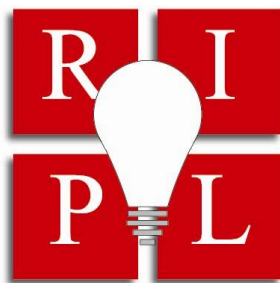


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## AMBER TEARS AND COPYRIGHT FEARS: THE INADEQUATE PROTECTION OF CULTURAL HERITAGE IN THE UNITED STATES

INGRIDA R. LATOZA

### ABSTRACT

The United States is comprised of many different cultural communities, each rich with expressions of language and custom. Cultural diversity promotes respect among individuals and harmonizes differences between communities—nationally and globally. Through the preservation of cultural heritage, diversity is maintained. Since World War II, with the exile of many from Lithuania, members of the Lithuanian-American community have strived to maintain the cultural heritage of their beloved homeland. After several decades, a Lithuanian-American cultural identity has developed, creating unique and individual traditions, adding to the cultural heritage of the United States as a whole. Most of the international community has adopted the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, but the United States relies on intellectual property laws, particularly the Copyright Act, to preserve cultural heritage. This comment explores the preservation of Lithuanian-American cultural heritage through the protection of copyright law with a modified standard for preserving and protecting intangible cultural heritage.

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## AMBER TEARS AND COPYRIGHT FEARS: THE INADEQUATE PROTECTION OF CULTURAL HERITAGE IN THE UNITED STATES

INGRIDA R. LATOZA\*

### I. INTRODUCTION

American novelist, Terri Windling, muses that what is interesting “about folklore is the dialogue it gives us with storytellers from centuries past.”<sup>1</sup> Growing up in a Lithuanian family in America, children were taught early on the importance of preserving their Lithuanian heritage. They spoke only Lithuanian at home, attended school on Saturdays, and ate pickled herring for Christmas Eve.<sup>2</sup> Families painted Easter eggs with wax and households were full of strong, but usually unpronounceable multi-syllabic names such as Birutė, Kastytis, or Vilija.<sup>3</sup> Summers were spent at camps in Michigan singing folk songs around a bonfire, acquiring skills in tying knots or reading trail marks with the Lithuanian scouts, and playing *Knygnešiai*, an intense game of book smuggling.<sup>4</sup> During free time, students

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<sup>1</sup> Terri Windling, *Myth & Moor: Musings on Mythic Life and Art from a Dartmoor Studio*, (October 4, 2015, 3:56 PM), <http://www.terriwindling.com/>. Terri Windling is an American artist and writer who has extensively studied folklore after growing up listening to fairy tales from Europe.

<sup>2</sup> DANUTE BRAZYTE BINDOKIENE, *LITHUANIAN CUSTOMS AND TRADITIONS* (Lithuanian World Community, 1989). The author explains that Lithuanians have a history of fasting during the Christmas season. Though the church no longer requires abstinence, Lithuanians still adhere to the custom of not eating meat on Christmas Eve. Representing the apostles, twelve meatless dishes are served including: fish, pickled herring, poppy seed milk, cranberry pudding, dried fruit soup, mushrooms, boiled potatoes, sauerkraut, and bread. In the past, as a northern European country, Lithuanians made do with foodstuffs preserved for the winter and did not have the luxuries of fresh fruits and vegetables or exotic seafood.

<sup>3</sup> *Id.* For Easter, the homemakers would prepare the food on Holy Saturday and the rest of the family would color Easter eggs. A pin tip is dipped in candle wax and then used to draw intricate designs of dashes and dots. Afterwards, the egg is immersed in dye, traditionally made from plants such as: onion skins, dried corn-flower petals, hay particles, beets, and alder bark.

<sup>4</sup> *Lithuania's Booksmugglers ('Knygnešiai')*, GENEALOGIJA (Volume IV, 1994), available at [http://www.spaudos.lt/Knygnešiai/Booksmugglers\\_knygnešiai.htm](http://www.spaudos.lt/Knygnešiai/Booksmugglers_knygnešiai.htm). *Knygnešiai* was a role-playing game based on an actual time period in Lithuania to teach children about this important event in Lithuania's history. After the Insurrection of 1863, the Russian government was concerned about maintaining control in Lithuania. They suppressed publication of materials in the Latin alphabet, requiring the use of the Cyrillic alphabet. This was to force Lithuanians to become accustomed to the Russian language with the goal of eliminating all forms of ethnic identity in the Lithuanian people. The prohibition of printing in the Lithuanian language lasted for 40 years (1864-1904), but this gave rise to a national consciousness ultimately leading to the patriotic and political movement for an independent nation. When Lithuanians could not publish in their own language, they printed materials in the German controlled area of Lithuania and smuggled the books across the border. Motivated by religious conviction and national pride, the book smugglers risked their freedom and lives in a heavily guarded German-Russian border. About 30,000-40,000 books were smuggled in and the Russian government realized that the prohibition had the opposite effect that the policy intended. A new Lithuanian nationalism emerged, turning the public opinion against the Tsarist regime.

performed in plays of fractured fairy tales with the Lithuanian Catholic youth group,<sup>5</sup> and helped raise money for a travelling folk dance troupe by making *koldūnai*, a Lithuanian delicacy of small dumplings. Parents, assimilating from the grandparents, told their children about the struggles that the family had when they arrived to this country, the sacrifices that were made, and horrors experienced by those forced to flee their homeland. This set Lithuanian American children apart from other American children, made them diverse, and even at a young age, made them value the Lithuanian language and culture as part of their own identity. Cultural diversity promotes respect among individuals as well as harmonizes differences between communities, nationally and globally. Through the preservation of intangible cultural heritage, diversity is maintained.

This comment explores the preservation of Lithuanian American cultural heritage through the protection of copyright law. Part II provides a brief history of exiled Lithuanians living in America and the importance of cultural heritage to this community. This part also gives an overview of intellectual property laws in regards to cultural heritage: differentiating between tangible and intangible cultural heritage and an explanation of copyright law as a mechanism of protection. Next, this comment reflects on the history of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (“2003 UNESCO Convention”) as well as other work to safeguard intangible cultural heritage in the United States (“U.S.”).<sup>6</sup> Part III analyzes the interaction between intangible cultural heritage and copyright laws. It addresses the international community’s adoption of the 2003 UNESCO Convention, how it has been used to preserve intangible cultural heritage, as well as the U.S.’s reluctance to adopt this convention.<sup>7</sup> Part IV proposes a modified standard for preserving intangible cultural heritage.

At this time, the U.S. is relying on intellectual property laws to protect intangible cultural heritage.<sup>8</sup> However, it may not account for all the distinctive characteristics of this living treasure.<sup>9</sup> Without a developed framework, the Lithuanian American intangible cultural heritage lacks adequate protection, as does the heritage of the many other communities within the U.S.<sup>10</sup> Copyright law

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<sup>5</sup> Rozvita Vareikiene, *Lithuanian Catholic Federation*, ATEITIS, (Oct. 27, 2014, 4:49PM), <http://ateitis.lt/en>. The Lithuanian Catholic Federation “Ateitis” is a youth organization, ages kindergarten to college. Established by a group of Lithuanian Catholic students, the organization is centered on a Lithuanian Catholic intellectual ideology whose members have had key positions in state administration, art, and scientific research. After World War II, the organization continued its activities in the U.S. and was reestablished in Lithuania in 1989. Activities for the youth groups were scheduled year round and it was popular to perform plays of Lithuanian folk tales reinterpreted for a Lithuanian American audience.

<sup>6</sup> *Text of the Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO (January 20, 2015, 5:47PM), <http://www.unesco.org/culture/ich/en/convention>.

<sup>7</sup> Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 75-76 (2004).

<sup>8</sup> Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed By Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. & POL’Y. 201, 229. (2006).

<sup>9</sup> *Id.* at 231.

