SPEAKING AUTHORSHIP: HONORING INDIGENOUS LANGUAGE SOVEREIGNTY IN JOINT AUTHORSHIP DOCTRINES

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INTRODUCTION

In 2022, the Standing Rock Sioux Tribal Council unanimously voted to banish the Lakota Language Consortium (LLC) and its two European founders from the reservation.[1] The LLC began working with the Tribe in the early 2000s to document the Lakota language and created numerous recordings of Lakota elders, a Lakota dictionary, and many other educational materials.[2] However, the LLC registered those works' copyrights solely under its own name, so Tribe members must now seek the LLC's permission to use or access them, which may require payment and may not be granted at all, even for recordings of the requestor's own family.[3] The LLC has repeatedly stated that it has not copyrighted the language itself, but what does it mean for a language with few fluent speakers when one of the only ways it can be taught is owned by a single, outside entity?[4] Consider that each language embodies a worldview and way of thinking that is specific to its speakers, connecting them to their ancestors' beliefs and history—their heritage.[5] The fate of a language, then, is tied to that of its speakers' culture and identity. Advocates of English-language supremacy racialize non-English languages and non-American accents to create racial categories by which to organize social

1 Graham Lee Brewer, *Lakota Elders Helped a White Man Preserve Their Language. Then He Tried to Sell It Back to Them.*, NBC NEWS (June 3, 2022, 4:08 PM), https://www.nbcnews.com/news/us-news/native-american-language-preservation-rcna31396 [https://perma.cc/PH2E-HPH3]. The Standing Rock Sioux Tribe includes members of both the Lakota and Dakota Nations. *About*, STANDING ROCK SIOUX TRIBE, https://standingrock.org/about [https://perma.cc/9WZY-8H2Y].

2 Brewer, *supra* note 1.

3 *Id.*

4 *See id.*

5 Movses Abelian, *Linguistic Diversity: An Imperative for the United Nations*, UN CHRON. (Feb. 21, 2022), https://www.un.org/en/un-chronicle/linguistic-diversity-imperative-united-nations [https://perma.cc/W9HC-47T8].

hierarchies,[6] often targeting immigrants and languages that are widely spoken around the world.[7] However, when the affected language has a small and dwindling number of speakers, the stakes are even higher—threatening the existence of the language itself and limiting that existence to what those speakers can document and convey to other members of the community.[8] The LLC, especially since it has used millions in federal grants that could have been used by Indigenous-led organizations, now holds significant influence over the development and growth of the Lakota language even outside of the Standing Rock Reservation.[9]

Though the LLC has received attention recently, it is not the first time non-Native people have entered a Native community, learned the language from Native speakers, taken recordings of speakers, and then claimed sole copyright in the educational materials they create.[10] Nor is the Standing Rock Sioux Tribal Council the only community that has taken issue with how, through such educational materials, a non-Indigenous party has shaped their language.[11] The underlying issue here is that the copyright system does not support Indigenous language sovereignty due to the specific circumstances Indigenous languages face and the disconnect between Indigenous and Western literary and

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6 Jennifer Roth-Gordon, *Language and White Supremacy*, OXFORD RSCH. ENCYC. OF ANTHROPOLOGY (Apr. 19, 2023), https://oxfordre.com/anthropology/view/10.1093/acrefore/9780190854584.001.0001/acrefore-9780190854584-e-591 [https://web.archive.org/web/20240401183721/https://oxfordre.com/anthropology/display/10.1093/acrefore/9780190854584.001.0001/acrefore-9780190854584-e-591].

7 *See* Beatriz Díez, *'English Only': The Movement to Limit Spanish Speaking in U.S.*, BBC (Dec. 3, 2019, 4:31 PM), https://www.bbc.com/news/world-us-canada-50550742 [https://perma.cc/9BBW-WVR8].

8 *See* Omeleto Documentary, *The Last Native American to Speak a Language Is Trying to Keep It Alive. | Marie's Dictionary*, YOUTUBE (Jan. 19, 2018), https://youtu.be/FOBqL-ClswE [https://perma.cc/NMX4-T4N5].

9 Brewer, *supra* note 1; Farah Javed, *Nonprofit Receives Grant to Teach Lakota Language in NYC, Despite Standing Rock Ban*, THE CITY (Oct. 12, 2023, 8:02 AM), https://www.thecity.nyc/2022/05/25/teaching-lakota-language-in-nyc-despite-standing-rock-ban [https://perma.cc/L4J8-M6KL]. Such influence can even persist after the tribe that created the language expresses clear censure of the LLC's methods. *Id.*

10 *See e.g.*, Alice Gregory, *How Did a Self-Taught Linguist Come to Own an Indigenous Language?*, NEW YORKER (Apr. 12, 2021), https://www.newyorker.com/magazine/2021/04/19/how-did-a-self-taught-linguist-come-to-own-an-indigenous-language [https://perma.cc/R4HG-FEBA]; Erin Chochla, *Stopping the Destruction of Native Languages: A Call for Revised Native Languages Legislation and Amendments to the Copyright Act*, 4 LAKEHEAD L.J. 115, 118–19 (2021) (describing how a non-Indigenous Canadian professor took recordings of traditional Maliseet stories in exchange for a promise to the Maliseet community that he would assign copyright of recordings taken of Maliseet people to families of the storytellers, a promise he later broke).

11 *E.g.*, Cal Thunder Hawk, *Sinte Gleska University to Reject Lakota Language Consortium Membership*, LAKOTA J., Aug. 30, 2002, at C3, https://calthunderhawk.tripod.com/images/final.gif [https://perma.cc/6NBR-Y2R2]; Gregory, *supra* note 10.

language traditions.[12] However, the United States enacted the Native American Languages Act (NALA) in 1990, setting explicit policy commitments to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages."[13] Further, the State Department issued a statement in 2011 supporting (four years after voting against) the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which sets forth such rights as fundamental human rights, though UNDRIP has yet to be ratified and adopted domestically.[14]

In this Note, I propose that Congress stand behind these policies and work towards giving them teeth by amending the Copyright Act to include a presumption of joint authorship between tribes and non-Indigenous authors when the non-Indigenous person creates copyrightable materials that document or educate the consumer about how to communicate in the language of a tribe recognized by a U.S. government (Language Materials).

Part I of this Note looks at the historical and legal contexts facing Indigenous people and languages in the United States. It first discusses the historical and political basis on which modern Indigenous language concerns manifest and why resolution of these concerns is so crucial for the survival of Indigenous people and cultures. Part I then describes the unique relationship between the United States and Indigenous tribes that is vital to understanding the landscape of federal Indigenous law in the United States today, as well as the bounds of U.S. jurisdiction over Indigenous people. Part I also situates American legal commitments towards Indigenous people, including through NALA and UNDRIP,

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12 The contours of how someone defines "sovereignty" may vary based on the subject of discussion, and in a legal context, a sovereign party holds the powers necessary for self-governance. More broadly, however, the subject of Indigenous sovereignty extends to a more general right to self-determination and ability to protect elements of the culture and people. For instance, the idea of "visual sovereignty" refers to visual media created by Indigenous artists to "revisit, contribute to, borrow from, critique, and reconfigure" narratives told about their cultures. *Visual Sovereignty: Native-Created Public Media*, AM. ARCHIVE OF PUB. BROAD., https://americanarchive.org/exhibits/native-narratives/visual-sovereignty [https://perma.cc/T2YJ-6E8Q] (quoting MICHELLE H. RAHEJA, RESERVATION REELISM: REDFACING, VISUAL SOVEREIGNTY, AND REPRESENTATIONS OF NATIVE AMERICANS IN FILM 193–94 (2010)). In this Note, I refer to "language sovereignty" as Indigenous self-determination with respect to the growth, development, and revitalization of their own languages.

13 25 U.S.C. § 2903.

14 U.S. Dep't. of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm [https://perma.cc/YH3E-LS7Q] [hereinafter State Department Announcement]; *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP'T ECON. & SOC. AFFS., https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples [https://perma.cc/F2GJ-6LU7].

against that social, political, and legal background, and lays out its implications for American policy where the propagation of Native American languages is curbed by American copyright law.

Lastly, Part I discusses how Indigenous languages and oral traditions conflict with federal copyright law. Using parallels to copyright law's treatment of Black oral traditions, Part I also shows that those conflicts with Indigenous creation are a symptom of how copyright law systemically disadvantages already marginalized communities in the United States.

Part II turns to the joint authorship doctrines that currently exist in American copyright law, including the elements needed to establish such a relationship between collaborators.

In Part III, this Note outlines the proposed presumption of joint authorship for Language Materials, looking to other presumptions and designations of authorship in the United States and abroad. This proposition approaches joint authorship by recognizing the literary and expressive qualities woven into Indigenous languages, highlighting the role of language and oral traditions in Indigenous cultural production, and examining the collaborative relationship built between the Indigenous and non-Indigenous contributors through the lens of the intent, control, and contribution elements of joint authorship doctrines.

I. HISTORICAL AND LEGAL BACKGROUND SITUATING INDIGENOUS PEOPLE AND LANGUAGES IN THE UNITED STATES

The historical context of the current state of Indigenous languages colors our understanding of the United States' duty to counter threats to those languages—and to do so in a way that honors Indigenous sovereignty and dignity.[15] Even though Indigenous people have

15 Rebecca Nagle, *The U.S. Has Spent More Money Erasing Native Languages Than Saving Them*, HIGH COUNTRY NEWS (Nov. 5, 2019), https://www.hcn.org/issues/51.21-22/indigenous-affairs-the-u-s-has-spent-more-money-erasing-native-languages-than-saving-them [https://perma.cc/VM79-G2XV].

contributed significantly to settler American[16] culture[17] and identity,[18] the foundation of American society rests on the conquest and genocide of Indigenous peoples.[19]

The effects of colonial powers in America are perhaps most visible in the near-total eradication of land inhabited by Indigenous tribes,[20] but colonial governments made concerted efforts to destroy Indigenous cultures as well, the results of which are equally devastating.[21] Language was key to this, as the most foundational basis through which people express the ideas, values, and worldviews of their cultures.[22] Recognizing this, the American government created prison-like boarding schools, sometimes even hijacking tribes' successful education infrastructures,[23] that used "systematic militarized and identity-alteration methodologies" to isolate children from their families, strip them of their identities, force them to abandon their Native language, and prevent them from ever

16 The term "settler American" refers not only to the original Europeans who colonized the part of Turtle Island (North America) that became the United States, but also the society and culture that they created and that the United States perpetuates today. Non-Indigenous Americans are not all descended from European settlers, and there are crucial differences in the legacies inherited by Americans whose ancestors arrived in this land because they were sold into slavery or fled to the United States in search of refuge from violence or unrest in their home countries. However, the vast majority of non-Indigenous Americans still live on stolen land and participate in or are influenced by the legacy left by the original European settlers. For that reason, the term "settler American" in this Note encompasses both original settlers and modern hegemonic American society and culture.

17 James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Addendum: The Situation of Indigenous Peoples in the United States of America*, U.N. Doc. A/HRC/21/47/Add. 1 (Aug. 30, 2008).

18 PHILIP J. DELORIA, PLAYING INDIAN 2–5 (1998); *see also* discussion *infra* note 104.

19 Donald L. Fixico, *When Native Americans Were Slaughtered in the Name of 'Civilization,'* HISTORY (July 11, 2023), https://www.history.com/news/native-americans-genocide-united-states [https://perma.cc/V6E5-5WQ5]; Press Release, U.S. Dep't. of the Interior Bureau of Indian Affs., Gover Apologizes for BIA's Misdeeds (Sept. 8, 2001), https://www.bia.gov/as-ia/opa/online-press-release/gover-apologizes-bias-misdeeds [https://perma.cc/YMM7-ANVQ] (apologizing for the "ethnic cleansing and cultural annihilation" the United States has inflicted upon Indigenous Americans); Emily Prey & Azeem Ibrahim, *The United States Must Reckon with Its Own Genocides*, FOREIGN POL'Y (Oct. 11, 2021, 3:07 PM), https://foreignpolicy.com/2021/10/11/us-genocide-china-indigenous-peoples-day-columbus [https://perma.cc/VL9D-YLE8].

