WHEN INDIGENOUS COMMUNITIES GO DIGITAL:

PROTECTING TRADITIONAL CULTURAL EXPRESSIONS THROUGH INTEGRATION OF IP AND CUSTOMARY LAW♦

I. INTRODUCTION

Traditional cultural expressions ("TCEs"), also known as "expressions of folklore" ("EoFs"), are the cultural creations and products of the folklore of traditional or indigenous communities.[1] The creation and development of TCEs require the creative input and participation of the particular community. TCEs also represent an active aspect of an indigenous community's culture and are elements of an indigenous community's cultural identity. Often TCEs emphasize the community's history and ancestry, social status, ritual or ceremony of an event, or stylistic practices specific to the indigenous community. Thus, TCEs are inextricably linked to the establishment and development of community identity.

Advancements in digital technology have made TCEs more globally accessible than ever before. On the one hand, technological advancements may encourage cultural interaction and exchange between communities. The exchange of cultural dialogue may include explorations into why other communities engage in ceremonies recognizing the transition from boyhood to manhood, how songs help to promote a sense of community through call and response forms, or why certain iconology signifies an individual's past achievements. There is a heightened overall social value to understanding various cultural practices within the global community because, by learning about other cultures, we gain more insight into our own cultural identity. Ultimately, it is the cultural exploration and exchange of a community's history, folklore, and cultural practice that helps one to gain a stronger sense of individual and communal identity.

On the other hand, advancements in technology have made misappropriation easier than ever before, which enhances incentives for cultural insularity. Sampling is a common form of misappropriation of musical works. For example, a European pop music group sampled a folk music recording without the permission of the performers, an elderly couple of the Taiwanese Ami indigenous group. The pop song was then used as the theme song of the 1996 Olympics.[2] The response to the threat of misappropriation is protection, which places limits on cultural exchange. For

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[1] The terms "traditional communities" and "indigenous communities" are used interchangeably in this Note.

[2] *See* Linda Chang, *Aborigine Singer Opts to Settle Out of Court in US Lawsuit*, TAIWAN AUJOURD'HUI, July 16, 1999, http://taiwanauj.nat.gov.tw/ct.asp?xItem=17333&CtNode=122. One reason for the settlement was that the performers were elderly and did not want to wait for a drawn out court proceeding. The husband, age 78, was quoted saying that "I'm getting too old to wait for a decision on this case." *Id.* After the settlement, the husband stated that "[w]e have regained our dignity." *Id.*

indigenous communities this limit is sometimes seen as necessary because "[t]he uncontrolled replication of ceremony, music, and graphic arts, which is facilitated by new electronic media, threatens to strip cultural elements of [indigenous] history and undermine their authenticity."[3] For some communities, the significance and import of certain cultural practices involve spiritual and religious meaning. The misappropriation or misuse of these sacred TCEs "strikes at the heart of communal self-constitution and ritual expression"[4] for it is these sacred practices that most help to establish the individual with the identity of a particular community. The public access of such cultural practices or misuse of the cultural products involved may result in more than mere insult towards a community; it may change the significance and meaning of the cultural practice itself. The reaction from the indigenous community can be one of cultural insularity, where overprotection of the TCE is preferred over the chance of misuse or misappropriation.

In an effort to protect TCEs from misuse, some indigenous communities have turned to intellectual property ("IP") law for protection. However, some TCEs simply fail to find protection under the conventional IP system. For example, some TCEs fail to satisfy the requirements for copyright protection: often there is no identifiable author, the work is not fixed because it is oral in nature, the work is not "original" because it has been passed down from generation to generation, or the duration of copyright protection has simply expired. Furthermore, the introduction of digital documentation as an IP management strategy, though effective in some respects, poses some problems. Conventional IP law as it stands today cannot adequately protect TCEs.

IP law should be a legal framework that can offer the same legal protection of a pop song and a folksong, of an oral story passed from generation to generation and a novel on the *New York Times*' Best Sellers List, of a painting by an indigenous artist and one by a contemporary artist. The conventional IP system must be altered to address the inconsistencies towards both traditional and nontraditional expressions. Where IP law fails to protect TCEs, customary law[5] of indigenous communities must be integrated into the taxonomy and definitions of what is protectable subject matter

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[3] MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 6 (2003) (citation omitted).
[4] SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 105 (2005).
[5] The term *customary law* means "law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws." BLACK'S LAW DICTIONARY 172 (3d pocket ed. 2006).

and in whom the IP rights vest. This integrated system provides a legal right for communal moral rights, communal ownership, and communal authorship. Furthermore, the customary law integrated into a conventional IP system must be one that clearly defines the communal aspects related to artistic works (e.g., who is the representative acting for the communal author). This does not mean that *all* TCEs should be protected by an IP system that integrates customary law. As in non-indigenous cultures, not every creative work can be protected by IP law. However, there exists an imbalance in the fairness of how IP protects non-indigenous and indigenous works, and the integration of both conventional IP law and customary law seeks to correct this imbalance.

Part II further examines the relationship between TCEs, conventional intellectual property, and communal moral rights. It also discusses the differences between the incentives for creation of non-indigenous and indigenous works. Part III addresses the difficulty and sometimes impossibility of IP protection of intangible and sacred TCEs. This Note's author proposes that the integration of communal authorship and moral rights will help address the protection of intangible and sacred TCEs. Part IV examines the benefits and costs of digital documentation as an IP management strategy for TCEs, especially for intangible and sacred TCEs. Part V examines the necessary role customary law must play in TCE protection, particularly to digital documentation strategies, and emphasizes that conventional IP law must recognize the communal nature of TCEs and integrate notions of communal authorship and communal moral rights. Finally, Part VI provides an example of a digital documentation IP management strategy aiming to integrate customary law aspects—The Creative Heritage Project. This Project illuminates the possibilities of providing indigenous communities with the capability of better navigating the conventional IP system; yet the Project is just the initial step to achieve the seemingly impossible goal of protecting intangible and sacred TCEs.

II. TCEs AND MORAL RIGHTS OF INDIGENOUS COMMUNITIES

A. *What Are TCEs and Why Should TCEs Be Protected?*

The definition of TCEs is a debatable and complex issue.[6] In

[6] World Intell. Prop. Org. [WIPO], *Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage: A Survey of Codes, Conduct and Challenges in North America*, 102, (October 2006) (*prepared by* Martin Skrydstrup), *available at* http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/skrydstrup_report.pdf (noting that there is "no universally accepted" definition of the subject matter of TCEs) [hereinafter Skrydstrup].

a survey prepared for the World Intellectual Property Organization ("WIPO") by Martin Skrydstrup, the scholar explains the difficulty of pinpointing an exact definition of the subject matter of TCEs:

> Opinions differ, from those who regard TCEs as "Expressions of Folklore," which is to say the subject matter of a number of Western scholarly disciplines and a derogatory term to many ears, to those who regard TCEs as "Indigenous Culture" capitalized alluding to autonomy and writ large comprising both tangible and intangible cultural heritage.[7]

The definition of TCEs used in this Note adopts the definition of "those who regard TCEs as 'Indigenous Culture.'"[8] TCEs are "products of creative intellectual activity" by individual or communal creativity that characterize a community's "cultural and social identity" and are "maintained, used or developed" by the traditional community.[9] TCEs often, if not always, have some sort of customary law aspect related to the indigenous community,[10] and so, the creation, development, and practice of TCEs are often dependent upon customary law.[11] More specifically, TCEs include an array of tangible and intangible creative expressions including, but not limited to, the following: stories, songs, instrumental music, dances, plays, rituals, drawings, paintings, sculptures, textiles, pottery, handicrafts, and architectural forms.[12] WIPO recognizes that TCEs have intrinsic value that benefits not only indigenous communities but also "*all* humanity."[13] These benefits come in two forms: social and economic benefit. In order for the global community to derive these benefits, protection of TCEs must be a priority in an IP management system.

