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Traditional Knowledge Rights and Wrongs

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ABSTRACT

International delegates at the World Intellectual Property Organization (WIPO) are nearing completion of a pair of ambitious treaties that would provide for exclusive rights in traditional knowledge and traditional cultural expression, respectively. This Article provides the first detailed analysis and critique of the draft treaties. Proponents of such intangible heritage rights often invoke rationales of both cultural integrity and economic justice to justify them. Yet, pursuing these distinct rationales dictates conflicting imperatives. To resolve this conflict, this Article argues for greater differentiation between the draft treaties based on subject matter. Just as patents and copyrights receive very different protection in conventional intellectual property regimes, so too, the WIPO treaties should differentiate much more sharply between technical knowledge and cultural expression. This Article provides a blueprint for disaggregating the normative interests most salient in each context and tailoring protections accordingly.

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INTRODUCTION

Should the intangible heritage of indigenous cultures be subject to intellectual property rights? While scholars have long debated this question,¹ fresh controversies have rekindled the debate. In 2015, college campuses across the United States confronted issues of cultural appropriation around Halloween.² High-profile films such as *The Lone Ranger*³ and the *Twilight*⁴

¹ For a sampling of viewpoints sympathetic to indigenous heritage rights, see generally Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009); Anupam Chander & Madhavi Sunder, *Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69 (2005); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997). For more skeptical perspectives, see generally Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 875-80 (2010); Naomi Mezey, *The Paradox of Cultural Property*, 107 COLUM. L. REV. 2004 (2007); Stephen Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37 (2009); Sean A. Pager, *Folklore 2.0: Preservation through Innovation*, 2012 Utah L. Rev. 1835; MICHAEL BROWN, WHO OWNS NATIVE CULTURE (2004).

² Kirk Johnson, *Halloween Costume Correctness on Campus: Feel Free to Be You, but Not Me*, NEW YORK TIMES, Oct. 30, 2015; Liam Stacknov, *Yale’s Halloween Advice Stokes a Racially Charged Debate*, NEW YORK TIMES, Nov. 09, 2015; see also Cathy Young, *To The New Culture Cops, Everything Is Appropriation*, WASH. POST (Aug. 21, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/08/21/to-the-new-culture-cops-everything-is-appropriation/>. While these controversies were not focused on appropriation of intangible heritage/traditional cultures per se, such issues were central to the debate.

³ While the brutal realities that attended European settlement of Indian lands have long rendered American Westerns problematic as a film genre, the 2013 version of the *Lone Ranger* promised a more sympathetic portrait of

series sparked their own charges of cultural theft and misuse of Native American heritage.⁵ Similarly, in 2014, Pharrell

Native American culture than its antecedents. Even so, critics saw the legacy of American genocidal conquest as compounded by cultural imperialism implicit in the film itself. See Sam Adams, *Why the Lone Ranger's Anachronisms Make Its History Lessons Hard to Swallow*, INDIIEWIRE (July 5, 2013, 2:32 PM), <http://blogs.indiewire.com/criticwire/lone-ranger-racism-tonto-comanche-history-anachronism>. The casting of an ostensibly non-Indian actor, Johnny Depp, as the Lone Ranger's sidekick Tonto added a further layer of controversy. See Angela Aleiss, *Johnny Depp, the 'Indian': Is He or Isn't He?*, ACADEMIA.EDU (June 17, 2013), http://www.academia.edu/3787152/Johnny_Depp_the_Indian_Is_He_or_Isnt_He. Canadian Mohawk actor Jay Silverheels portrayed the Tonto character in the 1950s TV series, and many felt that the role in the new film should have gone to an Indian. See *id.* Depp's outlandish costume, face-paint, and stereotypical character traits also garnered widespread criticism in the Native community. See, e.g., Aisha Harris, *Johnny Depp's Tonto: Not as Racist as You Might Think. But Still Kind of Racist*, SLATE (July 3, 2013), http://www.slate.com/blogs/browbeat/2013/07/03/johnny_depp_as_tonto_lone_ranger_movie_pushes_against_racism_but_reinforces.html; Lily Rothman, *Johnny Depp as Tonto: Is the Lone Ranger Racist*, TIME (July 3, 2013), <http://entertainment.time.com/2013/07/03/johnny-depp-as-tonto-is-the-lone-ranger-racist/>.

⁴ *Twilight* films series, presented a sensationalized and arguably defamatory version of Quileute Indian mythology. See Kristen A. Carpenter et al., *Clarifying Cultural Property*, 17 INT'L J. CULTURAL PROP. 581, 581-82 (2010); *Cultural Theft in Twilight*, TRUTH VERSUS TWILIGHT, http://www.burkemuseum.org/static/truth_vs_twilight/facts-03.php.

⁵ These were hardly the first films to raise issues around misappropriation of Native American culture. See Tsosie, *supra* note 1, at 326 (questioning whether non-Indians are entitled to tell "native stories"). Nor are Native Americans the only victims. Disney has courted controversies around the world for its commercial exploitation of indigenous folklore. See e.g., *Mulan Musings*, CHINA DAILY (Dec. 25, 2006), http://www.chinadaily.com.cn/bw/2006-12/25/content_766454.htm (noting controversy over Disney film based on a Chinese folktale); Cindy Y.

Williams became the latest in a series of celebrities to face criticism for donning a Native American feather headdress.⁶ Controversies over misappropriation of indigenous culture have also arisen with regard to music,⁷ literature,⁸ fashion,⁹

Rodriguez, *Day of the Dead Trademark Request Draws Backlash for Disney*, CNN.COM (May 11, 2013), <http://www.cnn.com/2013/05/10/us/disney-trademark-day-dead>; Sam Heydt, *Cinematic Essentialism, Social Hegemony, and Walt Disney's Aladdin*, WORDPRESS (Jan. 6, 2010), <http://samheydt.wordpress.com/cinematic-essentialism-social-hegemony-and-walt-disneys-aladdin/>; Hokulei Lindsey, *Responsibility with Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 HOW. L.J. 763, 766-68 (2005) (describing controversial use of traditional Hawaiian name chants in Disney's 2002 movie, *Lilo & Stitch*).

⁶ See Jon Blistein, *Pharrell Apologizes for Wearing Headdress on Magazine Cover*, ROLLING STONE (June 5, 2014), <http://www.rollingstone.com/music/news/pharrell-apologizes-for-wearing-headdress-on-magazine-cover-20140605>. Many American Indians consider feather headdresses as the sacred preserve of tribal chiefs, inappropriate for outsiders to wear. *Id.*

⁷ See Riley, *supra* note 1, at 70-72 (describing misappropriation of Navajo song by OutKast at 2004 Grammy Awards); see also Angela Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 175-77 (2000) (describing Enigma's misappropriation of Taiwanese indigenous melody in hit single, "Return to Innocence").

⁸ See Rosemary J. Coombe, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 208-09 (1998) (describing debate over cultural appropriation by Canadian writers).

⁹ See Lisa Hix, *Why the 'Native' Fashion Trend Is Pissing Off Real Native Americans*, COLLECTORS WEEKLY (Dec. 1, 2011), <http://www.collectorsweekly.com/articles/why-the-native-fashion-trend-is-pissing-off-real-native-americans/>; see also *Navajo Nation v. Urban Outfitters, Inc.*, 918 F. Supp. 2d 1245, 1248 (D.N.M. 2013) (challenge to Urban Outfitters' "Navajo" product line).

handicrafts,¹⁰ ice skating,¹¹ and many other contexts.¹² Meanwhile, the debate over Native American mascots in professional and collegiate sports shows such controversies increasingly moving outside the realm of politics to assume a legal guise.¹³ The cancellation of the Washington Redskins' trademark represents only the latest victory in a campaign against the perceived appropriation of Native American culture.¹⁴

¹⁰ See Farley, *supra* note 1, at 4-7 (describing misappropriation of Australian aboriginal design in mass-produced carpets); *id.* at 1 (describing inauthentic imitations of Navajo rug patterns made overseas); see generally William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001) (examining U.S. statutory regime proscribing mislabeling of "Indian" handicrafts).

¹¹ Eric Felten, *On Thin Ice: Two Russians Skate off the Reservation: A Loin-Clothed Homage to Aboriginal Peoples Backfires*, WALL ST. J. (Jan. 28, 2010), <http://www.wsj.com/articles/SB10001424052748704878904575031242199981602>.

¹² See Farley, *supra* note 1, at 8 ("Indigenous motifs are used to sell everything from Japanese automobiles like the Mazda Navajo to Barbie dolls to back-to-school clothes [W]e are seeing indigenous designs more often and in new contexts."); see also Carpenter et al., *supra* note 1, at 1024 n.1 (describing Zia pueblo's dispute with New Mexico over Zia sun symbol).

¹³ See e.g., Carpenter et. al., *supra* note 1, at 1106 (describing NCAA's formal process for arbitrating disputes over Indian mascots); Davidson v. State ex rel. N. Dakota State Bd. of Higher Educ., 781 N.W.2d 72, 73 (N.D. 2010).

¹⁴ See *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185 (T.T.A.B. June 18, 2014) (cancelling the Redskins trademark and labeling the name as disparaging). Technically, the challenge to the "Redskins" mark was based on its disparaging nature; far from considering "redskins" part of their culture, Native Americans reject it as an offensive, racist epithet. Yet, the Lanham Act's prohibition against trademark

Indigenous peoples are asserting claims to control and profit from use of their intangible heritage with increasing success around the world.¹⁵ Moreover, such claims are not limited to cultural expression; they also embrace indigenous technologies, know-how, and bio-resources.¹⁶ Collectively, such intangible heritage claims have been considered under the rubric of “traditional knowledge” rights. A global campaign to instantiate exclusive rights in traditional knowledge and cultural expression as bedrock norms of world intellectual property law has made steady progress.¹⁷ After years of effort,

disparagement merely provided the vehicle for what was in reality a broader challenge to use of indigenous iconography. The connection to this broader campaign can be seen in reports that the Cleveland Indians’ “Chief Wahoo” may be next on the chopping block. See Phil Helsel, *Native Groups Look to Retire the Cleveland Indians’ Chief Wahoo*, NBCNEWS, (June 23, 2014), <http://www.nbcnews.com/news/us-news/native-groups-look-retire-cleveland-indians-chief-wahoo-n137176>.

¹⁵ See, e.g., *Milpurruru v. Indofurn Party, Ltd.* (1994) 54 FCR 240, 240 (Austl.); *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481; Dec. 17, 2003 Decision of the Beijing Higher People’s Court in Case No. 246 (2003) (final) [2006] 37 IIC, 482-487; Andrew Osborn, *Maoris Win Logo Battle*, THE GUARDIAN (Oct. 30, 2001); Mulan Musings, *supra* note 5 (describing protection of Chinese kung-fu through Shaolin trademark).

¹⁶ See Emily Marden, *The Neem Tree Patent: International Conflict over the Commodification of Life*, 22 B.C. INT’L COMP. L. REV. 279, 283-86 (1999); *Protection of Traditional Knowledge and Genetic Resources: A Bottom-up Approach to Development*, WIPO MAG., Nov.-Dec. 2003, at 18, 20.

¹⁷ See Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property*, 49 SAN DIEGO L. REV. 1215, 1229-37 (2012) (providing history of global developments in TK law). For accounts of TK legislation enacted at the national level, see, e.g., Owen Dean, *Inside Views: The Mad Hatter in Wonderland: South Africa’s New TK Bill*, INTELL. PROP. WATCH (Nov. 8, 2011), <http://www.ip-watch.org/2011/11/08/the-mad-hatter-in-wonderland-south-africa99s99s99s’s-new-tk-bill/>; Lorraine V. Aragon & James Leach, *Arts and Owners: Intellectual Property Law and the Politics of Scale in Indonesian Arts*, 35 AM. ETHNOLOGIST 607, 615

international delegates to the World Intellectual Property Organization (WIPO) in Geneva have moved to complete a pair of ambitious treaties that would accomplish this goal.¹⁸

This Article makes several contributions to the traditional knowledge debate. First, it provides the first detailed analysis and critique of the draft WIPO treaties. Second, it offers a novel theoretical account of the conflicting imperatives posed by two of the leading rationales supporting TK rights: cultural integrity and economic justice. Third, to resolve these conflicts, the Article advances a normative argument for greater differentiation between the two draft treaties based on subject matter. Finally, the Article explores the flawed dynamics of WIPO's treaty drafting process that impede such differentiation.

(2008); DAPHNE ZOGRAFOS, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* 7-18 (2010).

¹⁸ See generally World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions: Draft Articles*, 28th Sess., WIPO/GRTK/IC/28/6 (June 2, 2014) [hereinafter *TCE Treaty*]; World Intellectual Property Organization, *The Protection of Traditional Knowledge: Draft Articles*, 28th Sess., WIPO/GRTKFGRTK/IC/28/5 (June 2, 2014) [hereinafter *TK Treaty*]. At least, the delegates were poised to complete the treaties as of summer, 2014, with developing countries calling for a final diplomatic conference to conclude the negotiation process. See Catherine Saez, *WIPO Delegates to "Rationalize" Draft Texts To Protect GR, TK, Folklore*, INTELL. PROP. WATCH (Mar. 7, 2014), <http://www.ip-watch.org/2014/07/03/wipo-delegates-to-rationalise-draft-texts-to-protect-gr-tk-folklore/>. A failure to reach consensus on the treaty drafting end-game has brought a temporary halt to negotiations. See Catherine Saez, *WIPO Seminar Could Rekindle Discussions on Genetic Resources, TK*, INTELL. PROP. WATCH (Feb. 20, 2015), <http://www.ip-watch.org/2015/02/20/wipo-seminar-could-rekindle-discussions-on-genetic-resources-tk/>. The dynamics of WIPO negotiations are explored further *infra* in Part IV.

On its face, WIPO's treaty-drafting has already bifurcated along subject matter lines, dividing rights in traditional cultural expression (TCE or folklore) from protection of technical know-how (technical TK or traditional knowledge *sensu stricto*).¹⁹ Traditional dances, melodies, designs, legends, and the like are to be governed by one treaty; traditional folk medicines, canoe-building techniques, etc. by another.²⁰ Yet, despite this formal distinction, the two draft treaties overlap considerably in the legal protections they would afford.²¹ Rather than tailoring rights narrowly to fit each context, the treaties eschew selectivity in favor of full spectrum coverage: Traditional communities would effectively gain broad property rights in their intangible heritage enforceable in perpetuity against the entire world.

This Article criticizes the WIPO treaties for their over-inclusive scope. It argues that the expansive and undifferentiated set of rights that the draft treaties confer masks

¹⁹ See Hughes, *supra* note 17, at 1216-17 (exploring the convoluted terminology used in the TK negotiations and arguing that it is "itself indicative of definitional instabilities in this field"). A third treaty on genetic resources governs tangible bio-resources rather than the intangible knowledge or expression of indigenous peoples. As this third treaty is not concerned with intellectual property as such, it will not be addressed here directly. However, the recommendations made here for technical TK largely apply to that treaty as well.

²⁰ The forms of folkloric expression covered by the TCE treaty roughly correspond to the subject matter regulated by copyright law. By contrast, technical forms of traditional knowledge (sometimes referred to as TK *sensu stricto*) have a technological, utilitarian bent analogous to patentable subject matter. See *id.* at 1218. Hughes offers a helpful example to further illustrate the difference: "[A] rain dance is TCE, but if the rain dance works—if it actually triggers precipitation in a cause and effect relationship—it is also TK." *Id.*

²¹ See *infra* notes 27-65 and accompanying text.

internal contradictions that are potentially harmful. Pursuing such flawed treaties will result in one of two outcomes: Either the internal contradictions will result in misguided policies that do actual harm, or the treaties will amount to a costly exercise in empty symbolism, dragged down by the weight of their overreaching ambition—assuming they can be completed at all. Indeed, the collapse of TK negotiations in late 2014 should serve as a wake-up call²²: The hard choices needed to ensure viable treaties cannot be deferred indefinitely.

This Article offers a roadmap to move forward. As a starting point, the current, all-inclusive approach of the draft treaties should be jettisoned in favor of a more discriminating approach that unpacks the separate normative interests that traditional knowledge rights serve: In particular, the implications of a cultural integrity rationale must be distinguished from those of economic justice. These distinctions can, in turn, be mapped onto differences in subject-matter: Drawing sharper distinctions between cultural expression and technical knowledge opens the way to more streamlined, narrowly targeted treaties.

Misappropriation of technical knowledge is unlikely to raise much in the way of cultural integrity concerns because such knowledge will typically be extracted from the traditional cultural context and divested of cultural meaning during the commercialization process. However, economic justice concerns are likely to be highly salient in this context, presenting a strong case for a compensation mechanism to ensure that source communities share in the benefits of such commercialization. The case for benefit-sharing is further bolstered by extrinsic policy interests in global health and

²² See *infra* Part IV.

environmental sustainability, both of which favor compensating source communities for use of their knowledge and bio-resources.²³

When it comes to traditional cultural expression, the reciprocal analysis applies. Concerns over cultural integrity loom most centrally in this context. By contrast, economic justice concerns are less compelling, given the ability of source communities to derive benefits from commercialization even in the absence of a formal benefit-sharing regime. Moreover, analogous extrinsic policy interests do not apply here (or apply with much less force).²⁴

Accordingly, traditional knowledge negotiators should pursue a strategy of normative arbitrage that exploits such asymmetries and tailors protection according to the normative interests most salient in each context.²⁵ Just as practical innovation receives very different protection from expressive art in conventional intellectual property regimes, so too, the WIPO treaties should differentiate much more sharply between technical knowledge and cultural expression.

What would emerge is a far more modest package of rights, not all of which require transnational effect. A baseline comprised of expanded unfair competition norms would supply

²³ See *infra* Part III-a(2)(b) and accompanying text.

²⁴ See *infra* notes 222-24 and accompanying text.

²⁵ This is not to say that TK should replicate the same distinctions present in the conventional copyright and patent systems. Indeed, in one respect the approach advocated here would lead to an inverse outcome: whereas global copyright law is a much more globally harmonized system than patent law with reciprocal protection conferred automatically without formalities, this Article advocates such seamless global protection for technical TK, while localizing protection for traditional cultural expression.

a common starting point that would regulate informed consent, secrecy, and false designation concerns.²⁶ Beyond this baseline, however, both the form of protection afforded to traditional knowledge and the extent to which global standards would be harmonized should vary according to the subject matter.

A strong case exists for a benefit-sharing mechanism on a global scale applicable to technical traditional knowledge. The distributional inequalities associated with the status quo are particularly skewed, making underscoring the need to remedy concerns over unjust enrichment. Moreover, the shared global interest in the efficient exploitation of ethno-biological knowledge combined with the asymmetrical nature of the protagonists' negotiating positions makes a benefit-sharing mechanism desirable from a game-theoretical standpoint. Benefit-sharing can be implemented through a relatively streamlined liability regime, minimizing the need for global governance. Indeed, such benefit-sharing is already required under the Convention on Biodiversity. Thus, traditional knowledge norm-development here can build upon existing implementation efforts. Finally, because cultural integrity concerns are relatively attenuated, a liability regime in this context is less problematic.

By contrast, the case for global benefit-sharing with respect to traditional cultural expression/folklore is far less convincing. The North-South capacity gap is not as acute in copyright industries as compared to patent, reducing distributive justice concerns. Instead, concerns over cultural integrity predominate, requiring a property regime to regulate authenticity *ex ante*. Yet, because the dilutive harm from

²⁶ See *infra* notes 85-104 and accompanying text.

cultural appropriation largely springs from local uses, there is less need for global regulation. Moreover, the contextually nuanced, managerial governance required to regulate cultural authenticity militates strongly toward localized solutions. Eschewing global solutions would allow more contextualized tailoring of the rights, of particular importance here given the constitutional implications of speech regulation.

The last part of this Article explores the flawed negotiating dynamics that account for WIPO's ill-considered "kitchen sink" approach. In particular, it critiques the tendency of proponents to situate TK rights within a larger rubric of anti-imperialism. Imperialism is a bad word that stands for many bad things. However, in the traditional knowledge context, imperialism serves more as polemical indictment than precise diagnosis. By conflating unrelated issues based on flawed analogies, such ideological blinders prevent the clarity of vision and pragmatic compromises needed to achieve a successful outcome. This Article suggests a more constructive approach to address the underlying grievances of TK *demandeurs*.

Part I provides an overview and initial critique of the current WIPO Draft Treaties. Part II delves into the theoretical rationales that could justify TK protection and shows that two of the key rationales—cultural integrity and economic justice—stand in tension with one another. Part III argues that such tensions can be largely avoided once subject matter is taken into account: economic justice is foremost a concern with respect to technical traditional knowledge, whereas cultural integrity is most salient with respect to traditional cultural expression. It argues the treaties should differentiate their protection accordingly. Part IV considers why WIPO negotiators have resisted such differentiation. It critiques the

anti-imperialist lens that has distorted the framing of issues and obstructed progress. Part V concludes.

I. CURRENT PROPOSALS FOR TRADITIONAL KNOWLEDGE PROTECTION

While this Article focuses on the theoretical case for traditional knowledge rights, it may be helpful to begin by examining the two WIPO draft treaties that form the backdrop to this discussion. As the following analysis demonstrates, the treaties combine protections drawn from all the major intellectual property rights, incorporating elements of copyright, patent, trademark, moral rights, and trade secret law, as well as tort law. This robust package of disparate rights forms the basis for a robust entitlement that would cover a broad swathe of previously public domain materials.

A. Overview of WIPO Draft Treaties

Now in its thirteenth year, the WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) has made steady progress drafting a pair of comprehensive treaties to address TK and TCE, respectively. While the language of the treaties remains subject to negotiation, their general contours have become clear. Despite differences in several specifics, there is a remarkable parallelism across both texts. Indeed, identical language appears in many corresponding

provisions of the treaties.²⁷ In particular, the scope of protection contemplated is equally expansive in each case.

1. Scope of Protection

The two treaties contemplate a very similar package of protections that Member States will be required to provide to treaty beneficiaries with respect to the covered subject-matter. Both treaties employ four main types of provisions whose capacious and often overlapping terms collectively govern: (a) use, (b) informed consent/misappropriation, (c) attribution, and (d) compensation.²⁸

²⁷ In addition to provisions discussed in detail below, the treaties contain very similar provisions under the following headings: Administration of Rights, Term of Protection, Formalities, Transboundary Cooperation, Transitional Measures, and National Treatment. Compare TK Treaty, arts. 5, 7-9, 11, 12, with TCE Treaty arts. 4, 6-7, 9, 11. Such parallelism reflects a deliberate effort to harmonize the separate drafts. See Catherine Saez, *WIPO Delegates to “Rationalize” Draft Texts to Protect GR, TK, Folklore*, INTELL. PROP. WATCH (Mar. 7, 2014).

