DESIGNED TO EXCLUDE: THE MISALIGNMENT OF THE UNITED STATES COPYRIGHT LAW REGIME WITH THE PROTECTION OF INDIGENOUS CULTURAL HERITAGE

by

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The United States copyright law regime does not adequately support the protection of Indigenous Cultural Heritage. Rooted in Western legal tradition, copyright law is built on a notion of authorship that privileges individual originality. By contrast, Indigenous knowledge and cultural expressions are often communally owned and authored, making copyright protection harder to obtain and at odds with the underlying assumption on which Western copyright law is founded. The requirement that works be "fixed in a tangible medium of expression" and the copyright term that hinges on the life of the author are examples of incompatible legal provisions. These legal shortcomings are no coincidence; copyright law developed at a time when tribes were especially marginalized and oppressed.

This thesis examines the historical development of copyright law and its doctrinal limitations that prevent adequate protection for expressions of cultural heritage. It also explores Felix Cohen's jurisprudential theories in the realist school of thought. His theories explain how extralegal influences may have shaped copyright law in ways that exclude Indigenous knowledge. This paper critiques the law's reliance on what Cohen coined "transcendental nonsense," which are conceptual legal fictions that obscure contradictions in the law.

This thesis proposes a new legal framework that recognizes tribal jurisdiction over Indigenous cultural expressions. This framework includes a rebuttable presumption that

indigenous cultural and intellectual property belongs to the respective tribal nation, placing the burden on external entities to justify use. Additionally, it introduces a Tribal Cultural Fair Use test—modeled after the fair use doctrine in copyright law—to balance tribal sovereignty with limited permissible uses. Potential constitutional justifications for this approach include the Fourth Amendment right to privacy and the Indian Commerce Clause.

In sum, a legal system that fails to recognize indigenous authorship on its own terms perpetuates cultural appropriation and legal disenfranchisement. A framework centered on tribal governance and sovereignty is necessary to ensure meaningful protection. This thesis argues that squaring copyright law with tribal sovereignty is a critical step toward protecting Native American cultural heritage.

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A. Introduction

Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, laches, and rights in rem…. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.[1]

- Felix Cohen

The coming into being of the notion of "author" constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences.[2]

- Michel Foucault

The truth is quite contrary: the author is not an indefinite source of significations which fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses....[3]

- Michel Foucault

Historical and cultural forces have shaped the notion of authorship. Copyright law's reliance on the definition of the romantic author is inapposite to native peoples' conceptions of authorship. Relying on "songs, proverbs, stories, folklore, community laws, common or collective property and invention, practices and rituals,"[4] it is difficult or impractical to trace Indigenous knowledge to a single author; it is oftentimes communally owned. Another hurdle to obtaining copyright protection is that oftentimes Indigenous Cultural Heritage hasn't been "fixed in a tangible medium of expression,"[5] as the law requires. Also, a copyright term measured in

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[1] Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). [hereinafter Transcendental Nonsense]
[2] Michel Foucault, Aesthetics, Method, and Epistemology, in Essential Works of Foucault 1954-1984, vol. 2, ed. James D. Faubion, trans. Robert Hurley and others (New York: The New Press, 1998).
[3] Michel Foucault, What Is An Author?, in The Foucault Reader 101, 118-19 (Paul Rabinow ed. & Josue V. Harari trans., 1984). Cited in Keith Aoki, (Intellectual) Property and Sovereignty: Notes Toward A Cultural Geography of Authorship, 48 Stan. L. Rev. 1293 (1996).
[4] Lindsey Schuler, Modern Age Protection: Protecting Indigenous Knowledge Through Intellectual Property Law, 21 Mich. St. Int'l L. Rev. 752 (2013) 754, available at TurtleTalk blog website (accessed 4/19/2024) (internal citations omitted).
[5] 17 U.S.C. § 102(a) (2022).

part by the author's lifetime is incompatible with communal authorship. For reasons such as these, copyright law falls short of protecting tribal cultural heritage. It is possible that the fact that copyright law developed at a time when Indigenous people in the United States were surviving genocide and assimilation contributed to this shortfall. This paper will examine the historical development of copyright law, its shortfalls in protecting Indigenous Cultural Heritage, and propose a legal framework better aligned with tribal sovereignty and communal authorship.

Felix Cohen, a legal theorist from the realist school of thought, elaborated jurisprudential theories that may shed light on the reason why copyright law developed to exclude Indigenous works as it does. According to his theories, this development may have come about as a consequence of judges letting their extralegal personal inclinations influence their rulings and constructing opinions that legitimized their viewpoints during a time when Indigenous people were persecuted.[6] Whatever the reason, the result is that copyright law evolved to be ill-suited to protecting Indigenous Cultural Heritage. While a group rights approach may more effectively protect it, this approach still burdens tribes with the task of identifying individual expressions of culture to protect. Burdening tribes with the task of using ill-suited existing frameworks to protect their heritage is the wrong strategy; laws should presume tribal cultural heritage to be protected in the first place.

