

Grafting Traditional Knowledge onto a Common Law System

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Modern legal systems are not usually designed to protect Indigenous traditional knowledge or traditional cultural expressions but are, more often, historically complicit in their misuse or suppression. The undefined status of traditional knowledge has left Indigenous communities vulnerable to harms not readily cognizable by either common or civil law systems: exploitation of those communities' genetic resources and medical knowledge, demeaning of their sacred symbols, and further alienation from their culture and land following colonial dispossession. Indigenous groups have therefore sought greater protection of traditional knowledge through a range of domestic and international legal avenues. This Article examines the experience of Australia as the common law jurisdiction that has likely gone furthest in protecting traditional knowledge. Aboriginal Australian claimants have found varying degrees of success through mechanisms such as copyright law, patent law, consumer protection, fiduciary claims, and privacy rights. Even at their most successful, however, these claimants have not obtained recognition of the unique interests represented by traditional knowledge. Instead, they have been forced to translate their claims into terms close to the conventional utilitarian or personality-based justifications for intellectual property. Australia therefore illustrates the potential of a common law system's ability to incrementally adapt to novel claims—but also that system's ultimate inadequacy.

TABLE OF CONTENTS

INTRODUCTION	76
I. THE GLOBAL NORMATIVE FRAMEWORK FOR TRADITIONAL KNOWLEDGE	78
A. TRADITIONAL KNOWLEDGE AND THE INTERNATIONAL LEGAL ORDER	80

* Jeremiah Smith, Jr. Professor of Law, Harvard Law School. © 2021, Ruth L. Okediji. I am immensely grateful to Danielle Sullivan, Gabrielle Sullivan, Patricia Adjei, Terri Janke, Lee Elsdon, Bibi Barba, Sharna White, members of staff of IP Australia, and Katrina Sanderson who spent considerable time with me sharing about longstanding efforts to protect Aboriginal authors and artists. My interviews with them greatly enriched my understanding of the Australian cultural and legal landscape for traditional knowledge and traditional cultural expressions. Graham Duffield and Daniel Robinson provided excellent feedback on earlier drafts; Reddy Lee developed a distinctive and invaluable set of case studies; Kat Geddes was an exceptional lead Research Fellow for the project that led to this Article; and Sean Lau provided superb research assistance for the finished product.

B.	THE RATIONALES FOR TRADITIONAL KNOWLEDGE AND THEIR LIMITATIONS	83
II.	TRADITIONAL KNOWLEDGE IN AUSTRALIAN INTELLECTUAL PROPERTY LAW.....	86
A.	COPYRIGHT LAW	86
B.	PATENT LAW	91
C.	TRADEMARK LAW	96
D.	TRADE PRACTICES	98
III.	TRADITIONAL KNOWLEDGE BEYOND INTELLECTUAL PROPERTY LAW	100
A.	PRIVACY LAW.....	100
B.	CROSS-CATEGORY REGULATION: BIODIVERSITY CONSERVATION	103
C.	CULTURAL HERITAGE LAW	105
D.	FIDUCIARY LAW.....	106
E.	NATIVE TITLE.....	107
F.	SOFT LAW “PLUS” MECHANISMS.....	109
IV.	MAPPING VALUES: RIGHTS, REGIMES, AND LEGAL INSTITUTIONS	112
A.	THE OVER- AND UNDER-PROTECTION OF TRADITIONAL KNOWLEDGE UNDER A PATCHWORK REGIME	112
B.	THE PROMISE AND PERILS OF A <i>SUI GENERIS</i> REGIME	115
C.	GRAFTING TRADITIONAL KNOWLEDGE ONTO NON-AUSTRALIAN COMMON LAW SYSTEMS	119
	CONCLUSION	123

INTRODUCTION

There has been longstanding and persistent debate in the international community over the appropriate regulation of knowledge assets of communities historically forced to relinquish land and often forgo creative activity relating to the management of plant, animal, and other resources. This so-called traditional knowledge (TK) of Indigenous people and local communities encompasses both tangible and intangible resources, includes knowledge embodied in innovations, and is reflected in cultural practices, know-how, and skills. Traditional Cultural

Expressions (TCEs) are an extension of TK that exist in communicative forms such as music, folklore, dance, language, and literature.¹

Although a universally accepted definition of TK remains elusive, many Indigenous groups and local communities adhere to the following criteria: TK is intergenerational by design, written and orally transmitted, and deeply connected to the land on which Indigenous people live.² Taken together, these features suggest that TK defines sociopolitical relations within Indigenous communities and is also central to the establishment of communal institutions and regulation of economic life. Within those communities, TK therefore embodies a system of governance increasingly recognized in several international instruments, and with constitutional features including separation of powers and an allocation of rights and duties among members.³

Despite a multilateral impasse at the World Intellectual Property Organization (WIPO), formal *sui generis* regimes for the protection of TK are on the rise globally.⁴ These developments reflect a measure of confidence by states in an emerging international law framework that addresses discrete aspects of knowledge governance for indigenous creativity and innovation.⁵ That is especially true in common law jurisdictions where gap filling via norms and practices is already a well-established practice, thereby encouraging the development of novel TK

1. *Traditional Cultural Expressions*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/tk/en/folklore/> [<https://perma.cc/K3H9-UJYV>] (last visited Aug. 15, 2021).

2. The World Intellectual Property Organization defines traditional knowledge as “a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.” WIPO, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY (2016), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf [<https://perma.cc/24W9-WAPQ>].

3. See RUTH L. OKEDIJI, CTR. FOR INT’L GOVERNANCE INNOVATION, TRADITIONAL KNOWLEDGE AND THE PUBLIC DOMAIN 2 (2018).

4. See, e.g., MARGO A. BAGLEY, CTR. FOR INT’L GOVERNANCE INNOVATION, TOWARD AN EFFECTIVE INDIGENOUS KNOWLEDGE PROTECTION REGIME: CASE STUDY OF SOUTH AFRICA 1, 4–5 (2018); see also V.K. Gupta, *Protecting India’s Traditional Knowledge*, WIPO MAG., June 2011, at 5, https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html#2 [<https://perma.cc/ZZ7C-7SHQ>] (describing India’s Traditional Knowledge Digital Library).

5. This includes certain intellectual property instruments and treaties, especially in the copyright field. See, e.g., UNESCO & WIPO, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (1985), <https://www.wipo.int/export/sites/www/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> [<https://perma.cc/5QTE-6S3K>]. These model provisions sought to protect “expressions of folklore” from unauthorized use, *id.* at 10, misrepresentation of source, *id.* at 11, and willful distortion, *id.* The provisions recognized expressions of folklore as products of communities who have vested “traditional artistic expectations,” *id.* at 9, and “cultural interests,” *id.* at 11, in their cultural creations. Another example is the Tunis Model Law on Copyright for Developing Countries. UNESCO & WIPO, TUNIS MODEL LAW ON COPYRIGHT FOR DEVELOPING COUNTRIES (1976), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_812.pdf [<https://perma.cc/TG99-67HG>]. The Tunis Model Law, which preceded the model provisions, extended copyright protection to “literary, artistic or scientific work[s]” by removing the fixation requirement, *id.* at 5, eliminating time limits for protection for “[w]orks of national folklore,” *id.* at 10, and designating a “competent authority” that could exercise moral rights to prevent folklore from distortion, *id.* at 9.

claims that do not easily comport with conventional intellectual property (IP) law doctrines.

This Article examines the felicity of the common law for effective TK protection. Using Australia as a leading example, the analysis explores the network of legal regimes that have been applied to the unauthorized access, use, copying, and patenting of indigenous art and innovation. It concludes with two observations that could influence the direction and content of international negotiations, while offering pathways for other countries seeking to act on this subject. First, the Australian experience suggests that, although legislatures play an essential role in creating TK laws, courts are best positioned to elaborate on the nature and scope of particular applications in light of specific legal harms. While a legislature may set the policy agenda for TK protection, it is the judiciary's construal of the collective interests associated with TK that ultimately determines whether TK thrives or flounders as a distinctive expression of the community that it is meant to serve. If this is true, the incrementalism of the common law, accompanied by soft law initiatives, will likely characterize the evolution of TK law for the foreseeable future. Second, even apart from express legislative protection of TK, grafting processes through adjudication of novel claims within older legal frames will produce a de facto *sui generis* TK regime. As with grafting techniques generally, entirely new forms of TK and IP norms are likely to emerge from this ad hoc process, reflecting a type of contestation in which essentially political claims are recast into legal rights through the adversarial process. In the long run, then, access to courts for Indigenous people may be one of the most important challenges to formal TK protection.

Part I introduces TK and TCEs. It will outline some of the conceptual dilemmas that TK and TCEs pose and review the relevant international instruments to which Australia is a party. Parts II and III will consider Australia's domestic IP regimes (copyright, patent, and trademark law), as well as its unique blend of legislation and common law doctrines that already extend to specific considerations of Indigenous people. Within each domestic legal regime, the Article highlights legislative, administrative, and judicial developments that have contributed to the protection of TK, as well as their associated shortfalls. Part IV will identify and summarize the most effective elements and strategies, existing gaps and areas for reform, and lessons for contemporary discourse on global IP rights in knowledge goods.

I. THE GLOBAL NORMATIVE FRAMEWORK FOR TRADITIONAL KNOWLEDGE

WIPO defines TK as a body of knowledge “developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”⁶ TK is typically characterized by five qualities. First, it includes the intergenerational institutions, norms, and processes that govern knowledge production. Second, the knowledge is held collectively. Third, the

6. *Traditional Knowledge and Intellectual Property*, *supra* note 2.

knowledge takes on tangible and intangible forms and can be expressed in skills, technical know-how, and material objects. Fourth, the knowledge need not be purely technical, but embodies certain economic, spiritual, or cultural values. Fifth, the knowledge serves as an identifier of a particular Indigenous group or local community.⁷

Defined this way, TK is a conceptual frame for resisting the appropriation of a community's culture by outsiders and has been effective as such. As just one illustration, in 2010, a gallery in Katoomba, Australia, displayed a sculpture and paintings based on Wandjina, which are the sacred spirits of the Indigenous Mowanjium people, although the gallery operator was not herself a Mowanjium.⁸ Most Wandjina have instantly recognizable characteristics: a head with two eyes and a nose but no mouth, surrounded by a semicircular band of solid color or radiating lines representing the lightning that precedes wet season rains.⁹ It is believed that the Wandjina originally painted their own images on cave walls before returning to the spirit world. As a result, it is the sacred responsibility of male tribal elders to repaint and maintain the images to ensure the coming of the wet season rains and thus the regeneration of all life forms.¹⁰ Repainted Wandjina also have the practical effect of evidencing a continuous connection between Aboriginal groups and tribal lands for the purpose of native title claims.¹¹ Wandjina painting sites helped to deliver over seven thousand square kilometers to the "Wanjina–Wunggurr" community in one of the biggest land claim cases in Australian history.¹²

Thus, under the Mowanjium people's practice, an image of a Wandjin is not a mere mimetic depiction of that spirit, but actually embodies it, which is why the depiction must be faithful and carefully maintained.¹³ By contrast, the Katoomba gallery displayed a sculpture and paintings, all by non-Indigenous artists, showing Wandjina with mouths, which offended traditional beliefs that the spirits' power descended to Earth through their noses, obviating the need

7. Ruth L. Okediji, *A Tiered Approach to Rights in Traditional Knowledge*, 58 WASHBURN L.J. 271, 273–74 (2019). For other and similar definitions, see William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L.J. 1511, 1513 (2018); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 38 (2009); David R. Hansen, *Protection of Traditional Knowledge: Trade Barriers and the Public Domain*, 58 J. COPYRIGHT SOC'Y U.S.A. 757, 759 (2010).

8. Delwyn Everard, *Safeguarding Cultural Heritage - The Case of the Sacred Wandjina*, WIPO MAG., December 2011, at 8, 8, 9, https://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html [<https://perma.cc/FEP9-YRX4>].

9. Ursula Frederick & Sue O'Connor, *Wandjina, Graffiti and Heritage: The Power and Politics of Enduring Imagery*, 15 HUMANS. RSCH. 153, 160 (2009).

10. *Id.* at 165.

11. Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous Peoples - Australian Case Studies*, 22 PAC. RIM L. & POL'Y. J., 391, 395 (2013).

12. Christoph B. Graber, *Aboriginal Self-Determination vs the Propertisation of Traditional Culture: The Case of Sacred Wandjina Sites*, 13 AUSTL. INDIGENOUS L. REV. 18, 18 (2009); see *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) (Federal Court) (Austl.).

13. Fisher, *supra* note 7, at 1520, 1522.

for mouths.¹⁴ Following objections by Mowanjum that the depiction was disrespectful, the city council ordered its removal.¹⁵

Nonetheless, the concept of TK is far from a perfect way to prevent exploitation. Advocates typically pit TK *against* IP, but by so doing, it is possible that effective protection for TK will permanently lag behind the protection that IP receives. In addition, the romanticization of TK as part of humanity's cultural commons—our “world heritage”—can suggest that this knowledge is not something over which legal rights should be asserted. Instead, the implication is that TK should be made freely available to the public, including the Indigenous community. But such a rosy view ignores the brute socioeconomic reality that vulnerable communities experience distinctive harms that undermine their prospects for development and self-realization, and for which benign doctrines, such as the public domain, do not offer meaningful advantages. On the contrary, the “benefits” of an open-access commons can serve to concentrate power in culturally powerful users who, in turn, leverage legal doctrine to deny opportunities and resist pathways of economic and cultural development most meaningfully available to the poor and weak.¹⁶ The same romanticization also risks portraying TK as static—a frozen wisdom for the ages rather than a deliberate and adaptive creation.¹⁷ As WIPO has acknowledged, much TK is “not ancient or inert, but is a vital, dynamic part of the contemporary lives of many communities today.”¹⁸

This Part provides background for understanding contemporary debates around TK. It begins by sketching the emergence of TK protection on the world stage and the current international legal framework, then turns to the rationales that advocates have offered for TK and their respective limitations.

A. TRADITIONAL KNOWLEDGE AND THE INTERNATIONAL LEGAL ORDER

Discussions of whether and how TK should be protected first began within the global Indigenous rights movement. Through advocacy before international institutions and partnership with nongovernmental organizations (NGOs), that movement succeeded in incorporating references to Indigenous peoples' unique needs into international legal instruments.¹⁹ In so doing, the movement replaced a previous paradigm in which international human rights law had assumed that

14. Everard, *supra* note 8, at 9.

15. *Id.* at 10.

16. See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 106 (2007); see also Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1335 (2004) (“Native peoples once stood for the commons. . . . Now, corporations declare the trees and the shaman’s lore to be the public domain, while indigenous peoples demand property rights in these resources.”).

17. See Sunder, *supra* note 16, at 100; Chander & Sunder, *supra* note 16, at 1335–36.

18. WIPO, INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE 6 (2005), https://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf [<https://perma.cc/YA3Q-X2YV>].

19. See, e.g., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, 1650 U.N.T.S. 383; Convention on Biological Diversity, opened for signature June 5, 1992, 31 I.L.M. 818. See generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 39–61 (1996) (outlining this history).

Indigenous groups—who at the time lacked a seat at the relevant tables—should be not only protected but also *assimilated* into the state and relinquish their distinctive identities.²⁰

The first major success came in 1992 when NGOs managed to insert a reference to equity into the Convention on Biological Diversity (CBD) regarding the use of “traditional knowledge, innovations and practices.”²¹ The 1993 Bellagio Declaration adds flavor to what NGOs were reacting to: it warns of the risk that “traditional knowledge, folklore, genetic material and native medical knowledge flow *out* of their countries of origin unprotected by intellectual property, while works from developed countries flow *in*, well protected by international intellectual property agreements.”²² International IP agreements include the Agreement on Trade-Related Aspects of Intellectual Property Rights,²³ which developing countries had bitterly resisted.²⁴ Thus, the delineation of TK emerged in part as a counterweight to the exploitative use of IP laws by transnational corporations. In the classic cases, pharmaceutical firms would ask Indigenous groups in developing countries which plants, in their long experience, had therapeutic properties. The answers would provide valuable insight, or a “head start,” for research; in some cases, answers led directly to the invention of new drugs but without any of the profits flowing to the indigenous groups that enabled the discovery.²⁵ A much-discussed instance is Eli Lilly & Co.’s patenting of a treatment for Hodgkin’s disease derived from the rosy periwinkle, which shamans in Madagascar had long known to have therapeutic effects.²⁶

The 2007 United Nations Declaration on the Rights of Indigenous People (UNDRIP) comprises the seminal soft law instrument for identifying discrete interests in TK.²⁷ UNDRIP’s philosophical premises are most closely aligned with a personhood theory of IP, according to which property is a manifestation of a person’s autonomy and liberty.²⁸ One of UNDRIP’s pillars is the principle of

20. See ANAYA, *supra* note 19, at 44.

21. Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RESRV. J. INT’L L. 233, 237 (2001) (citing Convention on Biological Diversity, *supra* note 19, at 822).

22. *The Bellagio Declaration from the 1993 Rockefeller Conference “Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era,”* SOC’Y FOR CRITICAL EXCH., <https://case.edu/affil/sce/BellagioDec.html> [<https://perma.cc/35W5-LMKA>] (last visited Aug. 17, 2021); see also JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192–94 (1996) (reprinting the Bellagio Declaration).

23. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, 33 I.L.M. 81.

24. See generally Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT’L L. 735 (1996) (elaborating on this history).

25. See Okediji, *supra* note 7, at 275.

26. See BOYLE, *supra* note 22, at 128; Shayana Kadidal, *Plants, Poverty, and Pharmaceutical Patents*, 103 YALE L.J. 223, 224 (1993).

27. G.A. Res. 61/295, (Oct. 2, 2007).

28. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (explaining that “objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world”).

“free, prior and informed consent.”²⁹ This principle implies that an Indigenous community must be able to access and use TK and genetic resources (GRs) in accordance with a process that meaningfully facilitates the autonomy, freedom, and values of that community. Therefore, although UNDRIP contains express language recognizing the rights of Indigenous people to own and control their Indigenous knowledge, to be consulted about uses of their knowledge, and to make decisions about their knowledge, the consent right remains both independent and fundamental.³⁰ This consent right grounds many discussions around TK regulation and, being about procedural self-determination, can avail even in the absence of well-defined property rights.

Australia is a party to both UNDRIP and a series of international IP agreements that have significant impact on its domestic IP policy. The IP agreements establish a minimum level of required protection and limit the ability of domestic legislatures to tinker with national IP standards, except at the margins. The CBD was signed by Australia in 1992 along with 167 other countries.³¹ The treaty covers all types of GRs, is primarily focused on biological diversity and sustainability, and has become the key document in international sustainable development. Originally, the CBD did not contain many explicit provisions regarding TK and TCE protections, but did enshrine fair and equitable sharing of resources as a primary goal, which is an important piece of the broader TK and TCE discussion.³²

The supplemental Nagoya Protocol on Access and Benefit Sharing, signed in 2010,³³ added express TK and TCE protections. The Protocol applies to the same GRs covered by the CBD and to TK associated with those GRs, with provisions on access, benefit sharing, and compliance.³⁴ Among other things, it requires member states to enact domestic rules requiring third-party users of GRs associated with TK to obtain prior informed consent from the relevant Indigenous group and engage in benefit-sharing arrangements with mutually agreed-upon terms.³⁵ As of this writing, the Protocol has 131 ratifications.³⁶ Australia has not ratified the Nagoya Protocol, and although it seemed poised to do so following national

29. TERRI JANKE & MAIKO SENTINA, *IP AUSTR. & THE DEP'T OF INDUS., INNOVATION & SCI., INDIGENOUS KNOWLEDGE: ISSUES FOR PROTECTION AND MANAGEMENT* 24 (2018).

30. See G.A. Res. 61/295, *supra* note 27, at 9.

31. *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/information/parties.shtml> [<https://perma.cc/PM42-YTDB>] (last visited Aug. 17, 2021).

32. See Convention on Biological Diversity, *supra* note 19, at 823.

33. See United Nations Environment Programme Dec. X/1, U.N. Doc. UNEP/CBD/COP/Dec/X/1, annex I (Oct. 29, 2010) [hereinafter Nagoya Protocol].

34. *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY (June 9, 2015), <https://www.cbd.int/abs/about/> [<https://perma.cc/7UDQ-JLAG>].

35. See *Article 8(j) - Traditional Knowledge, Innovations and Practices*, CONVENTION ON BIOLOGICAL DIVERSITY (July 15, 2021), <https://www.cbd.int/traditional/> [<https://perma.cc/AD44-EVDT>].

36. *Parties to the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY (last visited Aug. 17, 2021), <https://www.cbd.int/abs/nagoya-protocol/signatories/> [<https://perma.cc/PE2Q-RYUB>]. Kiribati most recently completed ratification in June 2021. *Id.*

consultations,³⁷ some scientists and researchers objected that the increased bureaucracy would slow down rapid disease prevention efforts, even as others lauded the Protocol as the most complete and culturally sensitive implementation of TK and TCE protection.³⁸ The Australian government touts that “existing domestic measures are consistent with the Protocol,”³⁹ but whether they are sufficient is another question altogether.

B. THE RATIONALES FOR TRADITIONAL KNOWLEDGE AND THEIR LIMITATIONS

The protection of TK, either international or domestic, cannot avoid conceptual justification. However, familiar rationalizations derived from IP law, such as that a creator or author is entitled to profit from their labor, can only be awkwardly applied to TK. Likewise, a utilitarian rationale of the need to incentivize innovation offers a poor fit, given that Indigenous communities are unlikely to be moved by the preferences of the wider public. The purpose of this Section, therefore, is to sketch the distinctive concerns that TK protection would address.

A more fitting justification than either a labor- or utility-based theory could be a cultural one, which would situate TK as a tool for groups to assert their capacity for self-determination and maintain their own distinctive practices. Nonetheless, such a theory would have to invoke deeply contested ideas about Indigenous sovereignty, colonialism, reparations, and the benefits of cultural diversity.⁴⁰ Moreover, while appealing in the abstract, the ideal of self-determination cannot by itself be conclusive in justifying legal recognition or protection, either generally or of TK specifically. After all, not every group that claims the right to self-determination will receive recognition as a sovereign nation-state.⁴¹

Arguably, the most compelling rationale for countries to implement some form of TK protection concerns longstanding economic- and cultural-displacement issues. The effects of such displacement are persistent and exacerbated by the ongoing acquisition of IP rights obtained by third parties in creations that use or derive from TK.⁴² A rationale for TK grounded in historical dispossession can be supplemented with considerations of human rights, global justice, and biodiversity preservation.⁴³

37. See Sarah Matheson, *Australia Releases Model for Implementing the Nagoya Protocol*, ALLENS LINKLATERS (May 8, 2014), <https://www.allens.com.au/insights-news/insights/2014/05/australia-releases-model-for-implementing-the-nagoya/> [<https://perma.cc/YBQ8-LABE>].

38. See Daniel Cressey, *Biopiracy Ban Stirs Red-Tape Fears*, 514 NATURE 14, 14–15 (2014).

39. *The Nagoya Protocol - Convention on Biological Diversity*, DEP’T. OF AGRIC., WATER & ENV’T., <https://www.environment.gov.au/science-and-research/australias-biological-resources/nagoya-protocol-convention-biological> [<https://perma.cc/KY3L-LD89>] (last visited Aug. 17, 2021).

40. See Okediji, *supra* note 7, at 272–73.

41. See ERNEST GELLNER, NATIONS AND NATIONALISM 49 (1983) (“Most . . . potential nations, the latent differentiable communities which could claim to be nations by criteria analogous to those which somewhere else have succeeded, fail altogether even to raise their claim, let alone press it effectively . . .”).

42. See generally Okediji, *supra* note 7, 281–84 (cataloguing the development of these debates in international law).

43. See *id.* at 291–93; Fisher, *supra* note 7, at 1543–47.

However, even these more persuasive justifications for TK do not address why existing legal regimes—IP, torts, or contracts—are *insufficient* for the regulation of TK. Those justifications do not demonstrate why a *sui generis* regime may present an advance over incremental changes to the existing options. There are at least three reasons that complicate the adequacy of prevailing candidates for a satisfying theoretical justification.

First, debates over the protection of TK adhere closely to the conventional bundle-of-rights approach to property, with a focus on which kinds of rights should inure to Indigenous communities for them to regulate access to GRs and associated knowledge for advancing scientific innovation. The balancing exercises of this approach, which enrich the language of property rights by encouraging inquiry into the competing interests of stakeholders, ironically make it a less satisfying regime for some TK creators. This is especially true for those creators who serve as trustees of knowledge primarily for the benefit of their communities and in the exercise of belief systems that can be hostile to the primacy other stakeholders confer on the material conditions in which the knowledge is applied.⁴⁴ Moreover, a bundle-of-rights framework may do violence to Indigenous people's understandings of their relationship with land because such a conceptual reduction runs contrary to the profound significance land has to Indigenous identity.⁴⁵

Second, in most countries the legal status of Indigenous people remains an unsettled political and constitutional question. Private law regimes for TK protection, such as contracts and torts, comprise rules that govern relationships between people presumed to have equal standing in law—people who have the rights to do things, to claim things, and to receive things. But in contrast to a natural person, a state, a corporation, or one of the old colonial settlements most responsible for Indigenous displacement, an Indigenous community, having no corporate charter, may lack distinct legal personality or standing *as a community* to claim rights or to prohibit conduct otherwise permitted by general laws, such as appropriating Indigenous styles of art or commercializing items of sacred value.

Third, most of the international treaties that address TK protection assume a direct relationship between legal rights for Indigenous people and legal rights in

44. See Graham Dutfield, *If We Have Never Been Modern, They Have Never Been Traditional: 'Traditional Knowledge', Biodiversity, and the Flawed ABS Paradigm*, in ROUTLEDGE HANDBOOK OF BIODIVERSITY AND THE LAW 276, 287 (Charles R. McManis & Burton Ong eds., 2018) (noting that “the land and other rights of indigenous groups within the borders of countries whose representatives in Geneva clamour for international protection of TK continue often to be denied”).

45. See LAURELYN WHITT, SCIENCE, COLONIALISM, AND INDIGENOUS PEOPLES: THE CULTURAL POLITICS OF LAW AND KNOWLEDGE 29 (2009) (“Among indigenous peoples, for example, the belief that knowledge and land are intimately bound to one another is widely shared, as is the accompanying belief that the natural world is alive, spiritually replete.”); Darrell Addison Posey, *Introduction: Culture and Nature – The Inextricable Link*, in CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY 1, 5 (Darrell Addison Posey ed., 1999) (“Local knowledge embraces information about location, movements and other factors explaining spatial patterns and timing in the ecosystem, including sequences of events, cycles and trends. Direct links with the land are fundamental, and obligations to maintain those connections form the core of individual and group identity.”).

TK. This approach is evident in UNDRIP⁴⁶ and the Nagoya Protocol.⁴⁷ These international instruments have greatly influenced the growing body of national TK laws. However, neither instrument defines TK as a form of property. The unsettled question of TK's legal nature and status further exacerbates the trade-offs and transaction costs associated with excluding third parties from the access and use of TK and GRs.

These three concerns reveal a crucial challenge for property-based designs of TK protection, justifications for which are based on historical displacement. On the one hand, classic property rights, although a strong club, make TK transactions extremely difficult because information about ownership, cost, value, and potential uses of TK depend heavily on access to the physical lands where Indigenous people live—and Indigenous people often are not owners of the land. On the other hand, the absence of any kind of legal regime for plant and other resources cultivated by Indigenous groups weakens the welfare gains attributable to new inventions that are based on Indigenous peoples' knowledge. Having accessed Indigenous communities, scientists and third parties assume that the knowledge those communities have obtained is part of a global commons or that the knowledge resides in some metaphorical public domain free for appropriation. The resulting controversies from such appropriation—of which there are numerous examples—disrupt and undermine scientific research as Indigenous groups contest, increasingly successfully, IP rights granted over TK.

Instead, to understand why existing regimes are inadequate for TK protection, it is necessary to have a sense of the particular harms inflicted on Indigenous communities where such protection is absent. As I have written elsewhere, the misuse of TK can harm those communities in at least three ways: relationally, by weakening the social bonds between Indigenous persons that are founded on such knowledge; collectively, by introducing instability into a group; and developmentally, by attacking the conditions for future knowledge production.⁴⁸ For example, males and females of the Kaytetye people in Central Australia each have a complex understanding of and set of rituals for the Dreamtime that are only partly shared with the other sex as part of complicated sexual politics.⁴⁹ Those rituals undergo a “continuous process of reinvention,”⁵⁰ but the entire edifice would be lost should either sex's knowledge be widely shared.

Thus, on the deepest level, the idea that TK has no distinct legal status violates the sense of fairness, liberty, and justice that should ideally animate social relations between Indigenous communities and broader society. Contemporary TK discourse insulates Indigenous communities from the burdens and opportunities of broader political participation while privileging IP-driven innovation as the

46. See G.A. Res. 61/295, *supra* note 27, at 5.

47. See Nagoya Protocol, *supra* note 33, at 6.

48. See Ruth L. Okediji, *Traditional Knowledge and Private Law*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW* 427, 437–40 (Andrew S. Gold et al. eds., 2020).

49. See DIANE BELL, *DAUGHTERS OF THE DREAMING* 182–84 (2d ed. 1993).

50. *Id.* at 183.

ultimate objective to which the collective interests of Indigenous groups should be subordinated. To address the harm to both IP and TK that is occasioned by the current state of legal ambiguity, it could be more helpful to identify legal rules that best support the sustainability and use of TK both within the collective group and in relation to external constituencies.

II. TRADITIONAL KNOWLEDGE IN AUSTRALIAN INTELLECTUAL PROPERTY LAW

Common law systems generally offer multi-layered protection to citizens through a patchwork of positive law, regulation, and rules of equity. Australia is no different, and the country has experimented with TK protection through a range of legal mechanisms, including copyright, patent, trademark, and consumer protection laws, with important insights for the development of a *sui generis* TK law. Although it is unclear how tailored such mechanisms are to the distinctive concerns presented by Indigenous holders of TK, the Australian patchwork, taken as a whole, has produced some victories of note for claimants.

A. COPYRIGHT LAW

Copyright law, typically concerned with original works of authorship, has been stretched in Australia to meaningfully fit some of the characteristics of TK and TCEs. Nonetheless, the fit remains cumbersome, as we might expect from a regime originally designed without TK in its line of sight. Although courts have interpreted some of the statutory requirements as permitting the frequently iterative and communal-based nature of TK, copyright is fundamentally designed around an individual author. Groups trying to protect their shared heritage have failed to obtain rights under either this regime or a moral rights supplement. Copyright protection thus continues to serve the interests of individual Indigenous artists more effectively than it does the wider communities to which they belong.

Australian copyright law is governed by the 1968 Copyright Act.⁵¹ Similar to U.S. and Canadian copyright law, to be copyrightable a work must be (1) original⁵² and (2) fixed in a tangible medium of expression.⁵³ Both the originality and fixation requirements provide obstacles to the protection of TCEs. In Australia, originality requires that the creation or production of the work involve some “independent intellectual effort”⁵⁴ and the exercise of “sufficient effort of a literary nature.”⁵⁵ This presents a challenge for Indigenous groups because expressions of TCE intentionally draw from existing cultural production from the tribe.⁵⁶ Indigenous art is often cumulative and heritage-based, with each new expression building heavily on existing TCEs from previous generations. Under Australia’s

51. *Copyright Act 1968* (Cth) (Austl.).

52. *Id.* s 32(1).

53. *Id.* s 22(1)–(2) (“[R]educed to writing or to some other material form.”).

54. See *IceTV Pty Ltd v Nine Network Austl Pty Ltd* [2009] HCA 14, 18 (High Court) (Austl.).

55. *Id.* at 39.

56. See JANKE & SENTINA, *supra* note 29, at 17.

originality standards, however, if a new expression of TCE displays “a sufficient degree of objective similarity” to a previous work, it will not be eligible for copyright protection.⁵⁷ Moreover, the term of copyright protection of the original work on which it was based could have already lapsed (if it were ever eligible), which means that the particular expression of TCE would be left with no copyright protection at all.⁵⁸ A similar outcome is likely in U.S. and Canadian courts.

When faced with claims that the Copyright Act protects TK and TCEs, Australian courts have interpreted some aspects of that legislation generously but others restrictively. During the 1990s, Australian courts were relatively active in engaging with questions related to the scope of copyright protection as it related to the works of Indigenous groups. More unusually, Indigenous groups in Australia were willing to participate in lawsuits regarding copyright protection for TCEs. Two cases that have been the focus of scholarship are worth mentioning.

First is *Milpurrurru v Indofurn*,⁵⁹ in which Justice von Doussa of the Federal Court of Australia ruled that works based on traditional dreaming themes contain sufficient creativity to merit copyright protection, despite the long and communal lineage of those themes. Often called the “Carpets Case,”⁶⁰ the litigation involved several Indigenous artists whose art was copied, with slight modifications, in the production of carpets by the defendant. The defendant’s primary defense was to contest the originality of the works of the Indigenous artists. These works were based on traditional dreaming themes from the respective Indigenous groups to which the individual artists belonged. The defendant claimed that, because those themes were well known beforehand, simply expressing them in particular forms did not constitute sufficient originality or creativity to merit independent copyright protection. But the court ruled that the expressions created by the artists exhibited “intricate detail and complexity reflecting great skill and originality.”⁶¹ For example, although the “dreaming of the Wititj [mythical rainbow serpent] is often told in Aboriginal artwork, the particular depiction of the tail and the rarrk [style of painting] used in this artwork [was] original and distinctive.”⁶²

This language by the court, which explicitly references the reality of new, Indigenous-made expressions of TCEs, is expedient. Newly created expressions of TCEs often build upon themes, art forms, stories, or even materials from previous TCEs. Judicial recognition that cumulative creation does not eliminate the

57. *Comput Edge Pty Ltd v Apple Comput Inc* [1986] HCA 19 (High Court) (Austl.); see *Coogi Austl Pty Ltd v Hysport Int’l Pty Ltd* [1998] FCA 1059, 45 (21 August 1998) (Federal Court) (Austl.) (affirming that a mere “translation” or “adaption” of an original work will infringe copyright).

