

NOTE

BATTLE IN THE DIGITAL SPHERE:  
THE REPATRIATION OF DIGITIZED NATIVE AMERICAN  
CULTURAL PROPERTIES

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## I. INTRODUCTION

In 2021, Harvard University received a letter from the Association on American Indian Affairs alleging that the University and the Peabody Museum of Archaeology and Ethnology had mishandled Native American human remains and affiliated cultural properties, causing “continuing physical, emotional and spiritual trauma to Native Nations and their citizens.”<sup>1</sup> The letter included allegations and demands regarding mishandling Native American cultural objects and failing to consult with Native American tribal nations as mandated by federal statute.<sup>2</sup> The allegations also involved a more nebulous subject matter—digital photographs of Native American human remains and cultural objects displayed on the Harvard Peabody Museum’s website.<sup>3</sup> The allegations signaled an impending lawsuit against Harvard University: just one of the many skirmishes between Native Nations and collecting institutions.<sup>4</sup> Native American communities have fought a long battle for the repatriation of their cultural objects and against the broad decolonization effort, but the battle does not stop at regaining ownership of physical properties.<sup>5</sup> Rather, Native Americans are now fighting a new battle—one to gain control of digital copies of their cultural objects, such as photographs, maps, oral histories, films, audio recordings, and 3D models.<sup>6</sup>

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<sup>1</sup> Oliver L. Riskin-Kutz, *Native American Nonprofit Accuses Harvard of Violating Federal Graves Protection and Repatriation Act*, HARV. CRIMSON (Mar. 12, 2021), <https://www.thecrimson.com/article/2021/3/12/nagpra-peabody-letter/> [<https://perma.cc/U57F-LV9N>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Zachary Small, *Push to Return 116,000 Native American Remains Is Long-Awaited*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html> [<https://perma.cc/92AV-ENT4>]; Gabriella Angeleti, *Native American Group Denounces Met’s Exhibition of Indigenous Objects*, ART NEWSPAPER (Nov. 6, 2018), <https://www.theartnewspaper.com/2018/11/06/native-american-group-denounces-mets-exhibition-of-indigenous-objects> [<https://perma.cc/N2MY-QXWF>].

<sup>5</sup> See Small, *supra* note 4; Angeleti, *supra* note 4.

<sup>6</sup> See E. Tammy Kim, *The Passamaquoddy Reclaim Their Culture Through Digital Repatriation*, NEW YORKER (Jan. 30, 2019), <https://www.newyorker.com/culture/culture-desk/the-passamaquoddy->

For example, the National Museum of the American Indian Archive Center houses thousands of photographic copies of cultural objects.<sup>7</sup> Many of these federally-funded digital resources are easily accessible online without adequate legal governance because existing statutes only apply to physical objects.<sup>8</sup> Thus, “[s]torage rooms and stacks have become sites of quiet rebellion,” where digital copies of cultural objects stored at collecting institutions have been largely neglected by the legal requirements for repatriation practice in the United States.<sup>9</sup> One of the most important pieces of repatriation legislation that Congress has made is the 1990 Native American Graves Protection and Repatriation Act (“NAGPRA”), but the statute does not explicitly address digitally stored cultural heritage, such as photographs, maps, oral histories, films, audio recordings, and 3D models.<sup>10</sup>

Granted, open and free access to digitized Native American cultural properties has its undeniable benefits in bringing awareness to marginalized communities, and is further validated by the classic American belief in the right of public access under the First Amendment.<sup>11</sup> Furthermore, the digitization of cultural property has long been a well-recognized tool for museums and federal collections to study, conserve, and educate the public on Native American cultural

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reclaim-their-culture-through-digital-repatriation [<https://perma.cc/V9MA-MRZM>].

<sup>7</sup> *Archive Center*, NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/explore/collections/archive> [<https://perma.cc/K4L4-RNYK>].

<sup>8</sup> *See id.*; Native American Graves Protection and Repatriation Act § 3001, 25 U.S.C. § 3001 (2022) (the current NAGPRA framework does not explicitly address the digitally stored Native American cultural heritage objects).

<sup>9</sup> Kim, *supra* note 6; Krystiana L. Krupa & Kelsey T. Grimm, *Digital Repatriation as a Decolonizing Practice in the Archaeological Archive*, 18 *ACROSS THE DISCIPLINES* 47, 49 (2021) (discussing how the current legal process for repatriating archival Native American cultural properties and human remains does not typically fall into the categories defined by current statutes and regulations).

<sup>10</sup> 25 U.S.C. § 3001.

<sup>11</sup> Chante Westmoreland, *An Analysis of the Lack of Protection for Intangible Tribal Cultural Property in the Digital Age*, 106 *CALIF. L. REV.* 959, 965 (2017); David L. Hudson Jr., *Public Forum Doctrine*, *FIRST AMEND. ENCYCLOPEDIA* (Feb. 18, 2024), <https://firstamendment.mtsu.edu/article/public-forum-doctrine/> [<https://perma.cc/2KBF-U67Q>].

heritage.<sup>12</sup> The significant role these digital surrogates take on essentially makes them wholly independent entities from their originals.<sup>13</sup>

The practice of creating digital surrogates from Native American cultural objects is becoming increasingly widespread.<sup>14</sup> For instance, the Smithsonian has reproduced repatriated Native American cultural items in digital format in the David T. Vernon Collection of Native American-held 3D scanned ethnographic objects, and other collecting institutions use high resolution 3D digitization to “maintain specimens after destruction sampling or repatriation and to create virtual ‘back-ups’ of objects as insurance against accidental loss.”<sup>15</sup> Digitizing Native American cultural objects has become more prevalent because many institutions own 3D-scanning equipment, and culturally sensitive content is often shared online where people have the opportunity to “download, print, and even modify the image or 3D digitization of archeological material, including human remains.”<sup>16</sup> Scholars have advocated for broader decolonizing efforts among museums that focus on “active interactions between the digital material and origin community members”, but challenges such as cost of data management and prioritizing public utility create barriers for collecting institutions to utilize digitized cultural assets in a manner that indigenous communities would deem appropriate.<sup>17</sup> Therefore, collecting and exhibiting Native American cultural items such as images of human remains, religious or sacred objects, recordings of ceremonies, etc., may be conducted in culturally insensitive manners, violating

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<sup>12</sup> See Candace S. Greene & Hannah Turner, *Digitization and Documentation in North American Collections: A History in Interviews*, NAT'L ANTHROPOLOGICAL ARCHIVES (2015), [https://naturalhistory2.si.edu/anthropology/media/NMNH-NAA\\_2019-09.pdf](https://naturalhistory2.si.edu/anthropology/media/NMNH-NAA_2019-09.pdf) [<https://perma.cc/4KM9-RHWB>].

<sup>13</sup> Hannah Stubee, *Effectiveness of 3D Digitization as a Tool for Indigenous Cultural Heritage Preservation*, in THE STATE OF MUSEUM DIGITAL PRACTICE | 2021: A COLLECTION OF GRADUATE ESSAYS AND RESPONSES 42, 42 (2021), <https://ad-hoc-museum-collective.github.io/Museum-Digital-Practice-2021/downloads/output.pdf> [<https://perma.cc/9P3M-T4MX>].

<sup>14</sup> See *Concept of Digital Heritage*, UNESCO, <https://en.unesco.org/themes/information-preservation/digital-heritage/concept-digital-heritage> [<https://perma.cc/E83W-XYQU>].

<sup>15</sup> EMMA CIESLIK, 3D DIGITIZATION IN CULTURAL HERITAGE INSTITUTIONS GUIDEBOOK 6 (2020).

<sup>16</sup> *Id.* at 5.