²⁸ The extent to which these protections apply varies somewhat according to the degree to which the protected materials are publicly known. In general, the treaties contemplate three different tiers: The full panoply of rights/protections would apply to traditional subject matter that is “sacred, secret, or otherwise only closely held within” the relevant source communities. TCE Treaty, art. 3.1; TK Treaty, art. 3.1. A less inclusive standard of protection would apply “where the subject matter is still held . . . by [the original source communities, but] is publicly available [albeit not] widely known, [and is neither] sacred, nor secret.” TCE Treaty, art. 3.2; TK Treaty, art. 3.2. The weakest protection would apply “where the subject matter is publicly available, widely known and in the public domain.” TCE Treaty, art. 3.3; TK Treaty, art. 3.3. Because the allocation of specific rights across these three tiers remains subject to negotiation, the following discussion will elide this variability and focus largely on the top tier of protection for illustrative purposes.

a. Use

The treaties' use provisions would give source communities the right both to "maintain, control and develop" their traditions and to prevent use by others "beyond the traditional context."²⁹ They also require use of the traditions "in a manner that respects the cultural norms and practices of the beneficiaries."³⁰ The draft TCE treaty contains a further prohibition on "use or modification which distorts or mutilates a protected traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary."³¹

b. Informed Consent & Misappropriation

Both treaties also emphasize that access to and use of covered traditions should be "based on prior and informed consent or approval and involvement and mutually agreed terms."³² The draft TK treaty contains some additional language on misappropriation. In one variant, misappropriation is defined simply as "access or use of the traditional knowledge without prior informed consent."³³ An

²⁹ TCE Treaty, art. 3.1(a)(i)-(iii); TK Treaty, art. 3.1(a)(i)-(iii). The treaties both contain almost identical definitions of "use" to include "manufacturing, importing, offering for sale, selling, stocking, or using" the respective knowledge or expression "beyond the traditional context." *See* Use of Terms, TCE Treaty & TK Treaty.

³⁰ TCE Treaty, art. 3.1(b)(iii); TK Treaty, art. 3.1(b) (iii).

³¹ TCE Treaty, art. 3.1(a)(v).

³² TCE Treaty, arts. 3.1(a)(iii), 3.2(d); TK Treaty, arts. 3.1(a)(ii), 3.2(d). The treaties do not specify the degree of affirmative disclosures required to secure informed consent.

³³ TK Treaty, Use of Terms.

alternative version would define misappropriation to cover use “where the traditional knowledge has been acquired by the user from the holder through improper means or a breach of confidence and which results in a violation of national law.”³⁴ This latter variant essentially comprehends misappropriation in terms of trade secrecy law.³⁵ The draft TCE Treaty does not address misappropriation as such. However, it does entitle source communities to “prevent the unauthorized disclosure and fixation” of their traditional cultural expressions.³⁶

c. Attribution

The treaties both require users to properly attribute covered traditions to their source communities.³⁷ Conversely, they prohibit “any false or misleading uses of protected tradition[s] that suggest endorsement by or linkage with the beneficiaries.”³⁸

³⁴ *Id.*

³⁵ Compare *id.*; art. 3bis (e), with Unif.Trade Secrets Act, § 1. The definition further stipulates that acquisition “through lawful means such as independent discovery or creation, reading books, receiving sources outside of intact traditional communities, reverse engineering, and inadvertent disclosure resulting from the holders’ failure to take reasonable protection measures is not misappropriation.” *Id.*; see also arts. 6.4, 6.5 (containing similar exclusion for lawful acquisition).

³⁶ TCE Treaty, art. 3.1(a)(ii). The TK Treaty similarly targets unauthorized disclosure by requiring compensation for “wide diffusion of protection subject matter [as] the result of an act of misappropriation.” TK Treaty, art. 4.

³⁷ TCE Treaty, art. 3.1(b)(i); TK Treaty, art. 3.1(b)(ii).

³⁸ TCE Treaty, art. 3.1(a)(iv); TK Treaty, art. 3.1(a)(iv).

d. Compensation

The treaties both require users to properly attribute covered traditions to their source communities.³⁹ Conversely, they prohibit “any false or misleading uses of protected tradition[s] that suggest endorsement by or linkage with the beneficiaries.”⁴⁰

2. Geographic Scope

Neither treaty limits the geographic scope within which its protections apply. Rather, in addressing their provisions to Member States generally with respect to “protected” subject matter, they contemplate a fully global system of protection that would apply to all traditional knowledge and cultural expression within its terms, regardless of its origin.⁴¹

3. Exceptions

The draft treaties do allow Member States to grant limited exceptions “compatible with fair practice” so long as they do not conflict with or unreasonably prejudice the interests of beneficiaries and are not “offensive or derogatory.”⁴² They also allow for specific exceptions for purposes such as teaching, research, archival preservation, or other public interests.⁴³ However, these latter exceptions do not apply to traditional subject matter that is sacred, secret or

³⁹ TCE Treaty, art. 3.1(b)(i); TK Treaty, art. 3.1(b)(ii).

⁴⁰ TCE Treaty, art. 3.1(a)(iv); TK Treaty, art. 3.1(a)(iv).

⁴¹ TCE Treaty, art. 3.1; TK Treaty, art 3.1.

⁴² TCE Treaty, art. 5.1; TK Treaty, art 6.1.

⁴³ TCE Treaty, art. 5.3; TK Treaty, art. 6.3.

otherwise closely held within indigenous or local communities.⁴⁴

4. Term of Protection

The draft treaties contemplate that the protection of traditional knowledge/cultural expression rights “shall last as long as the [underlying subject matter] satisfies the criteria of eligibility for protection.”⁴⁵ In other words, the treaty protections can continue indefinitely.

5. Subject Matter

The treaties unsurprisingly diverge in their definitions of subject matter: The draft TK treaty applies to traditional knowledge, which it defines as “know-how, skills, innovations, practices, teaching and learnings.”⁴⁶ The draft TCE treaty applies to traditional cultural expression, which it defines as “any form of artistic and literary, creative and other spiritual expression.”⁴⁷ However, both treaties frame their ambit in broad terms to encompass a wide variety of traditional heritage. Moreover, they employ essentially the same standard to determine what qualifies as “traditional:” To qualify, both treaties require that the knowledge or cultural expression, in question, be:

⁴⁴ TCE Treaty, art. 5.3; TK Treaty, art. 6.3.

⁴⁵ TK Treaty, art. 7, TCE Treaty, art. 6. However, alternative language under consideration suggests that “Member States may determine the appropriate term of protection.” *Id.*

⁴⁶ TK Treaty, art. 1, Use of Terms.

⁴⁷ TCE Treaty, art. 1, Use of Terms; *see also* Use of Terms, nn.1-4 (giving examples).

(a) “created and maintained in a collective context by indigenous peoples and local communities or nations”;

(b) “distinctively associated with the cultural heritage or social identity” of the [source community]”;

and

(c) “transmitted from generation to generation, whether consecutively or not.”⁴⁸

It is worth noting that almost all the material encompassed by the draft treaties would be considered in the public domain under current intellectual property law. The requirement of intergenerational transmission by its own terms suggests subject matter beyond the typical life-plus term of copyright and well beyond the 20 year exclusivity accorded under patent law.⁴⁹ And in the absence of commercial use by the source community, trademark and—under some definitions—trade secret protection are unlikely to apply either.⁵⁰ The treaties would thus lead to a dramatic and arguably unprecedented enclosure of the intangible commons.⁵¹ Moreover, a proviso allowing for non-consecutive, inter-generational transmission enables the revival

⁴⁸ TK Treaty, art. 1, TCE Treaty, Art. 1.

⁴⁹ See Hughes, *supra* note 17, at 1229.

⁵⁰ See Farley, *supra* note 1, at 52; THE RESTATEMENT OF TORTS, sect. 757 (protecting information “used in one’s business”). In addition, trade secrecy law requires secrecy and economic value. If the information is generally known, readily ascertainable, or lacks demonstrable value, it will not qualify. See Farley, *supra* note 1, at 53.

⁵¹ Pager, *supra* note 1, at 1875, n.248.

of lapsed traditions. Like a springing executory interest, such reclaiming of lost know-how or cultural expression could trigger disruptive property claims potentially without notice.

6. Beneficiaries

Both treaties stipulate that the beneficiaries of protection shall be the source communities associated with the respective traditions.⁵² However, the treaties provide little guidance as to what constitutes an “indigenous people” or “local communities,” nor how their relationship to a particular tradition should be established. “Indigenous people” is at least a term of art in international law, albeit one whose definitional boundaries remain contested.⁵³ However, “local community” represents a novel formulation introduced by the WIPO draft treaties that could apply to almost any group.

Such definitional lacunae are problematic in several respects. First, the lack of guidance as to what constitutes a qualifying source community leaves the door open for TK claimants of all stripes. Rastafarians are already laying claim to reggae music.⁵⁴ Other potential claimants under the treaties’ absurdly capacious definitions of eligibility could include Louisiana Cajuns (zydeco), African Americans (blues and

⁵² TK Treaty, art. 2; TCE Treaty, art. 2.

⁵³ See Brown, *supra* note 1, at 111-12. The third term, “nations,” is well defined and should pose even less difficulty, although there is no shortage of ambiguous cases here as well, including Kurds, Tibetans, Ossetians, Chaldeans, and Swabians.

⁵⁴ Marcus Goffe, *Exploring Ras Tafari Culture*, WIPO MAGAZINE, April, 2011. Wiccans are likewise mobilizing to defend their cultural heritage. See Mark Oppenheimer, *Witches Say Beer’s O.K., But Lose the Fire and Stake*, N.Y. TIMES, Oct. 23, 2010. If the treaties pass, modern-day druids may be next in line. See <http://en.wikipedia.org/wiki/Neo-Druidism>.

jazz), Western cowboys (rodeos), Native Hawaiians (surfing), and Neapolitans (pizza).⁵⁵ It may be only a matter of time before Norway contacts Marvel comics to reclaim Thor of behalf of Scandinavian Norsemen. And Greece will doubtless want a piece of the Percy Jackson Olympian book and film franchise.⁵⁶

Second, in assuming a one-to-one correspondence between culture and communal identities, the WIPO draft treaties embrace an understanding of culture based on nineteenth century anthropology—one that anthropologists themselves have long since rejected.⁵⁷ Modern anthropologists view culture (including traditional culture) as lacking clear boundaries and characterized by hybridity, heterogeneity, and contestation.⁵⁸ Given the treaties' restrictions on use "beyond the traditional context," such imprecision could lend itself to arbitrary line-drawing or discriminatory enforcement.⁵⁹

Furthermore, many cultural traditions are derived from earlier sources.⁶⁰ Are both equally entitled to protection, or would late-comers be deemed to infringe their antecedents?⁶¹ Further difficulties arise when traditions cross borders or are

⁵⁵ Cf. Pager, *supra* note 1, at 1841 n.29.

⁵⁶ The Quileute Indians' claim on the *Twilight* franchise has already been adumbrated. See *supra* note 4 and accompanying text. Meanwhile, *Harry Potter* contains such a broad mix of cultural influences, it could be anybody's prize.

⁵⁷ See Pager, *supra* note 1, at 1868-69.

⁵⁸ See, e.g., Brown, *supra* note 1, at 4-5, 221-22, 248-49.

⁵⁹ See Pager, *supra* note 1, at 1870, 1881-85.

⁶⁰ See, e.g., Hughes, *supra* note 17, at 1228 (observing that Christianity could be viewed as a derivative form of Jewish TCE).

⁶¹ Under this logic, the NFL might be forced to settle up with the English Football Association. See also Hughes, *supra* note 17, at 1238 (citing example of multinational origins of West African "highlife" music).

shared among more than community.⁶² Conflicting claims to entitlement are inevitable, especially where contested traditions that value as marketable commodities.⁶³ Unfortunately, as one participant in WIPO's TK negotiations has commented, "demandeurs have failed to treat this problem seriously."⁶⁴

Finally, the specter of state control hovers over the entire project of TK rights. The extent to which Member State governments will be authorized to act as custodians of traditional knowledge and cultural expression on behalf of source communities within their territorial boundaries remains a contested issue in the WIPO draft treaties.⁶⁵ Even without gaining direct control over the rights, national authorities will, as a practical matter, be responsible for implementing the treaties, giving them substantial indirect leverage. Given the often-fraught relations between indigenous peoples and national governments, and the checkered history of state control over natural resources, there is a serious concern that indigenous rights will be manipulated by authoritarian regimes to harness tradition in service of nationalist agendas.⁶⁶

⁶² See Pager, *supra* note 1, at 1877; cf. *Indonesia and Malaysia: No Brotherly Love*, THE ECONOMIST, October 13, 2007, at 47.

⁶³ *Id.* at 1842, n.31. Recognizing the possibility of such disputes, the treaties provide for referral to an undefined "alternative dispute resolution mechanism" by mutual agreement yet says nothing about the substantive criteria that should govern such disputes. TCE Treaty, art. 8.2; TK Treaty, art. 4.5.

⁶⁴ Hughes, *supra* note 17, at 1237; see also Brown, *supra* note 1 (noting that "vexing questions of origins and boundaries . . . are commonly swept under the rug in public discussions").

⁶⁵ TK Treaty, art. 2.2; TCE Treaty, art. 2.3.

⁶⁶ See Hughes, *supra* note 17, at 1260-65; Pager, *supra* note 1, at 1883-85.

B. The Dangers of Overbreadth

From the overview provided above, three main propositions emerge: (1) the scope of such protection contemplated by the draft WIPO treaties is comprehensive, far-reaching, and, at least at the multilateral level, unprecedented; (2) the subject matter that the treaties would cover is similarly capacious, encompassing vast swathes of materials currently in the public domain; and (3) the beneficiaries of such protection remain uncertain, making conflicts over the allocation and control of traditional knowledge rights all but inevitable.

Taken on their own, any of these propositions are troubling. In combination, they strongly counsel a sober reality check before proceeding further. Unleashing a vast new set of intangible property rights without geographic or temporal limitations could lead to any number of dystopian outcomes. Abuses by authoritarian actors could subvert TK rights to suppress speech or oppress disfavored minorities.⁶⁷ Restricting information flows could jeopardize societal interests in public health and scientific research.⁶⁸ Obstruction of commerce could discourage investment and jeopardize development.⁶⁹ Conflicting claims could provoke inter-ethnic discord.⁷⁰ Indeed, the untested nature of the TK regime raises the potential for unintended outcomes even assuming good faith implementation.⁷¹ Rather than revitalizing indigenous source communities, overbroad protection could ultimately hasten

⁶⁷ See Pager, *supra* note 1, at 1881-85.

⁶⁸ See Pager, *supra* note 1, at 1838; Paul J. Heald, *The Rhetoric of Biopiracy*, 11 *CARDOZO J. INT'L & COMP. L.* 519, 531-33 (2003).

⁶⁹ See Carol M. Rose, *Property in All the Wrong Places?*, 114 *Yale L. J.* 991, 999-1000 (2005).

⁷⁰ Pager, *supra* note 1, at 1842, 1877.

⁷¹ See Brown, *supra* note 1, at 215-18.

their demise by preventing the forms of creative repurposing and commodification necessary to sustain cultural vitality.⁷²

This is not to say that TK rights are doomed to fail. With sufficient attention and effort, the pitfalls described could conceivably be negotiated and appropriate balances struck. Yet, the prospect of such dystopian outcomes suggests that WIPO negotiators would do better to adopt a more modest approach that aims small and goes slow. Rather than seeking to instantiate a truly global system of protection, WIPO negotiators should ask whether regional regimes might suffice. Rather than rolling together multiple layers of overlapping protections in a “belt and suspenders” approach, they should consider whether a more narrowly tailored regime could achieve the desired goals. More than anything, they should clarify the goals of TK protection and assess the extent to which particular goals apply in particular contexts.

Unfortunately, such clarity of purpose has eluded TK proponents. Negotiations have proceeded under a delusional logic that has avoided any serious cost-benefit accounting. Commentators have spent more time proffering “solutions” than they have diagnosing the problem. The resultant treaty drafting reflects an “all of the above” buffet mentality rather than a carefully considered menu of à la carte choices.⁷³ The following part attempts to remedy such shortcomings and to unpack the conflicting imperatives that underlie calls for TK protection.

⁷² *Id.* at 1840.

⁷³ *See infra* Part IV.

II. SCRUTINIZING RATIONALES FOR TRADITIONAL KNOWLEDGE PROTECTION

A. The Misappropriation Archetype: A Tale of Two Injuries

Scholarship advocating protection of traditional knowledge (TK) has grown from a trickle to a flood as the traditional knowledge juggernaut has gained steam. Many of the scholarly articles on TK follow a predictable trajectory. They begin with an anecdote of misappropriation that hews to archetypal lines as follows:

A Western traveler heads deep into the rainforest and encounters an indigenous tribe who have lived peaceably in this pristine habitat for centuries, guided by the wisdom of their ancestors. Insinuating himself into their confidence, the predatory interloper observes the tribal members engaged in their traditional practices: He takes note as the village shaman gathers a particular flower to brew an herbal remedy and records the “healing song” that the villagers sing to hasten the passage of sickness. The Western interloper then departs, and, returning home, proceeds to commercially exploit these facets of the tribe’s cultural heritage—both the “healing song” and the shaman’s flower remedy—without the tribe’s consent and in an inauthentic and culturally insensitive manner, while falsely representing the origins of his wares as “100% indigenous-made.” Upon learning of these acts of misappropriation, the tribal community is devastated, its heritage despoiled and its traditional order upended. Meanwhile, the indignity of the violation is compounded by the

*knowledge that others are profiting at the community's expense.*⁷⁴

After relating such a tale of injustice, law review articles on TK typically bemoan the absence of a remedy under current law, while intimating that such misappropriation is rampant and proliferating.⁷⁵ The articles then proceed to advocate their preferred scheme to prevent future abuses. Where these articles often fall short, however, is in developing a normative framework whereby their proposed remedies can be measured against the rationales that ostensibly justify them.⁷⁶ This failure to closely scrutinize the relationship between means and ends is problematic because, in fact, there are deep tensions between the normative rationales underpinning TK protections that point us in fundamentally different directions.

For example, within the archetypal tale of misappropriation presented above, several distinct harms can be identified that could justify a remedy. We will focus here on four: (1) the unsavory business practices of the predatory interloper who “insinuates himself” into the tribe’s confidence and breaches their trust; (2) misrepresenting the commercial products as “100% indigenous-made”; (3) economic injustice related to the distribution of commercial gains (“profiting at the

⁷⁴ See Jim Chen, *There's No Such Thing as Biopiracy . . . And It's a Good Thing Too*, 37 MCGEORGE L. REV. 1, 4 (2006) (describing the “predictable script” that such tales of exploitation follow). Indeed, use of foundational anecdotes as a discursive strategy is so prevalent in the TK literature that Chen offers his own fill-in-the-blank template. *Id.*

⁷⁵ See, e.g., Riley, *supra* note 1, at 79; Farley, *supra* note 1, at 7.

⁷⁶ See Hughes, *supra* note 17, at 1228 (criticizing TK proponents’ “tendency to simplify and make sweeping, often unsupported claims” and to conflate unrelated issues).

community's expense"); and (4) cultural injuries that arise from exploiting the tribe's heritage in an "inauthentic and culturally insensitive manner."

The first two categories of harm—breach of trust and misrepresentation—involve deceptive practices that violate existing standards of commercial morality. These represent easy cases to deal with both normatively and positively. By contrast, the third harm identified above focuses not on the circumstances in which the interloper committed the misappropriation, but rather on the distribution of the proceeds. The claimed injury in allowing others to profit "at the community's expense" suggests an anti-free riding principle premised on unjust enrichment. Finally, the fourth harm focuses on the effects of the inauthentic and culturally insensitive use, which renders the heritage "despoiled" and leaves the community's "traditional order upended." The injuries here are cultural in nature; a cultural integrity rationale analogous to moral rights in copyright seems applicable.⁷⁷ These distinct theoretical bases by which the various harms can be cognized—commercial morality, economic justice, and cultural integrity—implicate very different remedial frameworks. The following sections address each in turn.

B. Unfair Business Practices

Let us begin by examining the easy cases: the first two categories of harm involving breach of trust and misrepresentation. The wrongful conduct here concerns either

⁷⁷ See Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 *CARDOZO J. INT'L & COMP. L.* 633, 641-45 (2003) (exploring potential for moral rights to address cultural integrity concerns).

deception or unsavory business practices whose objectionable nature seems clear on its face. Commercial morality standards represent a bedrock feature of almost every legal system. Prohibitions against unfair competition are also enshrined in international IP law.⁷⁸ Moreover, unfair competition law itself supplies a protean wellspring whose application has been melded to fit a variety of circumstances.⁷⁹ Indeed, as we will see, remedying the injuries alleged here would require only minor extension of existing law.

Consider first the circumstances in which our hypothetical appropriator initially came into possession of the tribe's cultural heritage. While the hypothetical facts do not elaborate on the specific means by which the interloper "insinuat[ed] himself into the tribe's confidence," acts of deception, breaches of promise and violations of trust all contravene basic, widely accepted principles of private civil law. While the applicable legal analysis will depend on facts of the specific breach, a variety of doctrinal frameworks could apply: (a) contractual theories such as implied contract or promissory estoppel/detrimental reliance;⁸⁰ (b) breach of trust

⁷⁸ Cf. Paris Convention for the Protection of Industrial Property, art. 10bis, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 303; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter *TRIPS*].

⁷⁹ See Edson B. Rodrigues, *Using the TRIPS Agreement's Unfair Competition Clause to Curb the Misappropriation of Biological Resources*, 4 QUEEN MARY J. INTELL. PROP. 139, 141-42 (2014); Nari Lee et al., *INTELLECTUAL PROPERTY, UNFAIR COMPETITION AND PUBLICITY* 19 (2014).

⁸⁰ See *Bower v. AT & T Technologies, Inc.*, 852 F.2d 361, 362 (8th Cir. 1988); Restatement (Second) of Contracts § 4 cmt. a (1981) (defining implied contracts); Restatement (Second) of Contracts § 90 (1981) (regarding detrimental reliance and promissory estoppel).

or fiduciary obligation; (c) violations of privacy;⁸¹ (d) intentional or negligent misrepresentation;⁸² (e) misappropriation of trade secrets;⁸³ or—as a catch-all—unfair competition law.⁸⁴ Any of these legal theories could potentially cover the circumstances of our hypothetical misappropriation without requiring much in the way of doctrinal elaboration.⁸⁵ Indeed, precedents already exist for applying several such theories in the TK context.⁸⁶ Therefore, in regulating misappropriation based on such dishonest practices, the WIPO treaties rest on a solid, jurisprudential footing.