58. See *Copyright Act 1968* (Cth) s 33(2) (Austl.) (setting a term of copyright for “70 years after the end of the calendar year in which the author of the work died”).

59. [1994] FCA 975 (23 October 2018) (Federal Court) (Austl.).

60. See *Case Study 4: ‘The Carpets Case,’* EDUC. STANDARDS AUTH., <https://ab-ed.nesa.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/case-studies-of-copying-and-appropriation/case-study-4-the-carpets-case> [<https://perma.cc/HM7K-MFLX>] (last updated May 1, 2007).

61. *Milpurrurru v Indofurn Pty Ltd* [1994] FCA 975 (23 October 2018) (Federal Court) (Austl.).

62. *Id.*

possibility of copyright protection is an important step in recognizing the inherent originality accompanying every generation's retelling of its historical, spiritual, or cultural narratives. The ruling indirectly conferred legitimacy not only on the labor of Indigenous artists but also on the cultural landscape from which creative expression emerges and on a more complicated notion of artistry, and perhaps, authorship. Functionally, the decision opens copyright protection for Indigenous works that satisfy the court's definition of originality. It leaves open the prospect of non-Indigenous groups creating new works based on TCEs—though this problem could be cured by an application of moral rights or, in a noncopyright framework, by using an informed consent requirement consistent with the Nagoya Protocol.⁶³

Although *Milpurrurru* offers a generous interpretation of copyright law for Indigenous groups, another decision by the same court and judge imposed significant restrictions on *who* could claim copyright protections. In *Bulun Bulun v R & T Textiles*,⁶⁴ Justice von Doussa ruled that the Ganabingu people could not be considered an author for the purposes of copyright law. Among the issues he decided was whether the Indigenous group had any communal ownership or rights in the art created by Mr. Bulun Bulun, the individual author.⁶⁵ The court ruled that there can be no group ownership of copyright, except in the case of joint ownership through joint authorship.⁶⁶

This point, on its own, is a significant setback for copyright protection for TCEs in Australia. Insisting that copyright vests in one individual within the Indigenous group often denies the cultural context in which TCEs are produced and limits the Indigenous group's ability to control their cultural goods in a manner consistent with their practices and dignity.⁶⁷ Reaching into equity, however, the court held that the group had a right *in personam* to bring action against Mr. Bulun Bulun in the event of a breach of his fiduciary obligations concerning his embodiment of their ritual knowledge within his artistic work.⁶⁸

Such doctrinal complexities, which have developed in the context of the originality requirement, are also evident with respect to copyright's second requirement, fixation. With respect to the latter, Indigenous groups often transmit TCE through oral tradition. Stories passed down orally, the content of which can be culturally sensitive and not designed to be shared widely, would not be entitled to any copyright protection until they are written down, illustrated, or otherwise fixed in a tangible medium,⁶⁹ potentially violating some of the traditions surrounding those sacred stories. In the 1990s, a legal and political controversy

63. See Nagoya Protocol, *supra* note 33, at 10.

64. (1998) 157 ALR 193, 205, 211 (Federal Court) (Austl.).

65. *Id.* at 204.

66. *Id.* at 204–05.

67. See TERRI JANKE, WORLD INTELL. PROP. ORG., MINDING CULTURE: CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS 65 (2003).

68. *Bulun Bulun*, 157 ALR at 211.

69. See *Copyright Act 1968* (Cth) s 22(1)–(2) (“[R]educed to writing or to some other material form . . .”).

erupted over the “secret women’s business” of Ngarrindjeri women near Hindmarsh Island. The women opposed the construction of a bridge to the island but could not reveal why they considered the site sacred, raising accusations of fabrication by non-Indigenous commentators.⁷⁰ The secret knowledge at stake rendered copyright law an unacceptable option for the community.

Additionally, the fixation requirement can jeopardize ownership by Indigenous people. Even well-intentioned efforts can strip Indigenous groups of rights. For example, prior to the amendments discussed below, if a researcher wanted to archive oral expression of an Indigenous community in Australia through recording, the legal doctrine suggests that the researcher and not the Indigenous community would own the rights.⁷¹ In *Foster v Mountford*, for example, the Pitjantjara Council had to fall back on a breach-of-confidence action, rather than a copyright claim, to prevent an anthropologist from publishing their people’s cultural secrets.⁷²

More generally, fake Indigenous art distorts the market for authentic Indigenous works in a way for which copyright can provide only a limited remedy. Copyright does not protect artistic style, only a style’s specific expression.⁷³ It therefore offers no redress for foreign goods imitating Aboriginal artistic styles.

At the Australian state level, there have been additional, if somewhat limited, attempts to create copyright-like protection for TK and TCEs. The State of Victoria, for example, passed the Aboriginal Heritage Act in 2006.⁷⁴ The Act allows Indigenous groups to voluntarily register intangible TCEs with the state government, after which third parties seeking to use such TCEs are required to obtain consent from the relevant Indigenous groups.⁷⁵ Although the legislation remains state-based (allowing parties to continue engaging in unauthorized use of TCEs in other Australian jurisdictions), Victoria is the second most populous state in Australia, which means that the legislation imposes a meaningful requirement on parties seeking access to, and use of, a rich trove of TK.

70. The case was eventually taken to the High Court, which allowed the development to proceed. See *Kartinyeri v Commonwealth* [1998] HCA 22 (High Court) (Austl.) (“The plaintiffs commenced proceedings in this Court seeking a declaration that the Bridge Act was invalid so that it did not operate to prevent the determination of their application in accordance with the Heritage Protection Act.”).

71. See *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCA 44 (8 February 2010) (Federal Court) (Austl.) (conflating fixation and authorship through the claim that “[t]he author is the person or persons who bring the work into existence in its material form”).

72. (1977) 14 ALR 71, 74–75 (Northern Territory Supreme Court) (Austl.).

73. See *Cummins v Vella* [2002] FCAFC 218, 14 (Federal Court) (Austl.). For an example in the United States, see *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711–12 (S.D.N.Y. 1987).

74. *Aboriginal Heritage Act 2006* (Vic) (Austl.).

75. See *Protecting Aboriginal Intangible Heritage: How Traditional Owners and Government Are Protecting Traditional Knowledge*, ABORIGINAL VICT., <https://www.aboriginalvictoria.vic.gov.au/protecting-aboriginal-intangible-heritage> [<https://perma.cc/22DB-EBZ4>].

The doctrinal gaps described above are not unique to the Australian copyright regime.⁷⁶ But attempts to manage these gaps through incremental legislative amendment have proven of limited use, which is perhaps unsurprising given the basic dissonance between a copyright framework and the concerns underpinning TK. In 2005, the federal Copyright Act was amended to extend sound recording protection to make copyright in the “sound recording of a live performance” shared by both the recorder and performer.⁷⁷ The amendment also extended the definition of a live performance to include “a performance of an expression of folklore.”⁷⁸ These adjustments, however, do not obviate the need to establish originality or to identify an individual, rather than a group, who might have a copyright claim.⁷⁹

A striking irony therefore prevails in the tension between TK protection and the public purpose of copyright law, which is reflected in contestations over appropriate limits to the mandatory exclusive rights granted to authors, as described above. Further, there is ongoing debate in Australia regarding the addition of a fair use exception like that contained in U.S. copyright law, a proposal steadfastly opposed by Indigenous groups.⁸⁰ The United States’ fair use doctrine evaluates the character of the use, the nature of the original work, and the amount of the original work that is used, as well as the use’s effect on the market for the original work.⁸¹ Educational uses and parody uses are typically characterized as fair use. Indigenous groups in Australia have expressed concerns that a fair use exception would create broad opportunities for parties to willfully misappropriate

76. See, e.g., Dalindybo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1128–35 (2017) (discussing U.S. law).

77. *Copyright Act 1968* (Cth) s 22(3A) (Austl.). Note that this extension of performers’ rights only applies to audio recordings, not to audio-visual recordings (such as film or video), and to performers contributing to the sounds of the live performance.

78. *Id.* s 22(7)(f) (reflecting narrow implementation of art. 2 of the WIPO Performances and Phonograms Treaty; the Treaty is not limited to live performances).

79. In 2003, there had been an unsuccessful attempt to amend the Copyright Act that would have extended protection to Indigenous Communal Moral Rights. See *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth) (Austl.). The goal of that amendment was to extend regular moral rights protections (such as a right against false attribution and a right of integrity) from individuals to communities, in order to address difficulties Indigenous groups face in overcoming archetypal notions of authorship as an individual endeavor. See MAIKO SENTINA, ELIZABETH MASON & TERRI JANKE, IP AUSTRAL. & THE DEP’T OF INDUS., INNOVATION & SCI., *LEGAL PROTECTION OF INDIGENOUS KNOWLEDGE IN AUSTRALIA: SUPPLEMENTARY PAPER 1*, at 9–10 (2017). The attempted amendment failed amidst doubts about whether, and to what extent, the bill would actually aid Indigenous groups due to its “confusing requirements” and “limited” scope. See *id.* The conservative Coalition government had promised Senator Aden Ridgeway, the sole Indigenous member of Parliament, that it would consider such legislation but then proceeded to draft the Bill without consultation with Indigenous groups. It then withdrew the Bill, following criticism that it would establish too many procedural hurdles to obtaining ICMR. See Senate Standing Committee on Environment and Communications, Parliament of Victoria, *Indigenous Cultural and Intellectual Property Rights* (Completed Inquiry, 20 June 2007) 155.

80. See JANKE & SENTINA, *supra* note 29, 123 fig. 2 (“Possible introduction of fair use can lead to more misappropriation.”).

81. 17 U.S.C. § 107.

Indigenous culture without respecting its traditions or cultural significance.⁸² The fair use debate in Australia is as yet unresolved. But the prospect that this canonically celebrated doctrine could perpetuate harm done to a discrete minority exemplifies the profound difference between the welfare ideals that undergird Anglo-American copyright regimes and the values that define knowledge creation in Indigenous communities.

Aside from the innate misalignment between common law derived copyright regimes and TCEs, Aboriginal artists in Australia also identify significant practical barriers to using copyright to protect their works: first, a general lack of awareness within Indigenous communities about legal rights and remedies; and second, the prohibitive legal costs of infringement suits. Aboriginal artists describe protracted legal battles with firms that continue to use their works without permission despite entreaties from counsel.⁸³ Aboriginal artists also suffer the isolating experience of creating art in an urban environment, being removed from their Indigenous community, and having to learn basic copyright principles.⁸⁴

A possible response to these challenges is the creation of a platform or forum where Indigenous artists can convene to share experiences and lessons from engaging with the copyright system. Knowledge sharing of this kind would raise awareness of legal rights and remedies among Indigenous artists and enhance their bargaining positions in negotiations with potential licensees and lawyers. Such knowledge sharing could also help overcome collective action problems in Indigenous communities, thus greatly strengthening the possibility of coordinated legal strategies and the effective use of grassroots tactics (such as publicity campaigns) to help galvanize public discourse about the impact of misappropriation on Indigenous people.

B. PATENT LAW

Patent law, which protects new and useful inventions from exploitation without the patent holder's consent, has also struggled with the fundamentally communal character of TK and TCEs. Australia again presents a double-edged sword. Much Indigenous knowledge that might have been eligible for patent protection is already public for patent law purposes, thereby precluding Indigenous groups from applying for patent protection. In theory, this publicness should also limit third parties such as "bioprospectors" from obtaining patents for innovations that comprise only of the TK. But for reasons related to both patent doctrine and limitations inherent in the patent-administrative complex, such innovations have been patented anyway.

82. See generally SENTINA ET AL., *supra* note 79, at 12.

83. See, e.g., Rangi Hirini, *Indigenous Artist Faces Uphill Legal Battle After Polish Hotel Allegedly Stole Her Art*, NITV (Apr. 5, 2018, 8:34 AM), <https://www.sbs.com.au/nitv/nitv-news/article/2018/03/23/indigenous-artist-faces-uphill-legal-battle-after-polish-hotel-allegedly-stole> [<https://perma.cc/ELB8-YA92>].

84. See *id.*

Australia's patent landscape is similar to those of other advanced economies. Patents are granted under the Patents Act of 1990,⁸⁵ and there is, as in most member states of the World Trade Organization (WTO), a focus on the concept of "prior art" when deciding whether an invention is sufficiently novel to warrant patent protection.⁸⁶ IP Australia, the administrative authority responsible for patent administration, maintains the national patent database and is responsible for conducting research into publicly available materials, against which new patent applications are checked for compliance with all the statutorily prescribed eligibility requirements.⁸⁷ To obtain a patent, an invention must be useful, novel, and non-obvious.⁸⁸ To show that an invention is novel, the patent filer must demonstrate that there is no previously filed invention or publicly available information—that is, no prior art—that significantly overlaps with the invention being filed.⁸⁹

For Indigenous groups in Australia, patent protection is often most relevant in the context of biological materials. Indigenous groups commonly possess TK in respect of the medical properties of specific biological materials, yielding a potentially lucrative market for health-related products through patent protection.⁹⁰ But those groups face numerous challenges if they attempt to secure or enforce TK under the patent regime. For example, as noted earlier in the case of the Ngarrindjeri women, the resolute commitment to a publicly oriented patent system entails public disclosure of the invention, which may jeopardize the secrecy required to protect culturally sensitive or sacred TK.

But a bigger obstacle to patent protection is the prior art requirement.⁹¹ Numerous researchers, academic and otherwise, have publicly discussed Indigenous practices and have conducted research on plant varieties or Indigenous medical techniques, resulting in a substantial body of Indigenous prior art that would presumptively foreclose future grants of patent protection. On the one hand, this has a distinctly positive effect: it prevents opportunistic patent filers from attempting to obtain patent protection for inventions derived from TK⁹²—so-called "defensive protection."⁹³

85. *Patents Act 1990 (Cth)* (Austl.).

86. *See id.* s 7 ("Novelty"); Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, *supra* note 23, at 93–94.

87. *See Searching Patents*, IP AUSTRALIA, <https://www.ipaustralia.gov.au/patents/understanding-patents/searching-patents> [<https://perma.cc/6R9W-K38H>] (last updated Nov. 11, 2020).

88. *See Patents Act 1990 (Cth)* s 18 (Austl.).

89. *See id.* ss 7, 18.

90. For example, in the late 1980's the U.S. National Cancer Council discovered that Smokebush, a plant grown in coastal Western Australia used by Indigenous peoples for its healing properties, had the potential to be developed into an anti-HIV drug. There was an active ingredient in Smokebush: Conocurovone, which was then patented to the U.S. National Center Council. In the 1990's Amrad paid the Australian government \$1.5 million to secure access to the plant. Amrad had never entered into a benefit-sharing agreement with the Indigenous group, nor did the group receive any acknowledgement. This example was taken from Terri Janke, *From Smokebush to Spinifex: Towards Recognition of Indigenous Knowledge in the Commercialisation of Plants*, INT'L J. RURAL L. & POL'Y, 2018, at 0, 2.

91. *See* JANKE & SENTINA, *supra* note 29, at 91.

92. *See id.*

93. *Id.*; *see, e.g.*, Margo A. Bagley, *The Fallacy of Defensive Protection for Traditional Knowledge*, 58 WASHBURN L.J., 323, 325 (2019); Munzer & Raustiala, *supra* note 7, at 81–93.

On the other hand, Indigenous groups seeking protection today are thus precluded from enjoying the economic benefits of, and legal protection for, their own traditional knowledge through the patent system. The failure of a third party to obtain a patent due to prior art—an essential dimension of the public-welfare bargain in patent law—*converts* a putative property claim by Indigenous groups into a property claim for the public. As noted in Part I, the public’s property right in this regard is quintessentially referred to as the “public domain.”⁹⁴ This perverse outcome highlights one of the fundamental disadvantages of attempting to embed TK or TCEs within IP law. Every restriction preventing third parties from appropriating TK via the IP system equally restricts protection for Indigenous groups as the inventors. Worse, it *dispossesses* Indigenous groups from their knowledge assets because the public domain in IP belongs to no one and can be accessed or used by all without legal recourse.

Moreover, there is some empirical evidence that the prior art requirement may not even cut both ways equally. Instead, it constrains Indigenous groups more than it does opportunistic third parties. Researchers from New South Wales found that WIPO had records of 1,300 patents involving the use of sixty-six Australian plant species.⁹⁵ At least some of the patents acknowledge Indigenous use of those plants, but they disavow that this use “forms part of the common general knowledge in Australia.”⁹⁶ Where a party making such a disavowal fails to obtain an Australian patent, it might then turn to a different jurisdiction—say, another state or the United States—where there will be a different understanding of what comprises the “general knowledge.”⁹⁷ Arbitrage is especially stark in the case of plant varieties. Thus, while Indigenous groups, who are less likely to possess these transnational options, are inhibited from seeking defensive protection in patent law for TK, third parties may successfully file claims anyway and, if those claims fail, turn to forum shopping.⁹⁸

Australia’s defensive evocation of patent doctrines certainly is one means of protecting the value of the TK held by Indigenous groups.⁹⁹ But even aside from the threat of arbitrage, it comes at some cost to the innovation ecosystem—the

94. See OKEDIJI, *supra* note 3, at 1 (“The public domain is not a universal ‘gotcha!’ that justifies a ransom in the form of weak or symbolic protection of Indigenous peoples’ knowledge. Properly applied, the public domain does not constitute a barrier to the effective protection of traditional knowledge.”).

