

Washington University Journal of Law & Policy

Volume 19 *Access to Justice: The Social Responsibility of Lawyers / Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples*

January 2005

Indigenous Peoples and Intellectual Property

Lorie Graham

Suffolk University Law School

Stephen McJohn

Suffolk University Law School

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Lorie Graham and Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J. L. & POL'Y 313 (2005),
https://openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/16

This Rights of Indigenous Peoples - Essay is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Indigenous Peoples and Intellectual Property

Lorie Graham^{*}
Stephen McJohn^{**}

“There is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and [] the protection of both is essential to the indigenous peoples’ cultural and economic *survival*”¹

Michael F. Brown’s *Who Owns Native Culture?*² is a thoughtful exploration of the issues raised by intellectual property law and indigenous cultures. The book gives several detailed accounts of disputes, addressing such questions as copyright in the art of the Ganalbingu people in the Northern Territory of Australia and patent rights in pharmaceuticals derived from traditional knowledge of healing plants.³ It succeeds in drawing out many complexities and showing numerous perspectives. This paper does not seek to review the book, beyond commending it as an intelligent and nuanced addition to the literature. Rather, this paper looks specifically to some general conclusions the book draws about whether intellectual property law is a useful tool to protect indigenous cultures. Brown suggests that “judicious modification of intellectual property law” has a role to play.⁴ But much of the book argues against reliance on intellectual property, preferring negotiation on the basis of mutual dignity.⁵ Intellectual property law, in this view, threatens the public

* Associate Professor of Law at Suffolk University Law School in Boston, Massachusetts.

** Professor of Law at Suffolk University Law School in Boston, Massachusetts.

1. Resolution of Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1992/30, 1992/35 (Aug. 27, 1992).

2. MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003). A website at <http://www.williams.edu/go/native> supplements the book, providing access to a number of related research resources.

3. *Id.* at 44–48, 106–08.

4. *Id.* at 10.

5. *Id.*

domain and is ill-suited in many respects for application to indigenous cultures. This paper suggests a different way to frame the issue, in which intellectual property law, negotiation, and human rights precepts work together to address indigenous claims to heritage protection.⁶

I. SPECIAL INTERESTS, THE PUBLIC DOMAIN, AND INDIGENOUS PEOPLES

Brown raises concern for the “public domain, which is squeezed on one side by the privatizing logic of the world’s corporations and on the other by native-rights activists promoting novel forms of collective copyright.”⁷ He thus places the calls for intellectual property protection of indigenous cultures within the larger context of intellectual property law. Recent intellectual property law public debate and scholarship has indeed recognized that the public domain is threatened by the increasing reach of patent, copyright, trademark, trade secret, and related bodies of law.⁸ Framed this way, calls for the use of intellectual property law to protect native cultures would appear to lead to new incursions on the threatened public domain. This has considerable resonance in a time of increasing public awareness of the privatization of abstractions.⁹ Brown is right in suggesting that any proposals to increase the reach of intellectual property protection should consider the effect on freedom to transmit ideas, to innovate, and to express oneself. Framing the overall issue in this way, however, overlooks some key distinctions between special interests, the public domain, and indigenous peoples’ claims to heritage protection.

6. On use of the term “indigenous heritage,” see TONY SIMPSON, THE FOREST PEOPLES PROGRAMME, INDIGENOUS HERITAGE AND SELF-DETERMINATION 20 (1997); Protection of the Heritage of Indigenous People, Erica-Irene Daes, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Doc. E.97.XIV.3, ¶¶ 21–32 (1997) [hereinafter Protection of the Heritage of Indigenous People].

7. BROWN, *supra* note 2, at 7.

8. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001); JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

9. “With the intellectual community in substantial agreement that the world has too much intellectual property, those adopting the strategy of proprietizing existing knowledge and unimproved plant genetic resources are in a difficult political position.” Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT’L & COMP. L. 519, 523 (2003).

First, it equates the ability special interests have had to shape intellectual property law to the calls for protection of indigenous cultures, characterizing the public domain as being squeezed between the two. But there are many differences in both the political strength of the indigenous claims and the position of indigenous peoples, vis-à-vis corporate power. Second, it is not so much a question of the public domain versus corporate and indigenous interests, as it is a question of the impact corporate interests have had on the indigenous claims. Indeed indigenous peoples' claims are in many respects more properly aligned with the interests of the public. Third, there are important questions of discriminatory treatment of indigenous knowledge that are overlooked when the issue is framed as such. The principle of non-discrimination is an important human rights precept that is equally applicable to the protection of indigenous intellectual and cultural property. Lastly, the scope and source of the rights being advanced by indigenous peoples are quite different than those of corporate or special interests. Legal protection of indigenous heritages is sought not for pure economic gain, but rather because it is integral to indigenous survival. And the source of this protection is grounded not in the "privatizing logic" of commercial law, but rather in human rights law.

The last few decades have indeed seen a steady increase in intellectual property protection in every area. Patent subject matter has been extended to every field of endeavor. Patents now issue on subject matter once thought unpatentable: new life forms, business methods, and software, to name a few.¹⁰ Copyright's reach has likewise broadened to cover things like software, and to provide new rights, such as the infamous anti-circumvention rules in the Digital Millennium Copyright Act.¹¹ The copyright term has been extended

10. See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (holding that a life form could be patented, and that patent law extended to "include anything under the sun that is made by man"); *AT&T Corp. v. Excel Commc'ns, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999); *State Street Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1368, 1375 (Fed. Cir. 1998) (holding specifically that business methods were patentable, and generally that there were few limits on the subject matter of patents, as long as the invention met the requirements of novelty, nonobviousness, and written description); *In re Alappat*, 33 F.3d 1526, 1542 (Fed. Cir. 1994) (affirming breadth of patent subject matter).

11. See 17 U.S.C. §§ 1201–05 (2000) (containing anti-circumvention provisions, which were added to the Copyright Act in 1998 and give considerable new protections to copyright

until, for practical purposes, it has become infinite.¹² Trademark law has expanded from the protection of trade symbols to protection of every imaginable symbol, including colors, scents and sounds.¹³ The varieties of trademark protections have increased from mere trademark infringement to just theories of dilution, and anti-cyber-squatting protection. In addition, trademark infringement itself has been richly expanded to include such theories as post-sale confusion, initial interest confusion and reverse confusion. In short, intellectual property law has greatly expanded, largely driven by the special interests' role in legislation and in the formulation of international treaties.