Admittedly, the WIPO treaties go a step beyond prohibiting outright deception. They also prescribe an “informed consent” standard that imposes an affirmative duty on prospective appropriators to disclose their intentions and provide material information for source communities to make a fully informed decision. Yet, here too, the duty imposed rests on established precedent. Legal systems routinely impose such affirmative duties of disclosure in circumstances where stark asymmetries of information and power exist, or where the consequences of a hasty decision could result in significant and

⁸¹ 15 U.S.C. § 687f (2011) (explaining breach of fiduciary duty in commerce and trade); R.I. GEN. LAWS ANN. § 9-1-28.1 (West 1980) (illustrating rights to privacy).

⁸² 225 ILL. COMP. STAT. ANN. 450/30.1 (West 2004) (defining intentional and negligent misrepresentation).

⁸³ See Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT’L L. 371, 396-404 (2011).

⁸⁴ See generally Restatement (Third) of Unfair Competition Law (1995).

⁸⁵ See Varadarajan, *supra* note 83, at 398.

⁸⁶ See *Foster and Others v. Mountford and Rigby Ltd.* (1976) 14 ALR 71 (breach of trust); *Bulun v. R&T Textiles Pty. Ltd.* (1998) 41 IPR 513 (deception).

irrevocable harm.⁸⁷ Both of these circumstances arguably apply in the TK context: Indigenous peoples are unlikely to be equipped to negotiate sophisticated licensing transactions,⁸⁸ and information, by its very nature, is often impossible to reclaim once released to the public domain.⁸⁹ Western appropriators are likely to be the party best situated to avert such ill-considered disclosures; therefore, it does not seem unreasonable to place the burden on them.

The misrepresentation claim is similarly supported by ample precedent. Misrepresenting the origins of commercial goods violates widely accepted principles of unfair competition law: in addition to punishing sharp practices by the perpetrator, we can also invoke consumer protection to justify a remedy.⁹⁰ We could analyze the violation in terms of trademark law, false advertising, unfair competition, or consumer fraud.⁹¹ However, the bottom line remains: acts of commercial misrepresentation are wrongful, independently of anything specific to the TK context. The WIPO treaties again rest on solid ground in prohibiting such deceptive practices. A wealth of existing precedent supports prohibitions against

⁸⁷ See 40 PA. STAT. ANN. § 1303.504 (West 2002) (discussing informed consent in medical procedures); N.Y. ST RPC RULE 1.7 (McKinney 2009) (explaining informed consent in client-lawyer relationship); KY. REV. STAT. ANN. § 199.011 (West 1984) (defining informed consent in adoption); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 940 (2007) (discussing informed consent in abortion cases); Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 718 (2001) (same for pre-nuptial agreements).

⁸⁸ See Chander & Sunder, *supra* note 1, at 1346-53.

⁸⁹ See Varadarajan, *supra* note 80, at 416 (citing Arrow's paradox).

⁹⁰ Restatement (Third) of Unfair Competition § 4 cmt. a (1995).

⁹¹ *Id.*; 1 McCarthy on Trademarks and Unfair Competition § 2:33 (4th ed.).

misrepresentation in the TK context,⁹² and, as with the initial breach of trust cases, only relatively minor doctrinal elaborations are required to take this step.⁹³ Indeed, the US and several countries have already taken steps to extend trademark-style protection to indigenous communities.⁹⁴

Once again, the most problematic aspect of the WIPO treaties may be their inclusion of affirmative attribution requirements that extend beyond actual misrepresentation.⁹⁵ Such affirmative obligations are harder to justify under existing unfair competition law.⁹⁶ Even so, there are plenty of

⁹² See, e.g., Millpururru, 41 IPR 513, 514; Hapiuk, *supra* note 10; Matthew Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, 3 INDIGENOUS L.J., 139-179 (2004).

⁹³ While use in commerce is required for TM law to apply, the Indian Craft Protection Act has no such requirement. Trademark law also requires distinctiveness in territory where enforcement takes place. However, the well-known marks doctrine already provides an exception. See Paris Convention, § 6bis. And the law on geographical indications goes even further. See TRIPS, art. 23; Lisbon Agreement (protection determined by source country). Moreover, consumer protection laws against fraud and unfair competition could still apply to objectively misleading claims regarding authenticity. See Farley, *supra* note 1, at 52.

⁹⁴ See Robert Miller, *American Indians and Tribal Intellectual Property*, 13 TULANE J. TECH. & INTELL. PROP. 179, 180, 183 (2010) (describing protections for American Indian tribes through both trademark and *sui generis* legislation); Rimmer, *supra* note 92, at 157-171 (describing analogous initiatives in Australia, New Zealand, and Canada).

⁹⁵ The draft treaties require both attribution as a moral right and also source disclosure for patents based on TK derivatives. See TK Treaty, Art. 3.1(b)(i), 4bis; TCE Treaty, Art. 3.1(b)(i).

⁹⁶ While some authority has suggested that attribution can be implied as a requirement of the Lanham Act, the U.S. Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 25 (2003) casts doubt on the viability of such a theory under U.S. law. Accord Guan Xiaomeng, *Zhang Yimou Sued over Opera Copyright*, CHINA DAILY, May 12, 2010 (upholding non-attribution of Chinese opera).

examples of such affirmative disclosure/labeling requirements elsewhere in the regulation of commercial speech,⁹⁷ and the burden of complying hardly seems onerous.⁹⁸

Unfair competition law also provides a natural fit with other aspects of TK protections. Both trademark and trade secret law can easily accommodate communal or concurrent ownership.⁹⁹ Originality is not a threshold requirement for protection. The scope of eligible subject matter is extremely broad.¹⁰⁰ Formalities are minimal.¹⁰¹ Compared to copyright and patent protection, unfair competition law therefore offers a

⁹⁷ See United States International Trade Commission, *Country-of-Origin Marking: Review of Laws, Regulations, and Practices*, Inv. No. 332-336, USITC PUB. 2975 (July 1996), <http://www.usitc.gov/publications/332/pub2975.pdf> (describing country of origin labeling requirements); *Chiarella v. United States*, 445 U.S. 222, 223 (1980) (analyzing affirmative duty of insiders to disclose when selling stocks); Restatement (Second) of Torts § 353 (1977) (describing seller's duty to disclose latent defects of property); *The FEC and the Federal Campaign Finance Law*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/fecfeca.shtml#Disclosure> (describing disclosure duties under federal campaign finance law).

⁹⁸ Attribution requirements are also an integral component of moral rights under copyright law. See Berne Convention § 6bis. Some question, however, whether a moral rights framework translates to the TK context. See, e.g., Farley, *supra* note 1, at 48-49.

⁹⁹ Because the rights focus on conduct of the appropriator, standing to enforce such rights can be shared among a plurality of affected parties. See Farley, *supra* note 1, at 52-53.

¹⁰⁰ Christopher C. Larkin, *Qualitex Revisited*, 94 TRADEMARK REP. 1017, 1023 (2004) (discussing breadth of trademark subject matter); see Varadarajan, *supra* note 83, at 398 (discussing same for trade secrets).

¹⁰¹ Use in commerce and, in the case of trade secrets, reasonable precautions to maintain secrecy are all that is required to establish rights. See Varadarajan, *supra* note 83, at 405-408; Farley, *supra* note 1, at 52. There is no fixation requirement as in copyright; no written application as in patent. Cf. Farley, *supra* note 1, at 27-29; 35 USC § 111-12.

smoother pathway to protecting TK. Moreover, because such protections would only apply against commercial actors, concerns over free speech are less pressing.¹⁰²

Furthermore, commercial morality rationales also readily accommodate the indefinite duration of TK rights contemplated under the WIPO draft treaties. Unlike copyright and patent, which are restricted to fixed durations, unfair competition norms—including protection of both trademarks and trade secrets—are already applied indefinitely.¹⁰³ Moreover, the “use it or lose it” basis on which trademark and trade secret protection operates closely parallels the term provisions for TK/TCE in the draft WIPO treaties.¹⁰⁴

Not only does allowing for TK protection in such cases rest on a solid doctrinal footing, but the impact of instantiating commercial morality norms would be relatively limited. Because commercial morality claims would focus on the specific wrongful conduct of the defendants, the remedy would remain limited to the specific perpetrators as well as those complicit in their bad acts. In contrast to a full-blown property right applicable against the entire world, conferring TK protection on this basis would thus only affect a limited set of identifiable “bad actors.”¹⁰⁵ Accordingly, even commentators

¹⁰² See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 (1976) (recognizing lower First Amendment standard for commercial speech).

¹⁰³ See Varadarajan, *supra* note 83 at 398.

¹⁰⁴ Compare Eric R. Claeys, *The Use Requirement at Common Law and Under the Uniform Trade Secrets Act*, 33 *HAMLIN L. REV.* 583, 597 (2010), with TK Treaty, art. 1.

¹⁰⁵ Cf. *E.I. du Pont & Co. v. Masland*, 244 U.S. 100, 102 (1917) (rejecting notion of property right in trade secrets where claim based on breach of confidential relationship between parties).

who are generally skeptical of TK rights have recognized the legitimacy of offering remedies in such cases.¹⁰⁶

It is also worth noting that these rationales apply equally to misappropriation/misrepresentation of both traditional know-how and cultural expression. There is no reason to think such violations would be more prevalent in one context than another. Indeed, in both cases, the violation inheres in morally objectionable conduct by a specific perpetrator—the Western appropriator in our hypothetical above. As such, a cause of action can be framed based on the misconduct of the defendant without regard to the subject matter appropriated. Accordingly, protection against such unfair practices appropriately forms a common baseline of both draft WIPO treaties and should remain as such.

C. Propertizing Tradition: Moving Beyond Unfair Competition

Having dealt with the easy cases, we must now address the more problematic scenarios in which TK is used in the *absence* of any deception, breach of trust, misrepresentation, or other violation of commercial morality. As we saw, the WIPO draft treaties contain a number of provisions that require the source communities' consent for uses of TK even where such objectionable practices are not present. These more expansive protections therefore operate akin to a property right, enforceable against the world. Traditional communities would gain broad veto powers over uses of their cultural expression and know-how. The WIPO treaties also stipulate an obligation that commercial appropriators provide “equitable

¹⁰⁶ See Munzer & Raustiala, *supra* note 1, at 73.

compensation” for revenues generated by TK use, essentially imposing a liability regime that once again applies even to use of TK in good faith by actors who are otherwise innocent of any wrong-doing.¹⁰⁷

The framing of these more expansive TK rights parallels the structure of conventional intellectual property rights. The WIPO draft treaties even parrot some of the specific language used by copyright and patent law in defining the scope of protection.¹⁰⁸ Yet, copyright and patent protection are premised on encouraging innovation. TK rights not only lack threshold requirements of originality/novelty, they focus on tradition—something that by definition has existed for generations.¹⁰⁹

Accordingly, we must instead look to alternative normative frameworks to justify a remedy. As suggested by our hypothetical misappropriation scenario above, the two leading candidates are: (1) economic justice and (2) cultural integrity. Commentators routinely invoke both rationales to justify robust TK protection.¹¹⁰ As we will see, the theoretical underpinning of these rationales is far more contested than unfair competition. Skeptics have questioned whether there should be a cognizable legal injury under either economic

¹⁰⁷ See *supra* notes 29-40 and accompanying text.

¹⁰⁸ Compare, e.g., TCE Treaty, Art. 3.1(a)(v), with Berne Convention, § 6bis.

¹⁰⁹ See TK Treaty, Art 1; TCE Treaty, Art. 1. Furthermore, whereas the term of patent and copyright protection is constitutionally restricted to “limited times,” U.S. Const., Art. I. sect 8, cl. 8, traditional knowledge rights are envisioned as lasting indefinitely. See *supra* note 45 and accompanying text.

¹¹⁰ See, e.g., Tsosie, *supra* note 1, at 313; Carpenter et al., *supra* note 1, at 1110.

justice or cultural integrity.¹¹¹ However, the present purpose is not to engage in that debate. Rather, this section seeks only to elucidate the logic of these rationales on their own terms.

1. Cultural Integrity

Perhaps the most evocative justification for protecting traditional knowledge derives from the cultural harms that unregulated use of TK can engender. As one commentator summarized:

The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.¹¹²

Cultural harm rationales draw an explicit connection between potential harms to the heritage and harm to the underlying community from which it is taken. Advocates of protection frame the issue in stark terms of survival.¹¹³ They point to the intimate links between culture and indigenous

¹¹¹ See Munzer & Raustiala, *supra* note 1, at 71-73, 76-78; Pager, *supra* note 1, at 1848.

¹¹² TOM GREAVES, *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK*, ix (Tom Greaves, ed., 1994); see also Riley, *supra* note 1, at 78 (describing “cultural devastation” caused by “appropriation and distortion of indigenous peoples’ intangible property”).

¹¹³ *Id.* at 1059 (“American Indians can only survive as distinct peoples if they enjoy legal protection of, and autonomy over, their cultural resources”); See generally Carpenter et al, *supra* note 1. See also Tsosie, *supra* note 1, at 310; Riley, *supra* note 1, at 76-77, 79.

identity.¹¹⁴ They emphasize the fragility of indigenous cultures, which face unrelenting assault from the outside world, and the pressures of globalization and digital communications that accelerate the threat and amplify the harm.¹¹⁵ Misappropriation of TK is presented as the “final blow” in a saga of dispossession leading to the demise of indigenous cultures.¹¹⁶

Blaming TK misappropriation for the destruction of indigenous culture is not only rhetorically evocative, it has serious implications in light of the extensive body of international human rights law that upholds the rights of a minority people to “enjoy their own culture.”¹¹⁷ At an extreme, such harms could be construed as a form of cultural genocide.¹¹⁸ Yet, Western borrowing of indigenous art forms does not actually prevent indigenous communities from continuing to practice their traditions. Inauthentic uses outside the community do not preclude authenticity within it.¹¹⁹ In

¹¹⁴ See Tsosie, *supra* note 1, at 300 (explaining that “Native culture is essential to the survival of Indian Nations”); Farley, *supra* note 1, at 12 (describing how indigenous identity “depend[s] on the survival of their art.”).

¹¹⁵ See, e.g., Riley, *supra* note 1, at 79 (describing “increasing concern in an age of globalization, where property and quasi-property can spread across the world in a matter of hours—or, with the proliferation of the Internet, in a matter of moments. Accounts of appropriation of indigenous knowledge are continually reported, each one more troubling than the next.”); Farley, *supra* note 1, at 7-8, (same).

¹¹⁶ See Farley, *supra* note 1, at 11-12.

¹¹⁷ Article 27, ICCPR; see also CESCR, art. 15; UN Declaration on the Rights of Indigenous Peoples, Gen'l Assem. Res. 1/295, September 13, 2007, Arts. 8, 11, 31.

¹¹⁸ See Tsosie, *supra* note 1, at 310- 11; Brown, *supra* note 1, at 3.

¹¹⁹ Thus, analogies to earlier repressive laws that banned use of native languages and forced natives to adopt Western dress are misleading. *Cf.*

what sense, then, are indigenous cultures—and by extension—indigenous people harmed by such cultural takings?

TK proponents respond by identifying a cluster of related harm, all of which operate at the level of cultural meaning. They “worry that the expropriation of their living culture will cause their imagery to lose its original significance.”¹²⁰ They point to the “cultural or psychological harm caused by the unauthorized use.”¹²¹ They worry that inauthentic meanings will displace authentic ones, diluting the original meaning or tarnishing its significance and value.¹²² They fear such cultural dislocations will have follow-on effects that undermine the community’s distinctive identity and “lead to a disruption of [the community’s] beliefs and a dissolution of their culture.”¹²³ To prevent such harms, TK proponents argue that indigenous communities need control over their cultural property to preserve their identity as distinct peoples.¹²⁴

Coombe, *supra* note 8, at 213 (quoting “Native artists” who draw such false analogies between cultural appropriation and cultural suppression).

¹²⁰ See Farley, *supra* note 1, at 15.

¹²¹ See *id.* at 14; Carpenter et al., *supra* note 1, at 1109 (drawing analogy to hate speech and racial harassment).

¹²² See Beebe, *supra* note 1, at 876 (describing concern that dilutive copying will destroy “the work’s spiritual power”).

¹²³ See Farley, *supra* note 1, at 15; Beebe, *supra* note 1, at 877 (describing fear that appropriation of tradition will “undermine the social and religious stability” of indigenous society); Tsosie, *supra* note 1, at 310 (“failure to protect Native cultures . . . perpetuates significant harm to Native people as distinctive, living cultural groups”).

¹²⁴ See Carpenter et al., *supra* note 1, at 1028 (arguing that “certain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.”); Tsosie, *supra* note 1, at 310 (arguing that native

2. Economic Justice

TK proponents sometimes take it as self-evident that indigenous people should enjoy exclusive rights to commercially exploit “their” TK and reap its economic benefits.¹²⁵ Western appropriation of traditional knowledge is condemned as “straight stealing.”¹²⁶ Examined more closely, however, these claims reduce to an argument for benefit-sharing under some variant of an anti-free riding principle. To prevent unjust enrichment, outsiders making money off traditional knowledge are said to incur an obligation to share the proceeds with the source communities.¹²⁷

Some commentators bolster this claim for compensation by broadening the horizon to invoke an equitable accounting based on past colonial injustice.¹²⁸ Such appeals invoke both distributive and corrective justice concerns based

people “must control representations of their cultures as a means to ensure cultural survival”).

¹²⁵ See Tsosie, *supra* note 1, at 314 (arguing that appropriation of indigenous culture causes “tangible economic harm . . . [that] is obvious: the non-Indian business or individual gets a commercial benefit from appropriating the Indian group's culture. The Indian people get nothing.”); 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, 770 (1999) (describing folklore commercialization as “short-chang[ing]” traditional societies who fail to derive economic benefits from such exploitation).

¹²⁶ Riley, *supra* note 1, at 72.

¹²⁷ See Carpenter et al., *supra* note 1, at 1103.

¹²⁸ See Farley, *supra* note 1, at 11 (“The theft of cultural symbols and art must be placed in historical perspective to grasp its implications fully.”); Tsosie, *supra* note 1, at 311 (connecting appropriation of Native culture “to systems of dominance and control that have been used to colonize, subdue and destroy Native peoples”).

on the historic oppression indigenous peoples have experienced¹²⁹ and the economic marginalization they continue to endure.¹³⁰ There is also a prospective element to some variants of this rationale: The WIPO draft treaties posit economic development as a goal of TK protection.¹³¹ Several commentators have explicitly argued that allowing source communities to share in the economic value of their TK would advance economic justice.¹³² On these views, revenues flowing to the source community assume a positive value above and beyond unjust enrichment concerns. Accordingly, benefit-sharing mechanisms could serve to remediate economic injustice on more than one level.

D. Navigating Normative Conflicts

While both the cultural integrity and economic justice rationales could potentially justify remedies beyond the unfair competition context, in many respects, these rationales work at cross purposes. As the previous discussion has shown, the two rationales each seek to remedy very different injuries. The

¹²⁹ See Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL'Y 313, 325 (2005) (justifying TK rights as a “form of reparations” for past oppression); Stephen Munzer, *Corrective Justice and Intellectual Property Rights in Traditional Knowledge*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 61-62 (Annabelle Lever, ed., 2012) (same); See Chander & Sunder, *supra* note 1, at 1354-55 (positing distributive justice claim).

¹³⁰ Carpenter et al., *supra* note 1, at 1103 (positing TK rights as “crucial” means for indigenous communities to survive economically).

¹³¹ See TCE Treaty, pmbl. (2), (9) (“contribute to . . . sustainable economic . . . development”); TK Treaty, pmbl. (vii) (“Promote innovation . . . in a manner conducive to social and economic welfare”).

¹³² Chander & Sunder, *supra* note 1, at 1355-56; Carpenter et al., *supra* note 1, at 1103.

cultural integrity rationale aims to prevent harms arising from inauthentic uses of TK. By contrast, the economic injustice rationale focuses instead on the bottom line; the wrong inheres when outsiders profit from commercial exploitation, whether authentic or otherwise.

Moreover, these very different aims give rise to diverging imperatives that point us in fundamentally different directions. We can anatomize these contrasting implications on four levels: (1) the structure of the rights/remedies; (2) the nature of the governance regime; (3) geographic scope; and (4) normative posture vis-à-vis commodification.

1. Structure of Rights/Remedies

To begin with, the cultural integrity and economic justice rationales implicate different remedies: Preventing cultural injuries requires the ability to restrict inauthentic usage; injunctive relief will likely play a central role. Accordingly, a cultural integrity rationale pushes strongly toward a property rights regime, which would ensure source communities retain exclusive control over their traditional assets. By contrast, economic injustice concerns can be resolved through a monetary transfer without the need for injunctive relief. Note that neither remedy will suffice to resolve both concerns. Paying compensation does not prevent harms arising from culturally inappropriate use. Conversely, controls to ensure culturally appropriate use do not necessarily resolve the issue of who benefits financially.¹³³

¹³³ For example, a cultural integrity regime might not prevent an individual community member from licensing traditional subject matter for external commodification. Such commodification might take place in a culturally

If the cultural integrity rationale pushes strongly toward a property rights regime, the implications of the economic justice rationale militate toward a liability regime. Remedying unjust enrichment implies a right to payment, but not to control. Moreover, the goal is to compensate source communities for the value of TK inputs in their “raw” form, as opposed to the (presumably higher) value of derivatives that emerge post-commercialization. Awarding source communities a full-blown property right would encourage hold-ups and potentially lead to excessive compensation.¹³⁴

In theory, hold-ups could be avoided through *ex ante* licensing.¹³⁵ Some might also argue that such negotiated licenses offer a fairer compensation mechanism than relying on the vagaries of adjudicative processes *ex post*.¹³⁶ However, the *ex ante* value of most forms of TK is probably near zero, making the transaction costs for piecemeal licensing arguably

authentic manner, but could still raise issues regarding benefit-sharing with the larger source community.

¹³⁴ The primary economic value of TK will typically emerge through the commercialization or adaptation of such knowledge. Allowing indigenous communities to leverage rights over the raw inputs to control such “downstream” uses would allow them to appropriate value that they themselves have not created. In effect, such property rights could give rise to an inverse image of the very injustice that TK proponents protest: allowing indigenous communities to “reap where [they] did not sow.” *Cf.* *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 239 (1918). Admittedly, we do allow holders of patents and copyrights to exert similar “blocking rights” over downstream improvers. However, such rights are justified under a utilitarian incentive rationale that should be distinguished from the restitutionary interest posited here.

¹³⁵ See generally Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1376-77 (1996).

