

Who Owns Our Ancestors' Voices?

Tribal Claims to Pre-1972 Sound Recordings

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INTRODUCTION

A familiar story is told in Indian Country:¹ a researcher arrives on a Native American reservation and begins recording ceremonial songs and oral histories;

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years later tribal members find, often to their horror, that these sensitive materials are available for sale, download, or streaming to the public.² This scenario aptly describes the life of numerous sound recordings made on federally recognized Indian reservations prior to 1972, whose ownership status remains uninterrogated due to the complex overlap and ambiguities of copyright and federal Indian law. Yet recently, owing to an increased sense of self-determination and autonomy, Native American tribes have begun to assert ownership claims to pre-1972 sound recordings made on tribal lands. This is significant for lawmakers and judges, as recordings of Native Americans performing ceremonies, songs, oral histories, and other oral literature make up a substantial portion of the media housed in American museums, universities, and government institutions. This Note seeks to shed greater light on who owns these recordings, and how future developments in this area of copyright law should take into account tribal intellectual property interests going forward.

When a performing artist records a song in a recording studio, the result is a copyrightable work known as a sound recording. Sound recordings are defined by the Copyright Act as “works that result from the fixation of a series of musical, spoken or other sounds.”³ In other words, they are a kind of creative work that results in impressions of sound waves in material—typically a recorded performance that is captured via a microphone on disk, tape, or in memory chips.⁴ Importantly, sound recordings are distinct from musical works, which can be thought of as the instructions for a performance (e.g., a musical score or a “lead sheet”). Sound recordings are also distinct from the physical media (e.g., a “master recording” or “audio tapes”) which embody them. The fact that an audio recording could be the subject of multiple ownership interests is just one reason why determining ownership of pre-1972 sound recordings made on tribal lands is so complex.

To add to this complexity, as sound recording technologies have rapidly evolved over the last century, lawmakers and judges have struggled to define ownership interests in these works. While federal copyright statutes pre-dated the invention of

Leigh Kuwanwisiwma, Ana Maria Ochoa, Anita Poleahla, and Audra Simpson for offering their insights into many of the topics contained in this Note.

1. References to “tribe” and “Indian” in this Note are terms of art and refer specifically to federally recognized Indian tribes and their members. “Reservation” refers to those lands currently held by the federal government in trust on behalf of either tribes or individual tribal members within the boundaries set forward by treaty, statute, or other official federal action. While much of what is discussed here may refer to reservation lands held by individual tribal members in fee, lands held by state-recognized tribes, or lands held in trust for a tribe that are not within a tribe’s federally recognized boundaries, these distinctions pose additional complexities that are beyond the scope of this Note.

2. See discussion of this scenario *infra* Part II.

3. 17 U.S.C. § 101 (2012).

4. See 17 U.S.C. § 102 (2012). Interestingly, for works that are not generally written down, an audio tape or digital file may actually contain the musical work (i.e., the instructions for how the work is to be performed) and the sound recording (the rendering of the musical work). However, streaming audio may contain only the sound recording copyright. *United States v. Am. Soc. of Composers, Authors & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010) (holding that “streaming” audio is not a musical work, but a performance “that renders the musical work audible”).

sound recording technologies, state courts actually performed most of the work of determining and defending sound recording rights. State court judges drew on the doctrines of common law copyright, unfair competition, and conversion to protect works from unjust exploitation.⁵ Also, state legislatures enacted a variety of criminal and civil statutes providing criteria for ownership rights in sound recordings and penalties for trespass on those rights.⁶ However, the need for more comprehensive national protection of sound recordings, particularly after the arrival of the cassette recorder, led to the passage of the 1971 Sound Recording Amendment to the 1909 Copyright Act—nearly a century after the invention of the phonograph.⁷ This Amendment added sound recordings to the list of works eligible for federal copyright while also substantially limiting the scope of protection in these works.⁸ Importantly, the Sound Recording Amendment applied only *prospectively*. As codified in 17 U.S.C. § 301(c), “[n]o sound recording fixed before February 15, 1972, shall be subject to [federal] copyright” until at least 2067. Even today, only those sound recordings created after February 15, 1972, are entitled to federal copyright protection.

The Copyright Act makes clear that, in absence of federal copyright protection for pre-1972 sound recordings, “any rights or remedies under the common law or statutes of any State” continue to apply.⁹ This means that state common law or statutes, if any, are still relied on to determine ownership interests in sound recordings made within their jurisdictions. However, federally recognized Indian tribes are not states, nor are tribal members generally subject to state property laws or to the jurisdiction of state courts for their activities on tribal lands.¹⁰ Because the Copyright Act is silent on what law, if any, applies to pre-1972 sound recordings created on reservation lands, performers, sound engineers, and potential users of sound recordings originating in tribal jurisdictions need to look elsewhere for

5. COPYRIGHT OFFICE, *FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS*, 25–28 (2011).

6. Copyright Office, *State Law Texts* (July 5, 2011), <https://perma.cc/B7D2-WTEH>; Copyright Office, *Survey of State Criminal Laws* (Dec. 12, 2012), <https://perma.cc/QC5S-937S>.

7. Sound Recording Amendment, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971); *see also* LIBRARY OF CONGRESS, *History of the Cylinder Phonograph*, <https://perma.cc/QSS5-27S4> (last visited Oct. 5, 2016). Even though members of Congress had for nearly fifty years introduced bills to add sound recordings to the list of protectable works under the 1909 Copyright Act, Congress—likely influenced by the Radio Broadcast industry—failed to do so. A central issue preventing such an amendment was disagreement over whether sound recordings represented a creative work of authorship under the Constitution’s Intellectual Property Clause. COPYRIGHT OFFICE, *supra* note 5, at 10–13.

8. *See generally* 17 U.S.C. §§ 102(a), 114 (2012); COPYRIGHT OFFICE, *supra* note 5.

9. 17 U.S.C. § 301(c) (2012).

10. *In re Kansas Indians*, 72 U.S. 737, 757 (1866) (“As long as the United States recognizes [a tribe’s] national character they are under the protection of treaties and the laws of Congress, and *their property is withdrawn from the operation of State laws*”) (emphasis added). *See generally* *Worcester v. Georgia*, 31 U.S. 515 (1832); 1-6 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (LexisNexis 2015) (explaining that “[w]ithin Indian country, generally speaking, primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States[.]”) (internal citations omitted). Even in “P.L. 280” States, where State civil jurisdiction has been extended onto tribal lands, States still lack jurisdiction to determine ownership and interests in real and personal property. 25 U.S.C. § 1360(b) (2012).

guidance on how to determine ownership interests in these creative works.¹¹ This Note will explore three potential sources of law which may be used to determine the scope of intellectual property rights governing reservation-made pre-1972 sound recordings: non-copyright federal statutes, common law principles, and tribal law.

In Part I, this Note will explore federal cultural property statutes as well as the doctrines of common law copyright and aboriginal title, each of which might be employed to determine ownership interests in pre-1972 sound recordings made on Indian reservations. In Part II, this Note will present a case study, involving a non-indigenous collector who captured a massive body of Native American cultural expression prior to 1972, to illustrate the complexities of applying cultural property statutes and common law doctrines to these types of materials in the present. Finally, recognizing that the Copyright Act's treatment of pre-1972 sound recordings has been identified by Congress as an area in need of revision,¹² Part III explores the potential risks and benefits of applying the Copyright Act's frameworks to pre-1972 sound recordings made on federally recognized Indian reservations. If Congress does have the power to impose these frameworks on pre-1972 sound recordings made on tribal lands, how might such a framework affect tribal communities? And, should tribal communities oppose such a move by Congress?

PART I: CURRENT FEDERAL AND TRIBAL LAWS GOVERNING PRE-1972 SOUND RECORDINGS

In deciding which law to apply to determine ownership interests in pre-1972 sound recordings made on reservation lands, courts must take into account the complex overlay of tribal and federal sovereignty. In general, tribes possess inherent sovereignty over their membership and territory,¹³ including the power to legislate and adjudicate in civil matters such as contract, tort, and property ownership claims that arise between tribal members and, in some cases, between members of the tribe and non-members.¹⁴ But like state law, tribal law may be preempted by acts of Congress or the Executive, or overturned by federal judicial

11. See H.R. REP. NO. 94-1476, at 131 (1976) (“the preemptive effect of section 301 is limited to State laws”).

12. MARIA A. PALLANTE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE OCTOBER 2011–2013 5 (Oct. 25, 2011), <https://copyright.gov/docs/priorities.pdf>.

13. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are a separate people possessing the power of regulating their internal and social relations . . .”) (internal citations omitted).

14. See, e.g., *Williams v. Lee*, 358 U.S. 217, 221-23 (1959) (finding that when a contract's cause of action arises on an Indian reservation, and the defendant is a tribal member, adjudicative authority lies in the tribal court); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140-41 (2006) (“The Tribes’ system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members”); *Jones v. Meehan*, 175 U.S. 1, 61 (1899) (property inheritance dispute involving tribal lands subject to the “laws, usages and customs of the tribe, and not by the law of the State of Minnesota”).

review.¹⁵ As federal copyright law does not apply to pre-1972 sound recordings, a court would likely look first to federal statutes to determine how ownership of such recordings might be determined. Where no federal statute applies, a court would look to federal common law on the subject.¹⁶ In the absence of a federal statute or existing federal common law, federal courts may apply tribal law, particularly “when the issue in controversy is one that federal law recognizes as within the purview of tribal governance.”¹⁷ Tribal law may include tribal statutes, customary principles, or common law derived from other jurisdictions.¹⁸ Alternatively, where an issue in controversy is not recognized as pertinent to tribal governance, a federal court may fashion a general rule based on common law principles.¹⁹

The following sections outline some potential statutes and common law principles courts might draw upon to determine the ownership of pre-1972 sound recordings made on federally recognized Indian reservations.

A. NON-COPYRIGHT FEDERAL STATUTES

Ownership disputes over some pre-1972 sound recordings made on Indian reservations could potentially be resolved by applying federal statutes like the Native American Languages Act of 1990 (“NALA”) and the Native American Graves Protection and Repatriation Act (“NAGPRA”). Congress has increasingly recognized the inherent rights of tribes to possess and control aspects of tribal culture, and to allow enforcement of those rights through various tribal and federal mechanisms. Under NALA, for example, tribes have an “inherent right . . . to take action on, and give official status to, their Native American languages” and “to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior.”²⁰ Some pre-1972 sound recordings made by Native American performers may contain protectable aspects of Native American languages which Native American tribes have an inherent right to protect and manage, particularly for educational purposes. For example, a tribe might reasonably give official status to a recording of a tribal elder reciting and defining indigenous words or phrases, recognizing it as tribal cultural property. And, it might take action on this designation by restricting its circulation only to local

15. *Cf. infra* Part III.A, discussing the distinct preemption rationales used by the Supreme Court when tribal laws are at issue. State law may be preempted under the Supremacy Clause of the Constitution, U.S. CONST. art. VI, § 2, but because tribes exist outside of the Constitution, *United States v. Lara*, 541 U.S. 193, 212 (2004), tribal laws are typically preempted by federal power under the “plenary power” doctrine. *See United States v. Kagama*, 118 U.S. 375 (1886).

16. Despite the Supreme Court’s assertion in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) that “[t]here is no federal general common law,” federal Indian law is one specific area of federal common law that persists. *See Nat’l Farmers Union Ins. Companies v. Crow Tribe*, 471 U.S. 845, 851-52 (1985).

17. 1-7 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.06[2] (2015).

18. 1-4 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[8] (2015).

19. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 336-37 (2008), where the Supreme Court fashioned a new rule preventing the enforcement of tribal laws that restrain the alienation of reservation lands held in fee simple by non-members in a case where tribal customary non-discrimination laws had been asserted as an important aspect of tribal sovereignty.

20. 25 U.S.C. § 2903 (2012).

schools. Yet, Congress has limited tribes' right to control their languages to "the purpose of conducting their own business," implying that tribes may not have control over uses of Native languages by members of the broader public outside of reservation boundaries.²¹ Therefore, tribes have at most only a limited, presumably local means of protecting the linguistic content contained in sound recordings under NALA.

