RETHINKING AUTHENTICITY

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ABSTRACT

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INTRODUCTION

In 2015, designer Isabel Marant released her much anticipated spring Étoile collection. One piece in the collection, a white blouse with red patterned stitching, was particularly memorable—not only because of its striking look, but what followed off-runway. The Marant blouse was similar to the traditional "xaam nëxuy" huipil garment made by the people of Santa María Tlahuitoltepec in Oaxaca, Mexico. The Indigenous Mixe community of Tlahuitoltepec has made textiles in this style for generations. Marant had appropriated the traditional design, selling her blouse for six times more than those made by the weavers of Tlahuitoltepec. In doing so, the Mixe felt the designer disrespected the cultural legacy of Tlahuitoltepec, treating it as treasure to be looted rather than acknowledged. In other cases, intellectual property law would protect unique creations from copying. Yet intellectual property often excludes traditional knowledge ("TK") and traditional cultural expressions ("TCEs") such as the xaam nëxuy huipil.

There are countless stories of outsiders commodifying Indigenous TK and TCEs for their own benefit with little concern as to how this could harm source communities. Adidas launched its Oaxaca Slip-On, with a strikingly

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similar design to the traditional Indigenous huaraches. Canadian art galleries feature expensive, pieces with recognizably Indigenous styles that are made by non-Indigenous individuals. Neiman Marcus sold a coat that mimicked the Ravenstail robe made for hundreds of years by Tlingit, Haida, and Tsimshian communities in Alaska. Chinese manufacturers mass-produced Ojibwe and Chippewa dreamcatchers. Urban Outfitters adorned tawdry products such as underwear and flasks with Navajo designs. Although cultural appropriation can be benign or even accepted and generative, in its worst forms it can challenge the very survival of Indigenous communities as distinct cultural groups. When TK is instead supported, it can revitalize Indigenous culture.

The international community is aware of the problem of outsiders appropriating Indigenous culture for their own benefit. International law explicitly safeguards Indigenous culture and customs.[1] Since 2001, World Intellectual Property Organization ("WIPO") member states have been negotiating international agreements on intellectual property and genetic resources, TK, and TCEs. After almost a quarter of a century, last year, WIPO members agreed on the terms of a treaty on genetic resources. Now may be the time to rethink intellectual property approaches to TK and TCEs—including the xaam nëxuy huipil—which remain in protracted negotiations.

Advocates and scholars from law, anthropology, and critical and Indigenous studies have extensively discussed appropriation of Indigenous culture and the failings of intellectual property law.[2] In response, policymakers, advocates, and scholars have offered a host of proposals to better protect TK and TCEs. Yet, time and time again, they continue to return to intellectual property.[3] Even most proposals for sui generis regimes that would uniquely protect TK and TCEs continue to rely on intellectual property concepts and principles.[4]

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[1] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, arts. 12, 13, 31 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [hereinafter UNDRIP].

[2] *See, e.g.*, *id.* at 1098; Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 272 (2006); Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 123 (2022); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN L. REV. 1, 41, 56–57 (1997); Ruth L. Okediji, *A Tiered Approach to Rights in Traditional Knowledge*, 58 WASHBURN L.J. 271, 296 (2019).

[3] *See, e.g.*, MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 41 (2012); J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GIs?*, 14 FIU L. REV. 571, 580 (2021); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 217 (2000); Daniel Gervais, *Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. U. L. REV. 137, 149 (2005); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 818 (2001).

[4] *See, e.g.*, Ruth Okediji, *Grafting Traditional Knowledge onto a Common Law System*,

Some have recognized that intellectual property, legal, and non-legal strategies could be used together to help limit harmful appropriation.[5] However, the proper objectives and balance of these different approaches are uncertain. While broadening the definition of intellectual property may help protect interests in TK and TCEs, some values in protecting against Indigenous cultural appropriation may be beyond its conceptual bounds. By wielding intellectual property as a blunt instrument, advocates risk trying to force a square peg into a round hole while more promising choices lay within reach. If protecting TCEs is a desirable end, we must take seriously the conceptual advantages and limitations of intellectual property as the method to achieve it.

To improve theoretical approaches to protecting Indigenous culture, this Article reconceptualizes authenticity to disaggregate which TK and TCE interests intellectual property can protect and which are beyond its conceptual bounds. TK discourse and related legal documents frequently refer to authenticity. Authenticity is collectively constructed by society. Legal scholarship has a nascent interest in examining (and often criticizing) the intersection between authenticity and intellectual property, building upon prior critical and theoretical work from other disciplines.[6] While these theories of authenticity have understood that the term is socially created, a taxonomy of its underlying meanings has been lacking.

This Article offers a new theory of authenticity by centering Indigenous communities and consumers' understandings and disaggregating the concept into four underlying dimensions that can reflect authenticity: uniqueness, creatorship, place, and tradition. By more precisely understanding the conceptual limitations of intellectual property law vis-à-vis these dimensions, policymakers and scholars can optimally wield intellectual property and non-intellectual property tools in tandem to best

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110 GEO. L.J. 75, 83 86–88, 113 (2021); Sunder, *supra* note 2, at 328; Riley, *supra* note 2, at 103; Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept*, CIGI Papers No. 185, at 8 (Aug. 2018), https://www.cigionline.org/sites/default/files/documents/Paper%20no.185web.pdf. (recommending a tiered approach).

[5] *See, e.g.*, Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 899 (2016); Susy Frankel, *'Ka Mate Ka Mate' and the Protection of Traditional Knowledge*, *in* INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF INTELLECTUAL PROPERTY 193, 197 (2014).

[6] *See, e.g.*, Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010); Amy Adler, *Artificial Authenticity*, 98 N.Y.U. L. REV. 706 (2023); Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291 (2023); Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 GA. L. REV. 1669 (2023); Laura A. Heymann, *Dialogues of Authenticity*, 67 STUD. L. POL. & SOC'Y 25 (2015).

protect Indigenous culture from the harms of cultural appropriation. While intellectual property law can conceptually protect significant facets (but not the entirety) of the first three authenticity dimensions, it is ill-equipped to safeguard tradition. Intellectual property's forward-looking focus on innovation and competition places it in opposition to, or at least makes it agnostic to, tradition. Instead, other legal and non-legal strategies such as sui generis laws and self-help in the form of education and shaming are likely better conceptual matches for preserving tradition in Indigenous culture.

I. INTELLECTUAL PROPERTY'S PREEMINENCE IN PROPOSALS TO PROTECT INDIGENOUS CULTURE

Despite the doctrinal inadequacy of intellectual property law for protecting TK and TCEs, intellectual property and related concepts have permeated new proposals for improved protection. While some scholars have developed taxonomies to understand Indigenous interests in TK, a theory of these interests vis-à-vis intellectual property is lacking.