95. Daniel Robinson & Margaret Raven, *Identifying and Preventing Biopiracy in Australia: Patent Landscapes and Legal Geographies for Plants with Indigenous Australian Uses*, 48 AUSTRALIAN GEOGRAPHER 311, 317 (2017).

96. *Id.* at 322.

97. *See id.* at 324.

98. See Ruth L. Okediji, *Negotiating the Public Domain in an International Framework for Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, in PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 141, 155–57 (Daniel F. Robinson et al. eds., 2017) (describing the Kakadu plum patent granted in the United States but denied in Australia).

99. For example, a patent application filed by Mary Kay in 2007 for the use of Kakadu plum extracts in skin care was rejected by IP Australia for obviousness and lack of novelty because evidence of the traditional uses of the plum by the Mirarr people constituted prior art. *See SENTINA ET AL.*, *supra* note 79, at 15.

foreclosure of knowledge from the public and uncertainty for researchers or prospective patent applicants.¹⁰⁰ Moreover, its fundamental shortcoming remains the lack of affirmative rights to benefit from third-party uses or to prevent moral and spiritual harm.

Proposals at the federal level to shore up the patent system in response to TK claimants suffer similar limitations. The 2002 Nationally Consistent Approach for Access to and Utilization of Australia's Native Genetic and Biochemical Resources,¹⁰¹ a national policy template, produced only a set of nonbinding, general principles that failed to prevent the proliferation of inconsistent state laws.¹⁰² In a similar vein, IP Australia has considered introducing a disclosure-of-origin requirement for TK embodied in patented technologies and plant breeders' rights applications.¹⁰³ If that reform proceeds, it would not directly prevent inappropriate patents. Instead, it would give Indigenous groups and civil society organizations ammunition to use in negotiations or public discussions around the use of TK.¹⁰⁴

By comparison, a more substantial if still partial approach is represented by New Zealand's Patents Act of 2013, which requires the Commissioner considering a patent application to consider advice from a Māori advisory committee as to whether an invention claimed in a patent application is derived from Māori TK or from plants or animals, and if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values.¹⁰⁵ This innovation at the institutional level provides direct legal force to shape the interface of TK and New Zealand's IP system, a force that is still taking shape in Australian IP protections of TK. A series of initiatives in Australia suggests that a similar turn to the administrative agency may yield notable gains.

Australian states have also made incremental attempts to strengthen the patent system to protect Indigenous people's knowledge. In several Australian states, access and benefit-sharing (ABS) laws require those who access biological materials to disclose such use and what, if any, benefit sharing with the relevant

100. See OKEDIJI, *supra* note 3, at 3 (“The public domain appears to be a rhetorical tool used by transnational actors as a response to attempts by traditional knowledge holders to restrain unbridled access to their knowledge and resources. But the protection of traditional knowledge is not an existential threat to the global public domain because there is no such creature” (footnote omitted)).

101. NAT. RES. MGMT. MINISTERIAL COUNCIL, NATIONALLY CONSISTENT APPROACH FOR ACCESS TO AND UTILISATION OF AUSTRALIA'S NATIVE GENETIC AND BIOCHEMICAL RESOURCES (2002).

102. See Charles Lawson, Fran Humphries & Michelle Rourke, *Legislative, Administrative and Policy Approaches to Access and Benefit Sharing ('ABS') Genetic Resources: Digital Sequence Information ('DSI') in New Zealand and Australian ABS Laws*, INTELL. PROP. F., Dec. 2019, at 38 (2019) (describing the existing “patchwork”).

103. See IP AUSTL., PROTECTION OF INDIGENOUS KNOWLEDGE IN THE INTELLECTUAL PROPERTY SYSTEM: WORK PLAN 2020–2021, at 6 (2020).

104. See Fisher, *supra* note 7, at 1574 (observing that a mandatory-disclosure regime “contemplates that the nations and indigenous groups from which traditional knowledge is taken would be active participants in the new regime, rather than mute beneficiaries of it”).

105. Patents Act 2013, ss 226–227 (N.Z.).

Indigenous group has occurred.¹⁰⁶ The objective of these laws seems to be the creation of incentives that facilitate market entry for new products. While the laws do not require patent applicants to engage in benefit sharing when using TK, the idea is that, by forcing disclosure, downstream consumers of the inventions might express a preference for outputs made by those who fairly accessed the biological materials and associated TK. At the very least, advocates hope that concern over generating consumer ill will may incentivize some patent applicants to engage in some form of benefit sharing. Because these laws do not alter the existing distribution of property rights, however, there is no guarantee the hoped-for benefits will accrue.

In the absence of substantive, federal-level reform, the regulator, IP Australia, has also undertaken administrative initiatives with the aim of reducing obstacles Indigenous groups face in accessing the patent system. One such obstacle is cost, and a number of initiatives to subsidize access to the patent system have been considered. In addition, low levels of public awareness about patent rights and remedies obstruct access to the patent system. IP Australia engaged in a campaign to educate Indigenous groups about their patent rights, including how to file for patents and what types of inventions are eligible for protection.¹⁰⁷ These initiatives are designed to bridge the knowledge gap that presents a set of challenges to Indigenous use of the patent regime.¹⁰⁸

Given that so much TK has been publicly disclosed, Indigenous groups may not easily benefit from patent protection despite a greater capacity to access and utilize the system. On the other hand, greater awareness of prospects under the patent system may increase the likelihood that Aboriginal communities will file notices of opposition to patent applications with claims that encompass TK.¹⁰⁹ Australian patent law also permits third parties to file requests for post-grant reexamination. However, filing fees may be prohibitive for communities with limited resources.¹¹⁰

Another proposed initiative is the creation of a national TK database that would serve simultaneously as a prior art resource for the patent office and a record of ownership for Indigenous communities. The database would be designed, administered, and managed by a national trust or by Indigenous people directly and could also facilitate the transmission of information to future generations.¹¹¹ There are several important considerations regarding a database mechanism. First, what would be its legal status—private property or a public resource?

106. See, e.g., *Biological Resources Act 2006* (NT) ss 28–29 (Austl.); *Biodiversity Act 2004* (Qld) ss 42–43 (Austl.).

107. See IP AUSTRALIA, INNOVATE RECONCILIATION ACTION PLAN 2015–2018, at 3–4 (2015).

108. See *id.*

109. See *Patents Act 1990* (Cth) s 27 (Austl.) (permitting third parties to file patent oppositions based on an application's failure to meet the requirement of novelty or an inventive step).

110. See *Patents Act 1990* (Cth) s 97(2) (Austl.); *Patent Regulations 1991* (Cth) reg 9.2 (Austl.) (describing the requirements for filing a request for reexamination of a patent).

111. See JANKE & SENTINA, *supra* note 29, at 9–10. See generally IP AUSTRALIA, *supra* note 107 (discussing IP Australia's plan for building partnership, knowledge and respect for Indigenous people).

Second, what would be the legal implications for disclosing TK in the database—would such disclosure strip communities of any legal or equitable interests? And third, what would be the consequences of wrongful access or use of the database? These all are difficult legal questions requiring stylized responses particularly suitable to the common law’s appeal to both precedent and equity.

In theory, national databases could be *both* private and public, borrowing from real property analogs that allow easements on private property to secure a specific public interest. The common law doctrine of *parens patriae* might also be a useful way to address the dynamic welfare interests that attend both to the public’s interest in a well-functioning patent system and its interest in equitable treatment of Indigenous populations. The state could hold the database in trust for the Indigenous community and be consistent with international obligations. Should litigation arise over controversial uses of the database, equity could supply prescriptive norms to confront the competing interests and exclude uses contrary to or subversive of the interests of Indigenous groups. In short, at least on a case-by-case basis, courts could adjust the policy levers in the direction most consistent with the nature of the harm posed by a given set of facts.

Yet, a national database or trust instrument might provoke opposition from Indigenous groups who have historically suffered mistreatment via the administration of similar government arrangements. These considerations augur in favor of a privately administrated database, potentially supported with government funds and technical assistance.¹¹²

There are strong reasons to support defensive protection for TK, especially because identifying inventions that fail to meet the criteria for patentability is an important component of preserving the public bargain that is fundamental to patent systems all over the world. Nonetheless, the benefits of “defensive protection” may be viewed as another way in which Indigenous people subsidize the modern system of knowledge production while they are also persistently excluded from its benefits and harmed by its prevailing normative framework. It will be important that TK databases—and the laws that govern them—serve the discrete interests of the more vulnerable claimants unless clearly identified public harms are at stake.

C. TRADEMARK LAW

In addition to the dominant copyright and patent regimes, other IP categories and supplemental legal regimes offer potential options for the protection of Indigenous people’s knowledge. These regimes offer legal resources, some yet to be tested, that could meaningfully strengthen Indigenous groups, particularly

112. Proposals with such features have been submitted at various sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which “undertakes text-based negotiations to finalize an agreement on an international legal instrument(s) for the protection of traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs).” *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/igc/> [<https://perma.cc/XU5X-L9TP>] (last visited Aug. 22, 2021).

when those resources are strategically deployed in court. They offer additional strategies to both governments and Indigenous people for the exercise of power in markets where TK is most vulnerable to abuse. Specifically, the more deeply entrenched an IP category is in common law rules, the greater the flexibility to regulate TK so as to more fully accommodate the values central to the Indigenous knowledge ecosystem. Trademark law provides the quintessential example.

Trademarks are concerned with the protection of marks or symbols firms use in the market to distinguish their goods and services. For Indigenous groups, trademark law has the benefit of group registration, but it is limited by its fundamentally commercial purpose.

The Australian Trade Marks Act of 1995 operates similarly to the regimes in the United States and Canada: an applicant submits a mark to an examiner that ensures compliance with the formalities of registering trademarks as well as substantive requirements, such as lack of overlap with existing marks.¹¹³ Requiring that certain trademarks be attached to traditional cultural works may be one way of “ensuring authenticity and culturally appropriate use,”¹¹⁴ similar to the way in which the “Toi Iho” trademark has been used in New Zealand to identify authentic Māori artworks.¹¹⁵ A feature unique to trademarks is that they can be owned collectively, without association in a corporate form, following a common law tradition.¹¹⁶ There is a proposal currently under consideration to preclude registration of a trademark that incorporates a TCE, particularly where incorporation is offensive. On its surface, the proposal is a call to embed defensive TK protection within trademark law. This proposal, because it might occur through regulation, suggests that administrative (rather than legislative) rulemaking could also be an effective tool for constructing a positive trademark regime for TK.¹¹⁷

Trademark rights in TK do, however, come with one significant limitation: rights in the mark typically require commercial use.¹¹⁸ Many Indigenous groups do not intend to use their TCEs in commerce or might even be actively trying to prevent such use due to a concern that doing so will dishonor the TCEs or otherwise dilute their value.

An additional barrier to trademark protection is the cost and legal complexity of the filing system. IP Australia has published a comprehensive guide specifically designed to assist Indigenous groups and individuals in registering TK trademarks.¹¹⁹ This guide identifies which types of TK are likely to be eligible for

113. See *Trade Marks Act 1995* (Cth) s 31 (Austl.).

114. SENTINA ET AL., *supra* note 79, at 19.

115. See *Tena Koutou Katoa Nau Mai, Piki Mai, Haere Mai Welcome to Toi Iho – 2021*, TOI IHO, <http://www.toiio.co.nz/> [<https://perma.cc/7XXW-LGH9>] (last visited Aug. 22, 2021).

116. See *Trade Marks Act 1995* (Cth) s 28 (Austl.).

117. See IP AUSTR., *supra* note 103, at 5–6, 8.

118. See *Trade Marks Act 1995* (Cth) s 59 (Austl.) (allowing a trademark registration to be opposed on the ground that the mark would not be used “in relation to the goods and/or services specified in the application”).

119. See IP AUSTR., *NANGA MAI ARUNG: Dream Shield A GUIDE TO PROTECTING INTELLECTUAL PROPERTY FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE* (2014).

protection and summarizes precedential cases of successful protection.¹²⁰ But although the guide is intended to be helpful, the seeming ease with which it depicts the trademark process belies the involved and expensive interaction between a trademark applicant and IP Australia that characterizes trademark prosecution. Important considerations include the cost and impact of opposition proceedings, the possibility of denial for failure to conform to one or more statutory requirements, and the reality that trademarks can be subject to ownership by more than one firm so long as each firm applies the mark to different classes of goods or services. Each of these factors complicates the analysis of the regime's appropriate fit for TK and the question of whether Indigenous people are sufficiently equipped for effective engagement with the process. Even beyond the economic cost of oppositions, Indigenous people must also weigh the risks of divulging information (including other TK) in publicly accessible documents, of revealing internal community processes to the government, and of interacting in spaces or in ways that could occasion further subordination of Indigenous sovereignty.

D. TRADE PRACTICES

TCEs currently receive limited protection under the Competition and Consumer Act of 2010.¹²¹ Remedies are therefore available for “[m]isleading or deceptive conduct” when products are falsely marketed as deriving from or endorsed by Indigenous communities.¹²² In *Milpurrurru v Indofurn*, for example, the court granted injunctive relief to prevent the further sale of imported Vietnamese carpets that falsely claimed to be “designed by Aboriginal artists” who were “paid royalties on every carpet sold.”¹²³ But while the broad prohibition against conduct that is “likely to mislead or deceive” may provide some protection against inauthentic Indigenous works, it offers limited recourse for goods that are not claimed to be authentic.¹²⁴

For the latter category of works—works that “look and feel” Aboriginally made (because they simulate Indigenous designs) but bear “Made in [foreign country]” labels—a network of NGOs has lobbied the Australian government to introduce specific legislation to prevent this form of misuse.¹²⁵ According to the campaign, fake art products can be damaging in several ways: they may misappropriate and disrespect Aboriginal and Torres Strait Islander culture in ways that

120. *Id.* at 7; *see, e.g., id.* at 13–15.

121. *Competition and Consumer Act 2010* (Cth) (Austl.).

122. *See id.* ss 56BN–56BO.

123. [1994] FCA 975 (23 October 2018) (Federal Court) (Austl.).

124. False and misleading representations may be impliedly conveyed by the surrounding circumstances; they do not need to be expressly made. In other words, a statement that is literally true and accurate may nevertheless carry with it a false representation. *See Australian Competition & Consumer Comm'n v Birubi Art Pty Ltd* [2018] FCA 1595 (23 October 2018) (Federal Court) (Austl.) (concerning the false impression of Australian origin conveyed by the “Aboriginal” appearance of certain artisan products, which did not bear labels showing their country of origin, Indonesia).

125. *See Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017* (Cth) sch 1 item 3 (Austl.).

may breach customary laws; they deprive Indigenous communities of artistic and other economic opportunities; they mislead consumers; they hinder intergenerational cultural education;¹²⁶ and they disadvantage Australian businesses that ethically source authentic cultural products from Indigenous communities.¹²⁷ Nonetheless, all attempts at legislation to target these harms have failed.¹²⁸

As in other areas, voluntary codes can supplement or innovate around the limits of legal norms with a lasting impact on trade practices. The Australian Indigenous Art Code is a voluntary set of guidelines containing broad prohibitions against “misleading or deceptive conduct” by art dealers with respect to the “authenticity or provenance” of an artwork, its place of origin, and whether it has been produced by an Indigenous artist.¹²⁹ While helpful in establishing ethical benchmarks, advocacy groups such as the Arts Law Centre continue to lobby the Australian government to amend the Competition and Consumer Act of 2010 to

126. See House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (Completed Inquiry, December 2018) 9.

127. See ARTS L. CTR. OF AUSTRALIA & INDIGENOUS ART CODE, *FAKE ART HARMS CULTURE 2* (2017).

128. In 2017, the Australian Parliament considered, but did not pass, the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill, which would have amended the Competition and Consumer Act of 2010. See Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth) (Austl.). The amendment would have prohibited, in trade or commerce, the supply or offer to supply “anything to a consumer that includes an indigenous cultural expression” unless the thing was “supplied by, or in accordance with an arrangement with, each indigenous community and indigenous artist with whom the indigenous cultural expression is connected” and was made in Australia. *Id.* at sch 1 item 3. The amendment was notable for two reasons: first, the recognition of Indigenous cultural expression “whether through images, form or any other medium” acknowledged the value of TCEs not fixed in material form (for example, traditional songs or dances) and therefore disregarded by traditional copyright law. *Id.* at sch 1 item 1. Second, the requirement for consent from not only Indigenous individuals but from Indigenous *communities* reflects a broader conception of cultural ownership and mirrors the prior informed consent requirements of the Nagoya Protocol. Requiring prior consent by the relevant Indigenous community allows it to retain control and dignity in the cultural product and creates incentives to engage in benefit sharing.