But indigenous people have hardly had the same sway as corporate interests. Intellectual property law has been expanded for corporate interests in a number of sweeping ways. By comparison, the few measures that have recognized rights in indigenous cultures have been quite limited. In the United States, the most significant examples are the Indian Arts and Crafts Act¹⁴ and the Native American Graves Protection and Repatriation Act (NAGPRA).¹⁵ None of these has had an effect on the public domain that is significant compared to the legislative grants to industry interests. In the international area, indigenous interests have hardly received the sort of attention that corporate interests have. The most significant

holders).

12. Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (affirming the extension of copyright term to ninety-five years, thus leaving items published since 1923 under copyright); Stephen M. McJohn, *Eldred's Aftermath*, 10 MICH. TELECOMM. & TECH. L. REV. 95 (2003). On the expansion of copyright, see William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1154 (1998) (on the "seemingly inexorable expansion of copyright"); Pamela Samuelson, *The Copyright Grab*, 4.01 WIRED, Jan. 1996, at 134. On the difficulties of reconciling expanding copyright with freedom of speech, see, e.g., Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000); for a broad view, see Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003).

13. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); Kenneth L. Port, *The Congressional Expansion of American Trademark Law*, 35 WAKE FOREST L. REV. 827 (2000).

14. 25 U.S.C. § 305 (2000).

15. *Id.* §§ 3001–13. See generally Angela R. Riley, *Indian Remains, Human Rights*, 34 COLUM. HUM. RTS. L. REV. 49 (2002).

change in international law is that intellectual property, through the TRIPS agreement, has been made part of international trade law. Thus, nations that do not abide by the international standards are subject to the coercive processes of the World Trade Organization (WTO) dispute resolution mechanism. Developed nations have put considerable pressure on developing nations to gradually adopt such norms.¹⁶ Efforts to use international treaties to provide protection of indigenous cultures, by contrast, have met much more resistance.¹⁷ Thanks to the efforts of indigenous groups and non-governmental organizations (NGO), both the World Intellectual Property Organization (WIPO) and the WTO have at least taken some issues into consideration.¹⁸ But, although issues of indigenous cultures now have a seat at the table, they have as yet little concrete recognition.

There is a second problem in viewing the public domain as being attacked on one front by corporations and on another front by indigenous peoples. The expansion of intellectual property law has not come only at the expense of the general public domain. To the contrary, it has cut into specific interests, such as those of indigenous peoples. Thus, in many respects, the rights of indigenous peoples are more properly aligned with the public domain than opposed. In intellectual property, as in other areas, legal protection for native peoples is effectively eroding, rather than expanding.

The political forces that allowed commercial power to decrease the public domain are also allowing commercial interests to increase at the cost of indigenous peoples. Many of the claims sought by indigenous peoples are not claims to something in the public domain, but rather claims for protection from corporate intellectual property. Folklore or indigenous music, for example, are often not protected by

16. See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11 (1998).

17. See, e.g., INTERNATIONAL INDIAN TREATY COUNCIL, SUMMARY OF THE INFORMAL INTERSESSIONAL CONSULTATIONS 16–19 (2002), at www.treatycouncil.org/new_page_552.htm (articulating various objections by some states to Article 29 of the Draft Declaration on the Rights of Indigenous Peoples, which provides for recognition and control over indigenous peoples' intellectual and cultural property).

18. For example, An Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been established in connection with WIPO. See www.wipo.int.

copyright.¹⁹ But a modern recording containing indigenous music or a new book containing folklore may be copyrighted, if it contains even minimal new elements (the choices made in the sound recording or the editorial additions to the folklore).²⁰ So a commercial interest may, in effect, be able to hold copyrights in the products of an indigenous group. Similarly, in biotechnology, traditional knowledge about the properties of plants may be privatized. Patent law “enables broad patents on minor modifications, syntheses, and purifications,” such as “plant genetic resources, where patents based on local knowledge of plant qualities have become routine.”²¹

Other areas of intellectual property likewise show indigenous groups seeking not to diminish the public domain but to resist privatization. The best known indigenous people’s trademark case may be that concerning the trademarked phrase, “The Washington Redskins.”²² U.S. trademark law bars protection for trademarks that are disparaging of a group of people, just as it bars protection for various other disfavored categories of mark.²³ The dispute did not involve Native Americans attempting to remove something from the public domain, but rather to prevent a commercial entity from owning rights to a term that disparaged them.

Patent prosecution is another good example of commercial interests being favored at the expense of indigenous peoples. Perhaps the greatest problem in patent law for indigenous peoples is not the law itself but rather its administration. Many issued patents have not

19. See Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U.L. REV. 769, 819–22 (1999); Angela R. Riley, *Recovering Collectivity*, 18 CARDOZO ARTS & ENT. L.J. 175, 177 (2000).

20. Riley, *supra* note 19, at 175–78 (discussing the “exploitation of a sacred tribal creation which has its roots in thousands of years of Ami tradition” by a German rock group Enigma, which had digitally incorporated the Ami Song of Joy into “a popular ‘world beat’ tune known as Return of Innocence”).

21. Rosemary J. Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 281 (2001). See generally RUSSEL L. BARSH, *FIRST PEOPLES WORLDWIDE, THE NORTH AMERICAN PHARMACEUTICAL INDUSTRY AND RESEARCH INVOLVING INDIGENOUS KNOWLEDGE* (2001).

22. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.C. Cir. 2003); see also Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT’L & COMP. L. 393, 394 (2003).

23. 15 U.S.C. § 1052(a) (2000).

met the substantive or procedural requirements for patent protection. When patents are litigated, somewhere around forty percent of them are held invalid by federal district courts.²⁴ The dynamics of the patent prosecution process tend to contribute to this. A patent examiner has limited time to examine the patent claims and the rest of the patent application to look at all the relevant prior art and to determine whether or not the applicant deserves a patent. It is very difficult for the patent office to make such a determination, which in theory would include researching the history of the relevant invention and looking at every document ever published that was relevant to the work. The path of least resistance is certainly to allow the patent to issue. Given how expensive it actually would be to conduct thorough patent examinations,²⁵ the burden of challenging invalid patents lies with those who would challenge them—a multimillion-dollar task which may not be feasible for an indigenous group. In the areas of biotechnology and of traditional knowledge, it is therefore possible for companies to effectively patent knowledge. Patent quality becomes a huge concern for indigenous peoples. Here again the model of the public domain being squeezed between corporate interests and indigenous claims is inaccurate. Rather the problem lies in corporations removing information from the public domain to the detriment of indigenous groups. Reforms that improve the quality of patent examination would thus benefit the public domain and also indigenous peoples, not one at the expense of the other.