<sup>17</sup> See Stubee, *supra* note 13, at 45, 47, 49.

tribal protocols or hampering affiliated tribes' rights to ownership without consequence.<sup>18</sup>

The digitization of cultural properties, though a relatively novel practice in collecting institutions, is not a field that lacks scholarly engagement.<sup>19</sup> Heritage projects funded by academic institutions around the world have developed multimedia platforms for indigenous cultural property since the mid-2000s, creating a digital space to exhibit, store, and share the indigenous cultures' vast bodies of knowledge.<sup>20</sup> Many of these digital heritage projects experienced initial success in cataloging and sharing indigenous cultural properties while adhering to specific cultural protocols.<sup>21</sup> For instance, the project *Tribal P.E.A.C.E.* (Preserving Education and Cultural Expression), conducted by Harvard University PhD. candidates, created an intertribal living digital archive that allows members of the Southern California tribal consortium to post, share, and comment on digitized cultural property contents.<sup>22</sup> Similarly, the project *Vachiam Eecha: Planting the Seeds*, hosted by New York University and the University of California, created virtual exhibitions for Yoeme indigenous content from a Flash-based interface.<sup>23</sup> However, the initial success of these digital projects does not necessarily foreshadow their long-term sustainability.<sup>24</sup>

Digital programs that aim to protect and preserve Native American cultural properties are designed by scholars, not legal experts or software service

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<sup>18</sup> See Michelle L. Fitch, *Native American Empowerment Through Digital Repatriation* 20–21, 48–49 (Dec. 2013) (M.A. thesis, East Tennessee State University) (ProQuest) (resting on the idea that the Western ideology of private ownership is the only legitimate one, unlimited public access to “digitized sensitive Native American cultural materials” threatens Native Americans’ right to control and own their cultural records).

<sup>19</sup> See generally Stubee, *supra* note 13 (a collection of graduate program essays devoted to exploring the digitization practices in museums).

<sup>20</sup> Nicole Strathman, *Digitizing the Ancestors: Issues in Indigenous Digital Heritage Projects*, 13 INT’L J. COMMC’N 3721, 3723 (2019); see also 43 C.F.R. pt. 10 (2024).

<sup>21</sup> See Strathman, *supra* note 20, at 3721–22.

<sup>22</sup> See Ramesh Srinivasan et al., *Tribal Peace – Preserving the Cultural Heritage of Dispersed Native American Communities*, INT’L CULTURAL HERITAGE INFORMATICS MEETING 11 (2004), [https://www.archimuse.com/publishing/ichim04/4763\\_Srinivasan.pdf](https://www.archimuse.com/publishing/ichim04/4763_Srinivasan.pdf) [<https://perma.cc/A72Q-NWUR>].

<sup>23</sup> Strathman, *supra* note 20, at 3724.

<sup>24</sup> *Id.* at 3721.

providers.<sup>25</sup> Maintaining the efficiency of these programs and preventing legal complications in the realms of statutory compliance and intellectual property protection exceeds the scope of scholars' research agendas and expertise.<sup>26</sup> Yet, the circulation of digitized cultural properties raises important legal questions, including: who owns the right to circulate and reproduce the raw data, and who owns the right to publish a manipulated version of that raw data?<sup>27</sup> For example, Native American communities could agree to the digitization of their cultural properties, but object to the worldwide circulation of archival photographs of the same items.<sup>28</sup> Institutions or persons holding these digital archives in custody could comply with indigenous communities' cultural protocols and remove data from the public domain, or simply refuse due to "uncertainties about resources, responsibility and methods for maintenance and preservation, and the lack of supportive legislation."<sup>29</sup>

NAGPRA is limited in scope, and legislators in the late twentieth century when it was enacted did not address the need for protection of Native American cultural heritage beyond its physical form.<sup>30</sup> The regulatory scheme under NAGPRA currently leaves digitized cultural properties, such as photographs, 2D and 3D models, and recordings, which contain arguably the same amount of culturally sensitive information as physical objects, unprotected.<sup>31</sup> Furthermore, the general movement for comprehensive repatriation legislation and regulatory compliance measures has far too narrowly focused on physical cultural properties,

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<sup>25</sup> *Id.* at 3725.

<sup>26</sup> *Id.*

<sup>27</sup> Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archaeology*, 10 HARV. J.L. & TECH. 281, 291 (1997).

<sup>28</sup> See Strathman, *supra* note 20, at 3725 (Explaining how some native communities wanted their cultural works archived offline while others native communities wanted their works "shared online as virtual exhibitions.").

<sup>29</sup> United Nations Educ., Sci., and Cultural Org. [UNESCO] Charter on the Pres. of Digit. Heritage art. 3, (Oct. 15, 2003) [hereinafter UNESCO Charter].

<sup>30</sup> See Westmoreland, *supra* note 11, at 963 (Explaining that NAGPRA differentiates between "intangible, sacred nature of the cultural property... and its physical expression, or the object.").

<sup>31</sup> See *id.* (Explaining that NAGPRA "does not protect against the scans, replicas, or digital copies of the repatriated object.").

such as human remains and artifacts, and not their digital extensions.<sup>32</sup> For example, Congress passed the National Museum of the American Indian Act (“NMAIA”), which only allows Native American tribal communities to request repatriation of human remains and artifacts housed in the Smithsonian Museum, but cannot require other institutions with similarly extensive collections of Native American cultural heritage, such as the Metropolitan Museum of Art, to adhere to the same standards.<sup>33</sup>

This Note identifies the potential risk of harm that Native American communities face should Congress continue to neglect digitized cultural properties. Significantly, this Note argues that Congress should enact new legislation to fill the gaps that NAGPRA left. New legislation and regulation should recognize that Native American digital property ownership and access are of equal importance in the repatriation process and the decolonization effort in the broader sense. Furthermore, intellectual property laws, such as copyright and data security statutes, are potential sources of guidance for legislators to carve out new rules.

This Note will proceed under the following structure. Part I of this Note introduces the legal issues and potential risks of harm arising out of the lack of legislative and regulatory foresight in the midst of growing digitization of Native American cultural heritage.<sup>34</sup> Part II provides background information regarding the ownership and control of Native American cultural property and human remains pursuant to NAGPRA and its corresponding agency regulations.<sup>35</sup> NAGPRA has extensive reach in the realm of physical cultural properties and a well-developed structure and regulatory scheme, but a new legislation is needed to streamline statutory and regulatory compliance regarding digital cultural

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<sup>32</sup> See Zoe E. Niesel, Comment, *Better Late Than Never? The Effect of the Native American Graves Protection and Repatriation Act's 2010 Regulations*, 46 WAKE FOREST L. REV. 837, 854 (2011) (Explaining that a court examined the “physical examination of the bones” to conclude that NAGPRA does not give tribal coalitions control over “remains of people bearing no special and significant genetic or cultural relationship to some preexisting indigenous tribe, people, or culture.”).

<sup>33</sup> See *id.* at 843 (Explaining what NMAIA is and how it created a “new museum to house the Smithsonian’s Native American collection and provided repatriation procedures for Native American skeletal remains ....”).

<sup>34</sup> See *supra* page 404.

<sup>35</sup> See *infra* Part II (discussing the ownership of Native American cultural properties via NAGPRA and the regulations of the Agencies that control it).

properties.<sup>36</sup> Part III explores how existing copyright law and information privacy law could be used as the substantive foundation for new legislation on the repatriation process through an evaluation of the benefits and drawbacks when applied to the realm of digital cultural property.<sup>37</sup> Finally, Part IV discusses the different policy considerations on open access to digital copies of Native American cultural properties between tribal communities and collecting institutions, and how the enactment of new legislation directly targeting digitized cultural property could prevent potential lawsuits, push the decolonization effort forward, and ameliorate the turbulent relationship between Native Nations and Anglo-American institutions.<sup>38</sup>

## II. NAGPRA & REPATRIATION IN THE PHYSICAL REALM: OWNERSHIP & CONTROL OF NATIVE AMERICAN CULTURAL HERITAGE IN EXISTING LEGISLATION & REGULATIONS

NAGPRA and its regulations provide Native American cultural heritage with limited safeguards, and thus a new piece of legislation should be enacted to afford more comprehensive protections to indigenous culture and traditional knowledge in the United States.

