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Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage[‡]

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INTRODUCTION

The ability to protect and safeguard cultural heritage is of vital importance to some communities. Without the ability to maintain control over these expressions, external subjects could freely appropriate them, which could negatively affect the community's identity, spirituality, and general well-being. Increasing awareness regarding cultural heritage provides momentum to better define a legal framework for the protection of the intangible goods that constitute cultural heritage. It is fundamental to ascertain whether the current intellectual property right (IPR) regime represents an adequate model of protection *vis-à-vis* intangible cultural heritage (ICH). The culture's unique concerns, which variably affect ICH, make it difficult to compare the rationales for these two legal domains. These concerns are pivotal in elaborating the need for legal protection. Not only does misuse and misappropriation of ICH cause economic

conferences and on the drafts from James Nafziger, Tullio Scovazzi, and Valentina Vadi. The Article reflects the authors' views only and the usual disclaimer applies.

damage, but it also violates the community's human rights and identity.

Accordingly, a range of issues must be taken into consideration, starting with the desirability of the *commodification*, or "reification," which would allow communities to control the commercialization of their ICH through the current IPR regime.[1] To adequately address concerns about commodification, a legal framework must be developed that can guarantee adequate advantages for the countries and communities where the intangible goods originate.[2] This legal framework must, in due time, boost the efforts of these communities to promote a self-sustainable model of economic development and lead them through the inevitable social policy changes that would accompany new ICH protections. Therefore, our study aims to clarify theoretical and practical legislative tools available to help the actors concerned ascertain how to exploit, trade, and market their own resources and heritage within the global market. Bearing in mind that there are numerous potential legal remedies or amendments to the current legal regime covering the protection of cultural heritage, it is not conceivable to tackle this issue as one uniform hurdle. Each community's ICH concerns are extremely specific, and, as a result, it may be appropriate to apply ad hoc legal remedies to some, but not all, circumstances involving ICH.

This analysis consists of five Parts. Part I defines fundamental concepts associated with ICH. Part II looks at ICH as a continuous process of social involvement that helps preserve cultural identification. Part III analyzes the current forms of protection available for cultural expression and knowledge. Part IV discusses the shortcomings of adopting a single, all-embracing, umbrella solution and analyzes ways in which the current IPRs can help protect ICH. And finally, Part V proposes ways to modify and improve the current IPRs to protect ICH more efficiently.

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[1] *See* 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, 634 (2003).

[2] *See id.*

I
DEFINITIONAL ISSUES

In recent decades, a fierce debate related to ICH has emerged about the protection of traditional art forms, symbols, stories, dances, songs, and knowledge.[3] Nonindigenous people have often struggled to understand the rationale used by traditional communities to protect their cultural expressions. Indeed, nonindigenous people tend to look at these cultural expressions through the lens of the Western concept of property, falsely assuming that those expressions belong to the public domain and not the indigenous communities. On the contrary, indigenous communities[4] usually seek to establish a minimum

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[3] There is a vast scholarly literature on ICH, although not within the framework of IPRs. *See generally* Chiara Bortolotto, *Le trouble du patrimoine culturel immatériel*, *in* LE PATRIMOINE CULTUREL IMMATÉRIEL: ENJEUX D'UNE NOUVELLE CATÉGORIE 21 (Chiara Bortolotto ed., 2011) (providing background on ICH); JOHANNA GIBSON, COMMUNITY RESOURCES: INTELLECTUAL PROPERTY, INTERNATIONAL TRADE AND PROTECTION OF TRADITIONAL KNOWLEDGE 73–99 (2005) (examining of the difficulties involved in applying traditional IPR protections, which focus on individual creation, to ICH, which is often viewed as communal, further suggesting that protection for ICH should include an overriding communal protection scheme whereby individuals could only assert individual IPRs for works that were not already designated as communal); *Publisher's Summary* of INTELLECTUAL PROPERTY LAW: ARTICLES ON THE LEGAL PROTECTION OF CULTURAL EXPRESSIONS AND INDIGENOUS KNOWLEDGE (F. Willem Grosheide & Jan J. Brinkhof eds., 2002) [hereinafter INTELLECTUAL PROPERTY LAW] (A collection of articles presented at a Center for Intellectual Property Law conference questioning "whether legal protection under an intellectual property regime would provide adequate legal recognition and respect to individuals and communities whose acts and products are difficult to reconcile with today's dominant Western legal concepts."); ANJA VON HAHN ET AL., INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (Silke von Lewinski ed., 2004) (exploring the impact and consequences of current intellectual property law on traditional knowledge); JACQUES LE GOFF, PATRIMOINE ET PASSIONS IDENTITAIRES: ACTES DES ENTRETIENS DU PATRIMOINE (1998) (examining the creation of ICH through passions and how ICH influences the creation of individual and collective identities); Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L J. CULTURAL PROP. 40 (2005) (examining scholarly proposals and policy efforts to preserve intangible cultural property and its cultural context).

[4] Given the intricacy of human and social organization, there can be no single definition of "indigenous." In some cases, the concept stems from an experience of colonization or ethnocide, as happened in the Americas, New Zealand, and Australia. *See* DAVID MAYBURY-LEWIS, INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE 1–15 (1997). Divergently, being indigenous can derive from subjugation or marginalization from within or by other indigenous people. Historically, some communities gathered in unified nations, whereas others remained isolated. As literature has remarked, the current definition of indigenous peoples that is most accepted in the international framework includes parts or all of the following elements: self-identification as indigenous; descent from the occupants of a territory prior to an act of conquest; possession of a common history, language, and culture regulated by customary laws that are distinct from national cultures; possession of

standard of protection for their common cultural expressions and traditional knowledge, without any consideration of an individual's right to property.[5] Unfortunately, greater control over aspects of ICH are perceived as a threat by nonindigenous communities. These nonindigenous actors seek to develop a cosmopolitan and globalized identity that is drawn from all cultural expressions that are not protected by IPR—whether material or not.[6] Indigenous control would prevent these external actors from using ICH in this manner.[7]

ICH's immaterial form has created a special issue in this regard. For decades, the IPR unduly emphasized the physical side of cultural heritage, "completely ignoring the question of [its] function in contemporary society."[8] Legal scholars Rosemary Coombe and Joseph Turcotte remark how, in some cases, state and international focus on fixed property actually harms the cultural

a common land; exclusion or marginalization from political decision-making; and claims for collective and sovereign rights that are unrecognized by the dominating and governing group(s) of the state. Of these, self-identification is central. Francesco Mauro & Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, 10 ECOLOGICAL APPLICATIONS 1263, 1264 (2000); *see also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 22 (1996) (defining "indigenous people").

5 As stressed by legal experts Rosemary Coombe and Joseph Turcotte, even though the characterization of cultural heritage as property is one that has been challenged; it is, however, "the case that propert[y], intellectual or otherwise, may embody ICH." Rosemary J. Coombe & Joseph F. Turcotte, *Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy*, *in* INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE 272, 302 (Christoph B. Graber et al. eds., 2012); *see also* Amanda Kearney, *Intangible Cultural Heritage: Global Awareness and Local Interest*, *in* INTANGIBLE HERITAGE 209, 209 (Laurajane Smith & Natsuko Akagawa eds., 2009). *See generally* Manlio Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 INT'L REV. RED CROSS 367 (2004), https://www.icrc.org/eng/assets/files/other/irrc_854_frigo.pdf.

6 *See* Coombe & Turcotte, *supra* note 5, at 281.

7 For purposes of this paper, the notion of intellectual property is framed to embrace the traditional, Western-created forms of legal protection for works of creative or innovative endeavor, as generally protected under international treaty regimes and including copyright, patents, trademarks, trade secrets, and geographic indications.

8 Coombe & Turcotte, *supra* note 5, at 281. For example, the notion of cultural heritage was crucial in the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; nevertheless the Convention's limited application to tangible goods, such as monuments, archaeological sites, relics, and landscapes detracted attention from their values. *See* UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

values designated as heritage in need of protection.[9] Meanwhile, other forms of cultural heritage that are deficient of tangible manifestation—such as ritual, behavior, oral history, and other practices—have not yet received protection; arguably, because they belong to less powerful communities "with denigrated cultural value systems," and "whose cultural forms were often deemed primitive and backward—destined to disappear under policies of modernity, assimilation and development."[10]

The ability to protect and safeguard ICH is vitally important to indigenous communities, which, therefore, have the need to maintain control over such expressions.[11] In fact, the use of these expressions by nonindigenous actors could trigger identity and spiritual crises detrimental to the overall community's well-being.[12] Unfortunately, current IPRs do not offer a viable solution. IPRs are generally limited in time, after which the asset becomes part of the Western property concept of "public domain."[13] Indigenous communities, on the other

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9 Coombe & Turcotte, *supra* note 5, at 281. For instance, the physical protection of world heritage sites like Angkor Wat are generally acknowledged to have damaged the cultural connection between the Cambodian people and this manifestation of their heritage. *Id.*

10 *Id.*; *see also* Rosemary J. Coombe & Nicole Aylwin, *The Evolution of Cultural Heritage Ethics via Human Rights Norms*, *in* DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE 201, 204 (Rosemary J. Coombe et al. eds., 2014).

11 *See* Coombe & Turcotte, *supra* note 5, at 281.

12 *Id.* at 283.

13 In regard to the concept of public domain, economic theory suggests that certain public goods—such as songs, stories, and other forms of ICH—should be protected for a limited time. However, after that time, the good may be replicated and commercialized by a competitor who was not required to sustain the cost of creation. Consequently, the public domain could be considered the repository of works and creative goods not subject to the costs and restrictions of ownership. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 42 (2006). *See generally* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES (2012) (advocating upon economic grounds for managing the sustaining infrastructure as public domain); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (James E. Alt & Douglass C. North eds., 1990) (demonstrating through new economic models sustainable common ownership of natural resources); Susy Frankel & Megan Richardson, *Cultural Property and 'the Public Domain': Case Studies from New Zealand and Australia*, *in* TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION 275 (Christoph Antons ed., 2009) (exploring how the public domain applies to the haka, koru, and boomerang); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (advocating that expansive public domain in copyright law would benefit authorship); Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term*, 6 REV. ECON. RES. ON COPYRIGHT ISSUES 35 (2009) (characterizing a unique formula to determine the optimal length of copyright protection).

hand, need permanent control over their ICH, as they consider themselves perpetual guardians of their cultural assets. While Western economic and legal schemes do not address the needs of indigenous communities, some communities have still adopted these models in order to voice their demands for protection at the international level and make their demands intelligible—trying not to isolate themselves, be misunderstood, or not be heard.[14]

Traditional cultural expressions or cultural heritage[15]—tangible or not—is the result of intergenerational and fluid social creative processes lying at the heart of communities and groups. Heritage stems from a traditional framework of creativity and innovation, thus representing new elements and differing from mere imitation and reproduction.[16] This dynamic context makes it arduous to define what constitutes an independent creation derived from preexisting traditional materials and questions the adequacy of current IPR protection *vis-à-vis* cultural heritage.

In analyzing the characteristics of cultural heritage, it can be stated that it generally: (1) is handed down from one generation to another, either orally or by imitation;[17] (2) reflects a community's cultural and

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[14] *See* Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT'L L. 9, 10 (2011). *See generally* PATRIMONIO CULTURALE E CREAZIONE DI VALORE (Golinelli M. Gaetano ed., 2012) (reviewing through a multidisciplinary lens the value of culture); MASSIMO MONTELLA, IL CAPITALE CULTURALE (2009) (discussing culture's economic value); Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT'L L. 101 (2011) (discussing ICH within the context of international human rights law).

[15] For over fifty years, the World Intellectual Property Organization, or WIPO, has tried to define what materials constitute cultural heritage. The current working definition of traditional cultural expressions includes verbal expressions (such as folk tales, folk poetry and riddles, signs, words, symbols, and indications); musical expressions (such as folk songs and instrumental music); expressions by actions (such as folk dances, plays, and artistic forms or rituals); whether or not reduced to a material form; and tangible expressions (such as productions of folk art, crafts, musical instruments, and architectural forms). *See generally* WORLD INTELLECTUAL PROP. ORG. [WIPO], http://www.wipo.int/tools/en/gsearch.html?cx=016458537594905406506%3Ahmturfwvzzq&cof=FORID%3A11&q=WIPO%2FGRTKF%2FINF%2F1 (last visited Nov. 14, 2015) (a database containing 1780 documents attempting to define the parameters of protected cultural heritage).

[16] *See generally* Paterson & Karjala, *supra* note 1 (examining one possibility of commercializing and copyrighting intangible cultural property).

[17] On the intergenerational nature of ICH, see generally Lukas H. Meyer & Dominic Roser, *Enough for the Future*, *in* INTERGENERATIONAL JUSTICE 219 (Axel Gosseries & Lukas H. Meyer eds., 2009) (examining how sufficientarian ways of viewing justice can improve policy-making for future generations); Axel Gosseries, *On Future Generations'*

social identity;[18] (3) consists of characteristic elements of a community's heritage; (4) is made by "authors unknown," communities, and/or individuals communally recognized as having the right, responsibility, or permission to do so; (5) is often not created for commercial purposes, but as a vehicle for religious and cultural expression; and (6) is constantly evolving, developing, and being recreated within the community. Expressions of traditional culture may be intangible, tangible or—often—a combination of both. It is challenging to find a widely accepted definition of ICH.[19] In the context of international law, the definition of ICH contained in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in 2003 (ICH Convention)[20] is descriptive and

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Future Rights, 16 J. POL. PHIL. 446 (2008) (examining challenges to the idea of rights of members of future generations).

[18] *See, e.g.*, Lourdes Arizpe, *Intangible Cultural Heritage, Diversity and Coherence*, 56 MUSEUM INT'L 130, 131 (2004).

[19] *See generally* REGARDS CROISÉS SUR LE PATRIMOINE DANS LE MONDE À L'AUBE DU XXI SIÈCLE 936 (Maria Gravari-Barbas & Syvie Guichard-Anguis eds., 2003) (discussing cultural heritage in various communities around the world).

