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# Looking Beyond Intellectual Property in Resolving Protection of Intangible Cultural Heritage of Indigenous Peoples

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# LOOKING BEYOND INTELLECTUAL PROPERTY IN RESOLVING PROTECTION OF THE INTANGIBLE CULTURAL HERITAGE OF INDIGENOUS PEOPLES

*Robert K. Paterson\* and Dennis S. Karjala\*\**

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\* Professor and Associate Dean, Faculty of Law, University of British Columbia. An early version of this paper was originally presented at the conference “Commodification Futures: Rethorizing Commodification,” held at the University of Denver College of Law, March 30-21, 2001. I would like to thank Professor Martha Ertman of the College of Law and her colleagues for their support, which helped provide the genesis for the present article.

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## 1. INTRODUCTION

An important contemporary issue confronting indigenous peoples is the appropriation of their intangible cultural property. While modern indigenous artists have been able to resort to traditional property rights concerning moveable cultural property, many native peoples have found their claims to ownership of their intangible cultural property, such as motifs, songs, prayers, ceremonies, music, legends and folklore, frustrated by the limits of established intellectual property and other legal regimes.<sup>1</sup> Especially frustrating for these groups are the difficulties faced by collectives when trying to establish elements of traditional intellectual property protection.

One of the consequences of the assertion of traditional intellectual property rights (IPRs) is the resultant commodification of intangible cultural property.<sup>2</sup> In this case commodification can be defined as the conversion of intangible cultural property into items of economic worth that can be traded for commercial gain by such means as license, rental, or sale. This process can be seen as the reification of intangible property and the exploitation of this reified intangible property is often referred to as commercialization. How desirable this consequence is for indigenous people is controversial. The process of transmogrifying songs and legends, chants and rituals, and collective heritage into products of trade has been seen by some as diminishing the inherent spirituality or dignity of native heritage. The very notion of such collective experience being turned into a property (with all its connotations of individual or exclusive ownership) has been identified by many as a misappropriation or at least an inappropriate use. Yet the denial or withholding of traditional IPRs concerning cultural property has been identified by others within the indigenous community as denying indigenous peoples control over their own cultural property. The catch-22 that indigenous people are either forced to commodify their own cultural property and thereby perhaps misappropriate its position in the indigenous community or renounce commodification, thus allowing other non-indigenous people to appropriate in-

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<sup>1</sup> See ERICA-IRENE DAES, FINAL REPORT ON THE PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES, at 26 U.N. Doc. E/CN.4/Sub.2/(1995), U.N. Sales No.

<sup>2</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION, DRAFT PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY at 2, E/CN.3/Sub.4, U.N. Sales No. (1996).

indigenous cultural traditions, has led to increasing frustration among indigenous communities with existing IPR regimes.<sup>3</sup>

Our purpose in writing this paper is to evaluate the various claims and desires of indigenous peoples, and others whose needs arguably justify specific legal recognition and protection, against the background of the often conflicting constitutional and social policies that establish the structural framework of modern democratic societies. Of particular concern are the policies underlying intellectual property law and the basic human rights of free speech and free expression. Our primary goal is to bring to the surface the social policy tradeoffs that are involved in recognizing, or refusing to recognize, intellectual property rights in indigenous cultural property. We conclude that, in many cases, legitimate concerns of indigenous people can be accommodated without going to the extreme of recognizing new intellectual property rights, either through modest reinterpretation of existing legal regimes concerning contract, privacy, and unfair competition law,<sup>4</sup> or through carefully tailored but general statutory amendment or incrementally developed common law principles aimed at leveling what might otherwise be seen as an unfair playing field. This approach to cultural property has a number of advantages. First, it affords protection not just to indigenous claimants, though it may be especially suitable for their needs, but to any person or group whose needs, arising from similar causes, justify specific legal recognition and protection. Second, it avoids the need for its claimants to define their legal rights in terms of a preexisting category of property rights, thus avoiding charges of debasement and commercialization that have adhered to such claims in the past. Finally, it respects the

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<sup>3</sup> See *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK* (Tom Greaves ed., 1994); J.C. Weiner, *Protection of Folklore: A Political and Legal Challenge*, 18 *INT'L REV. INDUS. PROP. & COPYRIGHT* 67 (1987).

<sup>4</sup> Many people include trademark and trade secret law (both offshoots of unfair competition law) under the general rubric of intellectual property. Both, however, recognize a much weaker panoply of rights than the exclusive rights systems of the dominant intellectual property regimes, patent and copyright. Trade secret law, for example, generally supplies a cause of action only when secret information is either acquired by improper means or is disclosed in breach of a confidential relationship. *E.g.*, Uniform Trade Secrets Act 1(2), 2 & 3 (1985) (defining misappropriation, enjoining misappropriation, and setting damages for misappropriation, respectively.) Traditional trademark requires commercial use of a mark that causes consumer confusion. *E.g.*, 15 U.S.C. 1114(1), 1125(a) (2000). When we refer to intellectual property rights (IPRs) herein, we generally mean patent and copyright rights (although the context may from time to time make a more general meaning clear).

fundamental human rights and social values that are reflected in our democratic traditions and the carefully articulated social policy balances embodied in intellectual property law for both indigenous and nonindigenous people.

We begin by outlining the problems identified or asserted in the literature on cultural property in an effort to set the stage for subsequent analysis. We then review the ways in which the current IPR regime affords protection for indigenous cultural heritage. While agreeing that the IPR regime does little to assuage the identified problems, we go on to consider the policy justifications for denying IPR protection for indigenous cultural heritage and conclude that expansion of IPRs to cover cultural heritage would raise a number of problems going to the heart of democratic notions of free speech and free expression, as implemented in both patent's and copyright's conception of a public domain. Finally, we examine several examples of non-IPR approaches to the protection of cultural heritage that are more narrowly tailored to address well defined problems. We use those examples as a basis for proposing more specific modifications in these and other legal regimes to address the problem of cultural heritage protection.

## 2. PROBLEMS RESULTING FROM THE FAILURE TO PROTECT INDIGENOUS CULTURAL HERITAGE

A number of problems have been identified in the literature as calling for more, better, or different legal protection of the cultural heritage of indigenous peoples. One such problem is the use of indigenous knowledge to develop a commercial product, especially a valuable drug.<sup>5</sup> Many feel, for example, that a group that first discovers a medicinal use for a plant and conveys that knowledge to outside scientists should share in the profits when that knowledge serves as the basis for a commercial pharmaceutical. The circumstances in which the knowledge is conveyed can add force to the claim. Where an outsider obtains knowledge by fraudulent or deceptive means concerning, for instance, which plants are effective against what disease or the location of mineral or plant resources, there is a clear element of unfairness, even where the

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<sup>5</sup> Russel Lawrence Barsh, *How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8 INT'L J. CULTURAL PROP. 14, 32-33 (1999) (discussing the Biodiversity Convention); Sarah Laird, *Natural Products and the Commercialization of Traditional Knowledge*, INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK, *supra* note 3, at 147.

outsider takes nothing tangible from the group supplying the knowledge. The knowledge might also be acquired by taking advantage of the possible ignorance of indigenous peoples of Western IP traditions and contract norms, thereby, although without deception, depriving the knowledge suppliers of the return that someone more familiar with these Western institutions could have negotiated.

Another problem is the use by outsiders of tribal names or other identifiers, sacred symbols or images, or artistic designs generally. Use of sacred symbols or rituals may offend the beliefs of the people from whom they were taken, and all the more so if they are corrupted or used out of context.<sup>6</sup> If the group has sought to maintain secrecy in its rituals, using unfair means to learn about them offends basic notions of privacy.<sup>7</sup> The use of artistic designs may occur without attribution to the group from which they sprang, or a corrupted version may be attributed to that group without their permission or against their will. A related problem concerns use of these names, symbols, or designs by authentic members of the group but in ways that assertedly run contrary to the group's traditional use.<sup>8</sup> Similarly, even where the group does not object to the commodification of, for instance, an artistic design, people outside the group may be confused as to whether a given object is authentic, harming the group's ability to profit from commercial sales.<sup>9</sup>

Another problem is the disturbance of an embedded landscape in which indigenous knowledge is so intimately tied to nature that it cannot be removed without either detracting from its original environment or rendering the knowledge less useful.<sup>10</sup> From this notion it follows that local ecological knowledge should belong

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<sup>6</sup> John Henry Merryman, *What Do Matisse, Van Gogh, and Hitler Have in Common?*, *MATERIAL CULTURE IN FLUX: LAW AND POLICY OF REPATRIATION OF CULTURAL PROPERTY*, U.B.C. L. REV. 273, 280 (Special Issue 1995)(discussing the removal of physical artifacts); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 *AZ. ST. L.J.* 299, 355 (2002)(discussing harms to Native Americans from commercial or even a new age religious adoption of sacred symbols, rituals, or songs).

<sup>7</sup> Susan Scafidi, *Intellectual Property and Cultural Products*, 81 *B.U. L. REV.* 793, 828-30 (2001)(discussing the unauthorized filming of a ceremonial dance from an airplane).

<sup>8</sup> *Id.* at 822 (questioning whether such a contested internal use disputes are amenable to legal resolution).

<sup>9</sup> *Id.* at 819 (noting that authenticity can serve as a secondary tool for protecting intangible cultural property).

<sup>10</sup> Barsh, *supra* note 5, at 18-20.

to the community as a whole and be considered inalienable.<sup>11</sup> The sensitivity of these embedded landscapes argues for the right of indigenous people to restrict research on indigenous knowledge or biological resources where integrity of natural or cultural patrimony is threatened.<sup>12</sup>

### 3. INDIGENOUS CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS

We now turn to current intellectual property law and ask to what degree it can be successful in addressing some of the identified problems. Given the intangible nature of much indigenous culture, intellectual property rules seemed, at first, the most promising for the protection of indigenous cultural traditions against inappropriate use. Early optimism, however, quickly gave way to the view that, without elaborate modification, existing intellectual property laws were likely an inadequate basis to protect indigenous cultural property.

