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# WESTERN INTELLECTUAL PROPERTY AND INDIGENOUS CULTURES: THE CASE OF THE PANAMANIAN INDIGENOUS INTELLECTUAL PROPERTY LAW

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“aunal ipakwenkine tule immar napir immaysat “*if one day a person did something well*[,]  
 we anmar sok. . . (another) person says . . .  
 “ani an kusye.” “*I’m the one who did it.*”  
 suli pe kuchuli a. *No it was not you ah.*  
 tule kusat yokkutta takkenye.” *The person who did it always gets denied (never gets credit).*”<sup>1</sup>

## I. INTRODUCTION

In the year 2000, Panama passed Law No. 20<sup>2</sup> approving the first *sui generis* Indigenous Intellectual Property (IP) system in the world. While most countries in the world are in the early stages of recognizing indigenous rights in general, Panama, a developing country and a former Spanish colony, passed a law that grants its indigenous groups exclusive, collective, and perpetual rights to their creations, inventions, and traditional expressions. The motivating force behind this law is a cloth called *mola*.<sup>3</sup> Made of multiple small pieces of cloth and sewn with invisible stitches in colorful designs, a *mola* is more than a garment; it is a decorative object; and moreover, it is a teacher of the *cosmovisión* (the interpretation of the world) of the Kuna nation.<sup>4</sup> Above all, a *mola* is a piece of art. The *mola* was born out of the union of western Christian modesty

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<sup>1</sup> JOEL SHERZER & OLOKWAGDI DE AKWANUSADUP, STORIES, MYTHS, CHANTS, AND SONGS OF THE KUNA INDIANS 42-43 (Joel Scerzer trans., University of Texas Press 2003) (Excerpt from *The One-eyed Grandmother*, a Kuna folk tale told by *arkar* (chief spokesman) Pedro Arias).

<sup>2</sup> Ley No. 20, 26 June 2000, Del régimen especial de propiedad intelectual sobre los derechos colectivos de los pueblos indígenas, para la protección y defensa de su identidad cultural y de sus conocimientos tradicionales, y se dictan otras disposiciones [On the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge, and whereby set forth other provisions], Gaceta Oficial No. 24,083, 27 June 2000 (Pan.), available at [http://www.asamblea.gob.pa/NORMAS/2000/2000/2000\\_517\\_0603.PDF](http://www.asamblea.gob.pa/NORMAS/2000/2000/2000_517_0603.PDF) (last visited Nov. 5, 2005). See *infra* Appendix II for an English translation of Law No. 20.

<sup>3</sup> See *infra* Appendix IA for photographs of *molos*. *Molas* are called *morra* in native Kuna language. For the sake of simplicity, *molos* are called by their popular name throughout this paper. The Kuna language is often erroneously classified as Chibchan in origin, although like most Central American dialects it contains a large number of loan-words from Chibcha, it probably belongs to an extinct family. See FRITZ W. KRAMER, LITERATURE AMONG THE KUNA INDIANS 11 (Göteborgs Etnografiska Museum 1970).

<sup>4</sup> Kuna or Cuna is the non-indigenous name given to the Dule (Tule) tribe that dwells in the Caribbean coast of the Isthmus of Panama. Please refer to Section III of this paper for a detailed explanation. For the sake of simplicity, the Kunas will be called by their popular name throughout this paper. The preferred spelling of their non-indigenous name is with “K”, even though it is common to see it written with

and indigenous ingenuity. *Molas* give Kuna women pride, clothing, and a trade. Furthermore, *molas* were partially responsible for the uprising that gave Kunas their political rights. But a good story needs to be told from the beginning.

It is said that history is written by the winners. It should be added that, afterwards, winners like to stick around to write the laws. Nowhere is the former truer than in the history of Colonialism. Nowhere is the latter more factual than in the application of traditional intellectual property laws to folklore, indigenous art, and traditional knowledge.<sup>5</sup> Intellectual Property (IP) regimes are usually shaped by western<sup>6</sup> European philosophy and its conception of property rights. This philosophy conceives and

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“C”. Respecting the wishes of members of the Kuna tribe, expressed via personal communication, the spelling that will be used in this paper is with “K”.

<sup>5</sup> These terms will be used throughout this paper as per their definitions in international instruments: Traditional Knowledge is “the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment[.] [It] is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.” SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, TRADITIONAL KNOWLEDGE AND THE CONVENTION ON BIOLOGICAL DIVERSITY (2004), available at <http://www.biodiv.org/doc/publications/8j-brochure-en.pdf> (last visited Nov. 5, 2005) [Hereinafter Secretariat on CBD]. Folklore, on the other hand, refers to “elements of the traditional artistic heritage developed and maintained by a community. . . Only ‘artistic’ heritage is covered. . . This means that . . . traditional beliefs, scientific views . . . or merely practical traditions . . . do not fall within the scope of the . . . definition . . . ‘Artistic’ heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action, and tangible expressions. . . may qualify as protected expressions of folklore.” WIPO & UNESCO Model Provisions, *Definition for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, (1982), available at <http://www.wipo.int/tk/en/glossary/index.html#8> (last visited Nov. 5, 2005) [hereinafter, Model Provisions]. Folklore is thus a subset of traditional knowledge. WIPO offers an enumeration of the most typical kinds of expressions of folklore, subdivided into four groups: “Expressions by words (‘verbal’), such as folk tales, folk poetry, and riddles; Expressions by musical sounds (‘musical’), such as folk songs and instrumental music; Expressions ‘by action’ (of the human body), such as folk dances, plays, and artistic forms of rituals. Expressions incorporated in a material object (‘tangible expressions’), such as drawings, paintings, carvings, sculptures, pottery, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, [and] costumes; musical instruments; architectural forms.” *Id.*

<sup>6</sup> Throughout this paper, *western* refers to noncommunist countries of western Europe and America that share Greco-Roman traditions, similar culture, and laws. It

justifies intellectual property under a black and white umbrella. Thus, IP regimes are either based on the Anglo-American utilitarian/economic approach with its objective of maximizing social welfare by balancing the benefits to society against the social costs of granting monopolies to individuals;<sup>7</sup> or they are based on the continental European approach<sup>8</sup>, with its romantic view of the authors and their moral rights<sup>9</sup> (also called the non-utilitarian approach because it advocates for respecting and treating fairly each individual and his/her rights).<sup>10</sup>

These two approaches share something in common: intellectual property is individualistic; it is born from the notion of property by exclusion, in which only one owner prevails.<sup>11</sup> This western notion of intellectual property clashes with the more communitarian notions of property held by indigenous groups,<sup>12</sup> which tend to be based in community rights<sup>13</sup> and the relationship these groups have with their traditions.<sup>14</sup> The academic approach to solving this problem oscillates between trying to fit indigenous rights within the constraints of western intellectual property and proposing *sui generis* IP systems aimed at harmonizing the conflicts between individualistic and collective notions of property.

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does not refer to the Indigenous tribes that inhabited the Americas, their islands, or any part of the western hemisphere before the arrival of Christopher Columbus.

<sup>7</sup> The U.S, for example, follows the *incentives* model. See ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 10-13 (3d ed., Aspen Publishers 2003).

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

<sup>9</sup> See Rachael Grad, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia*, 13 DUKE J. COMP. & INT'L L. 203, 203 (2003); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L. J. 175, 179-84 (2000); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 628-31 (1998).

<sup>10</sup> Continental Europe and countries with civil law systems follow the *moral rights* model. See MERGES, *supra* note 7, at 5-6.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> This paper uses the United Nations definition of indigenous tribes. The U.N defines indigenous population as "communities, peoples and nations [that] having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories. . . They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories and their ethnic identity." José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*: Volume 5, ¶379 U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1983). Complete report re-issued as U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

<sup>13</sup> Christine Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 Conn. L. Rev. 1, 30-31 (1997).

<sup>14</sup> *Id.* at 11-12.

Law No. 20 is a *sui-generis* system, or, in other words, an academic dream made real. Nevertheless, multiple questions arise: How does this law fit within more traditional IP models? How positive or negative is the Panamanian experience? Can the Panamanian law be an example to indigenous groups in other countries seeking to protect their intellectual property? And what does the *mola* have to do with all of this? The remainder of this paper strives to answer some of these questions.

Law No. 20 is the product of the particular idiosyncrasy of Panamanian politics and its relationship with its indigenous groups. However, even though this law may suit the needs of Panamanian indigenous cultures, it may not necessarily suit the interests of the rest of Panamanian society. Furthermore, it may not even achieve one of its underlying purposes, which is to preserve the integrity of indigenous cultures and help those cultures fend off acculturation. Moreover, the Panamanian experience shows that implementation of collective rights can be difficult as the interests of the collective owners do not always coincide.

Part II of this paper focuses on worldwide colonialism, the impact of western IP laws on indigenous culture, and the ongoing struggle that indigenous peoples face in trying to get their rights acknowledged. That discussion is followed by a brief evaluation of western IP requirements as applied to indigenous creations and the current worldwide initiatives to protect indigenous intellectual property rights. Part III addresses the cultural, historical, and political background of Panama and Law No. 20, focusing on the Kuna tribe and the *mola* craft. It also covers the evolution of Panamanian indigenous laws and the current situation of the tribes. Part IV of the paper describes the main provisions of Law No. 20 and the extent to which the law protects indigenous rights. Part V focuses on different aspects of implementation, including current and latent difficulties and proposes amendments to solve these problems. The paper concludes with a view of Law No. 20's impact on Panamanian indigenous tribes and Panamanian society.

## II. COLONIALISM, WESTERN LAWS, AND INDIGENOUS GROUPS

Until relatively recently, colonialism was a tale told by the colonizers. It is common for people in the former European colonies in the Americas<sup>15</sup> to date the beginning of their historical and cultural reference either from the date of the 'discovery' of the continent by Christopher Columbus or from the arrival of the first group of European settlers. The fact that the Americas were widely populated before the arrival of the

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<sup>15</sup> Throughout this paper the 'Americas' refer to the land mass that stretches from Canada to Argentina, including the islands in the area. Because this paper focuses on the laws and tribes of Panama, case law and comparative references on colonialism will focus on the Americas. However, some comparisons will be made with the aborigines in Australia as their experience parallels that of some groups of Native Americans.

Europeans seems more an anecdote from history books than a reality of day-to-day life.

The colonization processes of North and South America were substantially different, but they share something in common: the decimation of the native Amerindian population via European diseases<sup>16</sup> (among other factors) and the occupation of their land by the colonizers, which lead to the eventual marginalization of these indigenous groups. The colonies eventually evolved into today's countries, but the situation of the native population has not changed much. Currently, indigenous groups are mostly ostracized; they are consistently at the bottom of the social and economic pyramid; and they have the "highest rates of infant mortality, unemployment, alcoholism, disease, and incarceration."<sup>17</sup> During the second part of the twentieth century, however, awareness regarding the plight of the indigenous populations in former and present Western European colonies started to flourish.<sup>18</sup> The United Nations began working on the issues affecting indigenous peoples in the context of its work against racism and discrimination,<sup>19</sup> under the framework of the Universal Declaration of Human Rights.<sup>20</sup> This effort led to the creation of the United Nations Working Group on Indigenous Populations, with the goals of creating a Permanent Forum on Indigenous Issues, and the drafting of a declaration on the rights of indigenous peoples.<sup>21</sup> This new awareness resulted in new international agreements like the International Labor

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<sup>16</sup> EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA* 28-29 (Cedric Belfrage trans., Monthly Review Press) (1973). In Spanish and Portuguese America, Amerindians were also subjected to cruel systems of work, such as *encomiendas* and forced mining, which spurred their decimation. *Id.* at 50-53.

<sup>17</sup> Grad, *supra* note 9, at 204.

<sup>18</sup> In 1957, the International Labor Organization (ILO) officially recognized the disadvantageous position and isolation of indigenous groups and adopted international standards on the subject to assure, among other objectives, the improvement of their living and working conditions via The Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. *The Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* [hereinafter Convention No. 107], available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Nov. 2, 2005).

<sup>19</sup> E-press kit, "Doctrines of Dispossession"-Racism against Indigenous Peoples, World Conference Against Racism, (May 2001), available at <http://www.un.org/WCAR/e-kit/indigenous.htm> (last visited Nov. 5, 2005) [hereinafter "Doctrines of Dispossession"].

<sup>20</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (Dec. 12, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf> (last visited Nov. 5, 2005).

<sup>21</sup> "Doctrines of Dispossession," *supra* note 19. (The article quotes some of the findings from a U.N. Study on Discrimination in which government representatives confirmed that members of the indigenous groups lacked the legal and social capacity necessary to be part of the community or to understand the laws.)

Organization (ILO)'s Indigenous and Tribal Peoples Convention of 1989 (Convention No. 169);<sup>22</sup> the Convention on Biological Diversity (1992);<sup>23</sup> and the Convention Creating the Fund for the Development of the Indigenous Population of Latin America and the Caribbean (1992)<sup>24</sup> among others. In the domestic arena "countries such as Canada, Australia, and the United States focused efforts on settling land claims with indigenous groups and on achieving reconciliation for past injuries."<sup>25</sup> Even with this new wave of restitution, however, one of the effects of colonialism still remains: indigenous groups live within legal frameworks that are western European in origin and must go through these legal systems and courts to exercise their rights.<sup>26</sup> This is felt acutely in the interaction between indigenous culture and intellectual property, where the latter serves as the tool of protection for the former.

The complex relationship between resources, indigenous people, and development is beyond the scope of this paper; yet it is necessary to highlight that growing concerns about the environment<sup>27</sup> and the economic

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<sup>22</sup> Indigenous and Tribal Peoples Convention [hereinafter Convention No. 169], available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Nov. 5, 2005). Originally, it was assumed that the problem was the lack of integration of the indigenous groups in the societies in which they lived. Convention No. 169 seeks to protect indigenous societies *as they are*. See Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. Intell. Prop. Rev. 1, 28 (2001).

<sup>23</sup> The Convention on Biological Diversity (CBD) was the result of the United Nations Conference of Environment and Development (The Rio Earth Summit). It was conceived as the practical tool for translating the principles of Agenda 21 into reality. See Convention on Biological Diversity, 33 I.L.M. 88 (June 5, 1999), available at <http://www.biodiv.org/default.shtml> (last visited Nov. 25, 2005). Among other objectives, Agenda 21 seeks to recognize and strengthen the role of indigenous communities. Ragavan, *supra* note 22, at 29.

<sup>24</sup> Signed in Madrid during the Second Summit of the Ibero-American countries, the Convention seeks to further the rights and well being of indigenous tribes in Latin America and the Caribbean. See Convenio Constitutivo Del Fondo Para El Desarrollo De Los Pueblos Indígenas De América Latina Y El Caribe, available at <http://www.sispain.org/english/foreign/cumbres/seis.html> (last visited Nov. 25, 2005).

<sup>25</sup> "Doctrines of Dispossession," *supra* note 19. See *Morning Edition: Canada Tribe's Land Deal Breaks New Ground* (National Public Radio broadcast Sept. 5, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1420551> (last visited Feb. 25, 2005). The broadcast provided news that "Canada agrees to cede ownership of a 15,000-square-mile area south of the Arctic Circle to the Dogrib tribe, along with a payment of \$100 million. The tribe also wins control of mineral rights, industrial development, and the potential for royalties on many activities." *Id.*

<sup>26</sup> Grad, *supra* note 9, at 207, 212, 214-17 (describing how Congress' laws affected Native American tribes in the U.S. and how Australia's indigenous groups need to satisfy 'white laws' to prove their claims to their lands). See Farley, *supra* note 13, for a description of Australian case law applying western intellectual property laws to the protection of aboriginal art.

<sup>27</sup> "Doctrines of Dispossession," *supra* note 19.

interests of bio-related industries<sup>28</sup> has prompted governments from all over the world to pay attention to their indigenous groups as holders of 'traditional knowledge.'<sup>29</sup> Indigenous communities usually live in the same areas where the vast majority of the world's bio-genetic resources are found.<sup>30</sup> For thousands of years, these groups have cultivated and used the earth's biological resources in a sustainable way<sup>31</sup> because they believe that everything on the planet are children of the Earth and that each thing deserves to be treated with respect.<sup>32</sup> The contribution of indigenous groups is not limited, however, to their role as managers of natural resources.<sup>33</sup> Their skills and techniques have proven valuable as a source of information for several agricultural and modern industries. "[M]any widely used products, such as plant-based medicines and cosmetics, are derived from traditional knowledge."<sup>34</sup>

This newly found popularity is not without costs. As the developed world started appreciating indigenous products, indigenous culture found itself *en vogue*, and activities such as ecotourism and collecting indigenous relics became widespread.<sup>35</sup> For developing countries like Costa Rica, Ecuador, Kenya, and Nepal ecotourism has become the main source of foreign revenue and a major sector of their economies.<sup>36</sup> One of the consequences has been what scholar Doris Long calls the 'commodification' of indigenous culture.<sup>37</sup> Long explains how, as part of the globalization of commercial culture, some indigenous groups have "de-culturized" their rituals and folklore.<sup>38</sup> She cites Hawaii and New Zea-

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<sup>28</sup> In the year 2002, "[p]eople all over the world . . . paid more than \$400 billion for pharmaceuticals, nearly half of which were discovered in the wild." David Labrador, *Refining Green Gold*, SCI. AM., Dec. 2003, at 38.