The social benefit is the gain that the global community receives from ensuring the protection of TCEs. The social benefit encompasses an enlightened understanding and awareness of other cultures. Furthermore, there is a shared experience of de-

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[7] *Id.* (citations omitted).
[8] *Id.*
[9] World Intell. Prop. Org. [WIPO], *Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles*, 11, U.N. Doc. WIPO/GRTKF/IC/9/4 (Jan. 9, 2006) [hereinafter *Revised Provisions*].
[10] World Intell. Prop. Org. [WIPO], *Customary Law & the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge*, Issues Paper Draft Version 3.0, 20 (Dec. 2006), *available at* http://www.wipo.int/export/sites/www/tk/en/consultations/customary_law/issues-revised.pdf [hereinafter *Customary Law & IP System*].
[11] For example, Mr. Bulun Bulun, an Aboriginal artist from Australia, was permitted to paint an image depicting the *Ganalbingu* people's creator ancestor. He stated that "I am permitted by my law to create this artwork . . . ." Bulun Bulun v. R & T Textiles Pty Ltd. (1998) 86 F.C.R. 244, 250 (Austl.).
[12] *Revised Provisions*, *supra* note 9, at 11.
[13] *Id.* at 3 (emphasis added).

veloping cultural identity, which occurs with the entwining of both indigenous and non-indigenous cultures.[14]

The economic benefit derived from TCEs may go into the pockets of the indigenous community producing the TCEs or into the pockets of a third party that has misappropriated the TCEs. A mutual economic benefit may also exist for both the indigenous community and a third party, where a proper licensing agreement is made. The correlation between economic and social benefit regarding intellectual properties takes on a different priority in indigenous communities than in non-indigenous ones. Though indigenous communities may derive economic benefit from their TCEs, which is an especially important benefit for developing countries that often look to capitalize on their indigenous cultures, the underlying reason of continuing the creation and/or practice of TCEs is less for commercial gain and more for the perpetuation of "living, functional tradition[s]" that define the identity of the community.[15] TCEs establish the identity of a particular community by embodying the "religious, spiritual, social and cultural meanings, beliefs and values" of a community.[16] Because TCEs are emblematic of a traditional community, the protection that IP law provides to TCEs is not only for economic gain, but also "because it is integral to indigenous survival."[17] Though economic benefits may be derived from a traditional community's TCEs, IP law must also protect the social benefits and ensure that a community has the ability for their cultural survival and self-development.[18] Thus, TCEs are a vital component to the development and identity of traditional communities, whose cultural elements are becoming increasingly intertwined in modern market economies and societies, and IP law plays an integral role in ensuring that TCEs get adequate protection when they are introduced into the global market.

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[14] *See also* BROWN, *supra* note 3, at 10 ("All of us—native and non-native alike—have a stake in decisions about the control of culture, for those decisions will determine the future health of our imperiled intellectual and artistic commons.").

[15] U.N. Edu. Scientific and Cultural Org. [UNESCO] and World Intell. Prop. Org. [WIPO], *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 3 (1985) *available at* http://www.wipo.int/export/sites/www/tk/en/documents/pdf/1982-folklore-model-provisions.pdf [hereinafter *Model Provisions*].

[16] World Intell. Prop. Org. [WIPO], Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore, *Traditional Cultural Expressions/Expression of Folklore Legal and Policy Options*, para. 37, U.N. Doc. WIPO/GRTKF/IC/6/3 (Dec. 1, 2003) (*prepared by* the Secretariat) [hereinafter *Folklore Legal & Policy Options,* Sixth Session].

[17] Lori Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL'Y 313, 315 (2005).

[18] *Id.* at 323 (discussing the United Nations report on the *Protection of the Heritage of Indigenous People*).

B. *TCEs & IP: The Dual Purpose Relationship*

Because some TCEs by their very nature fail to satisfy certain requirements of IP,[19] there is much discourse seeking solutions for full protection of TCEs. Many propose the need for adherence to basic notions of respect and "best practices" to alleviate fears of misuse, misappropriation, and exploitation.[20] Aside from the moral and ethical aspects of "best practices," legal tools are used to protect TCEs, namely IP laws. There are two basic IP strategies relating to TCEs—protection and safeguarding.[21] IP laws can protect TCEs "against acts of misappropriation such as copying, adaptation or public communication, or derogatory uses . . . "; whereas, safeguarding helps to ensure the viability and continued use and practice of culture.[22] To ensure the development and even survival of an indigenous community, both IP protection and safeguarding should be complementary to each other. However, when referring to *protection*, the use in this Note refers to the "legal means to restrain third parties from undertaking certain unauthorized acts that involve the use of the protected material."[23] The type of protection IP offers to indigenous communities is both one that can prevent unwanted "intrusions into their already pillaged culture" and also one that can provide a legal scheme by which they can license uses of their culture.[24] The key lies in the autonomy of an indigenous community so that they can exercise control over and make their own decisions regarding the management of their IP rights in their TCEs.

C. *Conventional IP and the Incentive for Creation*

It is important to note the different roles that IP plays for conventional creative works and TCEs. In non-indigenous communities, IP law primarily provides a legal right that promotes economic incentives to spur the creation of works for the public

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[19] For example, oral traditions may fail to satisfy originality and fixation requirements. *See generally* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

[20] *See generally* BROWN, *supra* note 3; TERRI JANKE, MINDING CULTURE: CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS (2003); Skydstrup, *supra* note 6.

[21] World Intell. Prop. Org. [WIPO], Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles*, para. 24, U.N. Doc. WIPO/GRTKF/IC/7/3 (Aug. 20, 2004) (*prepared by* the Secretariat) [hereinafter *Policy Objectives & Core Principles,* Seventh Session].

[22] *See* U.N. Edu. Scientific and Cultural Org. [UNESCO], *Report of the Expert Meeting on Inventorying Intangible Cultural Heritage*, 7, 29, (Mar. 17-18, 2005), *available at* http://www.unesco.org/culture/ich/doc/src/00036-EN.pdf [hereinafter *Inventorying Intangible Cultural Heritage*].

[23] *Policy Objectives & Core Principles,* Seventh Session, *supra* note 21, at para. 24.

[24] Farley, *supra* note 19, at 13 (citations omitted).

good. In indigenous communities, IP law mainly provides legal protection of indigenous culture necessary for a community's survival, and there is no less of a dependence on the economic incentive, for communities will continue to create TCEs regardless of the economic benefit.

