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## CULTURAL RELICS, INTELLECTUAL PROPERTY, AND INTANGIBLE HERITAGE

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#### INTRODUCTION

In recent years, the protection of traditional knowledge (“TK”) and cultural expressions has received widespread international attention. In 2003, delegates of 190 countries adopted the Convention on the Safeguarding of Intangible Cultural Heritage (“2003 UNESCO Convention”). Developed under the auspices of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), this Convention sought to “safeguard the intangible cultural heritage,” “ensure respect” and appreciation for the materials, “raise awareness” of their importance, and “provide for international cooperation and assistance.”<sup>1</sup> Entered into force in April 2006, the 2003 UNESCO Convention now features more than 100 state parties.<sup>2</sup>

Two years later, delegates from 148 countries, most of which had already joined the 2003 UNESCO Convention, adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (“2005 UNESCO Convention”).<sup>3</sup> Focusing on “the diversity of cultural expressions, as circulated and shared through cultural activities, goods and services,”<sup>4</sup> this new convention aimed “to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner” and “to encourage dialogue among cultures” and countries.<sup>5</sup> It also “reaffirm[ed] the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”<sup>6</sup> Entered into force in March 2007, the 2005 UNESCO Convention now includes more than ninety member states.<sup>7</sup> Although

1. Convention for the Safeguarding of the Intangible Cultural Heritage art. 1, Oct. 17, 2003, U.N. Doc. MISC/2003/CLT/CH/14, available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> [hereinafter 2003 UNESCO Convention].

2. U.N. Educ., Sci., & Cultural Org. [UNESCO], The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), <http://www.unesco.org/culture/ich/index.php?pg=00024> (last updated Feb. 23, 2009).

3. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, U.N. Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV., available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [hereinafter 2005 UNESCO Convention].

4. UNESCO, TEN KEYS TO THE CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS 4 (2007), available at <http://unesdoc.unesco.org/images/0014/001495/149502e.pdf>.

5. 2005 UNESCO Convention, *supra* note 3, art. 1(b)–(c).

6. *Id.* art. 1(h). For a comprehensive discussion of cultural diversity issues in the international trade context, see generally PATRICIA M. GOFF, LIMITS TO LIBERALIZATION: LOCAL CULTURE IN A GLOBAL MARKETPLACE (2007).

7. See UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural

both the 2003 and 2005 UNESCO Conventions “deal with expressions as performed or enacted today,”<sup>8</sup> the latter is more “aspirational . . . than obligatory”;<sup>9</sup> it seems to be more interested in providing a platform for nurturing a long-term dialogue than achieving short-term results.

In 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples (“DRIPS”).<sup>10</sup> Although DRIPS was released in draft form in August 1994,<sup>11</sup> it took more than a decade before it was finalized in September 2007. With respect to the protection of intangible cultural heritage, DRIPS declared:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>12</sup>

DRIPS echoes provisions in the Universal Declaration of Human Rights<sup>13</sup> (“UDHR”), the International Covenant on Civil and Political Rights<sup>14</sup> (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights<sup>15</sup> (“ICESCR”), and other international human rights instruments.<sup>16</sup> Out

Expressions, Paris, 20 October 2005, <http://portal.unesco.org/la/convention.asp?KO=31038&language=E> (last visited Feb. 24, 2009) (listing signatories to convention).

8. UNESCO, 2003 Convention: Frequently Asked Questions, <http://www.unesco.org/culture/ich/index.php?pg=00021> (last visited Jan. 31, 2009).

9. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2013 (2007).

10. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter DRIPS].

11. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (Aug. 26, 1994), reprinted in 34 I.L.M. 541, 546–55 (1995).

12. DRIPS, *supra* note 10, art. 31(1).

13. See Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR] (declaring that “[e]veryone has the right freely to participate in the cultural life of the community”).

14. See International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (recognizing right of minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language”).

15. See International Covenant on Economic, Social and Cultural Rights art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (recognizing right “[t]o take part in cultural life”).

16. Article 15(2) of the International Labour Organization Convention No. 169, for example, provides:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining

of the International Bill of Rights, the ICCPR was the only covenant that explicitly addresses the cultural rights of minorities. Article 27 of the ICCPR provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>17</sup> Nevertheless, both the UDHR and the ICESCR cover the area of intangible cultural heritage. While article 27 of the UDHR states that “[e]veryone has the right freely to participate in the cultural life of the community,”<sup>18</sup> article 15(1)(a) of the ICESCR obliges states to “recognize the right of everyone . . . [t]o take part in cultural life.”<sup>19</sup>

In addition, both the UDHR and the ICESCR safeguard the right to the protection of moral and material interests in intellectual creations.<sup>20</sup> As the Committee on Economic, Social and Cultural Rights (“CESCR”), the authoritative interpretive body of the ICESCR, recently stated in its *General Comment No. 17*:

With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In

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to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 15(2), June 27, 1989, 28 I.L.M. 1382, 1387 (1989). In addition, as I noted previously,

[R]eferences to cultural participation and development appear in many international and human rights instruments, including the U.N. Charter, the UNESCO Constitution, the Declaration of the Principles of International Cultural Co-operation, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination.

Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1145–46 (2007) (citing Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 279, 282 (Audrey Chapman & Sage Russell eds., 2002)).

17. ICCPR, *supra* note 14, art. 27.

18. UDHR, *supra* note 13, art. 27(1).

19. ICESCR, *supra* note 15, art. 15(1)(a).

20. *See id.* art. 15(1)(c) (recognizing right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”); UDHR, *supra* note 13, art. 27(2) (recognizing similar right). For discussions of the right to the protection of moral and material interests in intellectual creations, see generally Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Yu, *supra* note 16; Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2007).

adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences.<sup>21</sup>

The CESCR is currently working on a general comment on article 15(1)(a) of the ICESCR, which covers the right to cultural development and participation.<sup>22</sup>

Outside the protections of human, cultural, and indigenous rights, less-developed countries and traditional communities have actively pushed for stronger protection of intangible cultural heritage. The World Intellectual Property Organization (“WIPO”), for example, established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in September 2000 to address the misappropriation of folklore, traditional knowledge, and indigenous practices.<sup>23</sup> This intergovernmental committee provides “a forum for international policy debate and development of legal mechanisms and practical tools concerning the protection of traditional knowledge . . . and traditional cultural expressions (folklore) against misappropriation and misuse, and the intellectual property . . . aspects of access to and benefit-sharing in genetic resources.”<sup>24</sup>

To reform the Patent Cooperation Treaty (“PCT”),<sup>25</sup> Switzerland has advanced a proposal to amend the PCT Regulations by explicitly enabling national patent legislation to require the disclosure in patent applications of traditional knowledge and genetic resources used in inventions for which intellectual property rights are applied.<sup>26</sup> Although the proposal makes the disclosure requirement optional, that requirement, once implemented, will

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21. ECOSOC, Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant)*, ¶ 32, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/\\$FILE/G0640060.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf).

22. See *id.* ¶ 4 (referring to forthcoming general comments on articles 15(1)(a), 15(1)(b), and 15(3)).

23. Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT'L & COMP. L. 239, 239–40 (2003).

24. World Intellectual Prop. Org. [WIPO], *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, <http://www.wipo.int/tk/en> (last visited Jan. 31, 2009). See generally Wend B. Wendland, “It’s a Small World (After All)”: *Some Reflections on Intellectual Property and Traditional Cultural Expression*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 150 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008) [hereinafter INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS], for a description of the activities conducted by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

25. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

26. WIPO, Working Group on Reform of the Patent Cooperation Treaty, *Proposals by Switzerland Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications*, at 1, PCT/R/WG/5/11 Rev. (Nov. 19, 2003) [hereinafter *Switzerland’s PCT Proposal*].

enable the disclosed information to become part of international patent applications.<sup>27</sup>

A group of developing countries advanced a similar proposal at the World Trade Organization (“WTO”).<sup>28</sup> Initiated as a new article 29*bis*, the proposal calls for an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).<sup>29</sup> If adopted, that amendment would create an obligation to disclose in patent applications the source of origin of biological resources and traditional knowledge used in inventions for which intellectual property rights are applied.<sup>30</sup> The proposal further requires patent applicants to disclose their compliance with access and benefit-sharing requirements under the relevant national laws.<sup>31</sup> Although a large number of less-developed countries support the proposal,<sup>32</sup> the United States and Japan strongly oppose it, expressing their fear that the additional requirement would destabilize the existing patent system.<sup>33</sup>

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27. Emanuela Arezzo, *Struggling Around the “Natural” Divide: The Protection of Tangible and Intangible Indigenous Property*, 25 CARDOZO ARTS & ENT. L.J. 367, 381–82 (2007).

28. See Council for Trade-Related Aspects of Intellectual Prop. Rights [TRIPS Council], *The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity: Checklist of Issues*, IP/C/W/420 (Mar. 2, 2004) (providing checklist of issues that should be explored by TRIPS Council, including disclosure of source of origin of biological resources and traditional knowledge used in patent-seeking inventions); TRIPS Council, *Elements of the Obligation to Disclose the Source and Country of Origin of the Biological Resources and/or Traditional Knowledge Used in an Invention*, IP/C/W/429/Rev.1 (Sept. 27, 2004) [hereinafter TRIPS Council, *Elements of the Obligation to Disclose*] (discussing issues listed in checklist and proposing that TRIPS Agreement be amended to include mandatory disclosure requirement); Arezzo, *supra* note 27, at 382–85 (discussing proposals to add disclosure requirement in TRIPS Agreement).

29. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

30. See Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania, *Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity*, ¶ 2, WT/GC/W/564/Rev.2 (July 5, 2006) [hereinafter *Article 29bis Proposal*] (requiring patent applicants to “disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin”).

31. See *id.* (requiring patent applications to “provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge”).

32. See William New, *WTO Biodiversity Amendment Backed; EU Seeks ‘New Thinking’ on GIs*, INTELLECTUAL PROPERTY WATCH, Oct. 26, 2007, <http://www.ip-watch.org/weblog/index.php?p=802> (describing support of majority of WTO membership).

33. See Arezzo, *supra* note 27, at 387–88 (noting United States’ opposition due to its concern that disclosure requirement would “render[] the application mechanism excessively burdensome and the validity of its protection uncertain”). As Bronwyn Parry elaborated,

In the course of my research, I did not find any executives who were opposed to paying a royalty of between 1 percent and 5 percent of net profits on products derived from natural materials that were not collected domestically. Most large pharmaceutical companies (those that generate large numbers of products and profits) now fully accept that they must pay for their raw materials. . . . What companies emphatically *do not* wish to do, however, is to spend

In addition, pursuant to the Doha Declaration, the TRIPS Council continued “to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [(“CBD”) and] the protection of traditional knowledge and folklore.”<sup>34</sup> The CBD<sup>35</sup> was established in 1992 to promote “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”<sup>36</sup> Although the convention has had only limited success, it remains one of the more “authoritative international instrument[s]” on the protection of traditional knowledge and cultural expressions.<sup>37</sup>

Finally, the International Treaty on Plant Genetic Resources for Food and Agriculture (“ITPGR”) “recognize[s] the enormous contribution that the local and indigenous communities and farmers of all regions of the world . . . have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.”<sup>38</sup> The treaty, which was adopted in November 2001, also requires member states to take measures to protect and promote farmers’ rights,<sup>39</sup> which are generally defined as “rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity.”<sup>40</sup> Although the ITPGR and the CBD contain different provisions, both conventions play important roles in the preservation and conservation of intangible cultural heritage.<sup>41</sup> Following the signing of the ITPGR, some countries, like Costa Rica, India, the Philippines, Venezuela, and the Andean Community (Bolivia, Colombia, Ecuador, and Peru) enacted laws or directives to promote biological diversity.<sup>42</sup>

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ever greater proportions of their operating budgets complying with an unnecessarily cumbersome and unpredictable regulatory system.

BRONWYN PARRY, *TRADING THE GENOME: INVESTIGATING THE COMMODIFICATION OF BIO-INFORMATION* 259–60 (2004).

34. World Trade Org. [WTO], Ministerial Declaration of 14 November 2001, ¶ 19, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

35. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

36. *Id.* art. 1.

37. CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE* 5 (2006).

38. International Treaty on Plant Genetic Resources for Food and Agriculture art. 9(1), Nov. 3, 2001, *available at* <ftp://ftp.fao.org/ag/cgrfa/it/ITPGRre.pdf> [hereinafter ITPGR].

39. *Id.* art. 9(2).

40. Farmers’ Rights, Food & Agric. Org. Res. 5/89 (Nov. 29, 1989), *available at* <ftp://ftp.fao.org/ag/cgrfa/Res/C5-89E.pdf>.

41. See KEITH AOKI, *SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* 126–27 (2008) (discussing convergence of CBD and ITPGR and significance of such convergence).

42. See BRYAN BACHNER, *INTELLECTUAL PROPERTY RIGHTS AND CHINA: THE MODERNIZATION OF TRADITIONAL KNOWLEDGE* 22–23 (2009) (discussing Executive Order No. 247 of the Philippine Guidelines on Bioprospecting and the Andean Community’s Common Regime on Access to Genetic Resources); Stephen B. Brush, *The Demise of ‘Common Heritage’ and Protection*

Taken together, all of these new conventions, declarations, laws, and policy discussions have helped establish a new international framework for the protection of intangible cultural heritage. The framework covers a wide array of materials, including traditional knowledge and cultural expressions. UNESCO, for instance, provides the following examples:

the oral traditions and expressions of the Aka Pygmies of Central Africa, the Hudhud Chants of the Ifugao in the Philippines; performing arts like the Royal Ballet of Cambodia; social practices, rituals and festive events like the carnival of Binche in Belgium, the Indigenous Festivity Dedicated to the Dead in Mexico, or the Vanuatu Sand Drawings; knowledge and practices concerning nature and the universe such as the Andean Cosmivision of the Kallawaya in Bolivia; traditional craftsmanship like Woodcrafting of the Zafimaniry in Madagascar, or cultural spaces such as the Jemaa el-Fna Square in Morocco or the Boyson District in Uzbekistan.<sup>43</sup>

This Article examines both the theoretical and practical challenges confronting the development and implementation of the framework for protecting these materials. Part I disaggregates the term “intangible cultural heritage” into two components—“intangible” heritage and “cultural” heritage. Drawing on the similarities and differences between the protection of cultural relics<sup>44</sup> and that of intellectual property, this Part argues that the different emphasis on the term “intangible cultural heritage” may call for very different protective regimes. This Part nevertheless points out that the similarities

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for *Traditional Agricultural Knowledge*, in *BIODIVERSITY AND THE LAW: INTELLECTUAL PROPERTY, BIOTECHNOLOGY AND TRADITIONAL KNOWLEDGE* 297, 309–11 (Charles R. McManis ed., 2007) [hereinafter *BIODIVERSITY AND THE LAW*] (discussing India’s Act No. 123 of 1999 for Protection of Plant Varieties and Farmers’ Rights); Rodrigo Gámez, *The Link Between Biodiversity and Sustainable Development: Lessons from INBio’s Bioprospecting Programme in Costa Rica*, in *BIODIVERSITY AND THE LAW*, *supra*, at 77, 83 (discussing Costa Rica’s Biodiversity Law No. 7788); Vivienne Solis Rivera & Patricia Madrigal Cordero, *Costa Rica’s Biodiversity Law: Searching for an Integral Approach to Cultural and Biological Diversity*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE* 440 (Barbara T. Hoffman ed., 2006) [hereinafter *ART AND CULTURAL HERITAGE*] (same); Stanford Zent & Egleé L. Zent, *On Biocultural Diversity from a Venezuelan Perspective: Tracing the Interrelationships Among Biodiversity, Culture Change and Legal Reforms*, in *BIODIVERSITY AND THE LAW*, *supra*, at 91, 107 (discussing 2000 Biodiversity Law in Venezuela). For an excellent discussion of biological diversity, see generally STEPHEN B. BRUSH, *FARMERS’ BOUNTY: LOCATING CROP DIVERSITY IN THE CONTEMPORARY WORLD* (2004).

43. UNESCO, *supra* note 8.

44. Commentators have used the terms “antiquities,” “cultural artifacts,” “cultural objects,” “cultural patrimony,” and “cultural property,” all of which are somewhat interchangeable. This Article adopts the term “cultural relics,” mainly because of its usage in Chinese law (*wénwù*), the growing problems created by the lack of protection in the area, and Part IV’s focus on related enforcement challenges in China. As Lyndel Prott and Patrick O’Keefe wrote,

The Oxford English Dictionary defines “relic” as “surviving trace or memorial of a custom, belief, period, people etc.; object interesting for age or associations”. It thus will include artifacts of recent manufacture, as well as ancient artifacts (antiquities) and palaeontological or historical material which is the subject of much modern legislation.

1 LYNDEL V. PROTT & P.J. O’KEEFE, *LAW AND THE CULTURAL HERITAGE* 4–5 (1984).

between the two components may provide significant common grounds for promoting further development and implementation of the framework.

Part II outlines eight different objectives for establishing this new framework. While some of these objectives overlap or conflict with each other, others touch on issues that are of only marginal concern to some constituencies. By focusing on each of these objectives, this Part underscores the divergent, and at times competing, interests amongst the many stakeholders within the framework. This Part also foreshadows the potential challenges for these stakeholders to achieve international consensus on the protection of intangible cultural heritage.

Part III discusses four different challenges confronting the implementation of the framework. Although this Part recognizes tribal sovereignty and the right to self-determination as key prerequisites to the development of a successful framework, it concedes that significant challenges are likely to remain even if the sovereignty and right to self-determination of traditional communities are fully respected. This Part focuses in particular on the mode of protection, the power to define protectable subject matters, the means to identify those materials, and the justifiability of international intervention.

Part IV revisits a crucial similarity between the protection of cultural relics and that of intellectual property—the need for enforcement and the related challenges. Using China as an illustration, this Part suggests that countries with significant problems in both areas may provide important insights into the development of the new framework for the protection of intangible cultural heritage. This Part points out that the enforcement challenges in this framework are likely to resemble those in the areas of cultural relics and intellectual property. This Part concludes that China, as well as other countries that have similar problems, may provide a rich and fertile ground for future research in both areas.

## I. CONCEPTUAL BASES AND ANALOGIES

Although there is a general consensus on the need to protect cultural heritage, there is no generally agreed definition of “culture” or “cultural heritage.”<sup>45</sup> As Raymond Williams put it, “[c]ulture is one of the two or three most complicated words in the English language.”<sup>46</sup> A diverse array of conventions, protocols, declarations, laws, policies, and guidelines therefore has been established to protect cultural heritage and cultural diversity.<sup>47</sup> As Lyndel

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45. See Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 67–68 (2000) (discussing difficulty in identifying “culture”).

46. RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed. 1985).

47. See, e.g., 2005 UNESCO Convention, *supra* note 3; 2003 UNESCO Convention, *supra* note 1; Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40; Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2329, 823 U.N.T.S. 231

Prott and Patrick O’Keefe aptly noted, “for various reasons each [UNESCO] Convention or Recommendation has a definition drafted for the purposes of that instrument alone; it may not, at this stage, be possible to achieve a general definition suitable for use in a variety of contexts.”<sup>48</sup> Likewise, Janet Blake observed,

There may be no difficulty . . . in understanding the intention of the 1970 UNESCO Convention as to the nature of the “cultural property” which it protects. There is, however, a difficulty with any attempt to identify exactly the range of meanings encompassed by the term cultural heritage as used now in international law and related areas since it has grown beyond the much narrower definitions included on a text-by-text basis.<sup>49</sup>

In fact, it is not uncommon for scholars and commentators to expect “cultural heritage” to cover everything. As one scholar asked rhetorically in a historic symposium on the loss and recovery of cultural property at the Bard Graduate Center for Studies in the Decorative Arts, Design, and Culture in New York,

What is cultural heritage? We may answer: *everything*, depending on the level of cultural consciousness of a nation and the extent of its knowledge of the past and its personal links with its heritage, for “heritage” means documents of the past. And the value of these documents can change. Some of those things that we appreciate might not have been as important to our ancestors—and may not be considered as valuable by future generations.<sup>50</sup>

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[hereinafter 1970 UNESCO Convention]; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

48. PROTTE & O’KEEFE, *supra* note 44, at 8; *accord* Blake, *supra* note 45, at 63 (noting that lack of generally agreed definition in these instruments means that each instrument “must be interpreted internally without reference to any set of principles”); Lyndel V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, 5 RECUEIL DES COURS 215, 224 (1989) (stating that “[w]hile cultural experts of various disciplines have a fairly clear conception of the subject-matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting scholars today”).

49. Blake, *supra* note 45, at 64.

50. Jan P. Pruszyński, *Poland: The War Losses, Cultural Heritage, and Cultural Legitimacy*, in THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 49, 50 (Elizabeth Simpson ed., 1997) [hereinafter SPOILS OF WAR]; *accord* ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 28, 1993) (prepared by Erica-Irene Daes), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1993.28.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1993.28.En?Opendocument) [hereinafter *Working Group Study*] (noting that “[h]eritage” is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples”); see also Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 303 (1999) (defining cultural heritage as “an individual or group creation of either a tangible or intangible good which, by virtue of the creation process, customary use, historical event, or simply geographic proximity, becomes an important expression of human or cultural life” and describing it as “a mishmash of things, including

In light of this challenge, cultural heritage conventions and declarations usually adopt all-encompassing definitions that are broad and vague. For example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”), which was adopted at The Hague in 1954, adopts the term “cultural property,” which is further defined as

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.<sup>51</sup>

Notwithstanding the use of the term “cultural property” in the 1954 Hague Convention, many scholars have found the term problematic. As they claim, the term focuses unduly on ownership and protection, and the property label “has acquired a wide range of emotive and value-laden nuances, from the arguments of John Locke to the challenge of Communism in the first two-thirds of [the twentieth] century.”<sup>52</sup> In lieu of that term, they have suggested the term “cultural heritage,”<sup>53</sup> which has since been widely used in international documents and “become the term of art in international law.”<sup>54</sup>

There are two different types of cultural heritage: *tangible* cultural heritage and *intangible* cultural heritage. Although the protection of cultural heritage initially focused primarily on the former, such protection has now been frequently extended to the latter.<sup>55</sup> The 2003 UNESCO Convention, for example, covers “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as

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songs, dances, stories, remedies, textile designs, sacred objects, drawings, works of art, sculpture and architectural structures” (footnotes omitted).

51. 1954 Hague Convention, *supra* note 47, art. 1(a).

52. Lyndel V. Prott & Patrick J. O’Keefe, “*Cultural Heritage*” or “*Cultural Property*?,” 1 INT’L J. CULTURAL PROP. 307, 309 (1992); accord Harding, *supra* note 50, at 298 (noting that “legal and philosophical baggage” associated with term “cultural property”).

53. See Harding, *supra* note 50, at 298 (defining “cultural heritage” and discussing history behind trend disfavoring term “cultural property”); Prott & O’Keefe, *supra* note 52, at 307 (expressing clear preference for term “cultural heritage” over “cultural property”).

54. Blake, *supra* note 45, at 67. The term also suggests the expanded coverage of cultural patrimony laws. See Lucille A. Roussin, *Cultural Heritage and Identity*, 11 CARDOZO J. INT’L & COMP. L. 707, 707–10 (2003) (discussing distinction between “cultural heritage” and “cultural property” and noting that “[t]he inseparability of ‘cultural heritage’ from the more strictly legal definition of ‘cultural property’ is an emerging concept and one with which the law will have to grapple”).

