THE COMPETING OBJECTIVES UNDERLYING THE PROTECTION OF INTANGIBLE CULTURAL HERITAGE

Peter K. Yu[*]

Introduction

The protection of genetic resources, traditional knowledge (TK) and traditional cultural expressions (TCE) is of great importance to agricultural production and food security. As the UK Commission on Intellectual Property Rights (IPR Commission) noted in its final report:

> Traditional knowledge has played, and still plays, a vital role in the daily lives of the vast majority of people. Traditional knowledge is essential to the food security and health of millions of people in the developing world. … In addition, … the use and continuous development by local farmers of plant varieties and the sharing and diffusion of these varieties and the knowledge associated with them play an essential role in agricultural systems in developing countries.[1]

Since its establishment at the World Intellectual Property Organization (WIPO) in September 2000, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has worked tirelessly to explore 'the development of an international legal instrument or instruments for the effective protection of traditional cultural expressions and traditional knowledge, and to address the intellectual property aspects of access to and benefit-sharing in genetic resources'.[2] As the inaugural issue of this Journal goes into production, the IGC has made important plans to submit the draft texts of three separate instruments—on genetic resources, TK and TCE—for consideration by the WIPO General Assembly in September 2014.[3]

In addition to the IGC's draft texts, Switzerland has proposed to amend the Regulations under the Patent Cooperation Treaty by explicitly enabling national patent legislation to require the disclosure in patent applications of TK and genetic resources used in patent-seeking

---

 This article was abridged and adapted from Peter K Yu, 'Cultural Relics, Intellectual Property, and Intangible Heritage' (2008) 81 Temple L Rev 433.

[1] Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights* (2002) 73.

[2] WIPO, 'Traditional Knowledge' <http://www.wipo.int/tk/en/> accessed 4 May 2014.

[3] Catherine Saez, 'Protection of Folklore Joins TK, GR on Way to WIPO General Assembly' *Intellectual Property Watch* (7 April 2014) <http://www.ip-watch.org/2014/04/07/protection-of-folklore-joins-tk-gr-on-way-to-wipo-general-assembly/> accessed 4 May 2014.

inventions.[4] Although the proposal makes the disclosure requirement optional, that requirement, once implemented, will enable the disclosed information to become part of international patent applications.[5]

Within the World Trade Organization (WTO), a group of developing countries has also advanced a similar proposal, which requires the addition of Article 29*bis* to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[6] If adopted, the new provision would create an obligation to disclose in patent applications the source of origin of biological resources and TK used in patent-seeking inventions. The proposal would further require patent applicants to disclose their compliance with access and benefit-sharing requirements under relevant national laws. Although a large number of developing countries have supported the proposal, the United States, Japan and South Korea strongly oppose it, claiming that the additional requirement would destabilize the existing patent system.[7]

In addition to efforts at WIPO and the WTO, traditional communities, governments and intergovernmental and nongovernmental organizations have advanced many different proposals and models to protect intangible cultural heritage. Among the new international instruments that have been adopted outside the intellectual property and international trade regimes thus far are the 1992 Convention on Biological Diversity (CBD), the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (under the auspices of the UN Food and Agriculture Organization), the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the 2007 UN Declaration on the Rights of Indigenous Peoples. Taken together, all of these instruments contribute to the emergent establishment of a new international framework for the protection of intangible cultural heritage.

One topic that has received considerable academic and policy attention concerns the key objectives underlying the establishment of this new framework. To help us develop a better and deeper understanding, this article outlines eight most widely documented objectives. While some of these objectives overlap or conflict with each other, others touch on issues that are of only marginal concern to *some* constituencies. By focusing on each objective in turn, this article aims to underscore the divergent, and at times competing, interests among the many stakeholders involved in the framework.

Although some readers may find the description of all eight underlying objectives somewhat messy, such messiness is rather common in any negotiations concerning the establishment of a new international framework. Rather than offering a subjective evaluation of

---

[4] WIPO, Working Group on Reform of the Patent Cooperation Treaty, 'Proposals by Switzerland Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications' (PCT/R/WG/5/11 Rev., 2003) 1.

[5] Emanuela Arezzo, 'Struggling around the "Natural" Divide: The Protection of Tangible and Intangible Indigenous Property' (2007) 25 Cardozo Arts & Entertainment LJ 367, 381–82.

[6] Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council), 'The Relationship between the TRIPS Agreement and the Convention on Biological Diversity: Checklist of Issues' (IP/C/W/420, 2004); TRIPS Council, 'Elements of the Obligation to Disclose the Source and Country of Origin of the Biological Resources and/or Traditional Knowledge Used in an Invention' (IP/C/W/429/Rev.1, 2004).

[7] Arezzo (n 5 above) 387–88; William New, 'WTO Biodiversity Amendment Backed; EU Seeks "New Thinking" on GIs' *Intellectual Property Watch* (26 October 2007) <http://www.ip-watch.org/2007/10/26/wto-biodiversity-amendment-backed-eu-seeks-new-thinking-on-gis/> accessed 4 May 2014.

the importance and urgency of each objective, or combining them to deduce some organizing principles, this article presents the objectives as they appear in the current policy debate. After all, policymakers, commentators, activists and the public at large are likely to value these objectives differently. By presenting the objectives together, this article foreshadows the challenges to achieving international consensus on the protection of intangible cultural heritage.

It is worth noting that this article does not distinguish between TK and TCE, even though the former is arguably more important and relevant to agricultural production and food security. There are at least two reasons. First, indigenous peoples and traditional communities embrace a holistic worldview. They do not make clear distinctions between TK and TCE, and they 'regard expressions of their traditional cultures/folklore as inseparable from systems of traditional knowledge'.[8] Second, because the discussions of TK and TCE are somewhat intertwined, a comprehensive discussion will be needed to fully understand the competing objectives underlying the protection of intangible cultural heritage.

Cultural Privacy

While globalization, the digital revolution and the increasing commodification of information have enriched the lives of many traditional communities, these factors have equally threatened these communities by allowing for the instantaneous distribution of knowledge and materials that are sacred or intended to be kept secret.[9] As Angela Riley noted, such unauthorized reproduction and distribution remains 'one of the biggest problems faced by indigenous groups today'.[10]

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

> [T]he control of traditional ideas and knowledge … identifies places, customs and beliefs which, if publicly known, will destroy parts of a people's cultural identity. Sometimes it is knowledge entrusted only to properly prepared religious specialists. Disclosure to other, unqualified members destroys it. Sometimes it is knowledge shared among all of a society's members, but not with outsiders. Such knowledge charters a society's sense of self; to disclose it loosens the society's self-rationale.[11]

The ability for these peoples to keep ideas and knowledge secret is therefore very important. As Sarah Harding explained, 'secrecy is an integral part of the sacredness of certain objects, stories, songs or rituals, and as such, instrumental in maintaining a certain social structure within the cultural group. [It] helps protect rituals and customs from destructive external forces.'[12]

Although traditional communities underscore the importance of protecting sacred objects and expressions, it has not been easy to distinguish between what is sacred and what is not.