Another problem with characterizing the conflict as one between indigenous claims and corporate interests squeezing the public domain is that much of the criticisms by indigenous groups seek merely to obtain equal treatment under the intellectual property laws—not equal treatment in the sense of matching the special-interest legislation, but simply in applying the basic rules of intellectual property law. Non-discrimination in the enjoyment of fundamental rights and the protection of law are basic tenets of human rights law.²⁶ Yet indigenous groups face significant

24. See Mark Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495 (2001).

25. See *id.* at 1497.

26. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 129–31 (2004).

discrimination, particularly in the area of protection of property under the law.²⁷ Intellectual property law is no exception.

Patent law, for example, has been amended to reduce discrimination against foreign inventors, but not to equalize its treatment of traditional knowledge. U.S. patent laws used to unfairly discriminate against foreign inventors. In a priority dispute between a U.S. inventor and foreign inventor, the foreign inventor could not rely upon activity in her own jurisdiction to support her claims of inventorship. So, the foreign inventor was forced to rely on the priority date established by her U.S. filing date, as opposed to a U.S. inventor who could rely on a priority date established by the inventive activity. This distinction was dropped as the U.S. sought to conform to the treaties it had signed.

Compare this to the treatment of indigenous peoples abroad. Under U.S. law, if an invention has been described in writing anywhere in the world, it is no longer patentable by others. What constitutes publication has been very widely construed. For example, if a chemical was described in a doctoral thesis and the doctoral thesis was put on a shelf in a library somewhere in Germany and entered into the library index, that would be sufficient to keep that chemical in the public domain.²⁸ The result would be different, however, if the chemical had been in use by indigenous peoples in a foreign country.²⁹ If the chemical was known and used by an

Nondiscrimination as a basic tenet of international human rights law is articulated in a number of human rights instruments such as the United Nations Charter (I.C. art. 1(3)), the Universal Declaration of Human Rights (I.C. arts. 1 & 2), the International Covenant on Civil and Political Rights (I.C. arts. 2(2) & 26), and the International Covenant on Economic, Social, and Cultural Rights (art. 2) to name a few.

27. See Erica-Irene Daes, *Indigenous Peoples and Their Relationship to Land*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 53rd Sess., Agenda Item 5, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001); Discrimination Against Indigenous Peoples, Study on the Protection of the Cultural and Intellectual Property Rights of Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1992/28 (1993); S. James Anaya and Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

28. An American who coincidentally discovered the same chemical in the United States would not be entitled to a patent on it, even though it would be highly unlikely that the American would have the ability to search out that obscure dissertation in a foreign jurisdiction, evidenced only by an entry in an index. See *In re Hall*, 781 F.2d 897 (Fed. Cir. 1986).

29. Coombe, *supra* note 21, at 281 ("There is no doubt that the appropriation of traditional

indigenous group in South America for instance, it would still be patentable in the United States, no matter how widespread, or how long standing that use was.³⁰ U.S. patent law thus privileges written documentation over social use. An amendment to equalize this discrimination would again strengthen, not diminish, the public domain.

Intellectual property law with respect to confidential information also gives preferential treatment to commercial interests, by giving far greater legal protection to trade secrets than to traditional knowledge. In one instance in the U.S., a governmental agency sought to reach an agreement with a native group concerning, among other things, traditional knowledge.³¹ The parties agreed that any traditional knowledge that was disclosed to the government would be held in confidence. Subsequent examination of the agreement by government lawyers, however, raised a number of issues including those relating to the Freedom of Information Act (FOIA).³² Even if the government agreed to keep the information confidential, it might be subject to mandatory disclosure under FOIA requests.³³ A far

knowledge continues and the existing U.S. patent system permits and encourages such appropriation to the extent that it fails to recognize foreign prior art unless it is published.”).

30. The public use bar to a patent applies only to activity within in the United States. *See* 35 U.S.C. § 102 (2000).

31. David Ruppert, *Buying Secrets*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES* 113 (Tom Greaves ed., 1994).

32. *Id.* at 121 n.12.

33. *See, e.g.*, Bureau of Land Mgmt., *General Procedural Guidance for Native American Consultation*, Rep. No. H-8160-1, Ch. III, Sec. F, (“BLM Handbook”), available at <http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html>. “One of the greatest barriers to completely open consultation discussions is Native Americans’ hesitation to divulge information about places that are considered to have a sacred character, or practices that are of a sacred or private nature. . . . We must not overstate our ability to protect sensitive information.” *Id.* There are limited exemptions, but they fail to provide adequate protection compared to that provided to commercial interests. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. § 470w-3(a) (2000) (may be able to withhold information about the “location, character, or ownership of a historic resource” that is eligible for the National Register if disclosure would “impede the use of a traditional religious site by practitioners”); Archaeological Resource Protection Act, 16 U.S.C. § 470hh (2000), and accompanying regulations, 43 C.F.R. § 7 (2005) (permitting “[f]ederal agencies to protect archaeological resources from harm by restricting information on their nature and location”). *Compare* Freedom of Information Act, Exemption 4, 5 U.S.C. § 552(b)(4) (2000) (protecting trade secrets and confidential *commercial* information), with *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) (finding documents concerning communications between the Department of the Interior’s Bureau of Reclamation and the Klamath Tribe relating to water rights not exempted from disclosure under

different result would likely arise for the confidential, valuable information of a corporation. If the information qualified as a trade secret, then it would likely qualify for protection against disclosure in FOIA requests.³⁴

Moreover, if regulatory action requires disclosure of a trade secret, that may give the business a right to compensation, because mandatory disclosure of a trade secret can amount to a taking of property for public use (like condemnation of a home to build a freeway).³⁵ So providing traditional knowledge legal protection (like trade secret knowledge) would do several things. It would somewhat even the field with commercial knowledge and it might facilitate sharing of the knowledge, because that could be done subject to greater protection.

