



PROTECTING THE RIGHTS OF INDIGENOUS CULTURES UNDER THE  
CURRENT INTELLECTUAL PROPERTY SYSTEM:  
IS IT A GOOD IDEA?

JUAN ANDRÉS FUENTES

ABSTRACT

Globalization and digital communication trends have provided new avenues and incentives for the commercial use of the folkloric artwork of indigenous peoples. Such commercial uses, however, have occurred largely without any creative control or financial benefit inuring to the original creators, people, or tribe of whom the artistic works form an integral part of their culture. Since much of the works are owned by a community as a whole, as opposed to being owned by individuals, it is difficult to fit such works into an intellectual property regime that is based on laws formed around Western notions of art and artistic ownership. The fact that the folkloric art is often not fixed in a tangible medium further confounds the issue. However, unless the folkloric works of indigenous peoples can somehow be treated as their rightful intellectual property, commercial exploitation by others will continue. Such a scenario threatens to destroy the meaning and sanctity of the work to its owners without recourse.

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INTRODUCTION

Culture has no borders. It belongs to no certain nation. However, cultural rights must be respected. Culture is not merely a manufactured product. It is the expression of what constitutes the identity of a nation: its history and traditions.<sup>1</sup> Every country, while being open to the cultures of others has a right, even a duty to protect and develop its own culture.<sup>2</sup>

Starting in the late twentieth century, the exploitation of culture has become big business.<sup>3</sup> From eco-tourism to cultural tours and souvenir artifacts, culture is being transformed into marketable merchandise.<sup>4</sup> This merchandising of culture is part of the emergence of a global marketplace where everything can be sold across international borders.<sup>5</sup> In fact, the need for protection of indigenous artwork increases each day due to the globalization of market economies; globalization that in part facilitates the commercialization of this indigenous art work. In addition, technology is constantly providing new ways to appropriate indigenous literary and

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\* Juan Andrés Fuentes earned his Bachelor of Laws from Pontificia Universidad Católica del Perú (2000) and is a member of the Lima Bar. [juanandresfuentes@terra.com](mailto:juanandresfuentes@terra.com). I want to thank my dear siblings Katia, Denise, Carlos and my new bro' Alan. I know I can always count on you. I hope you feel the same way about me. I also want to thank Lexis Allen for her assistance while doing this article. Finalement, gros bisous Florence et Julie, vive la Belgique!

<sup>1</sup> Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L. L. & POL. 187, (1997); Marilyn Phelan, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 57 (1998).

In 1965, the United States Congress declared: advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view to the future.

*Id.*

<sup>2</sup> Bishop, *supra* note 1, at 187.

<sup>3</sup> Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L. L. & COM. REG. 229, 230 (1998).

<sup>4</sup> Terri Janke et al., *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Chapter 4 – The Commercial Value of Indigenous Cultural and Intellectual Property, at <http://www.icip.lawnet.com.au/ch4.htm> (last visited Nov. 9, 2003).

<sup>5</sup> *Id.* This global market is dominated by industrialized countries that have abundant resources. Developing countries, on the other hand, are struggling to obtain foreign investments so that they too will be active participants in the global market.

artistic works for economic gain even where such works were not meant to be known by the public.<sup>6</sup>

This paper discusses the feasibility of protecting the rights of indigenous cultures<sup>7</sup> under the current intellectual property regime as a way to stifle the now common injustices caused by persons who misappropriate cultural rights from indigenous peoples.

## I. ORIGINS OF THE CURRENT INTELLECTUAL PROPERTY REGIME

The present intellectual property regime has Western<sup>8</sup> roots. Indeed, two traditions have historically protected many artistic works internationally: the copyright tradition associated with the common law system of England and its former colonies (including the United States), and the author's right tradition associated with the civil law systems of the countries of the European continent and their former colonies in Latin America, Africa and Asia.<sup>9</sup>

The origins of copyrights can be traced back to the establishment of the first printing press in England, in 1476, and the issuance of Crown licenses to print books. With the decline of licensing in the late seventeenth century, printers and publishers, who had benefited from the licensed printing monopolies, pressed for statutory relief.<sup>10</sup> Their efforts led to the world's first copyright act in 1710, the Statute of Anne.<sup>11</sup>

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<sup>6</sup> Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" – Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. BALT. INTELL. PROP. L.J. 99, 99–104 (1998); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997). Indeed, due to the sacred nature of the work, often times certain works of folklore cannot be shown, nor can the themes in them be disclosed, except to those few who have undergone initiation or other special ceremonies. *Id.* at 10.

<sup>7</sup> J. R. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. ECN.4/Sub.2/1986/7/ and Add.4.

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ethnic identity, as a basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

*Id.*

<sup>8</sup> The term "Western" is used here to indicate a legal system of European origin.

<sup>9</sup> PAUL GOLDSTEIN, *INTERNATIONAL INTELLECTUAL PROPERTY LAW*, 1–580 (Foundation Press 2001) (Protection for authors in France is traditionally not labeled copyright but rather "*droit de auteuf*," and in Germany "*Urhheberrecht*").