<sup>10</sup> Michael F. Brown, *From the Archive: Safeguarding the Intangible*. MUSEUM ANTHROPOLOGY REVIEW 6(2). 93, 94. (2012).

purports to offer a way to balance a free exchange of ideas without the expense of diminishing heritage and ideals of the people of this nation.

## II. BACKGROUND

### *A. Lithuania: Occupation, Exile, and Independence*

Lithuania, located next to the Baltic Sea, has a rich history of surviving hardships, relying on strong faith and unending perseverance.<sup>11</sup> Lithuania has seen its fair share of occupiers: first the Soviet Union and then Nazi Germany, followed again by the Soviets at the end of World War II.<sup>12</sup> At that time, hundreds of thousands of people were murdered, tortured, and shipped to Siberia in cattle carriages.<sup>13</sup> Targeting the intellectual elite, such as artists, priests, teachers, doctors, lawyers, and leaders of the community, the goal was to annihilate cultural heritage with the intent of genocide.<sup>14</sup>

After finding themselves in displacement camps in Germany, many of the exiled Lithuanians were fortunate enough to emigrate to America.<sup>15</sup> Fearing that they would never be able to return to their homeland, initiatives emerged to preserve the Lithuanian language and cultural heritage abroad.<sup>16</sup> Among these, the Chicago Lithuanian community hosted the first Lithuanian Song Festival in 1956.<sup>17</sup> The festival was a great success and Lithuanian Americans achieved “self-respect and encouragement for future cultural projects.”<sup>18</sup>

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<sup>11</sup> The Official Gateway of Lithuania, *About Lithuania*, LIETUVOS RESPUBLIKOS VYRIAUSYBE (Oct. 6, 2014, 9:47 PM) [http://www.lietuva.lt/en/about\\_lithuania/history](http://www.lietuva.lt/en/about_lithuania/history).

<sup>12</sup> *Id.*

<sup>13</sup> Augustinas Žemaitis, *History of Lithuania: Introduction*, True Lithuania: Sights, Cities, Culture, History, and More, (Oct. 4, 2014, 6:01 PM), <http://www.truelithuania.com/topics/history-and-politics-of-lithuania/history-of-lithuania>.

<sup>14</sup> DALIA KUODYTĖ & ROKAS TRACEVSKIS, *SIBERIA: MASS DEPORTATIONS FROM LITHUANIA TO THE USSR*, (Genocide and Resistance Research Center of Lithuania, 2005), available at <http://www.theinsidereport.org/TravelStories/SovietWarCrimesSiberia.htm>.

<sup>15</sup> Frank Passic & Steven A. Feller, *Displaced Persons - Lithuanians in DP Camps*, (Oct. 6, 2014, 10:14 PM), <http://www.dpcamps.org/lithuania.html>. About 70,000 Lithuanians took up residence in western Germany by the end of the war. They were reluctant to return to their homeland for fear of execution or deportation to Siberia. In the displacement camps, many of the inhabitants were professionals such as: “physicians, engineers, jurists, teachers, public officials, artists . . . targeted . . . by the Soviet occupational regime.” *Id.* Eventually, the western nations opened their doors to large numbers of immigrants from the displacement camps. Many made new lives in the U.S., Canada, Australia and Great Britain.

<sup>16</sup> *Id.*

<sup>17</sup> Nijolė Benotienė, *A History of the Lithuanian Song Festival in North America: Eighth 2006 Chicago*, LITHUANIAN SONG FESTIVAL 2015 (Oct. 4, 2014, 5:43 PM), <https://www.dainusvente.org/en/more/history>.

<sup>18</sup> *Id.* The first festival made a profit and was able to contribute towards other Lithuanian cultural projects, including publishing a book of Lithuanian songs for children. In 1991, after a newly independent Lithuania, the seventh Lithuanian Song Festival was organized, and over 900 performers from around the world gathered in Chicago for an exhibition of song and dance. Who would guess that fifteen years would pass before North America would see another Lithuanian Song Festival?

Then, in 1990, Lithuania was the first Soviet republic to declare its independence.<sup>19</sup> At this point, two to three generations of Lithuanian families had grown up outside of the small country and no one could predict what this meant for the future of the beloved Lithuanian culture outside of Lithuania.<sup>20</sup> Many worried that although the ultimate goal of preserving the cultural heritage of Lithuania had been achieved, the new traditions outside of Lithuania would soon disappear.<sup>21</sup>

Proactive in protecting its cultural heritage, the country of Lithuania has become a party to the 2003 UNESCO Convention.<sup>22</sup> The Song and Dance Celebration in the Baltic States, including Lithuania, are internationally recognized as a masterpiece of the oral and intangible heritage of humanity.<sup>23</sup> The accomplishments by the exiled Lithuanians who spent five decades preserving the culture and in turn created a unique intangible cultural heritage in North America, in the form of their own Lithuanian festivals, have not been afforded the same protection and international support.<sup>24</sup>

### *B. Touching the Past*

“Cultural heritage” pertains to monuments and collections of objects, as well as traditions or living expressions inherited from ancestors and passed on to

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<sup>19</sup> *Id.*

<sup>20</sup> Annemarie Mannion, *Dance Troupe Spins Its Way to Lithuania*, CHICAGO TRIBUNE, Jul. 1, 1998, available at [http://articles.chicagotribune.com/1998-07-01/news/9807010224\\_1\\_folk-dance-festival-culture-abundant-harvest](http://articles.chicagotribune.com/1998-07-01/news/9807010224_1_folk-dance-festival-culture-abundant-harvest). Lithuanian folk dancers explain that the Lithuanian culture survived because of the commitment of people who fled Lithuania in the 1940s and 1950s. The refugees taught the dances, music, and language to their children and grandchildren. Many of these dancers had never been to Lithuania and looked forward to showing native Lithuanians how they had been taught to cherish and preserve traditions. Some might be surprised how the children of exiles strived to keep the culture strong. Participating in the dance festivals was a way for children and grandchildren of exiled Lithuanians to lay claim to their heritage. Folk dance instructor, Audra Lintakas explained, “all our lives we are pushed to learn the Lithuanian culture and language . . . They (parents and grandparents) left under a horrible circumstance. They lost their homeland . . . (and) we were always hoping against hope that this little country would survive.” *Id.*

<sup>21</sup> See Benotiené, *supra* note 17. Members of the Lithuanian community in the U.S. as well as Canada were concerned with the revival of Song Festivals outside of Lithuania. They shared their thoughts with influential people in Lithuania. Professor Vytautas Jakelaitis explained that after Lithuania regained independence, the emigrants had difficulty organizing cultural events, “hastening denationalization.” VYTAUTAS, JAKELAITIS, SAULEI LEIDŽIANTIS TOKS BUVIMAS DRAUGE (AS THE SUN SETS – TOGETHER AS FRIENDS), at 159 (2002). It appeared to be a “painful paradox . . . because the goal, Lithuania’s independence for which everything was being done for, has been achieved.” *Id.* He feared that events such as Song Festivals outside of Lithuania would soon cease to exist.

<sup>22</sup> See The Official Gateway of Lithuania, *About Lithuania*, LIETUVOS RESPUBLIKOS VYRIAUSYBE, [https://www.lietuva.lt/en/tourism/what\\_to\\_see/unesco\\_heritage](https://www.lietuva.lt/en/tourism/what_to_see/unesco_heritage). In 2003, the traditions and symbols of the song festivals of the Baltic States were inscribed on the UNESCO List of Intangible Cultural Heritage.

<sup>23</sup> *Presentation of the masterpieces proclaimed in 2001 and 2003*, UNESCO (Jan. 21, 2015 3:29PM), <http://www.unesco.org/culture/intangible-heritage/masterpiece.php?id=92&lg=en>.

