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Creative Differences: Indigenous Artists and the Law at 20th Century Nation-Building Exhibitions

LUCAS LIXINSKI* AND STEPHEN YOUNG**

ABSTRACT

Indigenous peoples in major common law jurisdictions (Australia, Canada, New Zealand, and the United States) have had a fraught relationship with the state's legal system. However, while denying Indigenous individuals and peoples the same rights as white settlers, each of these states used Indigenous art to create a distinctive national-state identity. We analyze four major exhibitions, one from each of these countries to de-naturalize legal institutions responsible for the oppression of Indigenous people. This agenda-setting, comparative legal analysis yields valuable insights for the regulation of the contemporary Indigenous art market, and to understand how culture makes legal personality.

Keywords: Indigenous art; self-determination; colonialism; background norms; exhibitions; legal personality.

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TABLE OF CONTENTS

| | |
|--|----|
| I. INTRODUCTION | 5 |
| II. INDIGENOUS ART AND THE (UN)MAKING OF RIGHTS HOLDERS | 9 |
| A. NEW ZEALAND 1906: WHITE SALVAGE AND INDIGENOUS PRESERVATION | 9 |
| B. CANADA 1927: NATIONAL IDENTITY THROUGH THE ILLEGAL INDIGENOUS ARTS | 15 |
| C. UNITED STATES 1939: INDIGENOUS ART FROM “CIVILIZATION” TO “AUTHENTICITY” | 19 |
| D. AUSTRALIA 1988: INTERNATIONAL PRAISE TO LEVERAGE DOMESTIC RECOGNITION | 24 |
| III. BREAKING THE CYCLE? A RESEARCH AGENDA..... | 29 |
| A. INDIGENOUS PRODUCTIONS AS ART OR ETHNOLOGY..... | 30 |
| B. RECOGNITION OF PEOPLES | 31 |
| C. ASSIMILATIONISM | 32 |
| D. STATE PATRONAGE | 33 |
| E. INDIVIDUAL VERSUS GROUP RIGHTS..... | 34 |
| F. CONNECTION BETWEEN INDIGENEITY AND NATIONALISM | 35 |
| G. KNOWLEDGE CREATION AND POWER ASYMMETRIES | 36 |
| IV. CONCLUDING REMARKS..... | 37 |

I. INTRODUCTION

Throughout most of the 20th century, Indigenous peoples in major common law jurisdictions (Australia, Canada, New Zealand, and the United States) have had complex if not fraught relationships to each state's legal system.¹ At various times, these states did not recognize Indigenous individuals and peoples as having access to the same rights as white settlers. And yet, as we explore here, Indigenous art played a role in state-building and the cultivation of distinctive national-state identities. We examine four international exhibitions, which were used to showcase the distinctive art as 'belonging to' the nation-state and, in doing so, suggest plausible narratives of distinct national identities. As we explore here, there were key tensions with showcasing these arts. These exhibitions, in their promotion and co-option of Indigenous art for national identity-building produced questions about the identification of rights holders and the originality of Indigenous art as "art" that influenced broader debates about the legal recognition of Indigenous peoples in those four countries.

The international and comparative regulation of Indigenous art is a fruitful yet un(der)explored space where Indigenous identities, recognition, and rights are negotiated, often through background norms.² Critical (international) legal scholars have sought to articulate the importance of background norms through the interrelation of public international law to private law.³ In articulating the 'background norms', they target a 'common sense' approach to law and the market. This common-sense approach maintains the idea that, broadly, government is man-made and the market is natural and spontaneous order of human exchange.⁴ For critical legal scholars, that view obscures multiple debates and issues worth interrogating, which is why they seek to bring the 'background norms' to the foreground.⁵ Where some believe that the market is a naturally and spontaneously occurring phenomenon and that law or international law

1. Kristy Gover, *Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples*, 26 (2) EUR. J. OF INT'L L. 345 (2015).

2. Terri Janke & R Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006*, ABORIGINAL AND TORRES STRAIT ISLANDER ARTS BOARD, AUSTRALIA COUNCIL (2006).

3. David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 330, 370-72 (1994).

4. *Id.* at 372.

5. Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131 (2007). For non-art related context that reads legality into the creation of markets (and its crises), see ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 82-123 (Cambridge University Press 2003).

must catch-up to constrain its excesses,⁶ that style of narration obscures the legal processes in creating the conditions, contingencies, and social relations of the market.⁷ Accordingly, the supposed 'excesses' of the marketplace are part and parcel of that legal construction.

Narrative styles that maintain and reproduce these background norms do important work in shaping the realm of possibilities for broader recognition efforts through law. We take the regulation of Indigenous art seriously not only to understand the background norms and stakes of recognition, but also to better appreciate the interlinking of law with economic domains that are manifested in the art market. More specifically, our analysis shows that state-based legal regulation of Indigenous art has never been static. The legal regulations of and for Indigenous art became more important as states emerged from empire and formalized themselves to extend their own territories and boundaries. Similarly, the categorization of objects that are considered 'art' is flexible and dynamic. At first, Indigenous or 'native' objects were categorized as something other than 'art', but they were important and useful in forming national identities in support of the formalizations of the nation-state. As states emerged from colonies and through domains, classification involved (re)producing the category of art as applicable to Indigenous objects. The increasing formalization of state law then discursively produces the background norms for commodification of these art-objects as well as identities, in terms of claims to an 'authentic self' and national-identities for the nation-state and Indigenous nations.

We argue that the formalization of state boundaries reveals that employing legal frameworks for directly addressing and protecting Indigenous artists and art will continue to be dynamic, fraught, contested and limiting. Turning to national and international legal regimes to contain the so-called excesses of the marketplace maintains and reproduces a narrative style about background norms while it produces debates and contests, including: whether Indigenous objects are art or artefact, recognized or assimilated, dependent on state patronage versus exercising self-determination, or pathways to identity, capacity and rights. Rather than solve or fix these issues, legal regimes narrow the field of contestation to legitimate discourses that perpetuate background norms, so this winnowed

6. Neoliberals, like Friedrich A. von Hayek advocated for spontaneous ordering and market-based freedoms that required and depended on rights and the rule of law. *See* JESSICA WHYTE, *THE MORALS OF THE MARKET: HUMAN RIGHTS AND THE RISE OF NEOLIBERALISM*, 19-203 (2019); *see also* FREDRICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* 35-54 (1998).

7. Kennedy, *supra* note 3, at 372.

range of debates remain contested. Those legal contests, however, are valuable. They produce the opportunities for more legal claims, claims to authenticity, identity, and nation as well as a range of economic opportunities and they obscure any debate about the role of legality in constructing the market and those problems.

We make this argument through examining four major exhibitions, one in each of these four common law countries: the 1906 *New Zealand International Exhibition* in Christchurch, which curated the notion of ‘Maoriland’ that combined the Pākehā (non-Māori, white, person) salvage mentality and a genuine Māori concern to preserve and maintain their cultural heritage; the 1927 *Exposition d’Art Canadienne* at the Jeu de Palme Museum in Paris, which highlighted the incongruousness of legally protecting art and artists in contexts where cultural practices were otherwise legally forbidden; the 1939 *San Francisco World’s Fair*, which promoted Indian Arts to demonstrate Indian economic independence as a marker of their civilization; and the 1988 touring exhibition *Dreamings: The Art of Aboriginal Australia* that cemented domestic recognition efforts through appeals to international audiences and international legal discourse.

This is an agenda-setting article: additional research is needed because the case studies only offer snapshots of imperial workings and reproduction. The exhibitions on which we focus happened at different times over the course of the 20th century, meaning we need to deal not only with different countries, but also different moments in the international Indigenous movement, and different points of the state of the art with respect to scientific racism and colonialism. As a result, our account is more comparable to vignettes than a fully realized linear narrative. That is a fair possible objection to this article.

Nonetheless, we deal with this objection by accounting for those differences in discourse to highlight different modes of engagement while resisting linear narratives of progress.⁸ That is also a reason why we structure our discussion of these exhibitions in chronological order. Further, these snapshots enable a much more comprehensive sense of the direction of legal argument on Indigenous rights seen through the perspective of Indigenous art than would otherwise be possible.

Further, and vitally, we are both non-Indigenous scholars, meaning our positioning in the discussion of these themes is complicated by our own

8. We highlight the role of a linear narrative of progress, but not for the purposes of supporting it. For a discussion of the role of these narratives in legal argument, see Tilmann Altwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship?*, 25(2) EUR. J. INT’L L. 425 (2014).

non-Indigenous (and settler colonial) positionalities.⁹ Nevertheless, our position as insiders to the colonial legal order we seek to critique and unravel is also useful for understanding and articulating the role of law, and we do not seek to replace Indigenous voices and claims with our own. Instead, we wish to bring background norms forward to scrutinize ongoing colonial formations, which is necessary for Indigenous peoples to better position their own legalities.

Despite these limitations, this article offers significant benefits that might not be otherwise attainable. Our comparative historical and legal analysis de-naturalizes legal institutions responsible for the oppression of Indigenous peoples. Further, our comparison of these four jurisdictions fosters legal innovation by yielding valuable insights for the regulation of the contemporary (Indigenous) art market, as well as for understanding how culture (and cultural history with it) is interrelated to the making of legal personality, which continue to be contested grounds for rights recognition battles.¹⁰ However, we ultimately conclude that further research in this area is warranted, especially research attentive to international and comparative colonial legalities.

We intervene in comparative law more broadly by de-localizing settler-Indigenous experiences.¹¹ While a common assumption, particularly connected to certain readings of cultural anthropology, is that experiences are unique, culturally contingent, and we should not be too quick to generalize them,¹² a comparative analysis provides a broader vantage point, especially for understanding the role of law and legality as processes of abstraction.¹³ That is to say, we seek to draw attention to the processes of legal abstraction arising from background norms that would be occluded, obfuscated or ignored in detailed analysis of a singular, particular and localized account. When it comes to the settler states we examine, each state derived from a British colonial project which engaged with

9. For a discussion of positionality, see Celina Carter et al., *Explicating Positionality: A Journey of Dialogical and Reflexive Storytelling*, INT'L J. QUALITATIVE METHODS 362 (2014).

