

The Legal Protection of Indigenous Souvenir Products

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Abstract: The indigenous products that tourists purchase as souvenirs are often actually imitations of the original products that are both mass produced and sold by non-indigenous people without authorization from an indigenous group. This practice entails outsiders appropriating and imitating cultural heritage products in an inauthentic manner. It also limits the economic benefits indigenous groups can gain from products of their culture. This paper explores the possibility of using intellectual property laws to protect the production of such souvenirs for indigenous groups. The paper focuses on three different indigenous groups: the Kunas of Panama, the Aborigines of Australia, and the Atayals of Taiwan, to show that each group's situation is unique and protection efforts consequently must be adaptable rather than universal. Traditional intellectual property laws offer little potential for indigenous groups to establish legal rights over the production of their products, but unique *sui generis* laws can be established to achieve this goal. The paper explores numerous underlying questions that must be addressed if protective legislation is to be truly beneficial. Also, the protection of indigenous intellectual property is closely linked to other indigenous rights issues.

Keywords: souvenirs; intellectual property; indigenous groups; *sui generis* laws.

Introduction

Many tourists purchase indigenous products as souvenirs when they travel. For the purpose of this paper, the term 'indigenous products' refers to the material forms of indigenous culture, such as handicrafts, artwork, and clothing. The sale of such products as souvenirs creates an obvious economic opportunity for indigenous groups; however, the items purchased as souvenirs actually are sometimes imitated versions of the original indigenous products that have been mass produced by non-indigenous people. Such outside commercialization of these indigenous products consequently denies indigenous groups of the economic benefits of their culture's products and leads to such products being reproduced in an inauthentic manner that deviates from the traditional modes of production.

Some legislation has been enacted in order to counter such practices, but the reality is that indigenous products are often ineligible for protection under existing intellectual property laws. The most effective legal solution has, therefore, proven to be unique *sui generis* laws that are created exclusively to protect certain indigenous products. Nevertheless, such legislation is difficult to properly design because of the many complex issues involved. In effect, universal legislation that could theoretically be applied on an international scale would likely be ineffective and

countries must, therefore, deal with each indigenous group independently. Furthermore, it must be noted that any laws which are established to protect indigenous products have implications on other, sometimes more significant, indigenous matters.

As a literature review exploring the issues discussed above, this paper will focus primarily on three specific indigenous groups and the souvenir products they create: the weavings of the Atayals in Taiwan, the mola fabrics of the Kunas in Panama, and the paintings of the Aborigines in Australia. Atayal weaving is an important part of traditional Atayal female identity and the weavings are used in a variety of products, including clothing, blankets, bags, and other textile goods (Yoshimura 2007). Molas are the traditional front and back panels of Kuna women's blouses. Molas are woven in a unique style and are now sold as individual pieces of decorative art (Tice 1995). Australian Aboriginal paintings are sacred representations of the Dreaming, which is essentially the Aborigines' creation story and religious beliefs, and it remains central to Aboriginal life (Simons 2000). These three particular indigenous souvenir products have been selected because of the contrasts in the history and cultural significance of the products, the different ways in which they have been legally protected, and the availability of information in the tourism literature.

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Indigenous Products as Souvenirs and Cultural Heritage

It is very common for tourists to purchase souvenirs when they travel. Tourists buy souvenirs for a variety of reasons, but, typically, the consumer seeks a material representation to both remind him or her of a travel experience and conspicuously display this experience to others (Graburn 2000: xii; Wall and Mathieson 2006: 278). When selecting a specific souvenir, tourists generally prefer objects that are relatively inexpensive, easily transportable, and exotic (Wall and Mathieson 2006: 276). Souvenir purchases are not, however, typically inspired by a true interest in the host culture of a destination (Wall and Mathieson 2006: 278), even though tourists may nevertheless seek products they consider 'authentic' (Revilla and Dodd 2003).

Due to the characteristics that tourists prefer in their souvenirs, it should come as no surprise that indigenous products commonly have become popular for souvenir purchases. Indigenous products, such as art and handicrafts, are unique, exotic products that are often fairly small and transportable. Even if the products are not naturally small, it is common for larger products to be miniaturized so that they are more attractive to tourists (Smith 1996: 295). Indigenous souvenirs easily can be seen as representative of a tourist's experience with an indigenous culture during his or her travels. Additionally, these products sometimes have become symbols of the countries where the producing indigenous groups live, meaning that a tourist may regard an indigenous product as perfectly representative of a trip to the country where the indigenous group resides, even if the indigenous group played no part in the tourist's actual travel experience. For example, Panama has deliberately associated itself with the mola and frequently uses it as a national symbol (Tice 1995: 94). Molos are popular souvenirs and it is certain that some tourists who purchase molos buy them as symbolic representations of Panama, without having had any interaction with the Kuna, aside from casually seeing them in public.