[20] Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO, Oct. 17, 2003, 2368 U.N.T.S. 35 [hereinafter ICH Convention]. The ICH Convention provides a framework for stimulating the global persistence of traditional folklore, knowledge, and artistic expressions. It shows a growing concern for the intangible elements of cultural heritage, such as language, art styles, music, dance, religious beliefs, and all other traits of cultural heritage not directly embedded in material expressions. The underlying force to this shift is a focus on the cultural effects of globalization, which is likely to pose serious risks to indigenous communities whose cultural heritage is often misappropriated for the interests of culturally or economically dominant communities. To address these phenomena, the ICH Convention calls for heritage to be documented and preserved. Nevertheless, this solution starkly contrasts with the general tendency of indigenous communities towards greater secrecy. Indeed, once documented, ICH is paradoxically more likely to be taken advantage of by the developed world's intellectual property system, which favors individual creativity over the collective inventiveness that features ICH. For instance, various indigenous groups have demanded that publicly accessible records of their beliefs be repatriated from repositories made by powerful outsiders. This diverges with the Convention's policy of publicizing heritage in order to preserve it. On the other hand, the feasibility and opportunity of this rationalized concept of heritage, relying on the notion that ICH can be preserved by documenting it, is in doubt. First, it seems unfeasible to create ICH inventories in multiethnic nations such as Russia, Australia, or China, which comprise hundreds of distinct cultural communities. Second, this effort would merely recreate an ICH that only mimics the original one located in its specific context as poor substitutes. The real challenge is to preserve the surviving fraction of ICH diversity, which implies warranting that indigenous minorities enjoy a decent livelihood and be self-determined in making decisions relating to, inter alia, education, natural resources, and local governance. For further analysis of the ICH Convention, see JANET BLAKE, DEVELOPING A NEW STANDARD-SETTING INSTRUMENT FOR THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE: ELEMENTS FOR CONSIDERATION 75 (UNESCO, rev. ed. 2002), http://unesdoc.unesco.org/images/0012/001237/123744e

broad.[21] According to Article 2(1), ICH means, "the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[22] Moreover, Article 2(2) of the ICH Convention sets forth a non-exhaustive list of the domains in which ICH is manifested: "oral traditions and expressions"; "performing arts"; "social practices, rituals, and festive events"; "knowledge and practices concerning nature and the universe"; and "traditional craftsmanship."[23] As remarked by legal scholar Janet Blake, the ICH Convention obliges its members to safeguard ICH values, a term that is more far-reaching than the notion of protection and necessitates states to take part in positive actions to stimulate ICH by crafting milieus that contribute to its emergence and production.[24] This calls for states to adopt a participatory attitude[25] with respect to "measures aimed at ensuring the viability of the intangible cultural heritage, including . . . [its] identification, documentation, research, preservation, protection, promotion, enhancement, transmission . . .

.pdf. *See generally* Tullio Scovazzi, *La Convenzione per la salvaguardia del patrimonio culturale intangibile*, *in* IL PATRIMONIO CULTURALE INTANGIBILE NELLE SUE DIVERSE DIMENSIONI 3 (Tullio Scovazzi et al. eds., 2012) (discussing the ICH Convention's definition of ICH and proposed protections); Tullio Scovazzi, *La Convention Pour la Sauvegarde du Patrimoine Culturel Immatériel*, *in* DEMOCRACY, ECOLOGICAL INTEGRITY AND INTERNATIONAL LAW 409 (J. Ronald Engel et al. eds., 2010) (discussing the implications of the ICH Convention's defintion of ICH); Lauso Zagato, *La Convenzione sulla protezione del patrimonio culturale intangibile*, *in* LE IDENTITÀ CULTURALI NEI RECENTI STRUMENTI UNESCO: UN APPROCCIO NUOVO ALLA COSTRUZIONE DELLA PACE? 27 (Lauso Zagato ed., 2008) (same); Leila Lankarani, *L'avant-projet de convention de l'UNESCO pour la sauvegarde du patrimoine culturel immatériel: évolution et interrogations*, 48 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 624 (2002) (offering a historical overview of the negotiating process that led to the ICH Convention).

21 Nevertheless, the scope of UNESCO's ICH Convention still seems quite limited, as it seeks mainly to advance its priority policies in the fields of culture, cultural diversity, and cultural identity, thus placing "the emphasis on the processes *within communities* that generate such diversity and identity." Coombe & Turcotte, *supra* note 5, at 290.

22 ICH Convention, *supra* note 20, at art. 2(1).

23 *Id.* at art. 2(2).

24 JANET BLAKE, COMMENTARY ON THE 2003 UNESCO CONVENTION ON THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE 23 (2006).

25 *See generally* Eve Tuck, *Re-Visioning Action: Participatory Action Research and Indigenous Theories of Change*, 41 URB. REV. 47 (2009) (commenting on the participatory attitude that states should embrace toward ICH).

[and] revitalization."[26] In this vein, legal endorsement and action provide a means of protecting cultural heritage by strengthening and legitimating values rooted in ICH.[27]

With its adoption at the 2003 ICH Convention, ICH and its intangible expressions attained a legal status equal to that of tangible cultural heritage within the international heritage regime; meaning that ICH acquired a legal instrument of protection equivalent to tangible cultural heritage. However, equal legal status does not imply that tangible and intangible cultural heritages are identical forms of cultural heritage. Indeed, both types of cultural heritage have distinctive features calling for distinctive legal frameworks and approaches. Nonetheless, integrated approaches should not be ruled out as possible solutions.[28]

Next, the multifaceted term culture has to be framed.[29] From an anthropological perspective, this term has a polysemantic value—it can mean many things, depending on backgrounds and points of view. For example, culture has been defined as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and all it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[30] In relation to ICH, two classes of culture should be taken into consideration. The first class is that of traditional culture, which describes the cultural practices that a social group acquired from the past through intergenerational passage (even if these are recent inventions)[31] and to which that group assigns a clear status; the

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[26] Janet Blake, *UNESCO's 2003 Convention on Intangible Cultural Heritage: The Implications of Community Involvement in 'Safeguarding,' in* INTANGIBLE HERITAGE, *supra* note 5, at 45, 50 (quoting ICH Convention art. 2(3)).

[27] *Id.*

[28] For further discussion of integrated approaches to ICH, see Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage, Japanese Agency for Cultural Affairs-UNESCO, Oct. 20–23, 2004, http://portal.unesco.org/culture/en/files/23863/10988742599Yamato_Declaration.pdf/Yamato_Declaration.pdf.

[29] On the definitional issues, see Bortolotto, *supra* note 3, at 23.

[30] UNESCO, UNIVERSAL DECLARATION ON CULTURAL DIVERSITY: A VISION, A CONCEPTUAL PLATFORM, A POOL OF IDEAS FOR IMPLEMENTATION, A NEW PARADIGM 4 (2002), http://unesdoc.unesco.org/images/0012/001271/127162e.pdf; *see also* Lourdes Arizpe, Discussion Guidelines for the IIIrd Round Table of Ministers of Culture, *Intangible Cultural Heritage—A Mirror of Cultural Diversity*, 10 (Sept. 16–17, 2002), http://www.unesco.org/culture/ich/doc/src/00073-EN.pdf.

[31] On the intergenerational nature of ICH, see Meyer & Roser, *supra* note 17; Gosseries, *supra* note 17.

second class is that of popular culture,[32] which alludes to those cultural performances, often commercialized, through which a subgroup of a society manifests its unique identity.[33] As legal expert Lourdes Arizpe observed, since every member of a subcultural group can impact the practices of the groups that s/he is involved in,[34] the origin of all intangible cultural elements is found in the intrinsic capacity of human beings "to create original meanings and imaginaries that build social practices and representations."[35]

Hence, there is not a single agreed-upon definition of "culture." The subjective nature of cultural determination may be one of the causal factors for the tough international disagreements about the extent to which forms of culture and cultural heritage should qualify for protection under IPR regimes.[36] Particularly because, in the context of indigenous communities, the notion of culture is often essential to the function between state and nongovernmental institutions in order to assert identity, advocate for greater inclusion in local politics, and promote autonomy and control over resources.[37] In this respect, cultural distinction has acquired a new international status as a cherished social, political, and economic asset.[38] Culture

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[32] *See* Barbara Kirshenblatt-Gimblett, *Theorizing Heritage*, 39 ETHNOMUSICOLOGY 367, 368 (1995), http://www.jstor.org/stable/924627?seq=1#page_scan_tab_contents.

[33] Such cultural groups may choose to be represented by certain words, designs, and visual, aural, gestural, or textual elements. *See, e.g.*, Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 231 n.2 (1998).

[34] This mechanism is defined as "the agency of the members of communities in the creation, enactment, embodiment or transformation of their cultural representations or performances." Arizpe, *supra* note 30, at 10.

[35] *Id.* at 11.

[36] *See, e.g.*, Long, *supra* note 33, at 231 n.2. For an early overview of issues concerning the role of IPR regimes in protecting folklore, folk art, and other forms of traditional knowledge, see UNESCO-WIPO, *World Forum on the Protection of Folklore*, Doc. UNESCO-WIPO/FOLK/PKT/97 (Apr. 8–10, 1997), http://www.wipo.int/meetings/en/details.jsp?meeting_id=3074. *See generally* Doris Estelle Long, *"Globalization": A Future Trend or a Satisfying Mirage?*, 49 J. COPYRIGHT SOC'Y 313 (2001).

[37] *See generally* Rosemary J. Coombe, *First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law*, *in* PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 247 (Catherine Bell & Robert K. Paterson eds., 2009) (exploring proposals to extend "protection" to ICH).

[38] GEORGE YÚDICE, THE EXPEDIENCY OF CULTURE: USES OF CULTURE IN THE GLOBAL ERA 9–10 (2003). *See generally* ANITA ABRAHAM ET AL., CULTURE AND PUBLIC ACTION (Vijayendra Rao & Michael Walton eds., 2004) (contending that culture is central to development and that cultural processes are evolving sources of social and economic

has been further politicized, as cultural rights have become legal means through which political claims are chased.[39] Because of this politicization of culture, matters concerning safeguarding, managing, and developing ICH have become ultimately engrained in the broader field of politics.

II
ICH AS A CONTINUOUS PROCESS OF SOCIAL INVOLVEMENT

In the context of ICH, it is crucial to highlight that such heritage relates primarily to processes that imply the gathering of people belonging to a cultural group[40] or community that engenders an intangible cultural performance.[41] The term community is indispensable for the satisfactory and effective protection of ICH, despite the fact that it is severely condemned as vague and useless in scholarly literature.[42] Communities are indeed at the core of ICH protection, as ICH generally originates as a creation of early ancestors of that community. In this respect, ICH is shaped consistently with the natural environment, such as nature, landscape, or climate.[43] In

change); JOHN L. COMAROFF & JEAN COMAROFF, ETHNICITY, INC. (2009) (providing an account of the commodification of ethnicity).

39 *See* Rosemary J. Coombe, *'Possessing Culture': Political Economies of Community Subjects and Their Properties*, *in* OWNERSHIP AND APPROPRIATION 105, 120 (Veronica Strang & Mark Busse eds., 2011); Henrietta Marrie, *The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Protection and Maintenance of the Intangible Cultural Heritage of Indigenous Peoples*, *in* INTANGIBLE HERITAGE, *supra* note 5, at 169, 190; Bruce Robbins & Elsa Stamatopolou, *Reflections on Culture and Cultural Rights*, 103 SOUTH ATLANTIC Q. 419, 420 (2004).

40 The term cultural group includes a village, a group, or a nation. *See generally* Rosemary J. Coombe, *Cultural Agencies: The Legal Construction of Community Subjects and Their Properties*, *in* MAKING AND UNMAKING INTELLECTUAL PROPERTY 79 (Mario Biagioli et al. eds., 2011) (explaining the need for legal protection of ICH from the viewpoints of different community stakeholders).

41 *See* Arizpe, *supra* note 30, at 11.

42 VERED AMIT & NIGEL RAPPORT, THE TROUBLE WITH COMMUNITY: ANTHROPOLOGICAL REFLECTIONS ON MOVEMENT, IDENTITY AND COLLECTIVITY 1 (2002); Michael J. Watts, *Contested Communities, Malignant Markets, and Gilded Governance: Justice, Resource Extraction, and Conservation in the Tropics*, *in* PEOPLE, PLANTS, AND JUSTICE: THE POLITICS OF NATURE CONSERVATION 21, 22–23 (Charles Zerner ed., 2000); George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111, 111 (1955). For a more recent analysis of this term, see generally RETURNING (TO) COMMUNITIES: THEORY, CULTURE AND POLITICAL PRACTICE OF THE COMMUNAL (Stefan Herbrechter & Michael Higgins eds., 2006) (debating the proper concept of community).

43 *See generally* Walter E.A. van Beek & Fabiola Jara, *"Granular Knowledge": Cultural Problems with Intellectual Property and Protection*, *in* INTELLECTUAL

many instances, ICH mirrors the community's response to the social environment, comprising their history or exchanges with other societies and cultures. Today, these processes of cross-cultural borrowings and communications are even more penetrating due to social phenomena such as globalization and urbanization, which have a crucial stance in the globalizing world.[44]

What really matters in the maintenance of ICH by the community is the repetition of a continuous process of social involvement through mediums such as story-telling, myths, songs, or other such time-capturing expressions.[45] The ICH Convention stresses that communities have to be actively involved in all processes related to their ICH, and stipulates that competent authorities should thus "endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."[46] Indeed, the aptitude of the ICH Convention to meet indigenous communities' needs rests in the implementation and enforcement of the principles of community involvement. Janet Blake remarks that the precise character of ICH itself is unavoidably reliant on its continuing enactment by its practitioners, whose involvement and participation in the maintenance and development of their heritage must be guaranteed.[47]

From an anthropological point of view, the participation of people from the community in such events activates societal bonds. People who participate in such endeavors may primarily aim to bring the community together and assign each participant a specific role to play. As underlined at Lourdes Arizpe,

> [T]his 'activation' of bonds . . . has a crucial role in updating the representation of the community in the eyes of all its members even if they are living elsewhere. Intangible heritage, then, in terms of the processes it involves, helps keep otherwise invisible bonds alive and updated among the members of a community.[48]

PROPERTY LAW, *supra* note 3, at 35 (making an anthropological assessment of the evolution of culture).

44 *See* Ullrich Kockel, *Reflexive Traditions and Heritage Production*, *in* CULTURAL HERITAGES AS REFLEXIVE TRADITIONS 19, 28 (Ullrich Kockel & Máiréad Nic Craith eds., 2007).

45 Arizpe, *supra* note 30, at 11.

46 ICH Convention, *supra* note 20, art. 15.

47 Blake, *supra* note 26, at 49.

48 Arizpe, *supra* note 30, at 11.

Further, the trans-generational nature of ICH is closely connected to its role of self-identification.[49] The community recognizes its heritage as authentic when it mirrors the dynamic changes of its own culture through the passage of time,[50] in parallel with the changes that characterize the culture at large and the community in which this originates.[51] A legal regime that aims to protect these cultural events must take into account the dynamic and changeable nature of ICH. ICH follows a strong and seamless relationship between the individuals who make up the community and those who have created it through various generational steps.[52] Thus, cultural heritage, as an instrument of identity and continuity,[53] promotes cultural diversity

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49 As stressed by Coombe and Turcotte, any state-based system should avoid violating the human rights principle of indigenous self-identification. *See* Coombe & Turcotte, *supra* note 5, at 304. On the concept of self-identification, see also sources cited *supra* note 4.

50 The principle of self-identification can be derived by combining many rights held in the U.N. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Mar. 23, 1976, 1057 U.N.T.S. 407, arts. 18–22, 27.

