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Toward More Universal Protection of Intangible Cultural Property

Cathryn A. Berryman
Cabaniss, Johnston, Gardner, Dumas & O'Neal

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TOWARD MORE UNIVERSAL PROTECTION OF INTANGIBLE CULTURAL PROPERTY

Cathryn A. Berryman*

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I. INTRODUCTION: OUTLINE OF TANGIBLE CULTURAL PROPERTY PROTECTION

The notion of a state as the guardian of its people's cultural heritage has evolved from the mere association of objects and monuments with a particular nation's culture¹ to an international framework that authorizes states to protect and preserve cultural objects from theft, mutilation, and destruction.² As people began to recognize the inherent value of cultural objects—in that they reflect the collective identity, development, organization, and personality of a particular people—states proceeded to implement national legislation to control the ownership and exportation of cultural property originating from their territories. Ancient monuments and sites were declared public property as were any artifacts excavated from archaeological digs. Penal statutes were enhanced to protect private owners from thieves. States also reinforced customs regulations and regulated resale contracts to prevent the removal of movable pieces from their territory.³

Although these measures stemmed certain dangers faced by cultural property, state action alone proved inadequate in light of the international nature of theft, exploitation, and destruction. The Convention for the Protection of Cultural Property in the Event of Armed Conflict established an international framework for insulating cultural property from destruction or damage during

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Peacetime restrictions on cultural property acquisitions were subsequently imposed under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, Paris, reprinted in UNESCO, MOVABLE PROPERTY, supra note 2, app. at 357-64 [hereinafter Paris Convention]; see also WILLIAMS, supra note 4, at 178-99 (discussing Paris Convention).

These conventions, along with other international documents, recognize the status of cultural property as part of the "common heritage of mankind" and place an international duty on states to protect not only their own cultural heritage but also all other nations' cultural property for the ultimate benefit of mankind. Both the Hague and Paris Conventions outline specific obligations required of each contracting party such as "respecting cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings ... which is likely to expose it to destruction or damage." Hague Convention, art. 4, § 1, supra note 4. Customary international law also imposes duties upon states to respect and protect both its own and alien cultural property. See WILLIAMS, supra note 4, at 64-66.

The sweeping protection of these measures, however, is limited in scope by the definition of cultural property. The terms of the conventions include only physical forms of property by specifying "movable or immovable property." Protection is not extended to...
the non-physical or intangible aspects of cultural property. Although many experts would concede that a motive behind protecting the physical objects is to preserve the intangible expression of culture in those objects, the convention documents do not explicitly refer to the protection of the intangible. Thus, the protection and preservation of intangible cultural property remains exclusively within the discretion of individual nations.

What national and international measures currently protect intangible cultural property and are they adequate to preserve this form of cultural heritage? This Article will explore these questions in an effort to determine what steps can be taken to establish more uniform and universal intangible cultural property protection and whether conventions (similar to those for tangible cultural property) should be extended or developed for intangible cultural property. This quest begins with a consideration of current national measures and the level of protection they afford.

To clarify the term “intangible cultural property,” I draw upon the definition of “cultural property” asserted by John Merryman: cultural property means “objects that embody the culture.” John H. Merryman, The Public Interest in Cultural Property, 77 CAL. L. REV. 339, 341 (1989) [hereinafter Merryman, Public Interest]. Culture has been described as the composition of “all forms of expression, thought and action peculiar to a given community.” N'Daw, Universal Culture and National Cultures, reprinted in UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS 28 (1970). Thus, the intangible aspects of cultural property are those elements of expression, thought, or actions embodied in the physical cultural object, and intangible cultural property is the incorporeal characterization of that cultural expression.

In their treatise, Law and the Cultural Heritage, Prott and O'Keefe justify cultural property protection by explaining that culture is significant to the development of humanity, and the products of culture—“any material manifestations of a particular society”—constitute the cultural heritage of the society. Prott & O'Keefe, supra note 3, at 7-12. The passage goes on to state that the “rich human experience provided by the cultural heritage is constantly endangered. Embodied as it often is in objects which easily deteriorate, . . . its loss is irreremediable.” Id. at 11-12. The use of the terms “material manifestation” and “embodied in objects” suggests that the intangible cultural aspects are what is valued in the physical property to warrant preservation. See also WHO OWNS THE PAST 3 (I. McBryde ed., 1985) [hereinafter McBryde] (stating that “[w]e explore the past through our present perceptions of the evidence for its existence in written records, oral tradition, and in the tangible, physical remains of archaeological sites and artifacts”). See generally HISTORICAL ARCHAEOLOGY AND THE IMPORTANCE OF MATERIAL THINGS (L. Ferguson ed., 1977).

Most recently, Roger Mastalir distinguished between the protection afforded the property aspects of cultural property and its cultural elements. Mastalir stressed the cultural significance of cultural property and enhancing international awareness and protection for such elements. Roger Mastalir, A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under the International Law, 16 FORDHAM INT'L L.J. 1033 (1993).
II. NATIONAL MEASURES PROTECTING INTANGIBLE CULTURAL PROPERTY

A. COPYRIGHT

Although particular states have implemented domestic legislation that specifically protects the intangible elements of property as cultural, most nations indirectly protect intangible cultural property through the systems of copyright, moral rights, unfair competition, or other common-law actions. The copyright system is based on the protection of incorporeal property. By legally recognizing intellectual creations as property, a state concedes the distinction between the physical copy of an intellectual work and the intellectual work itself, which exists independently of its physical manifestation, and vests exclusive rights of economic exploitation in the work's creator. A state's purpose in granting a copyright for a limited time is to allow the creator to reap economic benefits from his or her creation.