10. JONAS BENS, *THE INDIGENOUS PARADOX: RIGHTS, SOVEREIGNTY, AND CULTURE IN THE AMERICAS* (2020); see generally STEPHEN YOUNG, *INDIGENOUS PEOPLES, CONSENT AND RIGHTS: TROUBLING SUBJECTS* (2020).

11. For a recent example of this type of intervention in history, see Jane Carey & Ben Silverstein, *Thinking With and Beyond Settler Colonial Studies: New Histories after the Postcolonial*, 23 POSTCOLONIAL STUDIES 1 (2020).

12. This discussion dates to the origins of cultural anthropology. For a recent account, see CHARLES KING, *THE REINVENTION OF HUMANITY: HOW A CIRCLE OF RENEGADE ANTHROPOLOGISTS REMADE RACE, SEX AND GENDER* (2020).

13. Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

Indigenous peoples based on the same premise – the want to expand of empire. However, colonialists engaged with Indigenous peoples in different places and times and faced local differences and resistances.¹⁴ Second, Indigenous movements are themselves internationalized, meaning they often share strategies across national boundaries.¹⁵ Finally, the scientific racism against which these internationalized Indigenous rights movements operate does not respect national boundaries nor cultural specificities of Indigenous peoples, responding instead to colonial projects and discourses that are far more internationalized.¹⁶ We do not mean to engage with these issues only from the perspective of colonial law and categories, of course, or to applaud colonialism or de-emphasize resistance. Instead, we seek to draw further attention to the background norms against which Indigenous recognition, especially through law, operates. In other words, we speak of the localized operation of recognition efforts against colonial structures that were becoming globalized, and there is thus much to be gained from learning and borrowing strategies from different contexts.

The article proceeds as follows: the next section provides four snapshots of exhibitions, using those events to query the basic legal categories. Based on those snapshots, section three pulls together the analytical threads that arise from our analysis of these exhibitions to indicate the potentials of a broader research agenda on the regulation of Indigenous art. We conclude with a call for additional research in this area.

II. INDIGENOUS ART AND THE (UN)MAKING OF RIGHTS HOLDERS

A. NEW ZEALAND 1906: WHITE SALVAGE AND INDIGENOUS PRESERVATION

At the Christchurch International Exhibition 1906-07, the New Zealand government funded the creation of a Māori model *pā*. This *pā*, named *Araiteuru*, was a life-size replica of a Māori “stockaded village of the olden times” that was constructed specifically for the Exhibition.¹⁷

14. STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA*, 455 (2007).

15. KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (Duke University Press) (2010).

16. KING, *supra* note 12.

17. J. COWAN, *OFFICIAL RECORD OF THE NEW ZEALAND INTERNATIONAL EXHIBITION OF ARTS AND INDUSTRIES HELD AT CHRISTCHURCH, 1906-07: A DESCRIPTIVE AND HISTORICAL ACCOUNT* 310 (John Mackay, Government Printer (1910)). *See also*, Simoncl, *110 years ago: The 1906 New Zealand International Exhibition* (Nov. 2, 2016) <https://my.christchurchcitylibraries.com/blogs/post/110-years-ago-the-1906-new-zealand-international-exhibition/>.

Within this ersatz village, Māori were exhibited, and they exhibited themselves, to an imperial or colonial gaze. They showcased their skills, talents, and *taonga* (anything prized including socially and culturally valuable objects, resources, phenomenon, ideas, and techniques). Through bodily acts and displaying *taonga*, they performed in ways that did not always conform to colonial expectations. These skillful performances and acts of display arrived at a time and place that helped cultivate broader appreciation for Māori art as art. It also helped Aotearoa New Zealand forge a distinct national identity within the British Empire through the promotion of a romanticized and mythic place, 'Maoriland'.

This exhibition reveals an interlinking of empires, identities, authenticity, and market. At the beginning of the 20th century, New Zealand was a British colony. The staging of the Christchurch International Exhibition 1906-07 reflects that colonial status in an ambiguous way. At one level, the New Zealand government staged the Exhibition to forge a distinct national identity as it transitioned from colony to self-governing dominion, while at the same time claiming the moniker "Britain of the South" and announcing fealty to Empire and Britishness.¹⁸ At another, Māori staged themselves, as others staged them, within the Exhibition in ways that demonstrate similar tensions of independence and fealty, particularly around promoting distinctive (national) identity within "the kingdom under the mana (prestige, reputation, authority, power) of which we live."¹⁹ Māori and Pākehā promoted these identities by establishing their material progress, advancement and industriousness as part of a civilizing narrative.²⁰ In relation to the rest of the Exhibition, *Araiteuru* promoted a vision of 'Maoriland' so Māori and Pākehā could stage distinct national identities.

The Exhibition's Main Building was dedicated to the products of the British Empire. Within it, as an example, Auckland displayed former colonial governor and premier Sir George Grey's "large collection of Maori artefacts."²¹ They were not displayed as art. As a reflection of

18. Jock Phillips, *Exhibiting Ourselves: The Exhibition and National Identity*, FAREWELL COLONIALISM: THE NEW ZEALAND INTERNATIONAL EXHIBITION CHRISTCHURCH, 1906-07 21-2 (John M. Thomson ed., 1998); Bernard Kernot, *Imaging the Nation: The New Zealand International Exhibition 1906-07 and the Model Maori Pa*, ART AND PERFORMANCE IN OCEANIA 37 (Barry Craig, Bernard Kernot and Christopher Anderson eds., 1999).

19. Margaret Orbell, *Maori writing about the Exhibition*, FAREWELL COLONIALISM, 148, citing *Te Pipīwharauoa no. 104* (November 1906).

20. Phillips, *supra* note 18.

21. Gavin McLean, *The Colony Commodified: Trade, Progress and the Real Business of Exhibitions*, FAREWELL COLONIALISM: THE NEW ZEALAND INTERNATIONAL EXHIBITION

Empire, the Art Gallery connected to the Main Building housed the British Art Exhibit, excluding Māori art. The exhibition was commercially unsuccessful (it lost money), but it was symbolically important and materially impactful in leaving “its mark on most of our [New Zealand’s] public collections,”²² underscoring a division between European settler and Indigenous forms of art production.

After 1900, the economic engine of international exhibitions was not education, commerce or propaganda – it was entertainment and consumption.²³ The Exhibition’s entertainment included a “Wonderland,” with its “Space ship”; the country’s first water-chute; the “Katzejammer Castle”; and a 375-foot long cyclorama of the “Battle of Gettysburg.”²⁴ Directly next to this ‘fun-fair’ was *Araiteuru*, part of the ‘amusements’.²⁵ This ‘entertainment’ feature helped solidify the notion that Māori produced art in sophisticated ways that were, importantly, authentic and proof of being recognized as civilized.

The idea for *Araiteuru* was imported from the United States. Secretary of the Department of Tourist and Health Reports, T.E. Donne convinced the New Zealand Government to construct a model Māori *pā* after viewing the model villages of Native American tribes and Filipino Islanders at the 1904 St Louis World’s Fair.²⁶ The St Louis World’s Fair displayed model villages of the tribes within the US’s growing empire along a scale of low to high civilization that supposedly demonstrated a social Darwinist evolution of historical progress.²⁷ By contrast, *Araiteuru*, presented romanticized “colonial images of a mythic Maoriland.”²⁸ That was not because Māori or Pākehā disagreed with this civilizational narrative, but both Māori and Pākehā involved in constructing *Araiteuru* saw Māori as relatively high on the civilizations scale.²⁹ If old and backwards superstitions were dying out, that was welcomed.³⁰ Māori, however, were

CHRISTCHURCH, *supra* note 18, at 33.

22. Linda Tyler, *Art For Empire: Paintings in the British Art Exhibit*, FAREWELL COLONIALISM: THE NEW ZEALAND INTERNATIONAL EXHIBITION CHRISTCHURCH, *supra* note 18, at 104.

23. A Māori visitor of the exhibition, Reweti Kohere noted the ‘fine’ *pā* but identified the entertainment and educational features. Orbell, *supra* note 19, at 149-60.

24. McLean, *supra* note 21, at 32-3.

25. Phillips, *supra* note 18, at 23; Cowan, *supra* note 17, at 5.

26. Kernot, *supra* note 18, at 38.

27. *Id.*, at 39.

28. *Id.*

29. Banner, *supra* note 14; see also MPK Sorrenson, *How to Civilize Savages: Some ‘Answers’ from Nineteenth-Century New Zealand*, 9(2) N.Z. J. HIST. 97 (1975).

30. NEW ZEALAND, ANNUAL REPORT OF THE PUBLIC HEALTH DEPARTMENT 133 (1908).

becoming modern civilized. Having identified the category of 'art' as important civilizational marker, Māori could revitalize those traditions to establish that their civilizational credentials.

The New Zealand Government funded *Araiteuru* and placed it under the management of the Minister for Native Affairs James Carroll (Timi Kara of Ngāti Kahungunu) and a "Maori Committee."³¹ Carroll appointed Augustus Hamilton as Māori Committee leader, two Pākehā and two Māori members, Sir Peter Buck and Henry Uru.³² Despite the Committee's oversight, Pākehā intellectuals interested in ethnography managed the construction and design of the *pā* to "convey the semi-barbaric life and colour that the builders imagined Pa life to have been."³³ As a fantastical re-imagination of pre-colonial Māori life, it was a representation of 'Maoriland' that combined "a display of Māori *taonga* as well as Pakeha salvage."³⁴ This fictionalized Maoriland supported the notion that Aotearoa New Zealand was a land of opportunity, industry and harmonious relationships between British and Māori. Although not within the Main Building, *Araiteuru* was centrally important to Aotearoa New Zealand's burgeoning national identity.

For some, Pākehā saw *Araiteuru*, and Maoriland more broadly, as an imperial appropriation of Māori cultural materials to help "ameliorate a sense of alienation from a lost motherland" and "build a local literary tradition and a sense of national identity."³⁵ Kernot writes that Maoriland was "both a romanticized world of the European imagination and an acknowledgement of their own cultural displacement in an alien place, coupled with the recognition of the Maori presence as being the more authentic."³⁶ Pākehā of that time promoted and exploited Māori images to support the notion of assimilation into the British Empire. This colonial

31. Kernot, *supra* note 18, at 39. Please note that we have updated spelling of proper nouns to reflect current use of macrons but preserve original spelling and lack of macrons within quotations.