¹³⁶ *Id.* at 1307-08.

prohibitive and likely leading to less remunerative outcomes.¹³⁷ Moreover, given the emotional resonance that attends many forms of traditional culture, uncertainty as to who controls the underlying rights, and distrust of outsiders, the potential for hold-ups is liable to remain significant.¹³⁸

Nor does a property regime seem warranted under the broader economic justice rationales. Even assuming one could evaluate claims of historical injustice and calibrate remedies accordingly,¹³⁹ it is hard to see how distributional or corrective justice claims justify conferring a property interest in intangible assets otherwise unrelated to the wrong. Why TK rights? Why not land or mineral rights? Such mismatches between remedy and injury would be further exacerbated by a misallocation of the burdens. In many cases, the costs of a TK property regime in restricted autonomy and speech would be borne by actors with little connection to original wrongdoers.¹⁴⁰

¹³⁷ See Chander & Sunder, *supra* note 1, at 1369-70 (explaining how with multiple TK stakeholders bidding against one another, the *ex ante* value of such property rights on average is likely to be negligible, making a regime based on “objective” valuation more equitable).

¹³⁸ See Heald, *supra* note 68, at 519, 524-25, 535-37 (explaining why the normal market-enhancing function of property rights does not apply in the TK context).

¹³⁹ Cf. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (terming the effects of societal discrimination “inherently unmeasurable”). Indigenous peoples hold no monopoly on historical injustice, and sorting through competing claims would present a vexing challenge that the draft TK treaties do not even purport to undertake.

¹⁴⁰ Recognizing this objection, Stephen Munzer bases his corrective justice rationale for TK rights on “the wrongdoers or their successors [being] identifiable as a group.” Munzer, *supra* note 129, at 61. This stipulation would result in much more geographically circumscribed remedies than contemplated under the current WIPO draft treaties.

Finally, from the standpoint of encouraging development, a property regime could prove counterproductive. While in many circumstances property rights can be conducive to commercialization,¹⁴¹ TK is likely to prove to be an exception to the rule.¹⁴² The amorphous nature and scope of TK rights, as well as their potential for contested ownership, are likely to undermine commercial certainty, rather than enhance it, imposing obstacles that deter investment.¹⁴³ Moreover, most commercialization of TK will require adaptive innovation to unlock new markets; the derivative versions that result will therefore already be subject to conventional IP rights that will function as conduits for commercial investment. Adding an additional layer of upstream rights in the original TK would only complicate matters, increasing licensing costs and uncertainty and raising the specter of a TK “anti-commons.”¹⁴⁴ Therefore, despite the symbolic appeal of property rights from the standpoint of economic sovereignty, a liability regime would seem the more

¹⁴¹ Following this logic, TK proponents claim TK rights will promote certainty, loan securitization, and induced investment. Munzer & Raustiala, *supra* note 1, at 67-68.

¹⁴² See Heald, *supra* note 68, at 519, 524-25, 535-37; Chander & Sunder, *supra* note 1, at 1370. While any form of exclusive rights can be leveraged to extract monopoly rents, the risks of unintended harms here seem to outweigh prospective benefits.

¹⁴³ See Rose *supra* note 69, at 999-1000; *cf.* TCE Treaty, Pmb. (8) (“Recognizing the importance of enhancing certainty”).

¹⁴⁴ *Cf.* Michael Heller & Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCIENCE* 698 (1998) (describing the anticommons problem created when an excess of overlapping property rights blocks development). The concerns over hold-up costs is especially salient because source communities, by TK proponents’ own account, are not motivated by exclusively economic motives.

prudent pathway to fostering economic justice through development.¹⁴⁵

2. Nature of Governance Regime

The contrasting imperatives of the cultural integrity and economic justice rationales are even starker when it comes to the governance regime required to administer TK rights. Broadly speaking, protecting cultural integrity requires far more hands-on management than remedying economic injustice. To put it crassly: money is money, whereas cultural integrity is complicated—enmeshed with complex understandings of authenticity and fundamental rights that defy simplistic resolution.

Indigenous communities differ dramatically from one and another in their belief systems and customary practices regarding their traditions, making one-size-fits-all approaches inappropriate.¹⁴⁶ Many communities have established protocols to regulate access and use. Indeed, rights to use traditional knowledge often vary *within* the source community. Certain practices may be restricted to initiated elders, or to men or women only, or even to a hereditary caste.¹⁴⁷ We therefore

¹⁴⁵ Rather than an à la carte “pay-as-you-go” regime, such a system could be centrally organized and administered under a variety different models. See Heald, *supra* note 68, at 539-41 (surveying a range of proposals).

¹⁴⁶ Jane Anderson, *The Politics of Indigenous Knowledge: Australia’s Proposed Communal Moral Rights Bill*, 27 UNIV. NEW SOUTH WALES L. J. 585, text accompanying n.38 (2004).

¹⁴⁷ Kuruk, *supra* note 125, at 783-85 (“Folklore rights are vested in particular segments of the community and are exercised under carefully circumscribed conditions.”); Kim Christen (describing how Australian aboriginal communities distinguish between “men’s business” and “women’s business”).

need to pay close attention to who is authorized to practice specific traditions under what circumstances and determine the parameters of authentic practice that govern such uses.¹⁴⁸ Even the procedural and evidentiary rules to resolve such questions require sensitivity to customary norms, and, potentially, the involvement of source communities themselves.¹⁴⁹

At the same time, a cultural integrity regime should avoid constructing rights along essentialist lines. Traditional practices often develop along variant streams, each of which is entitled to its own legitimacy. Where similar cultural traits are shared by more than one community, inter-group tensions must be carefully managed. Moreover, traditions—like all cultural practices—evolve organically over time. Allowing for a dynamic understanding of tradition prevents cultural calcification and enables adaptive mechanisms that keep traditions relevant to the present.¹⁵⁰

Indeed, overprotection here could prove as harmful as under-protection. Because the treaties proscribe uses “beyond the traditional context,” the worry is that they would be applied internally, empowering conservative elites to repress minority voices within the community.¹⁵¹ By censoring those who subvert established conventions, TK rights could stifle thus the

¹⁴⁸ For many traditional communities, further questions may also arise as to who exactly is a member of the community or even what defines the community itself. Pager, *supra* note 1, at 1877.

¹⁴⁹ See *infra* text accompanying notes 240-242.

¹⁵⁰ See Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 788 (1992).

¹⁵¹ Pager, *supra* note 1, at 1881-82.

very creativity that is the source of cultural vitality.¹⁵² Moreover, by preventing adaptations necessary to cater to external markets, TK rights could inhibit forms of commodification that sustain cultural practitioners financially.¹⁵³ The result could be that TK protection harms the very culture it aims to protect.

Furthermore, societal interests in free speech and access to information must also be respected and weighed against the interests of the source community in preserving its traditions. At stake is a clash of fundamental rights: Since cultural injuries are said to jeopardize the very survival of the community and its traditions,¹⁵⁴ the human right to culture must be balanced against the free speech rights of individuals.¹⁵⁵

Regulating cultural integrity thus presents a complex set of challenges. A diverging set of interests must be reconciled in a fact-intensive process. Given the high stakes attending substantive decisions and the potential for irreversible injuries, it is worth taking the time to get things right. To reach such contextually nuanced decisions requires input from multiple stakeholders. Rather than a standard property regime where the default entitlements are vested in clearly identifiable “owners,” rights under a cultural integrity regime would remain contingent and subject to blurred

¹⁵² See Kwame Anthony Appiah, *The Case for Contamination*, NY Times Magazine, Jan. 1, 2006, at 34 (“Societies without change aren’t authentic; they’re just dead”); Pager, *supra* note 1, at 1870, 1881-82.

¹⁵³ See Pager, *supra* note 1, at 1870.

¹⁵⁴ See Tsosie, *supra* note 1, at 308-10; GREAVES, *supra* note 112, at ix (Tom Greaves ed., 1994); Riley, *supra* note 1, at 81-82; Farley, *supra* note 1, at 11-12.

¹⁵⁵ See Carpenter et. al., *supra* note 1, at 1036.

boundaries. Such a stewardship regime would likely also incorporate restraints on alienability and, where appropriate, regulate proactively. In short, the cultural integrity rationale requires a relatively hands-on, resource-intensive form of “thick governance.”¹⁵⁶

By contrast, the compensatory mechanisms required under an economic justice rationale can operate under a much more streamlined process. There are no pressing concerns over cultural survival or censorship at issue in that context. Nor is there any need to delve into the particulars of the source community and its customs and contexts. It is just an argument over money, and thus largely a matter of accounting. The main issue is determining how much debt the commercialized derivatives owe to the original TK input: Does the indigenous knowledge form the core of the derivative invention, or was it merely the starting point for a more extended journey of discovery? Once these questions are resolved, revenues can be allocated accordingly.¹⁵⁷

Furthermore, there is no call to invest in finely-tuned adjudications (even assuming the evidentiary basis existed to do so). Both source communities and external appropriators

¹⁵⁶ See *id.* at 1079-80 (describing “governance regime” as requiring finely tuned determinations and entailing greater “need for administrative or judicial oversight over . . . implementation.”); cf. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 454-55 (2002).

¹⁵⁷ This is not to trivialize the difficulties entailed in such accounting. Nor should one overlook the difficulties in determining who the beneficiaries should be—a challenge that cuts across all TK rights regimes. However, a “rough justice” approach that tolerates inaccuracy in the name of efficiency is arguably more acceptable where economic justice is concerned than in the cultural integrity context.

are likely to prefer the certainty of a quick decision and speedy payment based on objective, transparent criteria to a drawn-out, lengthy process that leads to an unpredictable outcome and dissipates resources through transaction costs. Accordingly, a certain rough justice can be tolerated in the name of efficiency, relying on standardized formulas to bypass more contextualized inquiries.

3. Geographic Scope

The same factors underlying a divergence in the governance mechanisms suited to the cultural integrity and economic justice rationale also suggest differences in the geographic remit under which such regimes would operate. The geographic scope question has multiple facets: First, to what extent should the WIPO treaties prescribe a set of uniform standards as opposed to allow for local discretion and variation? Second, should a centralized authority be empowered to apply the standards, or should they be delegated to local authorities? Third, to what extent should protection of traditional knowledge bind geographically remote actors? As we will see, cultural integrity concerns are best managed locally on all these scores, while economic justice is a global matter.

On the first two questions, the contrasts are clear: The contextually nuanced nature of cultural integrity regulation requires ample leeway to tailor standards to local customs. The “thick governance” entailed in regulating cultural integrity thus pushes strongly toward devolving decisions to the local level. Given the heterogeneity in indigenous belief systems, we want adjudication to take place close to the source community, with ready access to the relevant evidence and with decision-makers who are knowledgeable about local customs and contexts. Conversely, it is unrealistic to expect a country far removed

from the traditional source community to adjudicate between rival claims to a particular tradition.

By contrast, the accounting required to ensure an equitable sharing of benefits can rely on standardized market criteria without being encumbered with the cultural particulars of the case at hand. Moreover, the preference for efficiency over equitable fine-tuning in this context militates toward centralized administration. Accordingly, an economic justice regime could be delegated to a central authority that would develop administrative expertise in such matters.

The contrasts regarding the geographic scope in which rights would apply are less manifest. In principle, a fully global system might be desirable under both rationales. Yet, the costs of globalizing are markedly higher under the cultural integrity rationale than the economic justice rationale, and the benefits of doing so in the former instance are less apparent.

To begin with, the need to apply culturally specific standards under a cultural integrity rationale makes regulating on a transnational scale inherently problematic. Intellectual property rights regimes are normally territorial. A misappropriation of traditional culture in Berlin would normally go before a German forum. Yet, does Germany really want to broker a dispute over Australian aboriginal dot paintings, delving into conflicting claims from parties and anthropological experts regarding authentic techniques and customary authority?¹⁵⁸ In theory, transnational forums could

¹⁵⁸ Cf. Brad Sherman and Leanne Wiseman, *From Terroir to Pangkarra: Geographical Indication of Origin and Traditional Knowledge*, in *GEOGRAPHICAL INDICATIONS: A HANDBOOK OF CONTEMPORARY RESEARCH* (Justin Hughes & Dev Gangjee eds.) 20 (2010) (explaining why

delegate such decisions to local fact-finders; yet, conducting such long-distance, multijurisdictional litigation would be expensive. At the same time, the interests of forum states in maintaining adjudicative and prescriptive sovereignty and in protecting their own nationals (the presumed defendants in such actions) would make them reluctant to blindly defer to the edicts of an Australian authority.

Not only are the costs of regulating cultural integrity on a global scale substantial, but the benefits seem uncertain. In general, the harmful impact of culturally inauthentic practices is likely to be felt most acutely when they take place close to home. This point will be elaborated further below, but the basic principles are “out of sight, out of mind” and “what you don’t know about, won’t hurt you.”¹⁵⁹

By contrast, the dictates of the economic justice rationale are far less geographically circumscribed. Profiting from free riding is equally objectionable whether it takes place at home or abroad; the same unjust enrichment principle applies regardless of location. And given the stream-lined governance regime required to administer such disputes, the costs of globalizing would be relatively modest.

In sum, the cultural integrity rationale implicates a regime that is thick in governance but narrow in geographic scope; the economic justice rationale points to a regime that is thin but wide. Forcing a choice between these conflicting imperatives requires compromises that would inevitably

the European Court of Justice would find it impractical to hear testimony in a dispute over Australian aboriginal rights due to the unconventional evidence required and need for place-specific testimony).

¹⁵⁹ See *infra* notes 245-48 and accompanying text.

engender suboptimal outcomes from the standpoint of either goal.

4. Economic Development

There are also deeper tensions between the two rationales with respect to commodification. Traditional knowledge proponents trumpet economic development as a benefit of TK protection: Source communities are to be empowered with the means to monetize their traditional assets, thereby restoring a measure of economic equity in the global economy. Commercialization can also serve to sustain traditional practitioners and thereby encourage them to perpetuate their knowledge.¹⁶⁰ Yet, such a commercialization agenda fits far more comfortably with the economic justice rationale than with the cultural integrity rationale.

Cultural integrity proponents worry that the inexorable pressure of the market will exert a corrupting influence on tradition. Practitioners will be tempted to cut corners and sacrifice authenticity in order to maximize profits. Even worse, national governments may override objections from source communities and exploit indigenous traditions for their own gain.¹⁶¹ Moreover, demand from the external market may itself dictate a certain amount of adaptation/translation to make traditional products marketable. Cultural integrity proponents emphasize that economic development must be “sustainable,” an amorphous phrase that implies restraints on alienability and heightened transaction costs.¹⁶² The “thick governance”

¹⁶⁰ Pager, *supra note 1*, at 1836. Cf. TK Treaty, Pmb. (iii) (“providing incentives to custodians to . . . safeguard their knowledge systems”).

¹⁶¹ See Carpenter et al., *supra note 1*, at 1099-1100.

¹⁶² See Pager, *supra note 1*, at 1848-49.

thereby entailed in turn discourages economic development by raising the risk of unpredictable outcomes and costly delays.

By contrast, an economic justice perspective does not oppose commodification *per se*; it only asks that commercialization pay its way through equitable benefit sharing. Moreover, if we expand our vision of economic justice to include the empowerment of economically marginalized communities, then commercialization appears positively beneficial. Once adequate benefit-sharing is secured, efficiency concerns become salient, and the more commodification the better. The result is a constant tension between economic development and cultural preservation whereby the temptation to adapt and exploit tradition for commercial gain runs headlong into objections based on cultural integrity.

5. Taking Stock

In short, the cultural integrity and economic justice rationales dictate conflicting imperatives across a wide gamut of issues. Trying to pursue both goals at once sets the stage for unavoidable tensions and potentially tragic choices. Will the need to accommodate local nuance trump the benefits of a streamlined, centralized global regime? Will commercial investments be subject to veto from a disparate set of stakeholders? Or conversely, will authenticity be sacrificed to efficiency?

No single regime will adequately fulfill these diverging normative imperatives. While propertizing tradition makes sense from the standpoint of cultural integrity, it likely represents an economically suboptimal solution. Moreover, even if a property regime did make economic sense, the structure of the entitlement would remain subject to similarly

diverging demands: From the standpoint of economic efficiency, traditional rights should be clearly demarcated, fully alienable, and globally enforceable. However, the messy balancing required to preserve cultural integrity without stifling other countervailing speech and innovation interests militates in favor of a less alienable, less clearly demarcated regime—arrangements that do not scale easily to transnational application.

The approach of the WIPO treaty drafters thus far has been to paper over these contradictions and pretend that they can have their cake and eat it too. However, as Part III explains, there is a better way: differentiating by subject-matter will enable more effective tailoring of rights and remedies.

III. TOWARD SUBJECT MATTER TAILORING

The appropriate response to TK misappropriation arguably depends on what has been taken and how it has been used. The misappropriation anecdote provided at the start of Part I contemplated two different takings. Let us revisit them here in further detail and consider their implications:

1. The “Healing Song” Remix: Our hypothetical Westerner secretly records the tribal villagers in their rainforest home singing a traditional “healing song.” Returning home, he remixes the recording in a non-traditional arrangement, using a synthesizer to blend New Age harmonies with catchy Reggae rhythms. He also rewrites the lyrics: Instead of a healing song, the song becomes a paean to ecological spirituality, with the tribe members presented as crude paragons of environmental sustainability, living in harmony with nature. The remixed song rapidly rises to top the World Music charts as a bestselling single.

2. The Flower Pharmaceutical: The Westerner observes the tribal shaman preparing an herbal remedy by mashing up the flower of a particular plant that grows nearby in the rainforest. The Westerner surreptitiously takes samples of the flower and returns to his laboratory at home. Here, he analyzes the flower, isolates the molecular compound responsible for its therapeutic properties, and extracts the compound in a purified form. After obtaining a patent on this purified derivative of the flower, he partners with Pfizer to produce a multimillion dollar pharmaceutical drug.

These two distinct acts of misappropriation present a diverging set of issues. To begin with, as noted at the outset of this paper, they would be governed under separate treaties under the emerging WIPO framework. The “healing song” would be considered a form of traditional cultural expression and dealt with under the draft TCE/folklore treaty. The shaman’s use of the flower as an herbal remedy falls under the domain of technical know-how covered by the draft treaty on TK *sensu stricto*.¹⁶³

However, the difference between these two cases goes beyond the formal criteria that govern which treaty they would fall under. As we will see, the mix of normative concerns at play in each context differs sharply. Such differences provide an opportunity to engage in a form of regulatory arbitrage: We can tailor the rights under each treaty regime to respond to the concerns most salient in each context. Doing so would avoid/mitigate the tragic choices presented above regarding conflicting rationales.

¹⁶³ The flower itself—as distinct from the shaman’s knowledge of its curative properties—would fall under the third WIPO treaty on Genetic Resources.

In general, the musical remix scenario presents far greater cultural integrity concerns, whereas economic justice issues loom much larger when it comes to the flower pharmaceutical. Moreover, the geographic scope in which these issues are salient also differs: The flower pharmaceutical is much more obviously a global issue requiring a global solution than the musical remix.

A. Prioritizing Rationales by Subject Matter

1. Cultural Integrity

As we saw, one of the main justifications for TK rights is to allow indigenous communities to protect their traditions from contamination through misappropriation.¹⁶⁴ Inauthentic uses of traditional culture, such as commercial commodification by outsiders, are said to exert a variety of harmful effects on the underlying source traditions. Commentators invoke notions of distortion, dilution, displacement, and disparagement.¹⁶⁵ They worry that cultural appropriation will damage or transform cultural practices, interfere with the source community's ability to establish its own identity, and encourage outsiders to define the group in a way that degrades or stereotypes the group.¹⁶⁶ The precise mechanism by which such harms take place often remains unspecified. However, at their core, cultural harm rationales embody a “struggle over cultural meaning.”¹⁶⁷

¹⁶⁴ See Tsosie, *supra* note 1, at 357; Riley, *supra* note 1, at 132.

¹⁶⁵ See *supra* notes 118-22 and accompanying text.

¹⁶⁶ Tsosie, *supra* note 1, at 313, 317; Riley, *supra* note 1, at 78.

¹⁶⁷ Farley, *supra* note 1, at 10; Riley, *supra* note 1, at 78.

Skeptics have questioned both the feasibility and desirability of attempting to regulate cultural meaning in this fashion.¹⁶⁸ However, even accepting the premises of a cultural harm rationale, we can observe that not all uses of traditional knowledge will raise cultural harm concerns to the same degree. Because the harms at issue are bound up with effects on cultural meaning, it follows that we need only concern ourselves with acts of misappropriation to the extent such acts could plausibly have an impact on the meaning of the underlying source traditions.

On this view, the potential for cultural injury appears much more palpable in the remixed melody scenario than in the case of the flower-pharmaceutical pill. Cultural meanings are much more likely to be destabilized in the former context because the musical remix involves a recognizable derivative form of the original source material from which cultural contagion could follow, while the pill does not.

One can imagine various scenarios in which such harms might play out. If the inauthentic (remixed) version of the melody circulates widely, it could create a distorted impression of the source culture and possibly reinforce pernicious stereotypes about indigenous people. For example, Outkast's 2004 Grammy Awards performance used the Navajo tune, "Beauty Way," as the lead-in to their own single "Hey Ya," tarring the sacred melody with distasteful and offensive associations; the performance featured scantily clad hip-hop dancers in Pocahontas garb in a cartoonish portrayal of American Indian culture.¹⁶⁹ Native activists have similarly

¹⁶⁸ See Munzer & Raustiala, *supra* note 1, at 71-73, 80; Waldron, *supra* note 150, at 762-63; Beebe, *supra* note 1, at 875-80.

¹⁶⁹ Riley, *supra* note 1, at 70-72.

decried the demeaning presence of Native-American “mascots” in professional and collegiate sports. As such incidents of cultural insensitivity are repeated over time, they contribute to the cultural subordination of Native communities as “exotic others” tarred with the stamp of racial inferiority.¹⁷⁰

Furthermore, while these inauthentic versions of tradition may initially circulate outside the source community, their deleterious influence would eventually be felt within the community as the pressures of outside technology encroach. We can imagine that even the members of our hypothetical rainforest tribe may visit nearby market towns to trade and encounter recorded music there. Younger members of the tribe may acquire iPods or radios and become exposed to the remix that way. The more tribal members encounter the remixed version of their “Healing Song,” the more likely that a cultural injury will be felt. The ceremonial value of the song would be tarnished by distasteful associations. Its original meanings would be adulterated or even supplanted.