20 Lizzie Wade, *Native Tribes Have Lost 99% of Their Land in the United States*, SCIENCE (Oct. 28, 2021, 3:00 PM), https://www.science.org/content/article/native-tribes-have-lost-99-their-land-united-states [https://perma.cc/2PMF-38WE].

21 Eric Hemenway, *Native Nations Face the Loss of Land and Traditions*, NAT'L PARK SERV. (Sept. 13, 2022), https://www.nps.gov/articles/negotiating-identity.htm [https://perma.cc/4FA7-C3TS].

22 *Id.*

23 *See* Nagle, *supra* note 15.

returning to their homes or communities.[24] The methods implemented by these schools were brutal and deeply violent; children were beaten simply for speaking their Native language, and many of them died from the conditions they endured.[25] This prohibition of Indigenous languages was also tied directly to the suppression of other essential components of culture and identity, including names and religious practices.[26]

Through NALA, Congress has formally acknowledged the vital role language plays in protecting Indigenous cultures, as well as the United States' role in their destruction.[27] However, NALA's effect has been limited by a lack of funding provided to achieve its goals,[28] and the No Child Left Behind Act, enacted in 2001 to "close educational achievement gaps," then severely restricted a tribe's ability to educate its children in their Native language while obtaining federal funding by disqualifying the majority of the fluent speakers from teaching.[29] Further, NALA did not

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24 BRYAN NEWLAND, BUREAU OF INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 7 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/7MX6-CXXF] [hereinafter BIA Report] ("The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including but not limited to the following: (1) renaming Indian children from Indian to English names; (2) cutting hair of Indian children; (3) discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices; and (4) organizing Indian and Native Hawaiian children into units to perform military drills.").

25 The Bureau of Indian Affairs found that nineteen boarding schools had killed over 500 children, and the government ran 408 of these schools. *Id.* at 8–9; *see also* Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH. J. 60 (1998) (discussing how issues plaguing contemporary Indigenous communities are rooted in unresolved, intergenerational grief resulting from losses and violence associated with colonization and federal assimilation policies).

26 BIA Report, *supra* note 24, at 53–54.

27 25 U.S.C. § 2901 (stating that for Native Americans, languages "are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values," and that "there is a lack of clear, comprehensive, and consistent Federal policy on treatment of Native American languages which has often resulted in acts of suppression and extermination of Native American languages and cultures").

28 Kelsey Klug, *Native American Languages Act: Twenty Years Later, Has It Made a Difference?*, CULTURAL SURVIVAL (July 18, 2012), https://www.culturalsurvival.org/news/native-american-languages-act-twenty-years-later-has-it-made-difference [https://perma.cc/TZF8-4GZE].

29 20 U.S.C. § 6301; Klug, *supra* note 28 (describing implications of various restrictions in the law, such as the fact that teachers needing a bachelor's degree, full state licensure, and "provable knowledge of their subject matter" often prevents the most fluent speakers of an Indigenous language from teaching).

provide a private right of action for Native Americans injured by violations of the statute, and there are no clear enforcement options.[30]

Today, the languages of Indigenous people are being threatened all around the world.[31] The U.N. has even designated this next decade (2022–32) the International Decade of Native Languages.[32] In America alone, ninety-nine percent of Native American languages are in danger.[33] It is indisputable that the cause of this is the policies and actions of the United States, especially in the nineteenth and twentieth centuries.[34]

A. *Legal Landscape of Federal Indigenous Law*

Indigenous tribes hold a unique place in the American legal landscape. When European colonizers arrived on the continent, they (and early American colonists) recognized tribes as sovereign nations with whom they waged war, negotiated, and made treaties.[35] However, tribal sovereignty has been a site of considerable tension and change since the United States was formed.[36] The United States is still bound by treaties it made with tribes,[37] yet it has continuously used its legal system to erode tribal sovereignty by abrogating tribal governments' powers and limiting Indigenous access to land, resources, self-government, and legal standing.[38] It has done so by characterizing the relationship between the

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30 Office of Haw. Affs. v. Dep't of Educ., 951 F. Supp. 1484, 1498 (D. Haw. 1996).

31 *Many Indigenous Languages Are in Danger of Extinction*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (Oct. 17, 2019), https://www.ohchr.org/en/stories/2019/10/many-indigenous-languages-are-danger-extinction [https://perma.cc/9BEU-M76Q] ("Linguists estimate that we are living in a time of mass language extinction, with a language going extinct every two weeks. In many cases, these disappearing languages belong to indigenous people.").

32 *International Decade of Indigenous Languages 2022–2032*, U.N. DEP'T ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/indigenous-languages.html [https://perma.cc/52W3-32UH].

33 Nagle, *supra* note 15.

34 *Id.*; *see also* Katalina Toth, *The Death and Revival of Indigenous Languages*, HARV. INT'L REV. (Jan. 19, 2022), https://hir.harvard.edu/the-death-and-revival-of-indigenous-languages [https://perma.cc/TF5J-K63S] ("While they differ in setting, culture, and phonetics, one aspect that most dead Indigenous languages share is that they perished as a result of colonization and the subsequent rise of international languages.").

35 John E. Echohawk, *Understanding Tribal Sovereignty: The Native American Rights Fund*, EXPEDITION, Winter 2013, at 18.

36 Matthew L.M. Fletcher, *The Supreme Court's Legal Cultural War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 95–102 (2007).

37 *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2460–62 (2020) (holding that the treaty with the Creek Nation establishing their reservation is still binding).

38 *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823) (extinguishing Native Americans' ownership rights to their land); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (categorizing tribes

United States and the tribes as that between a guardian and its wards as justification for Congress abrogating treaty rights at will.[39] The early republic was extremely aggressive in its efforts to eliminate tribal government, even passing a "Law and Order Code" for tribes, outlawing tribal practices that made them different from settler American societies.[40] Only in the 1960s and 1970s did the federal government come to accept the idea of tribal sovereignty.[41] The period was marked by numerous legislative acts and Supreme Court decisions intended to promote and protect tribal sovereignty.[42] For instance, *Santa Clara Pueblo v. Martinez* established sovereign immunity for tribes in the American legal system and held that tribes had exclusive jurisdiction over their internal affairs.[43] Yet in the last few decades, there has been an institutional shift to a more conservative view of tribal sovereignty.[44] Most recently, for instance, the Supreme Court has even contradicted long-established precedent to make way for states to assert jurisdiction over certain crimes committed on reservations.[45]

Through all these shifts in federal Indigenous law, the guardian-ward relationship has remained an important principle out of which arises the "general trust relationship," or a fiduciary duty that the United States holds towards tribes with respect to Indigenous lands and resources.[46] Though this sounds promising, it can also be seen as a

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as "domestic dependent nations," i.e., with more limited sovereignty than other nations); United States v. Kagama, 118 U.S. 375 (1886) (holding that plenary power can be used to limit tribal authority and placing certain crimes under exclusive federal jurisdiction and others under concurrent federal/tribal jurisdiction); United States v. Mitchell, 463 U.S. 206 (1983) (describing how the Department of the Interior came to control forestry resources on the Quinault Tribe's lands through the General Allotment Act); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (creating state jurisdiction to allow for state prosecution of crimes committed by non-Indigenous people on Indigenous land against Indigenous people); *see also* Fletcher, *supra* note 36, at 98 (describing how *United States v. Clapox*, 35 F. 575 (D. Or. 1888), upheld the Secretary of Interior's authority to create a "Law and Order Code" for tribal communities, which criminalized tribal ceremonies, dances, religious practices, and "everything else that made the tribal community distinct from American communities").

39 *Cherokee Nation*, 30 U.S. at 1–2; *McGirt*, 140 S. Ct. at 2460–61.

40 Fletcher, *supra* note 36, at 98.

41 *Id.* at 95–101.

42 *Id.* at 99–101.

43 *See* 436 U.S. 49, 72 (1978).

44 Fletcher, *supra* note 36, at 102.

45 Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493–94 (2022).

46 United States v. Mitchell, 463 U.S. 206, 225–26 (1983); United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 n.3 (2003) (tracing the first recognition of the general trust relationship to the characterization of the guardian-ward relationship in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

paternalist recasting of America's treaty obligations.[47] Instead of an actual, enforceable trust relationship—wherein America promised to manage and protect tribal resources, and often to also provide protection, education, healthcare, and other services to tribes—the guardian-ward relationship colors the promise as a moral obligation to assist tribes, which is difficult to enforce when those duties are unfulfilled.[48] Still, the general trust relationship, even as currently articulated by the Supreme Court, is an important source of authority permitting Congress to provide a wide range of important resources to tribes, like funding and services intended to improve Indigenous peoples' standard of living and access to self-determination.[49]

On the subject of Indigenous languages and language sovereignty in particular, the United States has made significant policy commitments to protect them in both domestic and international contexts by enacting NALA and supporting UNDRIP.[50] Through NALA, Congress set out an explicit commitment to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages," additionally stating that it is the policy of the United States to "fully recognize the inherent right of Indian tribes and other Native American governing bodies" over their languages.[51] This recognition of Native sovereignty directly contrasts situations where federal law has subsumed it[52] and the standards the Court has articulated

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47 Rory Taylor, *6 Native Leaders on What It Would Look Like If the US Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties [https://perma.cc/99T9-SKZ4] (highlighting a description from Matthew Fletcher, Director of the Indigenous Law and Policy Center at Michigan State University College of Law, on how the true trust relationship between the United States and tribes was articulated in treaties, where America guaranteed tribes protection, education, health care, and other services while maintaining and managing their resources—i.e., tribes would sacrifice significant "exterior sovereignty, but they were to retain all the internal governmental powers they possess").

48 *Id.*

49 *Id.*; AM. INDIAN POL'Y REV. COMM., 94TH CONG., FINAL REP. 130 (Comm. Print 1977) ("The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. This duty has long been recognized implicitly by Congress in numerous acts, including the Snyder Act of 1921, the Indian Reorganization Act of 1934, the Johnson-O'Malley Act of 1934, the Native American Programs Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Health Care Improvement Act of 1976." (footnotes omitted)).

50 25 U.S.C. §§ 2901–06; State Department Announcement, *supra* note 14.

51 §§ 2903(1), (6).

52 *See, e.g.*, United States v. Dion, 476 U.S. 734, 740 (1986) (finding that in the Eagle Protection Act, Congress intended to abrogate Native treaty rights to hunt bald and golden eagles in part

for finding Congressional intent to abrogate Native American rights (i.e., that the intention to abrogate must be expressly written into the statute doing so).[53] This raises the question of whether federal laws should be reconsidered when they enable the United States to substantially undermine Native language sovereignty.

By supporting UNDRIP, the United States has also signaled that it supports efforts to consider and affirm Indigenous language sovereignty, among other rights, in the context of domestic laws.[54] However, the United States has been noticeably silent on the subject of actually *implementing* UNDRIP, as several other countries already have and even more have committed to doing so.[55] As of May 2022, America's two closest neighbors, Mexico and Canada, had already enacted and committed to enacting, respectively, UNDRIP domestically.[56] However, it has been over a decade since the State Department released its reluctant endorsement of UNDRIP,[57] and even longer since the passage of NALA. This has left the United States open to valid accusations of paying mere lip service to tribal sovereignty.[58]

B. *Copyright Law, Oral Traditions, and Language*

1. Interconnection Between Language, Oral Traditions, and Culture

The forms of Indigenous cultural production that this Note is concerned with are commonly referred to as traditional cultural

because the statute carves out a permit exception for the taking of eagles by Native Americans for religious reasons); *see also* Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in Indian Country*, 62 FED. LAW., Sept. 2015, at 64–66.