In contrast, Congress has given national recognition to tribes' and tribal members' ownership interests in sacred objects or objects of cultural patrimony under NAGPRA.²² The Act allows tribes and, in certain circumstances, tribal members and their descendants, to demand the "expeditious[] return[]" of certain categories of items once "owned or controlled" by them from a museum or federal agency which does not hold proper "right of possession."²³ Because the statute requires the full, physical return of these objects rather than simply requiring holding institutions to provide tribes access to these materials, some archivists and legal scholars have argued that NAGPRA could potentially allow tribes to reclaim intellectual property interests in certain types of sound recordings in addition to the physical media on which they were originally recorded.²⁴

While there is no indication that Congress meant to include pre-1972 sound recordings in its consideration of repatriable objects under NAGPRA, some recordings may reasonably come under the Act if they meet the definitions of "sacred objects" or "objects of cultural patrimony." "Sacred objects" are narrowly defined as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."²⁵ Objects of "cultural patrimony" are those "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself" and, according to tribal law or custom, "cannot be

21. *Id.* Few courts have interpreted NALA, and no court has thus far opined on whether it creates or recognizes any enforceable proprietary interests for tribes. Courts that have examined NALA have refused to find that it provides a private cause of action under 42 U.S.C. § 1983 (2012). In a dispute over whether the State of Hawai'i was in violation of NALA by providing too few Hawai'iian language immersion programs for indigenous students, the United States District Court for the District of Hawai'i found that "the Act itself merely speaks in terms of general policy goals and does not create a new set of regulations which might lend itself to enforcement through suits by private citizens." *Office of Hawai'iian Affairs v. Dep't of Educ.*, 951 F. Supp. 1484, 1494–95 (D. Haw. 1996). A subsequent case, *Sturdevant v. Holder*, No. 1:09CV115, 2010 WL 3210961 at *3 (N.D. W. Va. Aug. 10, 2010), found that NALA did not provide a private cause of action against a prison for failing to provide an inmate with a secluded place (and presumably the materials) to conduct indigenous ceremonies.

22. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (1990).

23. 25 U.S.C. §§ 3005(a)(5), (c) (2012).

24. See interviews with James Nason and Karen Underhill in Trevor Reed, *Returning Hopi Voices: Toward a Model for Repatriation of the Archived Traditional Voice* 30–32 (Feb. 2010) (unpublished M.A. thesis, Teachers College, Columbia University) (on file with Teachers College, Columbia University); see also FIRST ARCHIVISTS CIRCLE, *Copying and Repatriation of Records to Native American Communities*, PROTOCOLS FOR NATIVE AMERICAN ARCHIVAL MATERIALS (2007), <https://perma.cc/6YJB-YKR2>.

25. 25 U.S.C. § 3001(3)(C) (2012).

alienated, appropriated, or conveyed by any individual.”²⁶ In many instances a particular sound recording may be necessary to perform a given traditional ceremony, thus qualifying as a “sacred object,” while in others—e.g. where the ceremony has been recorded multiple times or has been memorized by tribal members—it most likely would not. Likewise, some recordings of cultural performances may be considered inalienable from a tribe due to their historical, traditional, or cultural importance to present-day tribal culture and thereby be considered “objects of cultural patrimony”; however, others—e.g. recordings of songs specific to an individual or songs with only a cursory relationship to tribal history, tradition or culture—would not be. Additionally, NAGPRA only applies to Native American objects held by federal agencies, museums, and other federally funded institutions,²⁷ or to objects “which are excavated or discovered on federal or tribal lands after November 16, 1990.”²⁸ Tribes could not utilize NAGPRA to reclaim sound recordings from privately owned collections.

Even if NAGPRA could be successfully applied to pre-1972 tape recordings, wax cylinders, and other media containing sacred ceremonies or culturally significant performances, it is not yet clear whether the statute is a feasible means through which tribes may assert intellectual property rights pertaining to these objects.²⁹ On one hand, the focus of the statute is explicitly on *objects* pertaining to religion or patrimony, raising questions of statutory construction that may weigh against tribes’ claims to anything more than the master recordings themselves. Even if a tribe could successfully secure the return of the physical recording, nothing in NAGPRA directly suggests that tribes would be able to assert control over the duplication, creation of derivative works, performance, or distribution and display of existing and future copies of a recording. Further, tribes may not actually need exclusive control over all copies of sound recordings to perpetuate their culture or to practice tribal religions.³⁰ On the other hand, it is clear that Congress’ purpose in passing NAGPRA was to remedy prior instances of trespass, conversion, and misappropriation, which stripped tribes of control over their ancestors’ remains, their culture, and their religious practices.³¹ It would seem counter to such a policy to require federally funded institutions to return physical objects, like ceremonial altars or recordings of Native American voices, but then allow them to continue to duplicate and sell copies, publicly display replicas of

26. 25 U.S.C. § 3001(3)(D) (2012).

27. 25 U.S.C. § 3001 (2012). “Museums” is broadly defined to include all federally funded institutions including museums, archives, colleges and universities, and even State or local governments. The Smithsonian Institution is exempt from NAGPRA’s provisions, although the National Museum of the American Indian Act, as amended, regulates repatriation activities involving its collections. See 20 U.S.C. § 80q-9a(b) (2012).

28. 25 U.S.C. § 3002 (2012).

29. See FIRST ARCHIVISTS CIRCLE, *supra* note 24.

30. This argument, however, sidesteps the ontological considerations at stake in tribes’ claims to intellectual property ownership, which will be discussed *infra* Part III.C.

31. See 101 CONG. REC. H10985–91 (daily ed. Oct. 22, 1990) (statements of Reps. Campbell and Collins).

such items, or publicly perform them without the consent of and consultation with the respective tribes or the original creators' descendants.

B. COMMON LAW COPYRIGHT

Tribes and tribal members could potentially assert ownership in pre-1972 sound recordings by claiming rights under the doctrine of common law copyright.³² While no federal court decision exists determining whether common law copyright extends to sound recordings created on American Indian reservations, the Supreme Court has held conclusively that in situations where it is inappropriate to rely on state law, judges should apply federal common law.³³ Because federally recognized Indian tribes are located outside the jurisdictional boundaries of states, where the majority of common law copyright rules have been fashioned, a federal court would, absent existing precedents of the particular tribe or rulings in other related areas of federal common law (admiralty, bankruptcy, antitrust, etc.), generate its own rule, likely drawing upon the persuasive authority of state courts.³⁴

Generally, state common law sound recording rights vest in the performer of a recording.³⁵ However, courts and commentators have disagreed about whether ownership of common law copyright in a sound recording follows the holder of the physical master recording, absent explicit contractual language between the performer and recordist or other evidence indicating intent to assign or retain the

32. In addition to common law copyright (sometimes called the right of first publication), unfair competition and misappropriation are two additional common law claims typically asserted in infringement cases involving pre-1972 sound recordings. As this Note specifically deals with ownership, these other common law claims are not explored here.

33. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) (holding that questions relating to aspects of tribal sovereignty are matters of federal common law); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), discussed *infra*, text accompanying notes 51-53.

34. 1-7 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.06[2] (2015) ("Federal courts will apply tribal law to adjudicate a dispute when the issue in controversy is one that federal law recognizes as within the purview of tribal governance.") For example, federal courts have often looked to tribal law in contract, tort, and matters involving tribal membership, but have not looked to federal and state law when making choice of law determinations involving issues like banking or malpractice. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 340 (2008) (finding that a tribal law regulating lender discrimination could not be applied against non tribal members, while suggesting similar state and federal banking laws could be); *LaFromboise v. Leavitt*, 439 F.3d 792 (8th Cir. 2006) (finding that a medical malpractice suit against a government hospital brought under the Federal Tort Claims Act was governed by North Dakota malpractice law rather than the malpractice laws of the Turtle Mountain Band of Chippewa Indians, even though the tort occurred on tribal lands). An extensive search of these areas has revealed no existing federal precedents on the application of common law principles to pre-1972 sound recordings absent reliance on a particular state's common law.

35. *See Forward v. Thorogood*, 985 F.2d 604, 605 (1st Cir. 1993) ("The performer of a musical work is the author, as it were, of the [recorded] performance."); *Waring v. WDAS Broad. Station*, 194 A. 631, 635 (Pa. 1937); *R.C.A. Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939) (copyright vests in performer despite extensive labor on the part of the recording engineer); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 496-97 (3d Cir. 1956) (Hastie, J., dissenting); *see also Capitol Records, Inc. v. Naxos of Am., Inc.*, 820 N.E.2d 250, 259 (N.Y. 2005).

copyright.³⁶ In situations where contracts are silent as to the intention of the author to transfer his or her ownership interest, judges have looked to whether or not the performer had the clear opportunity to negotiate for control over the common law rights in the recording.

In *Ingram v. Bowers*, for example, the widow of famed Italian singer Enrico Caruso sought to establish her late husband's common law property right in sound recordings made with the Victor Company.³⁷ The contract Caruso signed with Victor made no reference to who would own the common law rights in the initial recording, though it did state that payment would be made to Caruso as a royalty. Judge Learned Hand opined that, because the contract simply required Caruso "to make these records," and made no mention of his future control over them, the Victor Company held a prima facie chattel property right in both the master recordings and the records produced from them.³⁸ Because Caruso had passed on the opportunity to reserve a right to control the future uses of the recording when he executed the contract with Victor, he held "no proprietary interest in the profits arising out of the records."³⁹

In contrast, where the parties have not had an opportunity to negotiate over the rights to a sound recording, some courts have found that the sound recording remains the common law property of the performer, even absent any possession or control over the physical media. In *Baez v. Fantasy Record, Inc.*, for example, the folk singer plaintiff made a demo tape for a studio in San Francisco.⁴⁰ Six years later, the producer of the demo sold the recording to Radio Corporation of America ("RCA") who began producing records from it for a commercial release. By that time, the plaintiff had gained popularity and signed with another label. When the plaintiff found out about the planned release of the demo tape, she brought suit for common law copyright infringement in California Superior Court.⁴¹ The court concluded that the plaintiff held "common law copyright in her musical interpretations, renditions and performances as recorded," the defendants held "no right, title or interest in" the demo tape; and ordered the destruction of all records produced by RCA and the transfer of the physical tape to the plaintiff.⁴²

36. As Robert Clarida has argued, ownership in "pre-1972 sound recordings can thus be established much more informally than ownership of a federal copyright, which is independent of the tangible object in which it is embodied, [17 U.S.C. § 202], and which cannot be transferred without a signed writing, [17 U.S.C. § 204]." Robert Clarida, *Who Owns Pre-1972 Sound Recordings?*, THE INTELL. PROP. STRATEGIST (Nov. 13, 2000), <https://perma.cc/RRT5-Y52L>. See also Bertolino v. Line, 414 F. Supp. 279, 285 (S.D.N.Y. 1976) ("Under common law [a recording] artist who agrees to sell his work contracts away his common law rights unless he reserves them by the terms of the contract."). However, the First Circuit has stated that, while courts "did in a number of cases infer from an unconditional sale of a manuscript or painting an intent to transfer the copyright . . . even under the doctrine this physical transfer merely created a presumption and the ultimate question was one of intent." *Forward v. Thorogood*, 985 F.2d 605 (1st Cir. 1993).

37. *Ingram v. Bowers*, 57 F.2d 65, 65 (2d Cir. 1932).

38. *Id.* at 65.

39. *Id.*

40. *Baez v. Fantasy Records, Inc.*, No. 543152, 1964 WL 8158, *6 (Cal. Super. Oct. 30, 1964).

41. *Id.*

42. *Id.* at *5.

David and Melville Nimmer, in their widely cited treatise on copyright law, find that rights holders of common law copyrights may typically exercise the same rights as statutory copyright holders, including the exclusive rights of duplication, distribution, public performance, and the creation of derivative works.⁴³ However, common law copyright differs in that the duration of common law copyright may be indefinite—at least until the Copyright Act is scheduled to preempt such copyrights in 2067.⁴⁴ Additionally, common law copyright may be “absolute” in the sense that there are virtually no public interest exemptions analogous to those contained in the Copyright Act’s §§ 108, 110, 114-115, unless they previously existed at common law. In other words, only defenses like fair use and the first sale doctrine may be available to defend against common law copyright infringement claims.⁴⁵

C. ABORIGINAL TITLE ENFORCED BY COMMON LAW DOCTRINES

The Supreme Court has long recognized aboriginal title as a viable property right.⁴⁶ While no precedent currently exists where a tribe or an individual tribal member has claimed an aboriginal property right in a sound recording, the successful assertion of such a claim appears increasingly plausible.⁴⁷ The doctrine of aboriginal title, formed in the early nineteenth century by the Marshall Court and perpetuated in the two centuries since, was originally a “diminished” form of

43. See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8C.02 (rev. ed. 2015) [hereinafter *NIMMER ON COPYRIGHT*]. A common law public performance right pertaining to sound recordings is a recent innovation, found only in a handful of cases. Late last year, the New York Court of Appeals refused to recognize such a right for pre-1972 sound recordings under that state’s common law copyright doctrine. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 172, 2016 WL 7349183 (NY Dec. 20, 2016).