<sup>29</sup> Secretariat on CBD, *supra* note 5. Please refer to CBD definition, *supra* note 5. "Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry." *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> ARESIO LÓPEZ, LEY GENERAL DE AMBIENTE Y PUEBLOS INDÍGENAS (Centro de Asistencia Legal Popular [hereinafter CEALP] y Fundación Ford Panamá) (2000), available at [http://www.iidh.ed.cr/comunidades/diversidades/docs/div\\_enlinea/ley\\_general\\_ambiente\\_por\\_aresio.htm](http://www.iidh.ed.cr/comunidades/diversidades/docs/div_enlinea/ley_general_ambiente_por_aresio.htm) (last visited Nov. 5, 2005).

<sup>33</sup> Secretariat on CBD, *supra* note 5.

<sup>34</sup> *Id.*

<sup>35</sup> Sherry Hutt, *Native American Cultural Property Law*, 34 ARIZ. ATT'Y 18, 20 (Jan. 1998) (recounting several cases of Native American grave desecration and relic pillage).

<sup>36</sup> The same is true in much of the Caribbean.

<sup>37</sup> Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 231 (1998).

<sup>38</sup> *Id.* at 243.

land as examples of dilution of traditional customs and folklore via commercialization and mass consumption for the sake of tourism.<sup>39</sup>

This commercialization and popularity of indigenous culture has led to indiscriminate poaching of indigenous art,<sup>40</sup> often under the presumption that indigenous folklore and knowledge do not belong to anybody in particular and therefore must belong to everybody.<sup>41</sup> The reaction of the indigenous groups has been one of outrage, as they consider these actions not mere stealing of their art but also the pilfering of their cultural heritage and the trivialization of their cultural identity.<sup>42</sup> For many indigenous groups, this is just a continuation of the colonist mentality and the pillaging attitude of westerners.<sup>43</sup> In the realm of bio-diversity, the patenting of traditional medicines, plants, and even cell lines of natives often involve large corporations benefiting without compensating indigenous groups, which are among the poorest people in the planet.<sup>44</sup>

The interest of indigenous people in monopolizing their culture, not only as a way of protecting it, but as a means of survival, has merged with new non-indigenous appreciation of native knowledge, prompting practical action. In the year 2000, the World Intellectual Property Organization (WIPO) established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

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<sup>39</sup> *Id.* at 243. It is arguable, though, whether the indigenous groups “commodifying” their own culture as a means of survival are victims or perpetrators.

<sup>40</sup> Farley, *supra* note 13, at 8, 11.

<sup>41</sup> Daniel J. Gervais, *Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT’L & COMP. L. 467, 468–469 (recounting several examples of appropriation of indigenous art in North America); Farley, *supra* note 13, at 4–8, 31 (recounting cases of appropriation in Australia, U.S. and Japan). As research for this paper, the author interviewed people at random in Panama about the use of indigenous designs. The consistent reaction was surprise at the idea that using a ‘native’ motif may be violating someone’s rights. As expressed by one person, “it would be the same as asking John Wayne for permission to use a cowboy outfit.” As glib as this may sound, it does reflect the feeling of entitlement regarding native designs and art.

<sup>42</sup> Farley, *supra* note 13, at 4–8, 11 (recounting the stealing of sacred secret Aboriginal images used to decorate carpets and the offense and feelings of impotence this generated; also recounting the counterfeiting of Navajo designs for the production of cheap carpets that compete directly with the Navajo’s own crafts); Ragavan, *supra* note 22, at 8–19.

<sup>43</sup> Interview with Aresio Valiente López, Esq., member of the Kuna tribe, attorney for the Kunas, and Director of the Indigenous Peoples Programme (CEALP) in Panama (Feb. 11, 2005) [hereinafter López Interview]; Farley, *supra* note 13, at 11–12.

<sup>44</sup> Ragavan, *supra* note 22, at 8–14 (recounting the patenting of the rosy periwinkle from Madagascar; the Neem tree extract from India; the Ayahuasca medicine from the Amazon; and even the cell lines of a Pandilla woman, who had a natural immunity to leukemia).

(IGC)<sup>45</sup> as an “international forum for the interplay between intellectual property, traditional knowledge, genetic resources, and traditional cultural expressions ([i.e.] folklore).”<sup>46</sup> WIPO believes “these issues cut across the conventional branches of IP law, and therefore do not fit into existing WIPO bodies,”<sup>47</sup> such as the standing committees on Patents; Copyright; Trademarks, Industrial Designs, and Geographical Indications; and/or Information Technologies.<sup>48</sup> These issues do not fit within conventional WIPO bodies not because traditional knowledge and folklore<sup>49</sup> encompass the expressions of indigenous culture, but because they represent what indigenous groups *are*.

Indigenous traditions, beliefs, and knowledge, as reflected in art, dances, and practices are what define indigenous groups as nations. Artistic expression in indigenous cultures is communal and central to their society. Through these expressions, history, knowledge, and spiritual teachings are transmitted from one generation to the next.<sup>50</sup> Within indigenous tribes, traditional medicinal knowledge is aimed not at securing patents, but rather at securing survival. The purpose of indigenous art<sup>51</sup> is often sacred;<sup>52</sup> and even when secular, it has cultural meaning. Traditional knowledge and folklore belong to (and define) the community. No single member of the tribe can claim them as his or her own.<sup>53</sup> Concepts like the expiration of rights after a time limit, or requirements like novelty or fixation, do not make sense when referring to oral teachings that go back hundreds of years. Moreover, indigenous tribes often have no interest in public dissemination of their knowledge, art, and folklore beyond the borders of their own community. As a result, customary objectives of IP, like rewards and/or dissemination to the public, may have no appeal for,

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<sup>45</sup> World Intellectual Prop. Org. [hereinafter WIPO], *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WO/GA/26/6 (Aug. 25, 2000), available at [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/ga26\\_6.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/ga26_6.pdf) (last visited Nov. 5, 2005) [hereinafter *Matters Concerning Intellectual Property and Genetic Resources*].

<sup>46</sup> WIPO, *Traditional Knowledge: Intergovernmental Committee*, available at <http://www.wipo.int/tk/en/igc/> (visited on Nov. 5, 2005).

<sup>47</sup> WIPO, *supra* note 45, at 4.

<sup>48</sup> *Id.*

<sup>49</sup> See Secretariat on CBD, *supra* note 5; See Model Provisions, *supra* note 5.

<sup>50</sup> Farley, *supra* note 13, at 9.

<sup>51</sup> It is not the intention of the author to assume that *all* production of art within an indigenous tribe is communal. However, the object of this paper is not the work of individualistic artists that happen to be from Indigenous tribes. That type of artist and artistic creativity fall under traditional IP concepts and would not clash with current legal frameworks.

<sup>52</sup> Farley, *supra* note 13, at 9.

<sup>53</sup> *Id.* at 31-32 (quoting an Australian copyright case in which an aboriginal artist licensed the use of a communal image to a bank without the authorization of the community, and the Aboriginal community sued); López Interview, *supra* note 43.

or make no sense to, indigenous tribes. Precisely because of this different value system, indigenous cultures find themselves in difficult situations when trying to protect their art and knowledge within the current legal frameworks.<sup>54</sup> The reality, though, is that, willingly or not, indigenous cultures are part of the globalization process. Some of these groups are now aware that the only way to withstand the current tide of patents and artistic plagiarism is by vigorous activism to get their cultural artifacts protected by western-type laws.<sup>55</sup>

#### A. *Traditional IP Requirements and Indigenous Creation: Brief Evaluation*

Indigenous cultures face a conundrum: the only IP laws available are usually full of 'obstacles' for the proper protection of their culture. These obstacles range from legal requirements that clash with the indigenous traditions mentioned above, to the hurdle of carrying the burden of proof when trying to protect and defend IP rights in the courts. Discharging this burden as plaintiffs can be tricky for the same reason it is tricky to protect indigenous culture: lack of fixation; ancestral origin; no identifiable author or inventor, and lack of registration.

A brief look at these obstacles will help put these points in context.<sup>56</sup> Copyright, for example, is usually very difficult to apply to folklore.<sup>57</sup> Its

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<sup>54</sup> Grad, *supra* note 9 at 214 (recounting U.S. cases like *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989) where tribal communal property rights could not be recognized by the courts; and Australian cases like *Yumulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481 (Austl.), where the courts could not recognize communal property rights above individual rights); Ragavan, *supra* note 22, at 8-14, 21-22 (recounting the efforts to block several patents, including the ones for the Neem tree and turmeric from India; for the cell line of a woman from the Padilla tribe; and the efforts from a Peruvian tribe to use trade secrets to protect their property from a California based pharmaceutical company); Hutt, *supra* note 35, at 20 (recounting the failure of the American courts to protect Indian burial grounds from desecration and pillage).

<sup>55</sup> Gervais, *supra* note 41, at 490-491 (quoting countries that have successfully codified "collective intellectual property" principles, mainly for the protection of indigenous art: Panama, Ecuador, Bolivia, Brazil, Chile, Colombia, Mexico and Nicaragua).

<sup>56</sup> See Grad, *supra* note 9, at 224-226, for an extensive analysis of the interaction between traditional IP and indigenous creations; See also Farley, *supra* note 13, at 13-53; Ragavan, *supra* note 22, at 8-24; Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM U.L. REV. 769, 829-833 (1999).

<sup>57</sup> Model Provisions, *supra* note 5. Folklore includes verbal expressions (i.e. folk tales, folk poetry, riddles); musical expressions (i.e. folk songs, instrumental music); actions of the human body (folk dances, plays, rituals.); and tangible expressions (drawings, paintings, carvings, sculptures, pottery, mosaic, woodwork, metalware,

main advantage is the fact that it does not require registration; however, it usually requires 'originality,' a concept that does not fit the idea of ancient and evolving indigenous folklore passing from generation to generation. Often, rituals and sacred art need to be reproduced exactly - i.e. slavishly - to convey spiritual meaning; thus, what non-indigenous people may consider copying, an indigenous group may perceive as a tribute. Copyright is premised on individual creativity, but collective creation and ownership are the cornerstones of indigenous culture. Other obstacles to applying existing copyright laws include the requirements of 'fixation in a tangible medium.'<sup>58</sup> Indigenous culture is primarily oral and expressed in dialects that often lack written form or alphabet. For example, dances, music, poetry and rituals are usually neither preserved nor communicated in fixed form. Another problem results from the limitation of the rights to a specific period of time,<sup>59</sup> while indigenous groups seek perpetual rights as necessary to protect their cultural identity.<sup>60</sup> Similar problems stand in the way of patent, trademark, and trade secret principles when applied to indigenous culture.<sup>61</sup>

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jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms, etc).

<sup>58</sup> MERGES, *supra* note 7 at 336.

<sup>59</sup> The Berne Convention for the Protection of Literary and Artistic Works establishes a minimum duration of life of author plus 50 years. The Berne Convention for the Protection of Literary and Artistic Works, art. 7, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3, *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html). In the U.S. it is the life of author plus 70 years. Indigenous folklore has no identifiable author against whom to measure the life in being. Analogizing to corporate authorship still only gives a fixed period of 95 years. *See* MERGES, *supra* note 7 at 322.

<sup>60</sup> Two other common copyright doctrines that clash with folklore are the U.S. *fair use doctrine*, which would allow use by non-indigenous people for academic comment, criticism or educational purposes while some indigenous folklore is sacred and cannot be shared outside the community because of religious and cultural reasons. *See* 17 U.S.C. § 107 (2003). The continental European doctrine of *moral rights* does not fare much better. Moral rights protect the reputation of the individual; they expire at death and are not transferable. *See* MERGES, *supra* note 7, at 443. The concept is useful to protect the integrity of indigenous folklore, but it would be difficult to establish when the one claiming harm is the community and the object is folklore that has passed down through many generations.

<sup>61</sup> *See supra* note 57. *Patents* (which would apply to traditional knowledge as applied to bio-diversity; traditional medicine and agricultural practices) are difficult and expensive to obtain; furthermore, indigenous communities find them difficult to oppose. *See* Ragavan, *supra* note 22, at 11, 12-14 (recounting the unsuccessful opposition to the Neem patent and the localized criteria that the U.S. Patent and Trademark Office uses to establish prior art: prior foreign activity only counts if in tangible form, like a patent or a published document). *Trademarks and geographical indicators* are useful but limited. The objectives of trademark law are identification of product source and protection of consumers. *See* MERGES, *supra* note 7, at 530-532.

On a policy level conventional IP doctrine teaches that monopoly is the price society pays for encouraging creation. However, with indigenous culture and art there is no need for legally induced incentives. What is most telling is that the social costs of failing to protect are not felt by society but by the indigenous tribes when their cultural references, religion, and knowledge are lost.

#### B. *Sui-Generis IP Systems*

Several developing countries have started the process of developing *sui generis* IP systems for the protection of indigenous culture. The Philippines passed an Indigenous Peoples' Rights Act in 1997 "to protect and promote the rights of indigenous cultural people."<sup>62</sup> Section 32 of the Act establishes "Community Intellectual Rights" by which the indigenous peoples "have the right to practice and revitalize their own cultural traditions and customs."<sup>63</sup> The State protects these rights, including the "restitution of cultural, intellectual, religious, and spiritual property taken without free and prior informed consent."<sup>64</sup> This provision is only a paragraph, not regulated and not enforced; however, the Philippines took a substantial step towards protecting indigenous IP by approving it. Countries such as India and Thailand have passed Plant Variety Protection Bills with the intention of protecting traditional knowledge.<sup>65</sup> Still other countries such as Benin and Rwanda explicitly include scientific and technological folklore in their copyright laws in order to protect their national culture.<sup>66</sup> Several Latin American countries also protect collective rights; among them are Ecuador, Panama, Bolivia, Brazil, Chile, Colombia, Mexico, and Nicaragua.<sup>67</sup>

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Marks can be used to identify the tribe, artist or source of the indigenous product or service, however marks are not designed to stop misuse of indigenous culture or to create monopolies; and are only useful if the indigenous group is interested in the protection of its commercial interests via marks. *Trade Secrets*: This is probably the best form of protection for traditional knowledge and certain types of folklore, but is too limited. Trade secret protection is perpetual as long as the information is valuable; entails a competitive advantage; and most important, is secret. See MERGES, *supra* note 7, at 29. Keeping the secret requires that the entire tribe understands the value of the information and avoids disclosure to academics, researchers or well-intended people.

<sup>62</sup> Ragavan, *supra* note 22, at 52 (quoting §5 of the Act).

<sup>63</sup> An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes, Rep. Act No. 8371, § 32, (Oct. 29, 1997) (Phil.), available at [http://www.congress.gov.ph/download/ra\\_10/RA08371.pdf](http://www.congress.gov.ph/download/ra_10/RA08371.pdf) (last visited Feb. 25, 2005).

<sup>64</sup> Rep. Act No. 8371, § 32 (Phil.).

<sup>65</sup> Ragavan, *supra* note 22, at 54-57.

<sup>66</sup> *Id.* at 57-58.

<sup>67</sup> Gervais, *supra* note 41, at 490-491.

Developed countries like the United States, Australia, and Canada, on the other hand, have tried to adapt conventional IP laws to protect indigenous cultures, but with mixed results.<sup>68</sup> Australian courts have protected indigenous IP by applying common law concepts, such as finding a breach of fiduciary duty against a tribe's communal right when an individual indigenous artist sold art replicating traditional indigenous designs, without the permission of the tribe.<sup>69</sup> The U.S. has invalidated some patents because of protests or showings of traditional indigenous use as prior art, but the record is scattered.<sup>70</sup>

In summary, indigenous people today are at the crossroads between getting their rights recognized *de facto* by the courts, trying to codify their rights via *sui generis* systems, and trying to exercise their rights within the existing legal systems. The result, in many instances, is frustration and anger within the indigenous groups and the pervading feeling that third parties had abused innocently shared knowledge.<sup>71</sup> Even with the international support of the U.N. and WIPO, most indigenous groups have not been able to get their rights acknowledged in their own countries, much less codified. Often considered an impossible feat, Law No. 20 is an important exception as it codifies an indigenous IP law.

### III. LAW NO. 20: CULTURAL AND HISTORICAL BACKGROUND

#### A. Panama and its Indigenous Population

The Isthmus of Panama, small and sunny, takes pride in being the narrowest point of the Americas. Ever since Vasco Núñez de Balboa crossed it in 1513, and claimed the Pacific Ocean for the Spanish Crown,<sup>72</sup> Panamanian history and economy have been marked by its geographical position. Even those who do not know where or what Panama is have heard

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<sup>68</sup> See Farley, *supra* note 13, at 12-16; Grad, *supra* note 9, at 214-219. Farley, *supra* note 13, at 50-52 (recounting how the U.S. also made an attempt to protect folklore with the passing of the Indian Arts and Crafts Act of 1935, 25 U.S.C. §305 (1994) (as amended), which provides for the issuing of certification marks by the Patent and Trademark Office (PTO) to ensure authenticity of Indian products; in its 70 years of existence, the act has never been regulated and there has never been a single prosecution under it).