55. See Blake, *supra* note 45, at 72 (noting growing trend since the mid-1980s to provide greater international recognition of intangible cultural heritage); Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 68 (2004) (noting that “[t]he formal effort to safeguard intangible cultural heritage through UNESCO began three decades ago” with the acceptance of World Heritage Convention).

part of their cultural heritage.”<sup>56</sup> Likewise, the 2001 Universal Declaration on Cultural Diversity broadly defines culture to cover “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>57</sup>

By extending coverage to intangible cultural heritage, the 2003 UNESCO Convention has raised three additional challenges. First, as we learn from the protection of intellectual property rights, the intangible nature of the protectable subject matter has created serious boundary issues concerning the scope of protection.<sup>58</sup> The nonexcludable and nonrivalrous nature of the protection<sup>59</sup> has also upset the traditional justifications for the protection of tangible cultural heritage, the loss of which is considered irremediable and the ownership of which is excludable and rivalrous.<sup>60</sup>

Second, materials that are considered tangible cultural heritage can also be protected as intangible cultural heritage. For example, the First Folio edition of Shakespeare’s Works can be protected as tangible cultural heritage. The importance of this edition, its rarity, and its immense value speak for themselves.<sup>61</sup> Thus far, only 228 of the original 1,000 copies survive.<sup>62</sup> When a copy was stolen from the Durham University Library a decade ago, the loss and its subsequent recovery received wide media coverage.<sup>63</sup>

56. 2003 UNESCO Convention, *supra* note 1, art. 2(1).

57. Universal Declaration on Cultural Diversity pmb., Nov. 2, 2001, U.N. Doc. CLT-2002/WS/9, available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

58. See Marshall Leaffer, *Character Merchandising in the U.K., a Nostalgic Look*, 11 U. MIAMI ENT. & SPORTS L. REV. 453, 454 (1994) (noting that “unlike physical property—land or chattels—intangible property, by its very nature, has vague boundaries”); Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 67–68 (2002) (noting that copyright law is “a notoriously complex and subtle body of law”).

59. For discussions of the nonrivalrous and nonexcludable nature of intellectual property, see generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 344–61 (1989); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–46 (2005).

60. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 360–61 (1989) (noting while there may be many legitimate claims to access, “the object in question can only be in one place”).

61. As a newspaper article in *The Guardian* described,

The First Folio is the first published edition of the collected works of Shakespeare. It was published in 1623, seven years after the playwright’s death. The folio includes 36 plays, 18 of which, including *Macbeth*, had never been printed before. Without the First Folio many of Shakespeare’s plays would probably have been lost forever, earning it the title of, “the most important work in the English language”. The plays were collected by Shakespeare’s friends and fellow actors John Heminge and Henry Condell, and were printed by Isaac Jaggard and Edward Blount. About 1,000 copies of the First Folio were published, roughly a quarter of which have survived into the present day. On its publication, the folio sold for £1. It now has an estimated value of £15m.

Martin Wainwright, *Missing Shakespeare: Stolen First Folio Surfaces in US*, THE GUARDIAN (London), July 12, 2008, at 3.

62. *Id.*

63. *E.g.*, Terri Judd, *All’s Well That Ends Well as Bard’s Stolen Folio Is Found*, THE INDEP.

However, the plays in the book can also be protected as intangible cultural heritage. The importance of this heritage is undeniable. Shakespeare's plays have been used as the basis for future creative works, and the phrases and vocabularies he used have now entered the English language as cultural shorthand. As Durham's Chancellor, Bill Bryson, noted, the book "is a national treasure, giving a rare and beautiful snapshot of Britain's incredible literary heritage."<sup>64</sup> It is therefore no surprise that some have described the book as "the most important work in the English language."<sup>65</sup> Had the plays been written today, as compared to many centuries ago, there is no doubt that they would receive some of the highest protections available under existing copyright law.

Third, "intangible cultural heritage is manifested in tangible forms. For instance, knowledge and skills to build musical instruments are manifested in the products: the instruments built."<sup>66</sup> Moreover, "[a]ll kinds of culture is [sic], in the earliest stage, intangible."<sup>67</sup> There may be no clear distinction between tangible and intangible cultural heritage. As Richard Kurin, the Acting Under Secretary for History, Art, and Culture of the Smithsonian Institution, reminded us,

For many peoples, separating the tangible and the intangible seems quite artificial and makes little sense. For example, among many local and indigenous communities, particular land, mountains, volcanoes, caves and other tangible physical features are endowed with intangible meanings that are thought to be inherently tied to their physicality. Similarly, it is hard to think of the intangible cultural heritage of Muslims on the *hajj*, Jews praying at the western wall of Jerusalem's temple, or Hindus assembling for the *kumbh mela* as somehow divorced and distinct from the physical instantiation of spirituality.<sup>68</sup>

In sum, there are challenges with respect to both the "cultural" and "intangible" aspects of intangible cultural heritage. To help provide a better understanding of the protection of such heritage, this Part compares the "cultural" aspect of the protection of cultural relics and the "intangible" aspect of the protection of intellectual property. Drawing on the similarities and differences between these two forms of protection, this Part argues that the differences in the two distinctive aspects of intangible cultural heritage may call

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(London), July 12, 2008, at 2 (reporting recovery of 400-year-old First Folio edition of Shakespeare's works stolen from Durham University Library in 1998); Wainwright, *supra* note 61 (same).

64. Wainwright, *supra* note 61.

65. *Id.*

66. Wim van Zanten, *Constructing New Terminology for Intangible Cultural Heritage*, 56 MUSEUM INT'L 36, 39 (2004) (footnote omitted); see also Kurin, *supra* note 55, at 70 (noting that "[c]raft items . . . are tangible, but the knowledge and skills to create them intangible").

67. Erin K. Slattery, *Preserving the United States' Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. 201, 208 (2006) (quoting Nobuo Ito, *Intangible Cultural Heritage Involved in Tangible Cultural Heritage*, <http://www.international.icomos.org/victoriafalls2003/papers/A3-2%20-%20Ito.pdf>).

68. Kurin, *supra* note 55, at 70; accord Van Zanten, *supra* note 66, at 39 (noting that "[s]ome human knowledge systems do not . . . differentiate tangible from intangible forms of heritage, or cultural from natural").

for contrasting protective regimes. This Part, nevertheless, contends that there are substantial similarities between these two forms of protection, and these similarities may provide significant common ground for promoting the protection of intangible cultural heritage.

A. *Differences*

At first glance, cultural relics and intellectual property are protected very differently. First, cultural relics are usually tangible. The major disputes in this area concern such artifacts or monuments as the Parthenon (Elgin?) Marbles from Greece, the Rosetta Stone in the British Museum, Afo-A-Kom in Cameroon, the Terracotta Army in China, the DunHuang Grottoes along the Silk Road, and totem poles in the Pacific Northwest. Intellectual property, by contrast, is intangible. It differs from real or personal property in its ability to allow for nonrivalrous consumption.<sup>69</sup> The use of a single creative work does not interfere with the use or enjoyment by others of that particular work. As a result, multiple individuals can use and enjoy a single work at the same time, although they may have to do so through different *copies* of the work.

Rosemary Coombe elegantly captured the distinction between cultural relics and intellectual property: “[i]f the expressive, inventive, and possessive individual dominates intellectual property laws, legitimizing personal control over the circulation of texts, laws of cultural property protect the material works (objects of artistic, archaeological, ethnological, or historical interest) of culture.”<sup>70</sup> As she elaborated,

[t]here is . . . a significant difference in the scope of the claims that can be made on behalf of a culture and those that can be made on behalf of an individual author. Copyright laws enable individual authors not only to claim possession of their original works as discrete objects, but to claim possession and control over any and all reproductions of those works, or any substantial part thereof, in any medium. Cultural property laws, however, enable proprietary claims to be made only to original objects or authentic artifacts.<sup>71</sup>

Unlike those of intellectual property, “mere copies or counterfeits [of cultural relics] are of comparatively little value.”<sup>72</sup> As Susan Scafidi rightly observed, “Greece would not be satisfied if its demand for return of the [Parthenon]

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69. For discussions of nonrivalrous consumption, see generally Landes & Posner, *supra* note 59, at 326; Lemley, *supra* note 59, at 1050.

70. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 220 (1998); see also SUSAN SCAFIDI, *WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* 51 (2005) (noting that “intellectual property protects the new and innovative; cultural property protects the old and venerated”).

71. COOMBE, *supra* note 70, at 225 (footnote omitted).

72. SCAFIDI, *supra* note 70, at 50. *But see* Diego Cevallos, *Quality Copies of Masterpieces at a Modest Price*, INTER PRESS SERVICE, Dec. 19, 2002 (reporting that “[m]useum quality reproductions of the works of old masters like Leonardo da Vinci, Vincent van Gogh, Claude Monet and Pierre Auguste Renoir can now be purchased legally in Mexico at affordable prices ranging from \$4,000 to \$15,000”).

marbles from Britain were answered with an artist's copy, nor is the British Museum willing to accept a substitute."<sup>73</sup>

Second, the goals of these two forms of protection are often quite different. Due to the tangible nature of cultural relics, cultural patrimony laws tend to focus on retention, repatriation, preservation, and authentication. As John Henry Merryman, a leading authority in cultural patrimony law, stated, "thinking about cultural property . . . as part of a national cultural heritage . . . legitimizes national export controls and demands for the 'repatriation' of cultural property."<sup>74</sup> By contrast, except for moral rights, certification marks, and geographical indications, intellectual property laws rarely share the same focus. Repatriation, indeed, would be very difficult, especially when the works or inventions have already fallen into the public domain.<sup>75</sup> The reproducibility and nonexcludable nature of intellectual property also make repatriation somewhat meaningless.

Instead, intellectual property laws focus on the commercial exploitation of the works and knowledge (in addition to the maintenance of their control). For example, copyright laws grant to authors the rights to reproduce, distribute, adapt, publicly display, and publicly perform creative works.<sup>76</sup> Patent laws grant to inventors the right to exclude others from manufacturing, distributing, importing, selling, or offering to sell inventions.<sup>77</sup> Trademark laws prevent others from putting into commercial channels goods or services that are identified by symbols that are identical to or confusingly similar to those sponsored by the rights holders.<sup>78</sup> Trade secret laws protect undisclosed information that has commercial value.<sup>79</sup> Finally, geographical indications identify the origin of goods based on quality, reputation, or other characteristics that are essentially attributable to the geographical origin.<sup>80</sup>

Third, the trade in cultural relics is different from that in intellectual property goods or services. Because less-developed countries are generally considered rich in cultural relics,<sup>81</sup> the trade in those materials usually flows from less-developed to developed countries. Meanwhile, developed countries are usually rich in intellectual property. The trade in intellectual property goods or services therefore tends to flow in the opposite direction—that is, from developed to less-developed countries. In light of these different directions of

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73. SCAFIDI, *supra* note 70, at 50.

74. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

75. *See* Golan v. Gonzales, 501 F.3d 1179, 1185–87, 1191–92 (10th Cir. 2007) (challenging constitutionality of Uruguay Round Agreements Act of 1994, which restored copyright protection to selected foreign works that had fallen into public domain in United States).

76. *E.g.*, 17 U.S.C. § 106 (2006).

77. *E.g.*, 35 U.S.C. § 154(a)(1) (2006).

78. *E.g.*, Lanham Act § 32, 15 U.S.C. § 1114 (2006).

79. *E.g.*, UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 536 (2005).

80. *E.g.*, TRIPS Agreement, *supra* note 29, art. 23.

81. *See* Merryman, *supra* note 74, at 832 (noting that source nations "are rich in cultural artifacts beyond any conceivable local use").

trade flows, cultural relics are generally considered "Third World assets," while intellectual properties are deemed "First World assets."<sup>82</sup> Although some countries, like those in Europe, are rich in both cultural relics and intellectual property, most are not. While Bolivia, Ecuador, and Peru are rich in cultural relics, but not in intellectual property, the United States is rich in intellectual property, but not in cultural relics.

Finally, the source of protection for cultural relics is very different from that for intellectual property. The source of protection for cultural relics is usually the source nation.<sup>83</sup> Thus, less-developed countries are often responsible for enacting laws to protect their own relics, partly because they are in the best position to know what to protect, and partly because the objects are usually located on their soil.

Meanwhile, the source of protection for intellectual property is usually the market nation. As stated in the Berne and Paris Conventions, the type of protection offered in each country is to be determined locally as long as the country satisfies the minimum standards and does not discriminate against foreign rights holders.<sup>84</sup> Likewise, Article 1 of the TRIPS Agreement allows member states "to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."<sup>85</sup>

#### B. Similarities

Notwithstanding these differences, there are significant similarities between the protection of cultural relics and that of intellectual property. In both areas, the protections seek to enable the rights holders to exert control over the protectable subject matters. It does not matter whether the materials are tangible or not. Cultural patrimony laws identify those who have the ability to control the use and display of the materials.<sup>86</sup> Similarly, intellectual property

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82. See generally Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689 (1989).

83. As Professor Merryman described,

[T]he world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.

Merryman, *supra* note 74, at 832 (footnotes omitted).

84. See Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886, as revised at Paris July 24, 1971, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property art. 2, Mar. 20, 1883, as revised at Stockholm July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter Paris Convention].

85. TRIPS Agreement, *supra* note 29, art. 1(1).

86. As Judge French described in *Yumbulul v. Reserve Bank of Australia*, a case involving the unauthorized reproduction of the sacred "Morning Star Pole" in an Australian \$10 bank note,

laws create rights to prevent others from exploiting the protected works without the rights holders' authorization.

Second, both forms of protection raise difficult questions about the appropriate balance between access and control. Raw materials are just as important in art and culture as in creativity and innovation. Except for those who believe in a strong notion of romantic authorship,<sup>87</sup> most people credit old art for the creation of new art. As Professor Merryman reminded us, "[A]rt comes from art (as well as from social, political, and cultural forces acting on the artist)."<sup>88</sup>

In the intellectual property area, raw materials are also considered important building blocks for both authors and inventors. To protect these raw materials, intellectual property law emphasizes the protection of the public domain.<sup>89</sup> In the copyright area, for example, one can find safeguards like "the originality requirement, the idea-expression dichotomy, durational limits . . . , the fair dealing or fair use privilege, the exhaustion of rights or first sale doctrine, the parody defense, and the *de minimis* use exception."<sup>90</sup>

Third, some aspects of both forms of protection concern issues of authenticity and integrity. The importance of authenticity of cultural artifacts is

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Mr Yumbulul has authority within his own clan to paint certain sacred designs. He has passed through various levels of initiation and revelatory ceremonies in which he has gradually learnt the designs and their meanings. The authority to paint them derives from his father. During the last initiation rite in which he participated, he was presented by the elders of his clan with two sacred bags. Their presentation reflected the power and title he has been given to paint the sacred objects of his people. It is from his mother's clan group, however, that Mr Yumbulul has inherited the right to make Morning Star Poles, one of which is the subject of these proceedings.

*Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481, ¶ 3 (Austl.). Erica-Irene Daes elaborated further,

Under Aboriginal law, the rights in artistic works are owned collectively. Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on status within a tribe. The right to depict a design does not mean that the artist may permit the reproduction of a design. This right to reproduce or reduplicate would depend on permission being granted by the tribal owners of the rights in the design.

*Working Group Study*, *supra* note 50, ¶ 78.

87. For discussions of the construction of the romantic author, see generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., 1994); Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 *REPRESENTATIONS* 109 (1990); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 *DUKE L.J.* 455; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 *EIGHTEENTH-CENTURY STUD.* 425 (1984).

88. Merryman, *supra* note 60, at 353-54.

89. For discussions of the public domain, see generally Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354 (1999); David Lange, *Recognizing the Public Domain*, 44 *LAW & CONTEMP. PROBS.* 147 (1981); Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965 (1990); Symposium, *The Public Domain*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 1.

90. John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 *DRAKE L. REV.* 427, 429 (2008).

beyond question. As Professor Merryman observed, “We yearn for the authentic, for the work as it left the hand of the artist or artisan. . . . The truth, the certainty, the authenticity, seem to inhere in the original.”<sup>91</sup>

Intellectual property laws protect similar authenticity interests. In the moral rights regime, for instance, the right of attribution enables authors to claim authorship of the protected work, while the right of integrity prevents others from distorting, mutilating, or modifying the work in a manner that would prejudice the authors’ honor or reputation.<sup>92</sup> Likewise, patent law respects and emphasizes the identity of the inventors. The Paris Convention, for example, stipulates, “[T]he inventor shall have the right to be mentioned as such in the patent.”<sup>93</sup> United States law further prohibits the grant of patents to those who “did not [themselves] invent the subject matter.”<sup>94</sup> This inventorship requirement, which is undergirded by Article I of the United States Constitution,<sup>95</sup> is indeed a main reason why the United States has yet to switch from a first-to-invent system to the more widely used first-to-file system.<sup>96</sup>

Fourth, the beneficiaries initiate both forms of protection—developed countries for stronger intellectual property protection and less-developed countries for stronger protection of cultural relics. In fact, as I pointed out elsewhere, “[c]opyright law has always been about stakeholders”—one could

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91. Merryman, *supra* note 60, at 346. As he elaborated,

When we stand before the authentic Domesday Book in the Public Record Office in London or the manuscript of Justinian’s Digest in the Gregorian Library in Florence, we feel a sense of satisfaction. This is the real thing, speaking truly of its time. When we discover that the original of the Digest manuscript is kept elsewhere for protection and we have actually been looking at a reproduction, we feel cheated, no matter how accurate the reproduction might be.

*Id.*

92. For discussions of moral rights, see generally Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997); Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1 (2001); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795 (2001); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

93. Paris Convention, *supra* note 84, art. 4*ter*.

94. 35 U.S.C. § 102(f) (2006).

95. U.S. CONST. art. I, § 8, cl. 8 (“Congress shall have Power . . . [t]o Promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries . . .”).

96. See Timothy R. Holbrook, *The Treaty Power and the Patent Clause: Are There Limits on the United States’ Ability to Harmonize?*, 22 CARDOZO ARTS & ENT. L.J. 1, 6 (2004) (noting that “Congress would not have the power under the Constitution to change the patent law to redefine the term ‘inventor’ to mean the first to file a patent application”); Max Stul Oppenheimer, *Harmonization Through Condemnation: Is New London the Key to World Patent Harmony?*, 40 VAND. J. TRANSNAT’L L. 445, 445 (2007) (discussing constitutional issues raised by first-to-file system); Karen E. Simon, Comment, *The Patent Reform Act’s Proposed First-to-File Standard: Needed Reform or Constitutional Blunder?*, 6 J. MARSHALL REV. INTELL. PROP. L. 129, 139–46 (2006) (analyzing constitutionality of first-to-file standard proposed in Patent Reform Act of 2005).

view intellectual property protection as a form of protection for the “haves.”<sup>97</sup> Those who have interests in the system are eager to protect what they have, while those who do not are likely to find the laws counterintuitive, annoying, and socially pernicious.

Scholars have made similar observations about the protection of cultural patrimony. Those who argue for weaker protection of cultural relics—or for a broader view of the world cultural heritage—are often those who do not have a lot of protectable treasures within their country. Those who argue for stronger protection, by contrast, are likely those who have objects worth protecting in their country. It is, therefore, no surprise that source nations make up the majority of the membership<sup>98</sup> of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>99</sup> (“1970 UNESCO Convention”).

Fifth, both forms of protection concern barriers put up to reduce illicit trade across borders. Because it is no longer possible to rely on national measures alone, global solutions are increasingly needed in both areas. To some extent, the need for global cooperation is similar to the need for international policy coordination in other cross-border problems, such as terrorism, drug trafficking, refugees, illegal immigration, environmental degradation, illegal arms sales, nuclear proliferation, and corruption.<sup>100</sup>

In fact, commentators and policymakers in both areas have increasingly emphasized the organized structure of illicit trade. For example, they have tied piracy and counterfeiting to terrorism and organized crime.<sup>101</sup> Similar linkage can be found in the looting of and illicit trade in cultural relics. As Patty Gerstenblith noted, “Recent revelations concerning the functioning of the art market and the acquisition of antiquities with unknown origins now demonstrate that the looting of archaeological sites is a well-organized big business motivated primarily by profit.”<sup>102</sup>

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97. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 402 (2003).

98. See Michael L. Dutra, *Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China*, 5 ASIAN-PACIFIC L. & POL'Y J. 62, 77 (2004) (noting that “a few of the major market nations—the United States, and recently, the United Kingdom and Japan—have joined the [1970 UNESCO Convention], while most of the source states of cultural property have signed th[at] Convention”).

99. 1970 UNESCO Convention, *supra* note 47.

100. See Judith H. Bello, *National Sovereignty and Transnational Problem Solving*, 18 CARDOZO L. REV. 1027, 1027 (1996) (discussing many cross-border problems that continue to challenge national laws in increasingly interdependent world).

101. See, e.g., *International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 4 (2003) (statement of Rep. Howard L. Berman, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property, H. Comm. on the Judiciary); TIM PHILLIPS, KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS 137–44 (2005); Maureen Walterbach, Comment, *International Illicit Convergence: The Growing Problem of Transnational Organized Crime Groups' Involvement in Intellectual Property Rights Violations*, 34 FLA. ST. U. L. REV. 591 (2007).

102. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm*,

One could even make an argument that the problem of illicit trade in cultural relics far exceeds that in pirated and counterfeit goods. According to Roger Noriega, Assistant Secretary of State for Western Hemisphere Affairs, “INTERPOL estimates the value of the illicit trade in art and artifacts worldwide each year at \$5 billion—*only the illegal markets in drugs and arms are larger.*”<sup>103</sup> In the past decades, accelerated efforts have been undertaken to develop “harmonized” solutions for the protection of both cultural relics and intellectual property. Although such harmonization efforts have their drawbacks and limitations,<sup>104</sup> there is general agreement that domestic solutions are inadequate for dealing with illicit cross-border trade.

Finally, as Part IV will discuss further, both forms of protection concern the same type of enforcement issues and challenges, and both developed and less-developed countries suffer from the lack of or inadequate protection. Illicit trade in cultural relics can hurt a country as much as, if not more than, illicit trade in pirated or counterfeit goods. Unfortunately, because of the different source of protection, less-developed countries are charged with enforcement in both areas. As a result, enforcement in both areas is fairly limited—due partly to the countries’ lack of capacity and resources for active law enforcement.<sup>105</sup> As one commentator wrote of China,

[T]he task of protecting cultural property in China is a herculean task of almost impossible magnitude. The sheer amount of cultural property in China is enormous. It is virtually impossible for the government to halt the illegal flow of cultural property out of—and within China. Because the international legal regime designed to protect cultural property is unlikely to be of much help, China must rely on its domestic laws to preserve its cultural heritage, as once objects have left

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*Preserving the Past*, 8 CHI. J. INT’L L. 169, 169 (2007); accord Matthew Bogdanos, *Thieves of Baghdad: Combating Global Traffic in Stolen Iraqi Antiquities*, 31 FORDHAM INT’L L.J. 725, 726 (2008) (declaring that “the genteel patina covering the world of antiquities rests atop a solid base of criminal activity”). For an interesting account of the recent looting of the National Museum of Iraq in Baghdad, see generally MATTHEW BOGDANOS WITH WILLIAM PATRICK, *THIEVES OF BAGHDAD: ONE MARINE’S PASSION FOR ANCIENT CIVILIZATIONS AND THE JOURNEY TO RECOVER THE WORLD’S GREATEST STOLEN TREASURES* (2005).