B. Copyright law developed at a time when tribes were systematically marginalized.

Copyright law in the United States has been developing since the 18th century, a time when tribes were alienated. To be sure, tribes never had a say in how the laws were developed. For example, tribes had no delegates at the Constitutional convention or get a say on

[6] See Felix S. Cohen, The Problems of a Functional Jurisprudence, 1 MOD. L. REV. 5 (1937) [hereinafter Problems of a Functional Jurisprudence]; Transcendental Nonsense, supra, note 1.

ratification,[7] nor did they have representatives in Congress[8]. This body of law developed in directions that lead to it under-protecting traditional knowledge, and tribes were forced to assimilate a legal system that evolved without being informed by their values.

The sharp distinction between public domain and private works in copyright law runs counter to early understandings of copyright law and authorship.[9] As we in the United States know it, copyright came about in England for the first time under the 1710 Statute of Anne.[10] At that time, the cultural understanding of authorship was different than it is today. A lexicon published forty years after the statute's passage defined a book in the following way:

> "A highly useful and convenient instrument constructed of printed sheets variously bound in cardboard, paper, vellum, leather, etc. for presenting the truth to another… Many people work on this ware before it is complete and becomes an actual book in this sense. The scholar and the writer, the papermaker, the type founder, the typesetter and the printer, the proofreader, the publisher, the book binder, sometimes even the gilder and the brass-worker, etc. Thus many mouths are fed by this branch of manufacture."[11]

As another example of the relatively recent shift in the definition of the author from the 16th to the 18th century, Commedia Dell'arte plays were a popular artform throughout Europe that used repeated storylines and well-known characters, developed by many troupes and whose

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[7] Gregory Ablavsky & W. Tanner Allread, We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution, 123 Colum. L. Rev. 283 (2023).
[8] Jennifer Davis, *Charles Curtis, First Native American Congressional Member*, In Custodia Legis: Law Librarians of Congress (Jan. 26, 2018),
[9] Keith Aoki, (Intellectual) Property and Sovereignty: Notes Toward A Cultural Geography of Authorship, 48 Stan. L. Rev. 1293 (1996).
[10] Aazaad Burn, Course Notes on Copyrights taught by Eric Priest, University of Oregon, Eugene, OR (Jan. 18, 2024) [hereinafter Course Notes on Copyrights].
[11] Martha Woodmansee, The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author', 17 Eighteenth-Century Stud. 425, 425 (1984) (citing Georg Heinrich Zinck, Allgemeines Oeconomisches Lexicon, 3rd ed. (Leipzig, 1753), col. 442).

authorship could not be traced back to a single person.[12] As time went on, guilds in Europe started to decline, and there was a shift in how creative works were treated; more and more, certain works became considered the property of an individual while others were seen as belonging to all.[13] The popularization of the printing press, enabling the dissemination of works beyond the local sphere, made attribution more of a concern to authors.[14]

United States copyright law doctrines were also informed by the novel conception of the 19th century romantic author-genius, whose inspiration came from within and whose genius was measured by his ability to break from tradition.[15] Describing what he deemed to be a worthy poet, Wordsworth wrote in 1815 that "every Author, as far as he is great and at the same time *original*, has had the task of *creating* the taste by which he is to be enjoyed" and that "grand thoughts… are most natural and most fitly conceived in solitude."[16] His conception described authorship as original, creative, and solitary, with the source of originality being the mind of the author.[17] In the present day, an "author" usually denotes an individual who creates a unique work, a relatively recent invention.[18] It follows that the notion of the "author" is context-dependent.

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[12] Commedia dell'arte, Encyclopaedia Britannica, https://www.britannica.com (last visited Apr. 20, 2024).
[13] *Id.*
[14] *Id.*
[15] Erlend Lavik, Romantic Authorship in Copyright Law and the Uses of Aesthetics, in The Work of Authorship, (Amsterdam University Press, 2014) 45, https://doi.org/10.1515/9789048523009-003.
[16] William Wordsworth, Essay, Supplementary to the Preface, in 1 Poems 1815 339, 366 (T. Davison ed., London, Whitefriars 1815).
[17] *Id.*; See also Lavik, supra note 15, at 47.
[18] Woodmansee, supra note 11, at 426.

