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# Folklore 2.0: Preservation Through Innovation

Sean A. Pager

*Michigan State University College of Law*, [spager@law.msu.edu](mailto:spager@law.msu.edu)

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## FOLKLORE 2.0: PRESERVATION THROUGH INNOVATION

Sean A. Pager\*

*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.<sup>1</sup>*

*Societies without change aren't authentic; they're just dead.<sup>2</sup>*

Commentators agree: traditional culture is in danger. As the effects of globalization extend their reach to the world's far-flung corners, it is putting pressure on pockets of cultural diversity that have hitherto resisted change.<sup>3</sup> The question is what policy makers should do in response.

This Article explores two approaches to regulating traditional culture within intellectual property law. We can characterize these contrasting approaches as offering a choice between preservation and innovation. Preservationists seek to harness intellectual property rights to safeguard traditional culture in its authentic form. By contrast, an innovation approach encourages tradition to evolve into new forms of expression. Because an innovation model offers the most viable strategy for sustaining traditional culture in the long run, this Article argues that global policy efforts should be reweighted accordingly.

As the dueling quotations above intimate, the preservation and innovation models stem from diverging conceptions of the challenge facing traditional culture. Preservationists, such as Tom Greaves, locate the threat externally in the corrupting influence of global markets: The commodification of cultural heritage

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<sup>1</sup> Tom Greaves, *Introduction to INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK*, at ix, ix (Tom Greaves ed., 1994).

<sup>2</sup> Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES MAG., Jan. 1, 2006, at 30, 34.

<sup>3</sup> See Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1112 (2009); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 8 (1997); Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 79 (2005).

contaminates its source, distorting the meaning of tradition in ways that imperil the survival of both the heritage and its people.<sup>4</sup>

By contrast, Kwame Appiah locates the threat internally: By failing to adapt traditions to new circumstances, societies hasten their own demise; embracing change becomes the key to long-term survival. Far from bemoaning compromises to authenticity, Appiah celebrates contamination as enriching traditional culture.<sup>5</sup> Appiah also challenges claims that global markets threaten cultural diversity, noting that producers of traditional handicrafts benefit from increased sales.<sup>6</sup>

These diverging diagnoses point to very different policy prescriptions. The preservation model sees intellectual property rights as the means to inoculate cultural heritage against contamination. Empowering source communities with exclusive rights over the use of their traditional cultural expression would allow them to prevent inauthentic forms of exploitation. To determine the corpus of protected subject matter to which rights would attach, the preservation model adopts the perspective of an ethnographic museum curator who catalogues the characteristic expressive forms and content of each traditional culture.<sup>7</sup> Yet, the aim of preservationists goes beyond the purely archival.<sup>8</sup> Rather, by protecting tradition in its authentic form—call it Folklore 1.0—preservationists seek to ensure the continuing viability of traditional communities as custodians and practitioners of their intangible heritage.

By contrast, the innovation model operates under very different premises. It begins with skepticism toward notions of authenticity that often prove essentializing or coercive.<sup>9</sup> It views traditional culture—like all culture—not as an assemblage of canonical forms governed by fixed meanings, but rather as a dynamic system of shared understandings that are contingent, evolving, and

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<sup>4</sup> Greaves, *supra* note 1, at ix; Farley, *supra* note 3, at 11–12; Riley, *supra* note 3, at 81–82.

<sup>5</sup> See Appiah, *supra* note 2, at 33–35; see also Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 788 (1992).

<sup>6</sup> See Appiah, *supra* note 2, at 34. Indeed, as this Article will show, the real challenge for traditional culture is arguably a *lack* of economic viability; indifference may be a greater threat than exploitation. See *infra* notes 215–216 and accompanying text.

<sup>7</sup> We normally associate museums with tangible artifacts displayed on physical shelves, but the focus here is on protecting *intangible* heritage—songs, dances, designs, stories, and the like. These forms of creative expression exist independently of the tangible media in which such content is embodied (such as a DVD), or even of a particular creative work (such a film). As such, they comprise a novel domain of intellectual property law.

<sup>8</sup> Preservationists thus depart from salvage ethnographers who were content to chronicle the dying gasps of indigenous cultures without forestalling their demise. See Jacob W. Gruber, *Ethnographic Salvage and the Shaping of Anthropology*, 72 AM. ANTHROPOLOGIST 1289, 1289–91 (1970).

<sup>9</sup> See Appiah, *supra* note 2, at 34 (“Talk of authenticity . . . amounts to telling other people what they ought to value in their own traditions.”).

subject to contestation.<sup>10</sup> Rather than seeking to preserve “authentic” expression in its original form, the innovation model actively encourages hybridity, experimentation, and subversion. Such processes of semiotic renewal allow the source community to reclaim its own traditions, reinventing meanings and adapting forms to reflect contemporary values. Call this ripping, mixing, and burning of culture Folklore 2.0.

The two models differ in their approach to intellectual property law in both method and purpose. Where the preservationist agenda seeks to recognize a new form of intellectual property (IP), the innovation model relies on existing IP rights long established in law. Instead of creating new rights in old things (tradition), these “old” IP rights focus on protecting new things—innovation. These contrasting models reflect very different normative conceptions of intangible property. IP rights are conventionally justified to encourage innovation. By vesting exclusive rights in authors, for example, copyright law provides an incentive to create and disseminate original works of creative expression. Society, in turn, reaps the benefit of a richer storehouse of knowledge and creativity.<sup>11</sup> Yet, far from encouraging innovation, preservationist IP rights seek to uphold tradition. Instead of adding to the storehouse of knowledge, such rights would, at best, prevent its diminishment by preserving intangible cultural heritage.<sup>12</sup>

Whereas copyright laws have long been established, traditional culture rights are an emerging norm. American sports teams’ use of Indian mascots offers perhaps the most prominent domestic controversy;<sup>13</sup> yet, traditional culture rights have been asserted in a dizzying array of contexts ranging from OutKast’s Grammy Awards performance of a sacred Navajo melody to Vietnamese carpet designs copied from Australian aboriginal bark paintings.<sup>14</sup> A growing number of jurisdictions have backed such claims by enacting specific protections for intangible heritage both domestically<sup>15</sup> and abroad.<sup>16</sup> Moreover, the World

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<sup>10</sup> See C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1370–72 (2000); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498–99 (2001).

<sup>11</sup> 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, 647–49 (2003). The limited duration of the rights balances the need for authors to recover their creative investments against the social costs of exclusivity. *Id.* at 647–48.

<sup>12</sup> See *id.* at 639–40. Protection of intangible heritage would also continue indefinitely and the rights would be communal rather than individual in nature. *Id.* at 639–41.

<sup>13</sup> See Carpenter et al., *supra* note 3, at 1105–12 (describing controversies involving Washington Redskins, Cleveland Indians, and other professional and collegiate teams).

<sup>14</sup> Farley, *supra* note 3, at 4–7; Riley, *supra* note 3, at 69–72, 75.

<sup>15</sup> See Carpenter et al., *supra* note 3, at 1106 (describing NCAA’s regulation of Indian mascots and team names); *id.* at 1104–05 (describing U.S. Congress’ overhaul of 1935 Indian Arts and Craft Act, via the 1990 amendment).

<sup>16</sup> See DAPHNE ZOGRAFOS, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* 7–18 (2010) (surveying existing laws protecting intangible heritage). Recent entrants include China and some African jurisdictions. Intangible Heritage Law

Intellectual Property Organization (WIPO) has recently made remarkable advances in multinational negotiations. A comprehensive treaty mandating exclusive rights in traditional cultural expression (abbreviated TCE and also known as folklore) has advanced to a near-final draft.<sup>17</sup>

This Article argues that the propertization of tradition contemplated by the WIPO draft treaty is fundamentally misguided. It echoes previous critics of TCE/folklore rights who have warned of impingements upon free speech and the public domain.<sup>18</sup> It also aligns with commentators who deplore such rights for departing from the progressive mission of intellectual property rights.<sup>19</sup> The focus here, however, moves beyond existing critiques. Instead, this Article challenges the preservationist approach to traditional culture on the preservationists' own terms. It argues that far from preserving traditional culture, exclusive TCE/folklore rights could jeopardize its survival, harming the very communities that such rights purport to protect.

This Article argues that an innovation model offers a better way forward. Traditional culture will only endure to the extent that it retains meaning and value to the source communities that perpetuate it. This requires the freedom to creatively adapt and hybridize tradition to keep it responsive to current needs. Rather than calcifying traditional expression in "authentic" forms that inhibit such innovation, the law should facilitate the dynamic development of culture. Copyright is better suited for this purpose because it encourages tradition and innovation to work hand in hand rather than opposing them as antagonists.

To develop these arguments, this Article presents the Nigerian video film industry—"Nollywood"—as a case study. Nollywood provides a striking example of an indigenous culture industry that has thrived by reinventing folkloric tradition to achieve popular and commercial success. Largely overlooked by Western commentators, Nollywood has emerged as a major creative force that is, by some

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(promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective June 1, 2011); AFRICAN REG'L INTELLECTUAL PROP. ORG. [ARIPO], *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (2010); 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-africa%E2%80%99s-new-tk-bill/>.

<sup>17</sup> See World Intellectual Prop. Org. [WIPO], *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles*, WIPO Doc. WIPO/GRTK/IC/17/4 (Sept. 21, 2010) [hereinafter *WIPO Draft Treaty*]. WIPO has drafted separate treaties on traditional knowledge (governing technical know-how) and genetic resources. This Article focuses solely on the TCE/folklore treaty.

<sup>18</sup> See, e.g., Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 202–03 (1998); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 38 (2009).

<sup>19</sup> See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 875–80 (2010).

measures, the second or third largest film industry in the world.<sup>20</sup> Audiences throughout Africa (and increasingly beyond) watch Nigerian movies.<sup>21</sup> As such, Nollywood provides an important corrective to prevailing narratives of cultural imperialism that has particular implications for the traditional knowledge debate.

On one level, the extraordinary success of Nollywood is a story of technological empowerment. Nollywood shows how digital technologies can serve as a “leap-frog” technology, leveling the global playing field by dramatically lowering the costs of cultural production. Nollywood forms part of a broader landscape of emerging culture industries in the Global South that are driving both commercial and cultural development in ways hitherto unimaginable. They have spawned a flowering of creative production that holds enormous significance for public discourse, democracy, cultural sovereignty, and much else.<sup>22</sup>

The implications for global intellectual property norms, in particular, merit attention. The rise of commercial industries whose livelihood depends on original creative content is creating a powerful set of stakeholders in developing countries for whom copyright protection represents opportunity rather than threat. Such developments carry obvious benefits for IP-exporting countries such as the United States. However, the implications for developing countries are equally profound: they suggest recalibration of the cost/benefits of pursuing preservation strategies at the expense of innovation.<sup>23</sup>

Nollywood’s experience has direct relevance to the TCE/folklore debate for another reason: the portrayal of traditional culture in Nigerian videos provides much of the films’ appeal and competitive advantage. Such use of folklore by an indigenous industry again provides a positive counter to the usual narrative of Western neocolonial appropriation—here, the Nigerians themselves are commercially exploiting their own culture. In doing so, they are perpetuating the underlying cultural traditions, but not necessarily in their original form. Rather, by adapting and remixing folkloric elements, Nollywood films repurpose them to serve new narrative contexts and, in the process, infuse tradition with fresh meaning and relevance.<sup>24</sup>

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<sup>20</sup> Nollywood’s annual production of over fifteen hundred feature films rivals that of India, the world’s leader, and is roughly double the output of its American namesake, Hollywood. To be fair, the Hollywood figures only count box office releases rather than total American film production. See Ramon Lobato, *Creative Industries and Informal Economies: Lessons from Nollywood*, 13 INT’L J. CULTURAL STUD. 337, 341 (2010). Yet the mere fact that Nollywood can be mentioned in the same breath as these longstanding industry heavyweights shows the democratizing potential of digital technology.

<sup>21</sup> Stevina U. Evuleocha, *Nollywood and the Home Video Revolution: Implications for Marketing Videofilm in Africa*, 3 INT’L J. EMERGING MKTS. 407, 409 (2008).

<sup>22</sup> See *infra* notes 131–149 and accompanying text.

<sup>23</sup> Cf. Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 87 (2008) (noting proponents “justify [TCE/folklore rights] with the assertion that poor countries do not produce the sorts of works that benefit from copyright protection”).

<sup>24</sup> See *infra* notes 180–193 and accompanying text.

Yet, herein lies the problem: while such semiotic renewal—Folklore 2.0—represents a healthy, even praiseworthy phenomenon, it runs contrary to Folklore 1.0 conceptions of tradition as cherished heritage whose authenticity must not be compromised. Nollywood's folklore remixes, therefore, potentially conflict with the preservationists' emerging norm of TCE/folklore rights. Enforcing such rights against the Nollywoods of the developing world could inhibit socially valuable innovation and deter much-needed investment.

Given a choice between promoting innovation versus reifying the past, the normative argument for the former is clear: a dynamic conception of culture is far more conducive to commercial and cultural development. Such creativity offers the best hope for the long-term survival of traditional culture. Accordingly, to encourage the remixing of tradition that Nollywood epitomizes and to clear a path for other creative industries to emulate its example, we must avoid shackling folklore to the dead hand of preservationist heritage rights.

Previous commentary has often discounted the prospect of TCE-based innovation, either by ignoring it or assuming incremental rates of development based on artisanal production.<sup>25</sup> In doing so, critics of TCE/folklore rights arguably radically underestimate the true costs to innovation. The Nollywood case study in this Article serves to remedy that gap.

The argument proceeds as follows: Part I provides an overview of TCE protection, describing the scope of the draft WIPO treaty and the rationales behind it. Part II.A introduces Nollywood, the Nigerian video film industry. Nollywood exemplifies the potential for creative industries to harness digital technologies for creative and commercial development. Part II.B explains how much of Nollywood's success depends upon its hybridized adaptations of traditional cultural sources. Part III explores the normative implications of the Nollywood case study. It underscores the advantages of innovation over preservation and explains how TCE rights could jeopardize the progressive promise that Nollywood remixes epitomize. Part IV argues for greater emphasis on adapting copyright law to serve the needs of emerging creative industries. Part V concludes.

## I. OVERVIEW OF THE WIPO TREATY – RIGHTS & RATIONALES

### *A. Scope of Proposed Protection*

Meeting in Geneva for the past several years, WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore has made steady progress toward fashioning international consensus around a treaty to protect traditional cultural expression. Although the language of the treaty remains subject to negotiation, the broad outlines of the protections it contemplates have become clear.

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<sup>25</sup> See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROBS. 97, 110–12 (2007).

### 1. *Subject Matter*

The WIPO treaty casts a wide net embracing all manner of expressive subject matter in both tangible and intangible embodiments, including stories, epics, legends, poetry, songs, rhythms, instrumental music, dances, plays, ceremonies, rituals, carvings, sculptures, pottery, textiles, glassware, carpets, costumes, and handicrafts.<sup>26</sup> To qualify as a protected tradition, however, the treaty stipulates that the cultural expression in question must be (a) “passed on from generation to generation” within an identifiable community and (b) “authentic”—that is, “characteristic” of that community’s “social identity and cultural heritage.”<sup>27</sup>

The first requirement—transgenerational transmission—imposes a retrospective frame of reference. The second requirement, in referencing authenticity, pushes toward essentialism. Together, these definitional requirements privilege stability over innovation. Cultural expression that conforms to settled conventions and accepted paradigms will qualify; experimental works that challenge them are unlikely to. A broad communal esthetic likewise trumps individual creativity and subcultural variation.

This definitional bias toward canonical works is reinforced by the treaty’s registration provisions for TCE/folklore having “particular value or significance.”<sup>28</sup> Folkloric traditions singled out for registration will likely be those that enjoy either widespread acceptance or the backing of controlling elites; disfavored genres reflecting minority viewpoints will likely be excluded. Such selective pressures accentuate the treaty’s conservative bias against innovation.

While relatively clear on what qualifies as traditional expression, the treaty offers less guidance as to who the corresponding source communities might be. While indigenous peoples remain the paradigmatic example, the treaty extends its protection much more broadly to embrace “traditional and other cultural communities”; these more nebulous categories are left undefined.<sup>29</sup> Such definitional lacunae arguably invite undesirable strategic mobilizations around

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<sup>26</sup> *WIPO Draft Treaty*, *supra* note 17, art. 1(a)–(d). Such language largely tracks subject matter protected by copyright law. *Cf.* 17 U.S.C. § 102(a) (2006); Berne Convention for the Protection of Literary and Artistic Works, art. 2, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 102 Stat. 2853, 1161 U.N.T.S. 3 [hereinafter *Berne Convention*].

<sup>27</sup> *WIPO Draft Treaty*, *supra* note 17, art. 1. The definition does not apply to religious heritage as such, although cultural expression of religious significance that otherwise qualifies is not excluded.

<sup>28</sup> *Id.* art. 7(2) (providing for either registration or notification of particular works). In theory, a community could register every aspect of its culture. But assuming transaction costs, selection pressures will likely favor works with the most powerful constituency behind them.

<sup>29</sup> *Id.* Such broad definitions might embrace a diverse range of communities such as Louisiana Cajuns, Scottish Highlanders, Jamaican Rastafarians, Mardi Gras “Indians,” and maybe even California surfers.



identity politics,<sup>30</sup> a prospect compounded by the inevitability of conflicting TCE claims.<sup>31</sup>

## 2. Rights

Having established the corpus of protected traditional expression, the treaty then proceeds to define three tiers of protection, which depend on whether the TCE/folklore in question (a) has been registered or notified, (b) is deemed “secret,” or (c) falls within the default category: “other.”<sup>32</sup> A range of specific legal protections follows. Many of these provisions extend basic unfair-competition principles to TCE/folklore. For example, the treaty requires appropriate attribution of the source community for works adapted from TCE, and, conversely, forbids “false, confusing or misleading indications” of origin or sponsorship.<sup>33</sup> The treaty also safeguards secret TCE/folklore against unauthorized disclosure.<sup>34</sup>

The foregoing provisions have much to commend them. Of greater concern, and the focus of this Article’s critique, are the treaty’s copyright-like provisions. These provisions confer exclusive rights to block uses even of *non*-secret traditional cultural expression in ways that are *not* misleading as to source or sponsorship. These more robust restrictions on TCE use come closer to asserting a property right in traditional culture.<sup>35</sup>

The treaty affords its strongest protection to registered TCE/folklore; it imposes a blanket ban on “reproduction, publication, adaptation, broadcastings, public performance, communication to the public, distribution, rental . . . and fixation” of such expression.<sup>36</sup> Such broad language essentially replicates the exclusive rights afforded under copyright law but without the term limits and many of the exceptions that ordinarily circumscribe copyright.<sup>37</sup> In addition, the treaty

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<sup>30</sup> Naomi Mezey, *The Paradox of Cultural Property*, 107 COLUM. L. REV. 2004, 2007 (2007) (“[C]ultural property tends to increase intragroup conformity and intergroup intransigence . . .”).

<sup>31</sup> See MICHAEL BROWN, WHO OWNS NATIVE CULTURE 19–21 (2003); 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, 803–05 (1999). While the treaty acknowledges the potential for conflicting claims asserted by rival communities, it defers to national authorities to resolve them. *WIPO Draft Treaty*, *supra* note 17, art. 7. Such purely national solutions cannot resolve conflicts that cut across international borders.

<sup>32</sup> *WIPO Draft Treaty*, *supra* note 17, art. 3.

<sup>33</sup> *Id.* arts. 3(1)(a)(ii), (1)(b)–(c), (2)(a), (2)(c).

<sup>34</sup> *Id.* art. 3(3).

<sup>35</sup> See Munzer & Raustiala, *supra* note 18, at 45–47.

<sup>36</sup> *WIPO Draft Treaty*, *supra* note 17, art. 3(1)(a)(i).

<sup>37</sup> Compare *id.* arts. 3, 6 (providing indefinite term of protection), with 17 U.S.C. §§ 106, 302 (2006) (providing a specified term of protection). Especially troubling is the treaty’s proviso that specified fair uses remain subject to the stipulation that the use not be offensive, distorting, or harmful. Compare *WIPO Draft Treaty*, *supra* note 17, art. 5 (requiring that specified fair uses remain subject to the stipulation that the use not be

provides blocking rights to prevent third parties from acquiring intellectual property rights in derivative forms of TCE.<sup>38</sup>

Somewhat narrower protection applies to *non*-registered works, which are protected only against uses that involve “distortion, mutilation or other modification of, or other derogatory action.”<sup>39</sup> This provision parallels the moral right of integrity afforded to authors of copyright expression.<sup>40</sup> While the scope of such protection remains subject to interpretation, read expansively, it could afford veto power over virtually any modifications that traditionalists find objectionable.<sup>41</sup>

Such strong exclusionary rights raise the specter of unintended harms and potential abuse. While TCE rights are ostensibly justified by the threat of external appropriation, their operative effect is not limited to outsiders. The treaty explicitly contemplates application against community members whose expression is deemed to stray beyond the “traditional and customary context.”<sup>42</sup> The potential for such intramural application to discourage cultural innovation represents a central concern of this Article.

### 3. Control

The treaty’s assignment of control over TCE/folklore rights exacerbates the potential for abuse. As an initial matter, the treaty vests authority with the community to administer collectively according to “traditional decision-making

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offensive, distorting, or harmful), with 17 U.S.C. §§ 107–110 (providing unqualified exemptions for specified fair uses); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (holding that disparagement is not a cognizable harm for purposes of fair use).

