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MISAPPROPRIATION OF INDIGENOUS TRADITIONAL DESIGNS: THE NEED FOR SUI GENERIS PROTECTION

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I. ABSTRACT

There exists a vast cultural heritage of indigenous peoples all over the globe, which is demonstrated through traditional artistic patterns and designs, bearing significant cosmological and spiritual importance for communities of indigenous peoples. Yet, intellectual property law of today is hardly designed to protect it. Indigenous traditional knowledge (ITK) and traditional cultural expressions (TCEs) are communal, intergenerational, and spiritually rooted knowledge systems that existing legal regimes including copyright, trademark, and design patent protection – were not designed to accommodate. The weaknesses inherent in the existing intellectual property systems in protecting indigenous traditional designs against commercial exploitation are analyzed in this research, which posits that only a sui generis legal system can provide effective protection. This study evaluates the various domestic sui generis initiatives in four different nations – New Zealand, Panama, Australia, and India, using a comparative approach to identify the common elements of successful design protection systems. In addition, this study considers the existing international legal framework in relation to the Nagoya Protocol on Access and Benefit Sharing, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and WIPO-IGC negotiations on genetic resources, traditional knowledge and folklore. The research work provides the sui generis model framework based on the comparative and normative analysis. Some of its elements are voluntary registration, moral rights for the sake of cultural integrity, obligation to share benefits, prior informed consent, collective rights of indigenous people, and enforceable civil remedies. According to the conclusions reached by the research work, the protection of indigenous traditional designs should include legislative measures both on the national and international levels because it involves matters of cultural self-determination and indigenous dignity.

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II. KEYWORDS

Indigenous Traditional Designs, Sui Generis Protection, Traditional Cultural Expressions, Misappropriation, WIPO-IGC.

III. INTRODUCTION

In 2015, French fashion label Isabel Marant faced criticism after garments in its Étoile Spring/Summer 2015 collection appeared to reproduce the traditional blouse designs of the Tlahuitoltepec Mixe community of Oaxaca. The controversy illustrates how commercial actors may extract aesthetic value from indigenous cultures without obtaining prior permission, providing adequate attribution, or ensuring any form of benefit-sharing. Through the marketing of the products of designs to customers through very high costs without telling the origin of the design, the Mixe community lost its cultural practices

This is also evident from documented debates concerning luxury fashion's reliance on Indian craft traditions. Dior's 2023 Mumbai show at the Gateway of India should not be characterized as an instance where practicing artisans were excluded, since the show was publicly presented as a collaboration with Chanakya International and the Chanakya School of Craft, with artisans working under the direction of Karishma Swali. The more precise criticism concerns the broader and long-standing dependence of European luxury houses on Indian embroidery ateliers, and whether such craftsmanship receives sufficiently visible creative credit, transparent provenance, equitable compensation, and sustained recognition in marketing and product narratives. Recently, Mukaish embroidery, a centuries-old metallic thread-work technique associated with Lucknow, was incorporated into a USD 200,000 overcoat shown as part of Dior's Fall/Winter 2025 Haute Couture collection, associated with Jonathan Anderson's Dior debut. The controversy concerned the absence of visible credit to Indian artisans and raised questions regarding attribution, benefit-sharing, and permission when such heritage craft

is used in luxury fashion.² Gucci's Cruise 2022 collection made use of Indian embroidery designs, and Etro's Spring/Summer 2021 collection made heavy use of Indian mirror-work designs. In all cases, high-profit luxury goods used the design language of the living community of artisans without any official sanctioning, acceptance, or proper remuneration. One of the greatest sources of knowledge on traditional textiles in the world is in India. Artisan communities have developed this live intellectual legacy over thousands of years. This legacy is communicated in the form of dyeing practices, motif languages, and weaving techniques that symbolize not only their cultural identity but also their livelihoods. But a geography of origin perspective is the very basis of the legal framework which is intended to protect this legacy.³

There have been numerous instances of the same in the past through history. The contemporary intellectual property law system forms an everlasting structural barrier. Some unique creations, which exist in a fixed form and are subject to copyright, may be used for a specific period after which their protection is removed. There is difficulty in dealing with creations that come out of oral tradition and lack any identifiable authors. Designers wanting to incorporate elements of historical designs will find it difficult since design patent laws of the US and other countries require them to show unique design that is non-obvious. Trademark law provides authorities with multiple applications, but it needs businesses to use their products commercially while obtaining their trademark rights which creates problems for indigenous communities who view their traditional designs as ancestral heritage.

² Business Today, 'No credit to Indian artisans: Dior slammed for \$200k coat with Lucknowi embroidery' *Business Today* (27 July 2025) <https://www.businesstoday.in/india/story/no-credit-to-indian-artisans-dior-slammed-for-200k-coat-with-lucknowi-embroidery-486500-2025-07-27> accessed 29 June 2026.

