

# Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property

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“A sense of injustice could serve as a signal that moves us, but a signal does demand critical examination, and there has to be some scrutiny of the soundness of a conclusion based mainly on signals.”

—Amartya Sen<sup>1</sup>

## I. INTRODUCTION

In 2001, a committee at the World Intellectual Property Organization (WIPO) began discussions on two topics that had long been at the periphery of the global intellectual property system: folklore and traditional knowledge.<sup>2</sup> A third topic—demands for recognition and protection of genetic resources in the patent system—also became part of the mandate of this new Intergovernmental Committee (IGC). The new subject matter came to be known by a fairly impenetrable set of initials: GRTKF (genetic resources, traditional knowledge, and folklore). To make things even more obscure, *folklore* is a term that has fallen out of favor and is now rarely used by itself. Instead, those involved in the IGC discussions of GRTKF refer to folklore as “traditional cultural expressions” (TCE).

That terminological disconnect is itself indicative of the definitional instabilities in this field. For the discussion here, we can work from rough understandings of the subject matter—starting with the most familiar of these concepts: folklore. Folklore includes traditional music,

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1. AMARTYA SEN, *THE IDEA OF JUSTICE*, at viii (2009).

2. See World Intellectual Prop. Org. [WIPO], *Rep. of the Intergovernmental Comm. on Intellectual Prop. and Genetic Resources, Traditional Knowledge and Folklore*, WIPO/GRTKF/IC/1/13 (May 23, 2001), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_13.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_13.pdf).

dances, stories, rituals, insignia, arts and crafts, sculptural forms, architectural forms, et cetera. Traditional cultural expression covers the same waterfront of human expression, but is now regarded as a more neutral, less quaint term than *folklore*.<sup>3</sup>

“Traditional knowledge” is a less familiar concept. Some commentators use this phrase to refer to *all* that is known and expressed by traditional groups, including traditional cultural expressions.<sup>4</sup> Conversely, some commentators and policymakers have defined *folklore* to include all traditional knowledge.<sup>5</sup> Again, it seems best to avoid these fairly jejune terminological debates. Here, as in most current WIPO discussions, traditional knowledge is used to refer to indigenous and local technologies—typically diagnostic, therapeutic, horticultural, predictive, or related to engineering with natural materials. Traditional knowledge (TK) is the local wisdom that chewing a specific leaf relieves headaches, that fibers

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3. See Hugh C. Hansen et al., *Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 756 (2001) (discussing reasons against use of the term *folklore*).

4. See, e.g., WIPO, Information Brochure, *Towards the Establishment of a Regional Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in the Caribbean Region*, A3:L434E (2008), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtk\\_kin\\_08/wipo\\_grtk\\_kin\\_08\\_caribbean\\_brochure.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_kin_08/wipo_grtk_kin_08_caribbean_brochure.pdf) (“‘Traditional knowledge’ in its broadest sense includes knowledge and ‘expressions of folklore’ (or TCEs). For the purpose of this brochure, however, TK refers to the *content* or *substance* of traditional know-how, skills and learning whereas TCEs refers to tangible and intangible forms of expressing knowledge and culture.”); David R. Hansen, *Protection of Traditional Knowledge: Trade Barriers and the Public Domain*, 58 J. COPYRIGHT SOC’Y U.S.A. 757, 759 (2010–2011) (calling cultural expressions a “small subset” of “traditional knowledge,” but recognizing current use in WIPO and World Trade Organization (WTO) discussions); *id.* at 765 (same); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 48 (2009).

5. See, e.g., Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property, Annex VII, art. 46, Mar. 2, 1977 [hereinafter *Bangui Agreement of March 2, 1977*], available at [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=227](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227) (defining *folklore* for some provisions as including “scientific knowledge and works” as well as “technological knowledge and works,” and “metallurgical and textile industries” and “agricultural techniques”); P.V. Valsala G. Kutty, WIPO, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, at 9, WIPO/GRTKF/STUDY/1 (Nov. 25, 2002), available at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf> (defining *folklore* as including “folk medicines” and “folk technology” and reasoning that “based on the characteristics that have been associated with it, ‘folklore’ can be defined as the sum total of human creativity”).

of a particular plant have a particular tensile strength for bows, and that particular weather is likely to follow particular cloud formations in a particular place.<sup>6</sup>

An easy way to understand the distinction between TK and TCE, but one that feeds into preconceived Western categories, is that TCEs are in the realm of copyright and trademarks while TK roughly maps onto that which would be patentable were it novel and nonobvious instead of being traditional. As with copyright, trademark, and patent, there can be some overlap between TCE and TK. We have both TCE and TK when a ritual pipe-smoking ceremony involves smoke with actual, intended pharmacological effects. One simple example might help: a rain dance is TCE, but if the rain dance works—if it actually triggers precipitation in a cause and effect relationship—it is also TK.<sup>7</sup>

These two topics involve discussions of new, positive intellectual property norms to protect the subject matter in question. In contrast, the genetic resources discussion is essentially one about limiting or conditioning intellectual property rights. The main argument is that patentable innovations that use genetic resources should be patentable only when there is both prior informed consent and appropriate benefit sharing with the peoples or land that contributed the raw genetic material. What links the genetic resources debate to discussions about TK and TCE is that all three involve rights, remuneration, and respect for inputs to innovation that are typically taken for granted.

At the time of this writing, the IGC negotiations in Geneva have continued for over a decade with no workable system yet in sight. And it is particularly because there is not yet a probable outcome that the space may exist for a more reflective analysis on whether the protection of TK/TCE sought by the *demandeurs* can be justified. Many commentators have offered particular justifications, and a few commentators—notably Stephen Munzer and Kal Raustiala<sup>8</sup>—have undertaken more systematic efforts to apply Western traditional justifications of intellectual property to non-Western traditional knowledge and cultural expressions. Some of what I will say here concurs with Munzer and Raustiala, although I may

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6. Traditional knowledge is local wisdom; as linguist David Crystal puts it, “all over the world, encounters with indigenous peoples bring to light a profound awareness of fauna and flora, rocks and soils, climatic cycles and their impact on the land, the interpretation of landscape, and the whole question of the balance of natural forces.” DAVID CRYSTAL, *LANGUAGE DEATH* 46–47 (2000).

7. See WIPO, Booklet No. 2, *Intellectual Property and Traditional Knowledge*, at 4–5, WIPO Pub. No. 920(E) (June 27, 2005), available at [http://www.wipo.int/freepublications/en/tk/920/wipo\\_pub\\_920.pdf](http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf) (“A traditional tool may embody TK but also may be seen as a cultural expression in itself by virtue of its design and ornamentation.”).

8. See Munzer & Raustiala, *supra* note 4.

reach similar conclusions via different pathways. Along the way, I will try to discuss the concerns of someone who has been involved in the negotiations and has spent a fair amount of time listening to what proponents of TK/TCE protection believe they are advocating.

Part II of this Article will provide a very brief overview of theories used to justify intellectual property, the brevity corresponding to the reader's likely familiarity with these accounts. Part III then surveys the history of international discussions on the protection of TK/TCE as well as the narrative on misappropriation and exploitation that motivates the *demandeurs*. That discussion concludes with the fundamental questions or issues that negotiators have realized will make or break any system for protection of TK/TCE.

These key issues inevitably resurface when we attempt, in Part IV, to apply accepted theories and justifications for intellectual property to the subject matter of TK/TCE. Not surprisingly, traditional incentive and welfare-maximizing theories for intellectual property fit uneasily with TK/TCE; labor-desert theories probably do not fare any better, but that will depend on one's understanding of the *object of desert*. And in contrast to incentive theories for the production and commercialization of intellectual property, incentives for preservation and conservation of TK/TCE might provide some support for intellectual property rights in this realm. Justifications for intellectual property based on personality, personhood, or autonomy can *work* for TK/TCE—as can privacy justifications, at least for *some* TK/TCE.

Part V then turns to redistributive and *fairness* concerns, proposing that these may be the best philosophical justifications for protection of TK/TCE. This account of protection of TK/TCE is likely part of a larger chunk of thinking, which Robert Merges and I have discussed—that the relationship of intellectual property to redistributive concerns is largely overlooked or misunderstood. Rotating through these different possible grounds for protection of TK/TCE is compatible with Michael Walzer's proposal that distinct areas of our lives can be governed by distinct principles of justice,<sup>9</sup> as well as Amartya Sen's belief that decisions can be taken and policies adopted on the basis of multiple foundations that are mutually reinforcing without any one principle being dominant.<sup>10</sup>

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9. See generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

10. Sen calls this "plural grounding" and describes it as being the notion that "central to the idea of justice, is that we can have a strong sense of injustice on many

In considering whether there are good theories to justify protection of TK/TCE, we are clearly not working on a project about ideally just social institutions. In contrast, this is an exercise in what Sen would call “determining whether a particular social change would enhance justice.”<sup>11</sup> This is a project in *nyaya*—the “lives that people are actually able to lead”—versus the fundamental organizational justice of *niti*, akin to the idealized projects that have occupied much of Anglo-American philosophy.<sup>12</sup>

As a practical project, crafting *workable* international protection of TK/TCE will be threading a needle. *If* the needle can be thread, the resulting intellectual property rights could protect meaningful privacy interests, provide marginal incentives for preservation of TK/TCE, and serve the ends of distributive justice in a modest way. But even then, we may still conclude that legal protection of TK/TCE would produce so many adverse side effects that the game is not worth the candle.

## II. FAMILIAR THEORIES TO JUSTIFY INTELLECTUAL PROPERTY RIGHTS

There are plenty of theories, justifications, and plain old accounts of intellectual property. There have also been some concise reviews of these many theories, including distinctly valuable projects by Peter Menell<sup>13</sup> and William Fisher.<sup>14</sup> Menell provides a simple taxonomy: utilitarian theories and everything else.<sup>15</sup> Menell’s goal was to describe all the schools of thought that bear on intellectual property, not merely the theories that are considered as providing *justifications* for intellectual property in its present forms. Fisher’s project is more limited: Fisher groups the varied *positive* accounts of intellectual property into four clusters,<sup>16</sup> a topology I will use here.

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different grounds, and yet not agree on one particular ground as being *the* dominant reason for the diagnosis of injustice.” SEN, *supra* note 1, at 2 (internal quotation marks omitted).

11. *Id.* at ix.

12. *Id.* at xv.

13. See Peter S. Menell, *Intellectual Property: General Theories*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS: CIVIL LAW AND ECONOMICS 129 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

14. See William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

15. See Menell, *supra* note 13, *passim* (natural rights/labor theory, unjust enrichment, personhood theory, Libertarian theories, distributive justice, democratic theories, radical/Socialist theories, and ecological theories).

16. Fisher, *supra* note 14, at 173.

### A. Green Eyeshade Accounts (*That Is, Incentives*)

The “incentive” justifications that provide the high-profile undergirding of American copyright and patent law are the most visible part of utilitarian and welfare-maximizing theories of intellectual property.<sup>17</sup> As Peter Menell writes, “Utilitarian theorists generally endorsed the creation of intellectual property rights as an appropriate means to foster innovation, subject to the caveat that such rights are limited in duration so as to balance the social welfare loss of monopoly exploitation.”<sup>18</sup> By varying the assumptions as to human and institutional behavior, markets, and information, utilitarian theories can produce a wide range of recommendations for systems of “exclusive privilege”—to use John Stuart Mill’s phrase<sup>19</sup>—to motivate innovation and the diffusion of that innovation. For the purposes of this Article, it is important to remember that (1) the incentive element from the exclusive rights or privilege *may* apply across the entire timeline of intellectual property—conception, development, commercialization, preservation—and (2) the rational agent who is the subject of the incentives can be someone other than private individuals.

### B. Labor Theory Accounts

Sitting close to the incentive justifications are “labor theory” justifications, almost always traced back to John Locke<sup>20</sup> and richly explored in the literature, including by many of the participants of this conference.<sup>21</sup> Labor theory justifications “sit close” to incentive

17. *Id.* (“References to the role of intellectual-property rights in stimulating the production of socially valuable works riddle American law.”).

18. Menell, *supra* note 13, at 129.

19. JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 112 (Oxford Univ. Press 1991) (1859).

20. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 27, at 328–29 (Peter Laslett ed., New Am. Library 1965) (1690).

21. See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992); Justin Hughes, *Locke’s 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENT. L.J. 555 (2010); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–330 (1988) [hereinafter Hughes, *Philosophy*]; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004); Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179 (2008) [hereinafter Merges, *Locke for the Masses*]; Robert P. Merges, *Locke Remixed* :-), 40 U.C. DAVIS L. REV. 1259 (2007); see also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

justifications because the two have many similar assumptions and are usually compatible but remain quite different, particularly if the labor justification is seen as a labor-desert theory or rooted in natural law.<sup>22</sup> This cluster of accounts also has a rich vein of legislative and judicial pronouncements in American law supporting it as an intended foundation for American intellectual property law.<sup>23</sup>

### C. Personality Accounts

The accounts of intellectual property in Fisher's third cluster try to justify intellectual property as a means to maximize human development and flourishing. Different "personality" or "personhood" theories, "derived loosely from the writings of Kant and Hegel," reason that exclusive rights over expression are an appropriate mechanism to enhance the individual person's development and general human flourishing.<sup>24</sup> These justifications sit within a larger body of work across an ideological spectrum from Margaret Jane Radin to Richard Pipes that sees property in all forms as contributing to personality, autonomy, and individual identity.<sup>25</sup>

Students of intellectual property law know that personality justifications apply best to the subject matter of copyright, but even if inventors do not "express" themselves in their innovations, those innovations may still be significant to the inventor's self-perception.<sup>26</sup> Even within copyright, it

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22. Locke's theory is commonly identified as a "natural law" theory, but people differ on this point and it appears to many that for Locke, property after the establishment of government and the introduction of currency is no longer based on natural rights. See JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 99, 123 (1980); Thomas Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFF. 6, 23 (1976).

23. Fisher notes a "durable and widespread popular commitment in the United States to a labor-desert theory of property." William W. Fisher III, *Geistiges Eigentum—Ein Ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, in EIGENTUM IM INTERNATIONALEN VERGLEICH: 18.–20. Jahrhundert 265, 277 (Hannes Siegrist & David Sugarman eds., 1999) (Ger.), translated in William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, BERKMAN CENTER FOR INTERNET & SOC'Y HARV. U. 12, <http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf> (last visited Jan. 5, 2013); see also BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 108 (1967) (noting "overtones of the natural law concept" in early American copyright laws).

