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Rethinking Intangible Cultural Heritage and Expressions of Folklore: A Lesson from the FCC's Localism Standards

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**Rethinking Intangible Cultural Heritage and Expressions of Folklore:
A Lesson from the FCC’s Localism Standards**

Jon M. Garon*

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Abstract

In the United States, the policy of localism – the legislative goal of fostering local community expression and competence to deliver local content – finds its home in the Telecommunications Act rather than either the Copyright Act or Trademark Act. Other nations have introduced values of localism into trade policy, content distribution rules, and international efforts to protect intangible cultural heritage and expressions of folklore.

Jurisdictions in every continent are struggling to address the pressures of globalism through efforts to protect indigenous peoples’ and minority communities’ languages and culture. These

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efforts take many forms. Nations have introduced efforts to protect these interests into trade policy, content distribution rules, and the legal regimes of copyright and trademark. Some jurisdictions, for example, emphasize the need for historical preservation of particular culture and content. Other jurisdictions emphasize localism to promote domestic employment and economic growth. At the same time, however, other regulators are cloaking governmental censorship under the guise of protectionism.

These efforts assume, *arguendo*, that some model of protectionism is necessary to assist these communities. Because there are many different types of intangible cultural heritage – local languages, tribal customs, religious traditions, folklore, styles of artworks, etc. – this assumption may be counterproductive. Particularly in our increasingly networked, global information community, assumptions of territorial protections must be reconsidered.

This article reviews the underlying societal imperatives reflected in a policy of intangible cultural heritage and the intellectual property-like regimes being developed to protect these interests. It contrasts UNESCO efforts with more narrowly tailored efforts of WIPO and juxtaposes those approaches with the localism model developed under the FCC. While aspects of the WIPO protection efforts focusing on trademark-like and trade secret-like protections benefit the people and cultures these policies hope to serve, additional copyright-like protections will likely do more harm than good. Instead, global public policy will be far better served through emphasis on localism's attributes of developing human capital to improve the quality of content being produced and encouraging local communities to focus on the content of their own choosing.

[A]s I look over the grand drama of history ... I am convinced that the world is not a mere bog in which men and women trample themselves in the mire and die. Something magnificent is taking place here amid the cruelties and tragedies, and the supreme challenge to intelligence is that of making the noblest and best in our curious heritage prevail.

-- Charles Austin Beard¹

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.

- Oliver Wendell Holmes²

¹ WILL DURANT, ON THE MEANING OF LIFE 43 (1932).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express

Introduction

Worldwide trends of increased connectivity and content-sharing have changed the landscape for creative content throughout the world, but they pose both opportunities and threats. One of the pillars of U.S. telecommunications policy had been the notion of localism – the legislative goal of fostering local community expression and diversity of opinion and content.³ Elsewhere different explanations for domestic policy often sought to achieve similar goals. For example, the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) have been working since the 1980s to protect cultural heritage characterized as “expressions of folklore.”⁴

Jurisdictions in every continent are struggling to address the pressures of globalism by seeking to protect our international heritage from a loss of indigenous peoples and minority communities’ languages and culture. These efforts are taking many forms. Nations have introduced efforts to protect these interests into trade policy, content distribution rules, and the legal regimes of copyright and trademark. Some jurisdictions, for example, emphasize the need for historical preservation of particular culture and content. Other jurisdictions emphasize localism to promote domestic employment and economic growth. At the same time, some governments may be cloaking governmental censorship under the guise of protectionism. These different goals suggest highly different legal regimes and demand a range of U.S. policy responses.

These efforts assume, *arguendo*, that some model of protectionism is necessary to assist these communities. Ranging from simple efforts for increasing resources for the creation of relevant cultural and linguistic content to creating governmental agencies dedicated to protecting

your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment

³ See, e.g., 47 U.S.C. §335, 338, 339, 342, 534 (2010).

⁴ See INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS, WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE 42-44 (1998-1999); World Intellectual Prop. Org. WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTKF/IC/17/4 (17th Session, Dec. 6-10, 2010) (June 7, 2010) [hereinafter WIPO, DRAFT REPORT OF SEVENTEENTH SESSION].

property rights through formal registration, the variety of proposals tend to assume that enforceable rights inevitably benefits the creators of the works. Because there are many different types of intangible cultural heritage – local languages, tribal customs, religious traditions, folklore, styles of artworks, etc. – this assumption may be counterproductive.

This article reviews the underlying societal imperatives reflected in a policy of intangible cultural heritage and the intellectual property-like regimes being developed to protect these interests. It contrasts UNESCO efforts with more narrowly tailored efforts of WIPO and juxtaposes those approaches with the localism model developed under the FCC. While aspects of the WIPO protection efforts focusing on trademark-like and trade secret-like protections benefit the people and cultures these policies hope to serve, additional copyright-like protections will likely do more harm than good.

Rather than focusing on restrictions over distribution of content, the social goals to protect this valuable culture and history may better be achieved through emphasis on local content creation rather than any distribution regulation. Instead, global public policy will be far better served through emphasis on localism's attributes of developing human capital to improve the quality of content being produced and encouraging local communities to focus on the content of their own choosing.

1. Globalization, the Meme and the Mode

In the 21st century there has been a paradigm shift in the delivery of creative content. The digital revolution has transformed access to content and the modalities of content distribution. Today over 500 million people use Facebook to communicate, with roughly half of those people accessing the service daily.⁵ According to YouTube, “[p]eople are watching 2 billion videos a day on YouTube and uploading hundreds of thousands of videos daily. In fact, every minute, 24 hours of video is uploaded to YouTube.”⁶ Worldwide connectivity, although growing somewhat sporadically, continues to reshape the communications landscape. “Africa is the fastest-growing mobile market in the world, having leaped from 16 million mobile subscribers in 2000 to 198 million in 2006 ... with a projected 278 million subscribers in 2007.”⁷ For the Internet, as of

⁵ See <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 16, 2010).

⁶ http://www.youtube.com/t/fact_sheet (last visited Aug. 16, 2010).

⁷ Tella, Adeyinka, Olorunfemi, Doreen Yemisi Oluyemisi, *The future of ICT in developing world: Forecasts on sustainable solutions for Global Development*, INDIAN J. LIB. AND INFO. SCIENCE 115, 116 (2010). As the article notes, the telecommunications penetration is far from universal. “However, this growth has taken place mainly in urban areas. Despite high growth rates in mobile access, Africa continues to lag other regions in overall access to [Information communication technologies,] particularly in rural and remote areas....” *Id.*

June 2010, North America leads penetration with 77.4% market penetration while Africa is the least engaged region of the world with only 10.9%.⁸ At the same time, Africa has seen an increase in penetration of 2,357.3 % since 2000.⁹

The delivery of creative content reflects just a small snapshot of the global economic transformation. With the rise of the information age,¹⁰ a new class of economic and social order is redefining the global landscape. “In the early 1990s multinational corporations employed directly “only” about 70 million workers, but these workers produced one third of the world’s total private output, and the global value of their sales in 1992 was US\$ 5,500 billion, which is 25 percent more than the total value of world trade in that year.”¹¹ In the following years, the trend has only accelerated. “[W]orld exports as a share of GDP increased from under 20% in 1994 to over 32% in 2008.”¹² But trade is not the only trend. “The Fortune Global 500, an annual ranking of the world’s largest corporations by revenue, has seen the number of Fortune Global 500 companies based in Brazil, Russia, India or China (BRIC) more than double from 27 to 58 in the last five years.”¹³ Globalization, then, is not a North American or European economic model but rather a fundamental re-ordering of socio-economic relationships across the world. And global trade has transformed itself into an information-based economy with “at least 70% of the Gross Domestic Product (GDP) [depending] on intangible goods, which are information-related, not of material goods...”¹⁴

Globalization may be framed as the liberalization of commercial actors from the state¹⁵ or the supremacy of the legal entity above state-defined societies¹⁶ or the “acceleration and

⁸ Internet World Stats, <http://www.internetworldstats.com/stats.htm> (last visited Aug. 16, 2010).

⁹ *Id.*

¹⁰ See generally, MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE VOLUME I* 167 (2d ed. Wiley 2009).

¹¹ MANUEL CASTELLS, *INFORMATION TECHNOLOGY, GLOBALIZATION AND SOCIAL DEVELOPMENT*, 4 UNRISD DISCUSSION PAPER NO. 114, (SEPTEMBER 1999).

¹² PriceWaterhouseCoopers, *Emerging Multinationals: The rise of new multinational companies from emerging economies*, April 2010 at 2, available http://www.pwc.fr/assets/files/pdf/2010/04/pwc_emerging_multinationals.pdf.

¹³ *Id.*

¹⁴ Luciano Floridi, *Philosophy of Technology: Critical Reflections*, 23 KNOWLEDGE, TECHNOLOGY AND POLICY, ___ (2010) available at <http://www.philosophyofinformation.net/publications/pdf/tpoiaacf.pdf>.

¹⁵ Peer Zumbansen, *Values: Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

One way, then, of identifying the consequences of globalization has been to celebrate the “liberation” of commercial actors from government intervention by making effective use of jurisdictional forum-shopping, tax havens and radically decentralized business organization

intensification of economic interaction among the people, companies, and governments of different nations.”¹⁷ The model of globalization as a tension between the business entity and the state, tends to underestimate the scope of the transformation taking place and ignores the fundamental information transfers taking place.¹⁸

Knowledge transfer is yet another facet of globalization, which represents the worldwide networking of individuals, entities, societies, nations and supranational organizations.

For the first time in history, the basic unit of economic organization is not a subject, be it individual (such as the entrepreneur, or the entrepreneurial family) or the collective (such as the capitalist class, the corporation, the state). ... *[T]he unit is the network*, made up of a variety of subjects and organizations, relentlessly modified as networks adapt to supportive environments and market structures.¹⁹

“[T]he information revolution has been changing the world profoundly, irreversibly and problematically since the fifties, at a breathtaking pace, and with unprecedented scope, making the creation, management and utilisation of information, communication and computational resources vital issues.”²⁰ Without the interconnectedness of individuals, corporations, NGOs and governments, the globalization would collapse under the weight of its transaction costs. “[G]lobalization is a new historical reality ... inscribed in processes of capitalist restructuring,

structures. Another one, arguably on the other end of the choice-continuum, would seek to radicalize globalization's de-hierarchization trends in search of realizing and nurturing civic and other bottom-up emancipatory powers, however uncomfortably and inevitably they remain situated between assertions of the global and the local.

Id. at 770 (internal citations omitted).

¹⁶ MANUEL CASTELLS, INFORMATION TECHNOLOGY, GLOBALIZATION AND SOCIAL DEVELOPMENT, *supra* note 11 at 4 (“A global economy is an economy whose core activities work as a unit in real time on a planetary scale. Thus capital markets are interconnected worldwide, so that savings and investment in all countries, even if most of them are not globally invested, depend for their performance on the evolution and behaviour of global financial markets.”).

¹⁷ Globalization101.org, *Culture and Globalization*, THE LEVIN INSTITUTE (STATE UNIVERSITY OF NEW YORK) 2, <http://www.globalization101.org/uploads/File/Culture/cultall2009.pdf> (last visited Sept. 3, 2010).

¹⁸ See Federica Saliola and Antonello Zanfei, *Multinational Firms, Global Value Chains and the Organization of Knowledge Transfer*, 38 RES. POL'Y 369, 373 (2009) available http://www.enterprisesurveys.org/documents/Multinational_firms_global_value_chains.pdf.

¹⁹ MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE VOLUME I, *supra* note 10 at 214.

²⁰ Floridi, *supra* note __ at 4.

innovation and competition, and enacted through the powerful medium of new information and communication technologies.”²¹

One of the core aspects of the debate relates to the role of the state in protecting its citizens’ interests. “Globalization and liberalization do not eliminate the nation state, but they fundamentally redefine its role and affect its operation.”²² If the state is relegated to being merely one of the participants in the global information society, then what becomes of the more remote communities and peoples who operate within the state? This question may have even more critical significance if the states involved are emerging economic states such as China, India, Russia and Brazil which have large ethnic communities, a multitude of languages and dialects, and significant numbers of distinct indigenous peoples.²³ As PriceWaterhouseCoopers reports, it anticipates India will “replace China as the largest source of new multinationals in the emerging world from 2018 onwards... and Malaysia, Russia, Singapore and South Korea also to supply high numbers of new multinationals to the world economy.”²⁴

The debate can no longer focus on the wisdom of globalization. Instead, it must explore how its manifestation will affect individuals and societies – both economically and culturally. Specifically, globalization may be putting the diversity of culture at risk. “There is a raging debate in the world on the mixed record of the information technology revolution, and of globalization – especially when we consider their social dimensions on a planetary scale.”²⁵

One of the key concerns generated by globalization is its impact on the language, culture and heritage of the world’s minority communities. If the new unit of economic organization is the

²¹ MANUEL CASTELLS, INFORMATION TECHNOLOGY, GLOBALIZATION AND SOCIAL DEVELOPMENT, *supra* note 11 at 5.