³ Christian Dior, 'Fall 2023 Ready-to-Wear Show' (Dior, 30 March 2023); LVMH, 'Dior Fall 2023, de Paris à Mumbai' (LVMH, 31 March 2023); Anders Christian Madsen, '5 Things to Know About Dior's Craft-Focused Pre-Fall 2023 Show in Mumbai' *British Vogue* (30 March 2023); Laure Guilbault, 'Backstage at Dior's Mumbai Show: Where Métiers d'Art Played a Star Role' *Vogue Business* (31 March 2023).

The global conversation about how to protect traditional cultural expressions and traditional knowledge has continued for more than thirty years. The World Intellectual Property Organization's Intergovernmental Committee on Genetic Resources Traditional Knowledge and Folklore established in 2000 has created multiple draft protection instruments but no international binding treaty has been achieved.

This paper proceeds in six substantive parts. Part II examines the nature and significance of indigenous traditional designs and the principal forms through which they are misappropriated. Part III subjects existing intellectual property regimes -copyright, design patent, trademark, and geographical indications to critical analysis, identifying their structural incapacity to protect communal, intergenerational design traditions. Part IV surveys the international normative landscape, evaluating the contribution and limitations of UNDRIP, the Nagoya Protocol, WIPO-IGC, and UNESCO frameworks. Part V draws on comparative domestic experience in New Zealand, Panama, Australia, and India to distil the essential features of effective sui generis protection. Part VI advances a model sui generis framework and considers the international coordination mechanisms necessary for its implementation. Part VII concludes.

A. Research Objectives

The research paper establishes its analytical framework through the following objectives which guide the research conducted in subsequent sections.

1. The study aims to analyze indigenous traditional designs as a separate cultural property category which exists apart from standard intellectual property rights because indigenous communities create the designs and the designs have religious value and traditional practices govern their use.
2. The research aims to identify all structural weaknesses that exist within current intellectual property systems which include copyright design patent trademark and geographical indications to determine their effectiveness in stopping unauthorized use of traditional designs.

3. The study evaluates whether international instruments- UNDRIP, the Nagoya Protocol, and WIPO-IGC drafts establish effective legal frameworks which protect rights through binding protective standards.
4. The research aims to study the sui generis systems used in New Zealand and Panama and Australia and India to discover essential components which should be included in a model framework.
5. The research proposes a sui generis system which gives indigenous communities collective rights through a process that requires their informed consent and establishes legally binding remedies for cultural damage.

B. Research Questions

The research paper is driven by the following research questions:

1. Are there any deficiencies within the existing regimes governing intellectual property including copyright, design patent, trademark, and geographical indications, which would prevent such regimes from protecting indigenous traditional designs against commercial appropriation, and if yes, what could the reasons for such deficiencies be?
2. Which substantive and procedural minimum standards should be satisfied by a sui generis regime for it to afford sufficient protection to indigenous traditional designs, having regard to the rights-based approach enshrined in UNDRIP and the principle of benefit-sharing under the Nagoya Protocol?
3. What lessons can be learned from the comparative analysis of regimes in place in New Zealand, Panama, Australia and India to devise an international sui generis regime?

C. Research Methodology

The methodology utilized here is doctrinal and qualitative. To identify the structural inadequacies of existing IP systems and to construct a normative basis for a tailored alternative, primary sources of law, including statutes, international treaties and

judgments, are studied alongside secondary sources, which include scholarly literature and policy documents. The doctrinal analysis concentrates on whether the basic assumptions of existing law can adapt to the communal, inter-generational and culturally embedded character of indigenous traditional designs, rather than just to what the existing law currently offers. The functionalist comparative analysis used here, after the tradition of Zweigert and Kötz, involves an examination of sui generis protection regimes in New Zealand, Panama, Australia and India in terms of the protective function rather than the legal categorization.

The three separate reasons that make up the argument for the sui generis legal system are discussed in detail. First is the instrumental reason; it is evident that the present laws do not stop anyone from using the designs of the indigenous people. The current system has offered no credible defense against any level of innovation. An answer that was developed with consideration of the problem must be used instead of developing an answer elsewhere and adjusting it for the use here.

The second one is the injustice principle, which states that indigenous people were deliberately stripped off their cultural and physical resources due to the process of colonization. The injustice suffered in history is compounded by the exploitation by the same civilization or subsequent civilizations of the cultural heritage without the permission of indigenous people. Lastly, the third one is the principle of self-determination. The principle of cultural self-determination, which gives indigenous people the rights to decide on how the cultural heritage is utilized and transferred, is one of the elements of self-determination in UNDRIP.