---

[8] WIPO, *Intellectual Property and Traditional Cultural Expressions/Folklore* (2005) 8.
[9] Angela R Riley, 'Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities' (2004) 14 Kansas J L & Public Policy 155, 159.
[10] ibid 157.
[11] Tom Greaves, 'IPR: A Current Survey' in Tom Greaves (ed), *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Society for Applied Anthropology 1994) 4.
[12] Sarah Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 Arizona State LJ 291, 314.

Making such a distinction sometimes may even be impossible, given the communities' holistic worldview and lack of distinction between sacredness and secularity. As the late Darrell Posey explained:

> All creation is sacred, and the sacred and secular are inseparable. Spirituality is the highest form of consciousness, and spiritual consciousness is the highest form of awareness. In this sense a dimension of traditional knowledge is not *local* knowledge but knowledge of the *universal* as expressed in the local. In indigenous and local cultures, experts exist who are peculiarly aware of the organizing principles of nature, sometimes described as entities, spirits, or natural law. Thus, knowledge of the environment depends not only on the relationship between humans and nature but also between the visible world and the invisible spirit world. According to the Ghanaian writer Kofi Asare Opoku, the distinctive feature of traditional African religion is that it is 'A way of life, [with] the purpose of … ordering our relationship with our fellow men and with our environment, both spiritual and physical. At the root of it is a quest for harmony between man, the spirit world, nature, and society.' The unseen is, therefore, as much a part of reality as that which is seen—the spiritual is as much a part of reality as the material. In fact, there is a complementary relationship between the two, with the spiritual being more powerful than the material.[13]

Even if the materials are not sacred or intended to be kept secret, it is important that the materials are not used in a way that would offend traditional communities—as in OutKast's culturally insensitive performance of their hit 'Hey Ya' during the internationally televised 2004 Grammy Awards Ceremony[14] and the University of Illinois' use of its fictitious Indian mascot Chief Illiniwek for more than eight decades.[15]

Moreover, regardless of whether the communities find the use of these materials offensive, they may prefer to keep their ideas and knowledge out of commercial channels. As Erica-Irene Daes, the founding chairperson and Special Rapporteur of the UN Working Group on Indigenous Populations, noted, 'In many ways, indigenous peoples challenge the fundamental assumptions of globalization. They do not accept the assumption that humanity will benefit from the construction of a world culture of consumerism.'[16] Indeed, consumerism may have little meaning to these communities. As she wrote earlier in her report for the Working Group:

> Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The 'object' has no meaning outside of the relationship, whether it is a physical object such as a sacred site or

[13] Darrell Addison Posey, 'Selling Grandma: Commodification of the Sacred through Intellectual Property Rights' in Elazar Barkan and Ronald Bush (eds), *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* (Getty Research Institute 2002) 201.

[14] Eireann Brooks, 'Cultural Imperialism vs. Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity' (2006) 5 J Intl Business & L 112, 117–18; Angela R Riley, '"Straight Stealing": Towards an Indigenous System of Cultural Property Protection' (2005) 80 Washington L Rev 69, 70–72.

[15] Jodi S Cohen, 'Hail to the Chief—and Farewell' *Chicago Tribune* (22 February 2007) C1; Jon Saraceno, 'Illini's Chief's Final Dance Here at Last' *USA Today* (21 February 2007) 2C.

[16] Erica-Irene Daes, 'Intellectual Property and Indigenous Peoples' (2001) 95 American Society of Intl L Proceedings 143, 143.

> ceremonial tool, or an intangible such as a song or story. To sell it is necessarily to bring the relationship to an end.[17]

Traditional communities may also 'fear for the well-being of [their communities] in the face of commercial exploitation, and … worry that the expropriation of their living culture will cause their imagery to lose its original significance which will lead to a disruption of their practiced religion and beliefs and a dissolution of their culture'.[18] Indeed, as Susan Scafidi pointed out, 'A cultural product reduced to the state of a mere commodity by the destruction of its intangible value is unlikely to be restored to the source community.'[19]

Thus, it is understandable why commentators have been concerned about the continuous push for intellectual property rights to protect TK and TCE. After all, the intellectual property system 'was largely developed in the West, and its models are based on a capitalistic philosophy designed to serve a market economy', which is quite different from philosophies embraced by traditional communities.[20] It is therefore no surprise that Naomi Roht-Arriaza expressed concern that, 'by attempting to manipulate the prevailing Western paradigm to suit their needs, … indigenous peoples [will] accelerate the very commodification of knowledge and of living things that many find so objectionable'.[21]

Concerns about the potential loss of heritage also explain why traditional communities are generally sceptical of open access arrangements, such as those relying on the development of a commons. As Michael Brown pointed out, 'from the indigenous-rights perspective, the public domain is the problem, not the solution, because it defines traditional knowledge as a freely available resource'.[22] In fact, the existing push for open access arrangements often ignores the inequitable conditions and distribution problems in the current socioeconomic system. Anupam Chander and Madhavi Sunder also cautioned that 'free and open access had the tendency to suggest "a commons where resources are up for grabs by the most technologically advanced"'.[23] Because one's success in the commons depends on factors like knowledge, wealth, power, access and ability, an open access approach does not benefit everybody equally.[24] Such an approach may therefore be of limited assistance to the poor, the backward, the needy and the politically marginalized.

To complicate matters even further, 'there may not always be consensus within a community … as to what is or is not acceptable use of culturally significant images in works intended for commercial sale'.[25] While some members of the communities may object to *any* usage for commercial purposes, others would allow the use of *some* materials at *selected* times

---

[17] Erica-Irene Daes, 'Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples' (E/CN.4/Sub.2/1993/28, 1993) [26].
[18] Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' (1997) 30 Connecticut L Rev 1, 15.
[19] Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (Rutgers UP 2005) 104.
[20] Riley (n 9 above) 159.
[21] Naomi Roht-Arriaza, 'Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities' (1996) 17 Michigan J Intl L 919, 956.
[22] Michael F Brown, *Who Owns Native Culture?* (Harvard UP 2003) 237.
[23] Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California L Rev 1331, 1356 fn. 131.
[24] ibid 1332.
[25] Wayne Shinya, *Protecting Traditional Cultural Expressions: Policy Issues and Considerations from a Copyright Perspective* (Department of Canadian Heritage 2004) 35.

under *certain* conditions. Thus, it is important to let the communities determine for themselves what materials can be used for commercial purposes. In doing so, the communities could 'make careful determinations about which events [or objects] are appropriate for outsiders based on norms of tribal law, allowing such revenue-generating activities only when they will not infringe on cultural privacy or religious dictates'.[26]

In recent years, cultural group leaders, policymakers and commentators have called for greater protection of 'cultural privacy'—that is, 'the right of possessors of a culture—especially possessors of a native culture—to shield themselves from unwanted scrutiny'.[27] Article 12(1) of the Declaration on the Rights of Indigenous Peoples, for instance, stipulates:

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

Likewise, Professor Brown reminded us that '[a] right to cultural privacy is presented as self-evident and morally unassailable, even if its scope remains unspecified'.[28]