Economic and property considerations dominate the legal structure of copyright, yet the cultural development of the state primarily motivates protection of intellectual creations. By granting economic rights and protection to authors, the state intends to stimulate the creation of new intellectual works that can

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11 See, e.g., Tay, Law and the Cultural Heritage, reprinted in McBryde, supra note 10, at 3 (describing extensive laws enacted by Japan to protect as culture not only traditional intangible products, such as music, drama, and applied art, but also Japanese manners, customs, skills, scenic landscapes, and bridges); see also Niec, supra note 1, at 1106-08 (reprinting relevant Japanese legislation and noting use of government subsidies to maintain national cultural heritage).
13 See Estate of Hemingway v. Random House, 244 N.E.2d 250 (1968) (stating that "the underlying rationale for common-law copyright (i.e. the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form") (citing Nimmer); see also Jerome Reichman, Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection, 22 Vand. J. Transnat'l L. 747, 800-05 (1989) (providing concise explanation of notion of intellectual creations as property).
15 See 1 John H. Merryman & Albert E. Elsen, Law, Ethics, and the Visual Arts 175 (2d ed. 1987) [hereinafter Merryman & Elsen].
be broadly disseminated to the public. Once the author's economic benefits expire, the work falls into the public domain, and the state as the representative of society assumes ownership of the creation. Thus, under a copyright system, society reaps the benefits from readily available intellectual products while the state, in turn, enriches its cultural heritage.

Copyright can also act as a protector of cultural creations. By vesting exclusive rights in the work's creator and providing him with an injunctive remedy for breach, copyright acts to immunize the creation from distortion, inaccuracy and misattribution. No one can take any protected element of expression in the artist's work and pass it off as his own or reproduce, alter or deviate from the work without the author's consent. Thus, the author acts as the self-patrolling policeman of his contribution to the nation's culture.

See, e.g., Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) ("Creative work is to be encouraged . . ., but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); see also Salah Abada, Copyright as a Factor in Cultural Development, COPYRIGHT BULL., vol. 16, no. 4, at 6, 12 (1982) (clarifying mutual benefit to authors—"[i]t is through the broad dissemination of [an author's] works that he obtains the greatest moral and material satisfaction"); Abul Hasan, Copyright and Development, COPYRIGHT BULL., vol. 16, no. 1/2, at 10, 11 (1982) (stating that "[p]rotection is also essential to provide incentives to creators and their associates engaged in dissemination of the work").

The public domain has been characterized as the "other side of the coin of copyright." See Krasilovsky, Observations on Public Domain, 14 BULL. COPYRIGHT SOC'Y 205 (1967). The public domain consists of all those elements, such as ideas, concepts, or facts, that cannot be protected under copyright as well as those once-copyrighted works that have lost their statutory protection. See David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROBS. 147, 150-53 n.20 (1981) (providing discourse and bibliography on "public domain").


See generally MERRYMAN & ELSEN, supra note 15, at 196-213.
Copyright has been extended beyond state borders with the inception of international conventions. Both the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Universal Copyright Convention (U.C.C.) act independently to establish international legal frameworks for private copyright disputes. These conventions enable an author to enforce the exclusive rights afforded nationals in the foreign country where his work is being distributed. The conventions also ensure that member countries provide those exclusive rights outlined in the convention in their domestic legislation.

B. MORAL RIGHTS

Within the system of copyright, some states also recognize an author's moral rights regarding his creation. Although moral

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20 For a thorough historical overview of the impetus behind the creation of international copyright conventions, see STEWART, supra note 12, at 28-48 (outlining distinctions made between international public law and international private law and providing insight into basic principles embodied in both conventions).

21 The Berne Convention, established in 1886, stands as the oldest international convention on copyright. For a thorough examination of its provisions, including subsequent revisions and current membership, see STEWART, supra note 12, at 86-132; see also SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987) (providing treatise overview of Berne Convention); WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION (1978) [hereinafter WIPO GUIDE] (overview of Berne Convention).

The Universal Copyright Convention (U.C.C.) was established to counteract the high standards required for countries to join the Berne Convention in an attempt to facilitate a more universal copyright system. See STEWART, supra note 12, at 134. Similar convention coverage of the U.C.C. is provided in id. at 133-73; see also ARPAD BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION (3d rev. ed. 1968).

22 See STEWART, supra note 12, at 78-85.


As of 1988, England explicitly recognizes moral rights in her copyright statutes. Copyright, Designs and Patents Act, 1988, ch. 48 (Eng.), reprinted in 4 CURRENT LAW STATUTES ANNOTATED 71-83 (1989) [hereinafter Copyright Act (England)]. The rights of paternity and integrity are acknowledged, as is the converse of paternity, the offense of false attribution, but authors must affirmatively assert the paternity right to gain enforcement. Id.
rights are statutorily categorized within copyright, their basis is not one of property. Instead, moral rights subsist independently as protectors of the creator’s personality reflected in the work. Unlike economic rights, moral rights are inalienable (non-transferable) and, in some instances, even perpetual.

Moral rights basically consist of the rights of publication, paternity, and integrity. The right of publication allows each creator to decide whether his work will be made public. The paternity right ensures that the author is credited with the creation of his published work. The right of integrity protects the work from distortion, alteration, or misrepresentation. Each of these rights acts to buffer the author’s reputational interest in the work from external abuse.

Moral rights also function as a protector of the state’s cultural interests. The accuracy and authenticity of the work is preserved through the exercise of the author’s integrity and paternity rights. This sentiment is stated best by John Merryman in The Refrigerator of Bernard Buffet when he exclaims that:

[art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture. [The state] [is] interested in protecting the work of art for public reasons, and the moral right of the artist is in part

24 See John H. Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1025-28 (1976) [hereinafter Merryman, Bernard Buffet]; see also RICKETSON, supra note 21, at 456-58; STEWART, supra note 12, at 58-59; WIPO GUIDE, supra note 21, at 41 (stating that moral rights “stem from the fact that the work is a reflection of the personality of its creator, just as the economic rights reflect the author’s need to keep body and soul together”); Abada, supra note 16, at 8 (stating that “moral rights derive their essence from the fact that the work reflects the personality of its author”).