<sup>38</sup> The scope of such blocking rights remains unsettled. As currently drafted, registered TCE are protected only against “unfair” acquisition or exercise of intellectual property rights. *WIPO Draft Treaty*, *supra* note 17, art. 3(a)(iv). The negotiating record of the treaty suggests, however, that derivative rights claims by outsiders could be regarded as presumptively unfair. *See WIPO Draft Treaty*, *supra* note 17, art. 3, n.100.

<sup>39</sup> *WIPO Draft Treaty*, *supra* note 17, art. 3(2)(b).

<sup>40</sup> *Cf.* 17 U.S.C. § 106A(a)(3)(A) (granting author right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”); Berne Convention, *supra* note 26, art. 6 bis (granting authors “the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation”).

<sup>41</sup> The capaciousness of terms such as “distortion” and “modification” combined with the lack of countervailing protection of free speech either in the treaty or in the legal systems of many of the countries that will implement it hardly inspires confidence. Moral rights regimes in Europe have allowed authors to block such modifications as colorizing a black-and-white film. *See Cour de Cassation [Cass.] [highest court for civil, commercial, social, and criminal matters] 1e civ.*, May 28, 1991, Bull. civ. I, No. 172 (Fr.). Given such precedents, virtually any modification can be presented as offensive by a sufficiently vehement complainant.

<sup>42</sup> *WIPO Draft Treaty*, *supra* note 17, art. 5(1)(a)–(b).

and governance processes.”<sup>43</sup> While respect for autonomous community norms is admirable in principle, the ill-defined nature of the communities thereby empowered raises concerns that self-appointed cultural guardians will manipulate the mantle of orthodoxy to stifle minority voices.

Worse, the treaty gives governments themselves the ability to commandeer enforcement of TCE rights. Although the source communities are supposed to remain beneficiaries and governments are to act in consultation with them, there is very little to prevent governments from usurping such power for their own purposes—a danger, which, as this Article will show, is far from theoretical.<sup>44</sup>

### B. Rationales

If the strong property-rights-approach to TCE/folklore embodied in the WIPO draft treaty can be justified at all, that justification arises from preservationist concerns over cultural integrity. Other rationales for protecting traditional culture include unjust enrichment, unfair competition, reparations, redistribution, anticommodification, and privacy.<sup>45</sup> But these objectives could be served through a combination of inalienability and liability rules.<sup>46</sup> The need for robust controls over the use of TCE/folklore arguably becomes imperative only where the goal is to prevent inauthentic or external appropriation from corrupting traditional culture.

Cultural preservation rationales for TCE/folklore rights generally encompass two subsidiary interests: (1) preventing cultural harm and (2) fostering sustainable development. A brief discussion of each follows.

#### 1. Preventing Cultural Harm

As noted, harm prevention focuses on warding off sources of cultural contamination that could compromise the integrity of traditional cultural expression. By attacking vital underpinnings of communal identity, such cultural injuries are said to inflict damage that, left unchecked, could jeopardize the very survival of the community and its traditions.<sup>47</sup> The precise mechanism by which such harms take place often remains unspecified. Commentators invoke notions of distortion, disparagement, and displacement. They “worry that the expropriation of

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<sup>43</sup> *Id.* art. 4; *see also id.* general guiding princ. (a) (encouraging the use of “indigenous and customary laws and protocols as far as possible”).

<sup>44</sup> *Id.*; *see infra* notes 300–309 and accompanying text.

<sup>45</sup> *See* Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL’Y 313, 325 (2005); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 313–14 (2002).

<sup>46</sup> *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1357, 1369 (2004). If compensation is due, the WIPO draft treaty provides a mechanism for “equitable remuneration or benefit-sharing.” *WIPO Draft Treaty*, *supra* note 17, art. 3(2)(d).

<sup>47</sup> Tsosie, *supra* note 45, at 308–10.

their living culture will cause their imagery to lose its original significance.”<sup>48</sup> They warn of the “cultural or psychological harm caused by the unauthorized use.”<sup>49</sup> They fear that inauthentic meanings will displace authentic ones, diluting the original meaning or tarnishing its significance and value.<sup>50</sup> They argue that such cultural dislocations will have follow-on effects that undermine the community’s distinctive identity and “lead to a disruption of [the communities’] . . . beliefs and a dissolution of their culture.”<sup>51</sup> Therefore, at their core, traditional knowledge rights claims represent a “struggle over cultural meaning” and cultural identity.<sup>52</sup>

Without a metric to measure the severity of any specific injury or its causal aftermath, such complaints are difficult to evaluate; claims are invariably couched within broader contexts of colonialism and subordination.<sup>53</sup> As such, a normative basis for remedying such cultural injuries remains unclear.<sup>54</sup> Some commentators contest the very premise of cultural preservation.<sup>55</sup>

This Article pursues a different tack. While accepting cultural preservation a priori as a goal, it advances a more practical objection: Cultural harm from appropriation may occur, but because we have no way to evaluate its probability or gravity in particular cases, we arguably need to worry about *over*protection, as much as *under*protection. Otherwise, TCE rights may do more harm than good.

In particular, this Article focuses on the risk that TCE rights may themselves inflict cultural harms by calcifying traditional expression within a rigid conception of authenticity. Such self-inflicted injuries could occur on multiple levels: (a) the process of defining “authentic” subject matter could foster a repressive essentialism, (b) the glorification of tradition could discourage experimentation, and (c) enforcing TCE rights could directly obstruct cultural innovation.<sup>56</sup> The resultant cultural atrophy could, in turn, jeopardize the survival of the very traditions that TCE protection purports to safeguard.<sup>57</sup>

By supplying a dynamic context to evaluate such concerns, Nollywood films underscore the tradeoffs between innovation and preservation. Using commercial mass media to reinvent tradition, such digital remixes exemplify the creative

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<sup>48</sup> Farley, *supra* note 3, at 15.

<sup>49</sup> *Id.* at 14; *see also* Carpenter et al., *supra* note 3, at 1109 (analogizing hate speech with racial harassment).

<sup>50</sup> Beebe, *supra* note 19, at 875–76.

<sup>51</sup> Farley, *supra* note 3, at 15.

<sup>52</sup> *Id.* at 10; Riley, *supra* note 3, at 78; Tsosie, *supra* note 45, at 313, 317 (“[T]he primary harm[] is to negate the reality of Native peoples’ separate political and cultural status and transform them into some quaint aspect of the dominant society’s ‘culture.’”).

<sup>53</sup> *See* Riley, *supra* note 3, at 78–79; Farley, *supra* note 3, at 11–12.

<sup>54</sup> *See* BROWN, *supra* note 31, at 220; Munzer & Raustiala, *supra* note 18, at 71–73, 80.

<sup>55</sup> *See* Appiah, *supra* note 2, at 33–34; Waldron, *supra* note 5, at 762–63.

<sup>56</sup> *See* BROWN, *supra* note 31, at 215–22; Mezey, *supra* note 30, at 2016–20; Sunder, *supra* note 10, at 500–01.

<sup>57</sup> TCE rights could also exacerbate identity politics and empower reactionary elites. *See* Sunder, *supra* note 10, at 504.

potential of the Folklore 2.0 paradigm and supply a powerful argument for favoring experimentation over authenticity.

## 2. *Fostering "Sustainable Development"*

TCE rights proponents generally dismiss the "cultural mummification" concerns described above as overstated. Far from confining traditional culture in a straightjacket of authenticity, proponents insist that TCE rights are compatible with a dynamic concept of culture in which practices and meanings evolve over time. The WIPO draft treaty acknowledges culture's "constantly evolving character" and stipulates that that "normal use . . . and development of TCEs" by community members does not infringe TCE rights.<sup>58</sup>

Cultural preservation rationales have themselves evolved beyond harm avoidance to advance an affirmative vision of cultural stewardship that views TCE rights as an instrument to promote both cultural and economic development. Rather than acquiesce in untrammled exploitation of traditional culture, however, such cultural stewardship models contemplate benevolent guardians who will shepherd the development of traditional culture along responsible paths.<sup>59</sup> This Article challenges the premise of such stewardship, arguing that it rests on an irredeemably flawed notion of cultural sustainability.

### (a) *Cultural Development*

As noted, the WIPO treaty provides for "normal use . . . and development" of traditional culture, while stipulating that such development must take place "within the traditional and customary context."<sup>60</sup> Such constraints presumably seek to ensure that new uses remain compatible with existing traditions. Borrowing from environmental policy, the animating concept here appears to be a notion of "sustainable . . . development."<sup>61</sup>

Yet, the notion of cultural sustainability appears, at best, problematic. Sustainability of traditional culture is hardly analogous to fishery management, where empirical models of replenishment can determine responsible limits. Moreover, the idea that we can identify "normal" development in traditional culture is deeply suspect. It assumes that change can be made to unfold in a gradual, evolutionary fashion and that we can meaningfully evaluate new developments as they arise. Yet there are no extrinsic criteria by which to make such determinations. Cultural innovations are unlike executable software or blood types for which compatibility can be objectively defined. Contemporary assessments of cultural value are notoriously problematic.<sup>62</sup>

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<sup>58</sup> *WIPO Draft Treaty*, *supra* note 17, general guiding princ. (e), art. 5(1)(a).

<sup>59</sup> See Carpenter et al., *supra* note 3, at 1069.

<sup>60</sup> *WIPO Draft Treaty*, *supra* note 17, art. 5(1)(a).

<sup>61</sup> *Id.* objective (iii).

<sup>62</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

The WIPO treaty sidesteps such ontological questions by opting for a procedural solution. It begins with the proviso that to qualify for the “development” exemption, innovations must originate within the community.<sup>63</sup> Next, it stipulates that the allowance for “normal” development shall be “determined by customary laws and practices.”<sup>64</sup> Finally, the treaty suggests that communal consensus supplies the touchstone of legitimacy.<sup>65</sup> In short, it envisions a process of cultural development emerging incrementally through communal consensus ratified by traditional practices. Rather than external forces imposing change, communities would thereby be empowered to embrace innovation selectively on their own terms.

Such appeals to cultural sovereignty are only persuasive, however, if we think that change can indeed be brokered consensually through autonomous processes. In fact, cultural change is often abrupt and riven by conflict, and the boundaries between internal and exogenous influences are seldom clear-cut. Nor does the WIPO draft treaty’s deference to customary norms offer a viable basis to navigate such conflicts. As this Article will show, its artful formulations elide deeper tensions that cannot be papered over. Cultural development requires experimentation, experimentation courts controversy, and controversy breeds conflict. The tensions between development and tradition are unavoidable. And the indeterminate nature of cultural sustainability offers no principled basis to resolve them. Moreover, the treaty could itself exacerbate matters by empowering cultural conservatives with the means to quash culturally heterodox voices, short-circuiting dialogue and deterring experimentation.<sup>66</sup>

### (b) *Economic Development*

A further source of potential conflict arises from tensions between cultural and economic development. A goal of the WIPO treaty is to enable source communities to exploit their traditional expression for commercial gain, leveraging their rights of content exclusivity to economic advantage. Commodification of TCE/folklore would contribute to the livelihoods of source communities and thereby underwrite the continued flourishing of the underlying traditions. In this sense, economic development undoubtedly contributes to cultural preservation.

Yet, does a property rights model offer the best means to unlock the potential value of TCE/folklore and secure the benefits of such commodification to source communities? Leveraging exclusive use rights would undoubtedly extract some value in the form of monopoly rents. TCE’s proponents further claim TCE rights

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<sup>63</sup> *WIPO Draft Treaty*, *supra* note 17, art. 5(1)(a) (referring to “development by members of the [relevant community]”).

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* general guiding princ. (h) (allowing for “contemporary use [where] the community identifies itself with that use”).

<sup>66</sup> *See infra* notes 276–291 and accompanying text.

will bring benefits to source communities in the form of commercial certainty, loan securitization, and induced investment.<sup>67</sup>

However, many of these benefits are illusory, and, indeed, the opposite effects are likely to result. The amorphous nature and scope of TCE rights and their potentially contested ownership is likely to undermine commercial certainty rather than further it. Such overlapping and contested claims raise the specter of a TCE “anticommons” that would complicate licensing and deter investment.<sup>68</sup> Moreover, by blocking uses that exceed the bounds of traditional and customary use, such rights could impede the kind of creative hybridizations needed to make TCE marketable.

This latter consideration points to the potential tradeoffs between preservation and innovation models. Traditional culture will rarely be marketable in its “raw,” authentic form. Rather, commodification of tradition typically entails adaptation. Catering to external markets requires varying degrees of cultural translation, mediation, and packaging. Evolving tastes at home may similarly demand variations and innovation. Such adaptations will likely be subject to copyright, which encourages the commercialization of traditional culture by allowing the improver to internalize the benefits of producing and marketing the adaptations.

By contrast, rather than incentivizing new versions of traditional culture, TCE/folklore rights push in the opposite direction by subordinating copyrights in derivative forms of TCE/folklore to preexisting claims to tradition in its original, “raw” form.<sup>69</sup> At best, such rights undermine copyright incentives to innovate by imposing added transaction costs. At worst, they could block innovation directly through holdups and outright vetoes.<sup>70</sup> Vesting “upstream” rights in source communities would therefore allow the communities to appropriate rents from the “downstream” adaptations that generate commercial value thereby undermining the incentives for creative development.<sup>71</sup> Accordingly, the expected outcome would be economically suboptimal rates of commercialization and innovation.

In fact, TCE proponents generally do not claim that TCE rights represent an economically efficient solution. Rather, such rights are justified as a brake on otherwise unrestricted commercialization. Thus, the case for upstream vetoes over commodification ultimately reverts to cultural rationales.<sup>72</sup> Propertizing tradition is

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<sup>67</sup> Munzer & Raustiala, *supra* note 18, at 67–68.

<sup>68</sup> Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 999–1000 (2005).

<sup>69</sup> See *infra* notes 231–232 and accompanying text.

<sup>70</sup> The concern over holdup costs is especially salient because source communities, by TCE proponents’ own account, are not motivated by exclusively economic motives.

<sup>71</sup> While the community may gain collectively from exploiting or licensing TCE rights, individual artists who generate commercially valuable innovations would not. Nor is there any guarantee that the most creative innovators would receive communal permission; rather, licenses could go to the highest bidder or those with the best connections.

<sup>72</sup> A variety of motives are at play: distrust of market mechanisms, a Marxist disdain for commodification, and the suspicion that commercial exploitation is more likely to benefit Western appropriators than the source communities themselves. See Chander &

not about wealth maximization, nor even about allocating the proceeds equitably. The point is to channel development along a culturally sustainable path. In theory, exclusive rights will allow source communities to selectively exploit the economic value of their TCE/folklore without compromising cultural integrity. Yet the right to control commodification does not remove the conflict between development and preservationism: the impetus to exploit tradition for economic gain remains in tension with cultural integrity concerns.<sup>73</sup>

As we have seen, the WIPO draft treaty envisions a harmonious integration of cultural and economic development emerging through an unspecified process based on communal consensus and customary practices. Yet conflicting imperatives and diverging conceptions of progress make such Panglossian faith hard to swallow. Autonomous decisionmaking offers no guarantee of sustainable outcomes. Rather, the unresolved contradictions within the cultural preservation model invite internecine struggles, unintended outcomes, and abuses.<sup>74</sup>

The Nollywood case study that follows shows how the premise of sustainable development rests on a vision of cultural stewardship that is itself ultimately unsustainable. Nollywood's creative hybridizations exemplify the autonomous development of tradition that TCE proponents purport to favor. Yet, as Part III demonstrates, TCE rights could block such socially valuable innovation in the name of cultural orthodoxy. As such, the cultural preservation rationale arguably fails on its own terms.

### C. *Why Not Innovation?*

Given the pitfalls of the preservationist approach, why have developing countries not embraced innovation instead of preservation as the means to both revitalize tradition and reap the benefits of cultural and economic development?<sup>75</sup> Arguably, much of the reluctance to embrace innovation springs from a lack of confidence. Developing countries have long viewed the global intellectual property regime as a stacked deck that serves the interests of powerful multinational firms and favors forms of innovation that developed countries already dominate.<sup>76</sup> Conversely, the innovative capacity of developing countries, as well as their ability to project cultural identities through global media, has been seen as historically weak. Such perceived vulnerability has led to defensive policies designed to fend

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Sunder, *supra* note 46, at 1337. As noted, however, inalienability rules and benefit sharing could address these concerns.

<sup>73</sup> These conflicts become even starker when governments administer TCE rights on source communities' behalf. See *infra* notes 303–304 and accompanying text.

<sup>74</sup> See *infra* notes 225–227, 274–309 and accompanying text.

<sup>75</sup> For now, place to one side the objection that innovation brings “contamination.” This concern is addressed *infra* Part III.

<sup>76</sup> Such perceptions are exacerbated by a tendency to view intellectual property rights as concerned solely with patentable innovation, a realm where the relative disadvantage of developing countries is particularly skewed. See Schultz & van Gelder, *supra* note 23, at 85–86.



off “cultural imperialism.”<sup>77</sup> TCE/folklore rights form part of this larger fabric of counterhegemonic resistance.<sup>78</sup>

In fact, such embattled despair ignores the extent to which digital technologies have democratized cultural production. While Southern policy-makers cling to outdated assumptions of Western hegemony, developments on the ground justify a more optimistic outlook. As new technologies and business models rewrite the rules of creative economies, emerging culture industries across the developing world stand to number among the leading beneficiaries.<sup>79</sup>

Over the last decade, commentators in the United States and other advanced Western nations have celebrated the emancipating potential of digital communications in glowing, almost utopian terms. Pundits have hailed Web 2.0 as a radical shift away from centralized mass media toward more diverse forms of expression.<sup>80</sup> By removing technological constraints on human creativity, such technologies are unleashing the ingenuity of ordinary citizens and delivering a cultural cornucopia.<sup>81</sup>

Nollywood videos are (literally and figuratively) worlds apart from the Internet mash-ups and remixes we think of as epitomizing Web 2.0 content.<sup>82</sup> Yet, if anything, the implications of digital technologies for developing countries may be even more dramatic. By empowering a new generation of homegrown cultural industries, digital production could banish lingering anxieties over cultural imperialism and jump-start economic development, while giving expression to popular voices that have too long been silenced. Last but not least, Folklore 2.0’s potential to remix tradition mirrors the promise of its cyberspace namesake: at stake is the revitalization of folklore itself.<sup>83</sup>

That such inspiring potential has gone unheralded in the West is unsurprising. That it remains unheeded in developing countries themselves is less

<sup>77</sup> J.P. Singh, *Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond*, 8 INT’L STUD. PERSP. 36, 40–44 (2007); Chioma Ugochukwu, *Cultural Resistance and Resilience amid Imported TV Programming in Nigeria*, AFR. TODAY, Fall 2008, at 35, 36–37, 41.

<sup>78</sup> Munzer & Raustiala, *supra* note 18, at 50–51.

<sup>79</sup> See *infra* notes 147–154 and accompanying text.

<sup>80</sup> See, e.g., Andrew Malone, *The 2.0 Revolution: How New Technology Is Driving a Radical Shift in the Building Industry*, LIVING URBANISM (July 2, 2009, 7:00 AM), <http://livingurbanism.wordpress.com/2009/07/02/the-2-0-revolution-how-new-technology-is-driving-a-radical-shift-in-the-building-industry-by-andrew-malone/> (discussing Web 2.0 in the context of the New Urbanism movement).

<sup>81</sup> See, e.g., CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 52–57 (2006); WILLIAM W. FISHER, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 27–28 (2004); Eben Moglen, *Anarchism Triumphant*, FIRST MONDAY (Aug. 2, 1999), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/684/594/>.

<sup>82</sup> See generally LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

<sup>83</sup> Cf. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 15 (2006) (hailing Web 2.0’s nurturing of digital “folk culture”).

understandable and may reflect the vested interest of ruling elites in perpetuating narratives of imperialist exploitation.<sup>84</sup> In belying such narratives, the transformative promise of digital technologies undercuts the rationale for TCE rights and invites a corresponding reappraisal of copyright law. As a step toward encouraging such normative reappraisal, this Article presents Nigeria's video film industry as a case study in digital content production.

## II. NOLLYWOOD

On its face, Nigeria is perhaps the last place one would expect to find a thriving, digitally based culture industry. Africa is often stereotyped as the "Dark Continent"—perpetually undeveloped, ravaged by dictatorships, corruption, and conflict, and facing an ever-yawning divide, digital and otherwise.<sup>85</sup> "Creative industries" in Africa call to mind traditional handicrafts more readily than sophisticated filmmaking. Moreover, unlike, say, India's Bollywood, Nigeria had very little in the way of an established filmmaking tradition prior to 1990.<sup>86</sup> African cinema at that time was primarily associated with francophone countries such as Mali and Senegal.<sup>87</sup> And yet in little more than a decade, Nigeria's video film industry has emerged as the one of the world's leading players. Measured by number of films produced annually, Nollywood rivals Bollywood and far exceeds Hollywood's output.<sup>88</sup> And while its revenues are still a pale shadow of these cinema heavyweights, Nollywood's rising share of global audiences gives it an extraordinary reach and influence.<sup>89</sup>

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<sup>84</sup> That autocratic elites abhor the grassroots empowerment that digital technologies bring is all the more reason to scrutinize skeptically their self-serving rationales for advancing TCE rights at the expense of innovation policies.

