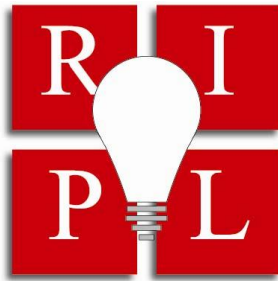


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## MUSIC AS CULTURAL HERITAGE: ANALYSIS OF THE MEANS OF PREVENTING THE EXPLOITATION OF INTANGIBLE CULTURAL HERITAGE

RONALD J. INAWAT

### ABSTRACT

What started out as a law school requirement quickly snowballed into an analysis of the relationship between intellectual property and cultural heritage. I am a music guy at heart, having played piano since I was five years old, having composed one song (after multiple tries), and now working directly with musicians and artists. So when I began researching a topic for an article that would connect the dots between the cultural heritage and its respective music, I could only come across legal doctrine and articles that focused heavily on tangible art and artifacts. So what happened to the music? After going down the rabbit hole of legal research regarding cultural heritage, I found very few articles analyzing the legal issues behind intangible cultural heritage, otherwise known as traditional and folklore music. So this Article does just that: explores the problematic legal issues involved with preventing the exploitation of intangible cultural heritage and suggests a methodology to fixing such problems. By delving into the various methodologies behind protecting and/or preventing traditional and folklore music, this Article breaks down the pros and cons behind each methodology in hopes of uncovering a solution buried underneath the rubble.

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*Cite as* Ronald J. Inawat, *Music as Cultural Heritage: Analysis of the Means of Preventing the Exploitation of Intangible Cultural Heritage*, 14 J. MARSHALL REV. INTELL. PROP. L. 228 (2015).

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## MUSIC AS CULTURAL HERITAGE: ANALYSIS OF THE MEANS OF PREVENTING THE EXPLOITATION OF INTANGIBLE CULTURAL HERITAGE

RONALD J. INAWAT\*

### I. INTRODUCTION

Music is deeply rooted in any culture. As an example, take a look at significant moments in today's culture in America. Can you imagine a graduation ceremony without the background music of "Pomp and Circumstance?" And what would a wedding be without the bride walking down to Wagner's "Bridal March?" Everyday use of music goes beyond the classical realm. What 7<sup>th</sup> inning stretch would be complete without a pipe organ version of "Take Me Out to the Ballgame?" And Queen's "We are the Champions" seems to always be on hand whenever a team wins any major championship. Music can even surround a time of year or describe a decade of questionable fashion: Christmas time with "Jingle Bells," the 70's with Bee Gee's "Stayin' Alive," and for some of us, senior year of high school with Green Day's "Good Riddance (Time of Your Life)." Just these few examples illustrate several facets of our modern day American culture. In fact, one could look to any aspect of life and probably attach a song or tune to that experience.

Music, although not a "physical" item, has as much importance to describing a culture as its physical counterparts, such as paintings, sculptures, and funerary objects, not only in modern times, but in the past as well. Music acts almost in a way opposite to language. As language creates a barrier to one understanding a culture, music is about opening up and welcoming people.<sup>1</sup> Traditional music of cultural groups welcomes complete strangers into their cultures and ways of life. Take, for example, the Kotas, a group indigenous to the Nilgiris mountain range in India. The Kotas have a religious ritual called *Devr*, a 12-day celebration of winter's first crescent moon.<sup>2</sup> On the first day a ceremony known as *omayn* begins the festivities with a style of entrance music: unison blasts from the *kob* (a native bass instrument) accompanied with flutes and drums playing the same tone, exemplifying *omayn* meaning - "sounding as one."<sup>3</sup> The intent of the music is an invitation to the gods, welcoming them to enter the

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<sup>1</sup> ELENA MANNES, *THE POWER OF MUSIC* 112 (Walker & Company, 2011).

<sup>2</sup> Daniel J. Levitin, *The World in Six Songs: How the Musical Brain Created Human Nature*, 206 (Dutton Adult 2008).

<sup>3</sup> *Id.*

village.<sup>4</sup> Following the opening ceremony, the next 12 days revolve around the use of music in their everyday activities, ranging from baths to food gathering.<sup>5</sup> The music played in these instances may not have much meaning when played out of context, but in the context of the celebration, give important insights of a culture paying respects to a higher power.

In addition to music's use in traditional ceremonies, music at its original core was used to convey information and share emotion. Cultures often use music to describe a moment or feeling that cannot be explained with mere words. The *Ami* people, Taiwan's largest surviving indigenous tribe<sup>6</sup> transcribe much of their culture's history through chant and oral traditions because their language cannot be transcribed in written form. One chant that has become part of recent legal history was an *Ami* traditional song that describes the emotion of Joy, appropriately titled "Song of Joy."<sup>7</sup> In some African cultures, a chant alters depending on the time and place that it is sung.<sup>8</sup>

These are just a few of the examples of how music is engrained in the lives and cultures of a group of people. To exploit this type of music would not simply be the theft of musical notations and sounds, but it would be the misuse of a cultural artifact. Such an artifact should be given just as much, if not more, protection as a tangible artifact. Yet historically, musical heritage is not given as much protection as its physical counterparts (paintings, sculptures, funerary objects, act.), both internationally and domestically.

This article addresses the unsettled issues of whether and how intangible cultural heritage such as traditional and folklore music should be protected by law. It delves into the failed attempts by both international and domestic law at protecting intangible cultural heritage, the role of acknowledging and recognizing a culture's contribution through documentation and inventory in preserving that culture, and ways to preserve such intangible cultural heritage through U.S. Copyright law.

## II. ANTI-EXPLOITATION HISTORY OF INTANGIBLE CULTURAL HERITAGE

There are many policies, international and domestic, that seek to prevent the exploitation of various types of intangible cultural heritage, mainly traditional music and folklore. There are two main goals behind laws preventing exploitation of intangible cultural heritage: to "preserve" the cultural heritage, traditions, and integrity of a culture; or to "protect" the owner's ability to use and benefit from the created work. Each purpose is completely viable, but as will be shown, each attempt at preventing exploitation has its flaws or loopholes.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *Cardozo Arts & Ent. L.J.*175, 175 (2000).

<sup>7</sup> *Id.* at 176.

<sup>8</sup> MANNES, *supra* note 1, at 116–118.

### A. Preserving the Culture

On one side of the issue is preservation. As defined by Webster's dictionary, preservation refers to the ability "to keep alive or in existence."<sup>9</sup> The following laws focus on ensuring that the culture itself continues to live on.

