

Spring 4-15-2021

When Imitation Is Not Flattery: Addressing Cultural Exploitation in Guatemala Through a Sui Generis Model

Paul Figueroa

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Paul Figueroa, *When Imitation Is Not Flattery: Addressing Cultural Exploitation in Guatemala Through a Sui Generis Model*, 46 BYU L. Rev. 979 (2021).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol46/iss4/6>

This Symposium Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

When Imitation Is Not Flattery: Addressing Cultural Exploitation in Guatemala Through a Sui Generis Model

Paul Figueroa*

Indigenous Guatemalan weavers are fighting for intellectual property laws that better protect their designs and other cultural expressions. The exploitation and appropriation by local and international companies has negatively affected the weavers' livelihoods and resulted in culturally inappropriate uses of spiritual and traditional symbols. Adhering to Western ideals of individual creativity and utility, intellectual property laws in most of the world (including Guatemala) are not suited to protect indigenous creations. To address this legal gap, some countries have adopted sui generis legal regimes that align with communal notions of creation, ownership, and stewardship found in indigenous knowledge systems. Based on extensive empirical field research, this Article finds that any criticisms against sui generis models are not borne out by the reality of the Panamanian sui generis model. This Article concludes by examining how the Panamanian model can be adapted to the Guatemalan context.

* Assistant Professor, University of New Mexico School of Law. Prior to joining the academy, the author served for four years as a Resident Legal Officer for the United States Agency for International Development Office in Guatemala City, Guatemala, and chaired for five years the international advisory group for the Consultative Group of the International Research Centers. I would like to thank David Moore, Brigham Daniels, Nathalie Martin, and Jenny Moore for their support and comments to earlier drafts. I want to thank and recognize Dylan Rhinehart, my research assistant whose tireless contribution made this article possible. Finally, I would like to thank my wife Maryam Ahranjani for her invaluable support throughout this journey.

CONTENTS

| | |
|---|------|
| I. IN THE COURTS OF THE CONQUERORS | 984 |
| A. Historical Context of Indigenous Peoples in Guatemala | 985 |
| B. The Constitutional Court's Ruling | 987 |
| II. CONVENTIONAL IP LAWS FAIL TO PROTECT TRADITIONAL CULTURAL EXPRESSIONS | 990 |
| A. Definitional Concepts | 990 |
| 1. Traditional knowledge, traditional cultural expressions | 990 |
| 2. Indigenous communities | 993 |
| 3. Cultural appropriation and cultural exploitation | 993 |
| B. Conventional Copyright Laws Are Ill Suited to Protect TCEs | 994 |
| 1. Copyright laws do not protect TCEs..... | 995 |
| 2. Creations are a collective endeavor..... | 996 |
| IV. APPROACHES TO ADDRESS THE LACK OF PROTECTION OF INDIGENOUS CREATIONS..... | 997 |
| A. The International Solution | 997 |
| B. How the U.S. Protects Native American Expressions..... | 999 |
| 1. The Native American Graves Protection and Repatriation Act (NAGPRA) | 1000 |
| 2. The Indian Arts and Crafts Act (IACA)..... | 1001 |
| 3. Sui generis regimes | 1002 |
| V. THE PANAMANIAN SUI GENERIS IP REGIME | 1003 |
| A. The Cultural and Historical Context Leading Up to the Passage of Law No. 20..... | 1004 |
| B. Key Aspects of Law No. 20: Scope, Collective Ownership, Protection in Perpetuity and Recognition of Customary Law | 1005 |
| 1. Scope of subject matter and registration requirement..... | 1006 |
| 2. Collective rights in perpetuity | 1007 |
| 3. Recognition of indigenous communities' rules | 1008 |
| 4. Implementation successes and challenges | 1008 |
| VI. THE CRITICISMS AGAINST SUI GENERIS REGIMES ARE NOT BORNE BY REALITY | 1012 |
| A. Sui-Generis IP Protection Corrects the Unfairness Inherent in the Public Domain Construct | 1012 |
| 1. Intangible property in the public domain also suffers from the tragedy of the commons..... | 1013 |
| 2. The public domain construct benefits companies at the expense of indigenous communities..... | 1014 |
| 3. Indigenous communities have their own vibrant public domains | 1015 |

| | |
|---|------|
| B. Definitions of “Traditional” and “Indigenous Communities” Are Challenging but Not Insurmountable | 1016 |
| C. Sui Generis Regimes Can and Do Coexist with Conventional IP Laws | 1018 |
| D. Sui Generis Laws Can Have a Tangible Economic Impact on Indigenous Communities | 1019 |
| VII. HOW TO ADAPT LAW NO. 20 TO THE GUATEMALAN CONTEXT | 1021 |
| A. Consultations with Stakeholders | 1021 |
| B. Exceptions for Weavers’ Fair Use of Collectively Owned Designs ... | 1022 |
| C. Lessons Learned on Governance | 1024 |
| VIII. CONCLUSION | 1025 |

INTRODUCTION

Within minutes of landing at the Guatemala City airport, tourists are offered blouses, bags, wallets, and crafts featuring vibrant geometric designs. Ubiquitous in Guatemala, these designs created by Guatemalan indigenous communities since pre-colonial times hold important social, religious, and traditional significance. Amazon.com, Etsy.com, and other e-commerce websites sell backpacks, blouses, and other products depicting similar designs, describing them as “Guatemalan inspired,” “Guate,” or “ethnic.”¹ Poor attempts at attribution, the phrases are also euphemisms for the fact that companies are inspired to copy the creations but are not sufficiently inspired to ask for consent, to compensate, or at the very least to properly identify the indigenous communities that “inspired” the designs. Unquestionably, the vendors who use online platforms have exacerbated the exploitation of indigenous

1. See, e.g., Search Results for Guatemalan Backpacks, ETSY, <https://www.etsy.com/search?q=guatemalan%20backpack> (last visited Nov. 18, 2020); *Hide & Drink Guatemalan Native Comalapa Canvas Make-Up Bag Cosmetic Case Travel Accessory Organizer Handmade Sunset*, AMAZON.COM, https://www.amazon.com/Hide-Drink-Guatemalan-Accessory-Organizer/dp/B01M22GPQ1/ref=asc_df_B01M22GPQ1/?tag=hyprod-20&linkCode=df0&hvadid=194926075123&hvpos=1o1&hvnetw=g&hvrand=7673504194242507120&hvpone=&hvpstwo=&hvmqmt=&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9030450&hvtargid=aud-801738734305:pla-316284977195&psc=1 (last visited Nov. 18, 2020); *Orvis Men’s Guatemalan Buffalo Nickel Belt*, AMAZON.COM, https://www.amazon.com/Orvis-Guatemalan-Buffalo-Nickel-Brown/dp/B06XV8Z2YF/ref=sr_1_3?keywords=Orvis+Men%27s+Guatemalan+Buffalo+Nickel+Belt&qid=1566350390&cs=gateway&sr=8-3 (last visited Nov. 18, 2020).

creations worldwide. However, this is a local as well as an international problem. Many Guatemalan businesses also incorporate indigenous designs, symbols, and creations without giving proper attribution to, asking for consent from, or sharing profits with the indigenous creators.² This exploitation is not copyright infringement in Guatemala or the vast majority of countries that are governed by conventional intellectual property rules.³ In order to protect their creations, Guatemalan weavers are advocating for the adoption of special laws—referred to as *sui generis*—that are loosely modeled after Panama’s Law No. 20.⁴ Panama is one of the first countries to establish a comprehensive *sui generis* IP regime.⁵

Most scholars agree that Western-based intellectual property laws, which serve as the basis for most countries’ IP rules, are not designed, and for the most part do not protect, traditional cultural expressions.⁶ However, there is strong disagreement about how to solve the problem. Proposed solutions include encouraging

2. AFP, *Indigenas Molestos por Copio de Diseños*, EL PERIODICO (June 27, 2019), <https://elperiodico.com.gt/mundo/2019/06/27/indigenas-molestos-por-copia-de-disenos/>.

3. See Lindsey Schuler, *Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law*, 21 MICH. ST. INT’L. L. REV. 751, 773 (2013) (explaining that traditional cultural expressions (TCEs) consist of indigenous folklore, a form of indigenous knowledge that is not typically protected under western concepts of intellectual property law).

4. Whitney Eulich, *Pride and Profit: Why Mayan Weavers Fight for Intellectual Property Rights*, CHRISTIAN SCI. MONITOR (Mar. 27, 2019), <https://www.csmonitor.com/World/Americas/2019/0327/Pride-and-profit-Why-Mayan-weavers-fight-for-intellectual-property-rights>.

5. Irma De Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT’L L.J. 337, 338 (2005). For articles discussing *sui generis* regimes in other countries, see Schuler, *supra* note 3, at 755–56 (“Under *sui generis* law . . . a statute can be enacted specifically for the purpose of using intellectual property law to protect untraditional subject matter.”). An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes, Rep. Act. No. 8293 (June 6, 1997) (Phil.); Ley No. 278111, 24 July 2002, *Ley Que Establece el Régimen de Protección de los Conocimientos Colectivos de los Pueblos Indígenas Vinculados a los Recursos Biológicos* (Peru); World Intell. Prop. Org., *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, U.N. Doc. WIPO/GRTKF/IC/25/INF/7 (May 7, 2013).

6. Schuler, *supra* note 3, at 753, 755–56; De Obaldia, *supra* note 5, at 346–47; Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 BERKELEY TECH. L.J. 1613, 1642 (2005).

indigenous people to use existing IP laws,⁷ making modest changes to the laws,⁸ and enacting parallel *sui generis* regimes predicated on indigenous notions of community creation and property.⁹

This Article sheds light on the exploitation of cultural expressions by arguing that the *sui generis* legal regime in Panama ("Law No. 20"), while far from being a silver bullet, better protects traditional cultural expressions by recognizing community ownership, granting IP protection in perpetuity, and imposing civil and criminal liability for infringers. Based on extensive empirical field research in Panama and Guatemala, I propose ways to adapt the Panama model to the context of the indigenous peoples in Guatemala. At a time when immigration from Guatemala to the U.S. continues to reach higher levels, particularly from indigenous communities in the Western Highlands,¹⁰ intellectual protection of indigenous creations would improve the communities' lack of economic opportunities, one of the main drivers of migration from Guatemala to the U.S.¹¹

This Article is divided into five parts. After this introduction explaining the problem, Part II provides the historical context of indigenous peoples in Guatemala and the weavers' recent initiative to protect their intellectual property. Part III explains the inherent biases in conventional IP laws. Part IV summarizes the different approaches to solve the problem at the international and national levels. Part V summarizes the most salient aspects of Panama's Law No. 20. Part VI examines how the arguments against *sui generis* regimes hold up in the context of the implementation of Law No. 20 in Panama. Part VII concludes that the Panamanian law, despite its challenges, has been largely successful and examines how Law No. 20 can be adopted and adapted to better protect traditional cultural creations in Guatemala.

7. De Obaldia, *supra* note 5; see also Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 90-92, 96-97 (2009).

8. Munzer & Raustiala, *supra* note 7, at 42-43.

9. Schuler, *supra* note 3, at 755; Munzer & Raustiala, *supra* note 7, at 49, 97.

10. CONG. RSCH. SERV., CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY (June 13, 2019), <https://fas.org/sgp/crs/row/IF11151.pdf>.

11. Jeff Abbott, *Indigenous Weavers Organize for Collective Intellectual Property Rights*, WAGING NONVIOLENCE (July 17, 2017), <https://wagingnonviolence.org/2017/07/indigenous-weavers-intellectual-property/>.

I. IN THE COURTS OF THE CONQUERORS

To indigenous peoples in Guatemala, today's exploitation of their creations is a continuation of the history of violence and of dispossession they have suffered since the conquest. This Part discusses how the historical and socio-political context are critical to understanding the weavers' struggle to protect their creations.

"Textiles are the books that the colonizers were not able to burn," is the mantra repeated by the leaders of the weaving movement in Guatemala to underscore the importance of their weaving tradition.¹² For more than one thousand years, Mayan women have hand-woven huipiles: blouses worn for special occasions that depict brightly colored patterns and figures.¹³ Woven on a backstrap loom, the weaving techniques have been passed down from grandmothers to mothers to daughters for generations.¹⁴ Composed of three panels sewn together, the huipil can take between a couple of weeks to a year to hand-weave using a backstrap loom.¹⁵ Through the various designs, patterns, figures, and colors depicted in their huipiles, indigenous women share details about their lives, their spiritual beliefs, and their communities' history.¹⁶

In addition to being a medium of self-expression and identity, weaving has also been a valuable source of income as tourism increased since the late nineties after the end of the civil war.¹⁷ It is the designs and colorful patterns in the huipiles that local and international companies have been quick to copy and incorporate into a myriad of products.

Furthermore, government agencies also exploit weaving designs and other elements of indigenous culture. For example,

12. AFEDES, NUESTROS TEJIDOS SON LOS LIBROS QUE LA COLONIA NO PUDO QUEMAR (1st ed. 2020).

13. Amanda Denham, *The Predicament of Maya Textiles in the South Highlands of Guatemala: What Is Authenticity and Where Can I Buy It?* (Aug. 30, 2017) (Master thesis, Cornell University) (on file with Cornell Theses and Dissertations).