When tourists buy indigenous products as souvenirs, they often are purchasing products that have great significance within the indigenous culture. The art and handicrafts of indigenous cultures often can have extremely deep links to either religion or cultural identity (Brown 2003: 53; Simons 2000; WIPO 2005a). For example, the weavings of the Atayal are closely linked to traditional Atayal female identity. The weavings were banned during Japanese colonialism and have never fully returned, yet they have undergone something of a revival and some Atayal women now weave in order to recover this identity and maintain the traditional custom (Yoshimura 2007). The Kunas' molos are

also linked to Kuna identity and are considered a source of pride among Kunas (Swain 1989: 93). Finally, the themes of Aboriginal art are derived from the various sacred stories of the Dreaming and these stories are maintained as closely guarded secrets, even between different groups of Aborigines (Nicholls 2002: 213; Simons 2000: 420).

The Conflict that Emerges

The commercialization of indigenous products for souvenirs not surprisingly leads to a complicated situation in which the indigenous groups and the tourists can have somewhat conflicting interests. The indigenous groups often are creating cultural and religious products of great significance, while tourists often simply want to purchase a cheap travel memento. In other words, the tourists have a demand that is not properly being satisfied by the supply naturally provided by the indigenous artisans, so the predictable result is that non-indigenous individuals enter the souvenir markets and create mass produced, inferior imitations that undercut the indigenous prices (Hitchcock 2000: 5; Wall and Mathieson 2006: 279). Sometimes tourists are indifferent about buying cheaper imitations not produced by indigenous people, while at other times the tourists are simply unable to distinguish the real from the fake. Regardless, two primary problems result from the presence of the imitations. Firstly, the cultural heritage products of indigenous groups are being appropriated and modified by outsiders with no interest in the preservation of the indigenous culture. Secondly, these opportunists are profiting from the sale of indigenous products instead of the economic benefit going to indigenous producers.

This phenomenon has affected the Atayal, Kuna, and Aborigines very directly. In the village of Wulai, where many Atayal live, the majority of the weavings sold to tourists are factory-made and sold in shops owned by Han Chinese (Yoshimura 2007: 190). Similarly, the Kuna have long had to fight against the influx of cheap molos made in Panama and abroad in factories and by non-Kuna people (Saint-Fleur 1999; WIPO 2005b). In Australia, the blatant reproduction of Aboriginal paintings seems relatively uncommon, but there are many instances of Aboriginal designs being illicitly reproduced on other mediums, like beach towels (Brown 2003: 45; Morrow 2000: 17-18).

Disadvantages Faced by Indigenous Producers

The opportunists who replicate and appropriate indigenous products have two distinct advantages over their indigenous competitors. Firstly, they are not bound by the traditional customs of authenticity that the indigenous producers must follow (Young-Ing 2006: 64). These outsiders

can, therefore, ignore traditional methods of production, which are often very time-consuming, in order to create cheap and standardized imitations. For instance, authentic, hand-made molas take between two and four weeks to complete (WIPO 2005b), so they naturally must be sold for a much higher price than imitation molas that have been mass produced. A similar situation emerges among the Atayal weavers, who devote too much time to their weavings to sell them at prices that can compare with those of the Han Chinese producers (Yoshimura 2007). As one Atayal weaver complained, 'The tourists say that our (indigenous) weaving products are much more expensive than the ones sold by the Han Chinese. Of course, they are cheap because they are not hand-made. Their stuff is nothing like our Atayal weaving products' (Yoshimura 2007: 192). Yet, despite the time invested in each weaving by the Atayal producers, many tourists are simply unable to distinguish between the Atayal weavings and the mass produced ones (Yoshimura 2007: 179). In another similar Chinese example, Han Chinese have imitated the Dongba carvings of the Naxi indigenous group (Yamamura 2005). As one frustrated Naxi lamented, 'We local Naxis are creating culture, but they're just making crafts for money' (Yamamura 2005: 197).

The second disadvantage for indigenous producers and sellers is that indigenous groups are often marginalized, meaning that they have poor access to capital, little commercial knowledge, and few business connections (Buultjens *et al.* 2005; Ryan 2005a: 6–7), which leaves them with a competitive disadvantage against competitors with more social and financial capital. For instance, the Naxis lack funds, business acumen, and distribution contacts, while the Han Dongba producers generally have all the three advantages (Yamamura 2005: 195). Similarly, Aborigines are normally poor, live in far-removed areas, and have little experience in the modern business world (Brown 2003: 174; Simons 2000: 422). In other words, sometimes the characteristics of marginalization afflicting an indigenous group hinder its ability to take better advantage of its economic tourism potential, which, in turn, perpetuates these aspects of marginalization.

From an economic standpoint, this inability of indigenous groups to fully profit from their products can be considered particularly unfortunate. Indigenous communities often suffer from lack of employment and various social problems, so tourism has been regarded as a possible economic opportunity with great potential. Consequently, the loss to outsiders of the economic profits from indigenous souvenir sales is particularly detrimental (Ryan 2005b: 70; Smith 1996: 299).