<sup>24</sup> *Id.* Since the U.S. is not a party to the UNESCO 2003 Convention, any cultural heritage from the U.S. remains absent from the list.

descendants.<sup>25</sup> Cultural heritage can be subdivided into tangible and intangible cultural heritage.<sup>26</sup>

Tangible cultural heritage includes objects such as monuments, groups of buildings, and sites of outstanding universal “historical, aesthetic, archeological, ethnological, or anthropological” value.<sup>27</sup> The pyramids of Egypt, Native American pottery, and cave paintings are examples of tangible cultural heritage.<sup>28</sup> In the U.S., places such as the Statue of Liberty, Monticello and the University of Virginia, and Independence Hall have been recognized globally as unique cultural heritage sites.<sup>29</sup>

Intangible “cultural heritage” is the part of culture that cannot be touched or interacted with, such as annual festivals, skills, song, dance, and cuisine.<sup>30</sup> Some examples are Spanish Flamenco, Dragon Boat festivals of China, woodcrafting knowledge of the Zafimaniry in Madagascar, Vedic chanting of India, and the Sicilian

<sup>25</sup> *What is Intangible Cultural Heritage?, About Intangible Heritage*, UNESCO (Oct. 4, 2014, 2:28 PM), <http://www.unesco.org/culture/>. Traditions or living expressions include, “oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts.” *Id.*

<sup>26</sup> See Slattery, *supra* note 8, at 205.

<sup>27</sup> United Nations Educational, Scientific, and Cultural Organization, UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* Art. 1, § 1 (1972). UNESCO defines “cultural heritage” as:

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 man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

*Id.*

<sup>28</sup> See Slattery, *supra* note 8, at 206.

<sup>29</sup> *World Heritage List*, The List, UNESCO (Oct. 5, 2014, 6:15 PM), <http://whc.unesco.org/en/list/>. The U.S. has adopted the UNESCO Convention for the World Culture and Natural Heritage. Registered places include:

Mesa Verde National Park, Yellowstone National Park, Everglades National Park, Grand Canyon National Park, Independence Hall, Kluane / Wrangell-St. Elias / Glacier Bay / Tatshenshini-Alsek, Redwood National and State Parks, Mammoth Cave National Park, Olympic National Park, Cahokia Mounds State Historic Site, Great Smoky Mountains National Park, La Fortaleza and San Juan National Historic Site in Puerto Rico, Statue of Liberty, Yosemite National Park, Chaco Culture, Hawaii Volcanoes National Park, Monticello and the University of Virginia in Charlottesville, Taos Pueblo, Carlsbad Caverns National Park, Waterton Glacier International Peace Park, Papahānaumokuākea, Monumental Earthworks of Poverty Point.

*Id.*

<sup>30</sup> United Nations Educational, Scientific, and Cultural Organization, UNESCO, *Convention for the Safeguarding of Intangible Cultural Heritage* §1, Art. 2 (2003). UNESCO defines “intangible cultural heritage” as, “(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;(b) performing arts;(c) social practices, rituals and festive events;(d) knowledge and practices concerning nature and the universe;(e) traditional craftsmanship.” *Id.*

puppet theater of Italy.<sup>31</sup> In the U.S., examples would be a brass band from New Orleans, an a cappella gospel group, a Lauhala (palm leaf) weaver from Honolulu, or even the musical skills of famous bluesman B.B. King.<sup>32</sup>

### *C. Law of the Land*

The U.S. Constitution gives Congress the power to enact laws that “grant for limited times, exclusive rights to authors and inventors in their respective writings and discoveries.”<sup>33</sup> Pursuant to this enumerated power, Congress enacted the Copyright Act in 1790.<sup>34</sup> The most current revision of the Act occurred in 1976.<sup>35</sup>

The purpose of copyright law is to protect human creativity so the public as a whole may benefit.<sup>36</sup> Copyright protection arises as an operation of law when a “work of authorship is fixed in any tangible medium of expression.”<sup>37</sup> The work must also fall within the list of appropriate copyrightable subject matter.<sup>38</sup> In order to establish copyright infringement, the plaintiff needs to show ownership of a valid copyright and copying of constituent elements of the work that are original.<sup>39</sup> Fair use of the copyrighted material is a defense to copyright infringement.<sup>40</sup> A transformative work, or a new work that alters “the original with new expression, meaning or message”, is considered fair use.<sup>41</sup>

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<sup>31</sup> Text of the Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO (April 6, 2016, 3:42 PM), *available at* <http://www.unesco.org/culture/ich/en/convention>.

<sup>32</sup> *About the NEA*, NATIONAL ENDOWMENT FOR THE ARTS (Dec. 22, 2014, 4:56PM), <http://arts.gov/about-nea>. Some intangible cultural heritage has been recognized by the National Endowment for the Arts (“NEA”), an independent agency of the federal government. It established a program to honor master artists for their contribution to the cultural heritage of the U.S. The NEA has awarded more than \$5 billion to individuals and communities in support of artistic excellence, creativity, and innovation.

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>34</sup> *Id.*

<sup>35</sup> 17 U.S.C. § 101, *et seq* (2012).

<sup>36</sup> U.S. CONST. art. I, § 8, cl. 8. Congress enacted the statute to promote the progress of science and useful arts, an exclusive right for a limited time to authors and inventors for writings and discoveries.

<sup>37</sup> 17 U.S.C. § 102(a) (2012).

<sup>38</sup> *Id.* There are eight different categories of copyrightable subject matter, “literary works, musical works including any accompanying words, dramatic works including any accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.”

<sup>39</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342 (1991).

<sup>40</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985). The Court explained, “fair use is traditionally defined as a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.” *Id.* The fair use defense is established under the Copyright Act. *See* 17 U.S.C.S. § 107 (2012) (“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.”).

<sup>41</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).



Although copyright law has been well-established in the U.S., there needs to be changes to the current Copyright Act before it can protect certain aspects of intangible cultural heritage.<sup>42</sup> As the current law is written, the elements of intangible cultural heritage would prevent it from being protected.<sup>43</sup>

#### *D. The Promise of Preservation and Protection*

The United Nations joined together in 1945 to create its “intellectual agency” named The United Nations Educational, Scientific, Cultural Organization (“UNESCO”).<sup>44</sup> The purpose of UNESCO was to “contribute peace and security by promoting collaboration among nations.”<sup>45</sup> Through the use of conventions, recommendations, and supplementary programs, UNESCO has been a driving force in raising awareness, as well as providing protection for cultural heritage.<sup>46</sup>

The 2003 UNESCO Convention went into force on April 20, 2006.<sup>47</sup> The purpose of the Convention was to safeguard intangible cultural heritage by raising awareness and appreciation for said heritage.<sup>48</sup> The Convention fosters respect for the individuals and communities at large that they work with, while providing international support and assistance.<sup>49</sup> Under this Convention, a ratifying nation must take necessary measures to ensure the safeguarding of intangible cultural heritage within its borders through the use of an inventory and promotional

<sup>42</sup> See Slattery, *supra* note 8, at 231.

<sup>43</sup> *Id.*

<sup>44</sup> *Introducing UNESCO*, UNESCO (Oct. 5, 2014, 9:55 PM), <http://en.unesco.org/about-us/introducing-unesco>. The goal of UNESCO is to build a lasting peace and sustain development, relying on “the power of intelligence to innovate, expand their horizons and sustain the hope of a new humanism.” UNESCO breathes life into the creative intelligence to life, “for it is in the minds of men and women that the defenses of peace and the conditions for sustainable development must be built.” *Id.*

<sup>45</sup> UNESCO Archives, *UNESCO Past and Present*, UNESCO (Oct. 5, 2014, 10:10 PM) [http://www.unesco.org/archives/new2010/en/history\\_of\\_unesco.html](http://www.unesco.org/archives/new2010/en/history_of_unesco.html). On November 16, 1945, 37 countries signed the Constitution of UNESCO in London, and it came into force on November 4, 1946. To achieve the purpose of peace through collaboration, UNESCO promotes, “education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion.”

<sup>46</sup> See Slattery, *supra* note 8, at 209.