<sup>85</sup> See Laura Nader & Mariane Ferme, *Transplants Innovation and Legal Tradition in the Horn of Africa*, 45 AM. J. COMP. L. 209, 210 (1997). Nigeria has confronted all of these hurdles in recent decades. See *Nigeria's Prospects: A Man and a Morass*, ECONOMIST, May 28, 2011, at 26.

<sup>86</sup> See Tunde Kelani, *Spielberg & I: The Digital Revolution*, in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA 90, 90 (Pierre Barrot ed., rev. ed. 2008); Lobato, *supra* note 20, at 340.

<sup>87</sup> See John C. McCall, *Madness, Money, and Movies: Watching a Nigerian Popular Video with the Guidance of a Native Doctor*, AFR. TODAY, Fall 2002, at 79, 85.

<sup>88</sup> UNESCO INST. FOR STATISTICS, INFORMATION BULL. NO. 8, FROM INTERNATIONAL BLOCKBUSTERS TO NATIONAL HITS: ANALYSIS OF THE 2010 UIS SURVEY ON FEATURE FILM STATISTICS 8 (2012), available at <http://www.uis.unesco.org/culture/Documents/ib8-analysis-cinema-production-2012-en2.pdf>.

<sup>89</sup> Reliable estimates of Nollywood's ranking among global film industries are difficult to come by. Some sources, however, place Nollywood third in global revenues. UCHENNA ONUZULIKE, NOLLYWOOD VIDEO FILM: NIGERIAN MOVIES AS INDIGENOUS VOICE 23 (2010); Evuleocha, *supra* note 21, at 409. What is clear is that its films enjoy audiences numbered in the hundreds of millions. Lobato, *supra* note 20, at 339; see also *Nollywood: Lights, Camera, Africa*, ECONOMIST (Dec. 18, 2010),

Nollywood's emergence is significant for two reasons. First, it calls into question the cultural imperialism thesis. In particular, it shows that far from intensifying existing inequalities, digital technologies can help to erase the development divide and level the playing field.<sup>90</sup> Second, the use of traditional culture in Nigerian video films serves as a counter to the usual narratives of Western appropriation. Not only is African culture being commercially exploited by Africans rather than Westerners, but such uses reveal a transformative potential that contrasts favorably with the protectionist premises of TCE/folklore rights. Each of these considerations is addressed in turn.

### A. Empowering African Voices

Before Nollywood, African cinema was largely an elite phenomenon. Celluloid (analog) filmmaking is a capital-intensive, time-consuming, and technically demanding art form. It required specialized training, expensive equipment, and access to imported materials and overseas processing that consumed scarce hard currency.<sup>91</sup> Cinema distribution was limited to urban areas, and even there, Western-owned distribution monopolies favored imported content over African films.<sup>92</sup> As a result, box office revenues could not possibly support domestic film industries.<sup>93</sup> African filmmakers relied instead on funding from national governments or, increasingly, patronage from European sponsors.<sup>94</sup> While African films earned praise from international festival juries, African audiences rarely saw them.<sup>95</sup>

By most accounts, Nollywood's commercial launch happened almost by accident. It started when an entrepreneur found himself with a surplus supply of blank videotape, decided they would sell better with content on them and so produced Nigeria's first commercial video film. The breakthrough success of Kenneth Nnebue's *Living in Bondage*, released a few years later in 1992, attracted widespread imitation, and an industry emerged virtually overnight.<sup>96</sup>

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<http://www.economist.com/node/17723124> ("Millions of Africans watch Nigerian films every day . . .").

<sup>90</sup> See, e.g., Kelani, *supra* note 86, at 92.

<sup>91</sup> See Afolabi Adesanya, *From Film to Video*, in NIGERIAN VIDEO FILMS 37, 39 (Jonathan Haynes ed., rev. & expanded ed. 2000); Jonathan Haynes, *Introduction to NIGERIAN VIDEO FILMS*, *supra*, at 14; Kelani, *supra* note 86, at 90–91.

<sup>92</sup> See McCall, *supra* note 87, at 85.

<sup>93</sup> See Pierre Barrot, *Selling Like Hot Cake: Box Office & Statistics*, in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA, *supra* note 86, at 32, 39–40.

<sup>94</sup> See Haynes, *supra* note 91, at 7–8.

<sup>95</sup> See Brian Larkin, *Itineraries of Indian Cinema: African Videos, Bollywood, and Global Media*, in MULTICULTURALISM, POSTCOLONIALITY AND TRANSNATIONAL MEDIA 170, 180 (Ella Shohat & Robert Stam eds., 2003); John C. McCall, *Nollywood Confidential: The Unlikely Rise of Nigerian Video Film*, TRANSITION, no. 95, 2004, at 98.

<sup>96</sup> McCall, *supra* note 95, at 99–100; *Nigeria's Film Industry: Nollywood Dreams*, ECONOMIST, Jul. 29, 2006, at 58 [hereinafter *Nollywood Dreams*].

The switch to video production dramatically altered the economics of filmmaking. Production of celluloid films in Nigeria had dwindled to an average of four movies per year in the 1980s and to roughly half that rate by the 1990s.<sup>97</sup> But by 2006, Nollywood's annual output of video films exceeded 1,500—more than three times as many movies as were made in the entire history of Nigeria's celluloid production.<sup>98</sup>

Nollywood started off using videotape and gradually switched to newer digital media. "Editing, music, and other post-production work is done with common computer-based systems. The films go straight to digital video disc (DVD) and video compact disc (VCD)."<sup>99</sup> Digital media are much less expensive and easier to shoot in, edit, copy, and distribute than traditional celluloid film.<sup>100</sup> Digital production allows full-length feature films to be shot on barebones budgets (around as low as \$10,000–\$15,000 USD) and completed within weeks (if not days). The lower costs of digital production/distribution make it possible to recoup investments on a far smaller revenue base.<sup>101</sup> As a result, the industry has rapidly expanded its production volume, churning out new releases at a bewildering rate.<sup>102</sup>

Nigeria provides a powerful example of how digital technologies can enable the democratization of cultural production. Lowering the barriers to entry has allowed the industry to remain extremely decentralized, with clusters of small-scale production located in each of Nigeria's principal cities and films produced in all of Nigeria's major indigenous languages, as well as in English.<sup>103</sup> Because working with digital media require less technical expertise, the emerging industry is populated by self-taught auteurs who have brought fresh visions to their craft and developed innovative approaches to guerilla filmmaking.<sup>104</sup> A significant number of Nollywood directors and producers are women, who were excluded from traditional filmmaking.<sup>105</sup>

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<sup>97</sup> Eno Akpabop & Kayode Mustapha-Lambe, *Nollywood Films and the Cultural Imperialism Hypothesis*, 7 PERSP. ON GLOBAL DEV. & TECH. 259, 260 (2008).

<sup>98</sup> See Barrot, *supra* note 93, at 32–33; Jonathan Haynes, *Nollywood in Lagos, Lagos in Nollywood Films*, AFR. TODAY, Winter 2007, at 131, 134.

<sup>99</sup> Evuleocha, *supra* note 21, at 408.

<sup>100</sup> See I.S. Popoola, *Nigeria and the Challenges of Violent Video Films*, in AFRICAN VIDEO FILM TODAY 129, 131 (Foluke Ogunleye ed., 2003).

<sup>101</sup> Average sales are around \$50,000, with blockbusters reaping several hundred thousand. Yet some estimate that films can break even on as little as \$15,000 in sales. Elizabeth March, *The Nollywood Phenomenon: We Tell Our Own Stories*, WIPO MAG., June 2007 at 8, 8–9; Franco Sacchi, *The Filmmaker*, WORLD POL'Y J., Fall 2010, at 30, 30.

<sup>102</sup> Barrot, *supra* note 93, at 32–33; see Pierre Barrot, *Informal Sector or Video "Industry?,"* in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA, *supra* note 86, at 53, 53–54 [hereinafter Barrot, *Informal Sector*].

<sup>103</sup> See Evuleocha, *supra* note 21, at 408; see March, *supra* note 101, at 8–9; Barrot, *supra* note 93, at 33.

<sup>104</sup> See Evuleocha, *supra* note 21, at 414.

<sup>105</sup> McCall, *supra* note 87, at 81.

Digital technology has proven equally revolutionary on the distribution end of the industry. Nollywood films are released directly to video, primarily for home viewing, with thousands of copies distributed across a decentralized network of market stalls countrywide.<sup>106</sup> By reaching rural audiences who never had access to traditional cinema exhibition, Nollywood video dramatically expanded its potential market.<sup>107</sup> Digital distribution has also enabled Nollywood access to audiences across Africa. Nollywood videos dominate markets and television programming in neighboring countries and have attracted mass audiences across sub-Saharan Africa.<sup>108</sup> Web distribution also allows them to cater to a devoted following in diaspora communities of African émigrés.<sup>109</sup>

The extraordinary popularity of Nollywood films has made the industry a socioeconomic force of major significance not just for Nigeria, but for Africa as a whole. As a “model of indigenous entrepreneurial achievement in a country plagued with a troubled and investment-starved economy,”<sup>110</sup> Nollywood has created new opportunities for development both material and cultural. With annual revenues numbering in the hundreds of millions (in U.S. dollars), Nollywood has become the country’s largest private employer, generating substantial economic benefits, both direct and indirect.<sup>111</sup> Perhaps more importantly,

in a strikingly entrepreneurial country where economic opportunities are practically nonexistent [and corruption pervasive], the video industry has laid the groundwork for what might be called the Nigerian Dream—a genuine opportunity for legitimate financial success and even celebrity, open to just about anyone with talent and imagination.<sup>112</sup>

The economic contribution of Nollywood, while substantial, arguably pales compared to its cultural significance. Africa has a deeply ingrained storytelling tradition, but has long lacked the means to harness its creative energies through the media of popular culture. For the first time, Africans stories told by Africans can

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<sup>106</sup> March, *supra* note 101, at 8–9. Videodisks sell for the equivalent of \$4 in market stalls and rent for around fifty cents. Sacchi, *supra* note 101, at 30.

<sup>107</sup> Video movies could be watched for the first time by women in conservative Northern Muslim states denied access to public cinemas. Brian Larkin, *Hausa Dramas and the Rise of Video Culture in Nigeria*, in *NIGERIAN VIDEO FILMS*, *supra* note 91, at 209, 226–27.

<sup>108</sup> Pierre Barrot, *Audacity, Scandal & Censorship*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 43, 43–44 (describing TV and satellite deals); Evuleocha, *supra* note 21, at 408.

<sup>109</sup> See Barrot, *supra* note 93, at 38–39; Evuleocha, *supra* note 21, at 407, 410, 411.

<sup>110</sup> McCall, *supra* note 87, at 92.

<sup>111</sup> See *Nollywood: Lights, Camera, Africa*, *supra* note 89. See generally March, *supra* note 101 (discussing the emergence and growth of Nollywood). The industry also generates indirect benefits such as road construction by film crews in rural villages. McCall, *supra* note 95, at 101.

<sup>112</sup> McCall, *supra* note 95, at 102.

be shared with audiences across the continent. Where African cinema used to “refer to the films Africans *produce* rather than those they *watch*,”<sup>113</sup> Nollywood has emerged as the vehicle by which the hopes and fears of Africa’s most populous nation can be captured and projected for mass consumption.<sup>114</sup>

Nollywood is not without its critics. Its movies are “regularly taken to task by the Nigerian cultural establishment . . . for being escapist and politically irresponsible . . . .”<sup>115</sup> Critics savage the technical and artistic deficiencies of video films, drawing unfavorable contrasts with the masterpieces of African (celluloid) cinema.<sup>116</sup> While such criticism has some basis, an examination of Nigerian videos in context justifies a more sympathetic account.

Nollywood’s technical shortcomings are undeniable. In part, they reflect the newness of an industry that is gradually professionalizing its operations. A more serious handicap is budgetary constraints. As Part IV explains, such constraints can be traced directly to the inability of filmmakers to enforce their copyrights, which deters investors from supporting more ambitious productions. The resulting low-budget assembly-line productions also account for much of Nollywood’s alleged artistic deficiencies.

Beyond that, criticism of Nollywood’s esthetics often tracks well-trodden critiques of commercial culture.<sup>117</sup> Nollywood stands accused of pandering to base consumer tastes rather than challenging or edifying them. It puts profits above art and poisons impressionable minds with the cinematic equivalent of “fast food” culture—irresistible, yet devoid of nutritional value.<sup>118</sup>

Yet, the mere fact that Nollywood videos are commercial and widely popular should not be cause to dismiss them.<sup>119</sup> Cultural value may not be synonymous with market preferences, but neither is it an antithesis. After all, Nollywood’s audiences are voting with their pocketbooks. At the very least, the films’ popularity testifies to their success in capturing the zeitgeist. Very few Africans have seen the celluloid masterpieces that elite critics champion. By contrast, Africans are passionate about Nollywood’s lowbrow offerings; millions watch them daily.<sup>120</sup> Moreover, far from a monolithic industry purveying prepackaged

<sup>113</sup> Larkin, *supra* note 95, at 180.

<sup>114</sup> Haynes, *supra* note 91, at 4; McCall, *supra* note 95, at 109.

<sup>115</sup> Haynes, *supra* note 91, at 9.

<sup>116</sup> Barrot, *Informal Sector*, *supra* note 102, at 54–58; McCall, *supra* note 87, at 80, 87.

<sup>117</sup> Cf. TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 10–11 (1998) (describing Frankfurt School critique of culture industries).

<sup>118</sup> Carmela Garritano, *Contesting Authenticities: The Emergence of Local Video Production in Ghana*, 20 CRITICAL ARTS 21, 38–39 (2008).

<sup>119</sup> See Femi Shaka, *Rethinking the Nigerian Video Film Industry: Technological Fascination and the Domestication Game*, in AFRICAN VIDEO FILM TODAY, *supra* note 100, at 41, 46–49.

<sup>120</sup> *Nollywood: Lights, Camera, Africa*, *supra* note 89.

conformity, Nollywood's decentralized structure ensures that a multiplicity of perspectives competes for consumer patronage.<sup>121</sup>

In this respect, it is instructive to compare the esthetic sensibilities of Nollywood videos with the earlier works of African cinema. The latter were primarily works of elite culture "framed by the aesthetic strictures of European film schools and foreign investors" and animated by strongly held ideological positions.<sup>122</sup> African cinema aimed to elevate the consciousness of its audiences, to "decoloniz[e] the mind"<sup>123</sup> and "put into images the African struggle against . . . underdevelopment."<sup>124</sup> By contrast, Nollywood videos are works of popular entertainment "driven by local markets."<sup>125</sup> "The realist verities of modernist development and cultural authenticity are rejected, as is any attempt toward a progressive political project."<sup>126</sup>

As for Nollywood's alleged flaws—a tendency toward melodrama; sensationalist, escapist, and "Westernized" formulaic plots; materialism; violence; immorality; and superstition—in many ways such perceived weaknesses are also its strengths. Nollywood offers its audiences characters they can identify with in stories that relate to their everyday lives.<sup>127</sup> No one would mistake its convoluted plots with their frequent recourse to magic for *cinéma vérité*. Yet, in their embrace of African modernity, Nollywood movies mark a departure from celluloid film traditions. Where Africa's cinema auteurs projected a vision of Africa as it *ought* to be, Nollywood videos engage the messiness of life as it exists today.

If Nollywood films are violent, they reflect the violence that is endemic in Nigerian society, and their escapist plots perform a cathartic function.<sup>128</sup> Likewise, a preoccupation with material wealth is understandable in a society marked by extreme income inequality, where "a small cadre of well-connected thugs" monopolizes vast oil wealth.<sup>129</sup> The voyeuristic pleasure that Nollywood audiences enjoy in ogling the lifestyles of the rich and beautiful is frequently coupled with overtones of moral disapproval. More generally, the use of melodrama as a dramatic form is typical of cinema in transitional societies negotiating modernity's

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<sup>121</sup> The sheer number of Nollywood videos being released and the diversity of producers, combined with decentralized direct-to-video distribution and low threshold for profitability allow Nollywood to explore a broader range of topics and viewpoints than conventional cinema based on theatrical release.

<sup>122</sup> Haynes, *supra* note 91, at 6; McCall, *supra* note 87, at 80, 85.

<sup>123</sup> NGUGI WA THIONG'O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* (1986).

<sup>124</sup> Adesanya, *supra* note 91, at 38; McCall, *supra* note 87, at 87.

<sup>125</sup> McCall, *supra* note 87, at 80.

<sup>126</sup> Larkin, *supra* note 95, at 180.

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

<sup>128</sup> Nollywood's portrayal of occult superstition similarly reflects traditional belief systems widely held—and practiced—by its audiences. *See id.* at 179.

<sup>129</sup> McCall, *supra* note 95, at 102.

destabilizing effects. By imposing a strong moral framework upon the storyline, melodrama helps audiences recover their sense of traditional values.<sup>130</sup>

Furthermore, accusations that Nollywood's movies are overly "Westernized" bear closer examination. When set against the explicitly anticolonial ideology of traditional African cinema, Nollywood's more accommodating stance toward Western influence seems clear; yet it hardly amounts to the wholesale adoption of "homogenized" global forms that the opponents of cultural imperialism decry.<sup>131</sup> Rather, Nollywood videos "partake of a mix of local, national, and global discourses and aesthetics. They reproduce elements of Western cinema and indigenize those appropriations."<sup>132</sup> The result of such hybridization is arguably a more authentic expression of African grass roots than the celluloid masterpieces of African cinema "edited in Parisian cutting-rooms."<sup>133</sup>

Whereas African audiences rarely saw earlier celluloid films, which instead inhabited the rarified world of auteur cinema screened at international festivals and embassies,<sup>134</sup> Nollywood produces African stories that Africans themselves consume.<sup>135</sup> Their plots revolve around "situations that people understand and confront daily; romance, comedy, the occult, corrupt cops, prostitution, and HIV/AIDS."<sup>136</sup> Their "characters, plot, and themes are now part of the everyday discourse of farmers, taxi drivers, market women, urban professionals, and native doctors."<sup>137</sup> By holding a powerful mirror to the realities of Nigerian life, Nollywood has helped to redefine African modernity.<sup>138</sup>

Nor can Nollywood films be dismissed as the vapid "brain candy" that critics of commercial-culture industries deplore. Many Nollywood scriptwriters were former journalists whose movie plots portray thinly disguised fictionalization of real-life incidents.<sup>139</sup> Far from avoiding controversial issues, Nollywood seems to revel in the role of provocateur. Its films address everything from polygamy, prostitution, teenage pregnancy, and AIDS to crime, drugs, police corruption, and coup d'états in an energetic, no-holds-barred fashion. Nigerian directors "even

<sup>130</sup> See Haynes, *supra* note 91, at 25–26.

<sup>131</sup> Larkin, *supra* note 95, at 180.

<sup>132</sup> McCall, *supra* note 87, at 80.

<sup>133</sup> *Id.* at 92; see also Moradewun A. Adejunmobi, *Nigerian Video Film as Minor Transnational Practice*, POSTCOLONIAL TEXT (May 3, 2007), <http://postcolonial.org/index.php/pct/article/view/548/405/> (noting "responsiveness to local constituencies in Africa, and of Africans, plays a much less important role [than] in the production of most global ethnic films").

<sup>134</sup> McCall, *supra* note 87, at 79–80.

<sup>135</sup> *Id.* at 92.

<sup>136</sup> Evuleocha, *supra* note 21, at 408.

<sup>137</sup> McCall, *supra* note 87, at 92.

<sup>138</sup> See ONUZULIKE, *supra* note 89, at 5–6, 27–30; see also McCall, *supra* note 87, at 92 ("One cannot underestimate the degree to which these videos have become a part of popular life in Nigeria.").

<sup>139</sup> Sean A. Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE* 262, 269 n.35 (Sean A. Pager & Adam Candeub eds., 2012).



manage to use religion to make people laugh, in a country where fanaticism and interdenominational confrontations are rife.<sup>140</sup> That Nollywood films tackle these issues for purposes of entertainment does nothing to diminish their contribution to public discourse—indeed, the reverse is almost certainly the case.<sup>141</sup>

In attempting to work through the internal contradictions of modern Nigeria in a uniquely African idiom, Nollywood exercises a powerful mediating role not only in Nigerian society, but also for audiences across Africa and the African diaspora.<sup>142</sup> Rather than presenting a narrow, elite perspective, Nollywood represents a multiplicity of viewpoints and ideological/cultural positions.<sup>143</sup> While “[it] may not be the African cinema that professional critics would choose, it is clearly the African cinema that has captured the imagination of the African continent.”<sup>144</sup>

Nollywood’s role as a driver of public discourse has political, as well as cultural, significance. Media theorists highlight the role creative industries play as engines of democratic expression. As Neil Netanel has noted, this role can be particularly crucial in transitional states where democratic norms are still being negotiated.<sup>145</sup> Such observations apply a fortiori in Africa, where the state has customarily exerted tight control over public media. In this context, Nollywood’s freedom to portray an African reality that is “neither dictated nor controlled by outsiders or the government” is virtually unprecedented.<sup>146</sup> Supported directly by its audience, Nollywood enjoys a financial independence that other African media lack. Moreover, its direct-to-video distribution helps to circumvent government censorship.<sup>147</sup>

As an “outsider” cinema, Nollywood dramas frequently exploit their freedom of expression to criticize state authority and subversively spoof its corrupt and inept practices.<sup>148</sup> Nollywood’s pan-African distribution gives such outspokenness potentially huge ramifications. Commentators have hailed its emergence as an awakening “giant of socio political commentary” that will demand a new level of

<sup>140</sup> Barrot, *supra* note 108, at 44.