26 See STEWART, supra note 12, at 60. Some nations, like France, also include the right to withdraw the work from sale, the right of modification, the right to obtain royalty upon resale, and the right to prevent excessive criticism of the work in their moral rights laws. See MERRYMAN & ELSEN, supra note 15, at 145-47; Merryman, Bernard Buffet, supra note 26, at 1028; Strauss, supra note 25, at 511-14.

27 See RICKETSON, supra note 21, at 456-57; STEWART, supra note 12, at 59-62.
Thus, moral rights help to ensure the sanctity of the artist's contribution to the nation's cultural heritage.

International conventions have extended limited moral rights protection to cultural works. Article 6bis of the Berne Convention recognizes the independent nature of moral rights and explicitly grants the rights of paternity and integrity to a convention author. The length of duration and method of enforcement, however, are not mandated by the Convention; instead, the forum where protection is sought governs these factors. This flexibility allows non-civil law countries to limit moral rights protection to common-law actions, such as defamation and misrepresentation.

Moral rights do not extend to works protected by the U.C.C. because the U.C.C. does not recognize moral rights per se. Although some experts would argue that moral rights can be inferred from the U.C.C. text, most non-Berne nations resort to misrepresentation or other common-law means to protect minimally the creator's reputational interest.

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28 Merryman, Bernard Buffet, supra note 24, at 1041.
30 See RICKETSON, supra note 21, at 467-76.
31 See WIPO GUIDE, supra note 21, at 43-44 (noting how countries may authorize moral rights).
32 See WIPO GUIDE, supra note 21, at 43-44; Strauss, supra note 25, at 518-520 (describing moral rights protection in Great Britain, Canada, and Switzerland). One must note England's recent adoption of moral rights and its effect on these resources. See Copyright Act (England), supra note 23.
33 See Adolf Dietz, Elements of Moral Right Protection in the Universal Copyright Convention, COPYRIGHT BULL., vol. 21, no. 3, at 17, 21 (1987) (arguing moral rights concept has already been incorporated into U.C.C.). See also STEWART, supra note 12, at 160 (noting that U.C.C. does not change member countries' stand on fundamental rights of authors).
C. COMMON-LAW ACTIONS AND UNFAIR COMPETITION

Common-law countries characterize moral rights as reputational and do not always include personality protection in their property-based copyright systems. Authors must rectify damage to their reputations or the reputation of their works through the general principles of contracts or torts. Such remedies include causes of action for libel, defamation, invasion of privacy, intentional injury to business relations, intentional infliction of emotional distress, and breach of contract. These common-law actions, however, do not specifically recognize authors as a protected class; artists must assert these rights as would any individual. These rights also are judicially determined, and thus, recovery can depend on the existence of persuasive precedent and a favorable disposition of the court.

Some moral rights protection, however, has been achieved through the application of unfair competition laws. Unfair
competition laws act to shelter consumers from the mislabeling or misrepresentation of products on the market.\(^4\) Courts have recognized violations of unfair competition laws when an author's work has been altered, rearranged, or misappropriated.\(^4\) These violations have been vindicated under the guise of consumer protection; courts have reasoned that the altered works did not reflect the original composition and could mislead the public.\(^4\) Protection under these acts, however, is statutorily limited to commercial transactions ("goods and services" in commerce).\(^4\)

D. PUBLIC DOMAIN

Notwithstanding that copyright, moral rights, and common-law systems extend protection to intangible cultural property, weaknesses in domestic protection remain, which thwart comprehensive intangible property protection. A copyright tolls fifty years after the death of the author (at a maximum) and works then fall into the public domain where use or misuse of the work is sometimes unlimited and unrestrained.\(^4\) Moral rights can be extinguished along with economic rights under some copyright systems after a set time, or at death in common-law countries, which means that a work's protection from mutilation or alteration does not necessarily extend into the public domain.\(^4\) The negatives of common-law actions are a lack of effective remedies. Generally, courts only require the infringer to relabel the product and do not mandate

\(^4\) See, e.g., section 43(a) of the Lanham Trademark Act, which prohibits any "false designation of origin," "description of fact," or "misleading representation of fact" on any commercial "goods or services" that "is likely to cause confusion" or deceive others as to origin, or "misrepresents the nature, characteristics, qualities, or geographic origin" of a good. 15 U.S.C. § 1125(a) (1982 and Supp. 1991). Section 43(a) also provides civil recovery for "any person . . . who believes that he or she is or is likely to be damaged." Id.


\(^4\) See generally Krasilovsky, supra note 17 (making observations on public domain).

\(^4\) See Ricketson, supra note 21, at 473-74; Abada, supra note 16, at 9-10; Strauss, supra note 25, at 517-18.
discontinuation of a work’s production in its non-original form or restoration of the work to its original form.\textsuperscript{46}

To combat these inefficiencies, a handful of states has extended legislative protection to works within the public domain.\textsuperscript{47} Public domain legislation is designed to "prevent or sanction use of public domain works in such a way as to prejudice their authenticity or identity."\textsuperscript{48} Protection covers either works whose copyright protection has expired or works that would have been under copyright if such a system had existed at the time of their creation or had extended protection to their class of works.\textsuperscript{49} In some instances, protection extends beyond works of national origin to include foreign works.\textsuperscript{50} For example, Beethoven’s "Fifth Symphony" was never a copyrighted work in the United States, but the composition could be protected if the United States public domain legislation included protection of foreign works in the public domain because the "Fifth Symphony" would have been entitled to copyright had such a system been in effect during Beethoven’s lifetime.

To avoid stifling any creativity or distribution, public domain legislation strikes a balance between freedom of use and preservation of integrity. Sanctions are imposed only on those uses that violate the work's essence, cultural value, or reputation. Thus, modern adaptations, translations, or republications are allowed as

\textsuperscript{46} See, e.g., Gilliam, 538 F.2d at 26-27 (using misrepresentation tort to impart moral rights).