Black's Law Dictionary defines "intellectual property" to be "a category of intangible rights protecting *commercially valuable* products of human intellect."[25] The notion of economic reward for the creation of works underlies the interests and concerns of IP in contemporary American society. Creative works contribute to the promotion of innovation and creation resulting in a greater societal benefit,[26] and economic reward incentivizes such creation. Would Stephen King have written as many best-selling novels, novellas, and short stories[27] if there was not a market enabling readers to purchase his writings? Would Damien Hirst continue to produce artworks if there was no one willing to pay outlandish prices?[28] In non-indigenous societies, IP law emphasizes the role that economic reward plays in incentivizing these artists and authors to continue creating works for the public. IP law adds fuel to the fire of economic incentive by offering protection to the author of her creative works, for if an author thinks that her works will be legally protected, she will be incentivized to create more works that are accessible by the public.

Furthermore, IP law in Anglo-American societies is based largely upon Lockean ideals of possessive individualism and utility, where "the expressive creation is seen as authorial 'work' that creates an 'Original,'"[29] and where the "workers [are] entitled to the fruits of their labor, for only labor could give value to a particular creation."[30] Thus, notions of originality, authorship, and economic reward have become the integral components of IP law. IP law is constantly engaged in the balancing act between the author's interests in maintaining a "limited monopoly" and the in-

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[25] BLACK'S LAW DICTIONARY 368 (3d pocket ed. 2006) (emphasis added).

[26] *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .").

[27] *See* StephenKing.com, Written Works A-Z, http://www.stephenking.com/library/written.html (last visited Nov. 15, 2009).

[28] *See* Carol Vogel, *Hirst's Art Auction Attracts Plenty of Bidders, Despite Financial Turmoil*, N.Y. TIMES, Sept. 16, 2008, at E1 (noting that an auction at Sotheby's for 223 works by Damien Hirst took in a reported $127.2 million despite the poor economic climate in September 2008).

[29] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 219 (1998). For an excellent resource on the underlying philosophies of IP, see generally Justin Hughes, *The Philosophy of Intellectual Property,* 77 GEO. L.J. 287 (1988).

[30] J. Carolina Chavez, Article, *Copyright's "Elephant in the Room": A Realistic Look at the Role of Moral Rights in Modern American Copyright,* 36 AIPLA Q.J. 125, 129 (2008).

terests of the public,[31] and it continues to aim for the efficacious result of promoting and progressing creation and innovation that will benefit the societal whole while still rewarding (or compensating) the author. For example, U.S. copyright law aims to secure "the general benefits derived by the public from the labors of authors."[32] Because society often communicates in terms of the market, economic concerns are often at the basis of analysis when determining whether the law is effective in promoting the social whole. An author will continue to offer writings to the public as long as the market demands them. However, once the market demand subsides, the creator or producer of a good can no longer afford to produce those creative works and place them into the market. This is the economic dependency between the creation or production of a work or good and its demand by the public for that good.

D. *Conventional IP and Moral Rights*

IP law encompasses more than utilitarian ideals as there is arguably some emphasis on moral rights. Generally, "[m]oral rights are the inalienable rights of a creator to his creations."[33] More specifically, the moral rights, or the *droit moral*, of the individual artist include rights of disclosure, attribution, integrity, and withdrawal.[34] Here, the incentives to create works remain not solely in economic advancement, but in the idea that the author may assert moral autonomy over the work.[35] An author would be encouraged to continue creating works if she knew that she would have rights protecting the attribution, integrity, and disclosure of the work.

The inclusion of some measure of moral rights in IP law is reflected in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). Article 6*bis* states that

> [i]ndependently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[36]

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[31] 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03(A) (Matthew Bender & Co. 2008) (citations omitted).
[32] *Id.* (quoting N.Y. Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting)).
[33] Chavez, *supra* note 30, at 131.
[34] *Id.* (citations omitted)*; see also* 3 DAVID NIMMER, NIMMER ON COPYRIGHT, § 8D.01 (Matthew Bender & Co. 2008).
[35] Chavez, *supra* note 30, at 134.
[36] Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 28, 1979, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

This notion of moral rights emphasizes the author's reputation irrespective of economic incentives (even if the author has transferred the economic rights to another). Article 6*bis* puts aside the author's economic rights and instead focuses on the author's "honor or reputation."[37]

However, not all countries apply moral rights to their IP laws equally.[38] For example, France is notorious for placing a prominent emphasis on *droit moral*. The United States, on the other hand, has limited its protection of an author's moral rights to the visual arts.[39] Two particularly relevant treaties pertinent to the moral rights of indigenous communities are the Berne Convention, which recognizes the author's right of attribution and right of integrity,[40] and the *WIPO Performances and Phonograms Treaty* ("WPPT"), which recognizes the performers' right of attribution and the right of integrity in "live aural performances or performances fixed in phonograms."[41]

E. *Conventional IP and Communal Moral Rights of Indigenous Communities*

Applying the moral rights of Article 6*bis* to a TCE context, the main concern is to prohibit any "distortion, mutilation or other modification of, or other derogatory action in relation to" the TCE that would be disparaging to the indigenous *community's* honor or reputation.[42] As emphasized by Michael Brown and Terri Janke,[43] two prominent scholars in the field of cultural studies, the underlying notion of respect is necessary to uphold a community's moral rights. Beyond the "best practices" standard, legal recognition of indigenous moral rights also assures that the non-indigenous public receives "accurate and authentic examples of indigenous culture."[44] In addition, the 6*bis* exclusion of economic rights emphasizes the notion that the economic rights and

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[37] *Id.*
[38] *See generally* June M. Besek & Philippa S. Loengard, *Maintaining the Integrity of Digital Archives*, 31 COLUM. J.L. & ARTS 267, 303-06 (2008) (discussing the level of recognition of moral rights in IP law in the United States, Australia, Canada, France, Singapore, and the United Kingdom).
[39] *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2006).
[40] Berne Convention, *supra* note 36, at art. 6*bis*. There are currently 164 Member States that have ratified the Berne Convention; *see* World Intellectual Property Organization, Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Nov. 15, 2009).
[41] WIPO Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, art. 5, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [hereinafter WPPT].
[42] Berne Convention, *supra* note 36, at art. 6*bis*. Note that "author" would change to "community" to emphasize the community's honor and reputation.
[43] *See generally* BROWN, *supra* note 3; JANKE, *supra* note 20.
[44] Farley, *supra* note 19, at 48.

the moral rights in IP are separate concepts.[45]

Aside from any licensing or assignments, moral rights generally vest in the individual author and not in a community.[46] However, many indigenous communities do not recognize the individual author as the sole creator of a work. Instead, the creative work is owned by the community. For example, in *Bulun Bulun v. R & T Textiles Pty Ltd.*, a noteworthy Australian case concerning the misappropriation of an aboriginal painting of the *Ganalbingu* people's creator ancestor, a representative of the *Ganalbingu* people claimed that both the *Ganalbingu* people and the painter have an equitable ownership of the copyright in the painting.[47] The painter, a *Ganalbingu* member, noted that it is the community's customary law that permits him to paint the image in the particular painting.[48] In the *Ganalbingu* community, the customary law is well-established and understood by the community members so that the duty and responsibility of who may create certain works is clear. Because of this clarity and continuous adherence to this custom, integration of customary law could effectively, without any tension from the indigenous community, be integrated into the conventional IP notion of authorship so that it would broaden to also include communal authorship.