<sup>141</sup> Ogova Ondego, *Kenya and Nollywood: A State of Dependence*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 114, 117 n.1 (noting Nollywood’s treatment of issues such as vaginal fistulas is “more effective than any kind of awareness-raising production tackling the same themes”); cf. Neil Weinstock Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217, 266 (1998) (“[A]ttempts to present information and opinion in a systematic ‘objective’ manner, distilled from entertainment values, may simply lose the audience.”).

<sup>142</sup> ONUZULIKE, *supra* note 89, at 27–30, 85–86.

<sup>143</sup> Haynes, *supra* note 98, at 145. Indeed, given its regional and linguistic fragmentation, it may be inaccurate to refer to Nollywood as a single industry at all.

<sup>144</sup> McCall, *supra* note 87, at 92.

<sup>145</sup> Netanel, *supra* note 141, at 252–54, 266–67.

<sup>146</sup> Pierre Barrot, *Epilogue to NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 130, 131; Larkin, *supra* note 107, at 211.

<sup>147</sup> Barrot, *supra* note 108, at 44, 46.

<sup>148</sup> John C. McCall, *Juju and Justice at the Movies: Vigilantes in Nigerian Popular Videos*, 47 *AFR. STUD. REV.* 51, 55 (2004).

accountability from the government.<sup>149</sup> Whether Nollywood will live up to such weighty expectations remains to be seen. That such potential exists, however, is cause for celebration in a continent whose political sphere has too long been stymied by corrupt authority.

As works of cinematic art, Nollywood videos are unremarkable, and their technical quality deplorable. That across Africa such videos consistently outsell competing offerings from Hollywood, India, and Hong Kong made with far higher budgets and splashier special effects testifies to the extraordinary and hitherto unmet demand in developing countries for locally produced audiovisual content.<sup>150</sup> African audiences watch Nollywood videos not because of their intrinsic quality but because their storylines speak to Africans in an accessible indigenous idiom that resonates powerfully with everyday realities.<sup>151</sup>

The success of Nigeria's video film industry has already spawned imitators across Africa.<sup>152</sup> Ghana's video film industry preceded Nollywood and has recently revived.<sup>153</sup> None of these competitors have come close to rivaling Nollywood's regional hegemony; however, they are already making a significant contribution to domestic discourse in their own countries.<sup>154</sup> These emerging industries reflect a remarkable cultural renaissance that is giving voice to ordinary Africans in a manner hitherto unprecedented.<sup>155</sup>

The success of African video film is part of a broader story of newly empowered creative industries in developing countries whose appearance is challenging traditional narratives of cultural imperialism. Beyond the cultural and economic dynamism they bring to their home markets, such industries hold the promise of a more diverse flows of global culture in the twenty-first century than the hegemonic order that preceded it.<sup>156</sup>

Much of this burgeoning creative enterprise can be traced to digital technologies' lowering of entry barriers.<sup>157</sup> That Nigeria should be responsible for

<sup>149</sup> Foluke Ogunleye, *Preface to AFRICAN VIDEO FILM TODAY*, *supra* note 100, at ix, ix-x.

<sup>150</sup> Mark F. Schultz, *The Nigerian Film Industry and Lessons Regarding Cultural Diversity from the Home-Market Effects Model of International Trade in Films*, in *TRANSNATIONAL CULTURE FLOWS IN THE INTERNET AGE*, *supra* note 139, at 231, 251-54.

<sup>151</sup> Lobato, *supra* note 20, at 345, 348.

<sup>152</sup> *Nollywood: Lights, Camera, Africa*, *supra* note 89 ("South Africa, Tanzania and Cameroon are now producing hundreds of films a year."). That such industries can flourish in much smaller domestic markets than Nigeria underscores digital technologies' democratizing potential.

<sup>153</sup> *Id.*

<sup>154</sup> Kenya's "Riverwood," in particular, is said to produce over one thousand films per year, and is now "beating Nigeria at its own award ceremonies." *Id.*

<sup>155</sup> *Id.*; Larkin, *supra* note 107, at 209-11.

<sup>156</sup> Singh, *supra* note 77, at 40-44.

<sup>157</sup> See Diana V. Barrowclough, *The Production of Knowledge, Innovation and IP in Developing Countries: Creative Industries and the Development Agenda*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 321, 331 (Neil Weinstock Netanel ed., 2009).

developing the world's first fully digital film industry underscores the potential for developing countries to leapfrog outdated technologies and become globally competitive. Furthermore, the full potential of these tools is arguably not yet realized. The introduction of 3G and 4G cellular networks across the developing world will open the door to creative innovation based on novel online platforms.<sup>158</sup>

Nollywood's successes to date already provide a powerful counter to the cultural pessimism that has dominated policymaking in the Global South. Moreover, it has repercussions for the discourse of global intellectual property rights in which creativity is too often presumed the sole preserve of developed countries.<sup>159</sup> As a fully fledged culture industry built around the production of original copyrighted content, Nollywood belies assumptions that developing countries have little to gain from enforcing intellectual property rights.<sup>160</sup> Yet, as Part IV will demonstrate, lack of copyright protection poses a serious threat to Nollywood's economic viability. Enforcement of existing law in this area would arguably do more good than newfangled cultural heritage rights.<sup>161</sup>

The normative implications of Nollywood for the traditional heritage debate do not end with copyright law, however. Nollywood films are noteworthy for their prominent use of traditional culture. Elements of traditional folklore are ubiquitous in Nollywood videos. Characters frequently speak in traditional proverbs; village drums beat the rhythms of daily life; folkloric costumes, carvings, and customs are all on display.<sup>162</sup> Cultural traditions also permeate Nollywood storylines, most commonly in the form of supernatural elements whose appearance is often integral to the advancing plot. Such magical realism draws on traditional occult beliefs deeply rooted in West African culture.<sup>163</sup>

Incorporation of traditional culture provides much of the appeal and perceived "African-ness" of Nollywood videos. However, folklore is more than just a marketing feature. Nollywood's use of traditional culture has cultural significance whose implications for the traditional knowledge debate should not be overlooked. In their complex exploration of tensions between tradition and modernity and reliance on syncretic forms, Nollywood videos display a vital and innovative approach to traditional culture that cuts directly against the grain of current efforts to preserve traditional culture. Just as Nollywood the industry belies prevailing assumptions of cultural hegemony, so too does Nollywood as an agent of cultural innovation call into question the push to propertize traditional culture.

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<sup>158</sup> See *Mobile Telecoms in Africa: Digital Revolution*, ECONOMIST, Apr. 9, 2011, at 74.

<sup>159</sup> See Schultz & van Gelder, *supra* note 23, at 90–91.

<sup>160</sup> Cf. *id.* at 87 (noting the belief that "poor countries do not produce the sorts of works that benefit from copyright protection").

<sup>161</sup> See *infra* notes 320–335 and accompanying text.

<sup>162</sup> See, e.g., ONUZULIKE, *supra* note 89, at 74–83; Evuleocha, *supra* note 21, at 414; McCall, *supra* note 95 at 100; McCall, *supra* note 148, at 56–58.

<sup>163</sup> ONUZULIKE, *supra* note 89, at 34–46.

### B. *Tradition Remixed*

In this respect, it is worth contrasting the use of traditional culture in Nollywood with its more idealized presentation in African celluloid cinema. Nollywood videos are hardly unique in showcasing Africa's rich folkloric traditions. However, Nollywood approaches traditional culture with a very different sensibility than its cinematic precursors. These contrasts make vivid the normative stakes of the traditional knowledge debate, as Part III elaborates below.

Africa's celluloid filmmakers were auteurs of talent and conviction. However, their visions were compromised by the strictures of the system within which they operated. With limited opportunities for distribution, such films relied on state and foreign patronage rather than popular audiences for funding. Inevitably, such patrons influenced the content of the films in ways both subtle and direct.<sup>164</sup> As a result, the presentation of traditional culture in African celluloid films reflected the need to cater to particular constituencies: government censors, foreign patrons, international film festival audiences, and critics.<sup>165</sup>

A romantic, often sentimental portrayal of village life and folkloric heritage appealed to European stereotypes of exotic Africa.<sup>166</sup> Such idealized evocations of African tradition also mirrored the cultural nationalist project of government culture ministries whose funding helped to underwrite such productions (and whose censors frequently blocked works espousing oppositional ideals). "National films" served both as prestigious cultural trophies to impress European elites and as a vehicle to project a particular vision of African heritage for internal, ideological ends.<sup>167</sup> African cinema was very much a postcolonial project, and culture served to unify the populace behind a shared vision of the nation state.<sup>168</sup>

What emerged was a portrayal of tradition filtered through the ideological prisms of intellectual/cultural elites and coded in conceptual binaries.<sup>169</sup> While

<sup>164</sup> See Garritano, *supra* note 118, at 23 (noting Ghanaian state "exercised complete control over the film industry" prior to video filmmaking); Haynes, *supra* note 91, at 5, 9–11 (describing vetting of scripts by European funding agencies, the influence exercised by French cameramen and editors, and the influence exerted through both positive and negative censorship).

<sup>165</sup> See Adejunmobi, *supra* note 133 ("[B]oth African and non-African financial backers have their objectives and are not likely to provide support for film projects that do not fit in with their own larger concerns.").

<sup>166</sup> Haynes, *supra* note 91, at 5–7; McCall, *supra* note 87, at 86–87.

<sup>167</sup> Lobato, *supra* note 20, at 340 (noting African film functioned "as a vehicle for propaganda, a signifier of Western modernity, and a status symbol for elites").

<sup>168</sup> Haynes, *supra* note 91, at 6 (noting centrality of "cultural nationalist project" within African cinema); Larkin, *supra* note 95, at 178–79 (describing national filmmaking tradition "where the nation-state is posited as the definer and defender of cultural values"); Birgit Meyer, "Tradition and Colour at Its Best": "Tradition" and "Heritage" in Ghanaian Video-Movies, 22 J. AFRICAN CULTURAL STUD. 7, 7–8 (describing view of film "as an instrument for national development").

<sup>169</sup> Kenneth Harrow, *Toward a New Paradigm of African Cinema*, 8 CRITICAL INTERVENTIONS 218, 219–21 (2012). Many African filmmakers believed passionately in

early filmmakers often criticized village customs as oppressive superstition and praised the emancipatory promise of modern urban life, a later breed sought to instill pride in African traditions, recovering the bygone glory of the past as the guidepost to an equally glorious future.<sup>170</sup> This vision of African cinema did not view tradition and modernity as in conflict but rather as complements.<sup>171</sup> Inevitably, such treatments glossed over awkward details. The cultural heritage extolled in these films was often an imagined one that elided ethnic divisions in favor of a discourse of national unity.<sup>172</sup>

The phenomenon of traditional culture pressed into the service of cultural nationalism is hardly unique to Africa. Indeed, the very notion of folklore began as an explicitly nationalist project of the Romantics.<sup>173</sup> The politics of folklore, however, are perhaps especially vexed in Africa because the underpinnings of African nationhood are so clearly artificial.<sup>174</sup> Africa's authoritarian regimes have leaned heavily on cultural props in a variety of contexts beyond film to legitimize their authority.<sup>175</sup> The result has sometimes been a vision of traditional culture as contrived as the colonial boundaries of the African states that espouse it.<sup>176</sup>

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the ideal of a "people's cinema" and would have bristled at accusations of elitism. However, their approach to raising the consciousness of the masses remained fundamentally a top-down exercise.

<sup>170</sup> *Id.*

<sup>171</sup> See Birgit Meyer, *Popular Ghanaian Cinema and "African Heritage,"* AFR. TODAY, Spring 1999, at 93, 102–03 (describing how film mirrored state policy to "retrieve and restore our history and heritage" . . . as a precondition for "development").

<sup>172</sup> Haynes, *supra* note 91, at 10–11; Larkin, *supra* note 95, at 180.

<sup>173</sup> Monika Dommann, *Lost in Tradition? Reconsidering the History of Folklore and Its Legal Protection Since 1800,* in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSION IN A DIGITAL ENVIRONMENT 3, 5–6 (Christoph Graber & Mira Burri-Nenova eds., 2008). Moreover, the reification of tradition as a political project in Africa began under colonial rule. See Terence Ranger, *The Invention of Tradition in Colonial Africa,* in THE INVENTION OF TRADITION 211, 211–12 (Eric Hobsbawm & Terence Ranger eds., Canto ed. 1992).

<sup>174</sup> While all nations represent "imagined communities," African nationhood is an especially blatant contrivance reflecting the arbitrariness of nineteenth-century colonial boundary lines. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2d ed. 1991); Jeffrey Gettleman, *Nation-Building: A Colonial Curse Comes Up for a Vote,* N.Y. TIMES, Jan. 9, 2011, at WK3.

<sup>175</sup> See Kuruk, *supra* note 31, at 774 n.27 (describing critical "importance of folklore to national development, the promotion of national unity, and the assertion of national cultural values"); Jay A. Ciaffa, *Tradition and Modernity in Postcolonial African Philosophy,* 21 HUMANITAS 121, 121, 128–29 (2008).

<sup>176</sup> See Kenneth Lee Adelman, *The Recourse to Authenticity and Negritude in Zaire,* 13 J. MOD. AFRICAN STUD. 134, 135, 137, 139 (1975) (describing invented folk ideology espoused by Congolese dictator); Ghislain C. Kabwit, *Zaire: The Roots of the Continuing Crisis,* 17 J. MOD. AFRICAN STUD. 381, 387, 391 (1979); Meyer, *supra* note 168, at 10 (describing a similar account of Ghanaian identity politics based on sanitized reading of tradition).

By contrast, Nollywood's more ambivalent take on tradition reflects the ambiguous and contested role that tradition plays in the everyday reality.<sup>177</sup> It chronicles a Nigerian populace torn between city and village, a world in which traditional values clash with modern lifestyles and African belief systems compete against foreign ideas and technology. Nollywood offers a less sentimental view of Nigerian folklore, but one that mirrors the perspectives of its audiences. Unlike the romantic conceits of cultural establishment elites, Nollywood videos answer only to the market. Their grassroots tradition of popular filmmaking eschews any single approved narrative. Rather, Nollywood's account of traditional culture reflects a multiplicity of perspectives. And in contrast to the ethnically cleansed vision of national cinema, Nollywood locates its films within Nigeria's diverse populace and does not shy from acknowledging the tensions surrounding ethnic and religious fault lines.<sup>178</sup>

Critics frequently accuse Nollywood videos of portraying traditional culture in a negative light.<sup>179</sup> Compared to the idealized vision presented in African celluloid cinema, this charge has some merit. Nollywood videos are primarily aimed at urban audiences, some of whom regard traditional culture as "backwards," the superstitious relic of country bumpkins. There is a subset of Nollywood films that openly pander to such urban disdain with such unsubtle titles as *I Hate My Village*.<sup>180</sup> Another genre of Nollywood videos caters to Pentecostal Christians by portraying the societal upheaval unleashed by heathen rituals practiced by "native doctors"; the ensuing mayhem is invariably cured by the intervention of a cross-brandishing pastor who duly vanquishes his demonic antagonists "in the name of Jesus!"<sup>181</sup>

Other Nollywood videos, however, present traditional culture in a more positive light. Some genres, such as vigilante films, celebrate traditional belief systems as an alternative to the discredited authority of the modern Nigerian state.<sup>182</sup> McCall describes the depiction of precolonial practices in these films—among them the use of "truth-seeking *jujus*" to expose dishonesty—as a resurgence of "indigenous legal rationalities" that reflects the all-too-real disillusionment that many Nigerians experience with Nigeria's lawless present.<sup>183</sup> Such portrayals of folkloric tradition are just as idealized as those of the African

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<sup>177</sup> Larkin, *supra* note 95, at 180.

<sup>178</sup> *Id.* at 180–81.

<sup>179</sup> Haynes, *supra* note 91, at 9; McCall, *supra* note 95, at 107–08.

<sup>180</sup> Tobias Wendl, *Wicked Villagers and the Mysteries of Reproduction: An Exploration of Horror Movies from Ghana and Nigeria*, POSTCOLONIAL TEXT (July, 3, 2007), <http://postcolonial.org/index.php/pct/article/view/529/420/> (describing film about cannibalism).

<sup>181</sup> McCall, *supra* note 87, at 88.

<sup>182</sup> McCall, *supra* note 148, at 54–55 (describing the *Issakaba* film series based on the exploits of real-life vigilantes).

<sup>183</sup> *Id.* at 58–60.

celluloid films; however, rather than functioning in service of the ruling regime, they are openly subversive of its authority.<sup>184</sup>

In other cases, Nollywood's presentation of traditional culture is neither positive nor negative but merely descriptive. Traditional values, belief systems, rituals, expressions, symbols, and artifacts pervade everyday life in Nigeria.<sup>185</sup> Oral traditions of storytelling keep folk tales, legends, and mythology a part of everyday consciousness. Even modern city dwellers maintain links to their ancestral villages, and the taproots of traditional culture run deep. In showcasing the rich tapestry of Nigerian heritage, Nollywood videos reflect its continued salience.<sup>186</sup>

Yet, Nollywood videos do more than hold a mirror to traditional culture. In many respects, both intentional and implicit, Nollywood critically interrogates the role of tradition, exploring its complex, fractured relationship with modernity. Portraying "characters torn between tradition and modernity," the films not only highlight conflicts but also serve to mediate them.<sup>187</sup> They are filled with "modern and traditional elements wrapping around one another until they become a contradictory whole."<sup>188</sup>

Rather than reconciling such contradictions in a totalizing vision, Nollywood films often suggest that both tradition and modernity have their respective places today. This message is driven home in *Osuofia in London*,<sup>189</sup> one of the most popular Nollywood movies to date. *Osuofia* begins as a fish-out-of-water story exploiting the comedic mishaps of the titular protagonist, a country bumpkin transplanted from his Nigerian village to the modern Western metropolis. After a series of comedic bumbling, the bumpkin eventually proves to be more than master of his new surroundings. Indeed, the end of the film suggests that Nigerian villagers harbor a wisdom that, in some ways, surpasses their outwardly sophisticated urban counterparts.<sup>190</sup>

A similar cultural ecumenicalism is conveyed explicitly in Tunde Kelani's *Thunderbolt Magun*. The film begins by showing a model modern couple whose

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<sup>184</sup> *Id.* at 55 (describing film's depiction of corrupt "village chiefs, elected officials, religious leaders, police, and venerable native doctors all conspir[ing] in greed-driven murderous exploits").

<sup>185</sup> *Id.* at 59; McCall, *supra* note 87, at 90–91.

<sup>186</sup> See ONUZULIKE, *supra* note 89, at 74–83.

<sup>187</sup> McCall, *supra* note 95, at 109.

<sup>188</sup> Haynes, *supra* note 91, at 32.

<sup>189</sup> OSUOFIA IN LONDON (Kingsley Ogoro Production 2003).

<sup>190</sup> *Id.*; *Film Profile No. 2: Osuofia in London [Parts I and II]*, in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA, *supra* note 86 at 22, 22–23. An inverted version of this fish-out-of-water scenario is exploited to similar comedic effect in *Ikuku/Hurricane*, which chronicles a foreign-educated nuclear physicist's return to his rural Nigerian family when the physicist is unexpectedly recalled to assume the traditionally ordained role of priest of the village shrine. The film pokes fun at the cultural alienation the prodigal physicist experiences while simultaneously lampooning the buffoonery of his traditionally minded kinsmen. See Jonathan Haynes & Onookome Okome, *Evolving Popular Media, in NIGERIAN VIDEO FILMS*, *supra* note 91, at 51, 82–85.

lives are disrupted by the intrusion of traditional village magic in the form of a curse (the titular *magun*). Rather than demonizing tradition as a threat to modernist utopia, however, Kelani emphasizes that Africans ignore tradition at their peril. The Western-educated professionals in the film who scoff at superstition themselves fall prey to the curse's power. When Western medicine proves impotent, it is traditional native doctors who right the balance.<sup>191</sup>

Many of these films also juxtapose tradition and modernity in ways that simultaneously comment on both.<sup>192</sup> Some set stories in ancient times that serve as a parable to comment on current history.<sup>193</sup> Others transpose traditional sources to modern settings in unexpected ways. An example of the latter are the so-called money cult films, a cinematic trope that constitutes its own Nollywood genre.<sup>194</sup> Currency fetishism—the West African equivalent of Mammon worship—is a long-established feature of Nigerian belief systems. Ancient “money shrines” still command devotion in rural Nigeria.<sup>195</sup> The money cult films transpose this traditional practice to imaginary urban settings. Instead of villagers in the jungle, the modern practitioners are portrayed as thrusting businessmen whose pursuit of wealth and influence leads to a distinctly Nigerian version of the proverbial Faustian bargain: sacrifice of a loved one for material success, a tradeoff revealed to be the constructive equivalent of the loss of one's soul.<sup>196</sup> By deploying traditional beliefs as an interpretive lens, these films help Nigerian audiences make sense of an otherwise bewildering feature of Nigerian modernity: the extreme inequality and injustice of a petroleum-fueled kleptocracy. The films simultaneously explain the emergence of Nigeria's moneyed class and condemn it in starkly moral terms.<sup>197</sup>

In repurposing traditional culture into a vehicle for contemporary social criticism, such money cult films invariably adapt the underlying cultural traditions to their own ends. John McCall describes one of these films, *Blood Money*, as opening with a cluster of besuited businessmen seated around a plushly appointed boardroom. Any outward resemblance to a Rotary meeting is belied, however,

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<sup>191</sup> *Film Profile No. 7: Thunderbolt [Magun]*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 70, 70–71.