C. Copyright is of limited use to protect tribal cultural heritage.

Indigenous knowledge doesn't always fit within this romantic definition of authorship.[19] In reality, traditional knowledge encompasses more than United States copyright law protects.[20] While tribal cultural heritage might include "beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural experience and expression," Western IP regimes are focused on protecting scientific, technological, artistic, and literary innovation through hardline tests of copyright, patent, and trademark law.[21] And diffusion of indigenous traditional knowledge differs from the Western tendency to protect works that are fixed in a tangible medium of expression.[22] To date, neither Congress nor the Courts have dealt with the application of copyright law to Native Americans' specific forms of cultural creativity.[23]

Indigenous knowledge is sometimes disseminated through mediums that aren't typically protectible by copyright, including proverbs, folklore, community laws, practices and rituals.[24] Moreover, the "originality" requirement also poses a problem to tribes because it is a low standard.[25] For example, "if a pioneering Hopi photographer had managed to document her community's rituals before H. R. Voth came on the scene, copyright protections afforded these earlier photographs would not have prevented Voth from publishing pictures of his own provided that they differed slightly from those of his predecessor."[26]

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[19] Schuler, supra note 4, at 753.
[20] *Id.*
[21] *Id.* (internal citations omitted).
[22] *Id.* (internal citations omitted).
[23] Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 Calif. L. Rev. 1373, 1379 (2021)..
[24] *Id.* at 753-54. (citing Tonina Simeone, Indigenous Traditional Knowledge and Intellectual Property Rights, PARLIAMENT OF CANADA (Mar. 17, 2004), http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0338-e.htm.)
[25] Michael F. Brown, *Who Owns Native Culture?* 60 (Harvard Univ. Press 2003).
[26] *Id.*

Tribes using copyright to protect their cultural heritage are too often dismayed by the fact that copyrighting a text or an image does not preempt the use of anything that vaguely resembles it.[27] Anthropologists have used the originality and fixation requirements against tribes, leading to the troubling result of Anthropologists owning the tribes' cultural heritage. Michael Brown relates a cautionary tale in his book, *Who Owns Native Culture?* During anthropologist David Dinwoodie's time studying the Chilcotin people of British Columbia, he learned that Tribal officials had installed a large safe in their office and were closed-mouth about its contents.[28]

> Dinwoodie tells of a day when one of the officials, to demonstrate the community's growing trust of the visiting anthropologist, offered to give him a tour of the safe. The heavy door was unlocked and ceremoniously pulled back. Inside lay a single document. His host explained that the document was a transcription of a Chilcotin myth. Chilcotin leaders, it seems, had heard that a folklorist living among a neighboring band of Indians had recorded the group's mythology and then published the stories in a copyrighted book. Now the folklorist "owned" the myths. To prevent this from happening to them, the Chilcotin were determined to record their own myths and secure them from theft.[29]

What is startling is that even if the Chilcotin people had protected their myth through copyright, variations on it would have been considered original under copyright law and would have qualified for protection as well.[30]

Another obstacle to protectability is the opposition of the Western idea that knowledge should be available to everyone without restriction—which is why copyright

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[27] *Id.*
[28] Brown, supra note 25, at 60.
[29] *Id.* at 60-61.
[30] *Id.* at 61.

protection eventually expires—and the beliefs of certain tribes that some knowledge must remain confidential.[31] There have been several other instances where anthropologists and other researchers publicized information about Native American rituals and sacred stories that were meant to remain secret, which in a few cases led to legal action; oftentimes, these cases include anthropologists' documentation and dissemination of tribal cultural heritage without permission.[32]

A hurdle to meeting the fixation requirement is that some aspects of tribes' cultures aren't meant to be fixed at all. For the Navajo, for example, sand-painting designs are regarded as powerful or dangerous embodiments of the Holy People, and are not meant to be fixed on paper, film, or in digital formats.[33]

Some tribal knowledge that is treated as classified under tribal law has become part of the public domain, through mishandling by Anthropologists. And tribes are left without a recourse. Recently, in 2015, the book *The Origin Myth of Acoma Pueblo*, by Peter Nabokov, was re-published.[34] He had been told the myth by a Pueblo man that he had worked closely with, Edward Proctor Hunt.[35] The tribe had known about Nabokov's project since 2007, and their lawyers sent several letters—to Nabokov and to the chancellor of UCLA—demanding Nabokov comply with Tribal law and appear before the Tribal Council to request permission to publish the narrative.[36] In 2008, Tribal council sent a letter requesting a copy of the manuscript.[37] Nabokov did not comply with