<sup>10</sup> *Id.* at 142.

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

Similarly, in France a 1791 law laid the statutory foundation for copyright protection by giving authors the exclusive right to perform their works.<sup>12</sup> Later, a 1793 law gave authors a broad-based right against unauthorized reproduction of their works.<sup>13</sup>

Intellectual property laws still protect a mode of individual autonomy that is grounded in nineteenth century notions of the individual.<sup>14</sup> In order to promote culture and science,<sup>15</sup> the current intellectual property regime rewards individual effort and secures rights to individuals themselves. This type of focus has strong ties to capitalism.<sup>16</sup> “Harvard Biology professor Stephen Jay Gould states that Darwin read Adam Smith prior to writing his ‘survival of the fittest’ theory.”<sup>17</sup> In Judith Silver’s article, “Intellectual Property Primer,” she comments that

[i]t wasn't accidental that capitalism had many of the same theoretical bases as Charles Darwin's notions of survival of the fittest.<sup>18</sup> Indeed, intellectual property law, with the exception of patents, which preceded the rest in codification by several centuries, reached major legal codifications in this same period - during the late eighteenth to late nineteenth century. These laws sought to ensure that the . . . inventions and creations earned monetary compensation for their creators.<sup>19</sup>

In reviewing the genesis of intellectual property protection and the main purpose of this special kind of legislation, it is clear that the current intellectual property law model is the product of Western traditions rooted in individualism,

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 374 (1998).

<sup>15</sup> Intellectual property rights have a constitutional protection in the United States, which mandates that Congress shall have the power, “[t]o 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.

<sup>16</sup> Houman Shadab, *Capitalism: Theory*, at [http://www.ekloges.com.cy/nqcontent.cfm?tt=article&a\\_id=438](http://www.ekloges.com.cy/nqcontent.cfm?tt=article&a_id=438)

What is capitalism? Laissez faire capitalism means the complete separation of economy and state . . . Capitalism is the social system based upon private ownership of the means of production which entails a completely uncontrolled and unregulated economy where all land is privately owned. But the separation of the state and the economy is not a primary, it is only an aspect of the premise that capitalism is based upon: *individual rights*.

*Id.* See also Judith Silver, *Intellectual Property Primer*, at <http://www.sitepoint.com/article/727> (last visited Nov. 9, 2003) implying that every single person will receive the benefits resulting from his own work and financial reward for the most popular or beneficial idea.

<sup>17</sup> Silver, *supra* note 16; Biology Online, *Charles Darwin and Natural Selection*, at [http://www.biology-online.org/2/10\\_natural\\_selection.htm](http://www.biology-online.org/2/10_natural_selection.htm) (last visited Nov. 9, 2003). “One of the prime motives for all species is to reproduce and survive, passing on the genetic information of the species from generation to generation. When species do this they tend to produce more offspring than the environment can support.” *Id.*

<sup>18</sup> *Id.* “The lack of resources to nourish these individuals places pressure on the size of the species population, and the lack of resources means increased competition and as a consequence, some organisms will not survive.” *Id.*

<sup>19</sup> Silver, *supra* note 17.

specifically, ownership by private individuals. This differs from the concept of ownership that pertains to the creative works of indigenous cultures, which are often the result of collective efforts. As a result of viewing all works of art from an occidental perspective, the focus given to intellectual property legislation is necessarily narrow and limited in scope.<sup>20</sup>

## II. THE NATURE AND CHARACTERISTICS OF INDIGENOUS ART

Art plays an important role in indigenous communities. Through art, these communities transmit their cultural traditions and knowledge orally and visually, rather than through written words.<sup>21</sup> In the words of a well-known Aboriginal artist, 'In song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society.'<sup>22</sup>

The different works of art of indigenous cultures could be encompassed in the term "folklore,"<sup>23</sup> "a living phenomenon that evolves over time. Thus, folklore is a window to a community's cultural and social identity. . . . Folklore is usually transmitted orally, by imitation or by other means. Its forms include language, literature, music, dance, games, mythology, rituals, customs, handicrafts and other arts."<sup>24</sup>

A basic trait of folklore is that folklore is passed from generation to generation using unfixed forms.<sup>25</sup> Its creations are not attributable to individual authors: rather, each becomes a community-oriented creation. Generally, local standards and traditions dictate the form of expression and use of folklore. However, from a national perspective, folklore forms and distinguishes "a nation's cultural history and is considered a fundamental element of a nation's cultural patrimony."<sup>26</sup>

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<sup>20</sup> United Nations Development Programme, *About Indigenous People: Frequently Asked Questions*, at <http://www.undp.org/csopp/CSO/NewFiles/ipaboutfaqs.html#ipfaqproperty> (last visited Oct. 19, 2003). At the Conference on Intellectual Property Rights and Biodiversity organized by the United Nations Development Programme (UNDP) and the Coordinating Body of Indigenous Organizations of the Amazon Basin in Santa Cruz de la Sierra, Bolivia, it was stated that for indigenous peoples, "the intellectual property system means legitimization of the misappropriation of our peoples' knowledge and resources for commercial purposes." *Id.*

<sup>21</sup> Theresa Simpson, *Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand*, 18 HASTINGS INTL. & COMP. L. REV. 195, 221 (1994) (citing Rebeca Clements, *Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law*, 49 U. TORONTO FAC. L. REV. 1, 2 (1991)).