<sup>47</sup> *Convention, Text of the Convention for the Safeguarding of Intangible Cultural Heritage, Convention*, UNESCO (Oct. 5, 2014, 10:25 PM), <http://www.unesco.org/culture/ich/>.

<sup>48</sup> United Nations Educational, Scientific, and Cultural Organization, UNESCO, *Convention for the Safeguarding of Intangible Cultural Heritage*, § 1, Art. 1 (2003). UNESCO explains the purposes of the convention are:

- (a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.

*Id.*

<sup>49</sup> *Id.*

education.<sup>50</sup> This Convention is the cumulative work of the international community for the creation of a legal instrument “to save, protect, and preserve the world’s living cultural heritage for at least several hundred years.”<sup>51</sup> The Convention is growing in popularity as the number of nations to ratify it has increased each year since it was adopted.<sup>52</sup> As of May 15, 2014, 161 states, not including the U.S., have ratified the Convention.<sup>53</sup>

The same year that the U.S. amended the Copyright Act, UNESCO together with the World Intellectual Property Organization (“WIPO”) developed the Tunis Model Law on Copyright (“Tunis Model Law”).<sup>54</sup> Designed to allow for protection of folklore and other forms of intangible cultural heritage, the Tunis Model Law eliminated many issues inherent in copyright laws, particularly those found in the U.S. Copyright Act.<sup>55</sup> Although the Tunis Model Law has many benefits, the U.S. has not been receptive to its implementation.<sup>56</sup> Implementing the Tunis Model Law would require an amendment to the U.S. Constitution to eliminate the proscription that copyrights can only be awarded for limited times.<sup>57</sup>

#### *E. All is Not Lost in Alternatives*

Short of ratifying the 2003 UNESCO Convention, the U.S. has done other work to help safeguard intangible cultural heritage. Governmental entities with significant responsibilities to intangible cultural heritage include: the National Endowment for the Arts (“NEA”), the National Endowment for the Humanities, the Institute for Museum and Library Services, and the Library of Congress which also

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<sup>50</sup> *Id.* at § 3, Art. 12-14. The role of states parties includes: maintaining a regularly updated inventory to ensure identification with a view to safeguarding, adopting a general policy aimed at promoting intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programs, and education for awareness-raising and capacity-building to ensure recognition of, respect for, and enhancement of cultural heritage.

<sup>51</sup> See Kurin, *supra* note 7, at 67.

<sup>52</sup> *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*, UNESCO (Oct. 6, 2014, 9:15 AM), <http://www.unesco.org/culture/ich/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Tunis Model Law on Copyright for Developing Countries*, (United Nations Educational, Scientific, and Cultural Organization [UNESCO], 1976), (April 6, 2016 4:08 PM) [http://portal.unesco.org/pv\\_obj\\_cache/pv\\_obj\\_id\\_40BCF110E81EBE9CCEF8976452B8FFDC9DA01900/filename/tunis\\_model\\_law\\_en-web.pdf](http://portal.unesco.org/pv_obj_cache/pv_obj_id_40BCF110E81EBE9CCEF8976452B8FFDC9DA01900/filename/tunis_model_law_en-web.pdf). The goal of the Tunis Model Law was to spread “works of the mind” beyond territorial frontiers. Since national copyright legislations are limited to the territory of the States that enact them, the goal was to make it possible for international dissemination and protection of works with a range of bilateral or multilateral conventions among the States themselves. The Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention are noted as the most important major worldwide conventions. Thereby, the provisions of the Tunis Model Law are compatible with both of these conventions.

<sup>55</sup> See Slattery, *supra* note 8, at 242. The Tunis Model Law provides protection of intangible cultural heritage for an unlimited amount of time and the fixation requirement is eliminated for folklore. However, it allows for protection of derivative works, thereby problematic for a fair use defense.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

houses the U.S. Copyright Office.<sup>58</sup> In addition, the U.S. has The Smithsonian Institution (“Smithsonian”). Although not a governmental entity, it is a public trust and has the largest complex of museums and research facilities in the world with a mission of “understanding, preserving, and presenting our nation’s cultural heritage.”<sup>59</sup> These entities have developed several strategies to safeguard cultural heritage through discovery, collaboration, education, and diversity.<sup>60</sup>

### III. ANALYSIS

#### *A. Fame and Fortune for Folklore*

In the U.S., intellectual property law is a possible mechanism to protect intangible cultural heritage.<sup>61</sup> However, because of the nature of intangible cultural heritage and the policies upon which intellectual property rights have been developed, the current copyright law is not the best fit for this type of protection.<sup>62</sup> The foundation of copyright law is to encourage creativity through the “allocation of economic incentives and property rights to authors.”<sup>63</sup> Moreover, requirements under the U.S. Copyright Act preclude it from being applied to intangible cultural heritage. Issues that arise include: authorship, originality, fixation, duration, and the focus on economic incentives.<sup>64</sup>

#### *1. Authorship*

Regarding intangible cultural heritage, the stories and rituals of many cultures are passed through generations and it is difficult to determine who is involved in the

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<sup>58</sup> Barry Bergy, National Endowment for the Arts, presented in Deurne, The Netherlands at the International Congress: *Intangible Cultural Heritage: Policies, Programs, Prospects*, (Feb. 18, 2012). Barry Bergy is the director of Folk & Traditional Arts at the NEA. He explains that the NEA is primarily a funding body that financially supports programs through not-for profit organizations and state and regional art agencies, the National Endowment for the Humanities supports study of the arts, history, and cultural heritage through grants, the Institute for Museums and Library services supports activities and programs of museums and libraries across the country, and the Library Congress serves as the national library as well as houses the repository for copyrighted material.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* During discovery, artists and cultural communities are identified creating an inventory; through collaboration, teams work with cultural communities with the “responsibility to respect the views of culture bearers and to understand the social, cultural, and historic context”; education incorporates the understanding of cultural traditions as well as the encouragement of the perpetuation of cultural knowledge and skills; diversity addresses the importance of “multiple aesthetic traditions and standards of excellence when working with culturally distinct communities.” *Id.*

<sup>61</sup> See Slattery, *supra* note 8, at 230.

<sup>62</sup> *Id.*

<sup>63</sup> See Slattery, *supra* note 8, at 231.

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

authorship, let alone give credit to one author.<sup>65</sup> Copyright ownership “vests initially in the author or authors of the work.”<sup>66</sup> The author is the person who creates the work, or the one who translates an idea into a “fixed, tangible expression entitled to copyright protection.”<sup>67</sup> If there is more than one author, the work is considered a joint work but the authors must have intended for the work to be merged into “inseparable and interdependent parts of a unitary whole.”<sup>68</sup> In the example of Lithuanian Americans, three generations have continued the tradition of hosting folk festivals in America. Many have contributed to the design of the festivals, choosing different repertoires and choreography as well as a theme for the festival, and it would be impossible to determine the exact authors.

## 2. Originality

Though the bar is low, originality poses an obstacle for many cultural groups seeking to protect their intangible cultural heritage, particularly traditions which have developed over time.<sup>69</sup> The work must be original to the author to qualify for copyright protection.<sup>70</sup> Originality is required, but only a minimal amount of creativity is necessary.<sup>71</sup> Anything in the work that is not original, such as facts or procedures, are considered to be part of the public domain.<sup>72</sup> Lithuania has a rich history of folk festivals, evolving over time and carrying over into the Lithuanian American traditions. It would be difficult to determine which aspects of the festivals are original and which should be considered part of the public domain and not afforded protection.

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<sup>65</sup> See Slattery, *supra* note 8, at 232.

<sup>66</sup> 17 U.S.C. § 201(a) (2012).

<sup>67</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737(1989).

<sup>68</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000).

<sup>69</sup> See Slattery, *supra* note 8, at 233. Certain aspects of intangible cultural heritage such as rituals, songs, and stories have developed within a particular group over a number of years. For some groups, originality is contrary to the mission of the traditional people. Rather, accuracy and faithful reproductions are valued.

