of codification may also require a significant investment of valuable

[122] *Tribal Laws/Codes*, TRIBAL CT. CLEARINGHOUSE, TRIBAL L. AND POL'Y INSTITUTE, http://www.tribal-institute.org/lists/codes.htm [https://perma.cc/KD6R-46JA] (last visited Feb. 11, 2022).
[123] Riley, *supra* note 3, at 97.
[124] *Id*.

resources, such as time and money.[125] As mentioned earlier, these considerations are also exacerbated by the fact that tribal laws, by definition, are of limited applicability to non-Indians.

On the other hand, as alluded to before, only if such laws are enacted and codified, can they gain the recognition they deserve from the mainstream, dominant court systems. Although this is by no means guaranteed, the opposite is certainly true: laws that do not exist in the form recognizable by the state and federal courts cannot be given adequate acknowledgment and respect. Importantly, written codification of traditional laws need not be seen only as an effort to seek the approval of the mainstream governments in recognizing those laws. In fact, it could be argued that what is important is that "when tribes articulate tribal law, they act as 'living sovereigns,' engaging in the essential tasks of self-government and nation building to ensure their continued existence."[126] How other sovereigns perceive such codification efforts is irrelevant.

Furthermore, for all its undisputed faults, the "Americanization" of Indians, who are now fluent in the English language and familiar with the American legal standards, written codification should not be as big an obstacle as it would certainly have been even a hundred years ago.

3. Why Civil, and Not Criminal, Model Code?

Although criminal penalties may be imposed for infringement of intellectual property protections in the mainstream, Western legal regimes, many criminal statutes require proof that the infringer acted knowingly or willfully.[127] If a tribe were to enact similar criminal laws, in order to have a chance of influencing the dominant system as argued for above, those tribal laws would likely also require similar types of proof. Those may be difficult, or simply cost-prohibitive, for a tribal entity to achieve. Furthermore, while establishing civil jurisdiction over non-Indians by a tribe is already difficult in light of the "Montana rule" mentioned above,[128] tribal criminal jurisdiction over non-Indians is circumscribed even further, and generally limited to federal courts.[129] Accordingly, the proposed Model Indigenous Intellectual Property Protection Tribal Code is a civil law code, which arguably gives a tribal code the greatest potential impact.

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[125] *Id*.

[126] *Id*. at 98.

[127] PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, VOL. I: PERSPECTIVES, TRADE SECRETS AND PATENTS 391 (2020).

[128] *See supra* note 8.

[129] *See, e.g.*, *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL CT. CLEARINGHOUSE, TRIBAL L. AND POL'Y INSTITUTE, https://www.tribal-institute.org/lists/jurisdiction.htm [https://perma.cc/UTW3-AYAZ] (last visited Feb. 11, 2022).

Conclusion

In order to address the inadequacy of the mainstream, Western cultural/intellectual property laws to properly protect traditional knowledge, this Article attempted to distill Indigenous "best practices," both historical and contemporary, in protecting such traditional knowledge, into a model tribal code. These best practices were identified based on an extensive review of a multitude of traditional stories and recorded interviews with, and/or accounts of the lives of, Native American elders, and especially tribal and spiritual leaders, as well as an examination of contemporary tribal constitutions, codes, ordinances, and case law, supplemented with interviews with legal scholars presently working in the area of cultural and intellectual property rights.

In agreement with the results obtained by other authors, very few contemporary legal sources have been found. As a result, the proposed model code (listed in the Appendix below) is mostly based on traditional sources. Nevertheless, it is framed in a form of a modern legal instrument.

It is the author's hope that the proposed model code could be adopted, with appropriate, tribe-specific modifications, by various American Indian nations. In addition, the author hopes that legal scholars and practitioners interested in this area of tribal law and intellectual property will comment on, and augment, the proposed model code, so that it may become more comprehensive and ultimately more useful to the tribes.

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APPENDIX

MODEL INDIGENOUS INTELLECTUAL PROPERTY PROTECTION TRIBAL CODE (MIIPPTC)

The Model Indigenous Intellectual Property Protection Tribal Code (MIIPPTC) proposed in this appendix is an attempt at combining all of the traditional and contemporary "best practices" regarding the approaches to the protection of Indigenous intellectual property unearthed in this research project and described in this Article. In addition to these materials, the Model Tribal Research Code from the American Indian Law Center was used as an example of the proper structure and formatting of such a model code.[130]

001. TITLE.

This code shall be known as the "Tribal Indigenous Intellectual Property Protection Code."