#### (a) *Copyright*

Since copyright is designed to prevent unauthorized reproduction of artistic works, it immediately suggests itself as a potential tool for the protection of indigenous cultural traditions from inappropriate use. This initial impression, however, quickly fades once certain characteristics of indigenous culture are tested against the requisite elements of copyright protection. Ironically, as one First Nations writer has pointed out, "In fact, copyright is used to protect non-Aboriginal people who appropriate and exploit oral tradition."<sup>13</sup>

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 37 (discussing model legislation propounded by the Organization of African Unity, OAU Council of Ministers Document CM/2075 (LXVIII) Add.1); see also TERRI JANKE, *OUR CULTURE: OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS* (1998). In New Zealand, a claim known as WAI 262 has been brought to the Waitangi Tribunal by a number of Maori tribes against the Crown (government). This claim includes broad categories of Maori cultural heritage.

<sup>13</sup> Cynthia Callison, *Appropriation of Aboriginal Oral Traditions*, MATERIAL CULTURE IN FLUX: LAW AND POLICY OF REPATRIATION OF CULTURAL PROPERTY, U.B.C. L. REV. 165, 176-77 (Special Issue 1995) (furnishing an example of a non-Aboriginal writer who collected traditional Nuuchah-nulth narratives in British Columbia and then claimed copyright in them for herself). It should be borne in mind, however, that under traditional copyright a work is protected only to the extent that it is original to the purported author. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Therefore, anyone publishing a collection of narratives taken from an indigenous cultural tradition would have copyright

Copyright requires, *inter alia*, that a literary, dramatic, musical, or artistic work originate from an author.<sup>14</sup> While a new work can be based on the earlier works of others, the new work must constitute a new expression to receive protection.<sup>15</sup> Indigenous cultural heritage often emphasizes and reiterates the expressions of past generations and any evolution of the past that occurs does so only incrementally. In their desire to preserve the past, indigenous authors may commensurately and unwittingly actually limit their eligibility for copyright privileges. Of course, at least in theory, works that are in a constant state of development should be considered derivative works based upon the public domain expression handed down from the past, and nothing in copyright law limits the number of joint authors of a given work. Nevertheless, the reality will often be that no one today knows just who was involved in creating the innovative expressive aspect that theoretically remains under protection, and the nearly universal absence of clearly defined ownership agreements among the joint authors makes reliance on this approach difficult.<sup>16</sup>

In some countries, such as the United States and Canada, attachment of copyright protection also requires that works be fixed in material form. Indigenous cultural traditions are mostly oral and may have never been recorded in any material form whatsoever. Indigenous material expressions that do occur are often intended to be temporary, such as those connected with ceremonies and celebrations.<sup>17</sup> Many indigenous oral traditions have been translated and published in printed form by non-indigenous authors who then themselves receive the benefits of copyright protec-

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protection, at most, for the narrative group as a collective work or compilation. The copyright does not cover any of the individual narratives, because the collector is not the author of any of them. See also *infra* note 18 and accompanying text.

<sup>14</sup> *E.g.*, *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>15</sup> See, *e.g.*, 17 U.S.C. 103(b)(2000) (The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material).

<sup>16</sup> Scafidi, *supra* note 7, at 808.

<sup>17</sup> In the United States, at least, this does not preclude their continued protection under copyright. The fixation requirement under the United States Copyright Act requires only that the work be fixed for a period of more than transitory duration. 17 U.S.C. 101 (2000) (definition of fixed). Canadian law appears to take a stricter view, but this has been criticized. See DAVID VAVER, *ESSENTIALS OF CANADIAN COPYRIGHT LAW* 63-65 (2000).



tion.<sup>18</sup> Similarly, a photograph of an indigenous person in traditional attire confers copyright on the photographer but not the subject of the photograph.<sup>19</sup> The copyright requirement of fixation often demands a change in indigenous cultural tradition that may itself amount to a forced assimilation of that tradition into Western culture.

In Berne Convention countries, such as Canada, the United States, and some 120 others, the minimum term of copyright protection is the life of the author and 50 years.<sup>20</sup> This long but limited term derives from Lockean theory that individual property rights are based on the addition of labour and must be reconciled with the competing demands of the public domain.<sup>21</sup> Indigenous cultural traditions are usually seen as requiring indefinite protection and contradict the whole notion of a finite term or life span.<sup>22</sup>

The notion of perpetual cultural property rights is linked to another characteristic of indigenous cultures, that of collectivity. Unlike Western concepts of the romantic solitary genius, indigenous cultures tend to value the collective efforts of a community that, in turn, reveres the significance of the past. Copyright law recognizes joint authorship only when it is the clear intention of the authors that authorship be so held.<sup>23</sup> In the Australian decision of

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<sup>18</sup> Any asserted copyright in such materials would have to be based on the translation, which is a type of derivative work, or on the addition of original creative material by the purported non-indigenous author. *See supra* note 15. Because adding new material, however creative, would detract from the work's authenticity, such a copyright would likely be based primarily on the translation.

<sup>19</sup> The author of a photograph is the photographer, not the subject. *See, e.g., Kaplan v. the Stock Market Photo Agency, Inc.*, 133 F.Supp.2d 317, 323 (S.D.N.Y. 2001)(copyright in a photo derives from the author's original conception of his subject, not the subject itself, and protectible elements include posing of the subjects, lighting, angle, selection of film and camera and evoking the desired expression); *cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884)(photograph of Oscar Wilde held to be an original work of art, the product of plaintiff's [Sarony's] intellectual invention, of which plaintiff is the author).

<sup>20</sup> BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 24 July 1971), Article 7, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

<sup>21</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (New York, 1952) (6th ed. London, 1764); *see* Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEORGETOWN L. REV.* 287, 296 (1988)(built-in expiration of intellectual property rights improves the fit between the statutory rights and the Lockean theories that justify them).

<sup>22</sup> *See* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples! Is Intellectual Property the Answer?*, 30 *CONN. L. REV.* 1, 17-18 (1997).

<sup>23</sup> *E.g., Copyright Act, R.S.C.*, ch. C-42, s. 2 (1985)(Can.)(definition of work of joint authorship); 17 U.S.C. Act 101 (2000) (definition of joint work); *Samuelson v. Proders*

*Yumbulul v. Reserve Bank of Australia*, an Aboriginal artist sued the Reserve Bank of Australia for copyright infringement regarding its use of an image of his sculpture Morning Star Pole on a new ten dollar bank note.<sup>24</sup> The action was dismissed and the Court did not address the argument that permission to reproduce the sculpture had to be obtained from the relevant tribal owners. The case, however, is a good illustration of the dilemma of using copyright law in an attempt to meet indigenous concerns. As one writer has pointed out, the Morning Star Pole motif used in the bank note design will eventually enter the public domain so that others can base their own designs on it.<sup>25</sup> Copyright eventually frees up underlying work to encourage continuing individual innovation. Indigenous cultures put a premium on the preservation and control of the underlying work. They want to prevent future artists from basing their work on the cultural symbols of indigenous groups.

### (b) *Moral Rights*

Moral rights offer an adjunctive protection to that afforded by copyright. Under Canadian law, moral rights, whether under statute, common, or civil law, are separate and independent rights from copyright.<sup>26</sup> While often viewed as Continental in origin, moral rights also have a long, though fragmentary, history at common law.<sup>27</sup> Moral rights have been acknowledged in Canada since 1931, in anticipation of Canadian accession to the 1928 revision of the Berne Convention.<sup>28</sup> The Berne Convention established spe-

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Distribution Co., 48 R.P.C. 580 (1931); *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir. 1998).

<sup>24</sup> (1991) 21 I.P.R. 481 (Australia); cf. *Milpurruru v. Indofurn Pty. Ltd.*, (1994) 30 I.P.R. 209 (Australia).

<sup>25</sup> Farley, *supra* note 22, at 55.

<sup>26</sup> The United States has only a very limited explicit notion of moral rights. Section 106A of the United States Copyright Act gives authors of works of visual art certain rights to claim authorship and to prevent mutilation that would be prejudicial to honor or reputation. 17 U.S.C. 106A (2000). The author of a work of recognized stature“ has, in addition, the right to prevent its destruction.

<sup>27</sup> See Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, in *LE DROIT MORAL DE L'AUTEUR (The Moral Right of the Author)* 81, 81-82 (Association Littéraire et Artistique Internationale 1993)(proceedings of Congress of Antwerp symposium, 19-24 September 1993). Dworkin notes that, despite attempts, general moral rights provisions have not been introduced in the United States. The one exception is the *Visual Artists Rights Act of 1990*, which introduced limited moral rights into U.S. copyright legislation. Dworkin, *supra* at 107-109; see also *supra* note 26.

<sup>28</sup> See ROBERT G. HOWELL, LINDA VINCENT AND MICHAEL D. MANSON, *INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS* 382 (1999). Current Canadian law com-

cific protection for attribution (*droit de paternité*) and integrity (*droit de respect l'oeuvre*). The right of attribution allows an author to claim authorship and prevents others from making competing claims. The right of integrity lets an author prevent distortion, mutilation, modification or other treatment of his or her work that is prejudicial to the author's honour or reputation.

A well-known Canadian case illustrates the sort of protection afforded by moral rights.<sup>29</sup> In *Snow v. Eaton Centre Ltd.*, the sculptor of some forty Canada geese on display at a shopping mall obtained an injunction to stop the mall operators from adding red Christmas ribbons to decorate his work. The remedy was granted on the ground that the modification of the work would harm the professional and artistic reputation of the artist, in violation of his right to the preservation of the integrity of his work. O'Brien, J. stated:

The plaintiff is adamant in his belief that his naturalistic composition has been made to look ridiculous by the addition of ribbons and suggests it is not unlike dangling earrings from the Venus de Milo. While the matter is not undisputed, the plaintiff's opinion is shared by a number of other well respected artists and people knowledgeable in his field.<sup>30</sup>

The *Snow* case shows what many regard as the most important aspect of moral rights law — the continuing protection it affords creative human expression, including limiting purchasers of artistic works from treating such works in any way they wish. The *Snow* case is not, however, indicative of unequivocal support for moral rights in Canadian law. Such rights are not alienable (assignable) though they may be waived.<sup>31</sup> This may mean that the inequality of bargaining power often extant in the relations of artists, on the one hand, and buyers (galleries, publishers, collectors and others), on the other, will effectively extinguish in practice those moral rights that may have existed.

