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Erin K. Slattery

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**PRESERVING THE UNITED STATES'
INTANGIBLE CULTURAL HERITAGE: AN
EVALUATION OF THE 2003 UNESCO
CONVENTION FOR THE SAFEGUARDING OF
THE INTANGIBLE CULTURAL HERITAGE AS A
MEANS TO OVERCOME THE PROBLEMS POSED
BY INTELLECTUAL PROPERTY LAW**

By Erin K. Slattery*

“A CULTURE CAN NEVER BE REDUCED TO ITS ARTIFACTS WHILE IT IS
BEING LIVED.”¹ —RAYMOND WILLIAMS

I. INTRODUCTION

Intangible cultural heritage has recently been lauded the “lifeblood of culture,”² and “the mother of all cultures.”³ Due to the importance that contemporary scholars place upon intangible aspects of culture, it thus seems surprising that up until recent years, the existence and significance of intangible cultural heritage had been largely ignored.⁴ Instead, preservation efforts by organizations such as the United Nations Educational, Scientific

* Research Staff Attorney for the Illinois Appellate Court, First Judicial District. J.D., 2006, DePaul University College of Law; B.A., 2002, Marquette University. Special thanks to Professor Patty Gerstenblith for her invaluable assistance during the writing of this article. Thanks also to Jim, Judi, and Dan. Slattery for their unwaivering support and guidance

1. UNESCO, Intangible Heritage, <http://www.unesco.or.id/activities/culture/56.php> (last visited March 16, 2006).

2. Choe Seok-yeong, *Preserving the Intangible Cultural Heritage of Humankind*, KOREANA 32 (2004). Choe Seok-yeong is a researcher for the National Folk Museum of Korea. *Id.*

3. Nobu Ito, *Intangible Cultural Heritage Involved in Tangible Cultural Heritage*, <http://www.international.icomos.org/victoriafalls2003/papers/A3--2%20-%20Ito.pdf>.

4. See Ana Filipa Vrdoljak, *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage 1*, <http://www.esil-sedi.org/english/pdf/Vrdoljak09-05.pdf> (noting that “[t]he protection of intangible cultural heritage has often been regarded as the long neglected area of international cultural heritage law”).

and Cultural Organization (UNESCO), and by countries such as the United States, have been primarily focused on the tangible aspects of culture. However, this focus changed on October 17, 2003 in Paris, France, when UNESCO delegates representing 190 different state parties officially adopted the Convention for the Safeguarding of the Intangible Cultural Heritage,⁵ UNESCO's first convention devoted entirely to the subject of the intangible aspects of culture, thus remedying the historical "blindness concerning the importance of safeguarding" intangible cultural heritage.⁶

This Convention specifically, as well as the idea of providing protection to intangible cultural heritage generally, has been met by scholars with both praise and criticism. For example, one scholar extolling the benefit of the Convention's flexible, broad-based approach stated,

[a]fter several years of effort, there now exists a framework that can serve the participatory states, providing as much assistance as they wish to safeguard their intangible cultural heritage, thanks to a Convention that excludes rigidity and tries to relieve their own efforts thanks to the solidarity of the international community.⁷

On the other hand, much criticism has been directed at the primary mechanism that the Convention utilizes to preserve

5. Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003, <http://www.unesdoc.unesco.org/images/0013/001325/132540e.pdf>. [hereinafter Intangible Convention].

6. Karin Czermak, et.al, *Preserving Intangible Cultural Heritage in Indonesia: A Pilot Project on Oral Tradition and Language Preservation* 2, http://www.sil.org/asia/ldc/parrallel_papers/unesco_jakarta.pdf. Indeed, Mohammed Bedjaoui, who had a role in developing the 2003 UNESCO Convention noted, "we were the tailors who did our best to create the desired custom-made garment adequately to clothe intangible heritage that up until now was dressed in rags when it was not left simply unclothed." Mohammed Bedjaoui, *The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles*, 56 MUSEUM INT'L 150, 151 (2004).

7. Bedjaoui, *supra* note 6, at 151.

intangible cultural heritage—inventory systems. For example, in response to the Convention's support of inventory systems, noted professor and author Michael Brown argued, "living cultures cannot be reduced to diagrams on a printed page or data on a CD."

This article seeks to examine the importance of intangible cultural heritage as well as the 2003 UNESCO Convention, and analyze the Convention's likelihood of success in preserving such heritage in the United States. It will determine whether the Convention provides the best means to protect the United States' intangible culture, or whether better alternative avenues, namely intellectual property regimes, would be more successful.

Part II of this article briefly introduces several different types of cultural heritage as well UNESCO's early efforts to protect tangible cultural heritage.⁹ It also examines the actions that the United States has taken over the years to safeguard the nation's tangible cultural heritage.¹⁰ Part II then concludes with an examination of the relatively recent efforts that the international community has taken to protect the world's intangible cultural heritage, focusing particularly on UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.¹¹

Finally, Part III evaluates the different possible mechanisms available to protect intangible cultural heritage and concludes that the Convention, due to its broad-based, multi-faceted approach, has the best possible chance at protecting intangible cultural heritage within the United States.¹²

II. BACKGROUND

This section begins by defining the term "cultural heritage," and by looking at several different categories encompassed by this

8. Michael F. Brown, Safeguarding the Intangible, Cultural Commons—The Meeting Place for Culture and Policy, <http://www.culturalcommons.org/comment-print.cfm?ID=12> (last visited April 23, 2006).

9. See *infra* notes 18–50 and accompanying text.

10. See *infra* notes 51–65 and accompanying text.

11. See *infra* notes 89–102 and accompanying text.

12. See *infra* notes 106–221 and accompanying text.

term.¹³ It then introduces the UNESCO organization and describes its early efforts at bringing awareness to, and providing protection for, cultural heritage.¹⁴ It details how UNESCO's early efforts to preserve such heritage were directed at tangible aspects of culture.¹⁵ It also discusses how the United States' efforts to protect cultural heritage has similarly been focused on tangible cultural heritage as well.¹⁶ Finally, this section concludes with an examination of more recent international efforts to provide protection to intangible cultural heritage, providing a special look at UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.¹⁷

A. Defining Cultural Heritage

The term "cultural heritage" encapsulates "the entire spirit of a people in terms of its values, actions, works, institutions, monuments and sites."¹⁸ It is a broad term "applying to history, language, art, traditions, oral compositions, written works, and more."¹⁹ In fact, UNESCO lists twenty different types of heritage that fall under this broad term, including "natural sacred sites" and "languages" as well as "traditional sports and games."²⁰ These

13. See *infra* notes 18–36 and accompanying text.

14. See *infra* notes 37–50 and accompanying text.

15. See *infra* notes 44–50 and accompanying text.

16. See *infra* notes 51–65 and accompanying text.

17. See *infra* notes 89–102 and accompanying text.

18. UNESCO, Cultural Heritage Sites, http://portal.unesco.org/culture/en/ev.phpURL_ID=1535&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited April 23, 2006).

19. Sarah La Voi, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 880 (2003).

20. The twenty different types of cultural heritage listed on UNESCO's website include:

cultural heritage sites, historic cities, cultural landscapes, natural sacred sites, the underwater cultural heritage, museums, the movable cultural heritage, handicrafts, the documentary and digital heritage, the cinematographic heritage, oral traditions, languages, festive events, rites and beliefs, music and song, the performing arts, traditional medicine, literature, culinary traditions, traditional sports and

twenty different types of cultural heritage ultimately fall within several subcategories including natural cultural heritage, tangible cultural heritage, and intangible cultural heritage.²¹

1. Natural Cultural Heritage

The term “natural cultural heritage” includes “outstanding physical, biological, and geological features; habitats of threatened plants or animal species, and areas of value on scientific or aesthetic grounds or from the point of view of conservation.”²² Examples of natural cultural heritage can be found at all corners of the globe and include such famed sites as “the Red Sea, Mount Kenya National Park, [and] the Grand Canyon.”²³ All of the sites that fall within this category of cultural heritage are places that

games.

UNESCO, The Different Types of Cultural Heritage, The UNESCO List, http://portal.unesco.org/culture/en/ev.php-URL_ID=1907&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited April 23, 2006).

21. Barbara Kirshenblatt-Gimblett, *Intangible Heritage as Metacultural Production*, 56 MUSEUM INTERNATIONAL 52, 52–53 (2004). Yet while these three categories are used by scholars in discussing the different facets of cultural heritage, “there is increasing awareness of the arbitrariness of the categories and their interrelatedness.” *Id.* at 52.

22. *Id.* at 53. In 1972, UNESCO implemented the Convention Concerning the Protection of the World Cultural and Natural Heritage 135–146, <http://www.unesdoc.unesco.org/images/0011/001140/114044e.pdf#page=134> [hereinafter World & Natural Heritage Convention]. The Convention defined the term “natural [cultural] heritage” in the following manner:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Id. § 2.

23. Kirshenblatt-Gimblett, *supra* note 21, at 53.

contain “special characteristics, beauty, or some other [significant] value.”²⁴ Recognition and preservation of natural cultural heritage is important since cultures are shaped and forever changed by the world and resources around them.²⁵ Furthermore, “[i]n societies with no written language, . . . hills, mountains, and valleys become the libraries and cathedrals that reflect cultural achievement.”²⁶ Because of its significance, UNESCO has devoted considerable attention to natural cultural heritage. For example, in 1972 UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage designed to engage in the conservation and protection of such heritage.²⁷

2. *Tangible Cultural Heritage*

Perhaps the most well-known form of cultural heritage is tangible cultural heritage, a term that includes objects such as monuments, artwork, and sites of “historical, aesthetic, archaeological, scientific, ethnological, or anthropological value.”²⁸ Examples of such heritage include the pyramids of Egypt, Native American pottery, and cave paintings. Tangible culture is the physical manifestation of the products utilized by a cultural group, the study of which can provide great insight and illumination about the intricacies of that particular culture. Therefore, it is essential to protect such heritage. It is thus understandable that leaders in the international community, like the UNESCO organization, as well as countries like the United States, have devoted much time and attention to this particular

24. *Id.*

25. For example, “[a]s James Galarrwuy Yunupinga, chairperson of the Northern Land Counsel, explains, ‘My land is mine only because I came in spirit from that land, and so did my ancestors of the same land...My land is my foundation.’” Darrell Addison Posey, *Selling Grandma: Commodification of the Sacred Through Intellectual Property Rights*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY, 202 (Elazar Barkan & Ronald Rush, eds. 2002).

26. *Id.* at 207.

27. World & Natural Heritage Convention, *supra* note 22 .

28. Kirshenblatt-Gimblett, *supra* note 21, at 52.

form of cultural heritage over the years, more so than to any other type of cultural heritage.²⁹

3. *Intangible Cultural Heritage*

Intangible cultural heritage is equally as important in terms of providing insight and knowledge about a cultural group. Such heritage includes “performances such as dance, song and story as well as knowledge systems—the diverse ways in which people understand the world around them, their language, cosmology and spiritual beliefs, even traditional systems of healing.”³⁰ Examples of such heritage listed on UNESCO’s website include:

the oral traditions and expressions of the Aka Pygmies of Central Africa, and the Hudhud Chants of the Ifugao in the Philippines; performing arts like the Royal Ballet of Cambodia; social practices, rituals and festive events like the carnival of Binche in Belgium, the Indigenous Festivity Dedicated to the Dead in Mexico, or the Vanuatu Sand Drawings; knowledge and practices concerning nature and the universe such as the Andean Cosmivision of the Kallawaya in Bolivia; traditional craftsmanship like Woodcrafting of the Zafimaniry in Madagascar, or cultural spaces such as the Jemaa-el-Fnâ Square in Morocco or the Boyson District in Uzbekistan.³¹

29. See *infra* notes 44–50 and accompanying text for a discussion of UNESCO’s previous efforts to preserve tangible cultural heritage; See also *infra* notes 51–65 for a description of the United States’ prior efforts to safeguard the nation’s tangible cultural heritage.