²² *Id.* Though the state continues to have a dominant role, it has also been forced to develop new strategies:

National governments, in order to maintain some capacity to manage global flows of capital and information, band together, creating or adapting supranational institutions (such as the International Monetary Fund, the European Union, NAFTA, or other regional co-operation agencies), to which they surrender much of their sovereignty. So they survive, but under a new form of state that links supranational institutions, national states, regional and local governments, and even NGOs, in a network of interaction and shared decision making that becomes the prevalent political form of the information age: the network state.

Id.

²³ See PriceWaterhouseCoopers, *supra* note 12 at 3-5.

²⁴ *Id.* at 8 (PriceWaterhouseCoopers also reported that it expects “the South American countries in the sample to be a relatively smaller source of new multinationals.”).

²⁵ MANUEL CASTELLS, INFORMATION TECHNOLOGY, GLOBALIZATION AND SOCIAL DEVELOPMENT, 1 UNRISD DISCUSSION PAPER NO. 114, SEPTEMBER 1999.

network, then it is axiomatic that those who are not networked and those who have networks of insufficient size are essentially excluded from the network economy. To what extent is the negative economic impact of isolation inversely related to the maintenance of ethnic customs and traditions? How can a language survive if its speakers are cut off from one another?

Without addressing the particular influence of network effects, analysts are beginning to recognize these phenomena. “Observers of globalization are increasingly recognizing that globalization is having a significant impact on matters such as local cultures, matters which are less tangible and hard to quantify, but often fraught with intense emotion and controversy.”²⁶

Scholars increasingly use the concept of “memes” to reflect these basic units of ideas, concepts, expression or culture.²⁷ Like genes, memes may propagate on an evolutionary model²⁸ based on the survival of the fittest. To be successful, memes, like genes, must have “longevity, fecundity, and copy-fidelity,”²⁹ meaning that the ideas must be sustainable, distributed widely and retain their central characteristics.

“In some ways it is obvious that ideas and cultures evolve – that is, changes are gradual and build on what went before. Ideas spread from one place to another and from one person to another.”³⁰ Against the backdrop of globalization, liberalization and information networking, a fresh look must be taken regarding the memes of intangible cultural heritage, expressions of folklore and localism.

Like their biological counterparts, there is at least a potential for mass extinction.³¹ Ironically, Darwin analogized to language – the competition and extinction of languages and dialects – to explain homogeneous local populations of species and the competition for survival of words like that of competition of species for survival.³² This analogy is now being reversed to understand how the network effects of successful memes may encroach upon the territory of less well-networked memes, extinguishing them in the competitive marketplace of culture.

²⁶ Globalization101.org, *Culture and Globalization*, *supra* note 14 at 2.

²⁷ See RICHARD DAWKINS, *THE SELFISH GENE* 193-94 (3006).

²⁸ *Id.* at 194 (“We biologists have assimilated the idea of genetic evolution so deeply that we tend to forget that it is only one of the many possible kinds of evolution.”).

²⁹ DAWKINS, *supra* note 25 at 194.

³⁰ SUSAN BLACKMORE, *THE MEME MACHINE* 24 (2000).

³¹ *Id.* at 166.

³² BLACKMORE, *supra* note 28 at 25 quoting CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* 422 (1859).

Another lesson may be learned from the debate over efforts to protect species from extinction where such efforts interfere with jobs and local economic health. Just as communities have fiercely debated the social value of protecting particular species,³³ individuals and communities may prefer the benefits of networked globalization rather than a lifestyle that emphasizes certain traditions while others in that same community decry such a tradeoff. Moreover, some memes – like their biological counterparts – are repugnant to society or dangerous to its members. Most, however, are highly valued. “Many societies, particularly indigenous peoples, view culture as their richest heritage, without which they have no roots, history or soul. Its value is other than monetary. To commodify it is to destroy it.”³⁴ In an effort to resist commoditization of cultural heritage, protectors of cultural heritage may resist engagement with the networks of globalization as inherently destructive.

Underlying this debate is a more fundamental tension between those who believe the best way to protect cultural works is to maximize their use and engagement with few or no legal restrictions³⁵ versus those who believe that the preferred model is ownership and careful curatorial protection.³⁶ This tension reflects debate over the scope of intellectual property laws but applies to cultural memes as well. The U.S. Constitution, for example, frames the rights in terms of a limited grant in exchange for exclusive rights.³⁷ This formulation results in strong beliefs that too much intellectual property protection is counterproductive. Larry Lessig frames the debate with regard to copyright as follows: “I have no doubt that it does good in regulating commercial copying. But I also have no doubt that it does more harm than good when regulating (as it regulates just now) noncommercial copying and, especially, noncommercial transformation.”³⁸ When the economic reasons for protecting works are eliminated, as they often

³³ See, e.g., Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771-778 (1996) (“An increasingly vocal segment of the population is attempting to weaken statutes and policies designed to protect wildlife”); John Charles Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conservation under the Endangered Species Act*, 24 ENVTL. L. 501, 509-11 (1994)

³⁴ Globalization101.org, *Culture and Globalization*, *supra* note 14 at 2-3 quoting Maude Barlow, *The Global Monoculture*, Earth Island J. ___ (2001) available at <http://www.globalization101.org/uploads/File/Culture/cultall2009.pdf>.

³⁵ See, e.g., LAWRENCE LESSIG, *FREE CULTURE – HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) Available [Http://Www.Free-Culture.Cc/Freeculture.Pdf](http://www.Free-Culture.Cc/Freeculture.Pdf) [Hereinafter LESSIG, *FREE CULTURE*]; Lewis Hyde, *Frames from the Framers: How America's Revolutionaries Imagined Intellectual Property*, BERKMAN CENTER RES. PUB. NO. 2005-08(2005) available at SSRN: <http://ssrn.com/abstract=870073>.

³⁶ See, e.g., OWEN MORGAN, *INTERNATIONAL PROTECTION OF PERFORMERS' RIGHTS* (2002).

³⁷ U.S. CONST., art. I sec.8, cl. 8. (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

³⁸ LESSIG, *FREE CULTURE*, *supra* note 33 at 198.

are when protecting works of cultural heritage that have been part of a community's traditions, there may be strong reasons to think that any regulation is harmful – to people both within and outside that community.³⁹

The other perspective is evidenced in the broader array of protections afforded by intellectual property. The international copyright convention, Berne Convention,⁴⁰ adds to this grant an explicit recognition of moral rights – attribution and integrity – as key elements of the author's basic protections.⁴¹ In contrast to an emphasis on the protection of the economic remuneration, a moral rights approach emphasizes the value of the work as it reflects upon the author.⁴² For a work to be legitimate, it must be distributed only with the approval of the author,⁴³ with attribution to the author⁴⁴ and not changed in a manner that would be considered mutilated, debased or destroyed.⁴⁵

³⁹ See Kimberly Christen, *Balancing Act: The Creation and Circulation of Indigenous Knowledge and Culture*, in BITS WITHOUT BORDERS, LAW, COMMUNICATIONS & TRANSNATIONAL CULTURE FLOW IN THE DIGITAL AGE, SEPT. 24-25, 2010, INTELLECTUAL PROPERTY & COMMUNICATIONS LAW PROGRAM, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW CONFERENCE PAPERS (HEREINAFTER BITS WITHOUT BORDERS) available at <http://www.law.msu.edu/bits/papers/index.html>.

The dominant discourses animating the debates surrounding the intersection of indigenous cultural materials, digital technologies and intellectual property laws, has focused on protection and preservation—two terms that maintain the residue of colonial impulses and paternal law-making and seem to reject the notion that indigenous peoples are creators of cultural materials, products and knowledge.

Id. at 2.

⁴⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol T.S. 185, revised Nov. 13, 1908, 1 L.N.T.S. 218, revised June 2, 1920, 123 L.N.T.S. 233, revised June 26, 1948, 331 U.N.T.S. 217, revised July 14, 1967, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁴¹ *Id.* at Art. 6^{bis}.

⁴² LESSIG, FREE CULTURE, *supra* note 33 at 2 (providing noncommercial copies under a creative commons license that permits only free non-commercial use of his work and only “so long as attribution is given”).

⁴³ See Paul Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 829 (1999) citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 8[D][05], at 58 (1978).

⁴⁴ Berne Convention at Art. 6^{bis}. See also Peter Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 450 (2008) (“In the moral rights regime, for instance, the right of attribution enables authors to claim authorship of the protected work, while the right of integrity prevents others from distorting, mutilating, or modifying the work in a manner that would prejudice the authors' honor or reputation.”).

⁴⁵ See *id.*

Particularly as it relates to moral rights, there is a close relationship between cultural heritage and intellectual property protection regimes. “[T]he protections seek to enable the rights holders to exert control over the protectable subject matters. It does not matter whether the materials are tangible or not. Cultural patrimony laws identify those who have the ability to control the use and display of the materials. Similarly, intellectual property laws create rights to prevent others from exploiting the protected works without the rights holders' authorization.”⁴⁶

Moral rights have a powerful relation to cultural heritage.

Scholars urge the recognition of moral rights in folklore as the solution to problems of distortion, misrepresentation, and authenticity that frequently accompany the unauthorized use of folklore. The moral rights of divulgation, paternity and integrity would be especially useful in protecting folklore from being “published without... authorization, published without attribution, reproduced in poor quality, reproduced only partially causing the message to be distorted, or put to a use which would be inappropriate to the nature of the original work.”⁴⁷

Moral rights protection is critical to the conception of protection of intangible cultural heritage and expressions of folklore. The inclusion of these interests, however, does not automatically lead to the conclusion that greater legal protections are necessary. Assuming the goals of protection are focused on maximizing the maintenance and vibrancy of culture and history, these efforts should be addressed in the context of the networked globalized community. “Intellectual and cultural commons are organized around shared intellectual and cultural resources [I]ntellectual and cultural resources can be created and regenerated only through social exchange and sociability – and often the more intense and frequent the social interactions, the greater the use-value....”⁴⁸ As such, the need to provide for greater social exchange may be at odds with greater legal controls.

Efforts that value the expressions of indigenous peoples but isolate those works and peoples may do more harm than good. New legal regimes developed to protect cultural heritage and folklore traditions must tread carefully to avoid creating habitats for dying ideas, languages and cultures. Assisting those who seek protection from the onslaught of the networked globalization

⁴⁶ *Id.* at 448-49. Professor Yu also identifies a number of areas in which cultural property and intellectual property differ, including the tangible aspects of cultural artifacts; the forms of protection; the flow of trade in cultural relics that tends to move from poorer regions to more affluent regions (the opposite of intellectual property transactions) and the sources of law. *Id.* at 447-48.

⁴⁷ Kuruk, *supra* note 40 at 829 quoting Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 48 (1997).

⁴⁸ DONALD M. NONINI, *THE GLOBAL IDEA OF “THE COMMONS”* 7 (2007).

may be good public policy. Forcing ethnic minorities into enclaves of cultural purity would never be so regarded. Fundamental culture clashes over religion, economic control and women's rights underlie conflicts in Afghanistan and elsewhere. These are essentially battles over memes fought with guns and butter – battles to win militarily and to win the hearts and minds of the population. Effective public policy regarding the protection of cultural heritage and safeguarding the value of localism against the influence of the larger network must be viewed in its complexity and not unduly romanticized if the promoters of such efforts hope to make a meaningful impact.⁴⁹

In other countries, efforts to protect cultural heritage may be subtle methods of control. In China, for example, the stated need to protect “public morals” has been used to justify the continued violation of free trade laws to limit legal imports of non-Chinese movies, books and music.⁵⁰ Having lost this debate in the World Trade Organization (WTO), China seeks to increase its protection of both intellectual property laws and laws protecting cultural heritage, shifting from one protection paradigm to continue censoring discourse of both the majority and minority communities.⁵¹ China also links censorship of content that impairs cultural traditions with that which is harmful to national unity and betrays state secrets, giving the state total control over the intangible cultural heritage at risk from majority and global domination.⁵²

⁴⁹ Professor Christen describes a number of successful efforts among Aboriginal People to “take the reins of modern media to tell their own stories.” See Christen, *supra* note ___ at 4.