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<sup>36</sup> See *infra* Part II; Press Release, Dep't of the Interior, Interior Department Takes Next Steps to Update Native American Graves Protection and Repatriation Act (Oct. 13, 2022), <https://www.doi.gov/pressreleases/interior-department-takes-next-steps-update-native-american-graves-protection-and-1> [<https://perma.cc/LL7A-RCWR>]

(Following extensive Tribal consultation and review, the Department of the Interior today announced that proposed revisions to the Native American Graves Protection and Repatriation Act's (NAGPRA) regulations ... NAGPRA regulations provide a systematic process for returning human remains, funerary objects, sacred objects, or objects of cultural patrimony to Native American and Alaska Native Tribes and Native Hawaiian organizations. The proposed changes would streamline requirements for museums and federal agencies to inventory and identify human remains and cultural items in their collections.)

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See *infra* Part IV.



## A. OWNERSHIP &amp; CONTROL UNDER NAGPRA

For three decades, the resolution of legal disputes between Native Nations and institutions that collect, research, and house Native American cultural heritage has been largely governed by NAGPRA.<sup>39</sup> The statute provides a framework for establishing ownership and control of Native American human remains, funerary and sacred objects, and objects of cultural patrimony.<sup>40</sup> The statute contains two main sets of provisions: an “ownership” provision and a set of “repatriation” provisions.<sup>41</sup> The “ownership” provision “generally vests ownership and control over the cultural items in the lineal descendants of a deceased Native American,” and the “repatriation” provisions “require the agency or museum to compile an inventory of the ‘Native American’ cultural items within its possession and determine each item’s ‘geographical and cultural affiliation.’”<sup>42</sup> The provisions explicitly grant Native American tribes the right to control the physical cultural objects through traceable lineage and affiliation, and its language makes clear that the legislative intent behind NAGPRA was to remedy trespass, conversion, and misappropriation of physical Native American cultural heritage objects.<sup>43</sup>

NAGPRA defines a set of ownership interests in Section 3001, including “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and objects of “cultural patrimony.”<sup>44</sup> However, legislators and regulators have limited the scope of ownership interests to physical items, expressly excluding digitized Native American cultural objects. On December 13, 2023, the U.S. Department of Interior (“DOI”) finalized new regulations that revised and replaced various definitions and procedures with the goal to “. . . clarify and improve upon the systemic processes for the disposition or repatriation . . .” of

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<sup>39</sup> See *White v. Univ. of Cal.*, 765 F.3d 1010, 1016 (9th Cir. 2014) (Explaining that dispute regarding remains between Native Americans and institutions are “largely governed by NAGPRA”; it was passed in 1990).

<sup>40</sup> 25 U.S.C. § 3001 (2022).

<sup>41</sup> *White*, 765 F.3d at 1016.

<sup>42</sup> *Id.* at 1016–17.

<sup>43</sup> Trevor Reed, *Who Owns Our Ancestors’ Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 281 (2016) (“[I]t 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.”).

<sup>44</sup> 25 U.S.C. § 3001.

Native American cultural objects under NAGPRA.<sup>45</sup> However, the DOI declined to expand the definition of protected objects under NAGPRA to include “casts, 3-D scans, or other digital data, documents, or records,” and the agency indicated that it would be inconsistent with the Act to prohibit the “sale or exchange of casts, replicas, or digital data” of protected objects.<sup>46</sup> Furthermore, the protected objects under NAGPRA are limited to Native American objects held by federal agencies and federally funded collections.<sup>47</sup> Although federally funded institutions, like the Smithsonian, hold the majority of Native American cultural objects, Native Nations do not have a claim for repatriation against any private institutions under NAGPRA.<sup>48</sup> Even though internal policies in dominating museums of the nation would have an impact on smaller, privately owned institutions’ repatriation process, NAGPRA does not legally bind private institutions to its standards.<sup>49</sup> Therefore, demands made by the Association on American Indian Affairs to Harvard University and the Peabody Museum regarding the use of Native American photographs would not be under the protective wing of NAGPRA because those institutions are supported by endowments from individuals, foundations, and corporations.<sup>50</sup>

NAGPRA’s limited scope and legislative history, which reveals the congressional intent behind NAGPRA’s enactment, supports the creation of a more comprehensive statute that governs the repatriation of Native American cultural objects and affiliations.<sup>51</sup> NAGPRA opens the door to the repatriation of Native American history and knowledge after centuries of physical and

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<sup>45</sup> Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,452 (Dec. 13, 2023) (to be codified at 43 C.F.R. pt. 10) [hereinafter NAGPRA Systemic Processes].

<sup>46</sup> *Id.* at 86,474.

<sup>47</sup> *See id.* at 86,472.

<sup>48</sup> *See id.*

<sup>49</sup> Suzianne D. Painter-Thorne, *Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261, 1281 (2002).

<sup>50</sup> *Id.*

<sup>51</sup> Leonard D. DuBoff, *500 Years After Columbus: Protecting Native American Culture*, 11 CARDOZO ARTS & ENT. L.J. 43, 50 (1992).

epistemological colonization.<sup>52</sup> The historical and social context behind the enactment of the statute shows that Congress aimed to change the definition of “repatriation” and move away from the prolonged disparate treatment toward Native Americans that was embedded in federal agency and museum practices.<sup>53</sup> Furthermore, NAGPRA shifted the ownership of cultural properties previously vested in the United States to native tribes and increased communication among tribal communities and federal agencies and museums, which has improved the Native Nations’ bargaining position in the repatriation process and emphasizes identifying and resolving concerns that were not addressed by NAGPRA.<sup>54</sup>

NAGPRA was enacted to specifically improve and streamline the repatriation process.<sup>55</sup> It is well recognized that Native Americans have met many roadblocks on their repatriation journey.<sup>56</sup> Tribal representatives testified during Senate hearings that Native Americans who attempted to regain ownership of items have met resistance from holding institutions and lack legal and financial resources to assist their repatriation efforts.<sup>57</sup> Native Nations have experienced difficulties in accessing information possessed by museums, and tribes have been unable to effectively prevent looting and illegal trading of sacred objects.<sup>58</sup>

Congress enacted NAGPRA to fortify Native Americans’ claims of ownership, and expected proactive repatriation efforts from federal agencies and museums.<sup>59</sup> The statute requires federal agencies and federally funded museums to each proactively compile an inventory of Native American objects in their control “to the extent possible based on information possessed by such museum or federal agency, [and] identify the geographical and cultural affiliation of such

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<sup>52</sup> Niadelman, *Epistemic Repatriation: NAGPRA and the Decolonization of Academia*, VASSAR COLL.: THEIRS OR OURS? (Feb. 13, 2015), <https://pages.vassar.edu/theirsorours/2015/02/13/epistemic-repatriation-nagpra-and-the-decolonization-of-academia/> [https://perma.cc/6PA4-CQJ2] (NAGPRA’s repatriation requirements suggest its implicit recognition of repatriation of Native American knowledge through its governance over federally funded research institutions, such as universities).

<sup>53</sup> Painter-Thorne, *supra* note 49, at 1287–89.

<sup>54</sup> *Id.* at 1290.

<sup>55</sup> *Id.* at 1302.

<sup>56</sup> See S. REP. NO. 101-473, at 4 (1990).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See 43 C.F.R. pt. 10 (2024); H.R. REP. NO. 101-877, at 4 (1990).

item[s].”<sup>60</sup> Furthermore, Congress indicated that NAGPRA was enacted on the basis of a trust relationship, where the federal government should “adhere strictly to fiduciary standards in its dealings with Indians” and statutes on Native American affairs should be “liberally construed for the benefit of Indian people and tribes.”<sup>61</sup> Therefore, the Congressional intent behind NAGPRA marked a shift in national policy where the preservation of Native American culture is paramount.<sup>62</sup>

NAGPRA was specifically a response to academia’s shifting outlook on Native American research, and the executive branch has expressly supported the repatriation of knowledge in general.<sup>63</sup> The view on Native American cultural heritage in academia and federal institutions before the enactment of NAGPRA was dominated by disparate treatment of Native Americans, where Native American culture and human remains were objectified and dehumanized.<sup>64</sup> In passing NAGPRA, Congress contemplated its remedial effect on prior injustices within the exhibition and research of Native American cultural heritage.<sup>65</sup> During the vote on NAGPRA, congressional representatives emphasized that museums’ possession of remains and artifacts resulted in displays of Native American cultural heritage that undermined the community’s pride.<sup>66</sup> One representative acknowledged that museums often portrayed Native Americans as historical relics rather than as contemporary communities.<sup>67</sup> Correcting the outdated view of Native American people and cultural objects was one of the driving forces behind the enactment of NAGPRA, and the statute is not limited to mere control of cultural property.<sup>68</sup> Instead, NAGPRA grants physical control over cultural objects to afford Native Americans an opportunity to control the knowledge

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<sup>60</sup> 25 U.S.C. § 3003(a) (2018).