<sup>22</sup> Farley, *supra* note 6, at 9 (citing W. Marika, *Copyright on Aboriginal Art*, ABORIGINAL NEWS, Feb. 1976.)

<sup>23</sup> See generally Michael Blakeney, *The Protection of Traditional Knowledge Under Intellectual Property Law*, EUR. INTELL. PROP. REV. 2000, 22 (6), 251-61 (2000). For the purposes of writing this paper, folklore and the works of art of indigenous cultures are synonymous.

<sup>24</sup> Cathryn A. Berryman, *Toward More Universal Protection of Intangible Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 310-11 (1994).

<sup>25</sup> *Id.* at 311.

<sup>26</sup> *Id.* at 310 n. 81 (citing Committee of Governmental Experts on the Safeguarding of Folklore, UNESCO HQ, Paris, France, 22-26, 16 COPYRIGHT BULL. No. 3 at 27, 29 (1982)).

## III. CULTURAL ABUSE

The traditions of local cultures around the world have become commercialized to the extent that their cultural and religious significance have all but vanished from public memory.<sup>27</sup> Increasingly, artifacts from indigenous cultures have been in demand in industrialized countries. This demand for “tribal art” has led to an escalated loss of the movable cultural heritage of many indigenous communities. Indigenous works of art have been reproduced and sold as art reproductions and craft items. More commonly, however, such works have been reproduced and sold in the form of cheaper commodities, such as T-shirts<sup>28</sup> and other souvenirs. “Indigenous art has also been reproduced and used in advertising and marketing.”<sup>29</sup> At the same time, indigenous people are often making an effort to preserve the cultural traditions embodied by their artifacts.<sup>30</sup> Survival for them is not simply a question of physical existence, but depends upon maintaining spiritual links with their land and their communities. Protection of their culture has become recognized as a fundamental right.<sup>31</sup>

Folkloric works are victims of integrity violations. They suffer mutilation, and distortion, particularly when recreated outside their natural habitat or without authorization. For instance, an American production company could record an African tribal ritual and, upon returning to America, incorporate the recording into a television documentary without any obligation to remunerate the African tribe and without any obligation to accurately attribute the ritual to its creating tribe or even to show appropriate respect for the ritual.<sup>32</sup> Also, even if authorized to use an indigenous ritual, the users typically do not acknowledge its source in all “printed publications or in connection with any communication to the public containing that expression.”<sup>33</sup>

There are many real life examples. The first problem that indigenous cultures face is the copying of works by outsiders who have not been authorized to do so by the respective native community. Such utilization provides for economic gain outside the customary context of folklore.<sup>34</sup> In a 1989 court action, *Yumbulul v.*

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<sup>27</sup> Long, *supra* note 3, at 243 (using the Maori of New Zealand, native Hawaiians, Native Americans, and indigenous cultures of Latin America as examples).

<sup>28</sup> See “Stonewolf Symbolic T-shirts,” <http://www.stonewolftaos.com/Indigenous.html> (last visited Sept. 28, 2003) (purporting to offer symbolic T-shirts and gifts with no mention of any royalty to the creators).

<sup>29</sup> Farley, *supra* note 6, at 8.

<sup>30</sup> Simpson, *supra* note 21, at 197.

<sup>31</sup> Farley, *supra* note 6, at 11. Article 27.2 of the Universal Declaration of Human Rights and Article 15.1 of the International Covenant of Economic, Social and Cultural Rights provide the right to protect the moral and material interests in any artistic production. To be more specific, Article 4 of the International Labour Organization on Indigenous Populations, No. 107 (1957) and its revision (No. 169) (1989) implore states to take due account of the cultural and religious values of indigenous populations and to promote the full realization of the cultural rights of indigenous peoples. The Draft Declaration on the Rights of Indigenous People of the United Nations Organization in Article 7 provides the right of indigenous peoples to have their cultural and intellectual property protected. *Id.*

<sup>32</sup> Berryman, *supra* note 24, at 312.

<sup>33</sup> Moran, *supra* note 6, at 105.

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

*Reserve Bank of Australia*,<sup>35</sup> an Aboriginal artist objected to a bank's reproduction of one of his works on a commemorative ten dollar note, asserting that ownership of the design was a collective right of his group and was managed on a custodial basis under Aboriginal tradition.<sup>36</sup> The artist asserted that he did not have the authority to grant the permission he had allegedly given for the reproduction. Australian copyright laws did not support the plaintiff's action, and he was unsuccessful.<sup>37</sup> Cases like *Yumbulul* reveal the gaps in protection left by current intellectual property legislation.