Vienna Convention interpretation principles are applied in this paper when interpreting international law instruments based on their history of negotiations. Furthermore, the study draws upon legal anthropological perspectives, post-colonial theory, as well as policy oriented approaches from New Haven School. In view of the right to cultural self-determination as stipulated in the UNDRIP, the study puts forward the moral and legal

norm that a sui generis system is needed. This article adheres to the Oxford Standard for Citation of Legal Authorities (OSCOLA) (4th edn).

IV. INDIGENOUS TRADITIONAL DESIGNS: NATURE, SIGNIFICANCE, AND MISAPPROPRIATION

A. The Character of Traditional Designs

The traditional designs of Indigenous cultures serve as design elements which carry cultural and historical and cosmological and social and spiritual meanings according to anthropological research. The facial tattoo of Māori people which is known as tā moko together with the Warli painting from Maharashtra and the Navajo sand painting and the Kente cloth geometric patterns of the Akan people from Ghana all contain cultural knowledge about how nature and ancestral spaces and people who are currently alive are interconnected.

The standards of customary law determine who is authorized to create or use these items based on specific situations and approved purposes. Traditional designs have their origins in group artistic activities which develop throughout different periods of history. The customs of their native culture have remained intact through the years because their practices have been passed down from one generation to another. The work exists as a multilinear creation which developed through multiple creative processes at different times throughout its existence.

Designers operate within a system of traditional responsibilities that they must fulfil. The Anishinaabe of the Great Lakes region make a distinction between community designs which belong to public domain and ceremonial designs which belong to specific clans and ceremonial societies.⁴ The unauthorized commercial use of the latter material constitutes both a legal infringement and a spiritual offense which creates real consequences for the community. The existing system of conventional IP law which

⁴ Anishinaabe Cultural Institute, 'Anishinaabe Cultural Protocols' <https://www.anishinaabecultural.org> accessed 1 June 2026.

defines public domain and personal ownership rights lacks the ability to identify these particular distinctions.

B. Forms of Misappropriation

People consider cultural misappropriation to be the act of taking intellectual property rights and cultural expressions and historical artifacts and their traditional knowledge systems without obtaining permission. The Nazis in Germany misappropriated cultural expressions from India through their use of the swastika symbol. The recent public discussion about cultural misappropriation began when companies Urban Outfitters and MAC faced criticism for using cultural designs and patterns without obtaining proper permissions and making appropriate attributions. Nike announced its plan to sell special edition "Air Force 1 Puerto Rico" sneakers which featured Guna cultural mola patterns that Nike mistakenly claimed to be Puerto Rican designs. The Guna people opposed this plan which resulted in Nike cancelling the shoe release. Western designers who focus on European styles have built their success through the theft of traditional designs and music and dance and hair styles from minority cultures who receive only minimal acknowledgment.⁵

Commercial enterprises use indigenous traditional designs without permission through a range of activities that lead to design theft. The most obvious form of design theft involves businesses copying indigenous designs through their direct reproduction of these designs as commercial products which they sell to customers. The 2015 Isabel Marant controversy exemplifies this form. Australian textile manufacturers have faced multiple legal actions because they reproduce Aboriginal dot paintings to create carpets and fabrics and tourist merchandise without obtaining artist permission or making payments.

⁵ Susan Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press 2005) 30-45.

The second form of this legal matter proves more complicated because it involves stylistic appropriation through the implementation of indigenous design elements which include patterns and colour palettes and compositional methods in product designs that do not directly copy protected works but succeed through their indigenous cultural ties. Fast fashion brands have repeatedly deployed this strategy which produces "tribal" or "ethnic" collections that don't reproduce specific cultural traditions but rather create an impression of those traditions.

The third category of misappropriation occurs when parties outside the original group attempt to register trademarks or design patents or geographical indications that contain indigenous cultural elements. Biopiracy through cultural expansion exists as a more organized practice because traditional design patterns get registered as industrial designs or decorative trademarks in areas where the originating community lacks the ability to contest such registrations.

The economic consequences of misappropriation are substantial. The Productivity Commission's 2022 study on Aboriginal and Torres Strait Islander Visual Arts and Crafts, found that spending on inauthentic Aboriginal-style souvenir merchandise in Australia amounted to approximately AUD 54 million annually, while total sector sales (authentic and inauthentic combined) reached at least AUD 250 million. The economic benefit from inauthentic merchandise flows entirely to non-indigenous manufacturers and retailers, while indigenous artists earn nothing from the commercial exploitation of their cultural aesthetic.⁶

V. THE INADEQUACY OF EXISTING INTELLECTUAL PROPERTY FRAMEWORKS

⁶ Productivity Commission, Aboriginal and Torres Strait Islander Visual Arts and Crafts, Study Report (December 2022) 12–15 <https://www.pc.gov.au/inquiries/completed/indigenous-arts/report> accessed 1 June 2026.