<sup>61</sup> FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 224, 227 (Rennard Strickland et al. eds., 1982).

<sup>62</sup> See 101 CONG. REC. H10985–91 (daily ed. Oct. 22, 1990); Reed, *supra* note 43, at 281.

<sup>63</sup> Reed, *supra* note 43, at 301.

<sup>64</sup> Painter-Thorne, *supra* note 49, at 1268.

<sup>65</sup> See *id.* at 1295.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 60 (1992).

embedded in those objects, ultimately providing “Native Americans with greater control over their cultural meaning and identity.”<sup>69</sup>

Congress emphasized Native Americans’ right to ownership and control of their knowledge in passing NAGPRA, but legislators in the 1990s were unable to foresee the impact of digitization on repatriation three decades later.<sup>70</sup> Nevertheless, the legislative history and congressional intent behind NAGPRA ensure a more profound objective in accordance with the new national policy in preservation of Native American cultural heritage.<sup>71</sup>

NAGPRA is viewed as a shift in the relationship between the federal government and Native American tribes to repair the damage caused by the country’s colonial past and to protect Native American cultural identity.<sup>72</sup> Yet, the statute alone does not provide comprehensive protection to all Native American cultural heritage to the same degree, which risks undermining the goals expressed by the legislative intent.<sup>73</sup> Specifically, cultural heritage repatriation has a far-reaching effect, but NAGPRA narrowly focuses on rights of ownership and control of physical property, leaving a gap for digitized items.<sup>74</sup> The intrinsic difference between standard private and public property rights and cultural heritage rights indicates a need for the law to develop “a system sensitive to the unique circumstance of cultural heritage rights.”<sup>75</sup> “NAPGRA, at its core, exists not to provide a cause of action, but to cement respect for tribal cultur[e] and sovereignty, thereby opening the door to further congressional recognition of Native Americans’ control over the derivatives of those objects and the body of knowledge they contain.”<sup>76</sup>

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<sup>69</sup> Painter-Thorne, *supra* note 49, at 1286–87.

<sup>70</sup> See Westmoreland, *supra* note 11, at 966.

<sup>71</sup> See COHEN, *supra* note 61.

<sup>72</sup> Adam Gerken, Note, *Examining the Administrative Unworkability of Final Agency Action Doctrine as Applied to the Native American Graves Protection and Repatriation Act*, 8 MICH. J. ENV’T & ADMIN. L. 477, 486 (2019) (NAGPRA’s legislative history demonstrates that the “federal government actively working to respect and protect tribal culture,” in stark contrast with the federal government’s atrocities committed against Native American communities in the 19th century).

<sup>73</sup> *Id.* at 487.

<sup>74</sup> *Id.* at 485.

<sup>75</sup> See *id.* at 479.

<sup>76</sup> See *id.* at 498.

B. THE IMPLEMENTATION OF NAGPRA UNDER THE DEPARTMENT OF THE INTERIOR'S REGULATIONS

NAGPRA and its administrative regulations and enforcement laid important groundwork for new legislation and corresponding regulations that grant further protection for Native American cultural heritage.<sup>77</sup> Agencies have created efficient programs to enforce repatriation and cultural heritage conservation requirements under NAGPRA.<sup>78</sup> Even though there are still a variety of challenges in regulatory compliance, reviewing committees and oversight agencies report on successful implementation of NAGPRA and areas in need of improvement every fiscal year, providing the essential building blocks for future legislation and regulations on the repatriation of digitized Native American cultural heritage.<sup>79</sup>

Regulations under NAGPRA are promulgated by the DOI, which has streamlined the repatriation process of physical Native American cultural objects and promoted conversations between institutions and Native Nations.<sup>80</sup> Detailed rules pertaining to the disposition, inventory, and repatriation of cultural properties, and civil penalties for statutory violations, are outlined in the code of regulations, which are subject to frequent amendments.<sup>81</sup> Furthermore, the U.S. Government Accountability Office ("GAO") creates an annual report to address NAGPRA implementation progress and challenges, overseeing agency conduct and recommending measures for improvements.<sup>82</sup> Federal agencies' extensive regulations and regulatory enforcement under NAGPRA since 1990 have made great progress in returning culturally significant objects to Native Americans' hands, making it possible for new legislation and regulations governing the

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<sup>77</sup> See 136 CONG. REC. H10991 (daily ed. Oct. 22, 1990).

<sup>78</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105685, NATIVE AMERICAN ISSUES: FEDERAL AGENCY EFFORTS AND CHALLENGES REPATRIATING CULTURAL ITEMS 6–7 (2022).

<sup>79</sup> See generally *id.*

<sup>80</sup> Trope & Echo-Hawk, *supra* note 68, at 72.

<sup>81</sup> See generally 43 C.F.R. pt. 10 (2024).

<sup>82</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010).

repatriation of digital Native American cultural heritage to be effected following NAGPRA precedent.<sup>83</sup>

NAGPRA regulations issued by the DOI develop a comprehensive and systematic process for determining Native American tribes' ownership and procedures for federal agencies and museums to follow when collecting and repatriating Native American cultural objects.<sup>84</sup> The regulations have extensive authority over Native American cultural properties, including human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>85</sup> The DOI interpretation of NAGPRA is strictly circumscribed to physical properties. DOI does not interpret the statute to include any digital derivatives of cultural properties that could carry information equally culturally significant and sensitive as their corporeal forms.<sup>86</sup> However, specific sections of the regulations pertaining to the identification and appropriate disposition of Native American cultural properties could be applicable to digital surrogates if Congress recognizes the extent of digitization of cultural heritage and makes corresponding legislative efforts.<sup>87</sup>

Current NAGPRA regulations streamline the repatriation process, but enforcement does not provide comprehensive protection to Native American interests.<sup>88</sup> When applying the current NAGPRA regulations to an intangible cultural property, such as a digital recording of a Native American ceremony, courts are forced to consider the property's cultural affiliation to a certain tribe

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<sup>83</sup> See *id.* at 69 (listing the new and restored Native American tribes since NAGPRA's enactment).

<sup>84</sup> 43 C.F.R. pt. 10.1(a).

<sup>85</sup> *Id.* pt. 10.1(b).

<sup>86</sup> See Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,473 (Dec. 13, 2023) (to be codified at 43 C.F.R. pt. 10) [hereinafter NAGPRA Systemic Processes] (DOI declines to expand the definition of protection objects under NAGPRA to include digitized items).

<sup>87</sup> See Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 194 (1998) (recognizing NAGPRA as the first step in a "historic reconciliation between native peoples and museums," suggesting that future legislations alike should be implemented to grant indigenous peoples in the U.S. more comprehensive protection with regard to their cultural heritage).

<sup>88</sup> See Gerken, *supra* note 72, at 492.

through the lens of economic property interest only.<sup>89</sup> “The technically correct resulting decision in this case appears unworkable to agencies.”<sup>90</sup> However, specific ideologies behind the regulations have future applicability to digital surrogates of Native American cultural properties if legislation for repatriation of cultural heritage not exclusive to physical properties is enacted.<sup>91</sup> For instance, DOI regulations on inventories require museums and federal agencies to compile inventories of Native American human remains and associated funerary objects to the fullest extent possible and notify Indian tribes within six months after the completion of the inventory process if identification or likely identification of cultural affiliation is found.<sup>92</sup> If a museum fails to comply with the regulatory requirements, the base penalty amount of \$8,315, subject to increase, may be imposed.<sup>93</sup> Unlike other federal laws that seek to protect cultural heritage objects only secondarily, the language and penalties indicated by regulations under NAGPRA provide a strong network of protection for Native American human remains and burial objects.<sup>94</sup>

NAGPRA regulations are amended annually to improve implementation and communication between the federal government and Native Nations.<sup>95</sup> The most updated version was issued in October of 2022.<sup>96</sup> Throughout the revision process, DOI solicits written public comments and includes an extensive preamble

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 498.