Legislation as a Possible Solution

One seemingly viable solution to this situation is the establishment of legislative protection that restricts the creation of indigenous products to members of the appropriate indigenous groups. This type of legislation typically falls within the realm of intellectual property laws, which refers to the granting of property rights to creations of the mind (WIPO 2007a). There are several categories of intellectual property, but the fact of the matter is that such laws were originally established to protect individual art and technological inventions, and they are not perfectly applicable to the protection of communal indigenous products (Simons 2000: 415).

Indigenous Products as Intellectual Property

Copyright

Copyright is a principal category of intellectual property and the basic concept of copyright is exactly what it appears to be – the right to make copies (Brown 2003: 55). Copyright laws grant creators certain rights over the reproduction and usage of works they have authored (Saint-Fleur 1999). There are two different schools of copyright theory, the Anglo-American and the Continental-European, but both are centred on an underlying principle of originality. In other words, a work must be fully original in order to be suitable for copyright protection. Due to the common repetition of certain techniques and reuse of certain thematic motifs within indigenous artwork, it has been argued that traditional representations are simply being reproduced, with limited originality or creativity involved. Such products are, therefore, ineligible for copyright protection, and are rather classified as 'folklore' (Anderson 2005: 361; Antons 2004: 88). In Panama, folklore is defined as, 'Characteristic elements of traditional cultural heritage created in Panama by its ethnic communities and passed along from one generation to the next, reflecting the community's artistic expectations' (Saint-Fleur 1999). In other words, the traditional rules guiding indigenous art automatically disqualify it from being fully original. In some cases it is true that indigenous artists are, in fact, quite limited in their potential creativity and originality. For example, an Aboriginal artist is restricted to a very limited set of themes that is permitted by his or her Dreaming Story (Antons 2004: 88–89). This concept of originality, nevertheless, can and has been contested due to the original expressions one reasonably can claim are illustrated in indigenous art despite the cultural constraints (Anderson 2005; Antons 2004). However, even an acceptance of indigenous art as original does not necessarily mean that copyright can function as a useful protective tool.

Copyright protects the rights of the individual, but that does not apply well to the communal protection of indigenous products and it conflicts with some indigenous attitudes towards ownership. For example, authorship of Aboriginal art is based on the group, rather than the individual, and derives partly from the different groups who have proprietary rights over any particular Dreaming representation (Nicholls 2002: 213). One possible solution to this conflict is to offer co-authorship, as would be offered to two musicians who wrote a song together, but the idea of granting ownership to an individual who was completely uninvolved in the creation process, as that process is viewed under Western law, is too troublesome (Brown 2003: 64). Consequently, one solution has been to acknowledge a fiduciary relationship, which is the typical legal relationship between trustees and beneficiaries, and basically recognizes an author's duty to his or her community in the use of his or her artwork (Antons 2004: 91). This solution may function in the handling of cases in which an Aboriginal design has been created and then illicitly reproduced, but it does little to protect an overall art form. With the mola, for instance, it may be easy to define the Kuna creator of a certain mola, but it is nearly impossible to define an owner of that traditional knowledge.

Additionally, copyright tends to focus on granting privileges over tangible works. In other words, an indigenous artist may be able to copyright a specific painting, but once again, the legal framework does not easily allow for an indigenous group to copyright an overall method of art creation (Brown, 2003: 59–60). Also, copyrights generally have limited durations, which means that eventually works of art can, in fact, be freely imitated and reproduced (Brown 2003: 56–57). Therefore, even if an indigenous group could copyright a certain traditional art technique, it would be nearly impossible to determine when it was first created, and, therefore, when the copyright should terminate – which it would also inevitably have to do.

Patents

Patents are a second form of intellectual property that are sometimes considered as legal tools for the protection of traditional knowledge. Patents are issued to recognize the creation of a new invention and restrict its imitation. The criteria for patentability focuses on 'novelty, non-obviousness, and utility' (Ganguli 2000: 45). However, indigenous products are clearly not newly invented in either design or method of production, so they do not fall into the normally recognized category of patentable products. Additionally, it is worth noting that patenting a product can often be fairly costly (Githaiga 1998: sec. 88).

Trademarks

A trademark is essentially an indication that recognizes a product as being created by a specific entity (Brown 2003: 74). Trademarks offer the possibility for indigenous groups to legally identify their work, which would allow informed and caring souvenir buyers to purchase only authentic products made by members of the appropriate indigenous group (Morrow 2000: 17). While such action may be valuable to both the producers and the consumers, trademarks would not function in restricting the imitation of indigenous products by others, because only new or original designs could be registered, but not the style or technique itself (WIPO 2005a).

