COMMENT

THE PAINTED ONES' FINE LINE: *BATOK* AS A PROTECTABLE FORM OF TRADITIONAL KNOWLEDGE UNDER TRADE SECRET JURISPRUDENCE

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For centuries, the ancestral tattooing practice of batok *has served not as mere ornamentation but as a visual archive of Indigenous Filipinos' history and identity. In 2021, a digital creator invited the public to learn* batok *online for merely fifteen dollars. Soon after, many discovered that the renown instructor, Apo Whang-Od, may not have agreed to take part. The resulting discourse exposed a broader issue: Indigenous customs and creations become increasingly vulnerable to misappropriation and improper commodification as they enter global markets and multimedia platforms. Though this event occurred abroad, it highlights how U.S. law is poorly designed to protect similar Indigenous works and underscores the need for a responsive legal framework. Western intellectual property laws are premised on sole creators and distinct ownership—assumptions*

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fundamentally misaligned with practices like batok *that are collectively owned, culturally delimited, and iteratively refined over generations.*

This Comment argues that batok *meets the statutory requirements and judicial factors governing trade secrecy. It first situates* batok *within the context of Indigenous Filipino history, explaining how various actors, protocols, and rituals have shaped the tradition. Next, it posits that foundational theories underlying U.S. intellectual property law allow for the legal protection of Indigenous customs like* batok*. Specifically, the custom's classification as traditional knowledge would provide doctrinal grounding for the protection of* batok *under U.S. trade secret law. This Comment then explores this solution in practice by referencing international frameworks as potential models and domestic legislation to demonstrate its feasibility. Finally, the piece concludes that the ceremonial aspects and symbolic grammars of* batok *demand greater protection, which is possible when leveraging existing legal tools.*

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"Why not keep tattooing while I can see? I'll only stop when I can no longer see, so I can continue to give people the mark of Buscalan, the mark of Kalinga."[1]

> Across the [I]ndigenous world, tribal peoples rarely describe tattooing as an artistic or aesthetic practice because there are no terms for 'art' or 'artist' in the majority of [I]ndigenous languages. Instead, tattooing is integrated into the social fabric of community . . . and typically speaking, *it is a cultural, clan, or family-mandated ritual that anchors societal values on the skin for all to see*.[2]

INTRODUCTION

When Spanish colonizers reached the Philippines' shores in 1521, they encountered Indigenous peoples adorned with elaborate tattoo markings—these natives were called *Pintados* or "the Painted Ones."[3] Traditional Filipino tattoos are now experiencing a resurgence centuries after near-extinction with Apo Whang-Od at the forefront.[4] As of October 2025, Whang-Od is a 108-year-old *mambabatok*, or traditional tattoo practitioner, native to the remote mountain village of Buscalan.[5] She is widely recognized for her practice of *batok*, an ancient tattooing custom that culminates in markings indicative of the lived Indigenous experience.[6] In 2021, Nuseir Yassin, a social media influencer known as Nas Daily, advertised an online class in which Whang-Od

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1. Celine Mallari, *Apo Whang-Od and the Thousand-Year-Old Tradition Live on*, VOGUE (Apr. 1, 2023), https://vogue.ph/lifestyle/apo-whang-od-and-the-thousand-year-old-tradition-live-on [https://perma.cc/7GSR-GKDV].

2. Lars Krutak, *The Cultural Heritage of Tattooing: A Brief History*, *in* 48 CURRENT PROBLEMS IN DERMATOLOGY: TATTOOED SKIN & HEALTH 1, 1 (Jørgen Serup, Nicolas Kluger & Wolfgang Bäumler eds., 2015) (emphasis added).

3. Lars Krutak, *Reviving Tribal Tattoo Traditions of the Philippines*, *in* ANCIENT INK: THE ARCHAEOLOGY OF TATTOOING 56, 56 (Lars Krutak & Aaron Deter-Wolf eds., 2017). Colonizers unsurprisingly used several pejorative labels for native Filipino people (i.e., Philippine peoples), aside from their use of *Pintados*. DAVID P. BARROWS, A HISTORY OF THE PHILIPPINES 25, 28 (1905).

4. Krutak, *supra* note 3, at 56–57.

5. Maria Regina Martinez, Batok *in the East,* Aloha *in the West: Intellectual Property Protections of Indigenous Peoples in the Philippines and the United States*, 58 UNIV. S.F. L. REV. 541, 541 (2024); Audrey Carpio, *Meet the 106-Year-Old Woman Keeping an Ancient Filipino Tattooing Tradition Alive*, VOGUE (Apr. 7, 2023), https://www.vogue.com/article/apo-whang-od-and-the-indelible-marks-of-filipino-identity (on file with American University Law Review).

6. *See* Carpio, *supra* note 5.

would teach *batok*.[7] Reporters later discovered, however, that Whang-Od neither consented to the course nor entered into a contract with Yassin.[8] The ensuing discourse revealed the concern that the practice of *batok* cannot be governed by a single individual because it is collectively owned knowledge.[9]

Beyond just this incident, Indigenous communities continue to see outsiders use tribal markings for gain and without the requisite reverence and understanding.[10] In recent years, tribal tattooing has experienced a revival in popular culture and among younger Indigenous generations.[11] With increased popularity came new opportunities for cultural appropriation.[12] In turn, tensions have grown as non-Indigenous people attempt to commodify the practice and its designs.[13]

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7. Martinez, *supra* note 5, at 542; *see also* AA Patawaran, *Nas Daily Cheapens Whang-od*, MANILA BULL. (Aug. 7, 2021, at 06:28 PHT), https://mb.com.ph/2021/8/7/nas-daily-cheapens-whang-od (on file with American University Law Review) (noting that Yassin listed the class at merely 750 pesos—sixty-nine percent lower than his own class on art storytelling).

8. Kathleen A. Llemit, *Nas Daily Under Fire for Including Apo Whang Od in Nas Academy*, PHILSTAR GLOB. (Aug. 4, 2021, at 19:14 PHT), https://www.philstar.com/lifestyle/arts-and-culture/2021/08/04/2117614/nas-daily-under-fire-including-apo-whang-od-nas-academy [https://perma.cc/Y6GU-MPR5].

9. *See* Martinez, *supra* note 5, at 542.

10. The general public's treatment of tribal tattoos has varied on a wide spectrum. Joseph Bernstein, *Cool Tribal Tattoo. Is it from the '90s?*, N.Y. TIMES (May 19, 2023), https://www.nytimes.com/2023/05/19/style/tribal-tattoo-90s.html (on file with American University Law Review). On one end, a tribal tattoo featured in a movie led to "legions of people" trying to participate in the practice and ultimately "screwing it up." *Id.* In the early 2000s, tribal tattoos became a punchline in mainstream media. *Id.* Yet at the same time, it was common for individuals to request a design by unknowingly describing a tribal tattoo, then become repulsed once told the design was actually tribal. *Id.* Prominent market figures have also attempted to use Indigenous tattoos in their products, presumably as a strategy to gain further traction in the market. *See* Dexter A. See, *Apo Whang-od's Tattoos Not for Commercial Use*, MANILA TIMES (Jan. 7, 2021), https://www.manilatimes.net/2021/01/07/news/regions/apo-whang-ods-tattoos-not-for-commercial-use/824036 [https://perma.cc/7T66-4ZK5] (discussing a global apparel company that attempted to use traditional Kalinga tattoo designs on its new products and even tried to purchase rights to a symbol).

11. Analyn Salvador-Amores, *Ritual Act, Technology, and the Efficacy of Traditional Tattooing Among the Igorots of North Luzon, Philippines*, 26 J. MATERIAL CULTURE 451, 452 (2021) (noting that "[t]attooing, both its practice and design, has become a significant component of global popular culture").

12. *See supra* notes 7–9 and accompanying text (highlighting the Yassin conflict as a prime example of an opportunity for cultural appropriation).

13. *See supra* note 10 and accompanying text.

Home to a myriad of Indigenous groups and customs, the Philippines is a nation characterized by its colonial histories and enduring cultures.[14] Early inhabitants led agrarian lifestyles in villages dispersed among the Southeast Asian islands.[15] These communities developed rich cultures and traditions using ancestral teachings and a collectivist worldview.[16] For instance, a tenet of Igorot culture, *binnadang*, is the traditional practice of mobilizing as a community to proffer non-reciprocal help, especially to those in need.[17] And across the Igorot diaspora, intergenerational values that center on culturalism and "family-orientedness" are expressed through creative practices and preserved through oral

14. *See* Vicente L. Rafael, *Colonial Contractions: The Making of the Modern Philippines, 1565–1946*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF ASIAN HISTORY 1 (David Luddan ed., 2018), https://history.washington.edu/sites/history/files/documents/research/vicente_l._rafael_colonial_contractions.pdf [https://perma.cc/7H5U-PCS6] ("The origins of the Philippine nation-state can be traced to the overlapping histories of three empires that swept onto its shores: the Spanish, the North American, and the Japanese."); *see also* BARROWS, *supra* note 3, at 78–97 (discussing the extensive colonial history of the Philippines and the rich culture that thrived before the Spaniards arrived). When colonizers first arrived, they were surprised by the natives' distinct system of writing that "borrowed from Hindu or [Japanese] sources." *Id.* at 93.

15. *See* BARROWS, *supra* note 3, at 33–34 (describing Philippine people in Northern Luzon as "wild people" or "mountaineers" who carried water for miles, raised various crops, built "stone-walled terraces on the slopes of the hills," and tended to cattle).

16. *See infra* notes 17–19 and accompanying text (providing specific examples within Igorot culture).

17. *Binnadang* is a native term that denotes "communal unity" and is understood as *bayanihan* in Tagalog, the dominant language used throughout the Philippines and by Filipinos. Annie Joy Castillo, *Panaki-Binnadang Rapid Rural Appraisal Conducted at Barangay Happy Hallow*, ST. LOUIS UNIV. (Mar. 31, 2023), https://www.slu.edu.ph/2023/03/31/panaki-binnadang-rapid-rural-appraisal-conducted-at-barangay-happy-hallow/ [https://perma.cc/B7UR-B393]. *See generally* Joseph D. Lesada, Taglish in Metro Manila: An Analysis of Tagalog-English Code-Switching 19 (2017) (B.A. thesis, University of Michigan) (on file with Deep Blue Repositories, University of Michigan) (noting that Tagalog is the "dominant mother tongue" used on many islands in the Philippines). *Igorots*, translating to "mountain people," encompass eight Indigenous groups in the mountainous Cordillera territory, namely, "*Bontoc*, *Ibaloi*, *Ifugao*, *Isneg*, *Kalinga*, *Kankanaey*, *Tingguian*, and *Yapayao*." Jose Mencio Molintas, *The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts*, 21 ARIZ. J. INT'L & COMPAR. L. 269, 274 (2004); Emmanuel C. Maraña, Ramiella Anne A. Arpon, Irvin Lance L. Capuchino, Romiele Anne F. Casiño, Kate Rossleth T. Casuga & Jenifer G. Aguilar, *Strengthening of Best Practices in the Preservation of Cultural Diversities: A Phenomenological Research*, 15 GSC ADVANCED RSCH. & REVS. 46, 48 (2023) (defining and providing examples of *binnadang*); Floor Leeftink, Coping After Typhoon Pepeng: A Case Study of Indigenous Practices and External Aid in the Cordillera, Philippines 40 (Oct. 2013) (M.S. thesis, Wageningen University) (on file with American University Law Review) (distinguishing the many terms that convey the practice of helping others).

traditions.[18] The ceremonial process by which tribal tattoos are created serves a crucial role in illustrating the multifaceted experience of an individual and their community.[19] But despotic colonial rule nearly extinguished these practices and persistent Western influences pose challenges to their full revival.[20]

Historically, the aboriginal people of the Philippines thrived in complex societies tempered over many generations.[21] Yet, in their delusion, colonizers justified the cruelties of their foreign rule by claiming Indigenous people needed saving from their "primitive" and "savage[]" ways.[22] Colonizers scrutinized, rejected, and overwrote nearly every facet of Indigenous life with Western ideologies.[23] After centuries of colonial rule under the United States, Spain, and Japan, the Philippines gained its independence as a sovereign nation in 1946.[24]

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18. Mark Preston S. Lopez, Rexton F. Chakas & Annie Grail F. Ekid, *Indigenous Culture and Hybrid Identity in the Igorot Transnational Diaspora: A Critical Perspective*, 10 INT'L J. POPULATION STUD. 1, 5–6 (2025).

19. *See* Salvador-Amores, *supra* note 11, at 468, 470 (noting that some designs illustrate "Ifugao deities" and that "the incorporation of knowledge encoded in the symbolic meanings of the tattoos achieves efficacy").

20. *See id.* at 452 (noting that the "American colonial government criminalized headhunting, which has had lasting repercussions on tattooing practice"); Andrea Malaya M. Ragragio & Myfel D. Paluga, *An Ethnography of Pantaron Manobo Tattooing (Pangotoeb): Towards a Heuristic Schema in Understanding Manobo Indigenous Tattoos*, 8 SE. ASIAN STUD. 259, 269 (2019) (describing certain tattoo traditions as "possibly a sustained practice until the American colonial era").

21. Lowell B. Bautista, Paper, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIAN-PAC. L. & POL'Y J. 1, 6 (2008) (noting that "[e]ven before the arrival of the first European . . . [the] Philippines had robust trade relations with its neighboring countries . . . [and] an established system of government existed in the islands. When the first Spaniards arrived on the islands in 1521, they found that the Philippines had a civilization of its own").

22. John Jerico Laudet Balisnomo, Thesis, *Ancestral Domain Ownership and Disposition: Whose Land, Which Lands*, 42 ATENEO L.J. 159, 161, 171 (1997).

