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Dennis S. Karjala

Arizona State University - Sandra Day O'Connor College of Law

Robert K. Paterson

University of British Columbia - Peter A. Allard School of Law

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Article

THE CASE AGAINST PROPERTY RIGHTS IN OLD INTANGIBLE INDIGENOUS CULTURAL PROPERTY

*Dennis S. Karjala**

*Robert K. Paterson***

NOTE—This article expands on a chapter to be published as “The Failed Case for Property Rights in Intangible Indigenous Cultural Property”, in Christoph Antons and William Logan (eds.) *Intellectual Property, Cultural Property and Intangible Cultural Heritage* (Routledge, forthcoming, 2017).

ABSTRACT—This article critically reviews some of the recent literature calling for intellectual property rights in indigenous cultural knowledge. In an earlier piece, we argued generally against the notion of defining a new class of “indigenous cultural property” analogous to copyright and patent rights. Rather, we must analyze demands for more protection for old cultural property by building from the ground up, using judicial interpretation or carefully tailored statutory amendments to determine whether the work in question is one that should be protected by a new right and, if so, deciding both the scope and term of protection. Intellectual property involves a tradeoff between rewarding the legitimate demands for protection and society’s overall interest in allowing information generally to be used freely. Hence the term of protection for both patent and

* Sadly, Professor Karjala passed away before this article could be published. He was the Jack Brown Chair in Law, Sandra Day O’Connor College of Law at Arizona State University. Professor Karjala was a founding member of the Center for Law, Science and Innovation at Arizona State University, the nation’s oldest and largest center dedicated to exploring the intersections of technology and law. He taught at universities throughout the world, connecting with hundreds of scholars and policymakers. He was one of the first legal scholars to recognize and advance serious research into the intellectual property protections for new technologies. However, he was chiefly known for his opposition, ultimately futile, to the Sonny Bono Copyright Term Extension Act, which greatly increased the length of copyright protection. For the past few years, Professor Karjala fought cancer, but he never stopped working and publishing. However, his work will continue to influence scholars, policymakers, artists, and many others for years to come.

** Professor Emeritus, Peter A. Allard School of Law, University of British Columbia.

copyright has always been limited. Here we review some of the commentary that has appeared in the interim seeking to establish rights in old cultural property. We conclude that many of the assumptions underlying calls for such protection cannot withstand critical analysis and that a one-size-fits-all definition of indigenous cultural property is both unwise to try and impossible to achieve.

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INTRODUCTION

In an earlier work,¹ we argued that resolving the problem of protecting intangible indigenous cultural heritage should not take the form of defining a new class of “indigenous cultural property” that would be subject to rights under, or analogous to, those recognized by the intellectual property regimes of patent and copyright. We concluded, rather, that a “one size fits all” approach was incapable of balancing the tensions between understandable demands from indigenous peoples to have control over their cultural heritage, on the one hand, and fundamental policy values reflected in the intellectual property regimes and in basic notions of free expression, on the other. We outlined a number of specific situations in which careful judicial interpretation of existing laws or modest amendments to existing statutory regimes can meet many of the needs and demands of indigenous peoples. In many cases, there is no fundamental clash between western legal traditions and the legitimate demands for privacy, confidentiality, or recognition that indigenous claimants might make. In some cases, however, especially those involving outsider use of publicly available but “old” indigenous works (that is, those works no longer protected by copyright), attempting to give control to the group is fundamentally antithetical to

¹ See generally 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 (2003).

basic notions of free expression and the overall development and dissemination of culture.² For such cases, a value judgment must be made. We concluded that a regime of perpetual rights in the indigenous group from which the work derived is both practically impossible and theoretically unsound: “[I]ndigenous cultural tradition must give way to the modern creative spirit.”³

Since our article appeared, there has been a good deal of activity, both at the United Nations and in various countries.⁴ In addition, the commentators have been active.⁵ Most approaches, however, continue down the path of asserting that western legal concepts are “inappropriate” to meet the needs of indigenous peoples and therefore must be modified in one way or another. An implicit assumption in many of these commentaries is that “indigenous peoples” do, in fact, have some common needs or demands that are in conflict with “western” traditions. They also seem to assume that all members within a particular indigenous culture have the same goals with respect to the use, by insiders or outsiders, of the group’s intangible heritage. To the extent a given proposal does rely on inter- or intra-group homogeneity, we are skeptical that it can provide a meaningful general resolution. Some groups might find, for example, that the commodification of their music or certain artistic images is offensive on religious grounds. Others might find the same use offensive simply because it is, in their opinion, in bad taste. Others might not object to the commodification so much as to their exclusion from the profits derived from it.⁶

Another problem that remains extant in the literature is the general assumption that “indigenous cultural property” can be defined in a meaningful way and that the individuals or groups who are to be given a certain degree of control rights can be identified. There is also an implicit assumption that these control rights can be appropriately circumscribed to assure that those in control do, in fact, exercise their power with the goals and needs of the group in mind.⁷

² *Id.* at 670

³ *Id.* at 670.

⁴ We discuss below developments in New Zealand, Taiwan, and the Pacific Islands. *See infra* pp.18–27.

⁵ The stewardship model in application to intangible property is discussed extensively, *see infra* Part A. Other commentary is discussed more briefly, *see infra* Parts B–D. -

⁶ *See* Yuqin Jin, Note, *Necessity: Enacting Laws to Protect Indigenous Intellectual Property Rights in the United States*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 950, 955–59 (2011) (reporting disputes between related tribes over ownership of the knowledge in question and raising the question of who can legitimately represent indigenous people).

⁷ *See* Marilyn Strathern, *Multiple Perspectives on Intellectual Property*, in *PROTECTION OF INTELLECTUAL, BIOLOGICAL AND CULTURAL PROPERTY IN PAPUA NEW GUINEA* 47, 52 (Kathy Whimp

One of the more important commentaries on these topics attempts to obviate some of these difficulties by reframing rights in indigenous cultural property within traditional western property law concepts.⁸ Professors Carpenter *et al.* offer the notion of “stewardship” as a limitation on ownership rights in cultural property, both tangible and intangible, so that an “owner” of property might not necessarily be able to use it to the full extent otherwise allowed but would negotiate with relevant cultural groups or their representatives over uses that impinge on aspects of the group’s cultural heritage that the group has an obligation to maintain. Unfortunately, however, while Professors Carpenter *et al.* give a number of examples to show how their stewardship model would work, they actually pay scant attention to the problem of intangible cultural property (discussing in detail only the problem of sports mascots). Professors Carpenter *et al.* supply no definition of what property is covered, who exercises the rights of stewardship, or how such rights are to be determined or delimited (except by way of ad hoc example). We believe that it is imperative to distinguish carefully between tangible and intangible property. We do not see how the stewardship model – as a limitation on property rights – applies even to the main intangible property problem that they address, which is that of sports mascots. More important, for traditional designs, music, dance, literature, and other graphic arts, we must distinguish between a demand for regulation on offensiveness grounds and a demand for revenue sharing. Not only must we decide who does the “stewarding” and on what basis, but we must also decide on what basis, if any, a new design based on an indigenous “style” gives right to a claim. For plants or even human DNA, what is there to “steward” except a stream of profits, to a part of which indigenous people are assumed to be entitled? The failure to distinguish tangible from intangible property in these situations is, in our minds, fatal to the enterprise insofar as intangible cultural heritage is concerned.

In this article, we undertake a critical review of some of the commentary on, as well as actual and proposed legal developments relating to, indigenous cultural property that have appeared since our earlier contribution. We remain convinced that a coherent approach to the problem of intangible cultural property protection must lie in a set of carefully articulated statements of the problem in specifically delineated cases.

& Mark Busse eds., 2013) (ebook) (“Even if a group can be identified, who belongs to the group? Who is the representative to speak on its behalf? What about power inequalities between different interests within the group?”).

⁸ See generally Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009) [hereinafter referred to as “Professors Carpenter et al”].

Reasonable people will disagree about the appropriate resolution in many of these cases, but it is only through such articulation that resolution is to be found. Continued search for a one-size-fits-all approach to “intangible indigenous cultural property,” we believe, amounts to chasing a will-o’-the-wisp.

I. THE BASIC PROBLEM OF INTANGIBLE CULTURAL HERITAGE PROTECTION

It is important to emphasize that we consider here the problem of control over *intangibles*—most broadly speaking, information. We are not dealing with real property, such as geographical locations that are sacred or otherwise culturally meaningful to one or more indigenous groups. Nor are we dealing with tangible personal property, such as carvings, rugs, pots, jewelry, clothing, paintings, and the like. Rather, we address whether and under what circumstances an indigenous group justifiably may assert control rights over such intangibles as music, designs, pictures, stories, and methods of medical treatment.

There are important reasons that we single out information for special treatment in the discussion of protecting indigenous cultural heritage. Rights in information—especially *property rights* in information—are a relatively new concept in human development. Copying successful behavior is something humans have done from time immemorial, and indeed copying successful behaviors has been shown to be a strategy that can win over a strategy of innovating.⁹ It is unlikely that the first person to come up with the idea of attaching rounded stones to some sort of axle felt entitled to royalties whenever this invention was used to move heavy boulders to erect ancient monuments and other buildings. The notion of patents in new technology—property rights in information—seems to be a product of the Renaissance, when a Venetian statute was adopted to encourage the building and disclosure of “any new and ingenious device” by granting a 10-year period of exclusive rights.¹⁰ And, of course, until the invention of the printing press, it was so difficult to copy an extensive work of literature that no need was seen for anything like copyright. In other words, over most of human history, the absence of exclusive rights in

⁹ Elizabeth Pennisi, *Conquering by Copying*, 329 SCI. 165 (2010) (describing a computer tournament in which, at each turn, teams could either observe another’s behavior, exploit a known behavior, or innovate a new behavior); see Dennis S. Karjala, “*Copying*” and “*Piracy*” in the Digital Age, 52 WASHBURN L.J. 245, 247 n.7 (2013). Recent observations among nonhuman primates has also shown the development and dissemination of “culture” by observation and copying.