These harmful scenarios are much harder to imagine in the context of the flower-pharmaceutical. The original context in which the shaman used the flower may have been richly imbued with cultural meanings: for example, the time and manner by which the flower was harvested, the ritual incantations recited as it was mashed into a poultice, the ceremony in which the end product was partaken, etc. Yet, all of these cultural connotations would be stripped away as irrelevant. The only cultural knowledge embodied in the

¹⁷⁰ See *id.* at 79; Carpenter et al., *supra* note 1, at 1038, 1101, 1105-10 (discussing the controversy over the use of Native American mascots in sports).

pharmaceutical company's end product would be the bare fact that flower X is associated with therapeutic properties Y.¹⁷¹

Moreover, even the flower itself would have undergone a process of abstraction and refinement as its active ingredients are isolated, purified, and possibly chemically synthesized or manipulated. The end product—a pharmaceutical pill—will typically bear no resemblance to any aspect of the source tradition from which it was derived. In such circumstances, the risk of “contamination” whereby the Western derivative undermines the meaning or value of the original practice seems remote. Harm from dilution or disparagement simply cannot occur without some meaningful association between the original source and end product.¹⁷² Such uses will almost always involve traditional cultural expression, rather than technical knowledge because the process by which TK is used as a technological input, invariably involves abstraction and refinement that renders the original unrecognizable.¹⁷³

¹⁷¹ Such instrumental knowledge is less likely to raise cultural integrity concerns than expressive art-forms that embody esthetic or spiritual values. Such concerns parallel the moral right of integrity in copyright law, whereas moral rights are considered inapplicable in a patent domain and are even disfavored in copyright subject matter such as software where instrumental, rather than esthetic considerations dominate. See Munzer & Raustiala, *supra* note 1, at 70, 93; ROBERTA KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2010).

¹⁷² This principle is firmly established in the analogous context of trademark dilution. Cf. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 102 (2d Cir. 2009) (junior use needs to “call to mind” or evoke the original to dilute).

¹⁷³ Admittedly, we can imagine contexts where traditional knowledge is used in ways that do remain recognizable as a derivative and could thus threaten cultural integrity. Such boundary cases are dealt with below. See *infra* notes 235-37 and accompanying text.

One could speculate about a potential displacement harm if the existence of the purified pill supplants demand for the Shaman's traditional cure and thereby undermines the latter's authority. However, the threat of this occurring seems no greater than that posed by Western medicine generally. Indeed, the validity of the Shaman's flower remedy could well be substantiated by the proven efficacy of its pharmaceutical derivative. Moreover, some may even seek out the Shaman's services specifically for an "original, natural" alternative to the pill. Either way, the community can continue to partake in its ritual flower ceremony, largely unaffected by such outside pressures.¹⁷⁴

Similarly, symbolic objections to the "proprertization" of indigenous knowledge in the form of patent rights, however deeply felt,¹⁷⁵ should not necessarily be cognized as "cultural injuries," without more particularized evidence of harm to the source community.¹⁷⁶ It is undoubtedly true (and indeed

¹⁷⁴ We should resist premising cultural protection on speculative scenarios regarding potential harms. To do otherwise opens the door to "extravagant, unprovable claims of cultural damage." Brown, *supra* note 1, at 220.

¹⁷⁵ See, e.g., Ronald Nigh, 43 *Maya Medicine in the Biological Gaze: Bioprospecting Research as Herbal Fetishism*, 43 CURRENT ANTHROPOLOGY 451, 462 (2002) (suggesting that asserting patent rights over innovation derived from traditional knowledge does violence to indigenous Mayan conceptions of knowledge as an information commons).

¹⁷⁶ Indigenous cultures "have survived five centuries of pestilence, military conflict, and dispossession." Their underlying resilience should not be underestimated. Brown, *supra* note 1, at 220. Accordingly, the law should refrain from turning every conceivable adverse impact into an actionable "cultural injury." Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (holding that disparagement is not legally cognizable as market harm in copyright fair use analysis). The effects of purely symbolic injuries that remain speculative therefore provide scant cause for the law to intervene. Cf. Brown, *supra* note 1, at 220 ("One could argue just as

inevitable) that “Western” conceptions of intellectual property law poorly track traditional understandings within indigenous communities regarding knowledge governance.¹⁷⁷ However, when indigenous activists object to outsiders “owning” indigenous knowledge that “belongs” to a specific community, they mischaracterize the nature of the intellectual property rights at issue. Patent rights only confer a negative right to block use by others of specific innovations that *go beyond* the existing state of the art (in our hypothetical, the pill derived from the shaman’s herbal cure). By definition, such negative rights can have no effect whatsoever on the indigenous communities’ ability to continue their traditional practices because such practice form part of the *existing* art rather than the patentable “improvements” to which the patent claims properly attach.¹⁷⁸ Accordingly, the grant of exclusive patent rights only affects *nontraditional* uses of the knowledge by outsiders. It is therefore difficult to see in the abstract why laws regulating uses *external* to the source community should be deemed to cause cultural injuries within it. Of course, everything is “cultural” in an anthropological sense. Yet, to be

convincingly that petty insults actually promote cultural survival by bringing Indians together in solidarity against the dominant culture”). For an example of a “more particularized” case where propertization objections may have greater force, *see infra* note 179.

¹⁷⁷ As noted, such understandings are complex and diverse in nature, varying widely between and even within indigenous communities and defying any facile attempt to catalogue them. *See supra* notes 146-50 and accompanying text.

¹⁷⁸ Admittedly, prior to the America Invents Act (AIA), U.S. patent law allowed a loophole that permitted patents covering extant knowledge in cases where the prior uses occurred outside U.S. territory in the absence of written documentation. The shift to a global standard of novelty ushered by the AIA has foreclosed this loophole. The need for further procedural safeguards in the form of source disclosure requirements can be debated. *Cf.* TK Treaty, art. 4bis.

actionable in the traditional knowledge context, the definition of “cultural injuries” should arguably remain focused on uses that more directly threaten the indigenous source communities’ cultural identity and traditional practices.¹⁷⁹

Furthermore, there is a strong policy interest in unlocking the therapeutic benefits of ethnobotanical resources such as the flower for public health reasons. Given the global interest in advancing medical science, we should hesitate before subjecting use of the flower to the potential roadblocks and delays under the “thick governance” dictated by the cultural integrity rationale.¹⁸⁰ By contrast, societal interest in

¹⁷⁹ A different case may be presented where symbolic injuries to an indigenous culture’s self-conception arise from propertization of *physical* resources that are central to that indigenous community’s core identity. See Gregory K. Schlais, *The Patenting of Sacred Biological Resources, The Taro Patent Controversy in Hawaii: A Soft Law Proposal*, 29 U. HAW L. REV. 581, 597-602 (2007) (describing objections by Native Hawaiians to patents on taro, the staple food plant of the Hawaiian people and one deeply embedded in the Native Hawaiians’ foundational mythology as the “elder brother” of mankind). Although the same defense could be offered in such cases—namely, that the patent rights only cover novel forms of the resource and not the traditional source material (taro, in the Hawaiian case)—the “improved” taro would be outwardly indistinguishable from its traditional form, unlike the pill versus flower example. Moreover, the symbolic force of the objection here is derived not from an objection to propertization in the abstract, but rather pertains to propertization of a specific, symbolically salient resource. In such extreme cases, an argument could be made for denying patent rights under patent law’s “moral utility” doctrine in jurisdictions where the source community resides in number. A global patentability bar, however, seems unwarranted in the same way that objections by devout Hindus to the slaughter of cows deserve moral credence in India, but less so outside it.

¹⁸⁰ Cf. *Moore v. Regents of Univ. of California*, 51 Cal. 3d 120, 124 (1990) (declining to grant property rights in human cells because science must not

commercializing the melody appears far less pressing. As the following section elaborates, such extrinsic policy interests in facilitating access to TK/TCE weighs far more heavily with respect to technical know-how than cultural expression.

In sum, because cultural expression is typically exploited in a manner in which the original source material remains recognizable, while technical knowledge is generally not, the possibility of harmful contagion mainly exists in the former case (the melody). Moreover, extrinsic policy interests militate against propertizing knowledge in the latter case (the flower). This suggests that the regulation of authenticity under a cultural integrity rationale should be confined to a treaty dealing solely with TCE/folklore: *i.e.*, the melody, not the flower.

2. Economic Justice

By contrast, the opposite outcome obtains under the economic justice rationale: The case for benefit-sharing in our misappropriation hypothetical is far stronger with respect to the flower pharmaceutical than the remixed melody. As we will see, in the absence of a legally compelled mechanism for compensation, the distribution of benefits from commercial exploitation of traditional knowledge will be sharply skewed. Moreover, extrinsic public policy interests in encouraging bioprospecting reinforce the necessity of benefit-sharing as a practical necessity to ensure access to biodiverse habitats. These concerns weigh less heavily in the context of cultural expression, where the alignment of economic interests is likely

be impeded); *Washington Univ. v. Catalona*, 490 F.3d 667, 670 (8th Cir. 2007) (same).

to be less one-sided and there are no comparable public policy interests in ensuring access.

a. Skewed Distribution of Benefits

Economic justice rationales begin with the principle that indigenous communities deserve to share in the economic benefits derived from their traditions. Where others exploit indigenous knowledge or cultural expression commercially, an obligation to ensure benefit-sharing arises. Again, one can contest the normative basis for such a duty.¹⁸¹ For our purposes, however, the key point is that while this unjust enrichment principle applies, in theory, to exploitation of both traditional culture and knowledge, there is a clear disparity in the *degree* to which such concerns arise; simply put, the need to provide an extrinsic compensation mechanism is far more compelling with respect to shaman's flower remedy than with respect to the remixed melody.

First, the economic stakes are much greater for bioprospecting of patentable knowledge than for cultural appropriation. With existing drug development pipe-lines running dry, pharmaceutical companies are keenly interested in exploiting global bioresources as a source of patentable innovation.¹⁸² Anywhere from seventy to eighty percent of all drugs are derived from natural sources.¹⁸³ Traditional knowledge provides a valuable short-cut to locating promising

¹⁸¹ Munzer & Raustiala, *supra* note 1, at 77-78.

¹⁸² See David J. Newman & Gordon M. Cragg, *Natural Products as Sources of New Drugs over the 30 Years from 1981 to 2010*, NIH PUBLIC ACCESS (Mar. 23, 2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3721181/pdf/nihms356104.pdf>.

¹⁸³ *Id.*; Heald, *supra* note 68, at 531; Chen, *supra* note 74, at 3.

compounds.¹⁸⁴ Major pharmaceutical companies have divisions dedicated to developing biologically derived products and have invested millions in bioprospecting initiatives that seek to systematically explore and harness the latent potential of exotic biota.¹⁸⁵

By contrast, their counterparts in the creative industries have not shown a comparable interest in commercially exploiting traditional cultural expression. Most knowledge of exotic cultures tends to come from field work by anthropologists who nowadays are governed by strict ethical codes not to exploit their subject's intellectual property.¹⁸⁶ Indeed, it is notable that the two of the best-known examples of cultural appropriations of indigenous music, Enigma's "Return to Innocence" and Deep Forest's, "Sweet Lullaby," were remixes of preexisting recordings released by

¹⁸⁴ MONGABAY.COM (Mar. 20, 2007), <http://news.mongabay.com/2007/0320-drugs.html>; Chen, *supra note* 63, at 7. By observing the shaman's flower remedy, a Western prospector learns two valuable pieces of information: (1) the flower likely contains some bio-active property that may be therapeutic; and (2) consumption or application of the remedy is relatively safe for human. The circumstances in which the shaman applies this remedy may offer further clues as to its efficacy. This allows researchers to zero-in immediately on the testing the specific properties of the flower, as opposed to assaying random flora gathered from the rainforest in searching blind akin to the proverbial needle in a haystack. Heald, *supra note* 68, at 533.

¹⁸⁵ See Michele Zebich-Knos, *Preserving Biodiversity in Costa Rica: The Case of the Merck-INBio Agreement*, J. ENVTL & DEV 181-86 (June 1997), <http://www.bio-nica.info/biblioteca/Zebich1997InBioMerck.pdf>; Shaman Pharmaceuticals; Matthew Rimmer, *Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge*, 7 S. Cross U. L. Rev. 1 (2003).

¹⁸⁶ See CODE OF ETHICS OF THE AMERICAN ANTHROPOLOGICAL ASSOCIATION III.A.6 (2009/1998), available at https://shahttp://www.aaanet.org/assets/documents/research/collections_management/AAA-Ethics-Code-2009profdev/ethics/upload/ethicscode1998.pdf.

ethnomusicologists.¹⁸⁷ Despite the success of these singles, world music artists have not exactly rushed to the rainforest to track down more source materials. And those who do work with indigenous musical traditions, such as Ry Cooder or Paul Simon, typically collaborate with local artists and share the proceeds with them.¹⁸⁸

The amount of revenues per transaction is also likely to be orders of magnitude greater. A blockbuster drug derived from the shaman's medicinal flower could yield revenues in the hundreds of millions, if not billions of dollars.¹⁸⁹ At best, the remixed melody might bring revenues in the millions, but more likely much less.¹⁹⁰ And there are far fewer instances of such high value profiteering involving commodified folklore compared to the bioprospected knowledge. A handful of high-profile examples—Deep Forest, Enigma, the aboriginal carpet case—get cited over and over again in the literature. While indigenous handicrafts and textiles are appropriated more often, such sales typically target low value sectors of the

¹⁸⁷ See Riley, *supra* note 71, at 176.

¹⁸⁸ See *infra* notes 185-86 and accompanying text.

¹⁸⁹ See, e.g., FeiFei Jiang, *The Problem with Patents*, HARV. INT'L REV., (Dec. 18, 2008), <http://hir.harvard.edu/global-education/the-problem-with-patents> (stating that the drugs extracted from Madagascar's rosy periwinkle generated about \$200 million in revenue); Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT'L & COMP. L. 785, 795-96 (2003) (Hoodia cactus appetite suppression drug sold to a pharmaceutical company for \$21 million). The most valuable pharmaceuticals can earn billions: for example, total sales of Lipitor throughout its patent term topped \$131 billion. See Jeff Bailey, *Pfizer's Projected \$3B Drug: Name Will Shock You*, FORBES (July 9, 2013), <http://www.forbes.com/sites/ycharts/2013/07/09/pfizers-projected-3b-drug-name-will-shock-you/>.

¹⁹⁰ See Riley, *supra* note 71, at 176 (stating Enigma's "Return to Innocence" sold 5 million copies worldwide).

market (e.g., tourist souvenirs).¹⁹¹ Such small-scale transactions often fly below the radar and could be costly to track for compensatory purposes.

Furthermore, the distribution of the proceeds is likely far more skewed with respect to the flower pharmaceutical than the remixed melody. Patented innovation based on traditional knowledge seldom results in benefits flowing back to the source communities. Once the Western appropriator gains the relevant knowledge, he can commercially exploit it without any further need to involve the source community. Accordingly, the commercial exploitation of patentable traditional knowledge will typically inure to the sole benefit of outsiders.¹⁹² Pfizer would make mega-millions from the flower, and the shaman and his tribe would get nothing. Such stark asymmetry in the distribution of benefits makes concerns over economic justice especially glaring.

By contrast, where outsiders appropriate and exploit traditional cultural expression, the source communities have a chance to reap significant ancillary benefits through a variety

¹⁹¹ See Kuruk, *supra* note 125, at 781.

¹⁹² In some cases, if the active compound cannot be synthesized artificially, commercial exploitation will require physically obtaining the relevant bio-resource (the flower in our hypothetical) in commercial quantities. This could provide an opportunity for the source community to share in the benefits of commercialization by acting as suppliers. Cf. *Using Traditional Knowledge to Revive the Body and a Community*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <http://www.wipo.int/ipadvantage/en/details.jsp?id=2599> (last visited Nov. 8, 2014). However, even here, the bio-resource can often be found or cultivated elsewhere, and doing so may be cheaper and more reliable than having to access supplies from a remote rainforest. Furthermore, the revenues generated from supplying such raw inputs likely account for only a small fraction of the value of the end product.

of avenues. Movies showcasing an exotic cultural tradition can stimulate tourist demand to visit the source region, providing a source of employment and follow-on spending that might, for example, stimulate sales of handicrafts by local artisans. Musical recordings incorporating “world music” elements often tap the talents of local performers who garner royalties from record sales and may go on to successful concert careers of their own. The international success of the South African group, Ladysmith Black Mambazo, in the wake of Paul Simon’s *Graceland* album provides a case in point. Simon was accused of unfairly profiting from South Africa’s traditional Zulu music, but by doing so, he gave the music international exposure that opened the door to many other successful recording/concert careers by local musicians.¹⁹³ Ry Cooder’s *Buena Vista Social Club* provided a similar boost to the Cuban artists featured therein.¹⁹⁴

Even *inauthentic* presentations that show traditional culture in a less-than-favorable light can generate valuable publicity benefits by putting a region on the map, as *Borat* did for Kazakhstan and Bram Stoker’s *Dracula* did for

¹⁹³ See Michael Giltz, *Paul Simon’s Graceland Turns 25 – Part Two: The Cultural Impact*, THE HUFFINGTON POST, (June 9, 2012, 2:51 AM), http://www.huffingtonpost.com/michael-giltz/paul-simons-graceland-tur_b_1582897.html.

¹⁹⁴ See Michele Norris, ‘*Mambo Sinuendo*’: Ry Cooder Returns to Cuba, NPR MUSIC (Jan. 27, 2003, 12:00 AM), <http://www.npr.org/2003/01/27/941610/mambo-sinuendo-ry-cooder-returns-to-cuba>. British Celtic folk musicians dabbling in world music had a similarly salutary effect on Baka (pygmy) musicians in Cameroon. See *Who are the Baka Pygmies? And what are they doing in Gateshead*, BBC ROOTS MUSIC (Sept. 14, 2014), http://www.bbc.co.uk/tyne/content/articles/2006/04/07/roots_baka_feature.shtml.

Transylvania.¹⁹⁵ Similarly, sales of inauthentic versions of indigenous designs can spark tourist interest in exploring the authentic traditions. Local artisans and performers enjoy an inherent advantage in capitalizing on such exposure. By representing themselves as “authentic” suppliers of the source tradition, they can often extract branding premiums and cater to higher end consumers.¹⁹⁶ Indeed, the trademark protection against misrepresentation of origins contemplated in Part I would augment the value of pursuing such strategies.

Such implicit compensation mechanisms arguably reduce the need for extrinsic intervention. Indeed, imposing further obligations might even prove counter-productive. After all, a benefit-sharing obligation acts as a *de facto* tax on the exploitation of traditional knowledge, measured both in monetary terms and increased transaction costs. By making such activities less profitable, it would lead to less marginal investment. Where the amounts at stake are high and distribution of benefits severely skewed, as with pharmaceuticals, the virtues of benefit-sharing far outweigh

¹⁹⁵ See *Cultural Learnings of Kazakhstan: If you can't beat Borat, then borrow his brand*, THE ECONOMIST (Nov. 9, 2006), <http://www.economist.com/node/8134147>; RADU R. FLORESCU & RAYMOND MCNALLY, DRACULA, PRINCE OF MANY FACES: HIS LIFE AND HIS TIMES (1990); Shaun Turton, *In the Blood*, SLATE (Aug. 29, 2014), http://www.slate.com/articles/news_and_politics/roads/2014/08/bram_stoker_s_great_grandnephew_wants_to_attract_visitors_to_the_remote.html).

Such exposure can then provide an opening for more authentic explorations of the source culture just as Bram Stokers' Dracula sparked interest in the historical figure by that name. Cf. Kim Griggs, *Maori Take on Hi-Tech Lego Toys*, BBC NEWS (Oct. 26, 2001), <http://news.bbc.co.uk/2/hi/asia-pacific/1619406.stm> (recognizing “a whole generation of kids around the world that get to know and understand about things Maori” thanks to Lego's featuring of Maori words in its Bionicle game).

¹⁹⁶ See Sunder, *supra* note 55, at 110-11.

such costs. However, in the cultural expression context where the amounts at stake are lower and the distribution of benefits less skewed, deterring commercialization could do more harm than good. Perhaps a few scofflaws would be forced to pay up, but the increased costs would diminish the incentive to commercialize. If the market already provides indirect sources of compensation, the source community could lose more than it gains.¹⁹⁷

Similar disparities can be seen when it comes to the ability of indigenous communities to commercialize their traditions on their own: Our hypothetical tribe would likely find it easier to commodify their “healing song” than they would the shaman’s flower remedy. An indigenous tribe in the Amazon lacks the scientific and technological capabilities to transform their ethnobotanical knowledge into a commercially valuable form of intellectual property. One needs advanced laboratories to isolate active ingredients and optimize their therapeutic properties. Procuring patents is an expensive and technically demanding process. Further funding and organizational capacity is required to shepherd a drug through clinical trials to obtain regulatory approval. The tribe cannot easily delegate such tasks to others. Again, capacity constraints loom as obstacles—indigenous peoples and developing countries generally lack access to scientists, technologies, patent lawyers, venture capitalists, and drug

¹⁹⁷ Indeed, the more appropriate policy response of countries seeking to preserve cultural diversity may be to encourage external investment through subsidies. See Sean A. Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 *NW. J. INT’L L. & BUS.* 63, 126 (2011).

companies. Indeed, the very concept of such mechanisms may be unfamiliar.¹⁹⁸

Analogous obstacles to commercializing cultural expression/folklore do exist.¹⁹⁹ However, digital technologies have greatly democratized cultural production and lowered the barriers to entry. The kinds of production capabilities that used to require multi-million-dollar studio equipment can now be achieved using inexpensive consumer-class equipment.²⁰⁰ And the internet provides a plethora of ready-made marketing and distribution platforms. As a result, home-grown culture industries have proliferated across the developing world.²⁰¹ Indigenous peoples increasingly have the means to project their voices onto the global stage.²⁰² Conversely, globalization has whetted the appetite of audiences to look beyond mainstream popular culture. Demand for traditional cultural expression, while still a niche sector, has grown steadily, as consumers seek both to explore exotic cultural traditions and rediscover

¹⁹⁸ See Chander & Sunder, *supra* note 1, at 1351-53.

¹⁹⁹ See Tsosie, *supra* note 1, at 313 (describing unequal access to media that impedes Indian tribes from commercializing their stories).

²⁰⁰ Indeed, even an iPhone can shoot HD-video.

²⁰¹ See Ana Santos, *Nurturing Creative Industries in the Developing World: The Case of Alternative Systems of Music Production and Distribution*, 21 MICH. ST. INT'L.L. REV. 601 (2013); Pager, *infra* note 305, at 242-44 (surveying emerging creative industries across the developing world). Nigeria's Nollywood film industry entirely digitally based—only two decades old and already ranks in the top three film industries world-wide based on annual production and global audience); See Pager, *supra* note 1, at 1851-52 (noting that depictions of traditional African culture pervade Nollywood movies and account for a significant part of their audience appeal).