<sup>70</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 345. The court explained that for a work to be considered original it has to be independently created by the author, not copied from other works, possessing a minimal degree of creativity. Most works possess some creative spark. The court continues to explain that originality does not signify novelty, and “a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”

<sup>71</sup> *Id.* at 342. The Court stated that the constitutional requirement necessitates independent creation plus a modicum of creativity.

<sup>72</sup> *Id.* at 350. Copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original, such as facts, or materials in the public domain, as long as such use does not unfairly appropriate the author's original contributions. In 17 U.S.C. § 102(b), the Copyright Act provides, “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.*

### 3. Fixation

Given the nature of intangible cultural heritage, many forms of it do not exist in any type of fixed form within certain cultural groups.<sup>73</sup> Copyright protection is only afforded to a “fixed tangible medium of expression.”<sup>74</sup> The requirement of fixation is met if the work is sufficiently permanent or stable to permit it to be reproduced for more than a transitory period.<sup>75</sup> Historically, many Lithuanian traditions have been passed down orally because of the limited resources after exile from the war and the general fear of being punished for carrying on the cultural traditions.<sup>76</sup> Today, more resources are available and it is possible to video record traditions such as song or dance festivals and document the planning stages in a resource book. However, since a festival is a living work, it could never be completely fixed.<sup>77</sup>

### 4. Duration

The owner of a copyrighted work has protection for the limited time of the author’s life plus seventy years.<sup>78</sup> When a copyright expires, the work enters the public domain.<sup>79</sup> If a work is unpublished, unregistered, and the author is unknown, then the work can be protected for 120 years from the date of the creation.<sup>80</sup> A durational limit may be appropriate in most situations, but it would be insufficient for intangible cultural heritage because groups want protection to last forever.<sup>81</sup> Such would be the case for Lithuanian Americans. With a turbulent history, one cannot predict what the future holds for the safety of this small country’s cultural heritage. Too much has already been lost and it would be a detriment to only afford protection of the intangible cultural heritage for a mere 120 years when it took

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<sup>73</sup> See Slattery, *supra* note 8, at 234. Some groups have orally passed stories, songs, and rituals in order to maintain secrecy of these traditions.

<sup>74</sup> 17 U.S.C. § 101. The Copyright Act provides:

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.

*Id.*

<sup>75</sup> *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 871 (3d Cir. 1982).

<sup>76</sup> *Id.* See also Passic, *supra* note 15.

<sup>77</sup> Betty Mould-Addrisu, *Preservation and Conservation of Expressions of Folklore: The Experience of Africa*, UNESCO-WIPO World Forum On The Protection Of Folklore, (Jan. 21, 2015, 5:29 PM), <http://unesdoc.unesco.org/images/0022/002201/220167eo.pdf>. In an attempt to document folklore, social folk custom was identified as a major area of expression of folklore. Festivals were listed as one of the richest and most complex expression of social folk custom with an emphasis on “group interaction rather than individual skills and performance.” The participants of the festivals make a festival a living thing and not just a collection of traditions.

<sup>78</sup> 17 U.S.C. § 302 (2012). The Copyright Act provides, “copyright in a work created on or after January 1, 1978 . . . endures for a term consisting of the life of the author and 70 years after the author’s death.”

<sup>79</sup> 17 U.S.C. § 301-305.

<sup>80</sup> *Id.*

<sup>81</sup> See Slattery, *supra* note 8, at 234-35.

nearly half that time for Lithuania to regain its independence most recently. Regardless of Lithuania's state of independence, the Lithuanian American community has spent over five decades creating their own distinct cultural heritage and it would be in the community's best interest to preserve it indefinitely.

Preserving the intangible cultural heritage of an ethnic community would be a benefit to the U.S., as well as the global community.<sup>82</sup> Scholars have analyzed the definitive loss throughout the world of languages, knowhow, and customs leading to the progressive impoverishment of human society.<sup>83</sup> One of the treasures of this country is that it is comprised of many nationalities each rich with their own cultural diversity. It would be in the best interest of this country to hold on to that treasure.

### 5. *Economic Incentives*

Copyright law gives authors an economic incentive to create, but monetary considerations are not the main focus for cultural groups in regards to protecting their intangible cultural heritage.<sup>84</sup> Protection is often given "under the guise" of authorship to encourage creativity or innovation, but in reality, it is an investment.<sup>85</sup> For the Lithuanian American community, no one stands to make a big profit through the efforts to preserve cultural traditions. Though the creators of the song and dance festivals in America have raised money for the Lithuanian American community, the main purpose of these festivals is not for monetary gain but to maintain the cultural traditions.

#### *B. The Green Grass of Safeguarding*

The international community has used copyright mechanisms to afford protection to intangible cultural heritage.<sup>86</sup> Additionally, the alternative to intellectual property law is using an inventory system, which, despite some drawbacks, has proven to be quite effective for many countries.<sup>87</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 42 EURO J. INT'L L. 1, 102 (2011). The rich cultural variety of humanity is progressively and dangerously becoming uniform. The loss of cultural heritage will standardize the differences among people, and their social and cultural identity will be narrowed down to stereotyped ways of life. Intangible cultural heritage is a living expression of the various traits of communities. With mutual recognition and respect, safeguarding cultural heritage is essential to "promoting harmony in intercultural relations, through fostering better appreciation and understanding of the differences between human communities."

<sup>84</sup> See Slattery, *supra* note 8, at 236.

<sup>85</sup> Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and A Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171 (2003). Much of the world's creativity goes unrecognized. If it is recognized, the global intellectual property regimes offer "rights without recognizing the responsibilities . . . to others, to their ancestors, to future generations . . ."

<sup>86</sup> Janet Blake, *Developing a New Standard-Setting Instrument for the Safeguard of the Intangible Cultural Heritage: Elements for Consideration*, 18 (UNESCO Publishing, 2001).

<sup>87</sup> See Slattery, *supra* note 8, at 251-53.

### 1. *Inventories of the Intangible*

Despite efforts by the international community to adopt an appropriate mechanism to protect intangible cultural heritage in the form of copyright law, preservation through alternative measures may be the only option available.<sup>88</sup> The 2003 UNESCO Convention endorses an inventory system to document intangible cultural heritage in order to preserve it.<sup>89</sup> Some problems with inventory systems are that they are inherently difficult to create, they involve value judgments to determine what is included on the list, and some groups might not want to include this information on a public list.<sup>90</sup>

If the U.S. adopted the 2003 Convention, the Lithuanian American community would still need to get traditions such as the song and dance festivals on the list. This might pose to be a great obstacle since the U.S. is a large multi-ethnic nation and Lithuanian Americans would be one of very many applicants to consider. In addition, while an inventory may recognize and give value to various traditions, this alone will not save these living treasures.<sup>91</sup>

Not limited to just an inventory system, the 2003 UNESCO Convention includes a broad-based approach to address the safeguarding of intangible cultural heritage.<sup>92</sup> The Lithuanian American community has a strong base to promote culture among others in the community. If the U.S. adopted the 2003 Convention, the Lithuanian Americans would have additional support to increase awareness to the general public about the value and uniqueness of this ethnic community. This requires a commitment to acknowledge and protect culture with the authorization, cooperation, and involvement in the decision-making process of the relevant community.<sup>93</sup> Considering the turbulent political history and past governmental tyranny in Lithuania, the Lithuanian Americans may be distrusting of any government

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<sup>88</sup> *Id.* at 244.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 245-250. Developing inventories in large multiethnic nations such as the U.S. could involve staggering bureaucratic labor. There are hundreds of distinct cultural communities and it would be very difficult to turn the complexity of even one culture into a list. However, with enough people and resources devoted to documentary efforts, an inventory preserves important aspects of cultural heritage. A long and arduous process should not deter these efforts. Value judgments may result in minority groups being deemed less worthy of protection, but this could be remedied by getting members of minority groups involved in developing the inventory. The biggest obstacle is that some groups may not want to be inventoried because of the group's desire to maintain cultural secrecy.