\textsuperscript{48} Working Group on Works in the Public Domain, COPYRIGHT BULL., vol. 13, no. 4, at 33, 34 (1979) [hereinafter Working Group]. Public domain laws primarily indict economic exploitation but preventative measures can extend to cultural or educational violations. See, e.g., Articles 11, 14, 19, 81, Law No. 17.336 on Copyright (Chile), reprinted in UNESCO, COPYRIGHT LAWS, supra note 23.


\textsuperscript{50} See Study: Public Domain, supra note 47, at 31.
long as the work's character is maintained. 51

Authority to control public domain usage is vested in either the state or an agency designated by the state. 52 In some instances, prior authorization is required before a national can exploit a public domain work. Other states preserve free use if the work's integrity is preserved. 53

One primary motive behind public domain statutes is the desire to retain safeguards on the author's personality through the moral rights of paternity and integrity. The state can act as the primary assertor of these moral rights if moral rights expire with economic rights or death, or as the secondary protector of moral rights if moral rights are perpetual and extend to the author's heirs. 54 Thus, states ensure that the author's reputation with respect to his work remains intact after his death.

A second motive for public domain legislation is the preservation of a state's cultural heritage. 55 States adopt protective laws that will safeguard the cultural interests of the public, which implies

51 See Second Committee of Governmental Experts on the Safeguarding of Works in the Public Domain, COPYRIGHT BULL., vol. 19, no. 3, at 29, 34-35 (1985) [hereinafter Second Committee] (stating that "adaptions . . . should be faithful to . . . spirit, essence and character").

52 See Study: Public Domain, supra note 47, at 32-33 (listing agencies responsible for public domain protection).


54 See CARLOS MOUCHET & S. RADAELLI, II DERECHOS INTELECTUALES SOBE LAS OBRAS LITERARIAS Y ARTISTICAS 64-70 (1948) (characterizing "dominio publico" as the legal term for benefit of collective and primary means towards protecting moral rights of public domain).

55 See León, supra note 18, at 26-27 (stating that "the State, as the depository and guardian of the heritage, must see to it that the original work is not distorted in any way that would violate the deceased author's moral rights, which, intrinsically and in the interests of sound cultural policy, are perpetual rights"); see also Theodore Limperg, Duration of Copyright Protection, 103 REVUE INTERNATIONALE DU DROIT D'AUTEUR 53, 87 (1980) (citing noted copyright theorist Adolf Dietz as rejecting perpetual moral rights unless the protection "bears the character of protection or preservation of cultural works against infringement or mutilation").
that no confusion should exist between the original work and works resulting from any use made of it, and prevent abusive or prejudicial forms of the work from entering the public market. Noted public domain theorist Carlos Mouchet justifies this protection by stating:

> [o]nce a work has fallen into the public domain, it is in the public interest that its artistic integrity should be maintained, that the name of its creator should not be omitted, that the title by which it can be identified should not be removed or modified, that the work should not be reproduced in any imperfect or rough form, etc.

Mouchet goes on to say:

> [w]hen the State introduces administrative or penal measures with a view to the protection, safeguard and defence of a piece of cultural property, it is . . . acting . . . as the representative of the interests of the community.57

Thus, public domain legislation acts as a cultural consumer protection device by forestalling any intangible cultural product that misrepresents a pre-existing work. The state’s interest in the author’s contribution to its cultural heritage is preserved, and society is not misled by cultural impostors.58

No international convention exists to explicitly protect public domain works, but commentators suggest that state-asserted protection is possible under Article 6bis of the Berne Convention.59

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56 Working Group, supra note 48, at 36.
57 Mouchet, Problems, supra note 29, at 146.
58 Second Committee, supra note 51, at 36.
59 According to Ricketson, in countries that recognize the perpetuity of moral rights, national legislation can designate who is entitled to exercise an author’s moral rights after his death. Therefore, Ricketson notes approvingly, “the protection of moral rights post mortem auctoris might be entrusted to a government or public agency concerned with the promotion of national culture or to some other appropriate body.” RICKETSON, supra note 21, at 474; see also WIPO GUIDE, supra note 21, at 43-44 (suggesting that states cannot completely extinguish an author’s moral rights at death).
However, public domain protection has been pursued by UNESCO as part of its cultural agenda, and draft legislation has been proposed for both national and international adoption.  

E. DOMAINE PUBLIC PAYANT

Additional requirements on the use of public domain works have been enforced by some states under the legal rubric of domaine public payant. Domaine public payant is a legislative scheme that imposes a fee for the use or economic exploitation of works in the public domain. Funds received are funnelled into societies that provide for the welfare of creative workers and their families or into state administrative agencies for the promotion of

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61 See RICKETSON, supra note 21, at 356-63, for a chart of Berne countries with domaine public payant protection; see also MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (P. Geller gen. ed., 1990) (noting that France, Hungary, Argentina, Italy, Brazil, U.S.S.R., Czechoslovakia, and Germany have either proposed or at one time had domaine public payant legislation); U.N. Doc. UNESCO/WIPO/DPP/CE/1/2, supra note 51 (listing domaine public payant countries including copies of their national laws).

A limited domaine public payant system has been proposed in the United States to benefit public arts and humanities education, but the proposal remains in committee. See Arts to be Funded with Copyright Royalties, J. PROPRIETARY RIGHTS, Nov. 1990, at 35.

62 Domaine public payant does not apply to uses that do not constitute infringement under copyright, or to derivative works unless the derivative work is a translation. See Non-Governmental Experts, supra note 51, at 52.