<sup>92</sup> See 43 C.F.R. pt. 10.9(a) (2024).

<sup>93</sup> See 43 C.F.R.pt.10.11(g).

<sup>94</sup> James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL 175, 189 (2006).

<sup>95</sup> *The Regulations*, NAT. PARK SERV. (Dec. 11, 2023), <https://www.nps.gov/subjects/nagpra/regulations.htm> [<https://perma.cc/95ZH-MC7X>] (DOI seek public comments when amending NAGPRA regulations to improve communications between the federal agency and interested communities).

<sup>96</sup> Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,425 (Dec. 13, 2023) (to be codified at 43 C.F.R. pt. 10) [hereinafter NAGPRA Systemic Processes].



in responses to comments.<sup>97</sup> Further, DOI consults with tribes and tribal organizations to seek their input on revisions to regulations under NAGPRA and issues consultation reports.<sup>98</sup> Tribal representatives provide comments to DOI on “how its draft proposed regulations could facilitate meaningful consultations and lead to respectful repatriation”.<sup>99</sup> Moreover, communication with Native Nations is furthered by NAGPRA regulations’ prohibition of intentional excavation or disposing inadvertent discovery of Native American cultural items without consultation with appropriate tribes or organizations.<sup>100</sup>

Successful compliance efforts under NAGPRA regulations indicate substantial progress in returning physical cultural items, but challenges remain due to the limited scope of the statute.<sup>101</sup> According to the National NAGPRA Program’s fiscal year 2020 report, in fiscal years 1990 through 2020, agencies repatriated 91.5% of the human remains in their collections that were culturally affiliated with a present-day Indian tribe or Native Hawaiian organization.<sup>102</sup> However, increasing numbers of allegations continue to be unsubstantiated due to NAGPRA’s lack of authority to enforce repatriation requests.<sup>103</sup> From 2008 to 2009 alone, 141 allegations of museum misconduct were made, and a significant number remain uninvestigated or were deemed unsubstantiated.<sup>104</sup>

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<sup>97</sup> See *id.* at 86,425, 86,482 (outlining and summarizing public comments submitted to the DOI on the new October 2022 NAGPRA proposed rule and DOI’s responses); *The Regulations*, *supra* note 95.

<sup>98</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105685, NATIVE AMERICAN ISSUES: FEDERAL AGENCY EFFORTS AND CHALLENGES REPATRIATING CULTURAL ITEMS 6–7 (2022).

<sup>99</sup> *Id.* at 9.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> See *generally id.* (elaborating on federal agencies’ approaches to prevent crimes against Native American cultural resources and listing factors that hinder efforts to investigate and prosecute crimes against Native American cultural objects and resources).

<sup>102</sup> *Id.* at 8.

<sup>103</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010) at 72.

<sup>104</sup> *Id.*

Among the substantiated allegations, Harvard University's Peabody Museum was not penalized through civil damages.<sup>105</sup> Aside from challenges in complying with the statute and regulations, museums and federal collections like the Harvard Peabody Museum could essentially follow the letter of the law while disregarding the spirit of the law by only repatriating objects under social pressure.<sup>106</sup> The limited scope of the type of Native American cultural items covered by NAGPRA made it easy for institutions to refuse to voluntarily return them to tribal nations.<sup>107</sup> Therefore, the institutions' continuing disregard for the national policy on the protection of Native American cultural heritage contemplated by NAGPRA will remain unresolved if no explicit statutory requirement is in place.<sup>108</sup>

C. OTHER RELEVANT STATUTES ON OWNERSHIP & CONTROL OF  
NATIVE AMERICAN CULTURAL HERITAGE

NAGPRA and its regulations are largely silent on the ownership and repatriation requirements of Native American cultural heritage beyond the physical realm, but issues concerning digital surrogates and virtual representations of cultural materials are addressed by other federal laws, such as the Indian Arts and Crafts Act ("IACA").<sup>109</sup> Further, current state laws also touch

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<sup>105</sup> Riskin-Kutz, *supra* note 1; NAT. PARK SERVICE, FISCAL YEAR 2022 REPORT: NATIONAL NAGPRA PROGRAM 8 (2022) (Table 3 of the report indicates the allegation substantiated as of Sept 30, 2022, and the penalty amount assessed to each NAGPRA violating institutions) [hereinafter 2022 REPORT].

<sup>106</sup> Juan Siliezar, *Peabody Museum's Repatriation Efforts Encounter Complications*, HARV. GAZETTE (Mar. 30, 2021), <https://news.harvard.edu/gazette/story/2021/03/peabody-museums-repatriation-efforts-encounter-complications/> [https://perma.cc/VVS7-BXT5] (Philip Deloria, Professor at Harvard University, chair of NAGPRA Advisory Committee, and past chair of the Repatriation Committee at the Smithsonian Institution's National Museum of the American Indian stated in an interview, "This is really a "spirit of the law/letter of the law" issue. The Peabody here was following the letter of the law, but it wasn't following the spirit. The museum did indeed refuse to voluntarily return these belongings to tribal nations. And the tribes called Harvard out on it.").

<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See* Nafziger, *supra* note 94, at 219 (providing other issues NAGPRA is silent on regarding non-physical cultural remains, such as "the acceptability of audio recordation and other uses of intangible heritage").

upon the protection and repatriation of Native American cultural heritage of different forms.<sup>110</sup> However, IACA does not make up for what is missing from NAGPRA to grant Native American tribes more comprehensive protection over their cultural heritage, and state laws are often unable to overcome Congress' plenary power to legislative Native American affairs.<sup>111</sup>

IACA recognizes Native American tribes' ownership of cultural objects beyond physical property, but it does not set forth adequate repatriation requirements.<sup>112</sup> "The main purpose of the Act is to foil counterfeit or bogus Native American art," and it establishes a procedure for certifying authentic Native American works of art, but has no bearing on the protection of other Native American cultural heritage.<sup>113</sup> Further, "[t]he IACA does not treat the objects themselves as heritage, but rather respects and promotes traditional arts and crafts, allowing this process to be treated as heritage so that future generations can continue to market and sell these objects."<sup>114</sup>

Current state and tribal laws are likewise not appropriate to address the repatriation of digital surrogates of Native American cultural heritage items.<sup>115</sup> State laws limit their protection and repatriation of indigenous heritage into categories that do not exceed the scope of NAGPRA, and are subject to preemption.<sup>116</sup> Similarly, tribal laws are often not adequate avenues for claiming

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<sup>110</sup> See *id.* at 181 (stating that all states have laws protecting Native American archaeological and burial sites).

<sup>111</sup> *Id.* at 180; Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 160 (1992).

<sup>112</sup> Nafziger, *supra* note 94, at 180; Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L.REV. 1083,1105, 1109 (2017) (IACA recognizes indigenous communities' trademark ownership and increased penalties for related goods. The main objective of the statute is to prevent fraud and foster indigenous American arts and craft but repatriation is not a part of the statute's purpose.).

<sup>113</sup> *Id.*; Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641, 682 (2011).

<sup>114</sup> See Fincham, *supra* note 113, at 682.

<sup>115</sup> See *id.*

<sup>116</sup> *Id.* See Johnson & Haensly, *supra* note 111, at 163 (highlighting that state law regarding on-reservation Native Americans and Native American property is not applicable unless Congress deems otherwise, and when non-Native

ownership of noncorporeal cultural heritage as “[m]ost treaties lack express provisions relating to ownership of cultural items or religious and cultural practices.”<sup>117</sup>

Related, international frameworks for protecting indigenous traditional knowledge and cultural expressions derived from physical objects exist and are under development.<sup>118</sup> International organizations have long recognized cultural heritage to include items beyond the scope of physical property, making the protection of indigenous cultural heritage possible in the digital age.<sup>119</sup>

As opposed to the four categories of cultural items under NAGPRA’s protection, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970 defines cultural property to include:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history...;
- (c) products of archaeological excavations...;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;

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Americans and non-reservation lands are involved, federal law preempts state law).