23. *See* Roberto M. Benedito, *Law and Nationhood: Transcending the Cracks in the Parchment Curtain*, 59 PHIL. L.J. 393, 393 (1984) (discussing how the Spanish colonial regime monopolized the production of Philippine history and ancestry, which prevented the formation of a "real history, [or] a clear picture of the Philippine colonial past"); *see also* Owen James Lynch, Jr., *Native Title, Private Right and Tribal Land Law: An Introductory Survey*, 57 PHIL. L.J. 268, 272 (1982) (describing how the Spanish viewed Indigenous property concepts as primitive).

24. Treaty of General Relations, Phil.-U.S., art. I, III, VIII, July 4–Sep. 30, 1946, 7 U.N.T.S. 3, *reprinted in* PHILIPPINE TREATY SERIES 217–19 (Haydee B. Yorac, ed., 1968); A. G. Hopkins, *The Philippines in Imperial History*, 49 J. IMPERIAL & COMMONWEALTH HIST. 805, 806 (2021). *See generally* Bautista, *supra* note 21, at 8–9 (noting that the "Philippines' first Republican President[] proclaimed the Philippine Declaration of Independence" in 1898, but shortly after, the state found itself under U.S. hegemony).

Even years after gaining independence, Indigenous Filipino people continue to grapple with the lingering effects of colonization and challenges stemming from modernization.[25] Pervasive technology encourages the proliferation of information and thus facilitates the so-called rediscovery of historic traditions; however, this exposure also begets more opportunities for outsiders to accidentally or maliciously misappropriate Indigenous culture.[26] Formal remedies for cultural appropriation are scarce because legal systems commonly operate on the preconceived notion of a sole creator absent external influences.[27] The dissonance between this individualistic system and one based on collective wisdom leaves Indigenous communities vulnerable to exploitation without an established avenue to seek redress.[28]

The ritualistic processes and symbolic grammars that form the basis of Indigenous tattoos are vital creations in need of greater legal protection. Intellectual property law contains frameworks capable of addressing cultural appropriation and is founded on theories and principles that compel a solution for this ongoing problem.[29] Trade secrecy is the most viable of the relevant intellectual property sectors to protect Indigenous tattooing practices because these customs fall squarely within the scope of trade secrecy and traditional knowledge.[30] Ultimately, recognizing *batok* as a protectable trade secret empowers Indigenous Filipino communities to prevent the misuse, dilution, and external commodification of the custom, while laying the groundwork to protect other Indigenous practices.

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25. The Yassin and Whang-Od conflict is a primary example of this struggle. Martinez, *supra* note 5, at 542; Patawaran, *supra* note 7.

26. Bernice Marie Violago, *Modernizing Protections of Traditional Knowledge:* Batek *and IPRA in the Digital Economy*, 95 PHIL. L.J. 347, 368 (2022) (describing how "technology has changed the economics of reproduction because of the availability of . . . digital form[s]").

27. *See id.* at 399 (noting how the "Philippine IP regime" also emphasizes individualism in a way). *See generally* Saul D. Alinksy, *The Philosophical Implications of the Individualistic Approach in Criminology*, *in* PROCEEDINGS OF THE SIXTY-SEVENTH ANNUAL CONGRESS OF THE AMERICAN PRISON ASSOCIATION 156, 157 (1937) (noting "that the individualistic approach is largely the result of, and the expected product of the individualistic . . . social order of our present times").

28. *See* Alinksy, *supra* note 27, at 157–59 (illustrating a capitalist society that is individualistic because of the "social order of . . . present times," which coincides closely to the United States).

29. *See infra* Part II (exploring trade secrecy and labor, personality, and utilitarian theories).

30. *See infra* Section II.B.

This Comment will examine concerns raised by the misappropriation of Indigenous tattooing methods and propose a solution grounded in Western trade secrecy law. In Part I, this Comment explores indigeneity as a concept, discerns whom the law considers an "Indigenous person," and overviews Indigenous Filipino culture and the traditional tattooing method of *batok*. Subsequently, it reviews trade secret jurisprudence and traditional knowledge within its bounds. Part II construes the viability of trade secrecy as a solution against the background of intellectual property theories. This Comment will then apply the principles of traditional knowledge to Indigenous tattooing methods and survey the feasibility of this solution in practice. To conclude, Part III reiterates the vital yet undervalued role Indigenous communities play in shaping contemporary society and challenges the outdated view that Western legal frameworks cannot protect Indigenous creations. This Comment submits that *batok* is traditional knowledge protectable under trade secret law and denying such protection would undermine the goals and principles of U.S. intellectual property law.

I. BACKGROUND

A. What Is Indigeneity and Who Is Considered Indigenous?

Indigeneity has held many connotations and implications over the years, yet a precise definition of "Indigenous people" remains elusive.[31] The concept has gone undefined even in major legal frameworks.[32] A clear understanding of who qualifies as "Indigenous" is essential, however, because it allows lawmakers to enact and enforce protective measures more effectively.[33] Without a clearly delineated definition, there is a risk of legislative inaction due to concerns about over- and under-inclusiveness.[34]

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31. *See infra* notes 35–43 and accompanying text (illustrating many definitions proffered by principal legal doctrines and prominent legal professionals).

32. *See infra* notes 35–42 and accompanying text (explaining that Convention 169 and the UNDRIP do not provide an explicit definition for "Indigenous people").

33. *See, e.g.*, Secretariat of the Permanent Forum on Indigenous Issues, The Concept of Indigenous Peoples, at ¶¶ 1–8, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19–21, 2004), https://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc (on file with the American University Law Review); *cf.* Violago, *supra* note 26, at 355 ("One of the main issues in determining these rights is the terminology used to define the parameters of [I]ndigenous cultural expressions.").

34. *Cf.* Violago, *supra* note 26, at 355 (noting that "it cannot be assumed that [I]ndigenous peoples' cultural expressions carry the conventional rights granted under IPL," or intellectual property law).

1. Ambiguity in international frameworks

In 1989, the International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention—known as Convention 169 or C. 169—set out to ensure human rights protections for Indigenous peoples and safeguard their right to self-determination.[35] Despite its commendable objectives, Convention 169 failed to plainly define "[I]ndigenous" and "tribal."[36] Rather, it offered an ambiguous set of criteria. Convention 169 describes "tribal peoples" as individuals who are distinguished "from other sections of the national community, and whose status is regulated . . . by their own customs."[37] Unsurprisingly, and unoriginally, the convention identifies "descent from the population which inhabited the country . . . at the time of conquest" as a defining factor.[38] And above all, it arbitrarily labels "[s]elf-identification as indigenous . . . as a fundamental criterion" without further explanation.[39]

In following years, government officials continued to bypass opportunities to impart a plain and clear definition. In 2007, the United Nations (UN) General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which reinforced the same principles and protections outlined in Convention 169.[40] The declaration, however, employed similar roundabout language when describing the group.[41] This generalized understanding carelessly overlooks the experiences that often inform an Indigenous group such as "the

35. Indigenous and Tribal Peoples Convention, *adopted* June 27, 1989, 1650 U.N.T.S. 383 [hereinafter Convention 169]; Peter Bille Larsen & Jérémie Gilbert, *Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future*, 24 INT'L J. HUM. RTS. 83, 83–84 (2020).

36. Larsen & Gilbert, *supra* note 35, at 84; *see also* Danika Elizabeth Watson, *Polarizing Impact: Indigenous Consultation Under International Labor Organization Convention 169 and the Emerging Polar Shipping Industry*, 90 FORDHAM L. REV. 165, 174 (2022) (highlighting that Convention 169 applies to "more than 370 million people in seventy countries worldwide" when using its indistinct description of "Indigenous" and "tribal").

37. Convention 169, *supra* note 35, at 385.

38. *Id.*

39. *Id.*

40. G.A. Res. 61/295, annex, at 1, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007) [hereinafter UNDRIP].

41. *See id*. (declaring that Indigenous peoples hold various rights and are owed certain protections). The Declaration provides that "[I]ndigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests . . . ." *Id.* at 2.

historical event of a community suffering invasion or colonization; the group's self-identification as distinct from other parts of the national society; a present non-dominant status of the community; and the group's determination to preserve its ancestral lands."[42] The inability to fashion a precise and appropriate definition is not only a detriment to Indigenous studies, but also to the advancement of Indigenous peoples' rights and protections.[43]

Among the international instruments that have fallen short, one offers a comparatively more precise and actionable model. The Indigenous Peoples Rights Act of 1997[44] (IPRA), a landmark law that significantly advanced Indigenous rights in the Philippines, collectively defined "Indigenous Cultural Communities" and "Indigenous Peoples" using notions of belonging, communal property, marginalization, and widespread displacement.[45] Recognized by "self-ascription and ascription by others," this classification includes individuals "who have continuously lived as organized community on communally bounded . . . territory" all while sharing analogous cultural traits.[46] The IPRA acknowledges that Indigenous peoples "became historically differentiated from the majority of Filipinos" and have been displaced from or forced to "resettle[] outside their ancestral domains."[47]

The IPRA offers a more grounded and contextualized definition of indigeneity compared to the inexact language of its legislative counterparts.

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42. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 111 (1999).

43. *See Why Is Indigenous Knowledge Often Overlooked by Governments?*, SUSTAINABILITY DIRECTORY (Apr. 12, 2025), https://climate.sustainability-directory.com/question/why-is-indigenous-knowledge-often-overlooked-by-governments [https://perma.cc/5Y6W-PN9B] (explaining how the absence of a doctrinal foundation can contribute to a government's tendency to overlook Indigenous knowledge).

44. Rep. Act No. 8371, O.G. 2276, 2276 (Oct. 29, 1997) (Phil.).

45. *Id.* at ch. I § 2(h); HANAYO HIRAI, INDIGENOUS COMMUNITIES IN THE PHILIPPINES: A SITUATION ANALYSIS 1, 4 (2015); WORLD BANK GRP., NO DATA, NO STORY: INDIGENOUS PEOPLES IN THE PHILIPPINES 17 (2024), https://thedocs.worldbank.org/en/doc/baa43cc91ec55266a538e9023c528bd7-0070062024/original/No-Data-No-Story-Indigenous-Peoples-in-the-Philippines.pdf [https://perma.cc/5BB3-6XQB]. *See generally* Pradiptajati Kusuma, Murray P. Cox, Graeme Barker, Herawati Sudoyo, J. Stephen Lansing & Guy S. Jacobs, *Deep Ancestry of Bornean Hunter-Gatherers Supports Long-Term Local Ancestry Dynamics*, 42 CELL REPS. 1, 2 (2023) (describing one of many Indigenous groups in the Philippines, the Kankanaey, who "are an indigenous Austronesian-language-speaking agricultural population from northern Luzon . . . [and] are considered an 'Austronesian-ancestry proxy'").

46. Indigenous Peoples Rights Act, Rep. Act No. 8371, ch. I § 2(h) O.G. 2276, 2279 (Oct. 29, 1997) (Phil.).

47. *Id.*

Yet, while it includes some key elements (e.g., self-identification and colonial history) that are absent from Convention 169 and UNDRIP entirely, it lacks other elements that scholarly works include.[48] Ultimately, the IPRA contributes to the mission of defining and protecting indigeneity and, while still imperfect, is arguably one of the most comprehensive pieces of legislation paving the foundation for the optimal definition.[49]

2. Indigenous peoples as defined by academia

Separately from legislators, academics have proposed a variety of definitions.[50] José R. Martinez Cobo, UN Special Rapporteur, proffered one of the earliest and most highly regarded definitions, centering Indigenous peoples around "historical continuity with . . . pre-colonial societies."[51] Cobo added that Indigenous peoples regard themselves separate from other presently prevailing groups and most commonly form "non-dominant sectors of society [that] are determined to preserve, develop and transmit to future generations . . . their ethnic identity."[52]

Yet this understanding, like Convention 169 and UNDRIP, omits the ongoing injustices these groups face. To accurately and fully represent the Indigenous identity, it is essential to incorporate this facet of their histories and experiences. Stephen James Anaya, author of the widely

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48. *Compare id.* (focusing primarily on familial descent, communal values, and colonial histories), *with* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3–4 (1996) (incorporating racism and marginalization into his definition).

49. *Contrast* Indigenous Peoples Rights Act, Rep. Act No. 8371, ch. I § 2(h) O.G. 2276, 2276 (Oct. 29, 1997) (Phil.) (incorporating communal values and colonial histories in its definition), *with* Convention 169, *supra* note 35, at 385 (failing to incorporate communal values, colonial histories, and persisting societal struggles) *and* UNDRIP, *supra* note 40, art. 3, at 4 (omitting vital concepts captured by the Indigenous Peoples Rights Act of 1997).

50. *Infra* notes 51–62 and accompanying text (illustrating definitions from distinguished academics that, when taken together, form a more comprehensive view compared to the previously mentioned pieces of legislation).

51. *See* José R. Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, at ¶379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, (Jan. 3, 1987) (providing a foundational understanding of Indigenous populations by defining the term Indigenous peoples, Cobo also included a comprehensive report on the discrimination Indigenous peoples experienced and recommendations to eliminate it); Wiessner, *supra* note 42, at 110–11; Ellen Lutz & Nicole Ledema, *Addressing Indigenous Rights at the United Nations*, CULTURAL SURVIVAL (May 7, 2010), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/addressing-indigenous-rights-united-nations [https://perma.cc/CR57-3MRU].