63 See WIPO, GLOSSARY OF TERMS OF LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 86 (1980) (defining domaine public payant as requiring "the user of a work . . . to pay certain amounts in proportion to the receipts obtained from the exploitation of the work to a competent authority"). For an in-depth consideration of domaine public payant and the modern problems associated with its implementation, see CARLOS MOUCHET, EL DOMINIO PUBLICO PAGANTE: EN MATIERA DE USO DE OBRAS INTELECTUALES (1970), parts of which are reprinted in Mouchet, Problems, supra note 29. Mouchet's writings provide an insightful critique of the system, its functions, and its flaws. See also PIERRE RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIETE 265-71 (1969) (discussing domaine public payant system in detail).

cultural activities and exchange. The charge can (i) be perpetual or limited in duration, (ii) vary according to category of work, and (iii) apply to foreign works in a state's public domain. Failure to pay these charges can result in civil fines or penal sanctions.

Domaine public payant is characterized as a protector of cultural heritage because it can provide the financial means for nations to protect and preserve their cultural creations, particularly folklore. In practice, however, domaine public payant mainly functions as a promoter of intangible property by assisting authors to generate intellectual works, which benefit both the immediate society and its cultural heritage. Developing countries, in particular, have utilized domaine public payant to facilitate intellectual development because their populations cannot afford to

Dietz labels domaine public payant as a "community of author's royalty." Id. at 58.

See, e.g., Argentine, Brazilian, and Uruguyan laws, reprinted in U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, supra note 53, at Annex II. Some countries, like Algeria and Brazil, also use domaine public payant as a means to fund their copyright systems. Id.

See Non-Governmental Experts, supra note 53, at 51.

See U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, supra note 53, at 5-6 (providing a royalty percentage table by category of work).

See, e.g., Decree/Law No. 1224/58 (1958) (Argentina), NIMMER & GELLER, supra note 61, at § 3(d).


See, e.g., Copyright Ordinance No. 73-14 of 3 April 1973 and No. 73-46 of 25 July 1973, art. 4(8) (Algeria), reprinted in U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, supra note 53, at Annex II (stating that fees are charged to "ensure the protection of works constituting the traditional cultural heritage and the folklore . . . and the works of nationals which are in the public domain").

See ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 163-64 (1978) [hereinafter DIETZ, EUROPEAN COMMUNITY]. Opponents of domaine public payant argue that domaine public payant thwarts rather than aids the dissemination of public domain works. This argument is readily refuted when one looks at the goal of copyright—broad public dissemination—in light of market practice. Free use of public domain works does not benefit cultural property consumers; instead, disseminators of cultural works capitalize on free use. The price charged consumers under copyright remains the same or even increases after the work's copyright expires. The price does not drop to reflect the publisher's loss in fixed cost royalties; it remains constant and publishers reap the profits. See Limberg, supra note 55, at 81 (citing Corbet); Mouchet, Problems, supra note 29, at 139-40; Committee of Governmental Experts on the Safeguarding of Works in the Public Domain: Observations Received from Member States Concerning the Report of the Working Group on Works in the Public Domain, U.N. Doc. PRS/CPY/DP/CEG/I/4 (1982) (available upon request from UNESCO) [hereinafter U.N. Doc. PRS/CPY/DP/CEG/I/4] (listing criticisms of states regarding exploitation of public domain works).
support artists under a patronage system.\textsuperscript{72} No existing international conventions impose \textit{domaine public payant},\textsuperscript{73} although amendments to include \textit{domaine public payant} protection have been suggested by UNESCO to both the U.C.C. and Berne Conventions.\textsuperscript{74} International draft documents, like the Tunis Model Law on Copyright, have encouraged the implementation of \textit{domaine public payant} to help developing countries fund copyright systems, stimulate creative activities, and preserve their rich cultural heritages.\textsuperscript{75} One scholarly commentator has even offered \textit{domaine public payant} as a solution for the copyright duration problems facing the European Economic Community as it consolidates.\textsuperscript{76}

In some ways, the system of \textit{domaine public payant} effectuates a transfer of the author's economic rights at expiration of copyright to the state or to a delegated artists' association. The delegee's assumption of the author's rights, however, is non-exclusive; anyone has the right to use a public domain work subject to payment of the fee.\textsuperscript{77} But when \textit{domaine public payant} is coupled with a public domain system, the full protection of copyright is imitated for cultural works in the public domain.

### III. Folklore as an Illustration of Current Protection

The five state measures outlined above (copyright, moral rights, unfair competition, public domain, and \textit{domaine public payant}) represent all existing forms of legal protection for intangible property. Their topical order graphs the level of coverage each system provides from the least available (copyright) to the greatest possible (public domain plus \textit{domaine public payant}). The majority

\textsuperscript{72} See Non-Governmental Experts, supra note 51, at 49.

\textsuperscript{73} See Ricketson, supra note 21, at 355 (citing Berne Convention).

\textsuperscript{74} See U.N. Doc. UNESCO/WIPO/DPP/CEI/2, supra note 53, at 1 (stating that committee of experts was convened specifically to prepare guidelines for public domain protection for U.C.C. and Berne Convention).

\textsuperscript{75} See Tunis Model Law on Copyright and Commentary, § 17, reprinted in COPYRIGHT BULL., vol. 10, no. 2, at 10, 29 (1976) [hereinafter Tunis Model Law] (stating that purpose of \textit{domaine public payant} is to "protect and disseminate national folklore").

\textsuperscript{76} Dietz, \textit{European Community}, supra note 71, at 160-64; Dietz, \textit{de L'Harmonisation}, supra note 64.

\textsuperscript{77} See Dietz, \textit{European Community}, supra note 71, at 163-64.
of states, however, tends to congregate at the lower end of the scale. Most countries offer little protection beyond mere copyright or copyright coupled with unfair competition and/or moral rights that terminate at death.\(^7^8\) Since convention protection usually depends on the domestic legislation in force, preservation of intangible cultural property on an international scale is limited to those works that can obtain shelter in countries granting perpetual moral rights or public domain protection.\(^7^9\) To illustrate the difficulties intangible cultural property faces when it seeks redress by national or international means, the legal protection of folklore will be examined.