30. Anita Smith, *Protecting Intangible Heritage—Anita Smith Defines Intangible Heritage* 1 (2002), <http://home.vicnet.net/au/museaust/insite/anita%20smith.pdf>.

31. UNESCO, *Frequently Asked Questions: Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) 2. Can you give examples of intangible cultural heritage?, <http://portal.unesco.org/culture/en/ev.php->

As the examples above clearly demonstrate, intangible cultural heritage comes in various forms and plays a large and important part in establishing a cultural group's identity. Therefore, it is important that the national and international communities make concerted efforts to study and preserve such heritage. UNESCO's recent efforts to do so are thus commendable.³²

4. *The Relationship Between Tangible and Intangible Cultural Heritage*

Throughout history, the protections afforded to tangible and intangible cultural heritage in the national and international arenas have differed greatly. However, the inequitable treatment of these two different types of cultural heritage is illogical due to the interrelatedness of tangible and intangible cultural heritage. Indeed, these two aspects of cultural heritage should not be thought of as discrete, unrelated categories. Rather, as one scholar has noted, it is impossible to study one type of culture without acknowledging the existence and importance of the other.³³ That is because “[a]ll kinds of culture is, in the earliest stage, intangible.”³⁴ For example, the knowledge (intangible heritage) passed down from generation to generation as to how to construct and maintain shelter (tangible heritage) effectively transforms intangible cultural heritage into a concrete, tangible form.³⁵

Furthermore, both tangible and intangible heritage are crucial to the study and understanding of different cultural groups. If one were to study a cultural group's tangible heritage and ignore the group's intangible heritage (or vice versa), that study would

URL_ID=21572&URL_DO=DO_TOPIC&URL_SECTION=201.html.

32. See *infra* notes 69–102 and accompanying text.

33. Ito, *supra* note 3.

34. *Id.*; see also, Mounir Bouchenaki, *The Interdependency of the Tangible and Intangible Cultural Heritage* 2, <http://www.international.icomos.org/victoriafalls2003/papers/2%20-%20Allocation%20Bouchenaki.pdf>. (stating that “intangible cultural heritage should be regarded as the larger framework within which tangible heritage takes on shape and significance”).

35. Ito, *supra* note 3.

provide an incomplete picture regarding the intricacies and dynamics of that group. That is why Article 7 of UNESCO's newly passed Universal Declaration on the Protection and Promotion of the Diversity of Cultural Expressions boldly proclaims that "heritage *in all its forms* must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity and to inspire genuine dialogue among cultures."³⁶

*B. The Birth of UNESCO and the United States' Relationship
With the Organization*

UNESCO, a specialized agency of the United Nations, came into existence on November 16, 1945 when representatives from thirty-seven different countries came together in London, England, and signed UNESCO's Constitution.³⁷ UNESCO's overall purpose was "to build peace in the minds of men"³⁸ through the use of educational and scientific efforts in order to "create a dialogue based upon respect for shared values and the dignity of each civilization and culture."³⁹ Through the use of its various Conventions, Recommendations, and supplementary programs, UNESCO has been an unstoppable and influential force in bringing awareness to, and providing protection for, all aspects of cultural heritage. Since its inception, membership in UNESCO has increased tremendously, and as of March 2005, UNESCO

36. Universal Declaration on the Protection and Promotion of the Diversity of Cultural Expressions § 7, <http://www.unesdoc.unesco.org/images/0014/001429/142919e.pdf> (emphasis added).

37. UNESCO, What it Is and What it Does 1, <http://unesdoc.unesco.org/images/0013/001315/131585e.pdf>. After UNESCO's Constitution was ratified by the requisite twenty signatories, UNESCO went to effect on November 4, 1946.

38. *Id.*

39. UNESCO, About UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited April 23, 2006). As UNESCO's Constitution eloquently recognizes, "[s]ince wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed." UNESCO, What it Is and What it Does, *supra* note 37.

boasts 191 Member States.⁴⁰

The United States was “a founding member of UNESCO”; however, over the years, the United States has had a somewhat rocky and tempestuous relationship with the organization.⁴¹ This tumultuous relationship ultimately caused the United States to withdraw from UNESCO in 1984.⁴² However, on September 12, 2002, President George W. Bush addressed the United States General Assembly and announced the United States’ renewed commitment to the UNESCO organization stating, “[a]s a symbol of our commitment to human dignity, the United States will return to UNESCO. This organization has been reformed and America will participate fully in its mission to advance human rights, tolerance, and learning.”⁴³ Thus, since 2002 the United States has reestablished itself as an active and vocal member of the UNESCO organization.

C. UNESCO’s Early Efforts to Safeguard the World’s Tangible Cultural Heritage

UNESCO’s early efforts to safeguard the world’s cultural heritage were mainly directed at preserving tangible aspects of culture. For example, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict’s referenced the term “cultural property.” The Hague Convention’s definition of the term clearly focused on tangible cultural property such as “monuments of architecture, . . . archaeological sites, . . .

40. About UNESCO, *supra* note 39.

41. United States Bureau of International Organizations Affairs, The United States Rejoins UNESCO 1, http://www.amb-usa.fr/usunesco/FS_UNESCO.pdf.

42. Fact Sheet, The White House, Office of the Press Secretary, United States Rejoins UNESCO, <http://www.state.gov/p/io/fs/2002/13482.htm> [hereinafter Fact Sheet]. The United States allegedly withdrew from the organization to protest UNESCO’s “growing politicization, anti-Western bias, rampant mismanagement, and advocacy of policies that undermine freedom of the press and free markets.” Brett D. Schaefer, *Not the Time for the United States To Rejoin UNESCO*, available at <http://www.heritage.org/Research/InternationalOrganizations/BG1405.cfm> (last visited April 23, 2006).

43. Fact Sheet, *supra* note 42.

works of art, . . . [and] books. . .”⁴⁴ Primarily a response to the devastation wreaked on tangible cultural heritage by German forces during World War II,⁴⁵ the Hague Convention understandably devoted its attention to artworks and other forms of tangible cultural heritage, because historically, this type of culture had been shown to be especially vulnerable to misappropriation and destruction during times of war.

UNESCO later renewed its efforts to protect tangible cultural heritage in its 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁴⁶ Like the Hague Convention, this 1970

44. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, §1(a) (1954), <http://unesdoc.unesco.org/images/0008/000824/00082464mb.pdf>. The Hague Convention’s definition of cultural property in its entirety reads:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centers containing monuments.

Id. § (a)-(c).

45. See John Henry Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULT. PROP. 18–19 (2005). During World War II, Nazi forces, under the direction of Adolf Hitler, “engaged in a highly organized campaign of art plunder.” *Id.* at 18. This campaign essentially resulted in a plunder of European art. *Id.* at 19. While some works of stolen art were photographed and recorded in thirty-nine separate volumes by Alfred Rosenberg, the Nazi official in charge of this operation, the majority of stolen works were not. *Id.* In fact, it is estimated that “[i]f the entire body of loot had been photographed and catalogued it would have run to about 300 volumes.” *Id.*

46. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),

Convention also used the term cultural property. As the title suggests, this Convention sought to protect cultural property by putting a stop to the illicit interstate transfer of such property. The property that the Convention sought to protect was strictly tangible cultural property such as “products of archaeological excavations; . . . elements of artistic or historical monuments; . . . pictures, paintings and drawings; . . . original works of statuary art and sculpture” and the like.⁴⁷ The Convention’s focus on the tangible aspects of culture resulted from the fact that only tangible cultural heritage can be subject to clear import and export controls.⁴⁸

<http://www.unesdoc.unesco.org/images/0011/001140/00114046e.pdf#page=130>

The full definition that the Convention provides for the term “cultural property” is as follows:

- (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

Id. § 1.

48. The United States ratified the 1970 Convention and implemented Cultural Property Implementation Act (CPIA) in 1983 to achieve UNESCO’s

Finally, in 1972, UNESCO implemented the Convention for the World Cultural and Natural Heritage.⁴⁹ This Convention had a two-prong goal—to protect the world’s cultural heritage as well as its natural heritage. While this Convention used the term “cultural heritage” instead of “cultural property,” its focus remained on tangible heritage. In particular, the Convention used the term cultural heritage to refer to monuments, groups of buildings, and sites which were all clearly tangible.⁵⁰

As these conventions demonstrate, UNESCO has made a concerted effort to protect the world’s tangible cultural heritage

objective of safeguarding cultural heritage by carefully monitoring and controlling the import and export of cultural objects. 19 U.S.C. §§ 2601 et seq (2000). Like the 1970 UNESCO Convention, the CPIA applies solely to tangible cultural heritage. Specifically, the CPIA applies to “objects” of archeological and ethnological interest. The CPIA defines an object of archeological interest as something that “(I) is of cultural significance; (II) is at least two hundred and fifty years old; and (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water. . .” *Id.* § 2601(2)(D)(i). In addition, the CPIA defines an object of ethnological interest as “(I) the product of a tribe or nonindustrial society, and (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origin, development, or history of that people.” *Id.* § 2601(2)(D)(ii).

49. World & Natural Heritage Convention, *supra* note 22.

50. *Id.* § 1. The Convention defined the terms “monuments,” “groups of buildings” and “sites” which made up the broader term “cultural heritage” as follows:

For the purposes of this Convention, the following shall be considered as “cultural heritage” : Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; Sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id.

over the years. While UNESCO's actions are thus commendable, the conventions also demonstrate a lack of action on the part of UNECO on behalf of intangible cultural heritage. This lack of attention directed toward intangible aspects of culture has been manifested at local levels as well, as countries like the United States have devoted significantly more time, energy, and resources to protect their tangible cultural heritage, and have thus far largely forsaken their intangible cultural heritage.

D. The United States' Legislative Efforts To Protect the Nation's Tangible Cultural Heritage

Throughout the history of the United States, our government has demonstrated a keen awareness about the importance of cultural heritage. However, like the UNESCO organization, the United States' efforts have similarly focused on tangible cultural heritage at the expense of the nation's bountiful intangible cultural heritage. Indeed, since 1909, all of the United States' legislative efforts to preserve the nation's cultural heritage have singularly focused on its tangible cultural heritage.

The United States first turned its attention to its tangible cultural heritage in 1909 when Congress passed the Antiquities Act.⁵¹ This Act seeks to protect tangible cultural heritage within the United States such as "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States."⁵² The goal of the Act is to protect tangible heritage by regulating archeological sites and by controlling the disposition of historical objects.⁵³ In particular, the

51. 16 U.S.C. §§ 431-433 (2000); *see also* Mary Lynn Murphy, *Assessing NAGPRA: Analysis of its Success From a Historical Perspective*, 25 SETON HALL LEGISLATIVE J. 499, (2001) (noting that "[t]he Antiquities Act of 1906 was one of the first laws passed by Congress to protect the *physical* cultural property of indigenous cultures) (emphasis added).

52. 16 U.S.C. § 431.

53. 16 U.S.C. § 432 specifically provides:

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be

Act requires that anyone seeking to engage in excavation endeavors receive a permit from the government and mandates that newly discovered tangible cultural objects be allocated to museums.⁵⁴ Furthermore, the Act imposes penalties on any person who fails to abide by its provisions.⁵⁵

Several decades later, Congress passed the Historic Sites, Buildings, and Antiquities Act.⁵⁶ This Act reflects the United States' "national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."⁵⁷ This Act charges the Secretary of the Interior with the responsibility of engaging in a variety of preservation efforts to protect important aspects of the nation's tangible cultural heritage.⁵⁸ Efforts include restoring

granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

54. *Id.*

55. The Antiquities Act mandates:

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court. 16 U.S.C. § 433.

56. 16 U.S.C. §§ 461–467 (2000). The Historic Sites, Buildings, and Antiquities Act was enacted in 1935.

57. 16 U.S.C. § 461.