103. Roger F. Noriega, *Helping the Hemisphere Recover and Preserve Its Cultural Patrimony*, <http://statelists.state.gov/scripts/wa.exe?A2=ind0408c&L=dosso&P=177> (last visited Feb. 10, 2009) (emphasis added).

104. For discussions of the benefits and drawbacks of harmonization, see generally John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685 (2002); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 429–35 (2004).

105. See PROTT & O’KEEFE, *supra* note 44, at 331 (noting suggestion that “the entire police force and military forces of Turkey together could not possibly keep watch over all the archaeological sites in that country”); Dutra, *supra* note 98, at 65 (noting that “[m]any source nations are poorer states with weak central governments that lack the resources or the will to protect and preserve archaeological sites and relics”); Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 217 (2007) (arguing that “[t]he origin states, which were often poor countries with weak institutions, could do little to prevent looters from extracting antiquities and sought assistance from the wealthy states to which the antiquities were exported”).

Chinese territory, they are likely gone forever. However, Chinese law is not yet capable of taking on this formidable task.<sup>106</sup>

This observation is quite similar to those on inadequate enforcement in the intellectual property area—online piracy primarily in developed countries and optical disc and offline piracy in less-developed countries.<sup>107</sup> Nevertheless, because of the importance of enforcement in both areas, enforcement issues may provide a promising opportunity for both developed and less-developed countries to cooperate. Although each country group is likely to seek protection for very different objects—developed countries for stronger intellectual property protection and less-developed countries for stronger protection of cultural relics—both of them are likely to be interested in building a stronger enforcement environment that will protect their interests. Such cooperation would enable these countries to work together, sharing with each other experience, knowledge, and best practices about law enforcement in general.

In sum, the protection of cultural relics and that of intellectual property are more similar than one would expect. As Erica-Irene Daes, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the chairperson of its Working Group on Indigenous Populations, wrote in her report, “[I]t is both simpler and more appropriate to refer to the collective ‘heritage’ of each indigenous people, rather than make distinctions between ‘cultural property’ and ‘intellectual property’.”<sup>108</sup> It also makes sense for the intellectual property model to be increasingly proposed as a means of protection for traditional knowledge and cultural expressions.

Moreover, intellectual property protection goes hand in hand with the production of cultural products.<sup>109</sup> As Professor Scafidi pointed out, “A review of intellectual property and its unique characteristics will thus assist in formulating a theory of cultural ownership and protection.”<sup>110</sup> A better understanding of these two forms of protection may also inform the discussion of

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106. Dutra, *supra* note 98, at 73 (footnotes omitted); see also J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA* 62 (1995) (noting that “[i]nstitutional insecurity, lack of funding, inadequate procedures, and corruption have combined to contribute to the steady outflow of relics from China”).

107. See Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 417 (2008) (observing that optical disc piracy happens mostly in China and other less-developed countries and online piracy happens extensively in developed countries); Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT’L MEDIA & ENT. L. 65, 77–78 (2008) (stating that difference between optical disc piracy and online piracy may have skewed public perception of piracy and counterfeiting problems in China and other less-developed countries).

108. *Working Group Study*, *supra* note 50, ¶ 23.

109. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (stating that “[c]opyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association”); Yu, *supra* note 107, at 427–28 (discussing relation between copyright protection and production and dissemination of cultural products).

110. SCAFIDI, *supra* note 70, at 13.

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the protection of intangible cultural heritage. Nonetheless, it is important to be cautious about the differences between these two forms of protection. Whether policymakers identify the protection of intangible cultural heritage with that of cultural relics or that of intellectual property may ultimately result in a different protective regime.

## II. UNDERLYING OBJECTIVES

Thus far, traditional communities, governments, and intergovernmental and nongovernmental organizations have advanced many different proposals and models to protect intangible cultural heritage. For example, as the Introduction noted, regimes in the area of human, cultural, and indigenous rights include a number of documents calling for stronger protection of intangible cultural heritage. There are also many active developments in the areas of international trade, intellectual property, and biological diversity.

To help us understand the stakes involved in the development of this new framework for the protection of intangible cultural heritage, this Part highlights eight of the framework's many underlying objectives. These objectives are neither exhaustive nor mutually exclusive; they can be achieved through the use of different mechanisms, which range from exclusive rights to liability rules and from benefit-sharing agreements to disclosure requirements. This Part does not discuss each of these mechanisms, which are already covered in a vast amount of literature in the area.<sup>111</sup> However, it is important to remember each mechanism may achieve various objectives, and several mechanisms may sometimes be needed to achieve a single objective. It is also worth keeping in mind that each objective may raise questions and issues that are addressed elsewhere.

Moreover, some readers may find the description of the objectives in this Part somewhat messy. Such messiness, however, is rather common in any negotiation for a new international framework for the protection of intangible cultural heritage. Rather than offering a subjective evaluation of the importance and urgency of each objective, or delineating some organizing principles, this Part presents the objectives as they appear in the current policy debate. After all, policymakers, commentators, activists, and the public at large are likely to value these objectives differently. By presenting the objectives together, this Part also helps illustrate why it is difficult to achieve international consensus. Although WIPO and other international intergovernmental organizations have actively pushed for stronger international protection of traditional knowledge and cultural expressions, no treaty has been adopted yet.<sup>112</sup>

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111. See, e.g., Graham Dutfield, *Legal and Economic Aspects of Traditional Knowledge*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 495 (Keith E. Maskus & Jerome H. Reichman eds., 2005) [hereinafter *INTERNATIONAL PUBLIC GOODS*].

112. See *infra* note 276 and accompanying text for a discussion of WIPO's failure to adopt a formal treaty to protect traditional knowledge and cultural expressions.

A. *Cultural Privacy*

While globalization, the digital revolution, and increasing commodification of information have enriched the lives of many traditional communities, these factors have equally threatened these communities by allowing for the instantaneous distribution of knowledge and materials that are sacred or intended to be kept secret.<sup>113</sup> As Angela Riley noted, such unauthorized reproduction and distribution remains “one of the biggest problems faced by indigenous groups today.”<sup>114</sup>

From the standpoint of traditional communities, secrecy is important for both cultural and spiritual purposes. As Tom Greaves explained,

[T]he control of traditional ideas and knowledge . . . identifies places, customs and beliefs which, if publicly known, will destroy parts of a people’s cultural identity. Sometimes it is knowledge entrusted only to properly prepared religious specialists. Disclosure to other, unqualified members destroys it. Sometimes it is knowledge shared among all of a society’s members, but not with outsiders. Such knowledge charts a society’s sense of self; to disclose it loosens the society’s self-rationale.<sup>115</sup>

The ability for these peoples to keep ideas and knowledge secret is, therefore, very important. As Sarah Harding explained, “secrecy is an integral part of the sacredness of certain objects, stories, songs or rituals, and as such, instrumental in maintaining a certain social structure within the cultural group. [It] helps protect rituals and customs from destructive external forces.”<sup>116</sup>

Although traditional communities underscore the importance of protecting sacred objects and expressions, it has not been easy to distinguish between what is sacred and what is not. Making such a distinction sometimes may even be impossible, given the communities’ holistic worldview and lack of distinction between sacredness and secularity. As the late Darrell Posey explained,

All creation is sacred, and the sacred and secular are inseparable. Spirituality is the highest form of consciousness, and spiritual consciousness is the highest form of awareness. In this sense a dimension of traditional knowledge is not *local* knowledge but knowledge of the *universal* as expressed in the local. In indigenous and local cultures, experts exist who are peculiarly aware of the organizing principles of nature, sometimes described as entities, spirits, or natural

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113. See Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J.L. & PUB. POL’Y 155, 159 (2004).

114. *Id.* at 157.

115. Tom Greaves, *IPR, A Current Survey*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK 1, 4 (Tom Greaves ed., 1994) [hereinafter IPR SOURCEBOOK]; accord Harding, *supra* note 50, at 313 (stating that “[m]any indigenous peoples consider certain objects, as well as certain knowledge, limited goods that cannot be shared and disseminated without a corresponding loss in power, significance, and meaning” and that “certain objects and information must remain concealed from the uninitiated either within or outside the cultural group”).

116. Harding, *supra* note 50, at 314 (footnote omitted).

law. Thus, knowledge of the environment depends not only on the relationship between humans and nature but also between the visible world and the invisible spirit world. According to the Ghanaian writer Kofi Asare Opoku, the distinctive feature of traditional African religion is that it is “A way of life, [with] the purpose of . . . order[ing] our relationship with our fellow men and with our environment, both spiritual and physical. At the root of it is a quest for harmony between man, the spirit world, nature, and society.” The unseen is, therefore, as much a part of reality as that which is seen—the spiritual is as much a part of reality as the material. In fact, there is a complementary relationship between the two, with the spiritual being more powerful than the material.<sup>117</sup>

Even if the materials are not sacred or intended to be kept secret, it is important that the materials are not used in a way that would offend traditional communities—as in OutKast’s culturally insensitive performance of their hit “Hey Ya” during the internationally televised Grammy Awards Ceremony in 2004<sup>118</sup> and the University of Illinois’ use for more than eighty years of its fictitious Indian mascot Chief Illiniwek.<sup>119</sup>

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117. Darrell Addison Posey, *Selling Grandma: Commodification of the Sacred Through Intellectual Property Rights*, in CLAIMING THE STONES/NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 201, 201 (Elazar Barkan & Ronald Bush eds., 2002) [hereinafter CLAIMING THE STONES] (alteration in original); accord WIPO, INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE 1 (2002), available at [http://www.wipo.int/freepublications/en/tk/920/wipo\\_pub\\_920.pdf](http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf) [hereinafter WIPO, IP & TK] (noting that “TK forms part of an holistic world-view, and is inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems”); see also George P. Nicholas & Kelly P. Bannister, *Copyrighting the Past? Emerging Intellectual Property Rights Issues in Archaeology*, 45 CURRENT ANTHROPOLOGY 327, 331 (2004) (noting that “[w]here there is no cognitive separation between past and present, ancestral spirits are part of the present”); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 77 (2005) (stating that “[f]or indigenous peoples, the natural, physical world is inexorably intertwined with the spiritual and cultural world” and that “the stripping of tangible property often results in corresponding cultural destruction”).

118. See Riley, *supra* note 117, at 70–72 (discussing OutKast’s performance and related issues concerning appropriation of culture and traditional knowledge); Eireann Brooks, Note, *Cultural Imperialism vs. Cultural Protectionism: Hollywood’s Response to UNESCO Efforts to Promote Cultural Diversity*, 5 J. INT’L BUS. & L. 112, 117–18 (2006) (discussing outrage of Native American leaders following OutKast’s performance). As Brooks described,

The band utilized “an ethereal, Indian-sounding melody” to introduce their performance, then segued into a dance routine with backup dancers clad in skimpy “buckskin bikinis, [with] long braids and feathers in their hair.” At a later point during the performance, the dancers “hit their open mouths with flat palms, imitating a traditional Plains-tribe war cry.” In addition, OutKast was joined onstage by the acclaimed University of Southern California marching band, whose hats were decorated with feathers to contribute to the theme.

Native American leaders were outraged by the perpetuation of “tomahawk-and-tipi stereotypes,” likening OutKast’s performance to a crude blackface routine. Not only were the Indian symbols used of a type traditionally reserved for ceremonial purposes, but the song used as a prelude to “Hey Ya” was also a sacred Navajo song wrongly appropriated for entertainment purposes.

Brooks, *supra*, at 117–18 (footnotes omitted) (quoting Riley, *supra* note 117, at 70).

119. See Jodi S. Cohen, *Hail to the Chief—and Farewell*, CHI. TRIB., Feb. 22, 2007, at C1

Even if the communities do not find the use of these materials offensive, they may prefer to keep their ideas and knowledge out of commercial channels. As Professor Daes noted, “indigenous peoples challenge the fundamental assumptions of globalization. They do not accept the assumption that humanity will benefit from the construction of a world culture of consumerism.”<sup>120</sup> Indeed, consumerism may have little meaning to these communities. As she wrote earlier in her report for the Working Group on Indigenous Populations,

Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The “object” has no meaning outside of the relationship, whether it is a physical object such as a sacred site or ceremonial tool, or an intangible such as a song or story. To sell it is necessarily to bring the relationship to an end.<sup>121</sup>

Traditional communities may also “fear for the well-being of [their communities] in the face of commercial exploitation, and . . . worry that the expropriation of their living culture will cause their imagery to lose its original significance which will lead to a disruption of their practiced religion and beliefs and a dissolution of their culture.”<sup>122</sup> Indeed, as Professor Scafidi pointed out, “[a] cultural product reduced to the state of a mere commodity by the destruction of its intangible value is unlikely to be restored to the source community.”<sup>123</sup>

Thus, it is understandable why commentators have been concerned about the continuous push for intellectual property rights to protect traditional knowledge and cultural expressions. After all, the intellectual property system “was largely developed in the West, and its models are based on a capitalistic philosophy designed to serve a market economy,” which is quite different from philosophies embraced by traditional communities.<sup>124</sup> It is therefore no surprise that Naomi Roht-Arriaza asked whether “[b]y attempting to manipulate the prevailing Western paradigm to suit their needs, . . . indigenous peoples [will]

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(reporting on Chief Illiniwek’s retirement); Jon Saraceno, *Illini’s Chief’s Final Dance Here at Last*, USA TODAY, Feb. 21, 2007, at 2C (same). For an informative documentary on Chief Illiniwek, see IN WHOSE HONOR? (New Day Films 1997).

120. Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC’Y INT’L PROC. 143, 143 (2001).

121. *Working Group Study*, *supra* note 50, ¶ 26.

122. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 15 (1997).

123. SCAFIDI, *supra* note 70, at 104.

124. Riley, *supra* note 113, at 159; accord Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT’L & COMP. L. 519, 529 (2003) (observing that “[c]reating new property rights is . . . a rather Western form of problem solving”); 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, 246 (1998) (stating that “[m]ost intellectual property law models are based on Western, capitalist philosophy, and indeed appear to be developed with such a world view in mind”).

accelerate the very commodification of knowledge and of living things that many find so objectionable.”<sup>125</sup>

Concerns about potential loss of heritage also explain why traditional communities are generally skeptical of open access arrangements, such as those relying on the development of a commons. As Michael Brown pointed out, “[f]rom the indigenous-rights perspective, the public domain is the problem, not the solution, because it defines traditional knowledge as a freely available resource.”<sup>126</sup> In fact, the existing push for open access arrangements often ignores the inequitable conditions and distribution problems in the current socioeconomic system.<sup>127</sup> As Anupam Chander and Madhavi Sunder reminded us, “free and open access had the tendency to suggest ‘a commons where resources are up for grabs by the most technologically advanced.’”<sup>128</sup> Because one’s success in the commons depends on factors like knowledge, wealth, power, access, and ability, an open access approach does not benefit everybody equally.<sup>129</sup> Such an approach, therefore, may be of limited assistance to the poor, the backward, the needy, and the politically marginalized.

To make things more complicated, “[t]here may not always be consensus within a community . . . as to what is or is not acceptable use of culturally significant images in works intended for commercial sale.”<sup>130</sup> While some members of the communities may object to *any* usage for commercial purposes, others would allow the use of *some* materials at *selected* times under *certain* conditions. Thus, it is important to let the communities determine for themselves what materials can be used for commercial purposes. In doing so, the communities could “make careful determinations about which events [or objects] are appropriate for outsiders based on norms of tribal law, allowing such

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125. Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT’L L. 919, 956 (1996).

126. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 237 (2003); *see also* Dutfield, *supra* note 111, at 531 (noting one of chief defects of many existing proposals to protect interests of traditional communities is that “they leave the legal character of the public domain untouched”).

127. For a criticism of commons-based approaches, *see* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1351–54 (2004).

128. *Id.* at 1356 n.131 (quoting J.M. Spectar, *Saving the Ice Princess: NGOs, Antarctica & International Law in the New Millennium*, 23 SUFFOLK TRANSNAT’L L. REV. 57, 63 (1999)).

129. *See id.* at 1332. As Professors Chander and Sunder noted,

Contemporary scholarship extolling the public domain presumes a landscape where each person can reap the riches found in the commons. . . . [B]ecause a resource is open to all by force of law, it will indeed be equally exploited by all. But, in practice, differing circumstances—including knowledge, wealth, power, and ability—render some better able than others to exploit a commons.

*Id.*

130. WAYNE SHINYA, COPYRIGHT POLICY BRANCH, DEP’T OF CANADIAN HERITAGE, PROTECTING TRADITIONAL CULTURAL EXPRESSIONS: POLICY ISSUES AND CONSIDERATIONS FROM A COPYRIGHT PERSPECTIVE 35 (2004).

revenue-generating activities only where they will not infringe on cultural privacy or religious dictates.”<sup>131</sup>

In recent years, cultural group leaders, policymakers, and commentators have called for greater protection of “cultural privacy”—that is, “the right of possessors of a culture—especially possessors of a native culture—to shield themselves from unwanted scrutiny.”<sup>132</sup> The recently adopted Declaration on the Rights of Indigenous Peoples, for example, stipulates that

[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.<sup>133</sup>

Likewise, Professor Brown reminded us that “[a] right to cultural privacy is presented as self-evident and morally unassailable, even if its scope remains unspecified.”<sup>134</sup>

#### B. Authenticity

The second objective concerns the authenticity of the protected materials. If the contributions of traditional communities are to be recognized, these materials need to be authentic. Unfortunately, as shown in many reproductions of Maya steles, Aboriginal crafts, and Native American rugs, nontraditional producers and copycats usually have very limited understanding of the culture that the works embody. In the end, they produce materials that not only free-ride on the efforts and contributions of traditional communities, but fail to make sense to those communities or researchers who study their culture.

For example, “Aboriginal Australian artists, writers and actors complained that non-Aboriginals were taking the initiative in utilizing Aboriginal motifs and themes, often resulting in misinterpretations and negative stereotypes.”<sup>135</sup> They have also been concerned about “the utilisation of reproductions of traditional Aboriginal designs as a means of decorating a host of mundane products primarily developed for the tourist trade, such as tea-towels, pencil cases, key rings, tee-shirts[,] . . . drink coasters[,] . . . wall hangings, carpets and posters.”<sup>136</sup> Furthermore, “[i]n Peru, local workers manufacture and sell replicas of golden artifacts symbolizing Incan culture with no remembrance or connection to the heritage that created such artifacts.”<sup>137</sup> Most disturbing of all, some “ingenious

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131. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. (forthcoming 2009), available at [http://ssrn.com/abstract\\_id=1220665](http://ssrn.com/abstract_id=1220665).

132. BROWN, *supra* note 126, at 27–28.

133. DRIPS, *supra* note 10, art. 12(1).

134. BROWN, *supra* note 126, at 28.

135. *Working Group Study*, *supra* note 50, ¶ 68.

136. Michael Blakeney, *Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law*, 17 EUR. INTEL. PROP. REV. 442, 442 (1995).

137. Long, *supra* note 124, at 243.

people set up a town named ‘Zuni’ in the Philippines, then stamped goods with the label ‘Made in Zuni.’”<sup>138</sup>

While traditional communities have sought courts’ assistance in enjoining others from making unauthorized reproduction of their materials, their cease-and-desist demands are not always fruitful. For example, in the case of the Australian aborigines, “[a]fter Australian tee-shirt companies were sued for infringing the copyright of Aboriginal artists, they began to print shirts with fake designs. ‘Most tourists shops [therefore] . . . are replete with examples of T-shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art.’”<sup>139</sup> The resulting misrepresentation and distortion have caused significant economic and psychological injuries to traditional communities. As Michael Blakeney noted, “the unauthorised reproduction of designs which are of significance to Aboriginal religious beliefs and cultural identity is as damaging as the desecration, through mining, of traditional dreaming places.”<sup>140</sup>

To reduce abuse and unauthorized copying, trademarks—in particular certification marks—have been used to ensure the authenticity and appropriate use of traditional materials.<sup>141</sup> Moral rights provide additional protection against

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138. J. Michael Finger, *Introduction and Overview*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 1, 17 (J. Michael Finger & Philip Schuler eds., 2004) [hereinafter POOR PEOPLE’S KNOWLEDGE].

139. BROWN, *supra* note 126, at 89 (quoting Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 14 EUR. INTELL. PROP. REV. 227, 229 (1992)).

140. Blakeney, *supra* note 136, at 442.

141. As Wend Wendland observed,

In Australia, certification marks have been registered by the National Indigenous Arts Advocacy Association. In Canada, trademarks, including certification marks, are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services, and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. In Portugal, the Association of Carpet Producers of Arraiolos has registered a collective trademark in respect of its products. And, in New Zealand, the Maori Arts Board of Creative New Zealand is making use of trademark protection through the development of the “Maori Made Mark.” It is a trademark of authenticity and quality, which indicates to consumers that the creator of goods is of Maori descent and produces work of a particular quality. It is a response to concerns raised by Maori regarding the protection of cultural and intellectual property rights, the misuse and abuse of Maori concepts, styles, and imagery, and the lack of commercial benefits accruing back to Maori.

Wend B. Wendland, *Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions*, in ART AND CULTURAL HERITAGE, *supra* note 42, at 327, 333; *see also* Maui Solomon, *Protecting Maori Heritage in New Zealand*, in ART AND CULTURAL HERITAGE, *supra* note 42, at 352, 355 (discussing the protection offered by the Maori Made Mark, “Toi Iho,” which “licences Maori artists to use the Mark to authenticate their works and provide consumers with quality assurance that the products are made by genuine Maori artists and to distinguish them from the many ‘copy-cat’ products in the market place”). More information about the “Toi Iho” mark is available at <http://www.toiho.com/>.

“debasement, mutilation or destruction” of traditional expressions.<sup>142</sup> Because “[t]he absence of an authenticity mark [or proper attribution] would alert potential consumers of cultural products to a lack of association with the presumed source community,”<sup>143</sup> these different forms of rights may enable traditional communities to share in the benefits of their intangible cultural heritage and obtain appropriate recognition for their creative contributions.

Although expectations for authenticity usually result in greater control by traditional communities and more deference to them, such expectations sometimes may backfire on the communities by making it more difficult for them to demand the return of those cultural relics that are already taken from the communities without their authorization. For instance, a museum can use authenticity as a justification to reject demands by indigenous communities to rebury human remains residing in the museum.<sup>144</sup>

### C. Recognition

An objective that goes hand in hand with the protection of authenticity interests is the recognition of the contributions traditional communities have made over the centuries. Such recognition can be achieved through the introduction of greater control of their intangible cultural heritage, which in turn would enable the communities to share in the benefits of the exploitation of such heritage. The traditional communities’ intangible cultural heritage can also be recognized through a requirement to disclose the origins of the traditional materials used in new creations or inventions. Proposals that seek to introduce a disclosure requirement include Switzerland’s recent proposal to amend the PCT Regulations and a similar proposal by a group of less-developed countries to amend the TRIPS Agreement.<sup>145</sup> To some extent, these requirements resemble those ethical guidelines museums have used to ensure proper handling of cultural relics.<sup>146</sup>

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142. Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 332 (1995).

143. SCAFIDI, *supra* note 70, at 66.

144. See Patty Gerstenblith, *Cultural Significance and the Kennewick Skeleton: Some Thoughts on the Resolution of Cultural Heritage Disputes*, in CLAIMING THE STONES, *supra* note 117, at 162, 163. See *supra* Part II.B for a discussion of the importance of authenticity.