52. *See* Wiessner, *supra* note 42, at 110–11.

acclaimed book *Indigenous Peoples in International Law* and established international Indigenous rights attorney, submitted a more comprehensive view that expressly regarded the native peoples of Asia as indigenous.[53] Using the same ideas of historical continuity as Cobo, Anaya reasoned that this "Indigenous" designation is warranted "because their ancestral roots are imbedded in the lands . . . more deeply than the roots of more powerful sectors of society living on the same lands . . . ."[54] But most importantly, he recognized the social challenges that persist for Indigenous people:[55]

> [I]ndigenous peoples characteristically exist under conditions of severe disadvantage relative to others . . . . Historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. . . . [I]ndigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. . . . [T]he indigenous sectors almost invariably are on the lowest rung of the socioeconomic ladder, and they exist at the margins of power.[56]

Like Anaya, Siegfried Wiessner, a law professor of Indigenous rights, maintains that Indigenous peoples are traditionally "descendants of preinvasion inhabitants of lands."[57] Weissner ventures a step further, averring that "spiritual bond[s]" often accompany this lineage.[58] In his view, Indigenous peoples "are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have, in past or present, suffered a pervasive pattern of subjugation, marginalization, dispossession, exclusion and/or discrimination."[59]

Addie C. Rolnick, a law professor and proponent of Indigenous rights, built upon this idea.[60] She first argued that indigeneity is a "group status" that "depends on both self-identification and group acceptance."[61] Secondly, and crucially, she posited that "'[h]istorical continuity with

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53. *See* ANAYA, *supra* note 48, at 3.
54. *See id.*
55. *See id.* at 3–4.
56. *Id.*
57. *See* Wiessner, *supra* note 42, at 57 n.3.
58. *Id.*
59. *Id.*
60. *See* Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2652 (2022).
61. *Id.* at 2674; *see also* Addie C. Rolnick, *Indigenous Children*, *in* THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 571, 573 (Jonathan Todres & Shani M. King eds., 2020) (noting that "formal government recognition" is not required and instead focuses on community perception).

pre-invasion and pre-colonial societies' is . . . the defining feature of indigeneity as compared to 'minority' status."[62]

This Comment will use these definitions in tandem. Thus, for the purposes of this Comment, "Indigenous peoples" refers to culturally distinct groups who self-identify and are recognized as descendants of the original inhabitants of land, maintain a level of spirituality and deep ancestral ties to their lands, and share a continuity of identity—all while enduring systemic inequities within settler-dominated societies.

B. The Philippines and Batok

The Philippines is comprised of over 100 distinct Indigenous groups and 7000 islands in Southeast Asia, with Luzon being one of the most prominent.[63] Across the archipelago, Indigenous peoples account for roughly ten percent of the population and foster similar subcultures with themes of community, spirituality, and creativity.[64] This is especially true for those residing in the Cordillera Administrative Region, or the Cordillera Region, situated in the northern part of Luzon.[65] From its founding as an independent nation, the Philippines explicitly acknowledged its Indigenous groups and recognized the importance of protecting their rights.[66] Specifically, the 1987 Philippine Constitution provided that "[t]he State recognizes and promotes the rights of [I]ndigenous cultural communities within the framework of national unity and development."[67]

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62. *See* Rolnick, *supra* note 60, at 2674.

63. *See* Martinez, *supra* note 5, at 545; ASIAN DEV. BANK, SOCIOECONOMIC IMPACT ASSESSMENT OF THE MALALISON ISLAND SOLAR PHOTOVOLTAIC HYBRID PROJECT IN THE PHILIPPINES ix (2024); JUSTIN KINSER, 3D ELEVATION DATA AND DECISION SUPPORT SYSTEMS FOR DEVELOPING NATIONS: PHILIPPINES 1 (2020); *Luzon*, BRITTANICA (July 9, 2025), https://www.britannica.com/place/Luzon [https://perma.cc/8QTV-RJCS].

64. *See* Martinez, *supra* note 5, at 545. *See generally id.* at 548 (describing how "[d]rumming, weaving, tattooing, and storytelling are everyday practices with inherent artistic and historical value dating back to the time of their ancestors").

65. June Prill-Brett, *Indigenous Land Rights and Legal Pluralism Among Philippine Highlanders*, 28 L. & SOC'Y SE. ASIA 687, 689, 695 (1994). *See generally id.* at 688–89 (illustrating the Cordillera Region as land that is defined by a "great chain of mountains . . . called the Gran Cordillera Central"); *see also* Joni L. Pagandian & Jesster P. Eduardo, *Restorative Justice in Cordillera Administrative Region: Tradition and Praxis Towards a Peace Process Model*, 7 INT'L J. SOC. SCI. STUD. 10, 14 (2018) ("The Cordillera is both the highest and the single largest mass of mountains in the entire Philippine archipelago.").

66. *See* CONST. (1987), art. II, § 22 (Phil.).

67. *Id.*

Indigenous people have consistently stood at the forefront of societal advancement through contributions to areas such as "navigation, housing, agriculture and climate resilience."[68] Their knowledge systems and creations often predate and exceed the bounds of contemporary technologies; so, it follows that lawmakers are compelled to confront complex questions surrounding Indigenous peoples' property rights.[69] The process likely required the consideration of Indigenous peoples' relationship with land and nature because it directly informs their understanding of proprietorship.[70] For instance, the Kalinga people believed that "no one can claim absolute ownership of land, water, and mineral resources, because only *Apo Kabuniyan*, or the Supreme Deity, can own land."[71] In this way, the Kalinga's concept of property ownership was inextricably linked to their cultural community, whereas ownership in Western and European-influenced countries centers on an individual.[72] To the Kalinga, land represented one's livelihood and the preservation of family, heritage, and identity—all secured through an unbroken lineage of stewardship.[73] And, instead of a single property owner, all community members were deemed "caretakers of divine lands."[74]

Beyond the spirituality of property ownership, Indigenous people are distinguished by their long histories of innovation, often achieved through their skilled use of natural resources and communal

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68. Suliasi Vunibola & Matthew Scobie, *Islands of Indigenous Innovation: Reclaiming and Reconceptualising Innovation Within, Against and Beyond Colonial-Capitalism*, 52 J. ROYAL SOC'Y N.Z. 54, 54–55 (2022).

69. *See id.* at 54.

70. *See* Peter Drahos & Susy Frankel, *Indigenous Peoples' Innovation and Intellectual Property: The Issues, in* INDIGENOUS PEOPLES' INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 1, 2 (Peter Drahos & Susy Frankel eds., 2012) ("[I]ndigenous innovation is . . . cosmologically linked to land and an [I]ndigenous group's relationship with that place . . . .").

71. Violago, *supra* note 26, at 407.

72. *See id.* at 378–79 (noting the perception that "collective or communal ownership" of certain works aligns with Indigenous cultures and existing frameworks across the globe); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 35 (2001) (noting how Western intellectual property frameworks have not contemplated that communities can own knowledge as collective property).

73. *See* Violago, *supra* note 26, at 407 ("So long as the individual has land where he can work, he enjoys the security and social prestige connected with his family or kinship name in the community.").

74. *See* Violago, *supra* note 26, at 407; Vicente Paolo Yu, *Controlling Indigenous Knowledge: Towards a Property Regime for Indigenous Knowledge Systems*, 70 PHIL. L.J. 27, 27 (1995).

knowledge.[75] Many of these creations, however, do not fit neatly within the confines of tangible property and its attendant legal rights.[76] In recognition of this reality and the broader need to safeguard Indigenous communities, the Philippine government enacted the IPRA and established the National Commission on Indigenous Peoples (NCIP).[77] The IPRA "paved the way for the explicit recognition of [I]ndigenous peoples' intellectual property rights . . . in the country."[78] And as a government agency, the NCIP is tasked with enforcing these protections and working to prevent the exploitation and marginalization of Indigenous groups.[79]

1. What is batok?

A significant tradition practiced by the Indigenous Filipino community is tribal tattooing.[80] Performed across the nation, this practice is known by various names, reflecting the linguistic and regional diversity of the archipelago.[81] The most widely used terms are *batok* or *batuk*, which refer to the ancient art of hand-tapping sacred symbols onto the skin that commemorate rites of passage, assert cultural identity, and reinforce communal belonging, among other

75. *See 10 Indigenous Inventions that Will Change How You See the World*, SURVIVAL, https://www.survivalinternational.org/articles/10-indigenous-inventions [https://perma.cc/8BSR-5VQW] (last visited Nov. 2, 2025) (highlighting that Indigenous people developed many creations now widely used and relied on).

76. *See* SEAN L. Collin, Yvette R. H. Collin & Michael Koskey, *Protecting the Right to Exist as a People: Intellectual Property as a Means to Protect Traditional Knowledge and Indigenous Culture*, 2016 ALASKA NATIVE STUD. CONF. 2, https://www.taftcollege.edu/academics/resources/oer/_files/Collin%20et%20al.pdf [https://perma.cc/84VT-QPHP]. *Batok* is a key example of this misalignment.

77. *See* Violago, *supra* note 26, at 349.

78. *Id.*

79. *See* Althea Marie Ampater, Steven Lance Dompor, Jenny Lyn Duhac & Bhea Paje, *Indigenous Peoples' Rights Act (IPRA) Law in the Philippines: A Scoping Review on the Effectiveness*, 6 J. PUB. ADMIN. & GOV'T 106, 113 (2024).

80. *See* C. R. Moss, *Nabaloi Law and Ritual*, 15 U.C. PUBL'NS AM. ARCHAEOLOGY & ETHNOLOGY 207, 217 (1920) ("[I]t was customary for all to be tattooed . . . ."); Valentina-Violeta Leff & Adrian Otovescu, *Tattoos as Markers of Identity: A Cultural Evolution*, 2 REVISTA UNIVERSITARIA DE SOCIOLOGIE 515, 517 (2024) ("[T]attoos had a protective function, being considered amulets against evil spirits and diseases . . . [and were] applied by shamans during sacred rituals . . . .").

81. *See* Ana Cabalquinto, Carmela Dizon, Chelsea Ramirez & Mai Santiago, *Batok: The Exploration of Indigenous Filipino Tattooing as a Collective Occupation* (Dec. 2021) (M.S. thesis, Dominican University of California) (on file with Dominican University of California, Occupational Therapy, Graduate Capstone Projects) (noting several different names for the practice).

meanings.[82] In some settings, this custom may be performed through hand-poking and hand-tapping techniques.[83] The term *batok* is believed to stem from the rhythmic sound of the *pat-ik* (stick) striking the *gisi* (tattoo instrument) which marks the skin.[84] Traditionally, the *gisi* was crafted from carabao horn that was "bent by fire" and embedded "with lemon thorns and/or four needles (*gambang*)" at its tip.[85] Contemporary practitioners may use electric tattoo machines or fashion their own *gisi* using wood and a metal needle.[86] Today, *batok* is most notably associated with the Kalinga people of the Cordillera Region.[87] Even so, the custom persists among Filipinos—both in the Philippines and throughout the diaspora.[88]

Batok's importance, at least in part, rests in its function as a visual archive of an entire group's history, values, and collective identity.[89] Each resulting tattoo contains many, upwards of hundreds in some cases, "mutually intelligible" symbols and shapes that communicate specific statuses and lived experiences when placed together in a certain composition.[90] For example, women set to be married received the

82. *See* Violago, *supra* note 26, at 408; *see also* Cabalquinto et al., *supra* note 81, at 1 (noting that the word *batok* is an "Illokano term" and that the practice is "also known as Fatek/Burik/Tatak/Batek/Patik").

83. *See* Analyn Ikin V. Salvador-Amores, *Batek: Traditional Tattoos and Identities in Contemporary Kalinga, Northern Luzon Philippines*, 3 HUMANITIES DILIMAN 105, 108 (2002).

84. *See id.*; Violago, *supra* note 26, at 408 (describing the *gisi*); *Pat-ik (Carved Piece of Wood Used in Tattooing)*, MAPPING PHILIPPINE MATERIAL CULTURE, https://philippinestudies.uk/mapping/items/show/27913 [https://perma.cc/3DJ5-WRWL] (last visited Nov. 18, 2025) (depicting a *pat-ik*).

85. Salvador-Amores, *supra* note 83, at 109.

86. *See id.*

87. *See* Prill-Brett, *supra* note 65, at 689. For the sake of simplicity, I use *batok* to refer to the entire Filipino practice of tribal tattooing despite the other terms available. *See* Cabalquinto et al., *supra* note 81, at 1 (noting that *batok* is "also known as Fatek/Burik/Tatak/Batek/Patik").

88. *See* Analyn Salvador-Amores, Batok (*Traditional Tattoos) in Diaspora: The Reinvention of a Globally Mediated Kalinga Identity*, 19 S.E. ASIA RSCH. 293, 294 (2011).

89. *See id.* at 299, 305 (providing examples such as how markings on "a woman's body [were] a visual display of their own and their male kinsmen's political and social positions in the community" or conveyed a family's wealth).

90. Salvador-Amores, *supra* note 83, at 112. The many symbols used in a *batok* design correlate to different animals, items, experiences, and more. *See* Salvador-Amores, *supra* note 11, at 468 ("Specific tattoo designs evoke visual imagery that is instantly understood by the members of the community . . . [f]or instance, the tattoos of the Kalinga, such as the *gayaman* (centipede), lizard (*bañas*), eagle (*turajan*), and axe

lin-lingao—"x-marks found on the forehead, both sides of the cheeks, and the nose"—to ward off vengeful and malevolent spirits.[91] Some markings were closely tied to an individual's integration into communal life, conferring legitimacy and recognition within the community.[92] For milestones such as entering "childhood, adulthood (*igam*) [or] old age (*baratang/baraker*)," the Kalinga received specific markings to denote a change in a person's place in society.[93] In other cases, warriors who had completed a headhunting ritual qualified for designs specifically reserved for this feat.[94] Modern practitioners safeguard this ancient art form by restricting the tattooing of headhunter markings onto only those who have rightfully earned them.[95]

The tattoo practitioners, also known as a *manbatok* or *mambabatok*, are the pillars of the practice.[96] Though sparsely documented, historians have glimpsed the innerworkings of the role by engaging with prominent figures such as Apo Whang-Od, a *mambabatok* hailing from a small town in Kalinga.[97] Accounts from various practitioners hint at different avenues to becoming an official *manbatok* or *mambabatok*.[98] Even so, the process seemingly requires, at a minimum, an extensive apprenticeship under an established practitioner, strong ties with community members and across regions, and a deep connection with and understanding of

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(*khaman*), among others, to connote the social standing in their community."). Even the color of the ink adds a layer of meaning to markings. *Id.* at 464 ("According to the elders, it is believed that the bluish and or greenish color of the ink on the skin 'imitates' the nerves carrying the blood of the human body.").