In response to concerns about the harms of Indigenous cultural appropriation, advocates and scholars have previously called for better protections for TK and TCEs. Protecting TK and TCEs is not guided by a desire to isolate or elevate indigenous culture, but rather to restore indigenous cultural properties to a comparable baseline to that enjoyed by other communities.[7] The ability of an Indigenous community to protect and promote their TK has been widely recognized as inherent to sovereignty. Under international law, Indigenous peoples have equal rights to everyone else, including access to intellectual property protections. The United Nations Declaration on the Rights of Indigenous People ("UNDRIP") affirmed that "[I]ndigenous peoples are equal to all other peoples" and recognizes the need to promote their inherent rights.[8] Furthermore, UNDRIP nominally provides Indigenous peoples with "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions" and intellectual property thereover.[9] Relatedly, they have the right to "practi[c]e and revitalize their cultural traditions and customs."[10] However, cultural appropriation undermines this preservation of Indigenous culture. A 2009 United Nations SOWIP report concluded that "social, economic and political marginalization of [I]ndigenous peoples is pervasive in all the regions of the world . . . [and] [I]ndigenous cultures, languages and

[7] Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property: A Response*, 17 INT'L J. CULTURAL PROP. 581, 584 (2010).
[8] UNDRIP, *supra* note 1, pmbl. para. 7.
[9] *Id.* art. 31(1).
[10] *Id.* art. 11(1).

practices were ignored or their preservation was discouraged."[11]

Some have questioned the viability of intellectual property for protecting TK and TCEs.[12] Intellectual property doctrine has historically fallen short of protecting TK and TCEs due to requirements such as fixation, identifiable authors, and commercial use. Part of this discomfort also comes from intellectual property law's Western background and grounding in commercial incentives, which can ignore cultural appropriation's dignitary harms.[13] These differing approaches mean that intellectual property rationalizations can perhaps only be "awkwardly applied" to TK.[14]

Yet, despite historical shortcomings and criticism, policymakers, advocates, and scholars continue to return to intellectual property as the primary vehicle for protecting TK and TCEs. International proclamations and agreements such as the Tunis Model Copyright Law, UNESCO and WIPO's model provisions, and the Bellagio Declaration, explicitly couched protection for TK and TCEs in intellectual property. In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore ("ICG") to address the misappropriation of TK. The work of the IGC has been one of the leading international legal efforts for protecting TK. These efforts culminated in May 2024 with the adoption of the WIPO Genetic Resources and Associated Traditional Knowledge Treaty. The Treaty specifically acknowledged UNDRIP and committed to achieving its ends.[15] Proposed intellectual property treaties for protecting TK and TCEs are still under discussion, as they have been for the past quarter of a century.

Likewise, national laws that nominally offer sui generis protections for TK and TCEs are also often couched in intellectual property concepts such as royalties, authorship, and likelihood of confusion. For example, Senegal requires royalty payments for using folklore.[16] In the United States,

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[11] Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, State of the World's Indigenous People (SOWIP): Education, Vol. 3, ST/ESA/368, at 4 (2017).

[12] *See, e.g.*, Riley, *supra* note 3, at 190; Okediji, *supra* note 2, at 296; Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 40 (2009); Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 SAN DIEGO L. REV. 1215, 1238 (2012).

[13] Angela Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 88 (2005).

[14] Okediji, *supra* note 4, at 83.

[15] WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, TRT/GRATK/001 pmbl. (May 24, 2024).

[16] Law No. 2008-09 of January 25, 2008 on Copyright and Neighboring Rights in Senegal, arts. 156–57 (Sen.), https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/sn/sn004en.html.

the Indian Arts and Crafts Act provides a trademark-adjacent cause of action for falsely suggesting that a good is produced by a member of an Indian tribe or an Indian artisan.[17]

Indigenous peoples have also tended to rely on intellectual property regimes in their advocacy and practice. In 1993, representatives from Indigenous populations of fifteen countries signed the Mataatua Declaration, which declares that existing intellectual property laws are inadequate for Indigenous peoples and calls for new intellectual property regimes that are able to protect TCEs.[18] Since then, Indigenous communities have increasingly turned toward intellectual property law to help protect their TCEs. For example, a recent study found that some American Indian tribes have registered their names as trademarks.[19]

Beyond international frameworks, national laws, and Indigenous practice, scholars have also continued to primarily rely on intellectual property as the solution for protecting TK. Some legal scholars have focused on existing but underexamined possibilities in intellectual property doctrine, such as trademark law, certification marks, fair use, geographical indications ("GIs"), and trade secrets.[20] Others have suggested revisions to intellectual property law, for example, by employing intellectual property social justice theory, providing copyright protections for Indigenous art, and requiring disclosure of TK in patent applications, an approach recently adopted in the WIPO treaty on genetic resources.[21]

Some have instead emphasized the uniqueness of Indigenous predicaments and advocated for separate Indigenous intellectual property laws. Intellectual property law itself will not necessarily change to fit TK—it is a Western formulation of law with its own specific aims and priors. Some scholars have criticized importing Western property notions into Indigenous

[17] 25 U.S.C. § 305e.

[18] *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, Hum. Rts. Comm., Sub-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. Working Group on Indigenous Populations, 12th Sess., U.N. Doc. E/CN/4/Sub.2/AC.4/1994/12 (1994).

[19] Sonia Katyal, Angela Riley & Rachel H. Lim, *Indigenous Misdescription*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4750595.

[20] *See, e.g.*, Munzer & Raustiala, *supra* note 12, at 87–88; Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. 1373, 1422 (2021); SUNDER, *supra* note 3, at 41; J Osei-Tutu, *supra* note 3, at 580; Margo A. Bagley & Justin Hughes, *Secret Traditions as Trade Secrets*, 66 HARV. INT'L L. J. 103, 106 (2025).

[21] *See, e.g.*, Steven D. Jamar & Lateef Mtima, *A Social Justice Perspective on Intellectual Property Protection for Folk Music*, *in* THE OXFORD HANDBOOK OF MUSIC LAW AND POLICY 7 (2021); Gervais, *supra* note 3, at 149; Okediji, *supra* note 2, at 275; *see also* WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, GRATK/DC/7 (May 24, 2024).

communities as a form of neo-colonialism.[22] Using intellectual property to protect TK may also be antithetical to Indigenous countries' own norms. Others have instead criticized using property law to protect TK and TCEs because the theories for protection are not aligned.[23]

But these and other scholars' own proposals do not entirely reject using intellectual property. For example, Kristen Carpenter, Sonia Katyal, and Angela Riley proffer that relying *solely* on the predominant Western, individualized form of property would be problematic, but that a broader theory of cultural property based on community-oriented claims grounded in cultural stewardship may be beneficial for Indigenous communities' goals.[24] Riley has also proposed an American Indian copyright law, which would protect "collective indigenous works" in perpetuity under copyright without regard to originality, authorship, or fixation requirements.[25]

The incompatibility some perceive between intellectual property law and TK—whether on legal or philosophical grounds—has led to proposed sui generis regimes. In theory, sui generis regimes could draw on a variety of other legal doctrines and traditions. Every culture—not just Western Europe—has its own knowledge protection mechanisms.