<sup>192</sup> For example, several films, *Thunderbolt [Magun]* among them, draw explicit parallels between AIDS and traditional occult magic. *Id.*

<sup>193</sup> Witness Tunde Kelani's trilogy of films using Yoruba court tales as a parable for Nigeria's military dictatorship and subsequent restoration of democracy. *Film Profile No. 11: Agogo Eewo*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 93, 93.

<sup>194</sup> Wendl, *supra* note 180.

<sup>195</sup> McCall, *supra* note 87, at 82–83 (such shrines, festooned with a mishmash of monetary currency ranging from ancient cowry shells to colonial British shillings, make literal the Marxist concept of commodity fetishism).

<sup>196</sup> *Nollywood Dreams*, *supra* note 96, at 58.

<sup>197</sup> Inevitably, by the end of these films the outward success of the cult-member protagonists collapses under the weight of their moral depravity. The take-home message therefore becomes: if this is how the rich get rich, I do not want that. *See id.* at 58–59.



when a panel slides open to reveal an animal totem whose hunger for human sacrifice provides the source of the cult members' occult power. Worship of animal totems is a traditional feature of Nigerian religion. But the totem figure portrayed in this film is a vulture, an animal not traditionally the object of veneration. As McCall observes, however, vultures supply the perfect metaphor for the film's indictment of capitalism.<sup>198</sup>

Inevitably, such reinvention of tradition through popular culture has real-world repercussions. Both the tradition and its meaning become altered, and instances of life imitating art are well documented.<sup>199</sup> Yet, rather than condemning such cultural "contamination," we should arguably embrace it. Through these means, "tradition uses modernity to relocate itself in the modern era. If in the process it goes through self-modifications that is only in order for it to emerge stronger. Tradition is modernized not rejected."<sup>200</sup>

### III. IMPLICATIONS

The best African celluloid films are magnificent works of art, but their cultural significance for ordinary Africans remains marginal. By contrast, Nollywood films have many artistic faults. Yet, by almost any measure, they have had a far greater impact on African society, whose repercussions for public discourse and much else are still reverberating. The contrasts between these two cinematic oeuvres illustrate the normative stakes in the debate over TCE rights. In brief, propertizing traditional culture risks tilting future cultural production toward the state-sponsored, top-down perspectives of the celluloid tradition at the expense of the grassroots expression exemplified by Nollywood. This could enable a reactionary power grab in which traditional culture emerges sanitized and anesthetized. We should think twice before continuing down such a path.

There are at least four ways in which Nollywood's example calls into question efforts to propertize intangible heritage. First, as a commercial culture industry capable of self-exploiting its cultural heritage, Nollywood shows that developing countries can project their voices on a global stage. As such, it challenges the assumptions of Western hegemony by which developing countries have justified TCE rights. Second, by reinventing tradition in the process of perpetuating it, Nollywood represents a more dynamic approach to cultural preservation than the retrospective "museum view" that TCE rights contemplate.

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<sup>198</sup> See McCall, *supra* note 87, at 90–91.

<sup>199</sup> For example, the popular Bollywood film, *Sholay* (Sippy Films 1975), featured a nontraditional melody in its depiction of the Hindu festival, Holi. The song subsequently became entrenched in popular imagination as the tune most associated with and widely played to celebrate the real-life holiday. Interview with Karin Zitzewitz, Assistant Professor, S. Asian Art, Art History, & Visual Culture, Mich. State Univ., East Lansing, Mich. (July 3, 2010).

<sup>200</sup> Wole Ogundele, *From Folk Opera to Soap Opera: Improvisations and Transformations in Yoruba Popular Theater*, in *NIGERIAN VIDEO FILMS*, *supra* note 91, at 89, 124.

Nollywood's decentralized, pluralistic production also offers a democratic alternative to the TCE right's top-down model of managed "sustainability." Third, the potential for direct conflict between these diverging approaches raises the specter that TCE rights could block or deter Nollywood and other creative industries from pursuing sensitive projects touching on traditional material. By walling off broad categories of expression as effectively off-limits, such TCE-enabled censorship could deter much-needed investment and stunt cultural and economic development. Finally—as shown in Part IV—Nollywood illustrates the potential opportunity costs of the attention and resources devoted to the TCE campaign at the expense of conventional IP rights. Conversely, it points to the comparative advantages of copyright law as both an engine of cultural and commercial innovation and a facilitator of public discourse.

#### *A. Hegemony Dethroned: Giving Voice to Home-Grown Expression*

As noted, Nollywood's very existence challenges prevailing assumptions about cultural hegemony. Nollywood competes successfully with Western imports not only in Nigeria, but all over Africa. Nor should Nollywood's success be viewed in a vacuum. As digital technologies empower creative industries across the developing world, a newfound confidence has begun to take root. Casting off outdated narratives of dependency, such emerging industries are keen to project their cultural traditions and visions both at home and, increasingly, to a global audience.<sup>201</sup>

This newfound confidence has been slow to filter through to government policy.<sup>202</sup> As this Article has shown, support for TCE rights has rested on perceived commercial and technological inequality translated into the rhetoric of exploitation: Western imperialists are unfairly profiting from less powerful cultures and imperiling their very survival. Such cultures cannot compete because the playing field is rigged against them. Exclusive folklore rights will both stanch the bleeding and allow the developing world to extract a "fair share" of the proceeds.<sup>203</sup>

Nollywood supports a more optimistic counternarrative in which digitally empowered upstarts can hold their own against established global hegemonies. If homegrown culture industries in developing countries can exploit their own heritage, cultural protectionism becomes a less pressing need. After all, indigenous industries have superior knowledge of their own culture, and domestic audiences offer the most natural market for heritage-based content. The limiting factor was always capacity.<sup>204</sup> Nollywood proves that such capacity is now within reach: instead of watching Disney's *Lion King* or *Jungle Book*, Africans can tell their own

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<sup>201</sup> Singh, *supra* note 77, at 40–44.

<sup>202</sup> *Id.* at 46–48.

<sup>203</sup> Kuruk, *supra* note 31, at 772–75; Carpenter et. al., *supra* note 3, at 1103.

<sup>204</sup> Chander & Sunder, *supra* note 46, at 1351–53.

stories, transforming folkloric traditions into creative profit.<sup>205</sup> Examples of such self-exploitation go well beyond Nollywood.<sup>206</sup>

Cultural property rights are designed to prevent Western appropriators from exploiting traditional culture in ways that are inauthentic or offensive. Rather than enjoining potentially harmful speech, however, digitally empowered creativity offers an alternative remedy in the form of counterspeech. So long as Africans can project their own cultural voices, the threat of Western adulteration recedes.<sup>207</sup>

Yet some would argue that, far from besting the imperialists, Nollywood videos compound their transgressions: by commodifying traditional culture in similarly inauthentic and offensive ways, they serve as vectors of contamination no less objectionable than the foreign content they emulate.<sup>208</sup> To answer this charge requires attention to the differences between external appropriation and self-exploitation. Unpacking this argument requires critical interrogation of the underlying notion of authenticity.

### B. Contested Authenticities & Semiotic Consumers

TCE rights are premised on a preservation rationale: the belief that traditional cultural expression is under pressure from outside influences. The question remains how best to avoid (or minimize) resulting harm.

As this Article has shown, the WIPO draft treaty proposes to prevent cultural harm by restricting the use of such traditions outside the traditional context. The treaty proceeds by identifying a set of canonical practices with a particular source community by triangulating along vectors of transgenerational stability, typicality (“characteristicness”), and salience (the link to “identity” or registration).<sup>209</sup> Having identified “authentic” traditions in this manner, the treaty establishes exclusive rights to control their use.<sup>210</sup>

Operating under the conceit that every people has an authentic culture that is stable, bounded, and homogenous, TCE rights hearken back to the premises of nineteenth-century anthropology. Anthropologists today have largely disowned such essentialized notions of cultural community.<sup>211</sup> Modern scholars resist the

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<sup>205</sup> Diana Barrowclough & Zeljka Kozul-Wright, *Voice, Choice and Diversity Through Creative Industries*, in *CREATIVE INDUSTRIES AND DEVELOPING COUNTRIES: VOICE, CHOICE AND ECONOMIC GROWTH* 3, 18–22, 27–28 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2008).

<sup>206</sup> See, e.g., *Hip-Hop in Uganda: The Dance in the Night-Time*, *ECONOMIST*, Feb. 26, 2011, at 92; *Putting Africa on the Animation Map: The Story of Pictoon, Senegal*, *WIPO MAG.*, Sept.–Oct., 2005, at 10 (describing South African cartoon series based on African folktales).

<sup>207</sup> Cf. Tsosie, *supra* note 45, at 357.

<sup>208</sup> Garritano, *supra* note 118, at 39–40.

<sup>209</sup> *WIPO Draft Treaty*, *supra* note 17, arts. 2(b), 3.

<sup>210</sup> See *supra* notes 24–39 and accompanying text.

<sup>211</sup> See BROWN, *supra* note 31, at 197; Mezey, *supra* note 30, at 2019, 2039–40; Sunder, *supra* note 10, at 507.

Folklore 1.0 idea that culture can be pinned down and emphasize its instability, heterogeneity, contestedness, hybridity, and lack of boundaries. They warn that constructing a property regime around such fuzzy variables will prove both unmanageable and counterproductive.<sup>212</sup> Critical studies perspectives also teach us that canonical notions as to what is accepted/valued reflect the coercive power of elites and argue that we should hesitate before validating such hierarchical constructs through law.<sup>213</sup>

Beyond such postmodern qualms, a deeper challenge to TCE rights springs from the dynamic nature of culture. Cultures change as societies evolve; their meanings are constantly renegotiated. Whatever canonical set of practices we identify as “authentic” at a given point in time rests on contingent meanings subject to reappraisal and challenge.<sup>214</sup> Far from constituting a threat, such dynamic meanings are, in fact, essential to cultural survival. Just as biological species evolve with changing environments, cultures must adapt to remain relevant to the communities that foster them.<sup>215</sup> As Kwame Appiah reminds us, “Societies without change aren’t authentic; they’re just dead.”<sup>216</sup>

Nigeria is a very different country today than the Nigeria of traditional lore. It is deeply embedded in global contexts as a petroleum exporter, a former British colony, and aspiring regional superpower. Its populace lives hybrid lives enveloped in imported goods, technologies, communications, and ideas. An overwhelming majority of Nigerians profess religious faiths that originated outside Nigeria.<sup>217</sup> The official language, English, is a colonial legacy that remains widely used in business, education, and government.<sup>218</sup>

TCE rights would do nothing to eliminate such pervasive foreign influences in everyday life. To do so would require a systematic program of disengagement and isolation that few modern societies are willing to undertake.<sup>219</sup> Instead, traditionalists want to keep their culture and their iPhones, too. To expect that TCE

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<sup>212</sup> See BROWN, *supra* note 31, at 213–14.

<sup>213</sup> See Mezey, *supra* note 30, at 2017–18; Sunder, *supra* note 10, at 509, 516–20.

<sup>214</sup> Sunder, *supra* note 10, at 515–23.

<sup>215</sup> Moreover, it is pointless to try to slow down the rate of change without altering the external environment. Delaying adaptations only makes them harder.

<sup>216</sup> Appiah, *supra* note 2, at 34; cf. JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 275–76 (2005). It is also unrealistic to expect that cultures will evolve in isolation. Cross-pollination is both inevitable and desirable. Hybrid vigor is a source of strength, not weakness.

<sup>217</sup> NAT’L POPULATION COMM’N OF THE FED. REPUBLIC OF NIGERIA, *NIGERIA DEMOGRAPHIC AND HEALTH SURVEY 24* tbl.3.1 (2003), available at <http://www.measuredhs.com/pubs/pdf/FR148/FR148.pdf>.

<sup>218</sup> See OLADIMEJI ABORISADE & ROBERT J. MUNDI, *POLITICS IN NIGERIA* 80–81 (2d ed. 2002).

<sup>219</sup> In the U.S. context, the Amish offer an example of the deliberate seclusion that would be required. See *Wisconsin v. Yoder*, 406 U.S. 205, 216–18 (1972). Internationally, only highly repressive states such as North Korea come close to managing such a feat.

rights will square this circle is not only delusional but also outright dangerous. As with other forms of cultural protection, the cure becomes its own disease.<sup>220</sup>

As this Article has shown, the epistemic practices by which the WIPO draft treaty constructs TCE rights favor a conservative, essentialized vision of culture.<sup>221</sup> By blocking departures from such canonical forms, enforcement of TCE rights could stop the recoding of tradition needed to keep its meaning contemporary and relevant. The danger is that culture would therefore become a museum artifact, a set of “authentic” practices certified by experts, rather than a living, breathing thing that continues to evolve. Fetishizing tradition in this manner could reduce it to an empty shell bereft of content; over time, the expression thus “preserved” would become no more relevant to its source community than ancient hieroglyphs printed on papyrus scrolls are to contemporary Egyptians.

To mummify a culture, thus, is to induce its own obsolescence. Such a prospect should give pause to TCE protectionists because the survival of traditional culture ultimately depends on the source community’s own commitment to perpetuate its heritage. Indifference is a far greater threat than exploitation. Practitioners of traditional culture already struggle with declining demand and lack of economic viability.<sup>222</sup> The last thing traditional culture needs is to increase such hurdles.

TCE rights can only block inauthentic use, they cannot ensure that authentic practices actually continue. The normative superiority of the Folklore 2.0 model compared to the “museum” approach to preservationism is therefore clear. Nollywood has found a way to keep Nigerian audiences engaged with their own culture by revitalizing tradition and—not insignificantly—fostering social and economic development in the process. Moreover, Nollywood operates through market forces, dispensing the need for government intervention and cumbersome bureaucracies.

However, preservationists may question whether Nollywood films represent a sustainable use of tradition. Without putting limits on cultural hybridization, what would stop Nollywood from diluting the distinctiveness of Nigerian tradition in a sea of foreign influences? Nollywood’s contribution assumes a less benign cast if its commodification of tradition harms the underlying source. As this Article has shown, critics have charged Nollywood with a multiplicity of transgressions: its films are too commercial, too westernized, too sensational, and so forth. Is there any difference then between Nollywood’s cultural appropriations and those of foreign imperialists?

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<sup>220</sup> Cf. Sean Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 NW. J. INT’L L. & BUS. 63, 92–94 (2011) (arguing European cultural protection has exacerbated the very failures it sought to remedy).

<sup>221</sup> See *supra* notes 24–25 and accompanying text.

<sup>222</sup> See Maureen Leibl & Tirthankar Roy, *Handmade in India: Traditional Craft Skills in a Changing World*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 53, 54–60 (J. Michael Finger & Philip Schuler eds., 2004).

Arguably, there is. Nollywood films are made in Nigeria by Nigerians themselves and are intended for Nigerian audiences. As such, they operate within the deep structures of Nigerian culture and must engage in discourse specific to that context.<sup>223</sup> Therefore, on their face, they conform to the autonomous model of cultural development that preservationists purport to favor. Elites may disapprove of their content, but the films have clearly met the approval of popular audiences. If culture is understood as a set of shared discursive understandings endorsed by a relevant community, Nollywood films are arguably validated by the enthusiastic response they command.<sup>224</sup>

What about their commercial nature? By pandering to vulgar consumer tastes for short-term profit, could Nollywood externalize harms onto the larger cultural fabric? Perhaps, but the theoretical concerns associated with commodification should be balanced against the benefits that markets provide. As this Article discussed, Nollywood films do not offer a single homogeneous perspective on tradition.<sup>225</sup> Rather, tradition becomes the site of competing discourses for which popular audiences remain the ultimate arbiter. Market success thus offers a tangible validation of cultural currency as well as an incentive for filmmakers to innovate.<sup>226</sup> Furthermore, commodification allows culture to pay its own keep, offering a means of livelihood to practitioners who might not otherwise perpetuate the underlying traditions.<sup>227</sup> Therefore, critics should not condemn Nollywood *ipso facto* merely because it is commercial.

Similarly, charges that Nollywood movies are too westernized cannot possibly justify categorical rejection of such works. As noted, Nigeria is a very different country today from the Nigeria of traditional lore. Its people are deeply embedded in global contexts on multiple levels. Nollywood films reflect the struggle to reconcile conflicts between these overlapping allegiances, offering creative syntheses that help African audiences find their own accommodation between tradition and modernity. To expect such expressions of Nigerian culture to

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<sup>223</sup> See Nancy Morris, *The Myth of Unadulterated Culture Meets the Threat of Imported Media*, 24 MEDIA, CULTURE & SOC'Y 278, 282–83 (2002).

<sup>224</sup> See Baker, *supra* note 10, at 1397–98.

<sup>225</sup> The decentralized structure of Nollywood-qua-culture industry also mitigates against commodification concerns by lowering the barriers to entry for diverse perspectives.

<sup>226</sup> Some may be discomforted by the notion of consumer exchanges supplying the “votes” in this marketplace for ideas. Commercial entertainment undoubtedly imposes biases that diverge from robust ideals of public discourse. Yet, adequate remedies arguably lie within the existing toolkit of media diversity regulation to enhance access for marginalized voices and genres.

<sup>227</sup> Sunder, *supra* note 25, at 111. In the case of Nollywood, the movies may not “sell tradition” in tangible form, but they can rekindle interest among audiences in recovering their heritage (and spending money doing so). Cf. Deming Liu, *Can Copyright Lend Its Cinderellaic Magic to Chinese Folklore?*, 5 J. MARSHALL REV. INTELL. PROP. L. 203, 211–15 (2006) (offering examples from China).

remain divorced from Western influence is to advance an ideology of “authenticity” based on willful denial of reality.<sup>228</sup>

As for Nollywood’s other supposed deficiencies, this Article has already suggested that much of the criticism reflects a paternalist conception of culture in which cinema is expected to project a particular vision of society.<sup>229</sup> Nollywood’s real offense may be to peddle inconvenient truths that Nigeria’s elites would rather not acknowledge. This conflict between opposing normative visions of culture is directly germane to the debate over TCE rights. The choice between Folklore 1.0 and Folklore 2.0 is ultimately a choice between decentralized innovation mediated through market forces and top-down regulation that purports to channel development in sustainable directions.

Nollywood is not National Geographic. Its films exist to entertain audiences, not necessarily to educate or edify.<sup>230</sup> Yet, collectively, they function as the site of competing discourses on tradition whose validity is left for audiences to endorse with their patronage. By allowing such bottom-up processes to determine cultural meaning, Nollywood’s discursive pluralism aligns well with ideals of semiotic democracy.<sup>231</sup>

The question then is whether adding a regulatory layer of TCE rights would improve on this existing cultural marketplace. Far from reifying tradition, proponents of TCE rights insist that such rights are compatible with cultural innovation. They would not stop Nollywood from making movies or audiences from watching them. They would just safeguard the integrity of traditional content and curb potential abuses. Such protections would correct market distortions and ensure new development remains appropriately respectful of the past.

Implicit in this undertaking is the premise that cultural progress can be rationally guided. Yet, to do so, enforcers of TCE rights will have to determine not just what is or is not authentic from a historical perspective, but also which innovations represent positive versus negative contributions. This requires defining contamination as something more than merely “new” or “foreign.” Instead of allowing tradition to evolve through organic processes, enforcers of TCE rights would enforce their vision of “sustainability” by extrapolating from some ill-defined notion of cultural continuity to determine the limits of acceptable progress.

To say that such assessments would be subjective is an understatement.<sup>232</sup> There is neither a neutral vantage point from which to judge these questions nor a pure source to refer back to as antecedent. Culture is both amorphous and entirely

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<sup>228</sup> See Waldron, *supra* note 5, at 763 (accusing traditionalists of “inauthenticity” for this reason).

<sup>229</sup> See, e.g., Meyer, *supra* note 168, at 7–8.

<sup>230</sup> If the films sometimes exceed the boundaries of good taste, that can be addressed by narrowly tailored speech regulations enforcing community standards of decency. This Article only criticizes efforts to protect the integrity of tradition beyond such generalized standards.

<sup>231</sup> Cf. JOHN FISKE, TELEVISION CULTURE 12–14 (1987).

<sup>232</sup> What counts as healthy development? What counts as harm? When does commercial pandering cross the line? Which “Western” borrowing is acceptable? What evidence would be accepted to resolve these questions?

intersubjective.<sup>233</sup> The WIPO draft treaty recognizes this fact when it invokes community acceptance as the touchstone of acceptable development.<sup>234</sup> But consensus itself is subjective and evolving. Much will turn on what questions you ask, as well as to whom and when. Moreover, we can expect the cultural equivalent of Heisenberg's uncertainty principle to apply: the administrative mechanisms used to implement such rights will impose their own systemic distortions.<sup>235</sup>

In disrupting the natural evolution of culture and substituting bureaucratic judgments for the wisdom of crowds, TCE rights effectively advance a theory of intelligent design without benefit of divine omniscience. Even assuming the best intentions, the epistemic challenges are daunting. Yet, as this Article will show, implementation of TCE rights is vulnerable to hijacking by a variety of actors whose intentions may be less than pure. The result could inflict far more lasting harm than it prevents.