<sup>117</sup> Johnson & Haensly, *supra* note 111, at 166.

<sup>118</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 23 (2011).

<sup>119</sup> See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 341 (1989) (“By ‘cultural property’ I mean objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture; but the category can be expanded to include almost anything made or changed by man.”).

- (g) property of artistic interest...;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest...;
- (i) postage, revenue and similar stamps...;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.<sup>120</sup>

The comprehensive list of cultural property enumerated by UNESCO identifies derivatives of indigenous cultural objects, such as “sound, photographic and cinematographic archives,” as essential items in need of safeguarding indigenous cultural expressions beyond the physical realm.<sup>121</sup> Moreover, the Convention has set guidelines for participating States to commit to restitution and reparation measures.<sup>122</sup> For example, Articles 7 and 13 of the Convention provide that State Parties have the responsibility to provide appropriate restitution and repatriation consistent with national legislation.<sup>123</sup>

There is a long history of legislative protection of Native American cultural heritage in the United States, starting with the Antiquities Act of 1960, continuing to NAGPRA of 1990, and ultimately to the most recent Safeguard Tribal Objects of Patrimony Act, which was introduced in 2016.<sup>124</sup> The protection

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<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See generally About 1970 Convention*, UNESCO (Sept. 19, 2023), <https://www.unesco.org/en/fight-illicit-trafficking/about> [<https://perma.cc/Y2EG-QESH>].

<sup>123</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 240, 244 (entered into force Apr. 24, 1972) [hereinafter Convention on Cultural Property].

<sup>124</sup> *See Felicia Fonseca, New Law Intends to Protect the Cultural Heritage of Natives*, ARK. DEMOCRAT-GAZETTE (Dec. 27, 2022, 4:44 AM), <https://www.arkansasonline.com/news/2022/dec/27/new-law-intends-to-protect-the-cultural-heritage/> [<https://perma.cc/55V9-ZX55>] (the Safeguard Tribal Objects of Patrimony Act “prohibits the export of sacred Native American items from the U.S. and creates a certification process to

and repatriation of Native Americans' cultural heritage has never fallen off the legislative branch's radar.<sup>125</sup> However, the federal government continues to circumscribe its laws to physical properties, and has yet to protect Native American cultural properties in the digital format. Therefore, Congress should pass a new piece of legislation to provide statutory safeguards for Native American cultural items beyond physical properties. New legislation should specifically target repatriation and ownership of digitized Native American cultural items by elaborating the definition of "ownership or control" set out in NAGPRA,<sup>126</sup> and respective agencies should streamline the enforcement of digital repatriation processes and active oversight efforts approximating those under NAGPRA.<sup>127</sup>

### III. INTELLECTUAL PROPERTY LAWS & REPATRIATION IN THE DIGITAL REALM: COPYRIGHT & INFORMATION PRIVACY LAWS AS SOURCES OF GUIDANCE

Legislators should seek guidance for new legislation from established intellectual property laws in order to address the relatively novel domain of digitized cultural heritage. The following sections examine some advantages and disadvantages of drawing from intellectual property laws such as the Copyright Act, Freedom of Information Act, and data usage and security laws, and, ultimately, suggest that collective authorship along with controlled public access is the appropriate model for an effective standard for digitized Native American cultural heritage.<sup>128</sup>

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distinguish art from sacred items" but does not extend its protection beyond physical properties).

<sup>125</sup> See Nafziger, *supra* note 94, at 177–80 (Congress had enacted a variety of legislations regarding the repatriation of Native American cultural properties since the beginning of the twentieth century, filling the gaps and improving protections of Native American's rights over their cultural heritage).

<sup>126</sup> See 25 U.S.C. § 3002 (2022).

<sup>127</sup> See 25 U.S.C. § 3005.

<sup>128</sup> See Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 54 (2004).

A. THE APPLICABILITY OF THE COPYRIGHT ACT TO DIGITIZED NATIVE AMERICAN CULTURAL HERITAGE

Researchers have called attention to the issues of ownership and control over culturally sensitive digital contents available on the internet, such as photographs of burial objects and human remains that are eligible for repatriation, and copyright rules raise important issues regarding the usage of these culturally sensitive archives and data.<sup>129</sup>

Copyright grants the author of an original work of authorship that is fixed in a tangible or material form “the exclusive right to reproduce, distribute, perform and display the work publicly, as well as to prepare derivative works” for a limited duration.<sup>130</sup> Applying copyright laws to modern creations is often simple as authorship is easily traceable, but applying copyright laws to cultural heritage objects, let alone their digital surrogates, is more complicated.<sup>131</sup> Furthermore, indigenous cultural properties, such as sound recordings or burial rituals, often do not satisfy the formal requirements under the current copyright scheme in the U.S.<sup>132</sup> However, existing tenets of copyright law could be effective tools for legislators to navigate the digital heritage field if a separate category of copyright that specifically cater to Native American cultural heritage objects are promulgated.<sup>133</sup> The new category of copyright should follow existing international regimes that provide more flexible formal requirements to cultural heritage objects and extend protection to works beyond tangible form.<sup>134</sup> Accordingly, with the new category of copyright in place, NAGPRA and its respective regulatory scheme that facilitate repatriation could attribute exclusive rights to digitized Native American cultural objects that currently unprotected.<sup>135</sup>

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<sup>129</sup> CIESLIK, *supra* note 15, at 4–5.

<sup>130</sup> Carpenter, *supra* note 128, at 57–58.

<sup>131</sup> *Id.* at 58 (legal constructs of authorship within the context of copyright laws are distinct from authorship conceived by indigenous people, because copyright law was developed based on Romantic Individualism, whereas indigenous creations are under the concept of collective control and ownership).

<sup>132</sup> Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 186 (2000).

<sup>133</sup> See Carpenter, *supra* note 128, at 53.

<sup>134</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 23 (2011) at 23.

<sup>135</sup> See generally Carpenter, *supra* note 128, at 77–78.

Copyright rules have been incorporated in a number of digitized data preservation projects, indicating their applicability to programs and institutions that digitize Native American cultural objects.<sup>136</sup> The Community Standards for 3D Data Preservation (“CS3DP”), funded by the Institute of Museum and Library Science, produces recommendations for 3D modelling used by research facilities and museums.<sup>137</sup> The CS3DP develops standards for institutions regarding the preservation, documentation, and dissemination of 3D data, and their standards focus on a five-part framework related to preservation best practices, management and storage, metadata, copyright and ownership, and access and discoverability.<sup>138</sup> Furthermore, Sketchfab, one of the leading platforms for 3D models that contains a large number of digitized Native American cultural objects, has a clear process for resolving copyright infringement claims.<sup>139</sup> The platform requests institutions to make 3D models downloadable under several Creative Commons licenses, which is a standardized way to grant copyright permissions to their Native American works.<sup>140</sup> Standards governing digitized Native American cultural heritage have been developed according to copyright rules or their affiliates, indicating the possibility of potential legislative efforts under similar rules.<sup>141</sup>

Despite existing internal copyright standards among digital platforms, current copyright laws’ applicability to digitized Native American cultural objects lacks efficiency.<sup>142</sup> In particular, there is a general consensus that a person who conceives a plan, rather than one who implements it, is the “author” of a copyright in the plan.<sup>143</sup> Therefore, scans and 3D digital representations of a Native American cultural object created by a collecting institution are not eligible for copyright protection.<sup>144</sup> The process of digitizing Native American cultural objects by museums and federal collections focuses on data collecting and archiving, allowing the institutions to own rights to the digital archives derived from the original objects even though it raises key issues like unlimited access and

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<sup>136</sup> See CIESLIK, *supra* note 15, at 46.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 4.

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* at 5.

<sup>142</sup> See Brown, *supra* note 87, at 196.

<sup>143</sup> See *id.* at 4.