A. Copyright Law

Copyright stands as the most logical choice for safeguarding traditional designs because it provides protection for artistic works without requiring artists to register their creations. The copyright system fails to accomplish this function because it contains multiple structural limitations.

First, copyright requires an identifiable human author. Member states can use Article 7(3) of the Berne Convention to protect anonymous works according to a time period that starts from the creation date.⁵ The copyright statutes establish authorship rights for natural persons and legal entities while they do not recognize communities as authors. Indigenous organizations face challenges in copyright registration for traditional works because courts cannot determine which doctrinal framework applies to their case.

Copyright law safeguards only the specific expression of artistic works and does not provide protection for artistic styles or conceptual ideas. The design vocabulary which includes specific geometric patterns and colour combinations and compositional grammar remains available for others to use even when an artist's traditional design interpretation receives copyright protection. Copyright law purposes to protect only specific artistic expressions which makes it impossible for others to use stylistic elements from protected works.

The third requirement for originality creates difficulties for designers who want to create products using established design conventions. In *Milpurrruru v. Indofurn Pty Ltd*, the Federal Court of Australia granted copyright protection to eight Aboriginal artists whose traditional artworks -bark paintings and related works had been reproduced without authorization onto carpets manufactured in Vietnam and imported by the defendant. The Court recognized the artists as copyright owners of those artworks and awarded damages, including for cultural harm caused by the reproduction of sacred designs. Critically, however, the protection extended to each artist's specific artwork; the underlying traditional design vocabulary shared across the community received no protection.⁶ The court's reasoning demonstrated both the limited reach of copyright in

this context and the urgent need for a legal instrument designed specifically for communal traditional works.

B. Design Patent and Registered Design Law

Registered design law exists through three separate legal systems which include the U.S. design patent system, the EU Community Design system, and the Hague System for International Registration of Industrial Designs to safeguard new decorative design elements that designers create for their products.⁷ The requirement for novelty disqualifies most traditional designs which cannot be considered new according to their fundamental definition. The TRIPS Agreement's Article 25 requires WTO members to protect independently created industrial designs that are new or original but explicitly excludes designs dictated essentially by technical or functional considerations a category that does not assist indigenous communities but demonstrates the regime's limited ambit.⁸

The registered design system maintains the same problem as copyright concerning individual authorship, but it introduces an additional requirement for registration, which demands that the design owner must possess both institutional knowledge and financial capacity to manage foreign IP office procedures in an unfamiliar language. The transaction costs of registration across the multiple jurisdictions where appropriation occurs are prohibitive for indigenous communities operating with minimal resources.⁹

C. Trademark and Certification Marks

The trademark law system provides better options than other legal systems because it allows more flexible execution of its regulations. A certification mark enables a certifying

⁷ WIPO, 'The Hague System for the International Registration of Industrial Designs' <https://www.wipo.int/treaties/en/registration/hague/> accessed 1 June 2026; see also Council Regulation (EC) 6/2002 on Community designs [2002] OJ L3/1, art 1.

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS), art 25.

⁹ *Milpurrru v Indofurn Pty Ltd* (1994) 54 FCR 240 (Fed Ct Austl); see Michael Blakeney, 'Protecting the Products of Minds: Cultural Rights and Intellectual Property' (1995) 2 Murdoch University Electronic Journal of Law <https://www5.austlii.edu.au/au/journals/MurUEJL/1995/4.html> accessed 1 June 2026.

organization to confirm that products displaying the mark adhere to predetermined criteria that include requirements for cultural heritage verification. The Indian Arts and Crafts Act of 1990 in the United States, while not a trademark law per se, operates on a similar logic by prohibiting the sale of goods falsely represented as Native American-made. Australia's AUTHENTIC trademark operated by AIATSIIS functions as a certification system that ensures only authentic Aboriginal and Torres Strait Islander artwork and products receive certification.¹⁰

Certification marks function as protection methods yet their effectiveness stops at establishing false identity protection. The system protects indigenous design elements from unauthorized commercial usage by non-indigenous businesses who do not identify themselves as indigenous. A fashion brand that uses Navajo geometric patterns without declaring its production of "Navajo art" has not violated any trademark laws. The process of certification system management requires organizations that lack sufficient resources to sustain their operations which creates ongoing demands on indigenous entities.

D. Geographical Indications

Geographical indications (GIs) protect products whose quality, reputation, or other characteristics are essentially attributable to their geographic origin. The two products-Darjeeling tea and Champagne serve as standard examples for this development. GIs function as a protective mechanism for indigenous crafts and designs which originate from specific territories. Oaxacan huipiles from the Mixe community possess potential for geographical indication protection if legal and organizational frameworks exist to validate such a request.