⁵⁰ See John Miller, *China Plea Dismissed by WTO*, WALL ST. J., Dec. 22, 2009 at A10.

⁵¹ See, e.g., KATRINA NAOMI, CHINA: MINORITY EXCLUSION, MARGINALIZATION AND RISING TENSIONS, MINORITY RIGHTS GROUP INTERNATIONAL 26 (2007) available at <http://www.hrichina.org/public/PDFs/MRG-HRIC.China.Report.pdf>; (“Carin Zissis and Corinne Baldwin, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS, May 27, 2010 at http://www.cfr.org/publication/11515/media_censorship_in_china.html (last visited Sept. 3, 2010).

⁵² Eric Silva Brenneman, *China: Culture, Legislation and Censorship*, Excerpts from Gao Shuxun, Chinese Cultural Laws Regulations and Institutions (1999), available at <http://www.freemuse.org/sw5220.asp> (last visited Sept. 3, 2010).

Such contents as follows are prohibited from being published: those that are against the basic principles of the Constitution; those that harm national unity and the sovereignty and territorial integrity of the country; those that incite ethnic conflict or separatism, encroach the customs and traditions of ethnic minorities or destroy ethnic solidarity; those that betray state secrets; those that advocate obscenity, superstition, play up violence of impair social morals and cultural traditions, and those that insult or defame others. For those publications aimed at minority ethnic groups, the following contents are prohibited: those that may lead the young to imitate activities against social morals or illegal or criminal activities and those that reflect terrifying or brutal activities that might be harmful to the physical and psychological health of minors.

Id.

At the time Francis Ford Coppola was producing and directing *Apocalypse Now*, he suggested that the next great filmmaker could be a thirteen-year-old girl in pigtails.⁵³ As technology has now made the suggestion possible, we must consider that this young girl could come from Da Nang, Manila, Barcelona, Beijing or a village unmarked on any map as easily as New York, Los Angeles, or Des Moines. Empowering the members of their own communities with techniques and tools to develop their own content and choose how each individual and community elects to engage in the global network may be preferable creating copyright-like restrictions on distribution and transformation of content.

To avoid the majority culture making value judgments over the appropriateness of an indigenous peoples' cultural heritage and to protect the integrity of a community's heritage without stifling its social exchange, those models that emphasize local production should be encouraged. Including minority languages, local production of media and media focused on local communities and incorporating those aspects of legislative efforts that emphasize trademark-like – but not copyright-like – protections of cultural heritage, will result in the best environment for intangible cultural heritage to weather the globalization transformation and help the culture of minority communities to thrive.

2. The Protection Imperative for Intangible Cultural Heritage, Expressions of Folklore and Localism

Existing efforts to protect the memes of minority culture include intellectual property-like regimes offering economic and moral rights for intangible cultural heritage of indigenous peoples, protection of minority languages, and emphasis on local content in media. Each of these models makes very different assumptions regarding the interests being protected and the preferred model of protection. When viewed in light of the survival of cultural memes in a networked global society, the tradeoffs between a cultural commons and a protectionist regime become fairly stark.

Organizations such as WIPO and UNESCO are leading nations toward recognition that some critical steps must be taken to protect at least some of the memes threatened by globalization. Beyond the imperative, however, there is little agreement on what is to be protected or how it is to be achieved.

UNESCO has worked to expand the concept of cultural heritage to move beyond the tangible assets of cultures to include its intangible cultural essence. Prior to 2003, all cultural

⁵³ FAX BAHR & ELEANOR COPPOLA, *HEARTS OF DARKNESS: A FILMMAKER'S APOCALYPSE* (1991) (documentary on the making of *APOCALYPSE NOW*). See Jon M. Garon, *Media and Monopoly in the Information Age: Slowing Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L.J.* 491, 621 (1999).

heritage designations focused on monuments, artifacts or other tangible items. In 2003, UNESCO adopted the Convention for the Safeguarding of Intangible Cultural Heritage (“Convention”) to expand the ability of states to identify intangible cultural heritage.⁵⁴ Under the text of the Convention, intangible cultural heritage is broadly defined:

1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.⁵⁵

Put simply, intangible cultural heritage is defined so broadly as to be the culture of any society or community. The language includes all religious practices (though without any specific reference to deities), traditions, languages and customs. The Newfoundland and Labrador Heritage Foundation describes its effort as follows:

Intangible Cultural Heritage (ICH) or what some call “Living Heritage” encompasses many traditions, practices and customs. These include the stories we tell, the family events we celebrate, our community gatherings, the languages we speak, the songs we sing, knowledge of our natural spaces, our healing traditions, the foods we eat, our holidays, beliefs and cultural practices. Specific examples of

⁵⁴ Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, U.N. Doc. MISC/2003/CLT/CH/14 (2003) available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>. See International Conference: Globalization and Intangible Cultural Heritage, Tokyo, Japan, Aug. 24- 25, 2004, BSP-2005/WS/6 BIS, available at <http://unesdoc.unesco.org/images/0014/001400/140090e.pdf> (last visited Sept. 2, 2010).

⁵⁵ *Id.* at Art. 2, para. 1-2.

our intangible traditions include - among many other customs, skills and practices - the Christmas mummering traditions, and boat building skills. Our ICH can also include Aboriginal languages and cultural knowledge, our various regional dialects, and the expressive culture, values and beliefs of the diverse cultural groups of Newfoundland and Labrador. Many of us play music or tell stories; some of us know about fishing grounds or berry-picking spots; others know about curing illnesses; some of us play cards or skateboard.⁵⁶

As the Newfoundland description suggests, UNESCO's definition is so inclusive to risk justifying virtually anything. To the extent that governments are urging citizens to document and capture their intangible cultural heritage, the broad definition is unobjectionable and possibly quite helpful.⁵⁷

As UNESCO recognizes, however, undifferentiated history is problematic. Recognizing that all traditions are not co-equal, the Convention explicitly incorporates the Universal Declaration for Human Rights and other human rights conventions to express that only those aspects of cultural heritage consistent with individual liberty and dignity are to be protected.⁵⁸ Slavery, female circumcision and caste systems are all practices transmitted from generation to generation – and each is often associated with recognized rituals. Nonetheless, none of these cultural institutions can retain support under the label as intangible cultural heritage because of the exclusionary language in the Convention that emphasizes human rights as predominant over intangible cultural heritage.⁵⁹

While the inclusion of human rights is essential, it is not sufficient to provide a working definition on the management of intangible cultural heritage. The UNESCO approach unfortunately provides an unworkably overbroad approach.

In contrast to UNESCO, WIPO continues to develop proposals that more closely mirror a *sui generis* version of an intellectual property regime for expressions of folklore.⁶⁰ Expression of

⁵⁶ NEWFOUNDLAND AND LABRADOR HERITAGE FOUNDATION, WHAT IS INTANGIBLE CULTURAL HERITAGE?, 1 (2008) available at http://www.mun.ca/ich/what_is_ich.pdf.

⁵⁷ See *id.* (The goals include “Recording Our Living Heritage,” Celebrating Our Living Heritage,” “Keeping Traditions Alive,” and “Living Traditions in Sustainable Communities”).

⁵⁸ See *id.* at Preamble. (“Referring to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966”).

⁵⁹ *Id.*

⁶⁰ See WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 16. The WIPO Intergovernmental Committee uses both the term “traditional cultural expressions” and “expressions of folklore” with the United States delegation noting that the two concepts may be separate and require distinct legislation. *Id.*

folklore is an awkward term utilized by WIPO to identify a particular aspect of a society's cultural heritage. "[E]xpressions of folklore" are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.⁶¹ Expressions of folklore are a subset of a community's intangible cultural heritage. While the definition intentionally steers clear of the copyright formulation of "works" so as to avoid concerns regarding fixation, authorship and duration,⁶² the expressions of folklore still focuses on particular expressive memes that are very closely related to copyright.

Although the language continues to be debated, the core focus is a very copyright-like definition, with protections that include copyright-like protections, trademark protections⁶³ and trade secret protections⁶⁴ – each for the benefit of the relevant cultural community.

The present draft definition regarding the subject matter of protection is much more concrete and focused than UNESCO's intangible cultural heritage, though still extremely broad:

1. "Traditional cultural expressions" and/or "expressions of folklore" and any forms, tangible or intangible or a combination thereof, in which traditional culture and knowledge are expressed, appear or are manifested, and are passed on from generation to generation, such as but not limited to the following forms of expressions or combinations thereof:
 - a) phonetic or verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.;
 - b) musical or sound expressions, such as songs, rhythms, instrumental music and popular tales;
 - c) expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games and other performances, theater, including, among others, puppet performance and folk drama, whether or not reduced to a material form; and,

⁶¹ INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS, WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE 43 (1998-99).

⁶² *Id.* ("The [UNESCO] Model Provisions use the words "expressions" and "productions" rather than "works" to underline the fact that the provisions are sui generis, rather than part of copyright. It is another matter that expressions of folklore may, and often do, have the same artistic forms as "works."").

⁶³ WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 23-26 (Art. 3).

⁶⁴ *Id.* at 26-28 (Art. 3).

- d) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, works of mas, toys, gifts and; handicrafts; musical instruments; stonework, metalwork, spinning, and architectural and/or funeral forms.
2. Protection shall extend to those “traditional cultural expressions” or “expressions of folklore” which are:
- a) the products of creative intellectual activity, including individual and communal creativity;
 - b) indicative of authenticity/being genuine of the cultural and social identity and cultural of indigenous peoples and communities and traditional and other cultural communities; and
 - c) maintained, used or developed by indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law/normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community.⁶⁵

While still a work in progress, the WIPO definition provides sufficient focus and guidance for national law so that it may be crafted to provide meaningful protection, and parties hoping to protect such expressions can identify at least the core expectations of the legislation. At the same time, tension will exist whether a particular expression is covered by the definition or whether the use of the expression falls outside the defined term. But this problem is inherent in all intellectual property regimes and can be effectively adjudicated.⁶⁶

⁶⁵ *Id.* at 11-12. This version of the draft provision assumes all proposed changes made during the seventeenth session are incorporated and does not show the language of the prior draft.

⁶⁶ Compare these definitional problems to that of the Visual Artists Rights Act, 17 U.S.C. §106A (2010); *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38 (1st Cir. 2010) (discussing *inter alia* the ability to protect an unfinished work); *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006) (discussing whether site specific work constitute one or multiple works and whether relocation constituted infringement); *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003) (discussing whether banner was promotional in nature and outside of statute’s protection).

With only limited exceptions such as the National Endowment for the Humanities⁶⁷ and the Indian Arts and Crafts Act,⁶⁸ the United States has not historically participated in the protection of intangible cultural heritage or expressions of folklore. This may be due, at least in part, to U.S. concerns that any protections at least implicate First Amendment concerns of government endorsed speech.⁶⁹

The First Amendment concern, however, is not fatal to U.S. government participation. As the Supreme Court has explained, while “the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”⁷⁰ The limitations are much more flexible when addressing funding than when addressing sanctions. “So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.”⁷¹ Steps that promote intangible cultural heritage through the promotion of culture and heritage would likely stay within the protection afforded to the National Endowment of the Humanities and the National Endowment for the Arts. Rules sanctioning misuse face greater scrutiny.

Nonetheless, since the beginning of radio regulation,⁷² Congress recognized that First Amendment goals may be better addressed by controlling the licensing of broadcasters rather than allowing an unregulated market to allocate the limited resources available on the broadcast spectrum.⁷³ Radio regulation has changed significantly as television and the digital spectrum as

⁶⁷ See generally, <http://NEH.gov> (last visited Sept. 8, 2010) (“*NEH Mission Statement*: Because democracy demands wisdom, the National Endowment for the Humanities serves and strengthens our Republic by promoting excellence in the humanities and conveying the lessons of history to all Americans”).

⁶⁸ 25 U.S.C. §§ 305 et seq. (2010).