### C. *A Manageable Conflict?*

Defenders of TCE rights could marshal several possible rejoinders. First, they would argue that TCE rights are primarily intended to prevent foreign appropriations (i.e., use by those outside the community). Second, they would suggest that internal conflicts can be managed consensually or mitigated through selective prosecution.

Unfortunately, neither ground offers much assurance. It is true that the main rhetoric of TCE protection is directed against external commodification. Rather than preventing Nigerians from exploiting their own culture, TCE rights are supposedly aimed at keeping out "foreigners"—predatory multinational corporations who want to appropriate folklore for offshore exploitation. Yet nothing in the WIPO draft treaty precludes internal application. On the contrary, the exclusive rights the treaty establishes apply to any use of traditional culture that takes place outside the "traditional and customary context."<sup>236</sup> Nollywood videos present traditional culture in a medium that inherently transcends the customary context; the films also routinely adapt and remix traditional sources, often in controversial ways. Such "inauthentic" uses therefore offer prime targets under a future TCE regime.

The potential for internal application cannot be dismissed as a *de minimis* concern that must be tolerated as collateral damage. As this Article has shown, uses of traditional culture are pervasive in Nollywood. They constitute a large part of Nollywood's distinctive appeal and competitive advantage vis-à-vis foreign imports.<sup>237</sup> Denied the ability to tap into the wellsprings of traditional culture,

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<sup>233</sup> Mezey, *supra* note 30, at 2041; Sunder, *supra* note 10, at 513–18.

<sup>234</sup> *WIPO Draft Treaty*, *supra* note 17, general guiding princ. (h).

<sup>235</sup> Brown, *supra* note 18, at 213–14.

<sup>236</sup> *WIPO Draft Treaty*, *supra* note 17, arts. 3, 5(1).

<sup>237</sup> *See supra* notes 146–159 and accompanying text.



Nollywood—and other creative industries—would be seriously handicapped.<sup>238</sup> Folklore is the source of the archetypal myths and foundational concepts from which so much of contemporary culture is derived.<sup>239</sup> Its essential infrastructural role is precisely why existing copyright law consigns such cultural building blocks to the public domain where all can access them.<sup>240</sup> By stamping a “no trespass” sign on such resources, TCE rights could cut off a vital source of creative inspiration.

By contrast, the interest of foreigners in appropriating traditional culture is much more sporadic and haphazard. Defenders of indigenous culture like to demonize the “cannibal culture” that drives Western multinational industries to pervasively commodify traditional sources.<sup>241</sup> In fact, such commodification occupies at best a tiny niche within the global cultural economy.<sup>242</sup> Although the rhetoric of commodification sometimes suggests culture is a globally fungible commodity akin to the oil that Chevron pumps out of the Niger delta, traditional culture is mostly of interest to communities who have a connection to it.<sup>243</sup> Because cultural appropriation begins at home, that is where most of the fights will occur.

While examples of intramural applications of TCE rights remain hard to find because such rights either do not legally exist or have gone unenforced, recent years have seen a steady drumbeat of cases involving local artists who recorded original works based on traditional melodies.<sup>244</sup> Musicians in several African countries have also expressed concern over government plans to extract royalties

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<sup>238</sup> Popular culture is all about putting old wine in new bottles. From Homer through Shakespeare on down, we do not invent, we reinvent. But there is real value in this process of reinvention. Audiences want to savor familiar archetypes, tropes, and conventions remixed into a cocktail that seem fresh and contemporary. See Umberto Eco, *Innovation and Repetition: Between Modern and Post-Modern Aesthetics*, DÆDALUS, Fall, 1985, at 161, 173–75.

<sup>239</sup> See Morris, *supra* note 223, at 282–83.

<sup>240</sup> See Peter Lee, *The Evolution of Intellectual Infrastructure*, 83 WASH. L. REV. 39, 60–61 (2008) (describing infrastructural role of copyright’s idea expression and scenes as faire doctrines).

<sup>241</sup> DEBORAH ROOT, CANNIBAL CULTURE: ART, APPROPRIATION, AND THE COMMODIFICATION OF DIFFERENCE 67–73 (1996).

<sup>242</sup> Take Justin Bieber, Lady Gaga, and Harry Potter—most global media products are squarely rooted in mainstream Western culture. While world music does constitute a growing niche, such productions typically entail collaborations with artists from the source communities. Regulating such transactions is a different matter than simply saying “hands off” to foreigners.

<sup>243</sup> It is no accident that American sports teams feature Native American mascots rather reaching outward to plunder indigenous iconography from afar. See Mezey, *supra* note 30, at 2027–30.

<sup>244</sup> See Liu, *supra* note 227, at 207–08; Daniel Wüger, *Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES*, *supra* note 222, at 183, 189.

for use of traditional drum cadences.<sup>245</sup> Meanwhile, an internationally renowned Chinese filmmaker was sued last year for alleged misuse of traditional Chinese opera.<sup>246</sup> While comparable TCE claims have yet to emerge against African film industries, government censors already regulate the presentation of traditional culture on quasi-moral-rights grounds. Films and television productions in Ghana and, lately, Nigeria itself have run afoul of such cultural policing. And authorities in these countries are under pressure to increase their vigilance.<sup>247</sup>

Proponents of TCE protection assume that potential conflicts between traditional-culture defenders and content industries such as Nollywood can be managed or mitigated, that Nollywood could find ways to use traditional culture compatible with TCE rights, that a community consensus would emerge as to appropriate boundaries, or that selective prosecution and forbearance would allow an accommodation to be reached. Such assessments appear far too sanguine.

TCE rights protection amounts to a largely unprecedented experiment—a newly minted body of law applying broad, subjective standards across a staggeringly diverse range of materials currently in the public domain.<sup>248</sup> The breadth of subject matter potentially embraced by such protection, the uncertain scope of the rights, and the ambiguous identity and overlapping claims of rights holders would all conspire to make TCE rights clearance an entertainment lawyer's worst nightmare.<sup>249</sup> Creative industries are already high-risk businesses. Anything that adds uncertainty or delay will deter investments and discourage innovation.<sup>250</sup> Nollywood might continue to make movies, but would likely avoid sensitive topics involving traditional materials. Such forbearance would not only undermine the marketability and appeal of the films, but would also arguably operate to the detriment of the very traditions supposedly being protected. Removing traditional culture from the public eye hardly helps its survival.<sup>251</sup>

<sup>245</sup> Wüger, *supra* note 244, at 189–90.

<sup>246</sup> See Guan Xiaomeng, *Zhang Yimou Sued over Opera Copyright*, CHINA DAILY, [http://www.chinadaily.com.cn/china/2010-05/12/content\\_9837120.htm](http://www.chinadaily.com.cn/china/2010-05/12/content_9837120.htm) (last updated May 12, 2010).

<sup>247</sup> See *infra* Part III.C.3.

<sup>248</sup> Arguments that intellectual property law was similarly newly invented and untested back in its day miss the mark. Cf. Chander & Sunder, *supra* note 46, at 1369 (arguing that the implementation challenges posed by TCE rights are no different than those that “our existing intellectual property system” prompted in shifting from “a legal regime granting property rights only in tangibles”). Copyright only applies prospectively to new works for a limited time and was initially confined to a narrow category of printed materials protected only against direct, literal reproduction. Copyrights were also territorially bounded within nation states. Only gradually did copyright law expand to its current breadth of subject matter, scope, and transnational reach. See Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations as to Its Future*, 18 J. INTELL. PROP. L. 231, 243–54 (2012).

<sup>249</sup> See Rose, *supra* note 68, at 999–1000 (describing anti-commons problem).

<sup>250</sup> Pager, *supra* note 220, at 103 & n.239.

<sup>251</sup> See Liu, *supra* note 227, at 211 (“To salvage folklore, it is crucial to popularize and disseminate it to the young generation, ensuring wide exposure.”).

Nor does the WIPO draft treaty's reliance on community consensus as a guidepost to resolve disputes provide a satisfactory solution. Art by consensus is a recipe for cultural stagnation. Great art provokes reactions, often violent ones. By transgressing boundaries and challenging taboos, it forces us to expand our horizons or confront contradictions in our values.<sup>252</sup> Subjecting such expression to communal approval would hamstring the sources of innovations by which tradition is renewed.

Traditional culture is often romanticized as a collection of time-honored practices benevolently presided over by trusted elders applying settled customs to the collective approval of the community. In fact, traditional culture is just as subject to evolutionary pressures as any culture.<sup>253</sup> And the forces driving such changes do not operate in a genteel manner that can be consensually negotiated. Tradition is a natural lightning rod pitting modernizers against traditionalists,<sup>254</sup> and the culture wars that TCE rights inspire are likely to prove unusually bloody.

If TCE rights become operational, then much will turn on the way they are implemented. In assessing *which* uses of traditional culture are likely to be endangered, a crucial question becomes *who* is empowered to enforce TCE rights against *whom*. This Article will consider three potential models: (1) a cultural semicommons, (2) community custodianship, and (3) state control.

### 1. Cultural Semicommons

From the standpoint of encouraging cultural innovation, by far the preferred solution would be a cultural semicommons model. Under this scheme, TCE enforcement would only apply to outsiders; members of a source community would retain *carte blanche* to do whatever they wished with their own culture.<sup>255</sup> Remixes and adaptations would be tolerated internally without any limits.<sup>256</sup>

In practice, however, a cultural semicommons would be difficult to implement for three reasons: First, cultural boundaries are too amorphous to establish workable boundaries separating insiders from outsiders. Second, the arbitrary line drawing necessary to make such boundaries enforceable may prove commercially disabling. Third, a semicommons model is likely to prove politically unpalatable.

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<sup>252</sup> See Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 609 (1987).

<sup>253</sup> That a culture remained stable during a period of isolation offers no assurance that it can smoothly navigate externally imposed changes once they arrive. See Waldron, *supra* note 5, at 788.

<sup>254</sup> See *Id.*

<sup>255</sup> See Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132, 160 (1998).

<sup>256</sup> Such a rule would go against the grain of the WIPO treaty in so far as it dispenses with the requirement of community consensus for uses of TCE outside the traditional context. *WIPO Draft Treaty*, *supra* note 17, art 5(1)(a), general guiding princ. (h).

To take Nigeria as an example, the country contains more than 250 ethnic groups, all of which could potentially claim folklore rights as “traditional communities” under the WIPO draft treaty (which does not currently define “communities”).<sup>257</sup> The boundaries between such groups are ill defined and fluid, however, and many of the larger groups encompass subgroups fractured across multiple cross-cutting lines of identity: language, religion, geography, and lifestyle. In many cases, group identities perpetuate colonial distinctions resting on questionable ethnography.<sup>258</sup> Even if we could decide which particular groups constitute a “traditional community” for purposes of TCE claims and reliably identify their individual members, we would still need some way to determine which cultural practices belong to which groups as well as to define the traditional parameters of authentic practice.<sup>259</sup> The director general of the Nigerian Copyright Commission has testified to the daunting nature of this task:

It is not uncommon to observe similar songs, craft, or painting in a given area covering a collection of communities. . . . It will therefore be difficult to single out the particular community from where a folklore work emanates. Even where ownership is shared between certain communities, delimiting such communities will still be difficult. In some occasions the meaning and usage of a particular folklore will differ in these communities. This makes it even more difficult to protect the moral right.<sup>260</sup>

Furthermore, it would be naive to think the task would remain a dispassionate, bureaucratic exercise. Nigeria’s identity politics are a combustible mix of ethnic rivalries, religious sectarianism, localized rent seeking, and historical grudges.<sup>261</sup> Making competing claims to tradition subject to potentially valuable commercial monopolies would exacerbate such intergroup conflicts.<sup>262</sup> Nigeria fought a civil war in the 1960s along ethnic lines and continues to suffer from localized insurgencies and sectarian violence.<sup>263</sup> Accordingly, the potential for TCE rights to exacerbate ethnic tensions should not be lightly dismissed.

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<sup>257</sup> *The World Factbook: Nigeria*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last updated Oct. 16, 2012).

<sup>258</sup> APRIL A. GORDON, NIGERIA’S DIVERSE PEOPLES 4, 83–84 (2003); Ranger, *supra* note 173, at 247–48.

<sup>259</sup> See Kuruk, *supra* note 31, at 803–804; Mezey, *supra* note 30, at 2019.

<sup>260</sup> Adebambo Adewopo, *Protection and Administration of Folklore in Nigeria*, 3 SCRIPTED 1, 8–9, (2006), <http://www.law.ed.ac.uk/ahrc/script-ed/vol3-1/editorial.pdf>.

<sup>261</sup> See ABU BAKARR BAH, BREAKDOWN AND RECONSTITUTION: DEMOCRACY, THE NATION-STATE, AND ETHNICITY IN NIGERIA 43–54 (2005).

<sup>262</sup> Cf. Hector Tobar, *Tempest in a Glass of Pisco*, L.A. TIMES (June 3, 2003) <http://articles.latimes.com/2003/jun/03/world/fg-pisco3> (examining political and commercial conflict over ownership of a traditional wine from the borders of Chile and Peru).

<sup>263</sup> BAH, *supra* note 261, at 43–54; GORDON, *supra* note 258, at 260–62.

Assuming rule makers could overcome such hurdles and construct appropriate group lines to define a putative cultural semicommons, presumably the rule would then become that only insiders can exploit their communal culture. In Nigeria, this might mean, for example, that only Yorubas could make films dealing with traditional Yoruba culture. But questions would then arise as to *who* exactly is making the film. Does the producer have to be Yoruba? The director? The actors? The financing sources? All of the above? A majority? Whatever test we devise will engender arbitrary results.<sup>264</sup> Moreover, by enforcing a “cultural apartheid” on Nollywood sets, such rules would have the perverse outcome of reinforcing existing divisions and undercutting the message of national integration that Nollywood’s multicultural productions deliver.<sup>265</sup>

Nigeria could attempt to circumvent these challenges by extending the semicommons into a general license for all Nigerians to exploit Nigerian culture. However, while the WIPO draft treaty appears to countenance such a national license,<sup>266</sup> granting one could potentially run afoul of international trade and IP rules that prohibit discrimination by nationality.<sup>267</sup> Moreover, a national semicommons would still confront the issue of ethnic groups that straddle Nigeria’s national boundaries.<sup>268</sup> It would seem odd that a Hausa from Northern Nigeria could exploit Yoruba culture while Yorubas living in neighboring Benin are excluded. The national semicommons would also have to address the status of the sizable Nigerian émigré communities overseas. Contributions from diaspora communities can bring valuable know-how and global connections. Many of India’s most successful film exports, for example, have been produced through collaborations with members of India’s diaspora populations.<sup>269</sup> Making nationality a strict criterion for cultural access could block such profitable collaborations.

Perhaps nationality rules could be bent to recognize these groups too as Nigerian. However, a national semicommons would also inhibit transnational coproductions. Nigeria and Ghana have collaborated on a number of successful joint productions, and Nollywood is increasingly a pan-African cinema drawing

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<sup>264</sup> Countries that subsidize domestic audiovisual industries struggle with analogous issues in defining national production. They typically employ multifactor tests that require cumbersome bureaucracies and invite gamesmanship and abuse. See Pager, *supra* note 220, at 133–34.

<sup>265</sup> Barrot, *supra* note 108, at 44; Philippe Descola, Commentary, in Michael H. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 208, 208–09 (1998).

<sup>266</sup> See *WIPO Draft Treaty*, *supra* note 17, art 5(2) (allowing for national license where consistent with customary norms).

<sup>267</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>268</sup> See Adewopo, *supra* note 260, at 8; Kuruk, *supra* note 31, at 804–05. Africa’s arbitrary colonial boundaries make such cross border issues pervasive.

<sup>269</sup> Daya Kishan Thussu, *The Globalization of “Bollywood”—The Hype and Hope*, in GLOBAL BOLLYWOOD 97, 106 (Anandam P. Kavoori & Aswin Punathambekar eds., 2008).

talent from across the continent.<sup>270</sup> The ability to form coproductions could be even more vital for creative industries in countries with smaller home markets than Nigeria. Such collaborations constitute a well-recognized strategy to pool resources and more effectively compete in global audiovisual markets.<sup>271</sup>

Restrictions on TCE-based productions could also deter valuable foreign investment and distribution deals.<sup>272</sup> Nollywood has already benefited from technical improvements brought by foreign partners and attracted interest from Hollywood investors and distributors.<sup>273</sup> U.S. financing has also underwritten fledgling film productions in other African countries, while French funding continues to sustain filmmaking in Francophone Africa.<sup>274</sup> As with diaspora populations, foreign partners often bring know-how, financing, and distribution networks that can prove critical to industry development.<sup>275</sup> Again, to use India as an example, it took an English filmmaker, Danny Boyle, to deliver Bollywood a truly global breakthrough hit in *Slumdog Millionaire*, a British-Indian collaboration that garnered the 2008 Academy Award for best picture.<sup>276</sup>

It is easy to demonize foreign investment as imperialist exploitation, but the reality is that developing countries stand to benefit. Especially where the cultural works in question are aimed at domestic audiences, there is no reason to assume that foreign involvement will taint the end product.<sup>277</sup> And even export-oriented projects can indirectly benefit domestic production through cross subsidies and

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<sup>270</sup> *Nollywood: Lights, Camera, Africa*, *supra* note 89.

<sup>271</sup> Europeans filmmakers used this model successfully in the early postwar years until protectionist policies forced a destructive balkanization of production. See Pager, *supra* note 220, at 93.

<sup>272</sup> *Cf. id.* (arguing restriction on American investment in national films shot European filmmaking in the foot).

<sup>273</sup> Barrot, *Informal Sector*, *supra* note 102, at 55 (noting South African television funded sound upgrades); Amelia H. Arsenault & Manuel Castells, *The Structure and Dynamics of Global Multi-Media Business Networks*, 2 INT'L J. COMM. 707, 730 (2008) (describing Hollywood interest).

<sup>274</sup> See, e.g., JUSTIN R. EDWARDS, BUILDING A SELF-SUSTAINING, INDIGENOUS FILM INDUSTRY IN KENYA 10–12 (2008), available at <http://worldstoryorganization.org/docs/WSOKenyaFilmIndustryReport.pdf>; *Africa First*, FOCUS FEATURES, <http://focusfeatures.com/africafirst/index.php> (last visited Feb. 16, 2013) (short film program); MAISHA FILM LAB, <http://www.maishafilmlab.org/background> (last visited Feb. 16, 2013).

<sup>275</sup> Pager, *supra* note 220, at 93, 117.

<sup>276</sup> *Id.* at 116 n.318. A similar story can be told of Hong Kong kung fu filmmaking's breakout success with *Crouching Tiger, Hidden Dragon*.

<sup>277</sup> Again, the European example is instructive. Far from corrupting European auteur traditions, Hollywood financiers have underwritten a number of quintessentially European films. Pager, *supra* note 220, at 93 n.185.

shared infrastructure.<sup>278</sup> Foreign commodification can also sustain traditional cultural practices suffering from neglect at home.<sup>279</sup>

The mere hint of TCE complications could torpedo foreign partnerships. Financing for transnational projects is highly risk averse, especially where creative industries are concerned.<sup>280</sup> Anything that increases transactional costs, complexities or uncertainty can be a deal breaker. The ill-defined parameters of TCE rights would therefore constitute a serious deterrent. Without the ability to safely and efficiently clear the necessary rights, prospective foreign partners are likely to look elsewhere. A restrictive semicommons could therefore hamper emerging creative industries. On the other hand, overly lax rules on internal-external collaborations would invite “front man” arrangements, whereby community members serve as sham participants to legitimize access.<sup>281</sup> A semicommons model therefore needs to negotiate these tradeoffs carefully.

Wholly apart from these other drawbacks, however, a cultural semicommons suffers from a more serious disability. For many traditional communities, the idea of unrestricted cultural experimentation is anathema. Many communities regulate cultural access and usage based upon customary norms and internal hierarchies.<sup>282</sup> Such groups are likely to insist that their customary norms be respected, and the WIPO draft treaty unequivocally supports this position.<sup>283</sup>

## 2. *Community Custodianship*

Accordingly, rather than issuing a general license for internal use to members of a traditional community, TCE regimes are more likely to vest control over folklore usage with designated traditional custodians and sui generis procedures. It is easier to demand cultural sovereignty, however, than to agree on mechanisms to implement it. Commentary on TCE rights often presumes existing institutions such as a village chieftain or council of elders will assume responsibility. Yet suitable institutions for this purpose in Africa are far from self-evident, and difficult questions of jurisdiction, legitimacy, and overlapping claims would arise.<sup>284</sup>

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<sup>278</sup> See *id.* at 95–96, 126–27.

<sup>279</sup> See Liu, *supra* note 227, at 214–15 (describing a revival of Chinese interest in its own folklore initiated by the Disney film *Mulan*).

<sup>280</sup> See Pager, *supra* note 220, at 103. See generally ARTHUR DE VANY, HOLLYWOOD ECONOMICS (2004) (addressing the financial uncertainty of the entertainment industry); Richard Phillips, *The Global Export of Risk: Finance and the Film Business*, 8 COMPETITION & CHANGE 105, 131 (2004) (discussing the difficulties in obtaining foreign film financing).

<sup>281</sup> Such front-men arrangements were, in fact, widely used to evade Nigeria’s media indigenization law during the 1970s. See ONUZULIKE, *supra* note 89, at 13–14.