32. *Id.*

33. Kernot, *supra* note 18, at 39 (citing Cowan, *supra* note 17, at 312).

34. CONAL MCCARTHY, EXHIBITING MĀORI: A HISTORY OF COLONIAL CULTURES OF DISPLAY 59 (2007).

35. Bernard Kernot, *Maoriland Metaphors and the Modern Pa*, FAREWELL COLONIALISM: THE NEW ZEALAND INTERNATIONAL EXHIBITION, CHRISTCHURCH, *supra* note 18, at 61-2 (1998); (citing Jock Phillips, *Musing in Maoriland – or was there a Bulletin school in New Zealand?*) 20 AUSTL. HIST. STUD. 520, 528 (1983); ROGER NEICH, JACOBI WILLIAM HEBERLEY OF WELLINGTON: A MAORI CARVER IN A CHANGED WORLD', 69, 144 (Records Of The Auckland Institute And Museum, 1991).

36. Kernot, *supra*, note 18, at 63; Conal McCarthy "Our Works of Ancient Times": History, Colonization, and Agency at the 1906-7 New Zealand International Exhibition, 2 MUSEUM HIST. J. 119, 137 (2009).

double-movement creates distinctiveness and difference (exclusion) for the purposes of inclusion and assimilation through sameness. The construction of a distinctive national identity, perhaps in tension with empire, shows the importance of New Zealand and Māori assimilation and progress for Empire. Part of this project was to promote and exhibit Māori imagery, skills, and their ‘authenticity’ as worthy of being art. As McCarthy argues, Māori did not have a word for art, but through this Exhibition and others like it “Māori ‘art’ was produced through the colonial culture of display.”³⁷ Objects that Māori highly valued were promoted and accepted within the imperial categorization of ‘art,’ which those constructing *Araiteuru* promoted.

For instance, before leading the Māori Committee for *Araiteuru*, August Hamilton published articles from 1896 to 1900 that were compiled into a book called *Māori Art*. He was the “best known Pakeha advocate of the artistic qualities of Māori culture.”³⁸ He became director of the Colonial Museum in 1903 and “launched a concerted buying campaign” to display Māori art. He publicly recommended that the basic patterns of “Maori decorative art” be applied to architecture and everyday objects so that it became “a national characteristic” and a “memorial to the race who created and developed it.”³⁹ Hamilton saw *Araiteuru* as a means of furthering this national identity by cultivated broad and imperial appreciation of Māori art as art. Accordingly, some criticize Hamilton for using Māori for his own ends, while others argue that he was also “used by Māori” and “his work indisputably earned him respect of Māori.”⁴⁰

Māori used the Exhibition as “an opportunity to enhance their *mana* and define a place for themselves within the colonial order.”⁴¹ McCarthy writes that Māori “participated enthusiastically” in the creation of and life within the *pā*.⁴² McCarthy reveals some contemporary effects of a colonial double-movement: where the colonized subject’s agency is acknowledged they can be identified as “enthusiastically” participating in acts that contribute to empire-building (even if it is to advance their own purposes), while highlighting the structural imposition of imperialism would undercut their agency.

37. McCarthy, *supra* note 34, at 46.

38. *Id.*

39. *Id.* at 46-7 (citing ANX TO 1, 1901 162/20 (1901)).

40. Conal McCarthy, *Before “Te Maori”: A revolution deconstructed*, MUSEUM REVOLUTIONS: HOW MUSEUMS CHANGE AND ARE CHANGED, 129 (Simon Knell et al., eds., 2007).

41. McCarthy, *supra* note 36, at 125.

42. *Id.* at 126, 130-32.

While Pākehā used Maoriland to overcome alienation, Māori approached *Araiteuru* in a similar way. Life for Māori in Aotearoa New Zealand in the early 20th century was “a real world of bitter struggle at the center of which was the possession of Maori land.”⁴³ After 1840,⁴⁴ the colonial government began a systematic process of land alienation through legal mechanisms.⁴⁵ These were socially deleterious and economically costly acts that dispossessed Māori of land.⁴⁶ In 1901, New Zealand passed laws to protect Māori ‘antiquities’ and created a Department of Tourist and Health Resorts, which made New Zealand into “the first nation in the world dedicated to the marketing and development of its natural and cultural resources.”⁴⁷ Other laws criminalized Māori healing practices involving “superstition,” “supernatural powers,” and “foretelling the future,” which also helped allay “Pākehā fears about Māori attempts to claw back some political power.”⁴⁸ *Araiteuru* became an opportunity to re-establish or cultivate a national identity through revitalized, but sterilized, non-superstitious or non-supernatural cultural practices within this “side show.”

Māori involved in the construction, carvings, and performances of *Araiteuru* “mounted a spirited cultural revival by redeploying ethnographic constructions of their “traditional past.”⁴⁹ It was also an opportunity for “important chiefs who reveled in the opportunity for interchange and rivalry” to “discuss issues important to the politics of the day” and “present themselves advantageously in an international context.”⁵⁰ *Araiteuru* contained fantastical aspects, like mock battles, but “rather than living out Pakeha ethnographic fantasies, Māori made them a reality by taking seriously the artifacts, activities and ceremonies, which Pakeha spectators thought were just for show.”⁵¹ Māori closed it to the public for private functions, lived on the *pā*, hosted visitors, met with and exchanged

43. McCarthy, *supra* note 36, at 128 (citing Kernot, *supra* note 35, at 77).

44. British colonists entered Te Tiriti o Waitangi/the Treaty of Waitangi with Māori iwi. For a detailed history, see Claudia Orange, *THE TREATY OF WAITANGI* (1987).

45. Native Lands Act of 1862; Native Lands Act of 1865.

46. Banner, *supra* note 14; Richard Boast et al., *MĀORI LAND LAW* 49-50, 61-80 (1999). See also JAMES BELICH, *THE NEW ZEALAND WARS AND THE VICTORIAN INTERPRETATION OF RACIAL CONFLICT* (2013).

47. Dennis Lance Foley, *From Traditional Carving to Plastic Tiki: Māori Struggles to Balance Commerce and Culture within the Global Tourism Marketplace, 1860-2010*, 3 J. TOUR. HIST. 177, 179-80 (2011).

48. Tohunga Suppression Act 1907, preamble; see Māmari Stephens, *A Return to the Tohunga Suppression Act 1907*, 32 VICTORIA UNIV. WELLINGTON L. REV. 437 (2001).

49. McCarthy, *supra* note 36, at 125

50. Kernot, *supra* note 18, at 46; Amiria Henare, *MUSEUMS, ANTHROPOLOGY AND IMPERIAL EXCHANGE*, 220 (2005).

51. McCarthy, *supra* note 36, at 137.

genealogical information with Cook Islanders, and revived interest in their arts.⁵² Their arts and performances were made anew, and often they did not conform to Hamilton's visions of Māori traditionalism.

Araiteuru played a role in forming Aotearoa New Zealand's national identities and Māori arts. The role that it played is a small part of a larger story about the multiple interlinking and overlapping trajectories of imperialism, civilization, and commodification. In one sense, the idea of model villages had been imported from the United States, which had become its own empire. Through *Araiteuru*, the Government of New Zealand promoted and cultivated a distinct national identity through the assimilation of Māori art, motifs, and bodies within empire. Simultaneously, the formation of *Araiteuru* enabled Māori to work with Pākehā and within Government to revitalize their arts and projects and connect with Cook Islanders and others within the empire.

Being simultaneously in the exhibition and (co-)managing it meant that Māori had some control over how they were displayed. This level of agency, albeit key in both narrational and regulatory engagements with Indigenous art and artists, was not available to Indigenous artists in other contexts. Elsewhere, Indigenous art was meant to serve discrete nation-making objectives for the benefit of settler colonizers themselves, with little regard for Indigenous aspirations. The Canadian example underscores the subordination and rejection of Indigenous art when it is framed as more than a discrete (yet crucial) point of break with the colonial power.

B. CANADA 1927: NATIONAL IDENTITY THROUGH THE ILLEGAL INDIGENOUS ARTS

In contrast to New Zealand's engagement with Māori art to cement the place of Māori and New Zealand as distinctive identities within Empire, the Canadian history of engagement with Indigenous art is marked by paternalism, erasure, and the sense of need for direct government support and intervention on behalf of First Nations.⁵³ It is also problematic in that telling the history of Indigenous art from the perspective of the colonial encounter which, while relevant, is not the only nor the key force shaping the history of Indigenous art.⁵⁴ Nonetheless, the colonial encounter is important for present purposes because we are telling a history of the

52. *Id.* at 139-41.

53. SOLEN ROTH, INCORPORATING CULTURE: HOW INDIGENOUS PEOPLE ARE RESHAPING THE NORTHWEST COAST ART INDUSTRY 44 (2018).

54. Colette G. St-Onge, Symbols of Authenticity: Challenging the Static Imposition of Minority Identities Through the Case Study of Contemporary Inuit Art 25 (2002) (unpublished M.A. thesis, University of Ottawa).

regulation of Indigenous art to serve emancipatory goals from colonialism. In this account, to create economic pathways, 'Indian art' was bound to a notion of authenticity that prevented the evolution of Indigenous artistic production in artists' own terms. Despite being a key point of interaction of First Nations with the settler-colonial market, there was little to no regulation of these transactions and the asymmetries that riddled them (in fact, regulation sometimes reinforced these asymmetries). Indeed, most of the little attention paid to Indigenous artistic production was not to the ways these power relationships operated in the background, but in the uses of Indigenous art (as art or ethnography) to forge and promote Canadian national identity.