91. *See* Violago, *supra* note 26, at 409 n.297; Salvador-Amores, *supra* note 83, at 113.

92. Salvador-Amores, *supra* note 83, at 111.

93. *Id.*

94. *See* Violago, *supra* note 26, at 408; Salvador-Amores, *supra* note 83, at 110; ALFRED GELL, WRAPPING IN IMAGES: TATTOOING IN POLYNESIA 34 (1993) (noting that even in other Indigenous communities "tattooing can be regarded . . . as a component of the social person as a whole").

95. *See* Ayla Roda, TATAK BY AYLA, https://www.tatakbyayla.com [https://perma.cc/URD6-6AJ7] (last visited Nov. 2, 2025).

96. Men practitioners were known as a "*manbatok* (*man*—a prefix meaning 'someone who does,' *batok*—tattoo)" and traveled to different villages to "tattoo for a fee." Salvador-Amores, *supra* note 11, at 454. In the Kalinga region, however, the practitioners were primarily women that "reside[d] permanently in the village" and were known as a *mambabatok*. *Id.*

97. *See* Krutak, *supra* note 3, at 56–57; Salvador-Amores, *supra* note 88, at 303.

98. *See* Analyn Salvador-Amores, *Philippines: The Tattoo Practitioner of Kalinga*, COMBONI MISSIONARIES IR., https://combonimissionaries.ie/2019/07/09/philippines-the-tattoo-practitioner-of-kalinga [https://perma.cc/AM76-5YA2] (last visited Nov. 2, 2025) ("To become a manbatok, one should be able to sustain the practice, as the skill requires depth and knowledge in tattooing.").

the cultural heritage.[99] In fact, Whang-Od herself became an apprentice as an early adolescent.[100] Only after a half-century did she take on a few apprentices—women from her lineage or her small tattooing village, Buscalan.[101] The practitioners' immersion in the culture is vital because they are tasked with performing hundreds of sacred ceremonies and incorporating many symbols which convey a unique meaning when placed in a specific orientation and context.[102] Certain symbolic grammars would likely be lost on those who are not accustomed to the Indigenous way of life.[103] Cultural belonging is likewise essential because practitioners are integrated into the communities they serve, often forming familial-like bonds with recipients of the markings.[104]

2. The implications of batok's revival

The revival of *batok* has sparked a sense of cultural pride and renewed interest among Filipinos.[105] In the context of the digital age,

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99. *See* Lars Krutak, *The Last Kalinga Tattoo Artist of the Philippines*, LARS KRUTAK: TATTOO ANTHROPOLOGIST (May 30, 2013), https://larskrutak.com/the-last-kalinga-tattoo-artist-of-the-philippines [https://perma.cc/SV4T-Z8F9] ("It is a difficult skill that requires a lot of patience, practice, and dedication."); Cabalquinto et al., *supra* note 81, at 11–12 (highlighting the communal and cultural importance of *batok*, which is passed down familial lines and preserved by individuals selected to be apprentices of the practice).

100. *See* Salvador-Amores, *supra* note 88, at 303.

101. *See* Krutak, *supra* note 3, at 56–57; Salvador-Amores, *supra* note 11, at 454 (noting that Grace Palicas, Whang-Od's grandniece who is now in her mid 20s, "has been her apprentice since the age of 10"). In 2017, "two other young women, Elyang and Reynalyn, from the village . . . joined" as apprentices. *Id.* Although sources vary as to whether Whang-Od has two or three apprentices, all sources agree that two of Whang-Od's grandnieces are training as apprentices.

102. *See* Cabalquinto et al., *supra* note 81, at 34 ("Mambabatoks urge those who reflect on receiving a batok to listen to their body and urges because it is said to be spiritual callings from ancestors."). The steps to receive *batok* often involve careful planning, extensive research, and various visits with the practitioner to discuss "considerations and precautions." *Id.* at 4.

103. *See* Salvador-Amores, *supra* note 11, at 454 ("The tattoo's appearance and the degree of permanence are also dependent on the method employed in its production; the varying pigments used to yield a blackish, greenish, or bluish color which indicates group affiliations; and the symmetry and arrangement of the design."). The practitioner's role as a guardian of the culture is supported by the effects that certain "[s]ocial and cultural practices" have on "the efficacy of the [marking's] purpose and function." *Id.*

104. *See* Cabalquinto et al., *supra* note 81, at 17 (noting that community members are often involved in the ceremonial processes to complete a recipient's *batok*).

105. Krutak, *supra* note 3, at 57–58 (describing the "Mark of the Four Waves Tribe," which is a "global community of hundreds of men and women of Filipino heritage that seeks to revitalize the tattooing traditions," all while exhibiting immense pride for their

however, the proliferation and widespread accessibility of information has created channels by which non-Indigenous people can misappropriate the practice.[106] A key aspect of *batok's* cultural and spiritual significance lies in its intentionality and selectivity—bestowed in a community-sanctioned process only to those who have met specific criteria.[107] The growing possibility that outsiders will decontextualize and commodify the practice poses a threat to *batok's* integrity as a sacred tradition. This becomes even clearer when considering the shifting generational attitudes toward tattoos, particularly among younger audiences who seek their cosmetic value.[108] And given that indigeneity is now often romanticized or valorized in popular media, opportunistic individuals and businesses are further incentivized to exploit *batok*.[109]

These concerns are punctuated by modern instances in which outsiders have attempted to commercialize the practice, especially in ways that disregard its origins and intended use.[110] One of the faces of the revitalization of *batok*, Apo Whang-Od, has received extensive recognition for her work as a *mambabatok*, predominantly in the small

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own markings); *see* Jessie Grace M. Sannadan, Sheila Mae Carol A. Buslig, Odette C. Pannogan & Marlita E. Quesada, *The Kalinga People's Commitment to Diversity and Inclusion: Narratives and Lessons from the Underground*, 25 ACTA SCIENTIAE 33, 40 (2024) ("This revival is not just about preserving a tradition but also educating the Kalinga youth and the global audience about the importance of cultural heritage.").

106. *See* Cabalquinto et al., *supra* note 81, at 12 (highlighting how *batok* has garnered "attention in the mainstream media"); Carpio, *supra* note 5 (presenting Apo Whang-Od on the cover of Vogue); *Marcos: Protect Whang-Od, Other National Cultural Treasures from Exploitation*, POLITIKO (Aug. 6, 2021), https://politiko.com.ph/2021/08/06/marcos-protect-whang-od-other-national-cultural-treasures-from-exploitation/politiko-lokal [https://perma.cc/U4EG-CAUE] (illustrating how non-Indigenous people have attempted to monetize and appropriate the custom).

107. *See* Cabalquinto et al., *supra* note 81, at 12 ("In pre-colonial Philippines, earning a batok was a sign of nobility, bravery, and/or maturity after a courageous task or event has occurred."). Even minor details, such as the location of each marking, carried significance. *Id.* Some communities also correlated the amount of *batok* markings with one's courage and integrity. *Id.*

108. Salvador-Amores, *supra* note 11, at 469 (noting that there has recently been "an influx of [young] tourists to the village of Buscalan" looking to receive *batok* from Whang-Od).

109. *See id.* ("[T]raditional tattooing technology has been appropriated by contemporary modern tattoo practices in the Philippines as a form of revival. The rarity and rawness of tattoos produced through the traditional process imbue them with a greater 'authenticity.'").

110. *See* Violago, *supra* note 26, at 351 (illustrating an example from recent years in which a vlogger misrepresented that Whang-Od agreed to teach an online class on *batok*).

mountain village of Buscalan.[111] In 2021, Nuseir Yassin and Whang-Od became entangled in a publicized conflict involving the practice.[112] Yassin, a YouTube content creator and owner of an online learning platform called Nas Academy, advertised an online course titled "Learn the Ancient Art of Tattooing."[113] For merely 750 Philippine pesos—roughly fifteen dollars at the time—prospective students were to be taught *batok* by Whang-Od herself.[114] After hearing of the class, Whang-Od's grandniece, Grace Palicas, publicly refuted its legitimacy, explaining that Whang-Od did not sign any contract and that the purported class was exploiting their culture.[115]

Yassin removed the course page from his website after Grace's remarks.[116] But not long after, he posted a video showcasing Whang-Od affixing her thumbprint on a contract, with her niece Estella Palangdao sitting in as a translator and witness.[117] The NCIP subsequently opened an investigation pursuant to the IPRA.[118] Under this legal framework, the NCIP declared that Yassin was required to obtain Free, Prior, and

111. *See* Salvador-Amores, *supra* note 11, at 454 ("The only known female tattooists reside in the village of Buscalan in southern Kalinga. Foremost among them are Whang-[O]d, who in the early 2000s was already a 90-year-old tattoo practitioner.").

112. Violago, *supra* note 26, at 351.

113. *Id.* at 410.

114. *Id.*

115. *Id.*; Tamara Nassar, *Nas Daily Suspends Philippines Venture amid Backlash*, ELEC. INTIFADA (Aug. 12, 2021), https://electronicintifada.net/blogs/tamara-nassar/nas-daily-suspends-philippines-venture-amid-backlash [https://perma.cc/FC6U-EVXX].

116. Violago, *supra* note 26, at 410; *see also Nas Academy Insists Whang-Od Consented to Online Tattoo Course*, RAPPLER (Aug. 5, 2021), https://www.rappler.com/life-and-style/arts-culture/nas-academy-says-whang-od-consented-online-tattoo-course (on file with the American University Law Review) ("[Nas Academy] said they took down the Whang-Od course page 'out of respect for her family . . . while [they] resolve[d] any issues that . . . [came] from these falsehoods.").

117. Violago, *supra* note 26, at 410–11; Miguel Cordon, *Nas Academy Removes Course After Instructor's Grandniece Calls It a 'Scam'*, TECHINASIA (Aug. 5, 2021), https://www.techinasia.com/nas-academy-removes-instructors-grandniece-calls-scam (on file with the American University Law Review).

118. Nassar, *supra* note 115; Violago, *supra* note 26, at 351; *see also* Ampater et al., *supra* note 79, at 113 ("[T]he National Commission on Indigenous Peoples (NCIP) plays a central role as the primary government agency tasked with implementing the Indigenous Peoples' Rights Act (IPRA)."). Beyond mediating conflicts, the NCIP is also responsible for "issuing Certificates of Ancestral Domain Title (CADT) and Certificates of Ancestral Land Title (CALT) . . . and ensuring that Free, Prior, and Informed Consent (FPIC) is observed in development projects." *Id.* Unfortunately, substantial barriers impede the NCIP's ability to deliver services effectively, leaving Indigenous Peoples vulnerable to encroachment by private entities. *See id.* (listing "[l]imited funding, insufficient manpower, and bureaucratic inefficiencies" as significant obstacles).

Informed Consent (FPIC) from the entire Butbut tribe to publicly offer the online course.[119] The NCIP found that Whang-Od did not receive sufficient information about the course to consent to participation.[120] The NCIP also deemed the contract "grossly onerous" because it granted Nas Academy perpetual ownership of her likeness.[121]

The ensuing backlash and discourse surrounding the dispute emphasized concerns that have long existed but had yet to be heard on such a large scale. Although Yassin has since participated in a NCIP-facilitated reconciliation process, this incident reveals the desire of non-Indigenous people and businesses to commodify Indigenous tattooing due to its surge in popularity and the current climate surrounding indigeneity and tattoos.[122]

C. Traditional Knowledge and Intellectual Property Law

The U.S. intellectual property framework is derived from the Constitution, which recognized the importance of innovation that aids

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119. *See NCIP to Review Validity of Nas Daily 'Contract' with Whang-Od*, RAPPLER (Aug. 6, 2021), https://www.rappler.com/life-and-style/arts-culture/national-commission-indigenous-peoples-review-validity-nas-daily-contract-whang-od [https://perma.cc/T6DL-TAZQ] ("Ownership of such [Indigenous tattoo patterns and designs are] lodged to the community and to its race, and not to a single individual. Thus, prudence dictates securing prior consent from the community as recognition of their collective ownership before any appropriation can be made."); *see also* Violago, *supra* note 26, at 412 (describing the Senate Committee inquiry into whether the Butbut community's FPIC was required).

120. Denver Del Rosario, *Whang-od Did Not Consent to Nas Academy Masterclass – NCIP*, INQUIRER.NET (Aug. 29, 2021, at 23:44 ET), https://newsinfo.inquirer.net/1480583/whang-od-did-not-consent-to-nas-academy-masterclass-ncip (on file with the American University Law Review); *see also* Violago, *supra* note 26, at 351 (noting that Whang-Od "denied ever affixing her thumbprint to the contract").

121. *Id.*

122. Nassar, *supra* note 115; *see* Mary Whitfill Roeloffs, *Tattoo USA: One-Third of Americans Have Ink as Industry Projected to Hit $4 Billion*, FORBES (Aug. 15, 2023, at 16:38 ET), https://www.forbes.com/sites/maryroeloffs/2023/08/15/tattoo-usa-one-third-of-americans-have-ink-as-industry-projected-to-hit-4-billion (on file with the American University Law Review) (describing the billion-dollar tattoo industry); *see also* Kathleen Magramo, *I Got Inked by the World's Oldest Tattoo Artist*, CNN: STYLE (July 10, 2024, at 03:55 ET), https://www.cnn.com/style/philippines-worlds-oldest-tattoo-artist-intl-hnk [https://perma.cc/PH4B-9ZPF] (demonstrating the high demand and cost of tribal tattooing); Abby, *The Cost of Getting Inked by the Living Legend Apo Whang-od*, JUST GO ABBY (Jan. 19, 2024), https://justgoabby.blog/2024/01/19/the-cost-of-getting-inked-by-the-living-legend-apo-whang-od [https://perma.cc/ZL94-59R9] ("[A]n overnight stay in Buscalan to get inked by Apo Whang-[O]d may cost from ₱6,000–₱8,500."); Roda, *supra* note 95 (requiring a minimum budget of $1000 for her large traditional Filipino tattoos).

the development of society.[123] Several theories exist at the foundation of intellectual property jurisprudence—namely the labor, personality, and utilitarian theories.[124] First, the labor theory proffers that one should reap and retain the fruits of their labors.[125] Second, the personality theory is built on the notion that "property provides a unique and especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person."[126] Third, the utilitarian theory, also referred to as the welfare theory, prioritizes any solution that "leads to the least amount of suffering for the least amount of individuals or conversely, the greatest pleasure for the greatest number of individuals."[127]

1. Traditional knowledge

While these principles seem to mandate expansive protections across all contexts, in reality, Western intellectual property laws primarily operate on an individualistic framework that imagines a sole creator of a good or process.[128] Societies, typically Indigenous communities, that

123. U.S. CONST. art I, § 8, cl. 8. The U.S. Constitution empowered Congress to "promote the Progress of Science and useful Arts" by granting "Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* This clause specifically relates to copyrights and patents but also set the foundation for the intellectual property field generally. At the same time, the Commerce Clause grants Congress the authority to regulate trademarks because of its role in interstate and foreign commerce. U.S. CONST. art I, § 8, cl. 3.

124. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746–47 (2012); Mala Chatterjee, *Understanding Intellectual Property: Expression, Function, and Individuation*, 70 J. COPYRIGHT SOC'Y U.S. 57, 63–64 (2023).

125. Michelle M. Wu, *Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge Is the Only Theory Able to Explain the Entirety of Copyright's Balance*, 64 IDEA 135, 147–48 (2023); Jessica Meindertsma, *Theories of Copyright*, THE OHIO STATE UNIV. (May 9, 2014), https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright [https://perma.cc/F9ZH-RCDF].

126. Mitchell Longan, *A System out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law Through the* Lenz *of Users' Rights*, 56 U. MICH. J.L. REFORM 779, 788–89 (2023); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

127. Longan, *supra* note 126, at 798; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPALS OF MORALS AND LEGISLATION 1, 2, 6–7 (1823); Matthew G. Sipe, *Patent Law's Philosophical Fault Line*, 2019 WIS. L. REV. 1033, 1044 (2019); Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 319 (2008).

128. *See* Jens Martin Skibsted, *How IP Laws Can be Reimagined to Stimulate Innovation*, WORLD ECON. F. (Feb. 19, 2024), https://www.weforum.org/stories/2024/02/how-ip-laws-can-be-reimagined-to-stimulate-innovation (on file with the American University Law Review) (discussing the difficulty of applying traditional intellectual

are founded on notions of communal and ancestral knowledge are ill-fitted to such legal constructs.[129] Recognizing this misalignment, the World Intellectual Property Organization (WIPO) acknowledged the concept of traditional knowledge in the context of intellectual property rights and biopiracy.[130] Traditional knowledge is defined as the "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."[131]

Proponents of increased legal protections for traditional knowledge have effectuated regional and multilateral agreements that "strengthen and harmonize the rights of [I]ndigenous groups and . . . expand the geographic reach of those rights."[132] Most notably, the Nagoya Protocol

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property laws in a time of digital collaboration); PETER DRAHOS, THE UNIVERSALITY OF INTELLECTUAL PROPERTY RIGHTS: ORIGINS AND DEVELOPMENT 2 (1999) (noting that intellectual property systems typically envision an individual person as the origin of a creation and how this does not resonate in Indigenous cultures which view shared knowledge as an "organic whole"). *But see* Indian Arts and Crafts Act, Pub. L. No. 101-644, 104 Stat. 4662 (1990) (protecting the cultural integrity of Native American works); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (conferring property rights to Native Americans over human remains and cultural items).

129. Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51–78 (2004) (proposing the "incorporation of . . . communal notions of authorship" for copyright protection when considering the Indigenous lifestyle that is community-oriented and conducive to creation).

130. *Traditional Knowledge*, WORLD INTELL. PROP. ORG., https://www.wipo.int/en/web/traditional-knowledge/tk/index [https://perma.cc/BPU7-JTUF] (last visited Nov. 2, 2025). Biopiracy refers to the appropriation of biological resources and traditional knowledge, often from Indigenous communities, without fair compensation or acknowledgement. Drahos & Frankel, *supra* note 70, at 1, 7–9.

131. WORLD INTELL. PROP. ORG., *supra* note 130.

132. William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L.J. 1511, 1538 (2018). For examples of agreements that expand the scope and protection of Indigenous rights, see UNDRIP, *supra* note 40; Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (as amended Sep. 28, 1979); United Nations Educational, Scientific and Cultural Organization [UNESCO] & World Intellectual Property Organization [WIPO], *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, at3, 5, 9 (1982), http://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf [https://perma.cc/KTT5-KUJA]; UNESCO Universal Declaration on Cultural Diversity, annex I, art. 9 (Nov. 2, 2001), http://unesdoc.unesco.org/images/0012/001246/124687e.pdf#page=67 [https://perma.cc/X5SA-LRNG]; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity art. 1, Oct. 29, 2010, 3008 U.N.T.S. 3 [hereinafter Nagoya Protocol].

requires its member countries to "adopt national legislation to ensure that . . . knowledge located within its own territory [is] accessed only 'with the prior and informed consent and approval and involvement of these [I]ndigenous and local communities, and that mutually agreed terms have been established.'"[133] While the concept of traditional knowledge presently exists outside conventional intellectual property law, its function as a protective mechanism is complex and evolving.[134]

2. U.S. trade secret law

Intellectual property law broadly encompasses four major frameworks: trade secrecy, copyright, trademark, and patent.[135] Trade secrecy is a form of legal protection for people and institutions in commerce, albeit less pursued among the intellectual property avenues.[136] According to the Restatement of Torts and Unfair Competition, "[a] trade secret may consist of any . . . compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[137] Historically, trade secret law focused on the regulation of labor disputes and protection of technical, proprietary information against competitors and former employees.[138] While fairness and "business morality" persist as central principles, the Supreme Court has brought concerns for innovation to the forefront of public policy.[139]

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133. Fisher, *supra* note 132, at 1541; Nagoya Protocol, *supra* note 132, art. 7.

134. *See* Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 23, 38 (2001) (describing the ongoing debates and discussions about the use and function of traditional knowledge in the intellectual property space).

135. Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, 2 J. ADVANCED PHARM. TECH. & RSCH. 88, 89 (2011); *Intellectual Property Law*, GEO. UNIV. L. CTR., https://www.law.georgetown.edu/your-life-career/career-exploration-professional-development/for-jd-students/explore-legal-careers/practice-areas/intellectual-property-law [https://perma.cc/628H-KXGP] (last visited Nov. 2, 2025).

136. Saha & Bhattacharya, *supra* note 135, at 89. Courts also view trade secrecy as creating a property right that "allows the trade secret owner to reap the fruits of its labor . . . and protects the owner's 'moral entitlement to these fruits.'" Altavion, Inc. v. Konica Minolta Sys. Lab'y Inc., 171 Cal. Rptr. 3d 714, 726 (Cal. Ct. App. 2014) (quoting DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 13 (Cal. 2003)).

137. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474–75 (1974) (quoting RESTATEMENT (FIRST) OF TORTS § 757, cmt. b (A.L.I 1939)).

138. Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1383 (2022).

139. *See* Melvin F. Jager & Brad Lane, *§ 1.3. The Maintenance of Commercial Morality*, in TRADE SECRETS LAW, Westlaw (database updated Apr. 2025) (previewing the history of trade secret law and noting the ongoing concern for business morality); RESTATEMENT

At the same time, the Court held that state trade secret laws are not preempted by federal intellectual property laws.[140]

Two cases displayed these Supreme Court actions and played a major role in the development of trade secret law.[141] In *Kewanee Oil Co. v. Bicron Corp.*,[142] the Supreme Court clarified the relationship between these state and federal laws.[143] The 1974 ruling rejected the idea that the latter should entirely preempt the former; instead, the Court viewed the two systems as complementary.[144] Building on that landmark case, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*[145] qualified this broad presumption of federal non-preemption.[146] The Court provided that state trade secret laws are not preempted if "(1) they do not interfere with the incentive rationales of patent and copyright law; (2) they do not protect information upon which others should be allowed to build; and (3) they seek to punish wrongful activity that is qualitatively different from patent and copyright infringement."[147] These cases illustrated the importance of not only protecting against unfair competition, but also prioritizing the public's right to innovate and balancing the interests of other intellectual property laws.[148]

(FIRST) OF TORTS § 757 cmt. a (A. L. I. 1939) (noting "that [trade secret] protection is afforded" to protect against the breach of a "general duty of good faith" in the business sector); *see also Kewanee Oil*, 416 U.S. at 481 ("The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.").

140. *See Kewanee Oil*, 416 U.S. at 492 ("Our conclusion that patent law does not pre-empt trade secret law is in accord with prior cases of this Court.").

141. *See* Sharon K. Sandeen, Kewanee *Revisited: Returning to First Principles of Intellectual Property Law to Determine the Issue of Federal Preemption*, 12 MARQ. INTELL. PROP. L. REV. 299, 305 (2008) (illustrating these two cases as highly influential on trade secrecy and other intellectual property fields because they altered the scope of the Court's focus on unfair competition and provided specific considerations to use in relevant cases).

142. 416 U.S. 470 (1974).

143. *See Kewanee Oil*, 416 U.S. at 491 (holding that trade secrecy does not entirely conflict with federal laws and policies); Sandeen, *supra* note 141, at 302 (noting "the Supreme Court in *Kewanee* is frequently cited for the proposition that trade secret laws are not preempted by federal law").

144. *See Kewanee Oil*, 416 U.S. at 491 ("[T]he extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure.").

145. 489 U.S. 141 (1989).

146. *See* Sandeen, *supra* note 141, at 350 (noting that state laws survive federal preemption if "federal intellectual property policies" are "not unduly interfere[d] with").

147. *Id.* at 351.

148. *See Kewanee Oil*, 416 U.S. at 471, 485–86 (describing the positive impacts of trade secrecy, including the dispersal of knowledge and the public's access to valuable

U.S. trade secret law stems from the Uniform Trade Secrets Act (UTSA), a model convention resolving inconsistencies across states' trade secrecy laws and reflective of the Court's ruling in *Bonito Boats*.[149] Per the UTSA, a "trade secret" is information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and . . . is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[150] Unlike trade secrecy's original focus on technical information, it now encompasses any information that satisfy these elements.[151] This broadened scope extends to the creation of a trade secret as well.[152] In fact, one is not required to complete a formal registration process to establish a trade secret.[153]

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inventions); *see also Bonito Boats*, 489 U.S. at 166 ("Both the law of unfair competition and state trade secret law have coexisted harmoniously with federal patent protection for almost 200 years . . . .").

149. *See Bonito Boats*, 489 U.S. at 166 (noting that Congress supported the protection of trade secrets before the enactment of the UTSA); 18 U.S.C. § 1832 (prescribing fines and imprisonment of up to ten years trade-secret theft); UNIF. TRADE SECRETS ACT, introductory cmt. (UNIF. L. COMM'N 1985) (codifying the core principles of U.S. trade secret laws with important distinctions from patent law); *see also This Day in Trade Secrets: Uniform Trade Secrets Act Approved 34 Years Ago Today*, ORRICK (Aug. 9, 2013), https://www.orrick.com/en/Insights/2013/08/This-Day-in-Trade-Secrets-Uniform-Trade-Secrets-Act-Approved-34-Years-Ago-Today [https://perma.cc/ZFM8-3N7D] (discussing the well-reasoned judicial roots of the USTA); *Bonito Boats*, 489 U.S. at 156 (noting the court's interest in striking a balance between trade secret and patent law).

150. UNIF. TRADE SECRETS ACT §1(4) (UNIF. L. COMM'N 1985); Lemley, *supra* note 127, at 317.

151. *See* Kapczynski, *supra* note 138, at 1383; *e.g.*, 18 U.S.C. § 1839 (3)(B) ("[T]he term 'trade secret' means all forms and types of . . . business [information] . . . including patterns, . . . methods, techniques, [and] processes, . . . whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing."); *see also* US W. Commc'ns, Inc. v. Off. Consumer Advoc., 498 N.W.2d 711, 714 (Iowa 1993) ("There is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.").

152. Kapczynski, *supra* note 138, at 1384.

153. WORLD INTELL. PROP. ORG, WIPO GUIDE TO TRADE SECRETS AND INNOVATION 2 (2022).

Nearly every state has enacted the UTSA with slight variations.[154] Representative is California's Uniform Trade Secrets Act[155] ("California's Act") which defines a trade secret using the same elements of economic value, secrecy, and reasonable efforts to maintain such secrecy that is seen in the UTSA.[156] California's Act prescribes specific criteria to assess whether information constitutes a trade secret, an approach consistent with other states'.[157] At both federal and state levels, six factors are considered:

> (1) The extent to which the information is known outside of the business;
>
> (2) the extent to which it is known by employees and others involved in the business;
>
> (3) the extent of measures taken by the business to guard the secrecy of the information;
>
> (4) the value of the information to the business and its competitors;
>
> (5) the amount of effort or money expended by the business in developing the information; and
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[158]

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154. *See* Bret A. Cohen, Michael T. Renaud & Nicholas Armington, *Explaining the Defend Trade Secrets Act*, AM. BAR ASS'N (Sept. 20, 2016), https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-september/explaining-the-defend-trade-secrets-act (on file with the American University Law Review); Altavion, Inc. v. Konica Minolta Sys. Lab'y Inc., 171 Cal. Rptr. 3d 714, 726 (Cal. Ct. App. 2014); CDC Restoration & Const., LC v. Tradesmen Contractors, LLC, 274 P.3d 317, 317 (Utah Ct. App. 2012). By 2018, "forty-seven states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands" have adopted some form of the UTSA. David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 113 (2018).

155. CA Civ. Code § 3426.1 (2024).

156. Am. Credit Indem. Co. v. Sacks, 262 Cal. Rptr. 92, 96–97 (Cal. Ct. App. 1989); UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM'N 1985).