¹⁰ Craig Allen Nard, THE LAW OF PATENTS 9–11 (3d ed. 2014).

information was the default position—almost certainly in every geographical region and in every culture.

And there is a good and easily understandable reason for distinguishing information from tangible articles: information is nonrival. Exclusive property rights in tangibles are arguably more conducive to economic efficiency because they help avoid “overgrazing” and the tragedy of the commons.¹¹ Although most will tire of hearing the same song over and over again, information cannot be overgrazed in the depletion sense, and the creator of a song remains just as free to sing or perform it after another learns it as before. Consequently, exclusive rights in information are *not* necessary to prevent the information from being used up too rapidly or inefficiently.¹² If we are to recognize exclusive rights in information, we need reasons that do not rely on scarcity, which distinguishes information from most of the resource allocation and distribution problems that economists typically consider.

While no one seriously disputes these premises, the legal community has seen ongoing debate over the reasons that we *do*, in fact, recognize intellectual property rights (IPRs). The reasons are important because they determine not only whether information of a particular type is protected at all but also the *scope* of any protection that is afforded, including the *term* of such protection. We protect trade secrets in the interest of stimulating economic efficiency by allowing the relatively free flow of information within a firm and in the interest of preventing economic waste that would otherwise go into self-help protection measures. Consistent with these purposes, trade secret protection lapses when the secret becomes known outside the firm, whether by authorized or unauthorized disclosure from within or by independent discovery.¹³ Similarly, traditional trademark law protects against the unauthorized use of a mark to “pass off” goods or services as those of the mark owner, but only if there is a likelihood of confusion by the consuming public. This allows mark owners to invest in

¹¹ E.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351–52 (1967); Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523, 1533–34 (2011).

¹² Professor Landes and Judge Posner have argued that perpetual copyright may be useful in protecting great works of art, literature, and music from becoming debased through over performance and display. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 485–88 (2003). Their theory, however, does not stand up to scrutiny. Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065, 1076–85 (2006).

¹³ Because of this limitation, it is difficult to classify trade secret information as “property.” Trade secret law simply protects against acquisition of the information by unlawful means, but it gives no exclusive right in the information as such. See Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 257 (1991) (concluding that the concept of property is not necessary to justify the rights of trade secret).

building their reputations with good quality products and services and assists consumers in rapidly finding products and services in whose quality they have confidence. While the term of trademark protection is indefinite (and therefore potentially infinite), the very narrow scope of protection severely limits trademark's encroachment into the public domain, even if we include trademark as an "intellectual property" statute.¹⁴ In the case of both trademark and trade secret law, therefore, we know what the protection goals are and this informs the decision concerning what types of information to protect, how such protection should be limited and by what means, and against what actions by third parties protection will be available.

The patent and copyright regimes are much more general in their protection of information. Patent law protects new technological advances, while traditional copyright protects works of authorship—art, literature, and music. Because an exclusive right to a desirable product permits the rightowner to charge a price above marginal cost, the exclusive rights of patent and copyright do inhibit consumption of works embodying the subject of the right, resulting in a "deadweight" social loss (in the sense that there are some people who would be willing to pay the marginal cost of production or even more but not the higher price charged by the rightowner). We accept these deadweight losses from the patent and copyright regimes because we fear that a failure to grant such rights to inventors and authors would result in less public availability of socially desirable works. In other words, we afford the exclusive rights of patent and copyright as an incentive to inventors and authors *to create* new inventions and works of authorship.¹⁵ In affording this incentive, both regimes attempt to be mindful as well of the problem of cumulative innovation: first-generation works often serve as inputs for second-generation innovations.¹⁶ Consequently, the stronger the rights afforded to the first innovator, the lower the incentive for follow-on creators to build on the earlier work.

¹⁴ See *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918) ("There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed."); see also Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 25–26 (2005) (noting that a trademark in the public domain is essentially useless to anyone, because it can no longer serve its signaling function). Admittedly, the recent extension of trademark law to the protection of famous marks against "dilution" brings trademark closer to a "property" regime.

¹⁵ Menell, *supra* note 11, at 1534–35.

¹⁶ *Id.* at 1535.

The details of patent and copyright protection depend on the nature of the information (subject matter) protected.¹⁷ In the United States, copyright arises automatically upon fixation of copyright subject matter – works of authorship – in a tangible medium. The scope of copyright protection is defined by the vague idea/expression dichotomy – copyright protects only the expression of ideas, not the ideas themselves. Copyright infringement is determined by the equally vague “substantial similarity” standard, and the term of copyright protection endures for seventy years after the death of the author. Patents, on the other hand, cover works of technology and issue only upon formal application and after examination by a skilled examiner for novelty and nonobviousness. The scope of patent protection is defined and narrowly limited by the claims, and the term of patent protection is only 20 years from filing. The reason that these two regimes, which have similar goals of promoting the general welfare by granting limited-term exclusive rights in information, are so different in their operational detail inheres in the respective natures of the information they protect: patent protects functional works of technology, while traditional copyright protects nonfunctional works of authorship.¹⁸ While many believe that the current term of copyright protection is too long, nearly all agree that the patent term must be shorter than that for copyright because so much technology builds incrementally on what has already been invented and made available.

The point is that intangible property – information – is given certain degrees of protection depending on the nature of the information and overall social goals. The default position is that information is free for anyone to use as he or she will. With trade secret law, society seeks to improve economic efficiency with respect to information that, in any event, would not be made available to the public, by reducing the effort the possessor of the information must make to keep the information of value. With trademark law, society cabins off a tiny bit of information so that it can serve a signaling function for offerors of goods and services and their customers. With patent and copyright, society seeks to supply an incentive to create new and desirable works, with the details depending crucially on whether the information relates to technological function or to the nonfunctional world of art, literature, and music.¹⁹ Thus, any call to protect

¹⁷ Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439 (2003).

¹⁸ *Id.* at 448–58.

¹⁹ Computer software presents a special case in which functional works are protected under copyright. One of the current authors has written extensively on this point. See, e.g., Dennis S. Karjala, *supra* note 17; Dennis S. Karjala, *A Coherent Theory for the Copyright Protection of Computer Software and Recent Judicial Interpretations*, 66 U. CINCINNATI L. REV. 53 (1997). This special case

information that does not fall within traditional information-protection regimes needs to supply a reason both for protection at all and for the specific scope and duration of such protection. We do not believe that a single rationale exists for protection of a broad category of information under the rubric of “indigenous cultural heritage.” We do believe, however, that reasons can be given for a degree of protection of specific types of information that many would classify as “indigenous cultural heritage.” It is simply a matter of articulating the need for protection in terms beyond “I would like to have exclusive rights in X.” (We would each like to have exclusive rights to, say, the works of Shakespeare.) Once the necessity or desirability case has been made, we can set about limiting both the scope and duration of protection to meet the articulated need, subject to countervailing interests of the public for allowing the information to remain in the public domain.

The basic problem for cultural heritage protection does not, therefore, lie in the absence of a known single author or group of authors. If a legitimate basis for protection can be articulated, it is relatively easy to write statutory language that accomplishes the task.²⁰ Similarly, the problem does not inhere in the absence of a writing or other fixation of the work, such as stories handed down by means of oral tradition. While it is true that the United States does require fixation for the attachment of federal copyright protection, most countries do not have a fixation requirement, and even within the United States unfixed works may be protected, at least against unauthorized publication, by state law.²¹ The real problem for intangible cultural heritage protection, as a general matter, is that it requires us to go beyond patent and copyright, and beyond the default position that information is in the public domain, to protect information for an indefinite, potentially infinite, time. We know why nonprotection is the default position for information, and we know why

that brings technological subject matter under copyright instead of its traditional home in patent law has no relevance to the cultural property question, except perhaps to show that copyright can, in fact, make room for special cases when there are reasons to do so.

²⁰ For example, Article 15(4)(a) of the Berne Convention provides that members may designate an author’s representative to enforce the copyright rights of an unknown author from that country. Berne Convention for the Protection of Literary and Artistic Works Art. 15(4)(a) (Paris text 1971), http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P192_37445 [https://perma.cc/DH2S-MLCP]. A student commentator has advocated the application of state tort law, in the United States, to culturally based harms resulting from sociological research, recognizing the difficulty of proving group harm but suggesting arguments that might be accepted. Gerald Carr, Comment, *Protecting Intangible Cultural Resources: Alternatives to Intellectual Property Law*, 18 MICH. J. RACE & L. 363 (2013). Of course, while we do not necessarily advocate such a statute, a statute narrowly tailored to achieve this end would be even more effective.