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prises sections 14.1, 28.1 and 28.2 of the Copyright Act, as established by sections 4, 6 and 8 of the *Copyright Amendment Act*, 1988, R.S.C., ch. 10 (4th Supp)(1985)(Can.), as amended by ch. 24, 1977 S.Q. §§ 13, 20 (Can). See also David Vaver, *Report on Moral Rights: Canada*, in *LE DROIT MORAL DE L'AUTEUR*, *supra* note 27, at 207.

<sup>29</sup> *Snow v. The Eaton Centre Ltd.*, (1982), 70 C.P.R. (2d) 105 (Ont. H.J.C.).

<sup>30</sup> *Id.* at 106.

<sup>31</sup> Copyright Act, R.S.C., ch. C-42, s. 14.1 (1985)(Can.). Rights in works of visual art in the United States are also inalienable and may be waived by a signed written instrument identifying the work and stating the uses to which the waiver applies. 17 U.S.C. 106A(e)(1) (2000).

Gerald Dworkin has described Canada "as in some respects provid[ing] a bridge between the approach to moral rights in common law and civil law countries."<sup>32</sup> Canada, as he points out, has laws influenced by the civil law of Quebec. Members of the Supreme Court of Canada come from both civil law and common law backgrounds and have looked to civil law jurisdictions in considering moral rights issues.<sup>33</sup> Under civil law an emphasis is placed on principles of natural justice. Rights in a work are viewed as arising from an act of personal creation and being part of the personality of the author.<sup>34</sup> As such, the work remains linked to the author throughout its life. In addition to the rights of attribution and integrity contained in the Berne Convention, Continental legal systems recognize the right of publication (*le droit de divulgation*) and the right to withdraw or repent (*droit de retrait ou de repentir*).<sup>35</sup>

An early Canadian case illustrates how moral rights in Canada can be based on civil law (or common law) principles, as well as on legislation. In a 1911 decision, *Morang and Company v. William Dawson Le Sueur*, the Supreme Court of Canada ordered a publisher to return a biographical manuscript that it had declined to publish.<sup>36</sup> The Chief Justice (a lawyer trained in the civil law) stated:

I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, e.g., paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But it will not be contended that the publisher who bought the manuscript of *The Life of Gladstone*, by Morley, or of *Cromwell* by the same author, might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of

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<sup>32</sup> Dworkin, *supra* note 27, at 93.

<sup>33</sup> *Id.*, citing *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193, where Justice La Forest, a New Brunswick judge, sought assistance from French law to support his interpretation of a moral rights provision.

<sup>34</sup> See STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 6 (Butterworths 2d ed. 1989). For a valuable analysis of property and the person, see Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

<sup>35</sup> See Adolf Dietz, *Legal Principles of Moral Rights (Civil Law)*, in *LE DROIT MORAL DE L'AUTEUR*, *supra* note 27, at 54, 57.

<sup>36</sup> (1911), 45 S.C.R. 95.

our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuniary interest in the manuscript, *he retains a species of personal or moral right in the product of his brain.*<sup>37</sup> (emphasis added)

The *Morang* decision was subsequently referred to with approval in an Ontario case with similar facts. In *Tedesco v. Bosa*, an author asked for the return of her manuscript for a book that she had prepared for a newly-formed Italian-Canadian historical society.<sup>38</sup> The Court found that the society had repudiated its contract with the author by failing to complete the editorial process leading to a publishable version of plaintiff's manuscript. Upon such repudiation, the Court ruled, the author had a right to have the manuscript returned to her.

These Canadian cases support the claim that under Canadian law, an author's moral rights include the right of publication, as recognized under French law. If this is the case, then moral rights in Canada go well beyond those contained in the Berne Convention and are analogous to those in some Continental systems. It should be noted, however, that this may be an overly broad interpretation of the *Tedesco* case, which held that the contract of transfer of the copyright was repudiated by the failure to publish. The case cannot fairly be interpreted to mean that the author generally retains a right of publication even after transfer of the copyright.

With its focus on the rights of creators, moral rights law has been seen as sympathetic to the concerns of indigenous peoples.<sup>39</sup> Indigenous peoples may think that the right to integrity may offer protection against distortion through inaccurate or unauthorized use of their cultural symbols. The right of attribution may also be capable of affording protection against claims by non-indigenous persons to original authorship. Despite its potential advantage for indigenous persons, however, moral rights law remains focused on the individual author and not the community as a whole.<sup>40</sup> Although the Berne Convention and the copyright laws of all coun-

<sup>37</sup> *Id.* at 97-98.

<sup>38</sup> *Tedesco v. Bosa* (1992), 45 C.P.R. (3d) 82 at 88-89 (Ont. Ct. Gen. Div.).

<sup>39</sup> See Callison, *supra* note 13, at 21; D. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENV'T'L. L. 253, 258-59 (2000).

<sup>40</sup> See Farley, *supra* note 22, at 29-31, 47-49.

tries provide for some notion of joint authorship,<sup>41</sup> the limited term comes into play for traditional works of indigenous peoples, even if the original (joint) authors could be known.<sup>42</sup> Without significant modification to address these sorts of concerns, moral rights, like copyright, will remain inadequate as a legal basis to address indigenous concerns.

(c) *Patent Law*

We need not dwell on patent law's inapplicability to the concerns of indigenous peoples to protect their cultural heritage. Insofar as we are concerned with the protection of artistic designs, symbols, literature, or music, patent law simply does not apply because these types of works are not technological and are therefore not patent subject matter. The potential relevance of patent law to traditional knowledge of herbal or other medicines, which can result in processes or medicines for treating human disease or other physical ailments, is equally clear, but it does not often lead to the result desired by advocates for indigenous peoples. For example, in the paradigmatic case in which a scientist learns that an indigenous group has found a particular plant effective in treating a human health problem, subsequent isolation of the active ingredient and its development into a useful drug by a modern pharmaceutical company may well result in a patent for the company,<sup>43</sup> but nothing in the patent law requires sharing any of the profits with the source of the information that led to the discovery. In principle, there would be nothing to stop the indigenous group from doing what the drug company did, but in practice such groups are not equipped to engage in the complex and very expensive process of determining scientifically which elements of the plant are active, creating an industrial process for manufacturing the drug, and proving its effectiveness and safety.<sup>44</sup>

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<sup>41</sup> See *supra* note 23.

<sup>42</sup> Article 7<sup>bis</sup> of the Berne Convention requires that the term of protection be measured from the death of the last surviving joint author. Berne Convention, *supra* note 20, Art. 7<sup>bis</sup>.

<sup>43</sup> While no one may patent a product of nature, at least in the United States patents do issue on substances that have been isolated and purified into a state in which they are not naturally occurring. Rebecca S. Eisenberg, *Re-Examining the Role of Patents in Appropriating the Value of DNA Sequences*, 49 *EMORY L.J.* 783, 785-86 (2000).

<sup>44</sup> See Michael H. Davis, *Some Realism about Indigenism*, Cardozo Symposium.

4.   ARE IPRs APPROPRIATE FOR THE PROTECTION  
      OF CULTURAL HERITAGE?

The last part explained the ineffectiveness of IPRs under the patent, copyright, and moral rights regimes, as presently constituted, to meet the asserted needs of indigenous peoples seeking to protect their cultural heritage. In this part we review some aspects of these regimes that in our opinion make the exclusive rights of patent and copyright inappropriate as a matter of overall social policy for the protection of indigenous cultural heritage.

Several commentators have attributed the inability of copyright to deal with problems of cultural heritage protection to a supposed copyright focus on the individual author.<sup>45</sup> More generally, some might feel that traditional intellectual property law, especially copyright, is based on natural rights of authorship, pursuant to which an author's (or perhaps inventor's) rights are grounded in the moral Lockean principle that the creator of something should have exclusive ownership rights to his or her creation.<sup>46</sup> A number of eminent copyright scholars have, indeed, pointed out the important role of the concept of the romantic author in copyright theory,<sup>47</sup> and there is also no doubt that the notion of the romantic author is often used as a political tool of forces seeking stronger, longer, and broader copyright protection.<sup>48</sup> Yet, no matter how appealing claims to natural rights might seem at a casual glance, no country follows a pure natural rights theory for intellectual property.<sup>49</sup> Natural rights theory, for example, does not and cannot incorporate limitations on either the duration or the scope of the

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<sup>45</sup> E.g., Barsh, *supra* note 5, at 16; Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 *MINN. INTELL. PROP. REV.* 1, 35, 45-46 (2001); Scafidi, *supra* note 7, at 803-06. We should note again, however, that, at least in theory, copyright embodies a notion of joint authorship that could be applied to communities. See *supra* notes 23, 41-42 and accompanying text.

<sup>46</sup> See *supra* note 21 and accompanying text.

<sup>47</sup> E.g., JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293,1322 (1996); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 *CARDOZO ARTS & ENT. L.J.* 293, 298-300 & *passim* (1992).

<sup>48</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197 (1996) (arguing that interest-group power is a part of the explanation for the recent broad expansion of copyright rights but that this power is augmented by the stake that the nation's elite have in copyright rhetoric concerning authors).