Authenticity

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

For example, 'Aboriginal Australian artists, writers and actors complained that non-Aboriginals were taking the initiative in utilizing Aboriginal motifs and themes, often resulting in misinterpretations and negative stereotypes'.[29] They have also been concerned about 'the utilisation of reproductions of traditional Aboriginal designs as a means of decorating a host of mundane products primarily developed for the tourist trade, such as tea-towels, pencil cases, key rings, tee-shirts[,] … drink coasters[,] … wall hangings, carpets and posters'.[30] Furthermore, 'in Peru, local workers manufacture and sell replicas of golden artifacts symbolizing Incan culture with no remembrance or connection to the heritage that created such artifacts'.[31] Most disturbing

[26] Kristen A Carpenter, Sonia K Katyal and Angela R Riley, 'In Defense of Property' (2009) 118 Yale LJ 1022, 1084.
[27] Brown (n 22 above) 27–28.
[28] ibid 28.
[29] Daes (n 17 above) [68].
[30] Michael Blakeney, 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' (1995) 17 EIPR 442, 442.
[31] Doris Estelle Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective' (1998) 23 North Carolina J Intl L & Commercial Regulation 229, 243.

of all, some 'ingenious people set up a town named "Zuni" in the Philippines, then stamped goods with the label "Made in Zuni"'.[32]

While traditional communities have sought courts' assistance in enjoining others from making unauthorized reproduction of their materials, their cease-and-desist demands are not always fruitful. For instance, in the case of the Australian aborigines, 'after Australian tee-shirt companies were sued for infringing the copyright of Aboriginal artists, they began to print shirts with fake designs. "Most tourists shops [therefore] … are replete with examples of T-shirt designs which may appear to be works of Aboriginal art but are in fact caricatures of Aboriginal art."'[33] The resulting misrepresentation and distortion have caused significant economic and psychological injuries to traditional communities. As Michael Blakeney noted, 'the unauthorised reproduction of designs which are of significance to Aboriginal religious beliefs and cultural identity is as damaging as the desecration, through mining, of traditional dreaming places'.[34]

To reduce abuse and unauthorized copying, trademarks—in particular, certification marks—have been used to ensure the authenticity and appropriate use of traditional materials.[35] Moral rights provide additional protection against 'debasement, mutilation or destruction' of traditional expressions.[36] Because 'the absence of an authenticity mark [or proper attribution] would alert potential consumers of cultural products to a lack of association with the presumed source community',[37] these different forms of rights may enable traditional communities to share in the benefits of their intangible cultural heritage and obtain appropriate recognition for their creative contributions.

Although expectations for authenticity usually result in greater control by traditional communities and more deference to them, such expectations sometimes may backfire on the communities by making it more difficult for them to demand the return of those cultural artifacts that are already taken from the communities without their authorization. For example, a museum can use authenticity as a justification to reject demands by indigenous communities to rebury human remains residing in the museum.[38]

Recognition

An objective that goes hand in hand with the protection of authenticity interests is the recognition of the contributions traditional communities have made over the centuries. Such recognition can be achieved through the introduction of greater control of their intangible cultural heritage, which in turn would enable the communities to share in the benefits of the exploitation of such heritage. The traditional communities' intangible cultural heritage can also

---

[32] J Michael Finger, 'Introduction and Overview' in J Michael Finger and Philip Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (OUP 2004) 17.
[33] Brown (n 22 above) 89.
[34] Blakeney (n 30 above) 442.
[35] Maui Solomon, 'Protecting Maori Heritage in New Zealand' in Hoffman (above) 355; Wend B Wendland, 'Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions' in Barbara T Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (CUP 2006) 333.
[36] Kamal Puri, 'Cultural Ownership and Intellectual Property Rights Post-*Mabo*: Putting Ideas into Action' (1995) 9 Intellectual Property J 293, 332.
[37] Scafidi (n 19 above) 66.
[38] Patty Gerstenblith, 'Cultural Significance and the Kennewick Skeleton: Some Thoughts on the Resolution of Cultural Heritage Disputes' in Barkan and Bush (n 13 above) 163.

be recognized through a requirement to disclose the origins of the traditional materials used in new creations or inventions. Proposals that seek to introduce a disclosure requirement include Switzerland's recent proposal to amend the Patent Cooperation Treaty Regulations and a similar proposal by a group of developing countries to amend the TRIPS Agreement. To some extent, these requirements resemble those ethical guidelines museums have used to ensure the proper handling of cultural artifacts.[39]

By identifying the source of the underlying materials, a disclosure requirement would help users better understand the origin of the products while providing recognition to the community responsible for the creation of those materials. Such a requirement would also enhance the ability of 'providers of genetic resources and TK to keep track of the use of their tangible and intangible resources as well as the development resulting in patentable inventions'.[40]

If informed consent is further mandated as part of the requirement, like what is stated in the Article 29*bis* Proposal, the requirement would further ensure a legitimate exchange between traditional communities and follow-on authors or inventors. Such consent is particularly important when the invention includes genetic resources from indigenous peoples and traditional communities. Such a requirement would also 'increase transparency and help Developing Countries to monitor actual compliance with the provisions [on access and benefit sharing] set forth in the CBD'.[41]

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

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

> Assuming that the circulation of indigenous art is inevitable, some indigenous artists want to be sure to participate in this celebration of indigenous culture. By gaining control over the circulation of their imagery, they want to ensure that the public gets an accurate account of indigenous culture and that the investment in that culture goes back to their communities.[42]

Nevertheless, disclosure has a major weakness: because of the inherent difficulty in determining the source of origin of the underlying materials, such a requirement may lead to

---

[39] James AR Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 Chicago J Intl L 147, 151–52.
[40] Arezzo (n 5 above) 381.
[41] ibid 379.
[42] Farley (n 18 above) 14.

uncertainty and inconsistency and may ultimately reduce incentives for creation and innovation. As Emanuela Arezzo explained:

> Use of genetic resources is rarely recognizable by merely looking at the final product. Even under a close analysis, indigenous people would not know that biological resources had been taken without prior informed consent, not to mention access and benefit sharing; the same applies for TK. Only when the innovation consists of the very same use of the plant that is known in the indigenous community is the link between the biological resource and the patent apparent. Sometimes, however, traditional scientific knowledge only provides useful leads that 'bioprospectors' use for prioritizing the screening of certain plants. The isolated molecules and compounds of these plants may reveal properties beyond those identified by indigenous communities, or the properties already known by indigenous communities are studied for new purposes. In the latter case, the link between TK and the final product gets blurred along the way to the patent office, and indigenous people are unable to find out about—and hence oppose—biosquatting.[43]

This difficulty is, indeed, one of the main reasons why the United States and Japan has strongly opposed the disclosure requirement proposals at both WIPO and the WTO.[44] Whether the requirement will be beneficial will depend on whether the benefits of disclosure exceed its costs. At this point, making that determination will require further empirical research.