²¹ See, e.g., Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

(more or less) we make limited exceptions to that position for patent and copyright. If we are to go beyond the boundaries of these two paradigms, we must know why we are doing so.²²

II. SOME CURRENT PROPOSALS FOR CULTURAL HERITAGE PROTECTION

A. *The Stewardship Model*

A good deal of attention has been directed toward the so-called “stewardship model” for cultural property proposed by Professors Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley.²³ This ambitious proposal argues that many problems of cultural heritage protection can be analyzed and resolved using the traditional concepts of property law. These authors correctly observe that title to property, tangible or intangible, has never given the property owner an absolute right to use, or even to exclude others from, the property. “Stewardship” is seen as a limitation on an owner’s rights designed to reconcile the interests of owners and nonowners. The notion is that indigenous people often have a fiduciary or custodial duty with respect to certain tangible and intangible properties and that the cultural survival of a group may depend on its ability to fulfill such duties.²⁴ Consequently, legal ownership rights would be modified or curtailed to some extent, presumably to the extent needed to permit the indigenous groups to fulfill their custodial duties.

We have no objection as a general matter to limitations on owners’ rights in tangible or intangible property that are designed to permit the carrying out of inherited custodial duties, especially if the survival of an entire culture depends on it. The problem is in the details, few of which Professors Carpenter et al. supply, especially for intangible property. Their basic idea stems from the claim that “certain property deserves legal protection because it is integral to the collective survival and identity of indigenous groups.”²⁵ This is followed by the claim that “[i]ndigenous

²² Professor Michael Brown has proffered an “ecological approach” to draw an appropriate balance between the two desirable goals of protecting cultural heritage and promoting free and open expression throughout society. Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 *INTERNAT’L J. CULTURAL PROP.* 40, 51 (2005). He would allow, as would we, greater protection for sacred information under conditions of confidentiality designed to secure intangible cultural heritage, provided such schemes do not impinge too greatly on democratic values. *Id.* at 52. We assume he would be equally amenable to schemes designed to protect an articulated indigenous interest, at least if they are narrowly limited to the articulated interest.

²³ See Carpenter et al., *supra* note 8.

²⁴ *Id.* at 1124–25.

²⁵ *Id.* at 1046. Except in their specific examples, Professors Carpenter et al. do not supply a definition of what property is included in the “certain property” they refer to here. Later they vary the formulation somewhat: “because certain lands, expressions, and products are integral to indigenous

peoples, rather than holding property rights delineated by notions of title and ownership, often hold rights, interests, and obligations to preserve cultural property irrespective of title.”²⁶ The stewardship model would transfer some of the sticks in the traditional property rights bundle to nonowners, who would exercise certain rights sometimes in conjunction with, and sometimes in place of, their exercise by the formal property owners.²⁷ Importantly, the stewardship model does not predetermine outcomes in favor of indigenous groups. Rather, the principle mandates that the interests of indigenous people be taken into consideration “as raising legal claims that are equal to, and in some unique cases superior to, those of title-holders.”²⁸ Finally, stewardship itself is divided into “dynamic and static stewardship,”²⁹ whose “trajectories”³⁰ serve as “prisms”³¹ for viewing the role of stewardship in protecting indigenous cultural property.

Static stewardship under the model of Professors Carpenter et al. involves four interests of indigenous people: Conserving a sacred resource from overuse or pollution; placing an object, such as funerary remains, to rest; imposing rules against alienation to preserve the “physical and spiritual integrity” of an object; and access to and preservation of a cultural resource, such as a sacred site.³² Static stewardship thus seems to apply largely, if not wholly, to tangible property. To that extent, it lies outside our specific concern here with intangible property. Dynamic stewardship, however, involves at least one of three “rights”: rights of “commodification that govern the production of downstream cultural properties”; rights governing the acquisition and use of downstream cultural goods, including the sharing of information with nonindigenous groups; and more limited

identity and group survival, they may merit expanded and particular legal protection in some cases.” *Id.* at 1089. The key word seems to be “integral” to group survival and identity, but a key unanswered question is, what kinds of works, exactly, are “integral” in this sense? One example these authors do supply is that of Aboriginal complaints in Australia to some pictures of a kangaroo and emu on various items of state property. Notwithstanding Aboriginal belief in the sacredness of these animals, stewardship does not give them any right to control the offensive use of the pictures because no Aboriginal person participated in the creation of the images nor did the state use traditional knowledge concerning the species involved. *Id.* at 1102. Not surprisingly, we do not quarrel with this conclusion. Nearly everyone would find it shocking if only Aboriginal people or their representative authorities could depict kangaroos or emus. The implication, however, that some sort of group right *should* be recognized where an Aboriginal person did participate in the design or the state made use of otherwise publicly available traditional knowledge is troubling.

²⁶ *Id.* at 1067.

²⁷ *Id.* at 1080.

²⁸ *Id.* at 1083.

²⁹ *Id.* at 1083–87.

³⁰ *See, e.g., id.* at 1084, 1085, 1086, 1087.

³¹ *See, e.g., id.* at 1086, 1087.

³² *Id.* at 1085.

rights of “representation and attribution” with respect to commercial use of indigenous religious practices and identities.³³ Professors Carpenter et al. concede that indigenous rights like attribution and commodification should not always win over the claims of a legitimate creator with respect to intellectual property.³⁴ They do claim, however, that stewardship is “a uniquely powerful normative framework” for considering the claims of indigenous people to intangible property.³⁵ They do not seek, for example, to deny outsider access to traditional medical information but rather seek to play a role in the development and distribution of products developed from such information and to receive compensation for revealing it. They claim that this type of information is “commonly” associated with sacred or confidential indigenous information,³⁶ but they do not say that the stewardship model would be restricted to sacred or confidential information. Confidential information, at least, *does* stand on different ground from information that may be learned simply from observing open practices of the group or has already been disclosed, without coercion, outside the group.³⁷ It is quite a different problem, however, if the objection is that outsiders are making an allegedly profane or otherwise objectionable use of known but “sacred” information. And while the notion of “stewardship” can be sufficiently broad to cover the protection of confidential information that has been improperly released, it is very difficult to see how “stewardship” applies to nonconfidential information. Finally, while one can understand the desire to share in the market benefits from worldwide distribution of a pharmaceutical product based on some aspect of indigenous but nonconfidential medical knowledge, it is difficult to see what “stewardship” adds to the claim.

To fill this gap, Professors Carpenter et al. make a second questionable move. They correctly note that indigenous people are among the developing world’s poorest. Traditional medical knowledge and genetic resources may be the economically most important contribution that a given group can make to the world’s economy. Therefore, “indigenous peoples increasingly request to share in the profits from the products that are created through the use of indigenous traditional knowledge, primarily as a matter of survival and basic equality.”³⁸ This ties in with their earlier definition of cultural property as property deserving of protection because

³³ *Id.* at 1084.

³⁴ *Id.* at 1087.

³⁵ *Id.* at 1102.

³⁶ *Id.*

³⁷ Paterson, *supra* note 1, at 665–66.

³⁸ Carpenter et al., *supra* note 8, at 1103–04.

it is integral to indigenous group survival and identity.³⁹ But the move is problematic. If participation in the commercialization of a downstream product based on indigenous knowledge is necessary to the group's survival, it is not stewardship of the knowledge itself that permits the group survival but simply the assumed economic claim against knowledge that, in any other context, would be in the public domain. With only a slight extension of this reasoning, we could help the group to survive by granting it a right to share in the exploitation of the works of Shakespeare. Moreover, this reasoning would not apply to commercial products derived from indigenous knowledge where the indigenous group is independently well off economically, say, by reason of mineral resources on their land or perhaps the operation of gaming casinos. It is insufficient simply to say that the descendants of knowledge creators are poor so we should give them permanent exclusive rights to commercialize such knowledge. Were there any living descendants from Shakespeare, for all we know they might be poor, too. Fifth generation descendants of Jane Austen's brothers have been heard to complain about their inability to share in the commercial benefits from the recent spate of Austen adaptations into television and film.⁴⁰ And even if indigenous groups were to share in the commercialization of traditional medicinal knowledge, how can we know that the group will in fact use this survival benefit to preserve their culture, as opposed to simply joining the mainstream of U.S. society? Finally, Professors Carpenter et al. do not provide even a conceptual schematic for what kinds of commercializable knowledge would be subject to stewardship restrictions or profit sharing⁴¹ or for how profits from commercialization are to be calculated and divided.⁴² In short, if we are to take information out of the public domain by giving even "stewardship" rights of participation in its commercial development, we need a reason other than "the group is poor

³⁹ *Id.* at 1046; see *supra* text accompanying note 25.

⁴⁰ Amy Stevens, *Poor Jane Austen Didn't Live to See "Sense and Sensibility,"* WALL ST. J., March 25, 1996, summarized at <http://homepages.law.asu.edu/~dkarjala/opposingcopyrightextension/commentary/austen-wsj.html>, including a response by Dennis Karjala to the nephews' claims for profit sharing.

⁴¹ In what sense, for example, would the use of a plant to treat a given medical condition be "integral" to the identity or survival of the group that discovers the useful property?