14. *Id.*

15. Interview with Angelina Aspuac, Maya Kaqchikel, Leader of la Asociación Femenina para el Desarrollo de Sacatepéquez, and Juan Castro, Mayan Attorney for AFEDES and Movimiento Nacional de Tejedoras de Guatemala, in Guatemala City (Sept. 27, 2020).

16. *Everything About Guatemalan Huipils*, ETHNY CORNER (June 24, 2019), <https://ethnycorner.com/en/2019/06/24/guatemalan-huipiles-at-the-origin-of-the-colorful-weaving/>; see *supra* note 12.

17. *Id.*

Inguat, the Guatemalan tourism agency, promotes tourism with pictures of indigenous women wearing huipiles, the Mayan ruins of Tikal, and other indigenous cultural creations.¹⁸ Tourists drawn to the rich and diverse indigenous culture contribute significantly to the country's economy.¹⁹ Yet, for every dollar of public spending per capita, only 32 cents benefit indigenous peoples.²⁰

A. Historical Context of Indigenous Peoples in Guatemala

In the past five hundred years, the indigenous communities in Guatemala have suffered two major events of ethnic prosecution and violence. First, the Spanish conquest started in the early 1500s and lasted almost two hundred years, as the Mayan communities resisted integration into the Spanish Empire.²¹ When the Spanish conquistadores arrived in Guatemala, the Mayan communities had already been weaving for hundreds of years.²² European diseases – small pox, measles, influenza, typhus, and yellow fever – contributed to the Spanish defeat of the Mayan.²³ In fact, European diseases ultimately decimated approximately 90% of indigenous inhabitants of what is now known as Guatemala.²⁴ After Guatemala gained independence from Spain on September 15, 1821, the Spanish descendants took possession of Mayan land and enslaved indigenous people to work on the cultivation of tobacco and sugar cane.²⁵

18. Somos INGUAT: Instituto Guatemalteco de Turismo, INGUAT: INSTITUTO GUATEMALTECO DE TURISMO, <http://www.inguat.gob.gt/> (last visited Nov. 18, 2020).

19. Benjamin Michael Willet, *Ethnic Tourism and Indigenous Activism: Power and Social Change in Quetzaltenango, Guatemala* (July 2007) (Ph.D. dissertation, University of Iowa) (on file with Iowa Research Online); *Descripción del Sector*, INGUAT: INSTITUTO GUATEMALTECO DE TURISMO, <http://www.inguat.gob.gt/index.php/gestion-turistica/descripcion-del-sector> (last visited Nov. 18, 2020).

20. See Willet, *supra* note 19; *Descripción del Sector*, *supra* note 19.

21. Ariana Crisafulli, *Tras Años de Apropiación Cultural, Tejedores Mayas Quieren Proteger Su Patrimonio*, GLOBAL VOICES (Oct. 1, 2017, 7:00 GMT), <https://es.globalvoices.org/2017/10/01/tras-anos-de-apropiacion-cultural-tejedoras-mayas-quieren-proteger-su-patrimonio/>.

22. W. George Lovell, *Surviving Conquest: The Maya of Guatemala in Historical Perspective*, 23 *LATIN AM. RSCH. REV.* 25, 28–30 (1988).

23. *Id.*

24. DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* 305 (1992); Juan Manuel Fernandez Cervantes, *¿Arte Robado? La Batalla Legal de las Tejedoras Mayas*, PLAZA PUBLICA (July 12, 2016), <https://www.plazapublica.com.gt/content/arte-robado-la-batalla-legal-de-las-tejedoras-mayas>.

25. W. George Lovell, *The Century After Independence: Land and Life in Guatemala, 1821–1920*, 19 *CANADIAN J. OF LATIN AM. & CARIBBEAN STUD.* 243, 251 (1994).

Second, the Guatemalan civil war between the military and leftist guerilla groups took place between 1960 and 1996.²⁶ Out of the 200,000 people killed during the civil war, 83% were indigenous people.²⁷ An important part of the military's counter-insurgency efforts focused on the killing of indigenous peoples whom the government viewed as siding with the guerilla forces.²⁸ The Guatemalan army forces learned to identify the targeted indigenous communities by their types of huipiles and, by their own admission, destroyed over 440 rural communities in the highlands.²⁹ A United Nations sponsored Commission for Historical Clarification in 1999 concluded that the Guatemalan army's actions against the Mayan communities constituted genocide.³⁰

Lasting over thirty years, the civil war culminated in 1996 with the signature of the Peace Accords between the guerrillas and Guatemalan government brokered by the United Nations.³¹ The impacts of the war on the Guatemalan rural indigenous communities—displacement, as well as loss of life and land—continue today. Not surprisingly, most Guatemalan migrants to the U.S. come from indigenous communities living in the Western Highlands.³² While the Peace Accords put an end to the systemic state-sanctioned violence against indigenous peoples, targeted violence still occurs today. In 2018 alone, twenty indigenous activists, many of them leading land reform efforts, were assassinated.³³

Since the Peace Accords, the government has not addressed the poverty among indigenous peoples. In 2017, the High Commission

26. Randall Janzen, *From Less War to More Peace: Guatemala's Journey Since 1996*, 40 PEACE RSCH. 55, 56 (2008).

27. Crisafulli, *supra* note 21.

28. MARIO ROBERTO MORALES, BREVE HISTORIA INTERCULTURAL DE GUATEMALA, CULTURAL 102 (Editorial Cultura 2013).

29. Fernandez Cervantes, *supra* note 24.

30. COMM'N. ON HIST. CLARIFICATION, GUATEMALA: MEMORY OF SILENCE 38–41 (1999), <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>.

31. MORALES, *supra* note 28, at 105.

32. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-62, CENTRAL AMERICA: USAID ASSISTS MIGRANTS RETURNING TO THEIR HOME COUNTRIES, BUT EFFECTIVENESS OF REINTEGRATION EFFORTS REMAINS TO BE DETERMINED 36 (2018).

33. Maria Martin, *Killing of Guatemala's Indigenous Activists Raise Specter of Human Rights Crisis*, NPR (Jan. 22, 2019, 6:45 PM), <https://www.npr.org/2019/01/22/685505116/killings-of-guatemalas-indigenous-activists-raise-specter-of-human-rights-crisis>.

of the UN reported that human rights violations among historically excluded populations continue and that 79.2% of the indigenous population lives in poverty.³⁴ This is the same level of poverty among Guatemalan indigenous peoples in 2000,³⁵ despite the country's stable growth for the past decades and being the largest economy in Central America.³⁶ In fact, the UN reported in 2019 that Guatemala had the second lowest level of human development in Central America.³⁷

B. The Constitutional Court's Ruling

For centuries, weaving has been an important aspect of indigenous peoples' lives.³⁸ Before the Spanish conquest, indigenous women hand-wove huipiles and other garments for both men and women to wear on special occasions.³⁹ During the conquest, the Spanish landowners required that the enslaved indigenous people wear huipiles and traditional garments, as a type of identifying uniform.⁴⁰ After the Guatemalan Independence, indigenous people, particularly women, continued wearing their traditional dresses as a matter of pride and identity. Each indigenous community has its own designs and methods of weaving huipiles.⁴¹ During the civil war, the Guatemalan army identified the indigenous communities it wanted to target by the types of huipiles and traditional garments.⁴²

After the end of the civil war, the growth of tourism to Guatemala created a large market for indigenous creations and

34. INTER-AM. COMM'N ON HUM. RTS., SITUATION OF HUMAN RIGHTS IN GUATEMALA (2017), <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2017-en.pdf>.

35. Guatemala, section of *Health in the Americas*, PAN AM. HEALTH ORG., <https://www.paho.org/salud-en-las-americas-2017/?p=3338> (last visited Nov. 19, 2020).

36. *Id.*

37. Hum. Rts. Council, Rep. of the Off. of the U.N. High Comm'r for Hum. Rts. on the Activities of the Office of the High Commissioner in Guatemala, U.N. Doc. A/HRC/40/23/Add.1 (2019).

38. *Everything About Guatemalan Huipils*, *supra* note 16. According to Brumfiel, some of the earliest weaving found in Mesoamerica can date back to around 1000–800 B.C.E. Elizabeth M. Brumfiel, *Cloth, Gender, Continuity, and Change: Fabricating Unity in Anthropology*, 108 AM. ANTHROPOLOGIST 862, 863 (2006).

39. J. Claire Odland, *Fashioning Tradition: Maya Huipiles in the Field Museum Collections*, 38 FIELDIANA: ANTHROPOLOGY 1, 2 (2006), <https://www.jstor.org/stable/41761997>.

40. *Id.*

41. *Id.* at 6.

42. *Id.* at 21.

products with indigenous designs, patterns, and colors.⁴³ With the rise of popularity and demand for indigenous-made products in the early 2000s, many nonindigenous owned businesses started to mass-produce and sell garments and other products that copied indigenous designs.⁴⁴ The prevalence of machine-made huipiles and other products caused a decrease in the price of hand-made products made by indigenous artisans.⁴⁵ As explained in more detail in Part III, indigenous weavers do not have a legal recourse to stop the indiscriminate use and copy of their designs, which are not protected by conventional IP laws.⁴⁶

An episode that broke the camel's back happened in 2014, when a local company obtained copyright protection over indigenous designs it had commissioned.⁴⁷ As the owner of the copyrights, the company told some indigenous women that they could not make identical or similar designs.⁴⁸ Not only had the indigenous designs been appropriated by a private enterprise, but the creators were told that they could no longer use their designs.⁴⁹ As a result of this episode and long-time simmering frustrations, la Asociación de Mujeres para el Desarrollo de Sacatepéquez (Association of Women for the Development of Sacatepéquez, or AFEDES, its acronym in Spanish) and the National Weaving Movement, a consortium of

43. Jennifer A. Devine, *Politics of Post-War Tourism in Guatemala: Contested Identities, Histories, and Futures*, L'ESPACE POLITIQUE (Apr. 27, 2016), <https://journals.openedition.org/espacepolitique/3723>.

44. *Id.*

45. Brenda Rosenbaum, *The Huipil in Danger*, MAYAN HANDS (July 26, 2016), <https://www.mayanhands.org/blogs/news/the-huipil-in-danger>.

46. Ariana Crisafulli, *After Years of Cultural Appropriation, Mayan Weavers Want Legal Protection for Their Heritage*, GLOBAL VOICES (Sept. 25, 2017, 17:31 GMT), <https://globalvoices.org/2017/09/25/after-years-of-cultural-appropriation-mayan-weavers-want-legal-protection-for-their-heritage/>.

47. See *supra* note 15; see also Colin Bratton, *Mayan Activist Speaks on Struggle for Collective Intellectual Property Rights for Indigenous Guatemalans*, MASS. DAILY COLLEGIAN (Nov. 18, 2019), <https://dailycollegian.com/2019/11/mayan-activist-speaks-on-struggle-for-collective-intellectual-property-rights-for-indigenous-guatemalans/>.

48. See *id.*; see also Gabe Fernandez, *Maya Women Fight to Protect Indigenous Textiles from Appropriation*, LAW ST. MEDIA (July 14, 2017); Jeff Abbott, *Indigenous Weavers in Guatemala Mobilize to Defend Their Craft and Cultural Rights*, TOWARD FREEDOM (Dec. 8, 2016), <https://towardfreedom.org/story/archives/americas/indigenous-weavers-in-guatemala-mobilize-to-defend-their-craft-and-cultural-rights/>; see also Interview with Angelina Aspuac, Maya Kaqchikel, Leader of la Asociación Femenina para el Desarrollo de Sacatepéquez (AFEDES) y del Movimiento Nacional de Tejedoras de Guatemala, in Guatemala City (Dec. 5, 2017).

49. Fernandez, *supra* note 48.

indigenous weavers who are members of thirty organizations from eighteen different indigenous communities, undertook a grass root campaign in 2011 to protect their creations by raising awareness and taking legal action.⁵⁰

In May of 2016, the weavers filed a constitutional challenge,⁵¹ arguing that Guatemalan IP laws' failure to protect indigenous creations violated the constitutional mandate that the government protect indigenous patrimony, artistic creations, and folklore.⁵² At around the same time, an indigenous Congressman introduced a bill on behalf of AFEDES, loosely modeled after Panama's Law No. 20, proposing a special IP regime that would recognize the indigenous communities as the collective authors and owners.⁵³ The bill was primarily introduced to bring awareness to the weavers' demands, as AFEDES knew that the adoption of a sui generis regime in Guatemala would take many years.⁵⁴

In October of 2017 the Constitutional Court, the highest court in Guatemala, ruled for the most part in favor of the weavers, holding that the failure of the laws to protect indigenous culture and heritage was unconstitutional.⁵⁵ The Constitutional Court ordered Congress to develop the necessary legislation to address the legal gap.⁵⁶ In late 2019 the Guatemalan Congress convened a Technical Committee, consisting of indigenous and government representatives, and tasked them with drafting a sui generis bill.⁵⁷ Notwithstanding the legal victory, passage of sui generis legislation by the Guatemalan Congress will be an uphill battle. A Congressional majority would have to vote in favor of the sui

50. Interview with Angelina Aspuac, *supra* note 15; see also Bratton, *supra* note 47.

51. Rick Kearns, *Mayan Weavers Seek Legal Protection of Their Designs*, INDIAN COUNTRY TODAY (June 11, 2017), <https://newsmaven.io/indiancountrytoday/archive/mayan-weavers-seek-legal-protection-of-their-designs-j5xl537KQ0mwdEHkc-0tsQ>.