Geographical Indications

It is also possible to use geographical indications as caveats within intellectual property laws. Such indicators define a product by its area of origin, meaning that a product cannot be legally produced outside of a given area (Ganguli 2000: 46). It is such laws that have been utilized in Europe to restrict the production of beverages like wines, champagne, and cognac to certain areas (Ganguli 2000: 46). With regard to indigenous production, such legislation has been employed to protect handicrafts produced by the Olinalá indigenous group that lives in Mexico's Sonora desert (WIPO 2005a). However, it is not always appropriate to enforce such strict geographical limitations. For instance, the Kuna live primarily on the semi-autonomous San Blas islands, so one may advocate using such a geographical indication to protect mola production. However, there are also Kuna who live in other parts of Panama and even Colombia, meaning that they would be excluded from the production rights (Saint-Fleur 1999). Furthermore, such indicators are solely geographic, and do not restrict who within the accepted areas can make the product so, in this case, anyone on the San Blas islands would be granted that right.

The Advantages of *Sui Generis*

Due to the clear limitations of ordinary intellectual property laws, the most viable option for the legal protection of indigenous products is the use of *sui generis* laws. The term *sui generis* refers to laws which are unique and specialized. In other words, *sui generis* laws can function in realms that are not appropriately covered by normal applications of the existing laws or natural adaptations of those laws. Consequently, *sui generis* laws offer the greatest potential for the legal protection of indigenous products, as they can transcend the boundaries posed by traditional intellectual property laws. *Sui generis* laws have, in fact, been applied in Canada, Australia, Panama and some other

countries in order to protect indigenous products and establish other indigenous rights.

In Panama, various acts of *sui generis* legislation have been created to help protect the mola. In 1984, a law was enacted to prohibit the importation of mola fabrics and imitations. In 2000, Law No. 20 was established, which allowed for the registration of collective rights for indigenous communities so that they could protect their cultural identities and traditional knowledge. Law No. 20 was further defined with Executive Decree No. 12 the following year, which listed dozens of specific products as being protected. Finally, in 2002 Panama established a regulatory code for molas that, among other points, included a defined restriction on rights to license a mola and recognized that molas were in constant evolution (WIPO 2005a). Such *sui generis* laws are clearly the best way for indigenous products to be legally protected.

Legislating Bodies

The protection of indigenous products is primarily dependent on national laws and the influence of various international bodies. There are numerous international bodies that are active in confronting this issue and international agreements regarding intellectual property date back well over a century. These international bodies and conventions help to regulate and influence national law, but in the end it is up to the national governments to enact appropriate legislation that will truly serve to protect their respective indigenous communities (Morrow 2000: 10).

The United Nations

The United Nations has been at the forefront in the move to protect indigenous proprietary rights. In 1957, the United Nations developed the "convention concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries", which highlighted the need to respect the various cultures present throughout the world. In 1970, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) recognized the importance of preserving cultural heritage with the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (Simons 2000: 415). Also, various arms of the UN, including UNESCO, the United Nations Permanent Forum on Indigenous Issues (UNPFII), and the World Intellectual Property Organization (WIPO) have historically worked both together and independently to further develop intellectual property laws that benefit indigenous groups. Two of the most significant developments in the protection of cultural heritage that were advanced by the UN are the 1976 Tunis Model Law on

Copyright for Developing Countries, which aimed to widen copyright concepts to include folklore, and the 1985 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which laid out a *sui generis* folklore protection strategy (Githaiga 1998: sec. 68–70). Also, more recent relevant advancements include the 1991 United Nations Draft Declaration of the World's Indigenous Peoples and more detailed laws that have been established with respect to certain specific areas, such as Africa and the Pacific Islands.

The WIPO

The most relevant branch of the UN for this discussion is the WIPO. The WIPO is one of the two primary global forces influencing international intellectual property rights issues, with the second being the World Trade Organization (WTO) and its Agreement on Trade-Related Intellectual Property Rights (TRIPS) (Morrow 2000: 10). The WIPO was established in 1967 and became an agency of the UN in 1974 (Simons 2000: 417). In its own words, the WIPO 'exists as a forum for its Member States to create and harmonize rules and practices to protect intellectual property rights' (WIPO 2007a: 22). In practice, 'The organization has been the pre-eminent entity in instituting and facilitating protection' of intellectual property (Simons 2000: 417). The WIPO is involved with all aspects of intellectual property, meaning that it does not simply focus on indigenous products, but rather handles indigenous matters along with a variety of other intellectual property issues. In part, the WIPO works to administer a range of international intellectual copyright treaties, one of the most important of which is the Berne Convention (WIPO 2007a, b). The Berne Convention is an international agreement of copyright that was originally established in 1886 and has been periodically refined over the years. The majority of the world's nations are signatories (WIPO 2007a), although some countries do not necessarily accept all of the terms (Morrow 2000: 12) and there is little offered with regard to enforcement (WIPO 2007a: 16).

National Governments

The international agreements overseen by the WIPO, WTO, and other bodies set an applicable framework for the protection of indigenous products, but the ultimate implementation primarily rests on the shoulders of national governments. Such deference to national governments is perhaps necessary, as every country's situation is unique, due to differences between countries and indigenous groups, so the use of uniform legislation would probably prove irrational and perhaps even counterproductive. For example, the Kuna mola and Aboriginal paintings are actually quite

distinct, due to the fact that Aboriginal art is derived from strict, sacred themes, while the Kuna are far more flexible in their design of molas. Consequently, the use of non-traditional themes in molas is widespread and acceptable (Tice 1995), while the use of such themes in an Aboriginal painting would immediately bring into question its status as authentic Aboriginal art.