53 *Dion*, 476 U.S. at 739 (stating that the government can abrogate treaty rights through "express declaration," "surrounding circumstances," "legislative history," or "the face of the Act" (citing Leavenworth, L., & G. R. Co. v. United States, 92 U.S. 733, 741–42 (1876); and then citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977) (quoting Mattz v. Arnett, 412 U.S. 481, 505 (1973))).

54 *See* State Department Announcement, *supra* note 14; 25 U.S.C. § 2903.

55 Jenna Kunze, *'The United States Lags Behind' on the Rights of Its Indigenous Peoples, Natives Say*, NATIVE NEWS ONLINE (May 8, 2022), https://nativenewsonline.net/currents/the-united-states-lags-behind-on-the-rights-of-its-indigenous-peoples-natives-say [https://perma.cc/Y23L-NRZX]. The United States was the last country to endorse UNDRIP, even among the four countries who initially voted against it. *See id.*

56 *Id.*

57 *See id.*

58 *See id.*; *see also* Prey & Ibrahim, *supra* note 19.

expressions (TCEs),[59] or the ways in which artistic and related works can embody or convey aspects of a culture and its collective, living body of knowledge.[60] There are numerous ways that these elements may be embodied in TCEs,[61] and this Note primarily contemplates Indigenous languages and oral traditions, collectively referred to in this Note as Language TCEs, because Indigenous languages and oral traditions are inherently intertwined.[62] For this reason, discussions about protecting and promoting Indigenous languages must acknowledge that such languages hold cultural significance beyond merely serving as methods of communication.[63] Indeed, some Indigenous writers and scholars of Indigenous literature have discussed how words are ascribed their own independent creative power—a power tied to origination and creation, such that the existence and development of reality directly arises from the act of channeling thoughts into spoken words.[64] Thus, words are

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59 TCEs have also been referred to as "expressions of folklore," but this Note proceeds with "traditional cultural expression" to avoid improperly trivializing TCEs by associating them with myths and fables. *See* Roxanne Struthers & Cynthia Peden-McAlpine, *Phenomenological Research Among Canadian and United States Indigenous Populations: Oral Tradition and Quintessence of Time*, 15 QUAL. HEALTH RSCH. 1264, 1268 (2005) (citing JOHN POUPART, CECILIA MARTINEZ, JOHN RED HORSE & DAWN SCHARNBERG, TO BUILD A BRIDGE: WORKING WITH AMERICAN INDIAN COMMUNITIES (2001)).

60 The World Intellectual Property Organization (WIPO), as the platform that has most thoroughly addressed protection of TCEs and traditional knowledge, provides definitions for both traditional knowledge and TCEs. Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1129–30 (2017). WIPO defines traditional knowledge as "a living body of knowledge that is developed, sustained and passed on from generation to generation within a community" and TCEs as the ways in which traditional knowledge and other aspects of a culture may be embodied in artistic or related forms, like performances, songs, and symbols. World Intell. Prop. Org. [WIPO], *Background Brief No. 1: Traditional Knowledge and Intellectual Property*, WIPO Reference RN2023-5.1EN (2023), https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-1-en-traditional-knowledge-and-intellectual-property.pdf [https://perma.cc/U3AY-RAVN] [hereinafter TK Background Brief]; *Traditional Cultural Expressions*, WIPO, https://www.wipo.int/tk/en/folklore [https://perma.cc/A7YN-KMUV].

61 *See* World. Intell. Prop. Org. [WIPO] Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore, *List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found*, at 2–3, WIPO/GRTKF/IC/INF/9 (Nov. 5, 2010) [hereinafter TK Technical Brief].

62 KIMBERLY M. BLAESER, GERALD VIZENOR: WRITING IN THE ORAL TRADITION 17–18 (1996).

63 *See id.* at 17–19.

64 *See id.*; Ivanna Yi, *Cartographies of the Voice: Storying the Land as Survivance in Native American Oral Traditions*, 5 HUMANITIES, no. 3, Sept. 2016, at 1, 3–5, https://www.mdpi.com/2076-0787/5/3/62 [https://perma.cc/W9Y7-6R8J]; *see also* Ernestine Hayes, *Contemporary Creative Writing and Ancient Oral Tradition*, *in* SHAPES OF NATIVE NONFICTION 23, 30 (Elissa Washuta & Theresa Warburton eds., 2019) ("With our words, we keep the history of our present culture. With our words, we perpetuate our human values. With our words, we clarify our worldview.").

generally revered in Native cultures and are subject to subtle and nuanced interpretations of how they may be properly used.[65]

Indigenous oral traditions use words carefully and with ritual, also combining language with other important means of communication, like silence, music, and nonlinguistic sounds.[66] In this way, oral traditions and components of the language become the culture itself,[67] and that connection cannot be exactly replicated in writing.[68] To attempt to transpose oral traditions into written English is extremely difficult—even "potentially dangerous."[69]

Western literary traditions crucially misconceive Indigenous languages and Language TCEs. One of the clearest examples of this is in the bifurcation of content and form imposed on Indigenous creation: the idea that factual details incorporated into the work can be neatly separated from the creative expression.[70] This misconception builds on the physical colonialization of Indigenous lands and people by disenfranchising Indigenous cultural production.[71] It reduces Language TCEs to the "factual" information communicated, designating it *gnaritas nullius* (nobody's knowledge) and therefore part of the public domain, a

65 BLAESER, *supra* note 62, at 20–21.

66 *See id.* at 22–23.

67 Struthers & Peden-McAlpine, *supra* note 59, at 1268 ("Oral tradition plays more than a prominent position in Native American culture; it is the culture itself: its history, its culture, its language, its values, and, subsequently, its literature. Oral tradition is indigenous people's very existence; it is their soul." (citations omitted)).

68 *Id.* at 1267–68.

69 Leslie Marmon Silko & Bernard A. Hirsch, *"The Telling Which Continues": Oral Tradition and the Written Word in Leslie Marmon Silko's "Storyteller,"* 18 AM. INDIAN Q. 1, 1 (1988). Silko, a Laguna Pueblo writer whose works draw on her Tribe's oral traditions, notes how imperative it is to approach writing with understanding of how it differs from oral storytelling because written stories are static, not allowing for the stories to live and grow as they would in the oral tradition, and "remove[] the story from its immediate context, from the place and people who nourished it in the telling, and thus rob[] it of much of its meaning." *Id.*

70 Elissa Washuta & Theresa Warburton, *Introduction* to SHAPES OF NATIVE NONFICTION 4–5 (Elissa Washuta & Theresa Warburton eds., 2019). This view is also evidenced by the long history of settler Americans viewing Indigenous works through an anthropological lens, rather than a literary one. Trevor Reed, *Indigenous Dignity and the Right to Be Forgotten*, 46 B.Y.U. L. REV. 1119 (2021); James [Sa'ke'j] Youngblood Henderson, *The Indigenous Domain and Intellectual Property Rights*, 4 LAKEHEAD L.J. 93 (2021). That anthropological lens not only dehumanizes Indigenous people, casting them as mere subjects of science, but also has enabled settler Americans to freeze elements of Indigenous cultures (in a form chosen by a non-Indigenous person) while neglecting the people and communities to whom the cultures belong. Reed, *supra* note 70, at 1129–30.

71 Gregory Younging, *Traditional Knowledge Exists; Intellectual Property Is Invented or Created*, 36 U. PA. J. INT'L L. 1077, 1083–85 (2015).

public resource of which settler Americans can essentially claim collective ownership and control.[72]

In approaching the issue of Language Materials, then, one must begin with the understanding that Indigenous languages are inherently intertwined with cultural expression, and Language TCEs cannot be easily analogized with Western categories of fact and fiction—and that, by extension, troubles the distinction between copyrightable and non-copyrightable creation.[73]

2. Copyright Law Is in Tension with Indigenous Traditional Knowledge and Traditional Cultural Expressions

To be copyrightable in the United States, there are three requirements a work must satisfy.[74] It must be: (1) an expression of an idea (and not the idea itself), (2) fixed in a tangible medium, and (3) an original work of authorship.[75] Additionally, American authorship only recognizes individual creators, the only exception to which is creation within the scope of someone's employment as a work made for hire.[76] By contrast, characteristics shared by Language TCEs are: (1) authorship

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72 The role of the public domain is commonly portrayed as enriching society as a whole and furthering intellectual property production by ensuring that even when authors enjoy exclusive rights for a fixed period, such creation will always flow into the hands of the public. *Id.* at 1082. Yet the true beneficiaries of the public domain, how much value they can extract, and whose work they may exploit are heavily influenced by factors like wealth, power, and access. *See generally* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004). When TCEs and other Indigenous cultural productions are viewed as part of the public domain, they are essentially further colonized by American copyright law's overriding of applicable Indigenous laws and regulations to give non-Indigenous Americans free rights to exploit them without acknowledgement and adopt them into the settler American imagination as its own. Younging, *supra* note 71, at 1082–85. Many forms of traditional knowledge and TCEs, not just Language Materials, are susceptible to this treatment. For other examples where Western assertions of public domain have threatened Native communities' ability to protect and use their own traditional knowledge and TCEs, see, e.g., *Navajo Nation Sues Urban Outfitters Over Trademark*, NAT'L PUB. RADIO (Apr. 5, 2012, 12:00 PM), https://www.npr.org/2012/04/05/150062611/navajo-nation-sues-urban-outfitters-over-trademark [https://perma.cc/SG26-VBB2], and John Reid, Comment, *Biopiracy: The Struggle for Traditional Knowledge Rights*, 34 AM. INDIAN L. REV. 77 (2009). In light of these considerations, and because tribes should be able to choose commercial avenues for sharing their own cultural works, I do not use this Note to explore an option where Language Materials would be deemed uncopyrightable.

73 Younging, *supra* note 71, at 1082–85.

74 17 U.S.C. § 102(a).

75 *Id.*

76 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (naming the author as "the *person* who translates an idea into a fixed, tangible expression" unless the work was created as a work made for hire (emphasis added)); § 201(b); *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.01 [hereinafter NIMMER].

that cannot be traced to specific individuals, (2) intangible or unfixed form, and (3) fluidity in expression.[77] Language TCEs generally are not fixed in tangible form because oral traditions lie "at the heart of Indigenous culture," evolving and growing with the community.[78] Together, these disconnects may suggest to a reviewing court that Language TCEs are considered closer to mere ideas and cannot be protected by copyright.[79]

The disconnect is due, in part, to the fact that the American intellectual property regime was developed in the age of Western industrialization and based on Western principles of property.[80] American copyright law has continued to develop in line with settler priorities and conceptions of creativity, artistry, progress, and economics.[81] These Romantic values, however, have historically been used to justify violence against and continued colonization of Indigenous peoples, land, and cultures.[82] Without intentionally setting out to protect Indigenous cultural property, then, American intellectual property laws simply cannot adequately do so.[83]

Notably, many tribes possess and maintain "aboriginal intellectual property laws and policies," and in the twenty-first century, tribes have begun very actively legislating and creating protection programs for a wide range of cultural elements, from works that would be copyrightable

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77 World. Intell. Prop. Org. [WIPO] Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, at 40, 43, WIPO/GRTKF/IC/5/3 (May 2, 2003).

78 Struthers & Peden-McAlpine, *supra* note 59, at 1265; Sarah La Voi, Comment, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 894 (2003) ("[I]ndigenous cultures often rely on oral traditions and works . . . . Stories and songs are often never transferred to paper, [and] exist only in the mind of the storyteller.").

79 La Voi, *supra* note 78, at 894.

80 TK Background Brief, *supra* note 60; Kathy Bowrey & Jane Anderson, *The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?*, 18 SOC. & LEGAL STUD. 479 (2009).

81 *See* Trevor Reed, *Creative Sovereignties: Should Copyright Apply on Tribal Lands?*, 67 J. COPYRIGHT SOC'Y U.S.A. 313, 349 (2020).

82 Bowrey & Anderson, *supra* note 80, at 480 ("For many Indigenous people across the globe, there is no fuzzy, warm glow that automatically accompanies western words like humanity, culture, progress, freedom, openness, knowledge . . . . These were the very terms that justified the denials of sovereignty, dispossession of culture and lands and removal of Indigenous children from their families and communities.")