Compensation

In addition to recognition and authenticity, some traditional communities want compensation. As this article has shown earlier, the use of traditional materials without their authorization harms the communities in economic, social, cultural, psychological and spiritual terms. As a result, some communities have demanded compensation for their injuries. Although such compensation may not fully cover those injuries, it does provide significant benefits to traditional communities. At the very least, it can promote 'local sustenance and adequacy for living' for these communities.[45]

As Graham Dutfield reminded us, 'TK is valuable first and foremost to indigenous and local communities who depend upon it for their livelihoods and well-being, as well as for enabling them to sustainably manage and exploit their local ecosystems such as through sustainable low-input agriculture.'[46] Likewise, Professor Brown suggested that we should reframe the question from 'Who owns native culture?' to 'How can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?'[47]

Taking account of the growing demands, Jerome Reichman advanced a proposal for using liability rules to address problems concerning the protection of TK and subpatentable

---

[43] Arezzo (n 5 above) 379.
[44] ibid 387–88.
[45] Stephen Gudeman, 'Sketches, Qualms, and Other Thoughts on Intellectual Property Rights' in Stephen B Brush and Doreen Stabinsky (eds), *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Island Press 1996) 119.
[46] Graham Dutfield, 'Legal and Economic Aspects of Traditional Knowledge' in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (CUP 2005) 505.
[47] Brown (n 22 above) 10.

inventions.[48] Under his proposed compensatory liability regime, second comers will be required 'to pay equitable compensation for borrowed improvements over a relatively short period of time'.[49] As Professor Reichman explained, such an alternative regime has several benefits. For example, it 'could stimulate investment without chilling follow-on innovation and without creating legal barriers to entry'.[50] Such a regime 'would also go a long way toward answering hard questions about how to protect applications of traditional biological and cultural knowledge to industry, questions that are of increasing importance to developing and least-developed countries'.[51]

A few years later, Professor Reichman and his colleague, Tracy Lewis, built on this proposal and called for the use of liability rules to address problems concerning TK protection.[52] Their compensatory liability regime would provide traditional communities with 'a clear entitlement to prevent wholesale duplication of their compiled information and to reasonable compensation for all follow-on commercial applications of their traditional knowledge during a specified period of time'.[53] The regime provides three distinct rights: '[1] a right to prevent wholesale duplication, [2] a right to compensation from value-adding improvers and [3] a right to make use of a second comer's value-adding improvements for purposes of making further improvements of his or her own'.[54] Through protection of these rights, the regime 'would temporarily remove eligible traditional knowledge from the limbo of a true public domain and relocate it to a semicommons, from which it could freely be accessed and used for specified purposes, in return for the payment of compensatory royalties for a specified period of time'.[55]

Notwithstanding these proposals, and similar proposals by other policymakers and commentators, compensation can be difficult sometimes. For instance, as the previous section noted, detecting the use of genetic resources can be difficult, time consuming and technology intensive.[56] Researchers may also 'find that a bioactive ingredient has a medical use different from that suggested by the original collectors'; such varied use 'is by no means unusual because traditional plant remedies may be effective within the framework of a society's own understanding and yet fail to satisfy the efficacy standards of Western medicine'.[57]

Moreover, some communities would simply consider monetary compensation inadequate. The continuing of cultural knowledge and practices is important to the survival of the communities,[58] and it is hard to quantify cultural erosion and community loss in monetary terms. As Antony Taubman, the director of the WTO Intellectual Property Division and the former director of WIPO Global Intellectual Property Issues Division, pointed out, 'Where certain uses cause spiritual offence and threaten cultural integrity, … rather than commercial damage,

[48] JH Reichman, 'Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation' (2000) 53 Vanderbilt L Rev 1743, 1776–91.
[49] ibid 1777.
[50] ibid 1746.
[51] ibid 1747.
[52] Jerome H Reichman and Tracy Lewis, 'Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge' in Maskus and Reichman (n 46 above) 348–65.
[53] ibid 358–59.
[54] ibid 349.
[55] ibid 354–55.
[56] Arezzo (n 5 above) 379.
[57] Brown (n 22 above) 111.
[58] Daes (n 17 above) [30].

monetary payment may not be viewed by TK holders as … an equitable form of compensation.'[59] Meanwhile, the survival of the community is also important to the survival of culture and knowledge.[60] If the community disappears, such important knowledge is also likely to become extinct.

Benefit Sharing

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

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

The Article 29*bis* Proposal also requires the disclosure of information concerning the compliance with the CBD's benefit-sharing requirement.

Taken together, these benefit-sharing arrangements would allow traditional communities to capitalize on what Michael Finger and Philip Schuler have called 'poor people's knowledge'.[61] As noted in a study by the Department of Canadian Heritage, the protection of TK and TCE can be seen 'as part of a development strategy'.[62] By facilitating the use and further development of this knowledge and these expressions, the arrangements would also benefit nontraditional communities and the public at large, especially if the protected materials can be clearly identified and such protection would not incur significant transaction costs or result in what Michael Heller and Rebecca Eisenberg described as the 'tragedy of the anti-commons'.[63]

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

> A number of distinctively patterned textiles, such as *ikat* cloth from Sulawesi and Zapotec rugs from Mexico have obtained large markets in industrialized countries. These items can

[59] Antony Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge' in Maskus and Reichman (n 46 above) 532.
[60] WIPO, *Intellectual Property and Traditional Knowledge* (2005) 7.
[61] Finger and Schuler (n 32 above).
[62] Shinya (n 25 above) 24.
[63] Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books 2010) 49–78; Michael A Heller and Rebecca S Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research' (1998) 280 Science 698.

> easily be reproduced at lower cost on machines, however, and when produced in large quantities they quickly lose their novelty and commercial value.[64]

Notwithstanding these benefits, commentators have questioned whether such a model would be ideal for the protection of intangible cultural heritage. For instance, 'indigenous peoples do not view their heritage in terms of property at all … but in terms of community and individual responsibility.… For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.'[65] Moreover, as Naomi Mezey noted:

> Cultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things. Thus, cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable. They also tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring.[66]

There is also a general 'presumption that Western nations prefer private ownership and source nations or indigenous peoples prefer group or common ownership'.[67] However, it is important to remember that not *all* traditional objects are intended to be communal. As Professor Daes pointed out, 'although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people's heritage'.[68] Moreover, as Michael Harkin has shown, the 'masks and ceremonial objects of the Kwakiutl, items associated with the potlatch ritual, were not communal but intensely personal, having been created for, and owned by, specific individuals'.[69] Many of the songs and dances associated with this potlatch ritual, indeed, 'are under the exclusive possession and control of particular individuals'.[70] Exclusive possession and control can also be found in 'some of the songs of the Suya, or the sacred objects of the Australian Aboriginal people'.[71]

More recently, Kristen Carpenter, Sonia Katyal and Angela Riley made a very convincing case about the merits of the property model.[72] As they explained, it is not that model per se that creates problems for the protection of intangible cultural heritage, but rather the undue focus on ownership and the rights to exclude, develop and transfer that makes the model undesirable.[73] To remedy this misguided focus, they articulated a new property model that is based on a stewardship paradigm. As they explained, such a model would 'take[] into account indigenous peoples' collective obligations toward land and resources'.[74]

---

[64] Daes (n 17 above) [61].
[65] ibid [26].
[66] Naomi Mezey, 'The Paradoxes of Cultural Property' (2007) 107 Columbia L Rev 2004, 2005.
[67] Harding (n 12 above) 304.
[68] Daes (n 17 above) [29].
[69] Sarah Harding, 'Defining Traditional Knowledge—Lessons from Cultural Property' (2003) 11 Cardozo J Intl & Comparative L 511, 516.
[70] Harding (n 12 above) 306.
[71] ibid.
[72] Carpenter, Katyal and Riley (n 26 above).
[73] ibid 1079–80.
[74] ibid 1028.