51 Indeed, ICH allows a community to distinguish itself from others, valuing and highlighting their peculiarities and dissimilarities. On a more individual level, ICH thus allows individuals to identify themselves with a particular community. *See* Neville Douglas, *Political Structures, Social Interaction and Identity Change in Northern Ireland*, *in* IN SEARCH OF IRELAND: A CULTURAL GEOGRAPHY 151, 151 (Brian Graham ed., 1997).

52 The trans-generational nature of ICH, such as its continued transmission, has further endowed communities with a sense of identity and continuity. *See* G.J. ASHWORTH ET AL., PLURALISING PASTS: HERITAGE, IDENTITY AND PLACE IN MULTICULTURAL SOCIETIES 4–5 (2007). *See generally* Elizabeth Coleman, *Cultural Property and Collective Identity*, *in* RETURNING (TO) COMMUNITIES, *supra* note 42, at 161 (discussing the relationship between material culture and collective identity); Richard Handler, *Who Owns the Past? History, Cultural Property, and the Logic of Possessive Individualism*, *in* THE POLITICS OF CULTURE 63 (Brett Williams ed., 1991) (discussing how individualism intersects with traditional culture).

53 The notion that the community needs its ICH to guarantee its persistence and continuity links with the debate on sustainable development, as it highlights the availability of ICH not only for present generations but also for future ones. *See* DAVID THROSBY, ECONOMICS AND CULTURE 54 (2001); Alan Boyle & David Freestone, *Introduction* to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 1, 12 (Alan Boyle & David Freestone eds., 1999). The most commonly referred to definition of sustainable development, spelled out in the Brundtland Report, expresses the issue as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 8 (1987). The 1987 Report of the World Commission on Environment and Development, *Our Common Future* (commonly referred to as the Brundtland Report in honor of Gro Harlem Brundtland, the Prime Minister of Norway, who chaired the World Commission) is generally viewed as the source of the term "sustainable development." *Id.*

and human creativity.[54] As a result, ICH has shaped itself in a manner that will persist and interconnect the community as ancestors hand it to future generations. And, as this process reiterates itself, ICH becomes further linked to its community.[55] Hence, the rapport between communities and their ICH is reciprocal. Communities shape their ICH as much as the ICH affects communities and their members.

The manifestations of ICH, as defined in the ICH Convention,[56] also takes into account the relevant economic assets of the communities or individuals who generate, implement, and preserve them. Hence, ICH and specific objects deriving from such heritage can be the contents of trade. Indeed, under Article 2,[57] the ICH Convention protects not merely intangible aspects of ICH, but also the tangible items originating from it.[58] Consequentially, the distinction between tangible and intangible cultural heritage is not clear-cut, and the two concepts may sometimes overlap.[59] According to the *World Intellectual Property Organization* (WIPO),[60] ICH embraces traditional knowledge and traditional cultural expressions or expressions of folklore.[61] Of note, this includes knowledge itself,

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54 *See* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003); Michael Rowlands, *Cultural Rights and Wrongs: Uses of the Concept of Property*, *in* PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY 207, 211 (Katherine Verdery & Caroline Humphrey eds., 2004).

55 *See id.* at 211–12.

56 *See* ICH Convention, *supra* note 20.

57 *Id.* at art. 2(1).

58 The Operational Directives for the Implementation of the ICH Convention recognize that commercial activities can stem from ICH. *See* UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, at para. 116 (2008) [hereinafter Operational Directive], http://www.unesco.org/culture/ich/doc/src/ICH-Operational_Directives-2.GA-EN.pdf.

59 *See* Alessandra Lanciotti, *Profili internazionalprivatistici dei nuovi strumenti UNESCO*, *in* LE IDENTITÀ CULTURALI NEI RECENTI STRUMENTI UNESCO, *supra* note 20, at 286, 286–307.

60 WIPO is the principal international intergovernmental organization responsible for the administration and negotiation of intellectual property treaties and the provision of intellectual property. The mandate of WIPO is to promote creative intellectual activity. WIPO also acknowledges the necessity to maintain a balance between rights of authors and the large public interest in accessibility. As a specialized agency of the United Nations (U.N.), WIPO is subject to the U.N. Charter, which specifies, inter alia, that promotion and protection of human rights is one of the purposes of the U.N. WIPO, *Intellectual Property Handbook: Policy, Law and Use*, WIPO pub. 489 (2004), http://www.wipo.int/about-ip/en/iprm/.

61 WIPO, *Annual Report 2003*, at 17 (2003), http://www.wipo.int/edocs/pubdocs/en/general/441/wipo_pub_441_2003.pdf. Kamil Idris, former Director General of WIPO, described the organization's mission in the following terms: "To promote through

which embraces know-how, skills, innovations, practices, traditional lifestyles, and distinctive signs and symbols related to traditional knowledge.[62] Traditional cultural expressions encompass "phonetic or verbal expressions, such as stories," narratives, signs and names; "musical or sound expressions"; "expressions by action, such as dances, plays, ceremonies, rituals . . . and performances, whether fixed or unfixed"; and "material expressions of art," such as handicrafts.[63] This broad range of traditional cultural expressions that need protection from commercial misappropriation, coupled with the need for indigenous communities to guarantee that the commercial use of ICH does not misconstrue its connotation, significance, and aim, highlights the need for an updated IPR framework that grants control of ICH to the originating communities.[64]

III
IPRS AND ICH: THE PROTECTION AND RESULTING COMMODIFICATION OF INTANGIBLE CULTURAL PROPERTY

The protection of ICH must take into account the inherently dynamic nature of the subject matter. Although different forms of protection for cultural expression and knowledge have been envisaged since the late 1800s,[65] the first international multilateral framework for this issue was not attained until October 2003, when the UNESCO General Conference adopted the International Convention on the Safeguarding of Intangible Cultural Heritage.[66] Until the end of the

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international cooperation the creation, dissemination, use and protection of works of the human spirit for the economic, cultural and social progress of all mankind." *Id.* (quoting the Mission Statement found on the report's cover page).

62 *See id.* at 17.

63 WIPO, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, art. 1.1, at annex II, p. 5, WIPO Doc. WIPO/GRTKF/IC/17/12 (June 6, 2011), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=171057.

64 This concept was highlighted in the Operational Directive for the Implementation of the ICH Convention. Operational Directive, *supra* note 58, para. 117.

65 Ana Filipa Vrdoljak, *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage*, EUR. SOC'Y FOR INT'L L. (ESIL) RES. F. INT'L L. CONTEMP. ISSUES 18 (2005).

66 ICH Convention, *supra* note 20. *See generally* Benedetta Ubertazzi, *Su alcuni aspetti problematici della Convenzione per la salvaguardia del patrimonio culturale intangibile*, 3 RIVISTA DI DIRITTO INTERNAZIONALE 777 (2011) (providing a critical analysis of the ICH Convention); Mohammed Bedjaoui, *The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles*, 56 MUSEUM INT'L 150 (2004) (providing a detailed exposition of the concept of ICH).

twentieth century,[67] the most important tools used to protect cultural heritage focused exclusively on its tangible expressions, the relevance of which was to be evaluated on the basis of an objective perception of their artistic, aesthetic, architectural, scientific, or economic value.[68] The lack of attention to intangible expressions of the cultural heritage was a direct consequence of the confidence that this heritage would continue to be developed at the local level and transmitted to new generations. Hence, there was an assumption that ICH would be protected as a fundamental part of the community's cultural and social life. This automatic and spontaneous process, however, was undermined by the advent of globalization,[69] which led to an intensification of intercultural relations, as well as cultural oppression and the imposition of certain cultural patterns over others.[70]

The term "globalization" is used in its broadest sense to refer to an integration process in which economic input factors, comprising, inter alia, capital, labor, production, and distribution are interconnected across borders to generate global prospects for trade and industry.[71] The integration process of globalization cuts across boundaries to accomplish a level of interdependence that raises transnational flows of goods, services, information, and problems.[72] As expressed by legal expert Robert Holton, globalization has created a variety of cultural consequences that can be examined through concepts of homogenization, polarization, and hybridization.[73] Homogenization means that global culture is becoming standardized around a Western or American pattern. According to Holton, while some evidence supports this view, the presence of cultural alternatives and resistance

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67 *See* C.A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 240 n.1 (Russell & Russell 1968) (1934); PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 41 (1991).

68 *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Protection of Cultural Property]; Protection of Cultural Property Protocol, May 14, 1954, 249 U.N.T.S. 358 (giving reference to the first protocol for this Convention); Protection of Cultural Property Protocol, Mar. 26, 1999, 2253 U.N.T.S. 212 (giving reference to the second protocol for this Convention; Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151).

69 *See generally* Robert Holton, *Globalization's Cultural Consequences*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (2000) (discussing globalization and its cultural consequences).

70 *See* Lenzerini, *supra* note 14, at 102.

71 *See* Holton, *supra* note 69, at 141.

72 *Id.*

73 *Id.*

to Western norms suggests that polarization provides a more convincing picture of global cultural development.[74] He further emphasizes that global interconnection and interdependence do not necessarily mean cultural conformity.[75] Culture, it seems, is harder to standardize than economic organization and technology. Yet the idea of polarization has its limits, too. Hybridization provides that cultures borrow and incorporate elements from each other, creating hybrid, or syncretic, forms.[76] Evidence to support this view comes mainly from popular music and religious life. Holton therefore concludes that the cultural consequences of globalization are diverse and complex.[77]

In attempting to evaluate the desirability of using IPRs for the protection of ICH, significant conflicts arise between these two domains. The clash between IPR and ICH derives from the fact that the former aims at protecting the proprietary rights and economic interests of individuals (human or corporate), whereas the latter relies on the preservation of the common heritage of a specific community or group.[78] In this vein, scholars, indigenous communities, minority groups,[79] NGOs,[80] and UNESCO have fought to reform the current IPR regime, stressing the different rationales for protecting ICH. Hence, two compelling requirements of ICH protection have arisen: first, the solicitation for acknowledgement of the rights of ICH holders associated with their traditional knowledge; and second, concerns about the unauthorized acquisition and access by third parties of IPRs over ICH.[81] As pointed out in legal scholarship, one of

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[74] *Id.* at 145.

[75] *Id.*

[76] *Id.* at 148.

[77] *Id.* at 151.

[78] *See generally* E. Wanda George, *Intangible Cultural Heritage, Ownership, Copyrights, and Tourism*, 4 INT'L J. CULTURE, TOURISM & HOSPITALITY RES. 376 (2010) (highlighting the issues related to ICH ownership and copyright and raising potential concerns for local communities involved in cultural heritage tourism).

[79] *See* Budislav Vukas, *International Protection of Minorities: Limits of Growth*, *in* HUMAN RIGHTS AND DEMOCRACY FOR THE 21ST CENTURY 17, 33 (2000); Joseph B. Kelly, *National Minorities in International Law*, 3 DENVER J. INT'L L. AND POL. 253, 260 (1973). *See generally* Josef L. Kunz, *The Present Status of International Law for the Protection of Minorities*, 48 AM. J. INT'L L. 282 (1954) (discussing problems related to minority groups in the 1950s).

[80] *See generally* Ken Taylor, *Cultural Heritage Management: A Possible Role for Charters and Principles in Asia*, 10 INT'L J. HERITAGE STUD. 417 (2004) (discussing the role NGOs play in reforming Asian IP regimes).

[81] *See* Federico Lenzerini, *Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge*, *in* CULTURAL HUMAN RIGHTS. 119, 141 (Francesco Francioni & Martin Scheinin eds., 2008).

the side effects of the affirmation of IPRs in this context is the *commodification of intangible cultural property*.[82] This notion of commodification is the translation of intangible cultural property into articles of economic worth that can be exchanged for commercial profit by such means as license, rental, or sale. Although ICH mirrors the interaction of a community with their environment, it may develop an economic value over time.[83] Consequently, ICH can be a valuable means for economic development.

Not all ICH is economically remunerative. However, it may nonetheless have vital meaning to the community concerned and contribute to the development of that community.[84] Further, some communities have considered the conversion of ICH into property as exploitation and commercialization and, consequentially, misappropriation of reified ICH.[85] Therefore, it is crucial to assess whether this resultant reification of ICH is desirable with regard to the aim of granting protection to collective cultural expression.

Furthermore, the dissemination of ICH through digital technology and the Internet has exacerbated the commodification of intangible cultural property by third parties,[86] or illegitimate custodians of the community's ICH.[87] As such, it seems appropriate not to recognize

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82 *See* Paterson & Karjala, *supra* note 1, at 634.

83 Amartya Sen, *How Does Culture Matter?*, *in* CULTURE AND PUBLIC ACTION 37, 39 (Vijayendra Rao & Michael Walton eds., 2004).

84 Lourdes Arizpe, *The Intellectual History of Culture and Development Institutions*, *in* CULTURE AND PUBLIC ACTION, *supra* note 83, at 163, 174.

85 *Id.*; *see also* Paterson & Karjala, *supra* note 1, at 634. Interestingly, the recent emphasis upon "inventorising" ICH, reifying it (i.e., commodification), possibly constitutes a new regime of power, which poses both promise and peril for the local communities and indigenous peoples deemed to form part of the distinctive culture that these new regimes seek to value. Coombe & Turcotte, *supra* note 5, at 304; *see also* Philip Scher, *UNESCO Conventions and Culture as a Resource*, 47 J. FOLKLORE RES. 197, 201 (2010).

86 Paterson & Karjala, *supra* note 1, at 637.

87 Generally referring to traditional cultural expressions, Miriam Sahfeld points out: "With the digitization of content and existence of the Internet as a tool for distribution, the risk of misappropriation has increased dramatically now that any tourist can use his or her mobile phone to photograph and record [a traditional cultural expression]." Miriam Sahlfeld, *Commercializing Cultural Heritage? Criteria for a Balanced Instrumentalization of Traditional Cultural Expressions for Development in a Globalized Digital Environment*, *in* INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 256, 281 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008). She observes that, "exploiting the captured [traditional cultural expression] commercially can be accomplished quickly [by third parties], thereby usurping the chance to use [traditional cultural expression] as an asset of economic development." *Id.*; *see also* Paolo Davide

new IPRs, but instead to campaign for a reinterpretation of existing legal regimes concerning specific aspects of the current IPR framework; including privacy and unfair competition laws, aimed at leveling what might be perceived as an unfair playing field. This approach allows claimants not to frame their legal rights in relation to preexisting classes of property rights, thus eluding the charges of misuse and reification that have clung to such claims in the past. In fact, several issues have been raised calling for differentiated and more coherent legal protection of cultural heritage. At the same time, it has been stressed[88] that the extension of IPRs over cultural heritage would generate a number of problems related to the very core of the democratic[89] conception of free speech and free expression, as carried out in both copyright and patent notions of public domain.[90]

The perils affecting ICH and its expressions cannot be underestimated. It is common to see the use of indigenous knowledge in a commercial product (for example a valuable drug)[91] or the use by outsiders of tribal names or other identifiers[92] (such as sacred

Farah & Riccardo Tremolada, *Global Governance and Intangible Cultural Heritage in the Information Society: At the Crossroads of IPRs and Innovation*, *in* THE HANDBOOK OF GLOBAL SCIENCE, TECHNOLOGY, AND INNOVATION 466 (Daniele Archibugi & Andrea Fillippetti eds., 2015).