⁴² Because the stewardship model supplements rather than replaces traditional property concepts, Professors Carpenter et al. concede "the need for regulatory oversight or mediation when title-holders and nonowners disagree." *Id.* at 1080. However, what standards does the mediator or regulator apply in deciding these and the many subsidiary questions that they raise? In the case of pharmaceuticals, in particular, what part of the risk of unsuccessful commercialization should be borne by the group supplying the initial information? See Dennis S. Karjala, *Sustainability and Intellectual Property Rights in Traditional Knowledge*, 53 JURIMETRICS J. 57, 64 n.25 (2012) (noting that drug companies can invest hundreds of millions of dollars before having to abandon development efforts because of things like later-discovered side effects).

and this is their only potential source of subsistence.” This is not to belittle the problem of poverty among indigenous people, or anybody else. It is, rather, to say that the problem of poverty is much more important than, and cannot be meaningfully addressed through, ad hoc recognition of intellectual property rights in what is otherwise public domain information.

The main intangible-property application that Professors Carpenter et al. make of their theory is to trademarks. They thereby side-step the difficult problem of how to apply copyright or copyright-like protection to indigenous cultural works of art, music, and literature, as well as the problem of applying patent or patent-like protection to indigenous information related to technology, such as herbal medicines or human or other genetic makeup. As discussed above,⁴³ including trademark law under the rubric of “intellectual property” and then expanding conclusions from trademark analysis to patent and copyright is an unjustifiable leap. The indefinite period of trademark exclusivity is ameliorated by the extremely narrow scope of traditional trademark protection (using the mark falsely to signal the identity of the supplier of goods or services, and only then if consumers are confused) that essentially does not impinge on the public domain.

The intangible cultural property problem to which Professors Carpenter et al. choose to apply their theory of stewardship is the use of American Indian imagery and caricatures as sports mascots.⁴⁴ We may assume the correctness of their assertions about Native American feelings toward these symbols:

For some [Native peoples], the mascots deny the truth about Indians: that they are active participants in dynamic and contemporary cultures that are defined by unique tribal identities, diverse across the continent. In this view, the monolithic, “mythic” Indian identity is linked to a colonizer’s attempts to make Indians disappear, facilitated by a legacy of death, removal, and assimilation. These Native peoples contend that Indian mascots portray Indians as nostalgic and anachronistic symbols of the past, and that their continued use is a manifestation of the vast power disparity faced by Indians today vis-à-vis whites and other minority groups. For critics of Indian mascots, no matter how vociferously fans contend that Indian mascots are meant to “honor” Native people, the actual caricatures and logos – which draw on stereotypes and employ sacred cultural elements such as feathers, war paint, songs, and drums – are an abomination.⁴⁵

⁴³ See *supra* note 13 and accompanying text.

⁴⁴ Carpenter et al., *supra* note 8, at 1105–06.

⁴⁵ *Id.* at 1106 (citations omitted).

Nevertheless, this example is particularly inapt as an application of the stewardship principle to the limitation of an intangible *property* right. This is not simply because of the questionable nature of trademark rights as intellectual property.⁴⁶ Even as an intellectual property right, it is standard intellectual property dogma that the exclusive rights are *negative*, that is, they give the legal power to prevent others from using the work but do not give an affirmative right to use it in any and all circumstances.⁴⁷ Moreover, as Professor Brown has pointed out in a critical analysis of the Carpenter et al. proposal, most of the offensive and stereotypical uses of Indian imagery and references are not specific to a given tribe.⁴⁸ Professors Carpenter et al. argue at length that the National Collegiate Athletic Association’s policy prohibiting the use of Native American imagery as sports mascots absent consent from the relevant Indian tribe created a “cognizable property interest”⁴⁹ in the Indian nations.⁵⁰ We can accept their conclusion that a few tribes received under this NCAA policy a practical right to participate in the decision whether to continue to use certain imagery as sports mascots by certain universities.⁵¹ But what is the property right involved in the use of generic Indian terms like “braves” or “warriors”? And who has the stewardship right to participate in the decision to allow continued use of such terms? The problem with sports mascots is that they reinforce

⁴⁶ See *supra* note 11 and accompanying text.

⁴⁷ See, e.g., Alexander B. Pope, *A Second Look at First Sale: An International Look at U.S. Copyright Exhaustion*, 19 J. INTELL. PROP. L. 201, 205 (2011) (“Intellectual property rights, particularly copyrights, provide their holders with a number of negative rights, which allow one to prevent others from taking specific actions”). In *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858 (5th Cir. 1979), the court concluded that obscenity was not a bar to copyright protection. The copyright would thus give its owner the right to prevent third parties from, say, publicly performing the work. It would not, however, give the copyright owner the affirmative right to authorize performance of the work in a locality in which such performance would violate the obscenity laws. Similarly, a patent in a pharmaceutical gives its owner the right to prevent third parties from making, using, or selling drugs embodying the patented invention, but the patent owner has no affirmative right to market the drug without regulatory approvals that are quite independent of the patent law. Trademark rights are not even phrased in the language of exclusivity. For example, the basic infringement provision states, “Any person who shall, without the consent of the registrant [use a mark in commerce, etc.] shall be liable. . . .” 15 U.S.C.A. § 1114(1). Trademark, too, is thus a negative right that creates liability in third parties who makes use of a mark in violation of the statute, but it does not purport to grant an affirmative right to the mark owner to use the mark in any way such owner chooses. A mark owner cannot, for example, use the mark in such a way as to deceive consumers, such as reverse passing off. See, e.g., *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 780 (2nd Cir. 1994).

⁴⁸ Michael F. Brown, *Culture, Property, And Peoplehood: A Comment on Carpenter, Katyal, and Riley’s “In Defense of Property,”* 17 INT’L J. CULTURAL PROP. 569, 571 (2010).

⁴⁹ Carpenter et al., *supra* note 8 at 1111.

⁵⁰ *Id.* at 1105–12.

⁵¹ For example, the University of Utah, after negotiations, received permission from the Ute tribe to continue to use the name “Utah Utes,” *Id.* at 1106.

offensive and stereotypical images of Indians in the general population.⁵² That is a problem that can be addressed more coherently without the added complication of supposed property rights further limited by supposed stewardship rights.

Professors Carpenter et al. assert that, “It is its unique flexibility and capacity for giving voice to claims of both owners and nonowners that make stewardship a uniquely powerful normative framework for considering indigenous peoples’ intangible property claims.”⁵³ However, they never explain exactly what this “normative framework” actually is, and they concede that the complexity of intellectual property law will require variances in indigenous approaches to disputes relating to intangible property.⁵⁴ We commend them for avoiding the “one size fits all” trap for all intangibles related to indigenous cultural heritage, but we query whether they have moved the ball very far forward in applying their stewardship notion to intangible cultural property. In each case or set of circumstances in which indigenous people demand an exception to the default rule that anyone may freely use information lawfully obtained, we need to articulate reasons for making such an exception. Only then can we tailor the type and scope of protection to the circumstances at hand. As Professors Carpenter *et al.* point out, the alleged misuse of human genetic material will raise very different issues from the adoption or modification into popular music of sacred indigenous music.⁵⁵

In response to Professor Michael Brown’s critical analysis of their stewardship proposal,⁵⁶ Professors Carpenter *et al.* offer the following example of what they view as a “cultural property story” based on the wildly successful *Twilight* vampire novels by Stephenie Meyer:

[T]he *Twilight* series depicts young, male members of the [Quileute] tribe as vampire-fighting werewolves. . . . Since *Twilight*’s unprecedented international success, the Quileute have been overwhelmed with fans and entrepreneurs, all grasping, quite literally in some cases, for their own piece of the Quileute.

Dozens of tourists have followed in [Meyer’s] path and removed rocks from First Beach for their own collections. MSN.com even entered a reservation cemetery to film the graves of deceased tribal elders, later publishing a macabre video montage set to music on the Internet. Busloads of tourists roll

⁵² Michael F. Brown, *supra* note 47, at 571–72]; Kevin Gover, *Native Mascots and Other Misguided Beliefs*, AM. INDIAN MAG. (Fall 2011), at 10.

⁵³ Carpenter et al., *supra* note 7, at 1102.

⁵⁴ *Id.* at 1100–01.

⁵⁵ *Id.*

⁵⁶ Michael F. Brown, *supra* note 47.

through the reservation daily, throwing the spotlight on a tribe that never sought the attention.

With the recent release of the third *Twilight* movie in the series, the commercialization of all things Quileute—from movies and books, to charm bracelets and earrings – has spawned a multimillion-dollar empire. Yet, little of this benefits the Quileute people, who remain impoverished and are currently devoting most of their scarce resources to a fight with the U.S. government over their ancestral lands. At the same time, copyright, trademark, and other laws protect those who have commodified Quileute culture—giving everyone from Stephenie Meyer, Summit Entertainment, and a dozen online T-shirt sellers the legal “right” to profit from so-called Quileute creations.

This is, in our view, a cultural property story. For the Quileute, as for most indigenous peoples in the world, culture is tied to their lands, resources, language, religion, sovereignty, and the Seventh Generation. Since the arrival of Europeans in North America, the Quileute have suffered severe losses of all of these resources, with the *Twilight* phenomenon representing only the most contemporary incarnation. Yet, like other indigenous peoples, the Quileute are not content to sit back while others commodify their cultural heritage. Instead, they are using legal tools to protect their cultural resources and navigate their participation in contemporary commerce.⁵⁷

There are indeed many potential wrongs in this cultural property story. The removal of rocks and similar items as souvenirs is something that can be controlled by ordinary trespass and conversion rules. Cemetery desecration or disrespect can also be regulated by property law, perhaps even with some stewardship limitations depending on who owns title to the property in question. It takes little imagination, moreover, to understand the tribe’s offense at being portrayed as werewolves. Here, however, we have difficulty understanding how creation or modification of *property* rights, especially rights in intangibles, can meaningfully address the problem. Falsely labeling an item as “Indian” or “Quileute” is actionable in the United States,⁵⁸ and if this type of protection needs strengthening, we have no objection to listening to suggestions. Indeed, to the extent that many more people now know the name “Quileute” and actively seek artifacts associated with that name, the *Twilight* series may have given the artisans of that community an opportunity to profit, should they so choose, to sell into a much larger market than had existed previously.