#### 1. UNESCO

The policies regarding intangible cultural heritage set forth by the United Nations Educational, Scientific and Cultural Organization (UNESCO) focus heavily on cultural preservation, noting that "cultural heritage is of great importance for all peoples of the world." Under UNESCO, "preservation" refers to "the safeguarding of and respect for cultural property" during times of peace.<sup>10</sup> This "preservation" is accomplished in various ways, ranging from simple acknowledgment<sup>11</sup> to funding<sup>12</sup> to granting in-person assistance.<sup>13</sup>

The application of UNESCO's provisions on preservation is best exemplified by the International Committee of the Blue Shield (ICBS). Founded in 1996, the ICBS was formed by a group of international heritage organizations in response to UNESCO's Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, more commonly known as the 1954 Hague Convention. The ICBS works to give world cultural heritage "protection from attack in the event of armed conflict."<sup>14</sup> Examples of the work they have done range from implementing programs to assist military personnel in the training and dissemination of cultural property, as done with U.S. military in 2008,<sup>15</sup> to issuing statements to governments urging for the preservation and safety of cultural property, as done in Libya in early 2011.<sup>16</sup>

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<sup>9</sup> "Preservation" *Merriam Webster's Collegiate Dictionary* 922 (10<sup>th</sup> ed. 1994).

<sup>10</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, ch. 1 art. 2. May 14, 1954, [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 14, 2012) (hereinafter "Hague Convention").

<sup>11</sup> *Id.* at art. 4–6 (recognizing its existence to bearing distinctive emblems to facilitate recognition).

<sup>12</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, ch. 6 Oct. 18, 2003, [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited April 15, 2012) (hereinafter "2003 Convention"). Chapter 6 focuses on the establishment and distribution of the Intangible Cultural Heritage Fund.

<sup>13</sup> *Hague Convention*, *supra* note 10, at ch. 2.

<sup>14</sup> BLUE SHIELD INTERNATIONAL, <http://www.ancbs.org/cms/en/about-us> (last visited May 17, 2012). The Blue Shield's website states that "The Blue Shield is the cultural equivalent of the Red Cross. It is the protective emblem specified in the 1954 Hague Convention (Convention for the Protection of Cultural Property in the Event of Armed Conflict) for marking cultural sites to give them protection from attack in the event of armed conflict. The Blue Shield network consists of organizations dealing with museums, archives, audiovisual supports, libraries, as well as monuments and sites."

<sup>15</sup> Dick Jackson, *Cultural Property Protection in Stability Operations*, 2008 Army Law. 47 (2008).

<sup>16</sup> Zoë Howe, *Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya*, 47 Tex Int'l L.J. 403, 424 (2012).

Unfortunately, the ICBS is limited by the definitions listed in the 1954 Hague Convention, which focuses protection on mainly tangible objects: moveable or immovable property of great importance to cultural heritage, buildings whose purpose is to preserve or exhibit movable cultural property, and centers containing large amounts of cultural property.<sup>17</sup> In fact, UNESCO did not officially recognize the idea of intangible cultural heritage, also known as “folklore,” until the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore (hereinafter “the 1989 Recommendation”).<sup>18</sup> In the 1989 Recommendation, UNESCO set forth the parameters of what needs to be preserved, defining “folklore” as “the totality of tradition-based creations of a cultural community expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity.”<sup>19</sup> In addition, UNESCO gave recommendations on how to preserve such folklore: design inventory systems of intangible cultural heritage, introduce formal and out-of-school curricula to emphasize respect for folklore, and promote scientific research relevant to folklore preservation.<sup>20</sup> After the 1989 Recommendation, UNESCO did not create specific programs regarding intangible cultural heritage for another three years, with the “Intangible Cultural Heritage” programme in 1992 and the “Living Human Treasures” project in 1993.<sup>21</sup>

UNESCO’s desire for world recognition of artists and creators of this type of heritage seemed to be more recommendation rather than practice at the time; more care and media coverage was—and arguably is—given to tangible artifacts.<sup>22</sup> In 2003, much was said about the looting of Iraq’s tangible cultural heritage, such as the artifacts taken from the Iraq National Museum, the rich National Library, and the Modern Art Museum.<sup>23</sup> But, little to no effort was made to prevent the destruction of intangible artifacts such as the sound recordings of ceremonial music recorded from the Centre for Traditional Music of Baghdad.<sup>24</sup> Given UNESCO’s definition of protection (the safeguarding of and respect for cultural property);<sup>25</sup> one would believe that equal care should be given to all forms of cultural heritage. In practice, though, this could not be further from the truth. Inquiries for developing inventories and recovering the loss, through either looting or destruction, of 850 or more tapes of documented field surveys of oral music were left unanswered by UNESCO’s Deputy Director of Culture, all while priority was given to recovering and discussing the tangible artifacts lost from the museums and libraries in Baghdad.<sup>26</sup>

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<sup>17</sup> *Hague Convention*, *supra* note 10, at art. 1.

<sup>18</sup> Noriko Aikawa, *An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage*, 56 *MUSEUM INT’L* 137, 138 (2004).

<sup>19</sup> The General Conference of the United Nations Educational, Scientific and Cultural Organization, Paris, France, Nov. 15, 1989 *Recommendation on the Safeguarding of Traditional Culture and Folklore* 238, 239 (Hereinafter “1989 Recommendation”).

<sup>20</sup> *Id.* at 240–41

<sup>21</sup> Aikawa, *supra* note 18, at 139.

<sup>22</sup> Aikawa, *supra* note 18, at 140.

<sup>23</sup> Scheherazade Hassan, *Non-Assistance to Endangered Treasures On the Center for Traditional Music in Baghdad*, 24 *JOURNAL OF ETHNOMUSICOLOGY* 189, 189-90 (2011).

<sup>24</sup> *Id.*

<sup>25</sup> *Hague Convention*, *supra* note 10.

<sup>26</sup> Hassan, *supra* note 23, at 201–02.

UNESCO has since made moves to help with the preservation of intangible cultural heritage. In 2003 in Paris, France, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter the “2003 Convention”). The 2003 Convention specifically defined the term “intangible cultural heritage” as “the practices, representations, expressions, knowledge, skills—as well as instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups, and in some cases, individuals recognize as part of their cultural heritage.”<sup>27</sup> Additionally, UNESCO further cited specific examples of intangible cultural heritage: oral traditions and expressions, performing arts, rituals, traditional knowledge, and traditional craftsmanship.<sup>28</sup> As well as establishing what needs to be protected, the 2003 Convention converted the suggestions on preservation noted in the 1989 Recommendation into requirements; it established an intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage,<sup>29</sup> required scientific studies for safeguarding intangible cultural heritage,<sup>30</sup> established the intangible cultural heritage fund to assist in all future programmes,<sup>31</sup> required reasonable endeavors in education and raising awareness of intangible cultural heritage,<sup>32</sup> and established the need of international cooperation for these provisions to reach the goal of cultural preservation.<sup>33</sup> Most importantly, the 2003 Convention emphasized the need for documentation in the preservation of intangible cultural heritage, requiring the establishment or updating of intangible cultural heritage inventories<sup>34</sup> and publishing a representatives list as well as areas in where urgent safeguarding of intangible cultural heritage is needed.<sup>35</sup>

Unfortunately, strong suggestion and application are two separate things. The application of UNESCO’s suggestions is attainable, but has its share of difficulties. The establishment or updating of such inventories is a long and arduous process.<sup>36</sup> Additionally, there could be prejudices in creating such lists, ranging from the views of the political party in power at the time to the issues that are more newsworthy.<sup>37</sup> And lastly, based on certain cultural beliefs, there may be cultural communities that do not wish for their information and rituals be publicized.<sup>38</sup> Difficulties such as these have made the establishment of such inventories difficult to create and maintain.