Though communal moral rights are less generally recognized, legislative attention to them is increasing, especially with regards to indigenous communities. In Australia the *Indigenous Communal Moral Rights Bill 2003* ("ICMR Bill") was proposed to give indigenous communities communal moral rights over creative works and films of indigenous materials.[49] The proposed ICMR Bill required conditions to be met for legal recognition of an indigenous community's moral rights.[50] Though the Bill did not pass, its proposal and consideration suggests an increasing awareness of and dialogue about communal moral rights within the legal system. The movement towards acceptance of communal moral rights in Australia shows no signs of waning as the Senate

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[45] Again, this is not to say that TCEs cannot or should not derive some sort of economic gain; however, economic gain is generally not the primary reason for the creation of TCEs.

[46] *See Folklore Legal & Policy Options,* Sixth Session, *supra* note 16, at para. 71; Farley, *supra* note 19.

[47] Bulun Bulun v. R & T Textiles Pty Ltd. (1998) 86 F.C.R. 244, 248 (Austl.) ("[A representative of the Ganalbingu people] filed in support of the claim that he and the Ganalbingu people are equitable owners of the copyright in the artistic work.").

[48] *Id.* at 250 ("I am permitted by my law to create this artwork . . . .").

[49] Terri Janke & Co., Hot Topics, *Indigenous Communal Moral Rights Bill 2003,* Feb. 20, 2004, http://www.terrijanke.com.au/fs_topics.htm (scroll down to find entry).

[50] Samantha Joseph & Erin Mackay, *Moral Rights and Indigenous Communities*, Arts Law Centre of Australia Online, Sept. 2006, http://www.artslaw.com.au/artlaw/archive/2006/06MoralRightsAndIndigenousCommunities.asp.

Standing Committee on Environment, Communications, Information Technology, and the Arts released a report in 2007 that prioritized revised legislation on indigenous communal moral rights.[51]

For TCEs to be effectively protected under IP law, a recognition of communal moral rights should be read into the interpretation of Article 6*bis*. Furthermore, as the creation of TCEs is often not the result of one author, but of an entire community, communal authorship should be granted all the rights that vest in individual authorship, including moral rights. An assertive recognition of these communal moral rights should be integrated into the conventional IP system to fully recognize and legally protect the communal subject matter of TCEs.

III. WHERE CONVENTIONAL IP FAILS TO PROTECT TCES

Some TCEs can be effectively protected by contemporary IP law as long as they meet the appropriate requirements (i.e., originality, authorship, fixation, and term renewal for copyright, or non-generic marks continuously used in commerce for trademark). For example, if an individual artist paints a painting, that artist has likely satisfied the appropriate requirements for copyright protection. Traditional signs and symbols can qualify as registrable trademarks, geographical marks, or certification marks. Derivative works made within a traditional context could also qualify for copyright protection. Furthermore, certain performances of TCEs fall under the protection of the WPPT.[52]

However, some TCEs slip through the grasp of conventional IP protection. Intangible TCEs (such as oral stories, instrumental music, and lyrical songs) are often dependent upon an oral heritage for their perpetuation and development and thus, cannot be protected by conventional IP law because they fail to satisfy the requirements of originality, fixation, and identifiable authorship.[53] Intangible TCEs highlight the limitations of protection that TCEs have under conventional IP. This is not surprising since the IP framework was not built upon the construct of traditional com-

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[51] S. REP. Standing Comm. on Env't, Commc'n, Info. Tech. And the Arts, *Indigenous Art: Securing the Future: Australia's Indigenous Visual Arts and Crafts Sector*, (June 2007) (Recommendation 24) (Austl.).

[52] *See Revised Provisions*, *supra* note 9, at 43 (discussing a non-exhaustive list of TCEs that have protection under contemporary IP laws).

[53] *See generally* World Intell. Prop. Org. [WIPO], Intergovernmental Comm. on Intell. Prop. and Genetic Resources, Traditional Knowledge and Folklore, *Consolidated Analysis of the Legal Protection of Traditional Culture Expressions/Expressions of Folklore: Background Paper No. 1*, Annex, paras. 36-44, U.N. Doc. WIPO/GRTKF/IC/5/3 (May 2, 2003) (*prepared by* the Secretariat) (discussing limitations of copyright protection for TCEs) [hereinafter *Consolidated Analysis*, Fifth Session].

munities, but instead, upon ideals of individualism and personhood. For example, communal relationships are only exhibited in IP law to a minimal extent.[54] Rosemary Coombe, a well-regarded IP scholar, eloquently comments on the debilitating nature of conventional IP law upon communal relationships of indigenous communities:

> The law rips asunder what First Nations people view as integrally related, freezing into categories what native peoples find flowing in relationships that do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from people's relationship to an ecological landscape that binds past and future generations in relations of spiritual significance.[55]

Because conventional IP law is based on notions of individualism that may not exist in indigenous communities, Michael Brown suggests that indigenous communities have a broader concern about an "alien intellectual property system that seems mysterious and exploitative."[56] Perhaps the actions of various international organizations, such as WIPO through the Creative Heritage Project,[57] which are striving to develop methods of assistance to traditional communities so that these communities can manage and assert their IP rights, will help to demystify the "alien intellectual property system."[58]

However, it must be questioned whether the demystification of the conventional IP system will, in some way, come at a cost to traditional communities regarding the way they perpetuate their culture, further produce TCEs, and survive as a people. Without recognition of customary values and laws of indigenous communities, the conventional IP community is essentially requiring the indigenous communities to forfeit some of their communal moral rights in their TCEs. With the application of communal concepts based in customary law, even the intangible TCEs can find sufficient protection under IP law. This will, however, require contemporary recognition of communal moral rights and authorship.

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[54] *See, e.g.*, Graham & McJohn, *supra* note 17, at 328-31 (discussing examples of collective rights of movie productions and corporation-shareholder relationships, and collective marks used by unions).
[55] COOMBE, *supra* note 29, at 229.
[56] BROWN, *supra* note 3, at 61.
[57] *See* WIPO Brochure, *Creative Heritage Project: IP Guidelines for Digitizing Intangible Cultural Heritage*, 2008, *available at* http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/pdf/creative_heritage_brochure.pdf [hereinafter WIPO Brochure]. See *infra* Part VI for discussion on The Creative Heritage Project [].
[58] BROWN, *supra* note 3, at 61.

IV. DIGITAL DOCUMENTATION AS AN IP MANAGEMENT STRATEGY

Digital Documentation and IP

Digital documentation of TCEs has been suggested by WIPO as one strategy to ensure IP protection for indigenous communities.[59] Digital documentation strategies can include "the use of software and digital rights management tools"[60] and the creation of digital databases.[61] Wend Wendland and Jessyca van Weelde of WIPO articulate the pros and cons of digital documentation for indigenous communities as having both "unprecedented opportunities for the preservation, promotion and protection of indigenous cultural materials" but also potentially unwanted exposure, misappropriation, and misuse of "culturally sensitive materials."[62] However, the risk of misappropriation and misuse of TCEs from digitally documented sources should not entirely prohibit utilizing digital documentation as a viable protection strategy for indigenous communities. The software and digital rights management tools can be and have been adjusted to meet the needs of the indigenous communities.[63] Such tools allow the authorized community members to "define and control the rights, accessibility and reuse of their digital resources," "uphold traditional laws pertaining to secret/sacred knowledge or objects," and "ensure proper attribution to the traditional owners" of the TCEs.[64] The use of digital rights management with TCEs shows how a modern, technological tool can be converged with traditional culture.