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

> Each generation has a part in … stewardship. Having taken a storyteller position, I could show a great range of people who are involved in this stewardship, from the home gardener, the peasant farmer and the traditional plant breeder to the international policy maker; anybody, in fact, who is involved in the stewardship of the plants humans depend upon for life itself. For my money, that involves, to a greater or lesser extent, each one of us. But while the term 'stewardship' provides a useful context within which to place this or that aspect of our management responsibilities, it does not formally front up on the tough question: who owns the seed? 'A private or public resource?' Pat Mooney asks.[75]

In addition to the use of property rights, benefit sharing can be arranged through the use of knowledge transfer and research collaborative agreements.[76] The innovative approach taken by the Instituto Nacional de Biodiversidad (INBio) in Costa Rica provided a leading example of the successful use of these agreements. The agreements allowed companies like Merck to collect biological samples in conservatories set up in Costa Rica and conduct research and develop commercial products based on those samples in exchange for advance payment and royalties in those products.[77] As one commentator observed, since its establishment, INBio 'has signed more than 20 agreements with industry, … and the total of the research budgets have come to represent an investment of US$0.5 million per year for bioprospecting activities and US$0.5 million per year for capacity building, technology transfer and institutional empowerment'.[78] Although INBio was widely cited as a success a decade ago, recent reports have noted the institute's deep financial crisis.[79] It remains to be seen whether this crisis was caused by the bioprospecting arrangement or other unrelated factors.

In sum, a number of ways exists to allow traditional communities to share in the benefits of the exploitation of their intangible cultural heritage. Two problems remain, however. First, the establishment of benefit-sharing arrangements assumes that traditional materials can be freely commodified. This is not true with respect to materials that are sacred or intended to be kept secret. Second, and more importantly, there is no guarantee that the proceeds from the benefit-sharing arrangement will go directly to traditional communities. Many developing countries

---

[75] Barry Barclay, *Mana Tuturu: Maori Treasures and Intellectual Property Rights* (U of Hawaii Press 2005) 44–45.

[76] On bioprospecting arrangements featuring North-South cooperation, see Djaja Djendoel Soejarto et al, 'Bioprospecting Arrangements: Cooperation between the North and the South' in Anatole Krattiger et al (eds), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (Centre for the Management of Intellectual Property in Health Research and Development and Public Intellectual Property Resource for Agriculture 2007); Carl-Gustaf Thornstrom and Lars Bjork, 'Access and Benefit Sharing: Illustrated Procedures for the Collection and Importation of Biological Materials' in Krattiger et al (above).

[77] Rodrigo Gamez, 'The Link between Biodiversity and Sustainable Development: Lessons from INBio's Bioprospecting Programme in Costa Rica' in Charles R McManis (ed), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge* (Earthscan 2007) 82–83.

[78] ibid 83–84.

[79] Edward Hammond, 'Costa Rica's INBio, Nearing Collapse, Surrenders Its Biodiversity Collections and Seeks Government Bailout' *Third World Network Info Service on Biodiversity and Traditional Knowledge* (20 April 2013) <http://www.twnside.org.sg/title2/biotk/2013/biotk130401.htm> accessed 4 May 2014.

remain troubled by rampant corruption and inadequate infrastructure.[80] As a result, the revenues that are generated through the use of intangible cultural heritage may never reach the hands of traditional communities.

Indeed, commentators have been particularly concerned about the potential claims on revenues by mediating government agencies. As Tom Greaves wrote, 'all of the countries with significant indigenous societies have government mediator agencies to deal with them [and serve as the authorized guardians of their welfare].… Would [the earned revenues] by-pass these intermediate organizations?'[81] Likewise, Professor Brown questioned, 'Who are legitimate representatives of indigenous peoples in negotiations with foreign bioprospectors? Can the state speak for them, or must they be allowed to speak for themselves?'[82] To avoid diversion, some companies, like Shaman Pharmaceuticals, have chosen 'not … to return royalties directly to source communities but to a Northern-run NGO that will distribute the proceeds as it sees fit'.[83]

To make things even gloomier and more complicated, there is a historical lack of respect and representation for, and participation of, traditional communities in the political process.[84] This is true with respect to communities in both the developed and developing worlds. As Rosemary Coombe noted:

> Although indigenous peoples are now recognized as key actors in this global dialogue, it will need to be expanded to encompass a wider range of principles and priorities, which will eventually encompass political commitments to indigenous peoples' rights of self-determination. Only when indigenous peoples are full partners in this dialogue, with full juridical standing and only when … their cultural world views, customary laws, and ecological practices are recognized as fundamental contributions to resolving local social justice concerns will we be engaged in anything we can genuinely call a dialogue.[85]

The late Keith Aoki also reminded us that it is not difficult to 'imagine situations where the interests of subnational groups, communities or tribes are at loggerheads with state interests'.[86]

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

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

[80] Paul J Heald, 'The Rhetoric of Biopiracy' (2003) 11 Cardozo J Intl & Comparative L 519, 536.
[81] Greaves (n 11 above) 12.
[82] Brown (n 22 above) 112.
[83] Roht-Arriaza (n 21 above) 961.
[84] Scafidi (n 19 above) 56.
[85] Rosemary J Coombe, 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law' (2001) 14 St Thomas L Rev 275, 284–85.
[86] Keith Aoki, *Seed Wars: Controversies and Cases on Plant Genetic Resources and Intellectual Property* (Carolina Academic Press 2008) 92.