58. Specifically, the Act mandates that the Secretary of the Interior: Secure, collate, and preserve drawings, plans, photographs, and other data of historic and archaeological sites, buildings, and objects. . . . Make a survey of historic and archaeological

deteriorating pieces of tangible heritage, conducting research into the impressive histories of notable pieces of tangible cultural heritage, and establishing educational endeavors to inform the American public about tangible culture, an important part of the nation's cultural heritage.

Congress later renewed its efforts to preserve notable objects of tangible cultural heritage within the United States in 1966 when it passed the National Historic Preservation Act.⁵⁹ This Act seeks to preserve tangible aspects of culture such as “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture” by placing them on a national Register.⁶⁰ The Register was designed to raise awareness toward aspects of the United States' tangible cultural heritage in need of special protection as well as to raise funds to be used toward preservation efforts.

Finally, several years later, in 1979, Congress enacted the Archaeological Protection Act (ARPA), which is closely related to

sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States. . . . Make necessary investigations and researches in the United States relating to particular sites, buildings, or objects to obtain true and accurate historical and archaeological facts and information concerning the same. . . . Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and properties of national historical or archaeological significance and where deemed desirable establish and maintain museums in connection therewith. . . . Erect and maintain tablets to mark or commemorate historic or prehistoric places and events of national historical or archaeological significance. . . . [and] Develop an educational program and service for the purpose of making available to the public facts and information pertaining to American historic and archaeological sites, buildings, and properties of national significance.

16 U.S.C. § 462.

59. 16 U.S.C. §§ 470 (2000).

60. *Id.* §470a(1)(A). See *infra* notes 205–215 and accompanying text for a discussion of the National Register of Historic Places.

the Antiquities Act.⁶¹ This Act is devoted to a specific type of tangible cultural heritage—archaeological resources—which Congress deemed an “irreplaceable part of the Nation’s heritage.”⁶² The Act defines the term “archaeological resource” as “any *material* remains of past human life or activities which are of archaeological interest.”⁶³ Similar to the Antiquities Act, ARPA seeks to protect tangible heritage by regulating excavation of archeological resources⁶⁴ as well as the disposition of such resources.⁶⁵

All of these efforts illustrate the United States’ concern with the nation’s tangible cultural heritage. Congress has allocated much time and many resources over the years to preserve the nation’s tangible heritage. Unfortunately, however, Congress has not acted to preserve an equally important part of the nation’s heritage—its intangible cultural heritage. Nevertheless, despite the lack of national action taken on behalf of intangible cultural heritage, many countries throughout the world have recently begun to

61. 16 U.S.C. §§ 470aa-470ll (2000); *see also* PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 617 (2004) (explaining that ARPA was enacted to remedy perceived deficiencies in the Antiquities Act.) Though ARPA essentially supersedes the Antiquities Act, the Antiquities Act remains valid law.

62. 16 U.S.C. § 470aa(a)(1).

63. 16 U.S.C. § 470bb(1) (emphasis added). The Act notes that the term “archeological resource” includes objects like “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.” *Id.* Notably, the Act contains an age requirement specifying that “[n]o item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.” *Id.*

64. 16 U.S.C. § 470cc(a). ARPA requires people to apply for “a permit to excavate or remove any archaeological resource located on public lands or Indian lands and to carry out activities associated with such excavation or removal.” *Id.*

65. 16 U.S.C. § 470dd (providing that “[t]he Secretary of the Interior may promulgate regulations providing for . . . the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands. . .”).

devote attention to this important form of heritage. This newfound attention toward intangible cultural heritage is due in large part to UNESCO's efforts over the past several decades to raise international awareness about intangible aspects of culture.

E. UNESCO's Early Efforts to Safeguard the World's Intangible Cultural Heritage

Over the past several decades, UNESCO has engaged in several efforts to protect intangible

cultural heritage throughout the world. UNESCO's first effort was its 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore.⁶⁶ UNESCO followed up this effort by implementing two separate supplementary programs to raise international awareness about the importance of intangible cultural heritage.⁶⁷ Finally, UNESCO's efforts culminated with the implementation of its 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.⁶⁸

1. UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore

UNESCO's strict devotion to tangible cultural heritage continued for many years. Indeed, it was not until 1989 that UNESCO adopted an official policy toward aspects of culture that were intangible. That year, UNESCO opened the door that allowed for dialogue regarding the importance of intangible cultural heritage and adopted its Recommendation on the Safeguarding of Traditional Culture and Folklore.⁶⁹ "Folklore" as defined by the UNESCO Recommendation includes:

[T]he totality of tradition-based creations of a cultural community, expressed by a group or

66. See *infra* notes 69–74 and accompanying text.

67. See *infra* notes 75–88 and accompanying text.

68. See *infra* notes 89–102 and accompanying text.

69. Recommendation on the Safeguarding of Traditional Culture and Folklore (1989), <http://unesdoc.unesco.org/images/0008/000846/00084696e.pdf#page=242>.

individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.⁷⁰

This Recommendation was the result of UNESCO's realization that "folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity."⁷¹ The Recommendation also resulted from UNESCO's acknowledgement of the "fragility" of folklore specifically, and of intangible cultural heritage generally, as well as the need for steps to protect such heritage.⁷² While this Recommendation represented a significant milestone by virtue of being the first UNESCO instrument to deal with intangible cultural heritage, it had little practical effect. Indeed, it has been described by critics as an "ill-defined," "soft" international document" that ultimately "had little impact around the globe."⁷³ Because the impact of this Recommendation was not strong, and because the protection of intangible cultural heritage was thought to be a crucial to the preservation of culture overall, UNESCO later renewed its efforts to protect intangible cultural heritage by implementing several programs dedicated to the preservation of such heritage as well as a new Convention in 2003.⁷⁴

2. UNESCO's Supplementary Programs to Safeguard Intangible Cultural Heritage

Despite the failure of the 1989 Recommendation, UNESCO continued its efforts to protect intangible cultural heritage. In

70. *Id.* § (B)(a).

71. *Id.* § (B).

72. *Id.*

73. Richard Kurin, *UNESCO Considers Draft for Intangible Cultural Heritage Convention*, 23 *TALK STORY* 8–9 (2003).

74. See *infra* notes 77–102 and accompanying text.

particular, UNESCO implemented two separate programs over the years that have succeeded in bringing awareness to the world's intangible cultural heritage: the Living Human Treasures Program⁷⁵ and The Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity Program.⁷⁶ While these two programs are aimed at accomplishing the same goal—safeguarding intangible heritage—they approach this goal in separate ways.

a. The Living Human Treasures Program

The Living Human Treasures Program was implemented in 1993 by UNESCO to “encourage Member States to grant official recognition to exceptionally talented tradition bearers and craftspeople and to encourage the transmission of their knowledge, know-how and skills to the younger generations.”⁷⁷ UNESCO uses the term “living treasures” to refer to persons that play an important part in the preservation their cultural group’s intangible cultural heritage. In particular, the term “living human treasures” is defined by UNESCO as

persons who possess to a very high degree the knowledge and skills required for performing or creating specific elements of the intangible cultural heritage that the Member States have selected as a testimony to their living cultural traditions and to the creative genius of groups, communities and individuals present in their territory.⁷⁸

Living human treasures are crucial to the maintenance, transmission, and preservation of intangible cultural heritage. Indeed, as one writer noted, “[i]n Africa, when an old person dies a

75. See *infra* notes 77–82 and accompanying text.

76. See *infra* notes 83–88 and accompanying text.

77. UNESCO, Living Human Treasures, http://portal.unesco.org/culture/en/ev.phpURL_ID=2243&URL_DO=DO_TOPI C&URL_SECTION=201.html (last visited April 23, 2006).

78. *Id.*

library burns down.”⁷⁹

As a result, UNESCO strongly encourages countries to establish national living treasure programs because “one of the most effective ways to achieve the sustainable safeguarding of the intangible cultural heritage would be to guarantee that the bearers of that heritage continue to further develop their knowledge and skills and transmit them to younger generations.”⁸⁰ These programs would allow member states to officially recognize persons who play a vital role in sustaining, as well as in transmitting, their culture’s intangible cultural heritage and to provide grants or subsidies to such persons.⁸¹ Another important component of these programs would be that they would “encourage younger people to learn and acquire the knowledge and skills required for the enactment or creation of specific elements of the intangible cultural heritage by providing them with recognition and support, and national or international recognition.”⁸² Thus, these programs act to ensure that the intangible cultural heritage of groups is maintained by focusing on the importance that people play in the transmission and preservation of such heritage.

b. The Proclamations of Masterpieces Program

UNESCO followed up the Living Human Treasures Program with the adoption of the Proclamations of Masterpieces Program in

79. Georges Condominas, *Researching and Safeguarding the Intangible Heritage*, 56 *MUSEUM INT’L* 21, 23 (2004).

80. UNESCO, Guidelines for the Establishment of National “Living Human Treasures” Systems 2, http://portal.unesco.org/culture/en/file_download.php/1422690320114549c199903cf8ba93f9Guidelines_lht.pdf.

81. *Id.* at 3. The Guidelines note that

[t]he principle reward for a Living Human Treasure is public recognition. To ensure this, an award should be granted at a formal ceremony presided over by a national high-ranking dignitary, involve bestowing a distinctive emblem, and preferably be linked with a programme of activities revealing and celebrating the cultural heritage for which a Living Human Treasure has been appointed.

Id. at 8.

82. *Id.* at 4.

1997. UNESCO created the Masterpieces Program because it “wished to extend protection to intangible cultural heritage, fragile and perishable but essential for communities’ cultural identity. Creating this new international distinction was a means for UNESCO to alert the international community on the importance of taking this heritage into consideration and safeguarding it.”⁸³ This program encourages states to nominate influential and notable aspects of their culture to receive the designation of “masterpiece.” UNESCO explains that nominated “cultural expressions and spaces should be a living cultural tradition, demonstrate human creative genius, be a means of affirming the cultural identity of the communities concerned or be at risk of destruction or of disappearing.”⁸⁴ Nominated forms of intangible cultural heritage are evaluated every two years by judges using certain specific criteria, and certain nominated cultural expressions are placed on the World Heritage List.⁸⁵ Since the program’s inception, three

83. UNESCO, Proclamation of Masterpieces, http://portal.unesco.org/culture/en/ev.phpURL_ID=2226&URL_DO=DO_TOPI C&URL_SECTION=201.html (last visited March 16, 2006).

84. *Id.*

85. Peter J.M. Nas, *Masterpieces of Oral and Intangible Culture, Reflections on the UNESCO World Heritage List*, 43 CURRENT ANTHROPOLOGY 139 (2002). The criteria used in “assessing the value of the heritage in question” includes:

its outstanding value as a masterpiece of the human creative genius; its roots in the cultural tradition or cultural history of the community concerned; its role as a means of affirming the cultural identity of the peoples and cultural communities concerned, its importance as a source of inspiration and intercultural exchange and as a means of bringing peoples or communities closer together, and its contemporary cultural and social role in the community concerned; excellence in the application of the skill and technical qualities displayed; its value as a unique testimony of a living cultural tradition; the risk of its disappearing due either to the lack of means for safeguarding and protecting it or to processes of rapid change, or to urbanization, or to acculturation.

UNESCO, Regulations Relating to the Proclamation By UNESCO of Masterpieces of the Oral and Intangible Heritage of Humanity 28, http://www.unesco.org/culture/intangible-heritage/files/common/rightcolumn/ressource_home/guide_annexe1>en.pdf [hereinafter Regulations of Masterpieces].

different lists have been compiled, and ninety different cultural “masterpieces” have been officially recognized.⁸⁶ This program ultimately serves to “pay tribute to outstanding masterpieces of the oral and intangible heritage of humanity,” thereby bringing the attention of the world to intangible cultural heritage, as well as instilling a sense of national and international pride in such heritage.⁸⁷

These two programs established by UNESCO ultimately have the same goal—to bring the public’s attention to the world’s valuable intangible cultural heritage as well as to the dangers that face such heritage. Thus far, they have certainly succeeded in doing so.⁸⁸ Because the focus and goals of these two programs parallel those voiced in the 2003 Convention, states can utilize these programs in addition to the 2003 Convention, thereby potentially increasing the effectiveness of the Convention.