145. *Article 29bis Proposal*, *supra* note 30, ¶ 2; *Switzerland’s PCT Proposal*, *supra* note 26, ¶ 21. For discussions of the advantages and disadvantages of the introduction of a disclosure requirement, see generally JOSHUA D. SARNOFF & CARLOS M. CORREA, ANALYSIS OF OPTIONS FOR IMPLEMENTING DISCLOSURE OF ORIGIN REQUIREMENTS IN INTELLECTUAL PROPERTY APPLICATIONS (2006), U.N. Doc. UNCTAD/DITC/TED/2004/14, available at <http://www.unctad.org/TEMPLATES/Download.asp?docid=6819&lang=1&intItemID=2094>; Nuno Pires de Carvalho, *From the Shaman’s Hut to the Patent Office: A Road Under Construction*, in BIODIVERSITY AND THE LAW, *supra* note 42, at 241, 245; Dutfield, *supra* note 111, at 506–09.

146. See James A.R. Nafziger, *The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*, 8 CHI. J. INT’L L. 147, 151–52 (2007) (noting ethical guidelines developed by University of Pennsylvania Museum that “insisted on a pedigree for every acquisition and on full disclosure of details about the acquisition to the public” and that have been followed by other leading

By identifying the source of the underlying materials, a disclosure requirement would help users understand better the origin of the products while providing recognition to the community responsible for the creation of those materials.<sup>147</sup> Such a requirement would also enhance the ability of “providers of genetic resources and TK to keep track of the use of their tangible and intangible resources as well as the development resulting in patentable inventions.”<sup>148</sup>

If informed consent is further mandated as part of the requirement, like what is stated in the Article 29bis Proposal,<sup>149</sup> the requirement would further ensure a legitimate exchange between traditional communities and follow-on authors or inventors. Such consent is particularly important when the invention includes genetic resources from traditional and indigenous peoples. Such a requirement would also “increase transparency and help Developing Countries to monitor actual compliance with the provisions [on access and benefit sharing] set forth in the CBD.”<sup>150</sup>

Moreover, the disclosure requirement would benefit the public at large by informing the public of the origin of the underlying materials while at the same time allowing them to anticipate potential issues that may arise as a result of such usage. By disclosing in intellectual property applications the underlying prior art, the requirement would also reduce the chance of privatization of pre-existing traditional knowledge and genetic resources,<sup>151</sup> both of which will remain in the public domain and be freely available to the public at large.

The requirement would also help strike a practical compromise that would allow traditional communities to ensure authenticity, obtain recognition, and share in the benefits amidst the rapid commodification of traditional cultural expressions and continuous and expanding practice of bioprospecting. As Christine Haight Farley wrote,

Assuming that the circulation of indigenous art is inevitable, some indigenous artists want to be sure to participate in this celebration of indigenous culture. By gaining control over the circulation of their imagery, they want to ensure that the public gets an accurate account

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museums, such as Metropolitan Museum of Art, Harvard University, Brooklyn Museum, Field Museum of Natural History, and Smithsonian Institution).

147. Cf. Steven R. King, *Establishing Reciprocity: Biodiversity, Conservation and New Models for Cooperation Between Forest-Dwelling Peoples and the Pharmaceutical Industry*, in IPR SOURCEBOOK, *supra* note 115, at 69, 80 (noting that “one of the ongoing concerns of the indigenous community is not only the financial credit but also the scientific and intellectual credit for their scientific discoveries and achievements”).

148. Arezzo, *supra* note 27, at 381.

149. Article 29bis Proposal, *supra* note 30, ¶ 2.

150. Arezzo, *supra* note 27, at 379; accord Dutfield, *supra* note 111, at 506–11 (noting that disclosure requirement aims to “ensure[] that the resources and [traditional knowledge] were acquired in accordance with biodiversity access and benefit sharing regulations in the source countries”).

151. See Arezzo, *supra* note 27, at 381 (noting that disclosure requirement would facilitate identification of prior art when evaluating inventions dealing with genetic resources and traditional knowledge).

of indigenous culture and that the investment in that culture goes back to their communities.<sup>152</sup>

Nevertheless, disclosure has a major weakness: because of the inherent difficulty in determining the source of origin of the underlying materials, such a requirement may lead to uncertainty and inconsistency and may ultimately reduce incentives for creation and innovation. As Emanuela Arezzo explained,

Use of genetic resources is rarely recognizable by merely looking at the final product. Even under a close analysis, indigenous people would not know that biological resources had been taken without prior informed consent, not to mention access and benefit sharing; the same applies for TK. Only when the innovation consists of the very same use of the plant that is known in the indigenous community is the link between the biological resource and the patent apparent. Sometimes, however, traditional scientific knowledge only provides useful leads that “bioprospectors” use for prioritizing the screening of certain plants. The isolated molecules and compounds of these plants may reveal properties beyond those identified by indigenous communities, or the properties already known by indigenous communities are studied for new purposes. In the latter case, the link between TK and the final product gets blurred along the way to the patent office, and indigenous people are unable to find out about—and hence oppose—biosquatting.<sup>153</sup>

This difficulty is, indeed, one of the main reasons why the United States and Japan strongly oppose the disclosure requirement proposals at both WIPO and the WTO.<sup>154</sup> Whether the requirement will be beneficial depends on whether the benefits of disclosure exceed its costs. At this point, making that determination will require further empirical research.

#### D. Compensation

In addition to recognition and authenticity, some traditional communities want compensation. As this Part has shown, the use of traditional materials without their authorization harms the communities in economic, social, cultural, psychological, and spiritual terms. As a result, some communities have demanded compensation for their injuries. To be certain, such compensation may not fully cover those injuries. However, it does provide significant benefits to the communities; at the very least, it can promote “local sustenance and adequacy for living” for the traditional communities.<sup>155</sup>

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152. Farley, *supra* note 122, at 14.

153. Arezzo, *supra* note 27, at 379; *see also* AOKI, *supra* note 41, at 92 (noting difficulty in obtaining meaningful informed consent as a result of the fact that “communities from whom consent is sought are often fragmented and dynamic in composition over time rather than homogenous and stable”).

154. *See* Arezzo, *supra* note 27, at 387–88.

155. Stephen Gudeman, *Sketches, Qualms, and Other Thoughts on Intellectual Property Rights*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 102, 119 (Stephen B. Brush & Doreen Stabinsky eds., 1996).

As Graham Dutfield reminded us, “TK is valuable first and foremost to indigenous and local communities who depend upon it for their livelihoods and well-being, as well as for enabling them to sustainably manage and exploit their local ecosystems such as through sustainable low-input agriculture.”<sup>156</sup> Likewise, Professor Brown suggested that we should reframe the question from “Who owns native culture?” to “How can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?”<sup>157</sup>

Taking account of the growing demands, Jerome Reichman developed a proposal for using liability rules to address problems concerning the protection of traditional knowledge and subpatentable inventions.<sup>158</sup> Under his proposed compensatory liability scheme, second comers will be required “to pay equitable compensation for borrowed improvements over a relatively short period of time.”<sup>159</sup> As Professor Reichman explained, such an alternative regime has several benefits. For example, it “could stimulate investment without chilling follow-on innovation and without creating legal barriers to entry.”<sup>160</sup> Such a regime “would also go a long way toward answering hard questions about how to protect applications of traditional biological and cultural knowledge to industry, questions that are of increasing importance to developing and least-developed countries.”<sup>161</sup>

In recent years, Professor Reichman and his colleague, Tracy Lewis, have further developed this proposal into one that uses liability rules to address problems concerning the protection of traditional knowledge.<sup>162</sup> Their compensatory liability regime would provide traditional communities with “a clear entitlement to prevent wholesale duplication of their compiled information and to reasonable compensation for all follow-on commercial applications of their traditional knowledge during a specified period of time.”<sup>163</sup> The scheme provides three distinct rights: “[1] a right to prevent wholesale duplication, [2] a right to compensation from value-adding improvers, and [3] a right to make use of a second comer’s value-adding improvements for purposes of making further improvements of his or her own.”<sup>164</sup> Through protection of these rights, the regime “would temporarily remove eligible traditional knowledge from the limbo of a true public domain and relocate it to a semicommons, from which it

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156. Dutfield, *supra* note 111, at 505.

157. BROWN, *supra* note 126, at 10.

158. J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1776–91 (2000).

159. *Id.* at 1777.

160. *Id.* at 1746.

161. *Id.* at 1747.

162. Jerome H. Reichman & Tracy Lewis, *Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS, *supra* note 111, at 337, 348–65.

163. *Id.* at 358–59.

164. *Id.* at 349.

could freely be accessed and used for specified purposes, in return for the payment of compensatory royalties for a specified period of time.”<sup>165</sup>

Notwithstanding these proposals, and similar proposals by other policymakers and commentators, compensation can be difficult sometimes. For example, as the previous section noted, detecting the use of genetic resources can be difficult, time consuming, and technology intensive.<sup>166</sup> Researchers may also “find that a bioactive ingredient has a medical use different from that suggested by the original collectors”;<sup>167</sup> such varied use “is by no means unusual because traditional plant remedies may be effective within the framework of a society’s own understanding and yet fail to satisfy the efficacy standards of Western medicine.”<sup>168</sup>

Moreover, some communities would simply consider monetary compensation inadequate. The continuing of cultural knowledge and practices is important to the survival of the communities,<sup>169</sup> and it is hard to quantify cultural erosion and community loss in monetary terms. As Antony Taubman, the former acting director of WIPO’s Traditional Knowledge Division, pointed out, “Where certain uses cause spiritual offence and threaten cultural integrity, . . . rather than commercial damage, monetary payment may not be viewed by TK holders as . . . an equitable form of compensation.”<sup>170</sup> Meanwhile, the survival of the community is also important to the survival of culture and knowledge.<sup>171</sup> If the community disappears, such important knowledge is also likely to become extinct.

#### *E. Benefit Sharing*

A more conciliatory objective is to allow traditional communities and less-developed countries to share in the benefits created through the use of their intangible cultural heritage. Article 8(j) of the CBD, for example, requires member states to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and

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165. *Id.* at 354–55.

166. See Arezzo, *supra* note 27, at 379 (explaining scientific process of detecting genetic resources in products).

167. BROWN, *supra* note 126, at 111.

168. *Id.*

169. See Working Group Study, *supra* note 50, ¶ 30.

170. Antony Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS, *supra* note 111, at 521, 532.

171. See WIPO, IP & TK, *supra* note 117, at 7 (noting that “the very survival of the knowledge is at stake, as the cultural survival of communities is under threat”).

practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.<sup>172</sup>

The Article 29bis Proposal also requires the disclosure of information concerning the compliance with the CBD's benefit-sharing requirement.<sup>173</sup>

Taken together, these benefit-sharing arrangements would allow traditional communities to capitalize on what Michael Finger and Philip Schuler have called "poor people's knowledge."<sup>174</sup> As noted in a study by the Department of Canadian Heritage, the protection of traditional knowledge and cultural expressions can be seen "as part of a development strategy."<sup>175</sup> By facilitating the use and further development of this knowledge and these expressions, the arrangements would also benefit nontraditional communities and the public at large, especially if the protected materials can be clearly identified and such protection would not incur significant transaction costs or result in what Michael Heller and Rebecca Eisenberg have described as the "tragedy of the anti-commons."<sup>176</sup>

To maximize benefits from the arrangement, commentators have advocated the use of property or intellectual property rights. By creating artificial scarcity in the form of limited monopolies, similar to what is offered in the intellectual property system, the exclusive rights model would enable traditional communities to obtain a higher return on the use and exploitation of their cultural materials.<sup>177</sup> As Professor Daes reasoned,

A number of distinctively patterned textiles, such as *ikat* cloth from Sulawesi and Zapotec rugs from Mexico have obtained large markets in industrialized countries. These items can easily be reproduced at lower cost on machines, however, and when produced in large quantities they quickly lose their novelty and commercial value.<sup>178</sup>

Notwithstanding these benefits, commentators have questioned whether

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172. CBD, *supra* note 35, art. 8(j).

173. Article 29bis Proposal, *supra* note 30, ¶ 2.

174. See generally POOR PEOPLE'S KNOWLEDGE, *supra* note 138.

175. SHINYA, *supra* note 130, at 24; accord WIPO, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE 12 (2002), available at [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf) [hereinafter WIPO, IP & TCE] (stating that "some communities wish to gain and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development").

176. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); see also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

177. For discussions of the use of intellectual property rights to protect traditional knowledge and cultural expressions, see generally INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (Silke von Lewinski ed., 2d ed., 2009); Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467 (2003); Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMP. L. 633 (2003); Puri, *supra* note 142.

178. Working Group Study, *supra* note 50, ¶ 61.

such a model would be ideal for the protection of intangible cultural heritage.<sup>179</sup> For example, “indigenous peoples do not view their heritage in terms of property at all . . . but in terms of community and individual responsibility. . . . For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.”<sup>180</sup> Moreover, as Naomi Mezey noted recently,

[C]ultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things. Thus, cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable. They also tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring.<sup>181</sup>

There is also a general “presumption that Western nations prefer private ownership and source nations or indigenous peoples prefer group or common ownership.”<sup>182</sup> However, it is important to remember that not *all* traditional objects are intended to be communal. As Professor Daes pointed out, “[a]lthough heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people’s heritage.”<sup>183</sup> Moreover, as Michael Harkin has shown, the “masks and ceremonial objects of the Kwakiutl, items associated with the potlatch ritual, were not communal but intensely personal, having been created for, and owned by, specific individuals.”<sup>184</sup> Many of the songs and dances associated with this potlatch ritual, indeed, “are under the exclusive possession and control of particular individuals.”<sup>185</sup> Exclusive possession and control can also be found in “some of the songs of the Suyá, or the sacred objects of the Australian Aboriginal people.”<sup>186</sup>

Most recently, Kristen Carpenter, Sonia Katyal, and Angela Riley made a very convincing case that the property model has its merits.<sup>187</sup> As they explained, it is not the property model per se that creates problems for the protection of

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179. For criticisms of the use of a property model for the protection of traditional knowledge, see generally BROWN, *supra* note 126; Mezey, *supra* note 9.

180. *Working Group Study*, *supra* note 50, ¶ 26.

181. Mezey, *supra* note 9, at 2005.

182. Harding, *supra* note 50, at 304.

183. *Working Group Study*, *supra* note 50, ¶ 29.

184. Sarah Harding, *Defining Traditional Knowledge—Lessons from Cultural Property*, 11 CARDOZO J. INT’L & COMP. L. 511, 516 (2003) (citing Michael Harkin, *Privacy, Ownership and the Repatriation of Cultural Properties: An Ethnographic Perspective from the Northwest Coast* 5 (2001) (unpublished manuscript, on file with Sarah Harding)).

185. Harding, *supra* note 50, at 306 (footnote omitted).

186. *Id.* (footnote omitted); see also Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 427–33 (1994) (describing recognition by the Kiowa tribe of “a warrior’s ownership of the story of his deeds, as well as individual ownership of songs, formal names, tipi designs, and beadwork patterns” and explaining how their treatment of these objects differs from that under Western law).

187. See Carpenter et al., *supra* note 131 (advancing stewardship model of reconceiving cultural property).

intangible cultural heritage, but rather the undue focus on ownership and the rights to exclude, develop, and transfer that makes the model undesirable.<sup>188</sup> To remedy this misguided focus, they articulated a new property model that is based on a stewardship paradigm.<sup>189</sup> As they explained, such a model would take account of the indigenous communities' collective obligations toward land and resources.<sup>190</sup>

Their proposed model makes a lot of sense. Stewardship has long been used as a key justification for the protection of intangible cultural heritage.<sup>191</sup> In addition, the property model based on a stewardship paradigm would not necessarily result in exclusion, alienation, and transfer—some of the main concerns of traditional communities. Nevertheless, there may be questions concerning how broadly stewardship should be defined. As Barry Barclay noted,

Each generation has a part in . . . stewardship. Having taken a storyteller position, I could show a great range of people who are involved in this stewardship, from the home gardener, the peasant farmer and the traditional plant breeder to the international policy maker; anybody, in fact, who is involved in the stewardship of the plants humans depend upon for life itself. For my money, that involves, to a greater or lesser extent, each one of us. But while the term 'stewardship' provides a useful context within which to place this or that aspect of our management responsibilities, it does not formally front up on the tough question: who owns the seed? 'A private or public resource?' Pat Mooney asks.<sup>192</sup>

In addition to the use of property rights, benefit sharing can be arranged through the use of knowledge transfer and research collaborative agreements.<sup>193</sup> The innovative approach taken by the Instituto Nacional de Biodiversidad ("INBio") in Costa Rica, for example, provides a leading example of the successful use of these agreements. The agreements allow companies like Merck to collect biological samples in conservatories set up in Costa Rica and conduct research and develop commercial products based on those samples in exchange for advance payment and royalties in those products.<sup>194</sup> To date, INBio has been quite successful. As one commentator noted, it "has signed more than 20 agreements with industry, . . . and the total of the research budgets have come to

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188. *Id.*

189. *Id.*

190. *Id.*

191. See BARRY BARCLAY, *MANA TUTURU: MAORI TREASURES AND INTELLECTUAL PROPERTY RIGHTS* 44–45 (2005).

192. *Id.*

193. For discussion of bioprospecting arrangements with cooperation between the North and the South, see generally Djaja Djendoel Soejarto et al., *Bioprospecting Arrangements: Cooperation Between the North and the South*, in *INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES 1511* (Anatole Krattiger et al. eds., 2007) [hereinafter *INTELLECTUAL PROPERTY MANAGEMENT HANDBOOK*]; Carl-Gustaf Thornström & Lars Björk, *Access and Benefit Sharing: Illustrated Procedures for the Collection and Importation of Biological Materials*, in *INTELLECTUAL PROPERTY MANAGEMENT HANDBOOK*, *supra*, at 1469.

194. See Gámez, *supra* note 42, at 82–83.

represent an investment of US\$0.5 million per year for bioprospecting activities and US\$0.5 million per year for capacity building, technology transfer and institutional empowerment.”<sup>195</sup>

In sum, there are a number of ways to allow traditional communities to share in the benefits of the exploitation of their intangible cultural heritage. Two problems remain, however. First, the establishment of benefit-sharing arrangements assumes that traditional materials can be freely commodified. This is not true with respect to materials that are sacred or intended to be kept secret.<sup>196</sup> Second, and more importantly, there is no guarantee that the proceeds from the benefit-sharing arrangement will go directly to traditional communities. Many less-developed countries remain troubled by rampant corruption and inadequate infrastructure.<sup>197</sup> As a result, the revenues that are generated through the use of intangible cultural heritage may never reach the hands of the traditional communities.

Indeed, commentators have been particularly concerned about the potential claims on revenues by government mediator agencies. As Tom Greaves wrote, “all of the countries with significant indigenous societies have government mediator agencies to deal with them [and serve as the authorized guardians of their welfare]. . . . Would [the earned revenues] by-pass these intermediate organizations?”<sup>198</sup> Likewise, Professor Brown questioned, “Who are legitimate representatives of indigenous peoples in negotiations with foreign bioprospectors? Can the state speak for them, or must they be allowed to speak for themselves?”<sup>199</sup> To avoid diversion, some companies, like Shaman Pharmaceuticals, have chosen “not . . . to return royalties directly to source communities but to a Northern-run NGO that will distribute the proceeds as it sees fit.”<sup>200</sup>

To make things even gloomier and more complicated, there is a historical lack of respect and representation for, and participation of, traditional

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195. *Id.* at 83–84.

196. See *supra* Part II.A for a discussion of cultural privacy.

197. As Professor Heald noted,

The problem with creating markets for knowledge of plant genetic resources is especially acute when corrupt local and national governments are unwilling to facilitate transactions with their least powerful constituents. In the developing world, we see a pattern of dislocation, destruction of homeland, and a preference for logging and commercial farming interests that threaten both biodiversity and the very existence of long-term occupant communities. Governmental antagonism to these communities complicates transactions with them. Even where official policy is benign, institutionalized bribery and the lack of a reliable judiciary make establishing a flourishing market difficult. Bureaucratic impediments to bioprospecting may make it entirely unprofitable.

Heald, *supra* note 124, at 536.

198. Greaves, *supra* note 115, at 12.

199. BROWN, *supra* note 126, at 112.

200. Roht-Arriaza, *supra* note 125, at 961.

communities in the political process.<sup>201</sup> This is true with respect to communities in both the developed and less-developed worlds. As Professor Coombe noted,

Although indigenous peoples are now recognized as key actors in this global dialogue, it will need to be expanded to encompass a wider range of principles and priorities, which will eventually encompass political commitments to indigenous peoples' rights of self-determination. Only when indigenous peoples are full partners in this dialogue, with full juridical standing and only when . . . their cultural world views, customary laws, and ecological practices are recognized as fundamental contributions to resolving local social justice concerns will we be engaged in anything we can genuinely call a dialogue.<sup>202</sup>

Indeed, Keith Aoki reminded us that it is not difficult to "imagine situations where the interests of subnational groups, communities or tribes are at loggerheads with state interests."<sup>203</sup>

Notwithstanding these political challenges, it is important not to overstate the disconnect between national governments and traditional communities. As Paul Kuruk reminded us,

Most Africans belong to tribes and have roots in traditional communities, whether they live in villages or cities. The lowest rural shepherd boy is no more a traditionalist than is the President of the country living in the state capital. Also, tribal groups are as much a part of the national government as any group could possibly be. As such, they are not minority groups fighting for political power. That central governments in Africa are not threatened politically may explain why they have readily acknowledged in legislation the entitlement of traditional groups to their folklore.<sup>204</sup>

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201. See SCAFIDI, *supra* note 70, at 56 (stating that "[b]y nature, cultural products develop through community participation over time" and that "[i]t would be incongruous to recognize as authentic only those frozen at a particular moment").

202. Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 284–85 (2001); accord Greaves, *supra* note 115, at 14 ("In most African states, . . . the larger tribal societies sees [sic] themselves as rightful elements of the nation's government. Owning their cultural knowledge is not the issue, owning a share of the central government is."); see also AOKI, *supra* note 41, at 107 (noting "internal disparities between ruling elites and traditional communities"); Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 488 (1999) (noting that "[t]he most effective way to make use of their traditional ecological knowledge is to recognize the rights of indigenous peoples to govern their own territories").

203. AOKI, *supra* note 41, at 92; accord Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 703 (2008) (noting that "[m]any countries contain minority communities whose interests are not always served by their national governments").

204. 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, 841 (1999); accord Hammer Jensen, *Who Owns Traditional Knowledge? A Personal and Industry View*, in ART AND CULTURAL HERITAGE, *supra* note 42, at 340, 341 (stating that "indigenous peoples are the majority" in most countries).

Benedict Kingsbury also found the concept of “indigenous people” somewhat problematic in Southeast Asia, due partly to its colonial history.<sup>205</sup>

*F. Conservation*

The objective to conserve intangible cultural heritage is quite different from some of the other underlying objectives discussed in this Article. This objective benefits not only traditional communities and less-developed countries, but also nontraditional communities and developed countries. Preservation and conservation, indeed, provide the main objectives of the protection for cultural relics. As Professor Merryman noted,

The essential ingredient of any cultural property policy is that the object itself be physically preserved. The point is too obvious to need elaboration; if it is lost or destroyed, the Etruscan sarcophagus or the Peruvian textile or the Chinese pot cannot be studied, enjoyed, or used. Everything else depends on the physical survival of the cultural artifact itself. Indeed, from a certain point of view the observation is tautological; if we don't care about its preservation, it isn't, for us, a cultural object.<sup>206</sup>

Thus, many consider cultural relics as “survivors.”<sup>207</sup> As such, they “play[] an integral role in characterizing and expressing the shared identity and essence of a community, a people and a nation. Cultural property tells people who they are and where they come from.”<sup>208</sup> Different people have different ways to “live[] their lives and order[] their values. [Because e]very human society manages to place its unique stamp on its artifacts . . . [cultural relics] reveal something essential about itself.”<sup>209</sup>

Like the protection of cultural relics, conservation is a very important objective of the protection for intangible cultural heritage. Unlike the protection of tangible objects, however, the conservation of such heritage focuses mainly on

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205. See Benedict Kingsbury, *The Applicability of the International Legal Concept of “Indigenous Peoples” in Asia*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 336 (Joanne R. Bauer & Daniel A. Bell eds., 1999) (arguing concept of “indigenous peoples” has roots in European colonial settlement and is inapplicable in parts of Asia not exposed to European settlement).