<sup>69</sup> Grad, *supra* note 9, at 218 (quoting *Bulun Bulun v. R&T Textiles Party Ltd.* (1998) 157 A.L.R. 193 (Austl.)).

<sup>70</sup> Ragavan, *supra* note 22, at 11, 12-14 (recounting the opposition to the turmeric patent and its rejection by the PTO because of the challenges; the unsuccessful opposition to the Neem patent and the localized criteria that the PTO uses to establish prior art: prior foreign activity only counts if in tangible form, like a patent or a published document).

<sup>71</sup> *Id.* at 58.

<sup>72</sup> Britannica Online, Panama § 'History: Exploration, Conquest, and Settlement,' available at <http://www.britannica.com/eb/article-41028> (last visited Jan. 29, 2006) [hereinafter "Panama"].

of the Panama Canal. The economy of the country is defined by the service sector and its position as a natural place of trade, a crossroads between the Americas, the Caribbean, and the Pacific. Panama is also an interesting mixture of races and cultures.

Like all former Spanish colonies in the Americas, Panama has a civil law legal system. Most of its laws have roots in Spanish Codes, some of which are outdated.<sup>73</sup> Interestingly though, in one area Panamanian legislation is unusual: it is highly protective of the autonomy, rights, and lands of its indigenous people.<sup>74</sup> This situation developed partly because the indigenous tribes in Panama are particularly well organized and aware of their rights,<sup>75</sup> and partly because, in time, Panama has come to deeply appreciate its indigenous groups as an integral part of its ethnic, social, and cultural makeup.

Panama's indigenous population accounts for approximately 10% of the total population.<sup>76</sup> The indigenous tribes of Panama are culturally rich and have managed to preserve many of their traditions, even though they face the constant threat of incursions by outside groups<sup>77</sup> and the ongoing environmental degradation of their lands.<sup>78</sup> These groups support themselves with traditional lifestyle and by selling crafts to outsiders. These crafts, developed from traditional culture, now help to maintain tribal identity and provide supplemental support.<sup>79</sup>

There are seven distinct indigenous groups in Panama: Ngöbes, Buglés, Emberá, Wounaán, Naso-Teribe, Bri-Bri and Kunas.<sup>80</sup> Five of these groups have their own autonomous territories, named *comarcas*, and they rule themselves by their own laws.<sup>81</sup> The amount of Panamanian land

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<sup>73</sup> CEALP, DERECHOS DE LOS PUEBLOS INDÍGENAS DE PANAMÁ, 7 (Aresio Valiente López ed., Impresora Gossestra Intl. 2002), available at <http://www.oit.or.cr/unfip/publicaciones/panama.pdf> (last visited Feb. 25, 2005) [hereinafter INDÍGENAS DE PANAMÁ].

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

<sup>75</sup> *Id.*

<sup>76</sup> LÓPEZ, *supra* note 32, at 2.

<sup>77</sup> The threat stems mainly from spillage from the Colombian guerilla conflict and the migration of peasants from other areas of the country.

<sup>78</sup> Merran Gray, Indigenous Artisans of Panamá, available at <http://www.panart.com/artisans.htm> (last visited Nov. 4, 2005).

<sup>79</sup> *Id.* For images of indigenous crafts, see Appendix I.

<sup>80</sup> LÓPEZ, *supra* note 32, at 2.

<sup>81</sup> See *infra* note 88 for a list of the laws approving the indigenous autonomous territories. The Emberás and Wounaáns live in the *comarca* (autonomous territory) Emberá-Wounaán created by Ley No. 22 of 1983. The Ngöbes and Buglés tribes live in the *comarca* Ngöbe-Buglé, created by Ley No. 10 of 1997. The Kunas live in four *comarcas*: Kuna-Yala, Madungandi, Wargandi and Takarkunyala. Created by Ley No. 16 of 1953; Ley No. 24 of 1996; and Ley No. 34 of 2000.

dedicated to *comarcas* is substantial relative to the size of the country.<sup>82</sup> Moreover, the beauty and quality of these lands place them among the best in the country. The *comarcas* represent some of the last ecological refuges of the biosphere. Nevertheless, the situation of the indigenous groups is far from idyllic. Some of the indigenous groups have been left out from the *comarcas*.<sup>83</sup> In addition, Panama still faces the accelerated destruction of its forests as one of its most serious environmental problems.<sup>84</sup>

A *comarca* is the name given in Panama to a political division of the territory that is subject to the laws of the indigenous tribe that populates it. The maximum authority in a *comarca* is the Indigenous General Congress, and its rulings and decisions are binding.<sup>85</sup> Its representatives are the *caciques*<sup>86</sup> generales.<sup>87</sup> In the *comarcas*, the indigenous law is the law of the land. This law applies to language, education, marriage, and property. Rules pertaining to divorce, property ownership, puberty rites, are also all indigenous laws but with the legal effect of Panamanian laws. Effectively, the indigenous territories are their own little countries protected by the legal framework of the Panamanian state. Non-indigenous people cannot buy, lease, prospect, or set up shops or hotels in the indigenous territories without the permission of the indigenous people.<sup>88</sup> The non-indigenous Panamanian population is largely unaware of the autonomy and rights of the indigenous territories.

The Panamanian newspaper *La Prensa* recounts two controversial episodes of exercise of indigenous autonomy. In 1992 and 1993, migrating peasants from the western provinces tried to settle in Kuna territory. The

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<sup>82</sup> Please refer to map of the *comarcas* to see the size of the indigenous territories mapped against the country. *Map printed in DERECHOS DE LOS PUEBLOS INDÍGENAS DE PANAMÁ*, *supra* note 73, at 13.

<sup>83</sup> LÓPEZ, *supra* note 32, at 2 (recounting how a great percentage of members of Emberá and Wounaán tribes were left out of the *comarca*).

<sup>84</sup> Trying to solve this problem, Panama has created national parks, which define protected areas. Not coincidentally, the indigenous people usually inhabit these areas because of their practices of sustainable development and their regard for the environment. However, the establishment of protected areas implies a ban on hunting, fishing, plant growing, and the traditional use of natural resources, and therefore, ironically, affects the subsistence of the indigenous peoples. World Rainforest Movement, Bulletin 57, *Panamá: Protected Areas v. Indigenous Peoples* (2002), available at <http://www.wrm.org.uy/bulletin/57/Panama.html> (last visited Nov. 5, 2005).

<sup>85</sup> LÓPEZ, *supra* note 32, at 2.

<sup>86</sup> Originally from the Taíno language, *cacique* means chief in Spanish. Merriam Webster Collegiate Dictionary 159 (10th ed. 1998). It is the name given to native Indian chiefs in areas dominated primarily by Spanish culture.

<sup>87</sup> LÓPEZ, *supra* note 32, at 2.

<sup>88</sup> See articles 2, 3, and 6 of Ley No. 22 of 1983; and articles 2, 5, 6, 7, 8 and 15 of Ley No. 24 of 1996. See *supra* note 81.

Kunas imprisoned the peasants and refused to let them go until the Panamanian government intervened. The result was the political delimitation of the autonomous territories.<sup>89</sup> In 2000, a Panamanian non-indigenous teacher accused of disrespecting a Kuna *Sahila* (Indian Chief) was punished corporally through the application of *ortiga* (stinging nettle).<sup>90</sup> The teacher was a government employee hired by the Ministry of Education and assigned to the *comarca*. This incident caused public uproar in the Panamanian capital, as the Constitution prohibits corporal punishments of any kind.<sup>91</sup> The final resolution of the debate was simple: in the autonomous indigenous territories, the law applicable is the law of the tribes. Panamanians visiting on personal or official business are subject to these laws. It is important to note that in Panama, traditionally, the indigenous groups enforce their own rights.

#### IV. THE KUNAS

Anthropologist James Howe named his book about the historical struggle of the Kunas "*A people who would not kneel*."<sup>92</sup> The title seems justified, as the Kunas have a long tradition of being ferocious fighters.<sup>93</sup> The original indigenous tribes of the Isthmus of Panama, the Cuevas, were extinct by the sixteenth century, victims of the Spanish Conquistadores and European diseases.<sup>94</sup> References to the Kuna started appearing at that time, as the Kuna migrated westward from today's Colombia and occupied the region known as Darien. The chronicles describe them as warlike people, intent on keeping their independence by way of fighting the Spaniards, creating alliances with pirates, and refusing to be enslaved or converted to Christianity.<sup>95</sup>

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<sup>89</sup> Elio A. Rujano M., *Alto Bayano: un problema sin resolver*, LA PRENSA (Pan.), Nov. 13, 1992, at 6a, available at <http://biblioteca.prensa.com/contenido/1992/batch01/bayano-0001765.html> (last visited Nov. 5, 2005).

<sup>90</sup> Rocío Grimaldo, *Un castigo controversial*, LA PRENSA (Pan.), Aug. 11, 2000, at 6a, available at <http://biblioteca.prensa.com/contenido/2000/08/38b34328.html> (last visited Nov. 5, 2005).

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

<sup>92</sup> JAMES HOWE, *A PEOPLE WHO WOULD NOT KNEEL: PANAMA, THE UNITED STATES AND THE SAN BLAS KUNA* (Smithsonian Institution Press 1998).

<sup>93</sup> Howe recounts the story that led to the Kunas negotiating their own terms with the Panamanian government in 1925, in a time when most nations in the western hemisphere relegated indigenous peoples to the lowest social levels, stealing their land, diminishing their populations, exploiting their labor, and flattening their cultures. Howe concludes that this was the result of the fierce spirit of the Kuna combined with the own exertion of the Panamanian state, an incipient democracy born in the shadow of the United States and struggling to find its own way as a nation. *Id.* at 4-6.

<sup>94</sup> KRAMER, *supra* note 3, at 12.

<sup>95</sup> HOWE, *supra* note 92, at 12. The most thorough account of the Kunas is that of Lionel Wafer, a British ship's surgeon who was abandoned by buccaneers in the

Before the beginning of the nineteenth century, however, the Isthmus of Panama lost its position as Spain's preferred trade route, and the region sank into abandonment and an economic depression that left the indigenous groups to their own devices.<sup>96</sup> The Kunas migrated from the Darien jungle towards the archipelago of San Blás on the Caribbean coast, a tropical paradise comprised of more than 360 islands.<sup>97</sup> The new habitat forced the Kuna to adjust from rainforest farming to coastal dwelling.<sup>98</sup> The move to the islands had another effect: due to the distance between the islands and the nature of the crops, the burden of agricultural labor shifted from women, who traditionally performed this work in indigenous South American groups, to men.<sup>99</sup> Consequently, women stayed mostly at home and could focus on their dresses, thereby developing the beautiful and intricate *mola*, a time consuming craft.<sup>100</sup>

Panama, whose entire economy once depended on the Spanish trade, was also abandoned to its own devices after the decline of the Spanish Empire.<sup>101</sup> When Panama gained its independence from Spain in 1821, it immediately became part of Nueva Granada, a short-lived republic comprised of present-day Colombia, Venezuela, Ecuador, and Panama. The countries soon seceded, and only Panama remained attached to Colombia.<sup>102</sup> Always a strongly autonomous province, Panama seceded from Colombia several times during the nineteenth century.<sup>103</sup> The natural barrier of the Darien jungle separated the countries and communication was scattered and difficult. Panama, weak and always dependent on its geographical position as the way to make its fortune, joined Colombia, a bigger and richer country, in the hope that the latter would invest in Panama's economy. But plagued with its own problems, Colombia did not invest in the far away province.<sup>104</sup> In 1879, Ferdinand de Lesseps was

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Isthmus in the seventeenth century. Wafer describes their customs, habits and garments. *Id.*; See Virtual American Biographies – Lionel Wafer, available at <http://www.famousamericans.net/lionelwafer/> (last visited Nov. 5, 2005). During the eighteenth century the Kunas faced multiple attempts at colonization and assimilation from different European settlers coupled with the ongoing struggle against the Spanish Crown, which left them decimated. HOWE, *supra* note 92, at 12-15.

<sup>96</sup> HOWE, *supra* note 92, at 14-15.

<sup>97</sup> *Id.* at 15.

<sup>98</sup> *Id.* As a result, they focused on exploitation of aquatic resources like tortoiseshells and maritime trade with non-indigenous merchants.

<sup>99</sup> *Id.* at 16. They cultivated mainly coconuts and bananas.

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

<sup>101</sup> "Panama", *supra* note 72.

<sup>102</sup> Britannica Online, § 'Gran Columbia,' available at <http://www.britannica.com/eb/article-9037644> (last visited Jan. 27, 2006).

<sup>103</sup> "Panama," *supra* note 72, at § 'Secession from Spain and Union with Gran Colombia.'

<sup>104</sup> See generally DAVID McCULLOUGH, THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL 1870-1914, 318 (Simon & Schuster 1977).

empowered to start a maritime canal through Panama.<sup>105</sup> The enterprise was an utter failure due to bad management, poor planning, and underestimation of the geographical challenges of the isthmus.<sup>106</sup> Panama was left in a disastrous condition and blamed its problems on the indifference of the Colombian government. At the turn of century, the United States showed interest in building a canal, but it found the Colombian government a difficult negotiator. Thus, the United States instead helped the province of Panama gain its independence.<sup>107</sup> In 1903, Panama was finally born as an independent nation. Its first official international act was signing the Panama Canal treaty with the United States.<sup>108</sup>

The Kuna played no part in the separation from Colombia. Nevertheless, due to the Kunas' *de facto* control of the Caribbean coast, and because some of their habitat extended over the Colombian border, the Panamanian government tried to establish ties with the tribe as quickly as possible.<sup>109</sup> The Kunas did not particularly care about Panamanians or Colombians, but they were aware that most of their land fell on the Panamanian side and that Panama had the support of the United States. Nevertheless, some Kuna advocated supporting Colombia, because they thought it was, at least, a known evil.<sup>110</sup> In 1870, Colombia gave the Kunas their own territory through the creation of the *comarca* Tulenega.<sup>111</sup> In contrast, Panama's freshly written Constitution offered nothing of the sort, nor did it recognize any of the old Colombian laws. The indigenous groups were effectively non-citizens within the young state. This made the Panamanian government insecure about Kuna alliances, and some of the first indigenous laws of Panama sought to 'civilize' the Kunas.<sup>112</sup>

The Catholic Church was charged with this mission.<sup>113</sup> The Church focused its strategy on converting the Kunas by trying to make them abandon their customs and rituals and by forcing their women to stop wearing their *mola* blouses.<sup>114</sup> The Kunas rebelled and took up arms

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<sup>105</sup> Britannica Online, Transcontinental Railroad and Canal Projects, *available at* <http://www.britannica.com/eb/article-9037644> (last visited Jan. 27, 2006).

<sup>106</sup> "Panama," *supra* note 72, at § 'Transcontinental Railroad and Canal Projects'; McCULLOUGH, *supra* note 104, at 124-181.

<sup>107</sup> "Panama," *supra* note 72, at § 'Transcontinental railroad and canal projects'.

<sup>108</sup> McCULLOUGH, *supra* note 104 at 388-398. McCullough offers a thorough recount of the Independence of Panama against the background of U.S.-French politics and the construction of the Canal.

<sup>109</sup> HOWE, *supra* note 92, at 27-28.

<sup>110</sup> *Id.* at 28-29. Howe quotes the analogy used by one of the high chiefs: one must not leave a "well-known and reliable older spouse versus an attractive but untried young woman." *Id.*

<sup>111</sup> INDÍGENAS DE PANAMÁ, *supra* note 73, at 14.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

against the Panamanian government.<sup>115</sup> The rebellion occurred during the carnival festivities, and Panama, without military resources, could barely defend itself. Casualties were minimal, but the uprising prompted the intervention of the United States, which was concerned with the security of the Panama Canal.<sup>116</sup> With the United States acting as a mediator, the Panamanian government and the Kuna signed a treaty.<sup>117</sup> The treaty provided that Panama would modify its Constitution to include the *comarcas* as a political division of the Panamanian state.<sup>118</sup> Eventually, Panama would go on to pass a remarkable array of laws showing an evolution in the standing of the country's indigenous groups, thanks in great measure to Kuna political activism in the Legislative Assembly. These laws are not limited to the Kunas, and today, they encompass all the indigenous tribes in Panama.

## V. THE LONG WALK OF THE *DULE*<sup>119</sup> *MORR*<sup>120</sup>

*Dule Morr* means the "blouse of the people." Kuna oral tradition teaches how Olonagegiryai, one of the wise mothers of the tribe, traveled to a sacred place called Galu Dugbis, a place where all the designs and colors of the *molas* dwell.<sup>121</sup> She brought back the art, the designs, and the technique of the *molas*, and taught Kuna women how to sew *it* using cotton. The Kuna men were jealous and tried to stop her from teaching

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<sup>115</sup> *Id.*

<sup>116</sup> Howe, *supra* note 92, at 279–281.

<sup>117</sup> *Id.* at 279–288.