The greatest objection to equating indigenous claims with commercial claims is that they derive from wholly different sources. Moreover, the stakes are quite different.³⁶ Commercial claims to intellectual property, by and large, seek to serve financial interests. The economic considerations that are served are often those best able to make their way through the legislative and other policy making processes. However, the source of indigenous claims is quite different. Legal protection for certain aspects of native cultures is

Exemption 5 as “inter-agency or intra-agency memorandums or letters”); Shannon Taylor Waldron, *Trust in the Balance: The Interplay of FOIA’s Exemption 5, Agency-Tribal Consultative Mandates, and the Trust Responsibility*, 26 VT. L. REV. 149 (2001) (criticizing the Court’s decision as being volatile of, among other things, the federal-tribal trust relationship).

34. See 5 U.S.C. § 552(b)(4) (exempting from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

35. See *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 680 (1st Cir. 1998).

36. Shuba Ghosh, *Reflections on the Traditional Knowledge Debate*, 11 CARDOZO J. INT’L & COMP. L. 497, 497 (2003).

Even though these tensions are played out in the arena of intellectual property, it is important to recognize the difference between the traditional knowledge debate and other debates over the expansion of intellectual property in other areas, such as with academic culture or with the Internet. The traditional knowledge debate occurs in the context of a culture clash between the developing and developed worlds, between different social structures in the South and in the North (as well as structures within those two regions). The questions of whether an artifact of traditional knowledge should be owned and of who the owner should be determine issues of development, sovereignty, and control over resources.

Id. at 497 (citations omitted).

grounded in principles of self-determination and international law.³⁷ Indeed, indigenous groups seek intellectual property protection in order to promote their own cultural survival, and as a by-product of their own claims to self-determination. In a United Nations report on the “Protection of the Heritage of Indigenous People,” special rapporteur Erica-Irene Daes emphasizes this important link between protection of indigenous heritages and the right of indigenous peoples to exist as “distinct peoples” in control of their own destinies:

The protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples. Traditional knowledge of values, autonomy, or self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting the land is embedded in the arts, songs, poetry and literature which must be learned and renewed by each succeeding generation of indigenous children.³⁸

Thus, indigenous claims have a much sounder basis in many respects, even though to date their political success has been less in the world’s rule-making bodies.³⁹ Finally, some indigenous claims to

37. Self-determination is an evolving legal precept that at minimum guarantees “all peoples” the right to “freely pursue their economic, social and cultural development.” International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171, G.A. Res. 2200(XXI), art. 1 [hereinafter ICCPR]. See generally ANAYA, *supra* note 26, at 97–128; ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995). While the scope of that right has been the subject of much debate, international law, as it stands today, seems squarely on the side of the protection and enhancement of indigenous cultural identities. *Id.* at 131–41; see also Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J. INT’L & COMP. L. 385 (2004); Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,”* 6 ILSA J. INT’L & COMP. L. 455 (2000). Support for this position can be found in numerous international treaties and declarations. See, e.g., ICCPR, art. 27 (affirming the rights of persons belonging to “ethnic, religious, or linguistic minorities” to “enjoy their own culture” in “community with other members of their group”); Convention on Biological Diversity, June 5, 1992, UNCED, art. 8(j), 1992, U.N. Doc. UNEP/Bio.Div./N7INCE.5/4 (1992) (obligating contracting parties to “respect, preserve, and maintain knowledge, innovations and practices of indigenous and local communities”). Other scholars have made similar claims relying on domestic law and policy. See, e.g., Riley, *supra* note 19, at 205.

38. Protection of the Heritage of Indigenous People, *supra* note 6, ¶ 4.

39. However, some international bodies have begun to take note of indigenous peoples’

intellectual property protection can be viewed as a very partial form of reparations for past wrongs.⁴⁰ At the very least, governments have begun to recognize “the requirement of affirmative action to secure indigenous cultural survival,”⁴¹ which may well include changes to intellectual property law. Thus, even to the extent that indigenous claims might diminish the public domain, they can, among other reasons, be justified because they serve to build and preserve that very public domain.

A related concern is the source of the public domain. One strong justification for limiting intellectual property protection is that authors and inventors necessarily rely on the public domain. Any novelist or software developer uses concepts, tools, ideas, and expressive elements created by others. Because all authors and inventors take from the public domain, they have less room for complaint when elements of their respective contributions are made

concerns as they relate to intellectual property. *See, e.g., Report on the Roundtable on Intellectual Property and Traditional Knowledge* (Geneva, Nov. 1–2, 1999), WIPO/IPTK/RT/99/7 (May 4, 2000), available at http://www.wipo.int/documents/en/meetings/1999/folklore/tkrt99_7.htm; *Report on the Third Session*, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (Geneva, June 13–21, 2002); WIPO/GRTKF/IC/3/17 (June 21, 2002), available at http://www.wipo.int/documents/en/meetings/2002/igc/wipo_grtkfic_3_17.htm. Moreover, as Professor Anaya so aptly demonstrates in his book, *INDIGENOUS PEOPLE IN INTERNATIONAL LAW*, “international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly or imperfectly, to support indigenous peoples’ demands.” ANAYA, *supra* note 26, at 4.

40. Widespread and systematic denial of indigenous peoples’ rights to their tangible and intangible property has resulted in a denial of their fundamental right to exist as distinct peoples. *See, e.g.,* Erica-Irene Daes, *Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. ESCOR, 45th Sess., Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 1993); *Protection of the Heritage of Indigenous People*, *supra* note 6. Such violations may well give rise to claims of reparations under international law. *See generally* Theo van Boven, *Final Report, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Escor, 45th Sess., Agenda Item 4, U.N. Doc. E/CN.4/SUB.2/1993 (July 1993); Theo van Boven, *Revised Set of Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Violations of Human Rights and Humanitarian Law*, U.N. Escor, 48th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/17 (1996); *cf. Lorie M. Graham, Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619, 622–23 (2001) (discussing how particular statutes may constitute a form of partial reparations).