Despite these potential alternatives, however, sui generis proposals are still typically grounded in intellectual property frameworks or import intellectual property concepts, whether explicitly or implicitly. The supposed strict dichotomy between intellectual property and sui generis regimes for TK is exaggerated. Some have explicitly situated sui generis protections within traditional notions of intellectual property, akin to bespoke U.S. laws protecting boat hull designs and semi-conductor chips.[26]

More often, intellectual property concepts implicitly influence proposed sui generis regimes through concepts such as licensing, authorship, or property. For example, many have proposed licensing for TK that would better protect the economic and dignitary interests of source communities.[27] One of the most prominent sui generis proposals comes from Carpenter, Katyal, and Riley, who advanced a cultural stewardship model of property based on tribal custom that would give Indigenous communities control over the trajectory of cultural property.[28] However, even this stewardship proposal

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[22] *See, e.g.*, Riley, *supra* note 3, at 190.

[23] *See, e.g.*, Munzer & Raustiala, *supra* note 12, at 40; Hughes, *supra* note 12, at 1238.

[24] Kristen Carpenter, Sonia Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028–29 (2009).

[25] Riley, *supra* note 3, at 217.

[26] Munzer & Raustiala, *supra* note 12, at 89–90.

[27] Jane Anderson & Kimberly Christen, *"Chuck a Copyright on It": Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels*, 7 MUSEUM ANTHROPOLOGY REV. 105, 118–19 (2013).

[28] Carpenter, Katyal & Riley, *supra* note 24, at 1086–87.

and others like it are not entirely free from intellectual property concepts. Due to their dynamic nature, some customary laws and models have incorporated aspects of intellectual property laws and norms. This likewise affects custom-based frameworks. Riley has also proposed endorsing tribal laws to give Native American tribes control over their TK.[29] Yet some of these tribal laws explicitly reference Western intellectual property regimes, including copyright and trademark law.[30]

These prior and contemplated laws and proposals illustrate that intellectual property remains a core piece of the theory and practice of protecting TK and TCEs. That said, most agree that something else is likely also needed to fill gaps in intellectual property's protection of TK.[31] Scholars have previously suggested that intellectual property, legal, and non-legal strategies could be used together to help combat harmful cultural appropriation.[32] Even truly sui generis regimes will need to interface with intellectual property to facilitate existing bounds.

The difficulty, then, is determining where intellectual property rights can be appropriately adapted to restrict cultural appropriation and where alternatives are needed. The common approach of individualized suggestions for how intellectual property and related rights and approaches may help protect TK is insufficient because it may miss the forest for the trees. By focusing on the ends, we miss the optimal means. Growing awareness of a broader toolkit is a start, but a theory of the conceptual limitations of intellectual property is lacking. Elucidating such a conceptual theory would advance an improved framework to protect TK and TCEs.

Earlier work started to disentangle the various interests in TK and TCEs. Some focused on disclosure, commodification, and purpose as ways to differentiate Indigenous interests in protection.[33] Others have instead focused on whether theories of intellectual property are aligned with protecting TK and TCEs.[34]

So far, however, these analyses have not scrutinized the conceptual limits of what intellectual property values and protects. Usage of or modifications to intellectual property law may be a promising avenue for protecting certain interests in TK and TCEs. But rather than continue to primarily rely on a piecemeal intellectual property approach, advocates should consider which of TK's interests are too far removed from intellectual property's conceptual core. It is imperative to differentiate between what

[29] Riley, *supra* note 13, at 86, 89.
[30] Riley, *supra* note 2, at 127–28.
[31] Okediji, *supra* note 4, at 116.
[32] *See, e.g.*, Riley & Carpenter, *supra* note 5, at 899; Frankel, *supra* note 5, at 197.
[33] Oguamanam, *supra* note 4, at 8.
[34] Hughes, *supra* note 12, at 1238.

intellectual property *can* do in relation to TK and what it *cannot*. While broadening the definition of intellectual property may help protect interests in TK and TCEs, some interests may be beyond its conceptual bounds. A theory of intellectual property's conceptual inadequacies will facilitate a realignment in approach to optimize both legal and non-legal strategies.

II. A New Approach to Authenticity

This Article offers such a framework for understanding the conceptual limits of intellectual property through a reconceptualization of authenticity. Authenticity is a term that appears time and again in both Indigenous communities and consumers' explanations of why they value knowledge and products made by Indigenous people. Source communities wish to preserve authenticity while consumers wish to be connected to it. Recognizing its importance, drafts of the WIPO treaties on TK and TCEs have included it.[35] Intellectual property scholarship—often building on earlier theoretical work from other disciplines—has frequently engaged in normative discussions around authenticity while recognizing its dialogical construction. Until now, however, these discussions have not developed a taxonomy of authenticity's different dimensions for TK and TCEs. By disaggregating different understandings of authenticity by both Indigenous populations and consumers, this Article reveals the conceptual limits of intellectual property for preserving Indigenous authenticity.

The murkiness of authenticity comes, in part, from its dialogical and unstable nature. Authenticity does not necessarily reflect truth because it does not exist in the abstract. It is collectively formed through socially created perceptions and cultural practices.[36] Anthropologists have defined authenticity as a "negotiated agreement about what is perceived as genuine."[37] Andy Warhol famously described authenticity as "something that only somebody else can see . . . It's all in the other person's eyes."[38] The same is true for Indigeneity and authentic Indigenous products, neither of which are bounded categories.[39]

[35] *See, e.g.*, The Protection of Traditional Cultural Expressions: Draft Articles, WIPO/GRTKF/IC/19/4, art. 1(2) (May 17, 2011); The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/25/6, at 4 (May 30, 2013).

[36] Beebe, *supra* note 6, at 832.

[37] Catherine M. Cameron & John B. Gatewood, *The Authentic Interior: Questing* Gemeinschaft *in Post-Industrial Society,* 53 HUM. ORG. 21, 23 (1994).

[38] ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL: FROM A TO B AND BACK AGAIN 77 (1975).

[39] JANET CATHERINE BERLO, NOT NATIVE AMERICAN ART: FAKES, REPLICAS, AND INVENTED TRADITIONS 5 (2023).

Although authenticity is artificial,[40] it has real power. Communities value the authentic while eschewing the inauthentic. There is something deeper that the public prizes in the form of authenticity, a sort of genuineness or legitimacy.[41]

Intellectual property law scholarship has usually critiqued authenticity and its influence. Authenticity rhetoric can reflect power hierarchies much like property ownership, placing the claimant above others.[42] In a canonical paper, Barton Beebe observed that authenticity can re-impose scarcity, and sumptuary intellectual property law can preserve authenticity.[43] According to Beebe and others, intellectual property serves "to re-enchant copies, to render them as somehow unique or authentic."[44]

Nonetheless, Beebe and other critics recognize that intellectual property is not coterminous with authenticity.[45] Courts have also acknowledged this.[46] However, neither prior literature nor judicial opinions offer a way to disaggregate the respective interests of authenticity and intellectual property.