<sup>118</sup> INDÍGENAS DE PANAMÁ, *supra* note 73, at 14. This is known today as the *Dule Revolution*, and until very recently, this bit of history was excised from the curriculum in Panamanian schools. On May 12, 1998, the Panamanian Legislative Assembly passed Law No. 29, recognizing February 25 as the Day of the Dule Revolution, commemorating the Kuna fight for their human rights and declaring the day a holiday in the Kuna territory. Ley No. 29, 12 May 1998, Por la Cual se Decreta el 25 de Febrero de Cada Año Día de la Revolución Dule, Gaceta Oficial No. 23,541, 13 May 1998 available at [http://www.asamblea.gob.pa/GACETAS/1990/1998/23541\\_1998.PDF](http://www.asamblea.gob.pa/GACETAS/1990/1998/23541_1998.PDF) (last visited Nov. 5, 2005).

<sup>119</sup> *Dule* or *Tule* means "the people" in the Kuna language. Kuna is their non-indigenous name. There are two linguistic experts in the Kuna tribe. Because of the soft pronunciation of the Kuna language, when translated to the western alphabet the sound of their name is a mix between the Spanish "T" and "D". Thus, one Kuna expert says that the name of the tribe is Dule and the other says is Tule. It is often found written both ways. Aresio Valiente López, who gave the author this information via personal communication, prefers to write it with a "D"; thus this is the form adopted throughout this paper. See López Interview, *supra* note 43.

<sup>120</sup> See *supra* note 4.

<sup>121</sup> EN DEFENSA DE LA VIDA Y SU ARMONÍA: ELEMENTOS DE LA RELIGIÓN KUNA. TEXTOS DEL BAB IGALA, 176 (Aiban Wagua ed., trans., Emisky/ Pastoral Social-Cáritas Panamá 2001) [hereinafter EN DEFENSA DE LA VIDA Y SU ARMONÍA].

this art to the women. Olonagegiryai persevered and defied them because she was bringing good to the community.<sup>122</sup>

Lionel Wafer, a British traveler who spent some time with the Kuna in the seventeenth century, described how Kuna women painted the upper part of their bodies with intricate designs.<sup>123</sup> Kuna women did not cover their chests then, much like the Emberá and Wounaan women do not cover their torsos today, except with intricate body art.<sup>124</sup> Additionally, Kuna women were exposed to the European art of appliqué (or sewing layers of cloth one on top of the other) during the eighteenth century when French Huguenots settled among the Kunas. Eventually the French were expelled or murdered,<sup>125</sup> but the women kept the appliqué art.

The body art described by Wafer evolved into today's *molas*. *Mola* refers to the front and back panels of the blouses worn by Kuna women. The *molas* are not simply crafts; they *are* what the women wear every day as part of their daily dress.<sup>126</sup> These panels are intricate works of dexterity; they are sewn by hand with seemingly invisible stitches in a complex technique called reverse appliqué and they use only bits and pieces of bright colored cotton.<sup>127</sup>

Many hours of careful sewing are required to create a fine *mola*, and the ability to make an outstanding *mola* is a source of status among Kuna women. The quality of a *mola* is determined by such factors as the number of layers, fineness of stitching, evenness and width of cutouts, addition of details, and the general artistic merit of the design, and color combination. When Kuna women get tired of a particular blouse, they disassemble it and sell the *molas* to collectors. Since *mola* panels have been worn as part of a dress, they often show signs of wear such as fading,

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<sup>122</sup> *Id.* at 176–179.

<sup>123</sup> LIONEL WAFER, "A NEW VOYAGE AND DESCRIPTION OF THE ISTHMUS OF AMERICA" (1699), quoted in Molastore.com, available at <http://molastore.com/whatismola.html> (last visited Nov. 5, 2005). See Virtual American Biographies – Lionel Wafer, *supra* note 95.

<sup>124</sup> For pictures of Emberá and Wounaan women in their habitats with examples of their body art, see Jean Philippe Soulé, *Around the World in a Viewfinder*, available at <http://www.jpsviewfinder.com/stock/galleries/index/stockfrpana.htm> (last visited Nov. 5, 2005).

<sup>125</sup> HOWE, *supra* note 92, at 14; Jorge Panama Miller, *What is Mola Art?* available at <http://molastore.com/whatismola.html> (last visited Oct. 27, 2005). This is the only time in the record of Kuna history that the tribe allowed miscegenation or intermarrying outside the tribe, as Kunas are fiercely opposed to this. The French influence also accounts for the modesty within the Kuna, prompting the covering of the women's breasts with cloth instead of body paint.

<sup>126</sup> The daily dress of a Kuna woman consists of a patterned blue cotton wrapped skirt, red and yellow headscarf, arm and leg beads, gold nose rings and earrings and the many layered and finely sewn *mola* panel blouse. See Appendix IB for photos of Kuna women in their day-to-day clothes.

<sup>127</sup> See Appendix IB; See Appendix IA for *molas* designs and appliqué details.

and stitch marks along the edges of the panels. These “imperfections” indicate that the *mola* is authentic and not made solely to be sold to tourists.<sup>128</sup> *Mola* panels have many uses. They can be framed as art or made into pillows, place mats, or wall hangings. Some people make them into bedspreads or incorporate them into quilting projects. Others use them to accentuate their own designs.<sup>129</sup> The *mola* blouse is an important symbol of Kuna culture and the Kuna’s main source of income. Since the designs of the *molos* are believed to come from a sacred place, the Kuna women express the *cosmovisión*<sup>130</sup> of the Kuna and their religious relationship with mother Earth when sewing them.<sup>131</sup> Because each *mola* is designed and sewn by hand, each one is as unique as a fingerprint<sup>132</sup> and is effectively a work of art.

*Molas* traditionally were popular with tourists or non-Panamanians. However, since the 1960s, and coincidentally with the growing awareness of indigenous rights, a new wave of appreciation for the *mola* started in Panama. As their popularity increased, *molos* inspired artists and commercial enterprises.<sup>133</sup> Simultaneously, as Kuna women started interacting with non-indigenous artists and others who commissioned *molos*, they learned new applications for their *molos* besides using them as panels of a blouse. Abraham Perez, CEO and owner of “My Name is Panama”®, a clothing line embroidered exclusively with *molos*, recounts how, when the line started in 1986, the Kuna would only sew the classical square *molos*.<sup>134</sup> Influenced by the commissions from non indigenous tailors, the Kuna women soon started making and selling commercial applications of the *molos*, such as belts, purses, and vests.<sup>135</sup>

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<sup>128</sup> Miller, *supra* note 125.

<sup>129</sup> See Appendix IE for commercial applications of the *molos*.

<sup>130</sup> I.e. indigenous understanding and interpretation of the world: for the indigenous communities Earth is the Mother and they are her children. She offers what is necessary to satisfy vital needs, like medicines, food, water, air, materials to build their homes, etc. Mother Earth’s protection is vital for existence. In Panama, each indigenous community has a name for Mother Earth: The Kunas call it Napguana; the Ngöbes call her Dobbo and the Emberá call her Egoro. LÓPEZ, *supra* note 32.

<sup>131</sup> Aresio Valiente López, *Experience with Act 20, June 26, 2000: Panama’s Indigenous Intellectual Property Law*, 2002, available at <http://www.ichrdd.ca/english/commdoc/publications/indigenous/aresioPanamaLawEng.html> (last visited Oct. 27, 2005) [hereinafter Lopez, Experience with Act 20].

<sup>132</sup> Miller, *supra* note 125.

<sup>133</sup> Such as the clothing line “My Name is Panama”® and the haute couture designs of French-Panamanian designer Hélène Breebaart.

<sup>134</sup> Abraham Perez, General Manager and owner of “My Name is Panama”®. E-mail from Abraham Perez, General Manager and Owner of “My Name is Panama”® to author (January 24, 2005) (on file with author).

<sup>135</sup> *Id.*

Hélène Breebaart, a French designer who has lived in Panama since the 1960s and considers the country her adopted homeland, tells a similar story. Ms. Breebaart designs *haute-couture* inspired by indigenous art. Her designs are original, executed by Kuna artisans. Ms. Breebaart recounts how she started seeing reproductions of some of her designs and delicate style *molas* in the selling stands of Kuna artists.<sup>136</sup>

The influence of *molas* and Kuna art is not limited to clothing. The intricate and particular style has inspired a range of artistic expression, from a distinctive style of decoration,<sup>137</sup> to the inspiration behind paintings,<sup>138</sup> trademarks, and logos.<sup>139</sup> As Ms. Breebaart appropriately describes it: “*Mola* is a living, breathing art; always evolving and carrying its history, its pain, and its love within.”<sup>140</sup>

## VI. PASSING LAW NO. 20 OF 2000

In the 1980s, the popularity of the *molas* prompted a wave of imported imitations that flooded the market.<sup>141</sup> Once again the Kunas mobilized; this time without arms. The Panamanian Congress passed Law No. 26 of 1984,<sup>142</sup> prohibiting the importation of counterfeit *molas* or any garment that imitated or resembled a *mola*. The purpose was to protect Kuna art.

After this episode, the representatives of Panamanian indigenous groups started to push for an indigenous intellectual property law. The campaign took fifteen years, culminating in Law No. 20. Law No. 20 was adopted against the background of other laws, addressing specialized concerns of indigenous groups and expressing a national concern for the

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<sup>136</sup> Interview with Hélène Breebaart, Atelier of Hélène Breebaart (Feb. 25, 2004) (on file with author) [hereinafter Breebaart].

<sup>137</sup> Geovanni Hernández, *Buen Beber*, LA PRENSA (Pan.), June 26, 2004, at 3B, available at <http://biblioteca.prensa.com/contenido/2004/06/25/25-1bnot3.html> (last visited Oct. 27, 2005), (recounting the opening of a new sushi bar in Panama City and praising the decoration based on *molas* and indigenous art).

<sup>138</sup> David Mesa, *Pintor Desiderio Sánchez Triunfa en Estados Unidos*, LA PRENSA (Pan.), February 15, 2004, available at <http://biblioteca.prensa.com/contenido/2004/02/15/15-9bnot1.html> (last visited Nov. 5, 2005). (recounting the success of Panamanian artist Desiderio Sánchez in the United States and his comments regarding *molas* as precursors of cubism and inspiration for Latin American art).

<sup>139</sup> Please refer to Appendix I, §E for a reproduction of the trademark logo of “My Name is Panama”®, which is inspired by *mola* design and art.

<sup>140</sup> Breebaart, *supra* note 136.

<sup>141</sup> López Interview, *supra* note 43.

<sup>142</sup> Ley No. 26, 22 Oct. 1984, Por la cual se Prohíbe la Importación de Copias de Molas y se Dictan Otras Disposiciones [Prohibition of Mola Importation], La Gaceta, No. 20-174, 31 Oct. 1984 (Pan.), available at [http://www.asamblea.gob.pa/GACETAS/1980/1984/20174\\_1984.PDF](http://www.asamblea.gob.pa/GACETAS/1980/1984/20174_1984.PDF) (last visited Oct. 27, 2005).

protection of indigenous rights. A brief summary of these laws helps illustrate this point:<sup>143</sup>

Law	Content
Indigenous Rights Panamanian Constitution of 1972, as amended. Articles 1, 5, 84, 86, 104, 120, 122, 123, 141, 287	Recognizes the rights of indigenous groups to their own territories; to their own language; to bicultural and bilingual education; to their collective rights; to political representation in the Legislative Assembly; to their culture and to their self determination. Establishes the duty of the Panamanian state to protect the indigenous groups; to promote their well being and their cultural identity and to compensate them if dispossessed of their lands.
Autonomous Territories Law No. 16 of 1953; Law No. 22 of 1983; Law No. 24 of 1996; Law No. 10 of 1997; Law No. 34 of 2000	Creates the Comarcas of San Blás (eventually re-named Kuna Yala); Emberá -Wounaan; Kuna-Madungandi; Ngöbe -Buglé; and Kuna-Wargandi.
Family Law Law No. 25 of 1984 and Law No. 3 of 1994	Gives ritual marriages same legal status as civil marriages and allows <i>sahilas</i> to grant divorces in the indigenous territories.
Environment and Indigenous Rights Law No. 41 of 1998	General law regarding the Environment. Recognizes traditional indigenous rights to their lands, their traditional knowledge, their sustainable environmental practices, their spiritual relationship with the environment; and grants them the right not to be relocated or moved from their lands without their previous consent. These rights apply regardless of the indigenous groups being in protected comarcas or not. Includes 'environmental crimes' and their punishments.
Education Law No. 34 of 1995	Creates bilingual and bicultural education in all the indigenous territories to protect their culture and languages.
Traditional Medicine Resolution No. 4376 of 1999 of the Ministry of Health	Recognizes traditional medicine and establishes a joint effort between the Health Ministry and the indigenous groups for the promotion, development, and usage of traditional medicine
Protection of Indigenous Women Law No. 4 of 1999, art 25.	Establishes equal opportunities for men and women; prohibits gender discrimination. Establishes incentives for authors and writers to record the traditions, stories, cultural patterns of the indigenous groups, expressed by their women, for posterity.

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<sup>143</sup> See INDÍGENAS DE PANAMÁ, *supra* note 73, for a thorough compilation of all Panamanian indigenous laws,

Law	Content
Intellectual Property and craft development Law No. 26 of 1984 (prohibiting importation of molas); Law No. 15 of 1994 (copyright); Law No. 35 of 1996 (industrial property); Law No. 23 of 1997 (plant varieties); Law No. 27 of 1997 (protection of crafts); Law No. 20 of 2000 (indigenous IP law); Law 35 of 2000 (indigenous crafts fairs)	Prohibits the importation of counterfeit <i>molas</i> into the country. Establishes a copyright and industrial property framework. Establishes the protection of New Plant Varieties. Promotes and protects the development of crafts. Establishes indigenous intellectual property rights that are collective and perpetual. Creates the Foundation for the Indigenous Crafts and Art Fairs aimed at promoting indigenous folklore, art, crafts, and traditional knowledge domestically and internationally.
Legislative Assembly Internal Regulations – 1995	Creates the Commission for Indigenous Affairs as a permanent working group of the Legislative Assembly for the promotion of Indigenous laws
Ministry of the Presidency Executive Decree No. 1 of 2000	Creates the National Council for Indigenous Development as part of the Ministry of the Presidency. The Council does not seek assimilation of the indigenous groups but the understanding and protection of the interests of the indigenous people as part of the multi-ethnic profile of Panama

This summary shows an evolving tradition of protecting indigenous rights that has grown in the last 10 years. Panama is also a member of all major international treaties and conventions aimed at protecting indigenous rights, except the 1989 ILO’s Convention No. 169.<sup>144</sup> The reason why Panama is not a member of ILO showcases some of the realities of Panamanian cultural complexity. The other traditionally dispossessed group in Panama is the *campesinos* (peasants). The peasants in Panama are mostly catholic *mestizos*; they are descendants of the union between Spaniards and Indians and are brought up with the old farming practices of felling and burning. Their lands, in the southwestern region of the country, face desertification due to a permanent drought caused by non-sustainable agricultural practices and deforestation.<sup>145</sup> These groups, who also make beautiful crafts of different origin,<sup>146</sup> started migrating towards the indigenous *comarcas* where the forests were still virgin and the lands seemed ready for occupation. This migration brought several violent encounters between the Indians protecting their habitats and the migrat-

<sup>144</sup> See Convention No. 169, *supra* note 22.

<sup>145</sup> This area of the country is known as the Azuero peninsula, and it is a “heavily settled, terribly deforested land where wilderness has been supplanted by farms and forests have been turned into wasteland.” The Azuero Peninsula, Panama, *available at* <http://www.moon.com/planner/panama/regions/azueroopeninsula.html> (last visited Jan. 28, 2006).

<sup>146</sup> These crafts are of Spanish origin and comprise, among others, the beautiful *Pollera*, or Panamanian national dress, and folkloric dances. Folklore de Panama, [http://www.panamatours.com/Culture/culture\\_folklore\\_esp.htm](http://www.panamatours.com/Culture/culture_folklore_esp.htm) (last visited Oct. 27, 2005).

ing peasants known as *colonos*. The Panamanian government, powerless to solve hundreds of years of cultural divide, mediated, thereby avoiding the possible bloodbath by making sure only the Indians had rights to their territories.<sup>147</sup> The result is an often-divided Legislative Assembly, where legislators looking after the interests of mostly peasant constituencies refuse to treat indigenous groups as special or grant them rights over the *campesinos*.<sup>148</sup>

The interests of the indigenous groups and the *campesinos* seem to diverge; in one instance, however, they joined. In 1997, the Panamanian Congress passed Law No. 27 for protecting and promoting the development of crafts.<sup>149</sup> Its objective was to protect all crafts produced in the country by indigenous groups and *campesinos* alike. Law No. 26 of 1984 only protected the *mola*; others felt the rest of the country's folklore deserved equal protection. To accomplish this, Law No. 27 of 1997 prohibits the importation of crafts and products that imitate traditional Panamanian costumes or pieces of costumes.<sup>150</sup>

After the revival of indigenous art – particularly the *molos* – in the 1980s and 1990s, the General Directorate of the Industrial Property Registry (DIGERPI), the administrative agency in charge of registering patents, trademarks, and designs, suddenly found itself swamped with requests for registration of *mola* designs from national and international non-indigenous companies.<sup>151</sup> This prompted the Women's Cooperative of *Molas*, an organization of Kuna women, to appeal to the General Kuna Congress for help.<sup>152</sup> The General Kuna Congress formed a special commission with the dual goal of stopping the unauthorized registrations and registering the *molos* in the name of the Kuna-Yala.<sup>153</sup> The legal alternative presented to the Kunas at the time was to register a collective trademark for the *molos* and their designs.<sup>154</sup> The Kunas thought that this was insufficient, as it would only protect the association that applied for the

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<sup>147</sup> See Indian-Peasant Wars, *supra* Part III.A. See also Rujano, *supra* note 89.