206. Merryman, *supra* note 60, at 355. Likewise, Roger Mastalir wrote,

Preservation is the first principle of protection of cultural property because if cultural property is destroyed the source nations or peoples, as well as the world heritage at large, are divested of valuable objects. Destruction makes any question of allocation moot. Deterioration, vandalism, and accidental damage also diminish the nation's and the world's cultural resources.

Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1045 (1993).

207. Merryman, *supra* note 60, at 347.

208. Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 *TRANSNAT'L LAW.* 235, 241–42 (1996) (footnote omitted).

209. Merryman, *supra* note 60, at 353; see also Harding, *supra* note 184, at 512 (recounting that when Cape Fox Pole was returned to Tlingit people, “a member of the Cape Fox community commented, ‘[t]hese things contain our tribal history, tell us who we really are. These things will make our grandchildren proud of who they are.’”).

the materials—whether they are physical, cultural, biological—as compared to cultures themselves. As Naomi Mezey reminded us, “[w]e humans should save species not because of the interest each species has in its own survival, but for the sake of diversity and the contribution of each species to a diversified global ecosystem.”<sup>210</sup>

Commentators have expressed concern about the ecological impact of increased intellectual property protection. As one commentator noted, one of the key ecological impacts of the TRIPS Agreement is “[t]he spread of monocultures as corporations with IPRs attempt to maximize returns on investments by increasing market shares.”<sup>211</sup> To highlight the danger of a lack of biodiversity, commentators have retold stories about “the Irish potato famine during the 1840s and the Southern Corn Leaf Blight during the 1970s.”<sup>212</sup> Jack Kloppenburg also pointed out that “none of the world’s twenty most important food crops is indigenous to North America or Australia . . . [and that] it is clearly the West Central Asiatic and Latin American regions whose germplasm resources have historically made the largest genetic contribution to feeding the world.”<sup>213</sup>

To date, the less-developed South possesses far richer biodiversity than the developed North. As Chidi Oguamanam observed,

The richness of biodiversity in the tropical South can be captured from few samples. A single leguminous tree in Peru harbours forty-three species of ants, almost the same as the entire ant population in Great Britain. Costa Rica has an estimated fifteen hundred to two thousand butterfly species. Britain has about sixty, even though Costa Rica constitutes less than one-sixth of the British land area. To physical/zoological geographers and conservation biologists, the whole of Europe is but a small fragment compared to Asia in terms of diversity of animal life. All the tree species in North America are equal to just seven hundred species of trees in ten selected one-hectare plots in Borneo. The Cape Florist Peninsula in South Africa, which is only 470 square kilometres in area, is home to over two thousand indigenous species, a greater number than the entire flora species of Eastern North America. A square-kilometre of the forests of Central or South America contains a legendary collection running into hundreds of assorted species.<sup>214</sup>

Sadly, the international system operates in the opposite direction: the wealth of a country is usually inversely proportional to the richness of its biodiversity. Because the market offers limited value to traditional materials and biological resources, the South was unable to convert their biological wealth to

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210. Mezey, *supra* note 9, at 2010.

211. Scott Holwick, Comment, *Developing Nations and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 11 *COLO. J. INT’L ENVTL. L. & POL’Y* (1999 YEARBOOK) 49, 58 (2000).

212. AOKI, *supra* note 41, at 24.

213. JACK RALPH KLOPPENBURG, JR., *FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY*, 1492–2000, at 181 (1988).

214. OGUAMANAM, *supra* note 37, at 39–40 (footnotes omitted).

economic development. To add insult to the injury, the biodiversity-poor countries “are now exporting wheat, corn, and rice to the very nations in which those crops originated”—at high prices at times.<sup>215</sup> In view of this inequitable arrangement, less-developed countries are now demanding reform that reflects their contributions and takes account of their local conditions.<sup>216</sup> They also seek greater financial resources from developed countries to help conserve biological resources.

Fortunately, as Paul Heald suggested, conservation of natural resources may provide common ground for developed and less-developed countries, traditional and nontraditional communities, and corporations and individuals to work together. As he explained, “[p]reservation is in the direct financial interest of some of the most powerful private institutions on the earth—international pharmaceutical, agribusiness and bio-tech firms—and it is worth convincing them to support the effort.”<sup>217</sup> Indeed, conservation would help create “ethnic externalities” that may benefit the entire world—both in the cultural and biological sense.<sup>218</sup>

While conservation benefits all humanity, including both traditional and nontraditional communities, conservation provides additional benefits to traditional communities. In some cases, conservation may even be needed to enable these communities to survive. As the United Kingdom Commission on Intellectual Property Rights (“IPR Commission”) reminded us,

Traditional knowledge has played, and still plays, a vital role in the daily lives of the vast majority of people. Traditional knowledge is essential to the food security and health of millions of people in the developing world. In many countries, traditional medicines provide the only affordable treatment available to poor people. In developing countries, up to 80% of the population depend on traditional medicines to help meet their healthcare needs. In addition, knowledge of the healing properties of plants has been the source of many modern medicines.<sup>219</sup>

According to Professor Coombe, “most of the worlds’ poorest people depend upon their traditional environmental, agricultural, and medicinal knowledge for their continuing survival, given their marginalization from market economies and the inability of markets to meet their basic needs of social reproduction.”<sup>220</sup>

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215. KLOPPENBURG, *supra* note 213, at 274.

216. See Yu, *supra* note 104, at 381–92.

217. Heald, *supra* note 124, at 538.

218. See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 747 (1997) (discussing “ethnic externalities”).

219. COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 73 (2002) (footnote omitted) [hereinafter IPR COMMISSION REPORT]; accord Suagee, *supra* note 202, at 488 (noting that “[b]ecause tribal cultures are rooted in the natural world, protecting the land and its biological communities tends to be a prerequisite for cultural survival”).

220. Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 FLA. J. INT’L L. 115, 115 (2005).

*G. Access*

An objective that is often mentioned along with conservation is access. Access is important to scientific research. The need for access by the scientific and museum communities, however, has created significant tension with the interests of traditional communities. A notable example concerns the discovery of what traditional communities have called the “Ancient One,” but what the popular press and many commentators have dubbed the “Kennewick Man”—a label derived from Kennewick, Washington, the town near which the skeleton was found.<sup>221</sup> As Sarah Harding described,

In the summer of 1996, two men came across the remains of a human skeleton lying in the Columbia River. After a brief investigation, a group of anthropologists made two tentative findings. First, the skeletal remains were that of a Caucasian and could not be assigned to any Native American tribe living in the area. Second, the skeletal remains were approximately 9000 years old. The age and location of the remains led the Army Corps of Engineers to assume they were associated with local Native American tribes and to send out a notice of intent to repatriate the remains in accordance with NAGPRA [Native American Graves Protection and Repatriation Act of 1990]. Numerous tribes in the area subsequently laid claim to the remains, now known as the Kennewick Man, named after the town near where he was discovered. At least two of the tribes claiming the remains, the Umatilla and the Nez Perce, announced that they would not permit scientific research on the remains prior to reburial. Shortly after the publication of the notice of intent and before actual repatriation, a group of scientists filed suit in federal district court claiming, among other things, the right to perform tests on the remains to determine whether the skeleton is Native American within the meaning of NAGPRA. The scientists were subsequently joined in their lawsuit by the Asatru Folk Assembly, a pre-Christian, European religion, which sought custody of the remains on the basis of the alleged European descent of the remains for the purpose of scientific study and reburial in accordance with their religious beliefs.<sup>222</sup>

After eight years, the United States Court of Appeals for the Ninth Circuit finally decided that the approximately 9,000-year-old remains did not fall within the scope of NAGPRA.<sup>223</sup> Because the remains were not culturally affiliated with any legitimate claimant, the court did not order the remains to be repatriated and permitted scientific research on the skeleton.<sup>224</sup>

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221. See Allison M. Dussias, *Kennewick Man, Kinship, and the “Dying Race”: The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 131–33 (2005) (discussing disagreement between indigenous communities and popular press over how to name skeleton). For discussions of the “Ancient One,” or the “Kennewick Man,” see generally *id.*; Gerstenblith, *supra* note 144, at 163–67; S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89 (2006).

222. Harding, *supra* note 50, at 349 (footnotes omitted).

223. *Bonnichsen v. United States*, 367 F.3d 864, 882 (9th Cir. 2004).

224. *Id.* The remains are now deposited at the Burke Museum at the University of Washington.

While scientists and archaeologists tend to place higher values on research and discoveries than cultural privacy and respect,<sup>225</sup> it is hard to ignore the fact that these value-laden decisions tend to privilege the nontraditional worldview over the traditional one. As Rebecca Tsosie pointed out, “The complex world views [to which traditional communities subscribe] . . . encompass radically different notions of life, death, kinship and cultural continuity, and suggest that the scientific proof standard is a complete mismatch for Native American claims to ancient remains. Science is incapable of demonstrating what Kennewick Man’s ‘culture’ was.”<sup>226</sup> It is therefore no surprise that the International Society of Ethnobiology stated as one of its guiding principles that scientists and researchers should have a duty “to ensure that their research and activities have minimum impact on local communities.”<sup>227</sup> After all, the controversy surrounding the Ancient One, or the Kennewick Man, is one “about whether the self-definition of a Native American group should be recognized even when it conflicts with the scientific interests of the dominant cultural and political group in the United States.”<sup>228</sup>

The reburial of human remains of indigenous peoples, indeed, has sparked significant controversies and concerns amongst the indigenous, scientific, and museum communities.<sup>229</sup> It has also raised questions about whether indigenous peoples should be treated differently.<sup>230</sup> With the assistance provided by the NAGPRA,<sup>231</sup> indigenous communities have begun to insist on the return of all

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Burke Museum of Natural History and Culture, University of Washington, Kennewick Man on Trial, <http://www.washington.edu/burkemuseum/kman/> (last visited Apr. 5, 2009).

225. See Neil Brodie, *An Archaeologist’s View of the Trade in Unprovenanced Antiquities*, in ART AND CULTURAL HERITAGE, *supra* note 42, at 52, 52 (stating that “[i]n the past . . . archaeologists have taken a rather proprietorial view of archaeological heritage, believing that their scientific methods and objective research strategies have privileged their claim”).

226. Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 640 (1999). Nevertheless, it is important not to assume all traditional knowledge will be unscientific. As Graham Dutfield explained,

Even if these differentiations were completely reliable, one should not conclude that TK is inherently unscientific. Johnson’s findings confirm that a great deal of traditional environmental knowledge is empirical and systematic, and therefore scientific. Further support for the view that TK is scientific comes from anthropologists and other academics that use the ethnosience approach to studying TK relating to nature, and treat this knowledge as being divisible into western scientific fields.

Dutfield, *supra* note 111, at 500 (footnote omitted).

227. Posey, *supra* note 117, at 214.

228. Gerstenblith, *supra* note 144, at 178.

229. For a provocative account of the effort by a young Inuit man and his tribe to rebury the human remains of his father displayed in the American Museum of Natural History in New York, see KENN HARPER, *GIVE ME MY FATHER’S BODY: THE LIFE OF MINIK THE NEW YORK ESKIMO* (Steerforth Press 2000) (1986).

230. Thanks to Angela Riley for reminding me of this point.

231. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006). The Act “instructs federal agencies and museums receiving federal funds to identify the origin and cultural affiliation of Native American cultural items and then to expeditiously return some of them to culturally-affiliated Indian tribes.” Harding, *supra* note 218, at 723.

the human remains that are still housed in museums or research institutions.<sup>232</sup> As one commentator noted, “[m]ost of the tribes believe that if you rob the dead . . . it disturbs the spirit and visits harm upon not only those who disturbed the grave, but on the relatives of the dead, who allowed that to happen.”<sup>233</sup> Likewise, Professor Harding reminded us that “the Kumeyaay believe that if the remains of an ancestor are disturbed, the spirit returns from the afterworld and remains in pain until the remains are again returned to the earth.”<sup>234</sup> By contrast, many museums believe that the retention of the remains is needed both for research purposes and for meeting their patrons’ general expectation of authenticity.<sup>235</sup> Scientists, understandably, also place high values on research, which they claim will benefit all humanity, including both traditional and nontraditional communities.<sup>236</sup>

Another example that illustrates well the tension between access and control concerns the potentially destructive practices of some traditional communities—such as the Zunis’ treatment of their *Ahayu:da*<sup>237</sup> and the Igbo people’s neglect of their *mbaris*.<sup>238</sup> *Ahayu:da*, the Zuni War Gods, “are carved wooden figures which are left in specific places in the mountains for ritual

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232. See Gerstenblith, *supra* note 144, at 162–63 (recounting Paho Society’s demand for museum’s release of remains of 18,000 Native American skeletons).

233. Vicki Quade, *Who Owns the Past?: How Native American Indian Lawyers Fight for Their Ancestors’ Remains and Memories*, HUM. RTS., Winter 1989–1990, at 24, 29 (quoting Walter Echo-Hawk, an advocate for repatriation).

234. Harding, *supra* note 218, at 765.

235. See Gerstenblith, *supra* note 144, at 162–63 (discussing one museum’s policy behind insistence on retaining real bones rather than their reproductions).

236. See Merryman, *supra* note 60, at 359 (noting that “[t]ruth about the culture is, in its way, as important to humanity as truth of other kinds—as scientific truth, for example”).

237. As one commentator described,

The war gods of the Zuni people, a Native American tribe of the southwestern United States, are carved wooden idols usually two or three feet tall. These *Ahayu:da* (ah-ha-YOO-dah), carved by the tribe’s Bear clan, appear to be simple, rather abstract faces. The objects are rare because the clan only carves two per year. The commercial market for these sculptures sets their value between U.S.\$5,000 and U.S.\$10,000. . . .

. . . The *Ahayu:da* were placed in a shrine where their powers were invoked to protect the tribe. Each *Ahayu:da* serves as guardian for the tribe until relieved by a new one. The older ones must remain in place, contributing their strength until they decay and return to the earth. The war gods are meant to be exposed to the weather so that they can do their work as religious objects. Disintegration under the force of the elements is necessary to their function. Although they can exist as objects, as property, when displayed in a museum, they cannot serve their cultural purpose.

Mastalir, *supra* note 206, at 1038 (footnote omitted). For a discussion of Zuni War Gods and their repatriation, see generally William L. Merrill et al., *The Return of the Ahayu:da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution*, 34 CURRENT ANTHROPOLOGY 523 (1993); William L. Merrill & Richard E. Ahlborn, *Zuni Archangels and Ahayu:da: A Sculpted Chronicle of Power and Identity*, in EXHIBITING DILEMMAS: ISSUES OF REPRESENTATION AT THE SMITHSONIAN 176 (Amy Henderson & Adrienne L. Kaeppler eds., 1997).

238. For a discussion of Igbo *mbaris*, see generally HERBERT M. COLE, MBARI: ART AND LIFE AMONG THE OWERRI IGBO (1982).

purposes.”<sup>239</sup> As Professor Harding noted, “the most respectful treatment [of these War Gods may be] destruction or neglect.”<sup>240</sup> Removing them, therefore, is not only considered theft and sacrilege, but may rob the War Gods of their powers.<sup>241</sup> Putting these statues in a museum also would deeply disturb the Zunis, and perhaps other traditional communities, creating cultural discomfort, psychological distress, and even spiritual harm.<sup>242</sup> As Professor Harding explained,

Violating the wishes and needs of Native American tribes with respect to their cultural property neither helps the non-Indian population understand Indian cultures nor assists in creating a sense of connection. This notion of a common heritage [as embraced by many museums] is at best an amorphous idea and at its worst an excuse to impose a museum-going culture on an often not-so-receptive Indian population. It is more often than not an easy excuse to put our own Western educational, scientific, and artistic demands over and above the interests and integrity of another culture. . . . Our common heritage is, if anything, our ability to appreciate the beauty and integrity of another culture and so it should be with an eye on preserving cultural integrity that we go about understanding and dealing with cultural property.<sup>243</sup>

Equally problematic is the seemingly counterintuitive practice of the Igbo people in Nigeria: they developed artfully created structures but ignored, and sometimes destroyed, them after completing their creations. Many conservationists are likely to find their practice shocking, partly because of the aesthetic appeal of the *mbaris* and partly because of the wasteful nature of the practice. Some well-intentioned ones may even offer to “rescue” and “protect” these *mbaris*—perhaps by relocating them to a museum for public display. However, as Professor Harding explained,

Indigenous peoples . . . tend to place greater emphasis on intangibles and process. . . . The Igbo intentionally destroy or neglect their artfully created structures to ensure the vitality of the urge to recreate: “The purposeful neglect of the painstakingly and devoutly accomplished *mbari* houses with all their art objects in them as soon as the primary mandate of their creation has been served, provides a significant insight into the Igbo aesthetic value as *process* rather than *product*. Process is motion while product is rest. When the product is preserved or venerated, the impulse to repeat the process is compromised.”<sup>244</sup>

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239. Harding, *supra* note 218, at 746 n.118; accord Bauer, *supra* note 203, at 701 (noting that Zuni War Gods “are meant to disintegrate among the elements in order to maintain balance in their lives”).

240. Harding, *supra* note 218, at 771.

241. *Id.* at 746 n.118; see also Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 445 (1986) (stating that “removal of [war god] from its original shrine on the reservation was . . . unauthorized and illegal”).

242. See *supra* Part II.A for a discussion of cultural privacy.

243. Harding, *supra* note 218, at 769.

244. Harding, *supra* note 50, at 309–10 (quoting James Clifford, *Objects and Selves*, in OBJECTS

Indeed, their practice is quite different from the approach taken by nontraditional communities, which have a tendency to collect, or even hoard, cultural objects. As Professor Harding explained further,

Collecting nations choose to reify the objects themselves, placing them in hermetically sealed display cases, whereas in many instances, source nations and indigenous peoples desire to preserve the spirit of the object over the object itself. Often the destruction, neglect, or seclusion of the object is, in fact, central to the preservation of the spirit, as is the case with the *mbari* house of the Igbo and the Zuni War Gods.<sup>245</sup>

Interestingly, such destruction is not limited to traditional communities. For example, as shown in Eastern Europe following the fall of the Berlin Wall and recently in Iraq following the removal of Saddam Hussein, “[t]hose who overthrow regimes often take as one of their first tasks the physical destruction of symbols—and the latent power possessed by these markers—of those whom they have displaced.”<sup>246</sup> As Eric Posner noted, “[o]ne might try to rely on objective aesthetic or scholarly criteria applied by experts, but one could hardly have demanded that Polish or Hungarian citizens not tear down aesthetically valuable statues of communists while permitting them to tear down the aesthetically objectionable statues.”<sup>247</sup> Professor Harding also reminded us that “cultural heritage has great potential as both propaganda and as ‘a hedge against ideological totalitarianism.’”<sup>248</sup>

Outside the cultural property context, one could also find a growing amount of literature discussing the decision by artists to destroy what they have

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AND OTHERS: ESSAYS ON MUSEUMS AND MATERIAL CULTURE 236, 241 (George W. Stocking, Jr. ed., 1985)). Herbert Cole described the *mbari* process as follows:

As a major festival only held at long intervals, *mbari* is capital entertainment for Owerri people. The process is high drama: perhaps ten years of crescendo, a hundred costumed actors, a mysterious setting, an unfolding, developing spectacle. It is a unified theatrical presentation created for three audiences: the gods, the people inside the fence, the community at large. . . . When an *mbari* is opened, it is no longer highly charged with spiritual power: it is now a public monument. The sacrifice has been presented and accepted; since this fundamental purpose has been served, the *mbari* is never repaired. In the old days it was permissible to replace worn-out roofing mats, but never could crumbling, rain-washed figures be repaired or repainted.

COLE, *supra* note 238, at 193, 198. See generally *id.* at 184–98 for a discussion of the *mbari* process.

245. Harding, *supra* note 50, at 312.

246. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 12 (1998).

247. Posner, *supra* note 105, at 222.

248. Harding, *supra* note 50, at 330 (quoting Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 97 (1996)); see also Hamilton, *supra*, at 96–101 (providing examples to illustrate destabilizing potential of art and relationship between art censorship and totalitarian regimes); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 253–57 (1998) (discussing how the commercial media help “undermine authoritarian rule by providing a window to the democratic West and presenting a rosy portrait of life in a more open and materially prosperous society”).

created.<sup>249</sup> In a recent article, Lior Strahilevitz showed that such requests are actually not unusual.<sup>250</sup> As he explained,

A society that does not allow authors to have their draft works destroyed posthumously could have less literary product than a society that requires the preservation of all literary works not destroyed during the author's life. Protecting authors' rights to destroy should encourage high-risk, high-reward projects, and might prevent writers from worrying that they should not commit words to paper unless they have complete visions of the narrative structures for their work.<sup>251</sup>

Likewise, Joseph Sax believes “[a]n artist should be entitled to decide how the world will remember him or her.”<sup>252</sup>

In fact, the right of withdrawal, which allows authors to withdraw their work from public dissemination, and to subsequently destroy it in private, remains one of the more controversial rights within a moral rights regime.<sup>253</sup> As Linda Lacey asked, “Who should prevail, . . . when an artist's will orders the destruction of her paintings and an art expert challenges the will, declaring that the paintings are masterpieces that would become an integral part of the culture of the artist's homeland?”<sup>254</sup> Professor Lacey drew her example from Franz Kafka, who asked his executor and friend, Max Brod, to destroy all of his unpublished works upon his death—including two of his masterpieces that had not yet been published, *The Castle* and *The Trial*.<sup>255</sup> Fortunately, “Brod did not do so, thus preserving for the public work which is widely acknowledged as being highly influential in modern Western literature.”<sup>256</sup>

Finally, commentators have expressed concern that greater protection—in the form of property rights perhaps—would reduce access to traditional materials. Such concerns are unlikely to be justified, except in cases where the protective regime includes *in situ* protection that restricts access of the communities to a plant or a site. As Dennis Karjala noted,

The patent may . . . mean that the price everywhere is higher than it would be were the product available without patent protection. It remains a fair question, however, whether the improved product would exist at all but for the patent incentive. We must bear in mind that no one is forced to buy the new product. *Everyone is free to continue using*

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249. See, e.g., JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 198–201 (1999) (discussing decision by creators to destroy own works); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 830–35 (2005) (elaborating on justifications for rights of authors to destroy own works).

250. See Strahilevitz, *supra* note 249, at 831 (discussing famous examples of authors' desire to destroy their works).

251. *Id.* at 832.

252. SAX, *supra* note 249, at 200.

253. The Berne Convention, for example, does not protect the right of withdrawal. It includes only two moral rights: the right of attribution and the right of integrity. Berne Convention, *supra* note 84, art. 6*bis*(1).

254. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1593–94.

255. *Id.* at 1594 n.263; Strahilevitz, *supra* note 249, at 830–31.

256. Lacey, *supra* note 254, at 1594 n.263.

*whatever he or she has used in the past.* Those who do choose to buy patented seed, for example, presumably believe that the higher seed cost is more than compensated by the beneficial improvements brought about by the newer product.<sup>257</sup>

Although Professor Karjala focused on patents, his arguments apply equally well to other forms of intellectual property or sui generis rights. As he concluded, “[T]he harmful influences of western life style for indigenous cultures are serious and real. Unfortunately, they will not be ameliorated by what would inevitably be minor adjustments to patent law in western countries or in locales of traditional cultures.”<sup>258</sup>

Theory, however, sometimes differs from practice. For example, the issued patents and plant variety protection certificates may be overbroad and therefore may cover traditional knowledge that should be considered unprotectable prior art. In the United States and other developed countries, for example, there have been wide and intense discussions about the poor quality of the patent examination process.<sup>259</sup> There have also been successful challenges by traditional communities and indigenous groups to patents that have been wrongfully issued to preexisting traditional knowledge.<sup>260</sup> Indeed, because of a lack of documentation for traditional knowledge and the difficulty in determining whether an invention has used such pre-existing knowledge, commentators have proposed to introduce a disclosure requirement in the patent application procedure.<sup>261</sup>

By expanding rights and protecting them aggressively, the intellectual property system sometimes may also lead to unintended consequences that can affect the ability by traditional communities to exploit their knowledge and practices. For example, commentators have noted the confusion among United States customs officials over whether it is legal for Mexican farmers to import into the United States naturally grown yellow beans that have been native to Mexico since perhaps the time of the Aztecs.<sup>262</sup> Such confusion, which has resulted in significantly reduced bean exports from Mexico to the United

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257. Dennis S. Karjala, *Biotechnology Patents and Indigenous Peoples*, in INTELLECTUAL PROPERTY MANAGEMENT HANDBOOK, *supra* note 193, at 1437, 1440 (emphasis added).

258. *Id.* at 1442.

259. For discussions of the problems within the United States patent system, see generally A PATENT SYSTEM FOR THE 21ST CENTURY (Stephen A. Merrill et al. eds., 2004); FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT (2004).

260. See IPR COMMISSION REPORT, *supra* note 219, at 75–79 (discussing controversial patent cases involving traditional knowledge and genetic resources).

261. See *supra* notes 145–54 for a discussion of the proposal to introduce a disclosure requirement.

262. See Finger, *supra* note 138, at 23–24. See generally Gillian N. Rattray, *The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips*, 2002 DUKE L. & TECH. REV. 0008 (discussing Enola bean controversy).

States,<sup>263</sup> was caused by the issuance of a patent and plant variety protection certificate to the Enola variety of yellow beans that originated from Mexico.<sup>264</sup>

To be certain, it is difficult to distinguish between the patented beans and the naturally grown variety, and it is also worth pointing out that the patent in the Enola beans has since been revoked.<sup>265</sup> Thus, technically, it is not the protective regime per se that caused the problem, but rather the failed or improper implementation of that regime. However, from the standpoint of traditional communities, this type of situation would not have occurred had intellectual property rights not been aggressively protected in the first place. To them, the abuse was an inevitable result of the continuous and ill-advised expansion and overzealous enforcement of intellectual property rights.

#### H. Resistance

Commentators have widely documented the growing problems of biopiracy<sup>266</sup> and the continuous push for stronger intellectual property protection, which ranges from heightened protection through the TRIPS Agreement to additional safeguards through the recently established bilateral and regional agreements.<sup>267</sup> As a result, traditional communities and less-developed countries are eager to use the protection of intangible cultural heritage to fight back. As Professor Taubman noted, “in practice, the impulse towards strengthened protection of TK originates from a sense that IP rights have been used to misappropriate material that might otherwise have fallen into the public domain.”<sup>268</sup>

Although traditional communities and less-developed countries understand the need to reduce biopiracy and the continued pressure to expand intellectual property rights, some of them may not have any overarching objectives other than to resist the continuing push for stronger protection by nontraditional communities and developed countries. As Professor Harding observed, “at least one individual has expressed a sentiment about repatriation that is likely

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263. Rattray, *supra* note 262.

264. U.S. Patent No. 5,894,079 (filed Nov. 15, 1996).

265. The U.S. Patent & Trademark Office struck down the Enola bean patent on April 29, 2008. Press Release, ETC Group, Hollow Victory: Enola Bean Patent Smashed at Last (Maybe) (Apr. 29, 2008), available at [http://www.etcgroup.org/en/materials/publications.html?pub\\_id=683](http://www.etcgroup.org/en/materials/publications.html?pub_id=683).

266. For discussions of biopiracy, see generally VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (1997); IKECHI MGBEOJI, *GLOBAL BIOPIRACY: PATENTS, PLANTS AND INDIGENOUS KNOWLEDGE* (2006); Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 *IND. J. GLOBAL LEGAL STUD.* 11 (1998); Peter Drahos, *Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?*, 2000 *EUR. INTELL. PROP. REV.* 245 (2000); Heald, *supra* note 124; Ikechi Mgbeoji, *Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?*, 9 *IND. J. GLOBAL LEGAL STUD.* 163 (2001); Roht-Arriaza, *supra* note 125.

267. For a discussion of the continuous push for stronger intellectual property protection through the TRIPS Agreement and TRIPS-plus regional and bilateral trade and investment agreements, see generally Peter K. Yu, *The International Enclosure Movement*, 82 *IND. L.J.* 827 (2007).

268. Taubman, *supra* note 170, at 543.

common among Native Americans: ‘Our dream is to pull a U-Haul up and take back as much as we can.’”<sup>269</sup> This comment captures very well the fight-back mentality of many traditional communities and less-developed countries. To them, the new framework for the protection of intangible cultural heritage is not just a shield to protect themselves, but also a sword to enable them to recapture what they have lost under the current unfair system.<sup>270</sup>

To be certain, the wide use of resistance is likely to stifle international cooperation and result in greater isolation. However, it is understandable why these communities want to fight back through resistance—as compared to, say, cooperation. There has been growing mistrust between developed and less-developed countries as well as between traditional and nontraditional communities about the willingness and ability of the current legal regime to protect intangible cultural heritage.<sup>271</sup>

Moreover, the push for stronger protection for intangible cultural heritage would provide the needed “bargaining chips” to ward off the push by developed countries for stronger intellectual property protection. As Robert Sherwood recounted his exchange with a Brazilian diplomat,

I recall the diplomat in Buenos Aires who said in a public forum that Argentina must withhold the intellectual property chip because Argentina has few others to play into the international trade negotiations game. He speaks for many other developing country trade negotiators. I later suggested to him, privately, that more might be achieved for the Argentine trade account if robust intellectual property were installed immediately. The result could well be that more Argentine producers and farmers would upgrade their products, crops and animals and become more competitive internationally. Instead, if they wait for eventual trade negotiation success, they might lower a European tariff a few notches, if that, but the gain would be narrow and selective, rather than sweeping across the industrial and agricultural sectors of the economy. He readily agreed, but insisted that the chip must be withheld to give his country something with which to bargain.<sup>272</sup>

This encounter shows that less-developed countries may not necessarily want to request protection in those areas, but they choose to do so because they fear that they would not have any bargaining chips left for future negotiations. The same can be said of traditional communities. Like many less-developed countries, these communities remain frustrated by the existing system, and some of them have become increasingly desperate. As Suzan Harjo, the former head

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269. Harding, *supra* note 184, at 515 (quoting David Whitney, *Old Photographs Were Key to Return*, <http://www.tlingithaida.org/what'shap/objects.html> (July 19, 2000)).

270. See WIPO, IP & TCE, *supra* note 175, at 13 (discussing “positive and defensive strategies”); Dutfield, *supra* note 111, at 496 (discussing “positive protection” and “defensive protection” of traditional knowledge).

271. See generally Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006).

272. Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L & COMP. L. 37, 39 (2002).

of the National Congress of American Indians, put it poignantly, “[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There’s little left that’s tangible. Now they’re taking what’s intangible.”<sup>273</sup>

### I. Summary

In sum, the stakeholders in the intangible cultural heritage debate want to achieve many different objectives and have since advanced a rich variety of proposals. An understanding of these objectives and proposals would certainly help us better appreciate the stakes involved in the debate. Such an understanding would provide important clues as to how to design the new framework to protect the relevant stakeholders. It would also provide more information about the competing interests within traditional communities and the potential challenges for achieving international consensus on the protection of intangible cultural heritage.

Most of the objectives and proposals discussed in this Article are not mutually exclusive, and advocates of strong protection for intangible cultural heritage often combine different objectives to craft their proposals. However, some of these objectives may overlap or conflict with each other, while the others may affect only a minority of the stakeholders. Understanding these objectives, therefore, would serve a third purpose: it helps us anticipate the political dynamics of future negotiations in the area.

In the near future, achieving consensus is likely to remain a challenge. If the framework is defined too narrowly, focusing exclusively on selected objectives, the framework is unlikely to have enough buy-in from the stakeholders. This is not uncommon in conventions that seek to protect cultural heritage: one only has to consider the membership of the 1970 UNESCO Convention, which is made up of mostly source nations.<sup>274</sup> However, if the framework is defined broadly to incorporate all the different objectives, or at least most of them, its vague, aspirational, and all-encompassing language may ultimately reduce the framework’s effectiveness.<sup>275</sup> The limits of the 2005 UNESCO Convention may provide a good warning signal.

It took more than thirteen years to finalize the Declaration on the Rights of Indigenous Peoples. Similarly, despite meeting for more than eight years, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has yet to offer any concrete treaty proposal or major declaration.<sup>276</sup> It is, therefore, likely to take some time

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273. Farley, *supra* note 122, at 12 (internal quotation marks omitted) (quoting Leslie Sowers, *Going Native/Just a Trend, Heartfelt Seeking—or Cultural Theft?*, HOUSTON CHRON., Sept. 12, 1993, at 1).

274. See Dutra, *supra* note 98, at 77 (stating few market nations signed 1970 UNESCO Convention while most source nations became signatories).

275. See Mezey, *supra* note 9, at 2013 (noting that 2005 UNESCO Convention is more “aspirational . . . than obligatory”).

276. See Kaitlin Mara, *No Agreement for WIPO Committee on Traditional Knowledge and*

before this new framework can offer concrete protection to intangible cultural heritage. The issues may also become more interesting and complex as new players emerge and as new issues arise.

### III. IMPLEMENTATION CHALLENGES

While traditional communities push for stronger protection of intangible cultural heritage to achieve different objectives, many challenges remain at the implementation stage after an international framework has been built. This Part focuses on four of these challenges: (1) the mode of protection, (2) the power to define, (3) the means of identification, and (4) the justifiability of international intervention.

#### A. *Mode of Protection*

As Part I has shown, the model for protecting intangible cultural heritage can be very different depending on whether such protection is analogized to that of cultural relics or intellectual property. In fact, the definition of intangible cultural heritage is so broad that many different bodies of law can be applied to the protection of such heritage. For example, intangible cultural heritage can be protected through laws developed in the areas of intellectual property, moral rights, environmental protection, biological diversity, historic preservation, food production, human rights, international trade, export control, and tourism. They can also be protected through the use of customary or tribal law.<sup>277</sup> In addition,

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*Folklore*, INTELLECTUAL PROPERTY WATCH, Oct. 18, 2008, available at <http://www.ip-watch.org/weblog/2008/10/18/no-agreement-for-wipo-committee-on-traditional-knowledge-and-folklore/> (noting the deadlock in WIPO negotiations on international protection of traditional knowledge and folklore). See generally Arezzo, *supra* note 27, at 393–98 (discussing developments in WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore). Nonetheless, the Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore include provisions on objectives, general guiding principles, and substantive provisions. See generally *Excerpts from Documents of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS, *supra* note 24, at 303.

277. See, e.g., SHINYA, *supra* note 130, at 34 (discussing use of customary protocols to protect traditional cultural expressions); Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67, 80–86 (2007) (discussing effectiveness of customary law as mechanism to protect traditional and indigenous knowledge); Riley, *supra* note 113, at 161 (emphasizing importance of drawing on sui generis tribal law systems in developing protection for cultural resources and traditional knowledge); Meghana RaoRane, Comment, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L. & POL'Y J. 827 (2006) (arguing that use of indigenous customary laws of the communities seeking protection would be more effective in protecting traditional cultural expressions than introduction of intellectual property rights and sui generis protection). As Professor Riley maintained,

[I]ndigenous groups must organize and to some extent, formalize, tribal laws governing the protection, maintenance, ownership, control, and alienability of their cultural property. Tribes themselves must decide whether laws should be written or transmitted orally, whether they should be fixed and certain, or flexible and accommodating. The codes can and should be established in accordance with the tribes' traditional and customary law and governing

such protection can take the form of governance treaties, mutual recognition agreements,<sup>278</sup> trust funds,<sup>279</sup> levies,<sup>280</sup> private contracts (including knowledge transfer and research collaborative agreements),<sup>281</sup> voluntary guidelines or codes of conduct,<sup>282</sup> and the development of cooperative partnerships<sup>283</sup> and collective societies.<sup>284</sup>

At the international level, the protection becomes even more complicated. Because of the growing complexity, incoherence, and fragmentation of international law,<sup>285</sup> there may not be a clear-cut determination as to which

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principles. For tribes that are firmly rooted in a history of oral tradition, a system of written laws may seem awkward. Tribes may find, however, that they can extend their legitimacy through articulation and application of laws that reflect tribal custom, and are recorded for future use. Regardless whether a particular tribe decides to codify customary law in written form, simply clarifying and, if necessary, re-establishing customary law will reinforce tribal practices of maintaining, sharing, and controlling traditional knowledge.

Riley, *supra* note 113, at 161–62 (footnote omitted).

278. See generally Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629 (2007).

279. See 2005 UNESCO Convention, *supra* note 3, art. 18(1) (establishing International Fund for Cultural Diversity); 2003 UNESCO Convention, *supra* note 1, arts. 25–28 (stipulating provisions for development of Fund for the Safeguarding of the Intangible Cultural Heritage); DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 137 (1996) (discussing Fund for Farmers' Rights). As Erin Slattery described,

Japan implemented a program called the Trust Fund for the Preservation and Promotion of Intangible Cultural Heritage in 1993 to document, study, and preserve intangible cultural heritage. Thus far, Japan has contributed millions of dollars to [sic] “to preserve and promote outstanding intangible cultural heritage, such as traditional performing arts like dances and music, traditional crafts like ceramics, lacquer ware, and dyeing and weaving and oral heritage, mainly in the Asian region.”

Slattery, *supra* note 67, at 252 (footnote omitted) (quoting Ministry of Foreign Affairs of Japan, UNESCO Japanese Trust Fund for Preservation and Promotion of Intangible Cultural Heritage, [http://www.mofa.go.jp/policy/culture/heritage/coop/fund\\_p.html](http://www.mofa.go.jp/policy/culture/heritage/coop/fund_p.html)).

280. See PARRY, *supra* note 33, at 261–62 (advancing proposal for levies on commercial products that are based on collected natural materials and on users of genetic-sequence databases and indigenous-knowledge databases).

281. See Gámez, *supra* note 42, at 82–83 (discussing criteria and terms of research collaborative agreements used by Instituto Nacional de Biodiversidad in Costa Rica).

282. See Dutfield, *supra* note 111, at 531 (discussing “ethical guidelines or standards, under which an industry or researcher may be ethically bound to follow or respect the customary laws of the source community”); Gerstenblith, *supra* note 102, at 189–92 (discussing “increasing regulation through voluntary self-regulation”).

283. See generally Barbara T. Hoffman, *Partnership Paradigms Combining Microbial Discovery with Preservation of Tropical Biodiversity and Sustainable Development*, in *ART AND CULTURAL HERITAGE*, *supra* note 42, at 448 (discussing use of cooperative partnerships).

284. See Drahos, *supra* note 266 (discussing the development of “global biocollecting society”).

285. See CHRISTOPHER MAY, *THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA* 66 (2007) (advancing concept of forum proliferation); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596–600 (2007) (discussing growing “proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous

international regime would provide the primary protection for intangible cultural heritage. As I wrote in the introduction to a 2002 traditional knowledge conference, “[g]iven the diverse array of issues involved in the protection of folklore, traditional knowledge, and indigenous practices, it would be very unlikely that a single international intergovernmental organization can shape, or even dominate, the discussions.”<sup>286</sup> The IPR Commission supported this assertion in its final report:

It is essential that all of the agencies considering the issue work together to avoid unnecessary duplication and to ensure that the debate includes as many different views as possible. . . . We believe . . . that no single body is likely to have the capacity, expertise or resources to handle all aspects of traditional knowledge. Indeed it is our view that a multiplicity of measures, only some of them IP-related, will be necessary to protect, preserve and promote traditional knowledge.<sup>287</sup>

Even after a state has decided what type of laws to use to protect intangible cultural heritage, there remain difficult questions concerning the mode of such protection. There is a tendency for policymakers to rely on the property model when new protection is needed. There is real property, personal property, intellectual property, and, of course, cultural property.<sup>288</sup> Given the fact that the property model has been used as the basis for the protection of both cultural relics and intellectual property, it would be no surprise if policymakers and commentators focus on the property aspects of the protection for intangible cultural heritage.<sup>289</sup>

Nevertheless, some other models exist and may better promote the different objectives in the new framework. Jerome Reichman and Tracy Lewis, for example, have championed the use of liability rules to provide protection for traditional knowledge.<sup>290</sup> One can also explore the use of certification marks and geographical indications, rewards that are based on stewardship and local innovation, moral rights-type protection, and open source and collaborative models.<sup>291</sup> In light of the existence of these many possible models, it would be ill

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boundaries”); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 13–21 (discussing development of “international intellectual property regime complex”). For a collection of articles discussing the interactions between different international regimes and the overlapping protection they offer, see generally Symposium, *The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1.

286. Yu, *supra* note 23, at 242–43.

287. IPR COMMISSION REPORT, *supra* note 219, at 78 (footnote omitted).

288. E.g., Harding, *supra* note 50, at 303–04; Steven Wilf, *What Is Property’s Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT’L L. 177, 177 (2001).

289. Compare Harding, *supra* note 50, at 303–04 (noting tendency to classify cultural materials as separate types of property), with Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 1–6 (discussing use of intellectual property label and warning against treating intellectual property as property).

290. Reichman, *supra* note 158, at 1777; Reichman & Lewis, *supra* note 162, at 365–66.

291. See Arezzo, *supra* note 27, at 410–12 (discussing use of open source and collaborative models in relation to protection of traditional knowledge). As Emanuela Arezzo noted, “[t]he

advised to extend the current cultural property or intellectual property model to intangible cultural heritage without seriously exploring the strength and weakness of each model and the differences between the protection of cultural relics and that of intellectual property.<sup>292</sup>

Moreover, it is important to remember that the legal approach is not the only approach that can be used to protect intangible cultural heritage or resolve disputes in this area. Nonlegal techniques, like negotiation and the use of technology, sometimes may help. Consider, for example, the filming of the fictitious Mount Doom in the *Lord of the Rings* trilogy. The movies were shot in New Zealand, and Mount Ruapehu on central North Island was selected as the site for Mount Doom. Unfortunately, as Mark Perry explained,

[T]his particular mountain is one of a range with special significance for Maori. Now in Tongariro National Park, the central volcanoes were given to the Crown by Te Heuheu Tukino, Chief of the Ngati Tuwharetoa, who was concerned that the sacred mountains would fall into the hands of developers. The image of Ruapehu, particularly the peak, is treated as *tapu*, or sacred, by some Maori to this day. The Maori of the area were uncomfortable with a movie using the image of the mountain as Mount Doom in the *Lord of the Rings*.<sup>293</sup>

Some Maoris even “do not look at its peak and consider drawing or photographing it offensive.”<sup>294</sup>

To avoid a potential conflict, director Peter Jackson could have taken the legal route to resolve the dispute by obtaining permission, which likely would have been very hard to get considering the volcano’s sacredness. He and his studio could have also prepared for a potential legal battle, which might have included a decent monetary settlement and protracted negotiations. Jackson chose neither. Taking into account the Maoris’ cultural sensitivities, Jackson struck an innovative compromise by “agree[ing] to film the mountain from a nearby ski area and to use digital effects to make it unrecognizable. The resulting fiery, lava-covered slopes conceal the real appearance of Ruapehu while meeting the creative needs of the project.”<sup>295</sup> Such a technology-oriented approach not only responded to most of the Maoris’ concerns, but also benefited the movie producers and the theater-going public.

### B. Power to Define

Once the framework is built, there are additional considerations about what type of materials should be covered in the protective regime. Although who

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collective and cumulative model of [traditional knowledge] creation resembles, even more closely, the viral effect underlying open source software.” *Id.* at 410 (emphasis omitted).

292. See Yu, *supra* note 267, at 899–900 (noting need to explore whether there is alternative strategy less restrictive to country’s social, economic, cultural, and developmental goals).

293. Mark Perry, *Digital Propertization of the New Artifacts: The Application of Technologies for “Soft” Representations of the Physical and Metaphysical*, 11 CARDOZO J. INT’L & COMP. L. 671, 699–700 (2003) (footnotes omitted).

294. SCAFIDI, *supra* note 70, at 124.

295. *Id.*

should have the power to make these decisions was once hotly contested, the prevailing view is that traditional communities should determine for themselves.<sup>296</sup> As Professor Riley declared, “[f]or a tribe, determining the destiny of collective property, particularly that which is sacred and intended solely for use and practice within the collective, is a crucial element of self-determination.”<sup>297</sup> Likewise, Professor Daes noted,

Indigenous peoples have always had their own laws and procedures for protecting their heritage and for determining when and with whom their heritage can be shared. The rules can be complex and they vary greatly among different indigenous peoples. To describe these rules thoroughly would be an almost impossible task; in any case, each indigenous people must remain free to interpret its own system of laws, as it understands them.<sup>298</sup>

Because self-determination remains one of the major barriers to the successful protection of traditional communities, it is fair to say that self-determination by traditional communities is a prerequisite to the successful implementation of this new framework.

Unfortunately, respect for self-determination only removes part of the barrier, though a major one. Even if traditional communities possess the power to determine for themselves what should be protected and how the materials should be protected, there remain many difficult situations when more than one community is involved. For example, who should decide when two communities have competing claims over the materials? Should one community be allowed to decide over the other? If so, would the other community be able to claim prior users’ rights?<sup>299</sup>

This type of situation is actually not uncommon. There is a tendency to assume that all traditional communities speak with a singular voice, but this is far from the truth. As Professor Riley observed,

[A]lthough many indigenous creations follow the pattern of oral, inter-generational works, this is not the only model. Many tribes may, in fact, recognize property interests that are considered to be more reflective of a “Western” view than an “indigenous one.” The ways in which indigenous peoples characterize and define property are as

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296. As Sarah Harding declared,

If there is a current winner in this debate, at least in print if not in practice, it appears to be the nationalists. An increasing number of scholars and official documents, both international and domestic, take the view that the disposition of cultural heritage should be determined exclusively by source nations or culturally-affiliated groups. As a consequence, we increasingly view cultural heritage as an issue of cultural, ethnic, or in some cases minority rights, and as one of the keys to cultural preservation and self-determination.

Harding, *supra* note 50, at 301 (footnotes omitted).

297. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *CARDOZO ARTS & ENT. L.J.* 175, 204–05 (2000).