A. *Benefits of Digital Documentation: Fixation and Identifiable Authorship*

The primary benefit of a digital documentation IP management strategy is that it places the control of the copyright in the hands of the indigenous community. The indigenous communities are better able to exert their right of control over their own cultural works. In addition, digital documentation particularly resolves two requirements for copyright protection: fixation and

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[59] WIPO Brochure, *supra* note 57.
[60] *Consolidated Analysis*, Fifth Session, *supra* note 53, at para. 244.
[61] The Indigenous Knowledge Management Project, a collaborative project between the Distributed Systems Technology Center in Australia and the Smithsonian Institute's National Museum of the American Indian Cultural Resources Centre, is an example of this type of digital rights management. *See* Indigenous Knowledge Management Project, http://metadata.net/ICM/ (last visited Nov. 15, 2009).
[62] Wend Wendland and Jessyca van Weelde, *WIPO's Capacity Building Tools for Indigenous Cultural Heritage*, Arts Law Centre of Australia Online, Mar. 2008, http://www.artslaw.com.au/ArtLaw/Archive/2008/08WIPOtools.asp.
[63] *Consolidated Analysis*, Fifth Session, *supra* note 53, at para. 245.
[64] *Id.* (citations omitted).

identifiable authorship. It enables the creative work to be fixed in a tangible medium, as is required under copyright law,[65] and it helps to ensure that the copyright in a particular recording vests in the identified indigenous community. When the indigenous communities are the parties digitally documenting TCEs (as opposed to third-party researchers), the copyright of the recordings or the digital databases vest in the indigenous communities because they become the "author" or creator of the documentations.[66]

Though the economic costs of digital documentation upon indigenous communities may be extremely high,[67] the threat to an indigenous community's moral rights likely will be minimal. For example, the recording and distribution of performances of non-sacred dances can be protected if digitally documented with little moral cost to the indigenous community. Digital documentation does not alter the performance or the dance. The nature of the performance is the same regardless of whether or not the dance is recorded.[68] The WPPT guarantees protection of the moral rights of attribution and integrity of these performances and also guarantees the performers' economic rights in "the fixation of their unfixed performances."[69] Thus, conventional IP protection provides adequate protection of this non-sacred TCE.

A digital database of TCEs not only helps organize the TCEs in a fixed medium, but also creates public awareness of the claims of authorship of the TCEs. One example of such digital database is Brazil's Registry of Intangible Cultural Assets that "functions as a database in which all the elements of [Intangible Cultural Heritage] are being stored and made available to the public while acknowledging the collective and individual rights that are linked to the cultural items."[70]

Digital documentation seems to be a workable IP management strategy for the non-sacred, tangible TCEs. To take a hypothetical example using the *Ganalbingu* community at the center of the *Bulun Bulun v. R & T Textiles Pty Ltd.* case discussed *supra*, a digital database of *Ganalbingu* paintings would be a useful mecha-

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[65] *See, e.g.*, 17 U.S.C. § 102 (2006). However, not all copyright laws require fixation for copyright protection. Article 2(2) of the Berne Convention does not require fixation and leaves this requirement up to the discretion of the member states. Many civil law countries in Africa, Latin America, and Europe do not require fixation. *See Consolidated Analysis*, Fifth Session, *supra* note 53, at para. 127.

[66] *Id.* at para. 252.

[67] *Id.* at para. 243.

[68] Assuming that choreography is not altered to ensure a better camera angle.

[69] WPPT, *supra* note 41, at art. 5-6.

[70] WIPO, *Brazil's Registry of the Intangible Heritage*, http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/brazil_registry.pdf (quotations omitted) (last visited Nov. 15, 2009).

nism to protect the community's IP rights. The digital documentation first creates a copy of the painting that helps to preserve the image in a format controlled by the indigenous community. The head of the community would have the authority according to customary law to determine which works would be documented in a digital database composed of representative works of the indigenous community. Additionally, the digital copies of the painting would not alter the painting's own visual nature, and the *Ganalbingu* community would be able to claim a clear ownership over the works in accordance with their customary law. Perhaps if the digital database were made open for public access, the fabric company that misappropriated images in the painting would have been on clear notice of the copyright ownership of the image and less likely to have misappropriated and commercialized the *Ganalbingu*'s image.

B. *Costs of Digital Documentation: Alteration of the Nature of Intangible and Sacred TCEs*

Though digital documentation may be an effective tool for protection of tangible TCEs, the digital documentation of intangible TCEs and sacred TCEs may violate the communal moral rights of the indigenous communities. These two particular types of TCEs (which may overlap with each other) are a priority for protection because of their sensitive nature and significance to the indigenous community. However, IP protection under a conventional framework could create costs to the indigenous community because it either requires an alteration of the TCE to adapt to conventional IP law, or it results in no IP protection because the indigenous community refuses alteration of their TCE. Either "choice" is simply a cost in disguise.[71]

1. Intangible TCEs

TCEs that are orally disseminated from generation to generation can include "lyrics, notes of songs, proverbs, designs, fables and the like [and] often develop anonymously and circulate within the oral traditions of communities . . . ."[72] These oral traditions are not solely attributable to one individual author; rather, the oral traditions have a "communal character."[73] One concern of the digital documentation of intangible TCEs is that the digital documentation alters the nature or format. This alteration can be

[71] The costs outlined *infra* are examined through the example of digital documentation and do not reflect the entire costs that conventional IP law presents to TCEs.
[72] *Folklore Legal & Policy Options,* Sixth Session, *supra* note 16, at para. 36.
[73] *Id.*

considered to be a "distortion" or "modification" of the subject matter of an oral or sacred TCE,[74] and according to Article 6*bis*, this "distortion" or "modification" can be considered a violation of the author's moral right,[75] which is ultimately a loss of self- (or group) determination.

There is an inherent, susceptible nature to intangible TCEs.[76] This susceptibility is exhibited through the ability of digital documentation to change the subject matter of what once was an oral story, for example, to what would then become a written, documented story. This change in the format of the subject matter affects the moral rights that indigenous communities have in their intangible TCEs because it distorts an oral culture into a tangible one. Additionally, this alteration of the subject matter would violate a "General Guiding Principle" of WIPO's *Revised Provisions*.[77] One of these Principles is the "Principle of Respect for Customary Use and Transmission of TCEs/EoF," which states that the IP protection of TCEs should "not hamper the use, development, exchange, transmission and dissemination of TCEs . . . ."[78] If, to meet the fixation requirement of copyright law, an oral story must be digitally documented, its documentation will arguably hamper the customary use, development, and exchange of the oral story. If the oral attribute of storytelling is damaged because no longer is the customary perpetuation of the story purely oral, a future storyteller might reference the documented story rather than the oral story. The custom of oral storytelling is threatened by documentation. The tradition of an oral heritage, which includes passing an oral story from one storyteller to another and the development of an oral story, which occurs as different storytellers keep, take out, and change certain parts, will no longer occur if one storyteller can simply refer to a digital database of oral stories. The aspect of communal storytelling is lost. If an oral story can only be protected by IP law if it satisfies the copyright requirement of fixation, then an indigenous community seems to have two choices: to document or not to document. If the community decides to document the oral story, then an important custom would be altered since the oral story traditionally has never been documented. If the community decides not to document the oral story in order to preserve the custom, then the story will remain at risk of misappropriation or misuse as there would be no recognized conventional IP rights. In the end, either choice comes at a cost

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[74] Berne Convention, *supra* note 36, at art. 6*bis*.
[75] *Id.*
[76] *See* Skrydstrup, *supra* note 6, at 102-03 (discussing tangible and intangible TCEs).
[77] *Revised Provisions*, *supra* note 9, at 9, § II(h).
[78] *Id.*

to the indigenous community.