While prior discussions of the relationship between intellectual property and authenticity offer valuable insights into the field, they do not offer a taxonomy of the underlying interests of authenticity. This Article expands our understanding of authenticity in two ways. First, it considers authenticity not only from a general perspective, but also from that of Indigenous communities and the market. Second, it disaggregates authenticity into discrete underlying dimensions that Indigenous communities and consumers value.

First, both Indigenous communities and consumers value authenticity in Indigenous TK and TCEs. Anthropologists have explained that cultural products and their underlying mystique can fuse cultural and economic capital, creating internal cultural consciousness while also creating external market value.[47] If a work or copy lacks connection to the Indigenous source community, the object may be viewed as inauthentic by both in-group and out-group individuals.[48] Authenticity can therefore bridge the interests of source communities and the public, despite the legal literature often viewing them in opposition to each other.

Authenticity can reflect commercial and dignitary interests of

[40] *See generally* Adler, *supra* note 6.
[41] Burk, *supra* note 6, at 1690.
[42] Scafidi, *supra* note 3, at 817.
[43] Beebe, *supra* note 6, at 844, 870.
[44] *Id.*
[45] *See, e.g.*, Heymann, *supra* note 6, at 42; Adler, *supra* note 6, at 713.
[46] *See, e.g.*, Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 983 (9th Cir. 2008).
[47] JEAN COMAROFF & JOHN COMAROFF, ETHNICITY, INC. 33 (2009).
[48] Sonia Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111, 1152 (2017).

Indigenous communities. Jean and John Comaroff found that marketing authenticity can be a mode of self-construction of identity for a particular Indigenous community.[49] For example, the Navajo Nation registered a trademark in its name to authenticate products produced by Navajo craftsmen. Former tribal chair Anna Rose Counsell-Geyer has explained how the Quileute Nation explored promoting "culturally appropriate authentic Quileute items" online.[50] The Indian Arts and Crafts Board—composed of Native commissioners—distinguishes between authentic and inauthentic Native American arts and crafts. By sharing authentic creations and knowledge on their terms, Indigenous peoples can conjure a broader societal understanding of authenticity.[51]

Intangible aspects such as authenticity are also desirable qualities for consumers. For decades, consumers have sought out "authentic" or "genuine" Indigenous products.[52] Consumers will even seek out indicia of what they deem authentic, such as uneven edges or mislaid color that are the tell-tale signs of human error.[53] This is not to say that consumers would not purchase an inauthentic work and even enjoy it. For example, there is a market for reproductions of Eames chairs and knockoff Gucci handbags at a fraction of the price. Nonetheless, many consumers opt for authentic goods, including Indigenous art and products, over practically indistinguishable copies for any number of reasons, including appreciating the quality of the original and signaling their economic status. Intellectual property literature has described in detail how individuals consume trademarks to signal status, expression, and social meaning.[54] The same is true for the public consuming authentic Indigenous art and products.[55]

Second, authenticity can be derived from overlapping but discrete values. The intangible value of authenticity—whether for Indigenous peoples, consumers, or anyone else—comes from what has been described as a "halo of preciousness" or "aura."[56] While early theoretical discussions of authenticity focused on historical artifacts and fine art in the era of mechanical reproduction, it need not be so limited. For example, producers seek to create auratic experiences in all kinds of productions and experiences,

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[49] COMAROFF & COMAROFF, *supra* note 47, at 9.

[50] Carpenter, Katyal & Riley, *supra* note 24, at 582.

[51] COMAROFF & COMAROFF, *supra* note 47, at 10.

[52] *Cf.* PHILIP J. DELORIA, PLAYING INDIAN 138 (1998).

[53] Burk, *supra* note 6, at 1683–84.

[54] *See, e.g.*, Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–98 (1990).

[55] COLIN GOLVAN, PROTECTING INDIGENOUS ART: FROM T-SHIRTS TO THE FLAG 1 (2024).

[56] WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION (1935), *reprinted in* ILLUMINATIONS 221 (Hannah Arendt ed., 1969).

from crafts, to furniture, to bottles of wine.[57] In addition, particularly for Indigenous peoples, the physical and intangible components of cultural property are linked.[58] Authenticity is not inherent to the object itself, but resides in its relationship to a particular associated narrative.[59] In critiquing authenticity, some legal scholars have, at times, focused on it as a single amorphous target.[60] Others have suggested that authenticity can signal different concepts,[61] but a taxonomy of these values is wanting.

This Article disaggregates the underlying values in authenticity to offer a new understanding of authenticity and its relationship with intellectual property. It argues that authenticity is not unitary but plural, composed of distinct but overlapping dimensions. Within both Indigenous communities and consumer markets, authenticity often signals at least one of four overlapping attributes: uniqueness, creatorship, place, and tradition. All four are not necessary for authenticity, and even a single one may be sufficient. By disentangling authenticity into these four dimensions, we can more precisely interrogate normative criteria by which authenticity is constructed and best understand how law can safeguard it as it relates to TK and TCEs.

III. INTELLECTUAL PROPERTY'S LIMITED CONCEPTION OF AUTHENTICITY

This Article's novel disaggregation of authenticity's dimensions reveals the limits of intellectual property law for preserving authenticity. While intellectual property can support authenticity, it does not align with all four dimensions identified in this Article. Intellectual property values uniqueness, creatorship, and place. While they are not perfect matches, the conceptual interests are broadly aligned. By contrast, intellectual property only marginally accounts for tradition. This taxonomy is summarized in Table 2 and discussed in detail in this Part.

[57] Bechtold & Sprigman, *supra* note 6, at 295.

[58] Angela Riley, *Before Mine!: Indigenous Property Rights for Jagenagenon*, 136 HARV. L. REV. 2074, 2101 (2023).

[59] Bechtold & Sprigman, *supra* note 6, at 299.

[60] *See, e.g.*, Beebe, *supra* note 6, at 844; Pager, *supra* note 24, at 1870.

[61] *See, e.g.*, Adler, *supra* note 6, at 715 (suggesting that authenticity can signal originality and authorship); Burk, *supra* note 6, at 1683, 1688 (signaling origin, physical composition, and artisan or traditional methods); SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 56–57 (2005) (signaling authorship or place of origin); Heymann, *supra* note 6, at 26–27, 31–33 (representing an artist's creation or approval, provenance, or physical qualities).

TABLE 2

Authenticity's Dimensions and Intellectual Property		
Dimension	**Definition**	**Conceptual IP Parallel**
Uniqueness	No dilutive copying	Copyright, Patent, Trademark
Creatorship	Maker or discoverer	Copyright, Patent, Trademark
Place	Geographical origin	Geographical Indications
Tradition	Traditional production method and associated historical context	None

Recognizing these conceptual fissures facilitates the emergence of a more integrative framework for safeguarding TK and TCEs that does not uniformly rely on intellectual property. Understanding the limits of intellectual property for authenticity can clear space for other authenticity work outside of intellectual property, helping to theorize a more comprehensive approach to protecting TK and TCEs. This Part explains how each of these four dimensions is reflected in societal, Indigenous, and consumer norms of authenticity, and interrogates the conceptual alignment of intellectual property law with each.