<sup>91</sup> Kurin, *supra* note 7, at 74-5. Traditions that are colorful, popular, and have a long history will continue to be included on the list, but endangered intangible cultural heritage may not necessarily stir action for adequate plans to sustain them. Survival depends on a variety of things such as, "freedom and desire of culture bearers, an adequate environment, a sustaining economic system, a political context within which their very existence is at least tolerated." *Id.*

<sup>92</sup> See Slattery, *supra* note 8, at 258. The 2003 Convention encourages states to develop policies and pass laws to address intangible cultural heritage as well as engage in educational endeavors to inform the public.

<sup>93</sup> Kurin, *supra* note 7, at 71. See also United Nations Educational, Scientific, and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage*, Art. 11(b), (Oct. 17, 2003), 2368 U.N.T.S. 35, available at <http://www.unesco.org/culture/ich/en/convention>.

involvement in the decision-making process in regards to safeguarding their cultural heritage.

Another drawback is the “necessary measures” upon the states to ensure the viability of intangible cultural heritage.<sup>94</sup> As generations get older and new generations assimilate, it becomes more difficult to maintain cultural traditions. It would also go against human rights to force anyone to continue traditions if they do not wish to do so.

Although the U.S. has supported a draft convention to safeguard intangible cultural heritage, it has other mechanisms in place and has no interest to adopt this international convention.<sup>95</sup>

## 2. Other Mechanisms in the U.S.

Supporting varied cultural traditions is important to the U.S. as a democracy and therefore, safeguarding intangible cultural heritage is indeed imperative.<sup>96</sup> The U.S. supports an approach that is flexible and multifaceted.<sup>97</sup> While UNESCO serves an important role in providing model action plans, individual states could develop their own plans to address intangible cultural heritage. In pursuing this goal, in addition to using its own intellectual property laws, the U.S. relies on government funded agencies, as well as Smithsonian.<sup>98</sup>

Through the NEA, there is support for the public presentation of folk arts, through festivals and exhibitions.<sup>99</sup> Similar to the 2003 UNESCO Convention,

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<sup>94</sup> Kurin, *supra* note 7, at 73. “Necessary measures” could end up being too extreme and legally require descendants who practice a tradition to continue in the footsteps of their ancestors. *Id.* Safeguarding under the 2003 Convention should not be coercive in that “no cultural treaty should ensure results through the denial of freedom promised under human-rights accords with the opportunity for social, cultural, and economic mobility.” *Id.* In addition, no convention can ensure the viability of intangible cultural heritage because culture changes and evolves. Traditions will cease when they are no longer “functionally useful or symbolically meaningful to a community.”

<sup>95</sup> Personal correspondence from Patty Gerstenblith (October 5, 2014). As appointed chair by President Obama for the Department of State’s Cultural Property Advisory Committee, author of several publications on the subject of cultural heritage, and editor-in-chief of the International Journal of Cultural Property, Gerstenblith has stated that there has not been any recent discussion in the U.S. in regards to the 2003 Convention. She explained that the U.S. is a “dead-end” so far as the 2003 Convention is concerned because there simply is no interest. The position is the U.S. deals with cultural heritage under copyright law and possibly other intellectual property law, which the U.S. is not interested in changing, especially not through another convention.

Personal correspondence from Giovanni Scepti (Oct. 27, 2014). The regional officer for the UNESCO headquarters of the Section, has stated, “the U.S. has not yet ratified the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, and this situation seems to be unlikely to change in the near future.”

<sup>96</sup> Statement of the U.S. Delegation on the draft convention on the Safeguarding of Intangible Cultural Heritage (September 24, 2002), U.S. Department of State: Diplomacy in Action, *available at* [www.state.gov/s/1/38646.htm](http://www.state.gov/s/1/38646.htm).

<sup>97</sup> *Id.* Objectives should be clear and common with explicit and achievable standards, a strategically focused scope and action plan, stated in simple and unambiguous language.

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

<sup>99</sup> See Bergy, *supra* note 58. These strategies are not prescriptive, but programmatically guided by peer panel recommendations. Funding supports free community-wide festivals that feature music, dance, craft, storytelling, and food of the region.



inventories are used for fieldwork and documentation to allow identification of the varied cultural traditions within the country.<sup>100</sup> In order for the program to be successful, a network of folk art specialists has been established for those communities operating in informal settings without the benefit of institutional or economic support.<sup>101</sup>

With so many programs in place, it may not be necessary for the U.S. to adopt the UNESCO Convention in order to preserve intangible cultural heritage. If a cultural group, such as the Lithuanian American community wants protection, there are resources available to them. Through peer panel recommendations, ethnic groups are funded to participate in festivals that feature music, dance, craft, storytelling, and food of their culture.<sup>102</sup> This creates a venue to showcase the intangible cultural heritage of an ethnic group. In addition, coordinators through the NEA identify, document, and assess the needs of folk artists and cultural specialists.<sup>103</sup> With that information, they collaborate with cultural communities to carry out programs to support the ethnic group.<sup>104</sup> Lithuanian Americans have mostly relied on their own resources to preserve their intangible cultural heritage, but through the NEA, they would have additional support to continue teaching traditions to future generations.

For ethnic groups such as the Lithuanian American community to take advantage of these programs, there needs to be more awareness of these programs. If no one reaches out to the ethnic communities, it is not foreseeable that the members of the community will know to contact the NEA. Although promising, it is imperative to increase public knowledge about the resources available to ethnic communities in order for the programs to be more effective.

### 3. *One Country, One People*

Through legislation, federal programs, and scholarly debate, there is some support in the U.S. to protect the intangible cultural heritage of Native Americans.<sup>105</sup>

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<sup>100</sup> *Id.* Inventories are important to identify, “new communities, new artistic traditions, and emergent forms of artistic expression . . . with new immigrant groups . . . targeted surveys look . . . at specific cultural groups or underserved areas of the state.” *Id.* Surveys include documentation of a variety of cultural traditions including, “of polka music in a Midwestern state, of crafts along the Arizona-Mexican border, of dance traditions of Bolivian immigrants living in the suburbs of Washington D.C., of foodways of selected counties in the state of Texas, and of local palm-leaf hat-making traditions in Hawaii.” *Id.*

<sup>101</sup> *Id.* Since many of the artistic traditions operate under the radar, the development of a strong infrastructure of cultural expertise has been a priority in order to create a link with the artists and cultural communities. The NEA director of Folk & Traditional Arts explained, “state and regional folk arts coordinators serve as eyes and ears in identifying, documenting, and assessing the needs of folk artists and these cultural specialists, in turn, provide the backbone and muscle to carry out programs in collaboration with cultural communities.” *Id.*

<sup>102</sup> Bergy, *supra* note 58.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> U.S. Department of the Interior, National Park Service, *National Nagpra*, NPS, (Nov. 20, 2014, 12:41PM), <http://www.nps.gov/nagpra/FAQ/>. The Native American Graves Protection and Repatriation Act (“NAGPRA”) is a federal law that was passed in 1990. It serves to protect the cultural artifacts of Native Americans. Many scholars have analyzed that through NAGPRA, the

In *Muckleshoot v. United States Forest Service*, land that had been used by a tribe for thousands of years was to be exchanged to a timber company.<sup>106</sup> In addition to the land's value as a resource, the court considered the use of this land by the tribe for cultural and religious purposes. The court ruled in favor of the tribe and held that the defendant had not complied with historic preservation laws.<sup>107</sup> Unfortunately, this would not apply to Lithuanian Americans because the law the court applied pertains to Native Americans. However, historic preservation laws could be expanded to include intangible cultural heritage.