44. 17 U.S.C. § 301(c) (1998).

45. Recent cases have found that the statutory fair use factors may be applied to sound recordings protected by common law copyright. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 346 (S.D.N.Y. 2014) (“[I]t appears that New York recognizes fair use as a defense to copyright infringement. New York courts have not, however, articulated the scope of New York’s fair use doctrine.”) (citations omitted); *EMI Records Ltd. v. Premise Media Corp.*, No. 601209/08, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008); *COPYRIGHT OFFICE, PRE-1972 SOUND RECORDINGS* (2011), *supra* note 5.

46. See *Johnson v. M’Intosh*, 21 U.S. 543 (1823). The specific term “aboriginal title” did not appear in Chief Justice Marshall’s early opinions addressing tribal sovereignty and property rights, though it had been used in U.S. judicial proceedings as early as 1799. See *Sims’ Lessee v. Irvine*, 3 U.S. 425, 452 (1799). The term has become widely used today as it more aptly describes the characteristics of tribal sovereignty and derivative property rights recognized by Marshall.

47. A significant recent case involving the enforcement of tribal intellectual property rights on nonmembers involved a claim by the Estate of Lakota Chief Crazy Horse against Hornell Brewing for its use of the Chief’s name and likeness in its beer advertising. *Estate of Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092 (D.S.D. 2001). Along with misappropriation and trademark claims, the tribe asserted claims arising under Lakota custom, tradition, and common law. Complaint at 10–16, *Estate of Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092 (D.S.D. 2001) (No. Civ. 00-4200). The claims survived a motion to dismiss for lack of personal jurisdiction, but ultimately settled following discovery. *But see* discussion of *Plains Commerce Bank*, *infra* note 49.

property ownership based on perceived racial difference.⁴⁸ The doctrine was a legal necessity that allowed a colonizing government to recognize Native American property *interests* without having to adopt indigenous property *rules*—which the Court believed (and in some cases, still believes) to be based on incomprehensible customs.⁴⁹ More recently, aboriginal title has been understood to mean proprietary interests that arise out of indigenous laws, customs or practices on tribal lands.⁵⁰

In the case of aboriginal rights to land, for example, the Court has allowed common law claims by the Oneida Indian Nation, a federally recognized Indian tribe, to collect the fair rental value of land settled upon without proper conveyance of title.⁵¹ In *Oneida*, the Court made clear that the Oneida Indian Nation still held its lands according to the law of the Iroquois Confederacy, which predated the founding of the United States.⁵² But, the Tribe’s land rights could likewise find recognition by federal courts under the common law doctrine of aboriginal title. As the Court in *Oneida* reiterated, “[i]n keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law.”⁵³

48. See counsel’s arguments recorded in the opinion of *Johnson*, 21 U.S. at 569 (1823), where it was argued that Native Americans “are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights. The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people . . . By the law of nature, they had not acquired a fixed property capable of being transferred.”

49. *Id.* at 590-91. Aboriginal title “derives its efficacy from [the Indians’] will The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.” Fear of having to incorporate indigenous property rules into American jurisprudence appears to have been a major factor guiding the Supreme Court’s 2008 opinion in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), which refused to enforce tribal common law property rules—specifically, an antidiscrimination rule that the dissent actually found “resemble[s] federal and state antidiscrimination measures,” *Id.* at 351—against a non-Native corporation on the grounds that the rule was a “novel” “Cheyenne River Sioux tradition and custom” which was “surely not a typical regulation.” *Id.* at 338.

50. The recognition that the aboriginal title concept extends into other legal domains affecting the rights of indigenous communities vis-à-vis the federal government is exemplified in the Indian Child Welfare Act and the Native American Graves Protection and Repatriation Act, which emphasize “the federal government’s promise to recognize, value, and ensure the continued preservation of the communal property of Indian nations, which is integral to tribal existence.” Angela R. Riley, Article, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 214 (1992). Developments in the common law concept of Aboriginal title include the Supreme Court of Canada’s decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1016 (Can.) (defining aboriginal title as “the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures.”); see also the Australian High Court decision in *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (Austl.) (“Since [Aboriginal] title preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom.”). As discussed herein, the United States Congress and federal courts appear to be following a similar course.

51. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

52. *Id.* at 230–34.

53. *Id.* at 236.

It is important to point out that the concept of aboriginal title was meant to refer not only to a land estate,⁵⁴ but to be used more broadly as a method of framing and adjusting the outer boundaries—but not necessarily the underlying principles—of the inherent rights of indigenous peoples in relation to a colonizing government.⁵⁵ The doctrine of aboriginal title presupposes a governance by the prior,⁵⁶ the existence of a “distinct political communit[y], having territorial boundaries, [within] which their authority is exclusive . . . which is not only acknowledged, but guaranteed by the United States.”⁵⁷ Because aboriginal property claims are rooted in tribal sovereignty, the Supreme Court found in *Santa Fe Railroad* that aboriginal title claims need not be based on “a treaty, statute, or other formal [federal] government action.”⁵⁸ Still, a property claim based on aboriginal title can be constrained or even extinguished “by treaty, by the sword, by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy.”⁵⁹ Federal common law can also be used to equitably limit the exercise of rights based on aboriginal title.⁶⁰ And, as expressed in *United States v. Lara*, Congress can restore and even expand aboriginal rights.⁶¹

In addition to finding aboriginal title in land, at least one federal court has recognized aboriginal rights to cultural property, finding federal common law doctrines to be potentially viable modes of enforcement of those rights—albeit with additional precautionary steps. In *Chilkat Indian Village v. Johnson*, the Ninth Circuit opined on whether an aboriginal cultural property right could be recognized by a federal court in a replevin claim. When four carved wooden posts and a screen covered with a Tlingit village’s traditional art were allegedly removed by a non-tribal member in violation of the Village’s law, the Ninth Circuit in *Chilkat* held that the Village’s claim demanding the return of the tribally recognized

54. *Johnson v. M’Intosh*, 21 U.S. 543, 582 (1823); *see also* *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (Douglas, J., dissenting) (arguing that the question of what aboriginal title encompasses is a question of fact, which may encompass rights as diverse as timber, fishing, hunting, or grazing rights in addition to actual claims to soil).

55. The opening paragraphs of the Chief Justice Marshall’s opinion in *Johnson* indicate that the Court is setting forward a general governance principle, not just a determination about the scope of land rights. The Court’s notion of aboriginal title, while “no more incompatible with a seisin in fee, than a lease for years,” is a framework generated from the Court’s adoption of “natural law” principles and historical European beliefs and practices regarding discovery and conquest of indigenous peoples and lands, which attempts to deal with the perpetually ambiguous and potentially incommensurable relationship between “the discoverer and the natives” where land ownership is only one point of intersection. *Johnson*, 21 U.S. at 572-74. From *Johnson* and the other Marshall Court cases involving the relational rights of indigenous peoples vis-à-vis the United States, the Court later developed the doctrine of plenary power, permitting virtually unchecked power over indigenous peoples and their lands. *See infra* Part III.A.

56. But, in presupposing a governance by the prior, a colonizing government’s recognition of aboriginal title does not necessarily recognize the organizing principals of the indigenous peoples prior to conquest. *See* ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION* 156 (2002).

57. *Worcester v. Georgia*, 31 U.S. 515, 557 (1832).

58. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

59. *Id.*

60. *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

61. *United States v. Lara*, 541 U.S. 193 (2004).

cultural properties was potentially enforceable in federal court.⁶² Addressing the case as a mixed question of tribal and federal law, the court held first that, “[w]hatever proprietary interest the Village has in the artifacts is a creature of tribal law or tradition wholly unconnected with federal law. *No construction of federal law is necessary to adjudicate title.*”⁶³ It then explained that “the heart of the controversy over the claim will be the Village’s power, *under federal law*, to . . . apply it to non-Indians.”⁶⁴

As in *Oneida*, the *Chilkat* court recognized the existence of Tlingit aboriginal title established by the Tribe’s laws and customs, and found such rights to be potentially enforceable under federal common law—even against non-indigenous defendants. However, it is interesting to note that in *Chilkat*, where the property at issue included tribal designs and artifacts rather than land, the enforcement of aboriginal ownership rights within the federal system required an additional step before an equitable remedy could be applied; it required the application of federal common law rules regulating tribal authority over those who are not members of a tribe. It appears that federal courts are comfortable recognizing and enforcing property interests arising under tribal law when the types of property are consistent with those typically addressed by federal common law doctrines, e.g. land or lease rights. However, a federal court may feel less comfortable enforcing property interests arising under tribal law when the type of property at issue lies outside of a court’s realm of general expertise. In such situations, these kinds of aboriginal property rights may be curtailed by Due Process considerations.⁶⁵

PART II: CASE STUDY—COLLECTORS’ RIGHTS VERSUS TRIBAL RIGHTS

Because the law surrounding pre-1972 sound recordings made on tribal lands remains unsettled, it is often difficult for tribes to assert exclusive control over these materials against the claims of government agencies, educational institutions, museums, researchers or collectors that physically possess them. In this section, I present a case study involving a series of recordings made on the Hopi Indian Reservation.⁶⁶ The case is an entirely typical example of the hundreds of thousands

62. *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469 (9th Cir. 1989).

63. *Id.* at 1474 (emphasis added).

64. *Id.* (emphasis added).

65. The Supreme Court articulated the limits to tribal civil jurisdiction over nonmembers in both *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Montana v. United States*, 540 U.S. 544 (1981), and its progeny. Under *Merrion*, nonmembers can become subject to tribal regulations governing a tribe’s property and resources when they conduct economic activity on tribal lands. 455 U.S. at 137, 144-45. Under *Montana*, a tribe can also regulate the activities of nonmembers on tribal lands when they (1) enter into contractual relationships with the tribe or its members in such a way that the activity has a nexus with tribal interests, or (2) when nonmember activities on an Indian reservation “threaten or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 540 U.S. at 566.

66. The Hopi Indian Reservation was created by executive order in 1882 following the acquisition of the Southwestern United States after the Spanish-American war. See *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 114 (9th Cir. 1980).

of field recordings made by scholars, missionaries, and tourists who captured indigenous performances in various forms of media prior to 1972.⁶⁷ In particular, this case illustrates the diverse sorts of interests at stake when ownership of Native American archival recordings is brought into question. Additionally, this case study will illustrate how well the legal frameworks outlined above might serve the interests of tribal plaintiffs as they seek to reclaim ownership of these materials.

A. LAURA BOULTON: THE MUSIC HUNTER⁶⁸

In the August heat of 1940, folk music collector Laura Boulton (1899-1980) travelled to the remote village of Hotevilla, Arizona, a small community of sandstone houses on the Hopi Reservation, to record local Native American ceremonial songs.⁶⁹ Boulton, while trained as a classical singer, lacked formal training in anthropology or ethnology.⁷⁰ Yet, she was particularly adept at gaining the trust of indigenous peoples and recording some of their most intimate musical expressions.⁷¹ In 1939, prior to her arrival on Hopi lands, Boulton had contracted

67. This large volume of recordings was generated from the numerous expeditions of anthropologists, psychologists, folklorists, and ethnomusicologists who were charged by public and private agencies with preserving the supposed dying cultures of Native American tribes. See generally JONATHAN STERNE, *THE AUDIBLE PAST: CULTURAL ORIGINS OF SOUND REPRODUCTIONS* (2003); ERIKA BRADY, *A SPIRAL WAY: HOW THE PHONOGRAPH CHANGED ETHNOGRAPHY* (1999). Ethics and practice surrounding work with indigenous peoples prior to 1972 generally did not take into account copyright law, and proceeded without written transfers of ownership. See e.g., Anthony Seeger, *Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property*, 28 *YEARBOOK FOR TRADITIONAL MUSIC* 87, 92 (1996) (“When I recorded the Suya Indians of Brazil in the 1970s, it was so obvious that I did so with their consent that I did not bother to get even verbal clearances. None of them could read or write, which made written contracts impossible.”). As a result, most major research institutions possess collections of field recordings containing Native American or other indigenous peoples’ ritual songs or other sensitive forms of cultural expression, but without a clearly documented chain of title from the indigenous performers. Three prominent holders of field recordings made on the lands of indigenous peoples include Indiana University, Columbia University, and the Library of Congress. See Indiana University, <https://perma.cc/MHM8-NB53> (last visited Oct. 1, 2016) (holding over 100,000 recordings of “traditional music,” especially from indigenous peoples around the world, with many of its collections made prior to 1972); ELAINE KEILLOR ET AL., *Historical Overview of Native Americans and their Music in* *ENCYCLOPEDIA OF NATIVE AMERICAN MUSIC OF NORTH AMERICA* xxxvii (2013) (Columbia University holds approximately 30,000 field recordings from Laura Boulton, a large portion of which contain performances by Native American and other indigenous groups); *Indigenous American Cylinder Recordings and the American Folklife Center*, *LIBRARY OF CONGRESS AMERICAN FOLKLIFE CENTER BLOG* (last visited Oct. 1, 2016), <https://perma.cc/MHM8-NB53> (holding approximately 10,000 recordings of Native American music in its collections).