41. ANAYA, *supra* note 26, at 103. “Comments by governments . . . and other international bodies, as well as trends in government initiatives domestically, indicate broad acceptance of the requirement of affirmative action to secure indigenous cultural survival.” *Id.*

available for copying by others. This argument has less force with respect to traditional knowledge and folklore, where elements have often been developed without borrowing from the public domain of other societies. For the same reason, the risk of overprotection of intellectual property is different with respect to indigenous peoples. All authors and inventors build on the public domain. Intellectual property protection thus should balance the incentives given to authors and inventors against the costs of that very protection to authors and inventors. But where indigenous culture has not drawn in the same way on that common domain, the balance is different. Indeed, because intellectual property rights can be seen as a very partial form of reparations, it is hard to imagine that there would ever be excessive compensation.

In addition, as Anupam Chander and Madhavi Sunder incisively show, the public domain may benefit some more than others.⁴² In theory, the public domain is a rich resource of ideas available to all. Indeed, a vibrant public domain is essential to creativity in every field. But expansion of the public domain may mean different things, especially in the case of indigenous peoples. In particular, “differing circumstances—including knowledge, wealth, power, and ability—render some better able than others to exploit a commons.”⁴³ Thus, if such elements as traditional knowledge and folklore are completely within the public domain, the commercial interests able to exploit them most efficiently could benefit most. As Chander and Sunder show, the present balance of intellectual property law gives protection to the knowledge generated by developed countries, while tending to leave open to all the knowledge generated by developing countries and indigenous peoples. Such a balance should be changed, even if it alters the contours of the public domain.⁴⁴

42. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

43. *Id.* at 1341.

44. Native Culture notes the disparity, but describes it as “symptomatic of broader social realities, not a failure of intellectual property law as such.” BROWN, *supra* note 2, at 236. But a great failing of intellectual property law is that it tends to protect the knowledge that developed countries produce while leaving unprotected the knowledge produced by developing countries and indigenous people. See generally Chander & Sunder, *supra* note 42.

II. THE ROLE OF INTELLECTUAL PROPERTY LAW

Who Owns Native Culture? focuses on refuting what it terms claims for “Total Heritage Protection,” characterizing that as the attempt to place entire indigenous cultures “off-limits to scrutiny and exploitation.”⁴⁵ A lesson of twentieth-century history “is that there is reason to be wary of totalizing solutions to complex social problems.”⁴⁶ The century was “littered with the ruins of failed utopias that caused untold human misery.”⁴⁷

This focus may well miss the mark in terms of the linkages between human rights and the protection of indigenous intellectual and cultural property. For instance, the book describes the U.N. report on “The Protection of the Heritage of Indigenous People” as “a canonical text that makes the case for Total Heritage Protection.”⁴⁸ However, viewed through a different lens, this and other related reports place indigenous claims in context.⁴⁹ As one noted scholar has stated:

Specific historical experiences and current political struggles provide the relevant context for considering [indigenous] claims of cultural appropriation. Only by situating these claims in this context can we understand how supposedly abstract, general, and (purportedly) universal principles . . . may operate as systematic structures of domination and exclusion. An evaluation and judgment of Native claims of cultural appropriation without this knowledge of context cannot but reinforce these larger patterns of injustice.⁵⁰

The historical and ongoing practices of governments and other entities to dispossess Native peoples of their tangible and intangible property and assimilate them into the dominate society are well

45. BROWN, *supra* note 2, at 209.

46. *Id.* at 8.

47. *Id.* (citing ROBERT CONQUEST, REFLECTIONS ON A RAVAGED CENTURY 18 (2000)).

48. *Id.* at 209.

49. See Protection of the Heritage of Indigenous People, *supra* note 6, ¶ 4.

50. ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, 231 (1998); cf. Martha Minow & Elizabeth V. Spelman, *In Context*, in PRAGMATISM IN LAW AND SOCIETY 247 (Michael Brant & William Weaver eds., 1991).

documented.⁵¹ Equally relevant to any analysis of indigenous claims to cultural heritage protection is an understanding of how Native cultures are inextricably connected to their identity as a people.⁵² Thus, as the Daes report concludes, international and domestic measures may well be necessary in order for “indigenous peoples to retain control over their remaining cultural and intellectual, as well as natural wealth, so that they have the possibility of survival and self-development.”⁵³

Moreover, the likelihood of total legal protection of indigenous cultures is remote. There is little chance that that such broad-ranging cultural protection would become standard.⁵⁴ As noted above, legal protections for indigenous cultures are few and far between. Attempts to pass the far greater protections implied by “Total Heritage Protection” would, in many areas, meet the same powerful political forces that have had considerable success in shaping intellectual property law to serve industry interests. International trade negotiations are instructive. Developing nations have been hard-pressed, seeking concessions in some areas (such as merely opening their markets to free competition in agricultural products) in exchange for agreeing to move toward similar intellectual property law regimes. Indigenous groups, which may not have the growing markets to offer, are hardly likely to receive the vastly greater

51. See, e.g., Protection of the Heritage of Indigenous People, *supra* note 6, ¶¶ 18–20 (1997).

52. See, e.g., Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191 (2001); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291 (2001).

53. Protection of the Heritage of Indigenous People, *supra* note 6, Preface.

54. As one commentator put it, referring to traditional knowledge (TK):

It seems highly unlikely that a new framework to protect TK will be inserted into TRIPS anytime soon. And since the United States is determined to prevent a WIPO convention on TK that could then be incorporated in TRIPS, this is unlikely to happen even in the more distant future. At best, minimalist measures to safeguard TK from misappropriation could conceivably be agreed upon. A greater danger is that trade negotiators will sacrifice the interests of traditional knowledge holders once concessions in other areas of intellectual property or other trade-related issues are secured in return.

Graham Dutfield, *Trips-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 273 (2001).

agreements that such “Total Heritage Protection” might entail. Supposed claims for Total Heritage Protection are hardly a threat to the public domain. It is about as likely that there would be total land reparations, with settler societies like the U.S. handing back their entire territory to the aboriginal inhabitants.

Rather, the question is whether intellectual property protection for indigenous culture will be fashioned at all. Brown, like others, questions whether intellectual property law is suitable for use as a tool to protect indigenous cultures. He raises several features of intellectual property law that might make it ill-suited for such application. Intellectual property law, especially in the United States, serves financial interests, as opposed to protecting cultural interests.⁵⁵ Moral rights have consistently been paid much less attention than financial interests in intellectual property law.⁵⁶ In addition, he contrasts the individualistic approach of intellectual property law (granting rights to individual authors and inventors), to the sort of collective rights that might best be used in such areas as folklore and traditional knowledge. The book also characterizes advocates as seeking novel and untested forms of intellectual property. This section suggests that such obstacles are not as great as they might at first appear. Intellectual property law has been readily adapted to new subject matter and to various types of group production and ownership.