⁶⁹ See, e.g., *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876, 898 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995) (as a public university, the Student Activities Fund became a limited public forum, from which a decision to exclude religious content was unconstitutionally discriminatory); *R.A.V. v. St. Paul*, 505 U.S. 377, 380 (1992) (striking down municipal ordinance “which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender” as viewpoint based)

⁷⁰ *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998).

⁷¹ *Id.* See also *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (upholding use of Internet filtering software by libraries as not violating patrons First Amendment Rights so financing for the filtering was a valid exercise of spending power).

⁷² Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927), sec. 3 (superceded).

⁷³ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) (“Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to

evolved. Still, the proposition that broadcast should be a local media⁷⁴ has remained a core component of the Communications Act of 1934⁷⁵ as it has been updated.⁷⁶

“Historically, the FCC has interpreted its animating legislation, the Communications Act, to embrace two fundamental goals – that the American media should be comprised of many competing owners (called “diversity”) and that media should serve local interests (“localism”).”⁷⁷ Localism became one of the fundamental regulatory assumptions of Congressional and FCC policy during the development of terrestrial radio and television.⁷⁸ “Along with diversity and competition, localism is one of the core principles that guide media regulation and policymaking in the United States. Of these three guiding principles, localism is perhaps the least understood and certainly the subject of the least amount of research.”⁷⁹ The FCC explains the policy quite simply:

Broadcasters are considered public trustees, afforded their spectrum so that they may serve the needs and interests of their communities of license. The obligation to provide such local service is fundamental.⁸⁰ ...

Broadcast radio and television are distinctly local media. They are licensed to local communities, and the Federal Communications Commission (FCC) has long required broadcasters to serve the needs and interests of the communities to which they are licensed. Congress has also required that the FCC assign broadcast

monopolistic domination in the broadcasting field. ... In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, “public convenience, interest, or necessity” was the touchstone for the exercise of the Commission's authority.”) *See also* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

⁷⁴ FCC Consumer Facts, Broadcasting and Localism 1 (<http://www.fcc.gov/localism>) (last visited Aug. 18, 2010). *See also* FCC, Report on Broadcast Localism and Notice of Proposed Rulemaking, doc. FCC 07-218, adopted Jan 24, 2008.

⁷⁵ Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (1934) (superceded).

⁷⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified 47 U.S.C. § 151, 161(a) (2010).

⁷⁷ Cheryl A. Leanza, *Essay: Monolith or Mosaic: Can the Federal Communications Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity?*, 53 AM. U. L. REV. 597, 598 (2004).

⁷⁸ *Id.*

⁷⁹ PHILIP M. NAPOLI, THE LOCALISM PRINCIPLE IN COMMUNICATIONS POLICYMAKING: AN ANNOTATED BIBLIOGRAPHY, 3 (2004) available at <http://www.fordham.edu/images/undergraduate/communications/localismbibliography.pdf>.

⁸⁰ *Id.*

stations to communities around the country to assure widespread service, and the Commission has given priority to affording local service as part of this requirement. Broadcast “localism” encompasses these requirements.⁸¹

Diversity and localism are closely linked policies and the two goals are often explained with conflated interests. Diversity of viewpoint, along with localism, “are grounded in the promotion of democracy and the American cultural values of pluralism and federalism.”⁸² As identified in *FCC v. Pottsville Broadcasting Co.*,⁸³ There has been a “widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”⁸⁴ To reduce this risk, diversity of ownership has been a core part of the licensing scheme since 1927.

Under the Telecommunications Act of 1996, the FCC is obligated to undertake periodic reviews of established broadcast ownership rules. In 2003 the FCC adopted a sweeping change to the ownership provisions, greatly reducing the barriers to cross-ownership of media and consolidation of ownership.⁸⁵ Despite the ownership changes permitted by the FCC, the Commission still emphasized the core values of diversity, localism and competition. In explaining diversity, it made the following finding:

Diversity is one of the guiding principles of the Commission’s multiple ownership rules. It advances the values of the First Amendment, which, as the Supreme Court stated, “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁸⁶ The Commission has elaborated on the Supreme Court’s view, positing that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.”⁸⁷

⁸¹ *Id.*

⁸² Leanza, *supra* note 73 at 601.

⁸³ 309 U.S. 134 (1940).

⁸⁴ *Id.* at 137.

⁸⁵ 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277, Sept. 12, 2002 (“2002 Notice of Proposed Rulemaking”).

⁸⁶ *Id.* quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁸⁷ *Id.* quoting Amendment of Sections 73.35, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476, 1477 (1964) ¶ 3.

If diversity was defined as a lack of monopoly ownership, then diversity of ownership as a distinct legal doctrine should rest on antitrust rationale rather than telecommunications policy.⁸⁸ Diversity extends beyond ownership, however, reflecting that the diversity policy is a tool to affect the content of broadcasts rather than merely the economic impact of the industry or its economic concentration.⁸⁹ As the courts have noted, “Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency – including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy.”⁹⁰

Diversity may have other meanings as well. In a panel program held at American University in 2004, Professor Victoria Phillips explained the spectrum of diversity interests as follows:

[T]ime and time again, the FCC, Congress and the courts have reaffirmed diversity as an essential goal of national communications policy, finding it is essential to our public welfare and it is essential to our democracy. ...

I will just name them to give you a little background on what we are talking about in communications policy when we say diversity. There is viewpoint diversity, the availability of media content reflecting a variety of perspectives. There is program diversity, a variety of programming formats and contents. Outlet diversity is multiple, independently-owned firms in a market. And source diversity is availability of content from a variety of producers. And then, of course, there is diversity as a result of minority and female ownership of the media. ...

Minorities make up one-third of the U.S. population, however, they own less than four percent of our commercial radio and less than two percent of our commercial television stations. Latinos, our fastest-growing population, own less than two percent of radio stations and less than one-tenth of one percent of our television stations. And while women represent more than fifty percent of our

⁸⁸ Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 252 (2001) (“Thus, an important purpose of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government, by companies, or by any individual.”) *citing* *United States v. AT&T*, 552 F. Supp. 131, 184 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁸⁹ *See* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 18 F.C.C.R. 13,620 (2003) [hereinafter 2003 Broadcast Ownership Order].

⁹⁰ *Id. quoting* *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047, *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

population, they own less than four percent of our broadcast stations. Everyone appears to agree that diversity and diverse voices and diverse views are essential to a democracy.⁹¹

It is unclear the extent to which each of the forms of diversity suggested by Professor Phillips have been embraced by Congress or the extent to which Congress could constitutionally embrace all these goal without running afoul of First Amendment restrictions.⁹² It is well demonstrated that the courts have been highly unsympathetic to this approach.⁹³ But the range of diversity outlined provides a strong reminder that the goals of media policy may be accomplished by the use of surrogate measures.⁹⁴ Surrogates have often been tools for cultural exchanges and used to introduce different viewpoints into marketplace of ideas.⁹⁵

⁹¹ Victoria Phillips, *Few Gate Keepers, Many Views: Will the New Rules Compromise the Representation of Marginalized Voices?*, 53 AM. U. L. REV. 547, 548-49 (2004) *citing* The Minority Telecomm. Dev. Project, U.S. Dep't of Commerce, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* (Dec. 2000), available at <http://search.ntia.doc.gov/pdf/mtdpreportv2.pdf>.

⁹² See Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in which Minorities Speak and are Heard*, 42 CATH. U. L. REV. 51 (1992).

⁹³ See, e.g., *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876; 175 L. Ed. 2d 753 (2010) (striking down federal campaign financing laws that prohibited the production and exhibition of an independent film a campaign financing); *FCC v. Fox TV Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800; 173 L. Ed. 2d 738 (2009) (reviewing the FCC policy on fleeting expletives based solely on administrative law procedures with concurrences and dissents suggesting the policy may be unconstitutional when finally ripe for the Court); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000) (requiring scrambling or time limitations on sexually oriented content found unconstitutional); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (statutory provisions on patently offensive programming unconstitutional because they were not sufficiently narrowly tailored to protect children). But in *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) the Court upheld must carry rules to require redistribution of terrestrial broadcast signals on cable systems as reasonable, content-neutral commercial obligations that did not impact speech.)

⁹⁴ Using surrogates to achieve these goals may help avoid idiosyncratic evidentiary difficulties.

Requiring that proof of a nexus between ownership of a station by a minority and programming on that station be made empirically is absurd. The very identification of the problem -- minority voices are not heard by the majority culture -- is too subtle to fit into traditional doctrine. So much silence has passed through so many generations, and that silence has defined the way the majority culture perceives, identifies and solves problems plaguing the public interest. That a nexus between minority station ownership and minority programming is demonstrated or not is meaningless without a sense of what minority voices sound like.

Rogovin, *supra* note ___ at 99 (reviewing *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992)).

⁹⁵ See Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, The Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 269-73 (2007). But it is equally true, therefore, that the surrogate measures selected may be inimical to the goals of diversity and instead chosen to frustrate these very

In a similar vein, localism may be a proxy for more nuanced societal goals. “Conceptually, localism is a fundamental principle of American federalism, which values devolution of power to the local level. Moreover, policies favoring localism can be seen as promoting the diversity of a country built by people hailing from many lands and countries of origin.”⁹⁶

The history of localism is therefore distinct from ownership rules and separate from concerns of diversity, focusing on the production and content of the media rather than the corporate ownership of the facilities.

Two of the four programming requirements cited by the *Blue Book* in 1946 were “local live programs” and “programming devoted to discussion of local public issues.” The 1960 Program Policy Statement gave a similar emphasis, citing “opportunity for local self-expression” and “the development and use of local talent” as the first 2 of 14 programming priorities. This statement also held that the “principal ingredient” of the public interest standard “consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area.”⁹⁷

The separate notions of localism as a goal of establishing content focusing on the needs of broadcast area’s local community can be accomplished by national media owners as well as by local ownership. Provided there is an affirmative duty to focus on local audience issues, the source of ownership may be only tangentially related.

The concept of seeking out the needs of the local audience, known as “ascertainment,” is a procedure that many broadcasters follow as a simple matter of good business practice... to consult with community leaders and members of the general public in developing suitable local programming and public service announcements. Although some television stations criticized ascertainment

goals. *Id.* at 269. See also Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface, World War II, Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996).

⁹⁶ Leanza, *supra* note 73 at 601 citing PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 203, 205-06 (2001).

⁹⁷ ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 27 (1998) (repealing primary localism ascertainment tools and outlining significant deregulation to impact diversity and localism) [hereinafter MOONVES ORNSTEIN REPORT] quoting PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES, 12 (1946) (*Blue Book*); Commission Policy on Programming, 20 Rad. Reg. (P &F) 1901, at 1913 (July. 29, 1960) (1960 *Program Policy Statement*), available at <http://govinfo.library.unt.edu/piac/piacreport.pdf> (last visited Aug. 22, 2010). The *Blue Book* was the FCC general policy entitled *Public Service Responsibility of Licensees* regarding programming, promulgated in 1946 but not ratified as Commission or Congressional policy.

procedures as empty and costly formalisms, many community leaders saw the procedures as a useful requirement that can lead to responsive local programming.⁹⁸

The formal rules promoting ascertainment through the engagement by the broadcasters in their local communities were abandoned as part of the 1984 wave of broadcast deregulation.⁹⁹ The belief – as with most market deregulation – was that market forces would drive broadcasters to provide local programming as a response to local demand.¹⁰⁰ One can certainly make the argument that only market forces should determine what content is available, but there is little to suggest that quality – however defined¹⁰¹ – improves when only popularity and profitability are determinants of production.

“Just as form follows function, content follows finance.”¹⁰² Looking at the expansion of digital television, former FCC Chairman Newton Minow framed the question thusly:

Howard Stern’s new television show featured Stern shaving a young woman’s pubic area. Have our broadcast standards descended to a level where public interest is confused with pubic interest?

Our assignment was to search for the meaning of the public interest in digital broadcasting. Will digital television only bring us clearer, brighter pictures of Howard Stern? Is it to bring us better, sharper sounds of Jerry Springer’s bleeps and punches? Or can the public interest amount to more?

When digital channels became available, police wanted to use them for public safety. Firefighters wanted to use them to save lives. Schools and libraries wanted to use them for education. Hospitals wanted them for better health. Then, broadcasters decided they wanted them for digital television: to make more money.

⁹⁸ *Id.* at 27-28 quoting Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms, Report and Order, 27 FCC 2d 650, 651 (1971), amended by 76 FCC 2d 401, 414(1980).

⁹⁹ *Id.* See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 FCC 2d 1076, 1116 (1984).