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[31] See *Id.* at 30.
[32] Brown, supra note 25, at 3, 10-12.
[33] Khristaan D. Villela, Telling Their Own Story: The Controversy over Peter Nabokov's Publication of the Origin Myth of Acoma Pueblo, *Santa Fe New Mexican*, Pasatiempo Sec. (Jan. 15, 2016, updated Jan. 21, 2016).
[34] Villela, supra note 33, at 28.
[35] *Id.* at 28-29.
[36] *Id.* at 30.
[37] *Id.*

either request.[38] In 2015, when the Tribal council received news of imminent publication, they reaffirmed their demands, and Nabokov finally sent the manuscript, but failed to appear.[39] Three days after publication, the Governor of the Acoma Pueblo, Hon. Fred S. Vallo Sr., sent a letter in protest demanding what right Nabokov had to publish the Pueblo's sacred stories.[40] Vallo claimed that the *Origin Myth of the Pueblo of Acoma* was the intellectual property of the Pueblo, and that since Hunt did not have permission to relate the narrative to an outsider, Nabokov did not have permission to republish it.[41] The Acoma Pueblo leadership and legal counsel stated that the Pueblo's religious and cultural knowledge remains carefully controlled, and is imparted gradually to Acoma Tribal members, conveyed on a need-to-know basis.[42] The Pueblo leadership stated they should decide what to share and what to conceal, with some information remaining secret forever.[43] But Nabokov was on firm legal footing; the original version was from 1946, and was in the public domain. While Hunt may have violated Pueblo Tribal Law by revealing the myth to Nabokov, he broke no U.S. law. The Acoma Pueblo had no recourse in U.S. copyright law.

The time-limited copyright term thus poses a problem to protecting knowledge tribes would prefer remained secret. Having to apply to extend the protection would pose a burden for tribes, and eventually, the work would end up in the public domain.

The fair use doctrine—an affirmative defense in copyright law[44]--presents yet another problem tribes face when using copyright to protect their tribal cultural

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[38] *Id.*
[39] *Id.*
[40] *Id.* at 28-29.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Course Notes on Copyrights, supra note 10, on February 13, 2024.

heritage.[45] Fair use is defined by an open-ended, four factor analysis.[46] Referring to the United States Supreme Court, a joke among copyright lawyers is that "there are only nine people in the world who know what a fair use is,"[47] because courts' decisions of what counts as a "fair use" are hard to predict. This doctrine allows works to be fragmented, or quoted, by others as part of their own creative efforts.[48] For sacred works, for example, this disassembling might violate their sanctity. All things considered, fair use is a doctrine that might facilitate cultural appropriation. Some scholars theorize that cultural appropriation is an extension of European-settler conquest, which is how Native Americans were dispossessed of what was theirs in the first place.[49]

Cultural theft of these and other types was widespread in the colonial period and later. And it lead to the loss of a lot of tribal cultural heritage. Until the 1830s, indigenous artworks were typically considered archaeological or curio-objects.[50] At the end of the 1800s, they were popularized and marketed by large department stores, arts and crafts publications, and "Indian traders' catalogues."[51] Commercializing native art had the effect of removing it from the sphere of fine art.[52] By the 1940's, they had become "primitive art" looked at in museums, not art galleries.[53] The 1960's disillusionment with American culture marked the recognition of indigenous art as being fine art rather than the stuff of souvenirs.[54] Today, intellectual property theft of tribal expression continues, just in different forms. Today, these expressions are

[45] Brown, supra note 25, at 62.
[46] Course Notes on Copyrights, supra note 10, on April 4, 2024.
[47] *Id.*
[48] Brown, supra note 25, at 62.
[49] Reed, supra note 23, at 1377.
[50] Kathryn Moynihan, How Navajo Nation v. Urban Outfitters Illustrates the Failure of Intellectual Property Law to Protect Native American Cultural Property 51, 62 19 Rutgers Race & L. Rev. 51 (2018).
[51] *Id.* (internal citations omitted).
[52] *Id.*
[53] *Id.*
[54] *Id.*

"exploited in the open market, duplicated by minimum wage workers or machines, traded at bargain basement prices created by the saturation of the market with cheap knock-offs, and dishonored and defaced by buyers and sellers that lack the proper respect that should be afforded to culture with such a deep heritage and tumultuous history."[55] Some indigenous intellectual property protections have emerged through privatized programs, such as the Indian Arts and Crafts Act of 1970[56], which was a truth in advertising law prohibiting selling "Indian Products" while falsely suggesting they are "Indian" made.[57] Historical context shows that it should come as no surprise that the foundations of copyright law developed without regard to protecting Indigenous Cultural Heritage.