Complexities of Legally Protecting Indigenous Products

It may be easy to criticize many national governments for their lack of action in protecting the products of their indigenous populations, but one should not overlook the many questions that must be answered in the forming of any protective legislation. As Brown states, 'There is reason to be wary of totalizing solutions to complex social problems' (Brown 2003: 8). The issue of protecting indigenous products is far more complex than it may initially appear, and one can easily identify numerous complex issues a country must face as it designs appropriate legislation.

Can Non-Indigenous Governments Effectively Adjudicate on Indigenous Products?

Firstly, one must answer the question of whether it is even appropriate for governments to establish laws regarding the heritage products of indigenous cultures that are often vastly different from their countries' dominant, national culture. As was discussed earlier, the concept of art within many Western nations is far removed from the concept of art within some indigenous cultures. For some indigenous groups, art is not simply a means of personal expression, but also the continuance of a possibly sacred tradition (Ryan 2005a: 5). With the Aborigines, for example, an author does not have complete rights over his or her work because art is regarded as property of the community. Consequently, the need to assign it a specific creator with special rights is a foreign and somewhat inapplicable concept (Antons 2004). The situation of the Aborigines is, in fact, particularly confusing because of the secret aspects of the art. It is virtually paradoxical to expect a government to legally protect heritage products that the government is prohibited from comprehending (Lowenthal 2005: 400).

Which Products Should Be Protected?

Once governments formally acknowledge the need to legally protect certain indigenous products, it is unclear how to determine which products must be protected as cultural heritage and which have simply become part of the public domain (Lowenthal 2005). For instance, if Aboriginal paintings are to be protected, then perhaps the boomerang and didgeridoo should be as well. This issue quickly extends into other forms of indigenous culture that are not typically

associated with tourist souvenirs, such as songs and dances. In the end, it may become hard to exclude any type of indigenous heritage once certain aspects are being protected. For example, the use of traditional Maori symbols by foreign tattoo artists has even been criticized (Lowenthal 2005: 410).

Who Can Speak For An Indigenous Group?

Currently, many governments do recognize the importance of consulting with indigenous groups when considering indigenous matters. However, in some cases it is not always clearly evident exactly who should be consulted. Some Aboriginal groups, for example, primarily defer decisions to community elders, but it may not be clear which elders should be consulted and their individual decision-making power may be very limited (Dyer *et al.* 2003). In fact, the Aborigines present a particularly complex case study because all Aborigines are restricted in their knowledge of certain aspects of the Dreaming. As the Dreaming is both sacred and secret, it must be handled extremely cautiously in a court of law if due respect is going to be given to the Aboriginal beliefs. Typically, courts must feature a combination of appropriate Aboriginal leaders and expert anthropologists to be properly informed as much as possible on the relevant issues. The involvement of anthropologists inevitably opens the door to bias and miscomprehension, but it is seen as necessary, given the circumstances (Antons 2004).

The Tunis Model mentioned earlier, which deals with intellectual property issues in developing countries, proposes the creation of a "competent authority" to oversee the implementation of indigenous intellectual property rights (Antons 2004: 99). However, as Antons naturally questions when considering the prospect of creating an Aboriginal authority, 'If a 'competent authority' such as a 'Folklore Commission' needs to be created, how should it be staffed? Who would be authorized to decide on the artistic quality and use of traditional artwork stemming from the different provinces?' (Antons 2004: 100). Despite such confusions, there are instances in which appropriate representative bodies have been established to oversee indigenous groups' communal heritage rights. One example of such an entity is the Maori Trade Marks Advisory Committee in New Zealand.

An additional complication in consultation with indigenous groups is that although some groups are very community-oriented, a belief that they are, therefore, attitudinally homogeneous is a dangerous fallacy. Indigenous communities, just like other communities, consist of individuals who sometimes are in conflict in their attitudes and desires. It is almost inevitable that any decision will not

please everyone in an indigenous group, just as every Canadian citizen may not fully agree with every decision made by the Canadian government. Nevertheless, if governments are not cautious when dealing with indigenous groups, they may make decisions based on the suggestions of individuals primarily focused on their own vested interests. For example, the prospect of protecting products with trademarks has been opposed at times due to the possibility that it would allow accredited craftspeople to exclude other local craftspeople from the use of certain cultural designs (WIPO 2005a).

Who is Indigenous?

Simply defining the term 'indigenous' has certain complexities, as different nations and international bodies use varying criteria (Ryan 2005a: 9). This paper has simply accepted the various groups that have been discussed as being indigenous, although as special laws are introduced to protect the rights of indigenous groups, then this is surely an issue that will be at the forefront of many relevant discussions.