The appropriation of names, images, and themes of indigenous cultures is very common. For example, as of October 1, 2003 there were ninety-four registered and live United States trademarks using the name "Cherokee," thirty-two that use the name "Navajo" and forty-three that refer to the "Sioux" according to the United States Patent and Trademark Office online database.<sup>38</sup> Use of these names and images is dehumanizing to many Native Americans.<sup>39</sup> In other words, the distortion of a cultural expression in any direct or indirect manner may be "prejudicial to the cultural interests of the community concerned."<sup>40</sup> Oren Lyons, an Iroquois faithkeeper, noted the use of Native American religious and cultural imagery for sports team mascots: "Army had a mule, Navy a goat, Georgia had a bulldog and Syracuse had an Indian."<sup>41</sup>

Furthermore, the culturally inappropriate use of Aboriginal images by non-creators constitutes a contentious issue as well. In Canada, a dispute arose in *Mohawk Bands v. Glenbow-Alberta Institution*<sup>42</sup> when the Mohawk objected to an exhibition of a False Face Mask, a sacred object used in the spiritual practices of the Mohawk Nation. A permanent injunction against the display was denied because the judge found that the display caused no irreparable harm to the Mohawk culture.<sup>43</sup> The question is whether it was fair for a judge who has a predominantly Western education to evaluate whether such irreparable harm existed. Could he truly appreciate the significance of the masks or similar symbols since they little or no meaning in his own culture? Is it just for a judge to apply an occidental possess criterion in his analysis?

Finally, the uncompensated expropriation of natural folkloric material is a constant trouble for indigenous cultures. Cat's Claw,<sup>44</sup> a vine from the rain forest,

<sup>35</sup> (1991) 21 I.P.R. 481.

<sup>36</sup> Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 2 ABORIGINAL L. BULL. 5 (1992), cited in Simpson, *supra* note 21, at 206.

<sup>37</sup> *Id.*

<sup>38</sup> See United States Patent and Trademark Office, <http://www.uspto.gov>.

<sup>39</sup> The term "Native Americans" is used here to refer to the indigenous people who lived and continue to live within the United States.

<sup>40</sup> Moran, *supra* note 6, at 105.

<sup>41</sup> Robert Lipsyte, *How Can Jane Fonda Be a Part of the Chop?*, N.Y. TIMES, Oct. 18, 1991, at B10.

<sup>42</sup> 42 [1998] 3 C.N.L.R. 70, cited in Catherine Bell, *Aboriginal Claims to Culture Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457, 464 n.21-23 (1992). This case did not reach the trial stage.

<sup>43</sup> Simpson, *supra* note 21, at 213 (citing Bell, *supra* note 42).

<sup>44</sup> Peru Village, *Cats Claw* [sic], at <http://www.peruvillage.com/html/catsclaw.html> (last visited Oct. 19, 2003). The name "Cat's Claw" refers to a vine-like plant, which is also known by its scientific name: *Uncaria Tomentosa*, and its Spanish name: *Uña de Gato*. "The active substances in

has been used for hundreds of years by the Ashaninkas,<sup>45</sup> a native Peruvian tribe, who discovered its many therapeutic attributes. By the end of the 1980's, the curative powers of this plant became known around the world.<sup>46</sup> As a result, pharmaceutical companies descended on Peru and the Ashaninkas. Now, opportunists are collecting royalties from the exploitation of Cat's Claw without providing any compensation to either the Ashaninkas or the Peruvian Government. Moreover, because of modern developments in global communication, isolated cultures have been subject to widespread appropriation of indigenous biological treasures. The exploitation of developing countries through this "bioprospecting" without compensation is unfortunately common.<sup>47</sup>

Folklore, especially within developing countries, is being overshadowed by mass communication and importation of foreign cultural works. The risk of total disappearance of folkloric culture is imminent if preservative actions are not taken.<sup>48</sup> As will be further discussed and examined in section VI, the best alternative to protect folklore falls primarily within the realm of copyright. Other possible legal solutions to protect folklore include trademark, patents and trade secrets.

#### IV. CURRENT BARRIERS TO THE FULL PROTECTION OF INDIGENOUS INTELLECTUAL PROPERTY RIGHTS

Many experts assert that it is impossible to protect the artwork of indigenous cultures under the existing scheme of copyright laws. The main obstacles are discussed below.