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<sup>27</sup> 2003 Convention, *supra* note 12, art. 1.

<sup>28</sup> 2003 Convention, *supra* note 12, art. 2.

<sup>29</sup> 2003 Convention, *supra* note 12, ch. 5.

<sup>30</sup> 2003 Convention, *supra* note 12, art. 13(c).

<sup>31</sup> 2003 Convention, *supra* note 12, arts. 25–28.

<sup>32</sup> 2003 Convention, *supra* note 12, art. 14.

<sup>33</sup> 2003 Convention, *supra* note 12, arts. 19–24.

<sup>34</sup> 2003 Convention, *supra* note 12, art. 12.

<sup>35</sup> 2003 Convention, *supra* note 12, arts. 16-17.

<sup>36</sup> Erin K. Slattery, Lead Article, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. & POL’Y 201, 245 (2006).

<sup>37</sup> *Id.* at 246–47.

<sup>38</sup> *Id.* at 248–49.

## 2. NAGPRA

In 1990, the U.S. passed the Native American Graves Protection and Repatriation Act (NAGPRA), becoming the foremost U.S. legislation pertaining to cultural artifacts. Although NAGPRA focuses on tangible artifacts, NAGPRA is one of the first U.S. laws to recognize the idea of cultural preservation and actually set forth means to such preservation. With NAGPRA, “preservation” of the culture is accomplished by the actual physical preservation of particular tangible artifact. NAGPRA accomplishes the preservation several ways. One way is by the repatriation, or returning, of human remains or tangible artifacts back to certain tribes upon the request of those tribes.<sup>39</sup> NAGPRA sets forth specific procedures for repatriation in order to properly and delicately preserve Native American cultures.<sup>40</sup> The second is by maintaining such artifacts in museum facilities for purposes of discovery and study to ensure that the history of that tribe lives on.<sup>41</sup>

A third aspect of NAGPRA’s effectiveness in preserving culture is the requirement of inventory establishment. Through NAGPRA, federal agencies and museums are required to compile and submit inventories of such items to the U.S. government, identifying the geographical and cultural affiliations of each item.<sup>42</sup> This federal law not only places a requirement on federal agencies and museums to acknowledge origin of tangible artifacts, but also makes each agency and museum responsible for each item by requiring them to submit summaries of what items they have on their premises and how they were obtained.<sup>43</sup> As of 2009, The U.S. federally recognizes 566 Native American tribes,<sup>44</sup> and the enactment of NAGPRA helped in the growth of that list. Although this law does not deal with intangible cultural heritage, it is paramount in the preservation of cultural heritage in general, and it lays a blueprint for how such methods of preservation are possible.

## 3. Preservation through acknowledgement and inventory

Looking into certain cultural communities can show ways to preserve cultural heritage. In the case of the Ami, with no ability to transpose its oral history into written form, “preservation” of the culture is ensured by each generation’s treatment of the cultural practices.<sup>45</sup> Because such items of folklore are basically “living” artifacts, the preservation of the culture’s traditions and history is ensured through the indigenous group’s ability to pass on such traditions from generation through generation. The hope of any culture is to have someone to apply advancements in technology in preservation, just as the case with the Centre for Traditional Music in Baghdad. Representatives of the Center for Traditional Music in Baghdad, starting in

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<sup>39</sup> 25 U.S.C. § 3005(a) (1990).

<sup>40</sup> 25 U.S.C. §§ 3005(a)(c).

<sup>41</sup> 25 U.S.C. § 3002(b).

<sup>42</sup> 25 U.S.C. § 3003(a).

<sup>43</sup> 25 U.S.C. § 3004.

<sup>44</sup> Indian Affairs – Tribal Directory, <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm> (follow “2014 Tribal Entities List” hyperlink).

<sup>45</sup> Riley, *supra* note 6, at 176.



February 1971, undertook documented field surveys involving the written and aural documentation of traditional music and religious ceremonies of the numerous geographical regions of Iraq, slowly creating an inventory of such forms of cultural heritage.<sup>46</sup>

Preservation of intangible cultural heritage, as shown by the Center for Traditional Music in Baghdad and the 2003 UNESCO Convention, is probably best achieved by proper documentation and inventory. At the core of creating an inventory of different cultural communities and their intangible cultural heritage is the concept of acknowledgement.<sup>47</sup> The only way for a culture to truly live on beyond the life of its people is through broad acknowledgement of its existence. The creation of inventories is an ideal application, but doing so will take many years to develop and will have several obstacles in the way of its creation.<sup>48</sup>

### *B. Protecting the Owner*

On the other side of the issue is protection. As defined by Webster's dictionary, protection refers to the ability "to shield from injury or danger."<sup>49</sup> The following laws focus on ensuring that the owner of a created work of music is shielded from danger through the deterrence of unauthorized usage of that work.

#### *1. U.S. Copyright Law*

Regarding music in general, the law that offers protection to creators of music of any type is the Copyright Act. The Copyright Act is centered on the progression of science and the arts,<sup>50</sup> with its overall purpose to offer "protection" to the author of a work by prohibiting certain ways that the created work can be used without the express consent of that author.<sup>51</sup>

According to the U.S. Copyright Act, an author has six "exclusive rights" in the work he or she created: the right to reproduce the work, the right to prepare derivative works of that work, the right to distribute copies of the work to the public, the right to publicly perform the work, the right to publicly display the work, and the right to publicly perform the work by means of digital audio transmission.<sup>52</sup> A person or entity that uses the work in any of these ways and is not authorized by the author or protected by a statutory exception<sup>53</sup> is an infringer,<sup>54</sup> is susceptible to paying damages,<sup>55</sup> and may be subject to criminal charges.<sup>56</sup>

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<sup>46</sup> Hassan, *supra* note 23, at 200–01.

<sup>47</sup> 2003 Convention, *supra* note 12, art. 12.

<sup>48</sup> Slattery, *supra* note 36, at 245.

<sup>49</sup> "Protect" *Merriam Webster's Collegiate Dictionary* 938 (10<sup>th</sup> ed. 1994).