⁵⁷ Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property* 17 INT’L J. CULTURAL PROP. 581 (2010). They go on to describe some success in getting MSN to apologize and take down the graveyard video. Subsequent documentary crews have negotiated permission to film on the reservation, and a website was created aimed at delineating authentic Quileute-made items from those made by outsiders. *Id.*

⁵⁸ Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305 et seq. & 18 U.S.C. §§ 1158–59 (2012).

The main complaint in this “cultural property story,” therefore, seems to be that the Quileute have not shared in the profits from the “multimillion-dollar empire” that the Meyer novels have spawned.⁵⁹ If this is true, our question is, what is the basis – legal or moral – on which such a claim to profit sharing can be based? Would a similar basis give profit-sharing rights to the “victims” of Edgar Lee Masters’s thinly veiled descriptions of people from his hometown in the *Spoon River Anthology* or those on whom Grace Metalious based characters for *Peyton Place*? Every work is based on known or assumed cultural surroundings of some sort. A primary reason we have a public domain for most information concerning such surroundings is to avoid the need to apportion the relative merits of contributions to identifiable works, like literature, art, and music, that are created in reliance on these cultural backgrounds.

B. Other Suggested Approaches

With no claim to comprehensiveness, we address here briefly the contributions of some recent commentators to illustrate what we regard as the structural framework for analyzing the problem of protecting intangible indigenous cultural heritage. Yuqin Jin⁶⁰ argues for U.S. adoption of “indigenous IP laws” respecting biological and genetic knowledge but is unclear exactly what those laws should provide. Jin argues for a registration system for indigenous knowledge and mandatory disclosure of

⁵⁹ The literature is replete with stories of this type. For example, Professor Riley relates how a song from an indigenous Taiwanese group was recorded without permission during a European tour by an elder who had been entrusted to act as “keeper” of the group’s traditional folk songs. The artist Enigma purchased rights to the recording from the French Cultural Ministry and ended up with a worldwide hit. Professor Riley laments the group’s inability to “control resulting violations of tribal law and blatant distortions of their work.” Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J.L. & PUB. POL’Y 155, 158 (2004). But what, exactly, is the complaint here? If it is the surreptitious recording, we can place the wrong easily within the wide range of western legal rules that seek to regulate and prohibit deception. Indeed, such surreptitious recording of a musical performance would subject the recorder to the remedies for copyright infringement in the United States. 17 U.S.C. § 1101 (2012). If the recording was sampled without the performer’s permission, there might be an infringement of the sound recording copyright. If the harm, however, is that an outsider is “distorting” the group’s musical heritage, how does that differ from a U.S. objection that foreigners are mangling the “Star Spangled Banner” or even Stephen Foster’s “Oh Suzanna!”? Here, the “keeper” of the group’s heritage performed the music outside the local realm, apparently voluntarily. Having returned home, that “keeper” can continue to perform and, presumably, guard and protect the music and its performance among the group. One cannot help thinking that the essence of the complaint is that someone outside the group has made money based on cultural traditions emanating from the group. Pete Seeger did essentially the same thing with the African song “Wimoweh.” Picasso took from African art, and Van Gogh took from Japanese art. That is how culture worldwide grows and, indeed, thrives.

⁶⁰ Jin, *supra* note 6.

the origins of genetic resources in patent applications.⁶¹ While these provisions might prevent the issuance of some patents and invalidate others, they would not in themselves give any affirmative right of control over the knowledge in question or any economic compensation to the indigenous group that is the source of the knowledge. Jin also suggests that “indigenous medicine, fauna, flora, and their associated knowledge” should be eligible for patents, perhaps for a longer term than is provided for inventions generally.⁶² Jin acknowledges the problems of what peoples qualify as “indigenous” and who speaks for them.⁶³ However, while this contribution does not explicitly advocate a “one size fits all” solution to the question of indigenous IP, it does not explain how the rights it advocates might vary from group to group. Nor does it attempt to address the problem of why indigenous knowledge, and only indigenous knowledge, should get treatment so radically different under IP law than we afford to all other types of old knowledge. Indeed, in a closing argument Jin asserts that if indigenous people could have patented turmeric, the subsequent litigation ultimately denying such a patent to “inventors” outside turmeric’s indigenous discoverers could have been avoided.⁶⁴ The real lesson, however, is that patents in old knowledge should not be afforded to *anybody*, indigenous or otherwise.

Don Marahare has reviewed the oft-cited “deficiencies” of traditional intellectual property law in the protection of traditional knowledge, such as the absence of protection for old knowledge or where no definitive author can be identified.⁶⁵ He strongly supports the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, discussed critically below,⁶⁶ supplemented by ideas from such things as the Convention on Biological Diversity.⁶⁷ We do not review his specific suggestions, because

⁶¹ *Id.* at 974–75.

⁶² *Id.* at 975–76.

⁶³ *Id.* at 958.

⁶⁴ *Id.* at 976. Assuming turmeric was in “public use” somewhere, no patent in it could validly issue in that country or elsewhere. Moreover, even if a patent did validly issue in another country – for example, in the United States, whose former statute required use “in this country” to disqualify an applicant – that would have no effect on continued indigenous use by the people whose ancestors made the discovery, because there can be no valid patent there. Preventing outsiders from obtaining a patent may give some visceral satisfaction, but it brings no monetary compensation to the indigenous group or anyone else.

⁶⁵ Don Marahare, *Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property*, 8 J. SOUTH PAC. L. (2004), <http://www.paclii.org/journals/fJSPL/vol08no2/6.shtml> [<https://perma.cc/D6DJ-RUA8>].

⁶⁶ See *infra* notes 102–08 and accompanying text.

⁶⁷ CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/undb/media/factsheets/undb-factsheets-en-web.pdf> [<https://perma.cc/QUC6-BLCQ>].

we feel that Mr. Marahare begins from an incorrect premise, namely, that the goal is to achieve “maximum protection over . . . traditional knowledge.”⁶⁸ Protection of knowledge is only half of the IP equation. Protection does provide some benefits to some people, but protection is also socially detrimental in tying up knowledge that could otherwise be used freely to advance both culture and technology. A move toward more protection is not warranted unless it can be shown that the benefits outweigh the costs.

Molly Torsen recognizes the inadequacy of a one-size-fits-all approach to the protection of traditional cultural expression and argues that general principles of western law can be applied to accommodate the needs of traditional cultures.⁶⁹ Her main concern appears to be indigenous control of distortion, disrespect, or commodification of traditional cultural expression,⁷⁰ and she finds basic philosophical principles in otherwise apparently disparate bodies of law such as the protection of geographical indications,⁷¹ moral rights and copyright,⁷² and privacy law,⁷³ as well as various international instruments.⁷⁴ She also recognizes the need to balance indigenous claims against principles of free speech.⁷⁵ Rather than a new body of law, she seeks a “declaration” that “traditional cultural expressions shall be extended an understanding of protection against usage, dissemination, and the making of derivative works deemed inappropriate by the collective people by whom the TCE was created.”⁷⁶ She concedes ambiguity in determining what is “inappropriate” and does not supply a means for determining who the “collective people” are or who speaks for them. Presumably, after such a declaration is adopted, courts in the adopting countries would decide disputes on a case-by-case common law approach. While we perhaps lack Ms. Torsen’s confidence that such a declaration would actually be effective in achieving her respect and anti-distortion goals, we see no objection to giving it a try. It is a serious attempt to avoid the difficulties of a one-size-fits-all approach – especially an

⁶⁸ Marahare, *supra* note 65, at n. 5.

⁶⁹ Molly Torsen, “*Anonymous, Untitled, Mixed Media*”: *Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions*, 54 AM. COMP. L. 173, 181 (2006).

⁷⁰ *Id.* at 198.

⁷¹ *Id.* at 184–86.

⁷² *Id.* at 186–91.

⁷³ *Id.* at 193–95.

⁷⁴ *See, e.g., id.* at 191–92 (discussing the United Nations Universal Declaration of Human Rights, G.A. Res. 217 A(III) (Dec. 10, 1948)).

⁷⁵ *Id.* at 182–83.

⁷⁶ *Id.* at 197.

approach that relies on intellectual property rights in old knowledge – and to accommodate not only the interests of the indigenous people involved in a particular case but also the more general society’s interest in free speech and the further development of culture based on the existing cultural heritage.

The World Intellectual Property Organization (WIPO) has been seeking for a number of years to come up with a proposal for protecting traditional knowledge (TK), traditional cultural expressions (TCE), and genetic resources.⁷⁷ As of October 2013, developed and developing countries were still wrangling over the protection of folklore and TCEs. Even putting substantive issues of protection to the side, the parties had not yet agreed even as to the form of the instrument – binding treaty, nonbinding agreement, or some third approach.⁷⁸ We strongly recommend that the WIPO negotiators avoid the trap of defining specific classes of “traditional knowledge” or “traditional cultural expressions” and attempting to attach new forms of IPRs to them. Starting from a well-defined problem (such as profane use of sacred imagery) and working up to a narrowly tailored solution is the only way to avoid a clash with fundamental notions of free speech and cultural advance.