The GI mechanism, however, faces several obstacles in the indigenous context. The system protects the association between products and their geographic origins but it does not safeguard their specific design elements. The system requires two components which

¹⁰ AIATSIIS, 'AUTHENTIC: Supporting Genuine Indigenous Art' <https://aiatsis.gov.au/authentic> accessed 1 June 2026.

include product specifications and a controlling organization yet many communities lack the necessary institutional resources to fulfill these requirements. GI protection becomes unavailable to non-agricultural products in jurisdictions that restrict GI registration to foodstuffs and beverages.¹¹

VI. THE INTERNATIONAL NORMATIVE FRAMEWORK: PROGRESS AND IMPASSE

A. UNDRIP and the Rights-Based Approach

The United Nations Declaration on the Rights of Indigenous Peoples which the General Assembly adopted in 2007 establishes a framework which protects indigenous cultural rights through its rights-based structure. Article 11 of the document grants indigenous peoples the right to safeguard their cultural heritage and their traditional knowledge and their traditional cultural expressions. UNDRIP further requires states to take effective measures to recognize and protect the exercise of these rights. UNDRIP functions as a non-binding international instrument which courts and legislative bodies have used as a guide to interpret its content.¹²

UNDRIP establishes free prior and informed consent (FPIC) as a mandatory condition which must be fulfilled before state or third-party groups can undertake activities that impact indigenous cultural heritage. The principle which exists in Articles 11, 19 and 28 functions as the fundamental legal base which every effective sui generis design protection system needs to implement consent-based access procedures. FPIC exists as more than a procedural rule because it enables indigenous peoples to maintain control over how their cultural heritage interacts with outside entities.

¹¹ TRIPS (n 5) art 22-24; see also Daniel Gervais, 'Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement (Geographical Indications)' (2010) 11 *Chicago Journal of International Law* 67, 88-91.

¹² United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st sess, UN Doc A/RES/61/295 (13 September 2007).

B. Convention on Biological Diversity and the Nagoya Protocol

The Convention on Biological Diversity (1992) and its supplementary Nagoya Protocol on Access and Benefit-Sharing (2010) were established to stop indigenous and local communities from losing their genetic resources and traditional knowledge. The Nagoya Protocol establishes an access and benefit-sharing (ABS) framework which demands that genetic resources and traditional knowledge (TK) be accessed through prior informed consent (PIC) and mutually agreed terms (MAT).

The Nagoya Protocol requires national registers to document community custodianship which must lead to fair benefit-sharing and establish a compliance system that the Access and Benefit-Sharing Clearing-House (ABSCH) uses for enforcement. The Protocol shows how an international treaty can implement benefit-sharing requirements across different legal systems to address the international issue of design misappropriation.¹³

C. WIPO-IGC Negotiations

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore remain the most relevant international forum for developing intellectual property-based protection for traditional knowledge and traditional cultural expressions. Since 2001, it has undertaken text-based negotiations concerning genetic resources, traditional knowledge, and traditional cultural expressions. A major development occurred on 24 May 2024, when WIPO member states adopted the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.

The treaty establishes a mandatory patent-disclosure requirement where claimed inventions are based on genetic resources or associated traditional knowledge, including disclosure of the country of origin or the Indigenous Peoples or local community

¹³ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (adopted 29 October 2010, entered into force 12 October 2014) 3008 UNTS 1, arts 5-7 <<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>> accessed 1 June 2026.

providing the associated knowledge. However, the treaty does not create a specific protection regime for traditional cultural expressions or indigenous traditional designs. Therefore, while it marks a historic breakthrough in WIPO-level norm-making, the TCE/design-specific protection question remains unresolved.¹⁴

The WIPO-IGC draft on TCEs identifies as protectable subject matter "expressions of folklore," including graphic and plastic art, designs, and artistic expressions a category that would encompass indigenous traditional designs. The main points of disagreement involve whether design protection should cover future designs only or include existing public domain designs and whether research and education should receive special exceptions and how to determine which communities should receive protective rights. The draft also remains divided between a rights-based approach and a more minimalist "misappropriation" approach that would merely prohibit deceptive or disrespectful uses.¹⁵

The WIPO-IGC division between developed and developing countries demonstrates the ongoing conflict about how intellectual property rights affect economic advancement. Developed countries, particularly those with significant cultural industries, resist strong protective frameworks that might constrain commercial actors' freedom to draw on global cultural repertoires. The indigenous populations of developing countries who experience the negative effects of misappropriation demand strong legal protections that include essential benefit-sharing agreements. Accordingly, the position is no longer that WIPO-level norm-making has produced no binding result at all; rather, the more precise position is that a binding WIPO instrument has now been adopted for genetic resources and associated traditional knowledge, while negotiations on traditional knowledge and

¹⁴ WIPO, The Protection of Traditional Cultural Expressions: Draft Articles, WIPO Doc WIPO/GRTKF/IC/40/4 (18 March 2021) https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=637076 accessed 1 June 2026.