<sup>50</sup> U.S. CONST. art. I § 8, cl. 8.

<sup>51</sup> 17 U.S.C. § 106 (2002).

<sup>52</sup> 17 U.S.C. § 106.

<sup>53</sup> 17 U.S.C §§ 111, 112(e), 114, 115, 118, 119, 122.

<sup>54</sup> 17 U.S.C. § 501.

<sup>55</sup> 17 U.S.C. § 504.

<sup>56</sup> 17 U.S.C. § 506.

Applying U.S. copyright law to traditional music and folklore has its difficulties. There are four specific issues that arise when applying copyright protection to pieces of intangible cultural heritage:

*a. Issues with fixation*

First is the issue of fixation. The Copyright Act only offers protection of creative works that are original and fixed in a tangible medium of expression.<sup>57</sup> This issue could easily be solved with a recording of the song or the evidence of a score, but because of the “living” nature of a piece of traditional music and folklore, ceremonial songs are rarely completely “fixed.”<sup>58</sup> For example, in the Kotas religious ritual of *Devr*, the music is based on interaction between the other musicians, making the “song” sound different every time it is played.<sup>59</sup> “Fixing” the piece onto a music score could prove difficult because the piece is played differently every time. Recording the piece may help in protection, but the recording would only apply to the performance on that day and could not offer a basis of protection for the multiple possible ways it is played.

*b. Issues with authorship*

Second is the issue of authorship. The Copyright Act only offers protection to a clearly identified author or authors.<sup>60</sup> And in order for multiple authors to have ownership in a created work, not only must all the authors intend to form a joint authorship with each other, but each author must also supply a meaningful contribution.<sup>61</sup> Generally, in the case of intangible cultural heritage, there is rarely ever only one author, and usually the structure of a cultural group or tribe suggests an idea of contribution to the group rather than individual ownership of a creation.<sup>62</sup> In the Kotas example, the music for a ceremony can potentially be created by a large group of musicians which could be as big as an entire cultural group or tribe. Pinpointing the exact authors would prove to be difficult. Additionally, the intent for the song is not to benefit the musicians themselves, but instead for the sake of the ritual or to benefit the entire cultural community.<sup>63</sup>

Copyright law does offer protection to large groups or corporations in certain cases. A group or company can effectively own a copyrighted work if an author grants the “exclusive rights” to that group or company, as was the case for the creators of Superman. The original creators of Superman sold the rights of that creative work to Detective Comics, later to be known as DC Comics, for a mere \$130 check.<sup>64</sup> The other method for a group or company is through the “work made for hire” doctrine, which

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<sup>57</sup> 17 U.S.C. § 102.

<sup>58</sup> 17 U.S.C. § 101.

<sup>59</sup> Levitin, *supra* note 2.

<sup>60</sup> 17 U.S.C. § 102.

<sup>61</sup> Childress v. Taylor, 945 F.2d 500, 507–09 (2d Cir. 1991).

<sup>62</sup> Riley, *supra* note 6, at 194.

<sup>63</sup> Riley, *supra* note 6, at 194.

<sup>64</sup> Siegel v. Warner Bros. Entm’t Inc., 542 F. Supp. 2d 1098, 1107 (C.D. Cal. 2008).

states that a work created by an employee within the scope of his or her employment with that company is owned by the company, not the employee.<sup>65</sup>

Claiming a cultural community owns the copyright on a piece of intangible cultural heritage through works-made-for-hire would be a difficult, but interesting, argument. A group or corporation owns the copyright in a creative work through the “work made for hire” doctrine so long as the work was created by a designated employee or group of employees within the scope of the employment.<sup>66</sup> An employee is usually determined by the relationship between the company and its employee, relying on how the employee was treated and whether or not the employee received benefits.<sup>67</sup> Depending on the leniency of the court, one could argue that an individual or group of individuals created a piece of intangible cultural heritage within the scope of their “membership” to the group.<sup>68</sup>

*c. Issues with duration*

This leads to the third issue: duration and the public domain. The U.S. Copyright act only gives protection to the owner of a copyrighted work for a limited time.<sup>69</sup> Several factors go into the duration of copyright protection, but after that limited time has expired, the work goes into the public domain.<sup>70</sup> If a work created is unpublished, unregistered, and the author is known, the work has protection under the Copyright act for 70 years after the death of that author.<sup>71</sup> As of January 2012, a work enters the public domain if the author died before 1942<sup>72</sup>. But if a work created is unpublished, unregistered, and the author is unknown (as is probably the case with a piece of intangible cultural heritage), the work has protection under the Copyright Act for 120 years from the date of the creation.<sup>73</sup> That means that as of January 2012, anything made before 1892 has entered into the public domain. Based on this, much intangible cultural heritage would naturally fall into the public domain; most forms of intangible cultural heritage were created well before 1892, and maybe even before settlers arrived in this country. In the case of the Kotas, the songs of the *Devr* ritual were probably originally created when the tribe was formed, which can be dated to over 60,000 year ago,<sup>74</sup> well before 1892. Denying protection to songs like those created by the Kotas people goes against the original purpose of the copyright act: “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>75</sup> Granted, when the original authors of these cultural songs, the concept of copyright protection wasn’t on

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<sup>65</sup> 17 U.S.C. § 201(b).

<sup>66</sup> 17 U.S.C. § 101.

<sup>67</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

<sup>68</sup> *See Id.* at 750–51 (explaining that once the court, using common law agency principles, determines whether a work is for hire under the Act, it can apply the appropriate subsection of § 101).

<sup>69</sup> 17 U.S.C. §§ 302–303.

<sup>70</sup> 17 U.S.C. §§ 302–05.

<sup>71</sup> 17 U.S.C. § 302(a).

<sup>72</sup> There is an exception that applies to works published on or before December 31, 2002, but for sake of argument we will refer to the general application.

<sup>73</sup> 17 U.S.C. §§ 302(c), 303(a).

<sup>74</sup> Levitin, *supra* note 2, at 206.

<sup>75</sup> U.S. CONST. art. I § 8, cl. 8.

their minds; they were encouraged to “create” for personal fulfillment and cultural obligation. But when such forms of intangible cultural heritage automatically fall into the public domain, the original creators of this form of art, the cultural community, were never even given the opportunity to reap the benefits of copyright protection.