Much has been made of the apparently individualistic bent of intellectual property law. Group rights, by contrast, have been deemed alien to the basic framework of such laws. Such arguments have been raised in opposition to the United Nations Draft Declaration on the Rights of Indigenous Peoples, which provides: “Indigenous Peoples have the right to own and control their intellectual and cultural property including indigenous sciences, technologies, genetic, seeds, medicines, flora and fauna, languages, literature, designs and visual and performing arts.”⁵⁷ If groups were granted rights in folklore or traditional knowledge or other cultural elements, the argument runs, there could be intractable problems,

55. *Id.*

56. *Id.*

57. Draft Declaration on the Rights of Indigenous Peoples, art. 29.

such as determining the appropriate group, arbitrating differences in opinion about exercising the rights, and providing a means for other to deal with the group to seek permission to use the cultural elements.

But intellectual property law has long dealt with the very same issues. There are many areas in which intellectual property rights are both created and held by groups. A movie, for example, may be the product of creative contributions from dozens or hundreds of directors, writers, actors, costumers, special effects technicians, and more. Inventions from pharmaceuticals to software to aeronautics all require input from many people over a long period of time. Trademarks often act as a banner giving an illusion of unity to vast international enterprises. The rights to copyrights and patents are often held by corporations with millions of shareholders.

A recent change to U.S. patent law shows how the individualist cast does not fit even modern industrial society. An inventor is entitled to a patent only if her product or process is significantly different from what others have already done, as opposed to an obvious step. But that rule can be difficult to apply to the product of teamwork. Any individual's contribution might not qualify as a sufficient advance, if the other teammembers' work counted as preexisting work. The U.S. patent law was amended to treat teams, in effect, as a single inventor for determining whether a claimed invention was sufficiently "nonobvious."⁵⁸ Thus, individual inventorship is hardly an unchangeable bedrock of intellectual property law. Rather, intellectual property law has adapted—especially where the affected interests were able to get legislation.

Trademark law also serves groups. A trademark can be a unifying symbol for a vast enterprise—think only of Coca-Cola, McDonalds, or the United States Postal Service. Particular types of trademarks can further specifically serve to promote the interests of groups. A union can use a "collective mark."⁵⁹ A certification mark can be used to demonstrate that a product or service conforms to the standards shared by a group. Thus, the OSI Certified mark can be used on software to show that it conforms to the principles of the open source

58. The Cooperative Research and Technology Enhancement Act of 2004, Pub. L. No. 108-453, 118 Stat. 3596.

59. 15 U.S.C. § 1127 (2000).

software movement—a large, dispersed group united mainly by certain beliefs about computer programs.⁶⁰ Accordingly, trademark can also fit into protecting group rights with respect to indigenous peoples. Indeed, as evidenced by the Indian Arts and Crafts Act,⁶¹ and by numerous marks registered to indigenous groups, such use of trademark is growing—and affecting the nature of trademark law itself.⁶² Intellectual property increasingly must face issues of creation by groups,⁶³ and in some respects indigenous peoples are leading in this adaptation.

Even though intellectual property rights are often group rights (and the groups can number in the millions), this has not proven a great obstacle to apportioning those rights. There are naturally disputes over ownership and inventorship, but such disputes are the exception. A new pharmaceutical rarely has scientists within a drug company fighting over the patent rights, and a new film does not usually have a dispute over the copyright. Rather, the ownership rules of intellectual property law, along with contracts, corporate law and other mechanisms, settle the ownership as agreed by the parties or as set out by the law. There is no reason to think that similar results would not obtain for indigenous groups, through their own mechanisms for governance and dispute resolution.⁶⁴ In one instance in the United States, a group of indigenous nations from the same

60. See Open Source Initiative, <http://www.opensource.org>.

61. 25 U.S.C. § 305 (2000).

62. Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467, 494–95 (2003) (suggesting that “sacred traditional knowledge” could be protected “based on collective or ‘communal’ authorship, which already exists in trademark law and related fields”).

63. See, e.g., Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002); Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works and Entrepreneurship*, 75 OR. L. REV. 257 (1996).

64. Riley, *supra* note 19, at 216 (proposing an Indian Copyright Act, which “(1) is flexible enough to include the oral works of indigenous groups, which means significantly altering existing copyright requirements; and (2) mandates that disputes over the construction of the term ‘collective indigenous work’ be resolved in tribal court, subject to interpretation by tribal law and custom”); see also Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51–78 (2004) (proposing “the incorporation of collective and communal notions of authorship, the expansion of the originality requirement to reflect these forms of authorship, and the application of limits on the duration of copyright protection in a broader community context”).

region worked together to form a consortium designed to address any disputes arising out of the issue of “cultural affiliation” and the return of human remains under NAGPRA. Other indigenous groups in the U.S. and elsewhere have adopted laws and related mechanisms that specifically address cultural resource protection.⁶⁵ Indigenous groups, especially as part of economic development effort, have considerable experience in integrating commercial law into their own governance systems.⁶⁶

With respect to moral rights, Brown quite correctly states that intellectual property law in the U.S. has not contained many explicit protections for moral rights, as such. Nevertheless, moral rights have found protection through the broad types of rights available. Moral rights include such things as rights of attribution, rights of integrity (protecting against destruction or distortion of the work), and rights of disclosure (the right to decide whether and when a work will be published).⁶⁷ Some would also include rights such as the right of withdrawal (to take a work such as a book off the market), the right to reply to criticism, and “following rights” (for example, the right of a painter to receive a percentage of the proceeds if her work is sold, even long after she has sold the work).⁶⁸

Such rights are not explicitly protected by U.S. intellectual property law, but, as commonly noted, can nevertheless be found by applying more general rights. If a work is distorted, for example, that would likely infringe copyright by creating a “derivative work.”⁶⁹ Likewise, distortion of the work could violate the license under

65. See generally Kristen A. Carpenter, *Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. 1061 (2005); Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69 (2005).