<sup>148</sup> López Interview, *supra* note 43 (recounting the reasons why a legislator opposed the ratification of Convention 169).

<sup>149</sup> Ley No. 27, 24 July 1997, Por la que se Establecen la Protección, el Fomento y Desarrollo Artesanal [Protection of Crafts], Gaceta Oficial, No. 23-343, 30 July 1997 (Pan.), available at [http://www.asamblea.gob.pa/GACETAS/1990/1997/23343\\_1997.PDF](http://www.asamblea.gob.pa/GACETAS/1990/1997/23343_1997.PDF) (last visited Oct. 27, 2005).

<sup>150</sup> *Id.* Including *Polleras* (Panamanian national dress); *montunos* (a simpler version of the national dress, name refers to both, the male and female costume); *molos* and *nahuas* (the colorful and practical dress wore by the women of the Ngöbe and Buglé tribes). See Appendix I for photos.

<sup>151</sup> López, *Experience with Act 20*, *supra* note 131. The DIGERPI is part of the Ministry of Commerce and Industries. The National Copyright office is part of the Ministry of Education.

<sup>152</sup> López, *Experience with Act 20*, *supra* note 131.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

mark and only for commercial purposes.<sup>155</sup> There was also the sticky point of exactly how to protect the *molos*. Some considered the *molos* works of art falling under copyright. Others considered it functional and thus a subject matter of industrial design. Still others thought that the process of making a *mola* should be patented as an invention. To complicate matters further, the Panamanian government could not decide whether the *mola* was part of Panama's national heritage or the exclusive property of the Kuna tribe.<sup>156</sup> It became obvious to the Kuna Special Commission during the process of negotiating a *mola* protection that it was necessary to broaden the scope of the bill to include all indigenous crafts and knowledge.<sup>157</sup> The crafts of other indigenous groups faced the same risks the *mola* did, but the other groups were less organized and politically savvy than the Kuna, and were therefore incapable of mustering enough political clout to pass similar laws. The Emberás and Wounaáns, for example, are dexterous carvers of exquisite miniature crafts made from tagua seed (or vegetable ivory),<sup>158</sup> but they still live much as they did two hundred years ago with minimum communication with the non-indigenous world.<sup>159</sup>

Aresio Valiente López, one of the drafters of Law No. 20, who is also a member of the Kuna tribe and an attorney, recounts the process and evolution of the bill in the Legislative Assembly.<sup>160</sup> According to Aresio López, Law No. 20 evolved from a draft proposal seeking to protect the garments and traditional dresses of the indigenous tribes into a bill with the wider purpose of filling the "vacuum concerning recognition of indigenous peoples' intellectual and cultural property rights."<sup>161</sup> Indigenous

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

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

<sup>157</sup> López Interview, *supra* note 43.

<sup>158</sup> The tagua is the seed of a palm that grows in the tropical rainforest in Panama. Taguas range in size from 2" to 6" and are uncommonly hard. Carving them is a slow and time-consuming process. Because it is a seed, taguas are harvested without harming the mother palm; thus, they are an excellent example of a naturally renewable resource. Like the *molos*, each tagua miniature is unique, and none is identical to another. Taguas won the UNESCO prize for handicrafts. Humberto Olarte Cupas, *Tagua Nut Carvings by the Embera Wounaan from Panama*, available at <http://panamarts.com/index.php/cPath/30> (lasted visited Feb. 25, 2005). Please refer to Appendix IC for photos of tagua miniatures and other Emberá-Wounnaán crafts. The Ngöbe and Buglés, who are among the poorest indigenous people in Panama, also have their own crafts such as their *nahua* dresses, and their *chácaras* (practical hand woven bags made of the wild pineapple plant). See Jean Philippe Soulé, *supra* note 124. See Appendix IC for photos of crafts by the Ngöbes and Buglés.

<sup>159</sup> See Jean Philippe Soulé, *supra* note 124, for photographs of the life and culture of the Emberá and Wounaán of Darién.

<sup>160</sup> López, *Experience with Act 20*, *supra* note 131.

<sup>161</sup> *Id.*

congresses revised the bill and WIPO sent comments requesting the addition of a 'national treatment' clause.<sup>162</sup>

During the debates of the bill in the Panamanian Congress, there was no opposition or comments from academics. A thorough search of the newspapers of the time reveals no mention of the bill. Indeed, the only opposition came from a legislator who raised concerns regarding non-indigenous artisans (*campesinos*) who produced crafts on the style of the Ngöbes and Buglés.<sup>163</sup> A special exemption was added to the draft; it geographically specified and limited the range of these non-indigenous artisans.<sup>164</sup> With this modification, Law No. 20 of 2000 was passed. Appendix II lists the complete statute.

## VII. LAW NO. 20: A DESCRIPTION

Panamanian IP laws are continental European in spirit and source and they comply with all the major international IP agreements of which Panama is a member.<sup>165</sup> As a result of Panama's accession to the World Trade Organization in 1997, its IP laws were revamped to comply with the Trade-Related Aspects of Intellectual Property Rights (TRIPs). The Panamanian Constitution does not establish time limits or ownership restrictions in intellectual property. The two main IP laws are Law No. 15 of 1994,<sup>166</sup> which regulates copyright, and Law No. 35 of 1996,<sup>167</sup> which regu-

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

<sup>163</sup> *Id.* During interviews with the author of this paper, Mr. López also refuse to mention the name of this politician.

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

<sup>165</sup> "Panama is a member of the World Intellectual Property Organization (WIPO); the Geneva Phonograms Convention; the Brussels Satellite Convention; the Universal Copyright Convention; the Berne Convention for the Protection of Literary and Artistic Works; the Paris Convention for the Protection of Industrial Property; and the International Convention for the Protection of Plant Varieties. In addition, Panama was one of the first countries to ratify the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty." Trade Compliance Center: National Estimates 2001 Panama, available at [http://www.mac.doc.gov/tcc/data/commerce\\_html/countries/nte2001/panama.pdf](http://www.mac.doc.gov/tcc/data/commerce_html/countries/nte2001/panama.pdf) (last visited Nov. 5, 2005).

<sup>166</sup> Ley No. 15, 8 Aug. 1994, Por la cual se aprueba la Ley sobre el Derecho de Autor y Derechos Conexos y se dictan otras disposiciones [By which the Copyright law is approved and whereby set forth other provisions], Gaceta Oficial No. 22,598, 10 Aug. 1994 (Pan.).

<sup>167</sup> Ley No. 35, 10 May 1996, Por la cual se dictan disposiciones sobre la Propiedad Industrial [By which provisions on Industrial Property are set forth], Gaceta Oficial No. 23,036, 15 May 1996 (Pan.).

lates Industrial property.<sup>168</sup> Both recognize indigenous folklore and traditional knowledge as protectible subject matter.<sup>169</sup>

#### A. Objectives

Article 1 of Law No. 20 identifies two purposes: (1) to *protect* the collective rights of the indigenous communities to their intellectual property and (2) to *promote* the *commercialization* of these rights in order to emphasize their value and ‘apply social justice.’<sup>170</sup> Article 2 establishes that all traditional expressions of the indigenous communities are their cultural heritage and cannot be owned by unauthorized third parties while nonetheless respecting previously acquired rights.<sup>171</sup> Articles 10, 11, and 12 mandate that the Panamanian authorities promote and disseminate indigenous culture through compulsory education of the public.<sup>172</sup>

Traditionally, IP laws seek either to encourage creation for the benefit of society (*utilitarian*) or to reward the author for his or her pains (*non utilitarian*). Granting an individual a monopoly on his or her creation is the price society pays for access to the creation. Law No. 20 fits neither of these two policies. It aims instead to protect indigenous groups, achieve social justice, and preserve their cultural heritage by granting them IP rights on their creations. Indigenous groups are protected because they become the legal owners of their cultural representations. The law tries to achieve social justice by facilitating the commercialization of indigenous crafts as a way to help the tribes deal with poverty and promote their economic well-being. The indigenous groups’ cultural heritage is preserved by granting the indigenous groups absolute control over it and by promoting the *dissemination of culture* (by way of compulsory education) for the benefit of the non-indigenous public. The price the Panamanian public pays for the benefit of information is the forfeiting of any economic reward in perpetuity in favor of the tribes. The rationale behind this bargain is a mix between an economic test that tilts in favor of the indigenous people as the more dispossessed group and the moral rights

<sup>168</sup> Industrial property is the generic term used to refer to patents, trademarks, denominations of origin, trade secrets, and industrial designs.

<sup>169</sup> See Ley No. 15, *supra* note 166; See Ley No. 35, *supra* note 167. The Copyright law includes in its definitions folklore and crafts as protectable subject matter. Ley No. 15, *supra* note 166, at art. 2. The Industrial Property law protects any invention with industrial application including, in the definition of ‘industrial’, craftsmanship, agriculture and fishing. Ley No. 35, *supra* note 167, at art. 17. The same law prohibits the use as trademarks or logos of “words, letters, characters or signs used by the indigenous groups . . . as an expression of their cult, customs, idiosyncrasy or religious practices, unless the application is by the indigenous group.” Ley No. 35, *supra* note 167, at art. 91 (Translation by author). Article 146 of the same law prohibits the usage for trade names. Ley No. 35, *supra* note 167, at art. 146.

<sup>170</sup> Ley No. 20, *supra* note 2, at art. 1.

<sup>171</sup> *Id.* at art. 2.

<sup>172</sup> *Id.* at art. 10, 11, and 12.

approach recognizing the labor of the indigenous communities and their contribution to Panamanian society. The underlying argument is that Panamanian society benefits from receiving a different vision of the world, and that Panama is a richer and more beautiful place thanks to (among other things) *molas* and *taguas*.

Law No. 20 gives the Panamanian State an active role in achieving the purposes mentioned above. The educational burden of *promoting* indigenous culture is satisfied through a free certification system,<sup>173</sup> by ensuring the participation of indigenous artisans in international and local fairs,<sup>174</sup> by making the inclusion of indigenous artistic expressions a mandatory part of school curriculums,<sup>175</sup> and by requiring that any representation of Panamanian indigenous folklore, domestically or internationally, exhibit authentic garments, dances, and traditions.<sup>176</sup>

### B. *Protection and Registration*

Protection under Law No. 20 is not automatic. It requires registration, which is a condition precedent for protection.<sup>177</sup> Article 4 establishes that registration can only be requested by the General Congresses or Indigenous Traditional Authorities and only for collective rights.<sup>178</sup> This means no individual indigenous artist can request the registration of an IP right. The restriction ensures that the General Congresses of the tribes, representing the communities, will control the tribe's collective IP rights. Indeed, Article 7 establishes that any administrative appeal against a registration shall be notified personally to the representative of the General Congresses or Indigenous Traditional Authorities.<sup>179</sup> The same article establishes a free registration process that does not require a lawyer<sup>180</sup> in order to encourage registration by the tribes and to further the social justice purpose of the law. The emphasis of Law No. 20 on registration reflects an interest in giving notice to the non-indigenous public, since Panamanians consider indigenous culture and art part of the national cultural heritage that belong to everyone. Registration would also seem to serve as a *property deed* of sorts for the monopoly.

Within the *comarcas*, the law applicable is the unwritten indigenous law that passed down from one generation to the next via oral traditions.

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<sup>173</sup> *Id.* at art. 10.

<sup>174</sup> *Id.* at art. 11.

<sup>175</sup> *Id.* at art. 13.

<sup>176</sup> *Id.* at art. 12.

<sup>177</sup> *Id.* at art. 4, 5, 6. In articles 4 and 5 Law No. 20 'recognizes' the collective rights of indigenous groups over their art, establishing immediately how to fulfill the requirement of registration. Article 6 establishes collective rights only on 'objects' that can be registered.

<sup>178</sup> *Id.* at art. 4.

<sup>179</sup> *Id.* at art. 7.

<sup>180</sup> *Id.*

With respect to the protection tribal rights outside the *comarcas*, Law No. 20 grants the tribes rights against the non-indigenous population. The indigenous drafters of the law believed that official written registration of the rights was required for their effective enforcement against non-indigenous people.<sup>181</sup>

### C. Collective Rights

As Article 4 expressly establishes, collectivity is at the center of the law.<sup>182</sup> There are no individual intellectual property rights belonging to individual members of the tribe, nor can any non-indigenous third party register an indigenous right. Although the concepts of private property, private ownership, and inheritance rights exist in communities like the Kuna,<sup>183</sup> the indigenous communities of Panama own their traditions and knowledge *only* in a communal way under Law No. 20.

### D. Other Requirements

Besides collectivity and registration, the other requirements for protection under Law No. 20 are originality,<sup>184</sup> authenticity,<sup>185</sup> and commercial viability of the subject matter.<sup>186</sup> Originality does not have the traditional meaning it receives under copyright. Originality and authenticity in Law No. 20 refer to works that are *originally* from an indigenous source and *authentically* indigenous. Thus, originality and novelty, as used in copyright and patent, have no role to play in Law No. 20 because all its subject matter has been around for centuries.

Article 1 establishes as subject matter *all* indigenous creations capable of commercial use, such as inventions, models, drawings, designs, innovations contained in images, figures, symbols, illustrations, graphics, old carved stones, and the cultural elements of the tribes' history, music, art, and traditional artistic expressions.<sup>187</sup> Articles 3 to 5 establish special provisions for traditional dresses, musical instruments, oral expressions, work instruments, and other examples of cultural expression.<sup>188</sup> The emphasis on 'commercial use' sheds an interesting light on Law No. 20. Intellectual Property does not usually have a commercial requirement, even if its creation is economically motivated. Law No. 20, however, protects indigenous rights as both cultural heritage and a source of income. The existence of this requirement does not imply that heritage that cannot be

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<sup>181</sup> López interview, *supra* note 43.

<sup>182</sup> Ley No. 20, *supra* note 2, at art. 4

<sup>183</sup> D. B. STOUT, SAN BLAS CUNA ACCULTURATION: AN INTRODUCTION 24 (1947).

<sup>184</sup> Ley No. 20, *supra* note 2, at art. 6.

<sup>185</sup> *Id.* at art. 6.

<sup>186</sup> *Id.* at art. 1.

<sup>187</sup> *Id.* at art. 1.

<sup>188</sup> *Id.* at art. 3-5.

sold cannot be protected. Rather, the requirement reflects the social justice purpose of the law.

### E. *Rights*

Article 15 grants the indigenous groups exclusive rights to use and commercialize their creations.<sup>189</sup> Among these, they have the right to enjoin others from claiming ownership of their art,<sup>190</sup> the right to enjoin others from passing off non indigenous art as indigenous,<sup>191</sup> the right to exclude others from making copies *imitating* their art,<sup>192</sup> and the right to prohibit *all industrial or mechanical* (i.e. not by hand) reproduction of their traditional art and knowledge.<sup>193</sup> It is unclear what the scope of these rights is as applied to derivative works. Article 2 of Law No. 20 prohibits non-indigenous third parties from registering any indigenous art,<sup>194</sup> but there are no provisions explaining when (or how) using an indigenous motif becomes a violation of a derivative right. It is also unclear from the language of Law No. 20 what exactly is covered by the indigenous 'expression' used in Articles 2 and 4. Traditionally, copyright doctrine distinguishes between an idea (not protected by copyright) and its expression (protected by copyright). Patents, on the other hand, give a monopoly on the 'ideas' of the inventors. Law No. 20 does not mention if the monopoly on an indigenous expression or invention includes the 'idea' behind it. There is no presumption in the law that indigenous communities own the natural products of the environment, but it is clear that there are property rights on the processes by which they convert them. Whether this means that no one else can carve a tagua seed, even if for different purposes than those of the Emberá, is a question not answered by the text of the law.

Article 7 establishes perpetual rights that cannot be terminated or abandoned.<sup>195</sup> The unanimous consensus when drafting this law was that the rights should be perpetual, because the cultural traditions of nations cannot be subject to expiration dates.<sup>196</sup>

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<sup>189</sup> *Id.* at art. 15.

<sup>190</sup> *Id.* at art. 2.

<sup>191</sup> *Id.* at art. 23.

<sup>192</sup> *Id.* at art. 18-19.

<sup>193</sup> *Id.* at art. 20.

<sup>194</sup> *Id.* at art. 2.

<sup>195</sup> *Id.* at art. 7.

<sup>196</sup> However, there is a counter-argument that may never have been raised when the bill was being debated in the Panamanian Congress, namely that maybe these rights should last only *until* the indigenous community assimilates or becomes acculturated since only then the need for having the monopoly ceases.