*d. Issues with originality*

Lastly, just as the copyright can give protection to the original author of a song, the copyright law can also easily give protection to a person using such intangible cultural heritage in their own work. Such was the case with the Ami group in Taiwan. The Ami, whose language has not been transcribed in written form, passes down its history through oral tradition and chants.<sup>76</sup> The German rock group *Enigma* utilized a recording of one of these traditional chants (the Ami Song of Joy) in its song “Return to Innocence,” which sold over five million copies world-wide.<sup>77</sup> *Enigma* obtained a registered U.S. copyright based on the fact that the song satisfied the minimum requirements of U.S. copyright law. In order to gain protection, a song which is borrowing aspects of a piece in the public domain only has to have “minimal” elements of originality in addition to being fixed in a tangible medium.<sup>78</sup>

*2. African Copyright Law/Domain Public Payment*

African copyright statutes are similar to its American counterparts. African copyright laws recognize an author’s exclusive rights regarding a work he or she created and offers “protection” by prohibiting others from using the work, for a limited amount of time, without the express consent of that author. In Ghana, an author has the exclusive right to reproduce, translate, or adapt a work he or she created,<sup>79</sup> can demand that his name or pseudonym be mentioned in any use of his work,<sup>80</sup> and can object to any distortion of the work that may harm his reputation or discredit the work.<sup>81</sup> Similar laws are applicable in Nigeria and Mali.<sup>82</sup>

African copyright laws also only provide protection for a limited amount of time. Ghana copyright law offers such protection to individuals for the duration of the author’s life plus 70years after his death<sup>83</sup> and to corporate bodies for 70years from the date on which the work was made public.<sup>84</sup>

Additionally, African copyright laws prohibit unauthorized use of a copyrighted work; any person or company that infringes on these rights by using the work in a

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<sup>76</sup> Riley, *supra* note 6, at 176.

<sup>77</sup> *Id.* at 176.

<sup>78</sup> 17 U.S.C. § 101.

<sup>79</sup> Copyright Act, 2005, Act 690 (Ghana) § 5.

<sup>80</sup> *Id.* § 6(a).

<sup>81</sup> *Id.* § 6(b).

<sup>82</sup> Paul Kuruk, *Protecting Folk lore 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, 798–801 (1999).

<sup>83</sup> Copyright Act, 2005, Act 690 (Ghana), § 12.

<sup>84</sup> *Id.* at § 13.

manner not authorized by the copyright owner is liable not only for civil remedies such as injunctions and damages,<sup>85</sup> but also for criminal penalties such as prison sentences and forfeiture of infringing materials.<sup>86</sup>

But one aspect of African Copyright laws differs in comparison to their American counterparts—the provisions specifically dealing with intangible cultural heritage, usually known as “folklore.” Most African Copyright laws specifically recognize and define “folklore.” Nigerian Copyright law defines folklore as “A group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.”<sup>87</sup> Ghanaian Copyright law similarly defines folklore as “the literary, artistic, and scientific expressions belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author... and any similar work designated under this Act to be works of folklore.”<sup>88</sup> Other similar definitions of “folklore” are noted by the Copyright laws in many other African countries,<sup>89</sup> recognizing that a community or group, not an individual author, contributes to the creation of the “folklore.”

In efforts to protect such unique pieces of creation, African copyright laws incorporate a “Domain Public Payment” system, where “protection” is granted to the cultural group, either by written application to the local government, monetary compensation to the cultural groups connected to certain folklore, or a combination of both.<sup>90</sup> Additionally, each African copyright law puts forth statutory exceptions for when folklore can be used without application or payment.<sup>91</sup> In Ghana and Mali one cannot use folklore without applying to the national government and paying a possible fee.<sup>92</sup> And Nigerian copyright law only allows for certain authorized uses of folklore, and those who use folklore in ways other than those permitted by the government are subject to injunctions and damage payments determined through the court system.<sup>93</sup>

While this system seems to be fairly practical in nature, problems do occur. The execution of this Domain Public Payment system could lead to administrative problems, specifically in the distribution of the fees.<sup>94</sup> Without proper record-keeping and organizational structure, one cannot really know where the money from these fees and court-issued damages should go. Additionally, such African laws are geographically limited. Issues arise when folklore is not bound by the borders of the countries, such as the Ewe community that straddles across the border between Ghana and Togo.<sup>95</sup> Related to this problem is a failure to provide appropriate exemptions for

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<sup>85</sup> Copyright Act, 2005, Act 690 (Ghana), § 47.

<sup>86</sup> *Id.* § 43.

<sup>87</sup> Copyright Act, 1992 Decree (Nigeria) § 27(5) (1992).

<sup>88</sup> Copyright Act, 2005, Act 690 (Ghana) § 76.

<sup>89</sup> Kuruk, *supra* note 82 at 778-79.

<sup>90</sup> Kuruk, *supra* note 82, at 830-31.

<sup>91</sup> *Id.* at 831.

<sup>92</sup> *Id.* at 799–802.

<sup>93</sup> *Id.* at 800.

<sup>94</sup> *Id.* at 831.

<sup>95</sup> *Id.* at 804.

a cultural community to use its own folklore without being subject to a fee.<sup>96</sup> These issues prevent this system from being truly effective.

### 3. *Human Rights*

International laws, and more specifically European laws, refer to protection as to guaranteeing that certain “natural rights” remain with the authors of an intangible creation. Unlike copyright protection, natural rights protect the non-monetary rights of an author. One international concept addressing the protection of intangible cultural heritage is the ideal of Human Rights, documented in the 1948 Universal Declaration of Human Rights (hereinafter “the 1948 Declaration”), which centers around the equal and inalienable rights. Specifically, the 1948 Declaration states that all people have the right to the “protection” of the moral and material interests resulting from any scientific, literary, or artistic production.<sup>97</sup> Additionally, the 1948 Declaration mandates equal protection for all persons<sup>98</sup> and, delving into monetary rights, states that everyone has a right to just and favorable remuneration.<sup>99</sup> Such provisions recognize natural rights belonging to a culture or creator, but as the case with many United Nation and UNESCO documents, unless set forth in a Convention or an official decree, they give no clear basis of application.

### 4. *Moral Rights*

Another international concept regarding these natural rights is the ideal of Moral Rights. A concept originating from France and Germany, moral rights are the inalienable rights granted to a work’s creator: right of publication (ability to publish), right of attribution (ability to claim authorship), and right to the integrity of a work (ability to prevent distortion).<sup>100</sup> Moral right provisions protect these rights by requiring that these inalienable rights stay with the creator of the work.

Unlike the Human rights provisions, the “protection” or safeguarding of these rights have been adopted by several governing bodies. The Berne Convention for the Protection of Literary and Artistic Works (hereinafter “the Berne Convention”) was the first international instrument to recognize an author’s “moral rights,” adopting the rights of attribution and integrity in its provisions and even set forth the length of ownership to last at least as long as those of his economic rights such as copyright.<sup>101</sup> UNESCO adopted a moral rights provision in its 1985 Modern Provision for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (hereinafter “Model Provisions”), focusing on the right of attribution by requiring acknowledgment of the source of an expression of folklore

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<sup>96</sup> Kuruk, *supra* note 82, at 805.