<sup>282</sup> See, e.g., Adewopo, *supra* note 260, at 4; Farley, *supra* note 3, at 10; Kuruk, *supra* note 31, at 783–86.

<sup>283</sup> See *WIPO Draft Treaty*, *supra* note 17, art. 5.

<sup>284</sup> See, e.g., BROWN, *supra* note 31, at 112–123; Kuruk, *supra* note 31, at 787.

Furthermore, whatever institutional mechanisms emerge are likely to be stacked in favor of cultural conservatism. Generational conflicts constitute a particular concern. It is a commonplace of popular culture that each generation delights in scandalizing its parents with cultural innovations that seem subversive and threatening but later become accepted parts of the canon—only to be subverted and threatened by a new generation.<sup>285</sup> This generational cycle from cultural rebel to establishment figure could be preempted, however, if elderly custodians become empowered to censor cultural insurgents before they have the chance to gain acceptance.

Even accepting that a community has a legitimate interest in regulating uses of tradition internally, the risks posed by TCE rights are three-fold. First, bureaucratic mechanisms to implement TCE rights may short-circuit informal processes of dialogues that would otherwise occur within the community. If cultural conservatives can employ the law as a trump card, they may be tempted to impose their reactionary values more aggressively than they would if their authority remained ambiguous.

Second, the scope of TCE rights reaches beyond traditional contexts to affect creative expression in venues and media for which communal authority, as a practical matter, would not otherwise extend.<sup>286</sup> Film, as a high-profile medium for projecting public values, supplies a natural target for self-proclaimed protectors of tradition.<sup>287</sup> TCE rights would offer communal censors a legal basis to impose their will on such nontraditional spheres.<sup>288</sup>

Finally, protecting “traditional values” can easily become a proxy for hidden agendas that themselves result in the distortion of tradition by its putative

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<sup>285</sup> Examples are legion: the waltz was banned as “immoral” in Vienna; the samba and tango rejected as “gutter culture”; Mozart’s operas faced censorship; Stravinsky’s music caused riots; the impressionists were shunned as “wild beasts,” modern art condemned as immoral; and rock-and-roll, jazz, rap, and hip-hop are attacked as vulgar, degenerate, or obscene. See TYLER COWEN, *GOOD AND PLENTY: THE CREATIVE SUCCESSES OF AMERICAN ARTS FUNDING* 99–100 (2006); Steven H. Chafee, *Popular Music and Communication Research: An Editorial Epilogue*, 12 COMM. RES. 413, 416 (1985); John Hood, *Hayek, Strauss, and the Political Waltz*, 55 FREEMAN 19, 19–21 (2005).

<sup>286</sup> In doing so, we would essentially be empowering grumpy old granddad to commandeer the stereo not just at home, but at the neighbor’s house—and even at the mall. By preventing “those kids” from playing their “filthy noise” anywhere in town, grandpa would make sure music would never advanced beyond the golden oldies of his youth.

<sup>287</sup> See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 76–90, 93–94 (2000) (describing Hindu violence over film’s perceived misuse of tradition in depicting lesbian romance); *Senegal’s Carmen Controversy*, BBC NEWS (Sept. 10, 2001, 7:10 PM), <http://news.bbc.co.uk/2/hi/africa/1535781.stm> (describing how a Senegalese sect blocked screening of a film which used a traditional Muslim melody in portraying a lesbian funeral).

<sup>288</sup> Indeed, the WIPO draft treaty is intended to give TCE rights transnational reach, as enforcement would be binding upon all signatories.



defenders—a further example of disease masquerading as cure.<sup>289</sup> The inherent subjectivity of prohibitions against “prejudicial,” “offensive,” or “inauthentic” uses make TCE rights rife for potential abuse.<sup>290</sup> Definitional disputes over cultural integrity may devolve into a form of proxy warfare in which competing factions deploy self-serving claims to authenticity.<sup>291</sup> Such culture wars favor insiders over outsiders and the powerful over the weak—as scholarship has repeatedly shown.<sup>292</sup>

Even where the community exercises its cultural stewardship through more inclusive, democratic norms, a majoritarian bias would persist against countercultural perspectives from freethinking bohemians and youthful visionaries. Cultural innovations rarely arrive fully formed to be greeted by community acclaim. Artistic rebels often begin by experimenting on the margins.<sup>293</sup> New movements provoke sharp breaks with the existing order. Creative breakthroughs arrive in provocative guises or couched in a language unintelligible to the larger community.<sup>294</sup> By censoring those who subvert established conventions, the community would stifle the creative sources that hold the greatest promise to modernize tradition.<sup>295</sup>

Squashing Nollywood productions that veer in controversial or offensive directions would result in a defanged film culture robbed of its vital edge—the equivalent of cinematic muzak. Nor is this threat merely theoretical. As noted, Nigerian authorities have been under increasing pressure to censor Nollywood films that present traditional culture in ways that are deemed immoral.<sup>296</sup> While communal decency standards should not be confused with TCE rights, such conflation appears well underway. Igbo elders have filed a formal petition with the government complaining about misuse of Igbo tradition in Nollywood films.<sup>297</sup>

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<sup>289</sup> Conservatives can be just as “activist” in their interpretation of tradition as progressives (and not just on the United States Supreme Court). See Sunder, *supra* note 287, at 87–90, 92 (describing how Hindu right-wing objections to depictions of homosexuality reflect a prudishness out of keeping with earlier traditions).

<sup>290</sup> See *WIPO Draft Treaty*, *supra* note 17, art. 3(a)(iii).

<sup>291</sup> See Sunder, *supra* note 10, at 502–07 (arguing that law “has become complicit in the backlash project” of suppressing dissenting conceptions of cultural traditions).

<sup>292</sup> See KIRK DOMBROWSKI, *AGAINST CULTURE: DEVELOPMENT, POLITICS, AND RELIGION IN INDIAN ALASKA* 182–90 (Gerald M. Sider & Kirk Dombrowski eds., 2001); Lorraine V. Aragon & James Leach, *Arts and Owners: Intellectual Property Law and the Politics of Scale in Indonesian Arts*, 35 *AM. ETHNOLOGIST* 607, 615 (2008); Ranger, *supra* note 173, at 254–60.

<sup>293</sup> See COWEN, *supra* note 117, at 29.

<sup>294</sup> See *id.*; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

<sup>295</sup> See Aragon & Leach, *supra* note 292, at 624.

<sup>296</sup> Jonathan Haynes, *Video Boom: Nigeria and Ghana*, *POSTCOLONIAL TEXT* (July 3, 2007), <http://postcolonial.org/index.php/pct/article/view/522/422/> (describing crackdown on “juju” films depicting occult rituals).

<sup>297</sup> McCall, *supra* note 95, at 107.

The concern is that use of traditional expression is being censored because it is “inauthentic” rather than being judged under more neutral standards of decency.<sup>298</sup>

The mere threat of TCE holdups could encourage filmmakers to avoid engaging “sensitive” folkloric content. Yet doing so would impoverish public discourse and stifle the creative renewal of tradition.<sup>299</sup> Entrenching by default a privileged snapshot version of tradition, the TCE regime would impair the diversity and richness of the underlying heritage and “cripple the mechanisms of adaptation and compromise,” which provide the source of its resilience.<sup>300</sup> In the end, tradition may emerge more distorted than saved.

### 3. State Control

Even more likely—and less desirable—than communal custodianship is the prospect that governments will control TCE rights directly. The WIPO draft treaty explicitly sanctions such state authority, subject only to the caveat that it be exercised with “appropriate consultation” and for the “benefit of” the source communities.<sup>301</sup> Because culture and tradition are deeply enmeshed with power and legitimacy, governments can be expected to resist ceding authority over such sensitive domains to anyone else.<sup>302</sup> Indeed, government control is already the norm in the existing folklore statutes adopted in much of Africa and Asia. Such regimes regard traditional culture as belonging to the collective heritage of the nation, justifying centralized control by state organs.<sup>303</sup> Lacking effective constraints, such public monopolies often wield TCE rights with effective impunity.

The prospect of government officials making decisions on behalf of indigenous communities introduces obvious agency problems, especially where the source communities comprise isolated minorities who lack effective political representation.<sup>304</sup> Subjective and amorphous standards, as well as built-in conflicts

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<sup>298</sup> The above examples of film censorship based on lesbianism provide a useful illustration of the distinction. See *supra* note 287 and accompanying text. If the Hindu and Muslim activists in each case had objected categorically to portrayals of lesbianism, such objections could reflect a general communal decency standard. However, the objections were more specific in nature: it was the juxtaposition of homosexual themes with traditional culture that aroused the activists’ ire.

<sup>299</sup> The result would be a contemporary culture that is *less* authentic and reflective of the cultural traditions of its source communities.

<sup>300</sup> Waldron, *supra* note 5, at 788.

<sup>301</sup> *WIPO Draft Treaty*, *supra* note 17, arts. 2, 4.

<sup>302</sup> See Pager, *supra* note 220, at 70.

<sup>303</sup> See ZOGRAFOS, *supra* note 16, at 16–27; Kuruk, *supra* note 31, at 799–803, 811.

<sup>304</sup> Cf. Carpenter et al., *supra* note 3, at 1099–100; Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 239, 273 (2001) (describing diverging interests between governments and indigenous minorities).

between commodification and authenticity, make such concerns particularly acute in the TCE rights context.<sup>305</sup>

Commercial development and tourism may trump sensitivity to local values and interests. A dominant ethnic group or well-placed insider may usurp the lion's share of benefits. Political or ideological imperatives may lead to distortions or deliberate favoritism in the construction and enforcement of TCE rights. An artificial nationalism may override both local variations and cross border affinities. A recent study of Indonesia's TCE/folklore regime found all of the above.<sup>306</sup>

Even worse, tradition is also liable to be appropriated in service of the governing regime itself. Just as African national cinema often presented an idealized version of tradition, traditional culture in the grasp of government elites could emerge similarly distorted. The intimate links between culture and national sovereignty and its emotive pull on public heartstrings make tradition a natural target for authoritarian regimes.<sup>307</sup> By manipulating TCE rights, such regimes could subvert tradition to buttress state authority.

Precedents for such authoritarian cooption of tradition are depressingly abundant. The Nazis melded ancient Indo-European symbols such as the swastika into a pastiche of Aryan mythology (real and imagined) that formed the ideological ballast for a racist, genocidal state.<sup>308</sup> Mussolini drew on Roman traditions to support his version of fascism in Italy,<sup>309</sup> Ceaușescu's Romania appropriated the heritage of the ancient Dacians,<sup>310</sup> Qaddafi's Libya exalted traditional Bedouin culture.<sup>311</sup> Mobutu Sese Seko of Zaire built his regime upon an ideology of *authenticité*, whose bricolage of folkloric elements bore only nominal resemblance to actual indigenous tradition.<sup>312</sup> Turkmenistan's late strongman, Saparmurat Niyazov, played a similar game to an even more bizarre effect.<sup>313</sup> For sheer Orwellian chutzpah and aggression, however, it is hard to beat the spectacle of China's officially atheist communist rulers promulgating regulations governing the reincarnation of Tibetan lamas.<sup>314</sup>

Such blatant cooption of indigenous tradition doubtless contravenes both the letter and spirit of the WIPO draft treaty. It will serve as a precedent, however, for

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<sup>305</sup> See *supra* notes 66–68 and accompanying text.

<sup>306</sup> See Aragon & Leach, *supra* note 292, at 612–16.

<sup>307</sup> See Pager, *supra* note 220, at 70, 88, 98.

<sup>308</sup> STEVEN HELLER, *IRON FIRSTS: BRANDING THE 20TH CENTURY TOTALITARIAN STATE* 20 (2008).

<sup>309</sup> *Id.* at 92.

<sup>310</sup> See *Protochronism*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Protochronism/> (last visited March 4, 2013).

<sup>311</sup> Ali Abdullartif Ahmida, *Why Qaddafi Has Already Lost*, N.Y. TIMES, Mar. 16, 2011, at A29.

<sup>312</sup> Adelman, *supra* note 176, at 135–39; see Ciaffa, *supra* note 175, at 129.

<sup>313</sup> See Slavomir Horak, *The Ideology of the Turkmenbashi Regime*, 6 PERSP. ON EUR. POL. & SOC'Y 305, 310–13 (2005).

<sup>314</sup> See Slavoj Zizek, *How China Got Religion*, N.Y. TIMES, Oct. 11, 2007, at A27 (describing strategy to subjugate Tibetan minority through subversion of its traditions).

similarly nefarious-minded regimes to wield TCE rights as an instrument of legitimization and power. Admittedly, none of these examples involved use of TCE rights as such. If governments want to coopt tradition, they can find ways to do so. The real concern is that the WIPO regime offers a framework to pursue such strategies with the patina of international legitimacy.<sup>315</sup>

Audiovisual media offer a special attraction for authoritarian manipulation, with a lengthy pedigree of state propaganda.<sup>316</sup> And there is no reason to think that Nigeria's rulers would prove immune to the temptations that TCE rights offer. As noted, the Nigerian cultural establishment has long resented Nollywood's populist pandering, and authoritarian power mongers among the ruling elite distrust its subversive independence.<sup>317</sup> Government censors have already begun to crack down on the perceived "immorality" of its videos, egged on by traditionalists.<sup>318</sup> Given the hostile forces gunning for Nollywood's demise, TCE rights could provide a convenient cudgel to curb its artistic freedom.

The result would be films and other forms of creative expression that conform to established orthodoxies rather than extend or challenge them, works that reflect elite sensibilities rather than popular tastes, and works that buttress existing power structures rather than encourage democratic alternatives. This brings us back to the distinction adumbrated above between Africa's celluloid versus video film traditions: strong traditional knowledge rights are likely to result in a cultural output that more closely resembles the ideologically inflected narratives of national filmmaking than the hybridity, ambivalence, and conflict embodied in Nollywood films. Whether intended or not, this will result in less of Nollywood's creative reimagining of tradition and more celluloid paeans to an idealized past.

Whereas digital technology has decentralized cultural production, allowing filmmakers to evade government censors and offer diverse viewpoints, TCE rights could restore a control over mass media that governments hitherto seemed destined to surrender, allowing them to impose a distorted representation of tradition. Nollywood films may be crude, commercial concoctions marred by wooden acting and badly dubbed sound, but they have revitalized the public sphere in Africa and spurred much-needed development. Their presentation of African tradition is a complex, multivalent one that holds enormous promise as a crucible for a new African identity (or identities). The tradeoff seems clear: Whereas remixing tradition has fostered cultural and commercial vitality, proprietizing it could do the exact opposite.

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<sup>315</sup> A similar logic arguably propelled recent efforts to enact international norms against religious defamation. Illiberal use of blasphemy laws may provide a template for future TCE enforcement. Cf. Hannibal Travis, *YouTube from Afghanistan to Zimbabwe: Tyrannize Locally, Censor Globally*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE*, *supra* note 139, at 76, 83.

<sup>316</sup> See COWEN, *supra* note 117, at 210; Pager, *supra* note 220, at 88 & nn.151–52.

<sup>317</sup> McCall, *supra* note 95, at 107; *Nollywood Dreams*, *supra* note 96, at 59.

<sup>318</sup> McCall, *supra* note 95, at 107.

IV. COPYRIGHT<sup>319</sup>

So far this account of the tradeoffs between innovation and preservation has focused on the negative effects of TCE rights on creative works derived from traditional sources—with Nollywood remixes serving as the prime example. Missing in this account is the role of policies designed to affirmatively *encourage* such creative innovation.

At the top of the list is copyright law. While TCE rights can certainly coexist with traditional IP regimes such as copyright, there are significant tensions between the two. Most obviously, subordinating copyrights in derivative works based on tradition to upstream TCE rights undermines the former's value—and with it the incentives to innovate.<sup>320</sup> At the extreme, anticommons holdups may render some traditional subject matter effectively off-limits.

Apart from direct conflicts, there is also a normative divergence between the innovation and preservation models. The two regimes function at cross-purposes: one encouraging new things, the other trying to hold on to the old. The individualist orientation of copyright law also sits ill at ease with the collectivist paradigm of TCE protection: it remains unclear when innovators within the traditional community should be regarded as individual authors as opposed to mere vessels of the communal collective. The question has systemic implications as well. The private rights model of copyright law functions as a decentralized regime that empowers independent voices. Such unfettered discourse may challenge official orthodoxies and threaten entrenched powers.<sup>321</sup> Given the tight control over culture and tradition many authoritarian regimes exercise, a preference among such constituencies for TCE rights over copyright should not be surprising.

Some may argue that the preceding analysis overstates the potential harm from TCE protection. Given the lack of enforcement of existing TCE rights regimes, it is possible that the effect of the WIPO draft treaty will be largely symbolic.<sup>322</sup> Developing countries will proclaim victory over Western hegemony and perhaps pursue a few high-profile cases against foreign “exploiters,” but little else will change on the ground. Even so, such gesture politics could still have pernicious effects both in terms of their symbolic message and opportunity costs.

By sending the message that traditional culture is imperiled by modernity, by legitimizing dirigiste policies that empower bureaucrats to “manage” cultural markets, and by equating innovation with contamination, a TCE rights regime

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<sup>319</sup> Portions of this section were published as a book chapter in late 2012: Sean A. Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE* 262 (Sean A. Pager & Adam Candeub eds., 2012).

<sup>320</sup> At best, TCE rights impose added transaction costs for authors to clear permission; at worst, they pose the risk of an outright veto or loss of copyright title.

<sup>321</sup> Netanel, *supra* note 141, at 228–29.

<sup>322</sup> See Dutfield, *supra* note 304, at 273. It is also possible that TCE rights could be enforced judiciously—targeting only gross mutilations while making ample allowance for free speech.

feeds into a reactionary, defensive mindset among developing countries that is both unjustified and counterproductive. In exalting tradition as a form of indigenous intellectual property suited to development, TCE rights perpetuate the canard that developing countries are incapable of commercially significant innovation. In doing so, the TCE agenda reinforces convictions that conventional intellectual property rights do not serve the interests of development.<sup>323</sup>

Developing countries are rightfully suspicious of intellectual rights. The acrimonious history of the TRIPS agreement and the skewed flow of benefits thereafter have contributed to the perception of global intellectual property rights as a protection racket to line the pockets of Western multinational corporations.<sup>324</sup> Yet, a more nuanced view of intellectual property and development is called for. IP rights are not an all-or-nothing proposition. Copyright law is not the same as patent law. And within the realm of copyright law, one can support an expansive definition of fair use, for example, while still condemning commercial-scale, verbatim copying as piracy.<sup>325</sup>

An obsession with the global inequities of transnational IP and culture flows has arguably led developing countries to overlook the potential for intellectual property rights to foster innovation and development at home.<sup>326</sup> Similarly, narratives of injustice and imperialism have blinded developing countries to the opportunities afforded by the digital age. As this Article has shown, Nollywood exemplifies such digital opportunity. Yet, even if Nollywood is never directly targeted by TCE rights, it could still suffer indirectly to the extent that TCE rights come at the expense of innovation policies that would encourage the development of creative industries.

As this Article has discussed, the administrative challenges entailed in implementing a full-blown property regime for TCE rights are enormous. Such efforts will divert resources and attention away from more progressive innovation policies. Even if TCE enforcement is never implemented, the investment of time and effort already devoted to this project at WIPO and other international organizations dwarfs any comparable efforts to promote domestic innovation in developing countries. Given the limited resources and leverage that developing countries have to advance their agenda, the opportunity costs of privileging TCE negotiations over other potentially worthwhile initiatives should not be ignored. Nor are such forgone opportunities merely theoretical. There is a long list of practical steps that governments could take to improve the business conditions that creative industries in developing countries must navigate.<sup>327</sup> Topping the list are measures to address copyright piracy.

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<sup>323</sup> Schultz & van Gelder, *supra* note 23, at 87–90.

<sup>324</sup> *See id.* at 84–86.

<sup>325</sup> *See* LESSIG, *supra* note 82, at 262–63, 268–73.

<sup>326</sup> *See* Schultz & van Gelder, *supra* note 23, at 89–90.

<sup>327</sup> *See* LESSIG, *supra* note 82, at 253–73; WORLD BANK, REPORT NO. 54457-NG PROJECT APPRAISAL DOCUMENT ON A PROPOSED CREDIT IN THE AMOUNT OF SDR 102.5 MILLION TO THE FEDERAL REPUBLIC OF NIGERIA FOR A GROWTH AND EMPLOYMENT IN STATES PROJECT (GEMS), at 14, 69–75 (2011) [hereinafter WORLD BANK APPRAISAL];

For all of its impressive successes, Nollywood's business model is not without its flaws. The same digital technologies that enable Nollywood's low-cost, direct-to-consumer distribution also make it all-too-easy for pirates to cannibalize its market. Nollywood filmmakers essentially rely on sales from new video releases in a handful of major Nigerian cities to recoup their production costs—and they only have a short window before pirated copies flood the market.<sup>328</sup> Filmmakers have little control over distribution in the rest of the countryside—let alone in neighboring countries—and therefore obtain almost no revenues from these markets, despite widespread distribution and sales of their work.<sup>329</sup> Nor do filmmakers receive royalties from the many thousand video film parlors (miniature theaters) where their works are screened for paying audiences; even films shown on television are rarely licensed.<sup>330</sup> Both physical and online distribution of Nollywood videos in diaspora markets are also plagued by piracy, with very little revenue accruing to content creators.<sup>331</sup>

The World Bank estimates that Nollywood forfeits \$1 billion in annual revenue to piracy.<sup>332</sup> Such lost revenues impose a straightjacket on artistic ambitions and investment.<sup>333</sup> It makes no sense to bankroll elaborate productions when the opportunities to recoup such investments are limited. Assembly-line productions with formulaic scripts, wooden acting, and crude production values are the predictable result of the skinflint budgets and breakneck schedules on which Nollywood operates.<sup>334</sup>

Lack of copyright protection also introduces perverse incentives. Filmmakers are forced to pursue a churn strategy that relies on a high volume of low budget offerings rushed to market weekly to beat the pirates rather than take chances on any one project.<sup>335</sup> As a result, filmmakers rely on formulaic plots to generate cookie-cutter offerings, often copied verbatim from previous films.<sup>336</sup> Without enforceable copyrights in their work, filmmakers cannot offer collateral to obtain financing. Instead, they must rely on informal short-term lenders at punitive

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Olufunmilayo B. Arewa, *The Rise Of Nollywood: Piracy And Digital Era Distribution Networks*, 22–23 (Univ. of California-Irvine Sch. of Law Research Paper No. 2012–11, 2012), available at <http://ssrn.com/abstract=2011980/>.