### F. *Exceptions and Licenses*

Law No. 20 spells out some limited exceptions. It allows students to make and sell indigenous-type crafts for the benefit of their school centers.<sup>197</sup> It also allows folkloric dance groups to use and commercialize indigenous music and choreographies.<sup>198</sup> However, the dance groups must include members of the indigenous communities in the performance, unless their recruitment is not possible.<sup>199</sup> In that case, each dance group, in order to preserve authenticity, needs the authorization of the respective indigenous group to be able to present the performance.<sup>200</sup> There is a special exemption, the result of a compromise struck during the debate in Congress, for small non-indigenous artisans from a specific geographical area to make crafts in the style of the Ngöbe-Buglés.<sup>201</sup> The non-indigenous artisans the law exempted can make and sell the crafts, but they cannot claim intellectual property rights in them.<sup>202</sup>

There are no commercial licensing provisions in the law or specific prohibitions against indigenous groups licensing their rights. Indeed, Article 20 seems to imply licensing rights when allowing the Indigenous General Congresses to authorize reproduction of the crafts.<sup>203</sup> There is one compulsory license stipulation: Article 24 allows for non-indigenous artisans who currently make indigenous type crafts, and are registered as such with the General Directorate of National Crafts, to continue to do so under the condition that the crafts are marked as replicas of non-indigenous craftsmanship.<sup>204</sup>

### G. *Enforcement*

Article 22 gives the General Indigenous Congresses the authority to pursue infringers, seize goods, and take preventive measures to avoid infringement.<sup>205</sup> They can enlist the help of the local authorities if necessary. This is an extraordinary provision, since victims of offenses usually cannot pursue perpetrators directly.<sup>206</sup> Once the General Indigenous Congress catches the infringers, the task of judging them falls under the purview of the Panamanian courts.

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<sup>197</sup> Ley No. 20, *supra* note 2, at art. 14.

<sup>198</sup> *Id.* at art. 16.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at art. 23.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at art. 20.

<sup>204</sup> *Id.* at art. 24.

<sup>205</sup> *Id.* at art. 22.

<sup>206</sup> *Id.* at art. 22. Other sanctions include fines, forfeiture, and destruction of the products. *Id.* at art. 21. Injunctions apply as regulated by the Copyright and Industrial Property laws, which are supplements of Law No. 20. *Id.*

### H. *National Treatment Clause*

At the request of WIPO, Law No. 20 includes a National Treatment Clause in Article 25.<sup>207</sup> The clause extends the law such that indigenous expressions of other countries will benefit from the same rights, if there are reciprocal international agreements with these countries for this purpose.<sup>208</sup>

## VIII. IMPLEMENTATION: THE GOOD, THE BAD, AND THE PRETTY MOLAS

Even though Law No. 20 was passed in the year 2000 with regulations in 2001,<sup>209</sup> its implementation has been slow. With the exception of the Kunas, the indigenous groups have not started the registration of their rights;<sup>210</sup> and, ironically, enforcing collective rights has proven thorny for the Kunas. The current and latent problems with Law No. 20 include (among others) the problem of enforcing collective rights, the use of IP rights across the indigenous communities, and the lack of balance in the law.

### A. *Enforcement of Collective Rights*

In 2002, the Kuna community took the first step towards implementation by registering its collective right over the *mola* and all its commercial uses and applications. The *mola* is identified through the symbol KALUS TUKBIS (also named Galu Dugbis),<sup>211</sup> which is a representation of the sacred place from which all the designs of the *molos* are believed to come. Below is a pictorial representation of the *mola*.<sup>212</sup>

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<sup>207</sup> Ley No. 20, *supra* note 2, at art. 25. *See also supra* note 162.

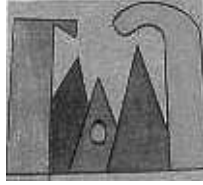
<sup>208</sup> Ley No. 20, *supra* note 2, at art. 25.

<sup>209</sup> Ministry of Commerce and Industries, Exec. Decree 12 (regulating Law No. 20 of June 26, 2000), 24, 270 O.G. (Pan.), arts. 3, 7 (Mar. 28, 2001).

<sup>210</sup> The Kuna is the only group actively seeking implementation of this law, doing so in the name of all the groups. The Emberás-Wounnaán and the Ngöbes-Buglés have not shown much interest in registering their rights, even though there are no costs attached to the registration. There are multiple reasons, practical and cultural, why this is the case. Among them the fact that these indigenous communities are located in remote areas away from Panama city; that there is no tradition of dealing with Panamanian bureaucracy; that historical remnants of colonialism and distrust still permeate their relationship with the non-indigenous population and that, unlike the Kunas, they are not actively involved in the political processes of Panama.

<sup>211</sup> *See EN DEFENSA DE LA VIDA Y SU ARMONÍA, supra* note 121, at 176, for the legend of Olonagegiryai and the creation of the *mola*.

<sup>212</sup> Reproduced with the authorization of Aresio Valiente López, Esq., attorney and member of the Kuna tribe.



With its registration, the Kalus Tukbis became a logo, a certification mark denoting the authenticity and origin of the *molas*, and a collective mark denoting its ownership by the Kuna tribe. All future production of *molas* is to be identified with the Kalus Tukbis brand as a sign of authenticity. Note also that the Kuna's collective right over the *mola* works like a blanket, covering all future and present *molas* from the date of the registration. This, of course, includes any and all *molas* sewn by indigenous hands, regardless of whether someone else provides the designs and models. However, a logo is not useful when the problem of enforcing a collective right comes from within the tribe itself.

The drafters of Law No. 20 considered primarily the possibility of infringement from non-indigenous people.<sup>213</sup> Articles 17 to 22 address the possibilities of infringement, imitation, counterfeiting, smuggling, and industrial reproduction of indigenous art by unauthorized third parties, or in other words, violations coming from outside the tribes.<sup>214</sup> The drafters may not have considered the possibility of infringement from inside members of the tribe, however, it is clear from the resulting problems that this has been precisely the first test of Law. No. 20.

In 2004, local Panamanian newspapers published the news that Costa Rica, a neighboring country, was selling *molas* marked as authentic Costa Rican crafts.<sup>215</sup> There was a public outcry that extended beyond the Kuna community, as Panamanians consider the *mola* part of their cultural heritage.<sup>216</sup> An investigation prompted by the Kuna General Congress brought to light that these *molas* were not counterfeited as suspected, but that they were sewn by Kuna women who traveled to Costa Rica and

<sup>213</sup> See Lopez, *Experience with Act 20*, *supra* note 131.

<sup>214</sup> Ley No. 20, *supra* note 2, at art. 17-22.

<sup>215</sup> Gionela Jordán V., *Ticos compran molas no autorizadas*, LA PRENSA (Pan.), July 26, 2004, available at <http://biblioteca.prensa.com/contenido/2004/07/26/26-8a-nota1.html> (last visited Nov. 5, 2005).

<sup>216</sup> *Id.* See also Julio Sanmiguel, Letter to the Editor, *Mas Sobre Las Molas*, LA PRENSA (Pan.), July 29, 2004, available at <http://biblioteca.prensa.com/contenido/2004/07/29/29-11anota1.html> (last visited Nov. 5, 2005); Alberto R. Corbett, Letter to the Editor, LA PRENSA (Pan.), Oct. 28, 2004, available at <http://biblioteca.prensa.com/contenido/2004/10/28/28-11anota5.html> (last visited Nov. 5, 2005); Juan Antonio G. Lezcano, Letter to the Editor, *Nuestro Patrimonio*, LA PRENSA (Pan.), July 8, 2004, available at <http://biblioteca.prensa.com/contenido/2004/07/08/8-11anota3.html> (last visited Nov. 5, 2005).

made the *molos* for a Costa Rican Company.<sup>217</sup> The Kuna women were paid the equivalent of US\$2.50 for each *mola*. In Panama, the *mola* is sold at higher prices. The cheap labor allowed the Costa Rican Company to sell T-shirts with *molos* at US\$10.00, or half the price of the cost of the same T-shirt in Panama.<sup>218</sup> The T-shirts displayed labels depicting Kuna women, but marked them as “Made in Costa Rica by Costa Rican indigenous communities.”<sup>219</sup> There are no Kuna indigenous tribes in Costa Rica, as the tribes that dwell on the border of both countries are the Ngöbes and Buglés. As both, Panama and Costa Rica compete fiercely for tourism, this affected the Panamanian businesses that deal with indigenous art.<sup>220</sup> The indignation of the Kuna stemmed not only from the false advertising on the labels, but also from the disobedience of the Kuna women and the effective cheapening of their labor. With the assistance of the Kuna community, Panama and Costa Rica are currently in negotiations to solve the problem with a bilateral treaty that will protect the crafts of both countries under the National Treatment Clause of Law No. 20.<sup>221</sup> This episode highlights the commercial value of the *mola* trade to Panamanians and Kunas, as well as deeper social realities.

In July 2004, the Kuna General Congress forbade Kuna women from bartering with Colombian sailors, a practice that dates back several decades.<sup>222</sup> The Kuna women would barter *molos* for products that the Kuna Congress deemed cheap and of lower value than the *molos* given to the sailors. The sailors would pay US\$1 or US\$2 per *mola* and resell them at twenty times that value. The Congress found that the practice disrupted Kuna family values and cheapened the value of the *molos*.<sup>223</sup>

Both incidents shed light on the fact that the feelings and opinions of the Indigenous General Congress may not be the same as those of the women that make the art. Enforcing a collective right has proved challenging for the Kuna men, because Kuna women get offered money to teach the technique, and, in many cases, selling *molos* helps the women achieve a certain degree of independence and economic well-being. The

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<sup>217</sup> Gionela Jordán V., *Conflicto por molos en C. Rica*, LA PRENSA (Pan.), July 26, 2004, available at <http://biblioteca.prensa.com/contenido/2004/07/26/26-1anota2.html> (last visited Nov. 5, 2005); Jordán V., *Ticos compran molos no autorizadas*, *supra* note 215.

<sup>218</sup> *Id.*; Arcadio Bonilla, *Especial para La Prensa*, LA PRENSA (Pan.), December 16, 2004, available at <http://biblioteca.prensa.com/contenido/2004/12/16/16-10a-nota1.html> (last visited Jan. 26, 2006).

<sup>219</sup> *Id.*; Jordán V., *Ticos compran molos no autorizadas*, *supra* note 215.

<sup>220</sup> Jordán V., *Ticos compran molos no autorizadas*, *supra* note 215.

<sup>221</sup> *Id.*

<sup>222</sup> See HOWE, *supra* note 92 (dating the practice to the nineteenth century); Arcadio Bonilla, *Prohíben a Kunas el intercambio por molos*, LA PRENSA (Pan.), July 5, 2004, available at <http://biblioteca.prensa.com/contenido/2004/07/05/5-10a-nota1.html> (last visited Nov. 5, 2005). Bonilla dates the practice back to 1945.

<sup>223</sup> Bonilla, *Prohíben a Kunas el intercambio por molos*, *supra* note 222.

proceeds from these activities also help Kuna educate their children. With the *mola* trade being their main source of income,<sup>224</sup> Kuna women may not want to be told what to do with their work.

In June 2000, for example, the General Kuna Congress issued a general prohibition to all Kuna women, forbidding them from teaching the *mola* art and its technique to non-indigenous people.<sup>225</sup> This prohibition came in response to European tourists hiring Kuna women to teach them the art and the publication of a thorough disclosure of the technique in a Japanese book. Because the *mola* is the main source of revenue for the Kuna community, the Kuna Congress expressed concern that "if the techniques [of making the *mola*] are known and imitated by non-indigenous people, the commercial value of the *mola* will fall."<sup>226</sup> However, even after this ban, Kuna women kept trying to exercise their independence and practice their craft.

Members of the Kuna tribe who disobey the rulings of the Kuna Congress face different sanctions that include fines, prohibition from making or selling *molos*, and even a bar from leaving the *comarcas*.<sup>227</sup> The Kuna General Congress is trying to solve the problem with a creative approach. It authorized a Special Congress of Kuna Women that was held in February and March of 2005. The Special Congress gave Kuna women the opportunity to address the *mola* problem and its commercialization.<sup>228</sup> The Kuna General Congress hopes that the Special Congress of Kuna Women will help avoid future disobedience from Kuna women and will enable the General Congress to enforce the collective rights of the tribe more effectively.

What can be concluded from these anecdotes is that for collective rights to work, they need to be exercised with a collective mentality. The previous episodes underline gender relations issues (that go beyond the scope of this paper) and coincide with conflicting perceptions of art ownership. The clash here is between the individual and the community, since the interests or needs of indigenous women may not be the same as those of the indigenous men or the tribe as a whole. Above all, the sense of entitlement held by the community and the men over the crafts created by the women is colliding heads on with the women's individualistic sense of ownership of the art. Even the legend of the origin of the *mola* underscores this conflicting perception of reality: the men, as the story goes,

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<sup>224</sup> Bonilla, *Especial para La Prensa*, *supra* note 218.

<sup>225</sup> Arcadio Bonilla, *CGK prohíbe a Kunas enseñar a no-indígenas cómo confeccionar molas*, LA PRENSA, July 07, 2000, 8A, available at <http://biblioteca.prensa.com/contenido/2000/07/37733115.html> (last visited Nov. 5, 2005). Even though Law No. 20 does not include trade secret provisions, this prohibition is effectively an attempt to protect the commercial value of the *mola* by trade secret.

<sup>226</sup> *Id.*

<sup>227</sup> López Interview, *supra* note 43.

<sup>228</sup> Bonilla, *Especial para La Prensa*, *supra* note 218.

were jealous that the women were learning crafts so they tried to stop Olonagegiryai, forcing her to invoke the protection of the elders of the tribe in openly defying the men.<sup>229</sup>

Law No. 20 contains no provisions that help the Kuna solve this predicament. It is possible that the Kuna may not need, or welcome, help from non-indigenous laws in solving their private communal problems. After all, they are already dealing with these problems internally. However, Law No. 20, as a legal instrument approved by the Legislative Assembly in order to protect the interests of all Panamanian citizens, regardless of race or gender, should address these issues. Law No. 20 could be amended to include the equivalent of a *fair use* exception for Kuna women. By this provision, Kuna women could make and sell *molos* on their own, if they first obtain the approval of a Special Committee comprised of Kuna women instead of permission from the whole Kuna Congress. The theory is that the Kuna Women's Committee will be more sensitive to the needs of Kuna women while simultaneously being sensitive to the interests of the tribe, and thus better able to strike a fair balance. This may also avoid the tribes perceiving this proposed amendment as non-indigenous meddling in the *comarcas*.

#### B. *Use of IP Rights Across the Indigenous Communities*

Another possibility of infringement that Law No. 20 does not contemplate is violations by other indigenous communities. Even though by the text of the law anyone who copies a registered right, such as the *molos*, contravenes the collective right, the indigenous groups drafted Law No. 20 only considering non-indigenous infringement. What happens if the Ngöbes and Buglés decide to incorporate Kuna style designs in their crafts to make them more commercially viable? In reality, it may be that the Ngöbes and Buglés consider imitating other tribes' art a violation to the integrity of their culture, but assuming a case of indigenous poaching, Law No. 20 establishes that any indigenous art created by indigenous hands falls under the protection of the Law without distinguishing between the tribes.<sup>230</sup> The purpose of Law No. 20 was to extend certain rights that the tribes already have in their *comarcas* to the non-indigenous world. Hundreds of years ago the Kunas and the Emberás were enemies.<sup>231</sup> Today they are allies based on common interests. Internal infringement of their respective IP rights may upset this balance and

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<sup>229</sup> EN DEFENSA DE LA VIDA Y SU ARMONÍA, *supra* note 121, at 176.

<sup>230</sup> Ley No. 20, *supra* note 2, at art. 1 et seq. uses generic language when referring to the collective rights of indigenous groups, without differentiating among the tribes. Only article 3 differentiates between the traditional garments and dresses of the tribes, identifying them by their indigenous names. The only other differentiation reflected in articles 23 and 24 is the difference made between crafts made by indigenous hands versus non indigenous.

<sup>231</sup> López interview, *supra* note 43.

rekindle old conflicts, leading to internal wars.<sup>232</sup> Law No. 20, as a neutral set of regulations, should address this possibility and offer a tailor-made arbitration/mediation system to solve conflicts between the tribes concerning indigenous IP infringement. Article 7 of Law No. 20 creates the department of Collective Rights and Folkloric Expressions within the DIGERPI for the registration of the collective rights.<sup>233</sup> The same department could be empowered to act as mediator when conflicts between the tribes arise. It could serve the dual role of respecting the independence of the indigenous communities while acting as a neutral forum for alternative dispute resolution. Panamanian indigenous groups have a long tradition of defending and exercising their rights by their own hand, and they traditionally do not solve their problems through the Panamanian judiciary. Rather, they get the Executive branch to grant concessions or pass laws through the legislative assembly, because they do not trust lengthy legal procedures with the exercise of their rights. This provision would offer an impartial and expedite resolution process, the procedural particulars of which could be developed in conjunction with the DIGERPI and the tribes.