Against this background, the 1920s was a pivotal moment for the formation of Canadian cultural identity. Despite Canada having separated from the United Kingdom in 1867, it struggled to find its distinctive voice and identity until the period after the First World War.⁵⁵ The development of a native Canadian art scene in the 1920s (particularly through the actions of the Group of Seven, modernist painters – who painted pristine and Canadian landscapes devoid of Indigenous Canadians) was in full force, but it needed to be reconciled with Indigenous art to showcase a clearly distinctive cultural and artistic path.⁵⁶ In 1927, at the Jeu de Paume in Paris, Canadian native and Indigenous art were put together in an exhibition on the same footing, which praised and validated Indigenous art but was less complimentary of the Group of Seven. This exhibition was important as a means to underscore the importance and status of Indigenous art alongside what settler Canadians assumed was the peak of their cultural achievement. However, the differing levels of recognition abroad led to backlash in the form of suppression of reviews of the exhibition.⁵⁷

The belief that Indians were a "dying race" helped cement and stabilize nationalism.⁵⁸ For the colonial approach, Indigenous art could be used to create distinctiveness without necessarily rights to Indigenous artists or tribes. Canadian politicians and policy-makers deemed the use of Indigenous art, which "show[ed] the Natives as individuals in possession of their culture, their regalia, their social structure, their traditions and their land," as dangerous to a nationalistic discourse based on a white

55. Leslie Allan Dawn, *How Canada Stole the Idea of Native Art: The Group of Seven and Images of the Indian in the 1920s*, 1-2 (2001) (unpublished Ph.D. thesis, University of British Columbia).

56. *Id.* at 315-316.

57. *Id.* at ii.

58. *Id.* at 2.

narrative.⁵⁹ Indigenous art was also dangerous in creating an imaginary of rights for tribal nations that was incompatible with Canadian domestic law and policy at the time, which even forbade a range of Indigenous artistic and cultural practices (most notably, the *potlatch*).⁶⁰

In a key review of this 1927 exhibition, a reviewer “unaware that the ‘Indians’ were at that moment being erased by these very artists from the representations of Canada, implied their continued presence as the ancient and originary *volk* from which Canadian culture sprang, rather than their disappearance.” They additionally “declared that in using Native art as a base, the new Canadian artists had become truly national, citing as a model the return among contemporary French artists to the art of the middle ages as more truly French. . . . This assertion flew in the face of the assertion that the Group [of Seven] sprang from the land without parent, or at most from an intimate union of Thomson and nature.”⁶¹

A version of this 1927 exhibition also toured Canadian cities before going to Paris. Despite efforts to control the narrative and subsume Indigenous art into the narrative of a dying culture that produces ethnographic instead of artistic objects, reactions suggested that Indigenous art overshadowed the non-Indigenous art. Overall, the exhibition failed in most cities where it toured, at least as measured in attendance numbers. Critics were really interested in the Indigenous art on display, almost entirely dismissing the non-Indigenous pieces.⁶² In other words, the exhibition cemented the importance of Indigenous art for Canadian national identity, but in a way different from the instrumental use the government expected from it. Crucially, it also fueled the fire of recognition and rights to land, culture, and resources. Back in Canada, First Nations leveraged these artistic accolades into greater visibility to their claims.

This exhibition also showcased Indigenous art as “art,” and not ethnographic artefacts. However, once back in Canada, museums and other cultural institutions returned Indigenous art “to the category of ethnology and replaced into the museums where it would remain for the next forty years, at least insofar as the country’s national institutions went,” with limited collecting of Indigenous art by national institutions for decades.⁶³

Prior to this 1927 exhibition, however, many First Nations made claims to Indigenous art with corresponding effects on legal norms.

59. *Id.* at 188-89.

60. *Id.* at 315-16.

61. *Id.* at 105.

62. *Id.* at 311-12.

63. *Id.* at 323-24.

Indigenous cultural production for consumption by non-Indigenous parties was a thriving industry in crafts, which served primarily economic, rather than political, objectives. Questions of classification of Indigenous art as ethnographic or artistic were secondary to the value of Indigenous cultural production as commodities, and a key business for First Nations.⁶⁴ That market for tribal crafts went as far back as the mid-19th century (around the time of Canadian independence), reaching an important landmark in 1902, with the formation of the Canadian Handicraft Guild.⁶⁵ In other words, the organization of Indigenous art and artists, while having important symbolic and political elements (not to mention being a means of practicing culture and maintaining it),⁶⁶ had the operation of a market at its core and should not be pushed to the background of recognition claims. The regulation of this market is central to making political recognition function beyond any declaratory act.

As Solen Roth put it, “Canada’s colonial history is filled with instances of relationships of interdependence going awry, as mutually profitable exchanges become exploitation.”⁶⁷ This exploitation happens both through political mechanisms of erasure—like the dying race assumption that underpinned the 1927 exhibition—and economic asymmetries that are legitimized by legal frameworks that tend to elude analyses of the art market.

The end of the potlatch ban in 1951 highlighted the use of Indigenous imagery without Indigenous control, but also opened a door for “Indigenous involvement in and control over such marketing strategies. By the late twentieth century, the industry had grown considerably. Although it was still dominated by non-Indigenous stakeholders, it is around this time that it began to see a steady increase in the level of Indigenous participation and entrepreneurship.”⁶⁸ In short, recognition acts are only a relatively small part of an emancipatory (or colonial) narrative, with more work being possibly done via private law mechanisms.

Bearing in mind this caveat to the imagined role of recognition, state patronage can turn into paternalism and fail to disrupt power asymmetries. In Canada, much artistic production happened through arts education in residential schools, meant to turn Indigenous persons into lower-class

64. Gerald R. McMaster, *Tenuous Lines of Descent: Indian Arts and Crafts of the Reservation Period*, 9(2) CAN. J. NATIVE STUDIES 205, 207 (1999).

65. *Id.* at 211-15.

66. Canadian Council for the Arts, ARTS & CULTURE IN CANADA FACT SHEET – CONTEMPORARY INUIT ARTS IN CANADA 3 (2009).

67. Roth, *supra* note 53, at 20.

68. *Id.* at 38.

laborer's producing crafts.⁶⁹ Civil society pushed for the inclusion of arts education and artistic production in schools via a home economics model that clearly ran contrary to the assimilationist agenda of the government, and thus met with resistance.⁷⁰ Nevertheless, the well-meaning emancipatory goals actually served patronizing and assimilationist ideas that worked against Indigenous interests.⁷¹ Indigenous artworks were framed as belonging to national heritage, rather than the property of Indigenous artists themselves, or First Nations.⁷²

Differently to New Zealand, where Māori art and imagery had a past and was becoming the future, Canadians saw Indigenous art as part of their nation-making project but did not anticipate or necessitate First Nations in the nation's future. Their erasure was assumed both in the exhibition and in the law around Indigenous cultural manifestations and art production. In the United States, as we will discuss below, Indigenous art was not part of a dying Indigenous past like in Canada. But, while sharing a future-oriented use with New Zealand, it was also a very different type of future. The US approached Indigenous art as an instrument to advanced assimilation and authentic distinctiveness through market-oriented legal instrumentalization.

C. UNITED STATES 1939: INDIGENOUS ART FROM "CIVILIZATION" TO "AUTHENTICITY"

Much like exhibitions in New Zealand and Canada, the Golden Gate International Exposition 1939-1940 in San Francisco, California promoted state interests as well as Indian arts. However, there are notable differences between the United States and the other settler-states we examine. Like Canada, the United States' ('US') used education to separate students from families starting in the 1880s, but unlike Canada, the US saw art education as an important aspect of assimilation. By 1939, the US adopted a very different approach to law and art based upon the assumed predominance of the US, as well as an expansion of state-based social welfare programs in the wake of the great depression.

Late 19th Century US legal policy was unabashedly assimilationist. It broke up communally-held reservations and transformed them into privately-held farms through the Dawes Act.⁷³ Almost simultaneously, it mandated state-based childhood education that removed Indian children

69. *Id.* at 44.

70. *Id.* at 47.

71. *Id.* at 48.

72. *Id.*

73. General Allotment Act of 1887. This was also known as the Dawes Act or the Dawes Severalty Act.

from reservations.⁷⁴ The US approached art education as “the foundation of morality, a means for the promotion of virtues and of personal and social improvement,” and it used art-education to transform “the little ‘savages’ into civilized men and women.”⁷⁵ The art curriculum, however, provided Indian pupils with the opportunity to “revive and perpetuate their own cultural practices,” which led government officials to “reconsider art education policies.”⁷⁶ Of course, it is a mistake to think that Indians or tribes were either passive victims or stalwart opponents of assimilation.⁷⁷

In the early 20th Century, the American public thought that Indian people “were considered either fully settled into the habits of a civilized and productive modern American life, and no longer thought to be ‘Indian,’ or, particularly with respect to those still living on reservations, seen as unredeemable.”⁷⁸ By the 1930s, US policies changed as lawmakers attempted to reverse the damages created through assimilation.⁷⁹

The 1939 Exposition promoted a vision of Indian arts that reflected that reversal. No longer “dying or vanishing,” and despite the hardships and injustices created by the US for Indian Nations, the 1939 Exposition depicted Indians as “vital and dynamic.”⁸⁰ Reversing assimilation, however, intensified legal regulation and commodification of identity and authenticity in ways that provided the US with more power over tribes. The 1939 Exposition was, in many ways, a result of the New Deal. It was also marketing for Indian arts and crafts, which promoted the Indian Arts and Crafts Act 1935 (‘Act’) that was associated with the Indian Reorganization Act (called the ‘Indian New Deal’). The Indian Reorganization Act halted allotment and restructured tribal governments as constitutional democracies.

The Indian Arts and Crafts Act created the Indian Arts and Craft Board (‘Board’) to “promote the economic welfare of Indian tribes and the

74. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE* 52 (1995).

75. MARINELLA LENTIS, *COLONIZED THROUGH ART: AMERICAN INDIAN SCHOOLS AND ART EDUCATION, 1889-191* xviii-xix (2017).

76. *Id.* at xxiv.

77. Julie Davis, *American Indian Boarding School Experiences: Recent Studies from Native Perspectives*, 15(2) OAH MAG. OF HIST. 20 (2001), discussing Adams, *supra* note 74.

78. Lentis, *supra* note 75, at 256.

79. Brookings Institution, Institute for Government Research: *The Problem of Indian Administration: Report of a Survey Made at the Request of Honorable Hubert Work, Secretary of the Interior, and Submitted to Him*, JOHNS HOPKINS PRESS 17 (Feb. 21, 1928).