24. Fisher, *supra* note 14, at 171–72.

25. See RICHARD PIPES, PROPERTY AND FREEDOM 65 (1999) (arguing that acquisitiveness and, therefore, the institution of property is "intimately connected with the human personality by promoting a sense of identity and competence"); MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

26. I make the same argument in Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998).

is widely thought that personality justifications are much more visible in continental *droit d'auteur* systems than Anglo-American copyright. But anyone who thinks that personhood justifications are alien to American copyright law has overlooked a rich vein of materials, both before and after Justice Holmes's seminal 1903 evocation of personality as a measure of originality in *Bleistein v. Donaldson Lithographing Co.*<sup>27</sup>

#### D. Culture Accounts

Fisher also identifies a fourth cluster of theories that reason that intellectual property “can and should be shaped so as to help foster the achievement of a just and attractive culture.”<sup>28</sup> Fisher lumps Jefferson, Marx, the Legal Realists, and quite a few present day academics, including himself, in this group.<sup>29</sup> Obviously, there is some overlap here between theories that see intellectual property as a means to produce an attractive culture and intellectual property as a means to maximize cultural utility; there is also overlap between theories that see intellectual property as a mechanism to maximize social utility or cultural robustness and theories that intellectual property should maximize individual “flourishing.”<sup>30</sup>

#### E. The Usefulness of These Ideas and Others

It is difficult to disagree with Fisher's assessment that “the prescriptive powers of all four [clusters of] arguments are sharply limited”<sup>31</sup> and that “[s]erious difficulties attend efforts to extract from any one of these approaches answers to concrete doctrinal problems.”<sup>32</sup> Moreover, these four clusters by no means exhaust all the reasons one could give to justify intellectual property rights. Courts, unlike academics, seem to give greater

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27. 188 U.S. 239, 249–50 (1903).

28. Fisher, *supra* note 14, at 172.

29. In addition to himself, Fisher would include Rosemary Coombe, Niva Elkin-Koren, Michael Madow, Neil Netanel, and the late Keith Aoki. *Id.* at 172–73 (citing Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1990–1991); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1995); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744–94 (1988); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125 (1993)).

30. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

31. Fisher, *supra* note 14, at 194.

32. *Id.* at 180.

weight to privacy concerns, custom, tradition, and fairness in intellectual property discussions.

Of these, *fairness* is an extremely powerful, freestanding force in the intellectual property discourse of courts and legislators in a way that is not found in late twentieth and early twenty-first century legal academic literature. We might speculate that appeals to fairness can help a judge avoid reversal, but that fairness itself does not give the legal scholar much to write about—notwithstanding John Rawls and his progeny.

### III. THE LONG WINDING ROAD OF TK/TCE

At the international level, the struggle over legal protection of TK/TCE cleaves nicely into two parts: before and after the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), with the latter era beginning in earnest in 2001—the year when TK/TCE became a serious subject of discussions in both the WIPO and the World Trade Organization (WTO).<sup>33</sup> Before reviewing these developments, we should keep in mind the problem, or problems, that *demandeurs* seek to address through legal protection of TK/TCE.

#### A. A Real but Amorphous Problem

There is no question that there has been a history of “outsiders”—whether foreigners or Western-educated local elites—studying indigenous or local communities, then appropriating or misappropriating elements from those indigenous or traditional societies. That history began with the earliest cultural exchanges and took on particularly egregious characteristics during the colonial empires of European powers. Indeed the exploitation, real and perceived, of colonial times still colors attitudes toward Western researchers, so much so that linguist David Crystal noted in 2000 that “[e]conomic exploitation is so common that it is only natural for a community to assume that a Western investigator is there to make money out of them.”<sup>34</sup>

As Crystal’s comment indicates, the narrative that all-interactions-are-exploitation remains strong among those who advocate TK/TCE

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33. On the WTO side, the 2001 Doha WTO Ministerial Declaration instructed “the Council for TRIPS, in pursuing its work programme . . . to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1.” World Trade Organization [WTO], Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#trips](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#trips).

34. CRYSTAL, *supra* note 6, at 148.

protection.<sup>35</sup> But the situations that fall under the general description of outsiders appropriating TK/TCE from indigenous people and local communities are more varied and often more complex.

In the case of knowledge or know-how, there has been a history of researchers, both from developed and developing countries, gaining insights from indigenous people and local communities, then converting those insights—often through substantial additional research and development—into “technology.”<sup>36</sup> Sometimes the transfer of an indigenous community’s insight into a modern technology is direct; an example of fairly direct transfer is a South African research institute’s isolation of the appetite suppressant P57 from the Hoodia cactus—research based on traditional knowledge held by San and other indigenous people in southern Africa.<sup>37</sup> Another example is the blue evergreen hydrangea, a plant that has been used as an antimalarial in Chinese traditional medicine since the Han dynasty (206 B.C.E.–220 C.E.).<sup>38</sup> Isolation of the root’s active agent, halofuginone, has established that it halts the production of the amino acid proline, the absence of which inhibits the development of rogue T-cells.<sup>39</sup> Through this mechanism, halofuginone is expected to be effective as an antimalarial.<sup>40</sup>

At other times, TK may produce dead ends,<sup>41</sup> or the resulting technology may be different from what the traditional knowledge would have been

35. *See id.*

36. INDIAN DEP’T INDUS. POLICY & PROMOTION, TRADITIONAL KNOWLEDGE AND THE NEGOTIATIONS IN THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: COUNTRY POSITION PAPER 1 (2011) (India), *available at* [http://dipp.nic.in/English/Country\\_Position\\_Paper/discussionPaper\\_TK\\_25Apr2011.pdf](http://dipp.nic.in/English/Country_Position_Paper/discussionPaper_TK_25Apr2011.pdf) (giving examples of “revocation of patent on wound healing properties of Turmeric in 1997 at the US Patent and Trade Marks Office and the revocation of patent for antifungal properties of Neem at the European Patent Office in 2005”).

37. *See* Robert L. Ostergard et al., *Between the Sacred and the Secular: Indigenous Intellectual Property, International Markets and the Modern African State*, 44 J. MOD. AFR. STUD. 309, 324–26 (2006).

38. *See* Tracy L. Keller et al., *Halofuginone and Other Febrifugine Derivatives Inhibit Prolyl-tRNA Synthetase*, 8 NATURE CHEMICAL BIOLOGY 311, 311 (2012) (acknowledging that the blue evergreen hydrangea has been used as an antimalarial for roughly 2,000 years in traditional Chinese medicine); Dan Morrell, *Han Healing: An Ancient Herbal Remedy*, HARV. MAG., May–June 2012, at 10, 10, *available at* <http://harvardmagazine.com/2012/05/an-ancient-herbal-remedy>.

39. Morrell, *supra* note 38, at 11.

40. *Id.* at 11–12.

41. For example, the medicinal herb Ch’ang Shan was used for centuries in traditional Chinese medicine as an antimalarial, prompting the isolation of active alkaloids from the plant in the 1940s in three different laboratories in China and the United States.

considered to have “taught” if it were treated as “prior art.”<sup>42</sup> For example, rosy periwinkle is often held up as an example of the TK and genetic resources of a developing country—in this narrative, Madagascar—that were exploited for modern medical technology without compensation to the home country.<sup>43</sup> But once one scratches beneath the surface, the story seems more complicated. The plant, while endemic to Madagascar, was naturalized and cultivated throughout the tropics and subtropics<sup>44</sup>—the varieties used for the Western research may not have come from Madagascar at all.<sup>45</sup> Rosy periwinkle was referenced in ancient and medieval literature for its medicinal properties and had a reputation in nineteenth- and twentieth-century traditional medicine—perhaps in multiple countries—as a treatment for a range of ailments from wasp stings to malaria to diabetes.<sup>46</sup> Research established that the plant’s active compounds had no effect on blood sugar, but vinblastine sulfate and

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G. Robert Coatney et al., *Studies in Human Malaria: XXV. Trial of Febrifugine, an Alkaloid Obtained from Dichroa Febrifuga Lour., Against the Chesson Strain of Plasmodium Vivax*, 9 J. NAT’L MALARIA SOC’Y 183, 183 (1950). Eventual human testing found that while the more powerful of the alkaloids had efficacy as an antimalarial, in effective doses it is “very poorly tolerated by the human host and its emetic action makes its use impractical.” *Id.* at 186.

42. Viewing the problem this way is not privileging patent law and its concepts any more than is already done in the IGC discourse where it is understood that TK may be protected “negatively” by viewing it as prior art that should limit patenting.

43. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 128–29 (1996); Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT’L L. 919, 922 (1996).

44. *Catharanthus Roseus*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Catharanthus\\_roseus](http://en.wikipedia.org/wiki/Catharanthus_roseus) (last visited Jan. 5, 2013) (“*Catharanthus roseus* (Madagascar Periwinkle) is a species of *Catharanthus* native and endemic to Madagascar. . . . It is also however widely cultivated and is naturalised in subtropical and tropical areas of the world.”).

45. See Manisha A. Desai, *The Rosy Periwinkle: Myth, Fact and the Role of Independent Scientific Research*, INT’L FED’N PHARMACEUTICAL MANUFACTURERS & ASS’NS (May 11, 2011), [http://www.ifpma.org/fileadmin/content/Events/Pharma\\_Forum/11\\_May\\_2011/Presentation\\_Eli\\_Lilly.pdf](http://www.ifpma.org/fileadmin/content/Events/Pharma_Forum/11_May_2011/Presentation_Eli_Lilly.pdf).

46. *Rosy Periwinkle: Vinca Rosea*, HERBS2000.COM, [http://www.herbs2000.com/herbs/herbs\\_periwinkle.htm](http://www.herbs2000.com/herbs/herbs_periwinkle.htm) (last visited Jan. 5, 2013) (describing how in the 1950s “herbal researchers first came upon the traditional ‘periwinkle tea’ used by people in Jamaica as a folk remedy. These researchers started to study the properties of the plant and tried to analyze its anecdotal anti-diabetic abilities—the main use for the herb in Jamaica,” as well as traditional medicine uses for the plant in India, Hawaii, and Central America); *Catharanthus Roseus (Madagascar Periwinkle)*, KEW ROYAL BOTANIC GARDENS, <http://www.kew.org/plants-fungi/Catharanthus-roseus.htm> (last visited Jan. 5, 2013) (“In traditional medicine, the Madagascar periwinkle has been used to treat a variety of ailments in Madagascar as well as in other parts of the world where the plant has naturalised.”); *Anti-cancer: Rosy Periwinkle*, LIVING RAINFOREST, <http://www.livingrainforest.org/about-rainforests/anti-cancer-rosy-periwinkle/> (last visited Jan. 5, 2013) (“Traditional Madagascan healers used the rosy periwinkle for treating diabetes.”); WIKIPEDIA, *supra* note 44 (describing treatments for which it was used in Indian and Chinese traditional medicine).

vincristine sulfate derived from the plant were eventually approved by the U.S. Food and Drug Administration (FDA) in the 1960s for the treatment of Hodgkins's disease and childhood leukemia, respectively.<sup>47</sup> While there may be *some* connection between the TK and the modern technology in such fact patterns, the connection may be quite attenuated.

In the case of artistic elements, (mis)appropriation ranges historically from direct, slavish copying of TCE, such as cheaper, manufactured versions of handmade crafts, to use of TCE as an element of or inspiration for new, original works of expression, to the drawing of more abstract inspiration from TCE. Prime examples of the first category would be direct, slavish copying of folk designs onto textiles<sup>48</sup> and industrial-scale reproduction of local pottery styles. Examples of the second category might be traditional Indian dances or costumes integrated into a Bollywood production or the elements of traditional Chinese culture used in a film like *Kung Fu Panda*.<sup>49</sup> A prime example of more abstract inspiration would be the widely recognized and clearly visible influence that African art forms had on the output of Picasso. It is important to tease out these differences because for many, whereas the first category may constitute "misappropriation" the third category definitely does not.<sup>50</sup>

Unfortunately, the international discussion of TK/TCE rarely parses out the issues and even more rarely focuses on the facts of even anecdotal

47. See Desai, *supra* note 45. The two FDA-approved treatments were patented. See U.S. Patent No. 3,025,220 (filed Oct. 26, 1961) (vincristine sulfate); U.S. Patent No. 3,097,137 (filed May 19, 1960) (vinblastine sulfate).

48. See, e.g., *Milpurrrru v Indofurn Pty Ltd* (1994) 54 FCR 240, 240 (Austl.) (Australian aboriginal artists' designs copied onto manufactured carpets); Kutty, *supra* note 5, at 21–22 ("[C]ommunities are subjected to exploitation at the hands of large textile and handicrafts companies, which through modern techniques, copy and replicate the artistic creations . . .").

49. Another example might be a recording of an indigenous chant integrated into a pop song, as happened with the German group Enigma's use of an indigenous chant by a couple from the aboriginal Ami group of Taiwan. See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 175–77 (2000), and sources used therein.

50. See, e.g., Mark Perry, *Digital Propertization of the New Artifacts: The Application of Technologies for "Soft" Representations of the Physical and Metaphysical*, 11 CARDOZO J. INT'L & COMP. L. 671, 705 (2003) ("There is a distinction to be drawn between the commercial exploitation of an artifact, such as the Maori Koru in a trademark, and the development of an artistic appreciation of the beauty of an unfurling fern frond. There is a distinction between taking a well-known traditional remedy and making a minimal change to claim a patent right, and the development of newly synthesized drugs from aboriginal clues.").

examples; instead, there is a tendency to simplify and make sweeping, often unsupported claims.<sup>51</sup> Sometimes these are unsupported claims about the frequency and gravity of acts of TK/TCE misappropriation.

At other times, commentators and politicians make unsupported claims about the *value* of TK/TCE. For example, in a 2006 article, three U.S.-based political scientists reasoned that “[b]ecause Western economies have become either reliant or dependent on cultural, social or biological resources from developing states, economic coercion [from TK/TCE protection] becomes a real possibility.”<sup>52</sup> Yet any sensible analysis of Western audiovisual, music, publishing, and fashion industries—surely the most “vulnerable” Western industries—would not find a great deal of “reliance” or “dependency” on non-Western TK/TCE that might be protected under a reasonable legal regime.

Another problem is the tendency to conflate the use of intangible TK/TCE with the related but quite different history of the taking of art and artifacts from indigenous peoples in the Americas, Africa, Asia, and Oceania.<sup>53</sup> Practically speaking, no progress will be made on the subject of legal protection of TK/TCE unless it is cleanly separated from repatriation claims related to physical objects in Western collections.