157. *Sacks*, 262 Cal. Rptr. at 96 (evaluating whether information satisfies the elements of economic value, secrecy, and reasonable efforts to maintain secrecy); *accord* IME Watchdog, Inc. v. Gelardi, 732 F. Supp. 3d 224, 238 (E.D.N.Y. 2024) (employing the same factors in its determination that were used in *Sacks*); Daniels Health Scis., LLC v. Vascular Health Scis., LLC, 710 F.3d 579, 583 (5th Cir. 2013) (same).

158. *E.g.*, *Gelardi*, 732 F. Supp. 3d at 239 (quoting Cardiocall, Inc. v. Serling, 492 F. Supp. 2d 139, 148 (E.D.N.Y. 2007)); *accord Daniels Health*, 710 F.3d at 583 (using the same six factors in Texas (citing Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, LLC, 637 F.3d 604, 610 (5th Cir. 2011))). *See generally* Glob. Water Grp., Inc. v. Atchley, 244 S.W.3d 924, 928 (Tex. Ct. App. 2008) ("The party claiming a trade secret need not satisfy all six factors because trade secrets do not fit neatly into each factor every time.").

This list, however, serves as a flexible framework rather than a checklist of mandatory elements.[159] As a result, a plaintiff need not "plead every single factor to state a claim, and 'the most important consideration is whether the information is actually a secret.'"[160]

A valid trade secret requires economic value and secrecy. Economic value derives from the information's secrecy, not merely its commercial value.[161] When considering this element, the court in *Genasys Inc. v. Vector Acoustics, LLC*[162] evaluated whether the secret afforded "an actual or potential economic advantage over" competitors.[163] Additionally, the protected information must not be "generally known" or "readily ascertainable."[164] In *John Bean Technologies Corp. v. B. GSE Group, LLC*,[165] the court found that "[i]nformation is not generally known" when it is kept "'secret from at least some interested parties' and has not been fully disclosed without limitations."[166] The court added that "[a] trade secret is 'readily' ascertainable 'when it can be determined without much difficulty through proper means.'"[167] Precedent thus construes these two factors as a low standard that requires monetary value from a competitive advantage in commerce and information that is not freely available in the public domain.[168]

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159. TileBar v. Glazzio Tiles, 723 F. Supp. 3d 164, 191 (E.D.N.Y. 2024); LivePerson, Inc. v. 24/7 Customer, Inc., 83 F. Supp. 3d 501, 514 (S.D.N.Y. 2015) ("These factors are guideposts, not elements").

160. *LivePerson, Inc.*, 83 F. Supp. 3d at 514 (quoting Jinna Int'l Co. v. Premier Fabrics, Inc., No. 12-cv-07820, 2013 WL 4780049, at *4 (S.D.N.Y. May 24, 2013)); *TileBar*, 723 F. Supp. 3d at 191.

161. Synopsys, Inc. v. Risk Based Sec., Inc., 70 F.4th 759, 772 (4th Cir. 2023). An owner "generally must tie the value of the information at issue to its secrecy." WWMAP, LLC v. Birth Your Way Midwifery, 711 F. Supp. 3d 1313, 1320 (N.D. Fla. 2024). *See generally* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984) (stating the "economic value of [a trade secret] lies in the competitive advantage over others that [an owner] enjoys by virtue of its exclusive access to the data"); *WWMAP*, 711 F. Supp. 3d at 1321 (finding that the plaintiff sufficiently demonstrated economic value because if the information was made public, "its value to [them] would [have] diminish[ed] substantially").

162. 638 F. Supp. 3d 1135 (S.D. Cal. 2022).

163. *Id.* at 1151 (quoting Calendar Rsch. LLC v. StubHub, Inc., No. 2:17-cv-04062-SVW-SS, 2017 WL 10378336, at *3 (C.D. Cal. 2017)).

164. 18 U.S.C. § 1839(3)(B).

165. 480 F. Supp. 3d 1274 (D. Utah 2020).

166. *Id.* at 1299; *see also* A. M. Castle & Co. v. Byrne, 123 F. Supp. 3d 895, 901 (S.D. Tex. 2015) (requiring a trade secret to not be "generally known by others in the same business").

167. *John Bean*, 480 F. Supp. at 1299–300; *see also Byrne*, 123 F. Supp. 3d at 901–02 (requiring a trade secret to not be "readily ascertainable by an independent investigation").

168. *See* Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1205, 1211 (E.D. Wash. 2003) (finding that the availability of pieces of the secret information in public sources is not enough).

A trade secret owner must also make an effort to maintain secrecy.[169] However, complete secrecy is not required.[170] The low threshold requires only "*reasonable*" measures to safeguard information while allowing disclosure in certain contexts.[171] The adequacy of an owner's actions is a fact-specific inquiry.[172] In *WWMAP, LLC v. Birth Your Way Midwifery*,[173] the court found that the owner of the purported secret took reasonable measures to keep the information secret.[174] In its analysis, the court listed reasonable measures including "access control policies[,] . . . warnings to those who have access to secrets[,] . . . [and the] compartmentalization of information based on 'need to know.'"[175]

Once formed, a trade secret confers certain rights and exists indefinitely so long as the statutory requirements are met.[176] While an owner does not have the right to complete exclusivity, they have a right against those who misappropriate the information.[177] Misappropriation occurs when a party acquires, uses, or discloses a trade secret without consent or by improper means.[178] In this instance, an owner may sue

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169. *E.g.*, 18 U.S.C. § 1839(3)(A)–(B) (requiring an owner to take "reasonable measures to keep such information secret" and economic value from "not being readily ascertainable").

170. *Id.*

171. *Id.* (emphasis added).

172. *See* La Potencia, LLC v. Chandler, 733 F. Supp. 3d 1238, 1270 (S.D. Fla. 2024) ("Assessing the reasonableness of measures taken to ensure secrecy is a factually intensive endeavor."); *accord* Adler v. Loyd, 496 F. Supp. 3d 269, 281 (D.D.C. 2020) ("A reasonable measure depends on the circumstances, not any bright-line rule."); *see also* Hertz v. Luzenac Grp., 576 F.3d 1103, 1113 (10th Cir. 2009) (noting that "there always are more security precautions that can be taken [and] [j]ust because there is something else that . . . *could* have [been] done does not mean that their efforts were unreasonable under the circumstances").

173. 711 F. Supp. 3d 1313 (N.D. Fla. 2024).

174. *Id.* at 1322. In this case, the plaintiff had stored the trade secrets in secure accounts, employed digital passwords to materials, and limited employee access to the information based on their "respective needs for access." *Id.*

175. *Id.*; *see also* Dmarcian, Inc. v. Dmarcian Eur. BV, 60 F.4th 119, 141 (4th Cir. 2023) (noting that keeping "information secret through security measures restricting access . . . and requiring confidentiality agreements from employees" are satisfactory measures for this element).

176. 18 U.S.C. § 1839.

177. *See* UNIF. TRADE SECRETS ACT, introductory cmt. (UNIF. L. COMM'N 1985) (explaining that "more than one person can be entitled to trade secret protection with respect to the same information"); *see also* 18 U.S.C. § 1832 (detailing the punishment for those who misappropriate or steal trade secrets).

178. Levine & Seaman, *supra* note 154, at 114. Examples of improper means include "theft, bribery, misrepresentation, breach of a fiduciary duty or a duty to maintain

under state law or the Defend Trade Secrets Act[179] (DTSA), a federal avenue for litigants to "enforce their intellectual property rights" and pursue civil remedies.[180] In *Corporation Claims Management v. Shaiper (In re Patriot National Inc.)*,[181] the court explained that the DTSA largely conforms to state trade secret laws, though there are some differences.[182] For example, the court in *Assessment Technologies Institute, LLC v. Parkes*[183] highlighted the DTSA's requirement that a trade secret relate to a product or service used in interstate or foreign commerce.[184] On the other hand, to properly assert a claim of misappropriation under California's Act, a party must establish the existence of a trade secret and the improper acquisition, use, or disclosure of that trade secret.[185]

II. ANALYSIS

A. Why Batok Requires Protection According to Theories of Intellectual Property Law

U.S. intellectual property law affords little room to address the nuances inherent in Indigenous creations, knowledge, and processes.[186] This, perhaps, comes as no surprise given the nation's history of violence toward Indigenous peoples; regardless, this failure leaves a population without the justice and legal redress guaranteed by this country.[187]

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secrecy, . . . espionage through electronic or other means." *Id.* This also extends to "otherwise lawful conduct which is improper under the circumstances." UNIF. TRADE SECRETS ACT, § 1 cmt. background (UNIF. L. COMM'N 1985).

179. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified at 18 U.S.C. §§ 1831–1839).

180. *Id.*; S. REP. NO. 114-220, at 14 (2016); Cohen et al., *supra* note 154 (explaining the Defend Trade Secrets Act's (DTSA) significance and uniformity).

181. 592 B.R. 560 (Bankr. D. Del. 2018).

182. *Id.* at 577.

183. 588 F. Supp. 3d 1178 (D. Kan. 2022).

184. *See id.* at 1211 (noting that the DTSA requires a nexus between the trade secret and a good or service "used in, or intended for use in, interstate or foreign commerce" (quoting API Ams. Inc. v. Miller, 380 F. Supp. 3d 1141, 1148 (D. Kan. 2019))).

185. Applied Med. Distrib. Corp. v. Jarrells, 319 Cal. Rptr. 3d 205, 215 (Cal. Ct. App. 2024).

186. *See* Alinksy, *supra* note 27, at 157–59 (describing U.S. society as overtly individualistic, which is misaligned with Indigenous creations often characterized by their communal nature).

187. Heather Sauyaq Jean Gordon & Travis W. M. Roberts, *Missing or Murdered Indigenous People: Culturally Based Prevention Strategies*, DEP'T JUST. J. FED. L. & PRAC. 47, 48 (2021) (highlighting that "multiple studies demonstrate that the majority of the violence experienced by Natives is interracial, meaning it is done by non-Natives to Native people and experienced by Native people [everywhere]").

While those unaffected have dismissed the need and urgency for reform, three major theories underpinning intellectual property law compel the protection of Indigenous practices like *batok*.[188]

First, the labor theory, also known as the Lockean labor theory or fairness theory, operates on the premise that one should reap and retain the fruits of their labors.[189] This theory rewards those that instill their labor into previously unowned resources.[190] *Batok* originates from the efforts of Indigenous ancestors who developed the tradition from unowned, natural resources.[191] Every subsequent generation has contributed its own labor, incrementally refining and enriching the tradition.[192] In accordance with the labor theory, Indigenous communities should be guaranteed the right to benefit from and preserve the tribal tattooing practice of *batok*.[193]

Second, the personality theory rests on the notion that "property provides a unique and especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person."[194] *Batok* embodies the Filipino Indigenous identity and culture in its entirety.[195] The distinct experiences attributable to each region's culture are expressed through the markings received.[196] While the practice

188. *See* Wu, *supra* note 125, at 147–48 (noting that Locke's labor theory describes a creator's private property right in their own inventions because they derived from their mind and their labor); Longan, *supra* note 126, at 788–89 (describing the personality theory as one that prioritizes the protection of self-expression and one's individuality); *id.* at 798 (illustrating the utilitarian theory as desiring solutions that benefit the greatest number of people).

189. Wu, *supra* note 125, at 147–48; Meindertsma, *supra* note 125.

190. *See* Cabalquinto et al., *supra* note 81, at 6 (noting that *batok* has been practiced for centuries and *mambabatok* would create ink using soot and water then fashion the tattoo instrument out of natural materials such as bone, wood, and lemon thorns).

191. *Id.*

192. *See* Lopez et al., *supra* note 18, at 5–6 (discussing the "Igorot community's enduring commitment to cultural preservation").

193. *See* Wu, *supra* note 125, at 147–48; Meindertsma, *supra* note 125.

194. Longan, *supra* note 126, at 788–89; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988). This theory is also referred to as "Hegel's Personality theory" and dominates the copyright laws in European countries. Longan, *supra* note 126, at 788.

195. *Infra* notes 196–98 and accompanying text (illustrating the many ways that *batok* captures Filipino Indigenous culture, which ultimately serves as a comprehensive embodiment of it); *see also* Salvador-Amores, *supra* note 11, at 470 ("Tattoos . . . signal individual identity, indigenous affiliation, and [one's] connection with ancestors.").

196. *See supra* note 90 (explaining that the many symbols in *batok* correlate to animals, items, experiences, and more).

is uniform to a degree, each *batok* is tailored to an individual.[197] Provided that the individuality of both the tattoo practitioner and the recipient shape the precursory acts, the resulting *batok* directly represents the will and essence of these individuals (i.e., the creators). Thus, according to the personality theory, all aspects of the practice should be protected because personal expression is found in both the ceremonial acts *and* the resulting markings themselves.[198]

And third, the utilitarian, or welfare, theory prioritizes solutions that "lead[] to the least amount of suffering for the least amount of individuals or conversely, the greatest pleasure for the greatest number of individuals."[199] Indigenous communities have historically operated as vital contributors to the advancement of science and art.[200] When laws minimize Indigenous interests in their own creations, society risks impeding social progress by discouraging further innovation.[201] From a comprehensive perspective, extending legal protections to Indigenous tattooing methods such as *batok* would yield "the greatest pleasure for the greatest number of individuals."[202] Such protections would facilitate universal access to authentic experiences, while discouraging and combating imitations.[203] All parties could then rely on established dispute resolution processes rather than resort to impromptu conflict resolution, resulting in a more accessible, fair, and efficient system.

Taken together, these theories support the need for stronger legal protections for *batok*. Because the U.S. Constitution and federal intellectual property laws promote innovation and deter unfair competition both explicitly and in spirit, these laws demand the protection of Indigenous tattooing practices.[204] Under the labor theory, Indigenous communities

197. *See id.* at 455 (describing how the practitioner will "check" and read the recipient's blood to ensure that the tattooing can continue).