<sup>97</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. U.N. Doc. A/RES/217(III) at 27 (Dec. 10, 1948).

<sup>98</sup> *Id.* at 7.

<sup>99</sup> *Id.* at 23 (3).

<sup>100</sup> Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 359 (2006).

<sup>101</sup> Berne Convention for the Protection of Literary and Artistic Works (Jul. 24, 1974), [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) (hereinafter “Berne Convention”).

(right of attribution)<sup>102</sup> and outlining ways that requirement is not attained.<sup>103</sup> And U.S. laws have adopted moral rights in its legislation of the Visual Artists Rights Act (VARA), focusing on the moral rights of integrity<sup>104</sup> and attribution<sup>105</sup> in regards to the creators of visual art.<sup>106</sup>

The right of integrity would benefit cultural communities the most in that it would prevent the distortion or misuse of its intangible cultural heritage. But in some cases, such as VARA, the law only applies to tangible works of visual art.<sup>107</sup> And in most cases, provisions regarding moral rights are certainly clear on how they apply to individuals, but fail to address the moral rights of a group. The Berne Convention only addresses groups in the context of joint authors,<sup>108</sup> in which the same problem from U.S. Copyright Law occurs.<sup>109</sup> And UNESCO's Model Provisions succeeds in recognizing the group being the source of an expression of folklore, but recognizes the difficulty of acknowledging a cultural group, stating that "it may often be difficult to determine where the given expression of folklore actually originated."<sup>110</sup>

##### 5. *Unfair Competition Laws/Indian Arts and Crafts Act*

Unfair Competition laws in the U.S. could be used in the protection of intangible cultural heritage. Through such laws, "protection" for the author and the created work is ensured by preventing the sale of fake copies of that work.<sup>111</sup> In the U.S. there are three specific laws that govern unfair competition, the Lanham Act, the Federal Trade Commission Act, and the Uniform Deceptive Trade Practices Act. The Lanham Act prohibits the sale and creation of goods with false designations of origin.<sup>112</sup> The Federal Trade Commission Act prohibits unfair and deceptive practices affecting commerce,<sup>113</sup> such as false advertising<sup>114</sup> and misrepresentation of the origin of a product.<sup>115</sup> And the Uniform Deceptive Trade Practices Act grants injunctive relief due to deceptive trade practices such as passing of goods and services as those of another,<sup>116</sup> causing confusion or misunderstanding regarding the source of a good or service,<sup>117</sup> or using deceptive representation of the geographical origin of a good or service.<sup>118</sup> But because these laws only grant "protection" by punishing or prohibiting

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<sup>102</sup> Model Provisions for National Laws on the Protection of Expression of Folklore against Illicit Exploitation and Other Prejudicial Actions Comment to § 5 (1982) (hereinafter "Model Provisions").

<sup>103</sup> Model provisions, *supra* note 102, § 6.

<sup>104</sup> 17 U.S.C. § 106A(a)(3)(A).

<sup>105</sup> 17 U.S.C. § 106A(a)(1)(A)-(B).

<sup>106</sup> 17 U.S.C. § 106A.

<sup>107</sup> 17 U.S.C. § 101.

<sup>108</sup> Berne Convention, *supra* note 100, art. 7.

<sup>109</sup> *See supra* note 61.

<sup>110</sup> Model provision, *supra* note 102, § 5.

<sup>111</sup> Kuruk, *supra* note 82, at 832-33.

<sup>112</sup> 15 U.S.C. § 1125(a) (1994).

<sup>113</sup> 15 U.S.C. § 45(a).

<sup>114</sup> 15 U.S.C. § 52.

<sup>115</sup> 15 U.S.C. § 45A.

<sup>116</sup> Unif. Deceptive Trade Practices Act, 7A U.L.A 281, § 2(a)(1) (1966).

<sup>117</sup> Unif. Deceptive Trade Practices Act, § 2(a)(2).

<sup>118</sup> Unif. Deceptive Trade Practices Act §2(a)(4).

the misrepresentation of commercial goods and services, most types of intangible cultural heritage will not be protected due to the narrow scope of the prohibited acts.<sup>119</sup> For example, such laws would not allow a person to perform a tribal ritual song and lie about being part of that tribe, but they could potentially allow him to sell a recording of that same tribal ritual song so long as he properly acknowledges the cultural group in the recording's credits.

A unique law that incorporates Unfair Competitions Laws in relation to Cultural heritage is the Indian Arts and Crafts Act. The Indian Arts and Crafts Act, using similar provisions to the Lanham Act, offers "protection" to a cultural group by prohibiting the misrepresentation of cultures indigenous to the U.S. and Alaska in the sale of goods.<sup>120</sup> The issue with this law is the fact that it only pertains to tangible goods<sup>121</sup> and therefore is not applicable in regards to intangible cultural heritage.

### 6. Trade Secrets Law

Trade secrets law, in theory, could be used to protect intangible cultural heritage. The Uniform Trade Secrets Act offers "protection" to the owner of a created work by prohibiting any type of misappropriation of a corporation's or business' trade secret.<sup>122</sup> In order for information to be considered a "trade secret," the information must have actual or potential economic value as well as a reasonable need for secrecy.<sup>123</sup> A piece of intangible cultural heritage could easily pass the "secrecy" test, but because it involves cultural groups, there could be difficulties in establishing economic value, especially if the court requires evidence of folklore being sold in the open market.<sup>124</sup>

### 7. Contract Law

Contract law could be the most direct method of protecting intangible cultural heritage. Two parties can agree to whatever they want to so long as there is an enforceable contract with understandable terms.<sup>125</sup> So in this scenario, the owner can choose what aspects of his work are protected, whether it be focused on monetary compensation, the misuse of the work, or a combination of both. The biggest issue that comes up in contracts involving intangible cultural heritage is the fact that both parties have to come to agreement.<sup>126</sup> Because there are several loopholes for an entity or individual to use intangible cultural heritage without gaining the express permission of a cultural group, such entities or individuals will not attempt to work with those groups.<sup>127</sup> In addition, even if agreement is met, there is still a threat of

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<sup>119</sup> Kuruk, *supra* note 82, at 832-33.

<sup>120</sup> 25 U.S.C. § 305a (2000).

<sup>121</sup> 25 U.S.C. § 305e.

<sup>122</sup> Unif. Trade Secrets Act 14 U.L.A. 437, § 2 (1990).

<sup>123</sup> Unif. Trade Secret Act 14 U.L.A. 437, § 1(4) (1990).

<sup>124</sup> Kuruk, *supra* note 82, at 833.

<sup>125</sup> *Id.* at 833-34.

<sup>126</sup> *Id.* at 834.