52. See *id.*; CONSTITUCIÓN POLITICA DE LA REPUBLICA DE GUATEMALA [CONSTITUTION], arts. 61–62 (Guat.) (mandating that the government protect cultural patrimony).

53. Reformas al Decreto 33-98 del Congreso de La Republica y sus Reformas, Le de Derechos de Autor y Derechos Conexos, Reformas al Decreto 57-2000 del Congreso de La Republica de Guatemala, Ley de Propiedad Industrial, Ley No. 5247 (Apr. 2017).

54. Interview with Angelina Aspuac, *supra* note 48.

55. See Corte de Constitucionalidad, 21112-2016, Oct. 2017 (Guatemala).

56. See *id.*

57. Telephone Interview with Ajbee Jiménez, U.S. Agency for Int'l Dev. (USAID) Indigenous Advisor (June 22, 2020).

generis legislation, something that is not likely to happen.⁵⁸ According to the indigenous representative, the Technical Committee is simply a pro forma exercise because the government is not serious about adopting new legislation.⁵⁹ Also, given that the Constitutional Court did not impose a deadline, Congress can take as long as it wants.⁶⁰ Nevertheless, the significance of the weavers' legal victory cannot be overstated in light of the country's socio-political context of violence, oppression, and marginalization of indigenous peoples and women in particular.

II. CONVENTIONAL IP LAWS FAIL TO PROTECT TRADITIONAL CULTURAL EXPRESSIONS

In addition to providing some definitional concepts, this Part explains why conventional IP laws not only fail to protect indigenous creations, as the Constitutional Court ruled in Guatemala, but in fact enable the appropriation, exploitation, and privatization of indigenous creations.

A. Definitional Concepts

1. *Traditional knowledge, traditional cultural expressions*

The terminology used to describe works created by indigenous communities has evolved. Instead of "folklore," the World Intellectual Property Organization (WIPO), scholars, and researchers now use the terms Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE).⁶¹ Traditional knowledge is a broad term used to describe all knowledge created and improved by indigenous communities.⁶² By contrast, traditional cultural

58. Interview with Angelina Aspuac, *supra* note 48. In fact, out of the thirty bills introduced on behalf of indigenous communities, not a single bill has passed. *Id.*

59. *Id.*

60. Interview with Luis Ruiz, BLP Partner, in Guatemala City (Jan. 10, 2017).

61. *Traditional Cultural Expressions*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/tk/en/folklore> (last visited Oct. 21, 2020). Although "expressions of folklore" has been the term used most commonly in international discussions and is found in many national laws, some communities have expressed reservations about the negative connotations of the word "folklore" because it implies derivation from inferior or extinct civilizations.

62. While there is no internationally agreed upon definition of traditional knowledge, the Draft WIPO Instruments provide that it may be broadly described as "knowledge that is created, maintained, and developed by indigenous [peoples], local communities, [or other

expressions generally refer to the forms in which traditional or indigenous *culture* is expressed, for example, dances, songs, handicraft, designs, ceremonies, tales, or many other artistic or cultural expressions.⁶³ The Draft WIPO Instruments include definitions for “traditional cultural expressions” and “traditional knowledge,” reflecting, in general, a separation of the artistic and technical manifestations of traditional knowledge.⁶⁴ While there is no wide agreement upon the definition of TCEs, this article borrows from WIPO. Broadly speaking TCEs

1. are the products of creative intellectual activity;
2. are handed down from one generation to another;
3. reflect a community’s cultural heritage and social identity; and
4. are constantly evolving and being recreated and improved by the communities.⁶⁵

beneficiaries], and that is linked with, or is an integral part of, the national or social identity and/or cultural heritage of indigenous [peoples], local communities; that is transmitted between or from generation to generation, whether consecutively or not; which subsists in codified, oral, or other forms; and which may be dynamic and evolving, and may take the form of know-how, skills, innovations, practices, teachings or learnings.” *The Protection of Traditional Knowledge: Draft Articles Facilitators’ Rev. 2*, WORLD INTELL. PROP. ORG. (Aug. 31, 2018), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_facilitators_text_tk_rev_2.pdf.

63. Traditional cultural expressions, as provided by the Draft WIPO Instruments, is defined as

[A]ny form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

World Intell. Prop. Org., *The Protection of Traditional Cultural Expressions: Draft Articles Facilitators’ Rev. 2*, U.N. Doc. WIPO/GRTKF/IC/34/6, at 5 (Mar. 14, 2017) (footnote call numbers omitted).

64. World Intell. Prop. Org., *supra* note 5.

65. Paul Kuruk, *Key Policy Issues on Intellectual Property and Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG. (June 9, 2017), http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ge_17/wipo_ipk_ge_17_presentation_3kuruk.pdf. The definition

By way of examples, Thai traditional healers' use of the plao-noi plant to treat ulcers is an example of TK. "Huipiles," on the other hand are an example of a TCE. Indigenous communities from Guatemala for centuries have hand woven huipiles depicting designs and patterns that represent their vision of the world, community life, and details about their personal life.⁶⁶ Accordingly, huipiles, the techniques to make them, and the designs on them, are considered TCEs. They are the products of creative intellectual activity (each weaver personalizes her huipil), have been handed down from generations (the weaving techniques were developed since before the conquest), reflect communities' cultural heritage and social identity (the designs depict the social status of the weaver, history of her community, etc.), and are constantly evolving and being improved by the communities (each weaver builds upon what she was taught and adds her own creations). From a Western legal perspective, TCEs would typically fall within the realm of original artistic works, which are generally protected by copyright laws.⁶⁷ "Indigenous intellectual property," or indigenous creations, are other umbrella terms used to describe all intangible property authored and created by indigenous communities.⁶⁸

Intellectual property "protection" of TK and TCEs would expand conventional IP rights to cover indigenous peoples' creations, that is, granting indigenous communities exclusive rights over their knowledge and creations.⁶⁹ This Article will use the terms

proposed in the Model Provisions by WIPO describes TCEs as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community." *Id.*

66. See generally Interview with Angelina Aspuac, *supra* note 48 (explaining what the designs, figures, and patterns in the huipil represent).

67. However, this characterization is not perfect, as there are plant-made dyes used to color cotton used in making the huipil, which could be considered traditional knowledge. Also, medicinal mixes used by indigenous people, for example, may also be represented in weavings. While some themes and arguments are relevant for both TK and TCEs, the focus of this Article will be on TCEs and not on the technical manifestations of traditional knowledge, which include generic or bio-diversity resources and related knowledge.

68. Jane E. Anderson, *Indigenous Knowledge and Intellectual Property Rights*, in 11 INT'L ENCYCLOPEDIA SOC. & BEHAV. SCIS. 769, 769-71 (2d ed. 2015).

69. One way IP rights have been expanded by sui generis laws is, for example, by recognizing collective authorship and ownership over TK and TCEs. See Ley No. 20, art. 1, 26 June 2000, Del Regimen Especial de Propiedad Intelectual Sobre los Derechos Colectivos de los Pueblos Indigenas, para la Proteccion y Defensa de su Identidad Cultural y de sus Conocimientos Tradicionales, y se Dictan Otras Disposiciones [On the Special Intellectual

TCEs, indigenous creations, and indigenous IP interchangeably; however many of the arguments and conclusions would also apply more broadly to TKs.

2. *Indigenous communities*

The definition of “indigenous peoples” or “indigenous communities” is also challenging. The author relies on the UN’s definition and explanation:

Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, indigenous peoples from around the world share common problems related to the protection of their rights as distinct peoples.⁷⁰

By this definition, the Kuna from Panama or the K’iche from Guatemala are indigenous communities. Both the Kuna and K’iche resisted and succumbed to the Spanish conquest and have tried to retain their cultural characteristics that are distinct from the dominant classes in Panama and Guatemala.⁷¹

3. *Cultural appropriation and cultural exploitation*

Cultural appropriation at its most basic level is the adoption or co-opting, usually without acknowledgment or consent, of cultural identity markers originating in indigenous communities, for example, a non-indigenous person wearing an indigenous huipil.⁷² In this Article, I use the term “cultural exploitation” to describe

Property Regime upon Collective Rights of Indigenous Communities, for the Protection of Their Cultural Identities and Traditional Knowledge, and Whereby Set Forth Other Provisions], Gaceta Oficial No. 24,083, 27 June 2000 (Pan.), [http://www.asamblea.gob.pa/NORMAS/2000/2000/2000 517 0603. PDF](http://www.asamblea.gob.pa/NORMAS/2000/2000/2000%20517%200603.PDF) (last visited Nov. 17, 2020).

70. *Indigenous Peoples at the United Nations*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited Nov. 17, 2020).

71. J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 196 (2011).

72. Erin M. Genia, *The Landscape and Language of Indigenous Cultural Rights*, 44 ARIZ. ST. L.J. 653, 660 (2012) (defining cultural appropriation in a globalized world). *See generally* Natascha Pröschel, *Commodification and Culture: How Can Culture Be Economically Used Without Selling It Out?* (June 1, 2012) (B.A. Thesis, Modul University) (on file with Modul University), <https://www.modul.ac.at/uploads/files/Theses/Bachelor/Thesis-2012-Proeschel-Natascha.pdf>. *See also id.* at 22, 42–43.

the use, transformation, or incorporation of a TCE into a product, name, brand, or logo for commercial purposes without the creators' consent. The sale of products that incorporate huipil designs without the consent of the indigenous creators is an example of cultural exploitation, which is sometimes referred to as commodification. While commodification or cultural exploitation can also be cultural appropriation, the former has a profit-making purpose. Neither cultural exploitation nor appropriation are illegal under conventional IP laws,⁷³ sometimes referred to in the literature as Western IP laws given their European origins.⁷⁴

B. Conventional Copyright Laws Are Ill Suited to Protect TCEs

Intellectual property laws are a relatively recent legal construct initially adopted in England to secure the rights of publishers and writers.⁷⁵ Over time, copyright protection has expanded to cover new subject matter, including maps, performances, paintings, photographs, sound recordings, motion pictures, and more recently, architectural works and computer programs.⁷⁶ The trend has been to strengthen IP laws in terms of scope (new subject matters are covered) and duration (longer protection terms).⁷⁷

For instance, copyright protection has increased to a point where the term is, practically speaking, perpetual.⁷⁸ Also, it is undisputed that the expansion of the IP system primarily supports the interests of corporations.⁷⁹ In contrast to this dramatic trend of expansion of IP laws to accommodate corporate interests, efforts to

73. Peter Jasazi, *Protecting Traditional Cultural Expressions-Questions for Law Makers*, WIPO MAG. (Aug. 2017), https://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html.

74. See generally De Obaldia, *supra* note 5.

75. GRAHAM DUTFIELD & UMA SUTHERANSEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 23 (2008).

76. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), <http://free-culture.cc/freeculture.pdf>.

77. *Id.*

78. See Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL'Y 313, 315-16 (2005); see also *Eldred v. Ashcroft*, 537 U.S. 186, 196 (2003) (upholding the constitutionality of extension of the copyright term to the author's lifetime plus seventy years).

79. LESSIG, *supra* note 76, at 137-38.

protect traditional knowledge and expressions have progressed slowly, particularly in developed countries.⁸⁰

1. Copyright laws do not protect TCEs

Scholars and commentators vastly agree that Western-based IP laws are not designed to and do not protect TCEs.⁸¹ Conventional copyright laws require fixation (that the expression be embodied on a physical object), originality (that the work be independently created and have a modicum of creativity), and that there be a known author or authors.⁸² TCEs often fail to meet the required elements to qualify for protection:

1. TCEs are too old and do not meet the originality requirement;
2. TCEs do not have an identifiable “author” or authors, as they were created by communities over many generations; and
3. TCEs are owned “collectively” by Indigenous groups for cultural claims and not by individuals or corporations for economic claims.⁸³

A traditional rhythm that is not recorded, for example, would not meet the fixation requirement, and it might not be considered original if it has been known for centuries. Even if the song is recorded and considered original, it would not qualify for copyright protection if the song does not have a known author or authors.⁸⁴ A modern-day artist who composes and records a song incorporating this rhythm (not subject to protection) into a derivative work can obtain copyright protection, as the fixation, originality, and known author requirements are met.⁸⁵ Presumably contemporary indigenous musicians could also seek protection

80. Rachel Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT'L L. 203, 228 (2003).

81. E.g., Schuler, *supra* note 3, at 755–56.

82. Copyright Act, 17 U.S.C. § 102. For example, a book is subject to copyright protection because it has a known author, is original, and is printed on paper, meeting the fixation requirement.

83. Dr. Gregory Younging, *Traditional Knowledge Exists; Intellectual Property Is Invented or Created*, 36 U. PA. J. INT'L L. 1077, 1082 (2015). Many authors distinguish TCEs from modern day representations of cultural expressions, some of which may qualify for IP protection.