Given the historical context, squaring copyright doctrine with protecting Indigenous Cultural Heritage was far from being a concern of 18th and 19th century judges. In fact, ruling in favor of tribes probably would have been unpopular. Copyright law development coincided with one of darkest periods of the relationship between the United States and the Native American tribes. By as early as the 1780s, despite federal attempts to safeguard Indian lands, state encroachment onto native territory had led dangerously close to wars.[58] During the last twenty years of the 1789-1871 treaty-making period, certain treaties subjected the internal affairs of the tribes to federal control—a departure from the traditional practice that had allowed tribes to manage their own affairs—a direct attack on tribal sovereignty and self-governance.[59] In 1814, under the leadership of a future anti-Indian president,[60] General Andrew Jackson, United States

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[55] David B. Jordan, Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?, 25 Am. Indian L. Rev. 93 (2001).
[56] Schuler, supra note 4, at 753.
[57] Reed, supra note 32, at 1377.
[58] Felix S. Cohen, Handbook of Federal Indian Law § 1.02 Post-Contact and Pre-Constitutional Development (1492–1789), (Lexis database) (citing Francis Paul Prucha, The Great Father: The United States Government and the American Indians 47-48 (Univ. Neb. Press 1984)).
[59] Cohen, supra note 58, at § 1.03, (citing Treaty with the Navajos, 1849, art. 9, 9 Stat. 974).
[60] Vine Deloria Jr. & David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations*, 35 (1999).

military forces attacked the Creek Indians who opposed American expansion and encroachment of their territory in the Battle of Horseshoe Bend.[61] As a result, the Creeks ceded more than 20 million acres of land.[62] On May 28, 1830, at the urging of president Andrew Jackson, Congress signed the Indian Removal Act into law.[63] This act legalized what otherwise would have been blatant treaty violations: natives could now be punished for remaining East of the Mississippi River.[64] In 1836, the last of the Creek Indians left their land for Oklahoma as part of the Indian removal process.[65] And in 1838, President Van Buren ordered the Cherokees, another southeastern tribe, to be marched at gunpoint from Georgia across the Mississippi, a journey that became known as the Trail of Tears.[66] In 1851, Congress passed the Indian Appropriations Act, creating reservations the natives weren't allowed to leave without government permission.[67] The passage of the General Allotment Act in 1887[68] marked the beginning of the Allotment and Assimilation Era; this Act intended to force natives to become an agrarian people, and thereby assimilating them into mainstream society[69]. It was against this backdrop that copyright jurisprudence developed, interwoven with judicial philosophies and our legal system's rule of recognition—the rule through which society recognizes rules of law.[70]

A rule of recognition is valid insofar as society accepts it.[71] It evolves based on the

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[61] Battle of Horseshoe Bend, *Encyclopedia Britannica* (last updated Mar. 20, 2024).
[62] Cohen, supra note 58, § 1.03 (citing See Marquis James, Andrew Jackson, The Border Captain 189 (The Literary Guild 1933).
[63] Deloria & Wilkins, supra note 60, at 35.
[64] *Id.*
[65] History.com Editors, Native American History Timeline, HISTORY, (last updated June 2, 2023, originally published November 27, 2018).
[66] *Id.*
[67] *Id.*
[68] Deloria & Wilkins, supra note 60, at 38.
[69] Cohen, supra note 58, at § 1.04.
[70] Aazaad Burn, Course Notes on Jurisprudence taught by Ofer Raban, University of Oregon, Eugene, OR (Jan. 29, 2024) (discussing H.L.A. Hart's Legal Positivism) [hereinafter Course Notes on Jurisprudence].
[71] *Id.*

prevailing beliefs and values of society, which influences how laws are recognized.[72] The rule is what provides authoritative criteria for identifying primary rules of obligation, the rules that govern and regulate our actions.[73] In our legal system, the primary rules might be, for example, the statutes of the Oregon legislature, a written constitution actually enacted by the legislature, or federal legislation.[74] The only thing giving a rule of recognition legitimacy is that people endorse it as binding, and compliance becomes customary.[75] For example, the United States Constitution only has binding power because society has chosen to recognize it.[76] Courts do not have coercive power other than through the legitimacy people choose to ascribe to their decisions; they lack the power of the sword and the purse. Hence, unpopular decisions typically delegitimize the courts' power and people's desire to comply. Therefore, courts often try to avoid polemical decisions. Sometimes, they dodge them on procedural grounds, to avoid ruling on the merits altogether. Other times, some argue, they contort the law to justify the decisions they desire to reach; this was on Felix Cohen's mind.[77]

[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See* Problems of a Functional Jurisprudence, supra note 6; Transcendental Nonsense, supra, note 1.

D. Felix Cohen's theory of jurisprudence might shed light on the genesis of the difficulties faced in using copyright to protect native cultural heritage.

Needing to rule in ways preserving peoples' regard for the rule of recognition, combined with malleable nature of metaphysical doctrines and the emerging nature of this legal regime, made copyright law a hotbed for convoluted legalese.