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Cat's Claw are alkaloids, tannins and several other phytochemicals." *Id.* Other constituents contribute antioxidant and anticancer properties. *Id.* It also has anti-inflammatory properties and an immunity-enhancing effect. "European clinical studies have used the extract from the bark in combination with AZT in the treatment of AIDS. It is also used in the treatment and prevention of arthritis and rheumatism, as well as diabetes, PMS, chronic fatigue syndrome, lupus, and prostrate conditions." *Id.*

<sup>45</sup> Rumbos Online, *Ashaninka: The Rebirth of a Nation*, at <http://www.rumbosperu.com/articles/2-32-portafolashaninka.htm> (last visited Nov. 9, 2003). The Ashaninkas, whose name means literally, "a brother to all," live in the Peruvian jungle. *Id.* Half of Peru is completely in the large river valleys that feed eastward into the Amazon. *Id.* The tribe is mainly scattered throughout the 228 communities dotted around the jungle valleys of the rivers Apurimac, Ene, Perené, Tambo and Urubamba. *Id.* In this region, the 25,000-member Ashaninka is the largest group of the many native peoples and one of the Amazon jungle's largest ethnic groups. The New Flag, *Ashaninkas in the People's War*, at <http://www.blythe.org/peru-ppc/rights/asha1.htm> (last visited Nov. 9, 2003). The Ashaninkas, or Campa, as they are also called, belong to the Pre-Andean Arahauaca language family. *Id.*

<sup>46</sup> Rain Tree Nutrition: Tropical Plant Database, *Cat's Claw*, at <http://www.rain-tree.com/catclaw.htm> (last visited Oct. 23, 2003); see generally Long, *supra* note 3.

Through the possibilities presented by the development of modern biotechnology, the genetic resources of the underdeveloped world have gained extraordinary value . . . . In fact, the possession and control of genetic resources constitutes a new way of plundering the Third World, which has become the main objective of those transnational corporations involved in this field . . . .

*Id.* at 237 n.18.

<sup>47</sup> Blakeney, *supra* note 23, at 255; see generally Janice Wiener, *Protection of Folklore: A Political and Legal Challenge*, 18 INT'L REV. INDUS. PROP. L. & COPYRIGHT 59 (1987).

<sup>48</sup> Berryman, *supra* note 24, at 311.

### *A. Duration of Rights*

“The limited duration of copyright protection has been perceived as a problem for the artistic works of indigenous cultures, some of which may have originated thousands of years ago.”<sup>49</sup> Current copyright laws provide for a period of fifty years beyond the end of the author’s natural life as the term of protection for his or her literary or artistic works.<sup>50</sup> After that period, the author’s works enter the public domain,<sup>51</sup> and the state, in its capacity as the representative of society, assumes ownership of the creation.<sup>52</sup>

On the other hand, the artistic works of indigenous cultures need perpetual protection to support continued creative contributions.<sup>53</sup> Perpetual protection should be granted to these works of art because the protection of folkloric material is not for the benefit of individual creators but for the community, the existence of which is not limited in time. Even assuming that such works would be protected for an arbitrary period of one hundred years, that period is still insignificant when compared with the lives of artistic traditions that date back thousands of years. Scholars warn that under such limited terms of protection, “most folkloric works [would] already be in the public domain and may therefore be used without authorization.”<sup>54</sup> This problem may be overcome with a strong response by national authorities. Moreover, many foreign laws already extend perpetual protection to folkloric expressions. For instance, such protection is explicitly provided for in the laws of Congo and Sri Lanka.<sup>55</sup>

### *B. Originality*

To be protected, a work of art requires originality. However, originality is not the most valued attribute in the realm of indigenous art. “Rather, faithful reproduction is prized. For the most part, the notion of original authorship is foreign to indigenous art and culture. The production of artwork in indigenous culture can be best described as a process of reinterpretation.”<sup>56</sup> It must not be forgotten that history and religion are the most important themes in many works of art by

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<sup>49</sup> Blakeney, *supra* note 23, at 256.

<sup>50</sup> Berne Convention for the Protection of Literary & Artistic Works, Sept. 9, 1886 art. 7(1)g, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>. The Berne Convention, first adopted in 1886, represented the first international intent to recognize copyright protection beyond the physical boundaries of a specific country. However, the copyright term may extend to seventy years beyond the end of the author’s natural life. See *id.* at art. 7(8); *Eldred v. Ashcroft*, 123 S.Ct. 769, 781–82 (2003).

<sup>51</sup> See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 976 (defining copyright public domain as copyrightable works that copyright law does not protect).

<sup>52</sup> Berryman, *supra* note 24, at 305. “Authority to control public domain usage is vested in either the state or an agency designated by the state. In some instances, prior authorization is required before a national can exploit a public domain work. Other states preserve free use if the work’s integrity is preserved.” *Id.*

<sup>53</sup> See, e.g., Moran, *supra* note 6, at 103.

<sup>54</sup> Farley, *supra* note 6, at 18.

<sup>55</sup> Moran, *supra* note 6, at 103.

<sup>56</sup> Farley, *supra* note 6, at 21.

indigenous people. Consequently, innovation is often restricted to what historical and religious expressions permit.

Folkloric work is most often ancient, many such art forms having been developed generations ago. Australian Aboriginal art, for instance, draws upon custom and tradition and represents a continuation of time-honored myths and legends. Moreover, “[a]lthough folklore can be entirely new, it is most often directly derived from preexisting works.”<sup>57</sup> Thus, an important question is whether the works of art of indigenous cultures can meet the requirement for originality.