84. Copyright Act, 17 U.S.C. § 301.

85. Copyright Act, 17 U.S.C. § 101; Chiung Wen Chang, “Return to Innocence”: *In Search of Ethnic Identity in the Music of Amis of Taiwan*, 49 COLL. MUSIC SYMP. 327, 329–30 (2019).

under similar derivative works doctrines, but claiming individual authorship would clash with their deeply held beliefs that their communities created and own the traditional rhythm.

2. *Creations are a collective endeavor*

The emphasis on individuality by Western-based IP laws does not align with how indigenous communities create and own their works, nor does it align with the science of creativity in general.

Informed by the psychology and science of creativity, Bradford Simon's unique analysis finds that⁸⁶ "the classic economic incentive model and notions of romantic authors and genius investors are, at best, impoverished simulacra of humanity and, at worst, fundamentally incorrect. More remarkably, the conception of creativity as framed in the TK discourse is revealed to be a more accurate characterization of human creativity."⁸⁷

Psychologists' studies on the science of creativity support the conclusion that cognitive work and creation are largely collective endeavors shaped by cultural contexts.⁸⁸ Notwithstanding the communal nature of creation, the binary discourse over the protection of TK is not constructive. That discourse generally pits Western views of creation and ownership focused on individuality against indigenous views of creation and ownership focused on communal creation.⁸⁹ In reality, creation is both communal and individual. The view of TK as a communal creation based on cumulative innovations aligns closely with how many creations happen, from movies to architecture. Corporations are the perfect example of communal creation of ideas, inventions, and works. While conventional IP laws have adapted to recognize corporate IP ownership under work-for-hire doctrines, they largely fail to recognize indigenous communities' collective ownership over TK and TCEs.⁹⁰

86. Simon, *supra* note 6, at 1684.

87. *Id.* at 1652.

88. *Id.* at 1653.

89. *Id.*

90. Deepa Varadarajan, *A Trade Secret Approach to Traditional Knowledge*, 36 YALE J. INT'L L. 371, 397 (2011) ("Trade secret law is thus a useful reminder that for over a century, the same corporate entities that contest the protection of traditional knowledge because it is old, communally and incrementally developed, lacking in novelty, and its precise individual creators unknown, have regularly invoked the protections of trade secret law to protect

It is also an oversimplification to say that indigenous communities only create works communally or that they view property differently. Traditional property rights are not always collective or communal in nature, just as Western notions of property are not always inherently individualistic.⁹¹ Travelers in Guatemala who see individual women weaving huipiles in backstrap looms may think that huipiles are individually created. However, the weaver, who learned her craft from her mother who in turn learned it from her grandmother, views her creation as being communal, that is, the result of the contributions of generations before her. Also, indigenous peoples, just like Western societies, have their own rules or “cultural protocols” within their customary laws that govern protection over their intangible creations.⁹² Of course, current legal systems, including intellectual property regimes, disregard indigenous stewardship protocols. In short, the Western notion of the genius inventor that underlies conventional IP law does not align with the communal nature of creation and ownership in indigenous communities.

IV. APPROACHES TO ADDRESS THE LACK OF PROTECTION OF INDIGENOUS CREATIONS

The lack of protection of TCEs and TK is a worldwide problem. This Part discusses the various approaches to protect TCEs at the international (WIPO) and national levels (U.S. and Panama).

A. The International Solution

IP laws are territorial. This means that laws that protect TCEs in country *A* do not apply to infringement of those TCEs taking place in country *B* unless country *A* and *B* have signed a bilateral treaty or agreement that includes reciprocity requirements of the relevant laws.⁹³ For instance, the Kuna from Panama own the

information that is . . . old (e.g., the century-old Coca-Cola formula), communally and incrementally developed, lacking in novelty, and its precise individual creators unknown.”).

91. UMA SUTHERSANEN, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (Feb. 26, 2015), http://www.ip4growth.eu/sites/default/files/07-IP4GROWTH%20TM1-Traditional%20Cultural%20Expressions_US.pdf.

92. Younging, *supra* note 83, at 1079.

93. Emmanuel Kolawole Oke, *Territoriality in Intellectual Property Law: Examining the Tension Between Securing Societal Goals and Treating Intellectual Property as an Investment Asset*, 15 SCRIPT-ED 313, 315–17 (2018).

exclusive rights of the mola, a hand-woven colorful blouse, and other TCEs under Panama's sui generis law.⁹⁴ However, the unauthorized use of a mola design in China is not technically illegal, as Panama's Law 20 does not apply in China. This situation underscores the importance of an international solution because even if individual countries adopt TCE friendly legislation, it will not stop cultural exploitation from infringers in other countries.

For this very reason, WIPO formed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to develop an international instrument, which will ensure the effective protection of TK and TCEs.⁹⁵ For the past twenty years, the IGC has developed various frameworks to protect traditional knowledge and creations. However, despite the IGC's robust efforts, developing countries who generally support stronger IP protection over TCEs have not reached a consensus with developed countries who have generally opposed the proposed models.⁹⁶

In the past three years, the IGC developed a new approach for protecting TK by differentiating along a spectrum of indigenous IP goods that are publicly available and goods that are unknown beyond a select community. The IGC then developed three categories determined by "the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion."⁹⁷ Based on how broadly diffused and used

94. Ley No. 20, 26 June 2000, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

95. Intergovernmental Committee (IGC), WIPO, <https://www.wipo.int/tk/en/igc/> (last visited Nov. 16, 2020).

96. In the international context, developed nations, including the United States, have been reluctant to join developing countries' efforts to adopt sui generis laws, like the one in Panama. See, e.g., Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 819 (1999). Notably, Japan and China also oppose an international solution. See, e.g., Antony Taubman, *New Dialogues, New Pathways: Reframing the Debate on Intellectual Property and Traditional Knowledge*, 58 WASHBURN L.J. 373, 376 (2019); see also World Intell. Prop. Org. [WIPO], Comments on The List of Issues from Japan (TCEs/EoF) (April 30, 2007), https://www.wipo.int/export/sites/www/tk/en/igc/pdf/japan_tce.pdf; World Intell. Prop. Org. [WIPO], Opinions on the Issues of WIPO-IGC Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF) (Mar. 30, 2007), https://www.wipo.int/export/sites/www/tk/en/igc/pdf/china_tce.pdf.

97. World Intell. Prop. Org., *Information Note on Traditional Knowledge/Traditional Cultural Expressions for IGC 40*, at 3 (2019), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chairs_information_note.docx.

the TK is, this tiered approach provides different levels of rights.⁹⁸ The more widely diffused the TK, the less IP rights the TK will get. While many support this practical approach, there is little hope that developed countries will get on board. The tiered approach is premised on the idea that once the TK is widely available, it is difficult to take it from the public domain. Notably, the Panama experience, as explained in Part IV, shows that it is possible to protect TCEs even when they have been widely used in the public domain.⁹⁹

B. How the U.S. Protects Native American Expressions

The Government Accountability Office found that U.S. federal and state laws protecting intellectual property do not explicitly include Native American traditional knowledge and cultural expressions and therefore provide little legal protection for them.¹⁰⁰ Likewise, scholars widely recognize that current U.S. copyright law fails to address the cultural and economic concerns of Native American tribes.¹⁰¹ Progress in the U.S., in terms of protecting intellectual property created by tribes, has been slow and careful.¹⁰²

One way the U.S. has incorporated protections for indigenous knowledge is through a database for the voluntary registration of cultural insignia and symbols with the U.S. Patent and Trademark Office (USPTO). The USPTO signed a Memorandum of Understanding with the Native American Intellectual Property Enterprise Council to encourage Native American inventors to register patents and trademarks, as well as provide intellectual property education to their communities. While this is a fine example of collaboration, the database initiative affords no

See generally Brigitte Vezina, *Moral Rights: Proposal for an International Protection Regime*, in ENSURING RESPECT FOR INDIGENOUS CULTURES: A MORAL RIGHTS APPROACH (2020), https://www.jstor.org/stable/resrep25328.11?seq=1#metadata_info_tab_contents.

98. World Intell. Prop. Org., Traditional Knowledge and Folklore, U.N. Doc. WIPO/GRTKF/IC/37/6, at 9 (July 20, 2018).

99. Ley No. 20, 26 June 2000, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

100. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN (2011), <https://www.gao.gov/assets/320/317826.pdf>.

101. See Grad, *supra* note 80, at 206–09.

102. *Id.* at 228.

affirmative rights over Native American creations not protected by conventional IP laws.¹⁰³

In the U.S. two laws protect narrow categories of TK and TCEs:

1. *The Native American Graves Protection and Repatriation Act (NAGPRA)*

A primary goal of NAGPRA is to correct the human rights violations committed against Native Americans from centuries of grave looting, stealing, and improper sales of indigenous religious items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands.¹⁰⁴ NAGPRA allows Native American Indian tribes to reclaim the protected objects removed by publicly-funded museums, federal agencies, and universities.¹⁰⁵ Also, NAGPRA makes it illegal to traffic Native American remains and cultural objects, and it establishes civil penalties for violations.¹⁰⁶ NAGPRA does not protect intangible property per se; nevertheless, it has been instrumental to return certain objects to their tribal owners.

Some anthropologists have criticized NAGPRA on the basis that the law does a disservice to science by permanently making certain objects unavailable to scientists.¹⁰⁷ Also, other critics and the GAO found that NAGPRA has not accomplished what it envisioned.¹⁰⁸ Without a doubt, NAGPRA's implementation, even after twenty-two years, has been problematic because of scope and definitional issues.¹⁰⁹ But despite its shortcomings, NAGPRA has been instrumental in strengthening engagement between indigenous people and the museums or universities who manage the objects covered by NAGPRA.¹¹⁰

103. Schuler, *supra* note 3, at 769.

104. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001.

105. *Id.* § 3002.

106. *Id.* § 3007.

107. NAGPRA Official Responds to Scientific Criticism of New Rule, NAT. SCI. COLLECTIONS ALL. (May 24, 2010), <http://nscalliance.org/?p=280>.

108. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 100.

109. See Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 603 (2012).

110. T.J. Sullivan, M. Abraham & D.J.G. Griffin, *NAGPRA: Effective Repatriation Programs and Cultural Change in Museums*, 43 CURATOR 231, 242 (2000).

2. *The Indian Arts and Crafts Act (IACA)*

IACA allows Indian tribes to register distinctive trademarks and prohibits the misrepresentation of tangibles as “Indian made.”¹¹¹ Under IACA, it is a federal crime to market or sell goods in a manner that misrepresents that it was produced by an Indian artisan or tribally approved artisan. The law imposes criminal penalties to individuals who become commercial artists or craftsmen selling products advertised as “Indian-made”¹¹² without tribal approval or without meeting required criteria to be considered a member of a federally recognized tribe.¹¹³

The *Navajo Nation vs. Urban Outfitters* case illustrates IACA’s stronger protections over products incorporating native designs and marketed in a way that suggest they were made by Native Americans.¹¹⁴ Urban Outfitters sold and advertised clothing—including a flask, a bracelet, a jacket, earrings, and underwear—as “Navajo.”¹¹⁵ The Navajo Nation sued, alleging trademark infringement for the use of the mark NAVAJO and also claimed that the use of the Navajo designs violated IACA.¹¹⁶ While Urban Outfitters did not claim the products were made by the Navajo, the Navajo Nation claimed that the designs in conjunction with the use of the word “Navajo” falsely suggested they were made by Navajo.¹¹⁷ Initially, Urban Outfitters vigorously fought the case in court, arguing that “Navajo” merely described a type of style or print and that it did not claim that the products were made by the Navajo.¹¹⁸ Ultimately, Urban Outfitters settled the case and signed a licensing agreement with the Navajo Nation for future use of the

111. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (1990).

112. *See id.* (defining an “Indian” as either a member of a tribe or an Indian artisan certified by a tribe).

113. *Id.*

114. *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1170–72 (D.N.M. 2013).

115. *Navajo Nation Seeks Millions from Urban Outfitters for Using Tribe’s Name*, CHI. TRIB. (Feb. 3, 2016), <https://www.chicagotribune.com/business/ct-navajo-nation-urban-outfitters-lawsuit-20160203-story.html>.

116. Amended Complaint for Injunctive Relief and Damages, *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013) (No. 1:12-cv-00195-LH-WDS), 2012 WL 10634538.

117. *Id.*

118. *Id.*; *see also Navajo Nation*, 935 F. Supp. 2d at 1161–62.

Navajo trademark.¹¹⁹ A success for the Navajo Nation, the case validated the trademarks of indigenous tribes and underscored the point that corporations should ask for permission before “finding inspiration” when using tribal names.¹²⁰

IACA’s scope is limited to cases of misrepresentation, that is, claiming or suggesting a product is Indian-made when it is not. Selling unauthorized copies of native works, however, without marking them as Indian-made does not in and of itself violate IACA. Nevertheless, as the Urban Outfitters case shows, IACA’s truth in advertising framework provides U.S. tribes a cause of action for misrepresentation of Native American made products, a remedy not available under conventional IP laws.