<sup>328</sup> See *Nollywood: Lights, Camera, Africa*, *supra* note 89.

<sup>329</sup> Arewa, *supra* note 327, at 28–29.

<sup>330</sup> See Haynes & Okome, *supra* note 190, at 69; March, *supra* note 101, at 9.

<sup>331</sup> March, *supra* note 101, at 9.

<sup>332</sup> WORLD BANK APPRAISAL, *supra* note 327, at 14.

<sup>333</sup> See *Nollywood: Lights, Camera, Africa*, *supra* note 89.

<sup>334</sup> See Haynes & Okome, *supra* note 190, at 55–57.

<sup>335</sup> See Pierre Barrot, *The Italians of Africa*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 12, 15.

<sup>336</sup> Such herd-like tendencies are hardly unknown in Western audiovisual industries. However, copyright laws limit the extent to which rip-off artists can directly copy earlier works.

interest rates—reinforcing the “rush to market” mentality that fosters slap-dash productions.<sup>337</sup>

Lack of clear ownership rights also breeds distrust at all levels of the industry. Bickering between producers and distributors is legendary.<sup>338</sup> Fear of script piracy has even led some directors to withhold scripts from their actors; instead, actors are only given their lines for individual scenes as they are shot.<sup>339</sup> Copyright failures, therefore, significantly increase industry transaction costs.<sup>340</sup> Such dystopian outcomes are entirely predictable under standard theoretical rationales for granting intellectual property rights.<sup>341</sup> Existing discourse on intellectual property and development, however, seldom acknowledges such costs of weak copyright norms. Instead, most commentators begin with the premise that intellectual property rights overall represent a losing proposition for developing countries and rarely look past this global assessment.<sup>342</sup>

Some commentators have emphasized that piracy has also benefited Nollywood by supplying a ready-made distribution network that has helped the industry grow.<sup>343</sup> Yet, without mechanisms to share the proceeds of such distribution, content producers are starved of the revenues needed to develop the industry beyond its current level of grade-C filmmaking. Piracy has become a cancer eating away at industry profitability.<sup>344</sup> Unless this changes, Nollywood will remain a shadow of its potential.<sup>345</sup>

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<sup>337</sup> See Barrot, *supra* note 335, at 12, 15; Patrick J. Ebewo, *The Emerging Video Film Industry in Nigeria: Challenges and Prospects*, J. FILM & VIDEO, Fall 2007, at 46, 49–54 (2007); Sacchi, *supra* note 101, at 32; Enyonam Osei-Hwere & Patrick Osei-Hwere, *Nollywood: A Multilevel Analysis of the International Flow of Nigerian Video Films 7* (May 21, 2008) (unpublished manuscript presented at the 2008 Conference of the International Communication Association, May 2008, Montreal, Canada), available at [http://www.allacademic.com/meta/p233897\\_index.html](http://www.allacademic.com/meta/p233897_index.html).

<sup>338</sup> Barrot, *supra* note 93, at 34–35. Because distributors routinely underreport sales, producer-directors generally forgo royalties in favor of a flat up-front fee. See Haynes & Okome, *supra* note 190, at 69.

<sup>339</sup> See Haynes & Okome, *supra* note 190 at 57; Haynes, *supra* note 296.

<sup>340</sup> Dayo Ogunyemi, *Film Financing in Nigeria: Opportunities and Challenges*, in WIPO, *Information Meeting on Intellectual Property Financing*, at 72, 75, WIPO Doc. WIPO/IP/FIN/GE/09/7 (Oct. 9, 2009), available at [http://www.wipo.int/edocs/mdocs/copyright/en/wipo\\_ip\\_fin\\_ge\\_09/wipo\\_ip\\_fin\\_ge\\_09\\_7-main1.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_fin_ge_09/wipo_ip_fin_ge_09_7-main1.pdf).

<sup>341</sup> Cf. Paul J. Heald, *A Transaction Cost Theory of Patent Law*, 66 OHIO ST. L.J. 473, 474–77 (2005).

<sup>342</sup> Schultz & van Gelder, *supra* note 23, at 84–86.

<sup>343</sup> *Nollywood: Lights, Camera, Africa*, *supra* note 89.

<sup>344</sup> See Haynes & Okome, *supra* note 190, at 69 (quoting filmmaker Kenneth Nnebue, “Piracy is our AIDS”).

<sup>345</sup> Nollywood’s experience is not atypical. Other creative industries in developing countries similarly struggle against piracy. See Adrian Athique, *The Global Dynamics of Indian Media Piracy: Export Markets, Playback Media and the Informal Economy*, 30 MEDIA, CULTURE & SOC’Y 699, 704, 713–14 (2008).



Cyberlibertarians sometimes claim that intellectual property rights have become obsolete in the digital age, arguing copyright reflects assumptions rooted in an era of scarce resource constraints that technology has vanquished.<sup>346</sup> Yet, if information wants to be free, commercial artists still want to be paid.<sup>347</sup> Even operating at their current stunted level, Nollywood films regularly feature a cast of hundreds and require dozens of supporting professionals (make-up artists, cameramen, key grip, etc.).<sup>348</sup> Sustaining such creative enterprises requires a solid revenue base.

Its digital pedigree notwithstanding, Nollywood remains wedded to a fundamentally twentieth-century business model based on the mass production and distribution of creative content embodied in physical copies.<sup>349</sup> While cybertopians may envision a future in which Web 2.0 platforms, long-tail economics, and ancillary revenue streams conjure up a digital cornucopia,<sup>350</sup> such “free culture” models remain largely untested. Until the revenue potential of such alternatives has been proven, it seems rash to presumptively reject copyright as a part of the mix.

Indeed, the drawbacks of many of these alternatives are still being discovered. This applies as much to the public policy calculus as it does to commercial viability. In Africa, for example, the alternative to the market has tended to be state support, which has historically come at a price of heavy censorship.<sup>351</sup> In this light, copyright law has been justified as a means to sustain a democratic discourse insulated from state regulation.<sup>352</sup> Alternative funding mechanisms may not fare as well.<sup>353</sup>

For example, Nollywood producers have increasingly relied on *private* sponsorship—a revenue model often touted by cyberlibertarians as an alternative to intellectual property rights.<sup>354</sup> However, such sponsorship comes with strings attached. Marketers are unwilling to put up significant funds unless they gain substantial creative control over content, demanding blatant product placements that effectively transform movies into infomercials for everything from beer to

<sup>346</sup> See, e.g., John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1994), <http://www.wired.com/wired/archive/2.03/economy.ideas.html>; Moglen, *supra* note 81.

<sup>347</sup> PETER S. GRANT, THE CULTURAL TOOL KIT: GOVERNMENT MEASURES TO SUPPORT CULTURAL DIVERSITY IN A DIGITAL AGE 4 (2008), available at [http://www.fd.ulaval.ca/sites/default/files/recherche/cultural\\_tool\\_kit.pdf](http://www.fd.ulaval.ca/sites/default/files/recherche/cultural_tool_kit.pdf).

<sup>348</sup> *Nollywood Dreams*, *supra* note 96.

<sup>349</sup> Moreover, the advent of Internet distribution is unlikely to alter the calculus for monetizing content any time soon.

<sup>350</sup> See CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE 20–22 (2009); ANDERSON, *supra* note 81, at 88–89; BENKLER, *supra* note 83, at 1–2.

<sup>351</sup> Barrot, *supra* note 108, at 46–47.

<sup>352</sup> Netanel, *supra* note 141, at 228–30.

<sup>353</sup> Cyber visionaries proffering “flat-rate license” schemes should consider the record of gross inefficiency and corruption by African collective rights organizations. See Schultz & van Gelder, *supra* note 23, at 131–33. Africa is not entirely atypical in this regard. See Ariel Katz, *Copyright Collectives: Good Solution but for Which Problem?*, in WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW 395, 411–15 (2010).

<sup>354</sup> *Nollywood Dreams*, *supra* note 96.

Christianity to AIDS prevention to political campaigns.<sup>355</sup> Far from enabling democratized expression, private patronage effectively substitutes a form of private speech control for public censorship.<sup>356</sup> By contrast, copyright offers a more democratic alternative by allowing audiences to express their preferences directly in the creative marketplace. By aggregating consumer preferences, it orients content production around audience demand rather than narrow interest-group agendas.<sup>357</sup>

Critics sometimes accuse copyright law of inhibiting diversity by conferring excess market power to industry conglomerates.<sup>358</sup> On this view, the diversity of viewpoints that Nollywood movies currently provide is an artifact of weak copyright norms that prevent studios from investing in bigger budget productions aimed at the mass market. Whatever the merits of this critique, however, Nollywood's current structure lies so far to the other end of this spectrum that a modest tradeoff of quantity for quality seems more than tolerable.<sup>359</sup>

Copyright incentives only function when content producers are ensured adequate enforcement mechanisms. Nigeria has made recent efforts to crack down on copyright piracy with mixed results.<sup>360</sup> Yet, Nigeria's weak state institutions and lack of rule-of-law culture are unlikely to improve overnight. A good place to start would be focusing on providing quick remedies in clear-cut cases of commercial-scale piracy through streamlined judicial procedures and specially trained and dedicated staff.<sup>361</sup> Impounding assets and providing for attorneys fees and statutory damages could also help to make private enforcement self-financing.

The piracy problem goes well beyond purely domestic concerns. As the marginal costs of digital distribution shrink, controls over copyrighted content abroad can be just as important as it is domestically. Moreover, in an increasingly global marketplace, leveraging the economies of scale from export markets can be essential to the viability of domestic industries.<sup>362</sup>

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<sup>355</sup> Evuleocha, *supra* note 21, at 410.

<sup>356</sup> Such private censorship exposes the fallacy of Web 2.0 assumptions that advertising is a benign substitute for intellectual property.

<sup>357</sup> See Netanel, *supra* note 141, at 228–30.

<sup>358</sup> See Michal Shur-Ofry, *Copyright, Complexity, and Cultural Diversity: A Skeptic's View*, in TRANSNATIONAL CULTURE FLOWS IN THE INTERNET AGE, *supra*, note 139, at 203, 210–11.

<sup>359</sup> See Schultz, *supra* note 150, at 258.

<sup>360</sup> See Sylvie Castonguay, *STRAP and CLAMP—Nigeria Copyright Commission in Action*, WIPO MAG., Oct. 2008, at 21, 21–22. *But see* Benjamin Njoku, *NCC Wants Kelani's N1.7 Million to Raid Alaba Pirates*, ALLAFRICA (July 10, 2010), <http://allafrica.com/stories/201007160203.html> (describing demand that film director pay an exorbitant fee before government would act to enforce his copyright).

<sup>361</sup> See Jishnu Guha, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L & COMP. L. 225, 259 & nn.166, 260 (2005).

<sup>362</sup> See Pager, *supra* note 220, at 127.

Currently, distribution of Nollywood videos outside Nigeria is predominantly unauthorized, with very little revenue flowing to content producers.<sup>363</sup> As an export industry, Nollywood's interest in cross-border copyright enforcement is obvious. Less intuitive is the interest that countries that are *recipients* of pirated content have in blocking such unauthorized distribution. Yet, imported copies of pirated content undercut the market for legitimate sales by domestic producers. Other emerging African film industries have complained that pirated Nollywood films represent a form of unfair competition.<sup>364</sup>

A key obstacle to enforcing copyright is proving ownership.<sup>365</sup> The informal manner in which Nollywood operates makes it difficult to determine who is an authorized distributor (or, in many cases, even who is the copyright owner).<sup>366</sup> This problem points to the need for a more effective system of copyright registries,<sup>367</sup> preferably operating on a regional basis. Collection action mechanisms for transnational licensing and enforcement could also play a role, perhaps by focusing on broadcast media and emerging e-commerce platforms.<sup>368</sup>

More could also be done to support exports by emerging creative industries to developed markets. While the latter have well established mechanisms for intellectual property enforcement, the transaction costs of long-distance enforcement actions (both informational and legal) often deter content producers from pursuing valid claims.<sup>369</sup> Moreover, in many cases, the difficulties in arranging authorized distributors leave pirate networks as the default providers.<sup>370</sup> Converting such networks into licensed distributors would allow filmmakers to benefit from existing distribution. To do this, however, rights holders need a credible means of enforcement. Local connections and expertise here could prove an invaluable boost.

Even simple measures such as registering copyrights would strengthen the hand of Nigerian exporters.<sup>371</sup> Developing countries should demand greater

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<sup>363</sup> March, *supra* note 101, at 8–9.

<sup>364</sup> Franck Baku Fuita & Godefroid Bwiti Lumisa, *Kinshasa & Nollywood: Chasing the Devil*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA*, *supra* note 86, at 107, 108–09; Birgit Meyer, *Ghanaian Popular Video Movies*, in *VIEWING AFRICAN CINEMA IN THE TWENTY-FIRST CENTURY* 44, 55 (Mahir Saul & Ralph A. Austen eds., 2010).

<sup>365</sup> March, *supra* note 101, at 9.

<sup>366</sup> Barrot, *Informal Sector*, *supra* note 102, at 54.

<sup>367</sup> Ogunyemi, *supra* note 340, at 75.

<sup>368</sup> See Neil Conley, *Future of Licensing Music Online*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 482–85 (2008).

<sup>369</sup> See Athique, *supra* note 345, at 704; Evuleocha, *supra* note 21, at 409 (discussing India's film market).

<sup>370</sup> See Barrot, *supra* note 93, at 133–34.

<sup>371</sup> Timely registration of U.S. copyrights enables rightsholders to seek statutory damages—up to \$150,000 per act of willful infringement—without the need to prove actual injury. 17 U.S.C. § 504(c) (2006). The American affiliate of the Filmmakers Association of Nigeria has, in fact, launched a campaign to register U.S. copyrights for African films and to coordinate U.S. enforcement efforts. See *US Copyright Registration*

assistance from Western governments with transnational capacity building along these lines.<sup>372</sup> While Western content producers may be understandably reluctant to offer support for potential competitors to enter their home markets, developed countries should insist on such assistance in return for their commitment to enforce global copyright norms. For their part, both big media and Western trade officials would reap public relations dividends by showing that they take all piracy seriously, not just piracy of *their* products.<sup>373</sup>

In embracing copyright's potential, developing countries need not embrace uncritically the high protectionist agenda on big media's wish list. Rather, the challenge is to make copyright work for *small* media, focusing on low-cost mechanisms that make sense for emerging market producers. In this respect, the recently adopted WIPO Development Agenda represents a missed opportunity; it focused mostly on exceptions and limitations to intellectual property rights and technology transfer, with very little attention to realizing the upside potential of intellectual property rights.<sup>374</sup> Yet, as Neil Netanel reminds us, copyright policy is about more than just economics. It exerts a powerful influence on democratic and cultural discourse.<sup>375</sup> It is worth striving harder to get the policy framework right.

## V. CONCLUSION

The WIPO draft treaty on TCE/folklore is intended to be legally binding. Yet, the exclusive rights it would establish are largely untested. They risk unintended consequences that may cause far more harm than good. This Article has argued that by placing undue restrictions on adaptation and commercialization, a strong property rights model of TCE protection would inhibit the creative renewal on which the long-term survival of traditional culture depends. Placing a "no trespassing sign" on intangible heritage may preserve folkloric traditions in their "authentic" state, but to do so is to adopt the preservationism of a taxidermist.

The impulse of cultural guardians to preserve their heritage is understandable; it is a deeply rooted part of identity whose value should not be minimized. Yet,

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*and Enforcement for African Films and Music*, FILMMAKERS ASS'N NIGERIA U.S.A. (Sept. 10, 2008), <http://www.fanmovieland.com/site/copyrightinitiative.htm>.

<sup>372</sup> Cf. J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT'L L. 11 (1998) (suggesting a cooperative operation framework for intellectual property protection implemented through public-private initiatives).

<sup>373</sup> Simply setting up an information clearinghouse to address basic enforcement needs would be a start. For example, such a clearinghouse might explain how filmmakers can register their works with the U.S. Customs and Border Protection's border enforcement database and how they can take advantage of YouTube's content-filtering mechanism.

<sup>374</sup> Cf. Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES*, *supra* note 157, at 1, 25–29.

<sup>375</sup> Netanel, *supra* note 141, at 228–29.

deliberate attempts to channel tradition along “sustainable” paths will ultimately prove counterproductive. Cultural guardianship should arguably be like parenting: as much about learning to let go as it is about maintaining control.<sup>376</sup>

None of this is to deny the many legitimate concerns and grievances that animate the campaign for TCE rights. Nor does this Article dismiss the utility of further norm development in the TCE domain. More modest protections akin to trademark or trade secret law do not raise the objections adverted to above. There may also be a place for narrowly tailored inalienability rules curtailing the commodification of sacred traditions.<sup>377</sup> Such safeguards would curb the worst abuses of which TCE rights proponents complain. The critique here only targets the proprietization of folklore through exclusive use rights.

A strong property rights model assumes that culture is a fragile flower whose integrity must be zealously defended. It seeks to safeguard tradition against insults and exploitation when more serious threats arguably arise from indifference, neglect, and lack of economic viability. Culture is far more resilient than many think, as empirical studies have consistently shown.<sup>378</sup> To survive, however, cultures need space to breathe and adapt. Imposing a straightjacket of authenticity points traditional culture down the path of an evolutionary dead end.

Some may argue that the value of more robust, copyright-style TCE rights is symbolic. It puts traditional artisans in developing countries on a par with Western multinational corporations, allowing the Dinka and Disney to stand as coequals. As a salve for Southern pride, such symbolism has a superficial appeal. Yet, the message it sends is ultimately pernicious. Creating intangible property rights in tradition turns the logic of intellectual property protection on its head. It perpetuates a myth of Southern incapacity to innovate that risks becoming a self-fulfilling prophecy. Such pessimism reflects neither the reality of the creative industries emerging in developing countries nor the promise of digital successes yet to come.

Nollywood has already done more to foster Africans’ pride in their heritage than any cultural protection law. The films Nollywood makes may not always be dignified, but they have reinvigorated Nigeria’s folkloric traditions and given them new meaning and relevance. In doing so, they have helped to ensure tradition’s survival far more than TCE rights ever could. Yet, Nollywood’s continued viability depends on its ability to extract adequate returns on its creative

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<sup>376</sup> Even communities such as the Amish, who cleave to traditional ways in near-holistic rejection of modernity’s influence, make allowance for cultural experimentation in just this manner. *See generally* TOM SHACHTMAN, RUMSPRINGA: TO BE OR NOT TO BE AMISH (2006) (describing custom by which Amish adolescents live outside the community before returning to be baptized).

<sup>377</sup> *Cf.* Paterson & Karjala, *supra* note 11, at 659–60 (describing civil law doctrine of *choses hors commerce* applied to religious objects).

<sup>378</sup> Omar Lizardo, *Understanding the Flow of Symbolic Goods in the Global Cultural Economy*, 45 INT’L J. CONTEMP. SOCIOLOGY 13, 18 (2008); Morris, *supra* note 223, at 282–85; Ugochukwu, *supra* note 77, at 55–56.

investments. A more realistic appraisal of cultural priorities would therefore lead to a rebalancing of policy away from TCE/folklore rights and toward copyright law.

None of this is to suggest that copyright law will cause a field of digital dream factories to magically mushroom across the developing world. Copyright is neither a panacea nor a self-executing norm.<sup>379</sup> Much work is required to adapt existing systems to the demands of emerging industries. There is also clearly a need for supportive government policies beyond intellectual property enforcement.<sup>380</sup> Indigenous peoples and other isolated or marginalized communities in particular may require affirmative assistance to enable effective cultural participation.<sup>381</sup> All of this will require experimentation and adaptation. The sooner we move past the chimera of tradition and focus on these tasks ahead, however, the sooner we can begin to build a viable future for the many diverse cultures and traditions that enrich our planet.

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<sup>379</sup> Overweening enforcement of copyright is also subject to abuse, as the recent SOPA-PIPA debate reminded us. See Travis, *supra* note 315, at 97–102.

<sup>380</sup> See Pager, *supra* note 220, at 124–30 (calling for cultural policy agenda based on decentralized subsidies); Barrowclough, *supra* note 157, at 333–35 (covering similar themes).

<sup>381</sup> See, e.g., Pager, *supra* note 139, at 262, 271–74 (describing Brazil's Culture Points program to empower digital creativity by disadvantaged communities).