F. UNESCO and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage

On October 17, 2003 in Paris, France, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage. This Convention was significant because it “marked the first formal step [since the 1989 Recommendation] toward redressing the imbalance that existed between the recognition of tangible and intangible cultural heritage.”⁸⁹ The United States notably abstained from voting on the Convention and has not

86. World Heritage lists were compiled in 2001, 2003 and 2005. See <http://www.unesco.org/culture/intangible-heritage>, the official website for the Masterpiece Program for a listing of the ninety different cultural “masterpieces” that have been recognized.

87. Regulations of Masterpieces, *supra* note 85, at 26.

88. UNESCO, International Conference, Globalization and Intangible Cultural Heritage 18 (2004), <http://www.unesdoc.unesco.org/images/0014/001400/140090E.pdf>. [hereinafter Globalization and Intangible Heritage Conference]. Koichiro Matsuura, the Director-General of UNESCO noted that the Proclamations “have resulted in an extraordinary increase in people’s awareness of the importance of intangible cultural heritage—and, more to the point, not only their own—and the need to safeguard it.” *Id.*

89. Seok-yeong, *supra* note 2, at 34.

undertaken any steps to implement any of the Convention's recommendations. Nevertheless, the Convention has received much international support and has since been ratified, accepted, or approved by thirty-two different countries.⁹⁰

This Convention resulted from the realization of several factors: the importance of intangible cultural heritage, the interdependence between intangible and tangible cultural heritage, and the grave danger that globalization poses to historically vulnerable intangible cultural heritage.⁹¹ The Convention has four listed purposes: (1) to provide protection for intangible cultural heritage; (2) to encourage respect for such heritage; (3) to make people aware of the importance of intangible cultural heritage; and (4) to encourage countries to cooperate in their efforts to safeguard such heritage.⁹²

The 2003 Convention defines the term "intangible cultural heritage" as "the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts

90. Convention on the Safeguarding of the Intangible Cultural Heritage, Paris, 17, October 2003, http://portal.unesco.org/la/convention_p.asp?language=E&KO=17116. These thirty-two countries include: Algeria, Mauritius, Japan, Gabon, Panama, China, Central African Republic, Latvia, Lithuania, Belarus, Republic of Korea, Seychelles, Syrian Arab Republic, United Arab Emirates, Mali, Mongolia, Croatia, Egypt, Oman, Dominica, India, Viet Nam, Peru, Pakistan, Bhutan, Nigeria, Iceland, Mexico, Senegal, Romania, Estonia, Luxembourg. *Id.*

91. Intangible Convention, *supra* note 5, at §1(a)-(d). Many scholars have recognized that globalization, in particular, poses a large threat toward the intangible aspects of culture. For example, one author thoughtfully noted that:

[p]aradoxically, it is precisely in the context of increasing globalization that more and more peoples and communities of the world have begun to recognize the importance of their cultural heritage—whether tangible or intangible—as a contribution to the world's cultural diversity. Communities in every land have come to realize that their cultural heritage, which is by nature fragile, plays a crucial role in their identity and that their engagement in safeguarding activities contributes to a sense of continuity. As a result, while globalization has undeniably contributed to the dissemination of cultures, its effects on cultural diversity can, if we are not careful, be negative.

Globalization and Intangible Heritage Conference, *supra* note 88.

92. Intangible Convention, *supra* note 5, at § 1.

and cultural spaces associated therewith—that communities, groups, and in some cases, individuals recognize as part of their cultural heritage.”⁹³ Based on this definition, this Convention clearly applies to a broader array of cultural heritage than did the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore.⁹⁴ In addition, this definition also illustrates the recognition of the relationship between tangible and intangible aspects of culture since it protects practices and expressions of intangible culture as well as the tangible instruments and objects associated with such practices and expressions.⁹⁵

As the title of the Convention indicates, its overall primary purpose is to safeguard intangible cultural heritage. The primary mechanism endorsed by UNESCO to do so is through the implementation of inventory systems that are to be established and maintained by individual State Parties.⁹⁶ The Convention and the inventory systems that UNESCO supports is modeled after the program that Japan has successfully implemented and utilized to preserve its own rich history of intangible cultural heritage.⁹⁷ However, an equally important aspect of the Convention is its recommendation that countries establish holistic, individualized programs to study and conserve their intangible cultural heritage.⁹⁸

93. *Id.* § 2(1). This definition is broad and encompasses “(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; social practices, rituals and festive events; (c) knowledge and practices concerning nature and the universe; (d) traditional craftsmanship.” *Id.* § (2).

94. *See supra* note 70 and accompanying text.

95. Intangible Convention, *supra* note 5, at § 2(1).

96. *Id.* § 12(1). The Convention states: “To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.” *Id.*

97. Richard Kurinoo, UNESCO Votes New Intangible Cultural Heritage Convention, <http://www.aaanet.org/press/an/0312pa-news.htm> (last visited April 23, 2006); see also *infra* notes 198–201 for a discussion of the Japanese program.

98. Intangible Convention, *supra* note 5, at §13. The Convention states:

To ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory, each State Party shall endeavour to:(a) adopt a general policy aimed at promoting the function of the intangible cultural

In particular, the Convention urges member states to create specialized bodies to adopt and carry out individual policies to preserve each state's intangible cultural heritage.⁹⁹ In addition to enforcing policies, this body would also be charged with the responsibility of studying the country's intangible cultural heritage.¹⁰⁰ The Convention also encourages states to develop legal and administrative instruments that will protect intangible cultural heritage, yet that will still provide access to such heritage for the purposes of studying and understanding that heritage.¹⁰¹ Finally, the Convention suggests that states engage in educational efforts to raise public awareness regarding the importance of intangible cultural heritage as well as the potential dangers that exist to destroy such heritage.¹⁰² These additional measures endorsed by the UNESCO organization would serve to strengthen and perhaps increase the effectiveness of inventory systems in preserving intangible cultural heritage, and are thus strongly

heritage in society, and at integrating the safeguarding of such heritage into planning programmes; (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory; (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger; (d) adopt appropriate legal, technical, administrative and financial measures aimed at: (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof; (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

Id. § 13. Unlike the implementation of inventory systems, the mechanisms to preserve intangible cultural heritage outlined in Article 13 are not mandatory, but rather are simply encouraged. *Id.*

99. *Id.* § 13(a)-(b).

100. *Id.* § 13(c).

101. *Id.* § 13(d).

102. Intangible Convention, *supra* note 5, at § 14 (a)-(b).

supported by UNESCO.

III. ANALYSIS

This section first determines that it is essential to protect intangible cultural heritage.¹⁰³ It then evaluates and determines whether the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage will truly be successful in providing protection to intangible aspects of culture within the United States.¹⁰⁴ In doing so, this section also looks at other potential measures that can be used to safeguard such heritage, namely intellectual property regimes.¹⁰⁵ This section ultimately determines that while not perfect, the Convention is the best potential means to protect the United States' intangible cultural heritage.

A. Intangible Heritage Should Be Protected

There are several reasons why it is essential to engage in efforts to safeguard intangible cultural heritage. First, intangible cultural heritage is an important component of culture overall. It is intricately tied to tangible cultural heritage, which has historically been subjected to the utmost protection.¹⁰⁶ Second, intangible cultural heritage is fragile, perhaps more so than tangible aspects of culture, and has a greater chance at disappearing.¹⁰⁷ For example, UNESCO notes that languages are a “determining factor

103. See *infra* notes 106–111 and accompanying text.

104. See *infra* notes 173–221 and accompanying text.

105. See *infra* notes 114–172 and accompanying text.

106. See *supra* notes 28–30 and accompanying text.

107. See, e.g., CultureLink Network, Intangible Cultural Heritage—A Mirror of Cultural Diversity Report from Istanbul, Culturelink Network, <http://www.culturelink.org/review/38/cl38un.html> (last visited April 23, 2006) (stating that intangible cultural heritage is the “segment of culture that is most vulnerable”); see also UNESCO, Intangible Heritage, <http://www.unesco.or.id/activities/culture/56.php> (last visited April 23, 2006) (noting that “intangible cultural expressions such as oral traditions and literature, visual arts, music and performing arts especially of minority peoples are due to their means of transmission and their ephemeral character fragile to deconstruction”).

in the identity of groups and individuals”¹⁰⁸ but warns that “over 50% of the world’s 6000 languages are endangered.”¹⁰⁹ Third, intangible heritage faces danger from the globalization phenomenon. As Koichiro Matsuura, Director-General of UNESCO explains, “[i]n our time, the transmission of [intangible] heritage from generation to generation is seriously threatened by industrialization, urbanization, migration, armed conflicts, environmental deterioration, the consequences of mass tourism and other factors leading to cultural uniformity.”¹¹⁰ Fourth, members of cultural groups recognize and desire the need for this protection. For example, one Native American woman heartbreakingly remarked, “[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There’s little left that’s tangible. Now they’re taking what’s intangible.”¹¹¹ Thus, due to the incredible importance of intangible cultural heritage and the unique dangers facing such heritage, something must be done to protect the United States’ intangible heritage. The question then becomes what exactly should be done to do so. Encouragingly, there are several potential means to protect and preserve intangible cultural heritage within the United States.

B. Mechanisms to Protect Intangible Cultural Heritage

There are several potential mechanisms that are available to

108. UNESCO, Endangered Languages, http://portal.unesco.org/culture/en/ev.ph.-URL_ID=8270&URL_DO=DO_TOPIC&URL (last visited April 23, 2006).

109. *Id.* In fact, “one language disappears on average every two weeks.” *Id.* The diversity of the world’s languages is astounding: “[f]or example, the Plains Indians talk to each other by sending up small clouds of smoke; and in Africa there is the extraordinary phenomenon of drum language . . . You hear the drum in the night and it is not only music, bit a message being transmitted.” Georges Condominas, *Researching and Safeguarding the Intangible Heritage*, 56 MUSEUM INT’L 21, 27 (2004).

110. UNESCO/Japan Funds-in-Trust for the Preservation and Promotion of the Intangible Cultural Heritage 5, <http://www.unesdoc.unesco.org/images/0014/001406/140628M.pdf>.

111. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 12 (1997).

protect the United States' intangible cultural heritage. One available option is that the United States could attempt to use intellectual property law to protect such heritage.¹¹² In addition, the United States can ratify the 2003 UNESCO Convention and implement a multi-faceted program that would include the use of inventory systems, to preserve and study intangible heritage.¹¹³ While both mechanisms have their drawbacks, this article concludes that the 2003 Convention's approach has the best potential to sustain the United States' intangible cultural heritage.

1. Intellectual Property Law

Intellectual property law was “the earliest form of protection afforded to intangible heritage” throughout international community.¹¹⁴ However, over the years, most scholars have determined that intellectual property law regimes throughout the world are not sufficiently capable of providing the necessary protection to intangible heritage.¹¹⁵ Like international intellectual property regimes throughout the world, the United States' intellectual property system has several deficiencies that preclude application to intangible cultural heritage.

a. Copyright Law

One potential mechanism to protect intangible cultural heritage within the United States is copyright law. The United States Constitution allocates to Congress the “Power. . . (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . .”¹¹⁶ Congress has exercised

112. *See infra* notes 114–172 and accompanying text.

113. *See infra* notes 173–221 and accompanying text.

114. Janet Blake, *Developing a New Standard-Setting Instrument for the Safeguarding of the Intangible Cultural Heritage—Elements for Consideration* 18, <http://unesco.org/images/001237/123744e.pdf>.

115. *Id.* at 13 (noting that “the premises on which IPRs [intellectual property rights] have been developed are contradictory to the needs of much intangible heritage”).