80. S.L. Meyn, *More than Curiosities: A Grassroots History of the Indian Arts and Crafts Board and its Precursors, 1920 to 1942*, 230, 233 (1997) (unpublished Ph.D. thesis, University of Cincinnati).

Indian wards of the Government through the development of Indian arts and crafts and the expansion of the market for the production of Indian art and craftsmanship.”⁸¹ The Board would create trademarks of “genuineness and quality for Indian products,”⁸² as the US obtained prosecution powers to criminalize counterfeits and imitations without those trademarks.⁸³ Given the supposed demand for authentic Indian art and the willingness of others to provide fakes,⁸⁴ the law sought to stabilize Indian ‘authenticity’ so that individuals identified as Indian (tribes registered with and acknowledged by the US) could produce “authentic” Indian artifacts for the consumer market. A Senate Report on the bill noted that “the very preservation of these products as expressions of Indian life, or as art, depends upon the market and upon bringing an attractive return to the maker.”⁸⁵

From its inception, the Board was obsessed “with defining and marketing the ideology of authenticity,” which defined and equated authenticity and “superior quality” with “unbroken links to a primitive past.”⁸⁶ General Manager of the Board Rene d’Harnoncourt claimed that “the more isolated the village, the higher the percentage of quality work.”⁸⁷ For d’Harnoncourt, the “ever-present link between quality and authentic craftsmanship by real Indians – those who were most primitive, least corrupted by the modern industrial world – increased an object’s value in the high-end market precisely by capitalizing on quality and ethnological curiosity.”⁸⁸ Despite changes in policy and law from assimilation to promotion, underlying racial and paternalistic views were not abolished. They were transformed.

Accordingly, this Act has been criticized an example of “salvage

81. Indian Arts and Crafts Act of 1935, S. Res. 2203, 74th Cong., 1 (1935) (enacted).

82. *Id.* at Section 2; see J.S. Haynes, *Constructing Authenticity: The Indian Arts and Crafts Board and the Easter Band of Cherokees, 1935-1985* 3 NATIVE SOUTH at 1, 3, 10-11 (2010).

83. H.R. 3055, ss 5-6.

84. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Art and Crafts Act of 1990*, 53(4) STAN. L. REV 1009, 1049-50 (2001).

85. *Id.* at 1050 citing REPORT OF THE COMMISSION ON INDIAN ARTS AND CRAFTS TO THE HONORABLE HAROLD L ICKES, SECRETARY OF THE INTERIOR, SENATE REPORT 74-900, 6 (1934). See WJ Rushing, *Marketing the Affinity of the Primitive and the Modern: Rene d’Harnoncourt and the “Indian Art of the United States”*, THE EARLY YEARS OF NATIVE AMERICAN ART HISTORY: THE POLITICS OF SCHOLARSHIP AND COLLECTING 191-236 (JC Berlo ed. 1992).

86. Haynes, *supra* note 82, at 4.

87. *Id.* at 4, citing Robert Fay Schrader, *Indian Arts and Crafts Board: An Aspect of the New Deal Indian Policy*, 200 (1981) (unpublished Ph.D. thesis, Marquette University).

88. Haynes, *supra* note 82, at 4-5.

paradigm:” an attempt to “rescue ‘authenticity’ out of destructive historical change.”⁸⁹ For Hapiuk,

“the salvaged objects (or culture itself) that are supposedly saved from destruction undergo a process of ossification and reification; removed from context, the contingencies of their existence and their past history are wiped away. The transformative process creates something quite “new” in the appropriator’s culture.”⁹⁰

The Exposition promoted Indian arts and crafts to justify the passage of the Act and “increase the public’s interest in Indian quality products.”⁹¹ Within the Exposition’s Federal Building, approximately one-third of it, or over an acre and quarter, was dedicated to Indian galleries, a marketplace and workspace for Indian artists.⁹² D’Harnoncourt planned and built the Indian exhibit to be “like an art museum,” and to “capture the public’s attention,”⁹³ which left the public with the impression that Indian arts were “a viable genre of art.”⁹⁴ D’Harnoncourt and Bureau of Indian Affairs Commissioner John Collier believed that it would help Indians “earn an income from their sale of the products as well as gain confidence. . .and self-esteem by working together in a tribal enterprise.”⁹⁵

Although Indians “did not participate in the exhibit planning phase or in any decision making related to the exhibit,” d’Harnoncourt made them visible and they were important behind the scenes.⁹⁶ Within the exhibit “Indian artisans assisted in the execution of the large stylized murals for the exhibit halls and after the exhibited opened Indian artists demonstrated their skills and gave gallery tours.”⁹⁷ Indians mostly participated through producing arts and crafts for sale at the exhibit.⁹⁸ Given the new Indian Arts and Crafts Act, non-Indian traders were prohibited from selling “Indian” arts and crafts, which increased the demand for objects produced by tribal

89. Hapiuk, *supra*, note 84 at 1045-46 (citing JAMES CLIFFORD, OF OTHER PEOPLES: BEYOND THE ‘SALVAGE’ PARADIGM, IN DISCUSSIONS IN CONTEMPORARY CULTURE 121 (Hal Foster ed., 1987)).

90. *Id.* at 1046; see also Joseph Traugott, *Native American Artists and the Postmodern Cultural Divide*, 51(3) ART. J. 36, 37 (1992).

91. Robert F. Schrader, *The Indian Arts and Crafts Board: An Aspect of New Deal Indian Policy*, 304 (April 1981) (unpublished Ph.D. thesis, Marquette University).

92. Meyn, *supra* note 80, at 240-1, 254.

93. *Id.* at 235.

94. Jon K. Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18(2) AM. INDIAN L. REV. 487, 489 (1993).

95. Meyn, *supra* note 80, at 250; Schrader, *supra* note 91, at 188.

96. Meyn, *supra* note 80, at 232.

97. *Id.* at 264.

98. *Id.* at 265-6.

artists while ensuring that d'Harnoncourt's staff "could control the quality and guarantee that the market would be free of imitations."⁹⁹ Because the galleries displayed Indian arts that were borrowed from US museums, d'Harnoncourt made sure that only high quality arts and crafts were sold in the market.¹⁰⁰ A consequence was that "No attention was paid in this shop to the tribal origins of the products, and the articles were arranged in such a manner as to make the individual pieces appear at their best."¹⁰¹ Similarly, some of the arts displayed in the galleries were labelled in a "western art perspective," meaning that the labels did not contain cultural information of the communities that produced them.¹⁰² Other labels "presented intensive anthropology lessons."¹⁰³

The Exposition's Indian market was conceived as "an experimental sales and display laboratory," a "testing grounds for the future merchandising of Indian arts and crafts."¹⁰⁴ This experiment in marketisation immediately ran aground of US law as well as the problems that US law had created for tribes. One problem was that the Board could not deal in Indian arts and crafts because the Indian Arts and Crafts Act prevented any non-Indian organization from "borrowing, lending, or dealing in Indian Artifacts."¹⁰⁵ To get around this limitation, Collier solicited cooperation from those tribes to lend pieces for sale on consignment at the market.¹⁰⁶ This arrangement shifted the burden of problem-solving to Indian artists and tribes, which needed financing to produce high quality arts and crafts to be sold at the Exposition. Tribes that had adopted the Indian Reorganization Act could access credit or apply for loans, but others had to seek funding elsewhere.¹⁰⁷ While the law had been designed to create a market, the market became a means for promoting the law to join the market.

This Exposition shows that by the 1930s, US law made the consumer market the primary tool of establishing distinctive identity for Indian Nations' to "claim their rightful place in American society" as it preserved, and perhaps ossified, their "authentic" identities. The US sought to promote Indian arts and Indian authenticity, as commodified objects within its

99. *Id.*

100. *Id.* at 267.

101. Schrader, *supra* note 91, at 295-6

102. Meyn, *supra* note 80, at 260-1.

103. *Id.* at 261.

104. *Id.* at 268-69.

105. *Id.*

106. *Id.* at 269.

107. *Id.* at 269-70.

expanding empire. However, the 1939 Exposition shows that the legal commodification of distinct national identities through arts and objects can support the empire, and from the US's perspective, strengthened their claims over its subjects.

After World War II, the language of self-determination arose from an anti-colonial, anti-imperial and anti-capitalist movement in international law, but would lose much of its anti-imperialist potential after the 1970s.¹⁰⁸ The Australian example below shows the intersection of Indigenous art and its legal regulation with the international legal-political language of self-determination. Accordingly, attempting to use state law, like intellectual property, or international legal language, like self-determination, can support the (re)formation distinct Indigenous identities or claims to distinct national identities. However, doing so is not separate from prior forms of imperialism or state formation. Instead, using law to (re)form claims about authenticity to regulate the excesses of the international art market is consonant with prior legal and formations of market-based imperialism.

D. AUSTRALIA 1988: INTERNATIONAL PRAISE TO LEVERAGE DOMESTIC RECOGNITION

In the late twentieth century, Australians proactively engaged with Indigenous art as part of its national project. Like other countries in our analysis, Australia tapped into the power of Indigenous art to create a distinctive, post-colonial identity for its white settler population, with relatively little benefit planned specifically for Aboriginal and Torres Strait Islander peoples. The recognition of the power and artistic significance of Indigenous art outside of Australia, however, lent momentum to Indigenous recognition pushes within Australia itself. This momentum worked in the direction of quickly individualizing the rights of Indigenous artists and grounding them on intellectual property (IP) law, a move that, while offering an easily accessible and enforceable rights framework, is made less so by many carve-outs for Indigenous culture which render the inclusionary potentials of IP law ultimately hollow, counter-productive, or exclusionary.