88 Paterson & Karjala, *supra* note 1, at 638–45.

89 We employ the terminology "democratic" in its far-reaching connotation to refer to processes that allow for extensive participation and equal access to fora so that diverse visions can be heard. Undeniably, greater participation should be moving the process of IPR harmonization in the direction of greater equilibrium in the search for an international level of social justice. Indeed, civil society serves an important regulatory function in international standard setting, and has been profoundly affected by the forces of globalization. *See generally* DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (1999) (examining how globalization is defined and its impact on state power, politics, global markets, global markets, migration, culture, and the environment); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing in favor of using the democratic paradigm rather than neoclassicism as the basis for copyright doctrine in the face of increasing digitalization and globalization).

90 On the notion of "public domain," see sources cited *supra* note 13.

91 Brian A. Liang, *Global Governance: Promoting Biodiversity and Protecting Indigenous Communities Against Biopiracy*, 17 J. COM. BIOTECHNOLOGY 248, 249 (2011); Tim K. Mackey & Bryan A. Liang, *Integrating Biodiversity Management and Indigenous Biopiracy Protection to Promote Environmental Justice and Global Health*, 102 AM. J. PUB. HEALTH 1091, 1091 (2012).

92 Annette Kur & Roland Knaak, *Protection of Traditional Names and Designations*, *in* INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 293, 294 (Silke von Lewinski ed., 2d ed. 2004).

symbols or images, or even artistic designs generally).[93] Associated hurdles pertain to the use of these names, symbols, and designs by authentic members of the community, but in ways that manifestly conflict with the community's traditional use.[94] Finally, a related issue is the "disturbance of an embedded landscape"[95] in which cultural heritage is so intrinsically connected to nature that it cannot be removed without either diverting from its authentic environment or reducing the usefulness of the heritage itself. Fragile environments and landscapes play a fundamental role in the interactions between humankind and cultural heritage. Therefore, they justify the right of indigenous people to restrict research on their knowledge or biological resources where the integrity of natural or cultural patrimony is threatened.[96]

IV
APPLICATION OF IPRS IN THE PROTECTION OF ICH

Attempts to protect ICH have revealed that no single all-embracing, umbrella solution will fully satisfy the needs of every traditional community. Conversely, valid and serviceable protection should include a range of options, reinforced by an internationally recognized range of core principles.[97] The contour of these objectives would frame the protection regime both at the domestic and international level, allowing for ad hoc implementation and greater flexibility regarding the diverse needs of ICH holders.[98] The protection of ICH may involve a range of measures, depending upon the value of the heritage at issue. This value ultimately relates its significance to human communities. Protection of ICH is tantamount to protecting not the expression or particular expressive practice per

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93 Additionally, if the community from which the heritage originates intends to maintain secrecy surrounding its rituals, employing unfair means to gain information about them, or taking advantage of these rituals after others have unfairly exposed them, clearly transgresses underlying concepts of privacy. For further discussion on privacy concerns see *infra* Part V.A.

94 Additionally, individuals external to the community may be confused as to whether a given item is authentic, negatively affecting the community's ability to profit from commercial sales.

95 Paterson & Karjala, *supra* note 1, at 637.

96 *Id.* at 637–38 ("[F]rom this notion it follows that local ecological knowledge should belong to the community as a whole and be considered inalienable.").

97 CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 3–4 (2010).

98 *Id.* at 6.

se, but the significance that the object, expression, or practice has in the social life of a community for whom it is cultural heritage.[99]

A. Existing IPR Systems

Efficient protection requires the legal recognition of rights over ICH, either under existing IPR regimes or *sui generis* (unique and special) regimes.[100] As previously observed, the heterogeneity of cultural heritage makes it impossible to adopt a single, one-size-fits-all solution. Rather, it is essential to equip ICH holders with a suitable menu of protection mechanisms, to give them the choice between various typologies of protection. From this perspective, the safeguarding of ICH, such as that generally provided under IPR, is not addressed as a goal in itself, but as an instrument for policy purposes. Efficient protective options should therefore encompass recourse to existing IPR systems; *sui generis* aspects of IPR systems through the adaptation of IPRs to the peculiarity of ICH; new, innovative *sui generis* systems providing specific rights; and, finally, non-IPR options.[101]

First, it is essential to evaluate to what extent IPRs are adequate in confronting some of the hurdles identified. In fact, since many traditional cultural expressions share an intangible nature, IPR rules seem at first glance to constitute the most assuring legal tool for the protection of ICH against misuse. Nevertheless, it can be observed

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[99] *See id.* at 3.

[100] WIPO, *Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options*, WIPO Doc. WIPO/GRTKF/IC/6/3, at para. 3 (Dec. 1, 2003).

[101] As it will be discussed in Part V, several non-IPR options must also be taken into account, such as trade practices and labeling laws, the law of civil liability, the use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources and associated traditional knowledge, and remedies based on torts, such as unjust enrichment, rights of publicity, and blasphemy. *See generally* SOPHIA ESPINOSA COLOMA, LEGAL PROTECTION OF ECUADORIAN BIODIVERSITY AND TRADITIONAL KNOWLEDGE: THE EXISTING INTELLECTUAL PROPERTY RIGHTS SYSTEM VS. A SUI GENERIS SYSTEM (2010) (discussing possible legal systems that could protect cultural heritage and simultaneously improve access to biological resources); PETER DRAHOS, TOWARDS AN INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL GROUP KNOWLEDGE AND PRACTICE (2004), https://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2004Drahos_tkframeworkUNCTAD.pdf (summarizing the UNCTAD-Commonwealth Secretariat Workshop on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, Geneva, Feb. 4–6).

that the current IPR framework[102] constitutes an unsatisfactory ground to safeguard ICH, unless elaborately revised. Specifically, experience has revealed a number of hindrances related to the assertion of IPRs as a means to protecting ICH, resulting from the inadequateness of existing IPRs in meeting all the peculiarities and characteristics of ICH. The principal shortcoming of the current IPR framework in protecting cultural heritage is its individual, self-centered nature, which is incompatible with the collectivistic nature of ICH. Furthermore, traditional communities' interests in cultural heritage are inter-generational and, consequently, last much longer than most IPRs. Another hurdle is the onerous cost associated with the use of IPR, which is a serious deterrent. The following section discusses potential applications of the current IPR system and its principal downsides in the context of ICH.

1. Copyright

Copyright commonly protects works of artistic, literary, and musical expression, including, for example, novels, paintings, music, and choreography, and is intended to prevent the unauthorized reproduction of artistic works.[103] Hence, it could serve as an

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102 *See generally* WILLIAM CORNISH ET AL., INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS (8th ed. 2013) (providing a comprehensive description of the United Kingdom's IPR regime).

103 Berne Convention for the Protection of Literary and Artistic Works (Paris Act) art. 2(1), July 24, 1971, 1161 U.N.T.S. 18388 [hereinafter Berne Convention] (defining copyrightable subject matter as "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression"); *see also* Agreement on Trade Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement] (incorporating by reference the definition of copyrightable works under Article 2 of the Berne Convention). For an analysis of the Convention, see SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 124 (1987); Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 180 (1989). *See generally* Thomas Cottier, *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS vol. I 1041 (Patrick F.J. Macrory et al. eds., 2005) (providing background on and implications of the TRIPS Agreement); Abraham L. Kaminstein, *Statement of the United States Delegation on the Berne Convention*, 14 BULL. COPYRIGHT SOC'Y. U.S.A. 435 (1967) (explaining the effect of the Berne Convention on copyright registration). Protection under copyright is limited to the expressions contained in the protected works, and does not extend to the ideas contained therein. TRIPS Agreement, *supra*, at art. 9(2) ("Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."); *see also* WIPO Copyright Treaty art. 2, Dec. 20, 1996, 2186 U.N.T.S. 121 (using the identical language of Article 9(2) of TRIPS to describe the limitations of copyrightable expression).

important instrument for safeguarding cultural heritage from inappropriate use.[104] Nevertheless, we need to attentively consider the peculiarities of ICH when tested against the essential constituents of copyright protection. In fact, copyrights present crucial limitations in the ICH context, thus excluding some expressions from eligibility for protection.[105]

One problem is that copyrights demand an identifiable author, a notion that is not clear-cut in many traditional societies in which heritage stems from expressions of folklore deriving from previous generations through reiteration. In most ICH, there is no specific identified author. This might render copyrights unsuitable since they do not recognize collective rights, but rather accentuate the role of individuals in contributing to the marketplace of ideas. Although copyright protects multiple authorships and coauthorship,[106] it does not recognize communal authorship.[107] Hence, cultural heritage, in its urge to guard the past and reprise the expressions of former generations, may accidentally restrict its eligibility for copyright privileges.[108] Nonetheless, authorship classifications of ICH could comprise a work that has no known author, so-called "orphan works," for instance in cases where the author of an indigenous song or tale cannot be traced, or in a communal work to which the entire community contributed. In respect to orphan works, Article 15(4) of the Berne Convention lets individual member states decide whether to enact legislation to protect the author in cases of orphan work.[109] Accordingly, this work must not have been published, and the

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104 On the evolution of the concept of "copyright" in intellectual property law, see GIOVANNI PASCUZZI & ROBERTO CASO, I DIRITTI SULLE OPERE DIGITALI: COPYRIGHT STATUNITENSE E DIRITTO D'AUTORE ITALIANO (2002).

105 *See generally* TULLIO ASCARELLI, TEORIA DELLA CONCORRENZA E DEI BENI IMMATERIALI: ISTITUZIONI DI DIRITTO INDUSTRIALE (1960) (examining the interaction of intangible goods with existing legal, social, and scientific practices); GIORGIO JARACH, MANUALE DEL DIRITTO D'AUTORE (1983) (discussing the advantages and limitations of Italian copyrights).

106 The concept of authorship under copyright law has been discussed by the U.S. Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony*, in which the Court demarcated the term "author" as "he to whom anything owes its origin; originator; maker." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884).

107 *See* Joseph Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, MURDOCH U. ELECTRONIC J.L. (Austl.), June 1998, at para. 31, http://www5.austlii.edu.au/au/journals/MurUEJL/1998/13.html.

108 *Id.*

109 *See* Berne Convention, *supra* note 103, at art. 15(4).

unknown author must be a citizen of a country that belongs to the Berne Union.[110]

Further, copyrights expire.[111] After a copyright expires, the previously copyrighted information becomes a part of the "public domain," and "the public domain is a problematic venue for Indigenous Peoples."[112] The public domain is problematic for the reason discussed above: ownership. The limited term of copyrights originates from the concept "that individual property rights are based on the addition of labor and must be reconciled with the competing demands of the public domain."[113] In fact, approaches like copyright that assume a dichotomy between private property rights and the public domain may not be able to accommodate other concepts of ownership or systems of heritage creation.[114] Scholar James Leach points out, for example, that "property" is only one way of approaching ownership, and many traditional communities have other methods of organizing ownership beyond those implied by Western property.[115] Other commentators have pointed out that traditional communities have their own systems of rights, including exclusive rights to expressions of their cultures in some contexts.[116] Accordingly, some traditional groups have argued that, while their cultural heritage is communally held and may not be subject to

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110 *Id.*

111 CORNISH ET AL., *supra* note 102, at 396.

112 Tzen Wong & Claudia Fernandini, *Traditional Cultural Expressions: Preservation and Innovation*, *in* INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS 175, 207 (Tzen Wong & Graham Dutfield eds., 2011) (quoting L.P.C. Belder, *Cultural Expressions: From Common Source to Public Domain*, *in* NEW DIRECTIONS IN COPYRIGHT LAW vol. 4 35, 45 (Fiona Macmillan ed., 2007)).

113 JAMES A.R. NAFZIGER ET AL., CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS 631 (2010); *see also* Kenneth Deer, *Indigenous ICT Taskforce: Managing Traditional Knowledge in the Information Society—From Indigenous Customary Law to Global Internet Governance*, *in* TRADITIONAL KNOWLEDGE & INDIGENOUS PEOPLES 94, 95 (Uila Popova-Gosart ed. & trans., 2009), http://www.wipo.int/edocs/pubdocs/en/tk/1014/wipo_pub_1014.pdf.; James Leach, *Modes of Creativity and the Register of Ownership*, *in* CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY 29, 33 (Rishab Aiyer Ghosh ed., 2005); Wong & Fernandini, *supra* note 112, at 207. *See generally* MARILYN STRATHERN, PROPERTY SUBSTANCE AND EFFECT: ANTHROPOLOGICAL ESSAYS ON PERSONS AND THINGS (1999) (discussing reification of social relations in the context of property, ownership, and knowledge).

114 *See* Leach, *supra* note 113, at 33.

115 *Id.* at 36–37.

116 *See* STRATHERN, *supra* note 113, at 192–95.

private property, this does not necessarily mean that it is in the public domain.[117]

Similarly, scholars Paterson and Karjala observe that copyrights eventually free up underlying cultural expression to foster individual innovation, whereas traditional communities and groups put a premium on the protection and control of the underlying cultural expression.[118] Contrarily, cultural traditions, especially from indigenous communities, generally require indefinite protection because, given the crucial role played by heritage—an essential element of a community's identity—they believe that this cultural heritage should not be released into the public domain. The concept of perpetual, cultural property rights is linked to the collectivistic nature of a traditional community, which contrasts with the Western paradigm of the romantic, solitary author.[119]

Nevertheless, it must be remarked that, since IPR protection is typically granted for a limited time in order to balance the rights of the author to gain a moral and economic incentive, and the need to guarantee that new works enter the public domain,[120] creating novel legal framework allowing everlasting protection of IPRs may face constitutional set backs in some jurisdictions. For example, the United States Constitution expressly states that protection of copyrightable and patentable works is to be afforded for a limited time.[121]

Moreover, the concept of authorship relates to the requirement of "originality,"[122] under copyright law. ICH is rarely capable of satisfying this threshold. Nevertheless it should be noted that at least in the common law system, the degree of originality required is relatively low,[123] meaning that originality will be found so long as the work originates with the author and conveys a "modicum of

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117 *See* Deer, *supra* note 113, at 95.

118 *See* Paterson & Karjala, *supra* note 1, at 641.

119 The evolution of the concept of "author" is discussed in JANE E. ANDERSON, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW 68–72 (2009).

120 Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. L. & POL'Y 313, 324–25 (2005).