²⁰² Sean A. Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?*, in TRANSNATIONAL CULTURE IN THE INTERNET AGE 267-273 (Sean A. Pager & Adam Candeub eds., 2012).

their own ancestral heritage. Efforts to meet such demand through indigenous “self-commodification” are already bearing fruits in many different contexts.²⁰³

The ability of indigenous communities to “self-exploit” their cultural traditions more readily than they can their technical know-how is also accentuated by differences in the applicable IP regimes. Cultural expression is governed by copyright law, which imposes far less exacting barriers to entry than the patent regimes that govern technical innovation. Only a modicum of originality is required for copyright, and protection is immediate upon fixation, without further formalities.²⁰⁴ Indigenous peoples and developing countries can therefore protect the commercialized versions of their creative traditions under these existing IP regimes without recourse to TK rights. Many have taken steps to avail themselves of such protections to bolster commercial development of their folkloric assets.²⁰⁵ Indeed, existing IP regimes may offer protection against misappropriation even without such proactive measures. For example, the Western interloper in our hypothetical example has likely infringed the tribe’s performance rights by making (and later remixing) a sound recording of the tribe singing the “healing song.”²⁰⁶ In fact, in several of the often-cited cases of foreign folklore misappropriation, partial remedies were furnished under copyright or neighboring rights regimes.²⁰⁷

²⁰³ See *id.* at 274, 297, 328-331, 336-37; Madhavi Sunder, *Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROBS. 97, 110-11 (2007).

²⁰⁴ See Pager, *supra* note 305, at 241-42.

²⁰⁵ See Sunder, *supra* note 203, at 110; Pager, *supra* note 305, at 244-45.

²⁰⁶ See Rome Convention Article 7, 10.

²⁰⁷ See Richard F. Roper, *Settle Lawsuit Claiming Their Original Composition Was Stolen; They Will Now Set Up Foundation*, BUSINESS

Finally, raising the baseline of TK rights would afford indigenous communities additional leverage to extract payments. Strengthened protection against unfair competition, for example, would facilitate efforts to exploit the marketing cachet of indigenous producers, by warding off inauthentic competitors who dilute their brand. Moreover, while the “thick governance” implicated by a cultural integrity regime may not be ideally suited to facilitating commercialization, such rights would further strengthen the bargaining position of source communities vis-à-vis misappropriators. Based on the conclusions of the previous section, such rights are better suited to cultural expression than to technical know-how, reducing concerns over economic injustice in the context of the former.²⁰⁸

In sum, the applicability of the economic justice rationale depends on the extent to which indigenous communities can reap benefits from commercialization on their

WIRE (June 23, 1999) <http://web.archive.org/web/20091027110755/http://www.geocities.com/enigmala/r/article4.html> (noting that Enigma notably ran afoul of performers’ rights with its “Return to Innocence” single), <http://web.archive.org/web/20091027110755/http://www.geocities.com/enigmala/r/article4.html>; Matt Harding, *Where the Hell is Afunakwa*, YOUTUBE (Dec. 2, 2007), <http://www.youtube.com/watch?v=BiHTh6NnoWo> (arguing that Deep Forest’s hit song, “Sweet Lullaby,” may have similarly involved a recording of an identifiable singer from the Solomon Islands, which would trigger a similar claim); <http://www.youtube.com/watch?v=BiHTh6NnoWo>; Rimmer, *supra* note 92, at 144 (stating that *Millpurrruru*, the aboriginal carpet case, was also resolved successively under copyright law, with the judge authorizing a collective award of damages to reflect the communal nature of the injury).

²⁰⁸ The caveat is that the following section suggests that protection based on cultural integrity should be circumscribed geographically, confined largely to the local or regional context. That said, such localized markets will likely furnish the largest source of revenues. *See infra* part III.B.

own. The lack of built-in benefit sharing mechanisms in the context of technical knowledge (the flower remedy) makes the case for extrinsic compensation far more urgent there than it does in the context of cultural expression (the melody). This is not to deny that uses of traditional cultural expression would go uncompensated in some cases in the absence of an extrinsic compensation mechanism. However, the benefits of enacting such a mechanism have to be balanced against the not-inconsiderable costs of implementing such a scheme. This cost-benefit equation is far more compelling in the technical knowledge context where the asymmetric nature of baseline distributions of benefits is so much more stark.

b. Extrinsic Policy Interests

The normative case for benefit-sharing in the technical TK context is bolstered by extrinsic interests rooted in global health and environmental policy. Indeed, a pragmatic case can be made for *ex post* benefit-sharing based on these policy interests even for those who reject *a priori* claim to TK rights. As with the economic justice rationale, these global interests have asymmetric implications. They weigh heavily in favor of compensating for use of technical know-how such as the flower-pharmaceutical, but do not apply (or apply with far less force) in the context of cultural commodification.

These policy interests begin with widespread recognition of the latent value harbored within nature's laboratory. Millions of years of evolution across diverse habitats have led to a plethora of exotic flora and fauna whose distinctive adaptations often hold valuable, potentially life-

saving secrets.²⁰⁹ Big Pharma may be salivating at the potential profits to be made. Yet, the benefits of bioprospecting are more than commercial: Humanity as a whole stands to benefit from unleashing the therapeutic and/or other useful properties of these biological resources. Many existing Western medicines have been derived from natural sources, and many more remain to be discovered.²¹⁰ Nor is the value of such bio-resources limited to medical applications. Other biosciences will advance as well.²¹¹

The largest concentrations of such unexplored flora and fauna are found in biodiverse habitats such as the planet's equatorial rainforests, which are also home to many indigenous communities. Such communities are more than passive bystanders in the bioprospecting enterprise. The traditional knowledge they harbor can afford scientific researchers valuable leads by pointing to specific bio-resources in the surrounding habitat whose useful properties have been established over generations of trial and error.²¹² Native know-how as exemplified by the shaman's flower remedy thus holds clear potential value to medicinal science. Accordingly, a strong public interest exists in facilitating access to it.

To unleash these benefits invariably requires costly research and development by scientists, companies, and

²⁰⁹ Examples range from adapting spider silk to improve body armor to copying ant behavior to program cooperative robots.

²¹⁰ Chen, *supra* note 74, at 7.

²¹¹ See, e.g., Kenneth G. For example, global climate change has made the development of biofuels of pressing interest. Kenneth G. Cassman, *Climate Change, Biofuels, and Global Food Security*, IOPSCIENCE (2007), <http://iopscience.iop.org/1748-9326/2/1/011002> (contending that global climate change has made the development of biofuels of pressing interest).

²¹² See *supra* 174-78 and accompanying text.

investors located outside the source communities.²¹³ Pharmaceutical companies may spend up to a billion dollars financing the development of a new drug, which they hope to recover later through exclusive sales under patent.²¹⁴ In the shaman's flower hypothetical, Pfizer may ultimately make billions from marketing the drug. Yet, the therapeutic properties of the new medicine will potentially benefit the entire world.²¹⁵

At the same time, source communities and developing countries are justifiably unhappy about the prospect of pharmaceutical companies reaping blockbuster profits from "their" traditional knowledge and bio-resources, while they get nothing.²¹⁶ And yet, as we have seen, such skewed distribution of benefits remains the norm. Once the pharmaceutical companies have extracted the requisite knowledge, they are under no compulsion to share the proceeds or even to disclose the sources from which their innovation was derived.

Attempts to enact national laws calling for benefit-sharing have proved unavailing, because such laws cannot be enforced extra-territorially. Instead, the only point of control that source communities have over bioprospectors is restricting access. By restricting physical access both to the natural

²¹³ See *supra* text accompanying note 190 (explaining why self-exploitation of indigenous know-how is impractical).

²¹⁴ Costs include both R & D, clinical trials, marketing, etc.

²¹⁵ Or more precisely: anyone within the ambit of allopathic healthcare systems—which may or may not include members of the source community.

²¹⁶ Moreover, as we will see, their claims to sovereignty over bio-resources within their territory have been explicitly recognized in the Convention on Biodiversity, a widely accepted international treaty that contains an explicit benefit-sharing obligation.

habitats and traditional communities within their borders, such governments seek to compel pharmaceutical companies and other bioprospectors to negotiate *ex-ante* benefit-sharing agreements that will govern revenues from any innovation arising from the prospecting within the national territory.²¹⁷ In our rainforest hypothetical, control over access to the flower and the shaman is thus used up front to compel an interest in the patented drug developed at the back-end.

The problem is that such bioprospecting laws are a poor fit for the problem at hand. Because governments cannot easily predict who is engaged in bioprospecting, they have every incentive to cast a wide net. Such laws restrict access to biodiverse regions and control exports of bio-diverse materials. They compel foreign researchers to engage in cumbersome disclosures and to enter into contractual pre-commitments.²¹⁸ Developing countries increasingly enforce these rules with a paranoid mentality, arresting scientists engaged even in purely academic studies.²¹⁹ However, without the ability to enforce

²¹⁷ As valid contracts, such agreements will be generally enforceable overseas. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972).

²¹⁸ Scientists are presumptively deemed potential bioprospectors—even if they have no commercial intent (hard to establish since opportunistic change in behavior is possible).

²¹⁹ See Larry Rohter, *As Brazil Defends Its Bounty, Rules Ensnare Scientists*, N.Y. TIMES (Aug. 28, 2007), <http://www.nytimes.com/2007/08/28/science/28biop.html?pagewanted=all>; <http://www.nytimes.com/2007/08/28/science/28biop.html?pagewanted=all>. See Bryan Walsh, *Indonesia's Bird Flu Showdown*, TIME (May 10, 2007), <http://content.time.com/time/health/article/0,8599,1619229,00.html> (depicting Indonesia's refusal to share sample of bird flu virus despite pressing global epidemic). See <http://content.time.com/time/health/article/0,8599,1619229,00.html>; Malaka Rodrigo, *Biopiracy on the Rise*, THE SUNDAY TIMES (Feb. 24, 2013),

benefit-sharing obligations transnationally, such regulators have every reason to err on the side of over-enforcement, which inflicts considerable collateral damage to scientific research.

In other words, we are presently at an impasse—an outcome that is suboptimal for either side due to asymmetrical interests and capacities. Perpetuating this game of “prisoner’s dilemma” could have potentially calamitous consequences. In one notorious instance, Indonesian public health officials refused to release samples of the Bird Flu virus collected from their territory to Western researchers absent an agreement to share the proceeds from any commercial vaccines derived from the sample.²²⁰ Holding the response to such a global health pandemic hostage to such petty dickering hardly seems the recipe for optimal policy. Yet, this is far from the only example of such hold-ups in an urgent public health context.²²¹ Meanwhile, biodiverse habitats are being lost to logging and industrial agriculture at an alarming rate.²²²

<http://www.sundaytimes.lk/130224/news/biopiracy-on-the-rise-34295.html>; <http://www.sundaytimes.lk/130224/news/biopiracy-on-the-rise-34295.html>. See Rebecca Mahurin, Adam L. Lunceford & Erich E. Veitenheimer, *Bioprospecting A Hot Spring of Legal Issues*, 9 ABA SCITECH LAW 4, 7 (2012) (noting that India’s bioprospecting law imposes onerous registration and disclosure requirements).

²²⁰ See Peter Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 ARIZ. ST. L. J. 1563, 1605-06 (2014), ^Walsh, *supra* note 219.

²²¹ See *id.*; David P. Fidler, *Who Owns MERS? The Intellectual Property Controversy Surrounding the Latest Pandemic*, FOREIGN AFFAIRS (June 7, 2013), <http://www.foreignaffairs.com/articles/139443/david-p-fidler/who-owns-mers>.

²²² Heald, *supra* note 68, at 532; Jim M. Chen, *Bioprospect Theory*, 7 AKRON INTELL. PROP. J. 19, 20-21 (2014).

It would be far better to have a binding international framework in place to defuse benefit-sharing demands in advance, allowing bioprospecting and other exchanges of bio-resources to proceed unhindered. To defuse mistrust and minimize transaction costs, such a regime should function in an efficient, transparent manner that prioritizes prompt payments and avoids protracted litigation by employing a liability rule based on objective criteria.²²³ In other words, we would want precisely the sort of streamlined, liability regime posited under the economic justice rationale in Part I.

Such a framework would be a win-win solution for everyone. For pharmaceutical companies, the added costs of such benefit-sharing would be well worth avoiding the uncertainty and asymmetric responses that characterizes the current prospecting environment. Scientific researchers would benefit from unrestricted access to biodiverse habitats. Source communities would be rewarded for exercising responsible stewardship over their environmental and cultural heritage. Governments would gain the security of a transnational commitment to enforce benefit-sharing. And the whole world stands to gain from the innovation thereby unleashed.

In fact, such an international benefit-sharing framework already exists. The Convention on Biodiversity (CBD), an international treaty contains an explicit obligation to share the benefits of commercialized bio-resources and/or traditional knowledge with the source communities residing in the regions

²²³ Such “material access agreement” typically also provide for a payment of a nominal sum up front, but the real money is paid only when revenues generated, as a percentage royalty. *Cf.* NIH model agreements that vary percentages based on source of knowledge and resources.

from which the resources were first taken.²²⁴ Although the obligations under the CBD impose a legal duty binding on most of the world community,²²⁵ its terms remain imperfectly implemented in practice; hence, the demand by source communities for additional rights under a TK regime. That said, substantial work has been done already to implement benefit-sharing under the CBD, upon which a prospective TK regime could piggyback. Indeed, the Nagoya Protocol on Access and Benefit-Sharing gained sufficient signatories and went into effect just this year.²²⁶ Incorporating a benefit-sharing duty into international IP law would bring these two international regimes into harmony, as countless commentators have urged and as the WTO's Doha Declaration anticipates.²²⁷

²²⁴ See Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818 (1992) [hereinafter CBD]. The Convention recognizes that these countries have a sovereign interest in controlling access. It also provides that indigenous communities have a right to benefit-sharing for use of bio-resources and of associated TK. *Id.* at 8(j).

²²⁵ 157 countries have ratified the CBD. *List of Parties, CONVENTION ON BIOLOGICAL DIVERSITY*, <http://www.cbd.int/information/parties.shtml#tab=0>. U.S. has signed, but not ratified. In practice, US government says it acts consistently with the CBD. The National Institute of Health requires benefit sharing clause be included within its standard material transfer agreements governing federally funded research.

²²⁶ Press Release, United Nations Decade on Biodiversity, Governments Fulfill their Commitment: Access and Benefit-Sharing Treaty Receives Required Number of Ratifications to Enter into Force (July 14, 2014), available at <http://www.cbd.int/doc/press/2014/pr-2014-07-14-Nagoya-Protocol-en.pdf>.

²²⁷ See Jonathan Curci, *The New Challenges to the International Patentability of Biotechnology: Legal Relations Between the WTO Treaty on Trade-Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity*, 2 INT'L L. & MGMT. REV. 1, 4 (2005); WTO Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, Fourth Session, Doha, Nov. 20, 2001, WT/MIN(01)/DEC/2.

The Convention on Biodiversity also points to an additional policy ground for favoring benefit-sharing: protecting the environment. By providing a mechanism for source communities to share in the value extracted from the bio-diverse habitats in which they reside, the Convention provides an incentive for such communities to preserve such fragile and endangered habitats, stewarding them responsibly.²²⁸ Wilderness preservation also figures prominently in international efforts to mitigate global climate change.²²⁹ These environmental goals thus dovetail with the public health imperatives, further underscoring the benefits of implementing a benefit-sharing regime.

By contrast, the pragmatic case for global benefit sharing, where traditional cultural expression is commercially exploited, seems less persuasive. The policy imperatives described above apply only to technical know-how, not cultural appropriation. The Convention on Biodiversity covers traditional knowledge only in so far as it pertains to the utilization of bio-resources. It does not cover TCE/folklore per se. Nor is there the same pressing global imperative to resolve an impasse over cultural commodification. As noted, there is no concerted effort to extract cultural resources comparable to

²²⁸ See Heald, *supra* note 68, at 533 (“[T]he bioprospecting value of certain genetic resources could be large enough to support market-based conservation of biodiversity”).

²²⁹ Murray Collins & Naomi Hicks, *What’s Redd and will it Help Tackle Climate Change?*, THE GUARDIAN (Dec. 19, 2012), <http://www.theguardian.com/environment/2012/dec/19/what-is-redd-climate-change-deforestation> (describing global initiatives to prevent deforestation).

bioprospecting.²³⁰ Nor have countries implemented equivalent regulatory controls at the national level.²³¹

More generally, the underlying policy interests in the cultural context rank lower among global priorities. World music lovers may welcome cross-pollinating albums such as *Graceland*. However, it is hard to argue that the global interest in encouraging this kind of cultural innovation stands on a par with the development of life-saving medicines and other useful technologies. Similarly, global policy-makers have recognized the value of preserving cultural diversity, which many analogize explicitly to the global interest in conserving biodiversity. Yet, such efforts have not assumed nearly the same policy priority as their environmental analogues.²³² Furthermore, given the ability of indigenous communities to benefit from commodification either indirectly through ancillary revenues or directly through self-commodification, the need for an extrinsic benefit-sharing mechanism in the cultural domain seems less than compelling.

A decision to forgo mandatory benefit-sharing for cultural commodification would disappoint global activists and

²³⁰ See *supra* 178-79 and accompanying text.

²³¹ Indeed, while many countries have asserted legal claims to their national folklore, such laws tend to go unenforced. See Susanna Frederick Fischer, *Dick Whittington and Creativity: From Trade to Folklore, from Folklore to Trade*, 12 Tex. Wesleyan L. Rev. 5, 30 (2005); see also Sean A. Pager, *Folklore 2.0: Preservation Through Innovation*, 2012 Utah L. Rev. 1835, 1874 (2012).

²³² The UNESCO Convention on Cultural Diversity treaty is largely hortatory and contains no analogous legal duty to compensate for cultural appropriation. Nor has there been any sustained effort to build on the UNESCO Diversity Convention through follow-on agreements akin to the Nagoya Protocol.

allow some uses of indigenous expression to go entirely uncompensated. Yet, the costs of implementing a global benefit-sharing regime are not trivial.²³³ Given the availability of the implicit benefit-sharing mechanisms described above as well as the not unusual prospect of voluntary payments by appropriators,²³⁴ these costs may not be warranted. The global resources and institutional capital required would arguably be better invested in capacity-building initiatives that enhance indigenous capabilities to commodify their traditions on their own terms.

To summarize the analysis thus far, we can see fairly sharp asymmetries in the normative interests implicated by the misappropriation of technical knowledge and cultural expression, respectively. Misappropriation of technical knowledge is unlikely to raise much in the way of cultural integrity concerns, because such knowledge will typically be extracted from the traditional cultural context and divested of cultural meaning. However, economic justice concerns are likely to be highly salient in this context, presenting a strong case for benefit-sharing. This case is further bolstered by extrinsic policy interests in global health and environmental sustainability, both of which favor compensating source communities for use of their knowledge and bio-resources.

²³³ Many of these costs flow from the often fuzzy boundaries associated with membership of indigenous communities. The scheme would have to define under what circumstances commercial use of indigenous traditions would trigger benefit-sharing obligations and to whom the payments should be made. The fluid nature of cultural identities and cultural boundaries make such determination far from a simple matter. *See* Brown, *supra* note 1, at 111, 225.

²³⁴ *See infra* note 255.

Conversely, when it comes to traditional cultural expression, the reciprocal analysis obtains. Concerns over cultural integrity dominate in this context. By contrast, economic justice concerns are fairly attenuated, given the ability of source communities to derive benefits from commercialization even in the absence of a formal benefit-sharing regime. Moreover, the extrinsic policy interests do not apply here (or apply with much less force).

Accordingly, by tailoring protection according to the interests most salient in each domain, we can exploit these asymmetries to divide and conquer: When it comes to technical know-how, we should prioritize economic justice and implement a streamlined, *ex post* benefit-sharing regime to compensate source communities for their knowledge. When it comes to cultural expression, we should prioritize cultural integrity and employ the more intrusive “thick governance” required to regulate authentic usage of TCE/folklore. By focusing each regime accordingly, we avoid the normative conflicts that would otherwise arise from pursuing both cultural integrity and economic justice simultaneously.

Some may object, however, that the above framing elides difficult boundary cases. By applying the template of a pharmaceutical company, we assumed that the use of technical TK occurs in a derivative form, whose final product—a pill—bears no resemblance to the source materials. As a practical matter, pharmaceuticals are by far the biggest value item derived from TK, and the focus of bioprospecting concerns. Therefore, crafting a rule around this paradigmatic case has value in and of itself. Yet, the possibility of boundary cases that blur the distinctions between TK and TCE usage cannot be

denied. Some forms of technical know-how can be used in more or less their original form.²³⁵ Some uses may also incorporate expressive elements that have strong cultural significance to their source community.

For example, yoga is a practice with proven therapeutic benefits. As such, it could be deemed a form of Indian traditional knowledge. At the same time, traditional yoga practice is also infused with culturally expressive aspects whose integrity could be jeopardized by non-traditional adaptations. One solution would be to simply accept that yoga is a hybrid that involves both TK and TCE elements and should receive protection under both regimes.²³⁶ After all, we allow for cumulative layers of protection with respect to conventional IP rights. Why should TK/TCE be different? The potential for such overlap could be limited through channeling doctrines analogous to copyright's ideal-expression dichotomy and patent law's printed matter doctrine.²³⁷ Thus, the functional methods aspects of yoga would be treated as TK, while the culturally expressive aspects would be TCE. A more radical step along these lines would be to reject ontological distinctions between subject matter entirely and regulate instead based on the nature of the end use. For example, for cultural integrity regulation to apply, rather than asking whether the traditional source was "culturally expressive," we could focus on whether the appropriator's *end use* involves

²³⁵ See Heald, *supra* note 68, at 532 (discussing turmeric and neem tree patents, which claimed traditional remedies in an essentially unaltered form).

²³⁶ Indeed, under the definitions of the draft WIPO treaties, yoga arguably does qualify as *both* TK and TCE, as might many traditional martial arts.

²³⁷ Cf. *Baker v. Selden*, 101 U.S. 99 (1879); 17 U.S.C.A. § 102(b); *In re Gulack*, 703 F.2d 1381, 1384-85 (Fed. Cir. 1983).

recognizable elements that have traditional culturally expressive significance. Conversely, we could make benefit-sharing obligations contingent upon uses that result in patentable subject-matter or otherwise rely on commercial exploitation of facts or methods derived from traditional sources.

B. Differentiating by Geographic Scope

Thus far, our discussion of subject-matter tailoring has focused on substantive rights. However, geographic scope presents a further dimension along which TK/TCE regimes could be tailored. Recall that the initial analysis in Part I concluded that it is easier to pursue benefit-sharing on a global scale than it is to regulate cultural integrity. As we will see, taking into account the subject matter associated with each of these rationales only bolsters the case for pursuing such a geographic differential.

First, the preceding discussion of bioprospecting makes plain the necessity of a global solution in this domain. As we saw, regulation at the national level could not solve the problem and led to clearly suboptimal outcomes.²³⁸ Pharmaceutical companies are primarily based in the global North. Biodiverse habitats and traditional communities are concentrated in the global South.²³⁹ Moreover, bioprospecting itself is a planet-wide endeavor. Thus, a compensation regime for bioprospecting cannot be cabined within any limited set of regional actors. To achieve economic justice requires benefit-sharing on a global scale.

²³⁸ See *supra* notes 209-11 and accompanying text.