<sup>49</sup> See Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 *U. DAYTON L. REV.* 511, 517 (1997).

right. How do natural rights justify a very long copyright term while maintaining a relatively short period of protection for patents? Many inventions are at least as intellectually creative as the bulk of copyright-protected works. Nor would we distinguish between idea and expression in determining the scope of copyright protection under a pure natural rights perspective. Often the most creative aspect of a work is its underlying idea, yet nothing in pure natural rights theory can tell us where to draw the line between protected and unprotected elements of works. Thus, concern for the romantic author, whether individual or communal, is not a true policy basis for patent and copyright legislation. Vague appeals to natural rights of authors are almost invariably a political smoke screen aimed at reducing the public benefits of copyright in favor of greater monetary returns to copyright owners.<sup>50</sup>

The real policy basis for recognizing exclusive intellectual property rights derives from the public goods problem, namely, that failure to protect the fruits of intellectual creativity would result in fewer creative and socially desirable works being produced and made available to the public, because the effort involved in first producing the works is much greater than that involved in simply copying works already made. On the other hand, protection that is too strong or too long also has a deleterious effect on the social availability of desirable works, because later authors and inventors depend and build upon works that have come before them. The goal of intellectual property law is to balance these two tensions, in order to optimize the works made available to the public.<sup>51</sup> Thus, all countries have concluded that the free use of ideas

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<sup>50</sup> Perhaps the most flagrant example of this (mis)use of the romantic author in the cause of extracting more income for copyright owners, such as publishers or distant descendants of original authors, is the recent extension of the copyright term by 20 years in both the European Union and the United States. See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989 (2000); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907(1997). See generally DENNIS S. KARJALA, *OPPOSING COPYRIGHT EXTENSION*, at <http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/>.

<sup>51</sup> A classic statement from United States jurisprudence comes from *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975):

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an author's creative



results in more works from subsequent authors than are lost by failing to protect ideas. In other words, they apply a public-benefit, or instrumentalist, philosophy in setting limits on intellectual property rights. Many believe that IPRs have become too strong in that further rights do not add any incentive for the creation of socially desirable works. Adding unlimited cultural rights to the mix would only increase the pressure from interest groups to extend traditional IPRs, especially copyright.

An appropriate balance in copyright law is also vital for maintaining and enhancing basic freedoms in a democratic society. Thus, copyright serves as an incentive for the creation and dissemination of original expression that is free of government regulation, supporting basic concepts of individual liberty.<sup>52</sup> On the other hand, overly strong copyright protection can stifle rather than promote expressive diversity:

All authors draw upon existing works in creating new ones. For that reason, a democratic copyright must provide considerable leeway for creative transformations of protected expression. At least to some extent, authors must be free to adapt, reformulate, quote, refer to, and abstract from existing expression without having to obtain copyright owner permission. Absent that breathing space, authors would be severely fettered in their ability to participate in public discourse, whether by building upon literary or artistic traditions, laying bare the contradictions in venerable cultural icons, or challenging prevailing modes of thought.<sup>53</sup>

We must therefore be cautious in too rapidly seizing on the notion of intellectual property rights as a general mode of protection for intangible knowledge arising out of a given cultural heritage. It is important that our economically dominant Western culture not

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labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Of course, different countries, and even different judges within a given country, will have different views concerning just where to draw the line between unprotected idea and protected expression. The point is simply that every country denies copyright protection to at least some creative ideas (such as the theory of relativity). Consequently, no matter what representatives of a particular country or copyright tradition may say about natural rights and creative authorship, they do not recognize such rights solely as a reward to creative people.

<sup>52</sup> Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217, 227-29 (1998).

<sup>53</sup> *Id.* at 229. See generally Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996).

take by stealth or deception that which a particular indigenous group wishes and has sought to keep secret. However, it is also important that indigenous groups recognize the fundamental role of individual freedom (from government regulation) in modern democratic societies. The emphasis on a broad and growing public domain is not simply utilitarianism,<sup>54</sup> unless that term is defined in the broadest sense to include the utility of a growing and diverse cultural environment. Our culture greatly benefits when Picasso brings elements of African art into his own or Van Gogh does the same with Japanese art. Indigenous cultures also benefit from the broad and vibrant public domain that has resulted from the time-limited nature of our intellectual property rights.<sup>55</sup> Many drugs, tools, and industrial processes that were once patented are now free all over the world for use or further adaptation by others, including indigenous peoples. A whole canon of cultural works from the Greek playwrights to early 20th century composers remains free for the taking by anybody. People all over the world, from nearly every culture, benefit from this rich public domain of intellectual property. We must at least pause before reducing the public domain solely on the ground that some of it belongs to a specifically identifiable cultural heritage.<sup>56</sup>

Treating intangible cultural property under the intellectual property regimes of patent and copyright would raise practical problems as well. The absence of specified authors or inventors raises the question of who should have powers of enforcement.<sup>57</sup> The incentive or instrumentalist basis for IPRs generally<sup>58</sup> cannot

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<sup>54</sup> Cf. Scafidi, *supra* note 7, at 806 (asserting that utilitarian theory's desire to improve the public domain leads to overly rigid IPRs).

<sup>55</sup> *But see* Ragavan, *supra* note 45, at 36-38 (discussing the Tunis Model Law on Copyright for Developing Countries and the Model Provisions for the National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions, both of which call for perpetual protection for aspects of folklore).

<sup>56</sup> Professor Tsosie, while expressly recognizing the danger of an unlimited right to control cultural expression, argues for a "right of access" to the production capabilities of the film industry, so that Native stories can be told from the Native point of view, in addition to (and not in place of) the ways such stories are traditionally and typically represented on film. Tsosie, *supra* note 6, at 356-57.

<sup>57</sup> *See* Scafidi, *supra* note 7, at 822 (noting that questions of contested internal use are not susceptible to legal resolution). Article 15(4)(a) of the Berne Convention allows national law of the country of origin of a work of otherwise unknown authorship to specify a representative of the author for the purpose of enforcing the author's rights. Berne Convention, *supra* note 20, Art. 15(1)(a). This does nothing, however, to eliminate disputes within the country of origin over what uses are appropriate.

<sup>58</sup> *See supra* note 51 and accompanying text.

serve as a basis for IPRs in intangible works that have already been created, and any justification based on natural rights must be squared with the inapplicability of that justification for IPRs generally.<sup>59</sup> In the United States, there are, in addition, specific constitutional problems with recognizing IPRs in intangible cultural heritage.<sup>60</sup>

Moreover, and putting aside for the moment questions like defamatory uses of sacred symbols and objects by outsiders, denying IPRs in intangibles associated with indigenous cultural heritages does not deprive those cultures of their own continued use of that knowledge.<sup>61</sup> We must be careful to distinguish between physical

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<sup>59</sup> See *supra* notes 46-50 and accompanying text.

<sup>60</sup> Professor Scafidi argues that the First Amendment does not preclude recognition of cultural products any more than it invalidates intellectual property law in general. Scafidi, *supra* note 7, at 826. She does not mention the intellectual property clause, however. The U.S. Constitution gives Congress the power 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. It is well settled that Congress has no power to take things out of the public domain. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available). To the extent that indigenous cultural property is already in the public domain in the United States, it is difficult to see how a new statute could create IPRs in it. *But see Eldred v. Ashcroft*, U.S. 123 S. Ct. 769 (2003) (upholding congressional power to extend the terms of existing copyrights and generally leaving to Congress the interpretation of the constitutional limits on congressional power contained in the intellectual property clause).

The situation is significantly different in Canada, where section 35 of the Constitution Act of 1982 recognizes "existing aboriginal and treaty rights" of the Aboriginal peoples of Canada. Constitution Act, 1982, Schedule B to Canada Act 1982 (U.K.), Part II. This protection may legally elevate the cultural heritage protection of these peoples above the property rights of others. For a discussion of Canadian Aboriginal cultural property, see Catherine E. Bell and Robert K. Paterson, *Aboriginal Rights to Cultural Property in Canada*, 8 INT'L J. CULTURAL PROP. 167 (1999).

<sup>61</sup> Professor Barsh, apparently, supports rejection of commercialization or commodification of local ecological knowledge as intellectual property, on the ground that such rights are communitarian and inalienable. Barsh, *supra* note 5, at 23. This is, in fact, a contradiction if by inalienable Professor Barsh means that no one outside the community may use the knowledge without permission. *Somebody* must have a property right if knowledge is to be legally controlled. Professor Barsh also argues that indigenous people should have the right to restrict research on knowledge or biological resources where integrity of natural or cultural patrimony is threatened. *Id.* at 37. But how can taking knowledge alone threaten such patrimony? The people from whom the knowledge is learned still have it and can continue to use it in their traditional ways. One argument is that indigenous peoples will grow accustomed to use of knowledge separate from the landscape, which will break its relationship with the land. *Id.* at 41. But how strong can the relationship be if it can be broken so easily? Finally, Professor Barsh fears that outsiders will take the knowledge and then cease to cooperate with local communities, thus removing their most power-

cultural artifacts and intangible cultural property. It is one thing to take an archeological artifact that represents an important part of a group's heritage and quite another simply to remember the design of the artifact and create a copy or derivative work based on it. As long as the new work is not attributed to the original group, how is indigenous culture harmed when an outsider takes one of their designs and commodifies it?

The failure to recognize that knowledge is not depleted by use can easily lead to misarticulation of claims and even to results that nobody, indigenous or otherwise, would likely seek. Some commentators seeking more protection for traditional knowledge seem to favor actions by indigenous groups to limit or deny patents in developed countries where the invention in question is based on folk knowledge that has long been available in traditional cultures elsewhere.<sup>62</sup> But what purpose is served by denying patents in these cases? The traditional culture from which the knowledge derives may still make full traditional use of it. And if the knowledge is only the starting point for costly research to isolate, extract, and develop into a useful product, such as a drug, the active ingredient of a traditional herbal remedy, how can we be sure the investment will be made to engage in this research without the patent incentive? If patents are uniformly denied in these cases, valuable medical and other advances may well simply not be made at all. How can this possibly help the culture that was the original source for the knowledge? It seems that the real complaint in these situations is that the traditional culture often does not share in the profits from a product derived from their knowledge base. To the extent that complaint is based on fraudulent inducements to transfer the knowledge, breach of a confidential relationship, or even unequal knowledge or bargaining power, it is something that must be addressed. Simply arguing for denial of patent rights in developed countries does not do this.