198. *See id.* at 455–56 (describing the various rituals that occur throughout the tattooing process such as "the [traditional chant] *ullalim*, which tells of the heroic exploits of the tattooed hero Banna").

199. Longan, *supra* note 126, at 798; BENTHAM, *supra* note 127, at 2, 6–7.

200. Vunibola & Scobie, *supra* note 68, at 54–55.

201. U.S. CONST. art I, § 8, cl. 8.

202. Longan, *supra* note 126, at 798.

203. *See* Camilla A. Hrdy, *The Value in Secrecy*, 91 FORDHAM L. REV. 557, 565–66 (2022) (describing the prevention of unfair competition as a major policy goal in U.S. trade secrets law).

204. *See ArtI.S8.C8.1 Overview of Congress's Power over Intellectual Property*, CONGRESS.GOV: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060 (on file with the American University Law Review) (last

are entitled to the "fruits of their labors" after dedicating centuries to crafting, refining, and preserving these traditions.[205] The need for protection is further accentuated by *batok's* nature—a deeply personal form of expression and a tangible manifestation of the culture itself.[206] A more inclusive framework, which provides protection for *batok*, would serve the greatest number of people by creating an efficient avenue for conflict resolution and preventing the market's oversaturation with imitations.[207] The very theories that form the basis of intellectual property law thus reveal why this solution is both relevant and necessary.

B. Trade Secrecy as a Viable Solution to the Misappropriation of Batok

Of the major frameworks in intellectual property, trade secrecy is the most viable for addressing the misappropriation of and lack of legal protections for Indigenous practices such as *batok*. To meet the requirements of a trade secret, information must have independent economic value, not be generally known or readily ascertainable, and the owner must make reasonable efforts to maintain its secrecy.[208] In consideration of these elements, courts use six factors.[209]

Batok derives independent economic value from not being "generally known" or "readily ascertainable."[210] In *WWMAP*, the court found that

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visited Nov. 23, 2025) ("Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place.").

205. Meindertsma, *supra* note 125; Wu, *supra* note 125, at 148.

206. Violago, *supra* note 26, at 408–09; Cabalquinto et al., *supra* note 81, at 3.

207. *See* Longan, *supra* note 126, at 798; BENTHAM, *supra* note 127, at 1–2; Lemley, *supra* note 127, at 319.

208. Am. Credit Indem. Co. v. Sacks, 262 Cal. Rptr. 2d 92, 96–97 (Cal. Ct. App. 1989).

209. The six factors are used at both the federal and state level; for instance, Texas courts expressly use this test when debating whether information is a trade secret:

> (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Daniels Health Scis., LLC v. Vascular Health Scis., LLC, 710 F.3d 579, 583 (5th Cir. 2013) (quoting Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, LLC, 637 F.3d 604, 610 (5th Cir. 2011)). However, "[t]he party claiming a trade secret need not satisfy all six factors because trade secrets do not fit neatly into each factor every time." Glob. Water Grp, Inc. v. Atchley, 244 S.W.3d 924, 928 (Tex. Ct. App. 2008).

210. 18 U.S.C. § 1839(3)(B).

the plaintiff satisfied this element because the sensitive business information gave them an advantage over their competitors.[211] The court reasoned that since the information's value to the plaintiff "would diminish substantially" if made public, it "derive[d] its value from its purported secrecy."[212] Like the information in *WWMAP*, the symbolic grammars of *batok* are withheld from the public domain.[213] Given the size of the global tattoo industry and the growing consumer interest in tribal tattooing, a clear economic incentive exists for non-Indigenous competitors to acquire and use this information.[214] Though part of its value extends beyond monetary gain, the knowledge "would lose economic value to [the Indigenous community] if it were disseminated freely."[215] This parallels the reasoning in *dmarcian, Inc. v. dmarcian Europe BV*,[216] where the release of a confidential customer list would reduce its worth as the listed members would "become inundated with rival offers."[217] If *every* tattoo artist had access to the procedures, designs, and meanings integral to *batok*, then *batok's* market value would degrade to that of generic tattoo designs, stripped of the distinctiveness that makes it desirable.[218] The generalized market for tattoos and growing submarket for tribal tattoos thus define an actual and potential economic advantage that *batok* practitioners have over artists not trained in the Indigenous practice.[219]

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211. WWMAP, LLC v. Birth Your Way Midwifery, 711 F. Supp. 3d 1313, 1320–21 (N.D. Fla. 2024).

212. *Id.* at 1321.

213. *Id.* at 1320–21.

214. In 2022, the global tattoo industry was valued at $1.89 billion and was projected to hit $3.92 billion by 2030. Roeloffs, *supra* note 122. It may cost up to 500 pesos (or $9 USD) to be tattooed by Whang-Od in her tattooing village in the Philippines. Magramo, *supra* note 122; Abby, *supra* note 122. *See generally* Roda, *supra* note 95 (requiring a minimum cost of $1,000 for large projects as a practitioner in the United States); Brandon Tenedora, *Creative Tattoos, Transparent Pricing – from $150 and up*, KAPWA, https://www.kapwatattoo.com/pricing-tattoo-honolulu-hawaii [https://perma.cc/R59U-WKDP] (last visited Nov. 2, 2025) (estimating large pieces at upwards of $3000).

215. *WWMAP*, 711 F. Supp. 3d at 1320.

216. 60 F.4th 119 (4th Cir. 2023).

217. *Id.* at 141.

218. The devaluation of *batok* would render traditional practitioners moot due to the oversaturation of the market and abundance of imitations. This would harm the Indigenous community as a whole, which contradicts the very theories that form U.S. intellectual property law.

219. *See* Genasys Inc. v. Vector Acoustics, LLC, 638 F. Supp. 3d 1135, 1151 (S.D. Cal. 2022) ("To have independent economic value, a trade secret must be 'sufficiently valuable and secret to afford an actual or potential economic advantage over others.'" (quoting

Batok satisfies the "not generally known" requirement for a trade secret because the foundational knowledge is embedded within exclusive cultural networks and passed through selective oral transmission or apprenticeships.[220] When deciding whether information fulfills this element, courts consider if it is kept "secret from at least some interested parties" and has not been divulged "without limitations."[221] While the practice is performed throughout the Philippines and its diaspora, its deepest symbolic grammar, ritual protocols, and proper applications are known only to recognized *manbatok* or *mambabatoks* and their chosen apprentices.[222] The visible designs, though rich with cultural meaning, do not outwardly disclose the rules governing their composition or the ceremonial contexts in which they must be applied. The few glimpses gleaned into the practice's history reveal deliberate gatekeeping; apprenticeships are limited to individuals with familial or community ties and an intimate understanding of the Indigenous experience.[223]

The secrecy element is also met because the specialized knowledge required for *batok* cannot be easily reverse-engineered or understood without years of cultural immersion.[224] Properly creating a *batok* tattoo demands more than simply replicating its visual appearance.[225] Rather, it requires consideration of the individual's lived experience along with the markings' place in a person's life cycle, ceremonial purpose, and

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Calendar Rsch. LLC v. Stubhub, Inc., No. 2:17-cv-04062-SVW-SS, 2017 WL 10378336, at *3 (C.D. Cal. 2017)). This also satisfies the fourth factor that courts consider. *See* Daniels Health Scis., LLC v. Vascular Health Scis., LLC, 710 F.3d 579, 583 (5th Cir. 2013) (illustrating the fourth factor as "the value of the information to the business and to its competitors" (quoting Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, LLC, 637 F.3d 604, 610 (5th Cir. 2011))).

220. Cabalquinto et al., *supra* note 82, at 11, 38.

221. John Bean Techs. Corp. v. B. GSE Grp., LLC, 480 F. Supp. 3d 1274, 1299 (D. Utah 2020).

222. *See* Violago, *supra* note 82, at 408 (describing how the *mambabatok* is the "tattoo artist in the village" and how "[p]ractices and techniques [then] vary among the communities").

223. *See* Salvador-Amores, *supra* note 11, at 454 (noting how Whang-Od has only taken on a few apprentices in her many years as a *mambabatok*).

224. *But see John Bean*, 480 F. Supp. 3d at 1299–300 ("A trade secret is 'readily' ascertainable 'when it can be determined without much difficulty through proper means.'").

225. *See* Salvador-Amores, *supra* note 11, at 467 ("The efficacy of tattoos is achieved through the combination of various elements: [t]he skill of the *manbatok*; the technology employed . . . and the beliefs and supernatural forces that are embedded in the ritual act of tattooing.").

interplay with other symbols.[226] *Batok* practitioners' deep cultural integration is indispensable to their role as they must preside over these rituals and gatekeep this aspect of the culture.[227] These ingrained barriers to access, combined with the intentional withholding of information from outsiders, shield *batok* from detrimental discovery.

The practice of *batok* is inherently communal because its ingrained knowledge is collective. Even if ownership is framed more narrowly with practitioners alone as the custodians, their actions nonetheless satisfy the low threshold for demonstrating reasonable efforts to preserve secrecy.[228] Practitioners actively guard against the acquisition and misuse of the practice by refusing to apply *batok* markings outside of their earned context and only sharing fragments of information concerning the practice with outsiders.[229] This form of gatekeeping parallels the confidentiality controls recognized as reasonable measures in *WWMAP*.[230] The process of becoming a practitioner itself also functions as a secrecy mechanism. No open enrollment or public instruction exists and aspiring *mambabatoks* must instead undergo years-long apprenticeships under the close supervision of an established practitioner who are sometimes difficult to find themselves.[231] For instance, Whang-Od studied for decades before officially accepting two apprentices, each from her lineage or native to her home village of Buscalan.[232] This

226. *See id.* at 467–69 (explaining how markings are applied for various reasons such as needing spiritual protection, guiding one's spirit in the afterlife, and improving fertility).

227. *See id.* at 470 ("Specific designs and patterns are marked on the skin and instilled with magical properties through ritual prayers and chants[;] . . . [thus,] the incorporation of knowledge encoded in the symbolic meanings of the tattoos achieves efficacy.").

228. *E.g.*, *supra* note 101 and accompanying text (describing the selectivity of becoming a practitioner); *see* Salvador-Amores, *supra* note 11, at 462 ("Each design carries within it cultural references held by the community."); *see also* Roda, *supra* note 95 (refusing to complete a headhunter ceremony and marking if inapplicable to the individual).

229. *See* Roda, *supra* note 95 (noting how certain markings such as those for headhunters will not be granted unless applicable to the recipient).

230. WWMAP, LLC v. Birth Your Way Midwifery, 711 F. Supp. 3d 1313, 1322 (N.D. Fla. 2024).

231. *See* Cabalquinto et al., *supra* note 81, at 11, 14 (noting *batok* was traditionally "passed through . . . familial lines"); Salvador-Amores, *supra* note 11, at 454 (describing the rarity of practitioners in the Philippines).

232. *See* Nina Unlay, *Whang-Od Loves Coco Martin*, GRID, https://www.gridmagazine.ph/story/whang-od-loves-coco-martin [https://perma.cc/M7X9-82H9] (last visited Nov. 14, 2025) ("There are many other tattoo practitioners . . . in Buscalan . . . , but

selective transmission, coupled with the ceremonial contexts in which *batok* is performed, ensures that the underlying knowledge remains inaccessible to outsiders.[233] These cultural protocols, geographic concentrations, and intentional limits on knowledge transfer collectively meet and arguably exceed the threshold for "reasonable measures" under trade secret law, even in the absence of formal, written confidentiality agreements.[234]

Apart from satisfying the trade secret elements, all six factors used by courts to assess the existence of a trade secret weigh in favor of recognizing *batok* as a trade secret.[235] While a general understanding of *batok* is publicly known, the precise ceremonial contexts and symbolic grammars remain largely undisclosed outside the communities that practice it.[236] Within those communities, this knowledge is concentrated among a small number of practitioners and their select apprentices, rather than being widely disseminated.[237] Practitioners deliberately reinforce this restriction through measures such as verbal teachings through kinship-based apprenticeships, selectivity of designs, and refusals to tattoo non-community members in certain cases.[238]

Whang-[O]d has chosen only two to personally mentor: her grandniece Grace Palicas, and Grace's cousin, Elyang Wigan."); Magramo, *supra* note 122 (noting that Whang-Od's "signature three-dot mark" signifies herself and her two grandnieces, who are also her apprentices); *see also* Fred Wissink, *The Fascinating Story of a Tattooing Tradition*, FRED WISSINK (Jan. 31, 2023), https://www.fredwissink.com/in-search-of-the-kalinga [https://perma.cc/AD83-2KD2] (noting that Whang-Od is "slowly passing her knowledge on to her two . . . apprentices").

233. While absolute secrecy is not required, this demonstrates that *batok* is not widely known "outside of the business" and those deemed owners of the information have taken considerable "measures . . . to guard [its] secrecy." Daniels Health Scis., LLC v. Vascular Health Scis., LLC, 710 F.3d 579, 583 (5th Cir. 2013) (quoting Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, LLC, 637 F.3d 604, 610 (5th Cir. 2011)); 18 U.S.C. § 1839(3)(A)–(B).

234. § 1839(3)(A).

235. *See Daniels Health Scis., LLC*, 710 F.3d at 583 (listing the six factors used by courts in their determination of a trade secret).

236. *See, e.g.*, Cabalquinto et al., *supra* note 81, at 38 (noting the "[l]imited literature on batok" because it is instead captured by "oral tradition[s]"). Instead, the specific innerworkings of *batok* are likely confined to selective apprenticeships. *Id.*

237. *See* Salvador-Amores, *supra* note 11, at 454 (noting that Whang-Od has only had a few apprentices and describing how practitioners are considered "very rare" in certain regions).