116. U.S. CONST. art.1, § 8, cl. 8.

its power to promote the progress of science and the arts over the years by enacting several copyright statutes. The current version is the 1976 Copyright Act, which sets forth several specific requirements that must be met by an author in order to obtain copyright protection.¹¹⁷ For example, in order to be awarded a copyright an author must satisfy three separate substantive requirements.¹¹⁸ In particular, the author must demonstrate: (1) that his or her work falls within the list of appropriate copyrightable subject matter,¹¹⁹ (2) that his or her work is original,¹²⁰ and (3) that his or her work is a fixed tangible medium of expression.¹²¹

117. 17 U.S.C. § 102 (2000).

118. The statute proscribes: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* § 102 (a).

119. There are eight separate categories of copyrightable subject matter: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” 17 U.S.C. § 102.

120. “Originality in the copyright context does not require novelty. Originality for copyright purposes only requires that the work was not copied from another.” GERSTENBLITH, *supra* note 61, at 87–88. Thus, the copyright statute states:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103(b). When it comes to the originality requirement and derivative works, it is important that the derivative author contribute something new; that is simple sweat of the brow is not sufficient. *See*, Feist Publications, Inc. v. Rural Telephone Service Co, 111 S. Ct. 1282, 1295 (1991) (holding that “the 1976 revisions to the Copyright Act leave no doubt that originality, not ‘sweat of the brow,’ is the touchstone of copyright protection”).

121. According to the copyright statute:

While copyright law is well-formulated and well-established within the United States, it is arguably insufficient to protect aspects of intangible cultural heritage. Indeed, there are several discrete problems that arise in attempting to apply copyright law to intangible cultural heritage. In particular, the requirements of individual authorship, originality, and fixation pose potential problems to members of cultures seeking to preserve their intangible cultural heritage.¹²² In addition, the finite duration of copyright protection, as well as the potential issues posed the doctrine of fair use are also problematic.¹²³ Thus, if there is any hope to use copyright law to protect intangible cultural heritage, several changes would have to be made to the United States Copyright Act.

i. The Individual Authorship Requirement

The premise behind copyright law is to encourage individual creativity through the allocation of economic incentives and property rights to authors.¹²⁴ For example, as the United States

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is *sufficiently permanent or stable* to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101 (2004) (emphasis added). *See also* Blake, *supra* note 114, at 14 noting that “copyright protection extend[s] only to forms and not to ideas.”

122. *See infra* notes 124–135 and accompanying text.

123. *See infra* notes 135–141 and accompanying text.

124. According to the statute, a copyright holder has the exclusive rights:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works,

Supreme Court aptly stated in *Mazer v. Stein*, copyright law “is ‘intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; [and] ‘to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.’”¹²⁵ That is why the copyright statute requires an identifiable author.¹²⁶ Yet in many cultures, intangible cultural heritage, such as stories and rituals are passed on orally from generation to generation, and consequently, “the reality will often be that no one today knows just who was involved in the innovative expression aspect.”¹²⁷ Thus, in many cultural groups, there will be no single author to award copyright protection to, since culture is thought of as belonging to the collective group as opposed to an individual person. As one author explained,

[w]estern notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions. In indigenous society, the work is produced for the benefit of a group and the group owns and controls it. There may not be an adequate analog in the western world, but consider this: giving rights to one individual author in the indigenous community may be akin to letting one individual control the use of the Star of David or the image of Jesus on the cross.¹²⁸

In some instances, copyright law does actually award copyright protection to multiple authors. For example, the statute provides

pantomimes, and pictorial, graphic, or sculptural works...to display the copyrighted work publicly.

17 U.S.C. §106.

125. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *Washington Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

126. 17 U.S.C. § 102(a) (requiring a “original work[] of authorship”).

127. Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protecting of the Intangible Cultural Heritage of Indigenous Peoples*, 11 *CARDOZO J. OF INT’L & COMP LAW*, 633, 639 (2003).

128. Farley, *supra* note 111, at 31.

copyright protection to “joint authors”¹²⁹ so long as the authors can demonstrate an “intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹³⁰ Yet this protection is too limited, as it would not allocate copyrights to an entire cultural group.

ii. The Originality Requirement

In order to obtain a copyright, an author must establish the originality of the work to be copyrighted. This requirement, too, poses an obstacle to cultural groups seeking to protect their intangible cultural heritage. For example, in most circumstances, certain aspects of intangible cultural heritage like rituals, songs, and stories have developed within a particular group over a number of years. In fact, “to traditional people, accuracy and faithful reproduction is prized in the reinterpretation of myths and legends and sacred symbols. Originality is not valued and, in fact, is contrary to the mission of passing down ancestral teachings from generation to generation with little or no variation.”¹³¹ Thus, meeting the burden of originality may be difficult, if not impossible for cultures seeking to preserve their intangible cultural heritage.

iii. The Fixation Requirement

As established above, copyright protection in the United States is only afforded to a “fixed tangible medium of expression.”¹³²

129. 17 U.S.C. § 201(a) provides that “[c]opyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.”

130. 17 U.S.C. §101.

131. ALI_ABA, SJ049 ALI-ABA 469, 476 (2004); *see also*, Farley, *supra* note 111, at 21 (noting that while “folklore can be entirely new, it is most often directly derived from preexisting works. Folklore is the product of a slow process of creative development. It is not stagnant, but evolves slowly”).

132. 17 U.S.C. § 102(a) (stating that copyright protection is only afforded to “works of authorship fixed in any tangible medium of expression”). The statute explains that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is

However, many forms of intangible cultural heritage, like stories, songs, and rituals do not exist in any type of fixed form within certain cultural groups. In fact, it has been argued that certain groups, in order to maintain the secrecy of their intangible cultural heritage, purposely pass down cultural traditions orally in order to maintain the secrecy of those traditions.¹³³ Thus, it can rightly be said that “[t]he copyright requirement of fixation often demands a change in cultural tradition that may itself amount to forced assimilation . . . into Western culture.”¹³⁴ In fact, because the requirement of fixation is so antithetical to many indigenous communities, many westerners have taken advantage of this fact and have found ways to “fix” aspects of a group’s intangible culture, and have subsequently been awarded copyright protection for doing so.¹³⁵ Clearly, then, the fixation requirement is actually actively working against certain cultural groups in their quest to protect their intangible cultural heritage.

iv. The Limited Duration Problem

The United States Constitution mandates that copyright protection be limited to a finite period based upon the proscription that Congress may only award copyright protection “for limited Times.”¹³⁶ Thus, in the United States, copyright protection is limited to the author’s life plus seventy years.¹³⁷ While a durational limitation may be appropriate in most situations, it is clearly insufficient to protect a culture’s heritage. That is, cultural

sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

133. See *infra* note 180 and accompanying text.

134. 17 U.S.C. § 102(a).

135. Paterson & Karjala, *supra* note 127, at 638 (noting that more often than not “copyright is used to protect . . . people who appropriate and exploit oral tradition”) (quoting Cynthia Callison, *Appropriation of Aboriginal Oral Traditions, Material Culture in Flux: Law and Policy of Repatriation of Cultural Property*, U.B.C. L. REV. 165, 176–77 (Special Issue 1995)).

136. U.S. CONST. art. I, § 8, cl. 8.

137. See Lauryn G. Grant, *The Protection of Traditional or Indigenous Knowledge*, SJ049 ALI-ABA 469, 476 (noting that “[c]opyright protection lasts only for a finite period, namely, the life of the author plus 70 years in all Berne Convention countries”).

groups seeking copyright protection for their intangible heritage want protection to last indefinitely. Indeed, one reason for this is the collective identity of indigenous cultures. Because the cultural group, itself owns its culture, the protection sought by that group “is not for the benefit of individual creators but a community whose existence is not limited in time.”¹³⁸ Thus, any copyright protection that is durationally limited is clearly insufficient to protect intangible cultural heritage.

vi. The Fair Use Problem

In addition to setting forth the requirements to obtain a copyright, Congress also provided for a statutory defense against charges of copyright infringement—the doctrine of fair use. The fair use doctrine allows an author to borrow aspects from another author’s copyrighted work “for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research.”¹³⁹ The rationale for this defense is that it provides a “guarantee of breathing space within the confines of copyright” law.¹⁴⁰ That is, the fair use doctrine allows copyrighted works to

138. Farley, *supra* note 111, at 17 (quoting Model Provision for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions § 2(UNESCO-WIPO, 1985)).

139. 17 U.S.C. § 107. In full the statute provides:

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

140. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

be used to a certain extent in other creative productive endeavors.¹⁴¹ Yet, while this doctrine promotes continued creativity, it poses a real threat to certain cultural groups. For example, use of a cultural group's intangible cultural heritage would be protected if the use fell into one of the aforementioned categories. Yet to many cultural groups, the idea of outsiders appropriating aspects of their culture for any purpose, no matter how "productive" is simply unacceptable. As a result, this doctrine poses a real threat to cultures seeking to preserve their intangible cultural heritage, since appropriators will be likely, and in most cases able, to assert this defense.

vii. Copyright Focuses on Monetary Concerns

Ultimately, "[t]he purpose of copyright law is to further the public interest through the economic incentives given to authors to create."¹⁴² Yet, monetary considerations are not of utmost importance to cultural groups when it comes to protecting their intangible cultural heritage. Indeed, as one author notes, "[c]opyright law, if considered to be a purely economic instrument, would not be a sensitive enough tool to deal effectively with the management of many works of folklore [and other forms of intangible cultural heritage] considered to be spiritually significant."¹⁴³ Thus, in addition to the requirements of copyright law in the United States, the very purpose behind the law is at odds with the ultimate goals of cultural groups. It thus becomes clear that the United States' copyright law is incapable of adequately protecting the nation's intangible cultural heritage.

141. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 495 (1984) (noting that the uses provided for by the statute are importantly "productive uses").

142. GERSTENBLITH, *supra* note 61, at 147.

143. Dieter Dambiec, *Indigenous People's Folklore and Copyright Law*, Media Monitors, available at <http://usa.mediamonitors.net/content/view/full/20295> (last visited April 23, 2006).

b. Moral Rights—The Visual Artists Rights Act

In addition to providing authors with copyrights, the United States' intellectual property laws also allocate moral rights to authors in certain instances as well. The concept of moral rights is closely connected to copyright law, yet the protections afforded by moral rights differ from those provided for by the 1976 Copyright Act. Unlike copyright protection, moral rights protect the non-monetary rights of an author, and are thus highly valued by authors all over the world.

European countries have had a long history of recognizing and providing protection for an author's moral rights. For example, France has protected authors' moral rights since the nineteenth century.¹⁴⁴ International support of the notion of moral rights culminated in the Berne Convention for the Protection of Literary and Artistic Works.¹⁴⁵ This Convention was the first international instrument to recognize an author's non-economic moral rights. The Convention states:

Independently of an author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.¹⁴⁶

The Convention allocates moral rights to an author that lasts after the author's death, or "at least until the expiry of the economic rights."¹⁴⁷ While the Convention was supported wholeheartedly by many European countries, the United States was not

144. Michael Rushton, *The Moral Rights of Artists: Droit Moral ou Droit Pecuniaire?*, 22 J. CULTURAL ECONOMICS 15, 17 (1998) (noting that "[t]hrough the latter part of the 19th century the rights of attribution, integrity, withdrawal and disclosure all received recognition in French civil courts").

145. GERSTENBLITH, *supra* note 61, at 169.

146. *Id.* (quoting Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, §1 (Paris 1971)).

147. Rushton, *supra* note 144, at 16.

so supportive, and initially refused to join the Convention.

In response to the United States federal government's reluctance to recognize moral rights within the country, several individual states were proactive and enacted legislation that provided for, and protected, moral rights.¹⁴⁸ These state statutes were important, as they were the only source of moral rights within the United States for quite some time.¹⁴⁹ Without these statutes, artists could not enforce such rights, unless he or she specifically reserved these rights in a service contract.¹⁵⁰

148. GERSTENBLITH, *supra* note 61, at 169. (noting that “[d]uring the 1970s and 1980s, eleven states enacted statutes protecting artists’ moral rights”).