A similar bill was introduced in February 2019. The Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill of 2019 would have amended the Competition and Consumer Act of 2010 to make it an offence to supply or offer commercial goods that include Indigenous cultural expression unless supplied by, or in accordance with a transparent arrangement with, an Indigenous artist or relevant Indigenous community. Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019 (Cth) sch 1 item 13 (Austl.). The Bill was submitted to the Senate Environment and Communications Legislation Committee for further study. In April 2020, the Committee submitted its final report to Parliament with a recommendation that the Commonwealth develop *sui generis* legislation rather than amend the competition and consumer law regime. See Environment and Communications Legislation Committee, Parliament of Australia, *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (Report, April 2020) 24–25. The Committee claimed to support “comprehensive, standalone legislative framework to protect the various complex forms of Indigenous cultural expression,” but resorted to difficulties of designing and drafting adequate legislation to justify why it could not recommend a more incremental amendment to the consumer law. *Id.* at 24.

129. *Indigenous Art Code: A Code to Promote Fair and Ethical Trade in Works of Art by Indigenous Artists*, INDIGENOUS ART CODE 2, <https://indigenousartcode.org/wp-content/uploads/2017/03/Indigenous-Art-Code.pdf> [<https://perma.cc/FGW9HHLK>] (last visited Aug. 22, 2021).

make it “an offence to supply or offer commercial goods . . . that include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community.”¹³⁰ One advantage of a legislative amendment of this kind is that it would leverage the expertise and enforcement powers of an existing regulator (the Australian Competition and Consumer Commission) and so avoids the need for creating a new administrative regime.¹³¹

III. TRADITIONAL KNOWLEDGE BEYOND INTELLECTUAL PROPERTY LAW

Even when relying on existing legal frameworks, those frameworks should not be limited to IP. Instead, a broader lens is useful. This Part therefore examines other tools for protecting TK and TCEs within Australia’s existing system: privacy law, biodiversity conservation, cultural heritage law, fiduciary relationships, native title, and soft law “plus” mechanisms. Although several of these tools are more tailored to the distinctive concerns presented by TK, they still fall far short of comprehensive protection.

A. PRIVACY LAW

First, it is worth considering how privacy law might be put in service to TK and TCEs, not least given the value of both public exposure *and* privacy for Indigenous self-determination. Within the broad spectrum of what constitutes TK, there are significant quantities of sacred knowledge that cannot be shared outside the community.¹³² The disclosure of such knowledge, for example, may violate customary laws and practices which delineate and preserve internal community relationships. When knowledge is openly accessible rather than carefully modulated, it loses its capacity for intergenerational social integration.¹³³ The forced disclosure of sacred information to government agencies not only reinscribes historical colonial power relationships¹³⁴ but also heightens the vulnerability of such information to misappropriation by third parties. For this reason, as indicated earlier, the protection of much TK depends upon its nondisclosure, in direct conflict with the quid pro quo of patent law. In this context, at least three options are available for maintaining the strategic privacy of TK.

First, a statutory or constitutional right to privacy could be extended to Indigenous groups and thus used to protect traditional knowledge from disclosure. Privacy enhances the capacity of a group to enjoy collective autonomy and dignity by controlling cultural heritage and preserving intracommunity

130. ARTS L. CTR. OF AUSTL. & INDIGENOUS ART CODE, *supra* note 127, at 4.

131. *See id.* at 5.

132. JANKE & SENTINA, *supra* note 29 (“There may be sacred or secret knowledge that is not to be known . . .”).

133. Kay Mathiesen, *A Defense of Native Americans’ Rights over Their Traditional Cultural Expressions*, 75 AM. ARCHIVIST 456, 476 (2012).

134. *See generally* Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 CULTURAL GEOGRAPHIES 153 (2009) (arguing that certain legal strategies have reworked instead of reversed colonial social relations).

relationships.¹³⁵ A collective right to cultural privacy for Indigenous Australians is arguably not only a moral imperative, demanded by the historical context of forced assimilation, cultural appropriation, and continuing social and economic disempowerment¹³⁶ but an international moral obligation. Thus, UNDRIP specifically invokes the right of Indigenous peoples to “maintain, protect, and have access in privacy to their religious and cultural sites.”¹³⁷

In Australia, however, privacy is defined only in individual terms and suffers from a series of systemic weaknesses, including the absence of constitutional protection for human or due process rights, the absence of a “privacy tort,” “narrow definitions of ‘personal information,’” and “significant exemptions” to federal privacy legislation.¹³⁸ Although the Privacy Act of 1988 defines “sensitive information” to include religious and philosophical beliefs,¹³⁹ which could theoretically be interpreted to include Indigenous cultural beliefs, the Act is designed to “promote the protection of the privacy of individuals,” not groups.¹⁴⁰ As early as 1995, the Aboriginal and Torres Strait Islander Privacy Awareness Consultation and Research Project found that federal privacy legislation disempowered Aboriginal communities by failing to recognize the literacy hurdles that often prevented Aboriginal Australians from completing the paperwork necessary to access government entitlements, which led to dependency on and the sharing of personal information with intermediaries.¹⁴¹ The Consultation also found that “[n]on-Aboriginal people find it hard to understand why Aboriginal people would rather not talk about these matters. Greater respect for Aboriginal concerns about the privacy implications of secret knowledge . . . was called for.”¹⁴²

Almost twenty-five years later, the absence of a legal right to privacy in the context of culture reflects not only legislative inertia but also the judiciary’s continued reluctance to recognize a tort of invasion of privacy.¹⁴³ In *Australian Broadcasting Corporation v Lenah Game Meats*, Chief Justice Gleeson, while not entirely foreclosing the possibility, nevertheless opined that “the lack of precision of the concept of privacy is a reason for caution in declaring a new tort,” in addition to “the tension that exists between interests in privacy and interests in free speech.”¹⁴⁴ Similar reluctance has been echoed by appellate courts in

135. See Mathiesen, *supra* note 133.

136. See *id.* at 473–76.

137. G.A. Res. 61/295, *supra* note 27, at 5.

138. AUSTRALIAN PRIVACY FOUNDATION, *PRIVACY IN AUSTRALIA: BRIEF TO UN SPECIAL RAPPORTEUR ON RIGHT TO PRIVACY 2–3* (2018).

139. *Privacy Act 1988* (Cth) s 6 (Austl.) (emphasis omitted).

140. *Id.* s 2A(a).

141. See generally ROY MORGAN RSCH. CTR. PTY. LTD., “IT’S LIKE DELVING INTO YOUR SOUL”: ABORIGINAL AND TORRES STRAIT ISLANDER PRIVACY AWARENESS CONSULTATION AND RESEARCH (1995).

142. See *id.*

143. See *Australian Broad Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63 (High Court) (Austl.).

144. *Id.*

Kalaba v Commonwealth,¹⁴⁵ and *Sands v South Australia*.¹⁴⁶ Continued judicial preference for the equitable doctrine of breach of confidence and the reluctance of litigants to prolong proceedings on the basis of uncertain or novel legal arguments (rather than well-established causes of action) are likely to further delay the introduction of a privacy tort in Australia.¹⁴⁷

State legislation has taken an incremental step forward. All sacred sites in the Northern Territory, for example, are protected by the Northern Territory Aboriginal Sacred Sites Act of 1989,¹⁴⁸ which contains strict secrecy provisions. It is an offense, punishable by 400 penalty units or imprisonment for two years, to “make a record of, or communicate to a person, information of a secret nature according to Aboriginal tradition.”¹⁴⁹ Naturally, a limitation of this protection lies first in government recognition of certain land as a “sacred site,” and protective legislation varies greatly by state. However, statutory acknowledgment of Indigenous secrecy needs is certainly a step in the right direction.

Second, the administrative regulations governing patent law should require the maintenance of a private database of TK that, like prior art, can support the rejection of a patent application, but unlike prior art, does not form part of the public domain.¹⁵⁰ Once an element of TK has been used by a patent examiner to determine novelty or nonobviousness questions, it must remain within the private sphere of the database and be withheld from the public at large. The creation of a private TK database would also frame privacy in positive terms as the active construction of safe spaces for empowerment rather than the negative act of avoiding surveillance or misappropriation.¹⁵¹

Policymakers will need to determine where and how such a database should be maintained. Self-hosting, although granting full control over the data to Indigenous communities, may be prohibitive for those who lack technical expertise and reliable access to digital infrastructure and secure facilities. A third-party server (for

145. *Kalaba v Commonwealth* [2004] FCA 763 (Federal Court) (Austl.) (“[T]he weight of authority at the moment is against [a tort of privacy].”).

146. *Sands v South Australia* [2013] SASC 44 (South Australia Supreme Court) (Austl.) (“[I]t would require a further development in the law to acknowledge the existence of a tort of privacy in Australia.”).

147. See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) 55.

148. *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Austl.).

149. *Id.* s 38(1)(a). The Act applies to information that is “acquired by reason of . . . membership of, or employment in the service of, the [Aboriginal Areas Protection] Authority or involvement in a procedure for the purposes of this Act.” *Id.*

150. See Okediji, *supra* note 7, at 314 (“[A] qualified disclosure of origin regime . . . would preclude the enforcement of any IP rights for innovations that utilize traditional knowledge without authorization.”); Fisher, *supra* note 7, at 1574.

151. See generally Jason C. Young & Michael P. Gilmore, *Subaltern Empowerment in the Geoweb: Tensions Between Publicity and Privacy*, 46 ANTIPODE 574 (observing the competing conceptualizations of publicity and legibility as opening a group to either empowerment or exploitation). Indigenous people have had longstanding concerns over database protection for TK, including in negotiations over an international TK framework. See, e.g., Catherine Saez, *WIPO: Databases to Protect GRs, TK, Useful but Some Controversy*, WORLD INTELL. PROP. ORG. (June 29, 2015), <https://www.ip-watch.org/2015/06/29/wipo-databases-to-protect-grs-tk-useful-but-some-controversy/> [<https://perma.cc/9D2L-YGVL>].

example, hosted by an academic institution or a private company) cedes some control over the data to non-Indigenous groups, which then requires careful negotiation of the terms of service with respect to the ownership of, and access to, the information contained in the database.¹⁵²

Third, the law of trade secrets offers significant advantages to Indigenous communities over copyright and patent law due to the absence of originality and novelty requirements and due to the capacity for protection in perpetuity. Private contractual arrangements imposing a duty of confidentiality upon recipients of traditional knowledge have successfully protected TK from disclosure in the past. In *Foster v Mountford*, for example, members of the Pitjantjara Council obtained an interlocutory injunction, on the basis of breach of confidence, to restrain the publication of a book containing information which, if revealed to the women, children, and uninitiated men of their community, might undermine its social stability.¹⁵³ The court found that the information was of deep religious and cultural significance and that its publication amounted to a breach of confidence.¹⁵⁴ It therefore granted an injunction to prevent the sale of the book as post-publication damages were not considered to be an appropriate remedy.¹⁵⁵ This case was the first of its kind to place Indigenous cultural knowledge on the same level as commercial or trade secrets and to acknowledge “relative” secrecy between “insiders” and “outsiders.”¹⁵⁶ A significant disadvantage of relying on breach of confidence, however, is that the duty of confidentiality only binds the parties to the agreement, not third parties who may obtain access to the knowledge through unauthorized means. Moreover, although an equitable action for breach of confidence can prevent the disclosure of private information, it may be less helpful *after* such information has been disclosed because it is unclear whether a plaintiff can obtain compensation for emotional distress.¹⁵⁷

B. CROSS-CATEGORY REGULATION: BIODIVERSITY CONSERVATION

In 1999, the Environment Protection and Biodiversity Conservation Act (EPBC) was enacted, codifying a prior informed-consent requirement for the use of TK.¹⁵⁸ This would appear to mirror the consent right enshrined in UNDRIP, but the implementing regulations dramatically narrow that right. Thus, the regulations specify that the prior informed-consent requirement is paired explicitly with

152. See Young & Gilmore, *supra* note 151, at 585–86.

153. (1977) 14 ALR 71, 72, 76 (Northern Territory Supreme Court) (Austl.); Valentina Vadi, *Intangible Heritage: Traditional Medicine and Knowledge Governance*, 2 J. INTELL. PROP. L. & PRAC. 682, 686 (2007).

154. *Foster v Mountford* (1977) 14 ALR at 74–75.

155. *Id.* at 75.

156. See Christoph Antons, *Foster v Mountford: Cultural Confidentiality in a Changing Australia*, in LANDMARKS IN AUSTRALIAN INTELLECTUAL PROPERTY LAW 110, 116–22 (Andrew T Kenyon et al. eds., 2009).

157. See Australian Law Reform Commission, *supra* note 147, at 263–64.

158. See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 305(6)(a) (Austl.).

a benefit-sharing requirement,¹⁵⁹ thus sharply limiting its scope. The legislation creates a permit system, where the government must grant a permit to individuals or companies that wish to access biological resources.¹⁶⁰ The EPBC regulations also apply only to government land (“Commonwealth Areas”) and specifically refer to the “taking of biological resources and native species for research and development,” further limiting the regime’s applicability.¹⁶¹ In addition, the “access provider” who must provide consent to the use of biological resources is narrowly defined, usually refers to the Commonwealth, and only applies to Indigenous communities where they are “native title holders.”¹⁶² These definitional limits may exclude native title claimants or native title holders with nonexclusive possession, raising concerns about the interaction between biodiversity legislation and land tenure laws.¹⁶³

Biodiversity laws that exist at the state level suffer from similar restrictions and are additionally undermined by jurisdictional arbitrage.¹⁶⁴ The state law that has gone furthest is Queensland’s 2004 Biodiscovery Act, which was amended in October 2020 to expressly cover traditional knowledge.¹⁶⁵ Nominally, no one can access TK for the purpose of biodiscovery except by agreement with the custodians of the TK.¹⁶⁶ However, the Queensland Minister for the Environment has wide discretion to release a code of practice, which, if complied with, exempts a party from this requirement.¹⁶⁷ At the time of writing, the code was in development.¹⁶⁸ In short, a hybridization of public interests and Indigenous interests appears to be the least desirable regulatory option. In addition to directly embedding the state in the decisionmaking process over aspects of TK, it also furthers incertitude over the legitimate authority of Indigenous communities over their knowledge assets.

159. Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) regs 8A.08, 8A.10 (Austl.).

160. *See id.* reg 17.03A(6) (requiring a benefit-sharing agreement with the access provider in order to “access biological resources for commercial purposes”).

161. DANIEL F. ROBINSON, UNITED NATIONS UNIV., TRADITIONAL KNOWLEDGE AND BIOLOGICAL PRODUCT DERIVATIVE PATENTS: BENEFIT-SHARING AND PATENT ISSUES RELATING TO CAMU CAMU, KAKADU PLUM AND AÇAÍ PLANT EXTRACTS 7 (2010).

162. Environment Protection and Biodiversity Conservation Regulations 2000, reg 8A.04(1).

163. Fran Humphries, Daniel F Robinson & Heron Loban, *Implications of Indigenous Land Tenure Changes for Accessing Indigenous Genetic Resources from Northern Australia*, 34 *Env’t Plan. L.J.* 560, 565 (2017).

164. *See, e.g., Biodiscovery Act 2004* (Qld) (Austl.); *Biological Resources Act 2006* (NT) (Austl.); *Biodiversity Conservation Act 2016* (WA) (Austl.); *Biodiversity Conservation Act 2016* (NSW) (Austl.).

165. *Biodiscovery and Other Legislation Amendment Act 2020* (Qld) s 10 (Austl.).

166. *Id.*

167. *See id.*

168. *Traditional Knowledge and Biodiversity*, BUS. QUEENSL. (May 31, 2021), <https://www.business.qld.gov.au/industries/science-it-creative/science/biodiscovery/traditional-knowledge> [<https://perma.cc/E7X8-2DY6>].

C. CULTURAL HERITAGE LAW

The Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 was designed to protect “significant” Aboriginal areas and objects from being used or treated in a manner “inconsistent with Aboriginal tradition,” for example, through injury or desecration.¹⁶⁹ Although, in theory, this legislation could be used to protect the sites of Aboriginal rock art and other areas of cultural significance, it provides the relevant cabinet minister with significant discretion to deny applications for protection or preservation, considering the likely impact on the “proprietary or pecuniary interests” of non-Aboriginals.¹⁷⁰ Indeed, after several years of litigation under the Heritage Protection Act, in which courts were unable to decide whether the development of a bridge in South Australia would desecrate Aboriginal sites,¹⁷¹ the Australian government eventually passed the Hindmarsh Island Bridge Act in 1997, exempting the bridge development from the heritage protection process altogether.¹⁷² Unsurprisingly, Aboriginal Australians have subsequently placed little faith in the capacity of cultural heritage legislation to protect TCE and TK.¹⁷³ Similar skepticism about cultural heritage laws abound in global spaces.

Australia, like the United States and Canada, is not a party to the Convention for the Safeguarding of the Intangible Cultural Heritage.¹⁷⁴ This reflects a trend among the same set of settler-colonial countries to be reluctant to ratify international instruments that support the rights of Indigenous people.¹⁷⁵ Simultaneously, however, the legal apparatus of cultural heritage has provoked criticisms, such as that it provides a pretext for governments not to also consider the material well-being of Indigenous groups.¹⁷⁶ Such criticisms dovetail with critiques of discussions about the value of diversity as a “containment strategy” for neutering more challenging claims about the need to redress historic injustices.¹⁷⁷ This suggests, at a minimum, that cultural-heritage treaties and implementing legislation may be blunt tools to address the special concerns and legal harms associated with violations of TK and TCEs by third parties.¹⁷⁸ Indeed, they may exacerbate those harms

169. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 3(1), (2)(a)(i), (iii) (Austl.) (emphasis omitted).