¹⁰⁰ *But see e.g.,* Leanza, *supra* note 73 at 601 (discussing the wide disparity between minority viewership and minority participation in ownership or on screen).

¹⁰¹ MOONVES ORNSTEIN REPORT, *supra* note 93 at 29 (“it is difficult to define “quality” programming in an enforceable way.”).

¹⁰² Jon M. Garon, *What if DRM Fails?: Seeking Patronage in the iWasteland and the Virtual O*, 2008 MICH. ST. L. REV. 103, 124 (2008).

Our Government said no to the police. No to the firefighters. No to the schools and libraries. No to the hospitals. And yes to the broadcasters. A gift – exclusive use of precious public property worth an estimated value up to \$70 billion.¹⁰³

Although Chairman Minow was focused on the use of the digital spectrum for high definition television, the same question could well be asked of intangible cultural heritage efforts – is this what we really desire to protect? Is the market the true arbiter of value? The deregulators of 1984 were willing to emphasize deregulation and market, eliminating obligations of ascertainment in exchange for market responsiveness.

When ascertainment was eliminated, the obligation to develop and utilize local talent seems to have disappeared along with it. While television has long been dominated by national networks, broadcast radio is now following suit. Beginning in the late 1990's radio station conglomerates began the practice of "voice tracking" or "cyberjocking" what otherwise often sounded like local programming.¹⁰⁴ "A computer would then patch together their show by combining the pre-recorded vocal drops, with listener calls, 'songs, promos, sound effects and commercials stored on a hard disk,' which would then be sent out to other conglomerate owned stations in other local and regional areas."¹⁰⁵ The effect has been dramatic. "Hundreds, if not thousands of DJ positions were eliminated."¹⁰⁶

The goal to develop and utilize local talent is facilitated by focusing on local stories, but it has a community-building aspect more in line with protection of cultural heritage than traditional broadcast concerns. Wholly unrelated to the ownership aspects of diversity, localism's emphasis on local talent and competence provides a compelling but oft forgotten aspect of broadcast's early recognition of its responsibilities. By investing in training and development of local talent, each community has an opportunity to diversify the artists and professionals necessary to engage in the process of broadcast.

¹⁰³ *Id.* at 91 (Statement of Newton N. Minow, dissenting to Recommendation 6: Improving the Quality of Political Discourse, in which Charles Benton, Frank M. Blythe, and James Yee join). Of course, when Mr. Minow was himself FCC Chairman, he famously noted that "when television is bad, nothing is worse. . . . I can assure you that you will observe a vast wasteland." Newton N. Minow, *Television and the Public Interest*, Speech Before the National Association of Broadcasters (May 9, 1961), in *The Vast Wasteland Revisited*, 55 FED. COMM. L.J. 3, 398 (2003) (symposium issue), available at <http://www.law.indiana.edu/fclj/pubs/v55/no3/Speech.pdf>.

¹⁰⁴ Folami, *supra* note 91 at 297.

¹⁰⁵ *Id.* quoting Randy Dotinga, "Good Mornin' (Your Town Here), WIRE NEWS, Aug. 6, 2002, <http://www.wired.com/news/business/1,54037-0.html> (last visited Aug. 22, 2010).

¹⁰⁶ *Id.*

Technology has reduced the barriers to entry for individuals who wish to create content – whether focused on local, national or global content.¹⁰⁷ But the reduction in technological barriers is not a substitute for training, mentoring and professional experience creating media content. The *Blue Book's* vision of localism based on local competence to participate in media and media content emphasizing local issues remain valid governmental concerns today, despite the paradigm shift in media delivery. Indeed, it may be that the role of the Internet, the decline in newspapers, the rise of digital books and the ubiquitous role of social media make localism more important than ever, even if these same trends undermine the scarcity doctrine at the heart of treating broadcast media differently than other media for First Amendment analysis.

3. The Role of Local in a Transnational World

While “all politics is local,”¹⁰⁸ all content is global. The role of localism, diversity, expressions of folklore, or intangible cultural heritage must therefore be considered in the context of globalization and its networked architecture. In the U.S., for example, the number of people using the Internet to view content originated on television doubled in just the past year.¹⁰⁹ While this growth has only motivated a small number of consumers to drop cable service, “25% of 18-34 year olds “have seriously considered dropping my subscription TV service because Internet video services meet most of my needs.”¹¹⁰

China is reported to have over 420,000,000 Internet users, representing 31.6% of its population.¹¹¹ Despite stringent governmental restrictions on media such as official access to

¹⁰⁷ Yochai Benkler, *Viacom-CBS Merger: From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 567-68 (2000) (“[T]he low cost of producing and communicating information means that the old points of concentration - the presses and distribution systems, the broadcast transmitters and licenses, the cable systems - no longer present the same insurmountable barriers to entry to becoming a speaker as they do in the mass mediated environment.”)

¹⁰⁸ Attributed to Thomas “Tip” O’Neill. John J. Burns Library, Thomas P. O’Neill papers, http://www.bc.edu/bc_org/avp/ulib/oneill_findingaid2.html (last visited Aug. 22, 2010).

¹⁰⁹ Mark Hefflinger, *Survey: Online Broadcast TV Viewership Doubled in Past Year*, DIGITAL MEDIA WIRE, Aug. 23, 2010, citing Altman Vilandrie & Company and Peanut Labs, available at <http://www.dmwwmedia.com/news/2010/08/23/survey-online-broadcast-tv-viewership-doubled-past-year> (last visited Aug. 24, 2010).

¹¹⁰ *New study shows TV Internet viewers have doubled since last year*, ALTMAN VILANDRIE, <http://www.businesswire.com/news/home/20100823005441/en/study-shows-TV-Internet-viewers-doubled-year> (last visited Aug. 24, 2010).

¹¹¹ Internet World Stats, China Internet Usage Stats and Population Report, <http://www.internetworldstats.com/asia/cn.htm> (last visited Aug. 24, 2010).

Google¹¹² or exhibition of most foreign films,¹¹³ content piracy in China is over 90%¹¹⁴, meaning that most such restrictions are little more than legal fictions. According to the China Film Copyright Protection Association, as much as “96% of the movies available on the Internet in China are pirated, and that only 10% of those in theaters actually make a profit.”¹¹⁵ Citizens of other countries are experiencing similar increases in access to globally distributed content – even if that content is not necessarily being distributed at the behest of the copyright owners or government regulators.

Similarly, The notion of “local” indigenous populations or speakers of domestic minority languages may be something of a misnomer. National borders that bisect traditional communities may play an ever-decreasing role in the networked, globalized community. A recent atlas

¹¹² Michael Wines, Sharon Lafraniere and Jonathan Ansfield, *China's Censors Tackle and Trip Over the Internet*, N.Y. TIMES, Apr. 8, 2010 at 1 (“Censorship used to be the sleepy province of the Communist Party's central propaganda department, whose main task was to tell editors what and what not to print or broadcast. In the new networked China, censorship is a major growth industry, overseen -- and fought over -- by no fewer than 14 government ministries.”).

¹¹³ In April 2007, the United States brought an action through the World Trade Organization related to China's noncompliance with its treaty obligations regarding, *inter alia*, “the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China.” The U.S. claim was upheld by both the panel and the Appellate Body. *See Report of Appellate Body, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

China has claimed amendments to its copyright laws now bring it into compliance. The U.S. has yet to accept this characterization. WTO, DISPUTE SETTLEMENT: DISPUTE DS362, CHINA — MEASURES AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (Mar. 19 2010) (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm) (last visited Aug. 31, 2010).

¹¹⁴ Jie Bai and Joel Wadlfogel, *Movie Piracy and Sales Displacement in Two Samples of Chinese Consumers*, MACK CENTER, THE WHARTON SCHOOL, UNIV. OF PENN. (Ph.D. dissertation) (Sept. 17, 2009) at 1 (http://bpp.wharton.upenn.edu/waldfogj/pdfs/bai_waldfogel_nber_two_datasets.pdf) (last visited Aug. 31, 2010). *See also* Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 AM. BUS. L.J. 331, 338-39 (2008) (“In 2005 global law enforcement in collaboration with the MPAA confiscated more than eighty-one million illegal optical discs. In April 2007 the United States filed complaints against China with the World Trade Organization (WTO) for its failure to crack down on piracy of copyrighted goods, especially the production and sales of counterfeit DVDs.” (footnotes omitted)).

¹¹⁵ *Chinese Film Group Files First Civil Copyright Lawsuit*, ZEROPAID, Aug. 12, 2010 at <http://www.zeropaid.com/news/90256/chinese-film-group-files-first-civil-copyright-lawsuit/> (last visited Aug. 24, 2010) (“Part of the problem, the CFCPA says, is that infringers are usually only fined well below the maximum of 500,000 yuan (\$74,000 USD), and in some cases pay copyright holders as little as a few hundred yuan (100 yuan = \$15 USD).”).

sponsored by UNICEF, for example, identifies 522 indigenous peoples in Latin America that are at least bi-national.¹¹⁶

One aspect of the disconnect between geographic and demographic communities has appeared in the discussions over the WIPO draft regarding expressions of folklore. As framed by the Secretariat, the discussion was over the “Diaspora” as part of the definitional issue of community:

The issue of community in Diaspora was also raised. The Delegation of the United States of America stated that [Traditional Cultural Expressions (TCEs)] were only alive when carried in people, when expressed through people within a political or geographic region that claimed it, or when owned by people across the world in the Diaspora. It gave the example of a Cambodian dancer located in Seattle, who might be accused of pirating Cambodian TCEs, or, similarly, of an Ethiopian group of musicians in Washington, D.C. The Delegation found [in the commentary to this article] that the statement “expressions which may characterize more recently established communities or identities would not be covered” was confusing.¹¹⁷

The legitimacy of indigenous peoples living outside their traditional homeland must be an essential part of the recognition of globalization. In some cases, the recognized traditional homeland includes multiple nations; in other cases migration and forced dispersion of those communities has defined or redefined those people.

“[T]he salience of the sovereign state, strictly defined by its territorial borders, has slowly declined.”¹¹⁸ The state has not necessarily lost power,¹¹⁹ but the ability of indigenous peoples and their advocates, NGOs, domestic groups, treaty organizations and other actors to network, coordinate and organize is another of the network effects that helps define the information age.¹²⁰ The ability of communities that were disrupted by the rise of the state in the Nineteenth and

¹¹⁶ See generally INGE SICHRA THE SOCIOLINGUISTIC ATLAS OF INDIGENOUS PEOPLES IN LATIN AMERICA: A TOOL FOR PLANNING REGARDING EDUCATION AND INDIGENOUS PEOPLES (2010).

¹¹⁷ WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 16.

¹¹⁸ Austen L. Parrish, *Lands, Liberties, And Legacies: Indigenous Peoples and International Law: Theoretical Approaches to International Indigenous Rights: Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 303 (2007).

¹¹⁹ See Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT'L L. 329, 334-36 (2004).

¹²⁰ Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 857 (2003) (“It has become commonplace to argue that qualitative changes in the global economy have weakened the ability of states to pursue autonomous policies - or have at least markedly raised the costs of doing so.”).

Twentieth century are reconnecting through the networked global community, reasserting their rights territorially and their community globally. Notions of exacting national borders, expatriate communities and the Diaspora must give way to a more fluid understanding of community and people. “The rise in extra-territorial relations, including the expansion of transnational and international administrative and judicial entities, further challenges the notion of absolute territorial borders.”¹²¹

The transnational and international entities, in turn, are benefactors if not creations of the informational networks that allow them to operate in concert with each other and beyond the narrow confines of the domestic state.¹²² At the same time, the trends of globalism and indigenous communities are not directly correlated. Minorities remain at risk from dominant cultures in many parts of the world. The combination of poverty and discrimination faced by these communities means that they are likely to be among the last to receive broadband access, Internet service or even cell tower connectivity. Nonetheless, even limited access to these tools has the potential to reconnect various indigenous peoples to their counterparts in other nations more than any other change since the rise of the modern state.

Globalism, therefore, has a yin/yang influence on indigenous peoples and their intangible cultural heritage and expressions of folklore.¹²³ The peoples and their expressions benefit from greater access to each other and outside entities dedicated to their success, but they are

¹²¹ Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1058 (2007).

¹²² See MANUEL CASTELLS, *INFORMATION TECHNOLOGY, GLOBALIZATION AND SOCIAL DEVELOPMENT*, *supra* note 11 at 5-6.