121 U.S. CONST. art. I, § 8, cl. 8.

122 DAPHNE ZOGRAFOS, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS 45–46 (2010).

123 *See* Peter Shand, *Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion*, 3 CULTURAL ANALYSIS 47, 74 (2002).

creativity."[124] Nevertheless, this low level of originality can be perilous for ICH because, "even if they have copyright in a work, they cannot prevent other people from creating derivatives if they are considered original and copyright works in and of themselves."[125]

More generally, some commentators point out that traditional IPRs, in particular copyright law, are founded on natural rights of authorship, from which an author's rights derive from the principle of exclusive ownership.[126] The author-centric approach of copyright is often considered the main hurdle for copyright protection of cultural heritage.[127] Indeed, the idea of "authorship" and related "ownership" of ICH is potentially detrimental to the communities concerned. In this vein, Diarmuid Ó Giolláin remarked that there are menaces as well as advantages to using copyright to protect cultural heritage because "[p]rivatizing the cultural resources shared by a community is a form of alienation and—notionally, at least—breaks the chain of transmission by which cultural traditions span the past, present, and future."[128]

Undoubtedly, the idea of the single author in copyright has often been instrumental, politically speaking, to advocate for stronger, longer, and broader copyright protection. However, it should be stressed that the actual policy ground for conceding exclusive IPRs stems from the public goods issue. In fact, the unsuccessful attempt to safeguard intellectual creativity would result in fewer inventive and socially advisable works being created and disclosed to the public, since the effort required to initially produce the cultural expressions is much greater than that required to merely copy existing cultural expressions. On the other hand, an overly strong or lengthy protection would create a detrimental effect on the availability of creative works to the public because authors and inventors depend and build upon works that have come before them. The final objective of the IPR regime is to bring these two forces into equilibrium, and, thus, take full advantage of the works made available to the public.

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124 Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 340 (1991) ("The constitutional requirement necessitates independent creation plus a modicum of creativity.").

125 JESSICA CHRISTINE LAI, INDIGENOUS CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS: LEARNING FROM THE NEW ZEALAND EXPERIENCE? 79 (2014).

126 *Id.* at 80.

127 Diarmuid Ó Giolláin, *Copy Wrong and Copyright: Serial Psychos, Coloured Covers, and Maori Marks*, 3 CULTURAL ANALYSIS 100, 101 (2002).

128 *Id.*

Indeed, in many non-Western cultural traditions, such as those in China, IPR protection is instrumental not to the individual, but rather to the entire community. For example, the Chinese philosopher Confucius claimed that he never invented anything but was only *transmitting* ancient *knowledge*.[129] Indeed, Confucius admitted in *The Analects* that he had only "transmitted what was taught to [him] without making up anything of [his] own."[130] Additionally, the concept of knowledge transmission has been deeply analyzed by Confucian scholars.[131] The scholar William Alford proposed that the stance adopted by Confucius has prevented the growth of an indigenous concept of IPRs in China.[132] Nevertheless, Alford emphasized "the role of three interrelated historical-cultural factors: the resilience of Confucian culture, which encourages learning through copying the works of others; a residual resentment of the West for forcing China to adopt both its pre-1949 IPR laws and the new IPR laws of the 1980s and 1990s; and the legacy of the Mao era, when copyrights, trademarks, and patents were virtually abolished."[133] In light of China's many impressive recent IPR developments, one should assess whether Confucianism can be accredited for the promising recent changes.[134]

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129 CONFUCIUS: THE ANALECTS 115 (Arthur Waley trans., Alfred A. Knopf, Inc. 2000).

130 *Id.*

131 Wm. Theodore de Bary, *Chu Hsi's Aims as an Educator*, *in* NEO-CONFUCIAN EDUCATION: THE FORMATIVE STAGE 186, 186 (Wm. Theodore de Bary & John W. Chaffee eds., 1989).

132 WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 9–29 (1995); *see also* Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C. J. INT'L L. & COM. REG. 1, 11 (2006). *See generally Kong Yigi*, *in* THE REAL STORY OF AH-Q AND OTHER TALES OF CHINA: THE COMPLETE FICTION OF LU XUN 32 (Julia Lovell trans., 2009) (a Chinese story condemning people who steal).

133 MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 21 (2009). For further discussion on cultural explanations for piracy and counterfeiting issues in China and the corresponding legal framework, see Charles R. Stone, Comment, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 202–03 (2008).

134 For instance, in 2013, China was among the top five countries filing international applications through the Patent Cooperation Treaty. Press Release, WIPO, US and China Drive International Patent Filing Growth in Record-Setting Year (Mar. 13, 2014), http://www.wipo.int/pressroom/en/articles/2014/article_0002.html; *see also* Paolo Davide Farah, *L'influenza della concezione confuciana sulla costruzione del sistema giuridico e politico cinese*, *in* IDENTITÀ EUROPEA E POLITICHE MIGRATORIE 193 (Giovanni Bombelli & Bruno Montanari eds., 2008); Paolo Davide Farah & Elena Cima, *China's Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and Transparency Issues*, *in* EL COMERCIO CON CHINA: OPORTUNIDADES

Another relevant hindrance is the copyright requirement of fixation, where the "original" work is stable and unvarying,[135] which conflicts with the oral nature of most ICH. Indeed, ICH is often manifested as a cultural expression that is transmitted from generation to generation and generally meant to be temporary, as relating to ceremonies and celebrations. Ironically, some nonindigenous authors have taken advantage of copyright protections by publishing traditional oral expressions from communities to which they did not belong. From this viewpoint, one could talk about "forced assimilation of that tradition into Western culture."[136]

All the aforementioned arguments restrain the eligibility of ICH for copyright protections, in light of the fact that intangible cultural expressions have their own peculiarities, which diverge from the standard principles of copyright law.

2. Industrial Design, Collective Trademarks, and Geographical Indications

An industrial design is the ornamental or aesthetic aspect of an article, which generally includes works and inventions that do not meet the requirements for patent or copyright protection; but instead demonstrate some degree of novelty or originality, and therefore

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EMPRESARIALES, INCERTIDUMBRES JURÍDICAS 83, 85 (Aurelio Lopez-Tarruella Martinez ed., 2010); JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 178 (2006); 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, 185–88 (Daniel J. Gervais ed., 2007); Peter K. Yu, *Building the Ladder: Three Decades of Development of the Chinese Patent System*, 5 WIPO J. 1, 4–10 (2013).

135 *See* Ó Giolláin, *supra* note 127, at 100. Fixation is generally required by common law systems, but not those of civil law. For instance, fixation amounts to a constitutional requirement in U.S. copyright law, though not elsewhere. The Copyright Clause of the U.S. Constitution states Congress is empowered to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The Berne Convention leaves it up to member states to decide whether to require fixation. *See* Berne Convention, *supra* note 103, art. 2(2). For further discussion of fixation, see PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 232–33 (3d ed. 2013).

136 NAFZIGER ET AL., *supra* note 113, at 631. For a summary of Nafziger, Kirkwood Paterson, and Renteln's theory of cultural law, see Asha Kaushal, Book Note, *Cultural Law: International, Comparative, and Indigenous, by James A. R. Nafziger, Robert Kirkwood Paterson & Alison Dundes Renteln*, 50 OSGOODE HALL L.J. 471 (2012).

warrant some level of protection.[137] The protection provided by industrial designs may be appropriate for the outer features of products deriving from ICH; meanwhile trademark protection may be more appropriate for names, symbols, and other signs.[138]

If the right holders are associations or other collective entities, certification and collective marks could be adequate to protect their interests.[139] Labeling items deriving from ICH, such as trademarks and collective marks, may be relevant for assuring consumers of the authenticity or source of particular products.[140] Authenticity is undoubtedly crucial in helping communities distinguish their renditions of cultural heritage from copies by third parties. As scholar Daphne Zografos observes, such labeling devices can "reward the goodwill accumulated over time" and potentially provide for

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137 *See* TRIPS Agreement, *supra* note 103, at art. 25(1) (requiring members to protect "independently created industrial designs that are new or original").

138 Trademark law generally protects corporate symbols, logos, and other distinctive indicia of the origin of goods or services. *Id.* at art. 15(1) (defining a trademark as "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings"). Among the types of source designations generally protected internationally are distinctive word marks, commercial logos, and other visible "signs." *See generally* GIUSEPPE SENA, I DIRITTI SULLE INVENZIONI E SUI MODELLI INDUSTRIALI, *in* TRATTATO DI DIRITTO CIVILE E COMMERCIALE vol. IX tit. 3 (Antonio Cicu & Fancesco Messineo eds., 1976) (framing the rights of inventors within the international regulatory regime).

139 Legal scholar D. Zografos Johnsson observes that:

> Certification and collective marks are special types of marks. They inform the public about certain characteristics of the products or services marketed under the mark. Article 7 *bis* of the Paris Convention provides for the mutual obligation of registration and protection of collective marks in the countries of the [European] Union. However, it leaves each country [to] be the judge of the particular conditions under which a collective mark shall be protected, and provides that it may refuse protection if the mark is contrary to public interest. Even though the Paris Convention refers only to collective marks, it is generally understood that the term also includes certification marks. Certification and collective marks can be indications of geographical origin. As such, they can be protected under the TRIPS Agreement. The TRIPS Agreement incorporates by reference a number of articles of the Paris Convention, including Article 7 *bis*. As a consequence, collective marks which belong to associations and are serving as GIs are protected under TRIPS.

Daphne Zografos Johnsson, *The Branding of Traditional Cultural Expressions: To Whose Benefit?*, *in* INDIGENOUS PEOPLES' INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 147, 159 (Peter Drahos & Susy Frankel eds., 2012) (footnotes omitted); *see also* JEFFREY BELSON, CERTIFICATION MARKS 23 (2002); NORMA DAWSON, CERTIFICATION TRADE MARKS, LAW AND PRACTICE 13, 36 (1988).

140 Wong & Fernandini, *supra* note 112, at 188–89.

indefinite protection.[141] At the same time, these legal instruments are primarily used within the context of trade and, similar to other forms of IPRs, create issues relating to the commodification of intangible cultural property.[142] More specifically, a trademark can play an important role in the protection of ICH.[143] Individuals, business organizations, or any other legal entities can own this distinctive sign as a form of IPR.[144] Collective marks are generally conceded to a legal entity of traders, typically an association or cooperative, to show that a member belongs to that association.[145] While owned by the legal entity in question, a collective mark can be designed to be used by all members of said association. In this sense, there can be communal use of the same mark.[146] Another relevant instrument is geographical indication,[147] which may[148] be relevant for the protection of commercial goodwill of communities, groups, and their goods as long as it serves the purpose of designating products in the specific territory and incorporating specific peculiarities linked to

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141 Daphne Zografos, *Legal Protection of Traditional Cultural Expressions in East and Southeast Asia: An Unexplored Territory?*, 18 AUSTRALIAN INTELL. PROP. J. 167, 178 (2007).

142 Zografos Johnsson, *supra* note 139, at 159.

143 On this point, a WIPO-commissioned case study suggests that trademarks may be relevant for indigenous people to protect their trade interests, though highlighting several limits in this attempt, such as the requirement to use the trademark. Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO 29–45 (2003), http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf.

144 Kasturi Das, *Select Issues and Debates Around Geographical Indications with Particular Reference to India*, 42 J. WORLD TRADE 461, 472 (2008).

145 *See* TRIPS Agreement, *supra* note 103, arts. 23–24; *see also* CORNISH ET AL., *supra* note 102, at 931–32.

146 Wong & Fernandini, *supra* note 112, at 191.

147 *See* Angela Lupone, *Il dibattito sulle indicazioni geografiche nel sistema multilaterale degli scambi: Dal Doha Round dell'Organizzazione mondiale del commercio alla protezione TRIPs plus*, *in* LE INDICAZIONI DI QUALITÀ DEGLI ALIMENTI: DIRITTO INTERNAZIONALE ED EUROPEO 36, 42 (Benedetta Uberazzi & Esther Muniz Espada eds., 2009); Giuseppe Sanseverino, *La protezione delle indicazioni geografiche*, *in* MANUALE DI DIRITTO COMMERCIALE INTERNAZIONALE 378, 378 (Ugo Patroni Griffi ed., 2012). Article 22(1) of the TRIPS Agreement defines geographical indications as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." TRIPS Agreement, *supra* note 103, at art. 22(1). For a historical analysis of the TRIPS Agreement, see DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 60–63 (2d ed. 2003).

148 The protection of geographical indications is not mandatory under the TRIPS Agreement and can be addressed through trademarks or collective marks. *See generally* J. AUDIER, TRIPS AGREEMENT GEOGRAPHICAL INDICATIONS (2000).

their origin.[149] However, ICH is not always connected to a precise geographical area.[150] The main shortcoming of geographical indications is that, despite being an appropriate tool for preventing misappropriation of names related to traditional communities by third parties, they neither grant protection to the knowledge comprised in the product nor to its production method.[151] Indeed, geographical indications protect names related to geographically designated goods; while ICH has broader applicability to a unique system of knowledge that is not automatically a tangible product linked to a geographical name (although in a number of cases it may well be).[152] In other words, the collective nature and potentially unlimited duration of geographical indications are features that fit with the protection needs of traditional knowledge and cultural expressions. However, the drawback is that they neither protect the knowledge embodied within the good nor the related production process.[153] Industrial designs, trademarks, and geographical indicators are potential solutions to some of the ICH protection issues faced by indigenous communities. Nevertheless, these tools still pose relevant risks of misappropriation of intangible elements by third parties for commercial use.[154]

3. Patents

Patent law generally protects novel, nonobvious, and useful inventions.[155] In respect to ICH, patent law does not typically apply

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149 TRIPS Agreement, *supra* note 103, at art. 23.

150 Bronwyn Parry remarks that any functions served by geographical indications can be better achieved by other legal means, including trademarks and the common law of "passing off." Bronwyn Parry, *Geographical Indications: Not All 'Champagne and Roses,' in* TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 361, 364 (Lionel Bently et al. eds., 2008). According to Parry, geographical indications are limited by their "explicit[] appeal[] to *place* (here construed as a unique assemblage of inhabitants, environment and associated cultural (artisanal) methods of production) to provide a guarantee of the quality of the products produced therein." *Id.*

151 Susy Frankel, *The Mismatch of Geographical Indications and Innovative Traditional Knowledge*, 29 PROMETHEUS 253, 261 (2011).

152 *Id.*

153 Kunal Basu, *Marketing Developing Society Crafts: A Framework for Analysis and Change*, *in* MARKETING IN A MULTICULTURAL WORLD: ETHNICITY, NATIONALISM, AND CULTURAL IDENTITY 257, 261 (Janeen Arnold Costa & Gary J. Bamossy eds., 1995).

154 Teshager Worku Dagne, *Harnessing the Development Potential of Geographical Indications for Traditional Knowledge-Based Agricultural Products*, 5 J. INTELL. PROP. L. & PRAC. 441, 458 (2010).