170. *Id.* at s 12(1)(c).

171. For more about this litigation, see generally James F. Weiner, *Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair*, 5 J. ROYAL ANTHROPOLOGICAL INST. 193, 195–200 (1999).

172. See Graber, *supra* note 12, at 23.

173. See *id.*

174. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N. T.S. 3.

175. See BRIAN Z. TAMANAHA, LEGAL PLURALISM EXPLAINED: HISTORY, THEORY, CONSEQUENCES 100 (2021) (observing the same reluctance in respect of UNDRIP).

176. See DEREK GILLMAN, THE IDEA OF CULTURAL HERITAGE 93–94 (2001).

177. SARA AHMED, ON BEING INCLUDED: RACISM AND DIVERSITY IN INSTITUTIONAL LIFE 53 (2012).

178. For a delineation of harms that flow from TK misuse, see Okediji, *supra* note 48, at 427.

by absorbing rights claims into a more diffuse conception of culture that undermines the distinct identity and developmental concerns of Indigenous peoples.

D. FIDUCIARY LAW

Consistent with my earlier claim about the common law's utility for TK, in some circumstances courts in Australia have used fiduciary law to secure communal interests in IP that an individual had wrongfully acquired in a TCE. In *Bulun Bulun v R & T Textiles*, the Federal Court found a fiduciary relationship between an artist, Mr. Bulun Bulun, and the Ganalbingu people.¹⁷⁹ The court reasoned that the fiduciary relationship existed because of Mr. Bulun Bulun's use, with permission, of the ritual knowledge of the Ganalbingu people and his "embodiment of that knowledge within [his] artistic work."¹⁸⁰ The court further reasoned that the permission had only been granted based on the Ganalbingu people's trust and confidence in Mr. Bulun Bulun.¹⁸¹ As a result, Mr. Bulun Bulun bore "obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu [p]eople."¹⁸²

Importantly, although the relationship between Mr. Bulun Bulun and the Ganalbingu people had imposed a fiduciary obligation on the former to protect the ritual knowledge he had been allowed to use, this obligation did not vest an equitable interest in the Ganalbingu people in the ownership of the copyright in the artwork. Rather, the Ganalbingu people only had a right *in personam* to bring an action against Mr. Bulun Bulun in the event of a breach of his fiduciary obligations.¹⁸³ Notwithstanding this caveat, judicial recognition of a fiduciary relationship between an artist and the Indigenous community from which his or her art is drawn represents a significant milestone in legal protection for TCEs. While future courts could apply this logic narrowly, for example, only to relationships such as the one between Mr. Bulun Bulun and the Ganalbingu people, it could also be read more broadly to encompass many members (or nonmembers) of Indigenous groups engaged in the creation of TCEs. Carefully designed fiduciary trusts in the use of TCEs could produce levels of control over impermissible exploitation of illegally (or even legally) obtained TCEs, which would achieve a qualitatively stronger effect for the protection of the broader social and cultural interests that are at stake for Indigenous communities.¹⁸⁴ Such a private law tool would accomplish significant improvements over what copyright law currently offers.

179. (1998) 157 ALR 193, 210 (Federal Court) (Austl.).

180. *Id.* at 209.

181. *Id.*

182. *Id.* at 211.

183. *Id.*

184. See Sally McCausland, *Protecting Communal Interests in Indigenous Artworks After the Bulun Bulun Case*, INDIGENOUS L. BULL., July 1999, at 4, 5; Jane Anderson, *The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill*, 27 U. N.S.W. L.J. 585, 593–96 (2004).

E. NATIVE TITLE

Prior to the recognition of native title in 1992, the doctrine of *terra nullius* (no man's land) was used to legitimate Britain's colonization of Australia on the basis that the land was never conquered but rather "settled," as it was "practically unoccupied, without settled inhabitants or settled law."¹⁸⁵ The doctrine of *terra nullius* effectively erased Indigenous occupancy of land and systems of social organization for failing to reflect the static structure of European land settlement.¹⁸⁶ *Terra nullius* was overturned in *Mabo v Queensland (Mabo No. 2)*, in which the High Court held that the Australian common law could accommodate the property interests of Indigenous legal and social systems that preexisted colonization.¹⁸⁷ Native title was shortly after placed on a legislative footing and defined as

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law of Australia.¹⁸⁸

As early as 1993, the explicit statutory inclusion of "hunting, gathering, [and] fishing" rights within the scope of native title reinforced that native title was no ordinary real property right but a dynamic and innovative *sui generis* regime.¹⁸⁹ While traditional Aboriginal rock art has successfully been used to support claims of native title by demonstrating a community's connection to a land,¹⁹⁰ the reverse has not been true. Native title has not provided effective protection for Aboriginal cultural expressions on Aboriginal land, illustrating the incongruence between Indigenous notions of interconnectedness and the Western preference for separating ownership of land and ownership of intellectual property.¹⁹¹

In *Neowarra v Western Australia*, the Wanjina–Wunggurr community claimed a right to "[u]se, maintain, protect and prevent the misuse of cultural knowledge of the Wanjina-Wunggurr community" as part of their native title claim to approximately 7,000 square kilometers of land in the Kimberley region of

185. *Cooper v Stuart* [1889] 14 App. Cas. 286 (PC) 291 (appeal taken from N.S.W.).

186. David Turnbull, *Narrative Traditions of Space, Time and Trust in Court: Terra Nullius, 'Wandering', the Yorta Yorta Native Title Claim, and the Hindmarsh Island Bridge Controversy*, in *EXPERTISE IN REGULATION AND LAW* 166, 172–74 (Gary Edmond ed., 2004).

187. *Mabo v Queensland [No 2]* [1992] HCA 23 (High Court) (Austl.).

188. *Native Title Act 1993* (Cth) s 223(1) (Austl.).

189. *Id.* at s 223(2).

190. See generally *Neowarra v Western Australia* [2003] FCA 1402 (Federal Court) (Austl.) (recognizing a potential native title right to enter land to refresh sacred rock art paintings).

191. See Graber, *supra* note 12, at 19–20.

Western Australia.¹⁹² The court reiterated previous dicta that recognition of such a right would require “a new species of intellectual property right” and could not fall under native title “for want of a connection with land.”¹⁹³ Indeed, five years earlier, in *Bulun Bulun*, another court had emphasized the “fundamental principle” of Australian law that “ownership of land and ownership of artistic works are separate statutory and common law institutions.”¹⁹⁴ The inability of Australian courts to acknowledge the fundamental interconnectedness of Aboriginal land and knowledge highlights the important role common law courts play in avoiding or confirming narrow doctrinal frames to accomplish goals consistent with Indigenous values and interests.¹⁹⁵

One solution could therefore be for courts to recognize “a right to protect traditional knowledge . . . as a distinct interest” and add it “to the bundle of rights that [currently constitute] native title.”¹⁹⁶ Some scholars believe that a right to protect TK within native title can already be inferred from the body of case law that recognizes not just land rights but land *use* rights, as well as the extensive class of activities (including “gathering”) protected under the Native Title Act of 1993.¹⁹⁷ In *Yanner v Eaton*, for example, the High Court held that statutory prohibitions on the taking of fauna from state territory did not preclude an Aboriginal man from exercising his native title rights and interests in traditional land by catching and eating juvenile crocodiles.¹⁹⁸ The majority judgment emphasized that “an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.”¹⁹⁹ Similarly, in *Commonwealth v Yarmirr*, the High Court recognized that the native title of specific Indigenous clans included a nonexclusive right to access certain seabeds to “safeguard [their] cultural and spiritual knowledge.”²⁰⁰ The Court in *Akiba v Commonwealth* also recognized that native title includes the right to access and take resources from native title land.²⁰¹

While judicial extension of native title to include an exclusive right to protect traditional knowledge remains aspirational, the *sui generis* regime of native title offers hope for judicial developments in the future. It will be important, in this

192. *Neowarra* [2003] FCA 1402.

193. *Id.*

194. *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193, 204 (Federal Court) (Austl.).

195. See Graber, *supra* note 12, at 21–22; see also Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Report No 126, April 2015) 272 (“While the *Native Title Act* is now the starting point for construing the definition of native title, it is important to acknowledge the rich jurisprudence in comparable jurisdictions that grapples with similar complex issues around indigenous rights and title to lands.”).

196. Kristin Howden, *Indigenous Traditional Knowledge and Native Title*, 24 U. N.S.W. L.J. 60, 83 (2001).

197. See, e.g., Marianne Lotz, *Colliding Worlds: Indigenous Rights, Traditional Knowledge, and Plant Intellectual Property*, 21 BUS. & PRO. ETHICS J. 71, 88 (2002).

198. [1999] HCA 53 (High Court) (Austl.).

199. *Id.*

200. *Commonwealth v Yarmirr* [2001] HCA 56 (High Court) (Austl.).

201. *Akiba v Commonwealth* [2013] HCA 33 (High Court) (Austl.).

regard, to consider the limitations of the native title construct in Australia, particularly concerns about the historical injustice to which it is still reactive,²⁰² its emphasis on those who can show a continuous connection with the country, and the bureaucratic structure that would introduce intermediaries between the government and traditional owners,²⁰³ which may exacerbate the confidence lag that is already present in relations between the Australian government and Indigenous communities.

F. SOFT LAW “PLUS” MECHANISMS

TK and TCEs are just one part of a much broader relationship between the Australian government and Indigenous groups. As part of a wider reconciliation effort designed to reduce inequalities in Aboriginal and Torres Strait Islander life expectancy, mortality, education, and employment, the Australian government has taken steps towards strengthening legal protection for Indigenous knowledge and cultural works. Not all these steps have resulted in specific enforcement mechanisms. Echoing efforts made by its neighbors in New Zealand and the Pacific Islands, as well as the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the Australian government commissioned, in the 1980s and 1990s, a series of studies to identify critical gaps in protection and areas for possible reform.²⁰⁴

TK and TCE protection have since become important points of discussion within the Australian government’s larger effort to engage in reconciliation with its Indigenous population. IP Australia has a significant role to play in these reconciliation efforts.²⁰⁵ Like many other areas of the Australian government, the IP agency has focused its efforts on a Reconciliation Action Plan (RAP), a step-by-step program laying out a multi-year strategy to contribute to national reconciliation efforts.²⁰⁶ The IP Australia RAP, Innovate Reconciliation Action Plan,²⁰⁷ has resulted in government grants to Indigenous groups to assist in filing for IP protection and has initiated multiple rounds of public consultation to facilitate

202. See Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH. U. J.L. & POL’Y 225, 225–26 (2005) (summarizing the relevant history).

203. I am grateful to Professor Daniel Robinson for highlighting this point.

204. See, e.g., DEP’T OF HOME AFFS. & ENV’T, REPORT OF THE WORKING PARTY ON THE PROTECTION OF ABORIGINAL FOLKLORE (1981); Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, November 1986); DEP’T OF ABORIGINAL AFFS., THE ABORIGINAL ARTS AND CRAFTS INDUSTRY: REPORT OF THE REVIEW COMMITTEE (1989); ATT’Y-GEN.’S DEP’T & DEP’T OF COMM’NS AND THE ARTS, PROPOSED MORAL RIGHTS LEGISLATION FOR COPYRIGHT CREATORS (1994); ATT’Y GEN.’S DEP’T, ABORIGINAL & TORRES STRAIT ISLANDER COMM’N & AUSTRALIAN CULTURAL DEV. OFF., STOPPING THE RIP-OFFS: INTELLECTUAL PROPERTY PROTECTION FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (1994).

205. See *Agency Overview*, IP AUSTRALIA, <https://www.ipaustralia.gov.au/about-us/agency-overview> (last updated July 5, 2021) (“We administer Australia’s intellectual property . . . rights system, specifically trade marks, patents, designs and plant breeder’s rights.”).

206. *About Us*, RECONCILIATION AUSTRALIA, <https://www.reconciliation.org.au/about-us/> [<https://perma.cc/S4PW-9B9A>] (last visited Aug. 25, 2021).

207. See generally IP AUSTRALIA, *supra* note 107.

engagement with Indigenous communities on issues that impact them.²⁰⁸ Fostering acceptance of IP rights and administration by Indigenous communities is an important component of Australia's efforts to address TK regulation. But ultimately, these initiatives seek integration of TK in ways that leave open significant questions, particularly those that implicate the values and sustainability of TK systems as an integral dimension of Indigenous identity. Reliance on IP as a primary—even if default—mechanism for TK protection offers improvements around the margins and reduces some of the pressure that comes from legislative inaction. But the absence of a framework that is coextensive with TK, even if not fully aligned with all its dimensions, leaves these most crucial contestations to fester. It presents IP administration as neutral and value-free when quite the opposite is the case.

In addition to reconciliation policies, so-called Cultural Protocols have emerged to provide detailed guidance to companies, government departments, and other actors engaging with TK and Indigenous cultural expressions. The Protocols are based on nine fundamental principles, some of which overlap with moral rights: respect; Indigenous control; communication, consultation, and consent; interpretation, integrity, and authenticity; secrecy and confidentiality; attribution and copyright; proper returns and royalties; continuing cultures; and recognition and protection.²⁰⁹ The Protocols are designed as a signaling measure to facilitate interaction between private actors and Indigenous groups. Private actors who embrace these protocols engender goodwill, pioneer new forms of transactions with Indigenous groups, and participate in evolving processes to strengthen Indigenous TK systems. To strengthen the effect of these voluntary principles, proponents suggest linkages with “hard” measures. For example, approval for grants and other funding measures could be tied to compliance with the Cultural Protocols. Moreover, any breaches would result in commercially damaging reputational harm.²¹⁰

Finally, a key objective of TK protection is continued production of Indigenous cultural assets. The Australian government has invested in supportive infrastructure for Aboriginal artists in remote areas. Federally funded “Art [C]entres” are located across Australia in rural communities and provide material support for Aboriginal artists in the form of art supplies, negotiating and marketing assistance.²¹¹ The Art Centre acts as an agent and manages the promotion and sale of artwork for Aboriginal artists, taking a small commission.²¹² Art Centres operate under the Office of the Registrar of Indigenous Corporations framework and are registered under the Corporations (Aboriginal and Torres Strait Islander)

208. See *Indigenous Knowledge Consultation*, IP AUSTL., <https://www.ipaustralia.gov.au/about-us/public-consultations/Indigenous-knowledge-consultation> (last updated Aug. 23, 2019).

209. TERRI JANKE & CO., *INDIGENOUS CULTURAL PROTOCOLS AND THE ARTS* 6–9 (2016).

210. See *id.* at 66–68.

211. Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Craft Sector* (Completed Inquiry, June 2007) 27, 31, 40.

212. See *id.* at 33.

Act of 2006 (CATSI Act).²¹³ Additionally, the Copyright Agency Limited manages a resale royalty for Indigenous artists to reduce the exploitation of artists that often occurs in initial sales or licensing agreements due to asymmetrical information and weak bargaining power.²¹⁴ The resale royalty scheme, although it allows all artists to recover five percent of commercial resales of their artwork for \$1,000 or more, was designed in large part for the benefit of Australia's Indigenous artists.²¹⁵ While the resale royalty scheme seems to have enhanced economic opportunities for Aboriginal and Torres Strait Islander artists to date, commentators argue that it could be strengthened by the creation of a national body vested with powers to coordinate among various actors and Indigenous communities. A proposed National Indigenous Cultural Authority arguably could devise more effective deterrents for unscrupulous art dealers by making it an offense not to pay the resale royalty.²¹⁶

A further “soft law” mechanism could involve enhanced participatory norms for Indigenous communities by strengthening existing due process requirements for negotiations, consultations, and other preliminary decisionmaking processes involving TK. For example, there has been an ongoing effort by Indigenous communities and civil society actors to amend the Australian Constitution to recognize Aboriginal Australians and give them a right to be consulted by Parliament.²¹⁷ Canadian case law on Indigenous consultation offers helpful examples of participatory decisionmaking for the Australian context.²¹⁸ Although the duty of consultation under Canadian law is inapplicable to the lawmaking process,²¹⁹ its otherwise relatively broad scope and low trigger threshold offer significant opportunities for Indigenous relationship building and political empowerment.

Indigenous communities have not been passive recipients of these government and nongovernmental initiatives. Important Indigenous-led activities also have

213. Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (Austl.); see OFF. OF THE REGISTRAR OF INDIGENOUS CORP., REGULATORY APPROACH 2 (2017); *About the CATSI Act*, OFF. REGISTRAR INDIGENOUS CORP., <https://www.oric.gov.au/catsi-act/about-catsi-act> [https://perma.cc/9PVU-JMJ4] (last visited Aug. 25, 2021).

214. See *Information Sheets: Resale Royalty Right for Visual Artists*, ARTS L. CTR. OF AUSTR., <https://www.artslaw.com.au/information-sheet/resale-royalty-rights-for-visual-artists/> [https://perma.cc/M2AB-GKL2] (last visited Aug. 25, 2021).

215. Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008 (Cth), 1, 4–5, 12 (Austl.) (emphasizing the need to protect traditional artworks from which it is historically difficult for artists to profit).