The question remains whether there really is harm in documenting an oral story. Where the conventional IP law only provides protection to those stories that are documented or fixed, the law presumptively excludes any oral TCEs. And, as noted *supra*, requiring this documentation also requires indigenous communities to adapt their culture. A drastic change of a TCE from oral to written seems to contradict the "intrinsic value" that TCEs offer to "all humanity."[79] Instead of adapting traditional culture to the law, the law should adapt to traditional culture. This could occur through the integration of customary law with conventional IP law. If digital documentation takes place, perhaps in the case of oral stories, the access to a database of digitally documented oral stories could be restricted to the appropriate leaders in the community and limited to situations where the documented stories would be necessary evidence in a copyright infringement suit. To preserve the nature of oral storytelling, the oral story would not be accessible by the storytellers in the community. Also, there is a necessity for the enforcement of communal moral rights because it would acknowledge the communal nature in which oral stories are created and would protect against distortion of a community's oral tradition.

Though it seems that digital documentation in the case of intangible TCEs is not the ideal solution for IP protection, this may depend on the indigenous community's view on the alteration of the nature of an oral tradition. Some communities may not believe the alteration of the nature of an oral story tradition to be a problematic change or a distortion in their culture. Through the assistance of WIPO's Creative Heritage Project, the Maasai community is one community that is seeking to use digital documentation, in the form of documentary film, to record student oral narratives within their community.[80] This shows that the Maasai community is willing to digitally document their indigenous stories and songs. Digital documentation in this way is used to empower the indigenous community so it can create works that directly place copyright protection with the community.

2. Sacred TCEs

Sacred TCEs are those that are related to a sacred ritual or rite often associated with a religious or spiritual ceremony. Indigenous communities often have an interest in maintaining the integrity of sacred TCEs, which reinforces the notion of secrecy

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[79] *Id.* at 3, § I(i).
[80] *See infra* Part VI.

and privacy. The need for secrecy may be so strong that even members of an indigenous community may not be exposed to certain sacred TCEs unless they have passed some sort of initiation ceremony.[81]

Indigenous communities may not want to digitally document sacred TCEs because they do not want these expressions made available to the general public via a digital database. Though there can be safeguards in place to restrict public access to digital databases, there is the risk of hacking or some leaking of the sacred material to the general public. One concern is that the exposure of a sacred TCE to the public may result in some sort of action "prejudicial to [the community's] honor or reputation."[82] Thus, there seems to be a measure of cost to the moral right of integrity.

One argument against application of IP rights to sacred TCEs is that, if the TCEs are indeed sacred and practiced in the private realm, then there could be no way of misuse because there would be no access by a third party to the sacred TCEs. Thus, IP protection would be irrelevant to sacred TCEs. Wend Wendland of WIPO has argued that TCEs "can be protected only once [they] become[] public."[83] This is a persuasive argument for those sacred TCEs that are maintained in a private arena, though it assumes that IP management is not a preventive strategy for protecting TCEs. Perhaps this is a correct argument for those purely private circumstances. However, the reality of increased cultural interaction between the indigenous and non-indigenous will inevitably expose sacred TCEs that were customarily practiced in private.

The following example is informative of the challenges of protecting sacred TCEs. In 1984, a sacred, private ritual of the Santo Domingo Pueblo American Indian tribe was exposed to the public sphere, despite the fact that the tribal leaders took "pains to keep" it secret.[84] The Pueblo leaders had established a visitor's ban on any photography taken without the Tribal Council's permission. However, the ritual required an open roof to enable the participants to communicate with "the Creator and tribal spirits."[85] Therefore, a photographer was able to take aerial shots of the ceremony, and one of the photographs was later printed in a local newspaper, accompanied by an offensive mislabeling of the reli-

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[81] Farley, *supra* note 19, at 10.
[82] Berne Convention, *supra* note 36, at art. 6*bis*.
[83] *Inventorying Intangible Cultural Heritage*, *supra* note 22, at 31.
[84] World Intell. Prop. Org. [WIPO], Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Table of Written Comments on Revised Objectives and Principles*, 34, U.N. Doc WIPO/GRTKF/IC/11/4(b) (Apr. 19, 2007) (*prepared by* the Secretariat).
[85] *Id.*

gious ceremony as a "pow-wow."[86] For the Pueblo, the primary concern was to keep the ritual and all cultural aspects attributable to it in the private realm. Once it was exposed to the public, the ceremonial practice was disturbed,[87] the ritual misinterpreted and misrepresented, and the copyright of the photograph vested not in the community but in the photographer or newspaper.[88]

What should be done when the practical requirements for sacred rituals expose a sacred TCE to the public sphere? In the case of the Santo Domingo Pueblo, the ritual would have to be changed (e.g., covering the open roof) for the tribe to have any chance of protecting the ceremonial dance, dress, and songs associated with the ritual. Yet, this would be a violation of the community's moral rights, amounting to a "distortion, mutilation or other modification" of a ritual that has been practiced for generations.[89] If digital documentation were implemented as an IP management strategy, it would serve to *safeguard* the sacred TCEs. However, there would remain a risk of unapproved access to them. Accordingly, the digital databases would have to be carefully designed to allow only pre-approved access, which would be granted according to customary laws within the Pueblo. For some sacred TCEs though, any risk of public exposure may not be worth the preservation and safeguarding that digital documentation enables.

V. CUSTOMARY LAWS

A. *Why Integrate Customary Laws with the Conventional IP System?*

The underlying question is whether conventional IP can and should fully protect TCEs. One argument is that it cannot be the role of IP to protect every aspect of indigenous folklore. Indeed, there are limitations and exceptions to conventional IP protection, such as copyright's fair use and first-sale doctrine. Perhaps the digital documentation strategy as applied to TCEs may be sufficient, though not all-encompassing, for attaining effective IP protection for most TCEs. Perhaps the cost to indigenous moral rights—the violation of a community's right of integrity and disclosure—is worth the benefit of attaining conventional IP protection. Perhaps the change that digital documentation would impose upon intangible TCEs is merely an organic change and

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[86] SCAFIDI, *supra* note 4, at 103, 106.
[87] A member of the Pueblo who was participating in the ceremony stated that "[t]he airplane disturbed my oneness with the dance and I feel that it violated and upset the Pueblo's balance of life by its disturbance of the dance that day." *Id.* at 104 (citations omitted).
[88] Copyright would depend upon whether the photograph was a work for hire.
[89] Berne Convention, *supra* note 36, at art. 6*bis*.

reflective of a development that exists within all cultures, whether indigenous or non-indigenous. Perhaps because conventional IP protects some TCEs, this is good enough.

On the other hand, IP should be a strategy to which indigenous communities can turn to protect their folklore.[90] In light of the potential violations of the moral rights of indigenous communities through a digital documentation strategy, IP costs could be avoided by integrating some indigenous customary law into the conventional IP system. Where conventional IP law fails to protect TCEs because of the failure to meet fixation, authorship, or originality requirements, customary laws can be expansively used in redefining protectable, communal subject matter or communal authorship of a work.