To answer this question, it is very important to use strict standards for what is considered original. Applying a trivial meaning to the concept of “originality” must be avoided. In an opinion for a unanimous United States Supreme Court, Justice O’Connor defined the concept as follows: “‘Original,’ as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>58</sup>

Folklore is the product of a process of creative development, which, though slow, is a process nonetheless.<sup>59</sup> The standard of creativity present in artwork from indigenous cultures is low but certainly sufficient to pass the threshold of originality required by current copyright laws.

### C. Fixation

Copyright law usually requires that protected works of art must be fixed in a tangible medium.<sup>60</sup> However, it is questionable whether folklore can meet such a statutory requirement because cultural art forms may only exist in an unfixed state.<sup>61</sup> For example, songs and dances are generally preserved from generation to generation without any evidence of such arts being fixed in a tangible form. Rather, each detail of a given song or dance is memorized and performed by each new generation.<sup>62</sup> However, from another perspective, such a lack of tangible fixation may prove to be a benefit: without it, a start date for the term of protection is difficult or impossible to set.<sup>63</sup> Thus, if a work is unfixed, the term does not begin to run until that work becomes fixed.<sup>64</sup> To address this feature of folkloric art, the current copyright laws are sufficiently flexible so as to accord a special status to indigenous

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<sup>57</sup> *Id.*

<sup>58</sup> *Feist Publ'ns, Inc. v. Rural Tel. Service Co. Inc.*, 499 U.S. 340 (1991) (citing NIMMER ON COPYRIGHTS §§ 2.01[A], [B] (1990)).

<sup>59</sup> Farley, *supra* note 6, at 21.

<sup>60</sup> 17 U.S.C. § 102(a) (2000).

<sup>61</sup> Farley, *supra* note 6, at 27–28; *see* 17 U.S.C. § 102(a).

<sup>62</sup> Farley, *supra* note 6, at 28.

<sup>63</sup> To fix a work of art, authorization from the author is required. *See* 17 U.S.C. § 101 (2000) (defining “fixed”).

<sup>64</sup> Under United States law, an unfixed work is not subject to federal copyright law. 17 U.S.C. § 102(a). Nonetheless, state courts could grant some kind of protection. *See* NIMMER ON COPYRIGHTS § 1.01[A] (explaining the reasoning behind allowing the states to have certain forms of concurrent copyright powers).

artwork; one in which the fixation requirement can be excused by the proof of authorship of the expression of art.

#### *D. Ownership*

Copyright law is based on individual rights. Conversely, indigenous art is seen as the property of the group even if there is only one person who physically created the artwork. The making of art in an indigenous group is not an individual process, but instead, a group process in which many people participate at various levels. “Western notions of property . . . are incompatible with indigenous customs and traditions. In indigenous society, the work is produced for the benefit of the group and the group owns and controls it.”<sup>65</sup> In 1893, a United States Federal Court defined the communal property system as one in which

[E]very member of the community is an owner . . . as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property . . . as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.<sup>66</sup>

To overcome this problem many have suggested applying copyright protection under the principle of joint authorship. However, the concept of joint authorship requires that each person’s contribution must be copyrightable; case law suggests the requirement of copyrightability as pertaining to each contribution, and the Register of Copyrights strongly supports this view.<sup>67</sup> Under this requirement, only the people who were actually involved in the creation of a given work can claim authorship. As a result, an indigenous community that dictates the composition of the artwork to the artist will not be considered a joint creator with the artist.<sup>68</sup>

Others have said that the “works made for hire” provision of the United States Copyright Act is an effective solution to protect the rights of indigenous cultures. However, for the “works-for-hire” principle to apply to a work, it must have been created by an employee within the scope of his employment.<sup>69</sup> To determine whether authors or artists are employees, courts use the general common law of agency.<sup>70</sup> This analysis takes several factors into account: the extent of the hiring party’s

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<sup>65</sup> Farley, *supra* note 6, at 31.

<sup>66</sup> *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893).

<sup>67</sup> *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

The insistence on copyrightable contributions by all putative joint authors might serve to prevent spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined.... In the absence of a contract, the copyright remains with the one or more persons who created copyrightable material.

*Id.*

<sup>68</sup> Farley, *supra* note 6, at 34.

<sup>69</sup> *Id.*; see 17 U.S.C. § 101 (2000).

<sup>70</sup> *Comm. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989).

discretion over when and for how long the individual was to work and the manner in which the author or artist was to perform his or her job, the location of the work, the ownership of the materials employed to create the work, and whether the employer maintained a payroll or contributed to workers' compensation funds.<sup>71</sup> Clearly, works of art created by indigenous cultures cannot fall within this category. A solution to this problem is outlined in section VII.