3. *Sui generis regimes*

As WIPO’s efforts to reach consensus on an international instrument continue to be elusive, some developing countries have adopted various forms of national *sui generis* regimes, models that essentially protect undefined intellectual property, providing protection to different categories of traditional knowledge and creations.¹²¹ The *sui generis* regimes enacted at the national levels

119. Nicky Woolf, *Urban Outfitters Settles with Navajo Nation After Illegally Using Tribe’s Name*, GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement>; Natasha Reed, *Cultural and Intellectual Property Appropriation: Disputes Over Culturally Inspired-Fashions*, TRADEMARK & COPYRIGHT L. BLOG (Feb. 8, 2019), <https://www.trademarkandcopyrightlawblog.com/2019/02/cultural-and-intellectual-property-appropriation-disputes-over-culturally-inspired-fashions/>; see Motion to Dismiss and Memorandum in Support, *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013) (No. CIV 2012-00195 LH-WDS), 2012 WL 10634458.

120. Woolf, *supra* note 119 (quoting the Navajo Nation president Russell Bagaye on the success of the outcome). More recently, three people were indicted for selling jewelry marked as “Navajo,” when in fact it was produced in the Philippines. See Dianne L. Stallings, *Two Businesses and 5 Men Charged for Misrepresentation of Jewelry Origin*, RUIDOSO NEWS (Feb. 2, 2019), <https://www.ruidosonews.com/story/news/local/community/2019/02/02/several-charged-passing-off-bogus-jewelry-native-american/2747401002/>. As a result, the jewelry store owner was sentenced to six months in prison and ordered to pay more than \$9,000 in restitution for selling counterfeit Native American jewelry. See *id.*

121. Other approaches include databases, regional agreements, and copyrights that vest in the government. Indian law grants defensive rights to traditional creators through a public registry. See, e.g., GHAZALA JAVED, PROTECTION OF TRADITIONAL KNOWLEDGE-INITIATIVES OF INDIA, https://www.wipo.int/edocs/mdocs/tk/en/wipo_ipmk_ge_2_16/wipo_ipmk_ge_2_16_presentation_12javed.pdf. The African Regional Property Organization (ARIPO) is a regional agreement whereby signatory countries agree to protect traditional knowledge within the region. *Traditional Knowledge*, ARIPO, <https://www.aripo.org/ip->

throughout the world depart from the classic copyright legal elements to accommodate the holders of TCEs, though each differs in substance, process, and scope. There is no one size fits all sui generis regime; rather countries strike their own balance between TK protection and other competing interests, including access and public domain.¹²² As is the case in Panama, Peru, the Philippines, Portugal, Thailand, and Brazil among others, sui generis measures are not mutually exclusive with existing IP laws.¹²³ In fact, IACA, discussed in this Part, is an example of a sui generis regime in the U.S. that coexists with classic IP laws.¹²⁴

V. THE PANAMANIAN SUI GENERIS IP REGIME

While developed countries have been tentative in granting IP protections to indigenous creations, some developing countries—particularly in the global South—have adopted special regimes. The Mola, a traditional blouse hand-woven for generations by the Kuna indigenous community and a symbol of pride, was the inspiration for Panama's Law No. 20,¹²⁵ which has been in effect for over twenty years. The Guatemalan weavers have looked at Panama's Law No. 20—considered the first comprehensive sui generis IP regime in the world—as a template.

This Part discusses key aspects of Law No. 20, main differences with conventional copyright laws, and lessons learned from its

services/traditional-knowledge/ (last visited Jan. 30, 2021). In Ghana copyright over TK vests in its government. See CHRIS ARMSTRONG, JEREMY DE BEER & DICK KAWOOYA, ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT, IRDC 362–64 (2010); see, e.g., An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes, Rep. Act. No. 8293 (June 6, 1997) (Phil.); Ley No. 278111, Ley que Establece el Regimen de Protección de los Conocimientos Colectivos de los Pueblos Indígenas Vinculados a los Recursos Biológicos, Peruvian Law 27811, 24 July 2002.

122. World Intell. Prop. Org., Revised Version of Traditional Knowledge: Policy and Legal Options, U.N. Doc. WIPO/GRTKF/IC/6/4 Rev., at 4 (Feb. 19, 2004).

123. *Id.* at 17–18.

124. World Intell. Prop. Org., Comparative Summary of Existing National Sui Generis Measures and Laws for the Protection of Traditional Knowledge, U.N. Doc. WIPO/GRTKF/IC/5/INF/4, at Annex 5 (June 20, 2003).

125. De Obaldia, *supra* note 5, at 363–64. The translation of the Panamanian law is a mouth-full: *Special Regime of Intellectual Property Rights on the Collective Rights of the Indigenous Peoples for the Protection and Defense of Their Cultural Identity and Traditional Knowledge*, referred to in this Article as Law No. 20. The law is implemented by the rules and regulations found in Executive Decree No. 12, Decreto Ejecutivo No. 12. For purposes of this article, the term “Law No. 20” encompasses both the law and implementing regulations.

implementation. While scholars have extensively theorized about the suitability of the *sui generis* models,¹²⁶ they have paid little attention to implementation of specific *sui generis* regimes enacted in several countries, including Panama's Law No. 20.

A. The Cultural and Historical Context Leading Up to the Passage of Law No. 20

Panama is the smallest country in Latin America in terms of population (approximately 4.3 million people) and in size (30,000 square miles).¹²⁷ It is also the home of the indigenous Kuna Indians, one of eight indigenous communities in Panama.¹²⁸ Despite its small size, Panama has the third largest economy in Central America.¹²⁹

The indigenous population in Panama comprises just over 12% of the country's population.¹³⁰ By comparison, Guatemala has approximately 16 million people and more than 20 major indigenous peoples. Almost a majority of the indigenous peoples in Panama live in comarcas, legally autonomous indigenous territories.¹³¹

Panama has a civil law legal system similar to all former Spanish colonies.¹³² In general, Latin countries provide greater autonomy and rights to indigenous communities than developed countries. Panama is no exception, and in many ways, the indigenous territories in Panama known as comarcas enjoy great legal and political autonomy to the point that they are viewed as little countries.¹³³ The fact that the indigenous tribes in Panama are

126. Munzer & Raustiala, *supra* note 7, at 39–40; De Obaldia, *supra* note 5, at 340–41.

127. *Panama Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/countries/panama-population/> (last visited Oct. 21, 2020).

128. Minority Rts. Grp. Int'l, *Panama*, WORLD DIRECTORY OF MINORITIES & INDIGENOUS PEOPLES (May 2020), <https://minorityrights.org/country/panama/>.

129. Joseph Kiprop, *The Biggest Industries in Panama*, WORLD ATLAS (Feb. 6, 2018), <https://www.worldatlas.com/articles/the-biggest-industries-in-panama.html>.

130. Minority Rts. Grp. Int'l, *supra* note 128.

131. Aresio Valiente López, *La Experiencia de Panama Respecto a la Protección de las Artesanías y su Relación con la Propiedad Intelectual*, SILO.TIPS 3 (Sept. 20, 2011), <https://silo.tips/download/la-experiencia-de-panama-respecto-a-la-proteccion-de-las-artesantias-y-su-relacio>; see also De Obaldia, *supra* note 5, at 351–53.

132. De Obaldia, *supra* note 5, at 351.

133. *Id.* at 352.

well organized, politically strong, and legally autonomous played an important role in the lobbying and passage of Law No. 20.¹³⁴

Over the past fifty years, the Panamanian indigenous peoples have survived by making and selling hand-made works. In the 1980s and 1990s, a revival of indigenous art triggered requests to the General Directorate of the Industrial Property Registry – the government agency in charge of intellectual property otherwise known as DIGERPI – for copyright registration of mola designs.¹³⁵ In response, the Kunas sought ways to obtain IP protection over the molas and other creations. However, the mola did not have a known author or authors and therefore did not qualify for copyright protection.¹³⁶ Kunas could only choose a mola design as a logo and register it as a collective trademark, which only prevented others from using the identical or similar design in a way that confuses the public but did not stop the appropriation of the designs.

It was the realization that IP laws in place at that time could not fully protect the mola that, starting in 1991, led the Kunas to lobby for special legislation.¹³⁷ However, it was not until 1999, when the General Assembly of the Panamanian legislature had an indigenous president, that a special *sui generis* regime was seriously considered and ultimately enacted after robust negotiations among various stakeholders and comments from WIPO.¹³⁸

B. Key Aspects of Law No. 20: Scope, Collective Ownership, Protection in Perpetuity and Recognition of Customary Law

The typical justification for having IP laws is primarily based on the premise that the resulting monopoly rights spur innovation and creativity.¹³⁹ By contrast, Law No. 20's explicit rationale is the achievement of social justice by giving indigenous communities an

134. ANNA FRIEDERIKE BUSCH, PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS IN LATIN AMERICA 282, 284 (Josef Drexler et al. eds., 2015).

135. De Obaldia, *supra* note 5, at 362.

136. López, *supra* note 131, at 2–3.

137. Conventional law could not protect TCEs because of the focus on driving economic interests and cultural barriers between the law and those original authors of the TCEs. See BUSCH, *supra* note 134, at 285.

138. *Id.*

139. Heidi L. Williams, *Intellectual Property Rights and Innovation: Evidence from the Human Genome*, 121 J. POL. ECON. 1, 1–2 (2013).

absolute monopoly over their cultural heritage and creations and recognizing their labor and contributions to Panamanian society.¹⁴⁰

1. Scope of subject matter and registration requirement

The subject matter covered by Law No. 20 is broad. It applies to “creations, like inventions, models, drawings and designs, innovations contained in the pictures, figures, symbols,” as well as “customs, traditions, beliefs, spirituality, religiosity, cosmovision, folkloric expressions, artistic manifestations, [and] traditional knowledge.”¹⁴¹

Under Law No. 20, the qualifying criteria for IP protection is that the subject matter be (1) “based upon tradition”; (2) “collective”;¹⁴² (3) “capable of commercial use”; and (4) able to “fit within the classification system established by Article 3 of the Decree.”¹⁴³ While Law No. 20 does not define key terms—such as “tradition” or “indigenous communities in Panama”—in practice, DIGERPI has had no issues to date in determining whether a given TCE warrants *sui generis* protection.¹⁴⁴

Unlike conventional copyright laws, Law No. 20 requires registration of a specific traditional cultural expression to qualify for protection. Interestingly, the registration requirement was introduced by the indigenous drafters because it was deemed necessary for the effective enforcement of the collective rights.¹⁴⁵

140. Ley No. 20, 26 June 2000, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

141. *Id.* At first glance, the scope of Law No. 20 appears to be broad, as it is clear from the catch-all phrase “any other type of traditional expressions of indigenous communities,” and by the fact that it covers tangible in addition to intangible goods. *Id.* However, Law No. 20 does not cover traditional knowledge over generic resources, which is the subject of a new law enacted in 2019.

142. To qualify for “collective” ownership, the creation must have no known author, no date of origin, and constitute the heritage of an entire indigenous people, or must be regarded as belonging to one or more of the indigenous communities of Panama.

143. See BUSCH, *supra* note 134, at 288; Ley No. 20, 26 June 2000, arts. 1–5, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

144. Interview with Rosina Lasso, Head of the Dep’t of Collective Rts. and Folk Expressions and Gen. Directorate of the Indus. Prop. Registry (DIGERPI), in Panama City (June 18, 2019).

145. BUSCH, *supra* note 134, at 304–05.

In addition to the mola, the Kunas have registered approximately a dozen TCEs.¹⁴⁶

2. *Collective rights in perpetuity*

Driven by the “genius inventor” bias, as explained in Part III, conventional IP laws require that there be a known author or authors.¹⁴⁷ In fact, the duration of copyright protection is linked to the life of the author. By contrast, Law No. 20 recognizes a collective—an indigenous community—as the creator and owner. In practice, an indigenous community registers a TCE with the DIGERPI, and if, after a reasonable period of time, the community authorship is not challenged by the public, the exclusive rights vest in the registering community.¹⁴⁸ Once registration is approved for a TCE, an individual member of the community cannot then apply for individual copyright protection. The indigenous communities’ governing bodies, known as General Congresses, control the exclusive rights, including the right to enjoin others from claiming ownership of their art or from passing off non-indigenous art as indigenous and the right to authorize others to use and commercialize their creations through licenses.¹⁴⁹

Another key difference with conventional copyright laws is that Law No. 20 grants indigenous communities exclusive rights over their registered TCEs in perpetuity. By contrast, conventional copyright laws usually grant the owner monopoly rights for the life of the author plus a number of years; in the U.S. the rights last seventy years after death.¹⁵⁰ While some authors have criticized the appropriateness of IP protection in perpetuity, this aspect of the legislation was not controversial during the negotiations leading

146. Interview with Rosina Lasso, *supra* note 144.

147. BUSCH, *supra* note 134, at 298.

148. See Ley No. 20, 26 June 2000, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf; BUSCH, *supra* note 134, at 289–91.

149. Law No. 20 does not explicitly address derivative works. However, according to DIGERPI’s interpretation of Law No. 20, it is illegal for a non-indigenous artist to profit from a design that was derived from a mola design without permission or a license. Interview with Rosina Lasso, *supra* note 144.