### A. BACKGROUND INFORMATION ON FOLKLORE

The term “folklore” literally means “wisdom of the people,”\(^8^0\) but obtaining a more explanatory definition is difficult due to folklore’s amorphous and inclusive nature.\(^8^1\) A general understanding can be gleaned from reading folklorist Kanwal Puri’s explication:

Folklore is a living phenomenon which evolves over time. It is a basic element of our culture which reflects the human spirit. Folklore is thus a window to a community’s cultural and social identity, its standards and values. Folklore is usually transmitted orally, by imitation or by other means. Its forms include language, literature, music, dance, games, mythology, rituals, customs, handicrafts and other

\(^7^8\) Roughly seventy percent of Berne members do not extend intangible property protection beyond the expiration of copyright. See Ricketson, supra note 21, at 356-63 (chart). Although England and the United States have recently adopted moral rights, these countries only increase that percentage. See Stewart, supra note 12, at 78-85 (noting that some states recognize moral rights); supra note 23 (noting England’s adoption of moral rights); supra note 34 (noting United States’ adoption of moral rights).

\(^7^9\) See Ricketson, supra note 21, at 356-63 (chart).

\(^8^0\) Edward Petrovich Gavrilov, The Legal Protection of Works of Folklore, 20 COPYRIGHT 76 (1984); see also Marie Niedzielska, The Intellectual Property Aspects of Folklore Protection, 16 COPYRIGHT 339 (1980) (describing folklore as the “knowledge of the people”).

INTANGIBLE CULTURAL PROPERTY

arts. Folklore comprises a great many manifestations which are both extremely various and constantly evolving. Because it is group-oriented and tradition-based, it is sometimes described as traditional and popular folk culture. 82

This passage touches upon folklore’s basic traits: namely, that (i) it is passed from generation to generation by unfixed forms; (ii) it is a community-oriented creation in that its expression is dictated by local standards and traditions; (iii) its creations generally are not attributable to individual authors; and (iv) it is being continually utilized and developed by the society in which it lives. 83 Folklore perpetually identifies a nation’s cultural history and is considered a fundamental element of a nation’s cultural patrimony. 84

Because of its evolutionary and unfixed form, external sources subject folklore to substantial threats. Folklore, especially within developing countries, is being consumed by mass communication and importation of foreign cultural works. The risk of total dissolution of folkloric culture is prevalent if preservation actions are not taken. 85 Economic exploitation of folkloric works has also

83 See RICKETSON, supra note 21, at 313; Gavrilov, supra note 80, at 79; León, supra note 18, at 27; Claude Masouyé, La Protection des Expressions du Folklore, 115 REVUE INTERNATIONALE DU DROIT D’AUTEUR 2, 2-4 (1983); Niedzielska, supra note 80, at 340, 344; Puri, supra note 82, at 19; see also Regional Committee of Experts on Means of Implementation in the Arab States of Model Provisions on Intellectual Property Aspects of Protection of Expressions of Folklore, Doha, Qatar, 8-10 Oct. 1984, COPYRIGHT BULL., vol. 19, no. 2, at 15, 16 (1985) [hereinafter Regional Committee of Arab States] (stating that “folklore which is a heritage handed down from generation to generation is an indication of the people’s spirit and wisdom and their link with the roots of their civilization”).
84 See Experts on Folklore, supra note 81, at 28; see also Masouyé, supra note 83, at 4 (noting folklore’s importance to state’s cultural heritage); Resolutions Concerning UNESCO’s Activities in the Field of Copyright and Neighboring Rights for 1990-1991 Adopted by the General Conference of UNESCO at its Twenty-Fifth Session, COPYRIGHT BULL., vol. 24, no. 1, at 7, 9 (1990).
85 See Experts on Folklore, supra note 81, at 38; see also THE CHALLENGE TO OUR CULTURAL HERITAGE 21 (Yudhithhraj Isar ed., 1986) [hereinafter ISAR] (noting developing countries’ loss of identity with acceptance of outside cultural models); UNESCO, CULTURAL POLICY: A PRELIMINARY STUDY 38 (1969) (stating that “[t]he preservation of the cultural heritage . . . is commonly regarded as within the scope of cultural affairs . . . [and] is now
been usurped by outside forces to the point that, even within a nation's own territory, nationals pay foreign publishers for reproductions of their own cultural works. Those publishers reap a substantial profit without providing any compensation to the nation's culture as creator. Folkloric works also are victims of integrity violations in that they suffer mutilation, distortion, and misappropriation, particularly when recreated outside their natural habitat or without authorization. For example, an American production company could capture an African tribal ritual on film or tape and, upon return to America, incorporate the recording into a television documentary, movie, radio program, or advertisement without any obligation to remunerate the African performers for exploiting the ritual and without any obligation to accurately attribute the ritual to its creating tribe.

B. COPYRIGHT APPROACH TO PROTECTING FOLKLORE

To combat these threats, nations have sought to incorporate folklore into their current methods of protecting intellectual creations, but with limited success. States logically turn first to copyright law since it governs the industry of expressive works and

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86 See Gavrilov, supra note 80, at 76; see also Jabbour, supra note 85, at 12 (acknowledging that denial of compensation for local creations is one impetus behind pursuit of folklore protection).

87 See Committee of Experts on the Legal Protection of Folklore, COPYRIGHT BULL., vol. 11, no. 3, at 28, 29-33 (1977) [hereinafter Legal Protection of Folklore]; Masouyé, supra note 83, at 4-6; Niedzielska, supra note 80, at 345; Puri, supra note 82, at 20.
folklore qualifies as a product of human creation. Copyright offers an immediate structure (both national and international), extensive protection, and economic opportunity since states need only to develop or amend their copyright laws to include provisions for folklore protection.