68. Unless otherwise noted, the historical documents for this case study are housed in the Laura Boulton collection at the Archives of Traditional Music, Indiana University, Bloomington, IN. [hereinafter “ATM”].

69. Laura Boulton, *Southwest Indians* (Aug.–Oct. 1940) (unpublished field notes) (on file with the Columbia University Center for Ethnomusicology).

70. Carl Rahkonen, *The Real Song Catchers: American Women Pioneers of Ethnomusicology*, *MUSIC LIBRARY ASSOCIATION WOMEN’S MUSIC ROUND TABLE* (Feb. 14, 2003), <https://perma.cc/Z3CY-FVL8>.

71. Prior to arriving at Hotevilla, Boulton had made two other music-collecting “expeditions”—one to Chicago’s *A Century of Progress* exhibition’s “Indian Village” in 1933, and another to various

with Victor Talking Machine Co. (hereinafter, “Victor”) to produce a new album of Native American music.⁷² Boulton presumably traveled to the Hopi Reservation to make a set of field recordings that would fulfill this purpose.

At Hotevilla, Boulton met Dan Qötshongva, Hotevilla’s *kikmongwi* or chief; Thomas Bahnaqya, his traditional spokesman; and David Monongye, another village member. The three men eventually sang a series of eleven songs for Boulton, who recorded them on her Fairchild disk recorder—a cutting-edge portable recording device of the day. Boulton, who was usually a meticulous record-keeper, left no description of her interactions with people at Hotevilla, and none of the family members of the men—all of whom are now deceased—recall the men ever mentioning making the recordings or receiving remuneration or royalties from them.⁷³ Boulton is not known to have made any written contracts with her indigenous informants over her nearly thirty-year fieldwork career from which one might deduce her course of dealing with the performers, and there is no indication in her correspondence with her colleagues, including her record producer, of what agreement, if any, was actually reached as to the rights in the recordings made at Hotevilla.⁷⁴

At least five of the songs sung by the three men were sacred ceremonial songs that today would not typically be performed to the general public, much less recorded.⁷⁵ The songs contain lyrics, melody and aesthetic features that were carefully guarded by Hopi customary law and traditional practices.⁷⁶ Further, the songs were specifically created to be circulated only for certain ceremonial or educational purposes, and within certain relationships under the Hopi principle of *nasimokyaata*, or owner-obligation.⁷⁷ Under this principle, members of Hopi Villages and ceremonial societies who witness a song’s performance are entitled to own and use it without compensating the composer or performer, but thereafter they carry an obligation to use it only according to established protocols, and then only for the general public benefit and not for personal remuneration.⁷⁸

indigenous groups in Africa as part of her husband’s collecting work as an ornithologist. See LAURA BOULTON, *THE MUSIC HUNTER: AN AUTOBIOGRAPHY OF A CAREER* 427 (1968).

72. Contract between Laura Boulton and Victor, Laura Boulton Collection, in ATM (1939).

73. This finding is based on my fieldwork at Hopi from 2009–2015 during which I gave copies of the recordings to members of Monongye’s and Bahnaqya’s families and asked if they had any knowledge of Laura Bolton, the recordings, or any payments or royalties received from them.

74. AARON A. FOX, *THE ARCHIVE OF THE ARCHIVE: THE SECRET HISTORY OF THE LAURA BOULTON COLLECTION* (forthcoming) (manuscript at 44) (“Boulton did not obtain signed releases, to my knowledge, from *anyone* she recorded over a period of thirty years, despite releasing numerous commercial recordings, published under her own name, featuring these performers’ efforts.”).

75. Trevor Reed, Hopi Materials Database based on Fieldwork (2009–2015) (unpublished manuscript) (on file with author and the Hopi Cultural Preservation Office).

76. Trevor Reed, *Returning Hopi Voices: Toward a Model for Repatriation of the Archived Indigenous Voice* (2010) (unpublished MA Thesis, Teachers College Columbia University) (on file at Teachers College, Columbia University).

77. Trevor Reed, *Decolonizing Ownership: The Hopi Music Repatriation Project*, in *THE OXFORD HANDBOOK OF MUSICAL REPATRIATION* (Frank Gunderson & Bret Woods, eds., forthcoming 2017).

78. *Id.*

Upon her return from Hopi lands, Laura Boulton selected one of the songs she had recorded at Hotevilla for inclusion in her album, *Indian Music of the Southwest*. The album was released by Victor in what was likely an initial pressing of 500 copies.⁷⁹ It was subsequently rereleased on Folkways Records, selling approximately 5,000 copies.⁸⁰ The Smithsonian Institution acquired Folkways Records in 1986, and has continued to sell the recording on cassette, CD, and has now made it available via digital download on its website and on iTunes.⁸¹ The album can also be streamed through a variety of educational media services, like Alexander Street Press.⁸² Boulton's entire collection of roughly 30,000 recordings from indigenous and other groups around the world, including the ten remaining recordings she made at Hotevilla, was sold to Columbia University in 1968 for \$10,000.⁸³

Columbia University currently asserts title to the majority of the sound recordings in what is now called the "Laura Boulton World Music Collection" under a written transfer of ownership from Boulton, while the Laura Boulton Estate claims to have retained ownership of those recordings used in her commercially released albums, including *Indian Music of the Southwest*.⁸⁴ Smithsonian Folkways continues to produce albums of Boulton's recordings under a nonexclusive license from Boulton.⁸⁵

The Hopi Tribe, on the other hand, asserts a competing claim, arguing that it holds exclusive rights in the Boulton recordings under its cultural property statute, which states that "archival records, including . . . audio tapes . . . which describe and depict esoteric ritual, ceremonial and religious knowledge . . . are declared to be the cultural property of the Hopi people."⁸⁶ This statute was meant to codify Hopi customary law dealing with ceremonial performances, which historically recognized Hopi villages and ceremonial societies as legitimate owners of these kinds of expression.⁸⁷ Codification became necessary following a marked increase

79. See original Victor record and liner notes, in MOSES ASCH COLLECTION (Rintzler Archive, Smithsonian Institution, Washington, D.C.).

80. *Id.* (assorted royalty ledgers); see also Laura Boulton, *Indian Music of the Southwest* (SMITHSONIAN FOLKWAYS RECORDS 1957).

81. *Indian Music of the Southwest*, SMITHSONIAN FOLKWAYS RECORDS (last visited Dec. 18, 2015), <https://perma.cc/383J-4SCX>.

82. *Id.* Alexander Street Press streams the entire Smithsonian Folkways catalog under a sublicense to educational markets. Correspondence from Alexander Street Press to author (July 19, 2016). Alexander Street Press has expressed a desire to work with the Hopi Tribe to take down restricted content from its site in a broader effort toward making historically significant field recording collections available to its audiences in socially responsible ways.

83. See FOX, *supra* note 74, at 33. The \$10,000 figure, however, does not include the endowed funds contributed by a wealthy Columbia alumnus who endowed a chair out of affection for Ms. Boulton, to the tune of roughly \$250,000 (\$2 million, accounting for inflation).

84. *Id.*

85. Contract between Laura Boulton and Folkways Records, in ATM (1956). In response to early drafts this Note, Smithsonian Folkways has expressed its willingness to work with the Hopi Tribe and Hopi village and ceremonial leaders to take down infringing content from its website.

86. Hopi Tribe, Res. H-70-94, ¶8 (May 23, 1994).

87. See Reed, *supra* note 76, at 78. This statute has received some criticism, however. Some Hopis do not believe the Tribe should control access to and use of ceremonial song performances.

in the unauthorized exploitation of Hopi ceremony, traditional knowledge, and ritual expressions outside of established protocols, which had long been forbidden under Hopi customary law.⁸⁸ Misuses of ceremony, particularly by non-Hopis, had resulted in the interruption of the economy for ritual knowledge and performances at Hopi, potentially interfering with numerous Hopi social, agricultural, and cosmological processes.⁸⁹ Recognizing that only the Hopi Tribe could have standing to assert ownership claims in non-Hopi courts, the Tribe formulated its statute in such a way that ownership of all recorded ceremonial performances, including those recorded prior to the enactment of the statute, vests in the Tribe.

Given these facts, so common to twentieth century encounters between Native Americans and researchers, missionaries, and other early cultural documentarians, how might a court adjudicate an action for declaratory judgment to determine the ownership of the sound recordings Boulton made at Hotevilla?

i. Application of Non-Copyright Federal Statutes

Because Laura Boulton's collection is currently held by Columbia University, an institution that regularly receives federal funds, the Hopi Tribe could attempt to assert ownership over the recordings as "sacred objects" or "objects of cultural patrimony" under NAGPRA. To claim them as sacred objects, the Tribe would have to argue that the recordings are necessary for the practice of traditional religion by present-day adherents.⁹⁰ Certainly, some Hopi ceremonial leaders have indicated that a number of the recordings in the Laura Boulton collection are the only source of information about certain parts of sacred ceremonies—the recordings "fill in the gaps" where key liturgical knowledge has been forgotten.⁹¹ However, many of the recordings are of non-ceremonial performances or are interchangeable with existing Hopi ceremonial songs, and would not reasonably be considered essential for the performance of Hopi religion.⁹² And, even if a particular recording were necessary to perform a ritual, it is not clear that the Tribe would need to have exclusive control over the recording (or even the exclusive right to exploit it) in order to make the ritual efficacious.⁹³

88. See generally PETER WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* (1998); see also Reed, *supra* note 76, at 68-69. These exploitations range from comic book villains based on Hopi deities to white fraternal organizations reenacting Hopi rituals to the recent auctions of Hopi ritual paraphernalia at auctions in Paris. See also Tanya Ballard Brown, *American Tribe Fights to Halt Artifact Auction in Paris*, NAT'L PUBLIC RADIO (Apr. 10, 2013), <https://perma.cc/3YVE-RB58>.

89. Trevor Reed, *Remediating Sonic Misappropriations: Strategies for Safeguarding Indigenous Musical Expression*, FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE 6-9 (Apr. 11, 2014).

90. See NAGPRA, *supra* note 22.

91. *Returning Hopi Song—A Hopi Perspective*, HOPI MUSIC REPATRIATION PROJECT (Feb. 5, 2011), <https://perma.cc/722Z-835Z>.

92. Reed, *supra* note 76.

93. The counterargument here is that the Hopi Tribe may need to exercise complete control over ceremonial recordings to effectively prevent inappropriate or unauthorized uses of ceremonies outside of established protocols, which is believed to be causing harm to the Hopi social structure and knowledge economy. See Richland, *Talking Tradition*, *infra* note 97.