In *United States v. Bresette*, two Chippewa Indians were convicted for selling dream catchers containing feathers, violating the Migratory Bird Treaty Act.<sup>108</sup> The court considered the artistic and spiritual value of the dream catchers to the Chippewa. The court ruled in favor of the defendants because of their status as Chippewa and the existing Indian treaties.<sup>109</sup> This case shows that courts are sympathetic to protecting the artistic expression of a culture. Therefore, the courts may be interested in extending the scope of protection to include the artistic expression of Lithuanian Americans such as the song and dance festivals in the U.S.

While it is hopeful that the U.S. does have interest to protect intangible cultural heritage, the non-Native American intangible cultural heritage of the ethnic communities would still fall short of protection.<sup>110</sup> Not having status as a Native American would prevent the law from being applicable to non-Native Americans. However, the U.S. could use the laws and programs in place to extend the protection to ethnic groups within the U.S.

#### IV. PROPOSAL

Cultural heritage goes to the heart of a given people with the identity of a community reflected in traditions.<sup>111</sup> The disappearance or dilution of cultural

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intangible cultural heritage could also be protected. *See also* Peter K. Yu. *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 475-476. The author discusses how indigenous communities have begun to insist on the return of all the human remains that are still housed in museums or research institutions. With the return of these artifacts, the right of traditional knowledge and cultural expression is protected. He argues that emphasis on the term "intangible cultural heritage" may call for very different protective regimes. *Id.* Similarities between the "cultural heritage" and "intangible heritage" may provide significant common grounds for promoting further development and implementation of the framework. *Id.*

<sup>106</sup> *Muckleshoot v. United States Forest Service*, 177 F.3d 800 (9th Cir. Wash. 1999).

<sup>107</sup> *Id.* at 815.

<sup>108</sup> *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991).

<sup>109</sup> *Id.* at 664.

<sup>110</sup> U.S. Department of the Interior, National Park Service, *National NAGPRA*, NPS (Nov. 20, 2014, 12:41PM), <http://www.nps.gov/nagpra/FAQ/>.

<sup>111</sup> Federico Lenzerini, *The Protection of Art in Times of Crisis: from War to Natural Disasters*, The Tulane-Siena Institute for International Law, Cultural Heritage & the Arts (Summer, 2014). International Law, Cultural Heritage, and the Arts. Siena, Italy: Tulane University. In his lecture, Lenzerini discussed how destruction of cultural property central to a community is sometimes done in order to weaken and destroy the community. It destroys the identity and sense of belonging of people living in the area. One example was the 2012 destruction of the historic and religious landmarks in northern Mali by Al Qaeda-linked rebels. Another example was the destruction of the Temple of Serapis in Alexandria, Egypt in 391 A.D. The Roman Empire was Christian, but the

heritage weakens the community and the world as a whole.<sup>112</sup> As a global community, it is important to all of humanity to preserve and protect cultural heritage.<sup>113</sup> Currently there are no plans to adopt the 2003 UNESCO Convention<sup>114</sup> and the current intellectual property laws do not adequately address intangible cultural heritage.<sup>115</sup> While relics and landmarks may remain,<sup>116</sup> the traditions and important skills of a cultural community such as the Lithuanian Americans are in danger of disappearing.<sup>117</sup> The U.S. needs a revision to the current Copyright Act or an alternative measure to safeguard intangible cultural heritage.

### A. *The Next Great Copyright Act*

There is a great need for revision to the current copyright laws. Congress last made an expansion to the U.S. Copyright Act more than fifteen years ago and the current law does not reflect the evolving needs of a global community.<sup>118</sup> In creating the next Copyright Act, Congress should consider the public interest to include provisions for the protection and preservation of intangible cultural heritage. By following the Tunis Model Law on Copyright, Congress could create a provision allowing for copyright protection of folklore and other forms of intangible cultural heritage.<sup>119</sup> This would create an exception for the requirement of an original fixed tangible medium of expression by an identifiable author.<sup>120</sup>

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temple was a symbol of pagan religion. The residents chose to remain in the temple and die during the destruction than lose the temple and live.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Personal correspondence from Megan Larson-Kone (Oct. 28, 2014). The Public Affairs Officer for the U.S. Mission to UNESCO was contacted in regards to any new developments. At the time, the U.S. Mission to UNESCO was engaged at the UNESCO Executive Board. No developments have been communicated.

<sup>115</sup> See Slattery, *supra* note 8, at 231.

<sup>116</sup> National Park Service, *National Register of Historic Places Program: About Us*, NPS (Nov. 15, 2014, 4:54 PM), <http://www.nps.gov/nr/about.htm>. The National Historic Preservation Act of 1966 established a national registry identifying, evaluating, and protecting America's historic and archeological resources. In addition to maintaining a registry, there is sponsorship for the Cultural Resources Diversity Program. They manage historic preservation and cultural resources. Places are recognized for meaning as well as associations people may have with memories and experiences. The program recognizes that cultural practices include tangible materials, such as structures and artifacts, as well as intangible aspects of cultural expression. However, not much is done to protect the oral traditions, music, and community rituals other than preserving the places of these cultures.

<sup>117</sup> See Benotienė, *supra* note 17. The original purpose of hosting folk festivals in the U.S. was to preserve the culture of a Soviet occupied Lithuania. Now that Lithuania is an independent country, priorities have shifted and there is not as much interest to continue the festivals in the U.S.

<sup>118</sup> The Register's Call for Updates to U.S. Copyright Law, Hearing before the Subcommittee on Courts, Intellectual Property and the Internet Committee on the Judiciary, U.S. H. REP., 113<sup>th</sup> CONG. 1 (Mar. 20, 2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office). Pallante discusses the need for an update because of the aging current law. Numerous, complex, and interrelated issues affecting the public at large as well as the economy include, "authors do not have effective protections, good faith businesses do not have clear roadmaps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated." *Id.*

<sup>119</sup> See Slattery, *supra* note 8, at 242.

<sup>120</sup> *Id.*

*B. Register, Represent, and Remember*

Since the U.S. Constitution requires that copyrights may only be awarded for “limited times,”<sup>121</sup> the duration of a copyright for intangible cultural heritage could be addressed by establishing a preservation system after a certain protection period has expired. Setting up an inventory, similar to that of the 2003 UNESCO Convention, would be successful in providing documentation of intangible cultural heritage.<sup>122</sup> The U.S. already has an inventory of some of the country’s intangible cultural heritage through the NEA. However, unlike the 2003 UNESCO Convention, there is not much awareness of these inventories within cultural communities.<sup>123</sup> To address this problem, the U.S. could establish an intangible cultural heritage committee to oversee the preservation system on a larger scale. While the NEA oversees the inventories, more support is needed to educate the general public about the existence of this inventory.<sup>124</sup>

Since one of the potential drawbacks to creating an inventory are the value judgments during the process, it would be important to get members of the ethnic groups involved in the development of the lists.<sup>125</sup> Cultural groups should be granted a voice in decisions affecting the education and resources for preserving intangible cultural heritage.<sup>126</sup> A representative from the ethnic communities would ensure that all groups are represented and lists are created accurately.<sup>127</sup>

Unfortunately, a specialized program or committee may not have staying power if there is a lack of federal funding.<sup>128</sup> For work identified as folklore or intangible

<sup>121</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>122</sup> Intangible Heritage, *Kit of the Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO (Nov. 20, 2014, 11:59 AM) <http://www.unesco.org/culture/ich/index>. Because the purpose of the Convention is to safeguard intangible cultural heritage of humanity, inventories are used to raise awareness about the heritage as well as its importance for individual and collective identities. The process involves providing public access to the inventories as well as a basis for formulating concrete plans for protection.

<sup>123</sup> See United Nations Educational, Scientific, and Cultural Organization (UNESCO), *Convention for the Safeguarding of Intangible Cultural Heritage*, § 1, art. 14 (2003) (explaining the parties endeavor for education, awareness-raising and capacity-building. To ensure recognition, respect, and enhancement of intangible cultural heritage in society, educational programs for the general public will be established. There are also efforts to keep the public informed of threats to cultural heritage as well as activities through the Convention that protect against such dangers. Each party to the Convention is to “promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage.”).