> may explain why they have readily acknowledged in legislation the entitlement of traditional groups to their folklore.[87]

Benedict Kingsbury also found the concept of 'indigenous people' somewhat problematic in Southeast Asia, due partly to its colonial history.[88]

Conservation

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

> The essential ingredient of any cultural property policy is that the object itself be physically preserved. The point is too obvious to need elaboration; if it is lost or destroyed, the Etruscan sarcophagus or the Peruvian textile or the Chinese pot cannot be studied, enjoyed, or used. Everything else depends on the physical survival of the cultural artifact itself. Indeed, from a certain point of view the observation is tautological; if we don't care about its preservation, it isn't, for us, a cultural object.[89]

Thus, many consider cultural artifacts as 'survivors'.[90] As such, they 'play[] an integral role in characterizing and expressing the shared identity and essence of a community, a people and a nation. Cultural property tells people who they are and where they come from.'[91] Different people have different ways to 'live[] their lives and order[] their values. [Because e]very human society manages to place its unique stamp on its artifacts … [cultural artifacts] reveal something essential about itself.'[92]

Like the protection of cultural artifacts, conservation is a very important objective of the protection for intangible cultural heritage. Unlike the protection of tangible objects, however, the conservation of such heritage focuses mainly on the materials—whether they are physical, cultural or biological. Such conservation does not focus on cultures themselves. As Professor Mezey reminded us, 'we humans should save species not because of the interest each species has in its own survival, but for the sake of diversity and the contribution of each species to a diversified global ecosystem'.[93]

Commentators have expressed concern about the ecological impact of increased intellectual property protection. As one commentator noted, one of the key ecological impacts of the TRIPS Agreement is 'the spread of monocultures as corporations with [intellectual property

---

[87] 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 American U L Rev 769, 841 (1999).
[88] Benedict Kingsbury, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia' in Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (CUP 1999).
[89] John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 California L Rev 339, 355.
[90] ibid 347.
[91] Stephanie O Forbes, 'Securing the Future of Our Past: Current Efforts to Protect Cultural Property' (1996) 9 Transnational Lawyer 235, 241–42.
[92] Merryman (n 89 above) 353.
[93] Mezey (n 66 above) 2010.

rights] attempt to maximize returns on investments by increasing market shares'.[94] To highlight the danger of a lack of biodiversity, commentators have retold stories about 'the Irish potato famine during the 1840s and the Southern Corn Leaf Blight during the 1970s'.[95] Jack Kloppenburg also pointed out that 'none of the world's twenty most important food crops is indigenous to North America or Australia … [and that] it is clearly the West Central Asiatic and Latin American regions whose germplasm resources have historically made the largest genetic contribution to feeding the world'.[96]

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

> The richness of biodiversity in the tropical South can be captured from few samples. A single leguminous tree in Peru harbours forty-three species of ants, almost the same as the entire ant population in Great Britain. Costa Rica has an estimated fifteen hundred to two thousand butterfly species. Britain has about sixty, even though Costa Rica constitutes less than one-sixth of the British land area. To physical/zoological geographers and conservation biologists, the whole of Europe is but a small fragment compared to Asia in terms of diversity of animal life. All the tree species in North America are equal to just seven hundred species of trees in ten selected one-hectare plots in Borneo. The Cape Florist Peninsula in South Africa, which is only 470 square kilometres in area, is home to over two thousand indigenous species, a greater number than the entire flora species of Eastern North America. A square-kilometre of the forests of Central or South America contains a legendary collection running into hundreds of assorted species.[97]

Sadly, the international system operates in the opposite direction: the wealth of a country is usually inversely proportional to the richness of its biodiversity. Because the market offers limited value to traditional materials and biological resources, the South was unable to convert their biological wealth to economic development. To add insult to the injury, the biodiversity-poor countries 'are now exporting wheat, corn, and rice to the very nations in which those crops originated'—at high prices at times.[98] In view of this inequitable arrangement, developing countries are now demanding reform that reflects their contributions and takes account of their local conditions.[99] They also seek greater financial resources from developed countries to help conserve biological resources.

Fortunately, as Paul Heald suggested, conservation of natural resources may provide common ground for developed and developing countries, traditional and nontraditional communities, and corporations and individuals to work together. As he explained, 'preservation is in the direct financial interest of some of the most powerful private institutions on the earth—international pharmaceutical, agribusiness and bio-tech firms—and it is worth convincing them

---

[94] Scott Holwick, 'Developing Nations and the Agreement on Trade-Related Aspects of Intellectual Property Rights' (2000) 11 Colorado J Intl Environmental L & Policy (1999 Yearbook) 49, 58.
[95] Aoki (n 86 above) 24.
[96] Jack Ralph Kloppenburg, Jr, *First the Seed: The Political Economy of Plant Biotechnology, 1492–2000* (U of Wisconsin Press 1988) 181.
[97] Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property, Plant Biodiversity, and Traditional Medicine* (U of Toronto Press 2006) 39–40.
[98] Kloppenburg (n 96 above) 274.
[99] Peter K Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime' (2004) 38 Loyola of Los Angeles L Rev 323, 381–92.

to support the effort'.[100] Indeed, conservation would help create 'ethnic externalities' that may benefit the entire world—both in the cultural and biological sense.[101]

While conservation benefits all humanity, including both traditional and nontraditional communities, conservation provides additional benefits to traditional communities. In some cases, conservation may even be needed to enable these communities to survive. As the IPR Commission declared in the public health context:

> Traditional knowledge is essential to the … health of millions of people in the developing world. In many countries, traditional medicines provide the only affordable treatment available to poor people. In developing countries, up to 80% of the population depend on traditional medicines to help meet their healthcare needs. In addition, knowledge of the healing properties of plants has been the source of many modern medicines.[102]

According to Professor Coombe, 'most of the worlds' poorest people depend upon their traditional environmental, agricultural, and medicinal knowledge for their continuing survival, given their marginalization from market economies and the inability of markets to meet their basic needs of social reproduction'.[103]

Access

An objective that is often mentioned along with conservation is access. Access is important to scientific research. The need for access by the scientific and museum communities, however, has created significant tension with the interests of traditional communities. A notable example concerns the discovery of what traditional communities have called the 'Ancient One', but what the popular press and many commentators have dubbed the 'Kennewick Man'—a label derived from Kennewick, Washington, the town near which the skeleton was found.[104] As Professor Harding described:

> In the summer of 1996, two men came across the remains of a human skeleton lying in the Columbia River. After a brief investigation, a group of anthropologists made two tentative findings. First, the skeletal remains were that of a Caucasian and could not be assigned to any Native American tribe living in the area. Second, the skeletal remains were approximately 9000 years old. The age and location of the remains led the Army Corps of Engineers to assume they were associated with local Native American tribes and to send out a notice of intent to repatriate the remains in accordance with NAGPRA [Native American Graves Protection and Repatriation Act of 1990]. Numerous tribes in the area subsequently laid claim to the remains, now known as the Kennewick Man, named after the town near where he was discovered. At least two of the tribes claiming the remains, the Umatilla and the Nez Perce, announced that they would not permit scientific research on the remains prior to reburial. Shortly after the publication of the notice of intent and before actual repatriation, a group of scientists filed suit in federal district court claiming, among other things, the right to perform

[100] Heald (n 80 above) 538.
[101] Sarah Harding, 'Justifying Repatriation of Native American Cultural Property' (1997) 72 Indiana LJ 723, 747.
[102] Commission on Intellectual Property Rights (n 1 above) 73.
[103] Rosemary J Coombe, 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?' (2005) 17 Florida J Intl L 115, 115.
[104] Allison M Dussias, 'Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act' (2005) 84 Nebraska L Rev 55, 131–33; Gerstenblith (n 38 above) 163–67; S Alan Ray, 'Native American Identity and the Challenge of Kennewick Man' (2006) 79 Temple L Rev 89.