²³⁹ See Heald, *supra* note 68, at 525-35.

By contrast, the necessity of policing the integrity of traditional cultural expression on a global scale is much more dubious. As we saw in Part I, the “thick governance” entailed in regulating cultural integrity makes it desirable for decision-making to take place at the local level and to employ processes that accommodate local customs. Traditional communities may experience the “harm” of cultural appropriation in very different ways. Customary norms as to who is qualified to provide and receive evidence and the appropriate manner by which such testimony is delivered can also vary dramatically. For example, Australian Aboriginals differentiate between “men’s business” vs. “women’s business.” Women will not testify about women’s business if men are within earshot, and vice versa.²⁴⁰ For at least one Aboriginal community, the submission of evidence was also contingent upon location: testimony regarding the cultural significance of a place could only be imparted at the place in question.²⁴¹ Similarly, in a Canadian First Nations case, property claims could only be invoked by singing in open court a traditional performative declaration.²⁴² Devolving decisions to the local level will accommodate such indigenous belief systems and enable a more nuanced tailoring of rules and remedies by those most knowledgeable about local customs.

To its credit, the WIPO Draft TCE Treaty goes to some length to accommodate diversity in traditional customs and

²⁴⁰ See *Aboriginal and Torres Strait Islander Cultural Protocols*, OXFAM AUSTRALIA 8 (2007), <http://www.reconciliation.org.au/raphub/wp-content/uploads/2013/03/respect-aboriginal-and-torres-strait-islander-protocols-oxfam-australia.pdf>.

²⁴¹ See Sherman & Wiseman, *supra* note 158, at 19-20.

²⁴² See Coombe, *supra* note 8, at 235.

understandings.²⁴³ The sticking point, however, comes with enforcement. The treaty imposes rules binding on all members and appears to assume a duty of transnational enforcement. This transnational scope requirement sits in tension with the preference for sensitivity to local contexts.

Attempting to regulate local norms regarding authenticity on a global scale raises several difficulties. First, the evidentiary challenges required to conduct such transnational proceedings would make them expensive and logistically challenging. Second, some conflicts of law issues would have to be navigated. As we saw in Part I, the need to accommodate customary norms of the source community would make a straightforward application of the *lex fori* principle inappropriate.²⁴⁴ That said, blind deference based on *lex originalis* seems just as impracticable. Forum courts will not lightly relinquish their juridical sovereignty and would likely resist a wholesale devolution of decisional authority to the source community. Indeed, IP rights have historically been constructed within territorial boundaries for precisely this reason.

Furthermore, because cultural expression is at issue, constitutional norms related to free speech loom large in this process. Forum states are likely to be especially protective of the speech liberties of their own nationals and predisposed to resist censorial demands emanating from remote traditional

²⁴³ The WIPO treaty frames a general set of values, principles, objectives, and standards, but does not unduly trample on sovereignty and efficiency by imposing a set of centralized rules. *See* WIPO Draft TCE, *supra* note 18.

²⁴⁴ *See supra* note 156 and accompanying text.

communities.²⁴⁵ Furthermore, there is no common ground to cabin such questions within neutral principles. Countries have taken very different approaches in balancing freedom of expression against communal injuries in hate speech/group libel cases, for example.²⁴⁶

Indeed, the very idea of granting property rights over traditional cultural expression may be a constitutional nonstarter in the United States. US law generally favors individual rights over protection of groups,²⁴⁷ and such unconventional forms of intellectual property would be unlikely to survive a First Amendment challenge.²⁴⁸ Nor is protection of group dignity likely to cut any more weight.²⁴⁹

Accordingly, attempting to regulate authenticity on a global scale would pose some weighty challenges and any robust effort to instantiate such norms may be flatly precluded

²⁴⁵ *Cf.* *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1201 (9th Cir. 2006).

²⁴⁶ John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 540-43 (2006).

²⁴⁷ *See, e.g.,* *Virginia v. Black*, 538 U.S. 343 (2003).

²⁴⁸ *Cf.* *Golan v. Holder*, 132 S. Ct. 873, 883-84 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003)) (declining to apply First Amendment scrutiny to copyright restoration so long as the “traditional contours” of copyright are maintained). Measured against the standard of conventional IP law, the contours of TCE protection are anything but “traditional.” *See supra* note 109 and accompanying text.

²⁴⁹ *See* *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1234-35 (E.D.N.Y. 1993) (“desire to protect society or certain members of society from the purported offensiveness of particular speech is not a substantial interest which justifies its prohibition”). *But see* *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 540-41 (1987) (upholding more limited exclusivity in symbol and word marks under trademark law).

by constitutional speech protection. Is the need for global protection of traditional expression nonetheless so palpable that traditional rights advocates should persist in their efforts to secure it? Arguably not. As we will see, the frequency with which misappropriation of cultural heritage occurs is likely to be concentrated close to the source community. Moreover, the harms emanating from inauthentic usage will also be far more salient when they take place close at hand. Accordingly, given the infrequency of long-distance misappropriation and the evanescent nature of the harms they pose, the benefits of globalizing authenticity enforcement do not seem to justify the costs.

First, consider frequency. Folklore is the source of the archetypal myths and foundational concepts from which so much of contemporary culture is derived.²⁵⁰ However, artists who engage in such creative recycling typically focus on traditions that are familiar to them and their intended audiences. It was not by accident that Walt Disney began by mining the corpus of European fairy tales and folklore for his early cartoons pitched at an audience composed predominantly of European immigrants: *Snow White*, *Cinderella*, *Pinocchio*, *Robin Hood*, *The Sword in the Stone*, etc.

The same applies to other forms of commodification. If you wander tourist gift shops around the world, you will notice a pattern: each prominently features the folkloric handicrafts indigenous to the local area. You will find Zulu spears and beadwork for sale in Johannesburg, Aboriginal boomerangs and bark painting in Sydney, flower leis and carved tikis in Honolulu, and Hopi kachinas and Navajo blankets in Phoenix.

²⁵⁰ See Nancy Morris, *The Myth of Unadulterated Culture Meets the Threat of Imported Media*, 24 MEDIA, CULTURE & SOC'Y 278, 282-83 (2002).

These wares may exhibit varying degrees of authenticity, but the point is they are selling the local culture because that is what their customers expect. If you stay at a Waikiki hotel, you want to see hula dancers, not Indian pow-wows. In Billings or Boise, the reverse applies.

While TK right proponents demonize the “cannibal culture” that drives rapacious Western multinationals to commodify global tradition in the manner of cultural conquistadors,²⁵¹ in fact, foreign interest in exotic traditional cultures is sporadic and haphazard. Such transnational commodification occupies at best a tiny niche within the cultural economy overall.²⁵² While the very term commodification suggests culture is a globally fungible commodity akin to oil, traditional culture is mostly of interest to communities who have a connection to it. American filmmakers showcase Native American culture. Australian filmmakers explore Aboriginal traditions. And New Zealand filmmakers orient their lens toward Maori culture. Similarly, it is no accident that the Washington, D.C., football team and the Atlanta and Cleveland baseball franchises were all named for

²⁵¹ DEBORAH ROOT, CANNIBAL CULTURE: ART, APPROPRIATION, AND THE COMMODIFICATION OF DIFFERENCE 67-73 (1996).

²⁵² Take Justin Bieber, Lady Gaga, Harry Potter—most global media products are squarely rooted in mainstream Western culture. *See* Hughes, *supra* note 17, at 1228. While world music does constitute a growing niche, such products typically entail collaborations with artists from the source communities rather than naked “plunder.” If TCE rights are to regulate such transactions, we need to decide when the source community can enjoin its own members from entering into such collaborations—a very different matter than simply saying “hands off” to foreigners.

the indigenous people native to this land.²⁵³ The pervasive use of Native American mascots by American sport teams illustrates the basic principle that cultural appropriation begins at home.²⁵⁴

This is not to deny that misappropriation takes place across more distant horizons. Globalization has led to increased contact with and interest in foreign cultures. The point is merely that the *frequency* with which cultural takings occur remains heavily weighted toward local takings. The more frequent and repeated the acts, the more *likely* that harm will result. Moreover, the *gravity* of harm caused by local misappropriations is also likely to be significantly higher than that emanating from afar.

To appreciate why the likelihood and gravity of cultural integrity harms are disproportionately weighted toward local misappropriation requires attention to the nature of the putative harm. Despite the property rhetoric often used to describe misappropriation of TCE/folklore, referring to theft, plunder, pillage, and so forth, inauthentic use of traditional expression does not automatically dispossess the original source community. They remain free to practice their traditions in the traditional manner. Rather, as we saw, the harmful effects are more subtle and primarily operate at the level of meaning.²⁵⁵

²⁵³ Even the exceptions illustrate the general rule: *e.g.*, the Boston Celtic's choice of a Leprechaun pays homage to the strong Irish roots of the franchise's hometown.

²⁵⁴ See Mezey, *supra* note 13, at 2027-30 (describing unique place that American Indians occupy within the historical fabric of American culture). Similarly, neighboring communities tend to borrow from each other. See Rose, *supra* note 69, at 999.

²⁵⁵ See *supra* 162-64 and accompanying text.

We should not expect each and every inauthentic use by an outsider to necessarily introduce new meanings, let alone meanings that impair the original source. Rather, the more frequent, repetitive and prominent the inauthentic uses, the greater the risk that cross-contamination and harmful effects may follow. Such harmful effects are likely to prove most palpable when they occur in close proximity to the source, such as where a dominant majority society appropriates and distorts the traditions of an indigenous minority.²⁵⁶ For example, Native Hawaiians feel justifiably aggrieved when Waikiki promoters present inauthentic and degrading versions of the hula to pander to tourists. Such distorted practices act as a visible and ongoing affront to the dignity of both Hawaiian tradition and the Native population at large. Adopted widely, they could eventually contaminate the source traditions.

By contrast, where such uses occur in contexts culturally and geographically remote from the source, the risk of harm becomes less plausible. Hula is unlikely to be danced in Bali or Bamako, but if it were, adverse effects on Hawaiian source traditions would seem unlikely. Native Hawaiians would likely remain blissfully unaware of such transgressions, however grossly inauthentic they may be. And even if they did learn of them, the psychological and cultural impact would likely be fleeting.

To use a real property analogy, rather than an actual dispossession of property, the harm inflicted here is akin to the disturbances dealt with under nuisance law: Nuisance occurs when the original owner's quiet enjoyment of her property is

²⁵⁶ The harmful impact of the appropriation in such cases is arguably aggravated by its larger message of cultural subordination. See Carpenter et al., *supra* note 1, at 1109.

impaired by a competing use in an adjoining property. Nuisance is quintessentially a local matter involving disputes between neighbors: Just as a noisy block party or polluting factory will disturb adjoining properties while leaving homeowners across town unperturbed, so too cultural harms are arguably a local issue that should arguably be dealt with as such.²⁵⁷

Moreover, frequency of the harm can greatly reinforce its salience. Continued and repeated acts of misappropriation exact a cumulative toll and reinforce patterns of subordination that set indigenous minorities apart from mainstream society. For example, American media constantly reinforces the message that Indians are exotic “others,” closer to animals than “normal” human beings. From the cartoonish images of “Indian” mascots at sporting events to the *Twilight* movies, which portray an Indian tribe as a race of werewolves, such negative stereotypes place a crushing burden on the psyche of Native children.²⁵⁸

Such repetitive harms are far less likely to arise in a transnational context for the simple reason that patterns of transnational misappropriation tend to be haphazard and episodic. Kazakhstan had its 15 minutes of fame in the first

²⁵⁷ In contrast to the cut-and-dry fashion in which trespass operates, nuisance law relies on a holistic balancing of equities that resembles the sort of contextualized, fact-intensive “thick governance” we have proposed to regulate cultural integrity concerns. See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970-71 (2004) (explaining why such use of resource intensive managerial regimes is limited to local disputes).

²⁵⁸ Carpenter et al., *supra* note 1, at 1109.

Borat movie. But next time it will be another culture's turn.²⁵⁹ Disney did *Aladdin* one year; *Mulan* the next. Such ephemeral takings, however offensive, are unlikely to leave lasting harm.

Accordingly, there are strong reasons to hesitate before embracing the difficult and costly challenges entailed in regulating authenticity on a global scale. Arguably, the concerns raised by the cultural integrity rationale are more effectively dealt with at the local level, while misappropriation further afield could be largely ignored. Some allowance could be made for regional governance or bilateral accords based on historic ties between communities (*e.g.*, due to migration). Yet, a presumption against global application would apply.

Limiting the scope of authenticity regulation in this fashion would not negate the logic of pursuing the WIPO TCE treaty as a multinational agreement. The treaty would establish a framework to resolve regional disputes, such as those between neighboring countries. The treaty would also serve to instantiate human rights standards that protect indigenous communities against abuses by national governments.²⁶⁰ Furthermore, the protections against unfair competition described in Part I would remain applicable on a worldwide basis, offering at least some measure of relief against transnational misappropriation. Indeed, the symbolic recognition and affirmation afforded by requiring baseline

²⁵⁹ And indeed, in Sacha Baron Cohen's next movie, *Briuno*, the titular character headed off instead to Israel and Nigeria.

²⁶⁰ The abuse and exploitation of indigenous resources by their own governments arguably presents a more pressing danger than that posed by multinational corporations. See Pager, *supra* note 1, at 1883-85. The WIPO treaties do contain language calling for governments to act in the interest of source communities. Yet, such norms remain vague and largely toothless. See *supra* note 243.

norms of attribution, informed consent, and honest labeling would go a good way toward addressing the grievances of many indigenous communities.

Still, imposing geographic cutoffs on authenticity norms would be highly controversial. The specter of cultural imperialism continues to haunt global relations, and popular sentiment has been stirred by a few, high-profile acts of misappropriation of traditional expression committed by multinational corporations.²⁶¹ The pain caused by such takings is real and undeniable. Leaving source communities without any recourse in such instances would prove a bitter pill for TK proponents to swallow.

Accordingly, it might prove expedient to extend some additional measure of protection beyond purely local/regional contexts. Such global standards could be framed in terms of soft law duties to consult²⁶² with, provide compensation to, and otherwise take into account source community interests. WIPO could then work with the relevant stakeholders to develop a set of “best practices” that could be applied proactively. Good faith compliance would be monitored and certified by various non-governmental organizations, with annual reporting to reward good behavior and shame persistent

²⁶¹ Lego’s use of Maori words and stories to market a new line of building blocks offers one example. Kim Griggs, *Maori Take on Hi-Tech Lego Toys*, BBC NEWS (Oct. 26, 2001), <http://news.bbc.co.uk/2/hi/asia-pacific/1619406.stm>. Disney’s more recent films such *Mulan* and *Aladdin* offer another. *See supra* note 5.

²⁶² Consultation requirements can be given teeth. *See, e.g.*, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-Am. Ct. H.R. No. 245 (June 27, 2012).

offenders.²⁶³ Member states could reinforce these guidelines by providing incentives and/or sanctions in particular cases as warranted. While short of an outright veto, such measures would ensure that indigenous source communities have a mechanism to voice concerns raised by appropriation of their cultural traditions.

In fact, public shaming in the form of adverse publicity already provides a powerful check against most such instances of corporate plunder. Many high-profile misappropriation cases have resulted in voluntary settlements even in the absence of legal compulsion.²⁶⁴ Few corporations want to be seen as oppressing indigenous minorities, and benefit-sharing is already widely practiced on a voluntary basis.²⁶⁵ Therefore,

²⁶³ Media organizations, indigenous advocates, and governments should all have a voice in this process. Australia already has some good working models that could be drawn upon.

²⁶⁴ For example, Lego apologized and agreed to work with Maoris to draw up a code of conduct to govern its use of folklore in the future. Andrew Osborn, *Maoris Win Lego Battle*, THE GUARDIAN (Oct. 30, 2001), <http://www.theguardian.com/world/2001/oct/31/andrewosborn>. The Chairman of Stroh Beer similarly apologized for misuse of revered Indian leader Crazy Horse's name on alcoholic beverages. See Elizabeth Stawicki, *Crazy Horse Dispute Settled*, MINNESOTA PUBLIC RADIO, (Apr. 26, 2001). While the maker of Crazy Horse malt liquor initially held out, it too eventually settled in 2012. *Id.*

²⁶⁵ See, e.g. www.deepforest.co (noting that the world music band, Deep Forest, voluntarily pay a portion of sales from all of its cultural remix albums to benefit the source communities whose music it spotlights); *Giving Back*, Baka Beyond (Dec. 21, 2015), available at <http://bakabeyond.net/giving-back/> (describing philanthropic projects undertaken by British Celtic band, "Baka Beyond," on behalf of Baka people); *About Putumayo World Music*, Putumayo World Music (Dec. 21, 2015), available at <https://www.putumayo.com/history/> (describing over \$1 million in donations made by American world music record label to benefit source communities).

adopting even a modest set of legal norms along these lines would amplify such shaming effects and achieve the desired outcome in most cases.

IV. ADDRESSING OBSTACLES TO DIFFERENTIATION

In sum, a compelling case can be made for sharper differentiation by subject matter. Cultural expression and technical know-how would receive asymmetric protection designed to tailor TK/TCE rights narrowly according to the normative interests most salient in each respective context. Following the logic of this bifurcated approach would lead to a more modest package of rights than the current draft WIPO treaties contemplate. Source communities would receive a robust right of control over inauthentic use of TCE/folklore; however, such rights would primarily be restricted to local/regional contexts to allow for contextually nuanced judgments. Technical TK, for its part, would be subject to rights of compensation, but not control; such a regime would operate on a global scale in a streamlined, centralized fashion.

Compared against the robust package of rights contemplated in the current WIPO draft treaties, the more modest scope of such an asymmetrical rights regime would naturally come as a disappointment to many TK *demandeurs*. Yet, half a loaf is sometimes better than none. The preceding analysis provides extensive reasons why the “half a loaf” that would emerge under the approach advocated here would focus on the most pressing issues of concern to TK *demandeurs* in the contexts where the case for protection is most salient. Such an asymmetrically tailored regime would, by definition, not deliver everything that such *demandeurs* want, but it would supply enough protection to meet their most urgent needs.

However, a skeptic might reasonably ask: If the case for sharply differentiating rights according to subject matter were so compelling, why have the delegates to the WIPO treaty effectively chosen a contrary course? To answer this question requires an understanding of WIPO negotiations, as well as the broader discourse of TK protection within which such negotiations are embedded. A full exploration of such public choice dynamics is beyond the present scope. However, this part of the Article will highlight some key factors that explain the bias toward undifferentiated, over-inclusive rights and will attempt to dispel misconceptions that may lie at their root.

A. Built-in Expansionist Biases

To begin, it is important to note the diverse array of protagonists engaged in these negotiations, each of whom has its own agenda. Indigenous peoples champion traditional knowledge protection as a means to restore cultural sovereignty.²⁶⁶ Developing countries hope to “rebalance” the global IP regime, to extract their due share of respect and monopoly rents; others may seek bargaining chips to be “cashed” in negotiations elsewhere.²⁶⁷ Developed countries have endorsed TK protection for reasons of their own: Most view TK negotiations primarily as a means to encourage developing countries to “buy into” global IP norms; they are willing to indulge in hortatory provisions but are reluctant to go much further. Some developed country blocs, however, see TK rights as a basis to steer such norms in profitable directions. The European Union emphasizes the affinity between TK

²⁶⁶ See Tsosie, *supra* note 1, at 301; Riley, *supra* note 1, at 74.

²⁶⁷ See Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 239, 273 (2001).

protection and geographical indications, seeking to build a coalition in favor of strengthening the latter.²⁶⁸ Corporate interests may also welcome the precedent for indefinite protection set by TK rights.²⁶⁹ Meanwhile, non-governmental organizations operate under agendas of their own.

An alliance between these multiple actors with convergent, but only partly overlapping interests has made the WIPO treaty drafting process an inherently unwieldy exercise that privileges fuzzy compromise over precision. The need for consensus may eventually force a winnowing down of provisions, but thus far it has had the opposite effect: WIPO's *modus operandi* has favored all-inclusive drafting, allowing each faction to insert its preferred language as a starting point, while bracketing most of it for future discussion. By deferring hard choices, negotiators have maintained the pretense that they just need to devise the right formula of fudge and all shall have prizes.

For more than a decade, this *modus operandi* preserved the illusion of progress. However, by 2014, developing country negotiators began to lose patience. Insisting that treaties were all but ready for signature, such delegates called for a diplomatic conference to surmount the final negotiating hurdles. Developed countries demurred, emphasizing the pervasive bracketing of key terms and provisions that spoke to enduring disagreements.²⁷⁰ Faced with this impasse at the end

²⁶⁸ Sherman & Wiseman, *supra* note 158, at 7.

²⁶⁹ See Owen Dean, *Happy Birthday To You, Copyrighted*, INTELLECTUAL PROPERTY WATCH, (July 4, 2013, 4:15 PM), <http://www.ip-watch.org/2013/07/04/happy-birthday-to-you-copyrighted>; Waldron, *supra* note 150, at 788.

²⁷⁰ Saez, *supra* note 18.

of 2014, the WIPO-IGC process stalled, and, with delegates unable to agree on a path forward, the WIPO General Assembly failed to renew the IGC mandate, bringing negotiations to an abrupt halt. Rather than accepting half a loaf, TK *demandeurs*, for the first time, had to face the prospect of ending up with none at all.²⁷¹

In the end, the IGC mandate was renewed a year later with negotiations set to resume in 2016.²⁷² Yet, this standstill points to the dangers of pursuing an overly-ambitious TK agenda: the result could be that the treaties are issued as non-binding soft law, or even that they fail to issue at all. In an ideal world, such a near-death experience would concentrate minds and encourage compromise, allowing negotiations to proceed under the more modest, pragmatic approach advocated here. Unfortunately, other dynamics of the WIPO negotiators continue to conspire against this end. First, delegates continue to negotiate in political blocs, which encourage grandstanding, ideological inflexibility, and the pursuit of maximalist positions.

Second, because culture and tradition are both emotive concepts, defending the national heritage against predatory foreigners offers a ready-made platform for appeals to nationalist sentiment. Just as populist rulers seize “strategic industries” owned by foreigners to thumb their noses at neo-liberalism, so too the TK agenda contains an element of gesture

²⁷¹ Catherine Saez, *WIPO Assembly Extends Talks On Traditional Knowledge, Design; Sets Policy For New Offices*, IP Watch, <http://www.ip-watch.org/2015/10/15/wipo-assembly-extends-talks-on-traditional-knowledge-design-sets-policy-for-new-offices/>. Catherine Saez, <http://www.ip-watch.org/2015/10/15/wipo-assembly-extends-talks-on-traditional-knowledge-design-sets-policy-for-new-offices/>.