155 TRIPS Agreement, *supra* note 103, at art. 27 (establishing a tripartite test that requires patent protection for inventions which are new, demonstrate an inventive step, and are capable of industrial application).

because intangible cultural expressions are not technological works and consequently not patentable.[156] Despite this, some intangible elements of cultural expression may be protected under patents. Patents have indeed been granted for natural components,[157] as well as for combinations of plants used for therapeutic purposes.[158] Nevertheless, numerous issues arise in relation to the patentability of traditional medical knowledge, mainly stemming from the legal requirements set forth by national law.[159] The fundamental requirements that need to be fulfilled are novelty, inventive steps, and

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156 Patent protection is extended generally to machines, articles of manufacture, processes, chemical or electrical structures and compositions, and the like, and in some countries, such as the United States and Japan, has been extended to include novel methods of doing business. *See, e.g.*, State St. Bank and Tr. Co. v. Signature Fin. Grp., Inc., 149 F.3d 1368, 1371 (Fed. Cir. 1998) (discussing the patent-protected method of processing financial data in a spoke and hub system for mutual funds' accounting and administration).

157 A natural product is generally not patentable because it can rarely satisfy any of the three requirements for patentability: novelty, inventive step, or industrial applicability. However, many legal frameworks, inter alia, those of the United States and the European Union, allow the possibility of patenting genes and cells, as well as naturally isolated or purified products. In other countries, the patentability of purely natural products, on the contrary, is not allowed. *E.g.*, Decision No. 486 Establishing the Common Industrial Property Regime, Andean Community, art. 15(b), Sept. 14, 2000, WIPO Lex No. CAN012, http://www.wipo.int/wipolex/en/text.jsp?file_id=223718 ("The following shall not be considered inventions: the entirety or part of living beings as encountered in nature, natural biological processes, biological material existing in nature or which may be isolated, including the genome or germ plasm of any natural living being.").

158 CARLOS M. CORREA, PROTECTION AND PROMOTION OF TRADITIONAL MEDICINE IMPLICATIONS FOR PUBLIC HEALTH IN DEVELOPING COUNTRIES 62 (2002), http://apps.who.int/medicinedocs/pdf/s4917e/s4917e.pdf (discussing European Patent EP 0519777 on formulations made from a variety of fresh plants). Many pharmaceutical, diagnostic, and therapeutic methods developed in industrialized countries, are derived from biological material, such as algae, microorganisms, and plant varieties. The debate over the application of IPRs to traditional knowledge in the medical field is extremely broad. *See, e.g.*, Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 164 (2006); Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPs-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 157–58; Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 35–36 (2004).

159 Nie JianQiang, *The Relationship Between the TRIPs Agreement and the Convention for Biological Diversity (CBD): Intellectual Property and Genetic Resources, Traditional Knowledge and Folk Protection from a Chinese Perspective*, *in* CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW (Paolo Farah ed., forthcoming Jan. 2016); *see also* Francesca Spigarelli et al., *Grasping Knowledge in Emerging Markets: Is This the Case of Western Pharmaceutical Companies in China?*, *in* CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW, *supra*.

capability of industrial application. In particular, since most traditional knowledge has been used for long periods of time, the novelty and/or inventive step requirements may be difficult to satisfy. Scholar Graham Dutfield points out the principal barriers to a patent regime over traditional knowledge and notes that, "traditional knowledge is collectively held and generated while patent law treats inventiveness as an achievement of individuals."[160] He also notes that "patent specifications must be written in a technical way that examiners can understand."[161] Thus, it is extremely complex for an indigenous group to complete a patent specification since "they do not have the ability to describe the phenomenon in e.g. the language of chemistry or molecular biology."[162]

B. Inadequateness of IPRs (As Currently Applied)

The desirability of using IPRs to protect ICH represents an ongoing debate amongst indigenous communities, government officials, public negotiators, and academic commentators who have all tried to assess whether IPRs are adequate for the preservation and legal protection of intangible aspects of cultural heritage. These issues need to be addressed while considering the intrinsic essence of ICH, which often carries "shared, symbolic meaning[s], which may represent for a community a link with the sacred . . . its history, or an attribute of its identity."[163] This challenge is further exacerbated by the assumptions of ownership and property related to IPRs and the protection of ICH. It is incorrect to believe that traditional communities lack concepts of

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160 GRAHAM DUTFIELD, INTELLECTUAL PROPERTY, BIOGENETIC RESOURCES AND TRADITIONAL KNOWLEDGE 104 (2004).

161 *Id.*

162 Rosa Giannina Alvarez Núñez, *Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience*, 12 Max Planck Y.B. United Nations L. 487, 519 (2008). *See generally* MARIA GINEVRA CATTANEO, UNA PROSPETTIVA STORICO FILOSOFICA SUI BREVETTI INDUSTRIALI TRA PARTICOLARISMO DELLE SCELTE ECONOMICHE E GENERALITÀ DELLE SCELTE GIURIDICHE (2010) (analyzing how patent law affects the development of antiretroviral drugs for HIV in South Africa and Brazil).

163 Submission of the International Commission of Jurists [ICJ] for the Day of Discussion on the Right to Participate in Cultural Rights Convened by the Committee on Economic, Social and Cultural Rights, at para. 9, ICJ Doc. E/C.12/40/7 (May 9, 2008), http://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/May2008/InternationalCommissionJurists.pdf.

ownership or property;[164] rather, their ideas of property are different from the Western concepts that underpin IPR protection systems.[165]

Therefore, approaches that are based on the dichotomy between private property rights and the public domain do not always meet the needs of the indigenous community to transmit their common cultural heritage. Scholar James Leach states that using IPRs as a "register of ownership" may implicitly transform the social networks in a society that underpin its creative processes, thus undoing the very traditions and creative expressions that the laws should protect.[166] He argues that:

> Preservation of materials is one (important) thing, but it seems to me that of more basic importance is the preservation of the social conditions of creativity itself. Laws that take such property relations as their baseline inhibit the utilization of indigenously appropriate mechanisms for the control, distribution, and protection of indigenous resources. In other words, it is not just the material expressions (object outcomes of creative work), but the actual form of social relations, which must be considered in a discussion of protection or attribution.[167]

The debate about IPRs and ICH protection develops in an environment defined by cultural assumptions stemming mainly from the Western characterization of "cultural property" and "cultural heritage." Leach further remarks that a peril in current versions of cultural property regulations is precluding innovation among those communities in need of protection for their culture. Leach argues that, "[t]his in turn reinforces a stereotypical divide between traditional culture (valued as heritage, but a barrier to innovation) and modern (no heritage value, but reliant on innovation)."[168] Other scholars have pointed out the stereotypical divide between the traditional,

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164 Leach, *supra* note 113, at 33.

165 *See id.* at 37. Leach observes, for example, customary rules governing a musical cult amongst people in the Madang region of Papua New Guinea, that:

> One aspect of Tambaran is a male musical cult with secret ritual paraphernalia. The tunes and designs used by this cult are associated with particular people, are owned by them, and handed down as heirlooms. That is, they have a named owner. Yet this ownership does not give the right of disposal. They are not "property," yet they are transacted. Spirit songs are being innovated all the time. There is a stock of ancestral songs for each residential group, but new spirits are coming into being today.

Id. at 33 (citations omitted).

166 *Id.* at 37.

167 *Id.*

168 *Id.* at 41.

developing, underdeveloped, and modern/developed,[169] which magnifies the isolation and "otherness" of some societies.[170] Indeed, Professor Boatema Boateng observes that relying on the artificial distinction of the "modern" and "scientific" from what is defined as "traditional" or "folkloric" is misleading since constant innovation exists in all domains, including ICH.[171]

The inadequateness of IPRs, as currently applied, reveals a need to refrain from relying on the current regime as a tool for the legal protection of ICH. On the one hand, we must prevent economically dominant cultures from taking or acquiring the cultural heritage of traditional communities that they have attempted to keep secret.[172] However, it is clear that the IPR regimes of patent and copyright would not adequately protect ICH.

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169 We acknowledge that the terms "developed" and "developing" are unsatisfactory to indicate levels of industrial, commercial, and social development among nations. These expressions lack clear definitions and are both over- and under-inclusive. Moreover, the word "developing" also suffers from having a pejorative connotation. Nevertheless, and in spite of these shortcomings, these terms, along with the expression "least developed" are employed in TRIPS. *See, e.g.*, TRIPS Agreement, *supra* note 103, at arts. 65–67. Furthermore, the term "developing" is used in Article I of the Appendix to the Berne Convention where it is defined "in conformity with the established practice of the General Assembly of the United Nations." Berne Convention, *supra* note 103, at app. I(1). Sam Ricketson describes the definition of established practices as "disturbingly vague." RICKETSON, *supra* note 103, at 634. We also believe that to a certain extent this terminology mirrors international approaches that add to the "undemocratic" nature of current IPRs harmonization. Indeed, on the one hand, "developed" countries are generally perceived as owning or controlling most of the presently available global technology that can be protected under IPRs as traditionally applied; on the other hand, "developing" countries are perceived as owning or controlling distinctly less technology, and therefore benefiting less from strong IPR protection.

170 *See* Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTELL. PROP. 29, 33 (2008).

171 Boatema Boateng, *Square Pegs in Round Holes? Cultural Production, Intellectual Property Frameworks, and Discourses of Power*, *in* CODE, *supra* note 113, at 61, 67; *see also* CHRISTINE GREENHALGH & MARK ROGERS, INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH 4–15 (2010) (providing two distinct definitions of "innovation"). *See generally* William van Caenegem, *Pervasive Incentives, Disparate Innovation and Intellectual Property*, *in* INTELLECTUAL PROPERTY POLICY REFORM: FOSTERING INNOVATION AND DEVELOPMENT 250 (Christopher Arup & William van Caenegem eds., 2009) (discussing how patent rights might not be capable of protecting innovation when two or more individuals independently create the similar processes); Daniel J. Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77 FORDHAM L. REV. 2353 (2009) (discussing the logic of how the TRIPS Agreement encourages and protects innovation strategies).

172 Dwijen Rangnekar, *The Challenge of Intellectual Property Rights and Social Justice*, 54 DEV. 212, 213 (2011), http://www.palgrave-journals.com/development/journal/v54/n2/full/dev201148a.html (underlying the need to protect cultural heritage of traditional communities as a matter of overall social policy).

Furthermore, the cost of acquiring rights when registration is required, such as in the case of patents, industrial designs, and trademarks, as well as the costs of enforcing the relevant rights might prevent these people from benefiting from these rights.[173] Given the fundamental inadequacy and contradiction of using the current IPR regime to resolve indigenous concerns, it is necessary to look elsewhere.

V
SUI GENERIS ADAPTATION OF IPRS

The discussion in Part IV shows that no existing IPR regimes appear capable of effectively protecting ICH. Moreover, the assertion of IPR regimes in this context would generate new practical issues. Hence, we take into account a more discreet approach, which would be practical and advantageous in addressing at least some of the anticipated problems faced with IPRs while lessening the tension with their underlying policies. This approach consists of evaluating the possibility of modifying, adapting, and reviewing the current IPR regime to obtain satisfactory outcomes in the context of ICH. Several countries have already adapted an IPR regime that meets the peculiar needs of their communities through adopting *sui generis* measures.[174] For instance, New Zealand's trademark law has been amended to exclude trademarks that cause offense, and applies specifically to Indigenous Maori symbols.[175] Likewise, India's Patent Act has been amended to clarify the status of traditional knowledge within patent law, and the Chinese State Intellectual Property Office has a team of patent examiners specializing in traditional Chinese medicine.[176] These are just a few examples of how the malleable nature of *sui*

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173 Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 807 (2001). Remarking on the lengthy and expensive nature of administrative and judicial procedures, some commentators have observed that, "the availability of IPRs protection for [traditional knowledge] may be, therefore, of little or no real value to those who may claim rights in [traditional knowledge]." CARLOS M. CORREA, QUAKER UNITED NATIONS OFFICE [QUNO], TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: ISSUES AND OPTIONS SURROUNDING THE PROTECTION OF TRADITIONAL KNOWLEDGE 11 (2001), http://www.researchgate.net/publication/49659959_Traditional_knowledge_and_Intellectual_Property.

174 Alvarez Núñez, *supra* note 162, at 522.

175 *Id.*

176 *Id.*

generis approaches can benefit the different needs of different communities.

A *sui generis* adaptation of copyrights requires the recognition of communal copyrights that are granted to groups of persons, such as traditional communities, and that take the form of a trust, association, or legal entity holding the copyright.[177] Communal copyrights could also be contained in ad hoc *sui generis* provisions embedded in the copyright legislation, and countries could support this concept by granting communities the right to exercise moral rights to protect the subject matter against the inappropriate, derogatory, or culturally insensitive use of tradition-based copyrighted material.[178] Finally, a country could safeguard collective interests by establishing a national body or office designed to enhance and promote the interests of the communities whose ICH is endangered.

A. Privacy

Under these circumstances, legal protection should be guaranteed to the community whose expression, and thus heritage, has been offended since the act of making their cultural expression public. This offense is tantamount to an invasion of privacy, although the privacy in question is related to an entire community and not to a single individual. Professor Valentina Vadi observes that the disclosure of sacred secrets may violate customary laws and practices of specific traditional communities,[179] as some of them believe that the knowledge related to their heritage should be transmitted only under particular circumstances or to specific people.[180] She remarks that in common law jurisdictions, publication of sacred secret materials has been successfully prevented by a breach of confidence action.[181] Consequently, the right to privacy might be fundamental in this regard, "this being the right of an individual or a community to keep their lives and personal affairs out of public view or to control the

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[177] The U.S. Copyright Act, for example, delineates joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (2012).

[178] *See* Alvarez Núñez, *supra* note 162, at 522.

[179] Valentina Vadi, *Intangible Heritage: Traditional Medicine and Knowledge Governance*, 2 J. INTELL. PROP. L. & PRAC. 682, 686 (2007).

[180] PATRICIA L. PARKER & THOMAS F. KING, U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES, NAT'L REG. BULL. 8 (1998), http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf.

[181] Vadi, *supra* note 179, at 686.

flow of information about themselves."[182] Along those lines, Vadi observes that given that cultural heritage is an element of the cultural identity of every community, an extensive interpretation of the right to privacy might be invoked against potential intrusion or theft to protect the enjoyment of the individual and collective private sphere.[183]

The right of publicity, described as the "inherent right of every human being to control the commercial use of his or her identity,"[184] comes into play as well. It amounts to a tort of invasion of privacy and is applicable to cases of appropriation of a person's name or image used to advertise the appropriator's product or service. As right of publicity has been applied to defend the commercial interest of famous personalities,[185] it is uncertain whether it can be used to the appropriation of the image of an indigenous person or a tribe in advertising unless that individual or community is well known and owns commercial value in their identity.

B. Moral Rights

Moral rights, including the right of authors to be identified as such (the right to paternity) and to object to having their works altered in ways that would prejudice their honor and reputation (the right to integrity), embrace the right to determine whether to publish and disclose certain contributions. Moral rights are fundamental to the protection of ICH.[186] And, therefore, an effective instrument to protect cultural heritage must also include "the assurance of safeguards and respect for intangible cultural property, by implementing, for example, a minimum of paternity and integrity rights."[187] Moral rights would allow the state to prohibit uses of ICH

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182 *Id.* at 686.