C. *The New Zealand Wai 262 Report*

In 2011 an important report concerning the cultural rights of New Zealand’s indigenous Maori people was published. With no written constitution, New Zealand law furnishes only statutory and common law rights for its large Maori population. Nevertheless, the Waitangi Tribunal report in *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (the “Wai

⁷⁷ The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established by the World Intellectual Property Organization in 2000. WIPO, *INTELLECTUAL PROPERTY HANDBOOK* 62 (2d ed. 2004), http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf.

⁷⁸ Daniel Pruzin, *WIPO Members Endorse Plans for Talks on Genetic Resources, Traditional Knowledge*, BLOOMBERG BIOTECH WATCH, Oct. 2, 2013. For genetic resources, developing countries like Brazil have been pushing for mandatory disclosure of the origin of the genetic materials that serve as the basis for a patent claim, in the interest of protecting against so-called “biopiracy.” The United States has opposed mandatory disclosure except as relevant to the traditional requirements for a patent, such as novelty. Daniel Pruzin, *WIPO Members Endorse Negotiating Text on Protection of Genetic Resources, But Substantial Gaps in Positions Remain*, BLOOMBERG WORLD INTELL. PROP. REP. (Feb. 2012). The Director General of WIPO stated in September 2014 that “the experts have prepared the stage for negotiations that I hope will be able to identify an achievable and successful outcome” relating to action on TK, TCE, and genetic resources. Address of the Director General, WIPO Assemblies 2014, September 22 to 30, 2014, http://www.wipo.int/about-wipo/en/dgo/speeches/a_54_dg_speech.html [<https://perma.cc/8Z6C-AMA6>].

262 report”) is likely to significantly influence future legal developments in New Zealand, as well as attract interest from around the world.⁷⁹

The Wai 262 report was in response to a claim originally filed in 1991 by six Maori tribes (*iwi*) regarding flora, fauna, and intellectual property issues.⁸⁰ It is beyond the scope of this analysis to discuss the report in detail but certain aspects of the report that address issues surrounding the legal protection of traditional Maori knowledge and culture are relevant to our topic. The Wai 262 report may represent an example of the stewardship notion that Carpenter *et al.* have put forth.

The Wai 262 report focused on the concept of Maori stewardship or guardianship (*kaitiakitanga*) – a concept of caring for natural and physical resources for the overall benefit of peoples and the resources themselves. The object of the report was to address Maori claims that the New Zealand government (the Crown) had failed to adequately protect, preserve, and respect various aspects of Maori culture and traditional knowledge. This meant addressing the ongoing tension between indigenous rights and existing intellectual property laws. The tribunal itself recognized this by referring to the two different (English and Maori language) versions of the 1840 Treaty of Waitangi (between the British Crown and the Maori tribes), which forms the basis for the jurisdiction of the Waitangi tribunal over claims like Wai 262.⁸¹ The Wai 262 report centered on the language of Article 2 of the Treaty of Waitangi. The Maori version of Article 2 emphasizes traditional knowledge, whereas the English version affirms western concepts of property, with its use of such terms as “preemption” and “alienation”. Nevertheless, inherent in the fact that the two different versions of the treaty are of equal authority is the idea that Maori were ceding sovereignty to the (then British) Crown, in exchange for retaining possession of their own lands and other resources.⁸² Even if the tribunal finds that the Crown has breached its duty towards Maori based on the treaty, this does not necessarily mean such breaches are remediable under New Zealand law. However, the the tribunal’s identification of violations

⁷⁹ The report was published in three volumes, the first of which summarizes its findings and recommendations. See David V. Williams, *Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity*, 20 INT’L. J. CUL. PROP. 311 (2013).

⁸⁰ See Graeme W. Austin, *Re-Treating Intellectual Property? The Wai 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 CARDOZO J. INT’L. & COMP. L., 333 (2003).

⁸¹ The 1840 Treaty was neglected by the New Zealand legal system but achieved constitutional status through the establishment of the Waitangi Tribunal in 1975. See *id.* at 341–51. The tribunal is a quasi-judicial body which hears claims by Maori alleging violations by the Crown of the principles contained in the treaty.

⁸² Many argue that the Maori version of the treaty did not cede sovereignty in the strict English sense of the term but something less and more akin to some sort of authority. See Austin, *supra* note 80, at 342–43.

by the Crown of treaty provisions often leads to the New Zealand government's introducing changes in legislation, policies, and practices affecting Maori.

The Wai 262 report addressed the concept of the public domain by noting that while Maori possession of its traditional knowledge was, prior to European settlement, undisturbed, it is now a shared resource, and, in that sense, irretrievable. While this may seem self-evident, it was an important conclusion, since it implicitly rejected the idea of creating *sui generis* intellectual property rights for Maori traditional knowledge.⁸³ Instead, the tribunal's report focused on the stewardship principle, which it saw as itself a key component of Maori culture. In so doing the report also sided with the vast majority of contemporary legal scholarship which concludes that indigenous traditional knowledge is an ill fit with western intellectual property concepts.

The tribunal thought that there needed to be restrictions in place to prevent the offensive or derogatory public use of Maori forms of cultural expression.⁸⁴ While New Zealand law already protects against such use to a certain extent, the tribunal recommended enhanced protection where someone had an existing custodial or guardianship relationship (*kaitiaki*) to the objects and beliefs in question. The report proposes that the existing Maori Trade Marks Advisory Committee be replaced by a new Commission that would establish guidelines for prospective users of Maori cultural expressions. This Commission could also serve as a register of the guardians of particular works, but such registration would not be made compulsory. The idea of a prohibition on offensive or derogatory use of Maori works seems appropriate enough and has well-established precedents in other countries with significant indigenous populations – such as Canada and the United States. What is more problematic about the tribunal's proposals is what exactly it is that can be subject to a “guardianship” relationship and afforded legal protection on that basis. Since these relationships appear to be subject to definition on a case-by-case basis, it would seem that there could be a good deal of uncertainty as to when a given use is protected, along with the precise nature of the level of protection itself.

The most controversial aspect of the report's recommendations surrounds its suggestion that any commercial use of Maori culture that is the subject of a “guardianship” relationship requires consultation with and

⁸³ See Jessica Christine Lai, *Maori Traditional Cultural Expressions and the WAI 262 Report: Looking at Details*, 8 (U. Lucerne, Switzerland, i-call Working Paper No. 2012/02) (2012).

⁸⁴ See Owen Morgan, *Protecting Indigenous Signs and Trade Marks – the New Zealand Experience*, INTELL. PROP. Q., 58 (2004).

possibly consent from *kaitiaki* before use. It should be stressed, however, that this recommendation is based on the tribunal's understanding of the obligations of the New Zealand Crown under the Treaty of Waitangi. As explained in the report, while western-based intellectual property concepts define specific legal rights connected to certain forms of property, Maori focus on relationships towards their cultural objects (*taonga*) and the duties and responsibilities that surround these relationships. The recommendation that consent be required to allow the commercial use of Maori cultural objects is basically a suggestion that New Zealand law make such consent mandatory – whether or not the works concerned are in the public domain. It remains unclear how such a requirement would be implemented and what sort of recognition it would receive outside New Zealand.

Even if this requirement of consent for expressions of Maori traditional knowledge were made part of New Zealand law, it is not clear what it exactly entails. The report does not explain what would happen if consent were refused – even assuming there had been prior consultation. Furthermore, the report recommends that the Commission have the power to limit commercial use of Maori cultural expressions in a form that the would-be user already has intellectual property rights over – like a photograph. Would this mean, for example, that the owner of copyright in a photograph could not display it for sale in a gallery if the *kaitiaki* of its subject matter objected?

The report grapples with this problem by suggesting that while existing intellectual property rights cannot be compromised, any future rights would be subject to decisions of the Commission. Thus, a design might be refused registration under the existing statutory scheme if the Commission decided that there had been inadequate consultation or an absence of consent. In effect, existing intellectual property rights might be made subject to laws giving effect to Treaty of Waitangi principles. This, however, would take the regulation beyond commercial uses of the subject matter. Indeed, refusal to recognize intellectual property rights would not address the basis for a stewardship rejection of commercial exploitation, which must inhere in the offensiveness of such exploitation. That a work is not protected by, say, copyright does not mean it cannot be published or sold. It only means that its creator has no exclusive rights to such publication or sale.