¹⁵ WIPO IGC, 'Draft Provisions on Traditional Cultural Expressions' (WIPO, 2021) https://www.wipo.int/en/web/igc/draft_provisions accessed 1 June 2026.

traditional cultural expressions, including design-related TCEs, continue under the IGC process.

D. UNESCO and Cultural Heritage Frameworks

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) establishes legal requirements which mandate countries to protect their living cultural heritage, including their traditional crafts and upcoming cultural activities.¹⁶ The Convention establishes national inventories and safeguarding measures which its member states use to create evidence-based administrative frameworks that support future sui generis legal systems. The 1970 UNESCO Convention on illicit traffic in cultural property and the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects demonstrate international legal restrictions which govern cultural heritage trade and which could extend to commercial use of traditional designs. A further instrument of direct normative relevance is the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005, 2440 UNTS 311). The 2005 Convention explicitly recognises the right of states and communities to protect and promote the diversity of cultural expressions, including traditional designs and artistic forms that serve as bearers of cultural identity and communal values.

It affirms state obligations to adopt measures that safeguard cultural expressions within their territories and encourages international cooperation toward that end. The 2005 Convention is significant in the context of this paper due to the creation of the complementary normative basis with UNDRIP. UNDRIP relies on the rights of indigenous people to self-determination and cultural heritage to justify its protection while the 2005 Convention does the same from the perspective of promotion of cultural diversity. Together, these instruments provide a robust international normative basis for the sui generis regime proposed in Part VI.

¹⁶ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.

VII. COMPARATIVE DOMESTIC EXPERIMENTS WITH SUI GENERIS PROTECTION

A. New Zealand: Mātauranga Māori and Design Protection

New Zealand demonstrates the highest level of common law development which addresses Māori intellectual property issues. The Trade Marks Act 2002 establishes the Maori Trade Marks Advisory Committee as a body which advises the Commissioner on whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Maori sign, including text or imagery, is, or is likely to be, offensive to Maori.¹⁷

The Patents Act 2013 establishes a Maori advisory committee which, on request, advises the Commissioner on whether an invention claimed in a patent application is derived from Maori traditional knowledge or from indigenous plants or animals, and, if so, whether its commercial exploitation is likely to be contrary to Maori values. The indigenous communities have established their presence in IP decision-making processes through these advisory bodies which do not have final authority.¹⁸

New Zealand has explored various sui generis approaches which extend beyond traditional legal frameworks. The Waitangi Tribunal's report on WAI 262 - the Flora, Fauna and Cultural and Intellectual Property claim, originally filed in 1991 by six iwi claimants was released in 2011 following a two-decade inquiry. Published as *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, the report recommended creating a Mātauranga Māori Act to protect Māori traditional knowledge and cultural expressions through designs which would function outside traditional IP copyright frameworks. The recommendation has

¹⁷ Trade Marks Act 2002 (NZ), ss 177-178

<https://www.legislation.govt.nz/act/public/2002/0049/latest/DLM165216.html> accessed 29 June 2026.

¹⁸ Patents Act 2013 (NZ), ss 225-228

<https://www.legislation.govt.nz/act/public/2013/0068/latest/DLM1419595.html> accessed 1 June 2026.

not yet become law but it has led to ongoing policy work and the development of the 2019 Te Ara Matihiko (Digital Pathways) document which analyzed ways to protect Māori cultural intellectual property.¹⁹

B. Panama: Law No. 20 of 2000

Panama passed Law No. 20 of 2000 on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of Their Cultural Identity and Their Traditional Knowledge. This was one of the first full sui generis TCE protection laws in the world. The law protects the collective rights of Panama's indigenous people when they wear traditional clothing, make art, play music, and do other cultural things. The rights belong to the whole indigenous community and are managed by the community's General Congress. The regime is permanent; rights do not expire, and commercial use of protected cultural expressions by nonindigenous individuals necessitates prior authorization from the General Congress of the pertinent community.²⁰

People have praised Panama's Law No. 20 for recognizing collective rights and linking rights to cultural expression to political self-governance structures. However, it has had problems with implementation. For example, it is very hard for indigenous communities to enforce their rights because they have to deal with a lot of paperwork, and it is still very hard to enforce against foreign businesses across borders.