Indigenous cultural tourism has long been an important part of how Australia defined itself to the world, both prior to and especially after the 1967 referendum that included Indigenous peoples in the Australian legal order.¹⁰⁹ This initial recognition move lent greater impetus to the

108. ROLAND BURKE, *DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* (2010).

109. Jennifer Craik, *Tourism, Culture and National Identity*, *CULTURE IN AUSTRALIA: POLICIES, PUBLICS AND PROGRAMS* 89, 91 (Tony Bennett & David Carter eds., 2001).

exploration of Indigenous art not just as a pre-existing resource for the tourist gaze, but also could be produced specifically for the art market. Geoffrey Bardon is referred to as a pioneer in engaging with Indigenous artists for the benefit of understanding and showcasing Indigenous culture and introducing the technique of acrylic painting on canvas that is a staple of contemporary Australian Indigenous art.¹¹⁰ Commercial interests soon followed, and arguably disrupted the emancipatory potential of Indigenous art by setting aside the performance of identity in favor of catering to an incipient art market.¹¹¹ Specifically, artists were accused of no longer producing ‘authentic’ Indigenous art and instead catering to consumer interests.¹¹² This accusation is, in our view, problematic, inasmuch as it encases Indigenous art in an ‘authentic’ realm defined by an outsider (Bardon), denying Indigenous peoples their cultural self-determination. It is also our contention that claims to self-determination can be problematic for ossifying authenticity within a language that is open to re-appropriation and contestation.

Paternalism was a strong theme in the legal treatment of Indigenous art from the government’s perspective, even though Indigenous artists themselves saw their art as a self-determination move and a means to engage with and make sense of colonialism.¹¹³ As Fred Myers put it, “[a]crylic painting should be reckoned on a continuum or Aboriginal productions of culture that we would ultimately understand as forms of activism within a multicultural context.”¹¹⁴

Because self-determination in the 1980s was connected to a politically charged struggle for land rights (which were only recognized in 1992),¹¹⁵ Indigenous art did not enjoy a particularly high status at home. Indigenous artists were treated as unskilled laborers,¹¹⁶ and only praise in international art centers like Paris and New York seemed to jolt the Australian public into awareness of the value of Indigenous art.¹¹⁷ When international recognition filtered back into Australia, difficult questions of justice to be sidestepped. “Australians felt a sense of cultural ownership with the

110. Bronwyn Coate, *A Comparative Study of Australian Indigenous and Non-Indigenous Art*, 3 (unpublished manuscript) (held on file).

111. John Oster, *Proposal for a Regulated Indigenous Art Industry*, 6(18) *INDIGENOUS L. BULL.* 21 (2006).

112. *Id.*

113. FRED R. MYERS, *PAINTING CULTURE: THE MAKING OF AN ABORIGINAL HIGH ART* 148 (2002).

114. *Id.* at 5.

115. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.).

116. Myers, *supra* note 111, at 186.

117. *Id.* at 230.

popularity of Aboriginal art but were reluctant to ask the difficult questions about the conditions in which these works were produced.”¹¹⁸ In other words, the effect of recognition via the international gaze overlooked issues regarding the legal treatment of individual artists. It served the collective cause of self-determination well (after all, international recourse is a staple of self-determination movements), but it left the legal frameworks affecting individual artists (whether as foreground or background norms) unattended.

Further, the use of Indigenous art for the benefit of the Australian nation was, like in other countries, tied to practices of borrowing and appropriation by non-Indigenous artists also involved in nation-making through the arts. In Australia, modernist painter Margaret Preston called for artists to be inspired by Indigenous art practices and adopt Indigenous motifs as background in their works. Her calls went unheeded (but not rejected) at the time, and later she was nonetheless accused of cultural appropriation.¹¹⁹ Despite this backlash, it is clear that “[a]ffirmation and appropriation thus went hand in hand.”¹²⁰

Against this background, the 1988 touring exhibition *Dreamings: The Art of Aboriginal Australia* generated “excitement surrounding this new art market phenomenon, [where] art enthusiasts conscientiously tried to unravel the symbolism of Aboriginal art.”¹²¹ It was partly led by the South Australia Museum in Adelaide and the Aboriginal Commission of Australia.¹²² Like the 1939 San Francisco Exposition discussed in the previous section, this exhibition sought to present Indigenous art as sophisticated contemporary art, and to dispel assumptions about Indigenous art as “primitive,” or of only ethnographic value.¹²³ Indigenous art in this exhibition was lauded for being “sophisticated, complex, extremely coherent and immensely accurate in its presentation of all that is the essence of being Aboriginal,”¹²⁴ as well as for its “timeless cultural

118. Ruth Rentschler and Mirko Bagaric, *The Indigenous Art Market: A Roadmap to a More Equitable and Efficient System*, 6(4) INDIGENOUS L. BULL. 11 (2004).

119. Coate, *supra* note 110, at 2.

120. Nicholas Thomas, *Indigenous Presences and National Narratives in Australasian Museums*, CULTURE IN AUSTRALIA: POLICIES, PUBLICS AND PROGRAMS 299, 301 (Tony Bennett & David Carter eds., 2001).

121. PEARL DUNCAN AND JIM PORTER, Review of DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA, 12(2) ABORIGINAL HIST. 199 (Peter Sutton eds., 1988).

122. Francine Farr, DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA, 22(3) AFRICAN ARTS 84 (1989).

123. LUKE TAYLOR, DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA, 12(2) ABORIGINAL HIST. 41, 42 (Peter Sutton eds., 1988).

124. JIM PORTER, DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA, 12 (2) ABORIGINAL HIST. 201 (Peter Sutton eds., 1988).

sophistication,”¹²⁵ and for being “a vital, even avant-garde art.”¹²⁶

The exhibition itself, and its accompanying catalogue, were praised for being “the first extended overview of the history of Aboriginal art scholarship,” “a substantial analysis of the Aboriginal aesthetic which reveals how it is integrated with the distinctive world view and social values of Aboriginal traditions,” an analysis of “the cultural, economic and political contexts of the production of Western Desert paintings for Australia and world art markets,” and, crucially, for refuting “the popular assumption held by non-Aborigines that Aboriginal culture and society would decline rapidly to extinction.”¹²⁷ The exhibition was also praised for being “a milestone for Australian Aboriginal art and a coming-of-age in the representation of peoples of color. The recognition of the increasingly conspicuous role of native peoples in the domestic control and international circulation of their art was the driving force behind this exhibition,” which “succeeded in informing of the past and ennobling the future through a careful balance of present realities.”¹²⁸ In other words, this exhibition portrayed to the world the artistic achievement of Aboriginal artists, as well as claims to self-determination and other rights Aboriginal art and artists were politicized through law in ways that other exhibitions did not, a move likely possible because the exhibition was held outside of Australia, and riding the wave of the Indigenous land rights movement occurring domestically and internationally.

One of the reviews, in the *Smithsonian* magazine, praised Indigenous art’s “persistence of vision [which] is maintained through collective enterprise,”¹²⁹ thus highlighting collective achievements of the artworks over individual artists’. At least one other reviewer also criticized the lack of individualization of the art and the artists in favor of broader contextualization of the artistic tradition.¹³⁰ In this way, like with other exhibitions we analyze here, *Dreamings* served to galvanize entirety of Indigenous art at the expense of the artists. Although the move to broader recognition was important in its own terms, it had detrimental impacts on the rights of artists, thereby compromising the very art these critics seek to elevate. Artists used the art market and *Dreamings* “to resist the wholesale

125. Farr, *supra* note 122, at 84.

126. Michael Dirda, DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA, 19 SMITHSONIAN 183 (Peter Sutton eds., 1988).

127. Duncan, *supra* note 121, at 200.

128. Farr, *supra* note 122, at 84.

129. Dirda, *supra* note 126, at 200.

130. Taylor, *supra* note 123, at 43.

incorporation of their culture,”¹³¹ and therefore the paternalistic assumption that they should be excluded from the market, which has direct effects on the rights of artists (by assuming they are secondary or should be subject to stringent state supervision) needs to be problematized and eliminated in regulatory projects.

Today, Indigenous artists are a much larger proportion of the market in Australian art than they are a proportion of the population.¹³² Because of the higher value of Indigenous art compared to proportion of population, art is a key economic source for Aboriginal peoples compared to the rest of the population.¹³³ That said, Indigenous art does not fetch the same average prices as non-Indigenous art at auction.¹³⁴ While male non-Indigenous artists command better prices than women, there is near parity in prices across genders with Indigenous art, suggesting that indigeneity eclipses gender as a marker of cultural value for buyers.¹³⁵ The relative overrepresentation of Indigenous artists can also lend the impression that the 1988 exhibition was too successful: it elevated Indigenous art and self-determination to the point where allegedly no specific or strong legal protection is needed. Debates in Australia have focused on resale rights as a subset of the artist’s IP rights over their creations, which is an important means of leveraging economic benefit in favor of Indigenous artists. That said, much discourse in Australia in this area involves “periods of legal exclusion and legal inclusion of indigenous art from the ambit of the *Copyright Act* with reference to wider socio-cultural values and political developments,” revealing “a double movement [that] characterizes the intersection between Australia’s copyright law and wider society: a dialogic of inclusion and exclusion. This double movement of inclusion and exclusion is dynamic and yet constant in its ultimate withdrawal from acknowledging indigenous cultural difference in a meaningful way.”¹³⁶ This double movement “can be understood as a movement of inclusion that is ultimately undone by its exclusionary elements.”¹³⁷

This Australian exhibition, alongside those in Canada, New Zealand, and the United States, shine a light on the uses of Indigenous art and Indigeneity to pursue nationalist projects, which often occurred without

131. *Id.* at 45.

132. Coate, *supra* note 110, at 8.

133. *Id.* at 14.

134. *Id.* at 8.

135. *Id.* at 11-2.

136. Marie Hadley, *The Double Movements That Define Copyright Law and Indigenous Art in Australia*, 9(1) *INDIGENOUS L. J.* at 47-9 (2010).

137. *Id.* at 50.

significant regard for Indigenous views and interests. They also show how Indigenous peoples have sought to tap into these exhibitions and associated legal frameworks to pursue their own causes despite them being objects instead of subjects of the law. These exhibitions and the legal contexts around them also show that it is not enough to rely on specific legal frameworks that directly address Indigenous art. There are myriad interactions between Indigenous artists and settler actors in the arts and cultural sector that often evade or undermine self-determination or other emancipatory efforts. In other words, these exhibitions show that in the connections between Indigenous art and their regulation on the one hand, and Indigenous goals on the other, the current analytical foci have insufficiently grappled with some of the legal mechanisms at work. A research agenda is needed to expose the colonial violence, and unearth the emancipatory potential, of art and art law in Indigenous contexts. The next section offers an articulation and roadmap of such a research agenda.