## V. INTERNATIONAL EFFORTS TO PROTECT CULTURAL RIGHTS

On the international level, a 1967 revision to the Berne Convention addressed the issue of protecting works of art belonging to indigenous cultures.<sup>72</sup> Specifically, Article 15 (4) of the Berne Convention introduced an attempt to protect folkloric art by providing a framework that could be adopted into a state's national copyright legislation. In pertinent part, Article 15 (4) states:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.<sup>73</sup>

Despite the application of Article 15(4), it is doubtful that even partial satisfaction could be found, because folklore is anonymous and any nationality presumptions can be overcome by the author's attribution to a given community.<sup>74</sup> Furthermore, whether this article can be applied to folklore is questionable because this provision is phrased in terms of individual rights.<sup>75</sup>

"Countries that modify their copyright legislation to include anonymous authorship must first notify the World Intellectual Property Organization (WIPO) before the designated authority's claims will be recognized."<sup>76</sup> As of 2000, no state has notified the WIPO of the creation of any such competent body.<sup>77</sup>

## VI. ADVANTAGES OF PROVIDING PROTECTION TO CULTURAL ARTWORK

Copyright protection appears to be the most appropriate legal system in which to protect indigenous artwork because copyright law is meant to protect artistic

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<sup>71</sup> *Id.* at 751–52.

<sup>72</sup> Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual And Communal Rights in the Africa and The United States*, 48 AM. U. L. REV. 769, 812–13 (1999).

<sup>73</sup> Berne Convention for the Protection of Literary & Artistic Works, Sept. 9, 1886 art. 15(4), available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

<sup>74</sup> Berryman, *supra* note 24, at 314 (citing Claude Masouye, *La Protection des Expressions du Folklore*, 115 REVUE INTERNATIONALE DU DROIT D'AUTEUR, 2–4 (1983)).

<sup>75</sup> Kuruk, *supra* note 72, at 813.

<sup>76</sup> Berryman, *supra* note 24, at 314.

<sup>77</sup> Kuruk, *supra* note 72, at 813.

works from unauthorized reproduction. The process of harmonization of international intellectual property recognition and protection standards appears to be inexorable. Copyright has a well-defined legal framework. Certain institutions facilitate the registration of works of art, and others are dedicated to enforcing compliance with and respect for the copyrights applicable to registered matter.<sup>78</sup>

It is extremely expensive to design and implement an entirely new system that protects indigenous artwork. Most of the countries that are trying to seek protection for this kind of art are saddled with emerging economies that afford only limited resources. Nonetheless, many countries have started to protect their folkloric art under copyright. Peru, for example, grants protection to expressions of folklore under its copyright law of 1996.<sup>79</sup> Moreover, certain African countries, such as Ghana, have done the same.<sup>80</sup>

Most of the world's indigenous communities are already properly identified. Thus, to create a special registry for the expressions of art of each one could lead to effective protection. Also, protecting the artwork of indigenous cultures under copyright will provide appropriate civil remedies against infringement such as injunctive relief,<sup>81</sup> impoundment and disposition,<sup>82</sup> actual damages,<sup>83</sup> and/or statutory damages.<sup>84</sup> "Extending these . . . rights and remedies to folklore would significantly improve the protection available under customary law. It would mean that rights for folkloric works could be enforced within national boundaries instead of under the limited jurisdictional confines of the local community."<sup>85</sup> Thus, copyright protection would prevent distortion, inaccuracy and misattribution of folkloric works.<sup>86</sup> Proponents of the extension of the intellectual property system to include folklore also believe that clothing designs and marks on agricultural implements

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<sup>78</sup> It would be very expensive for governments to bear the costs in time and money of enacting a law to handle indigenous cultural rights. Furthermore, considerations such as how to build the necessary infrastructure and the processes of hiring and training must be taken into account in order to make a realistic decision concerning how to best protect the works of indigenous cultures.

<sup>79</sup> *Ley Sobre el Derecho de Author* ("The Law on Author's Rights"), Legislative Decree No. 822, Art. 5, at <http://www.leyes.congreso.gob.pe/Imagenes/DecretosLegislativos/00822.pdf>; see also UNESCO, [www.unesco.org/culture/copy/copyright/peru/fr\\_sommaire.html](http://www.unesco.org/culture/copy/copyright/peru/fr_sommaire.html) (for an English translation of Peru's copyright law).

<sup>80</sup> Blakeney, *supra* note 23, at 251. Certain African countries, such as Ghana, included scientific knowledge under the definition of folklore. Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore – Response of Ghana, 5, at <http://www.wipo.int/tk/en/questionnaires/ie-2-7/ghana.pdf> (last visited Nov. 9, 2003).

<sup>81</sup> For example, in the United States, in appropriate cases, a court will order temporary or permanent injunctive relief to prevent further infringement where it is shown that a copyrighted work likely has been infringed upon. 17 U.S.C. § 502(a) (2000).

<sup>82</sup> During the course of litigation, a United States court may order the impoundment of all allegedly infringing copies of a work, all masters, and any article from which copies can be produced. 17 U.S.C. § 503(a) (2000). The court may also order the destruction or other disposition of the infringing copies after the case has been determined. 17 U.S.C. § 503(b) (2000).

<sup>83</sup> In addition to any profits earned by the infringer, a copyright holder in the United States can recover actual damages suffered as a result of an infringement. 17 U.S.C. § 504(a)(1) (2000).