<sup>124</sup> See Bergy, *supra* note 58. Although the NEA works with other entities to promote education, much more needs to be done to raise awareness. The challenge is to identify the ethnic communities in the U.S. that could benefit from such programs if they are not already aware of the resources and support available.

<sup>125</sup> See Slattery, *supra* note 8, at 245-50.

<sup>126</sup> Brown, *supra* note 10, at 95. This may be a demanding policy, but such implementation could save the world’s cultural diversity.

<sup>127</sup> See Slattery, *supra* note 8, at 246.

<sup>128</sup> *Save America’s Treasures*, NATIONAL TRUST FOR HISTORIC PRESERVATION (Nov. 15, 2014, 5:23PM), <http://www.preservationnation.org/travel-and-sites/save-americas-treasures/>. In 1998, Save America’s Treasure Program created an inventory of America’s tangible cultural heritage which included historic structures, collections, words of art, maps, and journals. However, Congress did not renew funding for this program for the fiscal years of 2011 and 2012 and the office remains closed with no plans to re-establish funding. Although Save America’s Treasures was one of the

cultural heritage belonging to a community rather than an individual, any economic gains from that work could be used to fund programs set up to protect and preserve heritage.<sup>129</sup>

### C. “*And Action!*”

Another way to protect intangible cultural heritage is to put the works in a tangible form. This could be through documentation of the traditions in a video or book format. The documented works would need to be updated with secondary editions and annotations since cultural heritage evolves. Following UNESCO’s inventory system, the U.S. could maintain a database accessible to the general public. The database would include an explanation of the importance of the cultural heritage, the impact it has had on the U.S., a description of the history of the cultural heritage as well as how it has evolved, and a short video showcasing the cultural heritage.<sup>130</sup> Since culture is a living thing, documentation may not always be possible. On the spectrum of protection, this would at least offer some safeguarding, which is better than none.

### D. *Hopes, Dreams, and Summer Camp Love*

The new generation of Lithuanian Americans is now distant relatives to the first generation who fled to the U.S. Keeping traditions and learning the songs, dances, and language may not be as strong. There may even be initial resistance to embrace these differences found in their cultural heritage.<sup>131</sup> However, a new cultural heritage has emerged in the American children whose first language was Lithuanian, who participated in folk dance groups, who begrudgingly ate pickled herring for Christmas, and who attended summer camps to learn more about the Lithuanian heritage and now have children and even grandchildren of their own. What remains

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most important and effective federally funded programs with cultural preservation efforts, they were only active for a short period of time.

<sup>129</sup> See Slattery, *supra* note 8, at 234-35. Despite the economic gains afforded by copyright protection, this is not the purpose of protection of an ethnic group’s cultural heritage. Therefore, any economic gains through this protection could be allocated to the system at large rather than an individual or community.

<sup>130</sup> Intangible Cultural Heritage, *NHK Videos in High-Definition on intangible cultural heritage*, UNESCO (Nov. 20, 2014, 12:32 PM), <http://www.unesco.org/culture/ich/en/nhk>. A public broadcaster of Japan has cooperated with UNESCO to develop an on-line database of high-definition images on cultural heritage. The videos first featured world heritage sites, but have now incorporated intangible cultural heritage. Available in French and English, examples of the videos include: Royal ballet of Cambodia, Chinese paper-cutting, carpet weaving of Iran, and traditional Mexican cuisine.

<sup>131</sup> Ann Petrolionas, *The Bard Festival - A Celebration of Song for the Heart at Camp Dainava*, DRAUGAS, (Nov. 10, 2012), <http://becominglithuanian.blogspot.com/>. Thirty-one year old author describes being raised by a Lithuanian father and American mother. She spent most of her life rejecting all things Lithuanian until she took a trip to Lithuania when she was nineteen. Afterwards, she grew closer to the Lithuanian side of her family and discovered how the universal language of Lithuanian music united them despite her struggles with the spoken Lithuanian language.

are fond memories and friendships made through this bond of sharing a Lithuanian heritage. With that, the next generation has a different understanding of the importance of maintaining this unique quality and some are choosing to instill this value in their children.

With the blend of cultures in the U.S., it is quite remarkable for an ethnic group to still have a strong cultural identity after many years of assimilation in the U.S.<sup>132</sup> The Lithuanian Americans are now part of the U.S.'s cultural heritage, with separate and unique traditions from Lithuania. One example is the Lithuanian Camp Dainava in Michigan, a unique place for Lithuanian Americans.<sup>133</sup> Having an impact on the lives of many Lithuanian Americans, it continues to be a location of great value for upholding the cultural treasures of the Lithuanian American.<sup>134</sup> A popular song written by a Lithuanian American who attended this camp throughout his life expresses the admiration for this special place, "your feelings for others open and your heart calms . . . in our dreams we will return to our Lake Spyglys and Camp Dainava!"<sup>135</sup>

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<sup>132</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, Table 52 Population by Selected Ancestry Group and Region: 2009, <https://www.census.gov/prod/2011pubs/12statab/pop.pdf>. Ancestry refers to the ethnic origin or heritage of a person and considered to be "the place of birth of the person, the person's parents, or ancestors before their arrival in the United States." According to the U.S. Census, there were almost 80 different ancestry groups reported.

<sup>133</sup> *About us*, DAINAVA (Nov. 15, 2014, 5:40PM), <http://www.dainava.org/about-us/>. The Lithuanian American Roman Catholic Federation ("ARKLF") with elected president, Dr. Adolfas Damušis, raised funds for a summer campground for Lithuanian youth. In 1957, after a 226-acre farm near Manchester, Michigan came to the attention of Lithuanians living in the Detroit area, many dedicated and generous individuals through ARKLF helped purchase the farm. It was named Camp Dainava.

<sup>134</sup> *Reflections on Heritage Stovkyla*, DAINAVA (Nov. 15, 2014, 5:40PM), <http://www.dainava.org/reflections-on-heritage-stovkyla/>. Mykolas Rušėnas reflects on his Lithuanian heritage and how Camp Dainava is more of a home than anywhere else he has ever lived. Attending camp here is a life changing experience and "people truly open their hearts and come together as a (family) to enjoy every little bit of wonder and magic that Dainava has to offer." This third generation Lithuanian American is forever grateful for the lessons learned at Heritage Camp and how it is an "absolute honor" for him to share the "experience, knowledge and love" that the camp has to offer to the new generations of campers. He hopes that the wonderful traditions of Lithuanian Heritage and Camp Dainava live on forever.

<sup>135</sup> *Ramūnas Underys, "Ei, Drauguži"*. Translated lyrics from the song written by a Lithuanian American. This song about friendship is still sung and fondly remembered by many Lithuanian Americans, especially when attending summer camp. It is a unique song because unlike other Lithuanian songs written about Lithuania or originally from Lithuania, it showcases Camp Dainava, a place in the U.S., and it reflects on the special bond made by those Lithuanian Americans who have attended this camp. This song is an example of intangible cultural heritage that is distinctive to Lithuanian Americans.

## V. CONCLUSION

When it comes to protecting and preserving intangible cultural heritage, the legal system in the U.S. has many limitations. The 2003 UNESCO Convention as well as the Tunis Model law have addressed the intangible cultural heritage at the international level. However, protections are still taking shape at the national level.<sup>136</sup> A revision to the current Copyright Act as well as a better structure to the alternatives available could provide more adequate protection and preservation of intangible cultural heritage.<sup>137</sup> With a more developed framework, the heritage of the ethnic communities within the U.S., in particular the Lithuanian Americans, will be protected and preserved.

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<sup>136</sup> See Gerstenblith, *supra* note 95.

<sup>137</sup> See Slattery, *supra* note 8, at 242.