Nevertheless, even if one accepts a group as being indigenous, it is not always clear which individual people should be included within that group. "First People" identity claims are ambiguous, casual, confused' (Lowenthal 2005: 407). Such grey areas interestingly create the potential for a government and an indigenous group to have differing opinions about who should be considered within the group. There are different potential criteria for judging one's inclusion in an indigenous group, such as ancestry, geography, customs, and language, but in the end it can be nearly impossible to clearly define who exactly should be included in a given group. For example, among a group of Maya descendants living in a Belizean village, contrasting opinions were observed within the community as to whether they were still 'Maya,' due to the fact that they now spoke Spanish and had lost many of the traditional Maya customs. Some individuals did consider themselves Maya while others did not, but there was relatively little conformity between the different rationalizations stated (Medina 2003).

Among the Kuna, those individuals who have left the traditional communities and adapted a more Western lifestyle are sometimes considered to have "gone modern" (Swain 1989: 94), and it is unclear what affect such a lifestyle would have on such an individual's status as a Kuna. A focus on genealogy would still regard such an individual to be Kuna. On the other hand, a focus on culture may exclude such an individual from the group, while potentially allowing an outsider who has lived amongst the Kuna and adapted their lifestyle to be considered Kuna. Such

circumstances are actually quite realistic, because the same characteristics that attract tourists to indigenous groups also attract potential members. 'With ever fewer folk left on ancestral turf, hundreds of millions of emigrants and their offspring crave legacies. So do mounting number of wannabe Maoris, Aborigines, and Native Americans, attracted by the spirituality, ecological nous, exotic chic, or lucrative spin-offs of minority status' (Lowenthal 2005: 407).

If ancestry is to be considered a principal factor in determining group inclusion, then it is difficult to decide exactly what genealogical connection is necessary for someone to be considered part of a group, especially within groups that have undergone widespread mixing with outside populations. The situation becomes even more complex when special rights are granted to indigenous peoples, as it creates a greater incentive for someone to be labelled as indigenous. For example, in recent years, many Native American tribes have ousted members who have claimed membership but have questionable ancestry links. There are tremendous financial benefits associated with being accepted as a member of some tribes because of the allotment of money earned in tribal casinos. Typically, in such membership disputes, tribal officials point to the dubious ancestry claims of the ousted members, while the ousted members claim they are simply being pushed out so that the rest of the tribe can share the casino earnings amongst a smaller group (AP 2007). Such unfortunate circumstances, therefore, serve as another example of the potential squabbles within indigenous groups and the consequent danger of blindly treating indigenous groups as homogeneous.

Does Legislation Derive from an Overly Restricted View of Authenticity?

The commercialization of indigenous products as souvenirs often leads to commodification, in which products are transformed to better satisfy the demands of the tourist market. While the loss of authenticity is often lamented, one must also recognize that indigenous products are inherently dynamic anyway, and have historically evolved over time. In some ways, the protection of indigenous products redefines indigenous groups as static, which ignores the realities of cultural evolution (Lowenthal 2005: 406). Even Aboriginal art, which has changed relatively little, has evolved over time to incorporate new materials and techniques. In fact, there are now 'urban Aborigines' who depict more modern themes within the traditional means of expression (Antons 2004: 89). It would be rash and counterproductive to simply restrict such creativity, but any acknowledgement of artistic evolution naturally leads to a questioning of what type of protection is truly necessary.

The mola serves as a particularly poignant example for this discussion of authenticity because the souvenir mola now being protected is in many ways a commodified product in and of itself. Souvenir molas are simply the traditional front and back panels of the blouses that Kuna women wear, and Kuna women only began sewing molas to sell as individual pieces of art during the 1950s in response to foreign demand (Jennings-Rentenaar 2005; Tice 1995). Also, molas are fairly new, as the reverse appliqué technique that distinguishes the mola only emerged in the early 20th century (Tice 1995: 60). Furthermore, Kuna women have a long history of incorporating modern images, ranging from electric fans to product labels, into their mola designs (Tice 1995: 80). Now, Kuna women have not only begun creating molas with designs favoured by tourists, they have also begun creating quickly-made 'turista' molas, which they can sell cheaply to tourists (Swain 1989; Tice 1995). Some would argue that such a situation is a depressing example of the destructive impact tourists can have on artwork, while others may argue that it is a natural part of the accepted commercialization of the mola. If Kuna women were to begin mass producing their molas in factories, then that would further complicate the issue, yet once again it would be hard to rationalize the restriction of what the Kuna are allowed to do with the mola.

The modes of indigenous art production, much like the designs, have evolved over time as well. For example, Atayal women weavers traditionally used backstrap looms that they propped on their legs while sitting on the floor, which was fairly uncomfortable (Yoshimura 2007: 113). The revival of Atayal weaving has somewhat forgone this relic of the past and the modern weavers frequently use more comfortable, modern looms (Yoshimura 2007). Such an adoption of modern technology could be seen as a loss of authenticity by some, but seems to be accepted among the Atayal.