III. BREAKING THE CYCLE? A RESEARCH AGENDA

Indigenous objects have not always been categorized as ‘art.’ However, those objects and images became important and useful in forming discrete national identities that supported the formalizations of the nation-state. When formalizing boundaries, first as colonies and then as states, the state-based legal regime can formally recognize and (re)produce the category of art as applicable to Indigenous art-objects. The increasing formalization of state law then discursively produces the conditions for commodification of these art-objects as well as identities, in terms of claims to an ‘authentic self’ and national-identities for the nation-state and Indigenous nations.

Having tapped into the insight of critical legal scholars, the four case studies suggest that law—whether private or public, or an international law based on common law imperialism—did not lag behind a market for Indigenous arts and crafts. It constituted that market as well as national identities which, then, discursively shape the law. Therefore, we suggest that those who advocate for a turn to national or international legal regimes, especially forms of private law—like IP or copyright—for the better regulation and promotion of Indigenous artists’ rights will not fully resolve the following issues. Instead, (re)turning to law ensures that so-called excesses of the marketplace will remain fruitful areas of legal contestation. The remainder of this section identifies some of these issues of legality and co-production that should animate further necessary research into the regulation of Indigenous art.

A. INDIGENOUS PRODUCTIONS AS ART OR ETHNOLOGY

Indigenous peoples have always prized objects, and some anthropologists and lawyers have considered those objects artefacts, not art. The Exhibitions demonstrate how that notion has changed. First, Māori performances and objects were staged in *Araiteuru*. Later, Canada placed Indigenous arts-objects next to non-Indigenous arts in Canada, and the US staged Indian arts like a museum. In the 1980s, the South Australia Museum and the Aboriginal Commission of Australia brought Aboriginal art to an international audience in support of Indigenous self-determination. Through this broad trajectory, art was alienated from the body as law became central to authenticity and self-identification. However, tensions between art and artefact persist—the exhibitions reveal the need to establish Indigenous arts as art in opposition to artefacts. It indicates that even if Indigenous peoples had valuable and prized objects, that does not necessarily make them “art.” The categorization of art is contentious and interdisciplinary tensions among anthropology, law, art history, and Indigenous peoples’ views fall short of stabilizing the category.

For instance, anthropologists and historians have concluded, in various ways and according to their disciplines, that “primitive tribes decorative art for its own sake does not exist”¹³⁸ or that “Māori ‘art’ was produced through the colonial culture of display.”¹³⁹ There are, of course, counter-claims that these “arts” were not fabricated.¹⁴⁰ While those two positions might otherwise agree on quite a bit, it is clear that Indigenous or native peoples had prized possession and at some later point associated with a colonial-project those objects were included within dynamic category of “art.” Indigenous art-like objects that pre-date that categorical shift, or subsequently produced art-objects in the style of pre-colonial categorization become “traditional.” When that occurs, it relates to and contributes to discussions about the colonial role in “producing” those objects as “traditional.”¹⁴¹ The constitution of these categories then become tied up in questions about authenticity. Whether traditions are authentic in fact or are “authentic” for the demands of a consumer, and whether those are the same thing, is contested.¹⁴²

138. Barbara E. Milmine, *Art, Identity and Culture: The Politicization of Contemporary Northwest Coast First Nations Art* 39 (2006) (unpublished M.A. Thesis, University of Northern British Columbia) (manuscript held on file), *citing* Franz Boaz, *THE MIND OF PRIMITIVE MAN* 217 (1983).

139. McCarthy, *supra* note 34, at 46.

140. St-Onge, *supra* note 54, at 26.

141. Milmine, *supra* note 138, at 45, 111.

142. *Id.* at 41.

Here, we note that the more anyone claims to have a “true account,” the deeper and more personal the contest seems. Recourse to law, whether invoking self-determination as an international legal concept or IP laws of state, does not resolve these issues. Instead, law becomes an area for contesting claims and disciplinary differences.

B. RECOGNITION OF PEOPLES

When it is claimed that colonial contact is what “produces” or “invents” “traditions” in opposition to “modernity” (stemming from the notion that the category of “art” is externally imposed on Indigenous individuals and communities), it inflects what recognition of peoples is or might be. Recognition as peoples can have multiple and different meanings, but to the degree it stems from international legal claims to self-determination it holds out the promise that peoples can “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁴³ In each of the case studies, even if the language of “self-determination” is not used, the state promotes Indigenous art as part of its national identity. State promotion can both help and hinder Indigenous peoples’ self-determination. If a separate or *sui generis* legal regime for the protection of Indigenous arts were to be created, it might be seen as reinforced “(yet again) Indigenous Otherness” but help acknowledge their unique position within contemporary state formations.¹⁴⁴ A *sui generis* regime could draw attention to the uniqueness of Indigenous ways that contribute to greater “respect for Indigenous laws and economic principles.”¹⁴⁵ It might create conditions for authentic claims to self-determination.

In addition to (re)producing conditions for claims to authenticity, non-Indigenous values might come to influence Indigenous values. An art market “is progressively being infused with [Indigenous] approaches to property, relationships, and economics that directly reflect the histories and cultures of the [Canadian] Northwest Coast’s Indigenous peoples”¹⁴⁶ but may simultaneously raise “questions of cultural appropriation and exploitation, even when it involves willing and active Indigenous participants.”¹⁴⁷ When questions of appropriation and exploitation are viewed as issues related to culture and market, rather than as produced as

143. UN G.A. Res 1514 (XV) (Dec. 14, 1960).

144. Natalie Stojanoff & Alpana Roy, *Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation*, 41(3) MONASH UNIV L. REV. 745, 782 (2015).

145. Roth, *supra* note 53, at 5.

146. *Id.*

147. *Id.* at 12.

an issue of and for legal contestation, renewed critical focus on authenticity arises.¹⁴⁸ Again, the double-movement of colonialism arises: working with the state can be viewed as furthering colonialism or assimilationism, while highlighting structural dimensions undercuts that agency, an inclusionary/exclusionary matrix.

C. ASSIMILATIONISM

Some states pursued assimilation through force, like removing children from reservations and placing them in white homes. But assimilation can be pursued through non-forceful means (assuming a distinction between force and non-force, violence and non-violence, or coercion and non-coercion). Each exhibition revealed a preconceived conceptual distinction between Indigenous and non-Indigenous or white and Indian/Aboriginal/Māori. With those conceptual distinctions, any practices or regulation that are exclusionary might be discriminatory while inclusionary practices may be assimilative – a double-movement based upon an inclusion/exclusion matrix that is itself exclusionary.¹⁴⁹ Similarly, the binary between authentic and inauthentic or fake presupposes the existence of a *real* and *authentic* pre-existing identity that could be excluded or included and, with the binary, those who are consider not-fully authentic fall out of the picture.¹⁵⁰ The discourses surrounding authenticity produce the struggles for and against authentic art and essentialist identities.¹⁵¹

Art can be the “primary platform” for Indigenous communities to present and negotiate identity, which states have also used to cultivate national identities.¹⁵² States’ intervention in Indigenous artistic production raises questions about the state’s appropriation of that identity, which within the colonial context re-triggers questions about the “invention” of tradition and identity. Throughout appropriation and invention of identities, legality is direct implicated. The role of the state as a patron and promoter of art showcases the powerful role of the law. But focusing on law as a solution to these problems shifts our focus to the subject-matter of law—legal capacity, individual and collective rights, and so on. Doing so tends to ignore the constitutive force of law in producing market, state, and claims to national identity and its “Others.”

148. Milmine, *supra* note 138, at 45, 111

149. Marie Hadley, *The Double Movements That Define Copyright Law and Indigenous Art in Australia*, 9(1) *INDIGENOUS L. J.* 47, 49 (2010).

150. *Id.* at 51-2.

151. St-Onge, *supra* note 54, at 52-3, 102.

152. *Id.* at 105, 111.

D. STATE PATRONAGE

State patronage arises when states and state actors play a role in the promotion of Indigenous arts. Where the state or state-actors attempt to save or “salvage” pre-contact “primitive” art from the ravages of modernity,¹⁵³ it can trigger claims of “invention” of tradition or identity, which were reflected through the exhibitions. Hamilton in New Zealand and d’Harnoncourt in the United States promoted, respectively, Māori and Indian arts to the public and for the public identification. When state actors promote, advocate and patron Indigenous artists, scholars—primarily anthropologists—have said that those individuals “used” those artists or “invented” those traditions.¹⁵⁴ That state patronage is not necessarily implicated in the same way for non-Indigenous artists reveals an orientalist discourse: non-Indigenous artists are the state while Indigenous artists belong to the state.

While state actors have typically promoted Indigenous arts to the public and may intend it helping to building nation identities (for the state and the tribe), the ability to promote Indigenous artists may rely on or contribute to the development of IP laws to facilitate marketization.¹⁵⁵ While one might believe that the IP realm has always existed or pre-existed Indigenous artists, the inclusion of Indigenous artists within state legal regimes changes the state, its legal regimes as well as the artists. IP for Indigenous arts can elucidate previously excluded domains but bringing within the ambit of the state as somehow different can also re-assert difference as inferiority.¹⁵⁶ Assertions of difference affect the state, and in fact help create it and Indigenous artists. Where a state promotes Indigenous artists, those promotions raise reputations domestically and internationally.¹⁵⁷ When Indigenous art is closely associated with national identity, the promotion of the art can devalue art and artists while

153. France Trépanier and Chris Creighton-Kelly, *Understanding Aboriginal Arts in Canada Today: A Knowledge and Literature Review Prepared for the Research and Evaluation Section of the Canada Council for the Arts* 46 (2011) (unpublished manuscript) (held on file); Hapiuk, *supra* note 84.

154. McCarthy, *supra* note 36; Jonaiti, 27; also W. Jackson Rushing, *Critical Issues in Recent Native American Art*, 51 ART J. 6, 7 (1992); also Allan Hanson, *The Making of Maori: Culture Invention and its Logic*, 91(4) AM. ANTHROPOLOGIST 849, 890 (1989).