183 *Id.*

184 J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987).

185 *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 460–61 (9th Cir. 1988) (involving the use of a "sound alike" to Bette Midler's voice in a commercial); Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999) (involving the appropriation of the image of Donald Hugh Henley, the founder of the Eagles).

186 Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 311 (1994).

187 *Id.* at 333.

in ways that distort it or fail to treat it with respect.[188] Moreover, provisions setting forth moral rights would require that the community connected to the heritage be recognized in the uses of such heritage.

C. Trade Secret Law

Trade secret law is usually pertinent to commercially valuable information that is kept in confidence and solely used by the business that owns the secret.[189] Trade secret law could also be useful in safeguarding undisclosed ICH,[190] such as sacred traditional knowledge and in protecting these cultural expressions against unauthorized acquisition or use by third parties. Most trade secret laws require the person who controls the information to adopt the necessary measures, according to the specific circumstances, in order to preserve the confidentiality of the information. Consequently, intentional acts designed to preserve the relevant information requires secrecy. The issue with information relating to intangible cultural rights stems from the fact that the secret is often spread among several members of the cultural group. Therefore, it seems challenging to obtain protection through this criterion, unless only one person keeps the information. Another shortcoming is that generally trade secret law requires that the information have a commercial value in a business. Hence, this legal framework cannot be directly applied to rituals and sacred symbols unless a statutory approach based on trade secrets is envisaged to protect symbols and rituals that people legitimately attempt to keep private or internal to the community.[191]

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188 Commentators have stressed the importance of recognizing moral rights as a solution to issues of distortion, misrepresentation, and authenticity that often come with the unauthorized use of ICH. Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-*Mabo*: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 332–34 (1995). For instance, a legal scholar remarked that such rights would be particularly useful in protecting folklore expressions from being "published without . . . authorization, published without attribution, reproduced in poor quality, reproduced only partially causing the message to be distorted, or put to a use which would be inappropriate to the nature of the original work." Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 48 (1997) (footnote omitted).

189 Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475–76 (1974).

190 LUCAS LIXINSKI, INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW 194–95 (2013).

191 Trade secrets generally protect confidential information that has some commercial or economic value as a result of its secret nature and for which the owner has taken reasonable steps to protect the secret nature of this information. TRIPS, *supra* note 103, at

Therefore, since the ultimate aim is to restrain the use of those rituals and information outside the sacred and temporary occasions to which they are destined, some authors have talked about a mixture of trade secret and privacy notions.[192]

D. Contract Law: Tangible Expressions of ICH as Subject-Matter of Contracts

Sui generis protection regimes show that other branches of the law are considered crucial *vis-à-vis* the protection of ICH, such as privacy law, protection of undisclosed information and other aspects of unfair competition law, contract law and quasi-contract claims, or unjust enrichment claims for breach of a confidential relationship in situations in which the other party obtains undue advantage through unfair conduct.[193] Namely, contract law plays an important role in connection with representations of ICH belonging to traditional communities because contracts may enable them to exploit their ICH without resorting to exclusive rights, which, as previously discussed, are likely to contrast with the collective characteristic of heritage and the traditional nature of the group.[194] Indeed, new means are being found to ensure that ICH delivers economic benefits to communities, while guaranteeing that a commodification of ICH is not a detriment to its communities.[195] As scholar Jane Lennon remarks, "generating income in ways that do not conflict with heritage conservation and are culturally sensitive is a management challenge."[196] Indeed, once distinctive ICH is identified with specific social groups as a target of

art. 39(2)(b)–(c) (defining "secret" as protected confidential information having "commercial value because it is secret" and requiring the owner to take "reasonable steps" to protect its confidential nature).

192 *E.g.*, Paterson & Karjala, *supra* note 1, at 666.

193 *See* Vadi, *supra* note 179, at 687.

194 Lucas Lixinski, A Framework for the Protection of Intangible Cultural Heritage in International Law (2010) (unpublished doctoral thesis, European University Institute) (on file with author).

195 During the U.N. World Decade for Cultural Development (1987–1997), UNESCO formally asserted that ICH "should be regarded as one of the major assets of a multidimensional type of development." Noriko Aikawa-Faure, *The Conceptual Development of UNESCO's Programme on Intangible Cultural Heritage*, *in* SAFEGUARDING INTANGIBLE CULTURAL HERITAGE: CHALLENGES AND APPROACHES 43 (Janet Blake ed., 2007) (citing UNESCO, 1990, at para. 209).

196 Jane Lennon, *Values as the Basis for Management of World Heritage Cultural Landscapes*, *in* UNESCO, CULTURAL LANDSCAPES: THE CHALLENGES OF CONSERVATION, WORLD HERITAGE PAPERS NO. 7 120, 122 (2003), http://whc.unesco.org/documents/publi_wh_papers_07_en.pdf.

preservation or safeguarding efforts, it tends, through IPRs, to become a means for the production of consumer goods and services that circulate in wider economic circuits,[197] creating the risk of indigenous communities losing control of the process and having their cultural processes distorted in ways that are alienating and break down community social bonds.[198] Hence, communities are now recognized as the only agents capable of leading the process of maintaining ICH and seeking ways to capitalize upon it.[199] As the new Operational Directive under the ICHC stresses:

> Commercial activities that can emerge from certain forms of intangible cultural heritage and trade in cultural goods and services related to intangible cultural heritage can raise awareness about the importance of such heritage and generate income for its practitioners. They can contribute to improving the living standards of the communities that bear and practice the heritage, enhance the local economy, and contribute to social cohesion. These activities and trade should not, however, threaten the viability of the intangible cultural heritage, and all appropriate measures should be taken to ensure that the communities concerned are their primary beneficiaries. Particular attention should be given to the way such activities might affect the nature and viability of the intangible cultural heritage, in particular the intangible cultural heritage manifested in the domains of rituals, social practices or knowledge about nature and the universe.[200]

It is indeed necessary to stress the relevance of drafting international instruments in this context because it would foster uniformity in a new area in which cross-border elements, such as the exploitation of ICH-related assets, has become increasingly common.[201] The lack of international uniformity is especially

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197 *Id.*

198 Antonio A. Arantes, *Diversity, Heritage and Cultural Politics*, 24 THEORY, CULTURE & SOC'Y 290, 294 (2007), http://tcs.sagepub.com/content/24/7-8/290.full.pdf.

199 *See* Operational Directive, *supra* note 58, at art. 16.

200 UNESCO Intergovernmental Comm. for the Safeguarding of the Intangible Cultural Heritage, *Convention for the Safeguarding of the Intangible Cultural Heritage Eighth Session*, UNESCO Doc. ITH/13/8.COM/13.a, at para. 116 (Oct. 11, 2013), http://webcache.googleusercontent.com/search?q=cache:lE3Nk9aIbPwJ:www.unesco.org/culture/ich/doc/src/ITH-13-8.COM-13.a-EN.doc+&cd=1&hl=en&ct=clnk&gl=us.

201 WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore Secretariat, *Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing*, WIPO Doc. WIPO/GRTKF/IC/2/3, para. 123 (Sept. 10, 2001), http://webcache.googleusercontent.com/search?q=cache:YGTsactFq_wJ:www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_3.doc+&cd=1&hl=en&ct=clnk&gl=us.

manifested in relation to contracts that have a cross-border scope and involve the transnational exploitation of ICH.[202]

Facilitating the collective management of ICH rights and guaranteeing the protection of its community requires the enactment of provisions setting forth prerequisites to contracts addressing the commercial exploitation of such heritage. In particular, international and national legal instruments should impose, on the party wishing to use the heritage, obligations to communicate general information to the traditional community, ensuring prior and informed consent, and attribution to the community, as well as the duty to confer financial benefits to the community.[203]

Prior informed consent has been recognized by the WIPO Intergovernmental Committee as fundamental to the protection and control of ICH.[204] Detailed provisions on prior informed consent are also found in the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization,[205] which integrate the 1992 Convention on Biological Diversity (CBD).[206] The Guidelines set forth the obligation to seek the prior informed consent of providers; respect customs, traditions, values, and customary practices of local communities; only use resources for purposes consistent with the terms under which they were acquired; and ensure the fair and equitable sharing of benefits arising from their commercialization.[207] Prior informed consent is linked to the requirement that outsiders interested in using ICH manifest in advance their intentions *vis-à-vis* ICH: which

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202 *Id.*

203 Pedro Alberto De Miguel Asensio, *Transnational Contracts Concerning the Commercial Exploitation of Intangible Cultural Heritage*, *in* IL PATRIMONIO CULTURALE INTANGIBILE NELLE SUE DIVERSE DIMENSIONI, *supra* note 20, at 93 (discussing IPR and *sui generis* contractual provisions related to ICH).

204 *Intergovernmental Committee (IGC)*, WIPO, http://www.wipo.int/tk/en/igc/index.html (last visited Nov. 18, 2015).

205 Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization*, paras. 13, 16 (2002) [hereinafter Bonn Guidelines], https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

206 Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 79. The Convention on Biological Diversity, adopted during the Earth Summit in Rio de Janeiro, promotes biodiversity, sustainable use, and the sharing of benefits arising out of the utilization of genetic resources. The Convention provides for national reporting of efforts to implement the provisions of the convention.

207 *See generally* Bonn Guidelines, *supra* note 205 (outlining the requirements for informed consent for the use of cultural resources).

enhances the bargaining position of the traditional community and forces the outsider to agree to terms that will respect the intended use.[208] The rationale of prior informed consent in such contracts is grounded on the evidence that one of the parties—the traditional community—generally lacks appropriate information and thus is more vulnerable in negotiations.

Similarly, representation plays a crucial role in relation to who is entitled to give consent. In traditional communities, representative bodies are decisive and protect the traditional practices and customs of the social group.[209] Furthermore, in circumstances where the relevant community lacks the necessary experience and knowledge, governmental authorities can be established and empowered to grant access and prior informed consent.[210] Nevertheless, a community's participation in the decision-making processes is a central matter of unique relevance, which is taken in high consideration in the ICH Convention.[211]

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[208] *See* Asensio, *supra* note 203.

[209] This makes issues of representation and misrepresentation pressing needs. Often, indigenous political representatives with whom States wish to negotiate are not necessarily those whom communities recognize as legitimate. *See* Kearney, *supra* note 5, at 221.

[210] Under the text of the WIPO Draft Articles on the Protection of Traditional Cultural Expressions, the possibility to grant licenses or collect benefits from the use of traditional cultural expressions may be vested in a national authority. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore Secretariat, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO Doc. WIPO/GRTKF/IC/28/6 (June 2, 2014), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf. Janet Blake describes how communities are empowered under the ICH Convention (and its Operational Directives), and the reasons why their own free, prior, and informed consent is necessary for identification, nomination, inscription, and for the preparation, recognition, and implementation of any safeguarding programs. Blake, *supra* note 26, at 48–52. "'Free, prior and informed consent' (FPIC), is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. . . . [and] is now a key principle in international law . . . related to indigenous peoples." *Free, Prior and Informed Consent (FPIC)*, FOREST PEOPLES PROGRAMME, http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic (last visited Nov. 19, 2015); *see also* Wong & Fernandini, *supra* note 112, at 180.

[211] On the participation of the community in the protection of ICH, see *id.*; Sabrina Urbinati, *Considerazioni sul ruolo di "comunità, gruppi e, in alcuni casi, individui" nell'applicazione della Convenzione UNESCO per la salvaguardia del patrimonio culturale intangibile*, *in* IL PATRIMONIO CULTURALE INTANGIBILE NELLE SUE DIVERSE DIMENSIONI, *supra* note 20, at 51, 58. *See generally* Irène Bellier, *Partenariat et participation des peuples autochtones aux Nations Unies: intérêt et limites d'une présence institutionnelle*, *in* DEMOCRATIE PARTICIPATIVE, CULTURES ET PRATIQUES 175 (Catherine Neveu ed., 2007) (discussing the implications of institutional regulation of indigenous cultures).

Contract law is the proper tool to address issues deriving from the economic consequences of the commercialization of ICH, including derivative works and adaptations thereof by parties from outside the community in which the heritage originates. Contracts related to tangible manifestations of ICH encompass IPR transfers, license contracts, sales agreements and related agreements that grant access or use to the relevant heritage. As long as aspects of the ICH are protected by IPRs and through *sui generis* regimes, they may consequently constitute the subject matter of transfers or licenses.

In addition to classical IPR license contracts, there are access agreements with third parties that allow for the commercial exploitation of such heritage while protecting the ICH. Indeed, only the traditional community has the right to control access to or use elements of heritage as collective resources.[212]

The main issue stemming from these types of contracts is the choice of applicable law, which directly affects the predictability of the outcome of litigation and the certainty about the rights and obligations involved.[213] It is indeed crucial to advocate for a precise and comprehensive drafting of the agreed terms.[214] As such, contracts are characterized by extreme diversity, reflecting the heterogeneity of expressions of ICH and the derivatives and adaptations of such heritage.

Specific model provisions may be relevant to this purpose.[215] The parties' choice of law should be where the relevant ICH originates, therefore properly guaranteeing the application of the provisions

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212 *See generally* R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003) (discussing issues related to IPR license contracts).

213 *See* Asensio, *supra* note 203.

214 *Id.*

215 *See* Bonn Guidelines, *supra* note 205, app. I. The Bonn Guidelines provide a list containing suggested elements for inclusion in material transfer agreements that, *mutatis mutandis*, can be useful for the drafting of contracts in other areas of traditional knowledge and cultural expressions. The suggested contractual terms embrace the following: description of resources covered by the transfer agreement; permitted uses of the resources; whether intellectual property rights may be sought and, if so, under what conditions; no warranties guaranteed by provider on identity or quality of the provided material; whether the resources or information may be transferred to third parties and, if so, what conditions should apply; confidentiality clause; duration of the agreement; and other clauses common in international contracts, including dispute settlement arrangements and choice of law. *Id.* Moreover, key components of the mutually agreed terms are typically the provisions on the conditions, obligations, and types of benefits to be shared, including their distribution. *Id.*

adopted by the originating community's jurisdiction, and potentially even the customary rules[216] developed within that community.[217] It is, however, important to briefly discuss the complexity associated with transnational contracts having the commercial exploitation of IPRs on aspects of ICH or *sui generis* regimes as their subject matter, due to the high likelihood of entangled conflict of law problems.[218] In fact, it is hard to distinguish between the scope of the contract law and the scope of the law applicable to the protection of the exclusive rights covered by the contract as they might overlap or, conversely, create normative gaps. Moreover, the application of choice of law rules on the law applicable to the contract in the absence of choice may generate additional uncertainty.[219]

E. A Novel Sui Generis *System?*

Various commentators have highlighted the possibility to develop a novel *sui generis* system that could be specifically adapted to the needs of ICH related assets.[220] This peculiar regime would rely on the framing of a system allowing traditional groups and communities to control access to, and use of, traditional knowledge and cultural expressions. It would enable the use and access by third parties only after obtaining prior informed consent from the traditional community. *Sui generis* protection of ICH may also encompass a right to claim the source of ownership and statutory financial obligations through mandatory contract law that may encompass other transactional aspects.[221]

The first effort to outline a *sui generis* solution for the protection of ICH and traditional, cultural expressions was the UNESCO-WIPO

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216 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, 80–83 (2007).