298. *Working Group Study*, *supra* note 50, ¶ 27.

299. See Roht-Arriaza, *supra* note 125, at 957 (suggesting community that “ha[s] long used the process or product at issue” may be considered recipient for rights); Taubman, *supra* note 170, at 545 (providing for an exception “for the continuation of *bona fide* prior use”).

varied as the peoples themselves, and Westerners must resist the urge to narrow and define the “indigenous perspective.”<sup>300</sup>

In fact, “a source community may include dissenting voices, and a grant of legal protection to those who speak on behalf of the community may silence those voices—always an issue when rights are vested in a group rather than an individual.”<sup>301</sup>

Moreover, as far as intangible cultural heritage is concerned, “more than one community makes similar use of the same resources, sometimes even using the same processes.”<sup>302</sup> There have been disputes among indigenous communities over lineage and heritage. For example, conflict arose in 1999 “when the National Park Service concluded that Navajos have a legitimate ‘cultural affiliation’ with the Anasazi culture of Chaco Canyon National Monument in northwestern New Mexico.”<sup>303</sup> As Professor Brown explained,

The Anasazi—a name now rejected by Pueblo tribes in favor of “Ancestral Puebloans”—constructed magnificent cliff dwellings and multi-storied stone structures that draw thousands of tourists to Chaco Canyon, Mesa Verde, and other national parks in the Southwest. Ancestral Puebloans are said to have vanished in the thirteenth century A.D., but the preponderance of scientific evidence, which in this case generally agrees with Pueblo oral history, supports the view that the cliff dwellers scattered throughout the region to found the communities today identified as Pueblo. Contemporary Pueblo people react to the assertion that Navajos have a “cultural affiliation” with the Anasazi about the same way the Irish would respond to an English claim of affiliation with pre-sixteenth-century cultural remains in Ireland.<sup>304</sup>

There have also been disputes over the origin of practices and beliefs as well as to whom the sacred places belong. The Hopis, for example, have “publicly complained about non-Hopi (especially Navajo) artists creating what is otherwise traditionally Hopi art as well as such commercial ventures as a liquor company decanter in the form of a kachina and a comic book featuring kachina characters.”<sup>305</sup> As an employee of the Hopi Cultural Preservation Office complained,

[t]he Navajos are taking Hopi qualities, saying that they came into the fourth world and that they have four sacred colors for the directions. But those ideas came from us. Now they are involved in eagle gathering, which is a Hopi practice. We Hopis don’t talk first in public

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300. Riley, *supra* note 113, at 161 (footnote omitted).

301. SCAFIDI, *supra* note 70, at xii.

302. Roht-Arriaza, *supra* note 125, at 957.

303. BROWN, *supra* note 126, at 20.

304. *Id.*

305. James D. Nason, *Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 237, 248 (Bruce Ziff & Pratima V. Rao eds., 1997).

gatherings anymore. Now we're afraid that if we say something, the Navajos will say that it's theirs too.<sup>306</sup>

Indeed, the rivalries between different traditional and indigenous communities have at times extended to how traditional objects are to be handled in museums. As Professor Brown observed, “representatives of some Aboriginal groups have aimed their most vigorous complaints at museums that allow ritual objects to be seen by Aboriginal people belonging to different societies or clans. In these cases, they prefer that the materials be handled by non-Aboriginal staff.”<sup>307</sup>

To complicate things, the two communities in this rather simple hypothetical may be making competing claims over something that was created by or derived from a third community, which has yet to be identified, no longer exists, or chooses to stay neutral.<sup>308</sup> To take one recent example, regarding ownership of a sacred bundle held by the American Museum of Natural History, “Montana, Saskatchewan, and Manitoba Crees are all independently claiming ownership as is the adopted great-great-grandson of Plains Cree Chief Big Bear. Determining who owned the bundle after Big Bear’s death, and thus whether the transfer was legitimate, will not be an easy task.”<sup>309</sup> In those cases, our understanding of concurrent ownership, joint authorship, and derivative works may shed some light on how to resolve the dispute.<sup>310</sup> However, problems remain if the original community has yet to be identified, no longer exists, or chooses to stay out of the dispute, for whatever reasons. To some extent, these problems are similar to those confronting Peru in *Peru v. Johnson*.<sup>311</sup> In that case, the court rejected Peru’s claims based on the fact that the contested artifacts could also be identified with those found in Bolivia or Ecuador.<sup>312</sup> To remedy these problems, commentators have advocated the establishment of “international cultural property trusts” to enable countries to share responsibility for and benefits of their shared cultural heritage.<sup>313</sup>

If the hypothetical is not challenging enough, there might also be “family feuds” within the community—for example, when the youngsters disagreed with their elders.<sup>314</sup> (The reverse situation—where the elders disagreed with the

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306. BROWN, *supra* note 126, at 19 (internal quotation marks omitted).

307. *Id.* at 32.

308. See Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 CHI. J. INT’L L. 197, 198 (2007) (noting “the need for a unified claim in American courts by modern states that share ancient cultural boundaries”).

309. Harding, *supra* note 218, at 724 (footnote omitted).

310. See SCAFIDI, *supra* note 70, at 161–62 (discussing concurrent ownership of property). The concept of joint authorship, nevertheless, presents some problems. As Silke von Lewinski stated, “[b]ecause of the lack of individual authorship in expressions of folklore, applying the concept of co-authorship does not remedy the situation, because co-authors are still individual authors who have decided to create a work together and according to a common plan.” Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT’L & COMP. L. 747, 758 (2003).

311. 720 F. Supp. 810 (C.D. Cal. 1989), *aff’d*, 933 F.2d 1013 (9th Cir. 1991).

312. *Johnson*, 720 F. Supp. at 812.

313. Forsyth, *supra* note 308, at 202.

314. See Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J.

youngsters—happens often and is generally not as important, because tribal law tends to grant decision-making power to the elders).<sup>315</sup> There could also be internal disagreement within a community, in which the majority prevails over the minority. While it is important to let the community decide for themselves, the decisions they make—such as the controversial decision by the Cherokee Nation of Oklahoma to strip the Freedmen of tribal membership<sup>316</sup> or a seemingly backward cultural choice of banning the written word<sup>317</sup>—may not always be satisfactory or popular. Nevertheless, as many in those communities would argue, regardless of how unsatisfactory the decisions may be, they would still be better than abrogation of their sovereignty.

Notwithstanding the importance of self-determination in this situation, it is hard to ignore the important countervailing interests of the departing group—either because they do not have the numbers to prevail in a majority contest or because they have chosen to leave. To some extent, this minority group—either as prior users or continuing innovators—deserves some form of protection.<sup>318</sup> If they continue to maintain a traditional lifestyle, the use of traditional materials is likely to remain important to them. Moreover, the heritage of the original group will always remain part of their cultural heritage. Just because they are no longer in the group does not mean that they should also give up their heritage.

Most bizarre of all, there may be questions about whether protection should be given to a community that no longer creates or manufactures the traditional products they are now selling. When Professor Farley wrote her pioneering article on the protection of folklore of indigenous peoples more than a decade ago, she asked, “What can the Navajos do to prevent non-Navajos from using Navajo rug patterns to produce rugs overseas using cheap materials and labor, thereby undercutting the Navajos themselves in a market for their famous rugs?”<sup>319</sup> While this question remains important, things have changed somewhat as a result of rapid globalization.

Today, the manufacture of *some* traditional products has been outsourced abroad—to countries like China, India, Vietnam, and other parts of Southeast Asia, where the production costs are low and the weaving skills are high. People both within and outside the traditional communities sometimes jointly manufacture some of these products. In those situations, one has to wonder whether and how much protection should still be extended to the community. As

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INT’L & COMP. L. 711, 739–40 (2003) (explaining, in case of Australian \$10 bank note that reproduced Aboriginal artist’s design, that some decisions can only be made by the elders).

315. As Chidi Oguamanam noted, “[i]n most of Africa, [for example] old age is a synonym for wisdom, an indication of deep spirituality and closeness to the ancestors.” OGUAMANAM, *supra* note 37, at 128.

316. See Matthew L.M. Fletcher, *On Black Freedmen* (MSU Legal Stud. Working Paper Group, Paper No. 05-08, 2007), available at <http://ssrn.com/abstract=1015282>.

317. Cf. SCAFIDI, *supra* note 70, at 32 (emphasizing European choice for written word as “cultural choice”).

318. See Taubman, *supra* note 170, at 545 (providing for an exception “for the continuation of *bona fide* prior use”).

319. Farley, *supra* note 122, at 1.

the author of a Department of Canadian Heritage study asked, “If the creation of the sculpture also involved artisans from outside the community, would the use of these artisans invalidate the sculpture as a legitimate work originating from a particular individual, family, clan, association or community?”<sup>320</sup>

A work-based protective model seems to suggest that the community should continue to obtain protection in both situations. However, a location-based model, such as geographical indications or appellations of origin, seems to suggest otherwise. Ultimately, the answer to this question depends on whether the system seeks to protect the community or the traditional craft. If the former, it is important to enable the community to make the products however they want and as efficiently as they can, not to mention the importance of tribal sovereignty and the community’s right to self-determination. If the latter, however, the decision to outsource the manufacturing process may invalidate their products for tradition-based protection.

In a recent work, Professor Sunder asked a similar question with respect to the protection traditional weavers from Mysore receive through geographical indications. As she observed, “Mysore silk *sarees* . . . ha[ve] had a makeover since obtaining a geographical indication, updating [their] look with trendy new (but interestingly, *natural*) colors . . . and ‘contemporary’ designs inspired by temple architecture and tribal jewelry.”<sup>321</sup> One question remains, however: “What rights do traditional weavers from Mysore have if they move to North India—or the U.K.?”<sup>322</sup> According to Professor Sunder,

[T]here are good reasons to prevent the alienation of the GI [geographical indication] from the particular geographical community. It prevents the scenario in which a large foreign corporation hires a member of that community away and then begins to produce “authentic” work elsewhere, using that GI—and decimating the livelihoods of the traditional community left behind. At the same time, such a restriction could stifle opportunities for some individuals, as they remain within a traditional community by economic necessity, not choice. People move, intermarry, and change jobs. Culture flows with them.<sup>323</sup>

### C. *Means of Identification*

Once the first two sets of questions are settled, the implementing laws have to tackle the challenge of determining the means to identify the protected cultural materials—for the rights holders, users, and administrators involved in the protected system and the larger international network. As the IPR Commission pointed out, “[i]n the absence of any accessible written record, a patent examiner in another country is unable to access documentation that

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320. SHINYA, *supra* note 130, at 31.

321. Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS., Spring 2007, at 97, 110.

322. *Id.* at 115.

323. *Id.*

would challenge the novelty or inventiveness of an application based on traditional knowledge.”<sup>324</sup> The lack of such a record indeed provides a strong reason to grant patents to preexisting traditional knowledge and genetic resources.

Unfortunately, because of the intangible nature of the materials—and, in some cases, the lack of written records—identifying the protectable subject matter has not been easy. Thus far, “China offers a Traditional Chinese Medicine Patents Database, recording traditional acupuncture, herbal medicine, animal-derived drugs, and mineral drugs in a format searchable by patent examiners.”<sup>325</sup> India has created a Traditional Knowledge Digital Library to convert traditional knowledge into fixed form.<sup>326</sup> This database allows users and administrators to determine what the existing regime covers. Such databases, or similar inventory systems, also help “document and preserve [the materials], thus protecting [them] from complete loss.”<sup>327</sup> Legislators in other countries, most recently South Africa, have proposed similar laws.<sup>328</sup> The inventory approach is also enshrined in the 2003 UNESCO Convention.<sup>329</sup>

Unfortunately, three problems remain. First, culture is dynamic, fluid, and constantly evolving.<sup>330</sup> The creation of intangible cultural heritage is more a process than the product of that process.<sup>331</sup> As Professor Sunder explained,

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324. IPR COMMISSION REPORT, *supra* note 219, at 81; *accord* TRIPS Council, *Elements of the Obligation to Disclose*, *supra* note 28, ¶ 3 (presenting argument that patent examiners cannot evaluate patentability of claimed invention without access to relevant prior art).

325. Chander & Sunder, *supra* note 127, at 1357.

326. Dutfield, *supra* note 111, at 509. For discussions of traditional knowledge databases and related inventory systems, see generally *id.* at 509–11; de Carvalho, *supra* note 145, at 258–61.

327. de Carvalho, *supra* note 145, at 245.

328. As Chidi Oguamanam pointed out,

At present, India is providing support for the creation of TKDL for the South Asian Association for Regional Cooperation . . . comprising Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. The Cameroon-based African Regional Industrial Property Organization . . . has also expressed interest in an African regional TKDL. Several individual countries, including South Africa, Mongolia, and Thailand have expressed the interest to engage in similar national initiatives.

Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOBAL LEGAL STUD. 489, 504 (2008) (footnotes omitted); see also Ramesh Menon, *Traditional Knowledge Receives a Boost*, INDIA TOGETHER, Jan. 13, 2007, <http://www.indiatogether.org/2007/jan/eco-tkdl.htm> (reporting interest in creating traditional knowledge databases or libraries in Iran, South Korea, Thailand, Cambodia, South Africa, Nigeria, Pakistan, Nepal, Sri Lanka, and Bangladesh).

329. See 2003 UNESCO Convention, *supra* note 1, art. 12(1) (requiring state parties to draw up and update inventories of intangible cultural heritage present in their territories).

330. SCAFIDI, *supra* note 70, at xii; Michael J. Balick, *Traditional Knowledge: Lessons from the Past, Lessons for the Future*, in BIODIVERSITY AND THE LAW, *supra* note 42, at 280, 280 (noting that “body of traditional knowledge is never static but rather dynamic in its shape and substance”); Harding, *supra* note 50, at 334 (noting “fluid and inventive qualities” of culture and describing it as “a form of ‘collective intentionality’” and “a forward-looking, non-static phenomenon,” as compared to “backward-looking ‘traditionalism’” (quoting GERALD M. SIDER, *CULTURE AND CLASS IN ANTHROPOLOGY AND HISTORY* 94 (1986))).

331. See WIPO, IP & TCE, *supra* note 175, at 5 (noting that traditional cultural expressions are

Traditional people move, intermarry, share ideas, and modify their skills and products to the shifting demands of the market and their culture. These activities are not merely strategic and pragmatic, but are evidence of a healthy and dynamic culture. In short, traditional knowledge is more vibrant and innovative than the “environmentalism” metaphor, with its emphasis on conservation of nature’s raw materials, acknowledges.<sup>332</sup>

As the example of the Igbo people in Nigeria has shown above, many traditional communities value the process more than they value the products.<sup>333</sup> As a result, upon completion of their *mbaris*, they are willing to leave them in utter neglect, despite the fact that they have spent a lot of time, effort, and resources in creating these artful objects in the first place.

Most recently, WIPO highlighted the “contemporary aspect” of the protection of traditional knowledge, which it argued provides “further justification for legal protection.”<sup>334</sup> As the organization stated in its promotional booklet on the protection of traditional knowledge,

What makes knowledge “traditional” is not its antiquity: much TK is not ancient or inert, but is a vital, dynamic part of the contemporary lives of many communities today. . . . TK is being created every day, and evolves as individuals and communities respond to the challenges posed by their social environment.<sup>335</sup>

Professor Sunder also highlighted the “inventiveness” of traditional knowledge.<sup>336</sup> As she concurred, “Many of the most ancient monuments survived because they remained in use. Traditional knowledge techniques survive in this way, as well, not as static but as continuously evolving as humans innovate around them to meet current needs and solve contemporary problems.”<sup>337</sup>

Similar sentiments have been expressed elsewhere. As Doris Long noted, “[t]raditional knowledge . . . changes in response to culture, environment, and the passage of time. It is a living active concept, and not just the snapshot of what used to be done back in the good old days.”<sup>338</sup> Likewise, the IPR Commission noted, “Whilst the vast majority of the knowledge is old in the sense that it has been handed down through the generations, it is continually refined and new

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“often the product of inter-generational and fluid social and communal creative processes”); Arezzo, *supra* note 27, at 371 (stating that traditional knowledge “is the fruit of an intergenerational process, whereby generations pass on their cultural heritage which, as time passes, continuously grows”); Harding, *supra* note 50, at 309 (noting that traditional communities “tend to place greater emphasis on intangibles and process”).

332. Sunder, *supra* note 321, at 109.

333. See *supra* notes 244–45 and accompanying text for a more detailed discussion of the Igbo practice of leaving *mbaris* in utter neglect after their completion.

334. WIPO, IP & TK, *supra* note 117, at 6.

335. *Id.*

336. Sunder, *supra* note 321, at 103 (emphasis omitted).

337. *Id.* at 110.

338. Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 617, 621 (2006).

knowledge developed, rather as the modern scientific process proceeds by continual incremental improvement rather than by major leaps forward.”<sup>339</sup>

As far as cultural materials are concerned, there is always a tendency to develop “a museum-like vision of unchanging, ahistorical ‘noble savages.’”<sup>340</sup> However, this vision is outdated and culturally insensitive. As Professor Scafidi noted with respect to the 2003 UNESCO Convention and traditional knowledge databases, “mechanisms such as national inventories speak to the warehousing rather than the evolution of living culture.”<sup>341</sup>

Moreover, as Michael Finger pointed out, “no one’s life is entirely traditional, and no one’s life is entirely modern. Traditional versus modern is better thought of as opposite ends of a scale rather than as a clean sorting.”<sup>342</sup> Thus, the evolving nature of intangible cultural heritage and the potential for mixing both traditional and nontraditional materials have made the inventory and identification process somewhat difficult. If the system is not constantly updated to reflect the changing culture, it may not fully capture the essence of the intangible heritage of the relevant communities. However, if it is constantly updated, guidelines need to be developed to determine how the protection should be extended to new forms of cultural materials. Otherwise, the protective regime would lose its consistency, coherence, and effectiveness.

The second problem concerns the difficulty in developing an inventory of intangible cultural heritage. Article 12 of the 2003 UNESCO Convention states: “To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.”<sup>343</sup> Unfortunately, “living cultures cannot be reduced to diagrams on a printed page or data on a CD,”<sup>344</sup> and “not all traditional knowledge can be expressed in a fixed form.”<sup>345</sup> Moreover, many countries would not have the needed resources to develop a reliable inventory system, even if such a system could be developed. As Richard Kurin noted, “[m]ost nations have developed some form of archives documenting intangible cultural heritage, but they generally lack the resources adequate to keep up with cataloguing and preservation functions.”<sup>346</sup>

The third problem concerns the fact that not all works should be identified; works that are sacred or intended to be kept secret are usually off limits. Even within a community, there are restrictions on who can handle or disseminate

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339. IPR COMMISSION REPORT, *supra* note 219, at 75.

340. Roht-Arriaza, *supra* note 125, at 957.

341. SCAFIDI, *supra* note 70, at x.

342. Finger, *supra* note 138, at 31.

343. 2003 UNESCO Convention, *supra* note 1, art. 12(1).

344. Michael F. Brown, *Safeguarding the Intangible*, CULTURAL COMMONS, Nov. 2003, <http://www.culturalcommons.org/comment-print.cfm?ID=12>.

345. OGUAMANAM, *supra* note 37, at 151.

346. Kurin, *supra* note 55, at 73; *see also* OGUAMANAM, *supra* note 37, at 151 (noting that “the operational modality of the digitalization process raises issues of funding”).

certain forms of knowledge.<sup>347</sup> The identification and inventory mechanisms and the documentation requirement therefore create a dilemma for those in the community who have to decide between obtaining protection and breaking their secrecy vows.<sup>348</sup>

The documentation requirement may also undermine the “unique spiritual and cultural character” of the concerned knowledge and expressions.<sup>349</sup> By ignoring cultural respect and privacy, the requirement may even endanger the survival of a community. As Professor Riley noted, “The idea of disclosing traditional knowledge within a public forum—even one with controlled access—represents a risk of exploitation and destruction that is, for many, far too great.”<sup>350</sup> Indeed, many indigenous rights advocates “believe that databases will only make it easier for those who wish to exploit cultural heritage and steal secret and sacred traditions. . . . [They consider] the proposal ‘entirely wrong-headed.’”<sup>351</sup>

Some even have compared the release of culturally sensitive information to indigenous communities digging a grave for themselves. If the community discloses which artifact is the most important to them, that object is likely to be stolen very quickly. It is small wonder that “the Hopi Tribe . . . request repatriation of all Hopi artifacts on the grounds that anything made by Hopis is sacred by definition.”<sup>352</sup> As an employee of the Hopi Cultural Preservation Office justified, “[e]ven something like a digging stick could have a ritual use, but we’re not about to say what it is.”<sup>353</sup>

#### D. *Justifiability of International Intervention*

Finally, there may be questions about whether countries should be able to intervene in the conservation of other countries’ intangible cultural heritage when the target countries have no interest in protecting the materials or do not have the means or capacity to do so. In the cultural relics area, commentators have underscored the need for international intervention to prevent the destruction of such important monuments as the Buddhas of Bamiyan by the Taliban regime of Afghanistan<sup>354</sup> or churches and mosques in Bosnia-

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347. See, e.g., *Working Group Study*, *supra* note 50, ¶ 83 (stating that “[a]mong Salish people in the Pacific Northwest region of North America, songs belong to lineages, but in each generation a song may be sung only by a single individual who has been given this right” (citation omitted)).

348. See BROWN, *supra* note 126, at 20 (noting that indigenous peoples are “put in the unhappy position of violating their tribe’s canons of secrecy in order to substantiate claims that particular objects are sacred”).

349. OGUAMANAM, *supra* note 37, at 151.

350. Riley, *supra* note 113, at 160.

351. *Id.* (footnote omitted) (quoting Daes, *supra* note 120, at 145).

352. BROWN, *supra* note 126, at 20.

353. *Id.* at 21 (internal quotation marks omitted).

354. See generally Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619 (2003) (arguing for international sanctions and criminal charges against governments that intentionally destroy important cultural artifacts).

Herzegovina.<sup>355</sup> Their destruction not only affects the Afghans or Bosnians, but all humanity.

Taking the cultural internationalist perspective, as articulated by Professor Merryman,<sup>356</sup> one would argue that there should be some form of international intervention to protect these works—perhaps through the creation of obligations *erga omnes partes* (obligations that a state owes to all parties to an international agreement).<sup>357</sup> After all, there are already treaties concerning how cultural relics should be protected in wartime—notable examples being the 1907 Hague Convention Respecting the Laws and Customs of War on Land<sup>358</sup> and the 1954 Hague Convention.<sup>359</sup> As Janet Blake noted, the latter convention

was developed in great part in response to the destruction and looting of monuments and works of art during the Second World War. It grew out of a feeling that action to prevent their deterioration or destruction was one responsibility of the emerging international world order and an element in reconciliation and the prevention of future conflicts.<sup>360</sup>

Likewise, countries have enacted laws to protect the public interest in art. The California Civil Code, for example, emphasizes the “public interest in preserving the integrity of cultural and artistic creations.”<sup>361</sup> The code states that “[a]n organization acting in the public interest may commence an action for injunctive

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355. See generally Gregory M. Mose, *The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property*, 3 BUFF. J. INT'L L. 180 (1996) (arguing that, in aftermath of Yugoslavian conflict and related destruction of culturally significant churches and mosques, internationally recognized right to practice religion should be used to protect religious cultural property).

356. As Professor Merryman noted,

One way of thinking about cultural property—i.e., objects of artistic, archaeological, ethnological or historical interest—is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction. That is the attitude embodied in the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 . . . , which culminates a development in the international law of war that began in the mid-19th century.