A. Uniqueness

Authenticity can be reflected through uniqueness, which is also at the heart of intellectual property. Theories of authenticity often derides copies and replicas, whether made by a human or machine. Instead, people seek the unique "original" work. Authenticity tries to distinguish between unique originals and mere copies that dilute meaning, even when they are exact replicas. Prominent cultural property theorist John Henry Merryman explained that when we discover that an "original" or unique object is in fact a mere replica, "[t]he magic" of authenticity dissipates.[62] Like authenticity itself, uniqueness can reflect further subsidiary meanings, such as being the first, most prominent, personal, or only.

Authenticity as uniqueness is perhaps the most prevalent of definitions. This understanding of authenticity as uniqueness appears to be the closest to German social theorist Walter Benjamin's conception of the

[62] John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 346 (1989).

term, as Benjamin refers to a "unique existence" of the authentic in opposition to reproductions.[63] Some legal scholars have subsequently understood authenticity in this way.[64]

The mere ability to reproduce does not necessarily make a copy inauthentic. Even with—or perhaps especially because of—the rise in reproductive technologies, authenticity continues to differentiate between authentically unique originals and mere copies. Benjamin rejected the notion of authentic technologically produced copies because "[f]rom a photographic negative . . . one can make any number of prints; to ask for the 'authentic' print makes no sense."[65] The creation of copies can often reinforce our desire for authenticity; we want the "real thing" rather than a mere copy.[66] While copies can be authentic to some, they also underscore the unique authenticity of the original.[67] For example, Warhol's "original" *Shot Sage Blue Marilyn* sold for $195 million even though anyone can buy a $16 version from the Andy Warhol Museum.[68] So long as the copies do not dilute uniqueness, they are not necessarily harmful to authenticity.

The uniqueness dimension is perhaps exemplified by the non-fungible token ("NFT"), which Amy Adler has described as "the culmination of a conversation about authenticity."[69] NFTs are unique, non-interchangeable tokens stored on the blockchain that can represent a connection, possession, or other rights in associated assets, be they art, music, videos, or anything else. While NFTs could be attached to a mere copy, the importance of authenticity for NFTs is imbued in the uniqueness of the particular token, not necessarily the associated asset.

While Indigenous peoples approach uniqueness differently than consumer markets, they can also value it as part of authenticity. Take, for example, the Citizen Potawatomi Nation of Oklahoma, which explains that "[o]ur spiritual beliefs, historic values, and the celebration of our unique traditions, language, and sovereignty must be protected and nurtured so that we are able to understand our past and continue to thrive throughout our future."[70] Even everyday objects can be imbued with this meaning and

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[63] BENJAMIN, *supra* note 56, at 220.

[64] *See, e.g.*, Beebe, *supra* note 6, at 844; Adler, *supra* note 6, at 715.

[65] BENJAMIN, *supra* note 56, at 224.

[66] MARTIN PUCHNER, CULTURE: THE STORY OF US FROM CAVE ART TO K-POP 183 (2023).

[67] COMAROFF & COMAROFF, *supra* note 47, at 20.

[68] Deborah Vankin, *Sold for $195 Million, Andy Warhol's "Shot Sage Blue Marilyn" Sets New Auction Record*, L.A. TIMES (May 9, 2022, 6:41 PM), https://www.latimes.com/entertainment-arts/story/2022-05-09/andy-warhols-shot-sage-blue-marilyn-sets-new-auction-record.

[69] Adler, *supra* note 6, at 764.

[70] CITIZEN POTAWATOMI NATION, https://www.potawatomi.org.

power.[71]

Replication is not necessarily a problem for authenticity, although there is resistance to outside appropriation. Native American tribes such as the Zuni, for example, view repetition as "an affirmation of the continuity of knowledge."[72] An authorized replica of a Tlingit killer whale clan hat created with the help of 3D technology could be a valuable educational tool, and even danced in a clan ceremony, but cannot have the status of *at.óow*.[73] However, when non-Indigenous artists copied Crow fashion designer Bethany Yellowtail's designs, she was upset in part because her art is "not robotic repetition or generic art to sell, simply to make a buck. It's thoughtful, it's cared for, it carries our people forward with us."[74] Without uniqueness, copies are hollow and lack the ability to preserve culture or contain spiritual significance.

In addition to being a dimension of authenticity, uniqueness is also close to the core of intellectual property law. Under utilitarian theory, intellectual property is meant to incentivize new creations and discoveries. For example, a work must be original and expressive to qualify for a copyright.[75] Copyright law also vests the ability to create lawful copies of the work in the copyright owner alone.[76] The personality theory of copyright seems to support uniqueness too, as it protects creations that are unique to us and reflect our personalities.[77] Moral rights in copyright law further reflect this interest by supporting the rights of attribution and integrity for creative works.[78] Similarly, patent law protects novel inventions and discoveries, and rights owners can prevent others from making the patented subject matter.[79] Both copyright and patent seek to acclaim uniqueness and pillory unauthorized copying.

Trademark law also values uniqueness. Trademarks are meant to distinguish a source's goods or services from those of their competitors.[80]

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[71] Riley, *supra* note 2, at 87.

[72] BERLO, *supra* note 39, at 14.

[73] *Id.* at 29.

[74] *Bethany Yellowtail 'Gutted' By Crow Design on Dress at New York Fashion Week*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 20, 2015), https://indiancountrytodaymedianetwork.com/2015/02/20/bethany-yellowtail-gutted-crow-design-dress-new-york-fashion-week-159319.

[75] Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 28, 1979, S. Treaty Doc. No. 99-27, arts. 11, 11ter, 14(2) [hereinafter Berne Convention].

[76] *Id.* art. 9.

[77] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982).

[78] Berne Convention, *supra* note 75, art. 6bis.

[79] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 15(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299, art. 27(1) [hereinafter TRIPS].

[80] *Id.* art. 15(1).

Arbitrary, fanciful, and suggestive marks are most eligible as trademark and receive the greatest degree of protection, while descriptive marks require additional secondary meaning among consumers, and generic marks can never receive trademark protection. Trademark law seeks to maintain this uniqueness by finding infringing any uses that would likely cause consumers to be confused about the source.[81] The doctrine of dilution by blurring further emphasizes this desire for uniqueness by barring those uses of a trademark that would cause the mark to lose its distinctiveness.

This conceptual alignment between intellectual property and authenticity does not mean congruency. Copyright and patent interests in uniqueness are narrower than those of authenticity, which values it in a more abstract sense. Consumers value authentic works when they are considered to be "unique" in some way, even if copyright and patent law would or would not protect them. For example, an NFT differentiates a legitimate copy from others, even if it would not be sufficiently creative or novel to be protected under intellectual property law. Consumers will also discriminate among authorized copies, as we saw with Warhol's *Shot Sage Blue Marilyn*. While trademark law requires use in commerce, authenticity can imbue noncommercial creation and discoveries too.