In the introduction to Felix Cohen's Handbook of Federal Indian Law, Rennard Strickland referred to Cohen as the Blackstone of American Indian law.[78] Indeed, Cohen is credited with immense contributions in the field. But he also contributed to the field of legal philosophy, or jurisprudence. He taught philosophy at City College of New York and jurisprudence at Yale Law School.[79] Unlike Blackstone who believed in natural law theory[80], Cohen, in jurisprudence, defended the functional approach.[81] This approach sought to describe the workings of a legal rule and the consequences flowing from it.[82] One wonders if the many paradoxical results and tortured doctrines in Indian law influenced Cohen's theory of jurisprudence, because he was a skeptic.

For a man who dedicated much of his life's work to compiling a practical Handbook on Indian law doctrines, his cynicism toward the rule of law comes off as a little startling. In his 1937 paper, "the Problems of a Functional Jurisprudence," he questioned the application of rules of law, asking "are certain rules of law, so-called, merely ritual observances which have no verifiable relation to the decisions of judges who recite them?"[83] Cohen described legal rules as

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[78] Jill E. Martin, The Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights, 23 Am. Indian L. Rev. 165, 165 (1998) (citing Rennard Strickland, Introduction to Felix S. Cohen's Handbook of Federal Indian Law (Rennard Strickland et al. eds., 1982)).
[79] Martin, supra note 78, at 166.
[80] Course notes on Jurisprudence, Supra note 70, on January 22, 2024.
[81] *See* Problems of a Functional Jurisprudence, supra note 6; Transcendental Nonsense, supra, note 1.
[82] *Id.*; Martin, Supra note 78, at 167.
[83] Problems of a Functional Jurisprudence, supra note 6; Transcendental Nonsense, supra, note 1.

a function of judicial decisions.[84] This would explain why some skeptics believe statute law as having only superficial resemblance to the workings of the statute, much of it being without force.[85] He also criticized judicial opinions as being unreliable, writing "under the skeptical gaze, a good many of the revered rules and principles of law turn out to be pious frauds, contradicted by the actual holdings in decided cases, others turn out to be so ambiguous that they have no predictive or scientific value, and still others tun out to be disguised tautologies, similar to the doctrine established by Moliere's physician, that opium puts men to sleep because it contains a dormitive principle."[86]

In fact, Cohen's treatment of the legal profession was along the same lines as Moliere's criticism of the medical profession in the 1600s. Moliere criticized doctors' erudition as vast but irrelevant, spouting pretentious monologues in Latin and Greek while dressed up in silly robes.[87] Three-hundred years later, Cohen criticized courts for obscuring uncertainty in law through the use of legal fictions and linguistic conventions that give the appearance of certainty when there is none: using words such as "good faith," and "due care."[88] Those might just as well be Latin and Greek to a layperson—Cohen called this language transcendental nonsense, that paved the way for circular reasoning in judicial decisions characterized by arguments that remain true so long as they are believed.[89] He was concerned with how legalese could be used to make a decision sound reasonable, when in fact its effects were unreasonable.[90]

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[84] *Id.* at 8.
[85] *Id.* at 9.
[86] *Id.*
[87] David Shaw, Molière and the Doctors, 33 Nottingham French Stud. 133 (1994).
[88] Problems of a Functional Jurisprudence, supra note 6, at 10; Transcendental Nonsense, supra, note 1, at 811.
[89] Transcendental Nonsense, supra, note 1, at 813.
[90] Martin, supra note 78, at 168.

Above all, Cohen recognized that judges, after all, are human.[91] Therefore, he reflected, not all the forces motivating judicial behavior come from law books.[92] For example, Cohen noted that judges and legislators used value-laden language when they discussed Indian legal issues, applying to Indians terms they ordinarily would use for animals.[93] In various opinions, where courts said a white man "traveled" or "commuted," and Indian would "roam."[94] Cohen explained this, stating "[p]robably the easiest way of maintaining consistency in our principles is to have a second-string substitute vocabulary to use in describing any facts that do not fit into the vocabulary of our professed principles."[95]

A lot comes down to the individual judges' "social vision, knowledge, judgment, and… ability to weigh available evidence."[96] The need for these competences grows when the "legal question presented involved the development of an important economic institution, social organization or political instrumentality."[97] Judges might be aware with the applicable statutes and cases, but not with the "social realities on which they impinge."[98] Unlike the positivist obsession with treating law as a science that caused the "divorce of legal reasoning from questions of social fact and ethical value"[99], for legal realists like Cohen, the meaning of a definition is found in its consequences.[100] Judges must not simply ask "whether a rule exists, but whether it *ought* to exist" (italics Cohen's).[101]