The use of customary law in the IP framework recognizes the communal nature of TCEs. Because most TCEs are "fundamentally the result of group authorship," the legal protection should, in turn, protect the group or communal authors.[91] This suggestion goes beyond the objective for IP law to "accommodate indigenous art,"[92] and attempts to modify the IP system to accept and protect creative works of communal or individual indigenous authorship inclusive of an intangible or sacred nature. Conventional IP law should not be viewed as accommodating minority groups, but rather should integrate the values of both the indigenous and non-indigenous into a workable, global IP system.

It should be noted that the integration of customary law with conventional IP law would be limited. Notions of communal authorship and, consequentially, communal moral rights can only be integrated into the conventional IP framework in those indigenous communities where the customary law is clearly articulated and followed. If customary law is unclear, highly disputed within the community, or non-analogous to IP, then the integration of the customary law would fail. In this way, application of customary laws to IP laws should be limited only to the developed and well-established customary laws, where there would be little dispute about who has the authority over the IP management scheme.

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[90] Though it should be noted that IP is not the only strategy for protection, as some indigenous communities can turn to other non-IP laws. *See, e.g.*, Indian Arts and Crafts Enforcement Act of 2000, 25 U.S.C. § 305(e) (2006) (providing that one may "bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, 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 . . . ."); Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013 (2006) (providing protection over cultural objects associated with burial and funeral rituals).

[91] SCAFIDI, *supra* note 4, at 116.

[92] Farley, *supra* note 19, at 40.

B. *Past Usage of Customary Laws Within Conventional Laws*

The discourse on the relationship between IP protection and TCEs became more prominent in the latter half of the twentieth century as exhibited by the Berne Convention,[93] the UNESCO-WIPO *Model Provisions* released in 1985,[94] and the initial meeting of the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore ("IGC") in 2001.[95] TCEs are also a cross-disciplinary issue—UNESCO, WIPO, and the WTO have issued collaborative documents that include the issue of TCEs, which shows the international community's growing concern of TCEs.[96]

Additionally, the suggestion of applying customary law is not in and of itself novel. The IGC has initiated studies concerning the relationship between customary law of indigenous communities and IP.[97] There is, however, debate on the various approaches to the role that customary laws play within the broader conventional legal context.[98] In many instances, customary laws in some aspect affect the national laws. NAGPRA is one example of integrating Native American customary rights into U.S. property rights when dealing with Native American sacred burial sites and objects therein.[99] This Note further argues for integration of customary law into the conventional IP system, such that the "two parallel systems of innovation" of Western and indigenous communities may become one.[100]

C. *How Customary Laws Can Be Integrated into a Digital*

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[93] Berne Convention, *supra* note 36, at art. 7(3) (recognizing protection for "anonymous and pseudonymous works," though TCEs are not explicitly mentioned).

[94] *See generally Model Provisions*, *supra* note 15.

[95] *See, e.g.*, WIPO, Program Activities, Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore, http://www.wipo.int/tk/en/ (last visited Nov. 15, 2009).

[96] *See generally Model Provisions*, *supra* note 15; Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex IC, General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round), 33 I.L.M. 81 (1994).

[97] World Intell. Prop. Org. [WIPO], Program Activities, *Customary Law and IP*, http://www.wipo.int/tk/en/consultations/customary_law/index.html (last visited Nov. 15, 2009) (discussing WIPO's priority on the study and survey of customary law and its relationship to IP).

[98] *Customary Law & IP System*, *supra* note 10, at 23 (discussing various options for customary law approaches).

[99] Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013 (2006). NAGPRA integrates notions of customary laws including the following: the definitions related to funerary objects are based upon traditional custom, inventory of remains and funerary objects should be conducted in consultation with traditional religious leaders, and evidence of ownership for repatriation of burial remains and funerary objects may be based on oral traditions. Furthermore, the notion of the communal rights of the Native American communities is emphasized through the use of "cultural patrimony" of a funerary object, where the ownership vests in the Native American community not the Native American individual.

[100] JANKE, *supra* note 20, at 6 (citations omitted).

Documentation IP Management Strategy

Underlying the proposed integration of conventional IP law and customary law is a required foundation of respect for indigenous communities' control over their own cultural products.[101] There is even suggestion that the "normative force of customary law" may "create a legal or moral expectation that it will be recognized" beyond the indigenous community.[102] Martin Skrydstrup states that anthropological study of and consultation with indigenous communities will provide the basis of understanding for customary laws.[103] He further states that "we need to examine how people live by their own customary protocols and laws with respect to intangible property and we need to incorporate a fine-grained knowledge of this into the IP Guidelines."[104] The IGC also notes that "it is necessary to examine more closely the nature and significance of the social and political structure in tribal societies."[105] There must be a respectful acknowledgement of the relationship between customary laws and the TCEs they govern in order to converge a customary legal structure within conventional IP laws.

With this basis of understanding and respect, some customary laws may be effectively integrated into the IP system. Where there is some level of similarity in concepts between the indigenous and non-indigenous, there should also be some level of applicability between indigenous and non-indigenous laws. For example, Molly Torsen, Vice President of the International IP Institute, analogizes the necessity of "some combination of respect, protection, recognition and privacy" to the French farmers and wine producers who use *appellation d'orgine controlee* (AOC)[106] to maintain the cultural and geographical authenticity of wine products.[107] The AOC is one example of how applying local customs (or in this case local French laws aimed to protect its wine production) can be adapted to IP law. The AOC provides rights to specific groups that follow the precise custom of producing a local wine product. Similarly,

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[101] *See Revised Provisions*, *supra* note 9, at 3; *see also Customary Law & IP System*, *supra* note 10, at 11 (discussing that "respect for customary law was a key issue at the most recent [IGC] panel discussion")*;* BROWN, *supra* note 3.
[102] *Revised Provisions*, *supra* note 9, at 18.
[103] Skrydstrup, *supra* note 6, at 105.
[104] *Id.*
[105] *Revised Provisions*, *supra* note 9, at 18 (citations omitted).
[106] AOC is defined in this case as "the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors." Molly Torsen, *"Anonymous, Untitled, Mixed Media": Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions,* 54 AM. J. COMP. L. 173, 185 (2006) (citing the 1958 Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration).
[107] *Id.* at 185-86.

markings on fabric designs or pottery designs indentify a specific region with the origin or maker of the art works.[108] Both marks, the AOC or fabric or pottery design markings associate the product with a culture, and both marks can be treated as certifications mark under trademark law.

Furthermore, there must be an integration of communal authorship and communal moral rights in the conventional IP framework. Copyright law, for example, must look merely beyond that of joint authorship and recognize communal authorship. Any infringement claims should be made by a representative of an indigenous community who, according to customary law, has the authority to speak on behalf of the community (typically an elder or group leader). Furthermore, a digital documentation IP management strategy should incorporate customary laws to best protect TCEs. For example, because *Ganalbingu* customary law only allows certain individuals to paint certain paintings, a digital database of *Ganalbingu* paintings may only include those paintings approved by the customary law. These are authentic, approved expressions of *Ganalbingu* culture. The individual painters and the images themselves would adequately reflect the TCEs of the *Ganalbingu* people. By applying notions of communal authorship, the copyright of only these images would be vested in the *Ganalbingu* people, administered by the representative determined by customary law, and the approved individual painter.