Nonetheless, copyright, patent, and trademark law, in theory at least, could be well attuned to protecting the uniqueness dimension or at least at preventing copies that lack such meaning. For example, copies of Yellowtail's designs were not unique, but harmful appropriations. Intellectual property law privileges the first work, the first to reduce an invention to practice and file for a patent, and the first to use or file a trademark.[82] If intellectual property law seeks to provide incentives to create and discover, by the same token it can discourage unauthorized copying that does not contribute to new knowledge and harms existing knowledge.

B. Creatorship

Authenticity can also come from the creator of a work rather than the work itself. The identity of the creator or progenitor, broadly interpreted, is an important consideration for both Indigenous communities and consumers. Copyright, trademark, and patent law also value creatorship.

Creatorship is a commonly theorized conception of authenticity. Consumers seek not just the appearance and physical qualities of the product, but also who produces it.[83] In many cases, consumers crave to be in the

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[81] *Id.* art. 16.
[82] Jeanne C. Fromer, *First Ideas*, 114 GEO. L.J. __, 16, 22, 27–28 (forthcoming 2025).
[83] SUNDER, *supra* note 3, at 143.

presence of the artist through attribution.[84] For example, the renown of famous artists such as Rembrandt Van Rijn, Pablo Picasso, and Kehinde Wiley can affect the perceived authenticity and market value of their works.

The importance of the creator is perhaps clearest in the context of authentication and provenance. In the fine art world, galleries, auction houses, and museums all determine provenance by tracing the line of ownership of a work back to its creative origin. Authentic in this context means proper attribution to an author. When a "Rothko" that was sold for $8 million by the Knoedler Gallery was revealed to be a fake, the work formerly described as "sublime" became worthless.

The idea of authenticity as creatorship can also be reflected in inexpensive products. For example, in a prominent Australian Indigenous art case, a consumer testified that when she purchased a t-shirt incorporating Aboriginal artist John Bulun Bulun's design, she intended to support the Aboriginal artist who made it—even though, unbeknownst to her, a corporation has appropriated Bulun Bulun's design. Like with the false "Rothko," this realization shattered the perceived authenticity in the eyes of the consumer.

Creatorship is not limited to a specific individual creating a particular copy with his own hand. Robert Storr, former dean of Yale's School of Art, explains that "[t]he value of a work of art is not invested in the hand that made it, but in the intention and the realization."[85] Several modern artists have employed veritable factories of workers, but each copy falls under the label of the artist rather than their assistants. For example, in a studio he called "The Factory," Andy Warhol employed an assembly line that created silkscreen copies of Brillo pad boxes, Campbell's soup cans, and Marilyn Monroes. Warhol even boasted about his estrangement from his art, remarking that reporters should speak to his assistant, Gerry Malanga, because "[h]e did a lot of my paintings."[86]

Creatorship can also refer to a community. For example, most will value Murano Glass because the artisans on the island in the Venetian Lagoon blew it rather than because a specific craftsman made the piece. In some cases, individual and group creatorship can overlap. For example, merchants often provide certificates of authenticity with finished pieces to verify that Navajo artisans made them, even if the artist's signature or mark is also present.

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[84] Adler, *supra* note 6, at 715; Merryman, *supra* note 62, at 346.

[85] Stan Sesser, *The Art Assembly Line*, WALL ST. J., https://www.wsj.com/articles/SB10001424052702303745304576357681741418282 (last updated June 3, 2011).

[86] CAROLINE A. JONES, MACHINE IN THE STUDIO: CONSTRUCTING THE POSTWAR AMERICAN ARTIST 199–200 (1996).

These aspects of the creatorship dimension are also reflected in Indigenous values. Many Indigenous communities have collective traditions, and knowledge or TCEs can be authentic if discovered or created iteratively or by the community as a whole. Creatorship could come from a cultural group, community, or locality. For example, Bedouin women in Palestine have maintained traditional hand-weaving methods for generations. Creatorship could also signify both the originating community and the specific artist from that community. The duodji crafts of the Sámi people of Scandinavia are deeply rooted in the culture, but individual artists such as Anna-Stina Svakko can expand on these origins too.

Creatorship is also an underlying value for intellectual property law, even if there are gaps between respective understandings. In copyright law, the copyright originally belongs to the author (or the employer, if it was a commissioned work or work made for hire) who fixed the work.[87] Exact copies are not permitted under copyright law unless they are authorized, further emphasizing the importance of the author or rights owner. In applicable jurisdictions, regardless of the transfer of economic rights, authors may maintain their moral rights to claim authorship and object to any modification of their work which would be prejudicial to their honor or reputation.[88]

Patent law also values the creator. As a default, U.S. patent rights initially vest in the named inventor or their assignee. Even where an assignee or agent applies for the patent, the inventor must authorize it and the patent application—the public record of the discovery—must name the inventor.[89] Indeed, under the Paris Convention for the Protection of Industrial Property, the inventor has the right to be mentioned in the patent.[90] The patent rights owner, in some cases the inventor, can prevent others from making or using their patented invention, further underscoring their importance.

Trademark law also seems to value creatorship because trademarks are supposed to distinguish the "source" of a good or service.[91] Judge Learned Hand even referred to a person's trademark as "his authentic seal" and "the symbol of its possessor and creator[, which] . . . another can use . . . only as a mask."[92] Trademark cases use indicia of authenticity to determine whether the product is genuinely from the source or infringing. Courts routinely treat minor manufacturing deviations as evidence of inauthentic source.[93]

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[87] *See, e.g.*, 17 U.S.C. §§ 101, 201.

[88] Berne Convention, *supra* note 75, art. 6bis.

[89] 35 U.S.C. §§ 111(a)(1), 115.

[90] Paris Convention for the Protection of Industrial Property, TRT/PARIS/001, art. 4ter (as amended Sept. 28, 1979).

[91] *Id.* art. 15(1).

[92] Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928).

[93] *See, e.g.*, Moroccanoil, Inc. v. Groupon, Inc., 278 F. Supp. 3d 1157, 1161 (C.D. Cal.

While copyright, patent, and trademark law value creatorship, they have cabined definitions that differ from how consumers and source communities value creatorship as authenticity. For example, copyright law does not protect community-based creations such as Bedouin textile designs or Sámi duodji crafts because there is not an identifiable author.[94] Patent law similarly requires an identifiable inventor, which could exclude Indigenous TK from patent protection.[95] Trademark law does not permit multiple services using similar marks on the same goods or services—there must be a single source.[96] Several Indigenous groups could claim to have started a tradition that is shared among many today. For example, many Native American tribes of the Great Plains region make warbonnets.

These limitations provide for a narrower definition of creatorship than is valued in the creatorship dimension, but there is still significant conceptual alignment. Creatorship as a dimension of authenticity seems to mean provenance, which cares more broadly about the creator of a work—be it an individual, group, or community. While individual author and inventor requirements would seem to contradict this definition, aspects of intellectual property law capture this broader meaning. Copyright and trademark law contemplate directed creation, such as Warhol's factory, through the work-for-hire doctrine and corporate entities. Patent law seems to contemplate not listing everyone who worked on a patent as a joint inventor so long as they did not contribute to a definite and permanent idea of the invention.[97] Trademark law protects the use of the deceased's name for a continuing line of products, and collective and certification marks for multiple parties.