¹²³ See Floridi, *supra* note __ at 11-12. Discussing the influence of the philosophy of information, Floridi describes the cultural shift at the personal level:

Within the information society, it seems that we are modifying our ontological perspective, from a materialist one, in which physical objects and processes still play a key role, to an informational one, in which (a) objects and processes are dephysicalised, typified and perfectly clonable; (b) the right of usage is perceived to be at least as important as the right to ownership; and (c) the criterion for existence is no longer being immutable (Greek metaphysics) or being potentially subject to perception (modern metaphysics) but being interactable. ...

We become mass-produced, anonymous entities among other anonymous entities, exposed to billions of other similar inforgs online. So we self-brand and re-appropriate ourselves in cyberspace by blogs and [F]acebook entries, homepages, [Y]outube videos, and [F]lickr albums. We use and expose information about ourselves to become less informationally indiscernible. We wish to maintain a high level of informational privacy almost as if that were the only way of saving a precious capital that can then be publicly invested by us in order to construct ourselves as individuals discernible by others.

Id.

increasingly competing with dominant cultural content – from not only the territory in which they reside but from the influence of Hollywood, Bollywood, the BBC, CNN and other global media producers.

Moreover, the states face an even more difficult dilemma. “Cultural hierarchies also [play] an important role in the type of knowledge that came to be protected under global intellectual property standards”¹²⁴ For some countries, they perceive international competition as a threat to the dominant language and culture even as they struggle to appropriately value and protect the minority rights and intangible cultural heritage of their citizens. France, for example, has long sought to protect the purity of its language and culture even as it has become an active participant in the European Union and has seen its ability to limit the influence of foreign language erode. Globalism suggests the focus should be elsewhere.

These concerns are entwined with the role of global culture in developing nations. Many perceive the output of global media producers as another form of imperialism.¹²⁵

The relationship of the global media system to the question of imperialism is complex. In the 1970s, much of the Third World mobilized through the United Nations Educational, Scientific, and Cultural Organization to battle the cultural imperialism of the Western powers. The Third World nations developed plans for a New World Information and Communication Order (NWICO) to address their concerns that Western domination over journalism and culture made it virtually impossible for newly independent nations to escape colonial status. Similar concerns about U.S. media domination were heard across Europe. ... Global journalism is dominated by Western news services, which regard existing capitalism, the United States, its allies, and their motives in the most charitable manner imaginable. As for culture, the “Hollywood juggernaut” and the specter of U.S. cultural domination remain a central concern in many countries, for obvious reasons.

But, with the changing global political economy, there are problems with leaving the discussion at this point. The notion that corporate media firms are merely purveyors of U.S. culture is ever less plausible as the media system becomes increasingly concentrated, commercialized, and globalized. The global

¹²⁴ Olufunmilayo B. Arewa *The First Ten Years of the Trips Agreement: Trips and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTEL. PROP. L. REV. 155, 160-61(2006).

¹²⁵ See Robert McChesney, *Global Media, Neoliberalism & Imperialism*, INT’L SOCIALIST REVIEW, Aug/Sep 2001 at ___, available at http://www.thirdworldtraveler.com/McChesney/GlobalMedia_Neoliberalism.html (last visited Oct. 1, 2010) (“Whereas, previously, media systems were primarily national, in the past few years a global commercial-media market has emerged.”).

media giants are the quintessential multinational firms, with shareholders, headquarters, and operations scattered across the globe. ... [T]he basic split is not between nation-states, but between the rich and the poor, across national borders.¹²⁶

It is beyond the scope of this article to assess the continuing efficacy of any global media cartel¹²⁷ in the face of continuing network globalism and reduced barriers to media entry. Nonetheless, English language dominance and cultural affinity continue to provide a significant advantage to the media industries dominant distributors.¹²⁸ The existing advantage, in turn, leads to a pessimism regarding the national production of media and by extension the ability of minority communities to produce media.¹²⁹

The concern of media imperialism, however, is based primarily on the trade of media content through sale theatrical exhibition of films, sales of DVDs, and licensing of television content.¹³⁰ Such measures do not take into account unlicensed public performances, content piracy, sharing of cultural media in music, home recordings, dance, theatrical performances, oral traditions or other common forms cultural exchange. Films may be shown outdoors, projected onto sheets in communal villages; DVDs played on televisions in bars and barber shops; live theatre flourishes; and music remixed and performed in outdoor dance parties – all without appearing in the international trade methodology. While this is part of an under-reported economy, it is not necessarily an underground culture. These events may be at the heart of a community's zeitgeist despite going unmeasured in international trade.

“Indigenous communities’ integration of digital technologies into cultural tourism ventures, language revitalization programs, cultural heritage projects, and land-management schemes

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See generally*, W. Wayne Fu, *Cross-country Comparison of National Tastes in Hollywood Movies: Cultural Proximity and Genre Preferences*, BITS WITHOUT BORDERS; Steven S. Wildman, *Trade Liberalization and Policy for Media Industries: A Theoretical Examination of Media Flows*, 20 CANADIAN J. COMM. __ (1995) available at <http://www.cjc-online.ca/index.php/journal/article/viewArticle/884/790>.

¹²⁹ Sean Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?*, BITS WITHOUT BORDERS, at 3 (“The economic structure of modern cultural industries seemed stacked against [developing economies]. Mass media production required expensive capital outlays, sophisticated technology and know-how, and organizational capacities... Meanwhile, established media giants continued to dominate global markets, enjoying economies of scale and distributional clout that allowed them to steamroll competition.”)

¹³⁰ *See Fu*, *supra* note __ at 5-6. For a more general discussion of intangible asset valuation, *see* Olufunmilayo B. Arewa, *Measuring and Representing the Knowledge Economy: Accounting for Economic Reality under the Intangibles Paradigm*, 54 BUFFALO L. REV. 1, 56 (2006) (hereinafter Arewa, *Knowledge Economy*).

foregrounds the multiple layers of connection between technological innovations, economic sustainability, and cultural production.”¹³¹ In the networked globalism of information age, this unmeasured cultural exchange may better reflect the true state of media distribution, painting a very different picture of influence and dominance.¹³²

Digital technologies have dramatically altered the economics of cultural production. By dramatically lowering barriers to entry, such technologies have allowed creative industries to flourish in developing countries in ways that were unimaginable decades earlier. Such changes have largely gone unheralded in the West where the digital commentariat has focused on the global expansion of Western-created online media such as Google, Facebook, and Twitter, while ignoring home-grown Southern [Hemisphere] alternatives. Commentators have also tended to overlook the significance of digital technologies for cultural production off-line in such diverse industries as Nigeria’s Nollywood and Brazil’s *tecno brega* music scene.¹³³

While the Hollywood media economy dominates international trade, there is not necessarily any correlation that the content dominates the culture of any particular community, such that concerns of economic influence should be separate from cultural imperialism.¹³⁴ Nor is there any

¹³¹ Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, INT’L J. CULTURAL PROPERTY 315, 318 (2005) (hereinafter Christen, *Gone Digital*).

¹³² This phenomenon is not unique to developing countries. Thousands of films, millions of video productions and an untold number of musical compositions are made in the U.S. each year, while only a fraction are acquired by the “Hollywood” media for national and international exploitation. The MPAA, for example, identifies only 558 theatrically released film in 2009. MPAA, THEATRICAL MARKET STATISTICS 11 (2009) available at [MPAA.org/resources](http://www.mpa.org/resources). The independent film distributor Bosko Group reports 8500 independent films are produced annually. <http://www.boskogroup.com/independent-films.php>. Cf. Geoff Gilmore, *Geoff Gilmore: Evolution v. Revolution, The State of Independent Film & Festivals*, IndieWire at http://www.indiewire.com/article/first_person/# (January 12, 2009) (Geoff Gilmore, Director of the Sundance Film Festival commenting that “[t]he numbers of films produced as compared to the mid-1990’s has quintupled.”).

¹³³ Pager, *supra* note __ at 4 (internal citations omitted).

¹³⁴ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L. J. 283 (1996).

[C]opyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society. In supporting a market for authors' works, copyright serves two democracy-enhancing functions. The first is a production function. Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association. The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.

particular correlation between copyright policy and creative output – as distinct from the ability of creative content producers to retain the economic benefits of their effort.¹³⁵ Even if copyright tends to be somewhat conservative by creating minimal barriers that each entrant joins the market with original content, it is far less intrusive than the cultural barriers of the state.

Anti-imperialist trade barriers often incorporate domestic policies that dictate a particular cultural output. “[S]tate-centric, *dirigiste* structure and elitist/ideological orientation have all-but ensured market failure.”¹³⁶ Sometimes these efforts are intended to create a national hegemony; other times, these efforts are intended to counteract perceptions that a nation’s history and culture was impermissibly shaped by colonizing powers; and occasionally they do nothing more than reinforce class and other stereotypes. Whatever the agenda, the effect of these content incentives, they work as a form of neocolonial cultural control that may discourage participation in media growth.¹³⁷

4. The Expressions of Folklore Regulatory Regime

The projects at WIPO and UNESCO illustrate the transnational nature of the effort to protect intangible cultural heritage and expressions of folklore. While individual countries are free to take on these tasks, the spatial irrelevance of the state makes international protocols a necessity.

For states seeking to protect the majority’s intangible cultural heritage, the UNESCO models for protecting the indigenous peoples could be used in unintended ways to subvert its goals into generic preservation projects. Instead of focused funding and enforcement, the minority interests and expressions of folklore they represent may be thrown aside in a cultural exercise of reverse

Id. at 288. *But see* NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX, pp. 38-39 (2008); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1094 (2003) (“From a cultural-diversity viewpoint... excessive exposure to corporate media’s multimarket media products decrease the total amount of cultural space left for other media products.”); Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKLEY TECH. L. J. 785 (2004).

¹³⁵ *See generally*, Michal Shur-Ofry, *Copyright, Complexity and Cultural Diversity – A Skeptic’s View*, BITS WITHOUT BORDERS at 10-12.

¹³⁶ Pager, *supra* note __ at 2 *citing* Sean Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, *forthcoming*, 31 NW J. INT’L L. & BUSINESS __ (2010).

¹³⁷ *See, e.g.*, Jonathan Clayton, *Nollywood success puts Nigeria’s film industry in regional spotlight*, THE TIMES (LONDON) Apr. 3, 2010 at <http://www.timesonline.co.uk/tol/news/world/africa/article7086248.ece> (“Paul Obazele, president of the Association of Movie Producers, said: “We just can’t compete, and the Nigerian Copyright Commission is a joke. The truth is that the Government has only paid lip service to this industry. Film-makers here in Nigeria are becoming serious and need support”).

discrimination. Nonetheless, the WIPO model for incorporating aspects of copyright, trademark and trade secret protection for expressions of folklore may have some potency to recognize the interests of the indigenous peoples' whose works are being exploited and the broader interests of access, expression and understanding. Because WIPO has set a goal to establish its standards by fall of 2011, there is both momentum and expectations in its proposal.¹³⁸

The nature of globalization and the tension over the definition of the indigenous people or community finds itself played out in the WIPO discussion draft regarding the beneficiary of the rights to protect the expressions of folklore. The philosophical basis is that the rights to be protected accrue and are guarded by the community.¹³⁹ "Some laws for the protection of [Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF)] provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs."¹⁴⁰

The African Group of Represented Nations favors the role of the state in identifying and protecting such rights.¹⁴¹ These concerns are fueled by well-documented examples of music and images that have been exploited without returning anything to their creators or community.¹⁴² This notion provides authority and clarity over the model, but it ignores the very global nature of the rights fundamental to the communities and puts the ability to manage the rights of minority

¹³⁸ World Intellectual Prop. Org. WIPO, *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Agenda Item 28, Decision, Gen. Assemb. Thirty-Eighth (19th Ordinary Session) (Sept. 22-Oct. 1, 2009), available at <http://www.wipo.int/edocs/mdocs/tk/en/wipogrtkfic15/wipogrtkfic15refdecision28.pdf>.

¹³⁹ WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 19-21.

¹⁴⁰ *Id.* at 20.

¹⁴¹ *Id.*

¹⁴² See Arewa, *Knowledge Economy*, *supra* note ___ at 176-77. Professor arewa provides may examples, including the song "Deep Forest."