²⁷² *Id.*

politics—the intangible equivalent of nationalizing an oil company.²⁷³ The links between traditional heritage and political legitimacy also make governments reluctant to cede authority over such sensitive domains. Conversely, the dangers of over-protection are less apparent or easily understood. Indeed, authoritarian governments may welcome broad TK rights as propaganda instruments that can be manipulated to entrench their regimes.²⁷⁴

Third, TK discourse is situated against a backdrop of unequal North-South relations. The lion's share of the world's most valuable innovation is generated by the developed countries, and IP rights have long been viewed as protecting Northern interests at the expense of the developing world. Southern insecurities over the global developmental and innovation divide has arguably led some to valorize traditional knowledge as a realm in which developing countries are perceived as having an advantage.²⁷⁵ This quest for reassurance and respect can be viewed plaintively in the preambles of the draft treaties, which celebrate the “intrinsic value” that traditional knowledge and cultural heritage embody as frameworks of innovation and creativity, worthy of respect “equal [to] other knowledge systems.”²⁷⁶

Besides providing a salve for bruised Southern egos, such lofty proclamations of universal value betray a programmatic subtext: establishing a normative equivalency

²⁷³ Dutfield, *supra* note 267, at 239, 273.

²⁷⁴ Pager, *supra* note 1, at 1883-84.

²⁷⁵ *Id.* at 1849-50.

²⁷⁶ TK Treaty, Pmbl. (i), (ii); TCE Treaty, Pmbl. 1, 4. The preambles also trumpet the manifold contributions that indigenous knowledge systems make to global diversity and conservation, which “benefit . . . all humanity.” TK Treaty, Pmbl. (ii)-(iii); TCE Treaty, Pmbl. 3, 7.

between traditional knowledge and conventional forms of intellectual property. Protection for conventional IP is enshrined in the TRIPS Agreement's global minimum standards. If we accept that traditional knowledge embodies an alternative innovation framework of equivalent value, then surely such "knowledge systems" deserve equivalent protection.²⁷⁷ Behind this syllogism lies the widely held belief that the global IP regime needs to be "rebalanced" to better serve the needs of developing countries²⁷⁸: IP rights should protect the knowledge produced by poor countries as much as that produced by rich countries. Framed thusly, the TK agenda affords a deeply satisfying rejoinder to rich country hectoring over information piracy: neatly reversing the party positions, it allows multinational corporations to be tarred as predatory corsairs guilty of misappropriating TK and "biopiracy."²⁷⁹

Taken together, these three dynamics work to reinforce a tendency toward exaggerated demands and overbroad rights. Moreover, these built-in expansionist biases are also propelled by an overarching narrative that further distorts TK discourse: imperialism.²⁸⁰ The following section explores the ways in which anti-imperialist discourse complicates TK negotiations. As we will see, the trope of imperialism both raises the emotional stakes surrounding traditional knowledge negotiations and exacerbates its intractability by perpetuating a series of misconceptions and flawed analogies.

²⁷⁷ See Hughes, *supra* note 17, at 1234.

²⁷⁸ Pager, *supra* note 1, at 1849-50. This "Development Agenda" has been formally enshrined as one of WIPO's core policy objectives. While much of the Agenda seeks to pare back existing IP rights and allow greater flexibility to developing countries, TK represents a notable exception, an area in which developing countries are pushing for stronger IP protection.

²⁷⁹ Chander & Sunder, *supra* note 1, at 1367.

²⁸⁰ See Munzer & Raustiala, *supra* note 1, at 51.

B. Anti-Imperialist Disclosure

Half a century after the collapse of the European empire, the specter of imperialism still haunts international intellectual property law.²⁸¹ Developed countries stand accused of operating a legal protection racket that robs poor countries to make rich ones richer.²⁸² The global intellectual property regime is denounced as an unconscionable bargain that legitimizes the plunder of information resources and perpetuates systems of neo-colonial dependency.²⁸³

The discourse of imperialism supplies a master narrative to rail against the global IP regime. Debates over global intellectual property protection come loaded with hyperbolic invective condemning cultural imperialism, neo-colonialism, information feudalism, biopiracy, “strip mining,” “cannibalism,” pillage, plunder, genocide, and much else.²⁸⁴ Resistance to such perceived exploitation increasingly defines

²⁸¹ See, e.g., Marci Hamilton, *TRIPS Agreement: Outdated, Imperialistic, and Overprotective*, 29 Vand. J. Transnat'l L. 613, 614-17 (1996); Anthony R. Noss, *Note: In Defense of TRIPS: It Only Seems Imperialistic*, 1 CYBARIS INTELL. PROP. L. REV. 154, 156 (2010).

²⁸² See Chander & Sunder, *supra* note 1, at 764.

²⁸³ See Peter Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 373 (2006); Rochelle Cooper Dreyfuss; Riley, *supra* note 1, at 78-79; Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 Hous. L. Rev. 763, 768 (2003); Statement of the Bellagio Conference, March 11, 1993 (quoted in JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY*, at 193 (1996)).

²⁸⁴ See, e.g., VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* 2-5 (1999); PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 1-3 (2002); Farley, *supra* note 1, at 8; BROWN, *supra* note 1, at 3-4 (“vampires”).

the developing world's agenda for intellectual property rights. And a central thrust of this counter-hegemonic agenda has focused on securing intellectual property protection for traditional knowledge.²⁸⁵

Imperialism is a bad word that stands for many bad things. And doubtless the colonial powers of the world have much to answer for. However, in the context of the TK debate, imperialism serves more as a catch-all indictment than precise diagnosis. The traditional knowledge juggernaut is fueled by multiple strands of anti-imperialist discontent, each of which contains its own mix of hyperbole and legitimate complaints. Unifying these separate strands of grievance within a single narrative may provide an effective strategy for political mobilization and coalition-building; yet, it also encourages polemic to triumph over practical problem-solving. In so doing, it has sustained a series of misconceptions and flawed analogies that distort the TK debate and exacerbate its intractability.

First, in condemning misappropriation of traditional knowledge, TK proponents have a tendency to draw misplaced analogies between tangible and intangible property. Such analogies are sometimes explicit: comparing TK misappropriation to colonial conquests of land and other seizures of tangible property.²⁸⁶ By invoking this legacy of

²⁸⁵ See Hughes, *supra* note 17, at 1234.

²⁸⁶ See, e.g., Farley, *supra* note 1, at 11-12 (quoting Suzan Harjo, former head of the National Congress of American Indians, "(t)hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There's little left that's tangible. Now they're taking what's intangible.").

injustice, advocates imply that opposing TK protection is tantamount to condoning imperialist aggression.²⁸⁷

Moreover, widespread use of rhetoric to describe tangible property takings—*theft, stealing, pillage, plunder, piracy, strip-mining, etc.*—falsely obscures the non-rival nature of intangible assets.²⁸⁸ Appropriation of TK by outsiders does not physically dispossess source communities of their heritage; they can continue to engage in their traditional practices unhindered. Rather, as we have seen, the harm caused by such takings is indirect, subtler in nature and contextually contingent.²⁸⁹

Second, as we saw, TK proponents have a habit of drawing explicit analogies between protection of traditional knowledge/cultural expression and conventional IP rights. In doing so, proponents seek to highlight the supposed injustice in the self-serving manner in which IP rights have been constructed to privilege Western creativity while leaving traditional innovation unprotected.²⁹⁰ Such critiques hold that

²⁸⁷ See Tsosie, *supra* note 1, at 311 (arguing that the appropriation of Native culture “continue[s] the same systems of dominance and control that have been used to colonize, subdue and destroy Native peoples”); Farley, *supra* note 31, at 11 (“theft of their folklore represents the final blow to their civilization from ‘invaders.’ It is simply an extension of the plunder mentality.”); See Riley, *supra* note 112, at 78 (same).

²⁸⁸ Admittedly, TK proponents are not alone in invoking such rhetoric. Advocates for conventional IP rights routinely indulge in the same misleading use of language.

²⁸⁹ See *supra* notes 162-64 and accompanying text.

²⁹⁰ See Coombe, *supra* note 8, at 285 (describing existing IP doctrine as reflecting “particular interested fictions emergent from a history of colonialism that has disempowered most of the peoples on this planet.”); Riley, *supra* note 7, at 178 (criticizing “flagrant dismissal of non-Western viewpoints in . . . interpretation of copyright law”); Statement of the

essentially the same stuff is arbitrarily subject to disparate treatment.²⁹¹ As James Boyle puts it:

The basic assumptions of the [international IP] regime mean that certain kinds of contributions to culture and scientific progress are validated, authorized, and thus rewarded, while others are made invisible. The author[/inventor] concept . . . is a gate that tends disproportionately to favor the developed countries . . . Curare, batik, myths, and the dance ‘lambada’ flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the movie *Lambada!* flow in—protected by a suite of intellectual property laws, which in turn are backed by the threat of trade sanctions.²⁹²

Moreover, such unequal outcomes are seen as far from accidental. The rigged rulebook that is the global IP regime can be attributed to a foundational act of legal imperialism: the coercive and deceptive tactics by which developed countries imposed the TRIPS Agreement as a *fait-accompli* upon the rest of the world.²⁹³ Under TRIPS, rich country IP is firmly

Bellagio Conference, March 11, 1993 (criticizing IP “paradigm that is selectively blind to the scientific and artistic contributions of many of the world’s cultures and constructed in fora where those who will be most directly affected have no representation”) (quoted in BOYLE, *supra* note 283, at 193).

²⁹¹ See Chander & Sunder, *supra* note 1, at 1350-53.

²⁹² See BOYLE, *supra* note 10, at 125; Bellagio Declaration, *supra* note 278, at 193.

²⁹³ See Peter Yu, *supra* note 220, at 379-86.

protected, while TK in the developing world is left open for plunder. Intellectual property law, on this view, appears the modern equivalent of the legal fictions by which European law treated indigenous territory as *terra nullius*, while recognizing property claims of “civilized” explorers.²⁹⁴

Such accusations of unequal treatment and self-serving biases are not entirely without foundation.²⁹⁵ Yet, even accepting this premise, it is a much bigger stretch to suggest—as TK proponents are wont to do—that works subject to conventional IP rights are essentially no different than the subject matter embraced by traditional knowledge and therefore that legal distinctions between them represent an arbitrary construct conjured out of imperialist hubris.

Such facile comparisons can be misleading. On its face, a traditional folklore melody may not seem much different than a top 20 hit single. Yet, rather than comparing an indigenous melody to a current hit, the more relevant comparison would be to an Elizabethan madrigal or Baroque cantata, both of which are entirely unprotected and open to appropriation under conventional IP regimes. The same applies to the rest of Western “traditional knowledge”—a veritable trove of cultural and scientific knowledge that includes every innovation made up through the twentieth century (early 20th century for copyrighted materials, late 20th century for patented subject-matter).²⁹⁶ This vast body of

²⁹⁴ See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); Chander & Sunder, *supra* note 1, at 1356; Shiva, *supra* note 284, at 2-3.

²⁹⁵ See, e.g., TRIPS, art. 23 (giving heightened protection to alcoholic products that predominantly originate from Europe).

²⁹⁶ See Hughes, *supra* note 17, at 1234.

information lies in the public domain. It is free to use without restriction by any and all—including by indigenous people.

This latter stipulation is more than a rhetorical debating point. Whatever the rate at which TK is currently being appropriated by outsiders, it seems clear that, by any measure, indigenous peoples benefit from knowledge in the Western public domain to a much higher degree than Westerners benefit from TK. Any time indigenous peoples use the telephone, clothe themselves in modern textiles, consult a physician, check the weather forecast, access the internet, take penicillin or many other lifesaving medicines²⁹⁷—they are taking advantage of the vast pool of information developed by Western civilization and bequeathed to the intellectual commons.²⁹⁸ The benefits of such unrestricted Western innovations are not confined to technology. Indigenous peoples have long drawn inspiration from Western philosophy, arts, and literature. Authors in developing countries have also felt free to appropriate liberally—without compensation—from Western “classics” as inspiration for their own creative endeavors. Therefore, the accusation that TRIPS unfairly protects “rich world” knowledge while excluding “poor people’s knowledge” is deeply misleading. At the very least, a full accounting of the benefits must go beyond merely comparing that category of information currently subject to private ownership.

²⁹⁷ *Id.* at 1244 (citing statistic about 85% of WHO “essential meds” being in the public domain).

²⁹⁸ It is true that some indigenous people still live in relative isolation from Western technology. Yet, they represent a very small minority of those who are currently asserting TK rights.

Accusations of legal imperialism surface in a different capacity that plays a more direct role in fueling resistance to subject matter differentiation. To many TK advocates, the construction of separate categories for technical TK versus cultural expression ignores the holistic nature of indigenous knowledge systems. By artificially imposing a schema derived from Western legal systems, such differentiation is seen as creating arbitrary distinctions that disrespect the integrity of indigenous culture.²⁹⁹

There are legitimate and unavoidable questions related to the propriety of using intellectual property law to regulate indigenous culture. Yet, the specific objection lodged here regarding subject matter differentiation arguably rests on a misunderstanding as to the nature of the distinctions being made. Intellectual property rights regulate unauthorized use of information goods. To say that different rules should govern technical knowledge versus cultural expression is not to proclaim any ontological distinctions regarding the underlying source material. It just means different uses are treated differently because the *uses* themselves differ in nature.³⁰⁰

To return to the shaman's flower example, our hypothetical stipulated that the context in which the shaman used the flower was accompanied by a series of expressive

²⁹⁹ Of course, WIPO has already taken a big first step toward subject matter differentiation in adopting multiple treaties. Yet, such undercurrents of resistance may explain its reluctance to go significantly further down this path.

³⁰⁰ Misunderstandings on this point derive from a tendency to reify property rights as synonymous with real-world objects. In fact, as modern property law scholars have emphasized, property rights merely speak to the entitlement of particular categories of users to engage in specific forms of use. See, e.g., Smith, *supra* note 257, at 981.

rituals richly imbued with cultural significance. To separate the legal consequences attaching to a pharmaceutical company's use of the flower-qua-knowledge from a musician's appropriation of the "healing song" sung as part of the same ritual does not imply that these TK elements constitute distinct forms of knowledge within the source culture itself. However, as we saw, these different facets of the indigenous healing ritual have very different meanings and value propositions to external appropriators. The pharmaceutical company is looking for useable knowledge as a shortcut to discover potential patentable drugs. The musician listens for esthetically interesting sounds that can be adapted or incorporated into a commercial music recording. Moreover, the nature of the end use differs dramatically: The pharmaceutical company will produce a pill in which indigenous source materials are all but invisible. By contrast, the traditional source material is much more likely to retain an identifiable and distinctive presence in the musicians' recording.

A similar confusion sometimes arises with respect to conventional IP rights. We may speak colloquially about a smartphone being "patented" or a book being "copyrighted." Yet, this expression is merely a shorthand way of saying certain intangible aspects of these real-world objects are bound up in IP rights that restrict certain uses. In fact, the same object may be regulated by multiple overlapping layers of intellectual property rights. For example, a smartphone app may employ patented software code and rely on communications protocols covered by separate patents. The expressive elements that comprise the app's screen display could be covered by copyright, trade dress, design patents—or possibly all three. None of this is to deny the holistic nature of the underlying app, which itself represents yet another form of property—an intangible chattel that may be purchased from the app store.

We can understand the app as having a coherent existence, meaning, and value—separate and distinct from the IP rights applying to its components. So, too, we should not view the TK rights that govern specific uses of indigenous culture as in any way compromising the integrity of the underlying culture as a whole.

More generally, it is worth underscoring that TK/TCE rights are largely intended to regulate uses *outside* the traditional community/context. As such, it is not unreasonable to ask source communities to operate within familiar structures established in global IP law. Doing so would allow for more predictable outcomes across national boundaries and reduce the costs of implementation. By contrast, imposing indigenous norms on the world would constitute a form of reverse imperialism.³⁰¹

Furthermore, the anti-imperialist discourse that underpins much of the traditional knowledge agenda can itself be challenged as tinged with internalized assumptions of Western supremacy. Such discourse implicitly dismisses developing countries as incapable of innovation and presents them instead as passive repositories of information resources awaiting Western colonization.³⁰² By asserting ownership over

³⁰¹ Indigenous activists often object to “Western” conceptions of property displacing the customary norms of indigenous cultures. However, one can equally ask: why should indigenous norms be imposed on parties who are not themselves members of the indigenous community?

³⁰² See Sunder, *supra* note 203, at 104-109 (describing view of source communities as “wardens of knowledge”); Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 89 (2008).at 89 (“In the current debate, innovation and creativity are effectively treated as the exclusive dominion of people in wealthy countries”). Indeed, the frequent linking of traditional

“their” traditions and heritage, developing countries aspire to be protagonists in the global knowledge economy. Yet, in many ways, tradition represents the antithesis of innovation,³⁰³ and propertizing tradition cuts against the progressive rationale that animates intellectual property rights.³⁰⁴ Far from “striking a blow against imperialism,” an uncritical embrace of the TK bandwagon risks validating its underlying assumptions of Southern incapacity and helplessness.

The asymmetrical benefits of the global IP regime are a genuine problem. Yet, the TK agenda is largely a distraction from the work required to tackle such enduring inequalities at their source. Rather than clinging to heritage from their past, developing countries should redouble their efforts to promote a forward-looking culture of innovation and focus on building the institutional capacities required to support it.³⁰⁵ The North-South innovation gap, the digital divide, the development divide—none of these are written in stone, as the recent successes by many surging emerging economies demonstrate. Yet, rather than embracing the hard work of expanding on these hard-won successes, the push for broad TK protection has

knowledge to biodiversity, suggests that Southern know-how is just another bio-resource for predatory Western corporations to Hoover up.

³⁰³ The very concept of tradition itself began an imperialist construct, making its re-appropriation as part of a counter-hegemonic campaign tinged with irony. “Traditional” was a synonym for “primitive”—the opposite of “modern”—used to refer to ahistorical cultures mired in superstition which needed the “civilizing” influence of modern, scientific Europeans to redeem them. See SHELLY ERRINGTON, *THE DEATH OF PRIMITIVE ART AND OTHER TALES OF PROGRESS* 13 (1998).

³⁰⁴ See Beebe, *supra* note 1, at 875.

³⁰⁵ Chander & Sunder, *supra* note 1, at 1371-72; Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT’L L. REV. 223, 252-53, 293 (2012).

consumed a disproportionate share of WIPO's institutional capacity. As a form of geopolitical theater, the symbolic luster of TK rights may offer a salve for Southern inferiority complexes. However, the tradeoff of dynamic potential for static protection that they entail could inhibit cultural and economic development and, ultimately, exacerbate the development divide rather than ameliorate it.

None of this is to deny the existence of valid reasons to support a more narrowly tailored set of traditional knowledge rights along the lines elaborated above. Yet, to get there requires tamping down on anti-imperialist rhetoric and adopting a more pragmatic outlook. The only "victory" achieved by advancing an overbroad and unworkable set of TK rights would be one over common sense.

V. CONCLUSION

This Article has criticized the WIPO draft treaties for their over-inclusive scope. It argues that the expansive rights that the draft treaties confer are both overbroad and internally contradictory. If implemented as presently configured, they would soon prove unmanageable in ways that produce perverse, unintended harms. The more likely outcome, however, is that the treaties will fail to issue at all, or will be reduced to a symbolic "soft law" document that lacks binding force.

To avoid such preordained failure, this Article has urged WIPO negotiators to set their sights on a more modest set of rights, tailored by subject matter. Robust norms of informed consent and attribution would supply a common baseline protection. Such baseline norms would go a long way toward satisfying indigenous grievances.

Beyond that, rights in traditional heritage would be selectively and narrowly targeted based on the normative interests at issue. Under this asymmetric approach to TK rights, the thick governance required to safeguard cultural integrity would be distinguished from the benefit sharing regime required to address economic justice concerns. These divergent normative interests, in turn, correspond fairly closely to differences in subject matter.

Non-traditional uses of technical knowledge are unlikely to raise cultural integrity concerns, because such knowledge is typically abstracted from its cultural context in ways that render it unrecognizable to the source community. However, asymmetries in the capacity to exploit such knowledge and the skewed distribution of benefits that results raise serious concerns over economic justice. The case for a benefit-sharing remedy is further bolstered by extrinsic policy interests in global health and environmental sustainability, both of which favor compensating source communities for use of their knowledge and bio-resources.³⁰⁶

Conversely, when it comes to traditional cultural expression, the reciprocal analysis applies. Concerns over cultural integrity are most salient in this context. By contrast, economic justice concerns are more attenuated, given the ability of source communities to derive benefits from commercialization even in the absence of a formal benefit-sharing regime. Moreover, the extrinsic policy interests favoring benefit-sharing apply with much less force.

Accordingly, this Article advocates jettisoning the current “all of the above” approach of the draft WIPO treaties

³⁰⁶ See *infra* Part III-a(2)(b) and accompanying text.

and replacing it with a more modest package of rights that would narrowly tailor protection according to the interests most salient in each domain. Just as conventional intellectual property regimes provide very different protection to copyrights and patents, so too should the WIPO treaties differentiate much more sharply between technical knowledge and cultural expression.³⁰⁷

This Article has offered a roadmap for a bifurcated approach that would implement such asymmetric protection. Source communities would exercise robust control over inauthentic use of TCE/folklore; however, such veto-power would be restricted to local/regional contexts. Conversely, rights over technical TK rights would not confer *ex ante* veto-power, but instead would function under a global liability regime requiring compensation to source communities.

This more streamlined approach to TK protection would be far more likely to win the consensus approval needed to enact legally binding treaties as global norms. At the same time, this Article has also explored structural obstacles impeding such a pragmatic solution. The dynamics of WIPO negotiations have privileged political grandstanding and maximalist agendas over practical problem-solving. Anti-imperialist rhetoric undermines the legitimacy and efficacy of the entire enterprise. Putting the Dinkas on a par with Disney and deeming the Navajo the equal of Novartis might be

³⁰⁷ This is not to say that TK should replicate the same distinctions present in the conventional copyright and patent systems. Indeed, in one respect the approach advocated here would lead to an inverse outcome: whereas global copyright law is a much more globally harmonized system than patent law with reciprocal protection conferred automatically without formalities, this Article advocates such seamless global protection for technical TK, while localizing protection for cultural expression.

innocuous were the intent purely symbolic. Yet, too much diplomatic capital has been invested for a purely symbolic outcome to be satisfactory. To achieve binding treaties, negotiators need to get serious.

TK negotiators should abandon their ambition to use TK rights as the vehicle to redress global inequality and focus instead on drafting a more modest set of treaties that focus narrowly on pragmatic goals: ensuring benefit-sharing for source communities, safeguarding cultural integrity, and preventing unfair competition. Tough choices will be required. Yet, there are also genuine gains to be had: Aiming to do less in the domain of TK rights would free up institutional bandwidth to concentrate on more effective capacity-building initiatives that tackle North-South inequality head on. Doing that would yield a more meaningful victory over imperialism in the end.