83 Reed, *supra* note 81 ("When one considers the application of the Copyright Act to Tribes . . . would essentially amount to a foreign government's re-engineering of another nation's systems for owning, regulating, and developing expression—to the potential exclusion of its own—it seems that there may be much more at stake for the invaded nation's sovereignty than mere 'property rights.'" (footnote omitted)).

and trademarkable to ceremonies, burial rites, and religious artifacts.[84] In Professor Angela Riley's 2020 survey of 574 Indigenous American and Alaskan tribes, she found that 134 tribes had passed cultural property laws, 48 of which had passed laws specifically dealing with intangible property, and several specifically referenced a federal intellectual property law; nearly the exact same study in 2005 identified no tribes with written laws governing "intellectual property" in the Western sense.[85] Tribes' strong engagement in formally protecting their cultural properties is especially significant in light of how the federal government disrupted and outlawed tribal governance in the nineteenth and twentieth centuries.[86] As more tribes develop and implement cultural protection laws and programs, perhaps a more comprehensive framework for TCE protection will emerge.

3. Resulting Effects on Racial Minorities in the United States

The absence of copyright protection makes Language TCEs especially vulnerable to cultural appropriation, which can lead to substantial structural and economic disadvantages for that culture.[87] This section will look at how American copyright law creates the space for such injury to minority communities by drawing a parallel to one of the most visible and central avenues of American cultural production: the music industry's exploitation of Black American oral traditions.

Like Indigenous Americans, Black Americans tend to face substantial disadvantages in relation to copyright law. This is due in part to the importance of oral traditions to Black cultural expression, which is heavily rooted in African oral traditions, as well as illiteracy among enslaved populations.[88] Black American oral traditions evolved in increasingly diverse ways as segregation isolated individual

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84 *Id.* at 316 (noting that such aboriginal laws and policies may predate the existence of the United States); Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 80, 107 (2022).

85 Riley, *supra* note 84, at 106–07. Because almost any tribal activity or program protects tribal culture in some shape or form, the definition of "cultural property" for the purposes of Riley's study included four sub-categories: (1) "burial sites, funerary objects, and repatriation;" (2) "sacred sites and ceremonial locations;" (3) "intangible property;" and (4) "data sovereignty." *Id.* at 98–99.

86 Fletcher, *supra* note 36, at 97–102.

87 Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. 1373, 1383–94 (2021).

88 *See* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 368–69 (1998); Candace G. Hines, Note, *Black Musical Traditions and Copyright Law: Historical Tensions*, 10 MICH. J. RACE & L. 463, 469–471 (2005).

communities,[89] but they generally still share three characteristics: (1) improvisation, (2) rhythmic and musical complexity, and (3) community authorship, including through call-and-response elements, where one performer's musical phrase is answered or repeated by a chorus or group.[90] In addition to clearly failing to meet the individual author requirement for copyright, these elements also pose a substantial hurdle when it comes to fixing music in a tangible form.[91]

Weak copyright protection has facilitated opportunities for white actors in the music industry to exploit Black music without attribution or compensation and reap the artistic and economic benefits, as well as the credit for innovation, due to the original Black musicians.[92] Many white musicians have achieved great acclaim for music that relies heavily on emulating Black musical styles,[93] sampling from Black music,[94] and directly copying Black artists' songs in "mirror covers."[95] The courts have upheld this inequality through decisions that consistently punish Black musicians for using methods that call to Black oral traditions (e.g., sampling) while enabling white artists to continue taking from Black

89 Hines, *supra* note 88, at 469.

90 *Id.* at 469–72.

91 *Id.* at 471–75 (noting that rhythmic complexity carried from African music and languages through to slaves' spirituals and the heavy bass of modern jazz and rap music; musical complexity like multiple vocal harmonies, dissonant tones, or blue notes prevented effective recordation in musical notation; and improvisation frustrates copyrightability because it is often referential to other works, as well as necessarily fluid and unfixed).

92 *See* Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 582 (2010) ("[T]he tendency to see blues music as a primitive form of collective folk production reflected widespread stereotypes about African Americans and was part of a conceptual framework of later borrowers that facilitated the free borrowing of such music, often without attribution, let alone compensation.").

93 *See* Greene, *supra* note 88, at 368–69. These artists range in genre and across time, from Elvis to Ariana Grande, Eric Clapton to Eminem. Black Americans created the foundation of so much of the music that is now deemed quintessentially American: blues, jazz, rock, funk, rap, disco, soul, R&B, and more. *Id.* at 368–69 n. 139 (citing ROBERT PALMER, DEEP BLUES 16 (1981)); Maya Eaglin, *The Soundtrack of History: How Black Music Has Shaped American Culture Through Time*, NBC NEWS (Feb. 21, 2021, 1:51 PM), https://www.nbcnews.com/news/nbcblk/soundtrack-history-how-black-music-has-shaped-american-culture-through-n1258474 [https://perma.cc/A8CF-M4PT]; Wesley Morris, *For Centuries, Black Music, Forged in Bondage, Has Been the Sound of Complete Artistic Freedom. No Wonder Everybody Is Always Stealing It.*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/music-black-culture-appropriation.html [https://perma.cc/7BX8-Y9PN].

94 *See, e.g.*, Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 593 (2019).

95 Robert Brauneis, *Copyright, Music and Race: The Case of Mirror Cover Recordings*, *in* THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE (Steven D. Jamar & Lateef Mtima, eds., 2024).

music and musicians with impunity.[96] For any musician, being deprived of copyright ownership and its corresponding rights is an especially difficult burden because the music industry already tends to both legally and economically favor non-artists, like record labels and publishers.[97] However, for Black musicians, this is also one way in which America's long history of disrespecting Black peoples' property rights continues to manifest.[98]

This parallel between Black and Indigenous Americans' exclusion from copyright protection is significant because it demonstrates how copyright law has been weaponized against racial minorities in America.[99] Though copyright law is facially race-neutral, it prioritizes communities with strong written traditions and literacy.[100] The fact that the United States was founded on deep, violent, and structural racial inequality—i.e., the genocide of Indigenous Americans, enslavement of Black Americans, and brutal efforts to eliminate non-Western values and practices from these populations—sets the foundation for an intellectual property system that inflicts discriminatory effects upon communities whose cultural expressions do not follow those of Eurocentric cultures.[101] Indeed, white America's long history of exploiting those communities' intellectual production shows that legally endorsed cultural appropriations are not informed solely by individual bias or allowed through unrelated judicial decisions.[102] Instead, they reveal a dark truth: that the nature of U.S. copyright law necessarily and systematically assigns legally binding value assessments to cultural expressions, and these evaluations cause particular and concrete harm to the cultures of already marginalized communities by exposing them to severe cultural appropriation without legal recourse.[103] In practice, this system enables

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96 *See, e.g.*, Supreme Records, Inc. v. Decca Records, Inc., 90 F. Supp. 904 (S.D. Cal. 1950). The reasoning from *Supreme Records*, which included racialized aesthetic discrimination, was later incorporated into 17 U.S.C. § 114(b). BRAUNEIS, supra note 95; *see also* Rosenblatt, *supra* note 94, at 593–94.

97 David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 374–76 (2010).

98 *See* Greene, *supra* note 88, at 363–64.

99 *E.g.*, K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1201 (2008).

100 Brauneis, *supra* note 95, at 1; Greene, *supra* note 88, at 367–68.

101 *See* Greene, *supra* note 88, at 367; *see also* Johnson v. M'Intosh, 21 U.S. 543 (1823) (incorporating the discovery doctrine in the United States legal system to justify the Court's irrecognition of Native title to the lands they inhabit and cultivate).

102 *Id.* at 367–73.

103 Rosenblatt, *supra* note 94, at 594.

white Americans to reap the benefits of racial minorities' innovations and cultural property while denying minority creators' value.[104]

This can have profound effects on how the community relates to the rest of American society and culture, as well as other people within the community itself. For instance, misuse of Language TCEs can encourage harmful racial stereotypes.[105] Indigenous people in America have, since the beginning of European colonialization of the continent, been used as the primitive foil to European civilization as symbols of instinct and unbridled freedom, wilderness, and savagery.[106] Trivializing the value of Indigenous languages and casting Indigenous storytelling as mythology only serves to reinforce that metaphor of anticivilization,[107] while commodifying Indigenous ritual and artistry perpetuates the narrative that Indigenous people and cultures belong in the past.[108] This treatment of Indigenous people is also mirrored in modern American society's treatment of Black people.[109] Black bodies and culture capture the collective imagination of white American society, which sees Blackness as both a "hungered-after taboo" and a phantom menace looming over

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104 *See* Greene, *supra* note 88, at 367–71; Troutt, *supra* note 97, at 374–76; *see also* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1758–59 (noting that Black music "played a major role in transforming the sensibilities of many young whites, [but] the color bar prevented black musicians from capitalizing fully on the popularity of a genre they had done much to establish; instead white cultural entrepreneurs typically reaped the largest commercial rewards—a pattern still visible today, albeit in less dramatic form"); Michael P. Goodyear, *Culture and Fair Use*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 334, 343 ("[T]he Zulu tribesman who composed the famous song from Disney's *The Lion King*, 'The Lion Sleeps Tonight,' was merely paid a small amount and only received credit for writing the song decades later."). The parasitic relationship white American society has with racial minorities can be traced all the way back to its founding. *See* DELORIA, *supra* note 18, at 2–5 (noting that colonial Americans "molded . . . narratives of national identity around the rejection of an older European consciousness and an almost mystical imperative to become new. . . . [They] want[ed] to savor both civilized order and savage freedom at the same time. . . . The indeterminacy of American identities stems, in part, from the nation's inability to deal with Indian people. Americans wanted to feel a natural affinity with the continent, and it was Indians who could teach them such aboriginal closeness. Yet, in order to control the landscape they had to destroy the original inhabitants.").

105 Greene, *supra* note 88, at 358–59.

106 DELORIA, *supra* note 18, at 3–5.

107 Youngblood Henderson, *supra* note 70, at 94–95, 107. For illustration of the extent to which settlers have wrongly cast Indigenous life and innovation as primitive, see CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2005).

108 Sarah Rose Harper, *Native Appropriation Isn't Appreciation. It Causes Real Harm.*, LAKOTA PEOPLE'S L. PROJECT (Feb. 10, 2022), https://lakotalaw.org/news/2022-02-10/appropriation-isnt-appreciation [https://perma.cc/HD5G-DYQT] ("Sepia-toned photographs are the most common way the dominant American culture views Indigenous Peoples. And, in current culture, one of the most common ways Native Peoples see ourselves represented is in mascotry.").

109 GREG TATE, EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE 3–7 (2003).

white society.[110] This tension results in white Americans co-opting the "cool" factor of Blackness while shirking accountability for, or even recognition of, their part in the systemic deprivation of rights Black Americans face.[111] The legal system's large scale denial of copyright protection for Black music has further played into these narratives—the resulting rampant appropriation and exploitation of Black musicians' work opened the door for white creators to exploit it in furtherance of racist depictions of Black people in mainstream American media.[112]

Unfortunately, issues with cultural appropriation of Language TCEs do not stop at those external effects of commodification, though they are substantial; it can also cause immense damage to a tribe's community and culture.[113] For instance, Margaret Leidy has written in depth about the harms wrought by unfettered appropriation of creation stories, using as an example Stephanie Meyer's fictionalization of the Quileute Tribe's creation story in the popular series *Twilight*.[114] Leaving such foundational aspects of an already threatened and marginalized culture open for free exploitation by anyone exposes it to the very likely harm of being "distorted and caricatured" in the view of outsiders.[115] The resulting erasure of the real Indigenous people and culture creates a downward spiral, eroding their social and political capital and making it harder to obtain redress and prevent further cultural appropriation. What's more, Language TCEs are strongly tied to how community identity is established and developed,[116] so their misappropriation can also result in an *internal* deterioration of community identity for cultures that have already been endangered by centuries of American colonialism.[117]

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110 *Id.* at 3.