"Deep Forest" involved the use of samples of indigenous people in commercial recordings. "Deep Forest" was a techno-house dance rhythm album created in 1992 that fused digital samples from Ghana, the Solomon Islands, and African pygmies. "Deep Forest" sold over two million copies by May 1995, received a Grammy nomination, and remained on Billboard Magazine's "top album" chart for twenty-five weeks. A number of companies, including Porsche, Sony TV and Coca-Cola have used music from "Deep Forest" in advertising campaigns. The musicians sampled do not appear to have received any benefit from the proceeds of commercialization of their music.

Id. at 177-78 (citations omitted).

communities in the hands of the very majorities that may have been suppressing these communities.

On the other hand, proposed language that vests authority in multiple communities with conflicting interests is hardly going to lead to less conflict.¹⁴³ Such a model will result in an encouragement of safeguarding of intangible cultural heritage, but create a regime in which multiple communities can legitimately claim authority to speak for and manage the heritage.

As memes go, the notion that a culture may claim a unique heritage to which it has unique authority is naïve. Consider as an example the monotheistic religious traditions – Genesis may have been based largely on the epic poem of Gilgamesh; the Christian Gospel of Matthew borrows heavily from the Jewish bible text – the Book of Isaiah; the Koran, in turn, borrows from both the Jewish and Christian Bibles; and the Book of Mormon is an extension of Christian doctrine. Should the law provide dominance of one tradition over another, and if so, what community controls this legacy of culture and teachings?¹⁴⁴ This does not mean that a cultural heritage system cannot work, but it may make it much less open to generalization.

Assuming the appropriate community can be identified to protect a particular expression of folklore, Article 3 provides a range of copyright-like, trademark-like and trade secret-like protections. Section 1 protects from a copyright-like list of reproduction, adaptation, public performance, broadcast or display.¹⁴⁵ It further provides community versions of moral rights by

¹⁴³ The proposed language provides:

Measures for the protection of national traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and communities, individual groups, families, tribes, nations and traditional and other cultural communities or the nation / or the countries, to which a traditional cultural expression/expression of folklore is specific:

- a) in whom the custody, care and safeguarding of the TCEs/EoF are existing in accordance with their customary law or practices; and
- b) who maintain, control, use or develop the traditional cultural expressions/expressions of folklore as being authentic and genuine of their cultural and social identity and cultural heritage.

Id. at 19 (internal citations and modifications from prior drafts omitted).

¹⁴⁴ The representative from the Arts Law Center of Australia suggested further modifying the language to provide a presumption that the indigenous community had been entrusted to protect its community. This suggestion would improve the ability of an indigenous community to claim rights but provide little assistance – and perhaps additional conflict – if competing communities were claiming the same or similar interests. *See Id.* at 22.

¹⁴⁵ *Id.* at 23-24 (Art. 3.1(a)). While all these rights are considered within the penumbra of copyright in the U.S., internationally some of these rights would be deemed “related rights.” *See generally* WIPO Copyright Treaty adopted Dec. 20, 1996, 36 I.L.M. 65 (1997) and the WIPO Performances and Phonographs Treaty, adopted Dec. 20, 1996, 36 I.L.M. 76 (1997).

requiring attribution to the community and a prohibition of distortion, mutilation or derogatory action when using the work.¹⁴⁶ While there remains a good deal of debate regarding the wording of these sections, such debate primarily reflects a question of drafting style. The goal of the works in a manner consistent with international copyright is clear throughout.

To deal with the problems inherent in the scope of Article 3 and adjudicate the rights associated with the copyright-like interests of the communities, Article 7 contemplates a registration system.¹⁴⁷ How such a system will ultimately be developed and how it will balance the copyright-like notions that protection vests upon creation with a validation-styled registration system remains unclear from the present discussion draft.¹⁴⁸ The draft Article 7 recites that “[a]s a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality.”¹⁴⁹ The next section then requires a registration regime of a nature yet to be developed.¹⁵⁰ The commentary provided by the Secretariat explains that the draft reflects an attempt to combine “some form of registration, possibly subject to formal or substantive examination” with a contrasting model providing “automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similar to copyright.”¹⁵¹

Both systems are highly problematic. The automatic protection will allow conflicting claims and tremendous uncertainty for artists, producers, and authors utilizing the memes of culture in works to which some community might claim to have rights. The lack of certainty would be extremely difficult to predict in the early years of the regime and likely subject to significant regional inconsistencies – have the effect of reducing access to the memes of intangible culture and hastening the demise of the very content sought to be protected and nourished by the system.

A registration system eliminates the problems of uncertainty for the public at large but places a potentially significant burden on the indigenous people to prove and defend their ownership of their traditional knowledge. Even if no registration fee was charged, there could be significant transaction costs associated with the identification, documentation and prosecution of the claims to protect the expressions of folklore. Decisions to forego registration could have the effect of

¹⁴⁶ *Id.* at 24 (Art. 3.1(b)-(c)).

¹⁴⁷ *Id.* at 42-46 (Art. 7).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 42 (Art. 7.1).

¹⁵⁰ *Id.* (Art 7.2).

¹⁵¹ *Id.* at 44.

dedicating potential material to the public domain so that practical concerns about resources could have devastating consequences.

The chilling effect of a non-registration system will likely have more negative and unintended consequences than the problems of the registration system. To mitigate the problems from a registration system, the provisions should make clear that there is no presumption of non-ownership or statute of limitations triggered by the decision not to register. At the same time, the copyright of other authors and the right of other authors and other parties to use material cannot be abridged by a subsequent registration. In other words, if a documentary filmmaker were to produce a work incorporating expressions of folklore, the community filmed could not have the film later banned if the material in the film was registered after the film was produced.

In addition to exempting the exploitation of the expressions of folklore within the applicable community,¹⁵² Article 5 proposes some exceptions and limitations analogous – but likely much narrower – than the fair use provisions of the U.S. Copyright Act.¹⁵³

Measures for the protection of TCEs/EoF should ... not apply to utilizations of TCEs/EoF in the following cases:

- a) by way of illustration for teaching and learning;
- b) non-commercial research or private study;
- c) criticism or review;
- d) reporting news or current events;
- e) use in the course of legal proceedings;
- f) the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
- g) incidental uses,

provided in each case that such uses are compatible with fair practice, the relevant indigenous peoples and communities and traditional and other cultural communities are acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to such indigenous peoples and communities and traditional and other cultural communities, as long as the traditional cultural expressions/expressions of folklore are not distorted, mutilated or modified so as to cause harm thereto or to the reputation of the community, indigenous peoples and communities or region to which they belong.¹⁵⁴

¹⁵² *Id.* at 37 (Art. 5.1 (a)-(b)).

¹⁵³ *See* 17 U.S.C. §107 (2009).

¹⁵⁴ WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 37 (Art. 5.1 (c)).

The exceptions and limitations are broad in their inclusion of archival purposes to protect cultural heritage. The limitations are generally typical of the fair use language, as it varies from nation to nation. As presently under consideration, however, the final paragraph of subsection (c) would not apply to the moral rights of paternity or integrity. Article 5 might be sufficient for a documentary filmmaker if the inclusion were incidental or the topic of the film was focused on reporting or current events, but even then the final paragraph creates a significant limitation on the content reflected by the filmmaker.

Producers are often concerned that reliance on fair use will fail, jeopardizing the ability of the author to exhibit or distribute the work.¹⁵⁵ Without a registration system, the lack of predictability would be exacerbated, creating an incentive to discourage reproduction of expressions of folklore. This may be what the representatives desire; that a series of difficult procedural and definitional hurdles will discourage all but the clear cultural owners from exploiting these expressions. But such a model risks creating a museum out of culture; ossifying the status quo. As the networked, global world moves to an increasingly digitized, interconnected ethos, the memes of intangible cultural heritage should not be frozen in amber and lost to future generations.

Unlike the problems inherent in the copyright-like regime, the trademark-like system and trade secret system have far fewer unintended consequences.¹⁵⁶ The language is illustrative:

[A]ny false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of the indigenous peoples and communities and traditional and other cultural communities or nation, suggest any endorsement by or linkage with them, can be prevented or stopped and/or is subject to criminal or civil sanctions.¹⁵⁷

Treaty protections that enable indigenous peoples and other communities to designate signs or trademarks serve as an extremely effective approach to allow those communities to endorse works that are consistent with their cultural heritage, to inform the public whether commercially available works are authorized or not authorized, and to stop those who would create false or misleading statements regarding such authorization.¹⁵⁸ In addition to general trademark law,¹⁵⁹

¹⁵⁵ See Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 *CARDOZO ARTS & ENT. L.J.* 391, 416 (2005); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525, 1623 (2004).

¹⁵⁶ See WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 26-27 (Art. 3.2-3).

¹⁵⁷ *Id.* at 26 (Art. 3.2 (c)).

¹⁵⁸ See *e.g.*, Lanham Act 15 U.S.C. §1125 (2010) (providing protection against false designation of origin for both registered and unregistered trademarks).

U.S. law also includes specific statutory language providing similar protection for Indian tribes and Native Americans.¹⁶⁰ The Indian Arts and Crafts Act provides civil liability against anyone “who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States ...”¹⁶¹ The statute provides standing to a tribal member, tribal arts and crafts organization, tribe or the U.S. Attorney General.¹⁶² Similar regimes have been used in other countries.¹⁶³

Trademark regimes are far less absolute than copyright regimes in stopping exploitation of cultural heritage, but may provide a better balance between the need to protect against the unauthorized exploitation of indigenous peoples and the encouragement of a robust marketplace of ideas informed by the traditions and knowledge of minority communities. Since trademark focuses on commercial exploitation, it provides a narrower focus for enforcement. It may also have less risk of serving to unintentionally marginalize the very ideas and knowledge sought to be protected.

Trademark-like regulation may provide a better balance for protecting the rights of attribution and integrity than the copyright-like approach. The values of protecting a person’s – or community’s – interests in assuring that full attribution is given for a work and that a work is not mutilated can either be based on the control of other parties’ content or based upon assurance that the public knows whether a work is authorized or not. While the first model affords greater protection, the second model provides more balance between the competing interests of the multiple authors and the interests of the public in being assured that it is not defrauded or misled regarding the provenance of its culture. While necessarily a value judgment, the regime that maximizes expression while still valuing attribution and integrity may prove the more effective strategy.¹⁶⁴

The final protection focuses on the trade secrets held by the indigenous peoples and communities. “There shall be adequate and effective legal and practical measures to ensure that

¹⁵⁹ *See id.*

¹⁶⁰ The Indian Arts and Crafts Act, 25 U.S.C. §§ 305 et seq. (2010).

¹⁶¹ *Id.* at §305e (a).

¹⁶² *Id.* at §305e (c).

¹⁶³ WIPO, DRAFT REPORT OF SEVENTEENTH SESSION, *supra* note 4 at 29 (“Specific tailored forms of protection are suggested for words, names, symbols and other designations, drawing on trademark law and special measures already established in this regard in the Andean Community, New Zealand and the United States of America.”).

¹⁶⁴ *See Kuruk, supra* note 40 at 828-29.

the indigenous peoples and communities and traditional and other cultural communities or nation have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.”¹⁶⁵ The proposal must be read in light of pre-existing legal protections.¹⁶⁶ Unlike the other protections, it does not specify its own regime. Nonetheless, assuming the jurisdiction has a trade secret regime in place, the provision provides standing for the community affected to seek such redress.

Because the WIPO language is a discussion draft, there is little detail in how the text would be transformed into treaty language and national legislation. Given the need to create registers, it is highly doubtful the proposal could become self-executing law. And whether adopted by various governments as is or through enabling legislation, there remains a significant risk that the very governments which have acted to marginalize some of these communities would draft laws to protect the rights at issue. In the U.S., for example, although the Indian Arts and Crafts Act was first passed in 1935, the first reported decision came in 2005.¹⁶⁷ In part, this was because the statute had only criminal provisions until amended in 1990¹⁶⁸ and no prosecution was ever brought forth.¹⁶⁹ While other nations may be more effective in protecting the communities they claim to help, the slow progress of WIPO and UNESCO bear at least some testament to the ambivalence with which this work is regarded and many of the communities affected reside in locations where human rights abuses far overshadow the concerns about destruction of cultural heritage. The relationship between human rights and cultural heritage is diplomatically omitted from the draft documents.

5. Localism as the Alternative to Protection

Each of the approaches incorporated into the WIPO model for protection of expressions of folklore emphasize the rights of the local community to stop unauthorized use without actually

¹⁶⁵ *Id.* at 27 (Art. 3.3).