66. See, e.g., Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 537 (2003) (discussing factors a tribe might consider in adopting commercial laws and adapting them to the tribe’s own norms).

67. ROBERT MERGES, PETER MENELL, & MARK LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 483 (3d ed. 2003).

68. Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 11 (1997); Russ VerSteege, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 829–30 (1992).

69. 17 U.S.C. § 106 (2000) (providing that copyright owner has exclusive right to create derivative works).

which the work was used, giving rise to a claim under contract law.⁷⁰ If authorship is misattributed, that could violate trademark law, as trademark infringement, false designation of origin, or simply false advertising.⁷¹ If a work is published without consent of the author, that could be copyright infringement—and the Supreme Court has given considerable weight to the author's right of first publication.⁷² Likewise, the right of withdrawal can find some protection in the author's exclusive right to make and distribute copies.⁷³ Such rights of attribution, integrity, and disclosure could broadly serve the interests of indigenous peoples in controlling whether and how cultural elements were disseminated.

To take a very specific example from copyright law, the right of termination might find resonance within a copyright scheme for indigenous works. Under U.S. copyright law, a grant of rights under a copyright may be terminated after thirty-five years.⁷⁴ If an author sells her copyright to a publisher, she has the right to terminate that transfer after thirty-five years. Termination gives her back the rights under the copyright. Rights of termination are inalienable, meaning they withstand even the broadest attempts to make copyright licenses irrevocable. The theory behind termination rights is that authors may be commercially unsophisticated, lack bargaining power, and have certain moral rights in their creations. Thus, despite copyright law's largely commercial role in the U.S., it does go beyond providing a framework for commercial transactions, and shows a willingness to undo deals in the interest of moral rights, a framework that would fit well with using intellectual property to serve indigenous self-determination. Where indigenous groups could show similar factors affecting them, a similar right would be appropriate.

The subject matter relevant to indigenous cultures, such as folklore and traditional knowledge, is also often deemed beyond the scope of intellectual property law. But the subject matter of intellectual property has never been fixed. To the contrary, it has

70. *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14 (1976).

71. 15 U.S.C. § 1125(a) (2000).

72. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

73. 17 U.S.C. § 106(1), (3) (2000) (granting copyright owner the exclusive rights to make and to distribute copies of the work).

74. 35 U.S.C. § 203 (2000).

adapted readily to new social practices and technology. As noted above, patent subject matter has spread from mechanical devices to every type of inventive activity, from biotechnology to ways of selling advertising space on web pages. Trademark law has gone from protecting a few types of designations to covering any type of symbol, whether visual, aural or otherwise.⁷⁵ The first U.S. copyright statute covered a narrow range of published material: maps, charts, and books. Copyright now applies to the entire spectrum of creative works, from architecture to zodiacs.⁷⁶ It could likewise adapt to the protection of folklore or indigenous art.

Brown does not categorically reject the use of intellectual property law to protect native cultures, despite the many cautions he raises. To the contrary, he suggests that some judicious modifications of intellectual property law would have a role to play. Rather, his skepticism is directed toward the sort of exclusive rights that typically come into play with intellectual property. The most extended specific proposal he makes is the use of compulsory licensing in the area of traditional knowledge that may be used to develop such commercial products as pharmaceuticals.⁷⁷ Compulsory licensing, the requirement that commercial interests pay fees in order to make use of the knowledge, would permit payment to indigenous groups while at the same time permitting the general benefits of commercialization. Brown's proposal is quite consistent with his general view that intellectual property law generally is best suited to financial concerns, as opposed to cultural issues, and consistent with his skepticism of "rights talk" and proprietization of culture. But indigenous groups seek much more than money. Rather, exclusive rights may be more appropriate in some areas, where the associated

75. See, e.g., Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 373–74 (1999).

76. The treatment of software, in particular, shows the adaptability of copyright. Software is far removed from the original copyright subject matter. The Constitution authorizes Congress to grant exclusive rights in "writings" to their "authors." U.S. CONST. art. I, § 8, cl. 8. Early copyright statutes applied to such things as maps, books, and charts. As software became commercially important, there was considerable debate whether a computer program was really a "writing" created by an "author." Likewise, software is largely functional, and copyright has always been deemed to protect only expressive elements, not functional ones. But both legislation and case law have readily adapted copyright to apply to software.

77. BROWN, *supra* note 2, at 240–41.

control would be consistent with the group's claims to self-determination—even where economic efficiency may not be best served. Compulsory licensing removes control over traditional knowledge and cultural elements, leaving only the price to be determined. But other approaches could recognize the interest indigenous peoples have in control, while balancing other interests. For example, one commentator suggests “localized institutions that are a mixture of public and private that are a ‘commons’ on the inside, and ‘private property’ on the outside. These types of evolving and flexible institutions importantly shift the focus from ownership of resources to governance.”⁷⁸

In the end, Brown's focus on “Total Heritage Protection” draws attention away from the many attempts to devise balanced ways to use intellectual property law to protect native cultures while accommodating other interests. A number of commentators have sought to come up with ways to balance various competing interests.⁷⁹ What these and other proposals suggest is both possible and desirable to provide intellectual property protection for indigenous cultures. Exactly what those protections might entail must be answered in consultation with indigenous peoples themselves and in accordance with their customs and beliefs, if they are to be effective.

III. NEGOTIATION AND CULTURAL PROTECTION

Who Owns Native Culture? calls for reliance on negotiation and mutual respect, as an alternative to “rights” incorporated into law.⁸⁰ But, negotiation and legal standards are interdependent in the context

78. Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247, 331 (2003). As Native Culture notes, sometimes outsiders are not aware of such “limited commons.” BROWN, *supra* note 2, at 239. But supporting these commons with intellectual property rights would translate them into widely recognized forms.

79. See, e.g., Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 796 (2001) (asserting “that intellectual property law, through modification of its authorial and temporal limitations and creation of community-specific protections such as an ‘authenticity mark,’ has the potential to strike an equitable balance between source community rights and the public interest in cultural products”); Riley, *supra* note 19, at 216–17 (proposing a copyright statute that is “specifically geared towards Indian peoples—one which encompasses inter-generational, oral traditions, as well as indigenous perspectives”).