> tests on the remains to determine whether the skeleton is Native American within the meaning of NAGPRA. The scientists were subsequently joined in their lawsuit by the Asatru Folk Assembly, a pre-Christian, European religion, which sought custody of the remains on the basis of the alleged European descent of the remains for the purpose of scientific study and reburial in accordance with their religious beliefs.[105]

After eight years, the US Court of Appeals for the Ninth Circuit finally decided that the approximately 9,000-year-old remains did not fall within the scope of NAGPRA.[106] Because the remains were not culturally affiliated with any legitimate claimant, the court did not order the remains to be repatriated and permitted scientific research on the skeleton.

While scientists and archaeologists tend to place higher values on research and discoveries than cultural privacy and respect,[107] it is hard to ignore the fact that these value-laden decisions tend to privilege the nontraditional worldview over the traditional one. As Rebecca Tsosie pointed out, 'The complex world views [to which traditional communities subscribe] … encompass radically different notions of life, death, kinship and cultural continuity, and suggest that the scientific proof standard is a complete mismatch for Native American claims to ancient remains. Science is incapable of demonstrating what Kennewick Man's "culture" was.'[108] It is therefore no surprise that the International Society of Ethnobiology stated as one of its guiding principles that scientists and researchers should have a duty 'to ensure that their research and activities have minimum impact on local communities'.[109] After all, the controversy surrounding the Ancient One, or the Kennewick Man, is one 'about whether the self-definition of a Native American group should be recognized even when it conflicts with the scientific interests of the dominant cultural and political group in the United States'.[110]

The reburial of human remains of indigenous peoples, indeed, has sparked significant controversies and concerns among the indigenous, scientific and museum communities.[111] It has also raised questions about whether indigenous peoples should be treated differently. With the assistance provided by the NAGPRA, indigenous communities have begun to insist on the return of all the human remains that are still housed in museums or research institutions.[112] As one commentator noted, 'most of the tribes believe that if you rob the dead … it disturbs the spirit and visits harm upon not only those who disturbed the grave, but on the relatives of the dead, who allowed that to happen'.[113] Likewise, Professor Harding reminded us that 'the Kumeyaay believe that if the remains of an ancestor are disturbed, the spirit returns from the afterworld and remains in pain until the remains are again returned to the earth'.[114] By contrast, many museums believe that the retention of the remains is needed both for research purposes and for meeting

---

[105] Harding (n 12 above) 349.
[106] Bonnichsen v United States, 367 F.3d 864, 882 (9th Cir 2004).
[107] Neil Brodie, 'An Archaeologist's View of the Trade in Unprovenanced Antiquities' in Hoffman (n 35 above) 52.
[108] Rebecca Tsosie, 'Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values' (1999) 31 Arizona State LJ 583, 640.
[109] Posey (n 13 above) 214.
[110] Gerstenblith (n 38 above) 178.
[111] On the effort by a young Inuit man and his tribe to rebury the human remains of his father displayed in the American Museum of Natural History in New York, see Kenn Harper, *Give Me My Father's Body: The Life of Minik the New York Eskimo* (Steerforth Press 2000).
[112] Gerstenblith (n 38 above) 162–63.
[113] Vicki Quade, 'Who Owns the Past?: How Native American Indian Lawyers Fight for Their Ancestors' Remains and Memories' (Winter 1989–1990) *Human Rights* 24, 29.
[114] Harding (n 101 above) 765.

their patrons' general expectation of authenticity.[115] Scientists, understandably, also place high values on research, which they claim will benefit all humanity, including both traditional and nontraditional communities.[116]

Another example that illustrates well the tension between access and control concerns the potentially destructive practices of some traditional communities—such as the Zunis' treatment of their *Ahayu:da* and the Igbo people's neglect of their *mbaris*. *Ahayu:da*, the Zuni War Gods, 'are carved wooden figures which are left in specific places in the mountains for ritual purposes'.[117] As Professor Harding noted, 'the most respectful treatment [of these War Gods may be] destruction or neglect'.[118] Removing them is therefore not only considered theft and sacrilege, but may rob the War Gods of their powers.[119] Putting these statues in a museum also would deeply disturb the Zunis, and perhaps other traditional communities, creating cultural discomfort, psychological distress and even spiritual harm. As Professor Harding explained:

> Violating the wishes and needs of Native American tribes with respect to their cultural property neither helps the non-Indian population understand Indian cultures nor assists in creating a sense of connection. This notion of a common heritage [as embraced by many museums] is at best an amorphous idea and at its worst an excuse to impose a museum-going culture on an often not-so-receptive Indian population. It is more often than not an easy excuse to put our own Western educational, scientific, and artistic demands over and above the interests and integrity of another culture.… Our common heritage is, if anything, our ability to appreciate the beauty and integrity of another culture and so it should be with an eye on preserving cultural integrity that we go about understanding and dealing with cultural property.[120]

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

> Indigenous peoples … tend to place greater emphasis on intangibles and process.… The Igbo intentionally destroy or neglect their artfully created structures to ensure the vitality of the urge to recreate: 'The purposeful neglect of the painstakingly and devoutly accomplished *mbari* houses with all their art objects in them as soon as the primary mandate of their creation has been served, provides a significant insight into the Igbo aesthetic value as *process* rather than *product*. Process is motion while product is rest. When the product is preserved or venerated, the impulse to repeat the process is compromised.'[121]

---

[115] Gerstenblith (n 38 above) 162–63.
[116] Merryman (n 89 above) 359.
[117] Harding (n 101 above) 746 fn. 118.
[118] ibid 771.
[119] ibid 746 fn. 118.
[120] ibid 769.
[121] Harding (n 12 above) 309–10.

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

> Collecting nations choose to reify the objects themselves, placing them in hermetically sealed display cases, whereas in many instances, source nations and indigenous peoples desire to preserve the spirit of the object over the object itself. Often the destruction, neglect, or seclusion of the object is, in fact, central to the preservation of the spirit, as is the case with the *mbari* house of the Igbo and the Zuni War Gods.[122]

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

> The patent may … mean that the price everywhere is higher than it would be were the product available without patent protection. It remains a fair question, however, whether the improved product would exist at all but for the patent incentive. We must bear in mind that no one is forced to buy the new product. *Everyone is free to continue using whatever he or she has used in the past*. Those who do choose to buy patented seed, for example, presumably believe that the higher seed cost is more than compensated by the beneficial improvements brought about by the newer product.[123]

Although Professor Karjala focused on patents, his arguments apply equally well to other forms of intellectual property or sui generis rights. As he concluded, 'The harmful influences of western life style for indigenous cultures are serious and real. Unfortunately, they will not be ameliorated by what would inevitably be minor adjustments to patent law in western countries or in locales of traditional cultures.'[124]

Theory, however, sometimes differs from practice. For instance, the issued patents and plant variety protection certificates may be overbroad and therefore may cover TK that should be considered unprotectable prior art. In the United States and other developed countries, there have been wide and intense discussions about the poor quality of the patent examination process. There have also been successful challenges by traditional communities and indigenous groups to patents that have been wrongfully issued to preexisting TK.[125] Indeed, because of a lack of documentation for TK and the difficulty in determining whether an invention has used such pre-existing knowledge, commentators have proposed to introduce a disclosure requirement in the patent application procedure.