¹⁶⁶ *Id.* at 29 (*citing* Foster v. Mountford (1976) 29 FLR 233 (Australia) and the 1993 Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Art. 2.1 (Aotearoa, New Zealand, June 1993) (“Recognise that Indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.”). *See also* World Intellectual Prop. Org. WIPO, *Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge — Preliminary Analysis and Conclusions*, Intergovernmental Committee On Intellectual Property And Genetic Resources, *Traditional Knowledge And Folklore*, WIPO/GRTKF/IC/2/9 4 (2d Sess., Dec. 10-14, 2001).

¹⁶⁷ *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871 (7th Cir. 2005).

¹⁶⁸ H.R. Rep. No. 400(II), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6391, 6392

¹⁶⁹ *Native Am. Arts, Inc.*, 399 F.3d at 873.

addressing the political realities of the situation that gave rise to the need for the legislation. The approach treats globalization as an industrial onslaught without regard to the networking opportunity it provides to expatriates and the importance of community members in the Diaspora. The protectionist regimes may even provide the state authorities responsible for the oppression of their minority communities with the obligation to serve as trustee for the communities' interests. Real concern must exist that the entire exercise will have little or no meaningful impact on the cultures sought to be protected.

Without abandoning the goals of protecting expressions of folklore, a “bottom-up” approach may have more impact.¹⁷⁰ Specifically the values associated with localism will serve as a more effective approach to the challenge. As defined by the FCC in 1946, the twin components of localism are training of local artists and emphasis on content of interest to the local community.¹⁷¹ Each of these components plays a critical role in providing useful tools for protecting expressions of folklore and intangible cultural heritage.

Localism may actually be enhanced through the globalized networked communities growing across the world. While somewhat ironic, globalism provides the tools and support necessary for localism. In news media, for example, the rise of hyper-local websites supported by citizen journalism has tapped the global, networked tools of social media to make news and cultural reporting available for small communities within cities.¹⁷² Traditional broadcasting is following the same model. “News networks are increasingly moving into smaller markets and market subsets. Cablevision Systems Corp., for example, has three “hyperlocal” news channels in the New York designated market area (“DMA”).”¹⁷³ Digital technology has lowered the cost to own production equipment and distribution equipment. With these barriers to entry reduced, fewer resources are needed to create and disseminate content. “The use of digital production technology has enabled the provision of “hyper-local news.”¹⁷⁴

¹⁷⁰ See Mark F. Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 81 (2008 / 2009) (stating that policy initiatives of WIPO and the World Health Organization “do not focus on making the most of the available local resources and the laws that countries already have. One would do well to focus also on specific reforms that could use copyright and creative industries to help poor people by removing obstacles at the local level.”).

¹⁷¹ MOONVES ORNSTEIN REPORT, *supra* note 93 at 27.

¹⁷² See, e.g., Lee Bollinger, *A Free Press for a Global Society*, CHRON. OF HIGHER EDUC., Feb. 26, 2010, at B6. See also Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 96, 141-42 (2010); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

¹⁷³ Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, FCC OPP WORKING PAPER SERIES 37 (Sept. 2002) at 126.

¹⁷⁴ Marianne Paskowski, *Dolan's 'Hyperlocalism'*, MULTICHANNEL NEWS, Oct. 5, 1998, at 52.

A virtue of this bottom-up approach is that resource-constrained policymakers need not embrace broad, expensive solutions. Nor is success contingent on the presence of an advanced technological, physical, educational, or financial infrastructure. Indeed, we contend that government can best support creative sectors primarily by providing a stable legal foundation and business environment. This role in fostering an enabling environment is crucial, but creators and creative industries can and must do most of the work. Ultimately, success will come from unleashing the genius and initiative of individuals.¹⁷⁵

Local, bottom-up solutions embrace the reality of networked globalism. Globalism is both worldwide and local; only at the national level do we witness decline and dissolution. The memes of culture never respected national boundaries; ideas migrated with travelers and refugees, circumnavigating the globe and arose at the very heart of the Diaspora.

It is already working. “Indigenous peoples are pragmatic. When an innovation makes life easier, or more comfortable, or provides other desired benefits, indigenous peoples are as likely as anyone else to incorporate it into their lives.”¹⁷⁶ “[T]hrough active engagement with new technologies and the legal frameworks that define the boundaries of cultural movement and production, indigenous communities have put technology and law to use for their own political, social, cultural and economic ends.”¹⁷⁷ The ability to empower oneself with the new technologies may have profound influence in the future.

In today's technologically rich and dependent world, indigenous peoples fully understand the importance of new technologies. Access on par with other people and groups protects indigenous peoples from subordination by those with greater technological might. It ... helps to level a playing field that is still fogged and swampy in the indigenous zone but clear and dry where Westerners play.

But unlike the new technologies of years gone by, today's technological innovations are centered on knowledge, information, and communication. They provide the means needed to gather and act on new ideas, to share ideas and ways of doing things with others, and to record past and present ways so that they are not forgotten in the future. Whereas guns once helped indigenous peoples fend off incursions that stripped them of aspects of their identity, today's technology

¹⁷⁵ Mark F. Schultz and Alec van Gelder, *supra* note __ at 81-82.

¹⁷⁶ Ellen Lutz, *The Many Meanings of Technology*, 29 CULTURAL SURVIVAL QUARTERLY __ (2005) available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/many-meanings-technology>.

¹⁷⁷ Christen, *supra* note __ at 2.

provides the means for indigenous peoples to reinforce and assert those identities.¹⁷⁸

The digital technologies and worldwide connectivity of the Internet and telecommunications systems also reduce the barriers to global distribution of narrowly tailored content. In this way, content created in regional languages may aggregate sufficient audience to remain viable. For example, while it may not be financially viable to produce content in many of the twenty-two scheduled languages of the Indian constitution,¹⁷⁹ production of content that reaches beyond the district in which the language is most commonly spoken to the entire country, all of Asia and all the speakers in that language throughout the rest of the world. By reaching in this fashion, the efforts will have a much greater reach. India is a particularly useful example because the Indian government has dedicated itself to those scheduled languages to provide that “they grow rapidly in richness and become effective means of communicating modern knowledge...”¹⁸⁰ The European Union has developed a similar strategy.¹⁸¹ The emphasis on language is, at least in part, a focus on the languages of the local communities.

While language is not an expression of folklore, the expressions of folklore may be tied directly to the nature of the language in which those traditions were created and transmitted. Combining efforts of regional language development with cultural development will enhance both.

Content development is the first prong of localism; competence is the second. If one of the goals underlying the WIPO and UNESCO efforts is to protect the memes of intangible cultural heritage from the onslaught of more dominant market voices, then encouraging their dissemination may be a critical part of the solution. This means investing in the training of members of indigenous and minority communities on the techniques of media production. Admittedly, recording oral traditions is different than witnessing those traditions *in situ* and in full context within the community. But the recordings can augment the live traditions, serve as a reference, and provide insight to those people who are not part of the community. Created by members of the community, they must be managed consistently with the needs to protect community trade secrets and hidden traditions – but even then, a private archive may be

¹⁷⁸ Lutz, *supra* note __ at __.

¹⁷⁹ Constitution of India, Art. 344(1). (There were 14 languages designated at the time of the Official Language Resolution in 1968.)

¹⁸⁰ India Ministry of Home Affairs, The Official Language Resolution, of 1968, available <http://www.rajbhasha.gov.in/dolresolutioneng.htm>.

¹⁸¹ See Council Resolution of 21 November 2008 on a European strategy for multilingualism, OFFICIAL JOURNAL C 320, 1-3, (Dec. 16, 2008) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:320:0001:01:EN:HTML>).

appropriate, depending on the political, economic and environmental risks posed to the community.¹⁸²

Localism's emphasis on local production includes provision of technical assistance in the form of technological tools and networks to communicate. But it also includes professional training to assure that the quality of the works created meet a professional standard, and training also includes education in ethical norms so that the community members involved in training understand the goals and values of the work they are doing just as schools of journalism stress the ethics for journalists.

Localism's emphasis on issues of concerns to the local communities fits closely with the local production. Local and hyperlocal content focusing on news, arts, culture and content rooted in the local language and centered on the community's culture may need financial support if the indigenous people or local community is too small to or economically weak to be supported by commercial endeavors. Nations, NGOs and supernational organizations should provide the necessary resources to assure that the culture so valued is, in fact, continued in this ongoing and developing manner. Rather than investing in an archive, localism shifts the focus to investing in a future of intangible cultural heritage that at least has potential to keep it flourishing for generations to come.

The localism approach also addresses the concerns that implicit in the protectionist barriers of WIPO and UNESCO are another form of cultural imperialism. "Neither compelled professions of faith nor the punishment of blasphemy really seeks to convince; both seek to assert that great communitarian principle: the primacy of politics."¹⁸³

¹⁸² See, e.g., Christen, *Gone Digital*, *supra* note __ at 318.

¹⁸³ Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 252-253 (1992).

In the end the "drown-out" forced-access thesis is really just a version of fancy arguments that are designed to justify silencing the opposition. What we have is an argument for censorship -- this time to avoid the competition, in much the spirit that East European television used to jam Western broadcasts of "Dallas." Or it is worse: by forcing newspapers to carry articles they do not want and by forcing networks to carry programming that the public will not buy, political entrepreneurs are once more flexing their muscles.

Forced programming is not so much a way of getting a message to the public (the public will probably tune out), as it is a way of showing off power by hoisting flags on other people's flagpoles. ... This instinct of the civic republican to assert the primacy of community by ramming beliefs and values down people's throats is thus the positive version of the negative instinct to punish those who would speak thoughts the community abhors.

Id.

Implicit in the ability to identify ownership of the expressions of cultural heritage is a very narrow construct of their influence and an externally defined view of the appropriate distribution. “[H]eritage work and the cultural negotiation it entails are part of a wider set of indigenous politics that should not be assumed to privilege tradition at the expense of emergent articulations and collaborations.”¹⁸⁴ By protecting expressions of folklore from being overwhelmed or drowned out by dominant, commercial culture, the treaty organization is making a statement to the communities regarding what it should want and how it should consume content.

UNESCO is deeply committed to protecting intangible cultural heritage. As it stated, “Massive efforts are being mobilized at UNESCO Headquarters and Field Offices to strengthen national capacities in such areas as safeguarding intangible cultural heritage, inventorying ICH and elaborating nominations and international assistance requests.”¹⁸⁵ These efforts should stop. Instead, the resources would be far better invested in developing the capacity of the creators of intangible cultural heritage to better capture their content, if they elect to do so.

By providing the means and training essential to participate in the networked information community, UNESCO would prove far more effective than through processes of inventorying and elaborating. By permitting the decision to choose to participate in the hands of those who have created the ICH, UNESCO would prove a far better facilitator and partner. In the globally networked information community, the time has arrived for self-determination and participation. Localism’s attributes of promoting content involving local concerns and developing the human capital to share that content is precisely what the information community needs.

Conclusion

Localism, instead of creating rules, creates capacity. If a particular indigenous people or other community elects to become more active in the global network, that community can develop and hopefully thrive using those tools. If another community elects to remain aloof from the grid, it can do so without changing its position and develop on its own terms.

Localism fits nicely with many of the goals of WIPO and UNESCO. Perhaps the addition of localism and support for local media and culture will enable the drafters to be less aggressive in the copyright-like protections that will otherwise be so difficult to define and enforce. Even if everything in the WIPO discussion draft becomes treaty and national law, however, it does not go far enough to meaningfully interconnect the indigenous people and minority communities into the networked global society we are fast becoming.

¹⁸⁴ Christen, *Gone Digital*, *supra* note ___ at 319 citing James Clifford, *Looking Several Ways: Anthropology and Native Heritage in Alaska*, 45 CURRENT ANTHROPOLOGY 1, 17 (2004).

¹⁸⁵ UNESCO, *Safeguarding Intangible Cultural Heritage*, <http://www.unesco.org/culture/ich/index.php?lg=EN&pg=home> (last visited Oct. 1, 2010)

At both the national and international level, emphasis on developing capacity for local production and encouraging content of local interest remains a media imperative in the public interest. The concept, first recognized in the Federal Radio Commission Act of 1927, remains equally important today. By embracing this simple, straightforward approach, efforts to improve the protection of intangible cultural heritage and expressions of folklore are most likely to succeed.