149. Two of the most influential state moral rights statutes were passed by California and New York. The California Art Preservation Act provides:

(c) [Mutilation, alteration, or destruction of work] (1) No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art. (2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art. (d) [Authorship] The artist shall retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art.

Cal. Civ. Code §987 (West 1982). Similar to the California model, New York's Artists' Authorship Rights Act states:

no person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public ...copies of that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances which would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

McKinney's Arts and Cultural Affairs Law §14.03 (1) (1990).

150. Before the enactment of the Visual Artists Rights Act, an artist's moral rights were not recognized in the United States, unless a state statute specifically

Finally, in 1989 the Visual Artists Rights Act (VARA), an amendment to the Copyright Act was introduced to Congress by Senator Kennedy and Senator Robert Kasten.¹⁵¹ Senator Kasten boldly spoke in support of his proposed amendment:

The Constitution of 1787 declared . . . [t]he Congress shall have the power . . . to promote the progress of Science and useful Arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discov[eries]. Today, more than 200 years later, the rights of one of our Nation's most important groups of inventors remain at risk. It is time Congress exercised its power to promote and secure the rights of America's visual artists.¹⁵²

As a result, VARA was enacted and signed into law by President George Bush in 1990, and thus for the first time, moral rights were recognized and protected by the United States federal government.¹⁵³ Under VARA, artists are given the rights of integrity and attribution. The right of attribution allows an author of a work "(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create."¹⁵⁴ The right of integrity, on the

recognized such rights. For example, in *Crimi v. Rutgers Presbyterian Church in the City of New York*, the Supreme Court of New York noted:

when a man, hereinafter referred to as a patron, contracts with an artist to paint a picture for him, of whatever nature it may be, the contract is essentially a service contract, and when the picture has been painted and delivered to the patron and paid for by him, the artist has no right whatsoever left in it...

Crimi v. Rutgers Presbyterian Church in the City of New York, 89 N.Y.S.2d 813, 818 (1949).

151. Laura W. Wooton, *Law For Law's Sake: The Visual Artists Rights Act of 1990*, 24 CONN. L. REV. 247, 263 (1991).

152. 135 Cong. Rec. S6811 (daily ed. June 16, 1989) (statement of Sen. Kaston); see also Wooton, *supra* note 151, at 364.

153. GERSTENBLITH, *supra* note 61, at 169. The enactment of VARA was the result of the United States finally joining the Berne Convention. *Id.*

154. 17 U.S.C. § 106(A)(a)(1)(A)-(B).

other hand, gives an author “the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”¹⁵⁵

The right of integrity, in particular, would greatly benefit cultural groups that object to aspects of their intangible cultural heritage (like their stories and religions) from being appropriated, modified, and utilized by outsiders. However, unlike other countries, the “United States has only a very limited notion of moral rights.”¹⁵⁶ In particular, VARA only protects works of “visual art”¹⁵⁷ and does not extend to oral traditions, rituals or other aspects of intangible cultural heritage. In addition, moral rights under VARA only last until the death of the author,¹⁵⁸ and can even be waived,¹⁵⁹ something that is likely to occur if the author has a poor bargaining position. Furthermore, in order to protect one’s work against complete destruction, the author must demonstrate that his or her work is a “work of recognized stature,”¹⁶⁰ which can be a difficult burden to meet. In addition to these limitations, VARA poses additional problems to those seeking to protect intangible cultural heritage. Specifically, since VARA is simply an amendment to the Copyright Act, all of the problems inherent in copyright law, still apply. That is, in order to qualify, the work of visual art would have to be a fixed tangible medium of expression, be original, and have an identifiable author. Thus, while the moral rights of integrity and attribution could potentially provide great protection to cultural groups seeking to protect their intangible cultural heritage, without modification, the United

155. 17 U.S.C. § 106(A)(a)(3)(A).

156. Paterson & Karjala, *supra* note 127, at 641 n.26.

157. 17 U.S.C. § 101(A). A “work of visual art” is defined as “(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer...” *Id.*

158. 17 U.S.C. § 106(A)(d)(1) (noting that the rights conferred by VARA “shall endure [only] for a term consisting of the life of the author”).

159. *Id.* § 106(A)(e)(1) (noting that an artist’s VARA rights “may be waived if the author expressly agrees to such waiver in a written instrument signed by the author”).

160. *Id.* § 106(A)(a)(3)(B) (recognizing the right of an artist “to prevent any destruction of a *work of recognized stature*”) (emphasis added).

States' moral rights regime is insufficient to protect such culture.

c. The Potential Promise of Copyright Law

It thus becomes clear that the current United States current copyright and moral rights regimes are insufficient to protect the nation's intangible cultural heritage. Indeed, as one author aptly remarked, "an attempt to protect . . . folklore works and traditional knowledge within existing intellectual property law systems is akin to fitting a square peg in a round hole."¹⁶¹ In recognition of the difficulty that the present United States copyright statute (in addition to many similar statutes in other countries) poses to cultures seeking to protect their intangible cultural heritage, the international intellectual property community has made several efforts to bring awareness to this issue and to reform current copyright requirements in order to better accommodate intangible cultural heritage.

i. Tunis Model Law on Copyright

For example, in 1976 UNESCO and the World Intellectual Property Organization (WIPO) collaborated and developed the Tunis Model Law on Copyright (Model Law).¹⁶² This model copyright law was specifically designed to allow for copyright protection for folklore and other forms of intangible cultural heritage.¹⁶³ As a result, the Tunis Model Law eliminated many of the problems inherent in copyright regimes around the globe. For example, the Model Law protects intangible cultural heritage for an unlimited length of time.¹⁶⁴ That is, unlike the United States

161. Joseph Githaiga, *Intellectual Property law and the Protection of Indigenous Folklore and Knowledge*, <http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52nf.html>.

162. Farley, *supra* note 111, at 43.

163. Githaiga, *supra* note 161 (noting that the Tunis Model Law "attempts to resolve the deficiencies [in current copyright systems] by widening the ambit of copyright law to accommodate the special features of folklore").

164. Farley, *supra* note 111, at 43 (citing Section 6(2) of the Model Act which states "[w]orks of national folklore are protected by all means . . . without limitation in time") (emphasis added).

Copyright Act, a copyright conferred under the Model Law would last indefinitely. The Model Law also addresses and remedies the fixation requirement found in the United States Copyright Act. For example, the Model Law eliminates the fixation requirement for folklore (but maintains the requirement for other works).¹⁶⁵ In addition, the Model Law confers moral rights upon persons holding a copyright for intangible cultural heritage.¹⁶⁶ Despite these benefits, the Model Law does, however, allow protection for derivative works based upon folklore and other forms of intangible cultural heritage.¹⁶⁷ Thus, the fair use defense could be potentially problematic under the Model Law as well. Nevertheless, the Model Law ultimately represents one means by which copyright law can effectively protect intangible cultural heritage in the United States. Thus far, however, the United States has not been receptive to the changes advocated by the Model Law. Perhaps this is because implementing the Model Law would require more than simply enacting legislation; rather, it would actually require an amendment to the United States Constitution to eliminate the proscription that copyrights can only be awarded for “limited Times.”¹⁶⁸

165. *Id.* Quoting comments from the Model Law stating that:
the fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage of peoples and their very nature lies in their being handed on from generation to generation orally or in the form of dances whose steps have never been recorded....Consequently,... the authors of the Model Law have made an exception to the fixation rule, particularly since, if this rule were sustained, the copyright in such works might well belong to the person who takes the initiative in fixing them.

Id.

166. Githaiga, *supra* note 161.

167. Farley, *supra* note 111, at 43. (noting that the Model Law protects “works derived from national folklore”). *Id.* (quoting Tunis Model Law on Copyright, S 2(1)(iii) (1976)).

168. The complex process for amending the United States Constitution is outlined in Article 5 of the Constitution:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing

*ii. Model Provisions for National Laws on the
Protection of Expressions of Folklore Against Illicit
Exploitation and Other Prejudicial Actions*

In 1986, the international property community, headed by WIPO, again made a concerted effort to develop a successful mechanism to protect folklore and other forms of intangible cultural heritage and ultimately established the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).¹⁶⁹ Like the Tunis Model Law, the Model Provisions eliminate a fixation requirement and allocate protection to an author for an unlimited period of time, and would thus require an amendment to the United States Constitution to be put into effect.¹⁷⁰ In addition, the Model Provisions provide for a “competent authority” to authorize folklore to be utilized by a person not holding a copyright for that folklore.¹⁷¹ This authority would be charged with the important responsibility of preventing the *unauthorized* use of intangible cultural heritage. Thus, like the Tunis Model Law, the Model Provisions shows the potential that

Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . .

U.S. CONST. art. V. Because of the complex process, amendments to the Constitution have been “few and far between.” Thomas E. Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 1 (2000). Indeed,

[b]y some estimates, there have been more than 10,000 bills introduced in Congress to amend the Constitution. Of these, only thirty-three garnered the necessary two-thirds vote in both houses and proceeded to the states, and only twenty-seven have received the necessary ratifications of three-fourths of the states. There has never been a convention for proposing amendments.

Id. at 9–10.

169. Farley, *supra* note 111, at 43.

170. *Id.* at 45.; see also *supra* note 168 and accompanying text.

171. *Id.*

copyright has to protect intangible cultural heritage. Yet, like the Tunis Model Law, the Model Provisions have not been supported by the United States and thus “have no legal force.”¹⁷²

Together, the Tunis Model Law and the Model Provisions show that with appropriate modifications, it is possible that copyright law may be an appropriate mechanism to protect the intangible aspects of culture. However, the lukewarm reception that both of these efforts have received from the United States and from other countries seems to indicate that the changes advocated by the Tunis Model Law and the Model Provisions are a long way from becoming a reality. As a result, it is necessary to look outside of copyright law to protect the nation’s intangible cultural heritage. The 2003 UNESCO Convention provides one such alternative outside of the realm of copyright law to protect the United States’ intangible cultural heritage. While not perfect, there are great benefits to the UNESCO approach, and it is time that the United States utilize that approach and implement efforts to sustain its intangible heritage.

2. The 2003 Convention and Inventory Systems

As stated above, the primary mechanism endorsed by the 2003 Convention to safeguard intangible cultural heritage is inventory systems. While inventory systems may be successful in providing useful documentation of intangible cultural heritage, thereby preserving such heritage, much criticism has been waged against the Convention because of its support of such systems. These criticisms demonstrate that there are several potential problems with inventory systems that will need to be addressed if the United States adopts the 2003 UNESCO Convention.

a. Potential Problems with Inventory Systems

Critics of the 2003 UNESCO Convention find fault with Convention’s endorsement of inventory systems. In particular, critics have cited several potential problems with respect to inventory systems: (1) the inherent difficulty of creating such

172. *Id.*

systems; (2) the potential for the use of value judgments when compiling cultural inventory lists; and (3) the possibility that cultural groups might not want to have their intangible heritage inventoried. While these are valid criticisms, they are not necessarily fatal to the success of the 2003 Convention. Indeed, the potential benefits of the Convention greatly outweigh any potential drawbacks.

i. Creating Inventory Systems Would Be Difficult

The first potential problem with inventory systems is that compiling an inventory of intangible cultural heritage is a seemingly daunting, if not, an impossible task. As noted author and professor Michael Brown argues:

one struggles to imagine the staggering bureaucratic labor required to develop such inventories in such large, multiethnic nations such as Russia, Australia, China, Canada, or the United States, each of which contains scores or hundreds of distinct cultural communities. How does one turn the complexity of even a single culture into a list?¹⁷³

This argument does seem to have merit; however, while it may be a long and arduous process to create a list of notable intangible cultural heritage, if enough people and other resources are devoted to this task, it seems likely that such an inventory can be created. Thus, the difficulty of the process should not deter any attempts to engage in documentary efforts and preserve one of the most important aspects of cultural heritage.

ii. Creating Inventory Lists Would Involve Value Judgments

Another potential drawback is that value judgments would

173. Michael F. Brown, Safeguarding the Intangible, Cultural Comment, <http://www.culturalcommons.org.comment-print.cfm?ID=12> (last visited April 23, 2006).

inevitably be made during the process of creating inventory lists to determine what forms of intangible cultural heritage are worthy to be inventoried, studied and preserved. The use of value judgments may thus result in the culture of certain minority groups being ignored and deemed less worthy of protection. For example, Professor Brown has argued that inventory systems “can lead to situations in which marginalized members of cultural communities (women, gays and lesbians, religious apostates, political dissidents) find themselves silenced by the power of the majority to represent its values and practices to the world at large.”¹⁷⁴ This argument certainly has merit. Nonetheless, the Convention encourages member states to develop multiple inventories if necessary to account for the multitude of different cultural groups within each state.¹⁷⁵ The use of numerous inventories can work to prevent the majority culture’s values from dominating those of minority groups, and to provide adequate protection to each and every culture. In addition, by working closely with minority groups in compiling inventory lists, the interests of these groups can be properly addressed and properly protected.