<sup>84</sup> Under United States copyright law, the copyright holder may, under certain circumstances and prior to the award of damages, elect to receive statutory damages instead of actual damages and any of the infringer's profits. 17 U.S.C. § 504(a)(2) (2000).

<sup>85</sup> Kuruk, *supra* note 72, at 791.

<sup>86</sup> Berryman, *supra* note 24, at 298.

could be protected as trademarks. In addition, the technological processes involved in metal-working, cloth-weaving, and herbal medicine could be afforded similar protection under patent laws.<sup>87</sup>

Copyright protection has extended beyond state borders with the inception of international conventions. With some adjustments to international standards for intellectual property protection, agreements such as the Berne Convention<sup>88</sup> and the Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>89</sup> would enable the indigenous cultures of one country to enforce exclusive rights in the foreign countries where their works are now being distributed.<sup>90</sup>

#### VII. WHO COULD DEFEND THE COMMUNITY RIGHTS OF INDIGENOUS PEOPLE?

Establishing ownership of a work in an indigenous community is difficult. Various indigenous communities could assert ownership over the same artwork. Therefore, it must be decided who is going to represent the rights of those communities before the rest of the world.<sup>91</sup> In most cases, indigenous people are not prepared to deal with these kinds of issues. As a result, it seems that national governments are in best position to administer the rights of these communities. A governmental organization, or a private entity designated for such purposes, could be responsible to collect royalties, represent the interests of creators, and oversee the use of folklore. However, governments must insure that the designated organization is vested with sufficient powers such that it can fulfill its duty of defending the interests of indigenous communities without becoming an obstacle to the normal development of cultural life within the nation.<sup>92</sup>

#### VIII. THE CHALLENGE

The domination of this worldview is clearly reflected today:

The products of culture that have the greatest value in the global marketplace ... appear to be those of the technologically developed, industrialized countries. Patented drugs, copyrighted videos and computer programs, and trademarked fast food logos are 'hot

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<sup>87</sup> Kuruk, *supra* note 72, at 793.

<sup>88</sup> The Berne Convention for the Protection of Literary & Artistic Works, Sept. 9, 1886, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

<sup>89</sup> See generally Jeanmarie Lovo, *Competing Interests: Anti-Piracy Efforts Triumph Under TRIPS But New Copying Technology Undermines The Success*, 25 BROOK. J. INT'L. L. 445 (1999).

<sup>90</sup> Stephan M. Stewart, *International Copyright and Neighboring Rights* 4 (1983).

<sup>91</sup> Indigenous communities may not be able to defend their cultural property before international tribunals because only recognized nation-states are allowed to join many international agreements.

<sup>92</sup> The foundation of any such entity's success will be the ability to avoid establishing long and useless processes to obtain authorization for such actions as public performances or other adaptations of protected folklore for commercial purposes.

commodities' in the global market place. By contrast, developing countries do not possess a large body of protected works created by their [nationals] that can find a ready international market.<sup>93</sup>

Developing countries have historically been used as mere sources for raw materials with little to no attention given to either the human toll or the political, social, or economic development of the source country. The existing intellectual property system can be seen as facilitating an analogous exploitation of developing countries as sources of the "raw materials" that later become developed countries' intellectual property.

If there is no significant economic compensation, would developed countries be willing to enact internal legislation and join in international agreements that protect folklore when they are the ones that most frequently infringe upon and misappropriate the cultural rights of indigenous people? The future of the cultural rights of indigenous people depends on the answer to this question. A negative answer threatens the preservation of the history and traditions of many indigenous cultures.

#### IX. CONCLUSION

The focus of current intellectual property laws are on the individual; not the community. Currently, a perspective that is both egocentric and ethnocentric is being applied to protect copyrighted works. As a result, there is no significant protection available for works that have been created within indigenous communities over hundreds of years. Such creations were not developed for public recognition or economic gain; but rather, to be used as icons in the preservation of cultural heritage.

Without any protective action, indigenous cultures are in danger of extinction. Therefore, urgent action is required. Measures such as requiring authorizations or licenses that allow the use of indigenous artwork tied to appropriate compensation, putting notices of origin or source on a work of art, and revising the copyright system to provide protection for folklore must be implemented. The survival of indigenous cultures' folklore depends on the actions taken to protect their artwork. *Mains a l'oeuvre* if we do not want to lose hundreds of years of culture and history.

Even in spite of the difficulties that the current copyright system presents, it has a sufficient basic framework to offer protection to the works of indigenous cultures. The creation of another system would entail a waste of resources, which most countries could not afford. Another important advantage to using copyright protection is that the entire world basically has a uniform system pertaining to works subject to such protection. Efforts to adjust existing legal mechanisms will serve as the foundation for preventing further violations of the rights of indigenous cultures and for according respect to their works of art.

Providing effective protection for works of indigenous cultures insures the survival of their history and gives citizens of developing countries a potential source of income. With this protection, governments can obtain new economic resources and

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<sup>93</sup> Long, *supra* note 3, at 244–45.

promote prosperity in their countries, especially among indigenous peoples who are often forgotten by their national authorities.