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[91] Problems of a Functional Jurisprudence, supra note 6, at 12.
[92] *Id.*
[93] Martin, supra note 78, at 167-69 (citing Felix S. Cohen, Field Theory and Judicial Logic, 59 Yale L.J. 238, 242 (1950)).
[94] *Id.* at 169.
[95] *Id.* (citing Felix S. Cohen, Indian Self-Government, Am. Indian, vol. 5, no. 2, 1949, at 3, 6, reprinted in Felix S. Cohen, The Legal Conscience: Selected Papers of Felix S. Cohen 305 (Lucy Kramer Cohen ed., 1960)).
[96] Problems of a Functional Jurisprudence, supra note 6, at 13.
[97] *Id.*
[98] *Id.*
[99] Transcendental Nonsense, supra, note 1, at 814.
[100] *Id.* at 838.
[101] Problems of a Functional Jurisprudence, supra note 6, at 20.

Although he only mentions it briefly, Cohen also criticized the judicial decisions creating the law of intellectual property as having the characteristic circular reasoning that was the target of his attack. He drew attention to the lack of logic in the "thingification" of property, where courts examined commercial words to find property rights inhering in them; by virtue of the right which the plaintiff acquired in the word, he would be entitled to pecuniary or injunctive relief.[102] To be sure, one could take copyright law to task on the same grounds. And I will, briefly.

E. "Transcendental nonsense" decisions plague copyright law.

Today, copyright law has come into vogue in earnest, both culturally and economically. In the early days of United States copyright law, Judges were busy sermonizing doctrines—expounding on the meaning of such terms as "work of *authorship*," "originality," and distinguishing "idea" from "expression." It requires no stretch of the mind to see how these intellectual crusades revolved mainly around metaphysical inquiries (even Justice Story agreed![103]) designed to sidestep the conceptual questions arising from treating intangibles as property. Demarcating the line between the public domain and private works is one such inquiry: for example, how does one separate movie scenes so quintessential to the genre that they should be public from ones that are sufficiently original to warrant protection as private property?[104] The line, so to speak, is probably only apparent to those who have taken, at the very least, a course in copyright law. A wide-eyed youth's reply to the claim of "I own that" as it pertains to intellectual property might be "how could anyone possibly own that?"[105] Shifting the vantage point towards economic concerns, the claim might be "I have the right to use and profit

[102] Transcendental Nonsense, supra, note 1, at 815.
[103] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).
[104] Course Notes on Copyrights, supra note 10, on Jan. 30, 2024 (discussing scènes à faire doctrine).
[105] James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (Harvard Univ. Press 1996) (Chapter 6, "Copyright and the Invention of Authorship").

from that" and the response from a native people might—on the one hand—be "that is part of our cultural heritage and has been so for hundreds or thousands of years, and you do not have the right to use that for profit"—or on the other hand—be "that is part of our private cultural heritage that is ours alone and you do not have the right to divulge, publish, or reproduce it."

Hence we find ourselves confronted with the questions of Indigenous peoples' right to privacy regarding their cultural customs and knowledge, and precisely when cultural appropriation of expressions of tribal culture, knowledge, customs, depictions, and artistic works crosses the line from being inappropriate and insensitive to being unlawful, and if unlawful, under what legal or regulatory construct.

F. I propose a new framework for protecting native intellectual and cultural property.

There is a fundamental gap in our western cultural notion of authorship that is reinforced and coupled with the economic system that we have, and that fundamentally disregards the communal nature of creation. Calculus emerged through Newton and Leibnitz simultaneously.[106] Einstein had to work on his theory of general relativity as quickly as he could in order to "beat" others who were working on the same idea at the same time.[107] Creation of new content can be seen just as much as an emergence form the collective as from the induvial.

The notion that the creation of a particular image or object rendered in the style of, say, a native tribe could then have a copyright controlled by a profit-seeking entity should seem absurd. But what if the entity's goal was using the image to generate revenue to sustain the teaching of a native people's language, or preserving their culture? And what would happen if the entity sold

[106] Jason Socrates Bardi, *The Calculus Wars: Newton, Leibniz, and the Greatest Mathematical Clash of All Time* (2006).
[107] Jørgen Veisdal, Einstein and Hilbert's Relativity Race, Privatdozent (July 3, 2021).

the copyright to Disney, who then used it as the global logo for a new set of theme parks? The sui generis law I propose will attempt to address these concerns.