C. Australia: The Carpets Cases and Legislative Reform

Australian law has developed through several important court decisions which deal with unauthorized copying of Aboriginal art. The eight Aboriginal artists who sued an

¹⁹ Waitangi Tribunal, Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, WAI 262 (2 July 2011) <https://waitangitribunal.govt.nz/en/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released> accessed 1 June 2026.

²⁰ Ley No 20 de 26 de junio de 2000 sobre el Régimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indígenas para la Protección y Defensa de su Identidad Cultural (Panama); English text: WIPO, 'Law No 20 of 2000 (Panama)' <https://www.wipo.int/wipolex/en/text/497286> accessed 1 June 2026.

importer of carpets for displaying their artwork sued to get justice from *Milpurrurru v. Indofurn Pty Ltd*.²¹ The court granted extra damages which showed how the false sacred design reproduction damaged cultural ties to the sacred designs because this method recognized community rights to cultural protection through an incomplete system. The Federal Court in *Bulun Bulun v. R & T Textiles Pty Ltd* established that an indigenous artist must protect sacred designs through fiduciary duties which copyright holders must fulfill because their rights belong to their entire community.²²

D. India: Geographical Indications and Tribal Art

India has implemented the Geographical Indications of Goods (Registration and Protection) Act, 1999, to safeguard multiple tribal art forms which include Madhubani paintings, Kondapalli toys, Channapatna toys, and Warli paintings. The registration of a geographic indication grants its holder the authority to stop unauthorized commercial use of their protected indication. The existing protection for geographic indications applies only to specific locations, which allows manufacturers outside protected areas to use the complete artistic vocabulary of the designated design. India lacks a separate dedicated law for protecting traditional designs, although the Biological Diversity Act of 2002 and the Protection of Plant Varieties and Farmers' Rights Act of 2001 offer limited protective frameworks in their respective areas.²³

The Indian experience demonstrates how GI protection provides useful benefits, yet it fails to function as an effective alternative to dedicated design legislation. The registration of GI has generated financial benefits for indigenous craft communities, which created

²¹ *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240; Michael Blakeney, 'Protecting the Products of Minds' (1995) 2 Murdoch University Electronic Journal of Law <https://www5.austlii.edu.au/au/journals/MurUEJL/1995/4.html> accessed 1 June 2026.

²² *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244; Kathy Bowrey, 'The Outer Limits of Copyright Law -Where Law Meets Law Reform' (1998) 12 Indigenous Law Bulletin 87 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/IndigLawB/1998/87.html> accessed 1 June 2026.

²³ Geographical Indications of Goods (Registration and Protection) Act 1999 (India), No 48 of 1999; WIPO, 'India: Geographical Indications of Goods Act' <https://www.wipo.int/wipolex/en/legislation/details/2302> accessed 1 June 2026.

better understanding among people about the geographic roots of traditional artistic expressions. The system cannot solve the primary issue which involves non-Warli manufacturers using Warli-style patterns without making any geographic assertions, while it lacks a method to obtain community approval or share advantages beyond the protected geographic indication.

VIII. SUGGESTIONS AND RECOMMENDATIONS

A. Essential Elements of a Model Sui Generis Regime

Based on the comparative analysis above and the normative framework of UNDRIP and the WIPO-IGC drafts, a model sui generis regime for the protection of indigenous traditional designs should include the following elements.

1. Definition of protected subject matter: The regime should protect "traditional designs," which are designs, patterns, motifs, ornamentation, and artistic expressions that:

- come from or are closely related to an indigenous cultural tradition;
- are kept, practiced, and passed down within that tradition; and
- have cultural, spiritual, or community meaning that the community recognizes.²⁴

The definition should be written in such a way that it includes both old and new ways of expressing tradition. This is because traditional designs are still living cultural forms, not just old objects.

2. Collective Rights Holders: The indigenous community which possesses indigenous design traditions should receive collective rights according to their customary laws and governance systems. The system should recognize all types of rights-holding entities which exist as legitimate rights-holders instead of enforcing one specific community governance structure. The strategy

²⁴ WIPO, The Protection of Traditional Cultural Expressions: Draft Articles (n 10) art 1-3.

reflects the increased recognition of legal pluralism in international laws of indigenous peoples' rights.

3. **Prior Informed Consent and Benefit-Sharing Requirements:** Individuals who are not members of the group owning the indigenous rights need to get prior informed consent (PIC) via culturally appropriate means of consultation before using any of the designs for commercial use. They must also comply with the Mutually Agreed Terms (MAT) in which the sharing of the benefits will be defined. The strategy complies with the requirements of UNDRIP Article 11 on free prior and informed consent and benefit-sharing mechanism required by the Nagoya Protocol.
4. **Moral Rights-Cultural Integrity:** The protection of the whole cultural integrity of the designs requires the inclusion of moral rights in copyright. The rights would grant communities the power to prevent any disrespectful or deceptive or sacrilegious treatment of their designs which exists apart from financial gain.
5. **Registration and Documentation:** The regime needs to establish a voluntary registration system which enables communities to record their traditional designs into a secure database as part of their rights implementation process. Non-registration should not take away essential rights from communities because registration should function as an optional process which does not determine their legal status. The system ensures that communities without institutional capacity to submit design registrations will not face any penalties which follow design registration processes.
6. **Exceptions:** The sui generis system needs to have clearly stated exceptions for:
 - cultural and educational purposes without any commercial gain,
 - accidental inclusion in news reporting and criticism,
 - traditional use by members of the indigenous community, and
 - uses approved under customary law.