In this discussion, I have emphasized history because such borrowing, taking, using, adapting, being inspired by—pick your appropriation verb—is endemic to the history of humanity. There is no question that such activities were part of the Western “age of exploration” and the centuries of colonialism that followed.<sup>54</sup> But such borrowing is not limited to circumstances of conquest. Using the broad definitions of TCE proposed by some *demandeurs*, Japanese *kanji* are adopted logographic TCE from China, Christianity started as TCE of a minor subset of the Jewish people, and basketball, as played globally, is Canadian-American TCE (originating in New England from a Canadian teaching physical education).

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51. See, e.g., Kutty, *supra* note 5, at 21 (describing situation in India in general terms and saying that “[t]he general outlook of those business interests who extensively borrow from the collection of the folklore of the communities or tribal settlements is that of exploitation of material available in the public domain”).

52. Ostergard et al., *supra* note 37, at 329.

53. This conflation goes at least as far back as the 1977 Bangui Agreement, which brought folklore and physical objects of “cultural heritage” within the same framework. See Bangui Agreement of March 2, 1977, *supra* note 5, Annex VII.

54. Ostergard et al., *supra* note 37, at 316 (“Since the age of exploration, researchers and travellers have transported plant species and acquired indigenous knowledge in using those species back to their own countries for new foods, plant breeding and other purposes.”).

*B. Early Developments in TK/TCE Protection and National Laws*

International discussions about the protection of folklore go back at least to the 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention. In a modest attempt to adopt the copyright system to address folklore, a new section (4) was tacked onto article 15, providing as follows:

- (a) 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 of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
- (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.<sup>55</sup>

This provision attempts to solve the apparent disconnect between individual authorship and the nature of folklore by allowing a member state to claim folkloric expressions as long as the expression can be identified reasonably with that member state. But one vexing issue was completely unaddressed: that folklore—passed on from generation to generation—is by definition prone to be beyond any life-plus term of copyright protection. And the kernel of another vexing issue became apparent: how to delineate the proper role of governments vis-à-vis TCE that should belong to indigenous people and local communities. With only one country, India, ever making the designation required in section (4)(b), Berne article 15(4) became a dead letter.

Yet thinking about folklore protection continued in the wake of the Stockholm revision, and in 1976, the Tunis Model Law on Copyright for Developing Countries was completed in a collaborative effort between WIPO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the government of Tunisia.<sup>56</sup> The Tunis

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55. Berne Convention for the Protection of Literary and Artistic Works art. 15, Sept. 6, 1886, *as last revised*, 828 U.N.T.S. 221, *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P192\\_37445](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P192_37445).

56. United Nations Educational, Scientific and Cultural Organization [UNESCO] & WIPO, *Tunis Model Law on Copyright for Developing Countries*, WIPO Pub. No. 812 (E) (1976), *available at* [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=31318&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html).

Model Law directly confronted the questions that Berne article 15(4) had avoided. It grappled expressly with the issue of folklore by identifying works “of national folklore” as distinct from regular “literary, artistic and scientific works,” while giving such works of national folklore the same set of rights provided to other works: economic rights of reproduction, translation, adaptation, and communication to the public by performance or broadcast, as well as moral rights of attribution and integrity.<sup>57</sup>

The Tunis Model Law did two other important things to set the stage for subsequent discussions of TCE protection. First, it resolved the tension between the nature of folklore and the usual term of copyright by providing that “[w]orks of national folklore are protected by all means . . . without limitation in time.”<sup>58</sup> Second, it provided that a nation’s folklore would be de facto owned by “competent authorit[ies]” created and staffed by national governments.<sup>59</sup> Commentary accompanying the model law suggests that this is without giving the relevant ethnic community any say in the matter.<sup>60</sup>

On the heels of the Tunis effort, in 1977 francophone African countries established the Organisation Africaine de la Propriété Intellectuelle (OAPI) in the Bangui Agreement, a treaty that established standards for protection across the waterfront of intellectual property.<sup>61</sup> The Bangui Agreement expressly subsumes “folklore and works derived from folklore” within the ambit of protection for copyrighted works with rights of

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57. *Id.* §§ 1(1)–(3), 4, 5.

58. *Id.* § 6(2).

59. Section 6(1) provides that “[i]n the case of works of national folklore, the [economic and moral] rights . . . shall be exercised by the competent authority as defined in Section 18,” while section 18(iii) provides that “‘competent authority’ means one or more bodies, each consisting of one or more persons appointed by the Government for the purpose of exercising jurisdiction under the provisions of this Law whenever any matter requires to be determined by such authority.” *Id.* §§ 6(1), 18(iii).

60. The commentary says that the rights should be exercised “by the competent national authority empowered to represent the people that originated” the works of folklore, but does not say whether the “empower[ing]” comes from the government or the ethnic people. *Id.* cmt. 39, at 10. Immediately after this cryptic sentence the commentary continues “[i]t has been proposed that this competent authority be the body responsible within the country for the administration of authors’ rights.” *Id.* This proposition strongly suggests that the ethnic communities were not expected to have any say in the matter. Later the commentary acknowledges that although the Model Law often mentions the ‘competent authority[.]’ [it] is by no means bound to be the same authority in each case and it is conceivable, for instance, that the authority that will consider applications for translation or reproduction licenses . . . will not be the one that exercises the rights in works of national folklore under Section 6.

*Id.* cmt. 87, at 19.

61. *See* Bangui Agreement of March 2, 1977, *supra* note 5 (establishing individual Annexes for patent, utility models, trademarks, industrial designs, unfair competition, appellations of origin, and copyright).

reproduction, communication to the public, public performance, translation, and adaptation.<sup>62</sup> Without specifying *who* should own works of folklore, the Bangui Agreement mentions neither indigenous people nor local communities, instead providing that any “royalties” shall be distributed as a “national authority” sees fit.<sup>63</sup> Indeed, for purposes of royalties, the 1977 Bangui Agreement seems to treat *older* works of folklore as nothing more than part of a larger *domain publique payant*.<sup>64</sup>

The Bangui Agreement was revised in 1999,<sup>65</sup> but the 1999 revision retains the same basic approach, again defining expressions of folklore as part of the copyright world in provisions that grant exclusive rights<sup>66</sup> subject to a royalty regime on a par with works that have fallen into the public domain.<sup>67</sup> The 1999 version then also has a broader, TK-encompassing concept of folklore<sup>68</sup> subject to the state’s more general “protection, safeguard and promotion.”<sup>69</sup>

On a different track, in 1973 the government of Bolivia requested that the Director-General of UNESCO establish a program to study a possible

62. *Id.* Annex VII, art. 3. This applies to folkloric works that fall in typical Berne categories. The Bangui Agreement then has a Part II to Annex VII that defines *folklore* much more broadly to include all TK, but then is much more ambiguous about the kind of protection given to non-TCE folklore. *See id.* Annex VII, art. 46 (definition); *id.* arts. 48–52 (protection).

63. *Id.* art. 8(5) (“The proceeds from royalties deriving from exploitation of the works referred to in the present Article shall be used for cultural and social purposes. The conditions under which such royalties are shared shall be fixed in a rule to be promulgated by the competent national authority.”).

64. A *domain publique payant* is a system in which even when works are in the public domain, one must pay for their use. The parallel between older works of folklore and the public domain is established in article 36, which provides that

[o]n expiration of the terms of protection referred to in Articles 34 and 35, above, during which a recognized exclusive right belongs to the authors, their heirs or the persons entitled, the exploitation of works of folklore or works falling into the public domain shall be subject to the agreement by the person exploiting them to pay to the national authority a royalty calculated on the basis of the gross profit of the exploitation.

*Id.* art. 36.

65. *See* Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization, Feb. 24, 1999, WIPO Lex No. TRT/OA002/002, [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?doc\\_id=132882&file\\_id=181151](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=132882&file_id=181151) [hereinafter 1999 Bangui Revision].

66. *Id.* Annex VII, art. 9 (adding a right of distribution to the exclusive rights granted in the 1977 Bangui Agreement).

67. *Id.* art. 59.

68. *Id.* art. 68.

69. *Id.* art. 72.

folklore protocol to the Universal Copyright Convention.<sup>70</sup> This eventually led to the establishment of a joint UNESCO/WIPO working group in 1980 and the completion in 1982 of the UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).<sup>71</sup>

After providing a definition of “expressions of folklore” that largely tracks the concept of “works” in international copyright norms,<sup>72</sup> the UNESCO/WIPO Model Provisions protect expressions of folklore against unauthorized reproduction, distribution, public performance, transmissions, or other communication to the public when such activities are done “both with gainful intent and outside their traditional or customary context.”<sup>73</sup> Reflecting a greater awareness of the rights of indigenous peoples and local communities, the Model Provisions anticipate “authorization” being granted either by a “competent authority” or the “community concerned,”<sup>74</sup> although there is absolutely nothing in the provisions that acknowledge that folklore *should* be controlled by the indigenous people or local community from which it originates.<sup>75</sup>

These international initiatives were aimed at establishing positive rights regimes for TCE. Meanwhile, a number of jurisdictions have developed defensive protection for TCEs, at least ensuring that others cannot obtain intellectual property rights over the TCE. Since 2002, New Zealand’s trademark law has expressly provided for the refusal of trademark registration where the trademark may “offend a significant section of the community, including Maori.”<sup>76</sup> A year earlier, the U.S.

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70. Kutty, *supra* note 5, at 5.

71. See *id.* at 5–6; see also UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1982) [hereinafter UNESCO/WIPO Model Provisions], available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=184668](http://www.wipo.int/wipolex/en/text.jsp?file_id=184668).

72. Kutty, *supra* note 5, at 11 (noting that “in practical terms most of the ‘expressions of folklore’ as per the limited definition in Section 2, are more in line with [copyright] ‘works’”).

73. UNESCO/WIPO Model Provisions, *supra* note 71, § 3 (Utilizations Subject to Authorization).

74. *Id.* §§ 3, 6, 10.

75. Comment 33 to the Model Provisions does offer a glimmer of recognition that communities have interests separate from “nations” by specifying that the protection in the Model Provisions is focused

on artistic heritage, on the one hand, and is community oriented, on the other. . . . [T]he artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation. “Traditional artistic heritage developed and maintained by a community” is understood as representing a special part of the “cultural heritage of the nation.”

*Id.* cmt. 33, at 15.

76. Section 17(1)(b)(ii) of the Trade Marks Act 2002 (N.Z.). For an explication of the law and its background, see Susy Frankel, *Third-Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard*, 8 J. WORLD INTELL. PROP. 83

Patent and Trademark Office (USPTO) established a database of insignia of Native American tribes that can be used by a USPTO trademark examiner to reject a trademark application on the grounds that the trademark would falsely suggest a connection with a person or group.<sup>77</sup> A number of countries including India and Peru have also established different sorts of registries intended to memorialize local TK as a means to establish prior art that will defeat patents over the same insights and innovations.<sup>78</sup>

### C. The Post-TRIPS Debate

No single event changed international intellectual property more in the twentieth century than the integration of intellectual property norms into the world trading system with the TRIPS Agreement. Integration of the standards of the Paris and Berne Conventions into the WTO/General Agreement on Tariffs and Trade (GATT) system did little to extend those substantive norms *formally*—most members of GATT were already members of Paris, Berne, or both. But TRIPS included a stable of new substantive norms and a completely new set of procedural and enforcement obligations. These changes along with the attachment of the intellectual property system to the compliance mechanism of WTO dispute settlement meant a radical change in international intellectual property.

Right or wrong, for better or for worse, the emergence of TRIPS also engendered feelings among developing countries—fomented by a new

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(2005). Of course, negative protection can become de facto positive rights. In the case of New Zealand law, when a trademark encompasses a Maori element, permission of the appropriate Maori authority will allow the trademark registration to proceed. *Id.* at 89–91 (describing new 2002 law and how prior practice had already sometimes required Maori consent for registration).

77. Under 15 U.S.C. § 1052(a), a trademark application can be rejected on the grounds that it consists of matter that may “falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols.” 15 U.S.C. § 1052(a) (2006). The Native American insignia database was established in 2001. *See* Establishment of a Database Containing the Official Insignia of Federally and State Recognized Native American Tribes, 60 Fed. Reg. 44,603 (Aug. 20, 2001), *available at* <http://www.uspto.gov/web/offices/com/sol/og/2001/week39/patdata.htm>.

78. *See, e.g.*, Law No. 27811 of 24 July 2002, Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (Peru), *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=3420>.

class of activist nongovernmental organizations—that the developing world had gotten a bad deal.<sup>79</sup>

Opinion that TRIPS was a one-sided arrangement understandably led to efforts to “rebalance” the system, principally by weakening the *Western* intellectual property rights in TRIPS but also by establishing new rights that could specifically benefit developing countries, that is, the protection of traditional knowledge, folklore, and genetic resources. The remark of an Indonesian official embodies that belief: “If the knowledge assets of developed countries are internationally protected, why [are] the developing countries’[] . . . not?”<sup>80</sup> Of course, most of the “knowledge assets of developed countries” are *not* protected—centuries of art and literature and the vast bulk of the world’s modern technology. But that does not prevent this sort of trope from being repeated over and over.<sup>81</sup>

Not surprisingly, TRIPS also provoked reactions from the legal academe, most of them negative. James Boyle was a central voice in the scholarly zeitgeist at this time, observing that Western intellectual property “blinds us . . . to the importance of the raw material from which information products are constructed.”<sup>82</sup> Boyle’s observations were directed at a spirited defense of the commons and the importance of avoiding undue “enclosure,”<sup>83</sup> but his own subsequent efforts recognized the value of using property tools in that effort; just as the Nature Conservancy uses

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79. See Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS., Spring 2007, at 97, 97 (“Since they had been pressured into signing TRIPS during the Uruguay Round of WTO negotiations, countries such as Brazil and India had argued that strong intellectual property rights helped the West but would devastate the rest.”). See generally SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST (1998).

80. Damos Dumoli Agusman, *GRTKF: The Core Concepts and Objectives, What They Are and Why Need Protections, Indonesia’s Perspective*, at 13, WIPO/IPTK/BKK/09/TOPIC1/1 (Dec. 16, 2009) (emphasis omitted), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_iptk\\_bkk\\_09/wipo\\_iptk\\_bkk\\_09\\_topic1\\_1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_bkk_09/wipo_iptk_bkk_09_topic1_1.pdf).

81. This trope is also repeated by academics who should know better. See, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1353 (2004) (“[T]he intellectual products held in the developing world rest in a global public domain, while the intellectual products of the developed world are held closely by corporations.”); Roht-Arriaza, *supra* note 43, at 929 (“[W]hile the products of formal knowledge systems have been protected as ‘property,’ those of informal, traditional systems have been tagged the freely available, ‘common heritage of humanity.’”) Such statements, of course, ignore the vast wealth of public domain materials generated by the developed world’s “formal knowledge systems.”