In short, IPRs under patent and copyright are in the nature of exclusive property rights. They reward intellectual creativity and

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ful argument for self-determination. *Id.* But if self-determination is the goal, it should be laid directly on the table for discussion. It has little to do with IPRs.

<sup>62</sup> *E.g.*, Ragavan, *supra* note 45, at 13-14 (citing a critical analysis of Dr. Vandana Shiva concerning the failure of U.S. patent law to treat practices employed in other parts of the world as prior art); *id.* at 50-51 (criticizing a U.S. court decision allowing the possibility of novelty in the case of a patent on toothpaste making use of a desensitizing agent known in ancient China).

recognize the human creative spirit, but they are potent weapons. They can provide a necessary incentive for a flowering of new and valuable works, but when made too strong or too long they can inhibit growth and diversity. We believe that there are better ways to handle the legitimate claims made on behalf of indigenous peoples seeking protection for their cultural heritages.

Given the fundamental inadequacy and contradiction of using IPRs to resolve indigenous concerns, it is necessary to look elsewhere for a solution to what is in a real sense a conflict of the traditional and the modern. This step also involves a more sophisticated appreciation of the various interests and perspectives within indigenous and other communities. Once the dilemma is conceded of choosing between a kind of protective freezing of indigenous culture and an opening up of it to new interpretations and market forces, then the opportunity arises to develop a fresh basis for the legal protection of indigenous culture. This task will not be a simple one, and it may take courts and legislatures many years to determine the form of such protection and its appropriate extent. In the following section of our paper, we discuss some selected instances where the law and legal theory have shown willingness to extend special protection to claims of a cultural nature. We believe these examples can be instructive in the ongoing debate over legal recognition of intangible cultural heritage.

## 5. NON-IPR APPROACHES TO CULTURAL HERITAGE PROTECTION

### (a) *International Law and National Export Controls*

The first designation of the nature of cultural property in international law in the modern era occurred in the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (the Hague Convention).<sup>63</sup> The second paragraph of the Preamble of the Hague Convention describes the subject matter of the Convention as the cultural heritage of all mankind. This description is particularly appropriate in that the Convention seeks to establish international minimum standards of protection for cultural property in times of armed conflict.

Professor John Merryman has suggested that the language of the Hague Convention is supportive of what he describes as a cos-

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<sup>63</sup> 249 UNTS 240.

mopolitan notion of a general interest in cultural property.<sup>64</sup> He compares the language of the Hague Convention with the language in the Law of the Sea Convention which defines the area of the seabed and the ocean floor as the common heritage of mankind.<sup>65</sup> If this interpretation were accepted, it might support a claim that cultural property could not be subject to claims by individual states. Professor Merryman's main concern is with the legitimacy of retentionist national cultural property export controls, but insofar as he implies that the Hague Convention undermines the legitimacy of such measures he seems to attribute more to that Convention than it can sustain. The phrase cultural heritage of all mankind in the Convention was intended to emphasize the responsibilities of states and not to define their rights of appropriation or ownership. According to this theory, war and other events that place cultural properties at risk oblige states to observe certain international minimum standards of protection and preservation. Such international obligations may not extend to all cultural property but only to that which is of sufficient importance to all of humanity. There has never been a concerted international effort to develop common rules about rights to immovables. All that can be reliably claimed in respect of the Hague Convention is that it seeks to develop international minimum standards for the treatment of certain cultural property. Necessarily, these rules do not apply to other more prosaic types of property. The Hague Convention is not concerned with individual or state property rights in relation to cultural property but with state responsibilities in respect of such property. Thus the use of similar concepts in relation to Antarctica or the deep seabed differ from their use in the Hague Convention in that in these other examples the principal objective in asserting international status is to avoid sovereignty claims by individual states.

The Hague Convention does make it clear that international law regards certain categories of cultural property as different from ordinary movables and justifies the existence of enhanced responsibilities among states. Merryman emphasizes that the Convention provides a rationale for the international protection of cultural property and that it is a charter for cultural internationalism, with profound implications for law and policy concerning the interna-

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<sup>64</sup> John Henry Merryman, *Two Ways of thinking About Cultural Property*, 80 *AM. J. INT'L L.* 831, 841 (1986).

<sup>65</sup> *Id.* at 841 n.35.

tional trade in and repatriation of cultural property.<sup>66</sup> Whatever one's views on Professor Merryman's thesis about the legitimacy of cultural property export controls, his point about the new international law of cultural property represented by the Hague Convention is indisputable.

States' responsibilities in respect of cultural property within their territories are circumscribed by the international legal regime established by the Hague Convention and subsequent international cultural property instruments.<sup>67</sup> Notwithstanding Professor Merryman's arguments, it is generally accepted that states have the right to control the export of cultural property and to otherwise regulate it within their borders. While Article XI of GATT 1994 (part of the 1994 Agreement Establishing the World Trade Organization) prohibits export quotas (or quantitative restrictions) on goods, Article XX(f) of the same treaty specifically allows for measures imposed for the protection of national treasures of artistic, historic or archaeological value.<sup>68</sup> Once again, international law has recognized the special significance of certain cultural property by allowing states to treat it differently than other movables. Many states, like Canada, the United Kingdom, Australia, New Zealand, and others maintain elaborate systems of cultural property export controls with the express aim of preventing such objects from leaving their country of origin.<sup>69</sup> The widespread pattern of these national laws, which are consistent with international law, shows a tendency of states to apply different rules to cultural property than they do to other moveables.

The United States Native American Graves Protection and Repatriation Act (NAGPRA) is one of the most important na-

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<sup>66</sup> *Id.* at 836, 837. This echoes the seminal views of an earlier writer. See Paul M. Bator, *An Essay in International Trade in Art*, 34 *STAN. L. REV.* 275, 313 (1982).

<sup>67</sup> The notion of a universal cultural heritage is further developed in the provisions of the 1972 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 11 *INT. LEGAL MATS.* 1358 (1972). The preamble to the Convention, listing bases for action, states that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.

<sup>68</sup> For a discussion of the background of Article XX, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

<sup>69</sup> See Robert K. Paterson, *The Legal Dynamics of Cultural Property Export Controls: Ortiz Revisited*, *MATERIAL CULTURE IN FLUX: LAW AND POLICY OF REPATRIATION OF CULTURAL PROPERTY*, *U.B.C. L. REV.* 241 (Special Issue 1995).

tional laws dealing with indigenous movable cultural property.<sup>70</sup> It was enacted in an effort to reduce illegal trafficking in and vandalism of Native American and Hawaiian objects. NAGPRA also seeks to promote indigenous property rights (especially concerning burial sites and sacred material). NAGPRA represents an effort to protect Native American culture and to promote cultural heritage values. The new law has received widespread interest outside the United States and done much to legitimize efforts around the world to provide frameworks for museums to return certain categories of objects to indigenous source groups.<sup>71</sup>

(b) *Critical Legal Theory and the Public/Private Divide*

According to a group of modern legal theorists, the division of public and private spheres for legal purposes can provide governments with a rationale for minimizing their political and social responsibilities.<sup>72</sup> In characterizing certain social phenomena as private, governments may justify their lack of involvement and, therefore, preserve existing inequalities and inequities. The legitimacy of this analysis is supported by the inevitable effect that private spheres have on public spheres and the fallacy of maintaining a separation of the two spheres for the purpose of policy development and state action.

The analysis that has been applied to the private/public divide (especially in the areas of labor policy and feminist legal studies) could be used by analogy to support a further break-up of the legal categories of moveable or inchoate property. It could be argued that indigenous societies, for instance, do not categorize the physical and intangible aspects of their cultures in a proprietary manner and it is, therefore, inappropriate on that basis alone to deny them the same level of legal protection as the beneficiaries of current legal categories receive. While a contemporary sculptor in New York City can enjoy full copyright and other IPR protection for her work, the same is rarely true for the traditional cultural heritage of

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<sup>70</sup> 25 U.S.C. 3001 *et seq.* (2000). See Symposium: *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation — Related Legislation*, 24 ARIZ. ST. L.J. (1992); Nancy Carol Carter, *Native American Graves Protection and Repatriation Act: Law, Analysis and Context*, 8 INT'L J. CULTURAL PROP. 285 (1999).

<sup>71</sup> For a discussion of several examples, see MATERIAL CULTURE IN FLUX: LAW AND POLICY OF REPATRIATION OF CULTURAL PROPERTY, U.B.C. L. REV. (Special Issue 1995).

<sup>72</sup> See CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY (Susan B. Boyd ed. 1997) and PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed. 1995).



indigenous societies. A lack of response to indigenous concerns by the courts will only reinforce this *status quo* of inequality.<sup>73</sup>

A Canadian case provides an example of the consequences of failing to acknowledge this type of approach.<sup>74</sup> In 1988, the Glenbow Museum in Calgary Alberta organized an exhibition entitled *The Spirit Sings* in conjunction with the staging of the Winter Olympic Games in Calgary. The exhibit included several First Nations' masks lent by museums outside Canada. The Lubicon Lake First Nation objected to the public display of what it regarded as sacred objects and organized a boycott of the exhibition. Several Mohawk native bands (tribes) then sought an interim injunction to prevent the display of a False Face mask in the exhibition. The trial judge refused to issue the injunction, reasoning that although the claim to ownership of tribal cultural property was a serious issue to be tried, the applicants had been unable to show that irreparable harm would result from the continued display of the mask.<sup>75</sup> The judge supported his view by noting that the mask had been on museum display for several years and the Mohawk had not previously objected to those displays.<sup>76</sup> A deconstruction of this case might suggest that the court failed to understand the significance of public displays of First Nations' spiritual objects by non-indigenous public institutions and as a result denied the claimants a similar level of protection available to non-indigenous claimants (based on perceived economic prejudice). Such an argument might invite comparison of the *Mohawk* case to the *Snow* case discussed above,<sup>77</sup> where the sculptor received the benefit of existing moral rights law. In doing so, however, it is important to avoid comparing apples to oranges. In *Snow*, the moral right was still in force because the work was of recent origin. The sculptor's grandchildren might more appropriately be analogized to the plaintiffs in the *Mohawk* case, who were the descendants of the actual authors of the masks in question. *Snow's* grandchildren would have no

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<sup>73</sup> Note, however, that the comparison of traditional cultural heritage to the work of a contemporary artist can be misleading. A *current* author from an indigenous culture who adds original expression to a traditional work will own a copyright in the new work that covers the new expressive features. See *supra* notes 15-18 and accompanying text.