It has been argued that even just the act of protecting indigenous traditions actually formalizes them in a restrictive way. 'In the context of what some are calling a 'global society of control,' there is reason to be wary of legislative proposals that would interpose a novel regulatory architecture between human beings and their most powerful forms of expression' (Brown 2003: 214). In other words, protective legislation may inherently impede on the creative expressions of the artists. Additionally, protective measures may hinder the creative appropriation of indigenous products and hybrid expressions that are created from other artists being impacted by indigenous art. 'There is also a danger that we may become overly protective towards cultures and fail to recognize that in some regions there are traditions of appropriation' (Morrow 2000: 20). Restricting such art could be seen as

impeding on freedom of expression and isolating indigenous art from the greater artistic landscape.

Is Lack of Protective Legislation the Real Problem?

If one of the principal goals of protective legislation is merely to protect indigenous products so that appropriate groups will be the sole economic benefactors, then the rationalization for protection is not necessarily obvious. As was previously described, many indigenous groups are poorly positioned to take advantage of the economic potential that their cultural products offer. Consequently, it can easily be argued that, 'This is manifestly unfair, but it is symptomatic of broader social realities, not a failure of intellectual property law as such' (Brown 2003: 236). In other words, intellectual property laws should not necessarily be adapted to benefit the needs of indigenous groups simply because they are socially and economically disadvantaged, as such action would be a misuse of the law. Therefore, 'it is vital to make a distinction between matters of economic justice and the broader goal of protecting "cultural integrity"' (Brown 2003: 234).

Additionally, protecting indigenous products to both help the economic status of the indigenous groups and maintain their cultural identity can create problems. In Australia, for instance, the combination of these two goals has proven to be troublesome (Anderson 2005: 356). In general, as soon as the economic issues are mentioned, the problem becomes framed as an economic one and the cultural preservation issues are misinterpreted as secondary (Brown 2003: 38).

How Can the Laws be Enforced?

Not only is legislation for the protection of indigenous products hard to design successfully, it is also very difficult to enforce. The issue of enforcement primarily rests with national governments and it is obviously a chief concern if true results are to be seen, as the establishment of international conventions is far from a guarantee of enforcement. International bodies like the UN, WIPO, and WTO are limited in their abilities to enforce measures, meaning that signatories do not always enact the laws they should. For instance, it has been observed that many signatories of the Berne Convention have not applied the rules to domestic laws (Simons 2000: 428). Also, the reproduction of a single indigenous product can easily involve more than one nation. If molas are being reproduced in Taiwan then this fact makes it an international issue with all of the connected implications of such a situation. If the molas are being sold in Taiwan as well, then it would make it that much harder for the Panamanian government to

enforce laws as it should. Nevertheless, the international bodies can have an impact as long as countries agree to use other economic resources, such as access to markets, to pressure non-compliant countries into compliance. For instance, such pressures are part of the reason why Panama enacted some of its early legislation protecting the mola (Saint-Fleur 1999).

Some Implications for Other Indigenous Issues

The protection of indigenous products is an important issue in and of itself that has received specific attention at the international level. However, these issues of protection are naturally interlinked with other broad issues of indigenous rights. It is imperative to recognize these relationships when considering potential legislation, because these broader implications sometimes involve issues of far more significance than the souvenirs that have been discussed in this paper. Consequently, these external implications may be greater barriers to the enactment of legislation than any issues previously mentioned.

Indigenous Control of Indigenous Tourism

Although this paper has focused on indigenous souvenir products, such products are just one part of the involvement of indigenous groups in the tourism industry. Smith (1996) defines four elements of indigenous tourism: habitat, heritage, history, and handicrafts with handicrafts as the element clearly focused on in this paper. As defined by Hinch and Butler (1996: 9), 'Indigenous tourism refers to tourism activity in which indigenous people are directly involved either through control and/or by having their culture serve as the essence of the attraction'. For the purpose of this paper, only tourism in which the indigenous group serves as the attraction is being considered.

Indigenous tourism is certainly popular, yet indigenous groups are often marginalized within the tourism industry and sometimes have relatively little control and receive few benefits, even from their own indigenous tourism destinations (Hinch and Butler 1996: 6). For example, the Tjapukai Aboriginal Cultural Park is based around a presentation of the culture of the Djabugay people, who are an Aboriginal indigenous group. However, the Djabugay community has little real control over the management of the attraction and has also received only minimal economic benefits (Dyer *et al.* 2003). The barriers to greater indigenous control in tourism are the same as those that limit indigenous people in the selling of their souvenirs – the indigenous groups often lack the social and financial capital to begin and run profitable tourism businesses effectively (Dyer *et al.* 2003; Notzke 2004). As Dyer *et al.* (2003: 89) state about

Tjapukai, 'The Djabugay were intent on managing the Park, but were realistic about their capacity to do so'. The issues of protection of indigenous products covered in this paper fall within this greater realm of indigenous tourism issues, and will likely often be considered within that greater framework.