111 *Id.* at 3–6.

112 Greene, *supra* note 88, at 356–58, 363–64.

113 *See, e.g.*, Angela Riley, *Sucking the Quileute Dry*, N.Y. TIMES (Feb. 7, 2010), http://www.nytimes.com/2010/02/08/opinion/08riley.html [https://perma.cc/ZM83-AD5F].

114 The Tribe's real creation story says they are descended from wolves who were made into humans by a wandering Transformer. The creation story also describes how they relate to other tribes and provides instruction on how the Quileute are to live. In *Twilight*, however, Meyer reconstructs their creation story to cast them as descendants of werewolves who shift back into wolf form to hunt vampires. This fictional creation story is used throughout the series to create rivals for Edward Cullen, the main love interest, and the fictional vampire coven to which he belongs. Margaret Leidy, Comment, *Protecting Creation: The Twilight Series, Creation Stories, and the Conversion of Intangible Cultural Property*, 41 SW. L. REV. 509, 509–11, 511 n. 19 (2012); *see also History*, QUILEUTE NATION, https://quileutenation.org/history [https://perma.cc/TJM3-87C3].

115 Leidy, *supra* note 114, at 518.

116 Struthers & Peden-McAlpine, *supra* note 95, at 1267–68; Stephanie Spangler, Note, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions Through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709, 710 (2010); TK Background Brief, *supra* note 60.

117 *See* Leidy, *supra* note 114, at 518–19; Fixico, *supra* note 17.

II. JOINT AUTHORSHIP UNDER AMERICAN COPYRIGHT LAW

One avenue through which copyright law can diminish inequitable exploitation of creative works is through expanding authorship doctrines in specific circumstances. Considering that copyright ownership automatically vests in the author of a work, authorship holds symbolic significance but also serves as the key to legally attaining both economic and moral rights pertaining to how the work may be exploited.[118] However, despite the weight held by an authorship designation, American law is not clear on a crucial point: what actually makes someone an author?[119] The Supreme Court has defined "author" two times,[120] but both definitions appear in dicta.[121] Most often, courts tend to simply define the author as someone who has created a copyrightable work, but tying authorship to a finding of copyright is only marginally helpful in setting the contours of authorship as a doctrine and how it may continue to develop.[122]

Notably, an author is not always required to have executed the act of fixation—so long as they have exerted sufficient influence over the creative direction of the work, the act of creation can be deemed fulfilled.[123] However, authorial designation becomes less clear when there is collaboration among multiple parties, so more factors need to be considered to assess co-authorship.[124] A *work* can be considered jointly authored when "two or more authors [collaborate] with the intention that their contributions be merged into [an] inseparable or interdependent

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118 *See* discussion *infra* Section III.B.; 17 U.S.C. § 106. Though the United States has not codified moral rights beyond the scope of certain visual works, they can be protected through claims in tort. *See, e.g.*, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34–35 (2003); Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14, 24 (2d Cir. 1976).

119 *See* Shyamkrishna Balganesh, *The Folklore and Symbolism of Authorship in American Copyright Law*, 54 HOUS. L. REV. 403 (2016).

120 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (defining "author" as "the person who translates an idea into a fixed, tangible expression"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (defining "author" as "he to whom anything owes its orign [sic]; originator; maker; one who completes a work of science or literature" (quoting JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 99 (1860)).

121 Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326 (1996).

122 *Id.* at 1326–34; Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1231–32 (discussing the practical and legal issues with unclear authorship doctrines, like the constitutional bounds of congressional authority to extend copyright protection to new forms of media).

123 Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999).

124 *See* NIMMER, *supra* note 76, at § 6.01; PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.1 (3d ed. 2005 & Supp. 2024-1).

part[] of a unitary whole."[125] However, there is no corresponding definition for joint authorship. For this reason, courts have typically been reluctant to find joint authorship unless there is clear intention shared by the parties to create a joint work.[126] The courts have limited joint authorship doctrines in different ways, and the foremost treatises (*Goldstein on Copyright* and *Nimmer on Copyright*) consider in particular how the Second and Ninth Circuits have done so.[127] The Second Circuit has made the intention test substantially harder for contributors to satisfy, and the Ninth Circuit has added a test of each contributor's control based on its definition of authorship.[128] Therefore, joint authorship may generally be determined from: (1) the contribution of each author, (2) intent to create a work of joint authorship, and (3) the degree of control each author has over the work.[129]

A. *Contribution of Each Author*

In American copyright law, there are two theories of what kind of contributor can be a joint author, and they differ most notably in whether a contribution must be independently copyrightable: one is advanced by Professor Goldstein, another by Professor Nimmer.[130] Courts have almost all followed the approach advanced by Goldstein,[131] which says that each author's contribution must be independently copyrightable.[132] By contrast, Nimmer's more lenient approach can attribute joint authorship to any contributor to the work whose contribution surpasses a de minimis

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125 17 U.S.C. § 101.

126 Teresa Huang, Note, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673, 673 (2005).

127 NIMMER, *supra* note 76, at § 6.07; GOLDSTEIN, *supra* note 124, at §§ 4.1–4.2.

128 GOLDSTEIN, *supra* note 124, at §§ 4.1–4.2; NIMMER, *supra* note 76, at § 6.07.

129 Tehila Rozencwaig-Feldman, *The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 172, 180 (2021).

130 GOLDSTEIN, *supra* note 124, at § 4.2.1.2124; NIMMER, *supra* note 76, at § 6.07.

131 *See* NIMMER, *supra* note 76, at § 6.07[A][3][b] (noting that courts have predominantly adopted Goldstein's approach); *see, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000); Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998).

132 GOLDSTEIN, *supra* note 124, at § 4.2.1.2 ("[C]ollaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.").

threshold.[133] This less-stringent approach is unpopular with courts,[134] but still holds a place in American copyright law.[135] Nimmer's approach has been explicitly embraced by some courts.[136] For example, in *Gaiman v. McFarlane*, the Seventh Circuit held a character copyrightable despite the fact that each individual contributor had not made a copyrightable contribution.[137] The holding is written to apply to "mixed media" works where the contributions create a unitary whole.[138]

B. *Intention to Create a Work of Joint Authorship*

This factor looks at whether the authors intended for their contributions to be "inseparable or interdependent parts of a unitary whole."[139] Intention to become joint authors is specific to American copyright law, though the courts do not agree on the contours of this requirement.[140] Nimmer does not delve into how intent must be manifested, choosing instead to focus on how various circuits have ruled where there was *not* mutual intent to create a singular work.[141] However, Goldstein articulates a clear vision of the intent requirement: follow the plain language of the Copyright Act.[142] Under the 1976 Act, joint authors must create their contributions with the intention that they be merged

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133 NIMMER, *supra* note 76, at § 6.07[A][3][a] ("[C]opyright's goal of fostering creativity is best served . . . by rewarding all parties who labor together to unite idea with form, and that copyright protection should extend both to the contributor of the skeletal ideas and the contributor who fleshes out the project.").

134 Scholarship is less firmly against Nimmer, however, even outside the realm of traditional knowledge and TCEs. *See, e.g.*, Huang, *supra* note 126, at 685–87, 698–700; Timothy J. McFarlin, *An Idea of Authorship: Orson Welles, the War of the Worlds Copyright, and Why We Should Recognize Idea-Contributors as Joint Authors*, 66 CASE W. RES. L. REV. 701 (2016); Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1 (2019); Gabriel Jacob Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235 (2008).

135 Rozencwaig-Feldman, *supra* note 129, at 184–86.

136 *E.g.*, Greene v. Ablon, 794 F.3d 133, 151 (1st Cir. 2015); Brown v. Flowers, 297 F. Supp. 2d 846, 851–52 (M.D.N.C. 2003); Words & Data, Inc. v. GTE Commc'ns. Servs., Inc., 765 F. Supp. 570, 575–79 (W.D. Mo. 1991).

137 360 F.3d 644, 659 (7th Cir. 2004).

138 *Id.* at 658–59; Huang, *supra* note 129, at 674–75.

139 17 U.S.C. § 101.

140 Rozencwaig-Feldman, *supra* note 129, at 187 ("[T]he main problem with the intention test is the inconsistency in courts' decisions and the wide range of interpretations of 'intention.' American courts' inconsistent interpretation of the intention test leaves the test vague and undefined." (footnote omitted)).

141 *See* NIMMER, *supra* note 76, at § 6.07[B].

142 *See* Goldstein, *supra* note 124, at § 4.2.1.1.

together into a single work.[143] This was not necessarily the case for joint authorship under the 1909 Act, under which the Second Circuit held that where Author *A* had a preexisting work and intentionally created a second work with contributing Author *B*, this second work could be a jointly-authored work.[144]

Interestingly, the Second Circuit has articulated a test for intention under the 1976 Act that is much more stringent than both its 1909 Act standard and the language of the 1976 Act. It held that the intent must be *mutual* intention to become authors in the legal sense, citing fear that an author will be denied sole authorship simply because another party provided some kind of assistance.[145] In a later opinion, the court set forth certain factors to consider in determining mutual intent,[146] but Goldstein notes that even with such factors, the Second Circuit's test asks judges to undertake the extremely difficult question of what legal result the parties subjectively intended.[147] For those reasons, following the plain language of the 1976 Act is preferable.[148]

C. *Degree of Control*

This factor most clearly builds on the requirements of authorship in general. An author is someone to whom a work "owes its origin,"[149] and this is not necessarily determined by who completed the physical act of creation[150] or who funded the work's production.[151] Further, Nimmer notes that when someone contributes expression *only* through direction, "[m]any gradations of contribution are cognizable" as authorship.[152]

The courts all implicitly recognize the role of control in authorial designation, at least to the extent it establishes originality.[153] However, the

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143 17 U.S.C. § 101; Goldstein, *supra* note 124, at § 4.2.1.1.

144 GOLDSTEIN, *supra* note 124, at § 4.2.1.1 (citing Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir. 1955)).

145 Childress v. Taylor, 945 F.2d 500, 504, 507–08 (2d Cir. 1991).

146 Thomson v. Larson, 147 F.3d 195, 201–05 (2d Cir. 1998).

147 GOLDSTEIN, *supra* note 124, at § 4.2.1.1.

148 *See id.*

149 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (quoting JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 99 (1860)).

150 Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 52 U.S.P.Q.2d 1609, 1612–13 (S.D.N.Y. 1999); Kyjen Co., Inc. v. Vo-Toys, Inc., 223 F. Supp. 2d 1065, 1068–69 (C.D. Cal. 2002).

151 Baker v. Robert I. Lappin Charitable Found., 415 F. Supp. 2d 473, 476–78, 487 (S.D.N.Y. 2006).

152 NIMMER, *supra* note 76, at § 6.07[A][2].

153 An author must have exercised a "modicum of creativity" in the work's creation. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991).

Ninth Circuit has focused on it most in the context of joint authorship and articulated a test in *Aalmuhammed v. Lee*, where Jefri Aalmuhammed served as a consultant on the set of Spike Lee's and Warner Brothers' film *Malcolm X*.[154] Aalmuhammed was hired for his expertise on Malcolm X and Islam, and he suggested extensive edits and made copyrightable contributions to the script.[155] Yet his claim of co-authorship ultimately failed because the Ninth Circuit held that an author's control over the entirety of the work must rise to the level of superintendence, and as a consultant, Aalmuhammed did not have such control over *Malcolm X*.[156]

Goldstein has commented that the *Aalmuhammed* test's expansion of authorship seems "both over-inclusive and under-inclusive" in identifying joint authors.[157] It is over-inclusive because Congress likely did not intend to make supervisory producers and directors joint authors to a film (if only because they rarely actually contribute copyrightable expression); it is under-inclusive because with such a focus on "a single creative force," it is highly likely that more than one author will meet the standard for authorship even when there are other contributors that should otherwise be considered authors.[158] Outside the context of films, where work-for-hire terms are common, Goldstein sees the *Aalmuhammed* test likely to convert ordinary joint creations into "winner-take-all gamble[s]," where judges will find sole authorship for the "dominant" contributor, to the significant detriment of the other contributor(s).[159]

On the other hand, the *Aalmuhammed* test may leave room for interesting joint authorship arrangements where each collaborator makes a significantly expressive standalone contribution that is essential to the new work: in *Morrill v. Smashing Pumpkins*, Jonathan Morrill produced and directed a music video starring The Smashing Pumpkins member Billy Corgan.[160] Morrill claimed sole copyright under the *Aalmuhammed* test, but the court pointed out that no matter how much work he put into the video, the work was a *music* video; without the music, there would be no video at all.[161] With this in mind, the court held that each party's creative control over "separate and indispensable elements of the

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154 202 F.3d 1227, 1229–32 (9th Cir. 2000).