<sup>74</sup> *Mohawk Bands v. Glenbow-Alberta Institute*, [1988] 3 Can. Native L. Rep. 70 (Alberta Queens Bench). See Bell and Paterson, *supra* note 60, at 196-97.

<sup>75</sup> [1988] 3 Can. Native L. Rep. at 71.

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* notes 29-31 and accompanying text.

more right to dictate how the work was to be used for display purposes than the plaintiffs in the *Mohawk* case.

We refer to the theoretical literature on the public/private divide simply to raise the issue of whether it could provide a basis for arguing that greater protection is needed for non-economic claims by indigenous groups and any other group whose cultural characteristics do not fit well with the Western individual property rights model. One important characteristic of the Western property rights model for IPRs, however, is the denial or limitation of IPRs in the interest of free speech and a developing public domain.<sup>78</sup> Thus, it is not property rights as such that cause the apparent problem. Rather, it is the limitation on the special kinds of property rights comprised by IPRs, especially the limitation on duration, that results in the failure to protect today the artistic creations of the distant past. To the extent that any group, indigenous or otherwise, does not share the free speech and building-block approach to the development of culture, there is a conflict of fundamental importance that is not easily resolved. We must therefore look further to determine how much can be accomplished without applying IPRs of the patent or copyright types and without abandoning the basic principle of time-limited IPRs.

### (c) *Appropriation and the Tort of Misappropriation*

Many advocates of indigenous cultural rights have used the term appropriation to describe what has occurred to the cultures of indigenous peoples.<sup>79</sup> This perspective is characteristic of discussions of indigenous cultures in post-colonial societies (such as Canada, Australia, and the United States), where a sense of loss through the influences and practices of the dominant non-indigenous society often prevails.<sup>80</sup> Many believe that government or government-sanctioned practices in the fields of education, religion, property development and economic policy have reinforced an

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<sup>78</sup> See *supra* notes 45-62 and accompanying text.

<sup>79</sup> See e.g., INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK, *supra* note 3; Bruce Ziff & R.V. Pratima (eds), BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION (1997); D. Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CAN. J. L. & SOC'Y, 129 (1995); B.S. Mandelker, *Indigenous People and Cultural Appropriation: Intellectual Property Problems and Solutions*, 16 CAN. INTELL. PROP. REV. 367 (2000).

<sup>80</sup> For a survey of the Australian situation, see JANKE, *supra* note 12.

overall sense of loss.<sup>81</sup> Contemporary instances of appropriation include the use by non-indigenous people of native symbols, songs, dances, words and other forms of cultural expression.<sup>82</sup> Objection to such practices goes beyond a sense of deprivation of economic opportunity. Cultural appropriation is argued to amount to a species of human rights abuse or, at a minimum, an affront to native dignity and sense of self-worth.<sup>83</sup>

Can the law respond to these kinds of concerns or are they too vague and indefinite to be the subject to effective private remedies? Furthermore, is it in the interests of the community as a whole that it not have access to or user rights in respect of the intangible attributes of indigenous and other cultures? Indeed, what are the limits, if any, on this type of reasoning to allow indigenous people control over their cultural expression? Do current indigenous authors get the benefit of modern copyright, in that their works are afforded full-fledged copyright protection and can be based on the entire public domain, while at the same time having exclusive rights to use those aspects of their own cultural traditions in creating new works? More fundamentally, who decides who has the right to do what and by what standard?

A common law doctrine of misappropriation was first developed by the United States Supreme Court in *International News Service v. Associated Press*.<sup>84</sup> The case involved the publication of summaries of news stories about World War I taken by Hearst's International News Service (INS) from Associated Press newspapers. The practice was triggered by military censorship that barred INS from direct access to European news about the war. The Supreme Court thought Associated Press had a quasi-property interest in the news that it collected and this interest prevented its competitors from using it.<sup>85</sup> A majority of the Court was also of the opinion that INS had engaged in unfair competition by taking

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<sup>81</sup> See REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 448 ff. (Supply and Services Canada, Ottawa, 1996).

<sup>82</sup> See Andrew Kenyon, *Australian Aboriginal Art, Carpets and Copyright*, 1 ART, ANTIQUITY & LAW 59 (1996).

<sup>83</sup> See Audrey R. Chapman, *Human Rights Implications of Indigenous Peoples' Intellectual Property Rights*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK, *supra* note 3, at 211.

<sup>84</sup> 248 U.S. 215 (1918).

<sup>85</sup> *Id.* at 236.

news reports from Associated Press and using them without payment.<sup>86</sup>

The misappropriation doctrine has remained controversial in the United States and elsewhere but it undeniably represents an attempt to protect what was perceived by the U.S. Supreme Court as a form of unfair competition.<sup>87</sup> What has caused most concern is the continuing uncertainty of its analytical basis.<sup>88</sup> Another problem with the misappropriation theory is whether it imposes any limits on the lifespan of the rights it confers.<sup>89</sup> While the doctrine has survived, its availability has been severely restricted to cases involving a free riding use of costly-to-generate and time-sensitive information in direct competition.<sup>90</sup>

While the spirit of the misappropriation doctrine in the *INS* case seems consistent with indigenous misappropriation claims, any refinement of the doctrine to address these claims would seemingly involve many of the same problems that have arisen in relation to IPRs, discussed above. The principal dilemma is that the tort of misappropriation once again focuses on economic rights and economic losses. Indigenous appropriation claims extend beyond this focus and will not be addressed by a remedy that is purely economic in nature.

#### (d) *Civil Law and Choses Hors Commerce*

Civil law has long recognized a category of property that accommodates cultural (rather than economic) priorities. For example, under French law, *choses hors commerce* (or *res extra commercium*) have had their alienability restricted in order to pro-

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<sup>86</sup> *Id.* at 237.

<sup>87</sup> It was rejected by the High Court of Australia in *Victoria Park Racing and Recreation Grounds Company Ltd. v. Taylor*, 58 C.L.R. 479 (1937), and referred to but not adopted by the Supreme Court of Canada in *MacDonald v. Vapor Canada Ltd.* [1977] 2 S.C.R. 134, at 149.

<sup>88</sup> See Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875, 884-887 (1991); Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 CHI. L. REV. 411, 417 (1983).

<sup>89</sup> See R.P. MERGES, P.S. MENELL, M.A. LEMLEY, & T.M. JORDE, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 749 (1997).

<sup>90</sup> See *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841, 852 (2d. Cir. 1997). In the United States, misappropriation is a branch of state unfair competition law. These limitations on the misappropriation claim derive from preemption by federal copyright law of state-created rights in copyright subject matter that are equivalent to copyright rights. 17 U.S.C. 301(a)(2000).

tect the public interest.<sup>91</sup> This recognition derives from Roman law's strong sense of property and the need to define property precisely. In Canada, Quebec civil law excludes sacred objects from being treated as objects of commerce. Title to such objects, sometimes called imprescriptibles, cannot be obtained, as with other moveables, through the lapse of time.<sup>92</sup> Like its Roman precedents, Quebec law requires an object to be actually used in a sacred or religious ceremony in order for it to acquire special status as a sacred object.

A little known case from Quebec furnishes a rare contemporary example of such laws in action. *Prévost v. Fabrique de la Paroisse de l'Ange-Gardien*, arose out of the reformation of the Roman Catholic liturgy in the 1960s.<sup>93</sup> In the spirit of renewal and modernization following the reforms of Vatican II, the parish priest of l'Ange-Gardien sold off a number of sculptures and religious objects. Some of these items eventually made their way into the collections of the National Gallery of Canada and the Musée du Quebec. A successor to the priest who had sold the objects decided to question the sale by his predecessor on the grounds that the objects involved were sacred, imprescriptible and outside the objects of ordinary sale and purchase transactions.

In 1976 the Church Council of the parish of l'Ange-Gardien sought a declaration voiding the sale of the sculptures and religious objects. The trial court granted the declaration, deeming the objects sacred and ordering their return. It also agreed with the applicants that, as sacred objects, the disputed items could not be treated as objects of commerce. Judge Bernier applied canon law to find that the objects had not lost their sacred character because the competent Quebec diocese authorities had not sanctioned their desacralization. The decision of the Quebec Superior Court was appealed to the Quebec Court of Appeal, which unanimously dismissed the appeal. Judge L'Heureux-Dubé (as she then was) also

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<sup>91</sup> See K. Siehr, *International Art Trade and the Law* (extract from the RECUEIL DES COURS, Vol. 243 (1993-VI)(Martinus Nijhoff Publishers, Dordrecht, Boston, London), at 64-66.

<sup>92</sup> *Res sacrae* is a sub-category Roman law under *res nullius* (property belonging to no one). Such consecrated property or dedicated property was not capable of being dealt with commercially; see W.W. BUCKLAND, *A TEXT-BOOK ON ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* (Peter Stein ed., rev' 3rd ed., Cambridge, 1963).

<sup>93</sup> See Benoît Pelletier, *The Case of the Treasures of L'Ange Gardien: An Overview*, 2 INT'L J. CULTURAL PROP. 371 (1993). The case was not reported, and the authors rely on Professor Pelletier's discussion for this summary.

agreed with the reference to canon law by the Superior Court for the purpose of determining the sacred character of the objects. She thought that the relevant sections of the Quebec Civil Code could be construed according to the norms of any particular belief, whether it be the canon law of Catholicism, the Jewish Torah, or the Muslim Koran. The Supreme Court of Canada subsequently rejected leave to appeal the decision of the Quebec Court of Appeal. As Professor Pelletier points out, the *L'Ange Gardien* case has significant implications for anyone involved with the possession or handling of sacred objects in Quebec, whatever the basis of their spiritual beliefs might be.<sup>94</sup> Limited as it is, however, to trade in tangible objects, the case has only tangential relevance to the central issue under consideration here, which is the protection of *intangible* cultural heritage.