This shared value of creatorship by intellectual property law and authenticity is exemplified by *Navajo Nation v. Urban Outfitters, Inc.* In that case, Urban Outfitters marketed a variety of products—including women's underwear and an alcohol flask—as Navajo and applied geometric patterns that mimicked Navajo-made patterned clothing. The Navajo Nation sued Urban Outfitters for trademark infringement and dilution, alleging that selling products bearing an Indian design and the Navajo name "confuses customers into believing they are being offered or purchasing authentic Indian-made products."[98] The district court denied a motion to dismiss, finding that the Navajo Nation had plausibly pled a likelihood of confusion as to source, sponsorship, and endorsement. Intellectual property law upheld the source

2017) (noting different types and concentrations of silicones and different visible light absorbance).

[94] Berne Convention, *supra* note 75, art. 7bis.

[95] TRIPS, *supra* note 79, art. 29.

[96] *Id.* art. 16.

[97] Burroughs Wellcome Co. v. Barr Labs., Inc., 40 F.3d 1223, 1229 (Fed. Cir. 1994).

[98] Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147, 1155 (D.N.M. 2013).

community over later inauthentic copiers.

C. Place

Authenticity as place can be related to creatorship, but this dimension is more connected to the particular geographic location from which a work originates, which parallels GIs to a certain extent. Despite the longstanding value of place, authenticity as place is less common in the legal literature. Susan ii recognized that authenticity could refer to authorship or place of origin. For example, Dan Burk discussed authenticity using the example of New York bagels.[99]

The importance of place as authenticity for consumers has a long history. For example, in the Middle Ages, silk from Thebes and Corinth in the Byzantine Empire was famous for its quality. Today, producers often promote a place-based narrative to help sell their products. For example, a study on the Italian cheese industry describes pressures on cheese farmers in Northern Italy to promote not just cheese, but rather the idea of a local, authentically produced cheese.[100] This representation of authenticity is the actual commodity.

Like with uniqueness and creatorship, there are ways in which an authentic place can be malleable. For example, leather goods "Made in Italy" may have only been partially made in Italy. The goods could have been finished in Italy, but most of the prior manufacturing process could have occurred in China. This may be different from the archetypal septuagenarian Italian master crafting each bag—from tanning to stich—by scratch. Nonetheless, consumers (and their admirers) value the leather goods because they are "from" Italy.

The importance of place-based authenticity can be seen in how companies and their consumers associate many products with certain geographies, even if they have extended far beyond their origins. For example, the world-famous Hershey's proudly shares its founding story by Milton Hershey over 125 years ago and the transformation of a quiet Pennsylvania farm field into the manufacturing plant that is still used today.

Place can also carry enormous significance to Indigenous communities. TK, songs, dances, stories, and rituals are associated with flora, fauna, and the land itself. The very materials on which TK or TCEs draw may be tied to the land. For example, the Ojibwe have mastered making crafts from birch tree bark. Various Native American tribes have used sweet grass, tobacco, sage, and cedar for medicinal purposes for centuries.

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[99] Burk, *supra* note 6, at 1688.

[100] Christina Grasseni, *Packaging Skills: Calibrating Cheese to the Global Market*, *in* COMMODIFYING EVERYTHING: RELATIONSHIPS OF THE MARKET 259, 260 (2003).

In intellectual property, GIs are particularly attuned to the importance of place as a signal of authenticity. They recognize that the authenticity of some goods derives from the land, with a region or locality giving the good a certain quality or other characteristic.[101] While historically this has required those qualities deriving from the terroir,[102] reputation associated with a certain region may qualify. For example, the recent European Union Craft and Industrial Geographical Indication Regulation refers to a craft or industrial products having a given quality, reputation, or characteristic linked to their geographical origin, although the regulation later requires that the characteristic is "essentially attributable" to the product's geographical origin, the same language used in TRIPS.[103]

The extent of this protection differs somewhat from place's conception as a source of aura stemming from authenticity, although that may be changing. This definition, at least as understood with terroir, means GIs limit themselves to goods from the land itself. Place for authenticity values a looser affiliation with place. For example, Hershey's is almost synonymous with Hershey, Pennsylvania, even if the cacao and sugar they use are not native to the local soil. Consumers value Italian leather bags as authentic even if they are made of Chinese cow hides and simply stitched together in Italy. TCEs such as dance and textile designs can be associated with specific places too even if they are not derived from the earth. GI laws that focus on reputation deriving from their origin in a certain geography, potentially including the new European Union Regulation, could better capture this sense of authenticity as place.

Despite the potential terroir limitation, there is still conceptual alignment between these place-based interests that could benefit Indigenous communities for flora or fauna-derived knowledge or expressions. For example, Ojibwe creations with birch bark could potentially avail themselves of GIs. As GIs expand to protect longstanding practices with a reputation based on a certain geography, TCEs associated with a particular area, such as Aboriginal boomerangs, could also be legally protected.

D. Tradition

Finally, authenticity could connote the tradition associated with producing a certain good or service. However, unlike the prior three

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[101] TRIPS, *supra* note 79, art. 22.

[102] Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 305 (2006).

[103] Craft and Industrial Geographical Indication Regulation, Regulation (EU) 2023/2411, art. 1(a), 2022 O.J. (L 27.10.2023) (EU) [hereinafter CIGIR]. *Compare id.* art. 6(1) *with* TRIPS, *supra* note *supra* note 79, art. 22(1).

dimensions, tradition has few parallel conceptual values in intellectual property law.

When one acquires a product, they are not just consuming the physical object, but the narrative about that object: the history, traditions, and culture that contributed to its form and accompany it as aura.[104] Authenticity can also signify compliance with certain traditional standards or characteristics, including longstanding Indigenous creative practices. Often the artisan or traditional is held up as genuine or authentic while mechanical outputs are seen as inauthentic.

Artisan and traditional methods are praised as "authentic" in many fields. Marketing scholars have explained that consumers often value objects based on contagion, or association with celebrities, origin stories, and other narratives.[105] For example, a study of Eastern Mediterranean cheeses noted that "[t]raditional cheeses [such as feta and beyaz peynir] appeal to those seeking authentic, labour-intensive products with distinct flavours and aromas that reflect their heritage and quality."[106] The producers of Aran sweaters and tartans also highlight how they passed their designs and production methods down generation to generation.

Brands often explicitly market their tradition to highlight their authenticity and value. For example, many restaurants and stores tout when they were established. Madrid's Sobrino de Botín, supposedly the oldest continuously operating restaurant in the world, proudly advertises its 300-year heritage on its website and in its restaurant. Alternatively, take the example of historic imagery. A visitor to the well-known Sandeman port wine cellars in Porto is inundated with stories about the founder and the brand's iconic image of "the Don." By providing consumers with these stories about the historical origins of their products, brands are providing similar authentic, tradition-based experiences.