150. Copyright Act, 17 U.S.C. § 302.

up to the enactment of Law No. 20.¹⁵¹ Based on conversations with both government officials and the IP attorneys in Panama, all parties agreed that it is only fair to give the communities monopoly rights in perpetuity. WIPO's most recent draft of the international instrument covering TCEs leaves the duration of the exclusive rights up to the national actors.¹⁵²

3. Recognition of indigenous communities' rules

Another unique aspect of Law No. 20 is the recognition of the indigenous communities' own rules over their registered TCEs. Under Law No. 20, the rights of use and commercialization of TCEs "must be governed by the regulation of each community approved and registered" with DIGERPI.¹⁵³ Indigenous participation in writing the "rules of use" that govern registered TCEs makes Law No. 20 very unique and one of a kind.¹⁵⁴ So far, the Kunas have only registered one rule of use: The Rules of Use of the Collective Right "Mola Kuna Panama."¹⁵⁵

4. Implementation successes and challenges

Panama's Law No. 20 has largely accomplished what it envisioned. Prior to its enactment, the sale of knock-off molas, weavings, and crafts bearing mola designs was commonplace.¹⁵⁶ While the law in Panama prohibited the importation of counterfeit molas prior to Law No. 20, local production of counterfeit molas as well as copying of mola designs was legal.¹⁵⁷

The legal framework created under Law No. 20 gives the indigenous communities the tools to protect the mola and other

151. De Obaldia, *supra* note 5, at 368. Also, exclusive rights in perpetuity are not as uncommon as it seems. The trademark regime, for example, grants exclusive rights over the trademark for as long as the trademark is renewed. See 15 U.S.C. § 1058.

152. World Intell. Prop. Org., The Protection of Traditional Cultural Expressions: Draft Articles, U.N. Doc. WIPO/GRTKF/IC/40/5, at Annex 7 (Apr. 9, 2019); Ley No. 20, 26 June 2000, art. 15, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

153. Ley No. 20, 26 June 2000, art. 15, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

154. BUSCH, *supra* note 134, at 323.

155. *Id.* at 297, 299.

156. López, *supra* note 131, at 2-3.

157. *Id.* In addition, many companies sought IP protection over logos and trademarks that included mola and other indigenous designs.

creations and the right to financial compensation in cases of infringement or through licensing. Law No. 20 forbids not only the importation but also the local production of goods that use or copy indigenous engravings, designs, or traditional dresses without prior authorization from the relevant indigenous governing bodies.¹⁵⁸ Infringers are not only subject to civil penalties, but also to criminal liability.¹⁵⁹ In 2007, the Panamanian penal code was amended to make infringements of Law No. 20 a crime punishable by five to ten years of prison time.¹⁶⁰ Criminal penalties for copyright infringement are not uncommon. In fact, U.S. law also criminalizes copyright infringement when it is willful or done for commercial gain.¹⁶¹

A few examples illustrate the impact of Law No. 20 on the protection of the mola. In 2013, the Panamanian beer producer Atlas used a mola design and the word “mola” in beer bottles produced to celebrate the country’s independence.¹⁶² The Kuna pressed for criminal and civil charges for infringement of the collectively owned mola design. Atlas reached an out-of-court settlement agreement paying the Kunas an undisclosed amount and agreeing to stop using the mola designs.¹⁶³ In 2016, Copa, a Latin American airline, also settled with the Kunas for incorporating without permission mola designs in toiletry bags given to business class passengers.¹⁶⁴ In both situations, the DIGERPI approved the terms of the confidential settlements¹⁶⁵ and did not pursue further criminal or civil penalties.¹⁶⁶ In addition to these out-of-court settlements, the Kuna communities have also

158. Ley No. 20, 26 June 2000, arts. 17, 20, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

159. *Id.* arts. 21, 26.

160. Ley No. 14, Art. 274, Gaceta Oficial, Panama, No. 25,796, 18 May 2007.

161. 17 U.S.C. § 506; ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH 1047–48 (2d ed. 2018). Despite the fact that Congress has greatly expanded criminal liability for copyright infringement since the enactment of the Copyright Act of 1976, criminal prosecutions have been rare.

162. Interview with Aresio Valiente, Profesor Facultad de Derecho y Ciencias Politicas, Abogado Kuna, and Director Ejecutivo en Centro de Asistencia Legal Popular, in Panama City (June 18, 2019). No published information is available, as the settlements were confidential. *See also* Interview with Rosina Lasso, *supra* note 144.

163. Interview with Aresio Valiente, *supra* note 162.

164. *Id.*

165. *Id.*

166. *Id.*

benefited financially from licenses signed with approximately a dozen companies for the use of mola designs.¹⁶⁷

From a socio-political perspective, the implementation and enforcement of Law No. 20 and the resulting collaboration between DIGERPI and the Kuna authorities in cases of infringement have also fostered greater trust between the indigenous communities and the government.¹⁶⁸

The tension between the Kuna collective rights and the mola weavers' individual initiatives has been the main challenge in the implementation of Law No. 20.¹⁶⁹ This has proven problematic when, for example, Kuna weavers are offered money to teach non-indigenous people the weaving mola techniques.¹⁷⁰ This is not technically allowed by Law No. 20, which requires that the weavers—who are generally women—obtain authorization from the Kuna Congress—who are generally men—to teach non-Kuna people how to make a mola, and to grant the third parties licenses to make or sell the molas.¹⁷¹ This authorization requirement created gender tensions.

Kuna women felt that the Kuna Congress did not represent their interest.¹⁷² To address this issue, Kuna women formed the Kuna Women Committee and now have representation in the Kuna Congress at least for decisions relating to the enforcement of Law No. 20.¹⁷³ The Kuna Congress is not enforcing Law 20 against individual weavers for selling molas without permission.¹⁷⁴ While this appears to work out for now, it may be a good idea to amend Law No. 20 to include a “fair use” exception that explicitly carves out certain individual activities, that is, the making and selling of molas by individual weavers.¹⁷⁵

167. *Id.* After the enactment of Law No. 20, the DIGERPI has rejected companies' applications for logos or trademarks that incorporate mola designs. *See* Interview with Rosina Lasso, *supra* note 144.

168. Interview with Rosina Lasso, *supra* note 144.

169. De Obaldia, *supra* note 5, at 371–73 (describing the sale of molas by Kuna women to Costa Rican middle-men). Law No. 20 requires that non-indigenous middle-men have authorization from the indigenous authorities to sell molas.

170. De Obaldia, *supra* note 5, at 373.

171. *See* Interview with Rosina Lasso, *supra* note 144; De Obaldia, *supra* note 5, at 372–74.

172. Interview with Aresio Valiente, *supra* note 162.

173. *See id.*

174. *See* Interview with Rosina Lasso, *supra* note 144.

175. *See* De Obaldia, *supra* note 5, at 374.

Another implementation issue is that not all indigenous communities in Panama have exercised their rights. For example, the Embera-Wounaan, another Panamanian indigenous community, has not registered its hand-woven baskets made of natural fibers and dyes—a unique and commercially popular creation.¹⁷⁶ DIGERPI officials recognize the need for more education and technical assistance to ensure these communities are aware of and know how to exercise their rights.¹⁷⁷

Law No. 20 has also elevated the Kuna's awareness of their exclusive rights and empowered them to exercise their rights or protest in case of violations. For example, in the summer of 2019, Nike planned to release the Nike Airforce 1—special edition sneakers designed to celebrate Puerto Rico.¹⁷⁸ The sneakers depicted a known mola design.¹⁷⁹ After the Kuna requested that Nike stop using the “mola” design without permission, the company cancelled the launch of the sneakers.¹⁸⁰ Not only had Nike copied a known design, but it also confused Panama with Puerto Rico. While embarrassing, Nike's use of the mola design was not technically illegal because the infringement happened in the U.S., outside of the territorial reach of Law No. 20. Nevertheless, the Kunas, who are aware of their IP rights over the mola, took swift and effective action to stop the appropriation.

Despite these challenges, Law No. 20 in large part accomplished its objectives, namely the protection of indigenous creations from unauthorized use and the transfer of economic benefits to the indigenous creators.¹⁸¹ Scholars have barely noticed success of Law No. 20, and many continue to criticize sui generis regimes as a viable alternative to addressing cultural exploitation.

176. See Interview with Rosina Lasso, *supra* note 144; Interview with Marissa Lasso de la Vega, Partner, Alfaro, Ferrer & Ramirez, in Panama City (June 20, 2019).

177. See Interview with Rosina Lasso, *supra* note 144.

178. *Nike Cancels 'Puerto Rico' Shoe Over Panama Indigenous Design*, BBC NEWS (May 22, 2019), <https://www.bbc.com/news/world-latin-america-48363024>.

179. *Id.*

180. *Id.*

181. The opinion that the overall implementation of Law No. 20 has been successful in protecting indigenous people's TCEs is shared by scholars, Panama government officials, private sector attorneys, and more importantly, the Kuna people. BUSCH, *supra* note 134, at 310; Interview with Aresio Valiente and Kuna Cacique, in Panama City (June 19, 2019); see Interview with Rosina Lasso, *supra* note 144; Interview with Marissa Lasso de la Vega, *supra* note 176.

VI. THE CRITICISMS AGAINST SUI GENERIS REGIMES ARE NOT
BORNE BY REALITY

Scholars have criticized sui generis protection of TCEs, arguing that these special regimes encroach on the public domain, have definitional challenges, cannot coexist with conventional IP regimes, and in any event do not result in tangible economic benefits for indigenous communities.¹⁸² While the critiques against sui generis regimes discuss the challenges and dilemmas of these regimes, they fail to study how these regimes play out in practice. This Part analyzes these critiques in the context of the implementation realities of Panama's Law No. 20.

*A. Sui-Generis IP Protection Corrects the Unfairness Inherent in the
Public Domain Construct*

Intangible property not subject to IP protection falls in the "public domain"¹⁸³ and is available to the public to access and use freely.¹⁸⁴ Generally speaking, intangible property enters the public domain in two ways: when the duration of IP protection expires or when the subject matter is not protected by IP laws in the first place. Indigenous works and creations fall in the latter category. Many scholars argue that extending IP protection to TCEs, a new subject matter, will reduce the amount of intangible goods that are in the public domain.¹⁸⁵ A smaller public domain, their argument goes, will have a detrimental effect on innovation. When I started doing research for this Article, I too was lured by the seemingly reasonable logic of this position. However, a closer examination of how the public domain construct works in reality reveals whom it benefits and at whose expense.

182. OseiTutu, *supra* note 71, at 190; De Obaldia, *supra* note 5, at 362–63.

183. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 38 (2008).

184. Ruth L. Okediji, *Traditional Knowledge and the Public Domain* 4 (CENTRE FOR INT'L GOVERNANCE INNOVATION, Paper No. 176, June 2018), <https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf>.

185. OseiTutu, *supra* note 71, at 190 ("[T]he introduction of a new intangible property right means a retraction, at least with respect to some traditional knowledge, of the public domain as it is currently understood."); see, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004); Munzer & Raustiala, *supra* note 7, at 41.

1. Intangible property in the public domain also suffers from the tragedy of the commons

In Panama, when the mola and related designs were in the public domain, the distribution of knock-off molas and other products depicting Kuna designs was rampant.¹⁸⁶ The indiscriminate copy, reproduction, and distribution of molas affected both the Kuna's economic and moral rights. The price of the mola decreased as a result of the increased supply of low-priced counterfeits, directly affecting the Kuna's main source of income.¹⁸⁷ In addition, many companies used the mola designs in culturally offensive ways. The misuse of intangible property in the public domain is nothing new. Scholars call this phenomenon the tragedy of the commons. This happens, for example, when a grazing field held in the commons is overused, driven by the cattleman's personal self-interest in feeding their cattle for free. This leads to misuse and depletion because no one has the incentive to take care of it. Similarly, indigenous intangible property in the public domain is victim of the tragedy of the commons. Accordingly, absent Law No. 20, the beer and airline companies that used mola designs without permission and in culturally offensive ways would continue misusing the mola, leading to its cultural depletion. Of course, the misuse and depletion of intangible property could happen to any widely used public good, whether created by indigenous communities or not. The difference is that when IP, say a song, falls into the public domain due to the expiration of protection, its authors and creators had the opportunity to reap the financial benefits from and control the use over their works for the duration of their copyrights. By contrast, indigenous creators of intangible goods in the public domain neither enjoyed the financial benefits conferred by exclusive rights nor exercised control over their use.

186. López, *supra* note 131, at 3–4. While the importation of counterfeit molas was prohibited, local companies produced and sold machine-made molas as well as other products depicting mola designs. *See id.* In addition, many companies sought IP protection over logos and trademarks that included mola and other indigenous designs. *Id.*

187. *Id.*

2. *The public domain construct benefits companies at the expense of indigenous communities*

A closer look at the commercial realities of the public domain sheds light on who benefits the most from the public good status of indigenous creations. Prior to Law No. 20, companies' use of the molas harmed the Kunas' economic interests in different ways. The Kunas did not receive any compensation from the use of their creations and also lost income as a result of the reduced prices caused by the increased supply of counterfeit molas.¹⁸⁸ The injury did not stop there. As demand for the molas increased in the 1990s, Panamanian companies sought to copyright and trademark designs and logos derived from traditional mola designs.¹⁸⁹ In Guatemala, designers who commissioned huipiles from indigenous weavers obtain copyright protection over indigenous designs under work-for-hire doctrines to stop the indigenous creators from replicating the commissioned designs.¹⁹⁰ That conventional IP regimes enable companies to obtain ownership rights over indigenous creations is not only a Guatemala problem; rather, it is an issue common to indigenous people all over the world, from Canada to the Philippines, from Australia to Peru.