Alternatively, many of the Hotevilla recordings could be reclaimed under NAGPRA as “objects of cultural patrimony” as they are collectively owned works containing historical and cultural information about Hopi ways of life that are vital to the community’s perpetuation. For example, some of these recordings contain performances detailing historical figures and events, ceremonial sites, resource conservation and distribution methods, agricultural knowledge, meteorological practices and others.⁹⁴ However, other sound recordings are more artistic in nature, evoking landscapes or describing the composers’ experiences, or simply expressing melodic phrases and vocables, which might not be considered “cultural patrimony” under NAGPRA’s definition.⁹⁵ Even if the recordings could be considered “cultural patrimony” and otherwise eligible for repatriation, it may be difficult for the Tribe to argue that it needs exclusive control over the recordings (not to mention the intellectual property rights), rather than just receiving copies of or access to the recordings, in order to maintain cultural continuity.⁹⁶ Further, as a practical matter, establishing proof of religious necessity or status as cultural patrimony would be quite difficult in the Hopi context because it would no doubt require furnishing evidence that would be either extremely invasive or inappropriate to disclose to the uninitiated.⁹⁷

In addition to qualifying as “sacred objects” or “objects of cultural patrimony,” the Hopi Tribe would need to present sufficient evidence that Columbia University lacked a valid right of possession over the recordings.⁹⁸ Laura Boulton no doubt held an exclusive chattel property right in the blank acetate disks that she brought with her to Hotevilla in August 1940. But, as discussed earlier, both common law and Hopi statutory law recognize that once a recordist allows recording media to be transformed by the imprint of a (ceremonial) performer’s voice, an additional property right is created which implies a right to control the physical media.⁹⁹ Assuming the Tribe could show that it holds such an ownership interest in the

94. *Id.*

95. On the other hand, even songs made from vocables or “nonsense syllables” may convey cultural meaning in Native American contexts. As Charlotte Frisbee has argued in her landmark study of vocables in Navajo ritual songs, “If one considers all the possibilities identified thus far when studying Navajo vocables, the end result can only be a confirmation . . . that there are no meaningless syllables in Navajo ceremonial music.” Charlotte Frisbee, *Vocables in Navajo Ceremonial Music*, 24 *ETHNOMUSICOLOGY* 347, 372 (1980). Vocables in Hopi songs, for example, are known to provide listeners with a sense of culturally-specific places or demonstrate attributes of characters in traditional stories. See Kathleen Sands & Emory Sekaquaptewa, *Four Hopi Lullabies: A Study in Method and Meaning*, 4 *AM. INDIAN Q.* 195, 196 (1978).

96. The counterargument, as in note 93, is that Hopi culture cannot perpetuate itself along established social structures and maintain established protocols if the exclusive right to reproduce, distribute, publicly perform, stream, or license the recordings to others is held by an institution that is not subject to tribal laws.

97. See Justin B. Richland, “*What Are You Going to Do with the Village’s Knowledge?*” *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 *LAW & SOC’Y REV.* 235, 264-65 (2005).

98. 25 U.S.C. § 3005(c) (2012). The standard of proof required to show a right of possession is whether “standing alone before the introduction of evidence to the contrary,” the Tribe’s evidence “would support a finding that the [f]ederal agency or museum [including federally funded institutions] did not have the right of possession[.]” *Id.*

99. See *supra* Part I.A.

recordings as a successor to the Hopi villages and the performers under the Tribe's cultural property statute, Columbia University—absent any evidence of a contract between Boulton and the performers—would have difficulty proving it received a valid “right of possession” from Boulton, and the Tribe could potentially reclaim ownership under NAGPRA.

ii. Application of Common Law Copyright Doctrine

While NAGPRA may provide the Hopi Tribe with a narrow means of obtaining control over the physical master recordings, owning physical objects does not necessarily imply a right to prevent the future exploitation of the intellectual property in those objects by others. Because Boulton made no written agreements with her indigenous interlocutors, and no evidence suggests that the performers had the opportunity to reserve any rights in the recordings she made,¹⁰⁰ it would appear that the common law default rule—that the sound recording copyright remains with the performer—would be applicable.¹⁰¹ If such a right is determined to be applicable on Hopi lands, the holder of the common law right in the Laura Boulton recordings could enjoin—and, if an exploitation has already occurred, potentially receive damages from—the unauthorized reproduction, distribution, public performance, or creation of derivative works from the recordings, so long as such a claim is not barred by laches or some other tribal or equitable defense.¹⁰² The holder could potentially recover, for example, the profits and royalties from Boulton's licensing of the recordings to Victor and Folkways Records, and recover profits from their use by Alexander Street Press. The holder could also foreseeably bring an action for injunctive relief and unjust enrichment against those who derive income (research grants, access fees) by making them available to the public.¹⁰³

Despite its potential to remedy unauthorized uses of the Hotevilla recordings, common law copyright may not be a perfect and enduring solution to prevent misappropriation of Hopi ceremonial songs. First, the scope of the exclusive rights in sound recordings is quite thin, only preventing the actual duplication of the recordings themselves, not the underlying musical works or even sound-alike performances.¹⁰⁴ Second, common law copyrights in pre-1972 sound recordings

100. See *Ingram v. Bowers*, 57 F.2d 65 (2d Cir. 1932).

101. See *Baez v. Fantasy Records, Inc.*, No. 543152, 1964 WL 8158, *6 (Cal. Super. Oct. 30, 1964); see also *Waring v. WDAS Broadcasting Station*, 194 A. 631, 635 (Pa. 1937), and *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 259 (N.Y. 2005).

102. *But see Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 172, 2016 WL 7349183 (NY Dec. 20, 2016) (finding that New York's common law copyright doctrine includes a cause of action for unauthorized reproduction and distribution of pre-1972 sound recordings, but not for unauthorized public performances of them).

103. See *FOX*, *supra* note 74. Additionally, the notice and takedown provisions of the Copyright Act may be applicable to pre-1972 sound recordings. See *Capitol Records v. Vimeo*, 826 F.3d 78, 87-93 (2d Cir. 2016) (“We conclude that the safe harbor established by § 512(c) protects a qualifying service provider from liability for infringement of copyright under state law.”).

104. See *NIMMER ON COPYRIGHT* § 2.10(A)(2) (2015). The copyright in pre-1972 sound recordings is thin enough that the Copyright Office has allowed “remixes” of these works to justify a copyright in the new version. *Id.* at n.41.

last only until they are preempted by the Copyright Act, which is slated for 2067, after which such recordings will enter the public domain.¹⁰⁵ Third, defendants in an infringement suit may assert common law defenses or appeal to the First Amendment to enable them to use the material without tribal authorization.¹⁰⁶ Such arguments may be appealing to courts accustomed to adjudicating cases under the Copyright Act, where the stated policy goal is “[t]o promote the Progress of Science and the useful Arts” and not necessarily to protect individual or tribal ownership interests.¹⁰⁷

iii. Application of Aboriginal Title Doctrine

The Hopi Tribe might also claim ownership in the recordings by asserting aboriginal title in them. As discussed earlier, the Ninth Circuit has found tribes’ ownership of cultural property to be “a creature of tribal law or tradition,”¹⁰⁸ and that such aboriginal property rights can be enforced in federal courts to the extent they are not extinguished or do not conflict with federal law or constitutional guarantees. Determining ownership of pre-1972 sound recordings made on Hopi lands would require a two-part assessment: first, a determination of aboriginal title through the application of local tribal laws determining ownership; and second, the application of any federal common law limitations on the enforceability of those rights against others.¹⁰⁹

The Hopi Tribe can certainly argue that it holds aboriginal title to the performances on the recordings in question. Hopi customary and statutory law makes clear that individual Hopi villages, or the Tribe on behalf of villages, owns any documentary materials—including audio recordings—containing esoteric ritual or ceremonial knowledge. Most, if not all, of the songs performed by Qötshongva, Bahnaqya, and Monongye fall into this category. Therefore, just as the Supreme Court in *Oneida* recognized the Oneida Indian Nation’s aboriginal title in land as real property under existing common law doctrines, a federal court could recognize the Hopi Tribe’s aboriginal title in recorded ceremonial performances as intellectual property under the existing doctrine of common law copyright. But would such recognition of aboriginal title in recordings of ritual performances be limited by federal law? No federal statute or federal common law rule has explicitly limited or extinguished a tribe’s ownership claims to recordings of its ceremonies.¹¹⁰ Rather, current federal policy, including NAGPRA, and

105. 17 U.S.C. § 301(c) (2012).

106. See discussion *infra*, Part III.

107. U.S. CONST. art. I, § 8, cl. 8; see *Feist Publ’ns v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (“The Primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.””).

108. See *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989).

109. See *supra* Part I.C.

110. Even NAGPRA specifically avoids “limit[ing] any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations” pertaining to objects governed by its provisions. 25 U.S.C. § 3009. However, it is not clear to what extent the First Amendment might limit the extent to which the Hopi Tribe can assert exclusive control over such

international policies explicitly supported by the Executive Branch, including the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), actively promote the protection and/or recovery of indigenous cultural property rights and the preservation of Native American religions.¹¹¹

Even if a court were to find aboriginal title in recorded ceremonial performances to be incompatible with both *Oneida* and Congress’s current policy of recognizing aboriginal title, the Hopi Tribe could potentially assert ownership claims in its own courts against Columbia University, the estate of Laura Boulton, Smithsonian-Folkways, and others. In such case, the court would likely apply existing tests for tribal regulatory jurisdiction over nonmembers to determine whether allowing Hopi law to govern the dispute would violate Boulton’s (or her heirs, successors, or assigns’) Fifth or Fourteenth Amendment Due Process rights.¹¹²

B. SUMMARY: UNCERTAINTY IN CURRENT LAW REGARDING PRE-1972 SOUND RECORDINGS MADE ON RESERVATION LANDS

Based on the foregoing case study, it is clear that significant gaps currently exist in the protection of pre-1972 sound recordings made on federally recognized Indian reservations. The only federal statutory protection through which tribes may assert ownership in these kinds of recordings is NAGPRA; however, tribes may only assert ownership under its provisions if the recordings they seek to claim fit the statute’s definition of sacred objects or objects of cultural patrimony. This leaves out a broad swath of recordings, from popular music to oral literature, and requires tribes to prove ceremonial necessity or historical or cultural importance—which may entail significant and invasive evidentiary hurdles. Additionally, NAGPRA is silent on the ownership of any intellectual property rights pertaining to the objects claimed. Common law copyright may allow tribes to claim certain exclusive rights in the exploitation of pre-1972 sound recordings, but that protection may be limited

recordings against non tribal members, especially with regard to “fair uses” of these materials. *See infra* Part III.B.

111. *See* NAGPRA, *supra* note 22; U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 11 § 1, art. 31 § 1 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Dec. 16, 2010), <http://www.state.gov/documents/organization/184099.pdf>.

112. *See* *Montana v. United States*, 450 U.S. 544 (1981); *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (Analogizing the *Montana* test for tribal jurisdiction over nonmembers to “Due Process Clause analysis for purposes of personal jurisdiction,” which “protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations, the constitutional touchstone being whether the defendant purposefully established minimum contacts in the forum State.”) (citations omitted). Whether non tribal members maintain their complete constitutional rights to Due Process while on federally recognized Indian reservations (even though those rights are not guaranteed to tribal members themselves) has been of substantial concern to the Supreme Court. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978) (“defendants [in the Tribal Court] are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. However, the guarantees are not identical.”); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (“The Bill of Rights does not apply to Indian Tribes.”).

both in duration and by the broader economic considerations at the heart of copyright law. Sound recording copyrights at common law are also thin forms of intellectual property, which only protect against exact duplication and not the exploitation of particular ritual techniques used in the recordings or the underlying musical or literary works performed.¹¹³ Finally, while aboriginal title would provide tribes the ability to claim ownership in pre-1972 sound recordings on their own terms, leveraging common law doctrines to enforce those ownership claims may be asking federal judges to stretch these doctrines too far, raising Free Speech and Due Process concerns.

PART III: IMPLICATIONS FOR THE NEXT COPYRIGHT ACT

Revising the Copyright Act is a current congressional priority.¹¹⁴ In 2009, Congress commissioned the Copyright Office to weigh the potential risks and benefits of bringing all pre-1972 sound recordings under federal copyright protection.¹¹⁵ In its report to Congress, the Copyright Office generally supported that move, citing the inconsistency of state statutes and common law governing these recordings, the economic and legal benefits of uniform coverage, and the potential for more works to eventually enter the public domain, thereby benefiting the American populace.¹¹⁶

While the Copyright Office report analyzed the consequences of such a move in state jurisdictions, to date no studies have been conducted on the potential impact of applying statutory copyright to works created on the aboriginal lands of Native American Tribes, Alaska Native Corporations and Villages, and Native Hawaiian Organizations. As the above case study suggests, there are significant gaps and ambiguities in current protection of pre-1972 sound recordings made in these jurisdictions. The application of federal copyright law to these recordings would likely magnify these issues and add new concerns for tribes seeking to assert control over culturally sensitive sound recordings, as discussed in Part III.B below. First, the Copyright Act differs substantially from current common law copyright doctrines governing sound recordings that may be presently applicable on tribal lands. For instance, instead of authorship vesting solely in the performer of a sound recording, the Copyright Act recognizes the contribution of the recording engineer as potentially copyrightable subject matter, thereby allowing him or her to claim coownership of a sound recording copyright. Second, the Copyright Act

113. The copyright status of indigenous “musical work” copyrights is beyond the scope of this Note, but certainly merits attention given the discussion *infra* Part III. For a discussion of the uncomfortable fit between the Copyright Act’s requirements for copyrightability and Hopi musical works, see David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CANADIAN J. OF L. & SOC’Y 129 (1995).