The report distinguished between what it described as “*taonga-works*” (Maori treasures or highly prized possessions) and “*taonga-derived works*”. While the former are assumed to always have living individuals or communities that are responsible for them, the latter are works that have a

Maori element but this is in combination with other non-Maori influences.⁸⁵ For these, there is no *kaitiaki* relationship. The report suggests that while derivative works be made subject to restrictions on offensive or derogatory use, they not be subject to consultation or consent because of the absence of guardians. In her analysis of the report, Dr. Jessica Christine Lai has said:

It would seem to the author here that the distinction cannot be made objectively and that the line between the two seems conceptually porous. As has been stated elsewhere, the opinion of Maori is by no means lacking in diversity, making it difficult to objectively and consistently answer the question of how much Western or “modern” material must make up a work for it to no longer be considered a *taonga* work but a *taonga*-derived work. Considering that Maori culture should be viewed as dynamic and constantly developing, how does one differentiate between this acceptable development (which may involve incorporating in aspects not of traditional Maori culture) and hybrids that cross the line and become *taonga*-derived works? This further begs the question of whether the racial descent of the creator is important towards this end. In other words, is one more willing to consider something a *taonga* work, rather than a *taonga*-derived work, if its creator is Maori in descent? If so, is that a justifiable distinction to make? Notably, this would not go both ways, as non-Maori can only make *taonga*-derived works, due to the requirement of a *kaitiaki* relationship.⁸⁶

Given the significance of the consultation and consent requirement, it is surprising that the report did not address these inherent problems more closely. In effect, the report is dealing here with the concept of “fair use” or its equivalent, which in most legal systems is seen as ensuring a basis for new interpretations and other creative expressions. If the concept of “*taonga*-derived works” were interpreted narrowly, it would place a significant and undesirable restriction on such creativity. This example illustrates the need to articulate the basis for limiting the right to use information freely. The justification for any right of refusal must inhere in a notion of sacrilege or similar offensive use of the underlying work. Assuming we can actually identify what is “offensive” and quantify how much “offensiveness” must be present to justify a refusal to allow commercial exploitation – each an extraordinarily difficult problem in a society that believes in rights of free expression – any refusal should be predicated not on the quantity of underlying indigenous content that finds its way into the challenged work but on the aspects of the challenged work

⁸⁵ This assumption itself seems highly questionable given that there are thousands of Maori artifacts in New Zealand and foreign museums alone whose tribal affiliation is unknown.

⁸⁶ See Lai, *supra* note 83, at 12.

that make the work offensive. It should be clear that a desire to share in the profits to be derived from the proposed commercial exploitation should not be a factor in justifying a refusal to allow commercial exploitation.

Another controversial aspect of the report is its suggestion that certain Maori traditional knowledge (*matauranga Maori*) that is “closely-held” be afforded additional protection beyond merely a prohibition on offensive or derogatory use. This is the closest the report gets to addressing what level of legal protection could be afforded intangible Maori culture. While unable to define the content of such Maori culture, the tribunal thought that traditional knowledge that was specific to particular Maori communities should enjoy some level of protection – possibly against offensive or derogatory use, as well as requirements of consultation and consent. As with Maori works more generally, there are troubling questions here surrounding how and when such use should or could be controlled. In addition, as Dr. Lai has pointed out, there is a good deal of uncertainty as to what exactly “closely-held” means.⁸⁷ She ponders from whose perspective such intangible cultural heritage would be considered as “closely-held.” As she goes on to say, the report also fails to address the possible misuse by Maori themselves of Maori culture. The report discusses the rights of Maori versus non-Maori, but it does not explain how its recommendations apply in other contexts – such as Maori misuse of Maori culture.⁸⁸ Again, articulation of the reasons justifying *any* deviation from the default rule that information should be freely useable by anyone is necessary both in determining the existence and scope of the right and the basis, if any, for distinguishing between Maori and non-Maori use of the knowledge.

Some aspects of the tribunal’s report do speak to general issues concerning the basis for affording legal protection to indigenous cultural heritage. What is most striking about the report is that it completely avoids any suggestion that new forms of property rights be created in respect of Maori cultural heritage. The explanations for this are likely many, but the most likely must be the daunting task of defining the content of such rights and explaining how they would co-exist with pre-existing norms. New Zealand has struggled over the last few decades to resolve its identity through a new kind of engagement between its Maori and non-Maori (*pakeha*) populations. The Wai 262 report is just one facet of this tortuous journey. It would seem its authors chose “stewardship” together with all its attendant uncertainties, over ownership, with the aim of avoiding the sort of confrontation that a rights-based approach might have engendered. In so

⁸⁷ *Id.* at 13.

⁸⁸ *Id.* at 13–14.

doing they may have merely designed a roadmap with its own particular set of problems concerning implementation and dissonance.

D. Taiwan

In 2007, Taiwan enacted the *Act for the Protection of the Traditional Intellectual Creations of Indigenous Peoples* (“the Act”).⁸⁹ While it has received relatively scant attention outside Taiwan, the Act represents a significant example of emerging efforts to provide additional protection for the traditional cultures of indigenous peoples.⁹⁰ Unfortunately, the Taiwan statute is more an example of what should *not* be done for the protection of indigenous cultural heritage than what should be done.

Article 1 of the Act states a purpose to protect the “traditional intellectual creations” of Taiwan’s indigenous peoples, as well as to promote the overall development of Taiwan’s indigenous culture. Article 3 of the Act defines the scope of the “intellectual creations” the law is designed to protect in terms of their being expressed in such forms as ceremonies, songs, weaving, and clothing. This means that the ideas on which such manifestations are based are not protected by the Act. However, it is unclear whether the word “creations” limits the protection the Act affords to cultural expressions that are in some way novel, rather than mere repetitions of traditional concepts.⁹¹ What is clear is that the Act is about cultural “expressions” rather than indigenous ecological traditional knowledge which is to be the subject of a separate law.⁹²

To receive the protection of the Act, “traditional intellectual creations” are required to be registered pursuant to a government-run system set up under the Act.⁹³ A group, including experts, scholars and indigenous representatives will vet applications under the Act. The rights that registration confers are limited to aboriginal groups or tribes, and representatives are to be elected to represent the appropriate body. Exclusive rights can be awarded to a group or tribe, or several tribes and groups jointly, but if no group or tribe can be determined to own the

⁸⁹ See Lawbank, Protection Act for the Traditional Intellectual Creations of Indigenous Peoples, <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0202.asp> [<https://perma.cc/F66E-4ESF>].

⁹⁰ It has been pointed out that the Act strongly resembles Panamanian law. See Chih-Chieh Yang, *A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions*, 11 *ASIAN-PAC. L. & POL’Y J.* 49, 62–63 (2010).

⁹¹ See Kai-Shyh Lin, *Using Intellectual Property Rights to Protect Indigenous Cultures: Critique on the Recent Development in Taiwan*, 67 *J. ARCHAEOLOGY & ANTHROPOLOGY* 185–220, 195 (2007).

⁹² See Ming-Yan Shieh & Chung-His Lee, *Taiwan* in *THE IMPACT OF UNIFORM LAWS ON THE PROTECTION OF CULTURAL HERITAGE AND THE PRESERVATION OF CULTURAL HERITAGE IN THE 21ST CENTURY* 745, 755 (Toshiyuki Kono ed., 2010).

⁹³ Protection Act, *supra* note 89, Arts. 4–6.

“intellectual creation” rights in it shall be registered in the name of the indigenous peoples of Taiwan as a whole.⁹⁴

The legal nature of the rights protected under the Act are set out in Articles 11, 12 and 13. The exclusive right to exploit an “intellectual creation” is defined as comprising “the property and moral rights of the intellectual creations.” Moral rights are defined as including the right to release the work, to identify an exclusive user and the right to prevent distortion, mutilation or modification of the work in a manner that violates the author’s reputation.⁹⁵ Rights are inalienable and non-transferable, and, if abandoned (or if a tribe or group ceases to exist), automatically revert to the aboriginal peoples of Taiwan.⁹⁶ Proceeds (such as royalties) derived by a tribe or group from rights cannot be used by individual persons for their own benefit but are to become part of an indigenous peoples welfare fund.⁹⁷

The Act eschews protection through the registration of names or marks in favor of property rights over certain manifestations of indigenous culture, which are rights to be held, apparently in perpetuity, by indigenous groups. As Professor Yang has pointed out, many traditional cultural expressions are regarded as sacred, and turning them into property rights may be seen by many as inappropriate. This relates to the recurrent problem of being able to define ownership when the origins of the traditional knowledge may itself be unclear.⁹⁸ Of much greater importance, however, is the fundamental problem of giving property rights in old information – and most especially *perpetual* property rights in old information. In terms of the policy analysis outlined above, the question must always be *why* new IPRs are being recognized.⁹⁹ What problem, exactly, is solved by recognizing property rights in old information? What is lacking in this statute is a normative basis for the level of protection it affords. Why does Taiwan protect indigenous cultural heritage differently from other parts of its cultural heritage? The answer cannot lie solely in what indigenous people want (assuming that they are unified on the point). Many western authors today clamor for longer, even perpetual, copyright rights. The issue is whether the claims have legitimacy in the context of society as a whole.

The title of the Act has been criticized as suggesting that its subject-matter consists of all of the traditional intellectual knowledge of Taiwan’s

⁹⁴ *Id.* Art. 7.

⁹⁵ *Id.* Art. 10.

⁹⁶ *Id.* Arts. 11, 12, 15.

⁹⁷ *Id.* Art. 14.

⁹⁸ Yang, *supra* note 90, at 62.

⁹⁹ See *supra* note 42 and accompanying text.

indigenous peoples, whereas its actual scope is much more limited.¹⁰⁰ The law deliberately omits biological knowledge and is primarily based on the provisions of earlier Taiwanese intellectual property laws. An even more serious concern is that the Act fails to adequately address the problem of deciding who is the appropriate representative for the rights claimed. With thirteen indigenous groups, there are many possibilities for uncertainty over which group has the best claim to a particular “intellectual creation.” Many practices may be shared or no longer practiced. On the other hand, registration suggests stasis and restraint of the fluid cross-fertilization of ideas and practices between cultures. The Act may “privilege certain interpretations of this tradition and render others ‘inauthentic’ and less ‘genuine’.”¹⁰¹ Even worse, where no tribe or group can be identified as the source, the information remains the restricted property of the aboriginal people of Taiwan instead of reverting to the public domain. What basis can there possibly be for such restrictions on the use of cultural information? In terms of western culture, this is analogous to recognizing a new property right in the works of Homer in the country of Greece or some subset of its current population. It goes without saying that the lucky members of any group entitled to royalties would be pleased with such a new property right in the works of Homer. But would the world, or even Greece, be better off if members of that group had sole right of control over new translations and interpretations of these classic works?