82. BOYLE, *supra* note 43, at xiv.

83. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33.

property law to further environmental protection, Creative Commons would use copyright law to further “cultural environmentalism.”<sup>84</sup>

It is also no surprise that the focus on “raw materials” for “information products” morphed in some people’s minds into a quest for exclusive control of—or at least economic rents from—the raw materials, not their permanent, costless dedication to humanity. As Madhavi Sunder has pointed out, the focus by Boyle and other scholars on the public domain itself “helped [to foster] ‘the invention of traditional knowledge’ as a political and legal category worthy of rights.”<sup>85</sup> Indeed, Professor Boyle had himself recognized the unfairness—from the perspective of distributive justice—of a system that created rights over only the most recent innovations.<sup>86</sup>

In addition to what was happening in the crucibles of WIPO, WTO, and academe, questions of cultural property have been discussed in other multilateral venues.<sup>87</sup> In 2001, UNESCO, which had largely gotten out of the copyright space with the decline of the Universal Copyright Convention, adopted the Universal Declaration on Cultural Diversity. The Declaration includes an enigmatic provision that could be taken as support for *everyone’s* copyright industries as well as support for aggressive protection of TK/TCE: “While ensuring the free circulation of ideas and works, cultural policies must create conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.”<sup>88</sup>

Recognition should also be given to the initially ad hoc and increasingly organized meetings of representatives of indigenous peoples. For example, the First International Conference on the Cultural and Intellectual

84. James Boyle, *James Boyle: Cultural Environmentalism?*, FIN. TIMES (Feb. 20, 2006, 7:01 PM), <http://www.ft.com/cms/s/2/cc8e24ce-a242-11da-90960000779e2340.html#axzz29QPjiC1K>.

85. Sunder, *supra* note 79, at 104.

86. BOYLE, *supra* note 43, at 142 (“If one has the slightest concern for distributional justice in one’s criteria for property regimes, this regime must surely fail.”).

87. See, e.g., Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1997/13, Rep. of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 27th Sess., Aug. 4–29, 1997, U.N. Doc. E/CN.4/Sub.2/RES/1997/13 (Aug. 22, 1997), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1997.13.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1997.13.En?Opendocument).

88. Universal Declaration on Cultural Diversity Annex 1, art. 9, Nov. 2, 2001, 41 I.L.M. 57, available at <http://unesdoc.unesco.org/images/0012/001246/124687e.pdf#page=67>.

Property Rights of Indigenous Peoples was held in New Zealand in 1993—pre-TRIPS—and attracted representatives from indigenous groups in fourteen mainly Pacific Rim jurisdictions, who produced the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.<sup>89</sup> In 2007, the U.N. General Assembly adopted a Declaration on the Rights of Indigenous Peoples that recognizes that “[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.”<sup>90</sup> The declaration further specified that “[t]hey also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”<sup>91</sup>

The increasing profile of indigenous peoples has definitely had a salutary effect on TK/TCE discussions. In 2010, the pan-African intellectual property organization for anglophone countries<sup>92</sup> established its own Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.<sup>93</sup> Although the Swakopmund Protocol, as it is commonly called, still requires each country to establish a “national competent authority,”<sup>94</sup> the protocol unequivocally establishes that the “owners of the rights shall be the holders of traditional knowledge, namely the local and traditional communities.”<sup>95</sup> Unlike the Model

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89. First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* (June 1993) [hereinafter *1993 Mataatua Declaration*], available at [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/mataatua.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf).

90. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 31, U.N. Doc. A/RES/61/L.67 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

91. *Id.* The Declaration also recognizes the rights of indigenous people to privacy in their religious ceremonies, *id.* art. 12(1), to repatriation of ceremonial objects and human remains, *id.* art. 12(2), and a general “right to practise and revitalize their cultural traditions and customs,” which includes “the right to maintain, protect and develop” what we would identify as TK/TCE, *id.* art. 11(1).

92. This organization is known as the African Regional Intellectual Property Organization (ARIPO). But ARIPO does not include Nigeria and South Africa, the two largest anglophone economies on the continent. See AFR. REGIONAL INTELL. PROP. ORG., <http://www.aripo.org/> (last visited Jan. 5, 2013).

93. See Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Aug. 9, 2010, WIPO Lex No. TRT/AP010/001, [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?doc\\_id=1\\_50520&file\\_id=201022](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=1_50520&file_id=201022) [hereinafter Swakopmund Protocol].

94. *Id.* § 3.

95. *Id.* § 6 (“The owners of the rights shall be the holders of traditional knowledge, namely the local and traditional communities, and recognized individuals within such communities, who create, preserve and transmit knowledge in a traditional and intergenerational context in accordance with the provisions of section 4.”). Section 7.1 explicitly provides: “This Protocol shall confer on the owners of rights referred to in

Provisions from the 1980s, the 2010 Swakopmund Protocol envisions protecting TCE against “uses of expressions of folklore taking place outside their traditional or customary context, *whether or not for commercial gain*.”<sup>96</sup>

Back at WIPO, in 2010 the IGC began looking for a way to produce more substantive progress in the discussions: the IGC agreed first to a series of “intersessional” experts’ meetings in 2011 and then to itself holding three sessions, instead of two, each one dedicated to one of the three topics—GR, TK, and TCE.<sup>97</sup> From these many meetings, it became clear that true progress would depend on reaching acceptable compromises in four areas: (1) the protected subject matter, that is, the *subject* of protection; (2) the *scope* of protection, that is, exclusive rights, protection against misappropriation, et cetera; (3) the definition of the beneficiaries of protection; and (4) the limitations and exceptions. The resolution of these issues can affect whether any justifications of intellectual property may be workable in the TK/TCE context.

One of the key questions embedded in the criteria for protected TK/TCE is *how does one determine what TK/TCE belongs to whom*. The problem of “who would own what” simply threatens to overwhelm any system unless it is dealt with at the fundamental level.<sup>98</sup> Generally speaking, *demandeurs* have failed to treat this problem seriously, even though, as some political scientists noted, the “underlying problem in dealing with indigenous intellectual property is that there is often no clear lineage of ownership to the idea or resource.”<sup>99</sup>

This would be a challenge even with a static form of TK/TCE, for example, a distinct decorative pattern used unchanged through the generations. But TK/TCE is celebrated as evolving and changing, in contrast to Western notions of static intellectual property, and that

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section 6 the exclusive right to authorize the exploitation of their traditional knowledge.” *Id.* § 7.1. Section 18 similarly provides that “[t]he owners of the rights in expressions of folklore shall be the local and traditional communities . . . who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.” *Id.* § 18.

96. *Id.* § 20.1(b) (emphasis added).

97. The Author was the designated expert for the United States in the 2011 intersessionals for TCE and TK.

98. As some political scientists noted in 2006, “[t]he conflict . . . originates when bioprospectors utilise local knowledge to ‘discover’ those new products. Whether the product is derived from a plant or animal, or is based in the genetic characteristics of a local population, the complexity associated with ownership of the knowledge or product immediately appears.” Ostergard et al., *supra* note 37, at 324.

99. *Id.* at 325.

exacerbates the problem of identifying who “holds” what. Distinct music genres, crafts, architectural styles, and languages themselves are developed from prior genres, crafts, styles, and languages. For example, “highlife” music is identified as TCE originating in Ghana and, from there, spreading through west Africa.<sup>100</sup> But highlife was itself developed from elements originating in Sierra Leone, Liberia, Jamaica, and the United States, not to mention musical instruments developed in Europe.<sup>101</sup>

#### IV. CAN WE JUSTIFY INTELLECTUAL PROPERTY IN TK/TCE?

Munzer and Raustiala conclude that protection of TK/TCE “fits poorly within standard justifications of property” and that “the chief arguments employed in the moral, political, and legal philosophies of property do not justify a robust package of rights” for holders of TK/TCE.<sup>102</sup> This conclusion seems generally correct, but I would have significant carve-outs for accounts of intellectual property based on privacy, incentives for preservation, and above all, fairness and distributive justice.

Indeed, privacy, preservation, and distributive justice have not been chief arguments for intellectual property in the past, and if we are going to find a credible account of the protection of TK/TCE, we must focus on these. But it is also worthwhile to consider some of the complexities of applying even these chief arguments to TK/TCE.

##### A. Incentive Theories and TK/TCE

In any discussion of incentives—particularly incentives to create—we should remember that some advocates for TK/TCE protection assume, and emphasize, the non-Western, “other” nature of indigenous peoples,

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100. BOATEMA BOATENG, *THE COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* 93 (2011).

101. *Id.* (“According to music scholar and activist John Collins, some of the earliest roots of highlife can be traced to influences from Sierra Leone, Liberia, and even Jamaica. From Sierra Leone came the gombey drums and drumming, one of many forms of African music that were ‘taken to the Americas by slaves, transmuted there, and then brought back to Africa.’ In this case, the return occurred through freed Maroon slaves from Jamaica, who settled in Sierra Leone in the early nineteenth century. From Liberia came ‘an African guitar plucking technique’ developed by sailors from the Kru ethnic group. . . . The earliest forms of highlife emerged in the Gold Coast in the late nineteenth century when musicians added the instruments introduced by European military bands at forts along the coast.” (quoting John Collins, *The Early History of West African Highlife Music*, 8 *POPULAR MUSIC* 221, 221 (1989); John Collins, *The ‘Folkloric Copyright Tax’ Problem in Ghana*, WACC GLOBAL, <http://waccglobal.org/en/20031-intellectual-property-rights-and-communication/649-The-folkloric-copyright-tax-problem-in-Ghana.html> (last visited Jan. 5, 2013)).

102. Munzer & Raustiala, *supra* note 4, at 40.

if not local communities.<sup>103</sup> Reasoning that these same indigenous peoples are, or should be, susceptible to economic incentives may be incongruent with basic assumptions of the discussion—at least for those advocates.

### 1. Incentives To Create or Innovate

If TK/TCE is understood as a sort of treasure trove pertaining to each local culture, a straightforward, Nordhausian incentive theory for the stimulation of TK/TCE production does not make sense.<sup>104</sup> Munzer and Raustiala encapsulate this thought in their conclusion that TK/TCE protection “cannot be defended on the basis of an incentive to innovate. The innovation has already occurred.”<sup>105</sup>

But this assumes the TK/TCE is fixed and static, that is, an *extant corpus*, and that assumption is something that TK/TCE *demandeurs* vigorously resist. For example, in the April 2012 meeting of the IGC, South Africa insisted that the definition of TK recognize that it is “knowledge that is dynamic and evolving.”<sup>106</sup> The fact that TK/TCE intellectual property advocates argue that whatever protection is crafted should apply to *new* and *subsequent* TK/TCE could be taken as evidence that TK/TCE protection is envisaged as a stimulus for further development of the traditional culture. But this insistence happens in the negotiations for

103. See generally DEBORAH ROOT, *CANNIBAL CULTURE: ART, APPROPRIATION, AND THE COMMODIFICATION OF DIFFERENCE* (1995); MELFORD E. SPIRO, *ANTHROPOLOGICAL OTHER OR BURMESE BROTHER?: STUDIES IN CULTURAL ANALYSIS*, at x (1992) (describing how “contemporary anthropology holds that, for Western social scientists, non-Western actors are the ‘Other’”).

104. Some stars in the constellation of incentive-to-create literature are William D. Nordhaus, Richard Gilbert, Carl Shapiro, and S.J. Liebowitz. See WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* (1969); Richard Gilbert & Carl Shapiro, *Optimal Patent Length and Breadth*, 21 *RAND J. ECON.* 106 (1990); S.J. Liebowitz, *Copying and Indirect Appropriability: Photocopying of Journals*, 93 *J. POL. ECON.* 945 (1985).

105. Munzer & Raustiala, *supra* note 4, at 73; see also Hansen, *supra* note 4, at 761 (after discussing incentive-to-create justifications, “TK protections do not have such elegant theoretical backing”).

106. WIPO, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, Annex B, at 10, WIPO Doc. WO/GA/41/15 (Aug. 1, 2012) [hereinafter WIPO, *Intergovernmental Committee*]; see also 1993 *Mataatua Declaration*, *supra* note 89, § 2.2 (“Recognise that indigenous people also have the right to create new knowledge based on cultural traditions.”); WIPO, *supra* note 7, at 6 (“TK is being created every day, and evolves as individuals and communities respond to the challenges posed by their social environment.”); Sunder, *supra* note 79, at 110–11 (discussing examples of dynamic TK/TCE).

other reasons—the same reasons the word *folklore* fell out of favor; expressly recognizing the prospect of new TK/TCE speaks to the vibrancy of traditional cultural and asserts that traditional culture is not just a defeated, historical “other” but a continuing alternative to modern, Western life.

Even if TK/TCE protection is envisaged as extending to a developing, evolving corpus, it seems hard to disagree with Munzer and Raustiala’s conclusion that there already appear to be adequate incentives to create for TK/TCE. Indeed, ample, robust production of TK/TCE is a central part of the *demandeurs’* understanding of TK/TCE. Sometimes a parallel argument is used against copyright, or the current breadth of copyright, that is, that no copyright incentive is needed for the production of term papers, scholarly writing, television commercials, posters promoting feature films, and some elements of the music business that can be sustained on paid performances. I am generally hesitant to embrace such arguments in relation to an *existing form of intellectual property* on the grounds that they call for an unworkable granularity in policymaking—unworkable because business practices change more quickly than legislation and because citizens, both as producers and consumers of works, can only digest so much granularity when it comes to the law working as an incentive structure.<sup>107</sup>

But the no-incentive-is-needed argument has a different status when one is considering the establishment of a category of intellectual property that does not yet exist, whether it is *sui generis* protection of nonoriginal databases, protection for semiconductor masks, or protection of TK/TCE. As long as the unprotected subject matter is sufficiently delineated such that we can *presently* judge citizen behavior in creating and using the material, then it is reasonable to assume that if there is already adequate production, no further incentive is needed.<sup>108</sup>

Even if incentives to create were *needed* for the kinds of materials we call TK and TCE, the incentives from TK/TCE protection would be quite attenuated, for both doctrinal and practical reasons. Doctrinally,

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107. Proposing more granular categories of protection and nonprotection for expressive works is quite different than proposing a return to a registration system. A registration system with adequate marking of registered works provides both producers and consumers with a relatively simple bright-line rule.