114. U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE, OCTOBER 2011 – 2013 (Oct. 25, 2011), <http://www.copyright.gov/docs/priorities.pdf>.

115. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011).

116. *Id.* at 120-39.

limits exclusive rights in sound recordings to only certain uses, permitting a wide variety of other uses—including “fair uses”—some of which may run counter to tribal interests and current federal policy toward Native American groups and their cultures. Federal interests that have shaped copyright protection have derived primarily from the progress-oriented economic and social policies enshrined in the Intellectual Property Clause and First Amendment of the United States Constitution, and not necessarily the interests found in the constitutions and laws of sovereign Native American Tribes—entities which neither derive their power from the federal Constitution nor are explicitly limited by its constraints.

Before discussing the above issues in greater depth, it is necessary to examine whether the Copyright Act’s ownership provisions actually apply on tribal lands.¹¹⁷ Recent cases seeking to apply the Copyright Act in tribal contexts have placed this into doubt. Additionally, it is not yet clear to what extent the Copyright Act’s preemption provisions affect tribal laws and customs granting ownership interests in recordings of traditional ceremonies, songs, and other oral literatures to tribal entities and tribal members.¹¹⁸ If Congress chooses to extend the Copyright Act to pre-1972 sound recordings made on tribal lands, such an action could extinguish aboriginal title in these intangible cultural properties, which would be a significant blow to Native American sovereignty and run counter to international agreements like the UNDRIP. Silence on the Act’s application to these recordings would leave the question of applicability to the courts, which may be equally deleterious given the ambiguity of current precedent, as will be explored below in Part III.A.

At a conceptual level, it becomes clear from the foregoing Hopi case study that tribes’ interests in protecting sound recordings may be altogether distinct from those interests protected by the Copyright Act. I argue that such a conflict of interests over certain categories of sound recordings made on tribal lands merits special treatment or exemption should Congress desire to bring all pre-1972 sound recordings under the Act, thereby preserving tribal law governing them. For example, tribes may desire to control sound recordings made on reservation lands to protect their oldest works, to protect works that have not yet been written down under the auspices of appropriate cultural authorities, or to offer specific modes of protection that align better with local economic and social policies. The classes of protection needed by tribes for recordings of ritual songs, ceremonial performances, and oral histories may be quite distinct from those reflected in the Copyright Act. As I discuss in Part III.C, these divergent interests are due in large part to ontological differences in the ways some forms of indigenous creative work function as compared to “musical works,” “audiovisual works,” or other forms of copyrightable expression currently protected under the Act. I argue that ontologically distinct works can find adequate protection within the federal copyright scheme only if tribal laws governing their ownership and use are recognized and enforced by federal law. Absent such a provision, tribes should oppose alterations to § 301 of the Copyright Act.

117. See discussion of 17 U.S.C. § 201 *infra* Part III.A.

118. See 17 U.S.C. § 301(a).

A. IS THE COPYRIGHT ACT APPLICABLE TO TRIBES?

Even if Congress were to bring all pre-1972 sound recordings under the Copyright Act, it is not yet certain that such a provision would actually impact tribes. There are two significant arguments supporting this. The first argument, recently revived by Justice Clarence Thomas, is that Congress lacks constitutional authority to legislate in matters of tribal governance that exceed the Indian Commerce Clause.¹¹⁹ This argument has been dealt with in greater depth elsewhere, and is beyond the scope of this paper as its ramifications cut to the core of federal Indian law.¹²⁰ Until Congress, the Supreme Court, or the people of the United States overturn the doctrine of federal “plenary power” over Native Americans and their lands, Congress and the Supreme Court will continue to assume the power to recognize, adjust, or even extinguish indigenous property rights—including rights to pre-1972 sound recordings.¹²¹

119. There are only scant references in the Constitution to the authority of Congress to legislate on behalf of tribes and tribal members, once in the Commerce Clause and another, by implication, in the Treaty Clause. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”); U.S. CONST. art. II, § 2, cl. 2 (describing the Executive’s power, with the “advice and consent of the Senate, to make treaties” with other governments). The scope of the Indian Commerce Clause has not been clearly articulated by the Court; however, it is clear that the Indian Commerce Clause power is distinct from Interstate Commerce Clause, *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831), but may also be more broad. *See United States v. Lomayaoma*, 86 F.3d 142, 145 (9th Cir. 1996). It, along with the Treaty Clause, has allowed Congress, with the assistance of the Executive, to deal expansively with Native American tribes as “domestic dependent,” but separate, “nations.” *Id.* In fact, the Indian Commerce Clause has been relied upon to legislate over Native American cultural resources. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001-3013 (as discussed, *supra*, NAGPRA regulates the ownership and sale of Native American human remains, burial items, sacred objects, and objects of cultural patrimony.). However, the Supreme Court has acknowledged that the Indian Commerce Clause is not an unlimited source of federal power over American Indian Tribes. *See United States v. Kagama*, 118 U.S. 375, 378-79 (1886) (“[W]e think it would be a very strained construction of this clause, that a system of criminal laws for Indians . . . without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”). Pointedly, Justice Thomas has recently acknowledged this lack of constitutional authority to legislate over Native American tribes in any matter not involving what would have been considered commerce in the 18th century. *United States v. Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) (“The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power”); *see also* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); *but see also* KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY* (2007) (arguing that Native American sovereignty is ambiguously both inside and outside of the federal governance structure).

120. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

121. Congress does have a “back door,” developed alongside changes in federal policy regarding Native Americans, that allows it some ability to legislate for tribes outside of the constitutional constraints of the Commerce Clause. As the United States’ relationship with Indian tribes shifted from one of conquest to assimilation in the mid- to late nineteenth century, the Supreme Court crafted a “plenary power” doctrine to justify congressional regulation of tribes and tribal members. The Court’s basis for the doctrine has been rooted in structural and ethical propositions: first, the federal government holds ultimate power within the territorial boundaries of the United States, which encompass tribal lands. Second, tribes are by comparison politically weak and economically depressed in the wake of centuries of American conquest, placing them in a relationship of dependence with the United States.

The second argument is that, as a matter of statutory construction, federal courts typically do not apply generally applicable laws created by Congress to Indian tribes absent “clear evidence of congressional intent.”¹²² In his leading treatise on federal Indian Law, Felix S. Cohen has identified three areas in which congressional statutes have no application in tribal matters: (1) general statutes that adversely affect rights reserved by treaty, statutes, or a tribe’s inherent right of self-government, (2) any instance where tribes are specifically excepted from the applicability of a Congressional statute, including when they are not included but states and local governments are, and (3) any instance where tribes’ sovereign immunity would be abrogated, unless Congress makes that abrogation “express and unequivocal.”¹²³

While no federal court has tested the authorship and ownership provisions of the Copyright Act for their applicability on tribal lands, federal courts have thus far resisted reading the Copyright Act’s infringement provisions as generally applicable to tribes. In *Bassett v. Mashantucket Pequot Tribe*, for example, a film production company brought a copyright infringement claim against a tribal museum for using portions of its script without permission, which the district court dismissed on sovereign immunity grounds.¹²⁴ On appeal, the film producer asserted that the Copyright Act was a generally applicable law enforceable on federally recognized Indian reservations, and therefore abrogated tribes’ common law sovereign immunity from suit. While the court did not apply the general applicability test to the Copyright Act, it did hold that even if the Copyright Act were applicable to tribes, its lack of specificity to tribal contexts certainly could not have abrogated tribal sovereign immunity. Likewise, in *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, an action was brought against a tribal economic development agency in the Northern District of Oklahoma for copyright infringement of plaintiff’s gaming software. In its motion for summary judgment, the tribal agency argued that the Copyright Act did not apply to tribes or tribal

Therefore, where Congress has “the duty of protection” over tribes located within its borders, it can legislate on tribes’ behalf. See *Kagama*, 118 U.S. at 383–84. But, such an expansive, amorphous, and seemingly extra-constitutional doctrine potentially authorizing Congress unlimited control over separate, sovereign governments seems at odds with the kind of separation of powers enshrined in the structure of the United States constitution.

122. *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (“clear evidence of congressional intent” is essential to abrogate established treaty rights by means of general Congressional legislation); see also *Iowa Mutual Ins. Co. v. LaPlanete*, 480 U.S. 9, 17-19 (1987) (Congressional grant of diversity jurisdiction to federal courts did not reference Indians and could not be used to sidestep a Tribe’s right to have parties fully exhaust judicial remedies before bringing action in Federal court); *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (“General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.”). However, dicta in *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), has fragmented the circuits over the question of when a generally applicable statute, silent on applicability to Native Americans, will be enforceable, particularly in the criminal context. See generally Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

123. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.03 (LexisNexis 2015).

124. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2000).

entities.¹²⁵ Building on the Second Circuit's holding in *Bassett*, the court agreed, stating, "[i]n order to conclude Congress intended to subject Indian tribes to the Copyright Act, the Court would need to infer such intent which does not unequivocally apply to tribal entities. Being cognizant of the Supreme Court's pronouncements on tribal sovereign immunity, such an inference is inappropriate."¹²⁶ Even though both of these rulings dismissed alleged copyright infringements by tribal agencies typically immune from suit, the reasoning in each suggests that federal courts view the Copyright Act as essentially different from the kinds of generally applicable statutes that are currently enforceable on tribal lands, such as the Occupational Safety and Health Act ("OSHA") which fulfills Congress's duty of protection to tribes and their members.¹²⁷ Thus, if Congress were to pass a pre-1972 sound recording amendment to the Copyright Act with the intention of applying it to tribes, it would likely have to do so expressly. Otherwise, the amendment faces the possibility of being construed by courts as inapplicable to tribes.

There are additional policy arguments against applying the Copyright Act to recorded ceremonies, oral histories, and other culturally sensitive works created on tribal lands. As author Michael Brown has argued, applying copyright law as a means of protecting Native American culture may actually harm it by converting indigenous modes of creativity into a capitalistic resource primed for commercial exploitation.¹²⁸ I argue below that preempting existing federal and tribal laws protecting Native American creators' rights in sound recordings, only to replace them with statutory provisions economically engineered to promote the progress of *Western* arts should be considered a further act of colonization and a diminution of tribes' inherent right to govern themselves. It would most certainly open the door to additional cultural misappropriations, like that of Boulton's unauthorized sale of Hopi ceremonial songs for commercial gain, under the guise of fair use or archival preservation.

It would also be difficult to justify imposing the Copyright Act's non-indigenous ownership frameworks onto cultural materials meant to circulate only within indigenous communities. Without research examining the effects of the Copyright Act on indigenous creative works, there is no evidence to suggest that the Act would encourage indigenous creative activity or foster superior uses of these kinds of materials than tribes' existing laws or customs. Rather, in most cases tribal lawmakers and judges are in a better position to assess tribal communities' creative capacities and tailor ownership principles to them. As discussed by the Ninth Circuit in *Chilkat*, the scope of ownership rights in tribal cultural properties is a "creature of Tribal law," operating outside the purview of federal adjudication.¹²⁹

125. *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1131 (N.D. Okla. 2001).

126. *Id.* at 1137.

127. 29 U.S.C.A. §§ 651–678 (2015); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115–16 (9th Cir. 1985).

128. See MICHAEL BROWN, WHO OWNS NATIVE CULTURE? 237 (2003).

129. *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1474 (9th Cir. 1989).

Certainly, Congress may recognize and enforce existing aboriginal rights to pre-1972 sound recordings made on tribal lands, as it has heretofore done with other tribal cultural property rights (e.g., NAGPRA, NALA). However, if instead it chooses to legislate so as to prescribe the scope and structure of those rights, it should carefully weigh the consequences of potentially extinguishing aboriginal title in these culturally valuable works, especially since the United States actively protects aboriginal rights to cultural objects under NAGPRA. Furthermore, the Executive Branch has officially expressed its support of the United Nations Declaration on the Rights of Indigenous Peoples, which promotes protection of tribal interests in intellectual property, traditional knowledge, and cultural heritage.¹³⁰

B. POTENTIAL TRIBAL CONCERNS OVER THE APPLICATION OF THE COPYRIGHT ACT TO PRE-1972 SOUND RECORDINGS

i. Initial Vesting of Ownership

If Congress were to bring all pre-1972 sound recordings under the Copyright Act, including those made on tribal lands, tribes and their members could be surprised by the Act's limited power to protect tribal interests in these materials. Certainly, recordings of ceremonies, oral histories, or performances of Native American oral literatures that qualify as "original works of authorship" could receive copyright protection from the moment they were "fixed in any tangible medium of expression."¹³¹ The constitutional standard for originality in a sound recording is relatively low, in that the sounds recorded must only (1) be "independently created by the author (as opposed to copied from other works)" and (2) must demonstrate a "modicum of creativity," "some creative spark no matter how crude, humble or obvious."¹³² As with common law copyright, a recording of a ceremonial performance would most likely provide the performer with a copyright interest in the resulting sound recording.¹³³ But, unlike common law copyright, an additional copyright interest almost always vests in the recording engineer when his or her contribution includes "capturing," "processing,"

130. U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 11 § 1, art. 31 § 1 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Dec. 16, 2010), <http://www.state.gov/documents/organization/184099.pdf>.