155 *Id.* at 1229–30.

156 *Id.* at 1233–36.

157 GOLDSTEIN, *supra* note 124, at § 4.2.1.2.

158 *Id.*

159 *Id.*

160 NIMMER, *supra* note 76, at § 6.07[B][3] n.80 (citing Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1121 (C.D. Cal. 2001)); 157 F. Supp. 2d 1120, 1121 (C.D. Cal. 2001).

161 *Morrill*, 157 F. Supp. 2d at 1124.

completed product" supported a finding that the creators of the music and video were joint authors.[162]

III. PROPOSED PRESUMPTION OF JOINT AUTHORSHIP

To honor the United States' commitments to protect and promote Indigenous languages and language sovereignty, courts should operate with a presumption of joint authorship for Language Materials. This Part begins with a discussion of existing presumptions of authorship and why the adoption of a similar presumption would be fitting. Then, this Part describes the proposed presumption in more detail and how it fits into existing joint authorship doctrines.

A. *Existing Presumptions of Authorship*

The United States stands out among countries with similar copyright laws insofar as it has not codified a definition for authorship.[163] Many other countries provide definitions or use presumptions of authorship based on contributions made during the creative process.[164] The Copyright Act already implements a presumption of authorship: when the author of a work has registered the copyright with the Copyright Office within five years of first publication.[165] However, imposing a similar, rebuttable presumption of authorship in other contexts is not a radical proposal. The Berne Convention of 1886, the oldest and most influential copyright-related treaty in over a century that was ratified by the United States in 1989, includes presumptions of authorship, including for film directors in audiovisual works and where an author is credited "in the usual manner."[166] These provisions have been adopted in other Berne Convention signatory countries, including the United Kingdom, the Netherlands, Australia, France, Belgium, and

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162 *Id.*

163 *See* Balganesh, *supra* note 119; Buccafusco, *supra* note 122; VerSteeg, *supra* note 121.

164 Balganesh, *supra* note 119, at 405; *see, e.g.*, various international copyright laws, *infra* note 167.

165 *See* 17 U.S.C. § 410(c).

166 Berne Convention for the Protection of Literary and Artistic Works art. 15, Sept. 9, 1886 (as amended on September 28, 1979), S. Treaty Doc. No. 99-27 (1986), TRT/BERNE/001; NIMMER, *supra* note 7676, at § 17.01 ("Congress . . . amend[ed] U.S. law to be compatible with Berne standards by enacting the Berne Convention Implementation Act of 1988 (BCIA), effective March 1, 1989.").

Mexico.[167] The United Kingdom has even surpassed the Berne Convention's provisions in presuming authorship for several other forms of media: sound recordings, films, broadcasts, and typographical arrangements of a published edition.[168]

The United States is notorious for its "minimalist" approach to adopting Berne obligations.[169] It ratified and implemented the Berne Convention over a century after the first Berne signatories, prioritizing protection for American copyright-based exports rather than authors' rights, one of the central concerns of the Berne Convention signatories.[170]

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167 Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1069 n.18 (2003); *see* Copyright Act of 1912, art. 4 (1912) (Neth.) (stating the person who presents himself as the author is presumed to be the author); Copyright, Designs and Patents Act 1988 c. 48, § 104 (g.) (stating the person whose name appears on the work as published shall be presumed to be the author of the work and to have not made it within in the course of employment); *Copyright Act 1968* (Cth) ss 127 (Austl.) (stating there is a presumption of authorship of a literary, dramatic, musical or artistic work if true name or commonly known name of the individual appears on the work "when it was made," applying equally to each individual purporting to be a joint author); Loi 92-597 du 1 juillet 1992 code de la propriété intellectuelle [Law 92-597 of July 1, 1992 on Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 3, 1992 (stating authorship status belongs to the person whose name appears on the work made public); Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights] (Belg.), B.S., June 30, 1994, art. 6; Alameda Films SA de CV v. Authors Rights Restoration Corp. Inc., 331 F.3d 472, 479 (5th Cir. 2003) (citing Ley Federal de Derechos de Autor [LFDA] art. 2, Diario Oficial de la Federación [DOF] 01-14-1948 (Mex.).

168 Copyright, Designs and Patents Act 1988, c. 48, § 9 (Eng.).

169 H.R. Rep. No. 100-609, at 6–7 (1988) ("The purpose of the legislation is to allow the United States to join the Berne Convention . . . , the world's premier multilateral copyright treaty. This international convention has several provisions that conflict with current American copyright law. In addressing these conflicts, the implementing legislation employs a minimalist approach, making only those changes to American copyright law that are clearly required under the treaty's provisions."). "Minimalist" may even be overselling Congress's approach. *See* David Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27, 28–29 (1989) ("[I]f ten experts . . . testified before Congress, seven stating that United States law needed to be changed and three opining that United States law was adequate, then Congress . . . left the law unaltered. Congress acted only if all ten agreed that there was a clear inconsistency." (footnotes omitted)).

170 H.R. Rep. No. 100-609, at 7 (describing one purpose of the BCIA as reforming trade laws to account for the United States' increase in copyright-based exports). One other purpose outlined is to bring American copyright laws closer to the standards set internationally and thus benefit American authors, but this purpose does not seem to include the international standard for respecting authors' rights, perhaps most clearly exhibited by the absence of any moral rights provisions in the BCIA. See Nimmer, supra note 169, at 40; John M. Kernochan, Comments of John M. Kernochan, 10 Colum.-VLA J.L. & Arts 685, 686 (1985) ("The conclusion that [the BCIA] is compatible with Berne . . . and recognizes moral rights in any sense comparable to that intended by most of the Berne signatories is tenuous indeed."). Yet authors' rights have always been at the heart of the Berne Convention. Peter Jaszi, A Garland of Reflections on Three International Copyright Topics, 8 Cardozo Arts & Ent. L.J. 47, 48–51 (1989).

Nonetheless, this "stingy" Berne implementation[171] does not prevent Congress from further harmonizing American copyright law with the international copyright treaty it has ratified—indeed, Congress has already adopted stronger moral rights protections to further align with Berne, though only for an extremely limited class of visual artists[172] through the Visual Artists Rights Act of 1990.[173] Congress ought to be open to similar actions now, at least where it would advance the policies it has set forth in NALA and UNDRIP.

B. *A Rebuttable Presumption of Joint Authorship Should Be Adopted for the Tribes Whose Languages Are Depicted in Language Materials*

Courts today tend to simply conceive of the author as someone who has created a copyrightable work, but this definition poses problems for the continued development of authorship doctrines.[174] Without a constitutional definition of authorship, for instance, the bounds of constitutional power are unclear where Congress chooses to broaden the definition of a copyrightable work.[175] In *Mazer v. Stein*, the Supreme Court side-stepped this question when Congress extended copyright protection to sculptural elements of useful articles, where both artistic and purely functional elements exist in a single work.[176] However, Justice Douglas's concurrence questions this choice, asking, "Is a sculptor an 'author' and is his statu[]e a 'writing' within the meaning of the Constitution? We have never decided the question."[177] He also points out that the wide variety of copyrighted forms recognized by the Copyright

171 Nimmer, *supra* note 169, at 29–30 ("[I]t is not only unfortunate, but self-defeating, for our government to implement Berne only through the most stingy means available.").

172 17 U.S.C. § 101 (defining a "work of visual art" as only "(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.")

173 17 U.S.C. § 106A.

174 VerSteeg, *supra* note 121, at 1326–34; Buccafusco, *supra* note 122, at 1231 (discussing the practical and legal issues with unclear authorship doctrines).

175 Buccafusco, *supra* note 122, at 1243; Mazer v. Stein, 347 U.S. 201, 210–13 (1954).

176 *See* 347 U.S. at 206–08.

177 *Id.* at 220 (Douglas, J., concurring); *see also* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to provide "to Authors . . . the exclusive Right to their respective Writings").

Office (including clocks, chandeliers, fishbowls, and casseroles)[178] do not clearly fit the constitutional grant.[179] Even Justice Douglas's concurrence focuses largely on the definition of a writing, rather than an author, but it raises the significant question of what copyright law should recognize as authorship.[180]

Since *Mazer*, there has not been a coherent articulation of the authorship doctrine,[181] and because this question is so fundamental to the concept and existence of authorship, more questions follow: What is the purpose of recognizing authorship?[182] Is authorship in any way defined by something outside the requirements for copyright eligibility?[183] Or perhaps more relevant here: If the purpose of authorship is better served through a recognition of it in a work with more than one contributor, can such authorship be found independently of a copyrightable contribution?[184]

This Note proposes an amendment to the Copyright Act that would create a presumption of joint authorship for tribes whose languages are the subject of Language Materials. While there may be ways to ensure tribes retain access to Language Materials through other methods like nonexclusive licenses, the only way to protect that access *and* honor the contributions from Indigenous parties is to accord authorship credit.[185]

Congress should ensure implementation of this presumption through a statutory amendment for several reasons: (1) the courts have demonstrated a clear reluctance to adopt broader interpretation of joint authorship doctrines;[186] (2) legal protections for Native American culture

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178 Justice Douglas's full list is "statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays." *Mazer*, 347 U.S. at 221 (Douglas, J., concurring).

179 *Id.* at 221 ("Perhaps these are all 'writings' in the constitutional sense. But to me, at least, they are not obviously so.").

180 *Id.* at 220–221.

181 *See* Buccafusco, *supra* note 122, at 1255.

182 *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 287 (2004).

183 *See* Buccafusco, *supra* note 122, at 1232 (arguing that "to be an author of a writing, one must intend to produce some mental effect in an audience").

184 The Supreme Court defined an author as "he to whom anything owes its orign [sic]; originator; maker; one who completes a work of science or literature." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (quoting JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 99 (1860)). Is an Indigenous tribe not the party to whom its language and oral tradition owe their origin? And is a language and oral tradition that encompasses generations of stories and experiences, painstakingly woven with storytelling intent, not a work of literature? *See, e.g.*, ALBERT B. LORD, *The Nature and Kinds of Oral Literature*, *in* THE SINGER RESUMES THE TALE (Mary Louise Lord ed., 1995) This seems a lesser jump in logic than classifying a casserole or piggy bank as a "writing." *See Mazer*, 347 U.S. at 221 (Douglas, J., concurring).

185 *See* discussion of the symbolic and cultural value of authorial designation, *infra* Section III.C.

186 *See* discussion *supra* Section II.

are generally statutory in nature;[187] and (3) Congress has made clear, unique, and specific policy commitments on this issue already, supporting amendments to address Language Materials in particular.[188] In addition, expanding the definition of a joint author where the final copyrightable work is a Language Material also furthers copyright law's fundamental goal of promoting progress, because it advances the sociopolitical and cultural goals that Congress has already articulated and provides economic rights for the intended beneficiaries of those goals.[189]

There is a myriad of differences and nuances distinguishing Native American tribes, including recognition of the tribe by a U.S. government,[190] structures of tribal authority,[191] and types of TCEs they create and value (and therefore how they are tied to language).[192] This Note addresses Language Materials specifically, where a non-Native person authors copyrightable materials that document or educate the consumer about how to communicate in the language of a tribe whose lands fall within the borders of the United States. A predictable parameter for the proposed amendment would only protect languages of tribes

187 *See, e.g.*, 25 U.S.C. § 3002 (The Native American Graves Protection and Repatriation Act); 25 U.S.C. § 305 (The Indian Arts and Crafts Act); 42 U.S.C. § 1996 (The American Indian Religious Freedom Act).