Merryman, *supra* note 74, at 831–32 (footnotes omitted); accord Harding, *supra* note 50, at 301 (noting that “the internationalists maintain that cultural heritage is the property of all humanity, its educational, scientific and aesthetic qualities are its most valuable assets, and its proper place is in Western museums where it can be viewed by a wider audience and its preservation is guaranteed”).

357. See Roger O’Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 INT’L & COMP. L.Q. 189, 190 (2004) (discussing obligation of State Parties to World Heritage Convention to enforce protection of cultural heritage due to Convention’s express references to universal interest in such protection).

358. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

359. 1954 Hague Convention, *supra* note 47.

360. Blake, *supra* note 45, at 61. For excellent discussions of the destruction and looting of art during the Second World War, see generally LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994); SPOILS OF WAR, *supra* note 50.

361. CAL. CIV. CODE § 989(a) (Deering 2008).

relief to preserve or restore the integrity of a work of fine art.”<sup>362</sup> Massachusetts and New York have similar art preservation laws.<sup>363</sup>

The need for self-help measures is, indeed, one of the justifications advanced to provide support for the British Museum to retain the Parthenon Marbles. For example, those who preferred the Marbles to stay in Britain have argued that Greece would not be able to preserve their condition as well as the British Museum.<sup>364</sup> Most recently, Eric Posner even suggested, somewhat disturbingly, that a “free market in cultural property” would enable “much cultural property [to] leave poor, insecure states that suffer from war, corruption, and inefficient law enforcement, and be stored in wealthy, secure states.”<sup>365</sup> As he continued,

In their self-interest, commercial firms would remove cultural property from war zones and potential war zones, and of course eventually most cultural property would be sold to museums and private collections located in secure, first-world countries. If the contents of the Baghdad Museum had been owned and held by museums located in New York, Tokyo, London, or Chicago, they would never have been stolen or destroyed during the second Gulf War.<sup>366</sup>

Likewise, Alexander Bauer, editor of the *International Journal of Cultural Property*, pointed out that “a licit trade might lead to the restructuring of the economics of the antiquities trade, such as deflating prices (that had been inflated because of the risk involved in an illicit trade), which, combined with increasing enforcement, could undercut the benefits for looters, smugglers, and unscrupulous dealers.”<sup>367</sup>

While the use of international intervention to protect cultural relics remains controversial, the use of such intervention to protect intangible cultural heritage has been highly problematic. To begin with, such intervention violates tribal sovereignty and the right to self-determination. As the late Darrell Posey wrote, the self-determination principle developed by the International Society of Ethnobiology

recognizes that indigenous peoples have a right to self-determination (or local determination for traditional and local communities) and that researchers shall as appropriate acknowledge and respect such rights.

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362. *Id.* § 989(c).

363. See Merryman, *supra* note 60, at 344 (discussing art preservation laws in Massachusetts and New York).

364. See CHRISTOPHER HITCHENS, THE ELGIN MARBLES: SHOULD THEY BE RETURNED TO GREECE? 79–83 (1987) (discussing argument that Parthenon Marbles are safer in London than they would be in Athens); Magnus Magnusson, *Introduction* to JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 1, 8 (2d ed. 1996) (considering “the capacity of the home country to house, protect, study and display any material that is returned” important factor regarding any decision to return cultural treasure); John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1917 (1985) (noting that “[i]f one had to make a decision based solely on concern for the physical preservation of the Marbles, it would be difficult to justify moving them to Athens”).

365. Posner, *supra* note 105, at 230.

366. *Id.*

367. Bauer, *supra* note 203, at 714.

Culture and language are intrinsically connected to land and territory, and cultural and linguistic diversity are inextricably linked to biological diversity; therefore, the principle of self-determination includes: (1) the right to control land and territory; (2) the right to sacred places; (3) the right to own, to determine the use of, and to accreditation, protection, and compensation for knowledge; (4) the right of access to traditional resources; (5) the right to preserve and protect local languages, symbols, and modes of expression; and (6) the right to self-definition.<sup>368</sup>

Moreover, if the use of international intervention to protect *tangible* cultural heritage remains debatable, it will be very hard to provide a strong justification for the protection of *intangible* cultural heritage. After all, the intangible nature of the materials strongly suggests the reproducibility of the materials. As a result, the danger of destruction is great, and such destruction is not even close to the type of “cultural cleansing” commentators have asserted with regard to the destruction of cultural relics.<sup>369</sup> Indeed, with the technological advances brought about by the digital and biotechnology revolutions, verbatim copies may even be made and protected *ex situ*.<sup>370</sup>

In sum, there are still many challenges concerning how to develop legislation to implement the new international framework for the protection of intangible cultural heritage. Nevertheless, these challenges should not deter policymakers from further developing this framework. Rather, policymakers should take account of the varying needs and interests involved in protection offered by the framework. The challenges also suggest the need for a deeper exploration and careful assessment of the various alternative models and proposals that may be used to achieve the framework’s underlying objectives.

#### IV. ENFORCEMENT CHALLENGES

Part I explored the similarities between the protection of cultural relics and that of intellectual property. This Part revisits two of these similarities: (1) both forms of protection concern the same type of enforcement issues and challenges, and (2) cultural relics and intellectual property in both developed and less-developed countries suffer from a lack of, or inadequate, protection. In highlighting these similarities, this Part focuses on countries that have problems in both areas. It argues that these countries present unique cases for enhancing

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368. Posey, *supra* note 117, at 214.

369. See Mose, *supra* note 355, at 196 (discussing “cultural cleansing” in the cultural property context).

370. Nevertheless, there remain challenges to the digitization of cultural materials. As an indigenous librarian pointed out,

When digitizing cultural materials, the important questions are: How do we send a message that strengthens the holistic context of each cultural item and collection? How do we ensure that both indigenous and nonindigenous peoples receive the message? How do we digitize material taking into account its metaphysical as well as its digital life?

Robert Sullivan, *Indigenous Cultural and Intellectual Property Rights: A Digital Library Context*, in ART AND CULTURAL HERITAGE, *supra* note 42, at 416, 416.

our understanding of the protection of intangible cultural heritage. Although this Part focuses on China, whose problems I am more familiar with, the discussion can be easily extended to other countries that have similar problems. All of these countries are likely to provide rich and fertile grounds for further research.

In the near future, China is likely to play very important roles in both the protection of cultural relics and intellectual property. Its problems in the intellectual property area have been widely documented.<sup>371</sup> Every year, the United States entertainment industry claims that it has lost billions of dollars in China,<sup>372</sup> and the United States has repeatedly taken action to induce China to offer stronger intellectual property protection.<sup>373</sup> For instance, the United States recently used—with only limited success<sup>374</sup>—the WTO dispute settlement process to resolve its dispute with China over inadequate enforcement of intellectual property rights.<sup>375</sup>

China is also very important in the cultural relics area. As Professor Merryman noted, “China, with its many centuries of high civilization and its vast area and large population, may be the richest source of cultural property of all.”<sup>376</sup> One would, in fact, expect no less from a country that has close to 5,000 years of history. With greater liberalization of the Chinese economy since the reopening of the country for trade with the West three decades ago, “China’s antiquities have become increasingly popular with foreign collectors, particularly with overseas collectors in diverse places as Canada, Singapore, Malaysia, and the United States.”<sup>377</sup>

Indeed, just as this Article was being finalized for publication, the Chinese government had vigorously protested the auction by Christie’s of two bronze fountainheads that were looted from the Old Summer Palace in China during the

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371. For some of my earlier discussions about piracy and counterfeiting problems in China, see generally Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006) [hereinafter Yu, *From Pirates to Partners II*]; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 173 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *China Puzzle*]; Yu, *supra* note 107.

372. See, e.g., Int’l Intellectual Prop. Alliance, USTR 2008 “Special 301” Decisions (June 17, 2008), <http://www.iipa.com/pdf/2008USTRdecisionsSpecial301AsiaFinal2007LossLevel061708.pdf> (estimating \$3.5 billion in trade losses to United States due to copyright piracy in China in 2007).

373. See Yu, *China Puzzle*, *supra* note 371, at 185–88.

374. See Kaitlin Mara, *Parties Accept WTO Dispute Settlement Report on China IP Protection*, INTELLECTUAL PROPERTY WATCH, Mar. 24, 2009, available at <http://www.ip-watch.org/weblog/2009/03/24/parties-accept-wto-dispute-settlement-report-on-china-ip-protection/> (discussing reactions to the case).

375. See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter WTO Panel Report].

376. John Henry Merryman, *Foreword to MURPHY*, *supra* note 106, at xiii, xiii; accord Dutra, *supra* note 98, at 71 (stating that “[b]ecause of China’s rich history, the landscape is littered with tombs from various eras—dating from 500 B.C. and earlier, up to the Qing dynasty”).

377. Dutra, *supra* note 98, at 68; see also *id.* at 72 (discussing how China’s recent economic reforms have “rekindled interest in antiquarianism and collecting relics”).

Second Opium War in 1860.<sup>378</sup> These bronze pieces were part of a collection of artworks and antiques being put up for sale in Paris by the estate of Yves Saint Laurent, the late famous fashion designer, and his former companion and longtime business partner.<sup>379</sup> Although a group of Chinese lawyers sought to block the auction in French court, they failed. Ultimately, a Chinese collector reportedly had sabotaged the auction by submitting two winning bids.<sup>380</sup>

In addition, scholars have found China “among the limited number of the world’s civilizations to embrace early on the cultural activity of ‘collecting.’”<sup>381</sup> As David Murphy explained, such early collecting history “may well have had a bearing both on the quantity of relics that have survived, and on their quality, due to care and preservation.”<sup>382</sup> As a result, many cultural artifacts in China have been carefully preserved, notwithstanding the looting and tragic losses resulting from foreign attacks in the nineteenth and early twentieth centuries, the Second World War, and the Cultural Revolution.<sup>383</sup>

While the developments in China will provide important insights into issues explored in this Article, the problems confronting the protection of both cultural relics and intellectual property will enhance our understanding in one area that has yet to be addressed: enforcement. When the two areas are considered together, China has been faulted for its lack of protection regardless of whether it serves as a source nation or a market nation. In the cultural relics area, it has been faulted for its lack of protection because it is a *source* nation. In the intellectual property area, it has been equally faulted for its lack of protection because it serves as a *market* nation.

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378. David Barboza, *China Seeks to Stop Paris Sale of Bronzes*, N.Y. TIMES, Feb. 17, 2009, at C1. As a journalist described,

The two Qing dynasty bronze animal heads, one depicting a rabbit and the other a rat, are believed to have been part of a set comprising 12 animals from the Chinese zodiac that were created for the imperial gardens during the reign of Emperor Qianlong in the 18th century. . . . The relics were displayed as fountainheads at the Old Summer Palace, known in Chinese as Yuanmingyuan, until it was destroyed and sacked by British and French forces in 1860.

*Id.*

379. *Id.*

380. Steven Erlanger, *China Fails to Halt the Sale of Looted Relics at a Paris Auction*, N.Y. TIMES, Feb. 26, 2009, at A9; Mark McDonald & Carol Vogel, *Twist in Sale of Relics Has China Winking*, N.Y. TIMES, Mar. 3, 2009, at A5.

381. MURPHY, *supra* note 106, at 28. As Joseph Alsop observed,

Antiques in astonishing variety were pursued as prizes by Chinese collectors during many centuries before Mao Zedong’s revolution. Ancient bronzes had been taken from earliest times by tomb robbers for the value of their metal; but they began to be sought in another way—in fact, by antique collectors—in the Song Dynasty. . . . The Song Dynasty further produced a substantial body of antiquarian writing on the subject of ancient bronzes.

Dutra, *supra* note 98, at 69 (quoting JOSEPH ALSOP, *THE RARE ART TRADITIONS* 249 (1982)); *see also id.* at 68–69 (noting that “the tradition of antiquarianism dates back hundreds of years in China, reflecting the Confucian veneration of and respect for the past”).

382. MURPHY, *supra* note 106, at 28.

383. *See, e.g., id.* at 48–50 (discussing loss of cultural relics during Cultural Revolution); Dutra, *supra* note 98, at 71 (noting that “many priceless relics were lost during the Cultural Revolution”).

Such an outcome is somewhat ironic—and certainly frustrating for the Chinese. Had the source of protection remained the same in both areas, China would have been able to avoid criticism in one of the two areas. In fact, if market nations were considered to be at fault, the blame for problems in the cultural relics area is likely to shift from China to the United States, “which is generally regarded as the single largest market for antiquities in the world.”<sup>384</sup> This shift makes great sense in light of the growing illicit trade in cultural relics. As Professor Bauer recently pointed out, although collectors and supporters of the antiquities trade have argued that “looting is driven by poverty and a problem of poor local law enforcement and corruption, . . . the assertion that demand for antiquities has no effect on looting is ludicrous and patently false.”<sup>385</sup>

Nevertheless, enforcement remains an area that deserves significant attention from policymakers. In fact, as Part I has shown, the issues are quite similar and do not depend on whether the discussion focuses on the protection of cultural relics or that of intellectual property. If China is able to provide better enforcement in one area, it is likely to be able to learn from its success and use similar approaches to enhance protection in other areas. A better understanding of enforcement in the cultural relics area, therefore, not only will improve the understanding of enforcement in the intellectual property area, but also that of enforcement in the intangible cultural heritage area.

The converse, unfortunately, is also true. If China is unable to provide effective enforcement in one area, it is unlikely to do so in other areas. In fact, the lack of enforcement in the protection of cultural relics provides a reality check on the enforcement challenges confronting the Chinese authorities in the intellectual property area. Such a lack shows how entrenched the enforcement problems are in not only the intellectual property area, but also other areas of law enforcement.

Commentators have widely criticized the lack of criminal enforcement of intellectual property rights in China. Such a lack is, indeed, one of the three main items targeted for dispute settlement in the recent WTO dispute between China and the United States over the inadequate enforcement of intellectual property rights.<sup>386</sup> However, criminal enforcement does not seem to be any more successful in the cultural relics area. Despite its significant problems with tomb robbing and thefts of cultural relics from museums and other protected sites, “China handled [only] forty criminal cases involving 222 artifacts stolen from the country’s protected sites and museums of cultural heritage [in 2004].”<sup>387</sup>

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384. Gerstenblith, *supra* note 102, at 174.

385. Bauer, *supra* note 203, at 698.

386. See Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007) (focusing on high thresholds for criminal procedures and penalties in intellectual property area that make enforcement of intellectual property rights ineffective); WTO Panel Report, *supra* note 375, ¶¶ 7.396–7.682 (discussing these thresholds).

387. Inbal Baum, Note, *The Great Mall of China: Should the United States Restrict Importation of Chinese Cultural Property?*, 24 CARDOZO ARTS & ENT. L.J. 919, 920 (2006) (emphasis omitted).

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While commentators have often criticized China for its lack of political will to enforce intellectual property rights, partly because of its lack of self-interest,<sup>388</sup> one could hardly make the same argument as far as the protection of cultural relics is concerned. The Chinese authorities have strong political will in protecting cultural relics. The strong nationalist sentiments also support such protection. In addition, the high number of tourists that can be attracted to China by these relics provide both self-interest and economic incentives. Interestingly, and disappointingly, the benefits, interests, and incentives alone are not sufficient to result in stronger enforcement. The outcomes for the protection in both areas are disturbingly the same—ineffective and inadequate.

The limited protection of cultural relics also reflects the tension between the central and local governments. As I have noted, the heavy and continuous decentralization of the Chinese government has made it difficult for the country to respond effectively to the problem of intellectual property enforcement.<sup>389</sup> Similar tension exists in the cultural property context. As Stefan Gruber observed,

Local governments do not necessarily welcome the discovery of new cultural heritage sites within the boundaries of their municipality, particularly where the site is not likely to attract streams of tourists. Local governments are obliged by law to allocate resources for the protection of designated heritage sites and take protective measures. Often newly discovered sites stand in the way of planned building or other development projects. In the worst case this may lead to the destruction of the heritage site by the property developer, the workers who fear for their jobs, or even the authorities who want to push development in their municipalities. Two recent cases show the seriousness of such problems in China.

At the end of 2004, in Shanxi Province, bulldozers destroyed a Ming Dynasty (1368–1644) beacon tower and dozens of tombs that are believed to be from the Han Dynasty (206 BC–220 AD). The construction company acted without approval from the local heritage protection authorities. The required archaeological survey was considered to be too expensive for the company. By law, such archaeological surveys are required to be included in construction budgets and done prior to commencing construction. Clearly the company obtained approval to commence from the local government. After the destroyed tombs were discovered, the work at the construction site was stopped immediately and archaeological investigations were started by the authorities. Despite clear legal regulations, neither the heads of the construction company nor the responsible members of the local government who issued the approval

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388. See Yu, *supra* note 107, at 414 (questioning assertions that China could easily end piracy but has not done so because of lack of “political willpower”).

389. See *id.* at 419–24 (attributing problems for intellectual property enforcement in China to heavy and continuous decentralization).

faced punishment as the construction company's investment was too important to the municipality.<sup>390</sup>

The complex socioeconomic conditions in China and the vast disparities in wealth and innovative capacities across the country also make China an ideal site for observing the tension between access and control in the protection of not only cultural relics and intellectual property, but also that of intangible cultural heritage. In fact, the challenges China currently faces may help it develop a more pragmatic approach that helps bridge the differences between developed and less-developed countries. On the one hand, China behaves like a developed country; it understands the importance of protection in certain fast-growing economic sectors—most notably those related to movies, computer programs, semiconductors, and certain forms of biotechnology.<sup>391</sup> On the other hand, the country sides with other less-developed countries and remains concerned about the overprotection of intellectual property rights in the areas of pharmaceuticals, chemicals, fertilizers, seeds, and foodstuffs.<sup>392</sup> China is also frustrated by the high burden of protection and enforcement that is placed on source nations of cultural relics.

In a previous article, I discussed four types of actions that may help improve intellectual property protection in China: (1) educate the local people, (2) create local stakeholders, (3) strengthen laws and enforcement mechanisms, and (4) develop legitimate alternatives.<sup>393</sup> The first three types will work equally well when applied to the protection of cultural relics. For example, education is likely to “increas[e] the awareness and appreciation of the noneconomic value of cultural items to Chinese society.”<sup>394</sup> Indeed, many Chinese peasants who use tomb robbing to “supplement their meager incomes. . . . have no idea of the value of what they have excavated . . . [I]gnorant of the prices that such artifacts may bring at auctions in Hong Kong or New York, [they] often sell relics to black market middlemen for a tiny fraction of the artifact's market value.”<sup>395</sup>

Likewise, the development of local stakeholders would provide the needed constituency to push for stronger protection within the country. Improvements in laws and enforcement mechanisms will certainly help strengthen the protection of cultural relics. Indeed, the new Law on the Protection of Cultural Relics,

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390. Stefan Gruber, *Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law*, 10 ASIA PAC. J. ENVTL. L. 253, 282 (2007) (footnote omitted).

391. See Yu, *supra* note 285, at 25–26 (indicating China's likely preference for stronger intellectual property protections in fast-growing industries).

392. See *id.* (indicating China's reluctance to strengthen intellectual property protection in areas that are more likely to adversely affect China's self-interests).

393. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 428–37 (2003).

394. Dutra, *supra* note 98, at 94. For discussions of the use of educational programs to change attitudes toward cultural relics, see *id.* at 94–95; PROTTE & O'KEEFE, *supra* note 44, at 332–36.

395. Dutra, *supra* note 98, at 71 (footnote omitted).

which was enacted in 2002 to replace the old 1982 Cultural Relics Protection Law, provides a good example of such improvement.<sup>396</sup>

Even the last suggestion, which focuses on the need for better alternatives, can be useful in the cultural relics area. To date, many Chinese are reluctant to report their finds to the authorities either because they will get into trouble or because they have limited incentives for their efforts.<sup>397</sup> However, their reluctance will be greatly reduced if China introduces a system that would provide more handsome rewards to those who make important discoveries of cultural relics.<sup>398</sup> Instead of selling the relics in the black market, the personal recognition and economic rewards might provide significant incentives for finders to report the finds to the authorities.<sup>399</sup>

In a recent book chapter, I further discussed the importance of developing an “enabling environment for effective intellectual property protection.”<sup>400</sup> Such an environment “provides the key preconditions for successful intellectual property law reform, including a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system,” the existence of supportive legal and business practices, “and a critical mass of local stakeholders.”<sup>401</sup> If cultural patrimony laws are to be effectively enforced, the development of these characteristics is essential. It is also important to have a well-functioning protective regime with supportive legal and business practices to preserve and display cultural relics. In addition, the emergence of a critical mass of local stakeholders will help promote

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396. See generally Law on the Protection of Cultural Relics (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Oct. 28, 2002) (P.R.C.), available at [http://english.gov.cn/laws/2005-10/09/content\\_75322.htm](http://english.gov.cn/laws/2005-10/09/content_75322.htm).

397. See Dutra, *supra* note 98, at 95 (advocating an “incentive program to reward bona fide finders of cultural property with substantial cash payments or awards for turning over such objects to the government”). As Dutra explained,

Although these awards do not have to be anywhere near the fair market value of the discovered relic or artifact, many Chinese people would likely be willing to give the government such property if the offered incentive is close to the amount that they would obtain from black market traffickers.

*Id.* Because the finders are usually offered only “a tiny fraction of the artifact’s market value,” *id.* at 71, these incentive awards are unlikely to be costly.

398. For discussions of this incentive-based approach, see generally PROTTE & O’KEEFE, *supra* note 44, at 341–43; Dutra, *supra* note 98, at 95–96.

399. Unfortunately, such an approach sometimes may also promote tomb robbing. See Dutra, *supra* note 98, at 95–96 (noting need to design incentive program in a way that would discourage “tomb robbing or the plundering of other cultural sites”). It may also result in misreporting or falsification of evidence—a recent example being the faked discovery of a very rare and endangered South China tiger in Shaanxi Province. Shi Jingtao, *Endangered Species in Photos Just a Paper Tiger*, S. CHINA MORNING POST, June 30, 2008, at 1. Nevertheless, no law and policy is abuse-proof, and the penalty for misreporting and falsification may be sufficient to reduce those abuses.

400. Yu, *China Puzzle*, *supra* note 371, at 213.

401. Yu, *supra* note 285, at 20.

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greater protection of cultural relics from the inside, which no doubt will be more effective than protection induced from the outside.<sup>402</sup>

In sum, the study of intellectual property protection may inform the study of protection for cultural relics, and vice versa. This is particularly true in countries that face significant challenges in protecting both cultural relics and intellectual property. The study of protection in these two areas may further inform the protection of intangible cultural heritage. After all, such heritage consists of both intangible and cultural aspects. By studying the challenges confronting the protection of both cultural relics and intellectual property, one would gain important insight into the development of the new international framework for the protection of intangible cultural heritage.

#### CONCLUSION

The protection of intangible cultural heritage has received growing attention at both the domestic and international levels. Significant challenges remain, however. If we are to develop a successful international framework for the protection of intangible cultural heritage, we need to understand better the conceptual basis of such protection—whether the protection is closer to that of cultural relics or that of intellectual property. We also need to have a better grasp of the different underlying objectives of the protection for intangible cultural heritage while anticipating the challenges to implementing the new framework. Until we do so, this framework is unlikely to provide meaningful protection to intangible cultural heritage.

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402. See Yu, *From Pirates to Partners II*, *supra* note 371, at 959 (noting importance of developing local allies that would lobby government for stronger and more effective protection).