216. Robert Dearn & Matthew Rimmer, *The Australian Resale Royalty Right for Visual Artists: Indigenous Art and Social Justice*, in INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 200, 228 (Matthew Rimmer ed., 2015).

217. See generally IT'S OUR COUNTRY: INDIGENOUS ARGUMENTS FOR MEANINGFUL CONSTITUTIONAL RECOGNITION AND REFORM (Megan Davis & Marcia Langton eds., 2016).

218. See, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.) (reaffirming the principle that the government has a meaningful duty to consult in good faith with Aboriginal groups over property claims); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (Can.) (same); *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 (Can.) (same).

219. *Mikisew Cree First Nation v. Canada (Governor General in Council)* [2018] 2 S.C.R. 765, 767 (Can.).

sought to instill constitutional and moral claims into the national discourse,²²⁰ elevating TK from a technocratic or instrumentalist legal problem into one that embodies the full spectrum of justice-based claims arising from Australia's commitment to a liberal, democratic society with just institutions. These soft law mechanisms and indirect reparation measures should therefore not be understood in isolation but instead as feeding into a wider endeavor to provide symbolic and substantive recognition to Indigenous Australians.

IV. MAPPING VALUES: RIGHTS, REGIMES, AND LEGAL INSTITUTIONS

Traditional knowledge reflects a series of moral, social, and political concerns that focus on how to provide Indigenous communities with tools to enable them to protect the integrity of their cultures and forms of life. By contrast, the IP and other legal doctrines examined above reflect a different series of concerns, focusing principally on the maximization of public welfare by, for example, incentivizing innovation. But so far, only the latter series leads to substantive legal rights, absent a *sui generis* TK regime. It is unsurprising, therefore, that groups trying to defend their traditional practices must make use of legal mechanisms that have been tailored to rather different purposes.

This Part draws out insights from Australia's ad hoc protections of TK, taken as a whole. First, it examines both the limits and also the unexpected benefits of such an ad hoc approach. Second, it argues that a *sui generis* regime would still comprise a substantial advance and contemplates how such a regime might be designed. Finally, this Part investigates the importance of institutional arrangements, particularly of the courts, in protecting TK, regardless of whether a jurisdiction possesses a *sui generis* regime or relies on a patchwork one.

A. THE OVER- AND UNDER-PROTECTION OF TRADITIONAL KNOWLEDGE UNDER A PATCHWORK REGIME

The Australian experience suggests that, even absent a comprehensive *sui generis* regime for TK, claimants may be able to cobble together legal rights and remedies not designed with TK in mind to produce relatively effective protection. Indeed, depending on the patchwork regime and the hypothetical *sui generis* regime being compared, the former might end up being more protective of TK than the latter. Nonetheless, even in the ideal case, a patchwork of laws will struggle to recognize the distinctive harms implicated by TK.

Put another way, TK and conventional IP law remain in tension, if not at cross-purposes, and there are limits to how much this gap can be bridged without a *sui generis* law. Thus, solutions based on IP law may not go far enough, as when a copyright is not available to an Indigenous group because of the focus on individual authorship, or when a group cannot file for a patent because its TK is treated as part of the public domain. Or the solutions may go too far, such as when an

220. See, e.g., IP AUSTL., IP AUSTRALIA AND THE FUTURE OF INTELLECTUAL PROPERTY 75–77 (2017) (documenting the increasing number of Indigenous “IP users”).

individual artist receives the whole copyright on what, in effect, is communal cultural property.

These dual risks put pressure on the judiciary to innovate in classic common law tradition and to parse interests that maintain the credibility of competing norms and the legitimacy of the legal process. For example, placing an individual into a fiduciary relationship with the rest of one's community, as in *Bulun Bulun v R & T Textiles*, is neither a rule of Indigenous customary law nor a precise application of common law fiduciary principles.²²¹ Nonetheless, the outcome produced by the court's innovation satisfies key tenets of justice while resolving a concrete legal controversy. Some commentators, critical of the role of the incrementalism of common law legal systems, argue that longstanding injustices demand aggressive action. But the common good made possible by a shared sense of the legitimacy of judicial institutions might caution that such incrementalism is a valuable aspect of a solid foundation for the development of TK law. Nonetheless, this incrementalism will function as a constraint on the extent to which the common law can be responsive to the peculiar concerns posed by TK.

A patchwork of various hard and soft law mechanisms, such as those described in Parts II and III, does have advantages. As Australia illustrates, TK claimants can win victories under a patchwork system. Furthermore, consistency, such as that presented by a *sui generis* regime governing TK and TCEs, is not always an unalloyed good if, for example, that regime is consistent in *under*-protecting TK. By contrast, the existence of different levels of decisionmakers, as in a federal system, or different kinds of legal mechanisms gives communities a range of venues to make their claims. Such a "fragmented structure can make small minorities disproportionately powerful"²²² by giving them more opportunities to advance their arguments. For example, a viable strategy could be to build up small victories in the most favorable forums to make one's claims increasingly plausible, instead of playing a zero-sum game before a single decisionmaker. By contrast, in highly centralized areas of policy in Australia, such as education, minority voices have found their potential influence diminished.²²³

Still, if one goal of TK protection is to provide a level of exclusive rights for Indigenous communities, the current patchwork of legal and regulatory regimes in Australia provides nontrivial but ultimately inadequate protection for Aboriginal GRs, TK, and TCEs. It is true that incremental changes to those regimes will assist, such as by expanding the conceptions of originality and fixation under copyright law, vetting patent claims more thoroughly, or by changing consumer law to ensure that objects bearing TCEs have been approved by the relevant Indigenous communities. Thus, there is some scope for better aligning the

221. See *supra* Section III.D.

222. MONICA PRASAD, *THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY* 43–44 (2012).

223. See generally DAMON MAYRL, *SECULAR CONVERSIONS: POLITICAL INSTITUTIONS AND RELIGIOUS EDUCATION IN THE UNITED STATES AND AUSTRALIA, 1800–2000* (2016) (contrasting centralization in the Australia with localism in the United States with respect to education policy).

philosophic concerns underpinning TK and TCEs with existing IP and other legal regimes.

But even if more realignment occurs, the relational, communal, and developmental harms associated with a lack of TK protection will remain different, in kind, from the utilitarian and personality-based priorities of IP law. This is illustrated by the Mowanjum community's struggle to protect images of their ancestral spirits, the Wandjina. In 2006, a graffiti artist spray-painted depictions of the Wandjina across the city of Perth, and suddenly the Wandjina appeared in multiple media (stencils, paintings, ground sculpture) and on multiple surfaces (walls, plants, trees, trash cans). Locals excited by their sudden and varied appearance began taking photos and posting them online, triggering a viral phenomenon known as the "Wandjina watching," which elicited further concern from Indigenous communities.²²⁴ Following a dialogue between the graffiti artist and Kimberley elders, the artist agreed to stop painting the Wandjina, and many of his images were removed.²²⁵

A second incident occurred in 2010, as described above.²²⁶ A non-Indigenous artist created a sculpture covered in depictions of the Wandjina for a Katoomba gallery that also displayed an exhibition of Wandjina paintings by another non-Indigenous artist.²²⁷ All of the depictions showed Wandjina with mouths, contrary to Mowanjum tradition.²²⁸ The Mowanjum filed a complaint with the Australian Competition and Consumer Commission, arguing that the display of the sculpture and the exhibition (and all explanatory text) amounted to "misleading and deceptive conduct" because it falsely suggested an association with or license by the Mowanjum.²²⁹ The complaint was unsuccessful, so petitions were instead filed with the Blue Mountains City Council to deny development approval for the site of the sculpture on the basis that the sculpture's display was offensive, disturbing, or distressful to Aboriginal and non-Aboriginal communities and therefore had "a substantial adverse social impact."²³⁰ Ultimately, the city council decided to remove the sculpture,²³¹ and the Land and Environment Court upheld the decision.²³²

The Mowanjum people's struggle to protect their ancestral spirits through various legal avenues reflects the limits of a piecemeal approach to Aboriginal TK and TCEs. As international commentators on the case have observed, although the gallery owner was trying to profit from the work of others, the graffiti artist

224. See Fisher, *supra* note 7, at 1522–28.

225. Frederick & O'Connor, *supra* note 9, at 179.

226. See *supra* Part I.

227. Everard, *supra* note 8.

228. *Id.* at 9.

229. *Id.*

230. *Id.* at 9–10.

231. Vanessa Mills, *Stony Response to Wandjina Sculpture*, ABC LOCAL (Oct. 20, 2010, 3:22 PM), <http://www.abc.net.au/local/stories/2010/10/20/3043661.htm> [<https://perma.cc/BZ8U-UJKG>].

232. See *Tenodi v Blue Mountains City Council* [2011] NSWLEC 1183 (Land and Environment Court) (Austl.); Everard, *supra* note 8.

was not.²³³ Thus, in respect of the latter, the usual concerns of IP law are a poor fit for defining the wrong, if any, that was committed. Least relevant would be a utilitarian account focused on how to incentivize innovation. Closer to the mark would be a personality-based explanation: depictions of the Wandjina could fairly be characterized as part of the Mowanjum's personal identity. Yet even this sounds too individualist a note and would omit the relational, communal, and developmental harms that may be inflicted on Indigenous communities when their TK is misused. To more adequately define those harms, then, it is necessary to resort to moral concerns about maintaining cultural diversity and the sovereignty of Indigenous communities.

B. THE PROMISE AND PERILS OF A *SUI GENERIS* REGIME

The struggle to accommodate Indigenous norms within existing legal frameworks suggests the need for a *sui generis* system²³⁴—one that could reflect customary law and embed within it the participatory dimensions of collective systems that distinguish TK. This Section explains both the advantages and limitations of such a system and offers preliminary comments about how such a system could be designed.

No matter how far it is pushed, IP law will not be able to recognize the peculiar features of TK in the way a *sui generis* regime could. Thus, ad hoc judicial recognition of copyright in an Aboriginal artwork, which displays a “distinctive” interpretation of otherwise common motifs, may not reliably protect the spectrum of TCEs that have been handed down over many generations or meet copyright standards of originality or subject matter scope. Copyright's continuing preoccupation with originality, fixation, identifiable and individual authorship, and term-limited protection stands in opposition to the grounding of TCEs in communal ownership and perpetual custodianship through oral tradition. Nor will the idea-expression dichotomy always prevent the public disclosure of sacred ideas and of knowledge intended to be preserved for rites of passage. Similarly, trademark and patent law suffer fundamental deficiencies in their attempts to recognize and accommodate Aboriginal customary law norms of communal ownership, perpetual custodianship of a living heritage, and collective consent and decisionmaking processes. To be clear, the problem is not merely that IP categories are unsuitable or inflexible. Rather, it is that TK is more complex than both advocates and critics are willing to admit.

The benefits of a *sui generis* regime for TK are not restricted to the specific and additional legal entitlements that Indigenous groups will receive under that regime, in contrast to existing ad hoc remedies. Lawyers schooled in Anglophone legal systems are often trained to think of law in terms of the rights, duties,

233. See Fisher, *supra* note 7, at 1567.

234. See generally Natalie Stojanoff & Alpana Roy, *Indigenous Knowledge and Culture in Australia — The Case for Sui Generis Legislation*, 41 MONASH U. L. REV. 745 (2015) (arguing for sui generis legislation to protect Australian TK).

privileges, powers, liabilities, and immunities that the law creates.²³⁵ They are thus acclimatized to believe that if a law confers onto a historically underserved community a new legal right, nothing more will be needed. But a myopic focus on specific legal rights overlooks other barriers that Indigenous groups face in protecting TK and TCEs. Such barriers include administrative burdens, the “learning, psychological, and compliance costs that citizens experience in their interactions with government.”²³⁶ Indigenous groups therefore need to expend substantial time and effort to research and understand their legal rights and then to translate their claims into the conceptual language in which those rights are framed. Such a language may be foreign and poorly tailored to addressing the specific considerations that TK and TCEs raise.

But beyond administrative burdens, a crucial problem that a *sui generis* regime works to resolve, or at least ameliorate, is that of *legibility*. A community and its claims are illegible when those claims are framed in a way that is incomprehensible to the legal system and its decisionmakers.²³⁷ As explained, the concerns underpinning TK, such as a community’s autonomy and ability to maintain the integrity of its culture, are foreign to the conventional justifications for copyright and patent law, including the incentivization of innovation and the protection of the work product for which one has labored. Yet Indigenous groups are forced to translate the former into the latter. Such translative work is onerous and may fail to match communities’ understanding of their own culture. Thus, one benefit of a *sui generis* regime, which would create a default set of causes of actions for TK protection, is to explicitly recognize a distinctive conceptual framework that Indigenous groups may wish to use to justify their claims for TK and TCE protection and so reduce this translative burden. With that framework in place, it becomes easier for groups to articulate the distinctive harms that arise when TK is misused: harms to in-group relations, harms to the community, and harms to the community’s ability to pursue and develop its distinctive form of life.²³⁸

Of the regimes explored in this paper, native title has perhaps gone the furthest in its recognition of Indigenous customary laws within a Western legal system. As a *sui generis* regime, it reflects the Australian government’s constitutional power to “make special laws” for “[t]he people of any race” and recognizes the fundamental interconnectedness of Indigenous communities with their land.²³⁹ Accordingly, it demonstrates significant potential for legal protection and recognition of TK and culture. A broader reconceptualization of native title rights,

235. See, e.g., Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 36 (1913) (analyzing the concept of liberty “as a legal relation”).

236. PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018).

237. Cf. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 77 (1998) (“State simplifications . . . represent techniques for grasping a large and complex reality . . .”). “An illegible society, then, is a hindrance to any effective intervention by the state, whether the purpose of that intervention is plunder or public welfare.” *Id.* at 78.

238. Okediji, *supra* note 48, at 435–40.

239. Commonwealth of Australia Constitution Act 1900 (Cth) pt V s 51(xxvi).

however, as shaped and informed by Indigenous interactions with the land, may allow it to recognize and protect Indigenous traditional knowledge.²⁴⁰

A *sui generis* regime may nonetheless undercut the protection of TK and TCEs, depending on its design and interpretation, particularly if it displaces other tools that Indigenous communities might have used. A restrictive regime, such as one that favors only some of the justifications for TK protection but undercuts others, may be worse than no regime at all. The fate of native title legislation in Australia provides a cautionary tale.

In *Members of the Yorta Yorta Aboriginal Community v Victoria*, a debate erupted as to whether the statutory description of native title exhaustively defined the term or instead gave leeway to the common law to continue evolving the concept.²⁴¹ The Australian High Court opted for the former theory—and then insisted on a narrow interpretation of the statutory words. The court held, under the influence of H.L.A. Hart’s positivist concept of law,²⁴² that native title could only exist when an Indigenous community had maintained its system of laws and customs since colonization,²⁴³ which had often proven impossible given the brutal manner of Indigenous displacement. Native title having been extinguished under the statutory definition, it could not be revived, whereas one of the Justices suggested that a more generous common law conception of native title would have permitted more leeway.²⁴⁴

The experience of native title also suggests that a *sui generis* regime will not entirely remove the difficulties posed by the need for translation and legibility. One risk is that *sui generis* legislation will be interpreted by legal decisionmakers according to legal concepts and doctrines resistant to Indigenous groups. Absent clear instructions to alter their practices, judges who are unfamiliar with alternative frameworks may fall back on existing doctrines and concepts. As a result, Indigenous communities would still be forced to work within the framework that such judges create. To illustrate this point, consider that Australian courts have interpreted native title using the bundle-of-rights metaphor, which was popularized throughout the twentieth century by American legal realism.²⁴⁵ Thus, even though native title is “not the same” as a property right under common law, the “common law’s conception of property as comprised of a ‘bundle of rights’ is translatable to native title.”²⁴⁶ The trouble is that the bundle-of-rights construct may do violence to Indigenous groups’ own understanding of their land, and

240. See Howden, *supra* note 196, 76 (proposing that “native title rights must be recognised and reconceptualised as knowledge from which flow physical rights”).

241. See [2002] HCA 58 (High Court) (Austl.).

242. See *id.* (quoting H.L.A. Hart); H. L. A. HART, *THE CONCEPT OF LAW* 10 (2d. ed. 1994).

243. See *id.*

244. See *id.* (McHugh, J., concurring) (preferring a construction where “the content of native title would depend on the developing common law”).

245. See Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 63 (2013).

246. *Northern Territory v Griffiths* [2019] HCA 7 (High Court) (Austl.).

perhaps, as something of which *they themselves* are an instantiation.²⁴⁷ Further, the allocation and nature of rights and responsibilities according to a group's self-understanding will be "often subject to processes of ongoing negotiation,"²⁴⁸ meaning that the translation needed for that group to vindicate its native title claims may disturb that group's internal equilibrium about how rights should be exercised as between its members.

Accepting, nonetheless, that there is a need for a *sui generis* regime, this still leaves open significant questions about the regime's design. Given that one of the most important benefits of such a regime is to reduce the burden of conceptual translation, it is evidently crucial that there be dialogue with the Indigenous communities whose TK is to be protected. That dialogue must not be tokenistic and would have the purpose of ensuring that the communities' distinctive concerns are heard and incorporated into the regime.