108. This could also be taken as a question of where the burden of proof falls when advocating any change in the law. See Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 439–40 (1985–1986) (“[T]he consideration of intellectual property issues should be governed by standards and procedures that are understood in advance and applied uniformly from case to case. At the outset, the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action.”).

the entire TK/TCE discussion is premised on the idea that expression and knowledge must pass through at least one generation before becoming traditional.<sup>109</sup> Just as there is strong evidence that the furthest reaches of the life-plus-seventy-years copyright term provide little or no incentive to create for rational actors,<sup>110</sup> a similar problem would arise with any incentive to create from TK/TCE protection: strictly applied, the “intergenerational” requirement means that any benefits would not arise for roughly twenty to twenty-five years.<sup>111</sup> And copyright or patent protection would apply immediately to the new expressive works or to some of the innovations, respectively.

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109. See, e.g., UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage art. 2(1), Oct. 17, 2003, 2368 U.N.T.S. 3 (defining “intangible cultural heritage” as “transmitted from generation to generation” (internal quotation marks omitted)); Bangui Agreement of March 2, 1977, *supra* note 5, Annex VII, art. 8(2) (defining *folklore* as “literary, artistic or scientific works . . . which are passed from generation to generation”); Swakopmund Protocol, *supra* note 93, pmb., at 6 (“[T]he specific characteristics of traditional knowledge and expressions of folklore[] includ[e] their collective or community context, [and] the intergenerational nature of their development . . .”); WIPO, *Intergovernmental Committee*, *supra* note 106, Annex B, at 10 (proposing that the definition of TK require it to be knowledge “that is intergenerational” or “that is passed on from generation to generation”); Martin A. Girsberger, *Legal Protection of Traditional Cultural Expressions: A Policy Perspective*, in *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT* 123, 127 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008) (describing TCE as “handed down from one generation to the next”).

110. A group of economists concluded that the twenty years of protection added to the U.S. copyright term in 1998 increases the present value of a copyrighted work's market over time by less than one percent. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (No. 01-618), available at <http://eon.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf> (concluding that the longer term's “present value is small, very likely an improvement of less than 1% compared to the pre-[1998] term”); see also Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2236–37 (2000) (noting that from an incentive perspective the 1998 extension “is virtually worthless” because “from a present-value perspective, the additional incentive to create a copyrightable work is negligible for an extension of copyright from life-plus-fifty years to life-plus-seventy years”).

111. Discounting for the present value of future dollars, this was Zechariah Chafee's conclusion in relation to the renewal copyright term, starting at the twenty-eight year mark: when the copyright term consisted of an initial twenty-eight-year term and a twenty-eight-year renewal, the market value of the renewal term, measured at the beginning of the first term, was near zero. See Zechariah Chafee, Jr., *Reflections on the Law of Copyright* (pt. 2), 45 COLUM. L. REV. 719, 723 (1945).

## 2. Incentives for Development and Commercialization

Moving beyond incentives to create, there is also widespread acknowledgment that intellectual property rights can provide incentives to develop and commercialize innovations and creative expressions. This reasoning is associated with Edmund Kitch's justification for patent rights. Kitch reasoned that giving the inventor a set of exclusive entitlements to the initial invention would permit the inventor to coordinate refinement and commercialization of the invention.<sup>112</sup> This general observation has been extended by a number of commentators.<sup>113</sup> The same argument applies nicely to novels and screenplays—the exclusive rights of copyright create the potential for payoff that propels the author and then the book agent, producer, and publisher to promote the work and development of derivative works thereof.

At the same time, there is responsive literature that says that patent owners are often not the best positioned to develop their innovations, either in commercialization or follow-on inventions.<sup>114</sup> Indeed, Kitch himself recognized this point.<sup>115</sup> And a sensible reading of the TK/TCE discourse would probably lead to the conclusion that indigenous people and local communities are *not* well-placed to take an active role in licensing protected TK or TCE. Part of the core narrative of the GRTKF debates is how it is the Western entrepreneurs or capital elites—the prospectors, so to speak—who identify the value of TK and TCE in relation to extant culture and technology.

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112. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

113. See, e.g., Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 340–45 (2008); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 *passim* (2001); Benjamin N. Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503 *passim* (2009).

114. See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524 (1945); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1048–58 (1997); Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 739–43 (2012); Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 871–75 (1990); Katherine J. Strandburg, *What Does the Public Get? Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 126. Ted Sichelman reasons that although “there is no reason to expect that inventors who win the race to patent will be the best commercializers,” patents may be an appropriate mechanism to protect innovators. Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 367 (2010).

115. Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1740 (2000) (“[Patent] rights can easily arise in the hands of persons or firms who are not in the best position to exploit them.”).

### 3. Incentives for Preservation and Conservation

Finally, among the different incentive arguments, we must consider incentives to preserve. Preservation of TK/TCE figures prominently in narratives about TK/TCE protection, although it is not frequently expressed as a matter of *incentives*, let alone *financial* incentives.<sup>116</sup>

It is sometimes pointed out that whatever the merits of *exclusive rights* over GRTKF, this is not a suitable realm for *intellectual property* rights because intellectual property is about *incentives for creation*. This is an important point, but one that cannot be taken very far. If preservation of assets is a justification for property rights over GRTKF, this is not qualitatively different from justifications that are given for the protection of trademarks and geographical indications. In the late 1990s, copyright owners argued that preservation of assets justified the extension of the copyright term in the United States from life-plus-fifty to life-plus-seventy years.<sup>117</sup> Films and old television programs were the prime example here, although the same rationale could apply to sound recordings and photographs.

The idea that exclusive rights to TK/TCE could create an environment for better conservation and preservation of TK/TCE has a powerful initial appeal. Indeed, preservation of resources is one of the few justifications that John Rawls expressly embraces for property rights. In *The Law of Peoples*, Rawls offers the following reasoning:

[A]n important role of government . . . is to be the effective agent of a people as they take responsibility for their territory and the size of their population, as well as for maintaining the land's environmental integrity. Unless a definite agent is given responsibility for maintaining an asset and bears the responsibility and loss for not doing so, that asset tends to deteriorate. On my account the role of the institution of property is to prevent this deterioration from occurring.<sup>118</sup>

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116. See Hansen, *supra* note 4, at 775.

117. See H.R. REP. NO. 105-452, at 4 (1998), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt452/pdf/CRPT-105hrpt452.pdf> (noting that twenty year extension would "provide copyright owners generally with the incentive to restore older works and further disseminate them to the public"). The Supreme Court recognized this as an acceptable policy rationale for the life-plus-seventy term. See *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003) ("[Congress] rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works.").

118. JOHN RAWLS, *THE LAW OF PEOPLES* 8 (1999) [hereinafter RAWLS, *THE LAW OF PEOPLES*]. In *A Theory of Justice*, Rawls expresses a similar concern without connecting it directly to property rights. JOHN RAWLS, *A THEORY OF JUSTICE* 239 (rev. ed. 1999)

Later in the same book, he provides this elaboration:

As I see it the point of the institution of property is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to support them in perpetuity; and the agent is the people themselves as politically organized.<sup>119</sup>

This explication of property draws the concept close to that of a national territory. National territory becomes the people's property, and for Rawls, the order among just peoples means that they are not getting *any more property*, absent an extraordinary act of territorial bequest—the sort of thing that happened in monarchical Europe and colonial empires, but seems unlikely among just peoples. Because the people are not getting any more territorial property, they must learn to preserve what they have.

Of course, we know that there *are* other mechanisms to make people care for physical assets. Each year, thousands of us write checks to the Central Park Conservancy, a private group that raises and spends nearly forty million dollars a year to take care of an impressive piece of real estate that neither it nor any of us contributors own.<sup>120</sup> And yet there is no question that property rights do give owners incentives to conserve real estate and chattel goods. In the Soviet Union, when large apartment buildings fell into disrepair it was commonly said, “No one owns it, so no one takes care of it.” If you are the host of the party, you care a lot more when people start dancing on the furniture.

Despite its initial appeal, the problem with the incentives-to-preserve argument for exclusive rights is that the exclusive rights do not by themselves trigger preservation or conservation. The world of audiovisual preservation offers one rough analog—a vast amount of cultural material in need of stewardship—and is exemplary with its complex topography. Copyright owners are substantially engaged in restoration and preservation, and those so engaged demonstrate clear ownership motivations. Although there is no doubt that film studios and other private owners of old films—film stock and copyright—undertake some of their conservation efforts from an alloy of civic duty and institutional pride, profit from

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[hereinafter RAWLS, *A THEORY OF JUSTICE*] (“In both a private-property as well as in a socialist society great concern may be expressed for preventing irreversible damages and for husbanding natural resources and preserving the environment.”).

119. RAWLS, *THE LAW OF PEOPLES*, *supra* note 118, at 39 (emphasis omitted).

120. Formed in 1980, the Central Park Conservancy is a private, nonprofit organization. The Conservancy “provides 85 percent of Central Park’s \$45.8 million annual Parkwide expense budget through its fundraising and investment revenue” to manage the park under contract from the City of New York. *About the Central Park Conservancy*, CENT. PARK CONSERVANCY, <http://www.centralparknyc.org/about/> (last visited Jan. 5, 2013).

their vast libraries is usually part of the equation. As one industry observer puts it, the choice of films for restoration “typically comes down to moneymaking potential.”<sup>121</sup>

On the other side of the equation, nonprofits and governments are engaged in at least equally ambitious efforts. Founded in 1997, the Library of Congress's National Film Preservation Foundation had, as of 2010, helped restore approximately 1,650 films.<sup>122</sup> Other significant efforts at film preservation and restoration can be found with New York's Museum of Modern Art (MoMA),<sup>123</sup> UCLA, the Eastman House in Rochester, the Academy of Motion Picture Arts and Sciences, and many smaller foundations and institutes.

It would be hard to overemphasize how much film preservation is nonmarket, depending on governments, nonprofits, and charities. In 2010, the British Film Institute (BFI) launched a campaign to raise one million pounds to restore nine of Alfred Hitchcock's early works<sup>124</sup>—apparently because Hitchcock's marquee name is not enough to give these silent films enough commercial rerelease value to trigger their restoration. In the United States, in the words of one journalist, “Hollywood essentially relies on the Library of Congress to handle most of its preservation efforts.”<sup>125</sup>

In this sense, the most blunt version of the incentive-to-preserve argument would *not* hold for audiovisual works—and if Hitchcock is not enough to identify marketable property in the audiovisual world, it is not clear how we would identify TK/TCE both in need of preservation and marketable as property. On the other hand, exclusive control of the

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121. Marc Graser, *Hollywood or Dust!*, VARIETY, Aug. 2–8, 2010, at 1, 28.

122. *Id.* at 1. The building of the Library of Congress's Packard Campus of the National Audio-Visual Conservation Center in 2007 was made possible by a \$160 million grant from the Packard Humanities Institute. *Id.* The Center is one of the few in the world that works with nitrate negatives (film stock from the early 1890s to 1951); Hollywood studios have entrusted the Library's Packard Campus with Frank Capra films, the camera negative of *The Maltese Falcon*, and Stan Laurel films. *Id.*

123. Since 1996, MoMA has had a large remote center in Hamlin, Pennsylvania to preserve and do conservation work on its collection of 27,000-plus films—a center for which MoMA seeks donations. Email from MoMA to Justin Hughes (April 18, 2012, 1:06 PM) (on file with author) (seeking contributions to Annual Fund on the basis of film preservation work).

124. *Hitchcock 'Adoption' in UK*, CHINA DAILY (July 8, 2010), <http://wo.chinadaily.com.cn/view.php?mid=16794&cid=98&isid=162>.

125. Graser, *supra* note 121, at 1.

restored prints *is* part of the BFI's overall economic plan for restoration of the Hitchcock films.

More importantly, the analogy to film may give us too narrow a sense of preservation when it comes to TK and TCE. Preservation of TK and TCE involves preservation of *practices, activities, and skills*. It is not just preservation of pottery forms in extant works, but how to make the pottery. If granting exclusive rights to typical art and craft designs, forms, and styles would curb industrial production of the same and enhance the capacity of local communities to maintain local production, surely this would be a form of *preservation*.<sup>126</sup> In a similar fashion, exclusive rights could give *some* incentive, in some circumstances, for TK/TCE preservation.

### B. Labor Theories and TK/TCE

Locke's account of property rights focuses on the individual human—not an auspicious fact for an account of collective and community rights. Because the individual laborer, artist, inventor, or tinkerer seems to remain central to most accounts of intellectual property, as Robert Merges notes, “collective creativity is today seen as a challenge to conventional mechanisms of encouragement, protection, and recognition. Intellectual property in particular is said to be a poor fit with this new form of creative work.”<sup>127</sup> This sort of observation has been made frequently in relation to collaborative and collective processes on the Internet.<sup>128</sup>

But the same concern is raised in relation to TK/TCE. As one carefully worded WIPO publication puts it, “Is the IP system compatible with the values and interests of traditional communities—or does it privilege individual rights over the collective interests of the community?”<sup>129</sup> Boatema Boateng has raised the same genre of concern in relation to

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126. Madhavi Sunder has made the same argument in relation to protection of geographical indications (GIs). Sunder, *supra* note 79, at 99 (“One hope is that Geographical Indication (GI) protection will allow local artisans to stay in their communities and fend for themselves, without having to renounce their traditional work for life in the overcrowded cities.”). I have doubts about how much GI protection can do this, but believe a similar, stronger case can be built for the potential impact of exclusive rights on TCE art forms.

127. Merges, *Locke for the Masses*, *supra* note 21, at 1181.

128. Two discussions from the earliest days of the Internet are Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996), and Ira V. Heffen, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487 (1997). See also Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004).

129. WIPO, *supra* note 7, at 3.

some west African TCE: *adinkra* and *kente* cloth.<sup>130</sup> Boateng views Western intellectual property as focused on the individual and only providing recognition of groups through a fiction:

Only individuals can claim to be authors or inventors; thus, cultural producers who work as individuals have legal standing, while those who operate in groups do not unless they individually claim authorship of discrete parts of the group's production. Alternatively, if those groups are formally constituted such that they can claim the status of "legal persons," then the group becomes a kind of honorary individual that can claim authorship.<sup>131</sup>

It seems true that intellectual labor by "large groups of dispersed creators" is "not well-accounted for in our legal system,"<sup>132</sup> but I share Merges's belief that collective creativity is not as incompatible with classic accounts of intellectual property, including labor theory accounts, as many commentators have claimed.<sup>133</sup>

To see this more clearly, consider Boateng's comparison of the context of the production of *adinkra* and *kente* cloth versus her view of Western art:

[I]n the case of *adinkra* and *kente* . . . authorization comes not from the person who makes the cloth but from the history that makes the cloth a valuable commodity. The cloth maker's name, in this scheme, has little authorizing value. Rather, it is his ability to link his cloth to a particular heritage whose elements include a long tradition of practice on the part of other cloth producers in his spatial and temporal community. . . .