Like with brands' stories, producers in certain communities use authenticity norms around tradition to market their goods. Take, for example, Amish furniture, which is lauded as authentic because the Amish "stuck to their traditions and made furniture by hand."[107] Maltese glass blowers highlight that they use "traditional, ancient glass-blowing techniques."[108] These producers do not need to be ancient themselves; a new Amish

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[104] *See* Bechtold & Sprigman, *supra* note 6, at 330 (discussing this with the example of Bergamasco salami).

[105] George E. Newman & Ravi Dahr, *Authenticity Is Contagious: Brand Essence and the Original Source of Production*, 51 J. MKTG. RSCH. 371, 372 (2014).

[106] Samir Kalit, *An Overview: Specificities and Novelties of the Cheeses of the Eastern Mediterranean*, 10 FERMENTATION 404, 426 (2024).

[107] *Is Amish Furniture Actually Amish?*, AMISH FURNITURE FACTORY, https://www.amishfurniturefactory.com/amishblog/is-amish-furniture-actually-amish.

[108] *About Valletta Glass*, VALLETTA GLASS, https://vallettaglass.com/about.

craftsman or Maltese glass blower can connect to and continue this longer tradition in their community. The historical narrative and traditions around the creation of a particular product lends it authenticity.

The unique history of Indigenous knowledge and expression also imbues a work with a special authenticity. Indigenous communities seek to preserve their TK and TCEs to continue traditions and revitalize Indigenous culture.[109] Preserving tradition is therefore critical to maintaining culture. The Comaroffs found that despite duplication or reproduction, Indigenous cultural products remained authentic so long as they embody tradition.[110]

That preserved authentic tradition can also make a product valuable for consumers. Native art collector John Painter considered a chief criteria to be whether the piece has "the soul of the Indian."[111] Haudenosaunee (Iroquois) pass down and innovate from traditional beadwork techniques, whose beauty and centuries-long history also make them valuable to consumers. Adinkra and kente cloth are valued not because of their specific creator, but that creator's "ability to link his cloth to a particular heritage whose elements include a long tradition of practice on the part of other cloth producers in his spatial and temporal community."[112] If innovation on tradition "strays too far," it may detract from the cloth's value.[113]

Tradition in this authenticity sense is the least directly valued dimension under intellectual property law. Innovation, a goal of intellectual property law, is at odds with tradition. While one looks forward, the other looks backward. While the two are not inherently incompatible, intellectual property law has opted for a forward-looking approach that either opposes or is agnostic to tradition.

While all creativity is derivative in that it builds on something that came before, copyright does not directly distinguish between works steeped in tradition and those that are more bespoke. To the extent copyright cares, it seems to favor bespoke works, not traditional ones, because art based on prior works would only be thinly protected for the novel contributions, not what came before. While derivative works build closely on what came before, the emphasis of copyright law is still on what is new, not the preservation of tradition.[114] In addition, copyright excludes expressions that have become commonplace over time, such as scènes à faire, possibly including traditional

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[109] Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 279 (2001).

[110] COMAROFF & COMAROFF, *supra* note 47, at 33.

[111] JOHN PAINTER, AMERICAN INDIAN ARTIFACTS: THE JOHN PAINTER COLLECTION 10 (1991).

[112] BOATEMA BOATENG, THE COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA 48–49 (2011).

[113] *Id.*

[114] Berne Convention, *supra* note 75, art. 2.

expression too, especially if it is common to multiple communities.[115]

Patent law likewise protects novel inventions and discoveries. It does not protect contributions that are close to the core of prior art—such as communally developed traditions—which might be considered obvious and therefore non-protectable.[116]

Trademark law is agnostic as to why a mark is distinctive: it could be because it evokes a sense of history, or not. Trademark law cares about protecting rights owners' goodwill, but that goodwill might stem from being associated with a particular historical tradition or numerous other reasons.[117] To the extent trademark does value the longevity of a mark, that history is fairly short. For example, in the United States, a mark can become incontestable after being used continuously for five consecutive years.[118]

Trade secrets are agnostic to longevity. Information could qualify as a trade secret so long as it is kept secret, no matter whether that has been for a single day or three hundred years.

GIs are perhaps the closest connection to tradition, but even there it is incidental rather than the primary focus. GIs usually emerge because there has been a history of producing certain products in a traditional manner. The local communities often have stringent internal requirements that maintain the consistency and reputation of these products.[119] For example, Parmigiano Reggiano cheese dates back to at least the eleventh century and has several requirements, including a twelve-month minimum aging process, standardized milk-to-wheel ratio, and limiting dairy cows to only being fed hay.[120] The recent EU regulation on GIs for crafts and industrial products refers to a desire to help maintain tradition, but does not require traditional methods to have been used or be the source of the product's geographic-based reputation.[121] Yet the emphasis of GIs remains not principally on long-standing tradition, but on geographic origin, which excludes other equally longstanding traditions that may not necessarily be based on a specific geography, or at least not the terroir. Sobrino de Botín, the Sandeman Don, and Amish furniture, all have their own traditions. So do Haudenosaunee beadwork and kente cloth. Yet none are explicitly reliant on the land or can

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[115] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

[116] TRIPS, *supra* note 79, art. 27(1).

[117] *See generally* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006).

[118] 15 U.S.C. § 1065.

[119] WIPO, *Geographical Indications: An Introduction* 11 (2021), https://tind.wipo.int/record/44179/files/wipo-pub-952-2021-en-geographical-indications-an-introduction-2nd-%20edition.pdf.

[120] *Parmesan – The King of Cheeses*, WIPO Mag. (Feb. 1, 2011), https://www.wipo.int/web/wipo-magazine/articles/parmesan-the-king-of-cheeses-37602.

[121] CIGIR, *supra* note 103, pmbl. ¶ 9, art. 9.

only be from a specific place of origin for the auratic experience they provide, so they would be outside of the conceptual scope of GIs, despite reflecting the tradition dimension of authenticity.

CONCLUSION

Intellectual property law alone cannot fully protect TK and TCEs. This Article's analysis suggests that, despite some conceptual variances, intellectual property law is attuned to although not perfectly corelated with protecting several aspects of authenticity. This authenticity analysis suggests that, conceptually, intellectual property could be well-suited for protecting these interests. Copyright, patent, trademark, and GIs law could be adapted—in line with their normative purposes—to more holistically protect interests in uniqueness, creatorship, and place. To protect TK and TCEs, the WIPO treaties and other intellectual property proposals should therefore focus on these three values, while being sensitive to the specific views and interests of Indigenous communities.

Tradition is where intellectual property and authenticity part ways. Beyond when it is incidental to other interests such as land or being a source identifier, intellectual property law seems largely uninterested in preserving tradition. Intellectual property law would have to be adapted significantly—and inappropriately—to safeguard authenticity interests in Indigenous tradition. The conceptual limits of intellectual property suggest that, if we wish to protect TK, we should employ non-intellectual property protections for tradition, such as sui generis regimes or even self-help measures such as education and shaming. By understanding the law's conceptual limits, legal and social strategies can potentially operate in a calculated tandem to better protect Indigenous expression.

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