Beyond this, advocates for a *sui generis* regime often call for a "liability rule," a simple prohibition on the use of TK or TCEs by people outside the relevant Indigenous community, except with that community's consent.²⁴⁹ A blanket rule, however, ignores how different controversies around TK may implicate very different interests.²⁵⁰ One community may not wish for its TCE to be used by outsiders at all. Another may be fine with a third party, such as a pharmaceutical company, using its TK as long as some of the benefits flow back to the community. Yet another may not tolerate any outside use even if that use does support some genuine public good. Some alternatives may include a mandatory disclosure rule about the use to which TK and TCEs have been put or the forfeiting of IP or other legal rights of anyone who uses TK and TCEs without consent.²⁵¹ There is, in addition, a thorny question about *defining* TK for the purpose of any regime. Similar to the problems in defining "religion" for the purpose of religious freedom protections,²⁵² any definition will privilege some instances of the category over others and incentivize borderline cases to rework their putative TK to become eligible for legal protection.

Given these design dilemmas, a *sui generis* regime will not be a panacea. Such a regime, while important, should still exist alongside the rest of the patchwork of legal protections and mechanisms, leaving Indigenous groups with multiple avenues to pursue their claims, with the most contested cases likely to be formally adjudicated. Easy, multiple paths towards alienability may occasion loss of the distinctiveness of the knowledge production systems in which TK is embedded. Nonetheless, if well-designed by an architecture of precedential decisions, a *sui*

247. See Katie Glaskin, *Native Title and the 'Bundle of Rights' Model: Implications for the Recognition of Aboriginal Relations to Country*, 13 ANTHROPOLOGICAL F. 67, 78 (2003).

248. *Id.* at 75.

249. Fisher, *supra* note 7, at 1565.

250. *See id.*

251. *See id.* at 1566–77.

252. *See generally* WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005) (explaining how legal definitions of religion favor characteristics the majority religion while remaining formally neutral).

generis regime would also create a forum for those groups to articulate their own distinctive interests so as to produce a meaningful advance beyond the current patchwork.

C. GRAFTING TRADITIONAL KNOWLEDGE ONTO NON-AUSTRALIAN COMMON LAW SYSTEMS

Australia's attempts to prevent misuse of TK offer crucial lessons about how TK might be protected in other common law states with substantial Indigenous populations, including the United States, Canada, and New Zealand. This Article's argument has therefore been that TK is best protected through a combination of a *sui generis* regime and other, non-TK-specific causes of action as a fallback. Both are important: the first by itself could be stifling, and the second by itself would be insufficient to recognize TK's distinctive concerns.

Beyond the question of formal law, however, the Australian experience also offers invaluable data about the institutional mechanisms through which TK and TCEs might be better protected. Certainly, that experience is not transferable without friction. The history of Australia's relations with Aboriginal Australians is both similar to and different from the histories of other settler-colonial nations' relations with their Indigenous populations. To illustrate, no treaty was ever formed between English colonists and Aboriginal Australians, unlike such seminal agreements as the Treaty of Waitangi in New Zealand.²⁵³ Furthermore, while Australian legal doctrines are not that far off from other common law jurisdictions—albeit with the notable exception of native title—its judicial politics and institutional arrangements have naturally taken their own path, meaning that lessons can only be applied to other countries with care.

In the United States, for example, there is a live question as to whether the federal judiciary or Congress has greater institutional competence to protect Native Nations, with a powerful empirical argument that political-process theory has failed and that Congress has proven more willing than courts to protect underserved minorities.²⁵⁴ This excludes a categorical suggestion that TK is always best protected by courts, notwithstanding some notable victories.²⁵⁵

The existence of a *sui generis* regime implies at least one essential role for the legislature: that of creating the regime. Courts are unlikely to take the first step in

253. Treaty of Cession Between Great Britain and New Zealand. Signed at Waitangi, Feb. 5, 1840, Gr. Brit.-N.Z., 29 BSP 1111 (1857) (U.K.).

254. See Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 155 (2015) (“Often perceived as [the] guardians of minority rights, courts have not lived up to this reputation when it comes to Indian nations. As a result, Indian nations have optimistically turned to the political process Congress enacted a higher percentage of Indian-related legislation than its enactment rate of legislation more generally. This finding challenges traditional narratives about the success of minority groups in the political process.”); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1799 (2019) (“The judiciary, long viewed as the ideal branch to empower in order to protect minorities, has been devastating to Indian law. Throughout the twentieth century, it has often been Congress and the Executive — and the ability to access the lawmaking process through petitioning and lobbying — rather than the courts, that have provided sanctuary.” (footnotes omitted)).

255. See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

recognizing a specific right in respect to TK, absent some applicable statutory or constitutional provision. Even where they do engage in decisive innovation and create a novel right, that right will be vulnerable to legislative encroachment, as the history of native title following *Mabo No. 2* illustrates.²⁵⁶

At the same time, a legislative *sui generis* regime may cause more harm than good if legal actors use it to limit the development of claims, as the Australian High Court's interpretation of the Native Title Act likewise suggests.²⁵⁷ In other words, TK-specific legislation is necessary but not sufficient.

Instead, although legislatures can provide greater systemic protection for Indigenous persons than courts, the latter can play a residual but essential role. First, there is something important about a court *bearing witness* and vindicating the experiences of a historically oppressed group following an investigation of the underlying facts before a public forum. The courtroom can never fully capture the experiences and self-understandings of displaced Indigenous communities, but it will always translate those experiences and understandings in ultimately reductive terms.²⁵⁸ Even so, the fact that a court provides a way for affected communities to speak in their own voice, and for a more or less impartial body to report on what occurred, serves a crucial function that is sometimes overlooked in discussions of how legal entitlements should be assigned. Thus, the High Court's vindication of Eddie Mabo's rights is regularly taught in Australian high schools; the Australian Parliament's passage of the Native Title Act is not.

Second, courts will retain a role in developing TK law through their equitable function. As the body of law that emerged from the English Court of Chancery and spread to other common law systems, equity has long been merged into the common law in the United States.²⁵⁹ This has obscured equity's surviving function as a second-order safety valve: ordinary common law rules are framed formally, without reference to context, making such rules poorly equipped to deal with certain kinds of problems that are more complex or that require more contextual attentiveness.²⁶⁰ The law of equity, by contrast, is more context-specific and less formally articulated. It therefore provides a way to target complex problems without having to undermine the generality or certainty of first-order rules by making them too prolix.²⁶¹

256. See *supra* Section III.E.

257. See *supra* Section III.E.

258. Cf. Nicola Henry, *The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice*, 16 VIOLENCE AGAINST WOMEN 1098, 1114 (2010) ("Although criminal trials for the expression of human pain or trauma may represent a fractured, incomplete, and inadequate forum, the trial nonetheless 'enables pain to enter into the realm of shared discourse that is wider, more social, than that which characterizes the relatively intimate conversation of patient and physician.'").

259. See generally Ralph E. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186 (1949) (describing the history of the law-equity merger within the United States).

260. See Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 173, 177–78 (Kit Barker et al. eds., 2017).

261. See *id.* at 184; cf. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 50 (4th ed.

Australian courts have maintained a robust distinction between common law and equity,²⁶² though the latter has itself ossified into a formal body of rules.²⁶³ This notwithstanding, absent a specific TK law, TK-protective decisions have proceeded not by proclaiming a radically new body of law, but instead through safety-valve equitable reasoning aimed to ameliorate the unintended consequences of restrictive statutory rules. Sometimes, this occurs through creative statutory interpretation, echoing the earlier doctrine of the equity of the statute.²⁶⁴ In *Milpurrruru v Indofurn*, the Federal Court's reading of the originality requirement of the Copyright Act adopted, as its "most important consideration," the existence of an *animus furandi*, an "intention . . . to take from the Wititj artwork for the purpose of saving themselves labour" by the particular defendants.²⁶⁵ The court thus imported a case-specific fact into its reading of the scope of the applicable legislation. Alternatively, Australian courts might instead resort to equitable doctrines and remedies to correct for statutory gaps, such as in *Bulun Bulun's* resort to fiduciary principles to make up for copyright's lack of communal ownership.²⁶⁶

The extension of TK protection through equity or equity-adjacent forms of judicial reasoning suggests that grafting Australian legal doctrines onto other common law systems, if it happens, will happen in a similarly haphazard way. Equity engages problems leftover and untouched by first-order rules: it does not usually have the first bite of the apple in addressing complex or polycentric social questions. But given that the first-order rules can show considerable variation between common law jurisdictions, crude transplants of legal doctrines across borders may be difficult to justify: equitable doctrines need to respond to their particular first-order rules. What *can* move across borders is the form of equitable reasoning that permits amelioration of these first-order rules, which the Australian cases at

2019) (observing that civil law systems, by constraining the role of equity, have sacrificed the flexibility to do justice to the individual case in favor of certainty).

262. See, e.g., *Harris v Digit Pulse Pty Ltd* [2003] NSWCA 10 (Spigelman, CJ) (Court of Appeal) (Austl.) ("The separation of equity and common law is of greater strength in Australian jurisprudence than appears to have become the case in other nations with similar traditions, including Canada and, it appears, New Zealand."). By contrast, equity has remained an adaptable doctrine in the United Kingdom, given ongoing debates about the extent to which it can be fused with the common law. See Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 4 (2002).

263. See, e.g., *Farah Constr Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (High Court) (Austl.) (lambasting an intermediate appellate court for seeking to modify the "long-established . . . equitable rule" concerning knowing receipt following a breach of trust); cf. Henry E Smith, *Fusion of Law and Confusion of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 210, 229 (Dennis Klimchuk et al. eds., 2020) ("[A]lthough something travelling under the heading of 'equity' may appear to feature strongly in English and Commonwealth law, it often reflects a flattening of a different sort: the replacement of second-order adjustment with elaborate first-order standards and highly detailed *ex ante* rules.").

264. See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (tracing the history of the doctrine from English common law).

265. 54 FCR 240 (Federal Court) (Austl.).

266. See *supra* Section III.D.

times exemplify. The result would be another patchwork of laws, albeit different from the precise Australian configuration.

Within the patchwork, equity is flexible enough to accommodate several recent scholarly proposals that have been offered for increasing protection of TK. Thus, a way to refuse to enforce patents whose use of TK has not been disclosed²⁶⁷ could be accomplished through a court applying the maxim that those seeking equity must do equity. Likewise, distinguishing between tiers of traditional knowledge²⁶⁸ involves a far more fact-intensive inquiry consonant to courts' equitable function. While *sui generis* legislation may also seek to make distinctions, the point is that equity is broad enough to fill such gaps if left out.

Where courts have tried to use equity to be first movers in doctrinal innovation, they have found more success than legislatures in identifying a problem and forcing public and legislative attention on it, but then found their own ability to effect change rapidly stymied. For example, although the Australian High Court in *Mabo No. 2* held equitable remedies could be crafted to protect the new native title rights,²⁶⁹ this suggestion was quickly superseded by comprehensive legislation on the subject.

Likewise, in the United States, the Supreme Court faced the vexed question, following *Brown v. Board of Education*,²⁷⁰ about what remedy to order in the face of an unconstitutional but decades-long system of school segregation. In its subsequent decision, the Court stressed the ability of lower courts implementing *Brown* to be "guided by equitable principles," as characterized by "practical flexibility in . . . remedies" and "a facility for adjusting and reconciling public and private needs."²⁷¹ By comparison, Justice Frankfurter objected that courts were not capable of acting as a "super-school board,"²⁷² even though this meant surrendering lower courts to intense community pressure to do nothing.²⁷³ In the event, nothing is what all too frequently occurred, and even the courts that did seek to craft equitable remedies were dismissed as too disruptive to communities.²⁷⁴ Accordingly, a *sui generis* regime that this Article argues would be desirable is unlikely to be sustainable through sheer judicial innovation.

The salience of the equitable function for Australia's TK protection also suggests that, if jurisdictions do enact *sui generis* TK laws, those laws might be best designed as framework statutes, that is, laws that set out broad policies but are

267. See Fisher, *supra* note 7, at 1569.

268. See generally Okediji, *supra* note 7, at 302–16.

269. [1992] HCA 23 (High Court) (Austl.) (1992) 175 CLR 1 (Deane & Gaudron, JJ., concurring) ("[N]ative title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence.").

270. 347 U.S. 483 (1954).

271. *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

272. MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 83 (2007).

273. See *id.* at 84.

274. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 107–09 (2004).

spare on specific legal rules, leaving it to the judiciary to fill in the details. In Australia, this kind of legislation is relatively rare, but in the United States, such framework statutes dominate such fields as administrative law and antitrust.²⁷⁵ An intrinsic difficulty with a TK regime is that, even while honoring the distinctive concerns of Indigenous communities, it must still necessarily be wrapped in a different conceptual language from those concerns, namely that of the liberal state.²⁷⁶ Thus, while translation from one conceptual language to another will remain necessary, some forms of translation are easier for Indigenous groups than others. A less detailed statute will give Indigenous communities room to maneuver, but an exhaustive one deprives courts and those communities space to develop legal norms in light of evolving understandings of TK.

This assumes that the judiciary is sympathetic to TK claims and would be willing to uphold them following nudging from the legislature. If that assumption proves incorrect, more detailed legislation will become necessary—but then, some of the major benefits of courts would be lost in the process.

CONCLUSION

Traditional knowledge poses a fundamental challenge for modern states, namely, how to accommodate an entirely different normative system inside the existing legal order. Even though TK and TCEs are essential for the forms of life of Indigenous peoples, and necessary conditions for the continued evolution of those forms, they are sufficiently foreign to government decisionmakers and therefore often evade their grasp. Something will always be lost in translation, even for the most sympathetic attempts to provide protection.

Still, progress has been made, reflecting the fruit of struggles by Indigenous communities to be recognized, both in their domestic jurisdictions and on the world stage.²⁷⁷ Despite the historical injustices too often inflicted on those communities, the arc of history has more recently turned in their favor. International legal instruments such as UNDRIP and Nagoya testify to this success, however partial that success may be. And, on the domestic front, Australia's relatively mature engagement with the use of intellectual property law and a mix of common law and other legislative supplements to protect Indigenous rights offers some useful lessons.

Australia illustrates how far TK protection can be taken without an express TK regime. Indigenous claimants have therefore won real victories under IP law and through equitable principles. Such equitable reasoning is what would be most

275. See, e.g., Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.); Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

276. Cf. Mohamed Amer Meziane, *The Deafness of the State on Sovereignty, Secular Aesthetics and the Untranslatability of the Qur'an*, 22 POL. THEOLOGY 155, 158 (2021) (“[T]he State does not respond to moral protest as moral but immediately translates it into a juridical language.” (emphasis omitted)).

277. Cf. AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (Joel Anderson trans., 1995) (centering communal and interpersonal recognition as criteria of social justice).

easily grafted onto other jurisdictions. At the same time, these legal doctrines can only be stretched so far in order to cover the peculiarly communal characteristics of TK. Nor can IP rules designed to assist individual creators really provide recognition to the harm done to Indigenous communities' forms of life when the latter's TK is misused. Thus, this Article has argued, a *sui generis* regime is ultimately necessary. Yet even such a regime would still rely on the sympathy of judges willing to apply legal rules to the complexities of Indigenous forms of life.

Australia also offers lessons on a more granular level. First, governments attempting to tackle this complex subject should consider the role of consistency to prevent arbitrage: across the government, across the country, and across IP areas. A pangovernmental approach is therefore important to ensure harmonious, holistic, and sustainable protection for TK: ideally, the legislature should work hand in hand with administrative agencies. Consistency is crucial to prevent the exploitation of differences between jurisdictions, even though a hodgepodge of laws may, in certain circumstances, also give Indigenous communities a wider array of fora to advance their claims. Second, policymakers must remember that process and procedure matter. Regardless of potential improvements in IP laws, if they are unevenly enforced or if the administrative procedures are too expensive, complicated, or otherwise prohibitive, the entry costs will prove too high for Indigenous people. Finally, continuing efforts to educate and promote the self-determination of Indigenous communities are crucial.²⁷⁸ Education on legal rights and processes is important, but emphasis should also be placed on nonlegal avenues for recourse, including public forums, spaces for community healing, and access to political representatives to lobby for legislative and policy reform.

Above all, Australia has recognized the importance of investing in legal institutions that reflect the dignity, contributions, and value—economic and otherwise—of TK and the Indigenous communities from which it is produced. The ad hoc approach to TK and TCEs in Australia in some ways mirrors the diversity of interests associated with promoting the welfare of Indigenous communities. But ultimately, the question of TK protection is a question of local citizenship, dependent on the existence of a civil society through which Indigenous communities can articulate those claims and on government decisionmakers, particularly judges, that are both sympathetic to and able to understand those claims.

A more effective TK regime would therefore recognize the significance of Indigenous communities as active contributors to the knowledge economy. Such recognition, and the structural changes it may occasion, would not only allow TK to flourish but would also have the effect of reducing friction between Indigenous communities and broader society. That, in the end, is the promise of TK—the promise of a more just society, where first nations are not merely tolerated but dignified.

278. See, e.g., *The Uluru Statement from the Heart*, ULURU STATEMENT, <https://ulurustatement.org/the-statement> [<https://perma.cc/7YD5-2H9S>].