<sup>144</sup> CIESLIK, *supra* note 15, at 4.



sharing.<sup>145</sup> Digitized indigenous cultural objects are published by institutions with unlimited access, subjecting the digital archives to the risk of unauthorized reproduction and exploitation by commercial enterprises.<sup>146</sup> Accordingly, providing collecting institutions with unregulated ownership of these digital files could lead to misuse that violates tribal cultural protocols, resulting in harm to Native American pride with no means of redress.<sup>147</sup> Therefore, legislation on the digital ownership of and access to Native American cultural objects should be drafted to regulate institutions' ownership of copyrights.<sup>148</sup>

It is difficult to apply current copyright laws to Native American cultural heritage objects because of fundamental differences between the western legal system and indigenous conception of ownership, but they are reconcilable.<sup>149</sup> For instance, the idea of authorship in the copyright context rests on Romantic Individualism, in contrast to the collective authorship of Native American cultural objects.<sup>150</sup> "The very nature of Native artistic expression—works that are created inter-generationally, built upon fluid conceptions of revision and creativity, and seldom recorded in a tangible medium (notwithstanding the collective memory of its people)—precludes copyright protection."<sup>151</sup> However, copyright tenets should be flexibly applied with regard to conserving Native American tribes' cultural heritage and its derivatives.<sup>152</sup> NAGPRA already requires federal agencies and museums to identify and document the geographical and cultural affiliation of each Native American item within their collections.<sup>153</sup> Therefore,

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<sup>145</sup> See *id.* at 5 ("The Smithsonian's National Museum of the American Indian worked to create the 'Fourth Museum project, focused on digitizing the museum's photographic archive and involving Native Americans in the design and contents of the exhibition .... The Smithsonian still owns the rights to the image.").

<sup>146</sup> *Milpurrurru v Indofurn Pty Ltd* (1994), 54 FCR 240, 240 (Austl.) (works of aboriginal artists were reproduced and exploited by a commercial entity that obtained digital files from numerous prestigious institutions that publish the artworks with unfettered access to their digital archives).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See Carpenter, *supra* note 128, at 58.

<sup>150</sup> *Id.*

<sup>151</sup> Riley, *supra* note 132, at 186.

<sup>152</sup> See Carpenter, *supra* note 128, at 62.

<sup>153</sup> 25 U.S.C. § 3003(a) (2018).

legislators should apply the copyright protection of original authors to digitized Native American cultural properties with traceable tribal affiliation by extending the idea of individual authorship to a collective one.<sup>154</sup> Hence, even if current copyright laws do not directly apply to the ownership interest in digitized Native American cultural objects, specific tenets in copyright law can be reconfigured and adapted to reflect the unique concept of ownership in indigenous cultural heritage and its derivatives.<sup>155</sup>

The new legislation should adopt the idea of flexible formalities, such as incorporating collective authorship for digitized cultural properties that are traceable to specific community but not traceable to their original tribal authors.<sup>156</sup> The proposed provision on collective and communal authorship should take the following form: copyright in a digitized derivative of a Native American cultural item with traceable cultural affiliation to a Native American tribe or Native Hawaiian organization and an identifiable earlier group vests initially in the tribe or organization, where the tribe or organization is considered the collective authors of the digitized derivative.<sup>157</sup> The new category of copyright protection should be granted to digitized cultural heritage objects to affiliated Native American communities without retroactive application; therefore, works that have already fallen into the public domain would not be removed and raise constitutional challenges.<sup>158</sup> Furthermore, international legislations could serve as models codifying collective authorship.<sup>159</sup>

The international community has implemented copyright law or other intellectual property frameworks in a flexible manner when determining ownership and repatriation of digitized indigenous cultural heritage.<sup>160</sup> The United Nations and other international organizations have called for the

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<sup>154</sup> See Carpenter, *supra* note 128, at 54.

<sup>155</sup> *Id.* at 76.

<sup>156</sup> *Id.* at 69.

<sup>157</sup> 17 U.S.C. § 201(a); Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013.

<sup>158</sup> Stuart Schüssell, *Copyright Protection's Challenges and Alaska Natives' Cultural Property*, 29 ALASKA L. REV. 313, 340 (2012).

<sup>159</sup> Carpenter, *supra* note 128, at 69.

<sup>160</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 23 (2011) at 23.

implementation of national laws to protect indigenous cultural heritage beyond tangible form.<sup>161</sup>

The Berne Convention for the Protection of Literary and Artistic Works, which includes productions in literary and artistic domains, whatever the mode or form of its expression, and the World Intellectual Property Organization Performances and Phonograms Treaty, which applies to performers of literary or artistic works or expressions of folklore and producers of sound recordings of those performances, grant moral rights to artists, performers, and producers.<sup>162</sup>

Further, the United Nations Educational, Scientific and Cultural Organization's Convention for the Safeguarding of Intangible Cultural Heritage requires party States to protect indigenous traditional knowledge and cultural expression through "identification, inventory, and other measures."<sup>163</sup> However, the United States has either not taken part in or not explicitly expressed its support for these international efforts.<sup>164</sup>

Other countries have adopted copyright rules in statutes and case law regarding the protection of different derivatives of indigenous cultural heritage.<sup>165</sup> For example, a large body of Australian case law deals with the indigenous interest and copyright infringements<sup>166</sup> In *Milpurrurru v. Indofurn Ltd.*, the High Court of Australia awarded damages to indigenous plaintiffs whose copyrights in sacred works were infringed by a nontribal entity that used the derivatives of such works for commercial ends.<sup>167</sup> Legislators in the United States should seek guidance from Australian courts' flexible usage of its Copyright Act, such as awarding damages based upon a provision of the Copyright Act that allows damages in cases of particularly egregious infringement rather than assessing the depreciation in monetary value of the copyright itself.<sup>168</sup>

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<sup>161</sup> See *id.* at 27.

<sup>162</sup> *Id.* at 25.

<sup>163</sup> *Id.* at 27.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 23.

<sup>166</sup> Carpenter, *supra* note 128, at 63.

<sup>167</sup> *Id.* at 60; *Milpurrurru v Indofurn Pty Ltd* (1994), 54 FCR 240, 275 (Austl.).

<sup>168</sup> Carpenter, *supra* note 128, at 66.

As another example, Panama passed a law to recognize indigenous people's rights to their cultural heritage specifically to protect collective authorship.<sup>169</sup> The law allows indigenous communities to "register their collective rights with a government office and prohibit[s] unauthorized third parties from holding exclusive rights in indigenous traditional knowledge and cultural expressions."<sup>170</sup> Furthermore, the Nigerian Copyright Act protects intangible indigenous cultural heritage by limiting its exposure to public access. Specifically, the Nigerian copyright act circumscribes the "(1) reproduction, (2) communication to the public by performance, broadcasting, distribution by cable or other means; and (3) adaptations, translations, and other transformations" of indigenous cultural expressions.<sup>171</sup>

Both legal and extra-legal efforts by domestic and international entities have incorporated copyright rules to either particularly address the need to protect digitized indigenous cultural objects or intangible cultural objects in general.<sup>172</sup> Legislators in the United States should seek guidance from these avenues to further safeguard Native American cultural heritage.<sup>173</sup> Specifically, legislators should expand the current definition of "authorship" and other formalities to recognize collective authorship and enforce restrictions on access under the current copyright laws.<sup>174</sup>

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<sup>169</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 23 (2011) at 29 (2011); System for the Collective Intellectual Property Rights of Indigenous Peoples (2000), Act No. 20, *Gaceta Oficial*, June 27, 2000, 2 (Pan.), [https://www.gacetaoficial.gob.pa/gacetas/24083\\_2000.pdf](https://www.gacetaoficial.gob.pa/gacetas/24083_2000.pdf) [<https://perma.cc/C5SX-N5K3>]. In 2000, Panama enacted a piece of legislation to protect the collective intellectual property rights and traditional knowledge of indigenous people. *Id.*

<sup>170</sup> System for the Collective Intellectual Property Rights of Indigenous Peoples, *supra* note 169, at 2.

<sup>171</sup> *Id.* at 30.

<sup>172</sup> See Carpenter, *supra* note 128.

<sup>173</sup> See *id.* at 51.