80. BROWN, *supra* note 2, at 144–72.

of indigenous peoples' rights and have long had an important interplay for several reasons. First, in negotiating for protection of indigenous cultures, indigenous peoples have always had much more success when they've had some legal power behind them. For instance, in the context of NAGPRA, while it may be true, as Brown notes, that museums are more willing today to enter into "extended negotiations" with Native nations, prior to the passage of NAGPRA, museums were rarely, if ever, knocking on the doors of Indian country or opening their own archival doors to discuss the issue of repatriation with Native peoples. "Professionalism" and "simple decency" (which Brown asserts are the primary factors pushing archives to the negotiating table)⁸¹ are honorable traits, but law has gone a long way in helping museums realize the value of those traits.⁸² As Kristen Carpenter notes with respect to legal protection of sacred sites, "[a] stronger articulation of [legal] rights may help to ensure that the parties even engage in dialogue and work toward accommodation."⁸³ However, as Carpenter further notes, this does not foreclose "negotiated approaches" to cultural protection nor does it ignore the larger context in which these decisions are being made: "The recognition of rights in a vulnerable minority does not require reverting to the winner-take-all property law approach Rights have a place in negotiated approaches to legal problems."⁸⁴ Second, in some matters, negotiation, unless it is to be endlessly repeated, can be best fulfilled when the results of negotiation are made into law. Similarly, it helps to ensure that the historical and contemporary injustices that led to the negotiations in the first place will not be repeated. NAGPRA once again provides a nice example. According to Suzan Shown Harjo, one of the principle negotiators of NAGPRA,

81. *Id.* at 232.

82. See Kate Morris, *Strategies and Procedures for the Repatriation of Materials from the Private Sector*, in AMERICAN INDIAN RITUAL OBJECT REPATRIATION FOUNDATION, MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE, available at <http://www.repatriationfoundation.org/strat.html>.

83. Carpenter, *supra* note 65, at 1142–43.

84. *Id.* at 1146. In describing a rights-based approach to sacred sites, Professor Carpenter "calls for the recognition of Indian *rights* in the context of Indian *relationships* with the government, other citizens, and the land itself and in the context of widely shared values like religious freedom and cultural diversity." Thus, contemplating a place for "thoughtful conversation" as urged by Professor Brown.

the law was “intended to provide some small measure of justice for native Peoples in the modern era for the generational suffering and hardship imposed by [past] policies and practices that outlawed Native religions and violated fundamental rules of human decency.”⁸⁵ The book is also somewhat inconsistent when it criticizes these statutes. For example it points out that the Indian Arts and Crafts Act⁸⁶ does not give protection to all indigenous peoples. Rather, its protection is limited to artisans of recognized tribes—a valid criticism noted by many.⁸⁷ But negotiations are likely to reach results that are partial. So it is perhaps unfair to call for negotiations on one hand and then to summarily criticize the results of those very negotiations. The solution to the inadequacies inherent in negotiated laws, like the Indian Arts and Crafts Act, is not less law, but rather modification of those laws as may be warranted. Finally, legal protection serves negotiation by helping to put the parties on an even footing. Negotiation where one party lacks any leverage is likely not to succeed. One example outside the intellectual property context is the 1993 Nunavut Land Claims Agreement with the Inuit people and the Canadian Government.⁸⁸ The Premier of Nunavut has stated that prior to the passage of the 1982 Canadian Constitutional Act,⁸⁹ which constitutionalized indigenous rights, there was “little incentive to negotiate and sign a land claim when a subsequent government had the power to overturn that agreement if it so chose.”⁹⁰

85. Suzan Shown Harjo, *Introduction* to AMERICAN RITUAL OBJECT REPATRIATION FOUNDATION, *MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE* 3 (1996); cf. *NMAI Not Just a Decoration*, INDIAN COUNTRY TODAY, Sept. 22, 2004, at A1 (discussing the important role that Harjo and others played in negotiating repatriation issues at the federal level).

86. Indian Arts and Crafts Act, Pub. L. No. 101-644, 104 Stat. 4666 (codified in scattered sections of U.S.C. titles 18, 20, 25, and 42).

87. BROWN, *supra* note 2, at 215; Protection of the Heritage of Indigenous People, *supra* note 6, ¶ 64.

88. Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, <http://www.tunngavik.com/site-eng/nlca/nlca.htm>.

89. The 1982 Constitution Act recognized and affirmed “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada.” Rights of the Aboriginal Peoples of Canada, Constitution Act, 1982, pt. II, Canada Act, 1982, ch. 11, sched. B § 35(1) (U.K.).

90. Gov’t of Nunavut, Premier Paul Okalik, Speaking Notes: Nunavut—North America’s Newest Democracy (Dec. 3, 2001), <http://www.gov.nu.ca/Nunavut/English/premier/press/nand.shtml> (last visited Sept. 22, 2005). See generally Graham, *Resolving Indigenous Claims*, *supra* note 37, at 412–20.

Similarly, international negotiations will continue to shape intellectual property law. The results of those negotiations will be influenced by preexisting attitudes toward the relationship between intellectual property law and traditional knowledge:

[T]he choice of forum, the mindsets of the negotiators, the extent and impact of cognitive barriers on the policymakers, and the participation of the indigenous community in the negotiation process will play major roles in determining whether governments can create a mutually beneficial solution, whether they can promote biological and cultural diversity, and whether they can establish a harmonized regime that effectively protects folklore, traditional knowledge, and indigenous practices.⁹¹

The international negotiations also shape the climate in which local negotiations are conducted.⁹²

If concern for indigenous peoples can become a real element in formulating international intellectual property law, the benefits could go beyond protection of indigenous cultures. As noted above, such negotiations have recently tended to benefit corporate interests at the cost of the public domain. They also have tended to increase the emphasis on the financial aspects of intellectual property, at the cost of its role in protecting moral rights. But intellectual property is not merely an aspect of trade protection, notwithstanding its recent move to the World Trade Organization. Rather, it can play an important role in protecting human rights.

91. Peter K. Yu, Introduction, Symposium: *Traditional Knowledge, Intellectual Property, and Indigenous Culture*, 11 CARDOZO J. INT'L & COMP. L. 239, 245 (2003).

92. Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547, 553 (2003) (discussing how international initiatives toward protection of traditional knowledge and folklore have contributed to the making of local agreements "among research institutions, companies, communities and non-governmental organizations").