002. LEGISLATIVE FINDINGS AND POLICY.

The _____ Tribal Council ("Council") recognizes the importance of preserving the Indigenous intellectual property of the _____ Tribe ("Tribe"). At the same time, the Council recognizes the inadequacy of the mainstream, Western cultural/intellectual property legal regimes to properly protect traditional knowledge. In particular, the Council acknowledges that while Western approaches incentivize creation for a market economy, and see intellectual property mainly as a means for an individual or a company to accumulate wealth, in the communitarian, gift-based culture, such as this tribal community, such property is considered a common good, to be shared in by all of the members of the community. Accordingly, the Council, accepting the Tribe's responsibility to take ownership of enacting and implementing adequate protective measures, must act to protect, preserve, and promote the Tribe's, as well as individual tribal members', intellectual property, not merely for financial and economic gain, but above all, for the preservation of the integrity of the knowledge, and to keep it safe from appropriation, destruction, deformation, and extinction.

003. PURPOSE.

The purpose of this Code is to define tribal policies regarding tribal intellectual property, in order to protect, preserve, and promote such intellectual property

[130] AMERICAN INDIAN LAW CENTER, INC., MODEL TRIBAL RESEARCH CODE (3d ed. 1999), https://www.sprc.org/sites/default/files/resource-program/ModelTribalResearchCode1999.pdf [https://perma.cc/5SRV-V26G].

belonging to the Tribe, while being mindful of the holistic character of such intellectual property, its direct applicability to, and usefulness for, the "seventh generation" perspective, its relationship to spirituality and general well-being of the Tribe, as well as virtues of humility, modesty, prudence, and the "do no harm" attitude. In particular, the Code provides:

A. The appropriate standards of conduct expected from the persons subject to the applicability of this Code.

B. The rules for the enforcement of these standards of conducts and the possible penalties for the violations thereof.

004. SCOPE AND NATURE OF THE CODE.

A. This Code is civil in nature and hereby amends all existing tribal legislation inconsistent with it.

B. This Code shall apply within the exterior boundaries of the _____ Reservation ("Reservation"). It shall also be enforceable outside of the boundaries of the Reservation with respect to such Indigenous intellectual property that may be reasonably traced to the Tribe.

C. This Code shall apply to all persons subject to the civil jurisdiction of the Tribe, including members and non-members, Indians and non-Indians, and other corporate and institutional persons who or which might wish to use any of such intellectual property that may be reasonably traced to the Tribe.

D. This Code is adopted pursuant to the Constitution and Bylaws of the Tribe, in the exercise of Article ___. Powers. Specifically, this Code asserts the Tribe's power to [protect, preserve, and promote the property of the Tribe, or another relevant, provisioned power].

E. This Code shall apply to all kinds of Indigenous intellectual property (as defined elsewhere in the Code).

005. DEFINITIONS.

Indigenous / tribal intellectual property means the Indigenous cultural information, knowledge, uses, and practice unique to the Tribe's ways of life maintained and established over protected lands and aboriginal areas. This knowledge is based upon observation, habitation, and experience, and is often a communal right held by the Tribe, but in some instances by individual tribal members. This property includes, but is not limited to, the following:

A. Knowledge of remembered histories or 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, and other 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. Knowledge of systems of taxonomy of plants, animals, and insects.

Protected lands means land that may contain cultural resources, spiritual sites, sacred objects, human remains, burial sites, burial items, archeological resources, reasonably traceable to the Tribe.

006. UNLAWFUL ACTS.

It shall be unlawful for any person to:

A. Benefit financially, or in any other economic way, from any tribal intellectual property without an explicit approval of the Council;

B. Assert, without at least one additional credible witness, and on more than one occasion, unless explicitly asked by the Council to do so, the ownership or custody of any Indigenous intellectual property;

C. Use any tribal intellectual property without giving credit to the originators or current custodians of the said intellectual property;

D. Publicly argue over the ownership or custody of any tribal intellectual property, outside of the appropriate forum designated to resolve any such disputes (as explained elsewhere in the document);

E. Purposefully limit the community's enjoyment of the tribal intellectual property, even if the origination or custody of the said intellectual property has been credited or assigned to the person;

F. Pass the details of any tribal intellectual property to a person deemed by the Council or the community unworthy of receiving such information;

G. Purposefully deceive other members of the community, through the use of ambiguous or confusing words, about the past, present, or potential uses of tribal intellectual property, as well as the details thereof.

007. ENFORCEMENT AND [POSSIBLE] PENALTIES.

This Code shall be enforced in the following manner.

A. The [Council, the Tribal Court, or another adjudicatory body, which the Council may find prudent to establish for the purpose,] will have the sole jurisdiction to enforce this Code.

B. The [Council, the Tribal Court, or another adjudicatory body, which the Council may find prudent to establish for the purpose,] in its discretion, may impose any of the following penalties, or a combination thereof, depending on the severity of the offense.

1. A civil monetary fine in the amount of $100 to $5,000 per violation.

2. Banishment.

3. Public shaming.

4. Repatriation.