131. 17 U.S.C. § 102(a) (2012).

132. *Feist Publ'ns, Inc. v. Rural Tele Serv. Co., Inc.*, 499 U.S. 340, 345-47 (1991) (internal citations omitted); *see also* *Goldstein v. California*, 412 U.S. 546, 561-62 (1973). ("[A]lthough the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor Thus, recordings of artistic performances may be within the reach of Clause 8.")

133. Though Nimmer reports that the originality requirement may not be met in a recording of "sounds [that] are fixed by some purely mechanical means," or when a work is recited rather than performed (e.g., a dry, nonexpressive rendition of a prepared lecture). *See* NIMMER ON COPYRIGHT § 2.10[A][2] n.33 (2015).

“compiling,” or “editing” the sounds.¹³⁴ Thus, sound recordings under the Copyright Act are, almost as a default, considered joint works coowned by both the performer and the recording engineer.¹³⁵ Absent an agreement to the contrary, a copyright coowner holds a one-half undivided interest in the work, and may use the work, make nonexclusive licenses of the work, and even assign his or her interest in the work without the other coowner’s permission, subject only to an accounting to the other coowner.¹³⁶

If the ownership provisions of the Copyright Act were applicable to pre-1972 sound recordings made on tribal lands, recordists like Laura Boulton and her heirs, successors and assigns could license Hopi recordings (albeit nonexclusively) without tribal permission, or duplicate, distribute, perform, or otherwise derive new works from the recordings, subject only to an accounting to the Tribe for profits. In the Hopi context, such an arrangement would be untenable, given that the Tribe desires exclusive control over the circulation of these culturally sensitive materials in order to prevent the circumvention of traditional protocols.

ii. Limitations on Exclusive Rights

Even if tribes were able to acquire both the performers’ and recordists’ rights in sound recordings they sought to protect, the Copyright Act provides such copyright holders only a handful of exclusive rights: the right to make exact copies of the recording,¹³⁷ the right to create derivative works through sampling (e.g. remixing, re-arranging) or other exact copying of the original sounds,¹³⁸ the right to control the initial distribution of phonorecords made from a sound recording,¹³⁹ and the right to perform the sound recording publicly via digital audio transmission.¹⁴⁰ The porousness of copyright protection allows sound recordings that come under the Act’s provisions to be used for a wide range of permissible activities, from sound-alike recordings to live public performances or radio broadcasts.

134. NIMMER ON COPYRIGHT § 2.10[a][3].

135. See 17 U.S.C. § 101 defining “joint work.” (assuming that, except for situations involving bootlegging, a performer and a recording engineer “inten[d] that their contributions be merged into inseparable or interdependent parts of a unitary whole.”).

136. See 17 U.S.C. § 201(a); *Weinstein v. Univ. of Ill.*, 811 F.2d 1901, 1095 (7th Cir. 1987); *Kaplan v. Vincent*, 937 F. Supp. 307 (S.D.N.Y. 1996); see also *Erikson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994) (A “co-owner is subject to an accounting to the other co-owners for any profits.”).

137. 17 U.S.C. § 106(1). *But see* 17 U.S.C. § 114(b) (extending this right only to copying “that directly or indirectly recapture[s] the actual sounds fixed in the recording.”).

138. 17 U.S.C. § 106(2). See also 17 U.S.C. § 114(b) (explaining that the derivative work right in a sound recording is limited to the making of new works by rearranging, remixing, or altering the sequence or quality of the original recording).

139. 17 U.S.C. § 106(3). See also 17 U.S.C. § 109(a) (the right of distribution is limited by the first sale doctrine). *But see* *Capitol Records v. ReDigi*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (finding that unauthorized digital transfers of sound recordings fall under the 17 U.S.C. § 106(1) reproduction right).

140. 17 U.S.C. § 106(6). While this provision covers digital streaming of a sound recording, there is no general public performance right for sound recordings.

In addition, the duration of exclusive ownership under the Copyright Act is limited: for joint works, copyright owners only hold exclusive rights for the life of the last living author plus seventy years, and for anonymous works, pseudonymous works, or works made for hire, the lesser of ninety-five years from the date of publication or 120 years from the date of creation.¹⁴¹ Copyright protection's finite life means that recordings will sooner or later enter the public domain where virtually any use is permitted.¹⁴² Such uses of recordings of tribal ceremonies or other culturally sensitive materials would certainly run counter to tribal interests, particularly for ceremonial and other types of performances that tribes have carefully safeguarded over centuries.

Perhaps more importantly, the Copyright Act's fair use doctrine—based on the Constitution's First Amendment protections—may permit the exact kinds of uses of sound recordings tribes seek to prevent. The First Amendment guarantees that Congress shall make no law “abridging the freedom of speech,” which the Supreme Court has recognized in the copyright context as “includ[ing] both the right to speak freely and the right to refrain from speaking at all.”¹⁴³ Copyright generally enables speech by incentivizing authors to make their works publicly available by granting them a temporary monopoly on the exploitation of their works. Alternatively, when used as a protection for unpublished works, copyright allows authors the freedom not to share their expressions publicly, at least for a finite period of time. However, even though authors enjoy exclusive rights to exploit their works (or not), the fair use provision of the Copyright Act gives follow-on authors the chance to use materials protected by copyright law in transformative ways or in certain educational contexts without authorization from the copyright owner.¹⁴⁴ While fair use is not always a viable defense to infringement, particularly for unpublished works,¹⁴⁵ the legality of a particular unauthorized “fair use” of a work is always a fact-specific determination.¹⁴⁶

Fair use has arguably been a part of copyright jurisprudence even before its inclusion in the Copyright Act of 1976.¹⁴⁷ Indeed, some states recognize fair use as

141. 17 U.S.C. § 302.

142. Of course, practically speaking, tribes may still protect their ceremonial performances by keeping them and any recordings of them limited to “members only” as many do today. However, as recording technologies become increasingly smaller and widely available, this strategy will be increasingly costly—economically, socially, and politically—to maintain.

143. *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985), quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

144. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (finding that “transformative” uses of existing copyrighted works are among those that weigh in favor of fair use); *Cambridge Univ. Press v. Patton*, 769 F.2d 1232, 1261 (11th Cir. 2014) (finding that using copyrighted works for nonprofit educational purposes may weigh in favor of fair use).

145. *Harper & Row*, 471 U.S. at 555 (“Under ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.”).

146. See 17 U.S.C. § 107 (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

147. See *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841); *EMI Records Ltd. v. Premise Media Corp.*, No. 601209/08, 2008 WL 5027245 (N.Y. Sup. Ct. Aug. 8, 2008).

a defense to the infringement of a common law copyright.¹⁴⁸ However, bringing all pre-1972 sound recordings under statutory copyright law would no doubt make the exploitation of pre-1972 sound recordings created on tribal lands a much more attractive option for those seeking to do so without following tribal custom or protocol, as it would provide at least one statutorily sanctioned defense for unauthorized use of these materials where such may not exist under tribal laws.¹⁴⁹ Congress has identified several uses of copyrighted works, including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research,” as potentially defensible under the doctrine of fair use.¹⁵⁰ Additional uses, ranging from parody to wholesale copying of works in another work (e.g. “appropriation art” and online course materials), have been identified as fair uses under certain conditions.¹⁵¹ Uses of tribal cultural properties in these exact ways (especially parody and academic research) have caused substantial harm to tribal communities and continue to run counter to tribal interests.¹⁵² Should Congress bring all pre-1972 sound recordings under the Copyright Act without an exemption for those made on Indian reservations, it is clear that scenarios like the case study above will continue to occur to the detriment of tribes.

While fair use should raise significant concerns for tribes seeking to protect recorded ceremonies and other materials from exploitation, it is important to note that tribes may have the unique ability to leverage the second fair use factor—the nature of the copyrighted work—in their favor when countering a fair use defense of an infringer of copyrighted ceremonial material.¹⁵³ While “[t]he second factor has rarely played a significant role in the determination of fair use,” and has been generally limited to a narrow set of concerns,¹⁵⁴ it is equally true that disputes over

148. See, e.g., *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 346 (S.D.N.Y. 2014) (“[I]t appears that New York recognizes fair use as a defense to [common law] copyright infringement. New York courts have not, however, articulated the scope of New York’s fair use doctrine.”) (citations omitted) Subsequently, the court applied the § 107 fair use factors.

149. The Copyright Act also provides additional limitations on the rights of copyright owners that would likely run counter to tribal interests in safeguarding culturally sensitive sound recordings, including the classroom public performance exception, 17 U.S.C. § 110(1), and the reproduction exception for libraries and archives, 17 U.S.C. § 108.

150. 17 U.S.C. § 107.

151. See *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569 (1994); *Cariou v. Prince*, 714 F.3d 694 (2013); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1280 (2014) (the fourth fair use factor hinges, in part, on whether copyright holders are satisfying the demand for a particular use of their work by offering licenses); *but see* *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015) (requiring a fair user to have a “transformative” purpose).

152. See LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (2d ed. 2012); JONATHAN STERNE, *THE AUDIBLE PAST: CULTURAL ORIGINS OF SOUND REPRODUCTION* 311-333 (2003); VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 78-100 (1969). For specific harms to the Hopi Tribe, see PETER M. WHITELY, *RETHINKING HOPI ETHNOGRAPHY* 163-187 (1998) (describing harms caused by parodies of Hopi Snake dance by the Smoki fraternal organization); Lomayumptewa Ishii, *Western Science Comes to the Hopis: Critically Deconstructing the Origins of an Imperialist Canon*, 25 WICAZO SA REV. 65-88 (2010) (describing harms caused by Jesse Walter Fewkes and other researchers affecting perceptions of Hopis in public policy).

153. See 17 U.S.C. § 107(2).

154. See *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015).

the use of indigenous recordings have not yet been raised in federal courts. As explained below, the “nature” of recorded indigenous ceremonial performances is quite different from commercial or even nonprofit artistic recordings, and, as a matter of current United States policy, merit substantially more protection.¹⁵⁵ Where a fair use defense is asserted in a context like that of Laura Boulton’s unauthorized publication of Hopi ceremonial performances, the second factor should weigh heavily against fair use.

C. ACCOUNTING FOR ONTOLOGICAL DIFFERENCES THROUGH TRIBAL JURISPRUDENCE

Numerous scholars have noted the problems Native American creators may face as they attempt to protect their works under the provisions of the Copyright Act.¹⁵⁶ Many important Native American creative works fall outside the scope of copyright protection due to: (1) the nature of their creation, which may not be strictly human in origin, (2) differing concepts of “fixation,” where a work need not be embodied in a material object for it to be considered “fixed” for a given indigenous community,¹⁵⁷ or (3) the finiteness of a copyright’s term of protection, even when in some Native American communities, ancient creative works merit more protection than newer ones.¹⁵⁸ As discussed earlier, many Native American tribes’ interests in protecting pre-1972 ceremonial sound recordings may not be aligned with the kinds of economic and intellectual progress desired by generations of non-indigenous settlers on their lands who adopted and developed copyright laws. Indeed, many indigenous groups are currently advocating for copyright protection for their creative works solely to prevent further colonization, which, instead of occurring through the taking of land, is now happening through the misappropriation of sensitive cultural knowledge and their modes of expression by the unaffiliated or uninitiated.¹⁵⁹

I argue that the central challenge facing tribes and legislators interested in protecting pre-1972 reservation-made sound recordings under copyright law is that many of these recordings are not simply artistic or expressive materials, but are actually functional components of indigenous ceremonial acts or performative

155. See *infra* Part III.C.

156. Two significant bibliographic resources compiling commentary on the uncomfortable fit between indigenous cultural expressions and copyright or other forms of intellectual property protection include Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANNU. REV. L. SOC. SCI. 393 (2009); Robert C. Lancefield, *On the repatriation of recorded sound from ethnomusicological archives: A survey of some of the issues pertaining to people’s access to documentation of the musical heritage* (1993) (unpublished Ph.D. dissertation, Wesleyan University).