UNESCO, itself, has recognized and responded to this potential problem by holding an “expert meeting” on the topic of “Gender and Intangible Cultural Heritage.”¹⁷⁶ The meeting was deemed necessary upon the realization that “[t]he Convention for the Safeguarding of the Intangible Cultural Heritage and the Declaration on Cultural Diversity could be vulnerable to manipulation or dismissal of women’s participation and rights, because of the tension between cultural rights and gender equality [and] the gender-neutral language of the Convention and the

174. Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT’L J. OF CULTURAL PROPERTY, 40, 51 (2005).

175. Intangible Convention, *supra* note 5, at § 12 (1) (providing that each state shall create and maintain “one or more inventories of the intangible cultural heritage present in its territory”).

176. UNESCO, Final Report: Expert Meeting—‘Gender and Intangible Heritage,’

http://portal.unesco.org/culture/en/file_download.php/7c4d9fa826c8e4b702f7577c453f4b76Final+Report.pdf [hereinafter Final Report].

Declaration.”¹⁷⁷ In response to this issue, the representatives at the meeting developed several recommendations that seem to be especially promising. In particular, one suggestion was that “[f]emale custodians and researchers should be involved in identifying and documenting intangible cultural heritage, as well as in designing policies for the safeguarding of that heritage” to ensure that inventory lists appropriately depict the views of women toward their cultural heritage.¹⁷⁸ While this meeting only addressed the issue of gender and intangible cultural heritage, the suggestion that important members of minority groups be involved in developing inventory lists would be equally applicable to all minority groups. Allowing for the active involvement of leaders of minority groups would ensure that the views of all groups would be adequately represented, and thus result in more accurate inventory lists.

Nonetheless, it is argued that during the development of inventory systems “collisions of discrepant values are inevitable.”¹⁷⁹ That is, in creating an inventory systems, “some aspects of traditional cultures such as child marriage, female genital mutilation, and [other] acts contrary to human rights” which are nonetheless important aspects of culture to some groups “can hardly be maintained in the face of general international agreement on human rights standards.”¹⁸⁰ However, unless a group’s heritage involves a recognized human rights violation, the majority of intangible cultural heritage can and should be protected.

177. Valentine M. Moghadam & Manilee Bagheritari, SHS Papers in Women’s Studies/Gender Research: Cultures, Conventions, and the Human Rights of Women: Examining the Convention for Safeguarding Intangible Cultural Heritage, and The Declaration on Cultural Diversity 8 (2005), http://www.portal.unesco.org/shs/en/file_download.php/a08cb18b18bf8d7333fc0dc872dd14f7baaArticle.pdf.

178. Final Report, *supra* note 176, at 13.

179. Brown, *supra* note 174, at 50.

180. Lyndel V. Prott, Some Considerations on the Protection of the Intangible Heritage: Claims and Remedies, <http://www.folklife.si.edu/resources/Unesco/prott.htm> (last visited April 23, 2006).

*iii. Cultural Groups Might Not Agree To Inventory
Their Intangible Cultural Heritage*

The Convention also ignores the fact that certain cultural groups might not want to have their intangible cultural heritage inventoried. Indeed, cultural secrecy is perhaps the biggest obstacle that a cultural inventory program could face.¹⁸¹ A group's desire not to participate in inventory efforts can stem from a multitude of reactions—a desire to maintain control over its own culture, a distrust of outsiders, and a feeling that secrecy is the best means for the group to protect its culture. Many cultural groups are intensely secretive and protective of their cultural heritage generally, and of their intangible cultural heritage specifically.¹⁸² Not surprisingly, the issue of cultural secrecy has appeared in the national and international legal realm.

For example, in *Muckleshoot v. United States Forest Service*, a 1999 case involving a land dispute, the Muckleshoot Indian Tribe

181. Sarah Harding, *Cultural Secrecy and the Protection of Cultural Property*, in TOPICS IN CULTURAL RESOURCE LAW 69 (Donald Forsyth Craib, ed., 2000). Professor Harding, describing the phenomenon of cultural secrecy, stated:

Many indigenous peoples [as well as other minority cultural groups] consider sacred objects and knowledge to be limited goods that cannot be shared and disseminated without corresponding loss in power, significance, and meaning. This sacred material must remain concealed from the uninitiated both within and outside the affiliated cultural group. In addition to being an integral part of the sacredness of specific objects, stories, songs, and rituals, cultural secrecy is also an instrument for maintaining a stable social structure within some cultural groups.

Id.

182. Michael F. Brown, Safeguarding the Intangible, Cultural Comment, <http://www.culturalcommons.org/comment-print.cfm?ID=12> (noting that “many indigenous groups, fearing that their cultural heritage will be appropriated by powerful outsiders, are gravitating toward greater secrecy”).

asserted a right to cultural secrecy.¹⁸³ The land at issue held special cultural significance to the Muckleshoot Tribe and was set to be transferred by the U.S. Forest Service. Because the land tract was culturally significant to the Muckleshoot Tribe the tribe objected, alleging that “[f]or thousands of years, the ancestors of present tribal members used Huckleberry Mountain for cultural religious, and resource purposes—uses that continue to the present day.”¹⁸⁴ However, when pressed by the court to elaborate and describe the precise cultural purposes that the Muckleshoot Tribe utilized the land, the tribe refused to do so. As one author noted, the Muckleshoot’s failure to elaborate “stemmed not from neglect but rather the confidential nature of the information requested.”¹⁸⁵ Nevertheless, because of the Muckleshoot Tribe’s failure to divulge cultural secrets to outsiders, the United States Forest Service was allowed to transfer the land in question.

Similarly, in *Chapman v. Tucker*, an Australian case, an aboriginal tribe asserted a right to cultural secrecy against the Australian government.¹⁸⁶ In that case, the Australian government planned to construct a bridge through a piece of land that was significant to an indigenous aboriginal group. The group protested, claiming that the construction of the bridge would be “obscene and sacrilegious to [their] culture.”¹⁸⁷ In particular, the group alleged that this land was important for “women’s business,” but declined to elaborate upon this assertion, claiming that this information was confidential and could not be disclosed to persons outside of the group.¹⁸⁸ Because the group refused to expound upon the precise significance that the group placed upon the land at issue, the court allowed the Australian government to continue with its construction of the bridge.¹⁸⁹

183. *Muckleshoot v. United States Forest Service*, 177 F.3d 800 (1999); see also Harding, *supra* note 181, at 70.

184. *Id.* at 805; see also Harding, *supra* note 181, at 70.

185. Harding, *supra* note 181, at 71.

186. *Id.* (citing (1995) 55 FCR 316).

187. *Id.* at 72 (quoting 55 FCR 316 ¶ 17).

188. *Id.*

189. Justice O’Loughlin who presided over this case explained “‘claims of Aboriginality can be made and they may, in appropriate circumstances, be upheld. But, as the law presently stands, a time will necessarily come when

Together, these two cases illustrate the importance that certain cultural groups place upon maintaining the secrecy of their cultural practices and the great lengths that they will go to make sure that their sacred practices remain secret from outsiders. In both cases, the tribes were willing to forego their connection with culturally significant land in order to maintain the secrecy of their cultural practices.¹⁹⁰ Thus, convincing minority cultures to participate in efforts to compile inventory systems may possibly be a daunting task. Nevertheless, it is possible that it can be done. Efforts will have to be made to earn and keep the trust of minority groups. In addition, it will be necessary to involve the leaders and representatives of such groups in the inventory process at every step of the way. By doing so, groups may be more receptive to the idea of inventorying their intangible cultural heritage. In the event that certain groups may not wish to participate, however, it is important that their wishes be respected. The possibility that a full and complete inventory list may never be created should not deter the United States from preserving the heritage of all groups that are willing to share their cultures and participate in the program.

b. Benefits of the 2003 Convention

Despite the potential pitfalls of inventory systems, the 2003 Convention's proposal to safeguard intangible cultural heritage has several benefits. One benefit of the Convention is that inventory systems have been successfully utilized in other UNESCO programs as well as in other countries, and have thus far been

there must be some disclosure so that the claim can be tested.” *Id.* (quoting 55 FCR 316 ¶ 204.)

190. This result is not surprising. As Professor Sarah Harding explained:

When important cultural information is not provided because a culturally affiliated group desires that it remain secret, chances are that the resource in question will not be protected or, if appropriate, repatriated. If the information is in fact provided, not only has the culturally mandated oath of secrecy been breached with whatever consequences that entails, but the information also becomes part of the public record, thereby exposing it to further breaches.

Id. at 70.

shown to be effective in bringing attention to intangible cultural heritage, as well as in studying and preserving such heritage.¹⁹¹ In addition, the United States has successfully utilized inventory systems to preserve the nation's tangible cultural heritage, and this success bodes well for the potential for inventory systems to be used to safeguard the nation's intangible heritage.¹⁹² Finally, the Convention's broad-based approach toward preservation efforts is commendable and is more likely ensure that intangible cultural heritage will be allowed to continue to flourish and emerge for years to come.¹⁹³

i. Prior International Success of Inventory Systems

None of the major criticisms that have been waged against the Convention's support of inventory systems are fatal. That is, as has been demonstrated above, each of the objections can be overcome. Furthermore, engaging in comprehensive documentation efforts could help a country to successfully study and sustain its intangible cultural heritage. Indeed, inventory systems have been used successfully around the world to preserve such heritage for quite some time.

For example, the Masterpiece Program, established by UNESCO in 1997, employs an inventory approach and has succeeded in raising public awareness of the importance and precarious nature of intangible cultural heritage by placing notable cultural heritage "masterpieces" on its World Heritage lists.¹⁹⁴ Indeed, Rieks Smeets, the Chief of the Intangible Heritage Section of UNESCO, described the 2003 Convention as "an indirect successor to the Masterpiece Programme," a program that has achieved much acclaim and support in the international community.¹⁹⁵ For example, Koichiro Matsuura, the Director-General of UNESCO, explained that the Masterpiece Program has

191. See *infra* notes 194–201 and accompanying text.

192. See *infra* notes 202–220 and accompanying text.

193. See *infra* notes 221–222 and accompanying text.

194. See *supra* notes 83–88 and accompanying text.

195. Rieks Smeets, *Globalization and the Convention For the Safeguarding of the Intangible Cultural Heritage*, in *Globalization and Intangible Heritage Conference*, *supra* note at 88, at 44.