The question is whether digital documentation as an IP management strategy can also be a platform supporting analogous cultural works. This digital documentation platform is an appropriate arena in which to experiment with the application of customary laws. Indeed, the digital documentation strategy itself can be a communal process, requiring collaboration and cooperation among many people in order to effectively document, store the information on a database, and manage the documentations (i.e., licensing). The Creative Heritage Project is such an experiment aimed at providing indigenous communities with the knowledge and ability to try digital documentation as their IP management strategy.

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[108] *See* Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 783 nn.83-84 (1999) (discussing how certain designs or marks on fabrics and works of art in metal, glass, ceramics, and wood can signify the associated cult, tribe, or other political, ritual or social significance).

VI. WIPO'S CREATIVE HERITAGE PROJECT: AN EXAMPLE OF THE INTEGRATION BETWEEN CUSTOMARY LAW AND CONVENTIONAL IP LAW

The Creative Heritage Project is one recent example of a digital documentation project facilitated through WIPO. This project is an overall resource that provides training to indigenous community leaders and "custodians" (i.e., museums and field researchers) on how digital documentation can beneficially serve as an IP management strategy.[109] The general purpose of the Project is to provide "best practices and guidelines for managing IP issues when recording, digitizing and disseminating intangible cultural heritage."[110] More specifically the Creative Heritage Project has the pilot program, the WIPO-AFC-CDS Cultural Documentation and IP Training Program, a joint project run by WIPO, the American Folklife Center with the Library of Congress, and the Center for Documentary Studies (CDS) at Duke University.[111] This Project aims to

> help indigenous communities document and preserve their own cultural traditions while simultaneously managing their intellectual property interests. . . . By empowering the community to record its own traditions and creative expressions, the program allows the community to create its own intellectual property in the form of photographs, sound recordings and databases. The IP training component of the program enables the community to make informed decisions about how to manage intellectual property assets in a way that corresponds with its values and development goals.[112]

Another goal of the Project is to provide more protection to the indigenous community from misappropriation.[113] The most effective way in which to defeat misappropriation is to ensure that the indigenous community has the autonomy to "make informed decisions" about how to best manage its IP rights.[114]

The pilot training portion of the Creative Heritage Project began in September 2008, with trained representatives of the Maasai community. In July 2009, WIPO presented a laptop, cam-

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[109] *See* WIPO, Creative Heritage Project: Strategic Management of IP Rights and Interests, http://www.wipo.int/tk/en/folklore/culturalheritage/ (last visited Nov. 15, 2009).
[110] WIPO Brochure, *supra* note 57.
[111] WIPO, Program Activities, WIPO-AFC-CDS Cultural Documentation and IP Management Training Program, http://www.wipo.int/tk/en/folklore/culturalheritage/wipo-afc-cds.html (last visited Nov. 15, 2009) [hereinafter Cultural Documentation].
[112] Press Release, World Intell. Prop. Org., Indigenous Community Goes Digital with High-Tech Support from WIPO, U.N. Doc. PR/2009/599 (Aug. 5, 2009).
[113] *Id.* ("Very often it is the recording which is misappropriated. It is the recording that ends up in an archive somewhere which eventually is accessed by a private interest as has happened in the music industry and the film industry.") (quoting Wend Wendland).
[114] Cultural Documentation, *supra* note 111.

era, and digital recorder to the Maasai community so that the community could "make digital recordings of music, oral history, interviews with their elders and so on."[115] The Maasai community is now equipped with the technical and legal knowledge, and also the technical equipment, necessary to begin documenting its TCEs on its own initiative.

The pilot program trained Kiprop Lagat, a representative from the National Museum of Kenya, and two representatives of the Maasai community from Laikipia, Kenya, on the technical documentation skills and IP knowledge necessary for digital documentation.[116] Mr. Lagat's reflections on the pilot training program emphasized his desire for the indigenous communities in Kenya to have autonomous control over their culture and the rights attributed to their cultural works: "We will ensure in all our documentation, the community has a say. The rights rest[] within the community. And for [the National Museum of Kenya] to do anything we will ensure that we have an input from the community."[117] The aim of the digital documentation training program is to strongly emphasize the *rights of the community*, not just those of an individual indigenous artist, and to place the control of the TCEs with the indigenous community. Mr. Lagat's comment reinforces the applicability and necessity of communal moral rights when dealing with TCEs.

Ann Sintoyia Tome of the Massai Cultural Heritage commented on the important training aspects regarding access to the documentation and the copyright management of the IP rights from the documentation:

> We [] have to [] sit down with the community and then they will tell us how they want other people to access the materials that we are going to document and then we [will] talk about copyrights who is going to have the copyrights … whether [the individual who did the documenting] or whether the copyrights will be shared among community members.[118]

The training seems to have addressed some of the concerns

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[115] Laura MacInnis, *Maasai Music on iTunes? U.N. Agency Works to Help*, REUTERS, July 29, 2009, http://www.reuters.com/article/internetNews/idUSTRE56S64G20090729 (quoting Wend Wendland).

[116] Cultural Documentation, *supra* note 111.

[117] Video: Intellectual Property Rights and Community Based Documentation: A Pilot Training Program for Indigenous Communities, (The World Intell. Prop. Org., The American Folklife Center at the Library of Congress & The Center for Documentary Studies at Duke University 2008), *available at* http://www.wipo.int/multimedia/en/cultural_heritage/maasai/index.html (showing highlights of the training program that teaches both the technical aspects and legal aspects of digital documentation) (quoting Kiprop Lagat).

[118] *Id.* (quoting Ann Sintoyia Tome).

surrounding intangible and sacred TCEs. The Project places importance on the community's preference for access (an important concern for sacred TCEs) and for copyright ownership (between an individual or communal authors). This program is a first step to determining how integration of customary law and conventional IP law can happen. The Project's emphasis on the autonomous control of the indigenous community in how they prefer to manage their IP rights means that aspects of customary law will be integrated into the conventional IP law to which the community must adhere. The Project has also attracted other indigenous communities, perhaps a testament to its potential success, who want to "replicate the Maasai recording project."[119]

VII. CONCLUSION

TCEs are a vital attribute of indigenous communities. Not only are they creative works, but they are also reflective of the values, social status, and identity of the community members. The failure of IP laws to protect intangible TCEs poses threats to not only an indigenous community's cultural integrity, but also to their moral rights. With the integration of indigenous customary law's notions of communal authorship into the conventional IP framework and the acceptance in the IP community of communal moral rights, the hope is that both the practice of traditional culture and contemporary law can co-exist "so that TCEs receive their due legal shield against misappropriation and misuse."[120] The integration requires the redefinition of authorship to include both individual and communal authorship. Above all, respect and adherence to indigenous communal moral rights must be at the foundation of any change in the legal framework.

When faced with the opportunities of technological advancement, thought must be given to how development may affect traditional culture. Digital documentation IP management strategies, such as the Creative Heritage Project, offer an immense opportunity for a participating indigenous community to assert control over the documentation and IP management of its TCEs. The Project also rightly focuses on the customary values and community autonomy over the works created through digital documentation. This is an important step towards ameliorating the tensions between conventional IP law and customary law when indigenous communities choose to digitally document their TCEs. Only the future will tell how effective programs like the Creative Heritage

[119] Press Release, *supra* note 112.
[120] Torsen, *supra* note 106, at 196.

Project are in protecting the IP rights of indigenous communities. However, it is indeed a positive step towards enabling indigenous communities to gain the autonomous decision-making power and knowledge necessary to manage their own IP rights in their TCEs.

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