It is inescapable not to compare the privatization of indigenous creations with the taking of their land. The Spanish settlers took native land by requiring legal formalities — legal title for example — that indigenous peoples could not meet, putting the land in the commons, and finally conveying legal title with the sale or transfer to private persons.¹⁹¹ This cycle of dispossession is eerily familiar to indigenous peoples. Applied in the context of indigenous creations, the dominant class imposes legal formalities that cannot be met

188. *Id.*

189. Interview with Rosina Lasso, *supra* note 144. In theory, copyright protection over derivative works only extends to the original contribution — so copyright protection does not cover the public good itself. Nevertheless, companies claim copyright protection over works derived from traditional expressions that are in the public domain.

190. Interview with Angelina Aspuac, *supra* note 15. In addition to the economic harm, indigenous communities also suffer moral harm as a result of culturally disrespectful use of the mola designs, some of which are considered sacred.

191. See ANNALISA MAURO & MICHEL MERLET, ACCESS TO LAND AND RECOGNITION OF LAND RIGHTS IN GUATEMALA (2003), <https://www.humanitarianlibrary.org/sites/default/files/2013/05/kpguatemala03.pdf>; Hanns J. Prem, *Spanish Colonization and Indian Property in Central Mexico, 1521–1620*, 82 ANNALS ASS'N AM. GEOGRAPHERS 444, 448–52 (1992), <https://www.jstor.org/stable/2563355>.

(fixation and originality for copyright protection), places the works in the public domain, and then privatizes it by relying on the same laws that failed to recognize their property rights in the first place.

Professors Chander and Sunder unveiled the romantic notion of the public domain by showing its patently unfair distributive impact on indigenous communities.¹⁹² The late and distinguished indigenous scholar Dr. Gregory Younging coined the term *gnaritas nullius*, meaning nobody's knowledge, to describe indigenous knowledge in the public domain: "Just as Indigenous territories were declared *terra nullius* in the colonization process, so, too, has TK been treated as *gnaritas nullius*" ¹⁹³

Other authors have further debunked the arguments that frame the narrative of protecting indigenous creations as an encroachment of the public domain.¹⁹⁴ Professor Okejidi concludes that reliance on the protection of the public domain arguments perpetuates "a historically prejudicial view of, the knowledge of Indigenous peoples as part of a global commons."¹⁹⁵

3. Indigenous communities have their own vibrant public domains

Some authors have also argued that once indigenous creations are in the public domain, it is not possible to grant them IP protection or "to force the genie back into the bottle."¹⁹⁶ However, the Panama experience tells a different story. When Law No. 20 took effect, the mola had been part of the public domain for hundreds of years. When the law changed, companies in Panama quickly adjusted and now know to ask for permission and negotiate licenses with the Kuna to use mola designs.¹⁹⁷

Moreover, a closer look at indigenous knowledge systems shows that the protection of TCEs better aligns with the spirit of the public domain construct. Professor Okejidi correctly notes that

192. Chander & Sunder, *supra* note 185.

193. Younging, *supra* note 83, at 1083.

194. Okediji, *supra* note 184.

195. *Id.* at 1.

196. Munzer & Raustiala, *supra* note 7, at 53–54; see also Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept 6* (Ctr. for Int'l Governance Innovation, Paper No. 185, August 2018).

197. BUSCH, *supra* note 134, at 312–15. It is important to note that Law No. 20 was not retroactive and allowed existing small producers to continue making the molas. *Id.*

there are many public domains even within a particular country.¹⁹⁸ The copyright, patent, and trademark regimes each have different public domains. Also, knowledge systems within indigenous communities have arguably the most vibrant public domains because their knowledge is freely accessible for community members. In Panama, the Kuna's knowledge system is truly a public good within their collective since no individual member of the community can claim exclusive rights over the community's creations.

Many authors conflate the romantic notion of the public domain construct with the public good, advancing the narrative that the larger the public domain the better it is for the public, and conversely, that any encroachment on the public domain is bad for the public.¹⁹⁹ Yet, in the unique context of traditional knowledge and cultural creations, the public domain construct, under the guise of serving the public good, enables the exploitation, misuse, and privatization of indigenous creations.²⁰⁰

B. Definitions of "Traditional" and "Indigenous Communities" Are Challenging but Not Insurmountable

Some authors have argued that the definitional challenges to implement sui generis laws are insurmountable. These authors question the fairness of granting IP rights to "indigenous communities" and not to other communities, asking whether the

198. Okediji, *supra* note 184, at 6.

199. Munzer & Raustiala, *supra* note 7, at 84–85; *see also* OseiTutu, *supra* note 71, at 186.

200. There are countless examples of biopiracy that illustrate this point. A pharmaceutical company located in the United States applies for a patent of a formula based on a medicinal plant with healing properties discovered and passed down orally through generations by an indigenous community in the Amazon. This indigenous knowledge is technically in the public domain but most likely not available to the public in the U.S. or anywhere but the Amazonian community. The patent application will most likely issue in the U.S. because no written documentation exists proving prior art. The patent based on the TK, which did not even make a public appearance, is now owned by a pharmaceutical company and no longer in the public domain. Having acquired the monopoly rights, the pharmaceutical company can prevent for all intents and purposes the use of that TK in the U.S. market and anyone using it would have to pay the company that owns the patent license fees. For examples of biopiracy, *see* Winston P. Nagan, Eduardo J. Mordujovich, Judit K. Otvos & Jason Taylor, *Misappropriation of Shuar Traditional Knowledge (TK) and Trade Secrets: A Case Study on Biopiracy in the Amazon*, 15 J. TECH. L. & POL'Y 9, 14 (2010).

Italians, for example, could be considered an indigenous community and get IP protection for the creation of coffee?²⁰¹

Without a doubt, the Italians would not be able to meet the distributive justice elements. Unlike the K'iche from Guatemala or the Kuna from Panama, the Italians are not fighting to retain their socio-economic status against a dominant majority's systemic racism and discrimination. Also, the Italians were not disenfranchised communities when Italy adopted its IP laws. Moreover, the Italians, unlike the indigenous communities who have been clamoring for IP protection, have not asked for IP protection over coffee. By contrast, the K'iche and the Kuna were not political participants when the IP laws were imposed on them.²⁰²

In Panama, no issues related to the definition of "indigenous communities" have arisen during the implementation of Law No. 20.²⁰³ Most Panamanians know that the law is meant to protect the Kunas and other Panamanian indigenous communities. Accordingly, there have not been challenges from other communities claiming that the Kunas, for example, are not indigenous for purposes of Law No. 20. Non-indigenous artisan groups, however, are currently advocating that Law No. 20 be expanded to cover their crafts, like the Panama hat.²⁰⁴

In certain countries, the definition of "indigenous communities" or "traditional" for purposes of granting IP rights may prove complex and challenging. Panama only has seven self-identified indigenous communities compared to twenty-three in Guatemala. Both in Panama and Guatemala, these communities have a historical continuity with their pre-invasion and pre-colonial societies and are fighting for their rights in a society dominated by non-indigenous groups (by the Ladinos in Guatemala and the

201. Munzer & Raustiala, *supra* note 7, at 77–78.

202. Younging, *supra* note 83, at 1079–81. In fact, before the adoption of IP laws in the nineteenth century, many indigenous communities had stewardship and other protocols that governed their tangible and intangible property. *See id.* These indigenous customary laws were completely disregarded by the Western occupiers and settlers. *See id.*

203. Interview with Rosina Lasso, *supra* note 144.

204. *Id.* Ms. Lasso said that it is very likely that IP protection will be granted to artisans when Law No. 20 is amended, as there is widespread consensus in Panamanian society to expand the *sui generis* regime to protect non-indigenous artisans' works, like the Panamanian sombrero. *Id.*

Mestizos in Panama).²⁰⁵ The criticisms of sui generis regimes on definitional grounds disregard the social justice elements of the definitions of “indigenous peoples.”

*C. Sui Generis Regimes Can and Do Coexist with
Conventional IP Laws*

Scholars argue that sui generis regimes with their unique and different legal criteria and requirements cannot coexist with conventional IP laws.²⁰⁶ To the contrary, many sui generis IP laws in both developed and developing countries coexist with and complement conventional IP laws.²⁰⁷ IACA in the U.S. and the E.U. Database Directive in Europe present examples in developed countries where sui generis systems do coexist with the conventional IP regimes despite their unique legal elements and requirements.²⁰⁸

Most, if not all, stakeholders in Panama have embraced Law No. 20.²⁰⁹ Of course, companies whose applications for marks or logos depicting mola designs were rejected are not happy. However, the private sector has adjusted to the new legal requirements, and companies now sign licenses with and pay

205. BUSCH, *supra* note 134, at 282–85; Laura Matthew, *Mexicanos and the Meanings of Ladino in Colonial Guatemala*, 7 J. COLONIALISM & COLONIAL HIST. (2006), https://muse.jhu.edu/article/196744#info_wrap; see, e.g., Jérémie Gilbert, *Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights*, 60 INT'L & COMPAR. L.Q. 245, 248–49 (2011).

206. See, e.g., OseiTutu, *supra* note 71, at 215. Instead of a sui generis approach, others argue that a “robust” conventional IP system is necessary. See Munzer & Raustiala, *supra* note 7, at 59. Another critique argues that non-Western sui generis regime along-side a Western regime reinforces the cultural divide. However, a cultural divide has existed since colonial times, when Western IP laws were imposed on indigenous peoples who were forced to adapt to foreign rules that conflicted with their views of the world. OseiTutu, *supra* note 71, at 214. Sui generis regimes seek to correct a cultural divide present in societies where a dominant class devalues and disrespects indigenous knowledge. See, e.g., OseiTutu, *supra* note 71.

207. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for it Powers and Functions, and for Other Purposes, Rep. Act. No. 8293 (June 6, 1997) (Phil.); Ley No. 278111, Ley que Establece el Regimen de Protección de los Conocimientos Colectivos de los Pueblos Indígenas Vinculados a los Recursos Biológicos, Peruvian Law 27811, 24 July 2002.

208. Indian Arts and Crafts Act, 25 U.S.C. § 305; Philip J. Cardinale, *Sui Generis Database Protection: Second Thoughts in the European Union and What It Means for the United States*, 6 CHI.-KENT J. INTELL. PROP. 157, 157–58 (2007).

209. Interview with Rosina Lasso, *supra* note 144.

royalties to the Kunas to use mola designs in their products.²¹⁰ Moreover, the collaboration between the government and the indigenous authorities in enforcing Law No. 20 has improved trust between the indigenous communities and the government.²¹¹

D. Sui Generis Laws Can Have a Tangible Economic Impact on Indigenous Communities

Critics of sui generis regimes also argue that strong protection of TK or TCEs will not have a tangible economic impact on indigenous communities nor will they solve the dire conditions of indigenous peoples.²¹² Specifically, Professors Munzer and Raustiala argue that a strong package of protection over TK or TCEs is not likely to result in tangible economic gains.²¹³

The view that TK or TCEs “would likely have little economic value,” as Professor Manzur posits, is contradicted by countless examples of commercial use.²¹⁴ Moreover, it perpetuates negative historical notions and attitudes towards indigenous peoples that devalue their creations. TK and TCEs not only have great traditional, sacred, and utilitarian value to their creators for which recognition is overdue, but many are also commercially viable. Urban Outfitters used Navajo designs and Nike used the mola because those companies thought it was good for business.²¹⁵

Implied in Professor Manzur’s argument is that the underlying value of the protected subject matter should be taken into account when deciding whether to grant IP rights to indigenous peoples for

210. Interview with Marissa Lasso de la Vega, *supra* note 176.

211. Interview with Rosina Lasso, *supra* note 144. No legal cases concerning Panama’s Law No. 20 have made their way to the courts yet. So far DIGERPI has not pursued the infringement cases because they were settled out of court to the satisfaction of the Kunas.

212. Munzer & Raustiala, *supra* note 7, at 58; *see also* OseiTutu, *supra* note 71, at 170 (“It has yet to be conclusively shown that intellectual property rights actually stimulate economic development.”).

213. Munzer & Raustiala, *supra* note 7, at 58.

214. *Id.*

215. In fact, Urban Outfitters spent a significant amount of resources fighting the Navajo’s lawsuit before agreeing to settle and signing a license agreement with the Navajo Nation. Agreed Order of Dismissal with Prejudice, *Navajo Nation v. Urb. Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013) (No. 1:12-cv-00195-BB-LAM), 2016 WL 8814836. Although they bear moral and social responsibility, the company’s ethos is to minimize costs and maximize profits. In this regard, the company’s behavior is not the problem. The IP laws that enable this corporate behavior is the problem.

distributive reasons.²¹⁶ Distributive justice to recognize and compensate authors—not the value of the IP—was the main driving criteria for the creation of IP rights in the first place. For instance, this Article as well as Professor Manzur's are automatically protected by copyright laws even though they unfortunately have no commercial value. Of course, just like many patents or books, not all TK and TCEs are commercially valuable. Conventional IP laws ensure first that authors and inventors are recognized and second that they are compensated for those creations and inventions that generate value. A sui generis regime accomplishes the same goal by ensuring that the indigenous creators are recognized and compensated when their creations are commercially valuable.