“resulted in an extraordinary increase in people’s awareness of the importance of intangible cultural heritage,”¹⁹⁶ and anthropologist Peter J. M. Nas, has praised the Program because it “offers clear opportunities for the preservation and revitalization of outstanding traditional cultural expressions.”¹⁹⁷

Furthermore, inventory systems have been implemented in Japan, a leader in cultural heritage preservation efforts, to successfully preserve its own rich history of intangible cultural heritage.¹⁹⁸ Japan implemented a program called the Trust Fund for the Preservation and Promotion of Intangible Cultural Heritage in 1993 to document, study, and preserve intangible cultural heritage.¹⁹⁹ Thus far, Japan has contributed millions of dollars to “to preserve and promote outstanding intangible cultural heritage, such as traditional performing arts like dances and music, traditional crafts like ceramics, lacquer ware, and dyeing and weaving and oral heritage, mainly in the Asian region.”²⁰⁰ The success that Japan has had with its program led it to play an active role in the drafting the 2003 UNESCO Convention.²⁰¹ The Japanese experience thus demonstrates that inventory systems can do much to bring attention to intangible cultural heritage and to spur the public to engage in and support preservation efforts.

ii. *Prior National Success of Inventory Systems*

In addition to the international use of inventory systems, the

196. Koichiro Matsuura, *Globalization, Intangible Cultural Heritage and the Role of UNESCO*, in *Id.*

197. Peter J. M. Nas, *Masterpieces of Oral and Intangible Culture*, 43 *CURRENT ANTHROPOLOGY* 139, 143 (2002).

198. Shogo Arai, *Japan and the Preservation of Intangible Cultural Heritage*, in *International Conference—Globalization and Intangible Cultural Heritage in Globalization and Intangible Heritage Conference*, *supra* note 88, at 27. Arai, Japan’s Parliamentary Secretary for Foreign Affairs, notes that Japan “has led the world in the protection of intangible cultural heritage.” *Id.*

199. *Id.*

200. The Ministry of Foreign Affairs of Japan, *UNESCO Japanese Trust Fund for Preservation and Promotion of Intangible Cultural Heritage*, available at http://www.mofa.go.jp/policy/culture/heritage/coop/fund_p.html (last visited April 23, 2006).

201. Arai, *supra* note 95.

United States has adopted several programs that utilize inventory systems to protect the nation's tangible cultural heritage. Two such programs include the National Register of Historic Places Program²⁰² and the Save America's Treasures Program.²⁰³ The success of these programs at raising public awareness toward the dangers that threaten the continued existence of the nation's tangible cultural heritage, as well as at raising funds to engage in restoration efforts, suggests that an inventory system approach could be successfully utilized to protect the nation's intangible cultural heritage.

a. The National Register of Historic Places Program

The National Register of Historic Places Program (Register) was implemented in 1966 after Congress passed the National Historic Preservation Act,²⁰⁴ and "is the Nation's official list of cultural resources worthy of preservation."²⁰⁵ This Act was passed after Congress found that the nation's cultural resources were an important source of identity for Americans and that many of these notable resources were being systematically altered or destroyed.²⁰⁶

202. National Register of Historic Places, <http://www.cr.nps.gov/nr/about.htm> (last visited April 23, 2006) [hereinafter National Register] (noting that "the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archaeological resources").

203. Save America's Treasures, <http://www.saveameericastreasures.org/about.htm> (last visited April 23, 2006) [hereinafter America's Treasures] (noting that "Save America's Treasure is a national effort to protect 'America's threatened cultural treasures, including historic structures, collections, works of art, maps and journals that document and illuminate the history and culture of the United States'").

204. 16 U.S.C. § 470 (60.1)(a) (2000) (stating that "[t]he National Historic Preservation Act of 1966 . . . authorizes the Secretary of the Interior to expand and maintain a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture").

205. National Register, *supra* note 202.

206. Specifically, Congress found that:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

The Register explicitly applies to the nation's tangible cultural heritage. For example, the Register's official website notes that "[p]roperties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture."²⁰⁷ In order to be listed on the national Register, the piece of tangible

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(b).

207. National Register, *supra* note 202.

cultural heritage must meet specific criteria. Particularly, it must: (1) “be associated with events” significant to our nation’s history; (2) be “associated with the lives of persons significant in our past”; (3) “embody distinctive characteristics of a type, period, or method of construction”; or (4) be something that has “yielded, or may be likely to yield, information important in prehistory or history.”²⁰⁸ Anyone is allowed to nominate a piece of intangible cultural heritage to be placed on the Register. For the most part, nominations are evaluated by the National Park Service, a component of the Department of the Interior.²⁰⁹ In addition, heritage can be added to the Register by executive order, by an act of Congress, or by a declaration by the Secretary of the Interior.²¹⁰

The Register ultimately seeks to protect tangible cultural heritage by placing it on the list, thereby bringing local and national attention to the importance of such property.²¹¹ In addition, registered property is also subject to federal tax benefits

208. 16 U.S.C. 470 (60.4).

209. 16 U.S.C. 470 (60.1(b)(3)-(5)) Properties can be added to the Register by:

- (3) Nominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and approved by the NPS; (4) Nominations from any person or local government (only if such property is located in a State with no approved State Historic Preservation Program) approved by the NPS; and (5) Nominations of the Federal properties prepared by Federal agencies, submitted by the Federal Preservation Officer and approved by NPS.

Id.

210. 16 U.S.C. 470 (60.1(b) (1)-(2)) Properties can be added to the Register by:

- (1) Those Acts of Congress and Executive orders which create historic areas of the National Park Systems administered by the National Park Service, all or portions of which may be determined to be of historic significance consistent with the intent of Congress; (2) Properties declared by the Secretary of the Interior to be of national significance and designated as National Historic Landmarks.

Id.

211. National Register, *supra* note 202.

as well as federal monetary assistance to be used for preservation efforts.²¹² This program has been an incredible success—currently, there are “nearly 79,000 listings” on the Register.²¹³ The Register includes a diverse, broad array of the nation’s notable tangible cultural heritage. Examples include Orchard House, the home of renowned American author, Louis May Alcott, located in Concord, Massachusetts,²¹⁴ the petroglyphs in Kings Canyon National Park,²¹⁵ and George Washington’s boyhood home.

b. Save America’s Treasures Program

In 1998, in his State of the Union Address, President William Jefferson Clinton declared “I am proposing a public-private partnership to advance our arts and humanities, and to celebrate the millennium by saving America’s treasures, great and small.”²¹⁶ With these notable words, the Save America’s Treasures Program was born. Like the National Register of Historic Places Program, the inception of the Save America’s Treasures Program stemmed from the realization of the importance of the nation’s tangible cultural heritage as well as precarious state of many of our nation’s most notable historical items. Indeed, the official website for the Save America’s Treasures Program notes,

[f]rom the Star-Spangled Banner, to the ancient cliff dwellings at Mesa Verde National Park, to historic monuments in our hometowns, the testaments to our diverse American experience can be found in communities across the country. Unfortunately, too many of the historic sites, monuments, artifacts and documents that tell America’s story are deteriorating and in danger of

212. *Id.*

213. *Id.*

214. Carol D. Shull, *The National Register of Historic Places Today*, <http://www.crm.cr.nps.gov/achive/25-01/25-01-01.pdf>.

215. See National Register of Historic Places, National Index by Name, http://www.nr.nps.gov/iwisapi/explorer.dll?IWS_SCHEMA=NRIS1&IWS_LOGIN=1&IWS_REPORT=100000081

216. America’s Treasures, *supra* note 203.

being lost forever.²¹⁷

Like the Register, this program was also designed to protect America's tangible cultural heritage "including historic structures, collections, works of art, maps and journals that document and illuminate the history and culture of the United States."²¹⁸ This program, however, differs from the Register program because of the comprehensive, multi-faceted approach that it takes toward safeguarding the nation's tangible cultural heritage. This program has four stated goals: (1) to "foster pride in American heritage;" (2) to "educate Americans" about the importance of the nation's tangible heritage as well as the problems facing such heritage; (3) to "raise concern for the urgent preservation needs" that our country's tangible heritage currently faces; and (4) to "stimulate broad-scale involvement" in the program.²¹⁹ To achieve these goals, the program has implemented "an educational outreach program" as well as national campaigns to obtain support and resources to be utilized in its preservation efforts, as well as a campaign to bring public awareness to this pressing issue.²²⁰ Thus, while use of the inventory approach is a key component of the Save America's Treasures program, use of these additional mechanisms, strengthens its overall effectiveness.

Together, these two programs demonstrate that the United States has successfully used, and continues to use inventory systems to preserve its tangible cultural heritage. This success certainly proves the effectiveness of inventory systems. In addition, this prior success bodes well for the potential future success of a program that utilizes inventory systems to safeguard the United States' intangible cultural heritage as well.

iii. The Convention's Broad-Based Approach

While most of the criticisms waged against the 2003 Convention have focused on the inventory systems that the Convention

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

supports, the Convention is not a simple inventory system program. Instead, the Convention encourages states to develop full-fledged policies to address the particularities of intangible cultural heritage, pass laws pertaining to such heritage, and engage in educational endeavors to inform the public about the importance of intangible cultural heritage and the particular dangers that exist to destroy it. As UNESCO itself notes,

[m]ultiple approaches are essential to the preservation of the intangible cultural heritage. A project, therefore, should be designed to address its complexities and thus comprise various types of actions, such as inventorying, documenting, transmitting, raising awareness, etc., in a balanced, coherent and complementary manner. There is no one-size-fits-all type of program for the intangible cultural heritage; the best mix of safeguarding actions will vary to a large extent according to genres of intangible heritage, in regions in question, and the level and causes of endangerment.²²¹

Thus, focusing solely on the inventory systems advocated by the Convention ignores the holistic nature of the Convention. Indeed, the broad-based nature of the approach advocated by the 2003 Convention is the Convention's strength. A country is allowed to be proactive and develop a program to address its particular needs as well as the particular dangers that are relevant to the intangible cultural heritage within its boundaries. These tailor-made programs will ultimately be more responsive to the particularities of the intangible cultural heritage of each country, and thereby be more effective in preserving such heritage.

Such a program has already been successfully adopted in the United States to preserve its tangible cultural heritage. For example, the Save America's Treasures Program, in addition to using inventory systems to safeguard the nation's tangible cultural

221. UNESCO, UNESCO/Japan Funds-in-Trust for the Preservation and Promotion of the Intangible Cultural Heritage 11, <http://www.unesdoc.unesco.org/images/0014/001406/140628M.pdf>.

heritage, also utilizes a broad-based approach to preserve America's tangible culture.²²² As outlined above, this program has adopted educational endeavors, and implemented public awareness campaigns to raise national awareness and support to the problems facing the nation's tangible cultural heritage. This is precisely the type of program that the United States government should implement to preserve our nation's intangible cultural heritage. If the success of the Save America's Treasures program is any indication, a similar program devoted specifically to our nation's intangible cultural heritage is likely to be equally as successful.

IV. CONCLUSION

It is essential that the United States take action and protect the nation's intangible cultural heritage. It must be acknowledged that

a system of protection should encourage . . . peoples' expectations of respect for their creative works, particularly from those outside [their cultural group]. This means that folklore [and other forms of intangible cultural heritage] should be protected from debasement, distortion and consequent loss of cultural integrity due to inappropriate uses which would be offensive to the community from which it originates. . . .²²³

Unfortunately, it seems that the United States' current copyright and moral right regimes do not possess the necessary characteristics to protect intangible cultural heritage. The 2003 Convention, on the other hand, has real potential to successfully allow the United States to take action and preserve its intangible cultural heritage. Most of the criticisms of the Convention are directed at the Convention's support of inventory systems. However, these arguments fail to recognize that the Convention espouses a holistic, multi-faceted approach toward the protection of intangible cultural heritage. In particular, the Convention

222. See *supra* notes 216–220 and accompanying text.

223. Dambiec, *supra* note 143.

recommends that member states implement policies, enact laws, and engage in educational efforts in order to preserve the intangible aspects of culture. Such a broad-based approach has already been established in the United States to preserve the nation's tangible cultural heritage, and ultimately holds the most promise to successfully safeguard the nation's intangible cultural heritage as well.