. . . . Unlike Foucault's "author function" that invests discourses with authority, authorization here is not bound up with the identity of a single person working at a specific historical moment but with a community of living and deceased producers. Authorship and authorization, in this scheme, are therefore collaborative and temporally indefinite.<sup>134</sup>

Initially this description seems compelling, but does it really identify anything different from *some* Western artistic practices? Instead of *cloth*, substitute *visual characters*, and instead of *kente* and *adinkra*, use *Mickey Mouse*, *Tin-Tin*, *Batman*, *Dr. Who*, or any number of cultural franchises in the West. For each of these franchises, "authorization . . . is not bound up with the identity of a single person working at a specific historical moment but with a community of living and deceased producers" and the

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130. See BOATENG, *supra* note 100, at 2–3.

131. *Id.* at 109.

132. Merges, *Locke for the Masses*, *supra* note 21, at 1180.

133. See *id.* at 1180–82.

134. BOATENG, *supra* note 100, at 48–49.

visual artist's name, in these schemes, "has little authorizing value" because the overarching objective is to "link" the new work to a "particular heritage" of known elements.<sup>135</sup>

Large, collaborative groups in which individual identity was often submerged and even more frequently lost are part and parcel of Western creativity—this is true not just with pop culture entertainment but also with the paintings in our museums that are designated only "School of \_\_\_\_\_" and how we revere relatively anonymous design in crafts and useful items as in the Victoria & Albert Museum collection of pottery or MoMA's collection of twentieth-century electric appliances.

Both Boateng and Merges might say that I am cheating a bit because even where Western culture submerges individual identity—a Disney film, "designed by Apple," Rookwood pottery, "School of Caravaggio"—there is still a "single highly centralized creative entity" and that centralization permits our accounts of intellectual property to work.<sup>136</sup> Merges's intuition is that even beyond such centralized creative enterprises, it should be possible "to make out a fuzzy case for a group right on the basis of a generalized appreciation for collective labor"<sup>137</sup> and that "[s]omething like exclusive (or semi-exclusive) rights to be held by groups who exert collective labor on things would satisfy the basic requirement of rewarding Lockean labor."<sup>138</sup> Beyond those intuitions, he seems conflicted as to how to make a labor theory account of intellectual property workable with relatively decentralized collective labor.<sup>139</sup>

The caution is well-placed, but I think that the degree of centralization is not the dispositive issue. Locke's narrative is one of the individual's actions and prerogatives in relation to the rest of humanity: "[m]ankind in common," "[m]en in [c]ommon," "all [m]en," "all his [f]ellow-[c]ommoners, all [m]ankind."<sup>140</sup> For all the moves Locke makes, it is a

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135. *Id.* Boateng also distinguishes the *adinkra* and *kente* production this way: "Although the designs [that *adinkra* and *kente* makers] use have individual creators, those individuals are not easily separated from the community as authors because the norm is for their designs to pass into the communal pool." *Id.* at 109. But, again, this would be true of the individual contributions of creators working in a large studio, whether the animators at Disney or the potters at Rookwood.

136. Merges, *Locke for the Masses*, *supra* note 21, at 1180.

137. *Id.* at 1188.

138. *Id.* at 1191. Merges's thesis is that "from a Lockean perspective . . . *collective* labor ought to count just as much, at least in some situations, as a foundation for property claims." *Id.* at 1185.

139. He thinks this can be done "without unduly complicating the IP system," *id.* at 1191, but has misgivings about how "to figure out even a moderately workable structure for such a right," *id.* at 1188.

140. LOCKE, *supra* note 20, § 25, at 327, § 27, at 328–29, § 32, at 332–33, § 34, at 333.

story of an individual in one tribe without any other tribes being present.<sup>141</sup> Contrast this with Rawls, who eschews any commitment to private property when he is focused on the individual within the tribe, but more expressly embraces property as a concept when concerned with interaction among peoples.<sup>142</sup> The question is not whether to centralize or decentralize but whether the group laboring collaboratively has a distinct identity from the rest of “[m]ankind in common” such that the group can carry out the use and enjoyment that Locke requires and therefore warrant property rights.<sup>143</sup>

Assuming that we accept that the relatively decentralized group laboring collaboratively can fit within a labor-desert theory, our initial acceptance would almost certainly be for *relatively contemporaneous* collaborative labor—something like Wikipedia. The intergenerational premise of TK/TCE means that we will also have to resolve a question the labor theory does not usually confront: who is the *laborer* across time? This is where one of the key issues under negotiation makes its presence felt: the beneficiary group—*who is the continuing indigenous people? What constitutes the “same” local community analogous to being the same person over the decades?*

One could think of this as a problem of representation, a problem of identity, or both. To be more specific, the relationship of the present generation to the future might be one of representation,<sup>144</sup> but the relationship of the present generation to the past strikes me as a question whether the present individuals are the *same people*. Locke clearly saw the labor theory as resting on the *present person's* labor—as in the philosopher's observation that God gave the Earth to “the Industrious

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141. True, he writes of “several [n]ations of the Americans,” *id.* § 41, at 338 (emphasis omitted), and that “in the beginning all the [w]orld was America,” *id.* § 49, at 343 (emphasis omitted), but I read him to view the Native Americans as a case study of what happens when there is a lack of labor.

142. While Rawls's discussion “assume[s] that the regime is a property-owning democracy since this case is likely to be better known” as between a private property system, a socialist system of production, or some hybrid, he tells us that “[t]he theory of justice does not include these matters.” RAWLS, A THEORY OF JUSTICE, *supra* note 118, at 242.

143. LOCKE, *supra* note 20, § 25, at 327.

144. See Merges, *Locke for the Masses*, *supra* note 21, at 1190 (“The problem of representation arises here, and might serve as a model. In these cases, the current inhabitants of traditional leadership roles are assumed to adequately represent the generations past and future who have an interest in protecting and profiting from the traditional knowledge.”).

and Rational, . . . not to the Fancy or Covetousness or the Quarrelsome and Contentious.”<sup>145</sup>

Perhaps there is some combination of Lockean labor theory and Rawlsian justice across generations available to us. It is easy to imagine a necessary, but not sufficient, condition that the indigenous people or local community must be themselves laboring on the TK/TCE in order to inherit the mantle of sameness. This might give resonance to the TK/TCE *demandeurs*' insistence that TK/TCE is dynamic and evolving—one might say, yes, it *must* be dynamic and evolving.

Even if not an obligatory evolving condition, applying Locke to TK/TCE could bring conditions of use and nonspoliation into the equation: where TK/TCE “perished” under the control of the indigenous people or local community without its “due use,” this would be offensive to the rest of humanity’s enjoyment of the resources in question.<sup>146</sup> A straightforward example might be where an indigenous people or local community kept control of some physical cultural asset and permitted that asset to deteriorate beyond restoration. Another might be an indigenous language’s slow decline to extinction. Either case might be particularly troubling if outsiders had offered to maintain the TCE but were refused on the grounds of the indigenous people or local community’s exclusive control. Use or nonspoliation condition(s) could put a labor-desert analysis of TK/TCE protection in virtual juxtapose with an incentive-to-preserve analysis: the former saying that efforts to preserve are required to justify the protection and the latter saying that the protection is needed to motivate the efforts to preserve.

But aside from physical deterioration of cultural assets, and maybe language death, it may not be easy to map Locke’s notion of impermissible spoilage onto TK/TCE. In section 38, Locke writes of “Grass of his Inclosure [that] rotted on the Ground, or the Fruit of his planting [that] perished without gathering.”<sup>147</sup> This is both waste of the individual’s labor—planting the fruit—and waste of valuable assets that others could enjoy—the fruit.<sup>148</sup> Propertization is fine “so long as nothing perishe[s] uselessly in his hands,” and as to shells, gold, and jewels acquired through barter of the perishable, that “he might heap up as much of these durable things as he please[s]; the exceeding of the bounds of his just [p]roperty

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145. LOCKE, *supra* note 20, § 34, at 333.

146. The phrases are drawn from LOCKE, *supra* note 20, § 37, at 337, in which Locke is describing acquisition of property before the appropriation of land.

147. LOCKE, *supra* note 20, § 38, at 337.

148. I discussed this in Hughes, *Philosophy*, *supra* note 21, at 327–28.

not lying in the largeness of his [p]ossession, but the perishing of anything uselessly in it.”<sup>149</sup>

Locke's discussion of spoilage is not clearly premised or conditioned on others *needing* that which went to waste. And his example, not surprisingly, is what we would now call renewable resources. Taken together, that would mean some of the objectionable waste is, in a sense, “victimless.” Along this pathway, the spoilage condition could become a simple use condition—perhaps Tully's reading. Of course, intellectual property has a complex history with use conditions: whether the manufacturing requirement that existed in U.S. copyright law,<sup>150</sup> the “working requirement” that exists in the patent system,<sup>151</sup> or various regimen of compulsory licensing, both real and proposed.<sup>152</sup> It is an intriguing question how one would formulate a working requirement for publicly known TK/TCE, that is, TK/TCE that is not kept secret.

### C. Personality Justifications and TK/TCE

Personality justifications for intellectual property might transmute themselves most helpfully by being understood as justifications for protection of TK/TCE based on the increased autonomy and recognition that would be afforded to the indigenous people, local community, and

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149. LOCKE, *supra* note 20, § 46, at 342 (emphasis omitted).

150. The domestic manufacturing clause first appeared in the 1909 version of the Copyright Act. Under the terms of the Act of July 13, 1982, the domestic manufacturing clause expired on June 30, 1986. Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (codified at 17 U.S.C. § 601 (repealed 2010)).

151. Article 5(A)(4) of the Paris Convention recognizes that countries may impose working requirements by constraining compulsory licensing that may result from the failure to work the patent. Paris Convention for the Protection of Industrial Property art. 5(A)(4), Mar. 20, 1883, 828 U.N.T.S. 107 (“A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons.”). The working requirement existed in U.S. patent law until 1908.

152. For example, TRIPS article 31 provides for “use of the subject matter of a patent without the authorization of the right holder” but only if, absent a national emergency, “prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.” Agreement on Trade-Related Aspects of Intellectual Property Rights art. 31, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

nation-state that houses them.<sup>153</sup> The problem in applying a personality justification directly to TK/TCE rights held by a group would be the recognition of the group, whether indigenous tribe or local community, as having its own “group personality.” That, of course, is part of the larger challenge of how the group as a receptacle or holder of rights fits in a modern system that focuses on the individual as the seat of rights, prerogatives, and responsibilities.<sup>154</sup>

But as Peggy Radin has observed, even if “we lack a convincing theory of group rights . . . group cohesion may be important and even necessary to [individual] personhood.”<sup>155</sup> Discussing the *Village of Belle Terre v. Boraas* case, in which six students sharing a house challenged zoning regulations that limited the village to nuclear families, Radin sees the case as one “involving personhood, in the guise of freedom of association, on both sides.”<sup>156</sup> In other words, both sides had claims that the personhood of their individual members would be harmed if they were not permitted to exercise their own freedom of association—one being the six students living with each other and the other being the 700 nuclear families associated together as a village. Radin’s own examples come from real property situations, but I do not see any reason that the same kind of analysis cannot be applied to elements of culture or know-how.

As long as the maintenance of group identity is part of the personhood interests of each individual member of the group, we do not need a theory of group rights to have personality interests count as a justification of some kind of protection of TK/TCE. Indeed, when American law protects Native Americans by limiting the alienability of any “object having ongoing historical, traditional, or cultural importance central to [a] Native American group or culture,”<sup>157</sup> there is no crisis in justification for the law. Everyone understands that, regardless of one’s views on

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153. For example, in describing rights over local flora and fauna—and the genetic resources thereof—Merges has speculated that “strong property rights” might “enhance developing country autonomy and environmental goals.” Robert P. Merges, *Rainforest Preservation: Problems with the Property Rights Approach* 3 (1995) (unpublished manuscript) (on file with Robert P. Merges).

154. See, e.g., David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 99 (2000–2001) (“The American copyright system stumbles as it attempts to protect ‘group’ rights that lack either identification of any actual original author, or alternatively, the requisite intent to enter into a legal relationship to create a joint or collective work.”).

155. RADIN, *supra* note 25, at 70.

156. *Id.* (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

157. 25 U.S.C. § 3001(3)(D) (2006). This is the Native American Graves Protection and Repatriation Act, which prohibits sale or purchase of Native American human remains or cultural items acquired without proper authority; the Act can also force repatriation of such items to the culturally affiliated tribe. See *id.* §§ 3001–3013.

full-blown group personality interests, we can protect the personality interests of individuals within that group through protection of the group's interests. Yet just as exclusionary zoning—the *Village of Belle Terre v. Boraas* case—is a difficult question between people's freedom to migrate and people's freedom to form and maintain cohesive communities,<sup>158</sup> protection of TK/TCE—at least when it is used to forbid outsiders from using the TK/TCE—presents a balance between some people developing their own personhood through free *migration* in thought and expression as against other people's freedom to protection of their personhood interests through maintenance of cohesive expressive communities.

#### D. Privacy Justifications and TK/TCE

Privacy justifications for exclusive rights over TK/TCE also seem like a promising area. Of course, such justifications will be limited to TK/TCE that is genuinely kept out of the possession of outsiders. When a tribal ritual, sanctuary, or sacred writing is unquestionably kept from outsiders, this is easy. But when some members of a community want to disclose or share with outsiders, thorny issues can arise.<sup>159</sup>

The analogous causes of action in traditional common law jurisdictions include trade secrecy—commonly, although not uniformly, considered part of intellectual property—protection of confidential information, breach of confidence, and straightforward invasion of privacy claims. Indeed, many of the elaborations of an invasion of privacy in American law would map reasonably well onto situations in which secret TK/TCE is disclosed and disseminated outside an indigenous people or local community.<sup>160</sup> The principal modification that is required is to move from the protection of an individual person, including a corporation as a juridical person, to the protection of a more amorphously but still discretely defined group. For reasons I have explained in Part IV.B above, I think

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158. An observation made by Radin. RADIN, *supra* note 25, at 97.

159. CRYSTAL, *supra* note 6, at 157 (“Some elders . . . do not want to tell their stories; and even if they do, their relatives or community groups may dispute their right to tell them, or refuse to allow other people to use them. The ancestral language may be viewed as sacred.”).