The closest the common law comes to recognizing cultural property as a distinct form of personalty arises when courts apply the laws of other countries that already afford such recognition. This may occur under the common law rules of private international law or on the basis of the principle of comity.<sup>95</sup> Given the approach of the Supreme Court of Canada in the area of moral rights, it would not seem extraordinary for that Court to incorporate a version of the civil law approach to cultural property into its interpretation of the common law of property. In effect the Supreme Court has already done something of the kind in its groundbreaking decision in *Delgamuukw v. British Columbia*.<sup>96</sup> That case outlined the parameters of the relationship between Canadian Aboriginal title and free-standing rights, as well as the criteria to be adopted in defining those rights. It was decided against the background of section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."<sup>97</sup> Professors Catherine Bell and Robert Paterson have explored elsewhere the effect of *Delgamuukw* on the existence of common law rights to ownership and control of Aboriginal cultural property in Canadian law.<sup>98</sup> Their analysis suggests that Canadian law is now in a position to protect

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<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., *Bumper Development v. Commissioner of Police of the Metropolis*, [1991] 4 All E.R. 638.

<sup>96</sup> [1997] 3 S.C.R. 1010.

<sup>97</sup> Constitution Act, 1982, Schedule B to Canada Act 1982 (U.K.), Part II.

<sup>98</sup> See Bell and Paterson *supra* note 60.

the cultural heritage rights of its Aboriginal populations, though the nature and extent of these rights await future definition. To the extent such protection depends on specific provisions of the Canadian Constitution, as interpreted by the Canadian courts in light of specifically Canadian history, this approach is not easily generalizable to other countries or the protection of the cultural heritages of other indigenous peoples. That said, it may suggest a significant basis or precedent for resolving such protection in the context of broader societal concerns and priorities.

(e) *Contract, Privacy, Trademark, and Trade Secret Law*

The above discussion shows that no existing legal regime, whether directly creating IPRs like patent and copyright or aiming more specifically at cultural property, appears capable of solving the perceived abuses of indigenous peoples' interests in their cultural heritages. Moreover, expanding the IPR regimes to cover such abuses would raise new practical problems and create even more 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.<sup>99</sup> We therefore turn our attention to more modest approaches, each of which might be helpful in solving at least some of the problems associated with the perceived abuses while creating less tension with underlying IPR policies. This approach takes each of the identified problems, outlined above,<sup>100</sup> and explores how modest variations of current legal doctrine might achieve at least acceptable, if not perfect, results.

(i) *Contract Law*

The problem of taking indigenous peoples' information concerning the medicinal effects of a plant and developing it into a patented and popular drug by large pharmaceutical companies has, in fact, parallels that lie wholly outside the arena of cultural heritage protection. It is the basic problem that someone has, for example, an idea for a movie script that she divulges in the hope of receiving some recompense if the idea is developed into a profitable film.<sup>101</sup> The policy tensions are the same as well: our sense that

<sup>99</sup> See *supra* notes 45-62 and accompanying text.

<sup>100</sup> See *supra* notes 5-12 and accompanying text.

<sup>101</sup> See David M. McGovern, *What Is Your Pitch?: Idea Protection Is Nothing But Curveballs*, 15 LOY. L.A. ENT. L. REV. 475 (1995).

justice requires some recompense to the supplier of a good idea, but for which the film would not have been made, is tempered by the notion that ideas, at least in general, must remain free for the taking unless they fall squarely within one of the traditional categories of protection, such as copyright, patent, or trade secret.<sup>102</sup>

An express contract, of course, specifying the idea communicated and stating the rights and duties of the parties thereto, will be enforceable,<sup>103</sup> and the idea person has had some occasional success with implied contract and quasi-contract claims, as well as claims for breach of a confidential relationship.<sup>104</sup> There seems to be little reason in principle that indigenous peoples who are aware of Western norms of contract law could not similarly agree to condition their transfer of information on some degree of participation in any resulting profits,<sup>105</sup> perhaps supplemented with approaches taken or borrowed from trademark that would allow indigenous people exclusive rights to use their name or other identifiers that the public comes to associate with quality in the product.<sup>106</sup>

The problem, of course, with contract notions is that many indigenous peoples will presumably be unaware both of their rights under Western contract law and of the commercial value of the information they are communicating. While courts are sometimes willing to find an implied contract in the case of the idea person for a movie, based on industry custom,<sup>107</sup> it is much more difficult conceptually to rely on implied contract where one party to the supposed contract is essentially unaware of the underlying principle.

<sup>102</sup> *Id.* at 479.

<sup>103</sup> Some courts, arguably mistakenly, have required that the idea communicated be both novel and concrete in order to support even an express contract claim. *Id.* at 492-94

<sup>104</sup> *Id.* at 488-90 & 495-99.

<sup>105</sup> Some contractual arrangements are already being described in the literature. See Laird, *supra* note 5.

<sup>106</sup> Sandra Lee Pintel & Michael J. Evans, *Tribal Sovereignty and the Control of Knowledge*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK*, *supra* note 3, at 43, 46 (describing contractual arrangement for the marketing of New Mexican Blue Corn seed but noting that outsiders were using terms like Hopi Blue for a hybridized commercial corn grown elsewhere). The possibilities of certification marks for indigenous peoples' products are discussed below. See *infra* notes 119-120 and accompanying text.

<sup>107</sup> *Bevan v. Columbia Broadcasting System, Inc.*, 329 F.Supp. 601, 608 (S.D.N.Y. 1971)(taking judicial notice of the television industry practice of remunerating those who proffer accepted though unsolicited manuscripts); *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F.Supp. 1204, 1216 (E.D.N.Y. 1981)(noting, and citing *Bevan*, that there is support for the proposition that an implied agreement may be based upon industry custom or usage regarding submission and use of ideas).



Quasi-contract, an equitable notion of unjust enrichment related to breach of a confidential relationship,<sup>108</sup> is another possible theory, especially where one party takes undue advantage through unfair conduct, such as a breach of confidence or other reprehensible means of obtaining valuable information without compensation.<sup>109</sup> However, it is heavily fact dependent, and, in the case of indigenous communities, it may not be easy to prove exactly who said what to whom to establish the background for deeming the conduct unfair. Moreover, judges do not apply this theory uniformly even in the more established situation between the idea person and the entertainment industry user. The theory also contains no built-in limitations to resolve the apparent contradiction that the claimant seeks compensation for something, an idea, that fundamental property law principles leave free for the taking.<sup>110</sup>

Notwithstanding numerous problems surrounding the protection of information flowing from indigenous peoples' cultural heritage, the various contract theories outlined above do hold at least some theoretical promise for the assertion of claims based on subsequent profitability arising from information taken from an indigenous group. The apparent contradiction between ideas as free-for-all property and compensation to the group supplying the information can be resolved by treating the disclosure of the information as a service that, in fairness, should be paid for, especially when it results in a highly profitable product.<sup>111</sup> This could be effected by courts directly, but that is not always a coherent process.<sup>112</sup> A statutory solution along these same lines would likely be preferable, provided the statute is carefully tailored to limit com-

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<sup>108</sup> See McGovern, *supra* note 101, at 499 (noting that idea person claims based on breach of a confidential relationship usually involve a hybrid of contract and equitable quasi-contract notions).

<sup>109</sup> *Krisel v. Duran*, 303 F.Supp. 573, 578 (S.D.N.Y. 1969).

<sup>110</sup> McGovern, *supra* note 101, at 489-90.

<sup>111</sup> *Id.* at 506 (suggesting a similar approach to resolving the analogous problem in the entertainment industries).

<sup>112</sup> *Moore v. Regents of University of California*, 51 Cal.3d 120 (1990) has engendered a good deal of discussion in the literature. The case held that a patient had no property right in the parts of his own body but liability could be predicated on violation of a fiduciary obligation to make full disclosure that the medical team removing the organ in question intended to use the organ for research that might lead to a valuable patent. *Id.* at 143-44. *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997), however, refused to follow the technique of *Moore* in declining to create a new tort for breach of fiduciary duty based on an allegedly wrongful kickback arrangement between a physician and distributors of prescription products.

compensation to circumstances in which the disclosure of information is an important service to a commercial activity. A statute should probably defer to express contracts between the parties, where they are made (from roughly equal bargaining positions), but could supply default rules concerning liability for compensation where no express or implied contract exists. The key feature of such a statute would be its definition of the groups with respect to which the law would presume, in the absence of fair bargaining leading to a different result, a right to compensation for knowledge transferred that is later developed into a commercial product.<sup>113</sup> It is beyond the scope of this article to try to flesh out the details of such a statute.<sup>114</sup> The point here is that such laws could address one of the commonly cited problems involved in takings from indigenous peoples' cultural heritage and seem quite capable of resolving it without raising any of the fundamental difficulties that would result from using traditional IPRs to achieve the desired goal.

(ii) *Privacy and Trade Secret*

Fairness dictates that some sort of legal protection would be appropriate when symbols or rituals that indigenous peoples treat as sacred are publicized against their will. Applying modern technology to gain access for recording such works, such as filming a sacred dance from an airplane, is a standard example.<sup>115</sup> Such acts are analogous to invasions of privacy, where the privacy in question is that of a group rather than a particular individual. Trade secret laws also come close to addressing the core problem. Trade secret law does not afford full-scale property rights like patent and copyright, but does seek to protect valuable business information that has been conveyed in confidence to employees and others for the purposes of carrying out the business of an enterprise.<sup>116</sup> A general requirement of trade secret law is that the information have

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<sup>113</sup> The statute would *a fortiori* cover knowledge obtained by fraudulent or deceptive means. While traditional fraud actions might work in some cases, explicit antifraud rules in the statute, with default assumptions that place the burden of proving fair negotiations on the outside user, would likely be appropriate.