### C. *Lack of Balance in Law No. 20*

The main problem Law No. 20 has on its face is that it is unabashedly pro-indigenous. It does not balance the benefits or social costs to Panamanian society. Consequently, the law overlooks other dispossessed groups, such as the *campesinos*, and ignores the interests of the rest of the Panamanian population. The problem is one of one-sidedness: who protects the interests of the non-indigenous people? Hélène Breebart recounts how she found her original designs replicated by indigenous artisans.<sup>234</sup> Under Law No. 20, unless she previously registered the design, the legal presumption is in favor of the indigenous artisan, because the law doesn't separate the indigenous craft (i.e. the *mola*) from its designs. Even if the supplementary copyright law provides this separation, enforcement on the part of a non-indigenous haute-couture designer may seem petty. After all, the Kuna and Hélène Breebart cater to different markets. Law No. 20 does not address the boundaries of derivative works: when, for example, is the usage of indigenous motifs an infringement? Would it be possible for "My Name is Panama"® to register its trademark logo today? The logo is inspired by a *mola* design.<sup>235</sup> Is the owner of a restaurant that uses decorations inspired by *molas*, but not made by indigenous hands, liable? The law prohibits any industrial or

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<sup>232</sup> Panamanian Indigenous groups are not shy about taking up arms when having to defend their rights. See Rujano, *supra* note 89, regarding the Indian-Peasant wars; See discussion *supra* Section IV for a recount of the Dule Revolution.

<sup>233</sup> Ley No. 20, *supra* note 3, at art. 7.

<sup>234</sup> See Breebart, *supra* note 136.

<sup>235</sup> See Appendix IE.

mechanical replication of indigenous crafts,<sup>236</sup> but it does not distinguish between the craft - for example a *mola* made by layers of cotton in reverse appliqué technique - or the design itself - for example, a painting of a *mola*, replicating the vivid colors and the intricate figures. The law is purposely broad because for years, non-indigenous entrepreneurs have copied *mola* designs, reproducing them on plastic placemats, cups, key chains, and any other object that may entice a tourist, without recognizing royalties to the Kuna tribe. The drafters of the law wanted any economic benefit to go the tribes. The problem is not the right to a permanent monopoly; it is the fact that the law does not take into account the possibility of non-indigenous Panamanians having legitimate interests in indigenous type art. Thus the law may produce future inequalities that do not necessarily right past wrongs.

Tightly linked with the above issues is the blurring effect created by the 'commerciality' requirement, which makes it difficult to delineate the lines between cultural heritage and commercial entitlement. Law No. 20 is motivated as much by protection of indigenous tradition as by the importance of the commercial and economic success of the crafts in the life of the communities. These crafts represent the main source of income in the limited livelihood of these indigenous groups. Yet, the mixed rhetoric of commercialization and cultural protection that permeates the law makes it fuzzy and effectively a potential Pandora's Box. Take for example its vague treatment of patents and traditional knowledge. As mentioned, worldwide biodiversity is currently big business. When does an invention or discovery stop being a reflection of indigenous culture and tradition and become a pure economic enterprise? There are no limits and no requirements of any kind in the law. It may seem far-fetched today, but imagine that in five years an indigenous medicine man discovers that one of the properties of the tagua seed is the cure for baldness. There is no cultural link between taguas and baldness, and moreover, baldness is not a problem among indigenous men. The result could be a permanent monopoly on this discovery and its economic benefits. Consequently, law No. 20 opens the possibility for perpetual monopolies in one of the most profitable areas of the future.<sup>237</sup>

Law No. 20 should be amended to include provisions defining the boundaries of the indigenous IP rights. It should clarify the difference between non-indigenous art inspired by indigenous culture (like a paint-

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<sup>236</sup> See Ley No. 20, *supra* note 2, at art. 20.

<sup>237</sup> See Labrador, *supra* note 28. In the article, Labrador explains the drug discovery industry in Panama and how it is possible for a developing country to succeed in harvesting and patenting their own biodiversity. The article does not address the relationship between Panamanian indigenous groups and this activity, but Law No. 20 grants the groups rights to their traditional knowledge and it is safe to assume that if bio-prospecting clashes with indigenous rights, the latter will have priority for patenting purposes. *Id.*

ing) and derivative works of indigenous art (like key chains with printed *molas* designs); or the difference between indigenous rights protected as part of cultural heritage that happen to be marketable (like traditional medicine) versus intellectual property generated by an individual contributor that happens to be of indigenous descent (like a Ngöbe biologist). This would require adding clearer definitions to Law No. 20. A joint effort between non-indigenous and indigenous drafters may be a better approach to handling such a process. In the long term, a compulsory licensing scheme in which the DIGERPI establishes reasonable royalties for the usage of indigenous art may also help deal with the elusive boundaries of indigenous rights. Such royalties could be paid to the Indigenous General Congresses of the tribes. This solution would help with the education of the non-indigenous population regarding indigenous rights while providing the tribes with a stable source of revenue.

## IX. CONCLUSION

It is difficult to evaluate Law No. 20 while ignoring the social reality of the groups that it aims to protect. The emotional draw of the social justice purpose of Law No. 20 is a strong one. Law No. 20 is an extraordinary effort aimed at protecting the culture and livelihood of some of the most dispossessed people on the planet. Balancing the interests of the indigenous population and the rest of Panamanian society raises complex issues. To understand the intricacies of Law No. 20 it is necessary to understand that non-indigenous Panamanians see indigenous groups, crafts, and culture as *Panamanian* and take untold pride in their beauty and accomplishments. The indigenous groups, on the other hand, traditionally see themselves as their own nations, and the fact that they are living within Panamanian borders as an accident of history. However, even with this caveat, the current relationship between Panama and its indigenous groups is one of mutual identification and concern. Panamanians see the tribes and their art as a representation of the country and have strong cultural ties with them. It is not by chance that one of the most representative clothing lines in the country, "My name is Panama"®, is based on *molas*. The indigenous groups understand that Panama, albeit imperfect, recognizes their rights and gives them strong political standing. During the *mola* conflict with Costa Rica, the Kuna General Congress demonstrated a reciprocal concern with protecting the identity of the *mola* as Panamanian. This evolving relationship between Panama and its tribes is rooted in common interests, such as increasing tourism and consequently the quality of life across the board. This bond is also part of the reason why Panama was willing to pass a law as peculiar as this one.

Other countries may find difficult to understand how this balance works, but it does. During the Fifth Session of the ICG in WIPO,<sup>238</sup> when Panama presented Law No. 20 and its regulations, the delegation of the United States voiced strong concerns. The conclusion of the meeting was that the U.S. would not support an international agreement along these same lines.<sup>239</sup> However, other countries with continental European systems are currently using Law No. 20 as a model for their own indigenous laws. Venezuela, Brazil, Peru, Guatemala, Mexico, and Bolivia are drafting legislation along similar lines.<sup>240</sup> WIPO ICG and international groups like Canadian Rights and Democracy support Law No. 20 and use it as an example of a *sui generis* IP system that can live in harmony with traditional IP notions.<sup>241</sup>

Law No. 20 is a work in progress; its implementation is as important as its passage. Among other things, the law requires modification of the provisions pertaining to derivative works, infringement, and a clear definition of the boundaries between what is traditionally indigenous and what is commercial. Even though this paper identifies potential conflicts, there are no records yet of Law No. 20 clashing with the traditional IP framework of Panama. This, however, may just be a matter of time. Panama's Legislative Assembly did not pass Law No. 20 with the intention of keeping it as an ornament or to fulfill a political requirement with the indigenous constituencies. Traditionally, protection of indigenous IP rights is not a high priority in a country with a high percentage of people living below the poverty level. Consequently, when drafting the law, the indigenous groups appointed themselves the task of protecting their rights,<sup>242</sup> precisely because they intended to enforce them. Surprisingly, though, the issues with its implementation have not come from the weaknesses or gaps in the text of the law, or with clashes with, or infringement by, non-indigenous people, but from the exercise of the collective rights.

Moreover, one of the hardest parts has been the fight against the permeation of indigenous culture by western influences. One of the objectives of this law was to improve the situation of the indigenous tribes, among the country's poorest, through the raise of their culture's profile and its commercialization. Simultaneously, the indigenous groups face

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<sup>238</sup> See *Matters Concerning Intellectual Property and Genetic Resources*, *supra* note 45.

<sup>239</sup> López Interview, *supra* note 43. IP law in the U.S. is predominantly utilitarian.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* See also López, *Experience with Act 20*, *supra* note 131. For Canadian Rights and Democracy visit: Rights and Democracy, <http://www.ichrdd.ca/site/home/index.php?lang=en> (last visited Jan. 27, 2006).

<sup>242</sup> Ley No.20, *supra* note 2, art. 22. The conflict of interests of a provision that creates state-sanctioned vigilantes was not addressed during the debate in Congress.

the rapid ‘*commodification*’<sup>243</sup> of their tribes, a process that makes their desire to control the integrity of their culture a race for survival.

Yet, this is the conundrum: if Law No. 20 is supposed to ensure that indigenous groups receive fair economic compensation for their art, it also helps them live more like westerners. This would seem counterintuitive as Law No. 20 aspires to educate people about indigenous groups and protect indigenous art and knowledge as means to save it for, and from, the indigenous groups themselves. Aresio Valiente López, for example, thinks indigenous groups are under siege from the outside and the inside, and that the only way for them to achieve social justice is by controlling their culture and information. But this is precisely the weight against which Law No. 20 and the *molas* are struggling: one law may not be enough to withstand the tide of change, and one craft may not be enough to preserve the culture of a nation.

*“People say ‘It is a story.’*

*It’s not a story.*

*It’s the truth ah.*

*It is like history it seems say ah.*

*It is ours, the Kuna people’s history and it is a good one also.”*<sup>244</sup>

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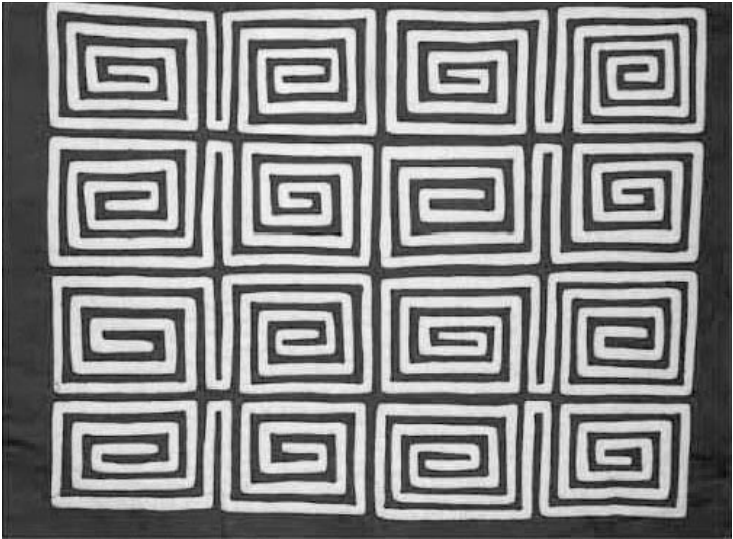
<sup>243</sup> This term appears in Long, *supra* note 37, at 231.

<sup>244</sup> Sherzer, *supra* note 1, at 44-45, verse 425.

I. APPENDIX I<sup>245</sup>

A. *Molas*

The *molas* reproduced in this appendix are from the private collection of Ms. Elizabeth Gibson, in Herndon, VA. The photographs are a courtesy of Ms. Gibson.



Traditional *mola* in two colors with geometrical design



**Dinosaur** – notice the multiple layers of appliqué.



**Firefan** (used as pillow cover)

<sup>245</sup> All photographs in this Appendix are reproduced with the authorization of their authors.



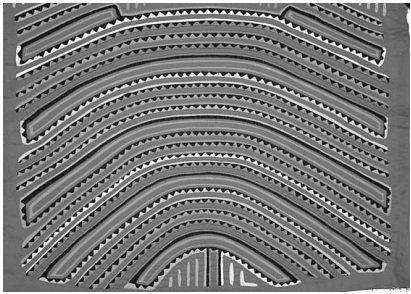
*Firefan* – close up. Notice the almost invisible stitches.



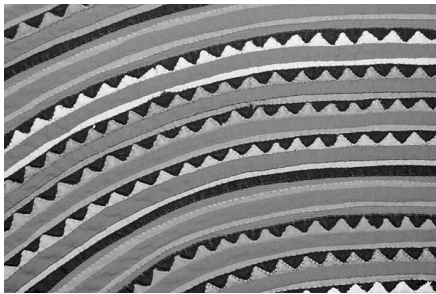
*Spiritbird* – channel appliqué with bird made of inlay.



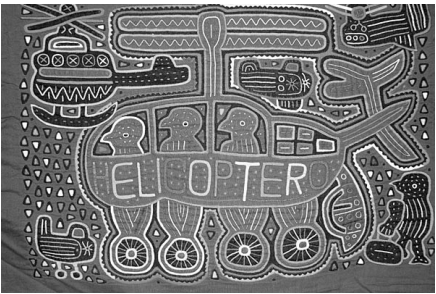
*Spiritbird* – close up cigar slits inlay. Notice the stitches.



*Rainbow* – Dientes (teeth) design.



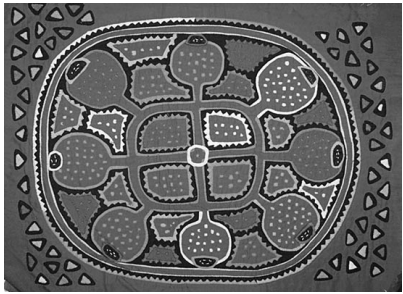
*Rainbow* – Dientes (teeth) close up.



*Helicopter* – whimsical mola. These are good examples of the mixture of traditional art and modern life



*Coconut tree* – detail of exquisite mola work with 4 or 5 layers of appliqué.



*Gourd rattles*

B. *Kuna Life*

Photographs of Kuna life and villages are the courtesy of Jorge Panama Miller<sup>246</sup>



A Kuna village. Notice the display of *molas* for sale on the left.



Left: A Kuna Indian transporting *molas* on *cayuco* (canoe).  
Right: Body painting – A Kuna Indian

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<sup>246</sup> Jorge Panama Miller, Photographs of Kuna life and villages, *available at*: <http://molastore.com/index.html>



Left: A Kuna Indian – notice the *mola* on the front part of her blouse.  
Right: An Aboriginal Ceremonial Blouse – Kuna Adulthood Ritual.  
Notice the *mola* with parrots design.



Kuna Indians sewing *molos*.

C. *Emberá – Wounaán crafts*

Photographs of *Emberá – Wounaán crafts* courtesy of Mr. Humberto Olarte Cupas.<sup>247</sup>

1. *Cocobolo carvings*

“*Cocobolo (Dalbergia retusa)* is a fine wood found in Panama, Costa Rica, and Nicaragua. *Cocobolo* is the most dense and strongest of all the rosewoods, and considered the most beautiful due to its colors and highly

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<sup>247</sup> Humberto Olarte Cupas, *Photographs of Emberá – Wounaán crafts*, available at: <http://panamarts.com/index.php>.

*figured grain patterns. The Emberá-Wounán, as well as the Tule (Kuna) people stand as guardians of the Mesoamerican biological corridor and use cocobolo as a renewable resource.”<sup>248</sup>*



Hummingbird



Tucán

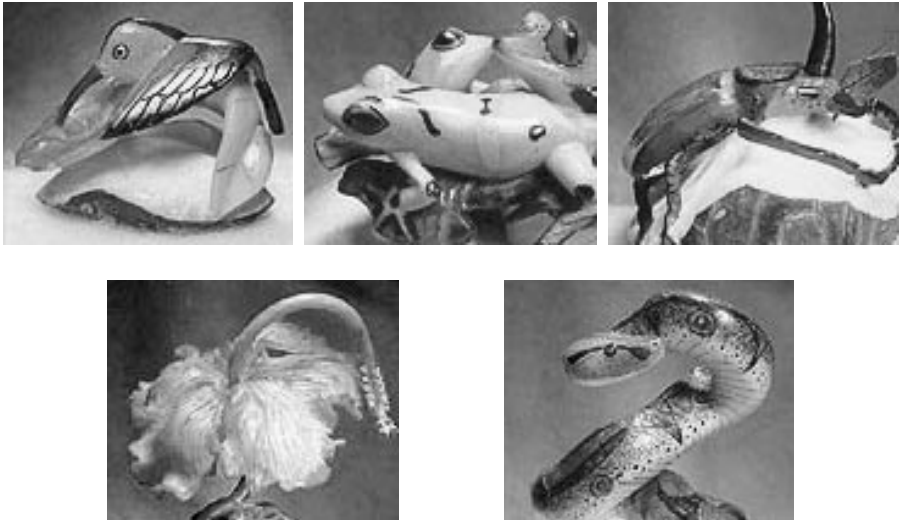
2. Tagua carvings – miniatures range from 2 to 6 inches tall



*Butterfly on orchid and Blue, Yellow and Red Macaw*

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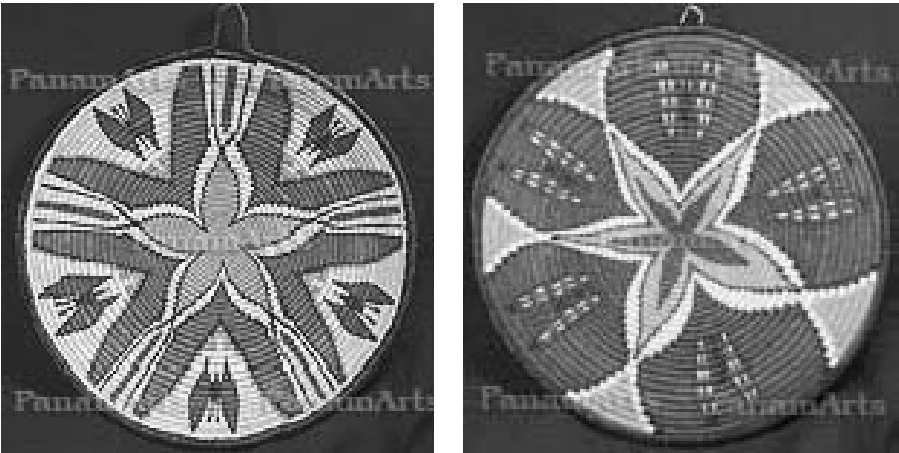
<sup>248</sup> Humberto Olarte Cupas, *Embera – Wounaan Cocobolo Hardwood Carvings from Panama*, available at <http://panamarts.com/index.php/cPath/29?osCsid=b240529353353cfa154fd027271f9c71>.