The Tunis Model Law was designed specifically to aid developing countries in drafting copyright legislation that would comply with international conventions. Section 6 explicitly grants economic exploitation rights and the moral right of paternity to "works of national folklore" for a perpetual duration. Under Section 18, these rights are vested in a competent authority delegated by the state to represent either the individual author or the community responsible for the folkloric creation. Even a denial of importation or exportation of unauthorized works is entailed. One must note that, notwithstanding the ample legal protection for folklore, the Tunis Model Law is only suggested legislation for developing countries, and those countries are free to excise folklore protection from the model law or to not enforce those provisions. One commentator confirms that the latter is reality.

If a state's national copyright legislation includes folklore, then the state can seek international copyright protection under the Berne Convention. Article 15(4) recognizes folklore as a special category of anonymous works so that members can economically exploit their own cultural heritages. In pertinent part, Article 15(4) states:

88 See Masouyé, supra note 83, at 6 (noting attempts at Stockholm revision of Berne Convention to insert provisions for protection of folklore through copyright).
89 See, e.g., Tunis Model Law, supra note 75.
90 See Preliminary Draft of a Model Law on Copyright for Developing Countries in Africa, COPYRIGHT BULL., vol. 7, no. 2/3, at 6, 7 (1973) (intending provisions to be compatible with Berne Convention and Universal Copyright Convention).
91 Tunis Model Law, supra note 75, at 17, 29.
92 See Gavrilov, supra note 80, at 77.
93 See WIPO GUIDE, supra note 21, at 95-96. The inclusion of folklore was not motivated by a desire to protect folklore per se; the provisions were designed to encourage culturally rich developing countries to become Berne members so that the developed countries that export a high percentage of their intellectual creations to these nations would gain copyright protection for their works. See RAYMOND MADISON, COPYRIGHT AND RELATED RIGHTS: PRINCIPLES, PROBLEMS AND TRENDS 52 (1983).
In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.94

Countries that modify their copyright legislation to include anonymous authorship must first notify the World Intellectual Property Organization [WIPO] before the designated authority's claims will be recognized.95

The extensive protection offered by Article 15(4), however, is misleading when one considers the impracticability of folklore ever satisfying the Article's requirements. A folkloric creation must first meet the stated prerequisites, i.e., the work must be unpublished, its author must be unknown, and that author must presumptively be a national of a member nation. Partial satisfaction is plausible because folklore, by its nature, is anonymous and any nationality presumptions can be overcome by the author's attribution to a given community.96 For example, the legend of Johnny Appleseed cannot be attributed to a particular person, but it is undoubtedly an American folktale. However, it is questionable if such authorship extends to the works of folklore that are fathered by the community rather than by an anonymous individual. Because most folkloric works are community-created, this non-personage eliminates protection outright.97 Even so, publication triggers the release of a work from state control; the designated agency loses its authority to represent the anonymous author. Since the majority of folkloric works are already published, there is little or no room for state assertion of Article 15(4) protection.98

94 RICKETSON, supra note 21, at 929.
95 See WIPO GUIDE, supra note 21, at 95.
96 See Masouyé, supra note 83, at 6-8 (denoting amorphous characteristics of folklore).
97 See RICKETSON, supra note 21, at 313. But see Tunis Model Law, supra note 75 (asserting compatibility with Berne rules and yet recognizing ethnic communities as authors).
98 See RICKETSON, supra note 21, at 315 (text of Article 15(4)).
Nations also must enact domestic statutes that both recognize folklore as protected subject matter and authorize a competent authority to enforce the convention's vested rights. Qualification alone does not remedy copyright infringement since redress is dependent on notification. The fact that only six Berne members provide the legal foundation necessary to assert these rights and only one country has notified WIPO (as of 1988) compounds the futility of labeling Article 15(4) as protective. Even if a folkloric work manages to jump through all of these hoops, protection is still meager since Article 7(3) limits duration to fifty years from the date of lawful publication.

Obtaining any shelter under the Convention's general provisions also appears chimerical. Those countries that do protect folklore can seek relief only in countries that recognize folklore as protectable subject matter since folklore does not fall within the mandatory enumerations of Article 2. With fewer than ten countries in this realm, most of which are developing countries, the plausibility of folklore obtaining any relief from international exploitation is nil. Berne Convention commentator Sam Ricketson also notes that a state's other folklore concerns, such as the sanctity of religion or custom, are beyond the limited scope of the Convention and thus, any domestic laws that protect these interests cannot utilize the Convention's text as a catalyst for aid.

In general, the legal structure of copyright is ill-suited for

99 See WIPO GUIDE, supra note 21, at 95.
100 See RICKETSON, supra note 21, at 356-63 (chart).
101 See Puri, supra note 82, at 22 n.17.
102 See RICKETSON, supra note 21, at 315, 340. Article 7(3) extends protection to life plus fifty years if the author reveals his identity, but considering that most folkloric works cannot be attributed to any author (lost in time) or only traceable to a community which has an immeasurable life span, such an event is highly unlikely.
103 See RICKETSON, supra note 21, at 306-07 (discussing national treatment).
104 See RICKETSON, supra note 21, at 356-63 (chart); see also Niedzielska, supra note 80, at 342 (stating that European countries protect folklore as compilations, which suggests that number of Berne members protecting folklore could be as high as ten).
105 The Berne Convention does provide developing countries with special treatment for educational use, compulsory translations, and reproduction licenses, but these concessions tend to favor protecting imported developed countries' works and not external exploitation of developing countries' creations. See MADDISON, supra note 93, at 54-55; RICKETSON, supra note 21, at 607-21.
106 See RICKETSON, supra note 21, at 313, 315.
adequately protecting folklore. Copyright laws recognize solely an individual author's creative expression as the authorship in a work and normally require fixation of the work in a tangible medium before limited duration rights will vest. Copyright entitlement does not retroactively extend to those works in existence prior to the enactment of copyright laws. Since folklore violates these generally established conditions, it is condemned to wallow in the unprotected marshes of the public domain unless special provisions are created to excuse its unqualifying nature. One should note the limited number of countries that have issued such a pardon.