188 *See* discussion *supra* Section I.A.

189 *See* discussion *supra* Section I.A; 17 U.S.C. § 106.

190 As of January 28, 2022, there were 574 federally recognized tribes. *Tribal Leaders Directory*, U.S. BUREAU OF INDIAN AFFS., https://www.bia.gov/service/tribal-leaders-directory [https://perma.cc/3KXZ-B9CC]. However, around 200 to 400 tribes remain unrecognized, meaning that they rarely receive federal support as recognized tribes do. Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic*, NPR (Apr. 17, 2021, 7:00 AM), https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic [https://perma.cc/2SU3-FVKG]; *Indian Issues: Federal Funding for Non-Federally Recognized Tribes*, U.S. GOV'T ACCOUNTABILITY OFFICE (Apr. 12, 2012), https://www.gao.gov/products/gao-12-348 [https://perma.cc/4KBQ-S325].

191 *See, e.g.*, *History*, NAVAJO NATION, https://www.navajo-nsn.gov/History [https://perma.cc/2UA3-GY7M] (describing the Navajo Nation government's extensive executive, legislative, and judicial branches); *Tribal Government*, HOPI TRIBE, https://www.hopi-nsn.gov/tribal-government [https://perma.cc/3SAA-6XVM] (explaining that the Hopi Tribe's government vests authority primarily in a Tribal Council with only limited powers in executive and judicial branches); *Our Government*, MOHEGAN TRIBE, https://www.mohegan.nsn.us/about/government [https://perma.cc/LGC4-C8RS] (explaining that the Mohegan Tribe's Tribal Council and Council of Elders divide executive and legislative powers, while the Council of Elders also holds certain judicial powers and a Tribal Court adjudicates all non-gaming disputes); *Government*, HAUDENOSAUNEE CONFEDERACY, https://www.haudenosauneeconfederacy.com/government [https://perma.cc/AK2A-EUN5] (describing how the Mohawk, Onondaga, Seneca, Cayuga, Oneida, and other Confederacy nations interact through their Grand Council and select leaders like the Chief, Clan Mothers, and Faith Keepers).

192 *See* TK Technical Brief, *supra* note 61, at 1–2.

recognized by federal or state governments,[193] but I hesitate to propose such a limitation because unrecognized tribes are likely to be in as vulnerable or even more vulnerable positions than recognized tribes, considering that U.S. resources and protections are much less likely to reach them.[194] However, Language Materials vary in both form and method of creation, depending on the tribe's needs, the relationship between the parties, and the language and culture itself. Therefore, the proposed presumption of joint authorship is intended to be rebuttable and subject to case-by-case evaluation if contested.[195] As I will address below, circumstances that could undermine a tribe's claim under this proposed presumption are currently very unlikely to arise. However, because the particular facts surrounding a Language Material may influence the other factors of joint authorship more drastically on a case-by-case basis, this Note focuses most attention on sufficient contribution.

1. Tribes Make a Sufficiently Substantial Creative Contribution to Language Materials

This Note does not claim that Nimmer's de minimis test is sufficient to establish joint authorship because the de minimis standard simply is not relevant to Indigenous contributions to Language Materials. The creativity and expressive quality of Language TCEs clearly exceed the threshold of de minimis contributions—rather, their lack of copyrightability lies in the statutory requirements of tangible fixation and individual authorship.[196] Instead, this Note advocates for recognition that uncopyrightable forms of expression, like Language TCEs, can be sufficiently expressive and original contributions to entitle the tribes from which they originate to joint authorship. Language Materials, through the incorporation of oral traditions and written word, bring together two different means of expression—just as the mixed media works contemplated by the Seventh Circuit in *Gaiman* do.[197] As both the

193 Similar intellectual property schemes involving TCEs have set such a parameter. *E.g.*, 18 U.S.C. § 1159(c) (defining terms in the Indian Arts and Crafts Act); *Native American Tribal Insignia*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia [https://perma.cc/QXE9-F352].

194 *See* discussion of recognized versus unrecognized tribes' access to aid from the United States, *supra* note 185.

195 For instance, the intent element of joint authorship may not be satisfied in a situation where a tribe's language is spoken widely enough that the outside author can create Language Materials without consulting the tribe, in which case it would make less sense for the tribe to be considered a joint author.

196 *See* discussion *supra* Section I.B.2.

197 Gaiman v. McFarlane, 360 F.3d 644, 658–59 (7th Cir. 2004).

Gaiman and *Morrill* courts recognized, there is a logical misstep in granting sole protection to an author whose work simply could not exist without, and substantially builds directly off of, an extraordinarily expressive and precisely articulated contribution by another party, even if certain elements of copyrightability for such contribution are not met.[198]

Additionally, this recognition advances the principle underpinning copyright law in general: that granting copyright protection must promote artistic and scientific progress.[199] Though Language TCEs may not align with Western literary traditions, they are nonetheless clearly distinguishable from the kinds of uncopyrightable subject matter that U.S. copyright law is concerned with—facts and ideas.[200] By contrasting expressive or "ornamental" content with general ideas and scientific discoveries, the Supreme Court located the distinction between copyrightable works and noncopyrightable ideas in the author's act of expressing an idea, as well as contemplation of aesthetic tastes in the creation process.[201] In denying protection to ideas, the Court pointed to cases where ideas and systems were shared by multiple parties but were expressed differently to illustrate how granting copyrights for ideas would overburden other authors' independent creations.[202] In a similar vein, the Court has located the problem with copyrighting facts in the lack of originality and the understanding that holding facts copyrightable would mean that nobody could rely on previously discovered or used facts.[203] When considering Language TCEs in these contexts, as intentionally articulated expressions of ideas and cultural values that cannot be recreated or "discovered," they clearly more closely resemble copyrightable than uncopyrightable works.[204]

Courts heavily consider whether granting copyright protection to a work will promote artistic and scientific progress.[205] Allowing people to copyright ideas and facts, for instance, would discourage exchange of

198 *Id.* at 654; Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1125–26 (C.D. Cal. 2001).

199 U.S. CONST. art. I, § 8, cl. 8; *see also* Baker v. Selden, 101 U.S. 99, 105 (1879).

200 These concerns about copyrighting ideas and facts play an important role in why courts have disapproved of Nimmer's test. *See* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069–70 (7th Cir. 1994).

201 *Baker*, 101 U.S. at 103–05.

202 *Id.* at 105–07.

203 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353–54 (1991).

204 *See* discussion *supra* Section I.B.2.

205 *Feist*, 499 U.S. at 349 ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)).

ideas and raise the costs of creation.[206] However, the information and stories conveyed by Indigenous languages, unlike the "raw" facts and ideas with which copyright law is concerned, cannot be cleanly separated from the contexts and people from which they originate.[207] The substantially expressive nature of Language TCEs also situates Language Materials much more closely to derivative or joint works than educational materials for non-Indigenous languages.[208] On top of that, imposing low costs on exploiting TCEs results in more works that exacerbate racial stereotypes and wrest the economic benefits of creativity from the originators.[209] Making such works part of the public domain or similarly easy to exploit only advances a very specific and limited vein of "progress," which does not benefit, and even *discourages* creation by, minority authors.[210]

2. Tribes Exert Substantial Control

This Note also proposes that, by serving as the keeper of crucial, if not all, information that serves as the base for Language Materials, Indigenous tribes have exerted sufficient control and influence over the creation of such materials that they should qualify as co-authors alongside non-Indigenous authors. This does not always align with the

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206 *Id.* at 350 (noting that "the means by which copyright advances the progress of science and art" is by "encourag[ing] others to build freely upon the ideas and information conveyed by a work" while still protecting that original author's personal expression).

207 Reed, *supra* note 70, at 1126–28; *Feist*, 499 U.S. at 349–50 (noting that uncopyrightable facts and ideas "may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas" (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990)).

208 *See* 17 U.S.C. § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.").

209 *See* discussion *supra* Section I.B.3. *See generally* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES (2018) (discussing "cultural Protocols" regarding Indigenous oral traditions).

210 *See* Chochla, *supra* note 1010, at 118–19. Maliseet elders agreed to let a non-Indigenous professor make tape recordings of their traditional stories in exchange for his conveyance of copyright to the families of storytellers. The professor delayed doing so for decades, until he finally explicitly refused to do so. Now, "[t]he families of the storytellers must choose between publishing the works with acknowledgement of the author's copyright, which would 'constitute consent to what was effectively the theft of their stories,' refrain from any publication, or publish without such acknowledgement and risk being the subject of litigation.'" *Id.* (quoting Andrea Bear Nicholas, *Who Owns Indigenous Cultural and Intellectual Property?*, POL'Y OPTIONS (June 27, 2017), https://policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property [https://perma.cc/7T9F-5HAP]).

common law standard of control.[211] However, from historical,[212] legal,[213] and cultural perspectives,[214] Language Materials are created under vastly different circumstances than other forms of content protected by copyright.[215]

Further, it is unlikely that a non-Indigenous person has created educational materials without substantial involvement by a tribe's authorities, people, or other resources. Tribes necessarily play a key role in creating educational materials; given the extreme scarcity of fluent Indigenous language speakers, it is virtually impossible to create educational materials without active participation by the tribe(s) with fluent speakers of the language.[216] This is especially true following the COVID-19 pandemic.[217] Elders in Indigenous communities are "keys to cultural continuity" and hold vital knowledge of their communities' languages, but COVID-19 has had a disproportionately devastating effect on Indigenous communities and their elders.[218] Moreover, tribes are often selective about which stories, and therefore which words, may come into contact with non-Indigenous people.[219] With a highly discretionary act of selection, then, tribes and their members exert significant control over the work as a whole. This is markedly different from cases like *Aalmuhammed*, where the contributor is merely a consultant.[220] Though consultants can be valuable collaborators, unless otherwise agreed between the parties, they lack the requisite level of artistic control to become a joint author; even their copyrightable contributions do not necessarily result in changes to the final work because some other creator(s)—i.e., the author(s)—may accept or reject such contributions at

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211 *E.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1232–35 (9th Cir. 2000) (applying a superintendence test).

212 *See supra* Part I.

213 *See* discussion *supra* Section I.A.

214 *See* discussion *supra* Section I.B.1.

215 *See Testimony of Michelle Sauve on Native American Languages and Cultures*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 3, 2021), https://www.acf.hhs.gov/olab/testimony/testimony-michelle-sauve-native-american-languages-and-cultures [https://perma.cc/Z2AM-W96Q].

216 *Id.* ("[L]anguage projects require tremendous time, effort, and resource investments within communities that are already responding to many needs.").

217 *Id.*

218 *Id.*

219 *See* Marmon Silko & Hirsch, *supra* note 69; *Protocols for Native American Archival Materials*, FIRST ARCHIVIST CIRCLE (Apr. 9, 2007), https://www2.nau.edu/libnap-p/protocols.html#Culturally, [https://perma.cc/5383-N5UZ] (also defining "culturally sensitive" Indigenous materials as "often includ[ing] property and knowledge that is not intended to be shared outside the community of origin or outside of specific groups within a community"). Indeed, such care and consideration can extend to the sharing of words, knowledge, and rituals even with the rest of the tribe. Reed, *supra* note 70, at 1123.