<sup>127</sup> *Id.*



contract breach, and depending on the courts application of public domain usage,<sup>128</sup> a person breaching a contract could do so without being punished.<sup>129</sup>

### *C. Why Focus on “Preserving” or “Protecting”?*

As has been shown, issues will arise in choosing on how to prevent exploitation of intangible cultural heritage. If the focus of a law to preserve the culture, emphasis is placed on the difficulties regarding the documentation of such cultures and the actual prevention of unauthorized usage becomes secondary. And if the focus of the law is to protect the owner from unauthorized use, the laws will be inherently drafted towards the protection of an individual and of tangible objects, and the notion of group or community protection becomes secondary.

In theory, could not both purposes be combined? Why not combine the best of both worlds, or at the very least, offer both forms of preventing exploitation? This concept of applying the preservation concepts of documentation and inventory with the established protection concepts of preventing unauthorized use will be discussed in this next section.<sup>130</sup>

## III. APPLICATION OF BASIC ACKNOWLEDGEMENT IN U.S. COPYRIGHT LAWS

The music industry has been a thriving industry in the U.S. Blossoming as a result of the creation of the phonograph in the early 1900's, the industry bloomed into a multi-billion dollar by the 1950's.<sup>131</sup> The roots of the music industry are embedded in the U.S., and much can be said about the music industry's impact on American culture. Many aspects of today's music can trace its origins back to some form of intangible cultural heritage: rap and hip-hop arguably evolved from the songs of African tribes, harmonies used by pop singing groups were arguably derived from the musical tones of Indian instruments, and the sounds of certain wind instruments are merely fine-tuned instruments originally created by indigenous Asian tribes.<sup>132</sup> Because of this, U.S. legislation should recognize its responsibility to acknowledge and therefore preserve the roots of the industry.

As noted earlier, preservation is best achieved through cultural acknowledgment.<sup>133</sup> The best way to address this issue of acknowledgment may be through the Copyright law. The U.S. Copyright law currently offers the strongest form of protection to the creators of original work; any claims that an artist can make regarding the misuse of his or her work is done so through the Copyright Act, and an artist can prevent the unauthorized usage of his or her work.

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<sup>128</sup> Note the previous discussion on duration, noting that unpublished, unregistered works created before 1892 entered the public domain if the author was unknown.

<sup>129</sup> *Id.*

<sup>130</sup> This method is completely theoretical. The application of such theory is unlikely, but its application could resolve the issue of exploitation of unauthorized use of intangible cultural heritage.

<sup>131</sup> Levitin, *supra* note 2, at 186-90.

<sup>132</sup> *Id.* at 131-43.

<sup>133</sup> 2003 Convention, *supra* note 12, art. 12. (requiring an updated inventory of intangible cultural heritage).

Fortunately, there is already a model copyright law where acknowledgment of intangible cultural heritage is required. The U.S. Legislature may want to look at African Copyright Laws for guidance on how to require acknowledgment when it comes to intangible cultural heritage. A theme that is apparent in many African copyright laws is the requirement that a user recognize “folklore” prior to using it—or be subject to some form of punishment, whether it is fines or court action.<sup>134</sup> But as mentioned earlier, the issues with African copyright laws are more administrative than conceptual.<sup>135</sup> With preservation being the main goal, and the protection of the rights to that group being an added bonus, these administrative problems would generally rise from four factors: what is the definition of “folklore” or “intangible cultural heritage,” which cultural groups get recognized, how to establish a requirement of acknowledgement, and how these cultural groups would benefit from this change in Copyright law. The blue print for this solution is already there; there are aspects of preservation and protection laws that have been proven to work. Combining these currently working aspects of preservation as well as protection laws will lead to a viable solution.<sup>136</sup>

#### *A. What is Intangible Cultural Heritage?*

In order to determine how to both preserve and protect intangible cultural heritage, there needs to be legislation defining what is being protected. UNESCO sets forth the most clear definition of intangible cultural heritage in the 2003 Convention: “the practices, representations, expressions, knowledge, skills – as well as instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups, and in some cases, individuals recognize as part of their cultural heritage.”<sup>137</sup> In addition, the 2003 Convention lists specific types of intangible cultural heritage: oral traditions and expressions, including languages as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals, and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.<sup>138</sup> Applying legislation to ratify these definitions should be the first objective.

#### *B. Who gets Recognized?*

Once the term “intangible cultural heritage” is defined, the next step is to determine who can obtain protection. This obviously cannot be achieved simply by adjusting the copyright law but rather the creation of two important preservation aspects:

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<sup>134</sup> Kuruk, *supra* note 20, at 799-800.

<sup>135</sup> *Id.* at 831.

<sup>136</sup> Such a concept is, again, theoretical. With law currently in place, such legislation would take years to pass. But what is stopping us from considering the theoretical?

<sup>137</sup> 2003 Convention, *supra* note 12, art. 1.

<sup>138</sup> 2003 Convention, *supra* note 12, art. 2.

### *1. Establish documentation/inventory requirements*

First, it is necessary to create an inventory and documentation of cultural heritage. The 2003 Convention lists the establishment or refinement of a documented inventory as the best way to ensure the preservation of a cultural community.<sup>139</sup> As mentioned earlier, there are several obstacles in the creation of a proper inventory.<sup>140</sup> But despite those obstacles, there is already a proven inventory system of certain cultures that is functional in the U.S. Through the efforts of NAGPRA as well as the Bureau of Indian Affairs,<sup>141</sup> the U.S. government has created an inventory of 566 federally recognized Indian tribes indigenous to the U.S.<sup>142</sup>

In addition to the inventory of Indian tribes, there are other successful inventory systems in place in the U.S. The National Register of Historic Places Program was implemented in 1966 resulting from the National Historic Preservation Act, creating “the official list of the Nation’s historic places worthy of preservation.”<sup>143</sup> And although the U.S Congress did not renew its funding, up until 2011, the Save America’s Treasures Program had created an inventory of America’s tangible cultural heritage which included “nationally-significant historic sites and special collections across the country.”<sup>144</sup> Although these inventories deal with tangible artifacts, they lay the blueprint for how to create a proper and successful inventory system.

One way to assist the creation of a cultural inventory would be through mimicking the terminology used in NAGPRA. First, establish that only federally recognized cultural groups can gain protection through this law. That way, the issue of cultures opposed to such inventories is avoided: the U.S. government will only acknowledge those cultural groups who wish to be recognized.

But who will maintain such requests for federal recognition?

### *2. Establish the creation of an intangible cultural heritage committee*

As noted in the 2003 Convention, the establishment of an intangible cultural heritage committee or governing body is paramount to the success of an inventory system.<sup>145</sup> Among the many duties of the committees will be to process these requests and establish a proper inventory system. As was done with NAGPRA, the inventories should include as the very least the cultural and geographical affiliation of the cultural group.<sup>146</sup> Expounding upon these categories regarding the culture itself, the committee can be responsible for the cataloging of the individual works of intangible cultural

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<sup>139</sup> 2003 Convention, *supra* note 12, art. 12.