I submit first that each indigenous tribe or nation might choose to determine their own approach to protection of their cultural works, and that no single system of protection under the law could rightly be proclaimed to bind all sovereign domestic nations together under one law, just as China might choose to apply different laws from those applied in the United Kingdom, for example. Hence, this shows that the question of jurisdiction over a given sovereign domestic nations' material must be the first pivotal question to adjudicate. From this point, the nation, then may define and assert its own judicial framework under which to keep private, preserve, protect, use, market, license, and publish cultural materials within its jurisdiction. Moreover, the default forum should be the tribal courts for the nation whose cultural expression is at issue in the case, though changes of judicial forum should be permitted if both parties agree. Note that only federally recognized tribes, including American Indian and Alaska Native nations, would be able to avail themselves of this new law; while I recognize this isn't an ideal solution, as many nations have been terminated and are therefore unrecognized, it will avoid creating a law whose boundaries are undefined and that can be eroded by unfavorable court decisions. This approach recognizes the inherent communal nature of Indigenous creations and the difficulties arising from pinpointing a unique author that acts as a barrier to protection.

Under my proposed law, all cultural and intellectual property originating within a nation's historical and cultural context—from the point of view of the nation—belong to the nation. The tribal nation would have authority over them for a time limit or in perpetuity, if it chooses. However, the presumption of tribal jurisdiction over their cultural and intellectual property should be rebuttable. This presumption ensures that the burden of proof is shifted away from the

tribe having to prove ownership of the cultural expression. Instead, the outside entity seeking to use the cultural expression commercially would have to show that either (1) the cultural expression does not fall within the tribe's jurisdiction, or (2) the tribe's laws do not prohibit the use of said cultural expression, or (3) show they have a right to use the expression for other reasons, namely that they are making a fair use.

Copyright law in the United States includes a fair use test, that allows limited use of copyrighted material when certain conditions are met. I adapted the test to fit the indigenous cultural and intellectual property context. If the cultural expression falls within the bounds of this fair use analysis, then the presumption of tribal jurisdiction over the expression is rebutted. The Tribal Cultural Fair Use test has four factors, to be evaluated on a case-by-case basis:

1. The Purpose and Character of the Use: This factor assesses whether the use is for commercial purposes, educational purposes, or for the preservation of culture. Non-commercial, educational, or preservation-oriented uses by non-tribal members would weigh for a finding of fair use.
2. The Nature of the Copyrighted Work: This factor would consider the significance of the work to the tribe. Sacred, secret, or spiritually significant works would be less susceptible to a finding of fair use.
3. The Amount and Substantiality: This factor would consider the quantity of the work used, and the qualitative significance of the portion taken. Minimal uses of a culturally significant work may be found to be a fair use insofar as they don't use the core or essential elements of the expression.
4. Effect on the Work's Value: The new use's impact on the market for, or value of, the work would be considered. The impact would be considered in light of the cultural

and economic interests of the tribe, and whether the new use had a potential to impair these interests. For example, if the new use competes with the tribe's own use, that would weigh against a finding of fair use.

Thus, this fair use test allows for specific, limited uses when certain conditions are met.

Two potential constitutional justifications for this framework would be through the Fourth Amendment Right to Privacy[108], or through the Article One Indian Commerce Clause[109]. While the intricacies of these justifications are beyond the scope of this paper, I will briefly address them. For the Right to Privacy justification, it could be argued that cultural expressions are an extension of the community's identity and personal life, and thus deserving of protection under privacy. While this grounding is tenuous, United States Supreme Court precedents on identity and privacy such as *Lawrence v. Texas*, and *Obergefell v. Hodges* could be analogized to the protection of a group's cultural and spiritual identity. For the Indian Commerce Clause justification, it could be that the cultural and intellectual property is an aspect of commerce, and thus tribes could regulate it under their inherent powers recognized in the clause.

By shifting the debate from one of how to protect cultural expression, and instead focusing on how tribes themselves may assert their right to themselves govern, protect, and define their own cultural expressions, tribal self-governance and self-determination are upheld, and the issue of indigenous nations being required to collectively follow a single framework defined from outside their jurisdiction is avoided. The debate is reduced to the question of jurisdiction of the tribal nation, and the tribal nation's right to privacy and to governance of cultural expressions within its jurisdiction. By incorporating a rebuttable presumption of

[108] U.S. Const. amend. IV.
[109] U.S. Const. art. I, § 8, cl. 3.

ownership and a fair use analysis specifically tailored to the tribal context, this framework would significantly enhance the protection of Indigenous Cultural Heritage. This framework respects tribal sovereignty and avoids many of the pitfalls posed by copyright law.

In sum, United States copyright law was shaped by a historically romanticized view of authorship. Partly for that reason, it fails to protect the communal and evolving nature of Indigenous Cultural Heritage. As a result, many tribes remain vulnerable to exploitation under a legal framework that does not align with their collective knowledge systems. An approach that prioritizes tribal jurisdiction and sovereignty would better honor indigenous rights and cultural expressions. Ultimately, bridging the gap between United States copyright law and indigenous perspectives will hep promote justice, preserve cultural heritage, and restore tribal autonomy.