In the Panama experience, the social justice goal expressly espoused by Law No. 20 has achieved its intended impact. For instance, the Kunas have signed about ten licenses with businesses using the mola designs and also obtained out-of-court settlements for two instances of infringements, which have totaled close to one million dollars.²¹⁷

Another related argument against the sui generis regimes is that the adoption of special regimes will not solve indigenous peoples' dire socio-economic conditions.²¹⁸ Just like the Western IP laws have not solved the socio-economic problems in the countries that adopted them, no sui generis IP regime will solve indigenous people's generational inequities caused by land dispossession, genocide, and more recently, continued oppression and discrimination. While the money received by the Kunas for the use of their TCEs will not address all their socio-economic problems, the Kuna Congress has allocated the money to community priorities.²¹⁹ Overall, the Panama experience has shown that the protection of indigenous creations under a sui generis regime can have tangible economic impact on indigenous communities.

216. Munzer & Raustiala, *supra* note 7, at 58.

217. Interview with Rosina Lasso, *supra* note 144; Interview with Aresio Valiente, *supra* note 162.

218. Michael Jon Andersen, *Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge*, 1 CASE W. RESERVE J.L. TECH. & INTERNET 148, 158 (2010).

219. Interview with Rosina Lasso, *supra* note 144.

VII. HOW TO ADAPT LAW NO. 20 TO THE GUATEMALAN CONTEXT

It will be challenging to replicate the success of Law No. 20 in Guatemala, one of the countries in the Americas with the worst record of violence and marginalization towards its indigenous peoples. Informed by lessons learned in Panama, this Part discusses how Law No. 20 can be adapted to the Guatemalan context.

A. Consultations with Stakeholders

Unlike Panama, Guatemalan indigenous communities do not have legal autonomy and have limited political participation. Over the past few decades, the number of indigenous members of the Guatemalan congress has numbered between ten and fifteen percent.²²⁰ Economic and socio-political exclusion of, and systemic racism against, indigenous peoples are the norm in Guatemala. In terms of public spending per capita, out of every dollar spent on non-indigenous people, the government spends only 32 cents on indigenous people.²²¹ During my time in Guatemala, I witnessed firsthand the social exclusion of indigenous voices. In the summer of 2018, for example, I attended a panel discussion organized by the Association of Guatemalan Intellectual Property Lawyers about the Constitutional Court's ruling on the weavers' legal challenge.²²² The panel consisted of government officials and private practitioners, yet the organizers (intellectual property attorneys) did not extend an invitation to the weavers, indigenous representatives, or their attorneys.²²³ It quickly became apparent during the panel discussion that the majority of IP lawyers opposed changing Guatemala's current IP regime to accommodate the

220. *Combating Racism Against Indigenous Peoples in Guatemala*, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/news/combating-racism-against-indigenous-peoples-guatemala> (last visited Oct. 22, 2020); MARLA LISSET MUJ GARCIA, POLITICAL REPRESENTATION AND SOCIAL INCLUSION: GUATEMALA CASE STUDY 5 (Wilda Escarfuller & Richard Andre eds., 2012), <https://www.as-coa.org/sites/default/files/GuatemalaFINAL.pdf>.

221. Maynor Cabrera, Nora Lustig & Hilcias E. Morán, *Fiscal Policy, Inequality and the Ethnic Divide in Guatemala* (Commitment to Equity, Working Paper No. 20, 2014), http://www.commitmenttoequity.org/publications_files/Guatemala/2Cabrera_Lustig_Moran_Oct_17_2014.pdf.

222. Discussion Panel with Ivón Hernandez, Manuel Duarte, Invitado Especial, Gabriela Gándara, Protección de Los Textiles en Guatemala, Camara Guatemalteca de La Propiedad Intelectual, in Guatemala City (July 26, 2018).

223. *Id.*

weavers' interests.²²⁴ For instance, many practitioners in attendance expressed the view that indigenous peoples should use existing copyright laws to protect their creations, missing the main point of the weavers' legal challenge that most indigenous creations do not meet the legal elements of traditional copyright laws. A minority of IP practitioners appeared more receptive to a sui generis legislation with different legal elements provided that existing IP laws did not change dramatically.²²⁵

By contrast, in Panama civil, society-wide consultations that included indigenous communities on the sui generis legislation were instrumental in raising awareness about the social justice goals of Law No. 20 and the commercial implications.²²⁶ While the stakeholders' consultation process will be more contentious in Guatemala, it will garner wider political support. Some universities and civil society organizations have already expressed strong support in favor of sui generis measures. Businesses that sell machine-made huipiles and use indigenous designs are sure to oppose any new legislation that recognizes collective rights. Regardless, consultations will be a political necessity to capture stakeholders' buy-in and build society wide support.

B. Exceptions for Weavers' Fair Use of Collectively Owned Designs

Carve-outs within a sui generis law could allow some of the weavers' individual activities. As with most countries in the Americas, Guatemala adopted Western IP laws which emphasize individual notions of property.²²⁷ Naturally, indigenous people in Guatemala have operated under this individualistic regime which runs counter to their views of creation and ownership, that is, when they hand-weave, sell, or teach others how to make huipiles. One implementation challenge would be for weavers who have been used to operating individually to then have to request community permission to conduct certain activities, including teaching others how to make huipiles, regulated by a sui generis regime.

224. *Id.*

225. Interview with Luis Ruiz, *supra* note 60.

226. BUSCH, *supra* note 134, at 284–86.

227. Kedron Thomas, *Intellectual Property Law and the Ethics of Imitation in Guatemala*, 85 ANTHROPOLOGICAL Q. 785, 786 (2012), https://anthropology.wustl.edu/files/anthropology/imce/thomas_intellectual_property_law.pdf.

The Panama experience is instructive on this point. Under Law No. 20, Kuna weavers are technically prohibited from weaving and selling molas without the permission of the Kuna Congress,²²⁸ the community's governing body. However, according to the DIGERPI, Law No. 20 is not enforced against individual weavers.²²⁹ In practice, the Kuna weavers are allowed to make and sell molas directly to tourists.²³⁰ The issue is more complicated when the molas are sold to middle men who in turn sell them to tourists or others. In accordance to the Rules of Use of the Mola written by the Kuna, non-indigenous peoples can only make or sell molas with permission from the Kuna Congress.²³¹ Accordingly, non-indigenous middle men are required to sign licenses with the Kuna Congress to resell molas even if the molas were made by Kuna weavers. Enforcement in these cases is spotty at best in Panama.²³² Some middle-men would probably not buy the molas from the Kuna weavers if they were not permitted to resell them without a license.

Another violation of Law No. 20 arises when Kuna weavers teach non-indigenous people or shops how to make the molas.²³³ The Kuna Congress has more strictly enforced Law No. 20 in this latter situation, requiring the stores to obtain licenses.²³⁴ The Kuna's enforcement efforts focus more on the unauthorized use or sale of molas by enterprises and less on purported violations by individual weavers.²³⁵ To avoid some of the problems related to the tension between the weavers' individual activities and the collective ownership of their creations, *sui generis* legislation could include fair use exceptions for (1) weavers who sell creations directly to end customers and (2) small non-indigenous stores and intermediaries.

228. Ley No. 20, 26 June 2000, art. 4, Gaceta Oficial No. 24,083, 27 June 2000, https://www.asamblea.gob.pa/APS/LEGISPAN/PDF_GACETAS/2000/2000/24083_2000.pdf.

229. Interview with Rosina Lasso, *supra* note 144.

230. See also Interview with Aresio Valiente, *supra* note 162.

231. REGLAMENTO DE USO DEL DERECHO COLECTIVO, "MOLA KUNA PANAMA," Chapt. 7 (2020) (Pan.), https://www.mici.gob.pa/uploads/media_ficheros/2018/08/2/digerpi-leyes-reglamentos/reglamento-uso-mola.pdf.

232. Interview with Rosina Lasso, *supra* note 144; Interview with Aresio Valiente, *supra* note 162.

233. Interview with Rosina Lasso, *supra* note 144.

234. *Id.*

235. *Id.*

In Guatemala, these carve-outs would not be too controversial and would also ensure buy-in from small businesses.

C. Lessons Learned on Governance

In Panama, DIGERPI shares enforcement responsibilities with the indigenous communities' governing bodies. The Kuna General Congress decides licenses and out-of-court settlements and allocates the revenue to community priorities.²³⁶ Unlike Panama, in Guatemala indigenous communities do not have legal autonomy, and therefore indigenous governing bodies have limited power to govern.²³⁷ In Guatemala, the governing bodies of the twenty-three indigenous communities have governing structures that vary greatly in terms of governance capacity. If Guatemala's *sui generis* legislation is passed, the question will be what indigenous governing bodies will have the authority to make decisions on behalf of the communities, for example, the various weavers' organizations, the indigenous bodies, etc. While some indigenous leaders wield significant influence in certain communities and are able to successfully lobby municipalities, others do not have any power, particularly in communities that do not have a large indigenous population.

In Guatemala, different indigenous organizations could have the governance responsibility over communities' creations. Indigenous organizations in departments with large indigenous populations have processes in place to appoint or elect indigenous governing officials, often referred to as indigenous mayors or authorities who often work alongside municipal authorities. No legal framework defines what responsibilities fall under the purview of the municipalities versus the indigenous governing bodies. Rather, each municipality has a unique arrangement with the indigenous authorities. For example, in Totonicapán, one of the departments with the strongest indigenous governance capacity, indigenous authorities' mission is to maintain social cohesion by

236. The Kuna Congress sends copies of the licenses and settlement agreements to DIGERPI.

237. Rachel Sieder, *Building Mayan Authority and Autonomy: The "Recovery" of Indigenous Law in Post-Peace Guatemala*, 55 *STUD. L., POL. & SOC'Y* 43, 45-46 (2011), <http://racheluk.domain.com/wp-content/uploads/2012/08/building-mayan-authority.pdf>.

resolving conflicts between community members, enforcing community social norms, and punishing violators.²³⁸

By contrast, in Nebaj, the indigenous authorities' main mission is to rebuild their communities, which were ravaged by the Civil War.²³⁹ The parallel indigenous governance structure is explained in large part by the indigenous peoples' view that municipal authorities do not represent their interests. Historically, the state has protected the interests of Ladinos who often treat indigenous people as cheap labor.

Relying on existing governing structures for purposes of enforcing indigenous peoples' copyrights would be an option. However, the majority of the indigenous authorities are men, which could give rise to gender tensions like the ones in Panama, given that the majority of weavers are women.

For many reasons it would make more sense to empower weavers' associations—dispersed across the country—with the governance authority and decisions concerning their IP rights. In AFEDES, for example, weavers who are also mid-wives are considered *de facto* authorities and are well positioned to make high-level decisions regarding the use of their communities' indigenous designs.²⁴⁰ Still, these governing structures might need technical assistance and their own lawyers when it comes to negotiating licenses or settlements.

VIII. CONCLUSION

The implementation of the *sui generis* regime in Panama has been largely a success, and Law No. 20 makes Panama a model country in terms of the protection of TK and TCEs. *Sui generis* regimes balance the bias against indigenous creations inherent in classic IP laws. The criticisms against *sui generis* regimes do not play out in the Panamanian context. Law No. 20 provides a legal framework that better aligns with the public domain while coexisting with conventional IP laws. Moreover, the indigenous communities in Panama have obtained tangible economic benefits.

238. Jeff Abbott, *Reviving Indigenous Authorities in Guatemala*, BRIARPATCH (Apr. 27, 2020), <https://briarpatchmagazine.com/articles/view/reviving-indigenous-authorities-in-guatemala>.

239. Telephone Interview with Ajbee Jiménez, USAID Indigenous Advisor (Aug. 6, 2020).

240. *Id.*

Law No. 20 could serve as a model for Guatemala despite the more complex and challenging indigenous socio-political dynamics. The Guatemalan indigenous communities are more numerous and diverse with governing bodies of varying degrees of efficiency in place. Nevertheless, country-wide consultations to ensure buy-in from indigenous and non-indigenous stakeholders could greatly spur wider political support.

At the heels of the Black Lives Matter movement, protests worldwide against racism have brought about concrete changes in corporate behavior that affect minority groups, including indigenous groups.²⁴¹ In the U.S., the football team based in the Washington D.C. area changed its name, which was a known insult to native tribes.²⁴² The weavers' legal victory in Guatemala has forged the path for the recognition of collective IP rights over their creations and has already triggered changes in corporate behavior. Even in the absence of a legal framework, some Guatemalan companies have sought permission and licenses from indigenous communities to use known huipil designs.²⁴³ This is just the beginning. Given the size of the textile market in Guatemala, a sui generis regime has enormous potential for furthering economic opportunities for indigenous weavers and their communities.

241. See Cody Benjamin, *Washington Redskins Changing Name: Trademark Squatter Says Only Four Name Options Are Viable for 2020 Season*, CBS SPORTS (July 16, 2020 at 4:22 PM), <https://www.cbssports.com/nfl/news/washington-redskins-name-change-trademark-squatter-says-only-four-name-options-are-viable-for-2020-season/>.

242. See *id.*

243. Interview with Angelina Aspuac, *supra* note 15.