<sup>140</sup> Note the discussion from earlier in this article. Critics feel that difficulties in creating successful inventories of intangible cultural heritage branch from 1) the arduous work in creating the inventory, 2) the possible political barriers, and 3) the cooperation of cultural communities.

<sup>141</sup> US DEPARTMENT OF THE INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/index.htm> (last visited Dec. 19, 2014).

<sup>142</sup> *See supra* note 44.

<sup>143</sup> NATIONAL REGISTER OF HISTORIC PLACES, <http://www.nps.gov/nr/about.htm> (last visited Feb. 6, 2015). (Noting the national registered archives database).

<sup>144</sup> Save America’s Treasures, <http://www.preservationnation.org/travel-and-sites/save-american-treasures/> (last visited Feb. 6, 2015).

<sup>145</sup> 2003 Convention, *supra* note 12, art. 8.

<sup>146</sup> 25 U.S.C. § 3003(a).

heritage based on the nature of the work itself. It could be as simple as utilizing the five categories noted in the 2003 Convention (oral traditions and expressions, including languages as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals, and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship),<sup>147</sup> but such categories may evolve based on the types of works that are submitted. Other committee responsibilities will be discussed later, such as the distribution of the monies received through this legislation and the monitoring of proper acknowledgment.

### *C. What Should be Required?*

Now that the questions of what is protected and who can obtain this protection have been answered, the next step is determining the method of preservation and protection. As listed in the Model Provisions, acknowledging the source of the intangible cultural heritage should be the first requirement.<sup>148</sup> At first the acknowledgment of such sources may be difficult based on the lack of information, but once an inventory system is established and working, ideally a cultural group could be pinpointed by such inventories.

Therefore, the next viable step would be to slightly adjust the copyright law. In fact, the U.S. legislation could directly rely on the African Copyright laws and the “Domain Public Payment” system discussed earlier. Once a list of federally recognized cultural groups is established, this proposed legislation can require the user to apply for the use of intangible cultural heritage and pay set fees for that usage. Obvious exceptions should be given to cultural communities using its own intangible cultural heritage.

The distribution of the fees can be tricky, but again there are agencies that provide a blueprint as to how fees can be properly distributed. Performing Rights Organizations (PROs), specifically the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), and SESAC, have established a system for issuing royalties based on the number of times an author’s work is performed. An author can apply to be a member with one of the three PROs, and that particular PRO monitors the performance of that author’s works and requires entities which facilitate the performance of these pieces (mainly venues and radio stations) to pay royalty fees for those performances.<sup>149</sup> These PROs then issue royalties based, among other factors, on the number of times a particular piece is performed publically. Such concepts can be utilized by this intangible cultural heritage committee. Once a member list or inventory is established, the fees collected can be distributed based on the usage of that cultural groups intangible work.

The establishment of an intangible cultural heritage committee would alleviate the issues that arise from the Domain Public Payment system. The committee will be

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<sup>147</sup> 2003 Convention, *supra* note 12, art. 2.

<sup>148</sup> Model provision, *supra* note 102, § 5.

<sup>149</sup> ASCAP, <http://ascap.com/about/> (last visited May 17, 2012). Regarding royalties: “ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP’s licensees encompass all who want to perform copyrighted music publicly. ASCAP makes giving and obtaining permission to perform music simple for both creators and users of music.”

an official governing body that will not only process these applications for usage, but will also distribute fees based on which cultural group to which the work belonged as well as monitor and process applications from cultural groups for federal recognition. And with distribution of fees based on the cultural group and not geographic location, there is no issue of geographic bias, except maybe in cases where different tribes of one cultural group are claiming ownership.

#### *D. A Temporary Fix?*

The creation of an intangible cultural heritage committee monitoring the inventory process as well as proper distribution of usage fees is a viable solution, but one that would take time to establish. Other legislations have recognized the amount of time it could take, giving museums five years to comply with inventories and summaries<sup>150</sup> and even set forth provisions for requesting extensions.<sup>151</sup> While this ideal application of inventory compilation is being achieved, something should be done as a temporary “fix.”

With preservation being the ultimate goal, the argument again goes back to acknowledgment. In the cases where obvious exploitation is used, such as Enigma’s use of the Ami’s *Song of Joy*, there should be a provision in the copyright law that simply requires acknowledgment when the source is known. Failure to acknowledge the cultural group in one’s usage should be subject to the same damages set forth for copyright infringement: actual or statutory damages, potential injunction, and relevant attorney’s fees.<sup>152</sup> Adjusting the copyright law to require acknowledgment of a cultural group in the case that a piece of intangible cultural heritage is used could be a temporary solution while inventories are being collected.

Obviously, there are issues that would arise. The user may claim ignorance of the existence of a cultural group. The cultural group may not want to be recognized. The cultural group may not approve of how its intangible cultural heritage is being used, but it could be protected if the user simply acknowledges the cultural group. Additionally, there is the issue of standing; who would have standing to sue for such unauthorized usage?

There will always be issues in regards to any legislation passed. But think of the case of the Ami’s *Song of Joy*. Unless told so, a layperson listener probably would not have known that a piece of Ami’s intangible cultural heritage was used in *Enigma*’s song. But a small acknowledgement, either in the credits of a CD or a heading on a music video, goes a long way in noting the Ami’s existence in the world. And that acknowledgment of existence could be one form of how the Ami culture is preserved. This is not to say that this is the only method of preservation, but this simple adjustment can go a long way in ensuring the preservation of a culture.

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<sup>150</sup> 25 U.S.C. § 3003(b)(1)(B).

<sup>151</sup> 25 U.S.C. § 3003(b)(2)

<sup>152</sup> 17 U.S.C. §§ 502-06.

*E. How Does this Help?*

This proposed legislation is ambitious: requiring the acknowledgment and registration of cultural tribes, requiring the creation or reassessment of inventories, establishing an intangible cultural heritage committee, and adjusting the copyright law to apply to cultural groups as well as individuals. But this proposed legislation expounds upon the two purposes in preventing the exploitation of intangible cultural heritage: to preserve the cultural heritage and to protect the owner's rights. Through this legislation, preservation is served by the establishment of documentation, ensuring that at the very least the name of the cultural group will live on. And protection is served by extending the "exclusive rights" of copyright to the group not only through a Domain Public Payment System, but also through an acknowledgement requirement. Such a solution may not be adopted by the U.S. But based on the current methods of preventing the exploitation of intangible cultural heritage, protection and preservation may best served through deduction. There is no need to reinvent the wheel. Analyze what works, utilize what works, and cut out the rest.