238. *See id.* at 454, 463 (describing the background of Whang-Od, a nationally recognized *mambabatok*, who began her career in *batok* as an apprentice over ninety years ago); Magramo, *supra* note 122 (noting that Whang-Od was 107 years old in July

The information underlying *batok* carries significant value.[239] The authenticity and authority of a *mambabatok* or *manbatok* confer a form of market exclusivity that cannot be properly replicated, and outsiders who gain unauthorized access to the practice could profit from offering disingenuous imitations.[240] In line with the fifth factor, Indigenous communities have developed and refined this knowledge over centuries through communal efforts.[241] Proper acquisition of *batok* techniques and meanings is implausible without sanctioned access, which is required to satisfy the sixth factor.[242] Provided that "[t]he party claiming a trade secret need not satisfy all six factors," these considerations mandate that courts protect *batok* as a trade secret.[243]

C. Batok as a Form of Traditional Knowledge

Whereas individualistic legal systems fail to properly consider Indigenous customs, the WIPO's definition of traditional knowledge aids in *batok's* legal recognition and protection.[244] Traditional knowledge is defined as the "knowledge, know-how, skills and practices that are

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2024). Throughout Whang-Od's long career, she has only taken on three apprentices. Salvador-Amores, *supra* note 11, at 454. But most notably, Whang-Od's apprentices originate from her lineage or her hometown of Buscalan. *Id.*; Krutak, *supra* note 3, at 56–57. Practitioners also exercise their authority to refuse to mark individuals entirely or with specific markings. Roda, *supra* note 95 (refusing to complete a headhunter ceremony and marking if inapplicable to the individual).

239. *See* Roeloffs, *supra* note 122 (describing the global tattoo industry as exceeding one billion dollars in value); Magramo, *supra* note 122 (demonstrating the high demand and price for a tribal tattoo); Roda, *supra* note 95 (illustrating the growing market for *batok* in the United States and the high prices that accompany the custom); *see also* Moss, *supra* note 80, at 217 (noting that in pre-colonial times it was "customary for all to be tattooed"); Leff & Otovescu, *supra* note 80, at 517 (describing the various functions that markings served such as protecting the recipient from "evil spirits and diseases"); Salvador-Amores, *supra* note 11, at 468 ("Specific tattoo designs evoke visual imagery that is instantly understood by the members of the community.").

240. The Yassin and Whang-Od controversy is a prime example of an outsider attempting to exploit the practice. Patawaran, *supra* note 7; *see also* Salvador-Amores, *supra* note 11, at 467 (describing the many reasons why recipients seek out *batok*, demonstrating the value it holds).

241. *See* Cabalquinto et al., *supra* note 81, at 6 (noting that *batok* has been practiced for hundreds of years and *mambabatoks* have adapted their techniques over time); Lopez et al., *supra* note 18, at 5–6 (describing the "Igorot community's enduring commitment to cultural preservation").

242. Daniels Health Scis., LLC v. Vascular Health Scis., LLC, 710 F.3d 579, 583 (5th Cir. 2013).

243. Glob. Water Grp, Inc. v. Atchley, 244 S.W.3d 924, 928 (Tex. Ct. App. 2008).

244. *See* SUSTAINABILITY DIRECTORY, *supra* note 43 (explaining how lacking a doctrinal foundation may contribute to a government's tendency to overlook Indigenous knowledge and creations).

developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."[245]

Batok exemplifies the very essence of traditional knowledge as defined by the WIPO because it is an intergenerational practice that encapsulates the native Filipino identity.[246] What may appear as mere tattoos of geometric shapes is rather a tradition that includes centuries of "knowledge, know-how, [and] skills."[247] Its subsistence amid Western-influences underscores its classification as a practice—*mambabatoks* continue to perform *batok* and Indigenous Filipinos continue to seek it out.[248] The tradition, however, extends beyond its classification as a practice because it also embodies centuries-old knowledge and skills.[249] *Batok's* function as a visual archive of cultural history demands that *mambabatoks* not only master the requisite technical skills to complete the markings but also possess substantial knowledge of the culture.[250] After all, it would be impossible for a practitioner to capture an individual's lived experiences without first knowing which symbols to employ and how those experiences fit within the broader cultural context.[251]

The WIPO limits traditional knowledge to intergenerational practices "often forming part of [a community's] cultural or spiritual identity"—a

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245. WORLD INTELL. PROP. ORG., *supra* note 130.

246. *See* Cabalquinto et al., *supra* note 81, at 11 ("[B]atok was passed through the familial lines [and] [w]ithin their communities, tattooists came from a specific family.").

247. WORLD INTELL. PROP. ORG., *supra* note 130.

248. *Batok* is a "repeated or customary action" that has been used throughout centuries in the archipelago. *Practice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/practice [https://perma.cc/DH26-228T] (last visited Nov. 2, 2025); *see also* Krutak, *supra* note 3, at 56–57 (describing how Whang-Od began apprenticing several Buscalan women "to create a vibrant Kalinga tattooing revival that continues to this day"). And it is not only a "common . . . procedure[] among a group of people," but also a very specific action "among particular . . . cultural groups [Indigenous Filipinos]." *Practice*, CORN. LEGAL INFO. INST., https://www.law.cornell.edu/wex/practice [https://perma.cc/6Z3U-7GTN] (last visited Nov. 2, 2025).

249. Cabalquinto et al., *supra* note 81, at 1.

250. *See id.* at 3 ("[M]ost Filipino [people] share a common thread through their traditional practices which includes . . . [*batok*]. Behind the traditional Filipino tattooing, there is a story to reveal and a way of connecting with ancestors."); *see also id.* at 12–13 (identifying many factors that contribute to the meaning of *batok* markings, including the timing after an event occurred, location of symbols, size of markings, and even the community where the ceremonial acts take place); Krutak, *supra* note 3, at 61 (highlighting that the practice of *batok* derives meaning from practitioners' adherence to ceremonies and rituals and describing how they "create art that has an energy and life of its own and [Indigenous community] members are drawn to [*batok*] because there are so many personal levels of meaning embodied within it.").

251. Salvador-Amores, *supra* note 83, at 112 (noting how *mambabatok* use hundreds of "mutually intelligible" symbols that convey different meanings, and how different villages may have their own distinct meanings and techniques).

definition that directly aligns with *batok*.[252] Early colonial accounts documented tribal tattooing, and centuries later, the practice has grown in significance and prevalence.[253] Within Indigenous Filipino culture, traditions like *batok* were passed down across generations through stories and apprenticeships.[254] The custom that exists today reflects generations of commitment to its refinement and preservation.[255] As a mode of visual storytelling, *batok* documents an individual's lived experiences while simultaneously serving as a marker of Indigenous Filipino identity.[256] Each marking is shaped by the recipient's cultural role and experience, with specific symbols representing subcultures and community traditions.[257] Over time, *batok* has become intertwined with the Indigenous way of life. For instance, among warrior tribes like the Igorots and Kalinga, specific markings were reserved for men who had successfully "taken a head."[258] The absence of such markings communicated this unfulfilled feat, so "single women of the community [would tease

252. WORLD INTELL. PROP. ORG., *supra* note 130.

253. Krutak, *supra* note 3, at 56–57; Salvador-Amores, *supra* note 11, at 452 (noting that "[t]attooing . . . has become a significant component of global popular culture").

254. *See generally* Lopez et al., *supra* note 18, at 5–6 (highlighting Igorot-Americans' strong commitment to cultural preservation and considering how they engage in "Indigenous-related activities at home" by educating their children on the significance of traditional customs); Cabalquinto et al., *supra* note 81, at 38 ("Due to the nature of [*batok*], history . . . is oftentimes preserved through storytelling from practicing [*mambabatoks*], their apprentices, and those whose received [*batok*]."); Salvador-Amores, *supra* note 11, at 462–63 (describing how the techniques used by practitioners of *batok* have changed across time).

255. Apo Whang-Od begun studying *batok* as an early adolescent and served as an apprentice to another established practitioner. Martinez, *supra* note 5, at 542; Carpio, *supra* note 5 ("Whang-Od was [sixteen] when she began her career as a tattooist under her father's mentorship"). Over her long career, Whang-Od has observed many changes in the practice such as the tools used. Salvador-Amores, *supra* note 11, at 460–61. *See generally* Krutak, *supra* note 3, at 61 ("Each tap or poke is like a whisper from another time or place. We want to pay our deepest respect to those Tribal artists who came before us, and that is why we give it [a] proper ceremony and ritual . . . Otherwise, the practice of tattooing will be like an empty vessel, hollow and without meaning."); Cabalquinto et al., *supra* note 81, at 3, 6 ("[T]he practice of batok . . . is an intertwined experience and expression of words, sounds, imagery, and text all reflecting on the state of body, mind and spirit.").

256. *See* Salvador-Amores, *supra* note 88, at 294, 298–300 (noting how the meaning of markings may vary between men and women); Salvador-Amores, *supra* note 11, at 468 (describing markings as bestowing legitimacy and recognition within a community and even commemorating milestones).

257. *See* Violago, *supra* note 26, at 408–09 (depicting differing practices and techniques for *batok* between communities in the Philippines).

258. Lars Krutak, *Return of the Headhunters: The Philippine Tattoo Revival*, LARS KRUTAK TATTOO: ANTHROPOLOGIST (Nov. 23, 2012), https://larskrutak.com/return-of-the-headhunters-the-philippine-tattoo-revival [https://perma.cc/7YEA-NU9K].

the man] until he had" done so.[259] Apart from marriage prospects, becoming a headhunter and receiving the respective markings connected to "magico-religious reasons" and served as a rite of passage.[260] *Batok* thus squarely falls within the WIPO's traditional knowledge definition as an intergenerational practice central to cultural identity.

D. This Solution in Practice

Classifying *batok* as traditional knowledge supplies a doctrinal basis for extending trade secret protection to the practice. Absent this classification, *batok* is vulnerable to dismissal as merely another commodified custom freely available in the public domain.[261] International frameworks, like the Nagoya Protocol and the IPRA in the Philippines, controvert the claim that only individually authored, privately-owned works merit protection.[262] These legal authorities reconcile communal ownership and intergenerational transmission with Western concepts, positioning them as valid bases for legal rights.[263] Ignoring this assessment would perpetuate a legal shortcoming rooted more in Western bias than in any principled objection.[264]

The Philippines has institutionalized these principles through the IPRA and the NCIP, which vests Indigenous communities with the authority to govern their cultural heritage.[265] Comparable models already

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259. *Id.*

260. *Id.*; *see* Violago, *supra* note 26, at 409 (describing how *batok* involves "deeply ingrained symbols . . . which also signify different rites of passage").

261. *See, e.g.*, SUSTAINABILITY DIRECTORY, *supra* note 43 (describing how a "lack of institutional frameworks" contributes to the "overlooking of Indigenous knowledge by governments).

262. The Nagoya Protocol requires member countries to adopt legislation that protects Indigenous knowledge in spite of individualistic notions of ownership and property. Fisher, *supra* note 132, at 1540–41; Nagoya Protocol, *supra* note 132, art. 7. The IPRA played a critical role in establishing intellectual property rights for Indigenous peoples' knowledge and creations. Indigenous Peoples Rights Act, Rep. Act No. 8371, O.G. 2276, 2276 (Oct. 29, 1997) (Phil.); Violago, *supra* note 26, at 349.

263. The Philippines illustrates the feasibility of assimilating Indigenous works with Western-influenced notions by enacting formal legal protections. Indigenous Peoples Rights Act, Rep. Act No. 8371, O.G. 2276, 2276 (Oct. 29, 1997) (Phil.). The many countries that have adopted the Nagoya Protocol further demonstrate this point. Nagoya Protocol, *supra* note 132, art. 7; *see Parties to the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/abs/nagoya-protocol/signatories [https://perma.cc/5RTE-7EHC] (last visited Nov. 2, 2025) (listing over 100 countries that have adopted and ratified the Nagoya Protocol).

264. *See* Collin et al., *supra* note 76, at 2 (describing how Western legal systems are often "premised upon an individualistic and commercial foundation" and fail to protect components of Indigenous cultures).

265. Violago, *supra* note 26, at 349; Ampater et al., *supra* note 79, at 113.

exist within the United States; namely, the Indian Arts and Crafts Act[266] and the Native American Graves Protection and Repatriation Act[267] demonstrate the willingness and capability to legislate in favor of Indigenous interests and traditions.[268] While apprehension may exist about community custodianship, these concerns are overstated. Analogous models are recognized and utilized in the context of corporate trade secrets.[269] To insist that the protection of *batok* is impossible under U.S. law is to ignore the rationales underlying the trade secret framework.

CONCLUSION

Indigenous communities have long existed at the margins of consideration, yet they undeniably form the foundation of modern society.[270] U.S. legal frameworks that purport to prioritize a creator's interests have consistently failed to properly acknowledge these communities. Claims that Indigenous creations are incompatible with Western systems are nothing more than excuses for inaction. The United States does not face a shortage of legal tools but an underuse of them. As illustrated in this Comment, intellectual property and trade secrecy can safeguard collectively owned, Indigenous works.[271]

The ceremonial acts and symbolic grammars of *batok* demand greater legal protection. Its value, at least in part, is derived from secrecy and its classification as traditional knowledge provides a clear doctrinal foundation for protection. Denying *batok* protection undermines the goals of intellectual property law, which purports to promote innovation, protect property interests, and recognize creative efforts. By thoughtfully leveraging existing frameworks, the law can preserve *batok* while acknowledging the fine line it occupies between communal heritage and legal recognition.

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266. Pub. L. No. 101-644, 104 Stat. 4662 (1990).

267. Pub. L. No. 101-601, 104 Stat. 3048 (1990).

268. *See* Indian Arts and Crafts Act, Pub. L. No. 101-644, 104 Stat. 4662 (1990) (protecting Native American creations); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (protecting Native Americans' right to reclaim and own cultural items).

269. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 442–43 (2001) (describing how companies can collectively assert trade secrecy over workplace knowledge).

270. ANAYA, *supra* note 48, at 3–4; *see* Vunibola & Scobie, *supra* note 68, at 54–55 (describing Indigenous peoples as essential innovators who have contributed greatly to the advancement of society).

271. *See supra* Part II.