160. In the United States, the right of privacy may be invaded by an “(a) unreasonable intrusion upon the seclusion of another[,] . . . (b) appropriation of the other’s name or likeness, . . . (c) unreasonable publicity given to the other’s private life, . . . or (d) publicity that unreasonably places the other in a false light before the public.” RESTATEMENT (SECOND) OF TORTS § 652A (1977).

that such a move is not difficult and in fact, at least one common law court has agreed.<sup>161</sup>

Another conceptual challenge here is that many advocates of TK/TCE protection conflate *private* with *sacred*. Although we can assume that those rituals, events, and artifacts that a community keeps private are of greater value—and may often be the equivalent in that society of sacred—there is much that is sacred that is not private, as any Catholic can attest. Perhaps more important, we can develop reasonably objective criteria for what is private, but the call from some *demandeurs* that sacred TK/TCE receive heightened protection has, as a counterpoint, the claim from other *demandeurs* that all TK/TCE is sacred.

## V. DISTRIBUTIVE JUSTICE AND TK/TCE

In the scholarly discourse explaining and justifying intellectual property, the concepts of fairness and desert are given little attention, if not outright short shrift. Yet there is no question that they have been and remain powerful notions in the daily intellectual property work of courts and legislators.<sup>162</sup>

On those occasions when fairness issues have come to the front and center of scholarly discussions, it is usually as a critique of intellectual property rights—limiting or conditioning intellectual property is seen as the means to promote distributive justice.<sup>163</sup> At the international level,

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161. For example, in *Foster v Mountford* (1976) 29 FLR 233, 235, an Australian court used the common law doctrine of confidential information to prevent the publication of a book containing information on sites and objects that had been revealed to the anthropologist in confidence and held that the publication of such information would amount to a breach of confidence.

162. For example, the earliest state copyright acts often spoke in terms that combined natural rights and incentive arguments. See THORVALD SOLBERG, COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783–1906, at 11–15, 18–20, 25–31 (1906) (state laws for Connecticut, Georgia, Massachusetts, New Hampshire, New York, North Carolina, and Rhode Island). Even when recognizing that the “reward” of copyright is an end to a means, the Supreme Court has noted that “[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.” *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (quoting *Mazer*, 347 U.S. at 219). This point was also repeated by many lower courts. See also U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3–6 (1961) (recognizing that a purpose of copyright is “[t]o give authors the reward due them for their contribution to society”). Intellectual property laws in other countries similarly have powerful fairness underpinnings. For example, Andre Lucas, the author of France’s best known treatise on copyright law, once remarked, “No far-reaching regulation on unfair competition exists in France. Otherwise patent and copyright law would be superfluous.” EUMETSAT, 1ST EUMETSAT WORKSHOP ON LEGAL PROTECTION OF METEOROLOGICAL SATELLITE DATA 11 (1991).

163. See, e.g., Timothy J. Brennan, *Copyright, Property, and the Right To Deny*, 68 CHI.-KENT L. REV. 675 (1993) (discussing distributive justice and fair use of author’s

concerns for justice, broadly understood, also seem to motivate action that limits intellectual property or curbs its impact. The 2001 Doha Declaration<sup>164</sup> and the 2005 extension of the period for least developed countries to bring their laws into TRIPS compliance might count.<sup>165</sup> But as Peter Menell observed a few years ago, “[t]he most concrete manifestation of distributive justice principles in the intellectual property field are recent international accords with regard to the protection, ownership and use of resources.”<sup>166</sup> Those undertakings—the Convention on Biological Diversity (CBD), the CBD’s recent Nagoya Protocol,<sup>167</sup> and work at the Food & Agricultural Organization on access and use of germplasms—are antecedents to the IGC’s discussion of genetic resources and patenting.

In that IGC discussion of genetic resources and patenting, *demandeurs* seek to condition the validity of patents on inventions using genetic resources on the disclosure of the genetic resources, prior informed consent in obtaining the genetic resources, and adequate benefit sharing with the territory from which or people from whom the genetic resources came. In this sense, the claim of developing countries for a share of the proceeds from patented technologies derived from genetic resources, and associated TK, is directly parallel to the distributive justice claims in domestic disputes that individual persons deserve a cut of the proceeds of patented technologies derived from cell lines.<sup>168</sup>

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materials); William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79 (1992).

164. WTO, Ministerial Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm). The Doha Declaration expanded the capacity of countries to use compulsory licensing of pharmaceutical patents in the face of “national emergency or other circumstances of extreme urgency,” expressly identifying “HIV/AIDS, tuberculosis, malaria and other epidemics.” *Id.* at para. 5(c).

165. See Press Release, World Trade Organization, Poorest Countries Given More Time To Apply Intellectual Property Rules (Nov. 29, 2005), available at [http://www.wto.org/english/news\\_e/pres05\\_e/pr424\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr424_e.htm).

166. Menell, *supra* note 13, at 160.

167. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization to the Convention on Biological Diversity, Oct. 29, 2010, available at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

168. A focal point for this issue was the California Supreme Court’s decision in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990). For discussions of human cells being used without prior informed consent, see BOYLE, *supra* note 43, at 21–24, 98–107 (discussing *Moore* case); REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010) (discussing HeLa cell line); and Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J.

### A. The Redistributive Power of “New” Property in TK/TCE

It is fair to say that distributive justice concerns are implicitly front and center in the TK/TCE discussions but in the opposite way from the genetic resources debate: the TK/TCE discussion is about establishing *new* intellectual property rights as a way to redistribute wealth.<sup>169</sup> And this implicit issue or claim is something we need to treat respectfully, particularly because, as Molly Torsen and Jane Anderson note, “[i]ndigenous and traditional communities are generally among the poorest and most disadvantaged in the world.”<sup>170</sup> Of course, there are many theories of redistributive justice,<sup>171</sup> and the only one I will attempt to explore here is a Rawlsian approach.

Readers of these symposium pages will be well acquainted with John Rawls’s *A Theory of Justice* and his overarching system built on just two principles. Rawls’s first principle is that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible

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81, 168–72 (1998) (discussing *Moore* case). Indeed, the modern, full concept of prior informed consent had its start in American medical malpractice law. See *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957). See generally Jay M. Zitter, Annotation, *Recovery for Nonconsensual Human Medical Experimentation*, 42 A.L.R.6th 301 (2009). In the 1980s and 1990s, the concept of free, prior informed consent migrated into public international law discussions as a tool to protect indigenous people, both on issues like displacement from tracts of land and in regards to TK/TCE. See generally Robert Goodland, *Free, Prior and Informed Consent and the World Bank Group*, SUSTAINABLE DEV. L. & POL’Y, Summer 2004, at 66, 66–67; Daniel Barstow Magraw & Lauren Baker, *Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent*, 35 DENV. J. INT’L L. & POL’Y 413, 421–22 (2007); Anne Perrault, *Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge*, SUSTAINABLE DEV. L. & POL’Y, Summer 2004, at 21.

169. For example, the preamble of the August 2012 IGC text recites that one of its purposes is to “promote the equitable sharing of benefits arising from their use.” WIPO, *Intergovernmental Committee*, *supra* note 106, at 3; see also Hansen, *supra* note 4, at 761 (describing TK/TCE protection as intended to “to correct North-South information and economic inequity”); *id.* at 775 (“The motivations . . . are those of equity in intellectual property ownership and economic development . . .”).

170. Molly Torsen & Jane Anderson, WIPO, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, at 14, WIPO Pub. No. 1023(E) (2010), available at [http://www.wipo.int/free/publications/en/tk/1023/wipo\\_pub\\_1023.pdf](http://www.wipo.int/free/publications/en/tk/1023/wipo_pub_1023.pdf); see also Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 4 (2001) (describing indigenous people as characteristically living “under conditions of severe disadvantage relative to others within the states constructed around them”).

171. See, e.g., G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* 2 (2008) (theory of distributive justice in which people’s material wealth prospects are roughly equal and distributive justice questions arise for both state and private individuals in their daily lives); PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM?* 35 (1995) (theory that redistributive justice requires a minimum basic income for everyone).

with a similar scheme of liberties for all.”<sup>172</sup> In itself, this is unremarkable; indeed, with a bit of polish and color it is not so different from things that world leaders say all the time. But Rawls’s vision of a just society is marked by, among many things, another principle commonly called the “difference principle.” The difference principle addresses both distributive equity and productive efficiency, stating that “[s]ocial and economic inequalities [must be of] . . . the greatest benefit [to] the least advantaged [members of society].”<sup>173</sup> This distribution of resources governs what Rawls calls “primary goods,” which include “rights, liberties, and opportunities, . . . income and wealth,” and the “social bases of self-respect.”<sup>174</sup> Much of Rawls’s profound influence stems from this simple justification of economic incentives: inequalities related to productive efficiency are allowed and defended as long as they work to improve the lot of the “worst-off” class in the society.

Every critical piece of the Rawlsian machinery has been debated for decades. For example, the primary goods list can be understood narrowly in the sense of consumptive goods and services or more broadly, in Amartya Sen’s words, as “the general-purpose means for the pursuit of one’s comprehensive goals.”<sup>175</sup> And quite a few well-meaning people modify Rawls’s framework without Sen’s rigor. One of the ways Rawlsian justice is most abused and misunderstood is through vague or loose understandings of the worst-off class. The worst-off class used in our calculations of justice should be a group with stable characteristics.<sup>176</sup> The most obvious candidate is the poorest class economically, although

172. JOHN RAWLS, *POLITICAL LIBERALISM* 291 (1993).

173. RAWLS, *A THEORY OF JUSTICE*, *supra* note 118, at 266.

174. *Id.* at 54.

175. SEN, *supra* note 1, at 64. For Sen, primary goods are best understood as “capabilities”—capabilities for living the life one chooses to live. *Id.* at 66. He believes that “primary goods are, at best, means to valued ends of human life” and “merely means to other things, in particular freedom.” *Id.* at 234.

176. When making judgments from the original position, Rawls is clear that the least advantaged are not identifiable this way. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* § 17.3, at 59 n.26 (Erin Kelly ed., 2001) (“The least advantaged are never identifiable as men or women, say, or as whites or blacks, or Indians or British. They are not individuals identified by natural or other features . . . . Rather, the worst off under any scheme of cooperation are simply the individuals who are worst off under that particular scheme.”). Nonetheless, Rawls recognizes that later stable characteristics of groups may be used to judge the comparative justice of different arrangements. *See, e.g., id.* § 18.6, at 66 (“[W]hen used in a certain way, distinctions of gender and race [may] give rise to further relevant positions to which a special form of the difference principle applies.”).

one can debate how large a slice to use; one can also imagine worst-off classes based on other metrics, such as long-term disabilities. But a worst-off class is not people suffering from headaches at 10:00 a.m. today or people who went to Vegas and lost everything.

Within the range of reasonable interpretations of primary goods and worst-off groups, the incentive-to-innovate, the incentive-to-disseminate, and the incentive-to-preserve justifications for intellectual property can all fit with the difference principle in the sense that the monopoly rents brought to inventors, authors, and the people who bankroll them make everyone better off, including the worst-off class. There is much to be explored about all this,<sup>177</sup> but the general argument is that the differences in incomes introduced by the intellectual property system are justified by the benefits brought to everyone, including the worst off.

But what kind of Rawlsian distributive justifications can we make for establishing, here and now, legal protection for TK/TCE? Rawls's initial vision was laid out in terms of the ex ante formulation of just institutions for a self-contained society, and there is a cottage industry critiquing Rawls's subsequent efforts to extend his vision of justice to the international level. It seems to me that if we are to use Rawls's ideas here, we should put to one side his awkward expansion of his system of justice to a proto-Westphalian world. Instead, we should concentrate on Sen's observation that "Rawls's formulation of the difference principle . . . gives us ground[s] enough to rank other alternatives in terms of the respective advantages of the worst-off."<sup>178</sup> In "a cross-border 'public framework of thought'"<sup>179</sup> that does not rely on a presumed social contract, we should rank our present circumstances—the existing international and national legal systems of intellectual property—against an alternative that would be the same legal systems of intellectual property with the addition of the *best* system of TK/TCE protection we believe *we can reasonably obtain in the current political circumstances*.

On that basis, I think we can reason as follows: if we assume that the recipients of any economic rents from the TK/TCE protection will be

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177. Indeed, one could make some interesting arguments about intellectual property enforcement from the Rawlsian perspective, for example, that an enforcement system focused on the middle and upper rungs of the society while permitting a more rampant level of piracy at the lower levels give the inventors/authors unequal rewards in order to make the poorest citizens better off.

178. SEN, *supra* note 1, at 97. Sen stresses that a vision of ideal distributive justice is not required to make binary comparisons. *Id.* at 102 ("There would be something deeply odd in a general belief that a comparison of any two alternatives cannot be sensibly made without a prior identification of a supreme alternative. There is no analytical connection there at all.")

179. *Id.* at 141.

sufficiently “among the poorest and most disadvantaged in the world”<sup>180</sup> and that we can treat them as a *worst-off group* for moral considerations, then a palpable moral case can be made for some kind of TK/TCE protection beyond protecting that which is secret or private (and would not therefore be a direct source of further goods in a market exchange economy). In financial terms, the TK/TCE protection would shift a relatively small amount of wealth from other groups to a worst-off group.

It also can be used to keep a small amount of wealth from *shifting away from them*. One concern—discussed implicitly or explicitly—is whether most indigenous peoples or local communities would be in a reasonable position to develop or commercialize the protected TK/TCE *outside the community*. But much TK/TCE is commercially exploited by *the community*, as when Hopi Indians make and sell *kachina* dolls, Aborigines make and sell dream paintings, and Laotian silkweavers make tapestries with traditional patterns. These are just a few examples of the many situations in which indigenous people and local communities have arts and crafts production systems that bring in outside capital through exports—either regular exports or sales to tourists, who carry out the products.

As Torsen notes, “TCEs can be economic resources that concretely contribute to providing livelihoods and easing poverty and socio-economic disadvantage for these communities, for example, through craft marketing.”<sup>181</sup> Many of these groups have faced stiff competition from Asian industries copying the arts and crafts styles and then flooding international markets—including supplying tourist shops in the indigenous people’s home country. So, we need to entertain seriously how TK/TCE protection may help indigenous people and local communities retain production bases that might otherwise be lost.

The kind of redistribution that would happen with an effective TK/TCE regime would *at best* be small, slow, and sporadic. This is not the sort of ad hoc move toward redistributive justice that Sen would advocate to avoid catastrophe through “calamitous inaction” (as with the case of a famine that can be averted).<sup>182</sup>

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180. Torsen & Anderson, *supra* note 170, at 14.