157. *C.f.* 17 U.S.C. § 101 (defining “fixed”).

158. See Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995).

159. See U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 11 § 1, art. 31 § 1 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For specific examples related to the case study, see David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CANADIAN J. OF L. & SOC’Y (1995).

utterances. The challenge of determining ownership interests in these recordings is not necessarily an empirical problem—there is no additional evidentiary burden or a more precise test a court must conduct to distinguish a sound recording that should be specially protected from one that could comfortably circulate in the global copyright system. Rather, the problem is ontological—the question of whether a recorded set of sounds performs a protected function within an indigenous mode of existence, and, if so, whether such a recording should be permitted to circulate beyond the control of the actors who rightfully control it.¹⁶⁰ This problem of ontological difference has been one that Congress and the federal courts have grappled with since the founding of the United States, as evidenced by open ambiguities regarding indigenous property claims in Federal Indian Law jurisprudence since *Johnson v. M'Intosh*.¹⁶¹ It is clear that Congress and the courts believe indigenous groups are entitled to control their lands, culture, and membership by means of sovereign governments operating under distinct ontological frameworks,¹⁶² but they are also uncomfortable with enforcing indigenous entitlements that arise from these ontological formations that cannot be justified through the logics of American jurisprudence.¹⁶³

160. BRUNO LATOUR, *AN INQUIRY INTO MODES OF EXISTENCE* 48-49 (2013) (arguing that in developing analytical methods to deal with phenomena that move across modern intellectual domains (e.g. music and speech, which exist simultaneously in domains as diverse as law, science, politics, and religion), the problem is rarely an empirical one, but one of selecting the appropriate categories for analysis). The failure to strike the appropriate balance between creative monopoly and public access to culture in the application of copyright law in Native American contexts is not necessarily a factual problem—trying to determine who contributed certain pitches, rhythms, lyrics and chords only reinforces what are often Eurocentric categories. Rather, the categories of analysis to be used in determining the copyrightability and ownership of Native American works, and the appropriate relationships between those categories, are incompletely addressed under the copyright law at this juncture. The constitutional categories of copyright, including “Writings,” “Sciences and the Useful Arts,” “Progress,” and “Authors” each have developed with virtually no consideration of indigenous peoples’ fundamental categories of creativity. To provide a brief example, “Authors” of Hopi ceremonial songs—those who create and exercise dominion and control over the songs—include non-human actors. See Trevor Reed, Epilogue: Pu’ Itaaqatsit aw Tuuqayta (Listening to our Modern Lives), in *MUSIC AND MODERNITY AMONG FIRST NATIONS OF NORTH AMERICA* (Victoria Levine and Dylan Robinson, eds., forthcoming). Could authorship and ownership rights of these sorts of actors be appropriately protected under current federal copyright regimes? See *Naruto v. Slater*, No. 15-cv-04324, 2016 WL 362231 *3-4 (N.D. Cal. Jan. 28, 2016) (denying standing to sue for copyright infringement of a photograph taken by a crested macaque, relying in part on the Copyright Office’s statement that “to qualify as a work of ‘authorship’ a work must be created by a human being.”).

161. See BRUYNEEL, *supra* note 119.

162. See *Montana v. United States*, 540 U.S. 544, 566 (1981).

163. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978). At issue was the ability of tribes to try nonmembers in tribal court, but the case has been relied upon in the civil context as setting forward the limits of tribes to regulate nonmembers’ conduct on tribal lands generally. Perpetuating the racialized frameworks of nineteenth jurisprudence exemplified in *Ex Parte Crow Dog*, 591 U.S. 556, 571 (1878), the *Oliphant* court found it “an intrusion[] on [U.S. Citizens’] personal liberty” that a tribal court could assert jurisdiction “‘over the members of a community separated by race [and] tradition, . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . These considerations . . . speak equally strongly against the validity of respondents’ contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.”

Determining the extent of protection that should be granted to authors of pre-1972 sound recordings on Indian reservations requires taking into account these ontological differences. Tribal laws (including statutes, common law, and customary law), not the Copyright Act, should be the default body of law applied to questions of creativity, authorship, and ownership interests in sound recordings and other creative works made on federally recognized Indian reservations, particularly when a work in question is one that was never meant to be circulated beyond the control of the tribe or its members.¹⁶⁴ Therefore, any amendment to the preemption provisions contained in § 301 of the Copyright Act should include an exemption for works created on aboriginal lands of federally recognized Indian tribes, Alaska Native Corporations, and Native Hawaiian Organizations, accompanied by a provision recognizing that tribal laws, if any, pertaining to works created on these aboriginal lands should supersede any property interests or limitations imposed by the Act. Such an amendment could be narrowed to pre-1972 sound recordings only, but the arguments above could easily apply to all creative works made on tribal lands.¹⁶⁵ In this way, tribal communities whose interests align with the Copyright Act's provisions are in no danger of losing the protections it offers—they need not pass any new laws to receive general copyright protection—while tribes like the Hopi Tribe whose interests diverge significantly can take action on their own to prevent undesired exploitation of their members' works.

If desired, Congress could ensure that such a tribal exception to statutory copyright law would be limited to only the types of culturally sensitive materials I have discussed in this Note by granting tribal courts jurisdiction to assess the level of ontological difference between the work in question and the types of works that should fall under the subject matter of copyright law. If a work has little or no ontological difference from the kind of work the Copyright Act was meant to protect, it would make little sense to exempt such a work from its provisions. But, where a work—e.g. a Hopi ceremonial song recording—functions not as music but as a mode of intervention between human ritual actors and environmental phenomena, such a work should be considered ontologically distinct from copyrightable subject matter, and tribal ownership interests should supersede any other claims. It should be made clear, however, that an ontological difference is

164. See Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 74 (2005) ("Because it is suited to indigenous groups' particular cultures and normative framework, tribal law is inimitably capable of capturing and accommodating the unique features of the tribal community. Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot.").

165. Certainly some works made on Tribal lands would not merit protection under tribal law under the rationale provided here, e.g. commercial recordings or purely artistic works. Further, it is possible that, if such an exemption were to include all works created on tribal lands, some artists, members of the tribe or nonmembers, might elect to create their works on Indian reservations specifically to take advantage of Tribal intellectual property laws. Such a scenario may actually be desirable under current federal policies, which seek to support tribal self-determination and economic growth. An intellectual or creative economy fostered by an expansive intellectual property regime would likely be an improvement upon many contemporary tribal economies which have migrated toward resource extraction, gaming, cigarette sales, and other similar types of enterprises.

not a difference in form, but one of function. A creative work that sounds like a popular melody to the average American citizen may actually have a recognized function within a particular indigenous mode of existence. The necessity of specialized judicial expertise, then, is clearly merited in such determinations.

Fortunately, tribal courts weigh these kinds of ontological differences on a regular basis as they apply tribal laws alongside the imposed constraints of the United States legal system.¹⁶⁶ However, their ability to perform this specialized function has been sharply curtailed. Following the Supreme Court's 2001 decision in *Nevada v. Hicks*, tribal courts are no longer recognized as courts of general jurisdiction.¹⁶⁷ In a recent action for declaratory judgment in a trademark case under the Lanham Act, the Ninth Circuit rejected tribal court jurisdiction over the dispute based on *Hicks*, finding the subject matter to have exceeded the scope of the tribe's legislative, and, consequentially, its adjudicative power.¹⁶⁸ Under current precedents, it is not clear that a tribe could, under its inherent sovereignty alone, assert jurisdiction in a copyright ownership dispute arising under federal copyright laws.¹⁶⁹ Therefore, in order for tribal courts to be empowered to make declaratory judgments regarding ownership interests in pre-1972 sound recordings, an amendment to the Copyright Act must also expressly recognize the inherent jurisdiction of tribal courts to adjudicate copyright cases arising on tribal lands.

The above proposals are not without their support from other legal scholars who have explored these issues in depth and made similar recommendations. Commentators Angela R. Riley and Kristen A. Carpenter have argued for nearly two decades that tribal courts should play a central role in resolving questions about indigenous intellectual properties that require a careful balancing of tribal and federal interests.¹⁷⁰ James Nason has argued that federal courts should be asked to enforce tribal court decisions involving intangible cultural properties like songs and sound recordings through principles of comity.¹⁷¹ Rebecca Tsosie has advocated for a tribal "right to culture"—a judicial concept she has developed for protecting tribal intellectual properties—that likewise relies on tribal jurisprudence to solve questions of ownership.¹⁷² Her proposed framework is based on Article 27 of the International Covenant on Civil and Political Rights, which declares that ethnic

166. See generally *Tribal Law and Policy Institute*, TRIBAL COURT CLEARINGHOUSE (last visited Nov. 8, 2016), <https://perma.cc/5EJF-TP97> (discussing the complex issues involved in reconciling indigenous modes of adjudication with adversarial legal environments).

167. *Nevada v. Hicks*, 533 U.S. 353, 374 (2001).

168. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938 (9th Cir. 2009).

169. See *Hicks*, 533 U.S. at 366-69.

170. See generally Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *Clarifying Cultural Property*, 17 INT'L J. CULTURAL PROP. 581, 587 (2010); Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005); Angela R. Riley, Article, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000).

171. See James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255 (2001).

172. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 334-38, 357 (2002).

minorities “shall not be denied the right . . . to enjoy their own culture.”¹⁷³ Under her proposed framework, tribes are permitted to set limits on uses of tribal culture so as to allow them to flourish locally, and are also empowered, presumably under federal law, to prevent harmful appropriations of them, thereby striking a balance between tribal interests and freedom of expression concerns.¹⁷⁴

Congressional policy toward Native Americans under NALA and NAGPRA would also tend to support such a proposal. These statutes reflect Congress’s desire to remedy past takings and suppressions of indigenous culture by recognizing ownership rights and returning control to those who can most appropriately use Native American cultural resources. In doing so, Congress has explicitly recognized existing tribal laws and customs as the basis for establishing ownership in these materials, allowing such ownership claims to supersede those of government agencies, museums, and other federally funded organizations unless proof of voluntary transfer has been given.¹⁷⁵ Additionally, concerns over social equity and judicial economy weigh heavily toward recognizing the place of tribal law in our nation’s copyright system. Given the potential harm to tribal interests that could result from bringing all pre-1972 sound recordings under the Copyright Act, and the likelihood that the Copyright Act’s applicability on tribal lands will continue to be a litigated issue as tribes seek to protect their culture from exploitation and misuse, a pre-1972 sound recording amendment to the Copyright Act must allow tribes to continue to define ownership interests in materials made within their territories and require courts to look to tribal law and judicial expertise when called upon to determine copyright ownership in them.

CONCLUSION

In this Note, I have explored three potential ways tribes may assert ownership in pre-1972 sound recordings made on reservation lands. Each of these pathways, however, has its limitations, and the ambiguities in current law in these areas leave tribes vulnerable to expensive and potentially risky litigation over the future of their ancestors’ recorded voices. As Congress is set to review the pre-1972 sound recording exception in the Copyright Act, now is the time for tribes to voice their desires for an explicit provision protecting sound recordings made on their lands on their own terms.

As I have argued above, such a provision must allow tribal laws to govern, at a minimum, the terms of authorship and ownership applied to these materials in federal courts. Such a provision would comport with constitutional limitations on the exercise of congressional power over federally recognized Indian tribes, and would also demonstrate consistency with federal cultural property legislation, including NAGPRA, and international standards for the recognition of aboriginal

173. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), Art. 27, U.N. Doc. A/RES/2200(XXI) (Jan. 1, 1967).

174. See Tsosie, *supra* note 172. (explaining that it is not certain whether federal or tribal courts would adjudicate a “right to culture”).

175. See 25 U.S.C. §§ 3001(13), 3005(c) (1990).

title in indigenous cultural expressions. Ideally, Congress should make recordings made on federally recognized Indian reservations explicitly subject to the statutes, common law, customs, and norms of the particular tribe. At a minimum, however, questions that arise in federal courts about the ownership interests in sound recordings made on tribal lands should be certified to tribes for their adjudication of those interests according to local principles. Under such a scenario, Congress may desire to incorporate a standard for when tribal law should or should not apply to sound recording. Such a standard could state that only where a tribe does not believe a significant ontological difference exists between the subject matter of copyright and local conceptions of the material at issue should the authorship and ownership provisions of the Copyright Act be applied. Without the addition of provisions recognizing tribal interests, unauthorized exploitation and appropriation of tribal culture will likely continue for decades to come.