The exceptions should be limited in scope and should meet the following criteria set out in TRIPS Article 13 limited to special cases, not prejudicial to the usual exploitation of the design, and not unfairly discriminatory against the rights-bearing community.

7. Enforcement Mechanisms: The issue of enforcement has consistently been the problem area in any regime to protect TCE. In developing the model regime, there should be:

- civil remedies such as injunction, damages (including cultural damage), and account of profits;
- customs power to seize infringements;
- government-provided legal aid for communities that lack the capacity to enforce their rights on their own; and
- dispute resolution mechanisms for indigenous culturebased disputes.

B. International Coordination

Domestic sui generis protection, no matter how sophisticated, cannot work without international coordination. Commercial misappropriation of indigenous designs tends to happen internationally, wherein the designs created by indigenous peoples in less developed states are appropriated for commercial purposes by firms in developed countries.²⁵ International coordination will thus be necessary to make sure that the rights afforded in the originating states can be made operative in the countries where infringement takes place.

There is no more suitable multilateral institution for international coordination than the WIPO-IGC. The adoption of the 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge demonstrates that WIPO member states can reach consensus on related Indigenous knowledge issues after prolonged

²⁵ WIPO IGC, Draft Provisions on Traditional Cultural Expressions (n 11); see also Madhavi Sunder, 'IP3' (2006) 59 Stanford Law Review 257, 295–301.

negotiations. That precedent strengthens the case for moving the current TK/TCE draft texts, including TCE-specific protection for indigenous traditional designs, toward a diplomatic conference with greater political support. The agreed treaty must be equipped with minimum standards of protection akin to those of the minimum standards of the Berne Convention for copyright while granting member states sufficient room in formulating their own domestic mechanisms for protecting TCEs. In addition, the treaty must contain a provision for national treatment, whereby states grant foreign indigenous communities the same protection as domestic communities.²⁶

IX. CONCLUSION

The misuse of traditional indigenous designs, therefore, presents a situation where there is a clear gap in existing intellectual property law and policy, a gap that cannot be adequately filled by conventional copyright, design patent, trademark, and geographical indication laws because the very nature of traditional indigenous designs precludes any effective application of such regimes. Consequently, what is required is an independent *sui generis* legal regime, a regime tailored to protecting the unique characteristics of traditional indigenous designs.

The conceptual framework is not lacking. The United Nations Declaration on the Rights of Indigenous Peoples establishes the rights-based premise. The Nagoya Protocol on Access and Benefit-Sharing provides the mechanism. The draft texts of the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore provide a text for international negotiations. Even domestically, efforts in New Zealand and Panama have

²⁶ WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles* (n 10); Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as revised) 828 UNTS 221, art 5 (national treatment principle).

shown that it can be legally achieved. What is missing, however, is the political will to do so.²⁷

X. BIBLIOGRAPHY

A. International Instruments

1. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.
2. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.
3. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, Oct. 29, 2010, 3008 U.N.T.S. 1.
4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869, U.N.T.S. 299.
5. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1.
6. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, adopted 24 May 2024
7. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 2440 U.N.T.S. 311.
8. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

B. Domestic Legislation

1. Biological Diversity Act, No. 18 of 2002 (India).
2. Geographical Indications of Goods (Registration and Protection) Act, No. 48 of 1999 (India).

²⁷ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf accessed 1 June 2026.

3. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (25 U.S.C. §§ 305–305e).
4. Patents Act 2013 (N.Z.).
5. Trade Marks Act 2002 (N.Z.)

C. Cases

1. *Bulun Bulun v. R & T Textiles Pty Ltd* (1998) 86 FCR 244 (Fed. Ct. Austl.).
2. *Milpurrurru v. Indofurn Pty Ltd* (1994) 54 FCR 240 (Fed. Ct. Austl.).

D. INSTITUTIONAL REPORTS AND DOCUMENTS

1. Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No. 122 (2013).
2. Daes, Erica-Irene, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).
3. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, WAI 262 (2011).
4. WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO Doc.
5. WIPO/GRTKF/IC/40/4 (Mar. 18, 2021).