Kai-Shih Lin has suggested that a probable effect of the Act could be that artists will avoid using Taiwanese cultural expressions as a basis for new works because of fear of contravening the new law.¹⁰² This could mean that Taiwanese indigenous cultures become isolated and of less interest to outsiders so that the registration under the Act becomes pointless. Copyright law is not extraterritorial, which means that no other country is bound to recognize the rights Taiwan affords to its indigenous groups. Outsiders would be free to appropriate from these groups at will, so long as all their underlying source material is obtained legally and all reproduction and derivative work preparation takes place outside of Taiwan. Taiwanese authors, however, would be severely hampered in their ability to make use of their own cultural heritage in the creation of new works. This cannot be considered a positive development for current authors in Taiwan.

¹⁰⁰ Kai-Shih Lin, *supra* note 91, at n.196 ff.

¹⁰¹ *Id.* at 207. Using the problem of sports mascots as a jump-off point, Professor Mezey has pointed out not just the inevitability but the important social value of cultural change, hybridity, and fusion. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2039–45 (2007).

¹⁰² *Id.* at 208–12.

E. The Pacific Island Countries Regional Framework

The Model Law for the Protection of Traditional Knowledge and Expressions of Culture derives from a Pacific Regional Framework aimed at assisting Pacific Island countries that wish to legislate new protection of traditional knowledge (TK) and expressions of culture (EOCs).¹⁰³ This Model Law suffers from the same fundamental errors as the Taiwan statute discussed above. The Model Law very broadly defines “expressions of culture” and “traditional knowledge”¹⁰⁴ and requires “prior and informed consent” from the “traditional owners” before performing just about any “non-customary” act one can imagine doing with traditional knowledge or expressions of culture other than privately thinking about them.¹⁰⁵ The rights endure in perpetuity.¹⁰⁶ The traditional owners, who are the ones authorized to give permission for non-customary uses, are the indigenous groups or the individuals recognized by the groups to whom protection is entrusted according to the customary practices of the groups.¹⁰⁷ The Model Law has a procedure for identifying the traditional owners,¹⁰⁸ but if no traditional owners can be identified, the determining agency (the “Cultural Authority”) may deem itself the “traditional owner” and must use any benefits derived “for traditional cultural development purposes.”¹⁰⁹ No justification is offered – indeed, there seems to be no recognition of the

¹⁰³ Secretariat of the Pacific Community, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002) [hereinafter referred to as the Model Law], <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnssofCulture20021.pdf> [<https://perma.cc/ZH49-HCPM>]

¹⁰⁴ Traditional knowledge is defined to include “any knowledge that generally: (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and (b) is or has been transmitted from generation to generation; and (c) is regarded as pertaining to a particular traditional group, clan or community of people in [Enacting country]; and (d) is collectively originated and held.” “Expressions of culture” mean “any way in which traditional knowledge appears or is manifested.” Model Law, cl. 4. The Model Law does not appear to specify who is to do the “regarding” in clause (c) of the TK definition to determine whether the knowledge relates to a particular group.

¹⁰⁵ In addition to reproduction, importation, translation, and similar acts, the Model Law has a catch-all for any use of “traditional knowledge or expressions of culture in any other material form,” if such use is non-customary. The Model Law expressly requires authorization for the creation of “derivative works,” which are defined broadly as “any intellectual creation or innovation based upon or derived from traditional knowledge or expressions of culture.” Model Law cl. 4. Even a highly creative work that takes no more than a copyright-unprotected “idea” from TK or EOP could require authorization as “derived from” such TK or EOP. “Customary use” is defined as “the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners.” Customary uses are not regulated by the Model Law. *Id.* cl. 5.

¹⁰⁶ *Id.* at cl. 9.

¹⁰⁷ *Id.* at cl. 4. The Model Law does provide a kind of “fair use” exception from the protections.

¹⁰⁸ *Id.* at cls. 17–18.

¹⁰⁹ *Id.* at cl. 19.

problem – for the economic inefficiency of protecting information in perpetuity, for protecting information to which no one can claim ownership, or for inhibiting further cultural development by creative people, whether inside or outside the group, who base new works on existing TK or EOCs, no matter how old or how tenuous the “ownership” claim.

Miranda Forsyth offers a cogent critical analysis of the Pacific Island Model Law as insufficiently considering the interrelationship between customary legal institutions, TK, and the indigenous communities TK protection is intended to serve.¹¹⁰ She points out the problems of intra-group disputes over allowed uses and economic benefit sharing,¹¹¹ unrealistic benefit expectations by group members,¹¹² the need to deal with property already in the public domain,¹¹³ and the stifling of internal use and development by TK owners themselves.¹¹⁴ Forsyth recommends a “deep pluralistic approach” to the problem of TK protection that works from the ground up, beginning with each individual community itself determining what the local people’s needs and desires actually are in drawing an appropriate balance between such aims as conservation and commercialization.¹¹⁵ She argues that the state should be a facilitator, not a regulator, in helping local communities devise and enforce decisions concerning TK, such as (presumably) secret or sacred knowledge and perhaps, as we have suggested, developing systems of certification marks for different communities.¹¹⁶ A central goal would be a system facilitating access by local communities to their own TK and to the TK of neighboring communities.¹¹⁷

We agree with a general approach that looks concretely at specific problems in the real world rather than one-size-fits-all abstractions. Sacred and secret information is different from information that has long been available to, and used by, people inside and outside the group from which the information first derived. It is only by identifying specific claims to

¹¹⁰ Miranda Forsyth, *Do You Want It Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries*, in *INDIGENOUS PEOPLES’ INNOVATION 206* (P. Drahos & S. Frankel eds. 2012), press.anu.edu.au/wp-content/uploads/2012/08/ch09.pdf.

¹¹¹ *Id.* at 206–07.

¹¹² *Id.* at 207–08.

¹¹³ *Id.* at 208–09. For example, in many cases the TK has already “escaped” and is being used by outsiders, who may themselves be members of indigenous groups but not the group to which the TK “belongs” under the Model Law.

¹¹⁴ *Id.* at 209–10.

¹¹⁵ *Id.* at 211–12.

¹¹⁶ *Id.* at 212–13.

¹¹⁷ *Id.* at 213.

specific knowledge and evaluating those claims in the light of a group's interest in maintaining a degree of control and society's interest in the free flow of information that we can effect the set of compromises that must underlie any realistic system of TK protection.

CONCLUDING THOUGHTS ON *SUI GENERIS* APPROACHES

We have suggested approaches to the protection of intangible cultural heritage outside the framework of IPRs, such as through tort law, contract law, rights of privacy, and analogies to trademark and trade secret law.¹¹⁸ We will not reiterate that discussion here. Rather, we wish to reaffirm the need to articulate specific legitimate interests that some indigenous people or groups may have in certain information or classes of information. Sacred information relating to religious rites that is not generally known provides one of the clearest examples. To the extent such information exists, and the groups in question wish to maintain its secrecy, we can imagine a statutory solution modeled on privacy and trade secret protection that could serve the legitimate interests of the group. On the other hand, where the information is publicly known and not otherwise eligible for protection under the existing IPR regimes, it is difficult for us to see *any* case for general control rights in the group that was the original source of the information. Between these two extremes, arguments can and should be made on a case-by-case basis, with focus always on the harm that is being suffered from outsider use of the information in question and whether that harm justifies limitations on free speech and the dissemination of knowledge.

We recognize that, at bottom, we are choosing sides in a fundamental value conflict. The default position of most western societies is that publicly available information, being nonrival, is free for all to use, subject to the IPR regimes for new information and subject to specific uses of information that threaten identifiable harms (e.g., crying "Fire!" in a crowded theater, even if there is an actual fire). Many defenders of exclusive rights in intangible indigenous cultural property disagree that this default position should apply to indigenous groups. The reasons these defenders have thus far given for their position, however, are not convincing. That many wrongs have been perpetrated against many indigenous groups all over the world, often over the course of centuries, is undeniable. How to compensate for these wrongs to the extent possible is a vital subject of public discourse and potential legal development. Recognizing exclusive control rights, or even more limited "stewardship"

¹¹⁸ Robert K. Paterson & Dennis S. Karjala, *supra* note 1, at 652–69.

rights, in old information, however, is simply not a remedy that in any way, except by chance, relates to the wrong.

In each case, we need to ask whether a right equivalent to the one proposed for indigenous groups should be recognized for nonindigenous groups otherwise similarly situated. Can and should we afford exclusive control over the origin stories of indigenous groups while denying such control to the Greeks over Homer? There is a clear and easily articulated basis for the default position that information is and must be free, with at least articulated reasons for the exceptions relating to traditional IPRs. There is nothing in that basis that distinguishes between information deriving from particular groups, indigenous or otherwise. The burden is therefore on those seeking stronger indigenous group rights in old information to articulate clearly whatever basis they see for deviating from this solidly grounded default position that information is free.