217 Nevertheless, this has some practical drawbacks since the application of customary law may be problematic because of the hindrances in clarifying its content, especially with regard to indigenous communities. *See* Asensio, *supra* note 203.

218 *See generally* Peter Wilner, *The Madrid Protocol: A Voluntary Model for the Internationalization of Trademark Law*, 13 DEPAUL J. ART & ENT. L. 17 (2003) (discussing trademark law within the context of international contract).

219 *See* Asensio, *supra* note 203.

220 *E.g.*, Anastasia Telesetsky, *Traditional Knowledge: Protecting Communal Rights through a* Sui Generis *System*, *in* LE PATRIMOINE CULTUREL DE L'HUMANITÉ / THE CULTURAL HERITAGE OF MANKIND 297, 352–53 (James A.R. Nafziger & Tullio Scovazzi eds., 2008).

221 *See* Asensio, *supra* note 203.

Model Provisions.[222] It set forth, inter alia, a *sui generis* system with an authorization procedure for any utilization made both with gainful intent and outside the traditional or customary context of folklore.[223] Among the acts against which adequate protection is required, the Model Provisions indicated: (1) "use without authorization"; (2) "violation of the obligation to indicate the source of folklore expressions" (this term was used to describe a concept mainly overlapping with ICH); (3) "misleading the public by distributing counterfeit objects as folklore creations (a kind of 'passing off')"; and (4) "the public use of distorted or mutilated folklore creations in a manner prejudicial to the cultural interests of the community concerned (violation of a kind of collective 'moral right')."[224] The Model Provisions mirror the Berne Convention by entrusting the protection of traditional cultural expressions to a competent State authority.[225] Given that in many countries the rights to folklore vest in the State, the Model Provisions did not use the concept of ownership, preferring on the contrary to identify a "competent authority" as the principal repository of rights to folklore.[226] Furthermore, under the Model Provisions—where protected expressions of folklore were to be used both with gainful intent and outside their traditional or customary context—prior approval had to be obtained from such authority.[227] The unsuccessful attempt to reach an agreement on an international legal instrument specifically addressing traditional cultural expressions and intangible aspects of

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222 In 1982, a committee of experts was jointly established by WIPO and UNESCO in order to draw up model provisions for national laws based on intellectual property law principles. UNESCO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Actions*, UNESCO Lex. No. UNESCO001 (1985) [hereinafter Model Provisions], http://www.wipo.int/wipolex/en/details.jsp?id=6714; *see also* Githaiga, *supra* note 107, at para. 100; S.I. Miller (Rapporteur-general) of the WIPO Comm. of Governmental Experts on the Intell. Prop. Aspects of the Prot. of Expressions of Folklore, *Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore*, *in* 16 COPYRIGHT BULL. 55, 62 (1982).

223 *See* Wong & Fernandini, *supra* note 112, 201–07.

224 *Id.* at 201 (quoting Model Provisions, *supra* note 222, at para. 7).

225 Model Provisions, *supra* note 222, at para. 14 § 3(i); *see also* Darrell Posey, *Effecting International Change*, CULTURAL SURVIVAL (Fall 1991), http://www.culturalsurvival.org/ourpublications/csq/article/effecting-international-change.

226 Model Provisions, *supra* note 222, at para. 14 § 3(i); *see also* Posey, *supra* note 225.

227 Model Provisions, *supra* note 222, at para. 14 § 3(i). Nonetheless, permission would not be required where the use of folklore is for educational purposes, incorporated in the original work of an author, or is incidental. *Id.* at annex I § 4(1).

heritage meant that current IPR regimes still hold dominion over this area, and many countries mainly default to these IPR regimes—which were not originally conceived for such objectives.[228]

On the other hand, crafting new peculiar regimes to join the lacunae in the IPR protection of ICH may raise some risks. Legal scholars pointed out that this may cause "fundamental conflicts between cultural heritage protection and the basic notions of free expression in democratic societies that are the underlying policy basis for the limitations we find in the current IPR regimes."[229] In this vein, "more modest" alternatives, implying an adaptation of the currently available IPR instruments, may be especially beneficial to fill some of the gaps left open by IPR law, while generating less antinomies with underlying IPRs.[230]

F. Protection Against the Tort of Cultural Misappropriation

Cultural expressions have been subject to misappropriation where nonindigenous people have used native symbols, songs, dances, words, and other forms of cultural expression. Cultural misappropriation exceeds the depravation of mere economic gains, rather representing a sort of human rights abuse or, at least, an offense to a community's self-respect and identity.[231] This risk arises from the detrimental effect of extreme globalization and erosion of the sovereignty of nation states.[232] In the context of a globalized world,[233] the cultural archetypes of the dominant societies lead to cultural hegemony and a substantial cancellation, or so-called

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228 David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions*, 17 INT'L REV. INDUS. PROP. & COMPETITION L. 577, 595 (1986).

229 Paterson & Karjala, *supra* note 1, at 662.

230 *Id.*

231 *See generally* Philippe Cullet, *Human Rights and Intellectual Property Protection in the TRIPS Era*, 29 HUM. RTS. Q. 401, 404–07 (2007) (examining the relationship between human rights and IPRs).

232 A detailed analysis of the theories concerning the current role of nation states as international players is beyond the scope of this paper. Some legal scholars have suggested that nation states are losing power and are being supplanted by supra-state, sub-state, and non-state actors. *See generally, e.g.*, Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF., Jan./Feb. 1997, at 50, https://www.foreignaffairs.com/articles/1997-01-01/power-shift (discussing the rise and implications of a international governance). Others claim that the nation state is not collapsing but is instead "disaggregating into its separate, functionally distinct parts," which are then being reformed into a new "trans-governmental" order. Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF., Sept./Oct. 1997, at 183, 184, https://www.foreignaffairs.com/articles/1997-09-01/real-new-world-order.

233 KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 3–6 (2000).

standardization, of aspects of local cultural traditions, causing not only the loss of cultural heritage, but also a uniformization of the different socio-cultural groups and their ways of thinking, living, and perceiving their surroundings. Such a process will eventually lead to the "crystallization of uniform and stereotyped cultural models and to the contextual mortification of the value of cultural diversity."[234] This has obvious implications for the international protection of human rights since many aspects of ICH have a connection with religious beliefs and spirituality.[235] Where a State does not ensure the protection of these intangible manifestations, it could be considered a violation of the right to freedom of thought, conscience, or religion as outlined in the Universal Declaration of Human Rights[236] and the International Covenant on Civil and Political Rights.[237] Therefore, to the extent that the close relationship between human rights and ICH persists, the protection of the latter must be considered within the scope of the international protection of human rights.[238] The notion of ICH entails a comprehensive appreciation of "the fact that goods of cultural significance, unlike propert[y] per se," are not detached from the social processes that withstand their values.[239] Coombe and Turcotte underline that "[u]nderstanding cultural heritage as a dynamic, expressive and productive practice of dialogue, rather than a passive appreciation for a field of static cultural works, is consonant with an international movement to revalue cultural diversity and reconceptualise heritage values that clearly situates such cultural activities in the normative field of human rights."[240] Indeed, human

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234 *See* Lenzerini, *supra* note 14, at 103.

235 *Id.* at 114.

236 G.A. Res. 217 (III) A, art 18, Universal Declaration of Human Rights (Dec. 10, 1948).

237 U.N. International Covenant on Civil and Political Rights, *supra* note 50.

238 *See generally* Jakob Cornides, *Human Rights and Intellectual Property: Conflict or Convergence?*, 7 J. WORLD INTELL. PROP. 135 (2005) (advocating for the international IPR regime to balance rewarding innovation and human rights).

239 Coombe & Turcotte, *supra* note 5, at 278; *see also* Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 52 (2003).

240 Coombe & Turcotte, *supra* note 5, at 278. Indeed, the notion of human rights as underpinning ICH is already expressed in the Constitution of UNESCO, which establishes that its purpose is to "contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world . . . by the Charter of the United Nations." UNESCO Constitution, Nov. 16, 1945, art. 1(1).

rights frame ICH claims, which are often expressed as human rights concerns, especially when they implicate indigenous communities.[241] Human rights thus become the main legal background for interpreting ICH law, as ICH claims are essential means for self-determination to occur through political, economic, and social means.[242]

The tort of misappropriation is centered on economic rights and losses, whereas cultural appropriation claims address other issues and cannot be satisfied by mere economic remedies. Likewise, Carlos Correa suggested a misappropriation regime that would permit national laws to define the appropriate measures to avoid misappropriation. He remarks that, "this regime should have three important points: documentation of traditional knowledge, proof of origin or materials, and prior informed consent." Implicit support for protection against misappropriation is found in two United Nations documents: Decision V/16 of the CBD's Conference of the Parties, and the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples.[243] Similarly, the WIPO Intergovernmental draft

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241 The ICH Convention preamble also includes a citation of the 1948 Universal Declaration on Human Rights and the two 1966 Human Rights Covenants in its second recital. ICH Convention, *supra* note 20. Article 2(1) provides that consideration shall only be given to such ICH as is compatible with existing international rights instruments. *Id.* at art. 2(1).

242 Val Napoleon, *Looking Beyond the Law: Questions About Indigenous Peoples' Tangible and Intangible Property*, *in* PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM, *supra* note 37, at 370, 371.

243 Farah & Tremolada, *supra* note 87, at 469. Paragraph 17 of the Decision V/16 of the CBD's Conference of the Parties states:

> Request[ed] Parties to support the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity through participatory programmes and consultations with indigenous and local communities, taking into account strengthening legislation, customary practices and traditional systems of resource management, such as the protection of traditional knowledge against unauthorized use.

Convention on Biodiversity, Conference of the Parties: COP 5 Decision V/16, para. 17 (May 15–26, 2000), https://www.cbd.int/decision/cop/?id=7158. Similarly, the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, prepared in 1995 by the Special Rapporteur of the former U.N. Sub Commission on the Prevention of Discrimination and Protection of Minorities, provides the following:

> National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits. National laws should ensure the labeling and correct attribution of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a

on the protection of traditional knowledge contains a provision on protection against misappropriation.[244]

In this regard, ICH holders should also be safeguarded *vis-à-vis* other acts of unfair competition, inter alia, those named in article 10*bis* of the Paris Convention, such as false or misleading representations that a product, service, or expression is supplied with the embroilment or approval of traditional cultural heritage holders, or that the commercial exploitation of products, services, or cultural expressions profits holders of cultural heritage.[245] Proper relevance must be given to acts susceptible to create confusion with a product or service of ICH holders as well as to false allegations in the course of trade that discredit the products or services of traditional knowledge holders. Therefore, the application, interpretation, and enforcement of protection against the misappropriation of traditional knowledge, along with the determination of equitable sharing and the distribution of benefits,[246] should be conducted with appreciation for customary

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> trademark or an appellation of origin, authorized by the peoples or communities concerned.

Erica-Irene Daes (Special Rapporteur of the Commission on Human Rights), *Discrimination Against Indigenous Peoples: Protecting the Heritage of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/1995/26, annex paras. 26–27 (June 21, 1995).

244 WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore Secretariat, *The Protection of Traditional Knowledge: Draft Objectives and Principles*, art.1(1)–(2), WIPO Doc. WIPO/GRTKF/IC/10/5 (Oct. 2, 2006), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_5.pdf. The Committee determined that:

> Traditional knowledge shall be protected against misappropriation. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

Id.

245 The Paris Convention covers all types of intellectual property and has two important provisions. Each member country guarantees citizens of other member countries the same rights as its own citizens, and the right of priority is recognized for subsequent filing in the member countries within a certain period. Paris Convention for the Protection of Industrial Property art. 4, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

246 For example, the provisions outlined in the CBD call for empowering indigenous communities with two fundamental rights: namely, the right to be protected from having their resources stolen and the right to benefit from any exploitation of such resources by third parties. Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 79, arts.

practices, laws, norms, and understandings of the holder of the heritage, comprising the sacred, spiritual, or ceremonial features of the traditional genesis of the heritage.

CONCLUSION

The protection of ICH and related expressions has become a multifaceted matter whose complexity is exacerbated by a lack of consensus on the definition of the subject matter, the *raison d'être* for protection, and the methods for achieving it. Nevertheless, this complexity should not lead to an impasse in trying to frame some form of protection. IPRs seem to be an unsatisfactory foundation on which to build a viable, legal edifice for cultural heritage. Rather than try to fit the justifiable claims of traditional communities into legal property right categories that were not designed to accommodate their essential characteristics, we propose focusing on those aspects of communities' claims that can be addressed outside the IPR regimes of patent and copyright. Instead, the traditional concepts of Western law, privacy, trade secret, trademark, and contracts can take lead in the desired direction.

At the same time, it is undeniable that the current IPR system can be relevant for the protection of some expressions of ICH. It is thus crucial to craft a *sui generis* system of protection capable of meeting the heterogenic needs of respective communities, each with their own peculiarities, cultures and resources, and of creating legal rights that not only protect against the perceived abuse of cultural heritage, but that also protect, at least in principle, anyone who can satisfy its requirements. Cultural heritage rights developed on this basis will have enhanced credibility and compatibility with existing property rights and liability systems. Moreover, some communities may oppose any commodification of their cultural heritage, and thus

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15(1), 15(7). In addition to the general provisions on equitable sharing results and benefits in article 15(7), the CBD further provides that:

> Each Contracting Party shall take . . . measures . . . with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources[,] are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights.

Id. at art. 16(3); *see also* Gustavo Ghidini, *Equitable Sharing of Benefits from Biodiversity-Based Innovation: Some Reflections Under the Shadow of a Neem Tree*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 695, 700–01 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

perceive the application of IPRs to their ICH as entailing such commodification. The application of IPR concepts of property to ICH may prompt a transformation even of the social relations underlying the creativity processes within the traditional communities. The extreme versions of such arguments are those of IPR ownership claims by individuals, which may deeply modify the relations of exchange and reciprocity that is vital to the communal genesis of ICH.

An alternative framework could be expected where specific types of IPRs or *sui generis* protection might be shaped to furnish some means of legal protection for cultural heritage and related expressions while also strengthening the underlying traditional practices and social relations. In order to pursue this framework, the protection of ICH would need to embrace various aspects of the communities in which the heritage is created and be grounded in a more integrated, comprehensive approach that would take into consideration customary principles and practices of those communities. ICH expression is produced through social relations. Its protection, therefore, must take into account that the author, the product, and the process creating it are in continuous evolution resulting from changes and complexities in culture, society, and its composition.