181. *Id.*

182. SEN, *supra* note 1, at 47. Sen makes the persuasive case that it is usually easy to thwart famines. He reasons that “[t]he relatively small redistribution of the food supply that is needed to avoid starvation can be brought about through the creation of purchasing power

In terms of redistributive effect, we should also emphasize that while everyone may have rights over TK/TCE, only a few will have valuable TK/TCE. Among those who advocate for new or stronger forms of intellectual property rights, there is a mistaken, if not sometimes disingenuous, conflation of new legal rights and new economic wealth. But the abstract prospect of benefit sharing for genetic resources, TK, or TCE will do little when a local community or indigenous people are faced with hard choices related to poverty.<sup>183</sup>

*B. Economic Rents to Beneficiaries—The Practical Problem of Getting This To Work*

Earlier, I described one of the four fundamental debates about TK/TCE protection being the *beneficiaries* of TK/TCE protection. This is where the discussion veers sharply from a simple North/South debate. The indigenous groups and local communities involved in the GRTKF discussions clearly want the beneficiaries of protection to be *themselves*.<sup>184</sup> These groups are generally supported by nongovernmental organizations and New World countries that have developed express systems for recognizing, however imperfectly, indigenous peoples' rights—Australia, Brazil, Canada, Mexico, New Zealand, and the United States.<sup>185</sup>

In contrast, a number of countries want national governments to both control and be the beneficiaries for all TK/TCE located within their national borders. This point of view has a long pedigree, dating back to at least the Tunis Model Law. Indeed, over the decades there has been a movement from the assumption that national governments should control TK/TCE to an increasing realization that control should vest with the concerned indigenous people or local community.<sup>186</sup>

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for those deprived of all incomes, through one calamity or another, which is typically the primary cause of starvation." *Id.* at 48.

183. Merges has also made this point. Merges, *supra* note 153, at 1 ("Granting strong property rights over the discovery of new plants and animals, or genetic features of them, will not by itself end the destruction of rainforests and other habitats.").

184. See, e.g., 1993 *Mataatua Declaration*, *supra* note 89, pmb., at 2 ("Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge . . ."); *id.* § 2.1 ("Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge."); *id.* § 2.4 ("Accept that the cultural and intellectual property rights of indigenous people are vested in those who created them.").

185. Many other countries also have laws recognizing that TK/TCE should be owned or controlled by indigenous people and local communities. See, e.g., The Indigenous Peoples' Rights Act of 1997, Rep. Act. No. 8371 (1997) (Phil.), available at <http://www.doe.gov.ph/ER/pdf/RA%208371.pdf>.

186. See, e.g., Kutty, *supra* note 5, at 22 (describing a survey the author conducted in the late 1990s finding "[m]ost of the respondents asserted that the right over the

As a practical matter, this has a powerful impact on our ability to justify TK/TCE protections. Although revenue from TK/TCE protection flowing into central government coffers *might* still serve as an incentive to preserve or even an incentive to distribute, such monies surely cannot serve as incentives to create *if the benefits never reach the creators*. More importantly, if revenues, or the benefits thereof, never reach the indigenous people or local community that is the source of the TK/TCE, there is no redistributive justification based on indigenous peoples being likely worst-off groups. Monies that remain in the capital are less likely to make the worst-off better off.

On this count, it is troubling that the postcolonial history of many developing countries has included elites—urban and connected to the government—extracting disproportionate amounts of the national wealth through control of external trade. This problem has arguably been worst where the resource being traded can be produced with a small workforce relative to the overall population, such as oil and diamonds—what Leif Wenar and others have called the “resource curse.”<sup>187</sup>

But the same problem—wealth being channeled away from the worst off—“can be seen in the troubling history many developing countries have had with centralized agricultural management in which government authorities have extracted economic rents from small farmers, particularly for key cash crops.”<sup>188</sup> For example, in the mid-1980s, Ghana cocoa

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elements constituting folklore should vest with the concerned communities themselves. . . . A few of those responded in favour of a special trust, established by the community, for the purpose of exercising their rights.”)

187. Leif Wenar, *Clean Trade in Natural Resources*, 25 ETHICS & INT’L AFF. 27 (2011); Leif Wenar, *Property Rights and the Resource Curse*, 36 PHIL. & PUB. AFF. 2 (2008).

188. Justin Hughes, *Coffee and Chocolate—Can We Help Developing Country Farmers Through Geographical Indications?* (Sept. 29, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1684370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684370) (describing how coffee and cocoa commodity boards have extracted disproportionate economic rents in many African countries); see also GEORGE B.N. AYITTEY, AFRICA UNCHAINED: THE BLUEPRINT FOR AFRICA’S FUTURE 74 (2005) (“Marketing boards, for example, were set up during the colonial era with the declared purpose to protect small African peasant producers from the vagaries of the world market. Marketing boards fixed prices well below world market levels, and the difference was to be used for the purpose of rural development.”); *id.* at 69, 133 (describing Kenya’s establishment of state monopolies over maize, tea, meat, and other food crops and state produce-buying agencies of other African countries); ROBERT H. BATES, MARKETS AND STATES IN TROPICAL AFRICA: THE POLITICAL BASIS OF AGRICULTURAL POLICIES 109–10 (1981) (viewing state bureaucracies as predatory on agricultural producers and markets); JOEL GLENN BRENNER, THE EMPERORS OF CHOCOLATE: INSIDE THE SECRET WORLD OF HERSHEY AND MARS 238 (1999) (“The boards control the entire cocoa crop, arranging for its shipment and export to producing

farmers were receiving less than 10% of the world price of cocoa while the Ghana Cocoa Marketing Board spent the 90% of the world market price it collected elsewhere.<sup>189</sup> Between 1960 and 1990, Côte d'Ivoire's Caisse de Stabilisation et de Soutien des Prix des Produits Agricoles sold that country's coffee and cocoa production on world markets at market prices while paying local farmers only a small percentage of the market price; from 1984 through 1985, Cote d'Ivoire farmers received only 37% of the world market prices for their production.<sup>190</sup>

The experience in Ghana and Côte d'Ivoire with cocoa is not unique; as Benoit Daviron and Stefano Ponte point out, in countries that have had centralized coffee marketing authorities, “[p]ayments to farmers were often late and resources were siphoned off the system at various levels.”<sup>191</sup> Andrew Dorward and a team of researchers described the sub-Saharan commodity board problem more directly:

[P]arastatals . . . were generally part of a bloated and inefficient state apparatus that was inefficient and ineffective in serving the agricultural sector and at the same time an enormous drain on government resources. These difficulties of parastatals were compounded by, and associated with, wider problems in macro-economic management.<sup>192</sup>

Even when African governments began to liberalize their agricultural commodity markets in the 1980s, neither the flow of revenue to farmers nor the transparency of institutions necessarily improved.<sup>193</sup>

Perhaps this is not the sort of discussion one expects to see in the context of *philosophical* justifications for a genre of intellectual property, but this must surely be part of our “determining whether a particular social change would enhance justice.”<sup>194</sup> The troubling experience of some developing countries with extractive resources and others with cash crops should be instructive because GRTKF share characteristics with each. Genetic resources from local plants and animals may be the closest in

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countries. Although the board receives market price for their beans, they pay farmers only a fraction of what they earn, often less than half the world price.”); TONY KILLICK, *DEVELOPMENT ECONOMICS IN ACTION: A STUDY OF ECONOMIC POLICIES IN GHANA* 48 (1978) (establishment of cocoa board in colonial Ghana).

189. See AYITTEY, *supra* note 188, at 133, 135 (describing the Cocoa Marketing Board's use of cocoa profits for personal gain at the expense of cocoa farmers' welfare).

190. Pascal Wick & Jane S. Shaw, *The Cote d'Ivoire's Troubled Economy: Why World Bank Intervention Failed*, 18 CATO J. 11, 12–13 (1998).

191. BENOIT DAVIRON & STEFANO PONTE, *THE COFFEE PARADOX: GLOBAL MARKETS, COMMODITY TRADE, AND THE ELUSIVE PROMISE OF DEVELOPMENT* 102 (2005).

192. ANDREW DORWARD ET AL., *CTR. FOR DEV. & POVERTY REDUCTION, IMPERIAL COLL. LONDON, AGRICULTURAL LIBERALISATION IN SUB SAHARAN AFRICA*, at ii (2004), available at <http://www.dfid.gov.uk/r4d/PDF/Outputs/ECPREP/AgriculturalLiberalisationAfricaFinalReport.pdf>.

193. See Hughes, *supra* note 188 (manuscript at 48–49), and sources cited therein.

194. SEN, *supra* note 1, at ix.

form to an extractive asset like petroleum or titanium—a central government can sign them away with little or no consultation with local communities. The same can be said for some forms of folklore. On the other hand, transmission of TK or performance-based TCE, like dance, may be closer to cash crops that require substantial numbers of local participants.

Separate from a central government's financial exploitation of TCE, there is the problem of whether central control of indigenous peoples' TCE is used to protect or suppress. Large countries with dominant cultures yet strong, geographically distinct ethnicities may see central administration of indigenous peoples and local communities' TCE as a means to ensure that the TCE is both protected and nonthreatening. Motives may be mixed; in the real world, they usually are.

To be fair, it can reasonably be argued that as a practical matter, governments will have to provide a role safeguarding and administering the TK/TCE. Proposals have expressly reflected this possibility. The problem is that there is a fine line between a national government *administering* or being a *guardian* of protected TK/TCE and that government being the *de facto* owner of the protected TK/TCE. On this count, the experience of states that do have forms of intellectual property for TK/TCE is not encouraging. There is little or no evidence that significant monies are collected and little or no evidence that any money ever trickles down to the indigenous peoples or local communities. Looking at the situation in Ghana, Boateng concludes: “[I]f there is one compelling argument to be made for treating ethnic culture as national culture under intellectual property law, it is that under this set of arrangements, when it comes to the ability to claim royalties for their cultural production, all ethnicities are equally dispossessed.”<sup>195</sup> If we are trying to do the right thing for indigenous people and local communities, the danger of creating a system in which these people are dispossessed is real. How we avoid that danger must be part of what Benjamin Franklin called the “prudential algebra” of government.<sup>196</sup>

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195. BOATENG, *supra* note 100, at 125.

196. See U.S. BUREAU OF EDUC., 2 BENJAMIN FRANKLIN AND THE UNIVERSITY OF PENNSYLVANIA 152 (Francis Newton Thorpe ed., 1893) (quoting Letter from Benjamin Franklin to Joseph Priestley (Sept. 19, 1772)).

C. *Other Redistributive Concerns—The Additional Problems  
When This Does Work*

Of course, we must also map out the redistributive effects on other groups besides the worst off who are recipients of payments, that is, effects beyond some primary goods shifting from non-worst-off to *some* worst-off. The problems here further cloud the value of TK/TCE protection as a means to make the worst-off class better off.

First, because the TK/TCE protection does not work as an incentive to create or an incentive to distribute, it does not make the other groups better off in the way that rewarding Tim Burton or Ang Lee makes tens of millions of filmgoers better off. It *might* make the other groups in society better off if it produces effective incentives to preserve TK/TCE that would otherwise be lost, in the full sense of *preservation* as discussed above.

Second, and more worrying, is the fact that some groups will have more valuable TK/TCE than others: some groups will be better at marketing their TK/TCE than others, and some groups will simply be luckier in having their TK/TCE draw the attention of motivated outsiders. Allowing local communities to profit directly and uniquely from their own TK/TCE risks *establishing* or *worsening* inequalities among indigenous groups; it would do this precisely because legal protection of TK/TCE would bring these intangibles into the casino of intellectual property, a crapshoot in which most products do not profit much but some profit massively. In other words, the *more successful the TK/TCE protection is, the worse the generated inequalities could become*. As Ostergard, Tubin, and Dikirr reason, the influx of payment “to a single group within a state establishes the potential for further destabilisation or, at a minimum, exacerbation of the inequality problems that have plagued African states during the post-colonial period.”<sup>197</sup>

A third effect of locating control and economic rents from TK/TCE with the relevant indigenous groups is that we may undermine another use for TK/TCE: the desire and need of modern states, particularly in Africa, to “harness their indigenous cultural and intellectual property to help consolidate state and national identity.”<sup>198</sup> The gaucho and the cowboy are iconic to Argentine and American culture respectively, but they began as *regional* TCE within each national polity. Indeed, national identity has always been built from local bits and pieces.

Yet even if we acknowledge that this sort of “nation building” through TCE remains a legitimate interest, if we cannot state principles that

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197. Ostergard et al., *supra* note 37, at 330–31.

198. *Id.* at 310–11.

separate the positive harnessing of TK/TCE from its inappropriate exploitation, then we may have a zero sum game in which we must choose between nation builders and local communities.

## VI. CONCLUSION

Discussions on international legal norms for the protection of TK/TCE have, in their contemporary form, been ongoing since the late 1990s. In that time, our understanding of key issues for a workable system—subject matter, beneficiaries, rights, or protections—have advanced little, if at all. Indeed, as Michael Brown has observed, “vexing questions of origins and boundaries . . . are commonly swept under the rug in public discussions.”<sup>199</sup> Yet even if all those questions were settled, we also need a clear justification or justifications for a new form of intellectual property on the world stage.

Most of the traditional justifications for intellectual property fit uneasily on TK/TCE, but some foundations are possible. Justifications based on privacy, personality interests, incentives to preserve, and distributive justice all seem potentially viable if properly refined. Among these possible foundations for TK/TCE protection, distributive justice is the one we traditionally discuss the least in intellectual property circles. International legal norms for the protection of TK/TCE would be, at best, only a small tool for distributive justice. But a small economic effect may still address a manifest injustice, and we should, whenever we can, be committed to “removing manifest injustices that can be identified by public reasoning, with a good deal of partial accord.”<sup>200</sup>

Indeed, properly understood these justifications tend to meld together. Jobs in local arts and crafts that are retained or resuscitated through TCE protection serve both to preserve traditions and distribute wealth that might have otherwise gone elsewhere. Participating in the *process* of creating and disseminating TCE arts and crafts can serve significant personhood and identity interests—interests beyond the cash payments we might make if we were concerned only with distribution of wealth.<sup>201</sup>

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199. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 7 (2003).

200. SEN, *supra* note 1, at 262.

201. I consider this akin to Sunder's observation that “[a] broader understanding of intellectual property,” as both an end and means of development, recognizes the importance not just of producing more knowledge goods, but also of participating in the process of knowledge creation. . . . To be sure, this broadened understanding of intellectual property may require the recognition

For those who are discouraged by the decade-plus of WIPO discussions, we should remember Sen’s admonition that “we have good reason to be sceptical of the possibility of ‘discussionless justice.’”<sup>202</sup> But we also have good reason to be frustrated with diplomats and policymakers who sweep the “vexing questions” under the rug. Those concerned about traditional knowledge and traditional cultural expressions—whatever their perspective—need to engage in a more frank discussion of what is being sought, what is needed, and what is possible.

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of new intellectual property rights, awarding private control over resources once thought to be in the public domain.  
Sunder, *supra* note 79, at 122–23.  
202. SEN, *supra* note 1, at 89.