Land Rights and Autonomy

Indigenous intellectual property issues are often indirectly associated with land rights and autonomy. If a government recognizes the *sui generis* rights of a particular group with regard to art, then that serves as a base recognition of that group's separateness from the general legal and political system, which consequently serves as a base argument in the support of land rights and autonomy. For instance, in the Australian court case of *John Bulun Bulun & Anor v. R. & T. Textiles Pty. Ltd., 1998*, a grievance about unauthorized reproduction of Aboriginal designs was directly linked to the *Mabo and Others v. Queensland, 1992* case, which recognized the validity of Aboriginal customary law under certain circumstances. In this case, the Aboriginal plaintiff won, yet the judge refused to allow that Aboriginal ties between art and land would mean rights on one could be automatically transferred to the other (Antons 2004). Nevertheless, just the simple fact that land rights were seriously considered in the case is significant. Also, perhaps it should come as no surprise that land rights have been found to be a common motif among some Latin American indigenous groups who have managed to maintain relative control of their craft production (Stephen 1991).

Repatriation

Discussions of granting special protective rights to indigenous products are also closely related to the volatile issue of repatriation. The link is obvious, as once a government acknowledges a group's proprietary rights over the products of its culture, it is natural to follow that line of reasoning to an argument that past artefacts should be repatriated to the descendants of their original producers as well (Lowenthal 2005). However, the issue of repatriation is an infinitely complex matter that can rapidly lead to disagreements on an international scale (Caprio 2006).

Biotechnology

When proprietary rights are granted to certain portions of indigenous culture, it opens the door for proprietary rights to be granted to other aspects of traditional knowledge as well. One significant area in which this fact comes into play is in the biotechnology industry, which sometimes utilizes indigenous plant knowledge in developing medicines and other biotechnological products. Companies searching for

useful chemicals within plants have a huge incentive to involve knowledgeable groups in that process, as it is far more efficient than having to discover all of the plant properties unassisted (Brown 2003: 126). There are examples of biotechnology profits being shared with indigenous groups whose knowledge helped develop the invention (Ganguli 2000: 50–51); however, quantifying the value of their knowledge is difficult, so deciding how much of a benefit the indigenous group should receive and who should receive the benefit is clearly a complicated issue.

Conclusion

Although the mass production of indigenous products as souvenirs by non-indigenous people may be disconcerting, this paper has clearly shown that there is little ability to restrict such reproductions with legislation within the existing intellectual property framework. *Sui generis* laws appear to offer the best legal alternative, as they allow countries to enact special legislation to protect specific indigenous cultural rights. Such laws have already been enacted in numerous nations, meaning that some groups, like the Kuna, do in fact enjoy some legal protections of their products while other groups, like the Atayal, do not.

The challenges faced by the Atayals, Kunas, and Aborigines with their indigenous souvenir products are shared by many indigenous groups around the world, ranging from the Inuit in Canada (Rimmer 2004) to the Orang Asli in Malaysia (Ying 2005) to the Jalq'a in Bolivia (Battiste and Henderson 2000). This paper has shown that each indigenous group and its products are distinct and, therefore, each indigenous group must be treated independently if protective legislation is going to be designed effectively. Moreover, there should be an attempt to create laws that respect each group's particular beliefs and political system.

It has also been shown that many very complex questions surround the issue of indigenous intellectual property and these questions must be dealt with carefully if legislation is going to be truly effective. An acknowledgement of the cultural importance of any particular product, combined with a realistic recognition of its current status within the public domain, will probably serve as the best indicators of which products should be protected. Determining who should be consulted in the decision-

making process and who should be considered indigenous will be no easy task, but the best results will likely derive from extensive input from the indigenous groups in question. Future research on specific indigenous souvenir products and attempted protective legal measures will be useful in providing a better understanding of the different ways in which legislation can be designed and the varying effectiveness of these different design techniques. However, when reflecting on this research, one should maintain respect for the uniqueness of each indigenous group's situation and be careful about making over-generalized conclusions.

Furthermore, there needs to be an understanding that indigenous communities are part of the global landscape and they should not be corralled off from the outside world as static untouchables. In some instances cultural preservation must be maintained via actions within the community, rather than via outside legislation. It may be unfortunate that non-indigenous people are profiting from the sale of inauthentic indigenous products as souvenirs, but that fact in no way means the products cannot be preserved authentically within the culture. Hopefully tourism will help to alleviate the poverty suffered by many indigenous peoples, but the law should not necessarily be exploited in order to do so. Governments, international organizations, and NGOs must all work to offer indigenous communities the knowledge and resources they need in order to better manoeuvre in the modern world, so that they can better interact with the outside world on their own terms.

Nevertheless, there certainly is an appropriate place for legislation in the protection process and *sui generis* laws should be further applied to help protect indigenous products. Panama's laws protecting the mola provide an excellent example of how a country can protect indigenous products while simultaneously allowing them to evolve naturally and adapt to the demands of the tourist market. If such laws are further applied and refined, then indigenous people will be able to better preserve and profit from the products of their cultures.

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