155. Colin Golvan, *Aboriginal Art and the Public Domain*, 9 J. L. & INFO. SCI. 122 (1998).

156. Hadley, *supra* note 150, at 60.

157. TOM ACKER, *SOMEWHERE IN THE WORLD: ABORIGINAL AND TORRES STRAIT ISLANDER ART AND ITS PLACE IN THE GLOBAL ART MARKET* 7 (CRC-REP Research Report CR017, 2016).

enhancing social capital in nationalist identities.¹⁵⁸

E. INDIVIDUAL VERSUS GROUP RIGHTS

When artists represent communally held “traditional cultural expressions and knowledge” as art-objects, state-based IP and copyright regimes do not adequately deal with the communal or collective nature of those rights.¹⁵⁹ This gap is often expressed in domestic and international law as a tension between individual and collective rights.¹⁶⁰ This tension, however, applies differently to Indigenous and non-Indigenous artists, in a way that “others” Indigenous artistic production and subsumes it into a collective paradigm ripe for capture by nation-building projects.

The common law can apply flexibly to Indigenous contexts. For example, judges can apply fiduciary relationships between Indigenous artists and the clan or tribal community when there is that relationship.¹⁶¹ British common law in this sense becomes the mode and method of expressing that relationship. Conversely, the framing can also recognize that Indigenous normative orders (and laws) can be given effect through the common law to recognize Indigenous authority over a work, “irrespective of who held the brush.”¹⁶² However, that authorship can be ascribed to an individual when the piece has been produced collectively is well-recognized within the “Western” tradition,¹⁶³ and does not risk negating the possibility of legal protection for non-Indigenous artists. In other words, non-Indigenous individual authorship over collective works is resolved through ascribing a simple individual right, whereas in the Indigenous context it is spoken instead in a register of collective rights that is harder to enforce.

Further, when authorship is attributed, it helps makes the object “authentic,” giving rise to legal problems when the attribution is false or

158. *Id.* at 11.

159. Stoianoff, *supra* note 144; JESSICA C. LAI, *INDIGENOUS CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS: LEARNING FROM THE NEW ZEALAND EXPERIENCE?* 59-208 (2014).

160. JESSIKA EICHLER, *RECONCILING INDIGENOUS PEOPLES' INDIVIDUAL AND COLLECTIVE RIGHTS: PARTICIPATION, PRIOR CONSULTATION AND SELF-DETERMINATION IN LATIN AMERICA* (2019).

161. Colin Golvan, *The Protection of “At The Waterhole” by John Bulun Bulun – Aboriginal art and the recognition of private and communal rights*, 80 *INTELL. PROP. F.: J. OF THE INTELL. AND INDUS. PROP. SOC'Y OF AUSTL. & N.Z.* 38 (2010).

162. Tania Johnson, *When is a Forgery not a Forgery?*, 6 *J. OF INDIGENOUS POL'Y* 83, 87 (2006) (footnotes omitted).

163. COMMONWEALTH OF AUSTL., *INDIGENOUS VISUAL ARTS AND CRAFTS SECTOR, S. STANDING COMM. ON ENV'T, COMMC'N, INFO. TECH. & THE ARTS, INDIGENOUS ART – SECURING THE FUTURE*, at p. 8.12-8.13 (2007).

inauthentic.¹⁶⁴ And, as we saw above, authenticity has played a significant role in the development of state legal regimes for the regulation and promotion of tribal arts and crafts. The battle over “authenticity” suggests, however, that focusing on tensions between individual and collective rights presupposes a distinction between Indigenous “Others” and national identity. It also presupposes that the national identity of the state was formed or made without regard for the Indigenous Others. The ability of a legal regimes to facilitate individual or collective rights, while keeping that distinction relevant, obfuscates that the collective national identity was constructed through the inclusion of Others. The use of state-based copyright or IP for Indigenous artists then maintains the imperial formation of the state, and its civilizing mission, by either shoehorning the “Other” into state structures or carving out an exception that purportedly respects Indigenous identity, but in order to do so essentializes Indigeneity to the point of rendering the law opaque, thereby othering Indigeneity in ways that render collective rights meaningless.

F. CONNECTION BETWEEN INDIGENEITY AND NATIONALISM

In the exhibitions, states promoted Indigenous authenticity to cultivate their own distinct national identities. For instance, in our first example about New Zealand, Hamilton sought to memorialize and salvage Māori motifs for a national identity.¹⁶⁵ Similarly, in Australia Bardon promoted Aboriginal artists’ use of acrylics, which became a well-known form of Australian Indigenous art.¹⁶⁶ We have considered exhibitions because they are illustrative of larger trends, hopes and themes. They also reveal that the colonies and domains of the British Empire and, later, states relied on Indigenous images/motifs to make themselves distinct from the British Empire. As they formed distinct identities, they solidified jurisdictional and territorial control, which, as the US demonstrates, creates a sense of self and responsibility to their own empires.¹⁶⁷ Within each of these states today, “Indigenous cultural themes are used extensively in tourism promotion, for example, and indigenous art has been exhibited and artists celebrated internationally.”¹⁶⁸ Where distinctive Indigenous artistic images aids in the creation of a nation-state identity that is separate from Europe,

164. Johnson, *supra* note 163 at 97-8.

165. McCarthy, *supra* note 34.

166. Coate, *supra* note 110 at 3.

167. See also Antony Anghie, *Race, Self-Determination and Australian Empire*, 19 MELB. J. OF INT’L L. 423 (2018).

168. JENNIFER CRAIK, RE-VISIONING ARTS AND CULTURAL POLICY: CURRENT IMPASSES AND FUTURE DIRECTIONS 41-5 (2007).

the formation of national-state identity and the desire for distinctiveness can only arise when there is an international ordering, whether an imperial formation or an international legal ordering of states. The states remake and reproduce empire through the extension of their jurisdictional borders and their turn to British common law, as states claim the Other as internal to themselves.

Similarly, the formation and solidification of the national-state identity and boundaries can produce a desire amongst Indigenous individuals and communities for recognition as distinct from the state—a recognition as peoples with self-determination discussed above. In the same way that the formation of nation-states requires the establishment and formalization of jurisdictional boundaries, Indigenous peoples can uphold their imagery and arts to promote distinctive identities as nations. This recognition does not deny that many tribes had spatial/temporal claims associated with political formations that pre-exist colonial contact. Instead, it points to the formative role of law or the international law of self-determination as a new feature in (re)creating those boundaries between self and European or self and Other.

Distinctive Indigenous artistic images can help create a tribal national identity that is separate from the nation-state. The formation of a tribal national identity and the desire for distinctiveness from the nation-state or Europeans can only arise when there is some sort of (inter)national ordering. So even if a tribe had pre-colonial claims to land and political formations, tribal nations that remake its self-identification in opposition to Europe or the nation-state centralize law while reproducing it.

G. KNOWLEDGE CREATION AND POWER ASYMMETRIES

Again, Indigenous individuals and communities have always possessed prized article and objects. The ability to produce those objects, display them and sell them can produce senses of identity as well as sources of income. However, Indigenous artists have identified problems with the marketplace that are not about identity or market. Instead, knowledge created and deployed through colonial-Indigenous encounters produced “Indigenous” in opposition to colonists, which made both, including “Indigenous” subjects of disciplinary expert knowledge.¹⁶⁹ When issues arise from the production of knowledge/power, there are reasons to believe that invoking a disciplinary knowledge of colonial construction, like the state’s legal frameworks, will re-entrench the problems.¹⁷⁰ While

169. Kathy Bowrey, *Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?*, 13(2) AILR 35, 35 (2009); Hadley, *supra* note 150, at 68.

170. *Id.* at 35.

lawyers and government officials may view the problems of Indigenous artists in terms of market failures or a misapplied legal, this way of thinking may make it more difficult to recognize broader or foundational problems stemming from the colonial production of knowledge as an ongoing exercise of power creation.¹⁷¹ As Kathy Bowrey writes, turning to national or international IP laws for Indigenous cultural products could

“and should serve political reconciliation—affirming culture and identity and establishing new entitlements of post-colonial Indigenous citizenship. What is held out as a political and legal possibility is the future development of laws that appropriately reflect Indigenous perspectives and cultural identity. This is incredibly problematic.”¹⁷²

For Bowrey, the legality and the marketplace remains un(der)interrogated but central in reproducing discrimination and disadvantage.¹⁷³ Even if a legal regime were to create *sui generis* rights for Indigenous arts, it would (re)produce differences that fail to interrogate power dynamics while upholding the status quo and a “range of discriminatory practices and burdens that the ‘norm’ is not expected to entertain to the same degree.”¹⁷⁴ If we are right that law was (at least partially) productive of demand for Indigenous arts, and that demand discursively constructed the law, then using law to constrain market excesses is bound to reproduce the problems that it seeks to solve.

IV. CONCLUDING REMARKS

Understanding Indigenous art through anthropology or law is use of knowledge. It works from a way of understanding the world (as already abstracted) towards a subject (that is supposedly concrete). We have adopted the view that the legal regulation of Indigenous art is a fruitful but un(der)explored space—particularly in terms articulating how empire and international law are reproduced in terms of national identities and state formation. We seek to challenge the notion that law needs to catch up to a global market, because law is constitutive of the conditions and contingencies of that market. We do not suggest that our inquiry is outside of imperial construction; rather, we suggest that legal knowledge is central to its reproduction.

There is a need for additional international and comparative focus on

171. *Id.*

172. *Id.* at 36.

173. *Id.* at 42.

174. *Id.* at 52.

this issue because the formalization of state boundaries reveals that employing legal frameworks for directly addressing and protecting Indigenous artists or Indigenous art has produced inter-disciplinary debates and contests involving many issues discussed here. These debates include whether Indigenous objects are art or artefact; the role of art and recognition of peoples as opposed to assimilation; the role of state patronage in preserving and producing “authenticity;” the legal capacity of arts; individual or collective rights, commodification, identity, and nationality. We discuss each in short without suggesting that we can or will try to solve these debates. Instead, they are evidence of a result of a legal regime that ensures these issues will not be fully resolved. The legal regimes narrow a dizzying array of potentially inchoate tensions to an apparently legitimate terrain upon which they become areas of contestation, rather than becoming solved, fixed, or permanently stabilized.