220 Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000).

will.[221] Whereas Aalmuhammed advised on and contributed to a script that Warner Brothers and Spike Lee had already begun developing,[222] tribes who work with an outside party to create Language Materials exert immense selective influence over the work as a whole by choosing which words are even available to be included in the work and providing the creative foundation upon which another party may contribute, much like the Smashing Pumpkins did for Morrill's music video.[223]

The relationship between tribes and non-Indigenous authors creating Language Materials also calls to a limited collective interest for Indigenous communities that Australian case law has recognized, arising where the author of an artistic work incorporates culturally significant knowledge belonging to an Indigenous community subject to their consent.[224] In *Bulun Bulun v. R&T Textiles*, the Federal Court of Australia found a fiduciary relationship between the artist, Bulun Bulun, and the Ganalbingu people, whose ritual knowledge was used in Bulun Bulun's painting, because the Ganalbingu representatives' permission to use such knowledge was "predicated on the trust and confidence" they had in Bulun Bulun.[225] Though this fiduciary relationship did not create an equitable interest in the painting itself for the Ganalbingu people, the Court noted that Bulun Bulun's fiduciary obligations included using the ritual knowledge in accordance with Ganalbingu customs. Had Bulun Bulun not obtained redress for infringement by R&T Textiles, the Ganalbingu people may have had a successful claim to remedies, and even intervention of equity to impose a constructive trust on the copyright owner in the extreme case.[226] The court also recognized that, though inapplicable in *Bulun Bulun*, it was "not inconceivable" that contractual arrangements between artist and tribe could create fiduciary or equitable interests in the artwork itself, citing such arrangements made by Ghanaian tribes.[227]

These factors—the tribe's sharing of information based on trust and confidence in the outside author and the information's cultural significance—are present in the creation of Language Materials as well, especially with the added intention of creating a work that will specifically

221 *Id.* at 1235.

222 *Id.* at 1230.

223 *See* Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1124 (C.D. Cal. 2001).

224 *Bulun Bulun v. R&T Textiles Pty. Ltd.* (1998) 86 FCR 244 (Austl.).

225 *Id.* at 262.

226 *Id.* at 262–64.

227 *Id.* at 262.

benefit the tribe and its members.[228] Given such circumstances and the absence of existing protections in our copyright regime, the United States should follow similar international legal arrangements to create a presumption of joint authorship between tribes and non-Indigenous authors.

3. Tribes and Non-Indigenous Authors Intend to Create a Joint Work

If tribes have participated in the process of creating the work enough to satisfy the substantial contribution and control elements of joint authorship, it is extremely likely that the parties also intended to create a joint work by merging their creative contributions into a single work. Perhaps more importantly, the non-Native author would have undoubtedly intended to create a joint work in the sense that they created a new work based on substantial contributions from the tribe that would relate back to the relevant Language TCEs.[229] This satisfies the plain language of the 1976 Act,[230] and this situation is very different from those the Second Circuit intended to address with its higher mutual intention standard.[231] Members of the tribe would have provided their knowledge, stories, and resources with the intention of having a documented work that could be used to teach their language.[232] For that reason, the plain language of the 1976 Act suffices to shape the intent factor of joint authorship in the context of Language Materials. Using the plain language standard is also vital to equitably apply joint authorship doctrines for Language Materials—there is currently no reason for non-Indigenous authors to actively register an Indigenous entity as co-author for the works, and they only have incentives to claim all the economic

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228 *See* Standing Rock Banishment Resolution No. 150-22 (May 3, 2022) (declaring the LLC and its founders "continually misle[d] . . . elders to believe that first-language speakers' grossly under-compensated and unattributed expertise will freely benefit [the Tribe's] language learners—when, in fact, all [LLC] products are generated for sale to [the Tribe's] own People and to a global commercial audience without any provision to protect or maintain sacred stories or knowledge as an inalienable, non-transferrable collective Oceti Sakowin birthright for [their] children and grandchildren") [hereinafter Standing Rock Tribe Resolution].

229 See *supra* INTRODUCTION for a discussion of the LLC's creation of materials. If this intent did not exist, it would likely also signal uncertainty as to the accuracy of the resulting Language Materials. In such a case, a tribe may not be particularly interested in asserting co-authorship, and it may be a moot point.

230 *See* 17 U.S.C. § 101; GOLDSTEIN, *supra* note 124, at § 4.2.1.1.

231 For example, consider the editor or research assistant who makes copyrightable contributions when working on the primary author's book. Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

232 *See* Lee Brewer, *supra* note 1.

rights conveyed by copyright.[233] Indeed, history shows that non-Indigenous authors may sooner actively ignore copyright law or renege on an agreement than equitably represent Indigenous contributors in copyright arrangements.[234] In such a context, non-Indigenous authors should not be entitled to the higher standard of mutual intent designed to protect authors who receive minor help in preparing works.[235]

C. *Why a Presumption of Co-Authorship?*

I do not write this Note believing non-Indigenous authors necessarily work on Language Materials only for their own gain. However, where they possess the sole claim to copyright for such works, several issues arise that can be addressed with a rebuttable presumption of co-authorship for the tribe whose language is depicted in the Language Materials. The first is the most obvious issue of inequity where a non-Indigenous author has the exclusive right to exploit and reap any economic benefits associated with the materials used to teach a tribe's language, despite those materials being based in large part, if not solely, on information and cultural materials provided by members of the tribe.[236] Joint authorship would provide the tribe a claim of ownership to the materials and the ability to take advantage of the economic rights attached to a copyright.[237]

On the other hand, sharing authorship with a tribe would not unreasonably limit the non-Indigenous author's ability to use the work while targeting the exclusivity issue.[238] This is because in American copyright law, joint authors do not have the right to bar another joint author from exploiting the work as they see fit, though it may cause the exploiting author to be more thoughtful of what the other author(s)

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233 *See generally* Chochla, *supra* note 10; Reed, *supra* note 87.

234 *See* Chochla, *supra* note 10, at 118 (explaining when a Maliseet Tribe made an agreement with the copyright holder for transfer of rights, which he later reneged on; afterwards, the Tribe was still denied copyright); Reed, *supra* note 87, at 1397–99 (describing an anthropologist who knew that the rights she held in recordings she took of traditional Indigenous performances were subject to the performers' copyright and permission, but she worked with her record label and the Smithsonian Museum to unilaterally sell those recordings without the requisite permission).

235 *See Childress*, 945 F.2d at 507.

236 *See* 17 U.S.C. § 106; *see, e.g.*, Gregory, *supra* note 10; Lee Brewer, *supra* note 1.

237 *See* § 106.

238 NIMMER, *supra* note 76, at § 6.10[A][1][a] ("One joint owner [of a copyright] cannot be liable for copyright infringement to another joint owner . . . ."); Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1145 (9th Cir. 2008) (holding that a copyright joint owner can only issue an exclusive license with the consent of the other co-owner(s)).

would think of such use.[239] Joint authors need to be in agreement only when conveying exclusive rights, and joint authors are entitled to a share of the profits made by another author.[240] This is precisely in line with a purpose of the joint work doctrines: allocation of rights between *collaborators*.[241] In this way, then, adopting a presumption of joint authorship largely would not restrict the rights already recognized in the non-Indigenous author, while honoring the inherently substantial, collaborative relationship with the tribe.[242]

Additionally, depending how closely the Language Materials include content resembling the original oral traditions of the tribe whose Language TCEs are depicted, according the non-Indigenous authors sole ownership may leave the tribe vulnerable to copyright infringement suits for use of their own culture in copyrightable form.[243] For instance, the LLC used information collected from the Standing Rock Sioux Tribe for decades to formulate its Lakota Language Materials.[244] A Lakota teacher named Ray Taken Alive then began using some of the LLC's lessons in a language learning app. His logic for posting the lessons was simple: all that data and the language belong to the Tribe, the Tribe had supported the LLC's grant applications, Lakota language speakers had been led to believe that their contributions would result in free resources for the Tribe, and if the LLC's purpose was really to teach the Lakota language, it should be accessible to the Lakota people.[245] He was soon after served with a cease-and-desist letter from the LLC, and all the while, the LLC had not returned those decades of materials it had obtained from the Tribe despite promises to do so.[246]

Lastly, cultural conceptions of authorship are tied to the acts of creation, meaning-giving, and origination.[247] "The author" continues to be an important cultural figure in the collective imagination, especially in a society that focuses so heavily on individual rights, and attribution of authorship is more than simply naming someone who has created a

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239 This is true provided such exploitation does not infringe upon rights of the other co-author(s). PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 234–35 (4th ed. 2019).

240 *Sybersound Records, Inc.*, 517 F.3d at 1145.

241 GOLDSTEIN, *supra* note 124, at § 4:2 (The purpose of the joint work doctrines is "to provide a starting point . . . for allocating rights and liabilities between coauthors of collaborative works.").

242 *See* GOLDSTEIN & HUGENHOLTZ, *supra* note 239.

243 *See* 17 U.S.C. § 501.

244 Lee Brewer, *supra* note 1.

245 *Id.*; Standing Rock Tribe Resolution, *supra* note 228.

246 Lee Brewer, *supra* note 1. The Tribe has since hired attorneys to ensure their return. *Id.*

247 STEPHEN DONOVAN, DANUTA FJELLESTAD & ROLF LUNDÉN, AUTHORITY MATTERS: RETHINKING THE THEORY AND PRACTICE OF AUTHORSHIP 1–2 (Stephen Donovan, Dauta Fjellestad & Rolf Lundén eds., 2008).

work—it formalizes and preserves a relationship between the named entity and their thoughts, philosophies, and modes of expression, which in turn influences how the work is perceived and valued by those who consume it.[248] What does it mean, then, if American legal regimes protect non-Indigenous people's ability to claim sole authorship of works that are so directly based on and tied to the existence of Indigenous cultures and peoples? Even if tribes can use Language Materials through an exception like fair use, America's systematic denial of authorship to Indigenous communities makes a significant symbolic and legal statement about its values and priorities.[249]

CONCLUSION

Congress should amend the Copyright Act to adopt a rebuttable presumption of joint authorship for Indigenous tribes and non-Indigenous authors in the context of Language Materials. Such an amendment is not so different from other presumptions of authorship in international copyright systems, and it can be justified through the same logic that exists in niche, but still valid, areas of American copyright law today. Adopting such a presumption would hold both symbolic and legal significance, and it would be a concrete step in the direction of fulfilling

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248 *See* Michel Foucault, *What Is an Author?*, *in* 2 AESTHETICS, METHOD, AND EPISTEMOLOGY 205 (James D. Faubion, ed., Josué V. Harari, trans.) (1998). Foucault also introduces his discussion of the author by exploring how even if, as Barthes famously proposed, the author is "dead," there is an inherent tension in such a proposition—without the figure of the author, how can we define a "work" and where do we locate the meaningful borders of its interpretation? *Id.* at 206–08; ROLAND BARTHES, IMAGE, MUSIC, TEXT 148 (Stephen Heath, trans. 1977) ("The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination. . . . [T]o give writing its future, it is necessary to overthrow the myth [that the writer is the only person in literature]: the birth of the reader must be at the cost of the death of the Author."). Foucault's interrogation of the author-work relationship holds an interesting mirror up to American copyright law's silence on what constitutes an author, echoing both Justice Douglas's *Mazer* concurrence, questioning whether the wide array of objects granted copyright protection can truly be deemed Copyright Clause "writings," and Professor Buccafusco's point that without a statutory definition for authorship, it is difficult to fully ascertain the constitutional bounds of copyright law. Mazer v. Stein, 347 U.S. 201, 219–21 (1954) (Douglas, J., concurring); Buccafusco, *supra* note 122. So too do Foucault's reflections on how modern authorial designation is deemed unnecessary for scientific or factual works, in contrast to how essential it is for literary works, call to mind Professors Washuta and Warburton's discussion of the diminution of Indigenous peoples and cultural expressions into objects of settlers' anthropological study, which in turn supports the relegation of such works into the public domain and the devaluation and erasure of Indigenous authorship. Washuta & Warburton, *supra* note 70. Acknowledging and addressing these dimensions of how authorship is socially constructed, and how that informs the corresponding legal framework, is crucial in building a more just copyright regime.

249 Balganesh, *supra* note 119, at 412.

the legal, political, and moral commitments the United States has already made toward Indigenous people within its borders.