Hummingbird, Golden frogs, Blue beetle, Hibiscus, and Boa Constrictor  
(Note that in all the Taguas, the resting base is the bottom part of the Tagua seed)

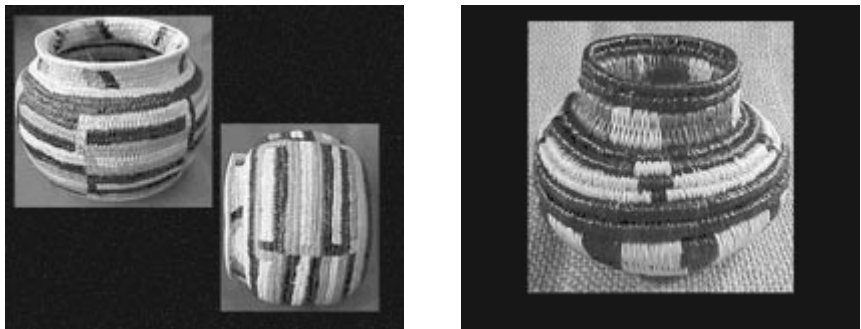
3. Baskets

*“These baskets are deemed by a lot of experts as the finest baskets in the world. Made by the Wounaan women, the threads are so tight, that it is said that water won’t leak from them.”*<sup>249</sup>



(Photos courtesy of Mr. Humberto Olarte Cupas)

<sup>249</sup> Humberto Olarte Cupas, *Embera – Wounaan Baskets from Panama*, available at <http://panamarts.com/index.php/cPath/53>



(Photos courtesy of Mr. Jorge Panama Miller)

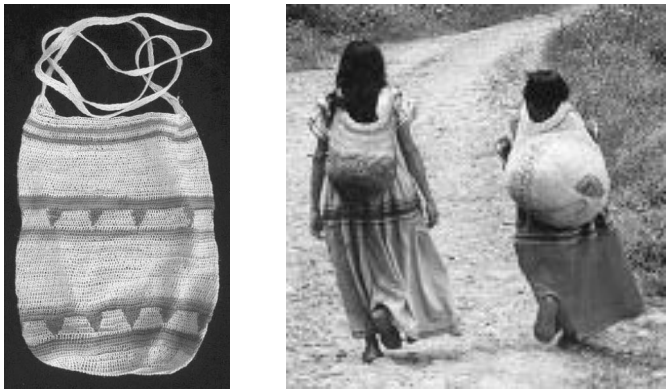
D. *Ngöbe and Buglé crafts*<sup>250</sup>



Traditional Ngobe and Buglé dresses. They are colorful and very practical

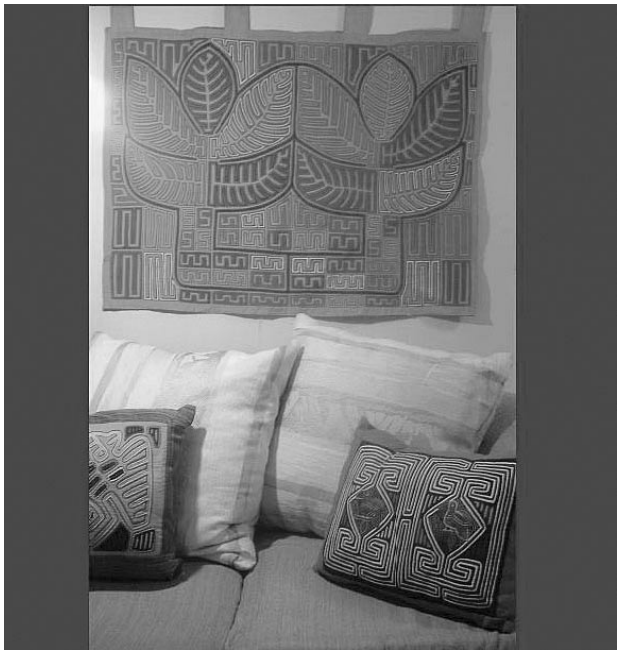
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<sup>250</sup> Photographs of Ngöbe and Bugle life and crafts courtesy of Mr. Merran Gray and are available at: <http://www.panart.com/index.html>



*Chácaras* – hand woven bags from the fiber of the wild pineapple plant (*Aechmea magdalenae*). “The Ngobe-Bugle use these bags for transporting everything from babies to market goods on the mountainous trails of Panama.”<sup>251</sup> These bags stretch to incredible dimensions.

E. *Commercial application of indigenous designs, molas, taguas and crafts*



Molas as decoration (photo courtesy of Jorge Panama Miller)

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<sup>251</sup> Merran Gray, “Chácara Bags from the Ngobe-Bugle of Panama,” available at <http://www.panart.com/ngobe.htm>



Molas, chaquiras, and taguas in haute couture designs  
(designs and photos courtesy of H  l  ne Breebaart)



Left: "My name is Panama  " trademark logo. (Courtesy of Abraham Perez).  
Right: "My name is Panama  " shirts with molas. (Courtesy of Abraham Perez)



Left: Mola Cushions (Photo courtesy of Mr. Jorge Panama Miller).  
Right: Mola bag (Photo courtesy of Mr. Jorge Panama Miller)



Chaquira necklaces (Photo courtesy of Mr. Jorge Panama Miller)

## II. APPENDIX II

### Translation Law No. 20 of June 26, 2000

#### LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF PANAMA

LAW No. 20 (of June 26, 2000)

Published in the Official Gazette N° 24,083 (June 27, 2000).

**On the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge, and whereby set forth other provisions.**

#### THE LEGISLATIVE ASSEMBLY DECREES:

##### CHAPTER 1 – PURPOSE

Article 1. The purpose of this law is to protect the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations such as inventions, models, drawings and designs, innovations contained in the pictures, figures, symbols, illustrations, old carved stones and others; likewise, the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use, through a special registration system, promotion, commercialization of their rights in order to stand out the value of the indigenous cultures and to apply social justice.

Article 2. The customs, traditions, beliefs, spirituality, religiosity, cosmovisión, folkloric expressions, artistic manifestations, traditional knowledge and any other type of traditional expressions of the indigenous communities, constitute part of their cultural heritage; consequently, cannot be object of any form of exclusive right by unauthorized third parties under the intellectual property system such as copyrights, industrial models, trademarks, geographical indications and others, unless the application is filed by the indigenous community. However, rights previously recognized under the legislation on the matter will be respected and will not be affected.

##### CHAPTER II – OBJECTS SUSCEPTIBLE OF PROTECTION

Article 3. It is recognized as traditional dresses of indigenous communities, those used by the communities of Kuna, Ngobe and Bugle, Embera and Wounaan, Naso and Brebre, such as:

1. Dule Mor. It consists in the combined use of the garment by which the Kuna men and women identify the culture, history and representation of their community. Composed by the Morsen, Saburedi, Olassu and Wini.

2. Jio. It consists in the combined use of the garment by which the Emberás and the Wounaan men and women identify the culture, history and representation of their community. The women use Wua (Paruma), Boró Barí, Dyidi Dyidi, Kondita, Neta, Parata Kerá, Manía, Soritja Kipará (Jagua), Karichí (achiote), and Kera Patura. The men use the same garments with exception of the Paruma, and also use earflap, breast strap, Amburá and Andíá.

3. Nahua. It consists in the garment by which the Ngobes and Buglés identify the culture, history and representation of their community. This dress is of a single piece. It is wide and it covers half of the leg; it is made with plain cloths of attractive colors, decorated with geometric applications of the cloths of contrasting colors and it includes a wide necklace made with chaquiras. The technical description of these traditional dresses will be contained in their respective registrations.

Article 4. The collective rights of the indigenous communities are recognized on their musical instruments, music, dances or performance, oral and written expressions con-

tained in their traditions that constitutes their historical, cosmological and cultural expression.

The application for registration of these collective rights shall be filed by the respective general congresses or indigenous traditional authorities, before the General Office for the Registry of the Industrial Property of the Ministry of the Commerce and Industry here in after referred to as DIGERPI or before the National Copyright Office of the Ministry of Education, depending on the case, for its approval and registration.

Article 5. The collective rights of the indigenous communities are recognized on their work instruments and traditional art, as well as the technique for making them, expressed in the national basic materials, through the elements of the nature, their method of process, elaboration, combination of natural dyes, such as the carved tagua (ivory plant) and wood (cocobolo and nazareno), traditional baskets, nuchus, chaquiras, chacaras and any other cultural expression of traditional aspects of these communities.

The registration of these rights shall be requested by the general congresses or indigenous traditional authorities before the offices mentioned in the previous article.

Article 6. Registrable objects susceptible of protection, as this Law determines to protect their originality and authenticity, are deemed to be collective rights.

### CHAPTER III – REGISTRATION OF COLLECTIVE RIGHTS

Article 7. The department of Collective Rights and Folkloric Expressions shall be created within DIGERPI, through which will be granted, among others, the registration of the collective rights of the indigenous communities.

This registration shall be requested by the general congresses or indigenous traditional authorities in order to protect their dresses, arts, music and any other traditional rights susceptible of protection.

The registrations of the collective rights of the indigenous communities will not expire, neither will have duration. The procedure before DIGERPI will not require the service of a lawyer and it is exempt of any payment. The administrative appeals against this registration shall be notified personally to the representative of the general congresses or indigenous traditional authorities.

Article 8. The provisions on collective marks and guarantees contained in the Law 35 of 1996 will be applicable to the present regime, as long as they do not harm the rights recognized in the present Law.

Article 9. DIGERPI will create a position of examiner on indigenous collective rights, for the protection of the intellectual property and other traditional rights of the indigenous communities. This public officer will have the power to examine all the applications that are filed before DIGERPI related with the collective rights of the indigenous communities, so the registration will not be granted against this law.

### CHAPTER IV – PROMOTION OF THE INDIGENOUS ARTS AND CULTURAL EXPRESSIONS

Article 10. The arts, the craftsmanship, the dresses and other forms of cultural expression of the indigenous community, will be object of promotion and development by General Directorate of National Craftsmanship of the Ministry of the Commerce and Industry.

The General Directorate of National Craftsmanship or the Provincial Directorate of the mentioned Ministry, with awareness of the local indigenous authorities and by the request of interest party, will seal, print or stamp, without any cost, a certification in the artistic work, dress, craft or other protected forms of industrial property or copy-

right, in which shows that it has been elaborated by means of the traditional indigenous procedures and or by indigenous hands. For this purpose, the Directorate that issues the certificate is authorized to inspect the workshops, materials, finished products and procedures used.

Article 11. The Ministry of Commerce and Industry shall do the necessary task in order to ensure the participation of the indigenous craftsmen in the national and international fairs and to expose their handicrafts. The General Directorate of National Craftsmanship will do the required to carry out the celebration of the indigenous artisan's day with the sponsor of this Ministry.

Article 12. In the national and international presentations of the Panamanian indigenous culture, the exhibition of their dresses, dances and traditions will be mandatory.

Articles 13. The Ministry of Education shall include in the school curriculum contents related to the indigenous artistic expressions, as integral part of the national culture.

Article 14. The public institutions vested with legal power are authorized to disclose and to promote, in agreement with the general congresses and indigenous traditional authorities, the history, customs, values and artistic and traditional expressions (including the garments) of the indigenous communities, as integral part of the national culture.

The exhibition and sale of indigenous crafts elaborated by students shall be allowed in the school fairs for the benefit of their school center.

#### CHAPTER V – RIGHTS OF USE AND COMMERCIALIZATION

Article 15. The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation of each indigenous communities, approved and registered in DIGERPI or in the National Copyright Office of the Ministry of Education, according to the case.

Article 16. The folkloric dance groups that perform artistic presentations in the national and international level will be exempt of the compliance of the previous article. However, the natural or legal person that organizes artistic presentations to stand out the indigenous culture, whole or in part, he (she) shall include members of this communities for this performance. If the recruiting of these is not possible, the authorization of the respective general congress or indigenous traditional authority is required, in order to preserve its authenticity. The National Institute of Culture will look after for the compliance of this obligation.

#### CHAPTER VI – PROHIBITIONS AND SANCTIONS

Article 17. The literal j is added to the article 439 of the Fiscal Code, amending as follow:

Article 439. Foreign goods originating from all countries can be imported except the following:

j. The non-original products, recorded, embroidered, weave or any other articles that imitate, in whole or in part, the making of the traditional dresses of the indigenous communities, as well as musical instruments and traditional artistic works of these communities.

Article 18. The numeral 7 is added to the article 16 of the Law 30 of 1984, amending as follow:

Article 16. The following acts constitute the crime of smuggling:

7. The possession of not expressed, neither declared, neither authorized transitory goods, under the custom regulation, of the not original products that imitate in whole

or in part, the traditional dresses of the Panamanian indigenous communities, as well as the materials and musical instruments and artistic or handmade works of these communities.

Article 19. An additional paragraph is added to the article 55 of the Law 30 of 1984, amending as follow:

Article 55. . . .

When it is concerned with custom crimes of goods that imitate products belonging to the Panamanian indigenous communities, from fifty percent (50%) of the fine, not transferable to the informer and accusers mentioned in this article, fifty percent (50%) will be destined for the benefit of the National Treasure, and the other fifty percent (50%) will be dedicated to cover the investment expenses of the respective indigenous community or district, according to the procedures that establishes the law.

Article 20. The industrial reproduction, either total or partial, of the traditional dresses and other collective rights recognized in this Law, is forbidden, unless it is authorized by the Ministry of Commerce and Industry, with the previous and express consent of the general congresses and indigenous council, and if it is not against the provision established hereon.

Article 21. In the cases not contemplated in the custom legislation and in that of industrial property, the infringement of this Law will be sanctioned, depending on the seriousness of the act, with the fine of a thousand dollars (\$ 1,000.00) to five thousand dollars (B/5,000.00). In the repeating event, the fine will be double of the previous quantity. The sanctions established hereon will be applied in addition to the forfeiture and destruction of the products in violation of this law.

The fifty percent (50%) of the imposed fine according to this article will be assigned for the benefit of the National Treasure and the other fifty percent (50%) will be re-invested in the respective indigenous communities.

Article 22. The following authorities are vested with the legal power to persecute the offenders of this Law, to take preventive measures on the respective products and goods, and to forward them to the corresponding appointed public officers:

1. The regional governor or the county governor, in case the first one does not exist.
2. The general congress of the corresponding district. For such effects, the traditional authorities will be able to request the cooperation and the support of the Public Force.

Article 23. The small non-indigenous artisans that dedicates to the manufacture, productions and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés that reside in the districts of Tolé, Remedios, San Félix and San Lorenzo of the Province of Chiriqui are exempt of this law. These small non-indigenous artisans will be able to manufacture and to market these reproductions, but they will not be able to claim the collective rights recognized by this Law to the indigenous group.

## CHAPTER VII – FINAL PROVISIONS

Article 24. At the day in force of the present law, the small not indigenous artisans who dedicate to the elaboration, reproduction and sale of traditional indigenous crafts registered in the General Office of National Craftsmanship, will be able to carry out this activities, with the awareness of the indigenous traditional authorities.

The Ministry of Commerce and Industry, previous verification of the registration date and issuance of license, will issue the permits and respective authorizations. However, the Panamanian non-indigenous artisans shall affix, print, write or identify in easily visible way that the product is a reproduction, as well as its origin place.

Article 25. For the effects of the protection, use and marketing of the intellectual property collective rights of the indigenous communities contained in this Law, the artistic and traditional expressions of other countries will have the same benefits set forth in hereon, whenever they are made by means of reciprocal international agreements with these countries.

Article 26. This Law will be regulated by the Executive Branch through the Ministry of Commerce and Industry.

Article 27. The present Law adds to the Law 30 of November 8 of 1984, the number 7 to the article 16 and a paragraph to the article 55, as well as the literal j to the article 439 of the Fiscal Code, and it abolishes any disposition contrary to this law.

Article 28. This Law shall enter into force from its promulgation.

LET IT BE KNOWN AND EXECUTED,

Approved in third debate, in the Justo Arosemena Palace, City of Panama, on the fifteen days of the month of May of the year two thousand.

NATIONAL EXECUTIVE BRANCH - PRESIDENCY OF THE REPUBLIC. -

PANAMA, REPUBLIC OF PANAMA, JUNE 26TH, 2000.

MIREYA MOSCOSO – President of the Republic

JOAQUIN JACOME TEN –Minister of Commerce and Industry.