<sup>174</sup> See *id.*

B. THE APPLICABILITY OF INFORMATION PRIVACY LAWS TO DIGITIZED  
NATIVE AMERICAN CULTURAL HERITAGE

The legal framework of information privacy laws is another potential resource for legislators to gain more insight.<sup>175</sup> Ideas regarding digitized indigenous cultural heritage objects exhibited in the public domain have already been explored by the World Intellectual Property Organization and UNESCO, creating a legislative scheme that imposes a fee for the use of cultural heritage works in the public domain when affiliated authors cannot be determined.<sup>176</sup> Funds raised as part of this scheme usually go to support arts organizations, and could, in these instances, be directed toward arts or cultural organizations supporting indigenous communities.<sup>177</sup> Legislators should look to relevant U.S. statutes such as the Freedom of Information Act (“FOIA”) and innovative software platforms on information access for guidance.<sup>178</sup>

FOIA, which provides the public with access to federal agency records, is a potential model for regulations that reasonably limit public access to digitized archives of Native American cultural properties held by federal collections or federally funded museums.<sup>179</sup> Unlimited public access to digitized Native American cultural properties, especially human remains and burial objects that contain privileged or culturally sensitive information that should only be accessed by members of the community, could lead to violation of the dignity and cultural

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<sup>175</sup> See Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J. L. & TECH. 222, 227 (2005) (The increasing tension between privacy laws and intellectual property rights has led to the phenomenon where “intellectual property rights have been fundamentally altered—from a defensive shield into an offensively oriented type of weapon that can be used by intellectual property creators to record the activities of their consumers, and also to enforce particular standards of use and expression, proscribing activities that they deem unacceptable.”).

<sup>176</sup> Carpenter, *supra* note 128, at 72.

<sup>177</sup> *Id.* (copyright protection for cultural works is not by itself enough to provide comprehensive safeguards to indigenous communities; therefore, public domain interests should be considered as well, as they could “reduce harmful derivation costs by removing only those elements of the nation’s culture from unfettered use which the nation itself believes to be either more vulnerable to de-culturation or more valuable to the maintenance of the country’s cultural heritage”).

<sup>178</sup> See 5 U.S.C. § 552(a) (2022).

<sup>179</sup> See *id.*

protocols of tribal communities.<sup>180</sup> Adopting provisions similar to those in FOIA may resolve these issues. For instance, under FOIA, agencies authorize a record request based on the use of the record.<sup>181</sup> If the “agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Agency may seek additional clarification before assigning the request to a specific category.”<sup>182</sup>

The Supreme Court has ruled against a party with the intention to exploit personal privacy with respect to photographic images of the deceased under FOIA.<sup>183</sup> In *National Archives and Records Administration v. Favish*, the Court ruled that FOIA Exemption 6 permits family members to assert their own privacy rights over autopsy photographs of their deceased relatives.<sup>184</sup> The Court held that under the common law and the nation’s cultural traditions, the family members had the right (i) to direct and control disposition of the deceased person’s body, and (ii) to limit attempts to exploit pictures of the body for public purposes.<sup>185</sup> Under the same reasoning, photographs of Native American human remains and burial imageries that are held in federal agencies and museums’ digital archives should not be subject to disclosure under FOIA, if such imagery has an identified tribal affiliation.<sup>186</sup>

The new legislation should incorporate an exemption system with indigenous cultural protocols in mind and circumscribe public requests for digitized Native American cultural properties to educational and other not-for-profit usages.<sup>187</sup> The proposed provision on exemptions should take the following

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<sup>180</sup> See Fitch, *supra* note 18, at 20–21, 48–49.

<sup>181</sup> 5 U.S.C.S. § 212.35(a)(5).

<sup>182</sup> *Id.*

<sup>183</sup> See *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 159 (2004). Law enforcement officials took photographs of a deceased person’s body during an investigation. The photographs were held by the National Archives and Records Administration. Family members of the decedent brought suit against the agency requesting access to those photographs. The Supreme Court held that exemption of FOIA permits family members of deceased persons to assert privacy rights with respect to their deceased relatives. *Id.*

<sup>184</sup> See *id.* at 158.

<sup>185</sup> *Id.* at 167.

<sup>186</sup> See *id.* at 157.

<sup>187</sup> See Fitch, *supra* note 18, at 24 (Scholars have argued that Native American communities possess the right to determine public access to traditional cultural expressions and traditional knowledge. There needs to be a

form: An agency or collecting institution of digitized indigenous cultural properties shall withhold information if it reasonably foresees that disclosure would lead to a usage not authorized by any exemptions or violation of the cultural protocol of a Native American tribe or Native Hawaiian organization.<sup>188</sup>

A global project on digital repatriation also sheds light on how information regarding sensitive indigenous cultural materials could be safely recorded, shared, and stored.<sup>189</sup> An innovative software program named *Mukurtu* encourages tribal members to provide and share information about their heritage within their own discretion.<sup>190</sup> Prioritizing indigenous cultural protocols, the platform provides users with access rights and privacy settings, which range from open public access to restricted access.<sup>191</sup> Nontribal members can gain easy access by requesting licenses for using indigenous contents on the platform; moreover, indigenous content providers can collaborate with museums and other institutions to exhibit their digital cultural materials.<sup>192</sup> When content is exported to a non-tribal entity, the metadata that contains cultural protocols remains intact.<sup>193</sup> The Huna Heritage Foundation has archived and utilized digitized Native American cultural materials through *Mukurtu*.<sup>194</sup> The main feature of the platform is to foster the relationship between tribal members and non-tribal institutions by encouraging communication and understanding among parties regarding digital access.<sup>195</sup> Information privacy laws and standards concerning

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common ground between the Western approaches to preserve history and the needs of indigenous tribes, and thus the implementation of changes to accommodate Native American cultures may lead to access restrictions.).

<sup>188</sup> 5 U.S.C. § 552(a) (2022).

<sup>189</sup> See Fitch, *supra* note 18, at 61–62.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 61.

<sup>192</sup> *Id.* at 61–62.

<sup>193</sup> *About*, MUKURTU, <https://mukurtu.org/about/> [<https://perma.cc/V23Z-PEJY>].

<sup>194</sup> *Huna Heritage Foundation Digital Archives*, MUKURTU, <https://mukurtu.org/project/huna-heritage-foundation/> [<https://perma.cc/5NSL-4QD9>] [hereinafter *Huna Heritage Foundation Digital Archives*, MUKURTU].

<sup>195</sup> *About*, *supra* note 193.

the protection of private information and limited public access are valuable resources that should be incorporated during the legislative process.<sup>196</sup>

#### IV. CONCLUSION

This Note explores the ways NAGPRA and its regulations provide protection to Native American cultural heritage.<sup>197</sup> The previous legislative effort was a step forward in realizing the national policy to improve relationships with tribal communities and correct past wrongdoings.<sup>198</sup> However, as argued above, the statutory framework constructed in the last century is not up to date with the current digital age.<sup>199</sup> The lack of enforcement measures and ways for Native American communities to seek redress regarding digitized cultural properties call for the enactment of a new legislation.<sup>200</sup>

Established international frameworks regarding digitized indigenous cultural heritage demonstrates the practical capacity for the enactment of a new legislation.<sup>201</sup> In addition to seeking guidance from international frameworks, legislators should extract from both copyright and information privacy law tenets to protect Native American authorship and privacy.<sup>202</sup> Without the additional recognition of tribal interest in its digitized cultural heritage, unauthorized exploitation and appropriation of Native American culture would continue to be unchecked.<sup>203</sup>

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<sup>196</sup> See Fitch, *supra* note 18, at 47 (The Protocols for Native American Archival Materials recognizes archiving institutions' lack of attention paid to Native Americans and "the lapse in allowing them their right to privacy and access"; therefore, it urges these facilities to apply access restrictions to culturally sensitive materials.).

<sup>197</sup> See 25 U.S.C. § 3001 (2022).

<sup>198</sup> See 136 CONG. REC. H10985 (daily ed. Oct. 22, 1990).

<sup>199</sup> See Westmoreland, *supra* note 11, at 965; Hudson, *supra* note 11.

<sup>200</sup> See CIESLIK, *supra* note 15, at 4.

<sup>201</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 23 (2011) at 23.

<sup>202</sup> *Id.*; see CIESLIK, *supra* note 15, at 4.

<sup>203</sup> Reed, *supra* note 43, at 310.