<sup>114</sup> Model laws developed by the Organization of African Unity and Costa Rica require prior informed consent for the use of biological or genetic resources. Barsh, *supra* note 5, at 37-38. Without necessarily endorsing either of these specific statutes, they could at least serve as a starting point for a statutory solution centered around traditional contract norms.

<sup>115</sup> Scafidi, *supra* note 7, at 830.

<sup>116</sup> See *supra* note 4 and accompanying text.

commercial value in a business, meaning that this branch of law cannot be directly applied to sacred symbols and rituals. Again, however, a modest statutory approach modeled on trade secret law and aimed, as in the case for contracts, at symbols and rituals people legitimately seek to maintain in private might be effective. The statute could, perhaps, continue to apply even after the information is once wrongfully disclosed to the public.<sup>117</sup> The goal here is different from that of trade secret, however, because it is not so much *knowledge* of the information that the group wishes to confine but rather use of that knowledge outside the sacred circumstances for which it is intended. In that sense, we are aiming at a mixture of trade secret and privacy notions.

(iii) *Trademark*

Trademark is another branch of law that is often lumped in the intellectual property constellation, but, like trade secret, does not afford the full-fledged property rights<sup>118</sup> that cause so many problems in using IPRs to right perceived wrongs of outsiders who take and use intangibles from the cultural heritage of indigenous peoples. At its core, trademark protects the investment of a commercial operation in names or symbols that identify a commercial product as coming from that source. Any member of the public who prefers to buy from A and not from B may do so simply by noting A's mark on the product, which B is prohibited from using. Thus, trademark helps assure consumers of authenticity as to the source of particular products.

Authenticity has already been recognized as an important tool in the protection of intangible goods.<sup>119</sup> Just as even the finest copy of a Rembrandt or a Van Gogh will sell for only a tiny fraction of the original, purchasers of artistic works from a particular cultural heritage will value authentic products more highly than copies of those products made by outsiders. The use of certification marks to assure the consuming public that a product originates where it purports to is not at all new to Western law. It is, in fact, a

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<sup>117</sup> In the United States, protection after public disclosure might run afoul of rights under the First Amendment. Even in legal cultures lacking formal prohibitions on government regulation of speech, however, any such statute should address the basic policy problem involved in suppressing speech that makes use of publicly known symbols. Again, this is an issue that goes beyond the scope of this article.

<sup>118</sup> See *supra* note 4 and accompanying text.

<sup>119</sup> Scafidi, *supra* note 7, at 819.

major feature of international trade law, as TRIPS now requires members to prevent the use of false indications of a product's geographic origins.<sup>120</sup> Again, where traditional trademark law proves insufficient, a modest statutory provision along the lines of the TRIPS agreement aimed at identifying the groups with a legitimate claim to certification rights would help protect them as the *source* of their products, without resort to the blunderbuss approach of applying IPRs. United States law has already made a step in this direction with the Indian Arts and Crafts Act of 1990,<sup>121</sup> which provides for criminal penalties<sup>122</sup> and authorizes civil actions<sup>123</sup> against persons who offer or sell goods in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization.<sup>124</sup> In 1996, the Department of the Interior published regulations defining the nature and Indian origin of products protected by the statute from false representations and specifying how the Indian Arts and Crafts Board<sup>125</sup> will interpret certain conduct for enforcement purposes.<sup>126</sup>

(f) *Cultural Heritage Rights in Domestic Law*

The concerns of indigenous peoples about effective legal recognition and protection of their intangible cultural heritage often overlap with demands for sovereignty or self-government.<sup>127</sup> These broader pressures have led to new legal frameworks allowing for the recognition of expanded indigenous rights (including sovereignty over land and natural resources). This has been the pattern in countries such as Australia, Canada, and New Zealand.<sup>128</sup> As

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<sup>120</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS) Arts. 22 & 23, available at <http://www.jus.uio.no/lm/wta.1994/iialc.html>.

<sup>121</sup> Pub. L. No. 101-644 (1990), codified at 25 U.S.C. 305 (2000) *et seq.* & 18 U.S.C. 1158-59 (2000).

<sup>122</sup> 25 U.S.C. 305d(a) (2000).

<sup>123</sup> 25 U.S.C. 305e (2000). The statute has provisions for injunctive relief, punitive damages, and attorneys fees. In addition, it provides for the larger of treble damages or \$1,000 per day for each day the illegal offer or sale continues.

<sup>124</sup> 25 U.S.C. 305e(a) (2000).

<sup>125</sup> The Board is established by the statute to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship. *Id.* 305a.

<sup>126</sup> Department of the Interior, Final Rule, Indian Arts and Crafts Act of 1990, 61 Fed. Reg. 54551 (1996), 25 C.F.R. Part 309 (2003).

<sup>127</sup> See also *supra* note 61.

<sup>128</sup> See *supra* text accompanying note 97.

these broader-based rights regimes expand, they may include, or at least give room for, cultural heritage protection. It is not possible to explore these trends in any detail here, because they depend on individual national situations. What can be said, however, is that any cultural heritage protection developed in this manner will require carefully crafted legislation or incremental judicial definition.

New cultural heritage protection afforded indigenous peoples may not necessarily be proprietary in nature. Instead, it may recognize that cultural rights are a separate category of rights with their own unique characteristics. Given the inevitable comparison of such rights with IPRs, questions arise as to the appropriate basis for limits on such rights. Just as IPRs are qualified by the concept of the public domain, cultural property rights will be compromised by competing interests in appropriate instances. One potential methodology for accommodating such pressures might place the onus for establishing justifiable exceptions on those seeking to rely on them. As Professor Susan Scafidi has pointed out, because the appropriation of intangible culture already accessible to the public is less likely than the commodification of aspects of private cultural heritage to harm source communities, it may demand commensurately less legal protection.<sup>129</sup> While much will depend on individual national characteristics, the scope of legislation or even an incrementally developed judicial definition of cultural heritage rights must involve a careful balance of the legitimate interests both of source communities in controlling their cultural heritage and society as a whole in maintaining a rich and growing public domain that promotes basic values of free thought and expression in all individuals.

Any rules in respect of intangible property will always present difficulties for lawyers and judges. The complex Western IPR system is a response to new methods of producing and distributing information in an industrial, and now post-industrial, age. Accommodating concerns of a non-economic nature in relation to the characteristics of different cultures is likely to be no less simple. It is beyond the scope of this paper to develop a model for the new cultural rights, but the examples (such as *choses hors commerce* under the civil law, contract, and unfair competition) discussed above could furnish useful precedents, or at least bases for the creation of statutory solutions that are general in scope but avoid the

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<sup>129</sup> Scafidi, *supra* note 7, at 842.

many problems that would result from application of the IPR regimes. Just as the Supreme Court of Canada in *Delgamuukw* explored the parameters of Canadian Aboriginal rights in terms of accommodating countervailing but legitimate concerns of Canadian society in general, the developers of cultural heritage rights will need to balance the unique character and legitimacy of the right to be protected with the interests of society at large. Both statutory and judicial common law solutions should recognize the special character of cultural heritage rights, especially that commercial value will not always, or indeed often, be at the core of a legitimate claim. Cultural heritage rights claimants will need to solicit and rely on judicial deference to religious or indigenous beliefs and practices. The challenge for courts will be to differentiate between legitimate and illegitimate statements of such beliefs and practices, and to afford legal protection that accommodates respect for the past with the pressures of the present.

## 6. CONCLUSION

We have explored the deficiencies of the pre-existing IPR regimes, as well as their general inappropriateness, in relation to the claims of indigenous peoples for greater legal protection in respect of their intangible cultural heritage. Like most commentators, we have found that IPR rights seem to be an unsatisfactory foundation on which to build a viable cultural heritage legal edifice. Rather than try to fit the justifiable claims of indigenous peoples into legal property-rights categories that were not designed to accommodate their essential characteristics, our proposal is to focus on those aspects of indigenous peoples' claims that can be addressed outside the IPR regimes of patent and copyright. We have found that traditional concepts of Western law — contract, privacy, trade secret, and trademark — can take us a long way in the desired direction.

Indigenous peoples, along with other minorities, are susceptible to having their claims attacked on the basis that they represent a demand for special treatment or privileges. The dilemma indigenous peoples face is that the preservation of their culture requires them to make such demands. Alternatively they face the dissolution of the very characteristics of that culture defining them as indigenous peoples in the first place. The answer to this problem may be to seek or create legal rights that not only meaningfully protect against the perceived abuse of indigenous peoples' cultural

heritages, but that also protect, at least in principle, anyone who can satisfy its requirements, indigenous or not. Cultural heritage rights developed on this basis will have enhanced credibility and compatibility with existing property rights and liability systems. The existence of a civil law category of *choses hors commerce*, as well as common law notions of contract and unfair competition (trademark), is evidence that such a right need not be seen as novel or discriminatory in character.

The net result of this complex approach will not be the recognition of all the claims that have been asserted on behalf of indigenous peoples. Direct use of indigenous artistic designs without attribution is legitimately analogous to a trademark-type question, but the creation of derivative works based on public domain indigenous designs, absent false attribution, is not. Just as indigenous artists can adapt techniques and styles from outside their group and incorporate them into new designs based on their own cultural heritage without harming artistic traditions outside their group, indigenous culture is not harmed when an outsider takes one of their publicly known designs and commodifies it, with proper attribution. Where privacy and confidentiality are legitimately present, there is nothing in the Western legal tradition antithetical to protection carefully tailored to these concerns. On the other hand, where knowledge of old works (i.e., those no longer protected by copyright) is publicly available, the creation of new exclusive rights somehow restricting the use of those designs, and all designs based on them, to a single group is fundamentally antithetical to basic notions of free expression and the overall dissemination and development of culture. At this point, we believe that indigenous cultural tradition must give way to the modern creative spirit.