By expanding rights and protecting them aggressively, the intellectual property system sometimes may also lead to unintended consequences that can affect the ability by traditional communities to exploit their knowledge and practices. For example, commentators have noted the confusion among US customs officials over whether it is legal for Mexican farmers to import into the United States naturally grown yellow beans that have been native to Mexico since

---

[122] ibid 312.
[123] Dennis S Karjala, 'Biotechnology Patents and Indigenous Peoples' in Krattiger et al (n 76 above) 1440 (emphasis added).
[124] ibid 1442.
[125] Commission on Intellectual Property Rights (n 1 above) 75–79.

perhaps the time of the Aztecs.[126] Such confusion, which has resulted in significantly reduced bean exports from Mexico to the United States,[127] was caused by the issuance of a patent and plant variety protection certificate to the Enola variety of yellow beans that originated from Mexico.

To be certain, it is difficult to distinguish between the patented beans and the naturally grown variety. It is also worth pointing out that the patent in the Enola beans has since been revoked.[128] Thus, technically, it is not the protective regime per se that caused the problem, but rather the failed or improper implementation of that regime. However, from the standpoint of traditional communities, this type of situation would not have occurred had intellectual property rights not been aggressively protected in the first place. To them, the abuse was an inevitable result of the continuous and ill-advised expansion and overzealous enforcement of intellectual property rights.

Resistance

Commentators have widely documented the growing problems of biopiracy and the continuous push for stronger intellectual property protection, which ranges from heightened protection through the TRIPS Agreement to additional safeguards through the recently established bilateral and regional agreements. As a result, traditional communities and developing countries are eager to use the protection of intangible cultural heritage to fight back. As Antony Taubman noted, 'in practice, the impulse towards strengthened protection of TK originates from a sense that [intellectual property] rights have been used to misappropriate material that might otherwise have fallen into the public domain'.[129]

Although traditional communities and developing countries understand the need to reduce biopiracy and the continued pressure to expand intellectual property rights, some of them may not have any overarching objectives other than to resist the continuing push for stronger protection by nontraditional communities and developed countries. As Professor Harding observed, 'at least one individual has expressed a sentiment about repatriation that is likely common among Native Americans: "Our dream is to pull a U-Haul up and take back as much as we can."'[130] This comment captured very well the fight-back mentality of many traditional communities and developing countries. To them, the new international framework for the protection of intangible cultural heritage is not just a shield to protect themselves, but also a sword to enable them to recapture what they have lost under the current unfair system.[131]

To be certain, the wide use of resistance is likely to stifle international cooperation and result in greater isolation. However, it is understandable why these communities want to fight back through resistance—as compared to, say, cooperation. There has been growing mistrust

---

[126] Finger (n 32 above) 23–24.
[127] Gillian N Rattray, 'The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips' [2002] Duke L & Technology Rev 0008.
[128] ETC Group, 'Hollow Victory: Enola Bean Patent Smashed at Last (Maybe)' (30 April 2008) <http://www.etcgroup.org/content/hollow-victory-enola-bean-patent-smashed-last-maybe> accessed 4 May 2014.
[129] Taubman (n 59 above) 543.
[130] Harding (n 69 above) 515.
[131] Dutfield (n 46 above) 496; WIPO (n 8 above) 13.

between developed and developing countries as well as between traditional and nontraditional communities about the willingness and ability of the current legal regime to protect intangible cultural heritage.

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

> I recall the diplomat in Buenos Aires who said in a public forum that Argentina must withhold the intellectual property chip because Argentina has few others to play into the international trade negotiations game. He speaks for many other developing country trade negotiators. I later suggested to him, privately, that more might be achieved for the Argentine trade account if robust intellectual property were installed immediately. The result could well be that more Argentine producers and farmers would upgrade their products, crops and animals and become more competitive internationally. Instead, if they wait for eventual trade negotiation success, they might lower a European tariff a few notches, if that, but the gain would be narrow and selective, rather than sweeping across the industrial and agricultural sectors of the economy. He readily agreed, but insisted that the chip must be withheld to give his country something with which to bargain.[132]

This encounter shows that developing countries may not necessarily want to request protection in those areas, but they choose to do so because they fear that they would not have any bargaining chips left for future negotiations. The same can be said of traditional communities. Like many developing countries, these communities remain frustrated by the existing system, and some of them have become increasingly desperate. As Suzan Harjo, the former head of the National Congress of American Indians, put it poignantly, '[T]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There's little left that's tangible. Now they're taking what's intangible.'[133]

Conclusion

The stakeholders in the debate on intangible cultural heritage want to achieve many different objectives. A deeper understanding of these objectives would certainly help us better appreciate the stakes involved in the debate and the rich variety of proposals advanced by the relevant stakeholders. Such an understanding would provide important clues on how to design a new framework to protect intangible cultural heritage. It would also provide important information about the various competing interests among indigenous peoples and within traditional communities as well as the potential challenges to achieving international consensus on the protection of these interests.

In reviewing the eight underlying objectives discussed in this article, it is important to recognize that these objectives are not always mutually exclusive, and advocates of strong protection for intangible cultural heritage often combine different objectives to craft their proposals. Nevertheless, some of these objectives may overlap or conflict with each other, while

---

[132] Robert M Sherwood, 'Some Things Cannot Be Legislated' (2002) 10 Cardozo J Intl & Comparative L 37, 39.
[133] Farley (n 18 above) 12.

the others may affect only a minority of the stakeholders. Thus, a better and deeper understanding of these objectives would help us anticipate the political dynamics surrounding the negotiations in this emerging area.

In the near future, achieving consensus is likely to remain a challenge. If the new international framework for the protection of intangible cultural heritage is defined too narrowly—with an exclusive focus on selected objectives, perhaps—this framework is unlikely to have enough buy-in from the non-beneficiaries. This is not uncommon in conventions that seek to protect cultural heritage: one only has to consider the membership of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which is made up of mostly source nations.[134]

However, if the framework is defined too broadly—to the point that it encompasses all the different objectives, or at least most of them—the framework's vague and aspirational language may ultimately undermine its effectiveness. A case in point is the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This convention is more 'aspirational ... than obligatory', and its drafters seemed to be more interested in providing a platform for nurturing a long-term dialogue than achieving short-term results.[135]

It took more than 13 years to finalize the Declaration on the Rights of Indigenous Peoples. Similarly, despite meeting for close to a decade and a half, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore only began recently to submit draft treaty texts to the WIPO General Assembly for consideration. It is therefore likely to take some time before a new international framework can be established to offer concrete protection to intangible cultural heritage. As new players and issues emerge, the policy debate in this area will likely become even more complex.

[134] Michael L Dutra, 'Sir, How Much Is That Ming Vase in the Window?: Protecting Cultural Relics in the People's Republic of China' (2004) 5 Asian-Pacific L & Policy J 62, 77.
[135] Mezey (n 66 above) 2013.