C. MORAL RIGHTS PROTECTION AND UNFAIR COMPETITION MEANS

Moral rights protection also depends on the recognition of folklore as a protected class. In countries that both extend moral rights in perpetuity and designate an authority to enforce those rights for folkloric works, folklore can secure relief from paternity and integrity violations. In most states, however, moral rights are codified within copyright law and satisfaction of copyright prerequisites precedes any grant of moral rights. Thus, folklore is once again excluded unless exceptions are secured.

Remedying folklore's misattribution and mutilation in commercial

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107 Denial of the fixation requirement allows Berne members to exempt folklore from this general copyright requirement, see RICKETSON, supra note 21, at 242-43, but most nations mandate fixation to qualify for domestic protection. See, e.g., 17 U.S.C. § 102 (1993) (U.S.A.).

108 See RICKETSON, supra note 21, at 313; Niedzielska, supra note 80, at 344; Puri, supra note 82, at 23-34.

109 See Jabbour, supra note 85, at 13; Puri, supra note 82, at 24; see also Robin A.I. Bell, Protection of Folklore: the Australian Experience, COPYRIGHT BULL., vol. 19, no. 2, at 4 (1985) (looking at Australia's dilemma when it attempted to protect folklore under copyright).

110 See supra note 104. Masouyé notes the possibility of protecting folklore under neighboring rights and sui generis means, but dismisses these rights as ineffective to protect against exploitation. Masouyé, supra note 83, at 10-11 (discussing sui generis protection); see also Puri, supra note 82, at 22.

111 See Puri, supra note 82, at 21-22. Moral rights protection within the common-law countries, however, cannot exist as long as reputational actions are the only remedy.

112 In addition, Gavrilov suggests that the group representation recognized under copyright for authors' societies would be suitable for folkloric work protection. Gavrilov, supra note 80, at 78-79.
products can be pursued under the laws of unfair competition.\footnote{113}{See Niedzielska, supra note 80, at 345-46 (citing Poland's unfair competition laws' appellation of origin provisions); Puri, supra note 82, at 22 (noting conditions governing commercial use of folklore).} By forbidding reproduction on the grounds of consumer confusion and misidentification, community cultural creations can be protected from external exploitation. States generally authorize particular groups to monitor and control commercial exploitation.\footnote{114}{See id. (noting French unfair competition laws and Art. 4 of Poland's 1926 Law of Unfair Competition).} To gain protection, however, folklore must qualify as a commercial good or service. Some aspects of folklore, such as rituals or dance, function only in the realm of society and do not generally qualify as commercial activities.

D. PUBLIC DOMAIN AND DOMAINE PUBLIC PAYANT PROTECTION

Public domain legislation is the most prevalent method states choose to protect and exploit their folkloric creations. States can readily classify folklore as a segment of their public domain\footnote{115}{See Puri, supra note 82, at 24; see also Ricketson, supra note 21, at 315 (noting Article 15(4) does not extend to public domain folklore). But see León, supra note 18, at 27-28 (criticizing folklore's classification as public domain material); Niedzielska, supra note 80, at 343-44 (stating, "[i]n view of the fact that these works have never been protected by copyright, there would be no justification for treating them now as an escheated heritage").} and thus can control folklore's usage. Consideration is given to modern artists who create new, copyrightable works based on folklore and societal usage so that the cultural evolution is not retarded.\footnote{116}{See, e.g., U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, supra note 53, at Annex II (Albania); see also Legal Protection of Folklore, supra note 87, at 32; León, supra note 18, at 28; Niedzielska, supra note 80, at 340, 343, 346 (concluding "the measures for its protection should not create barriers that would hamper the popularization of folklore or cancel out the benefits of copyright in works based on folklore").} Public domain systems also facilitate the application of domaine public payant to works of folklore.

Economic exploitation has been achieved through the imposition of domaine public payant for commercial usage. By imposing a royalty on such usage, states generate funds that are diverted towards meeting the community's cultural needs.\footnote{117}{See, e.g., Yugoslavia Law of 20 July 1968, art. 52, reprinted in U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, supra note 53, at Annex II; see also Puri, supra note 82, at 22.} The Tunis
Model Law even advocates the implementation of *domaine public payant* for developing countries to "protect and disseminate national folklore." Although experts question the ability of *domaine public payant* alone to protect folklore from abuse, the system can sustain artists in developing countries and can help to both preserve oral folklore in archives and educate people about their folkloric heritage.

The main drawback to relying on the public domain and *domaine public payant* is the lack of an international structure to enforce these protective measures extraterritorially. Because the bulk of abuse arises outside the borders of the country of origin, effective protection of a state's folkloric heritage is sometimes unachievable.

IV. PROPOSALS FOR MORE ADEQUATE AND UNIVERSAL PROTECTION

A. ESTABLISHMENT OF BASIC MORAL RIGHTS PROTECTION

The above discussion on folklore illustrates the need for stronger protection of mankind's intangible cultural heritage. What steps can be taken to ensure adequate and universal protection for intangible cultural property? First, establishing the basic moral rights of paternity and integrity on an explicit, impartial, and mandatory basis would ensure that current creations of intangible cultural property are adequately protected. Once an artist transfers his economic rights, he loses control over his work unless inalienable moral rights are granted to him. Even so, moral rights protection under the Berne Convention is limited to domestic provisions in countries where "protection is claimed." If moral rights infringement transpires in a non-explicit or limited moral

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118 See Tunis Model Law, *supra* note 75, at 29 (§ 17(2)(b)).
119 See Jabbour, *supra* note 85, at 14; Niedzielska, *supra* note 80, at 344; Puri, *supra* note 82, at 27 n.29.
120 See, e.g., U.N. Doc. UNESCO/WIPO/DPP/CE/I/2, *supra* note 53, at Annex II (Senegal); see also León, *supra* note 18, at 28 ("When the royalties are paid to the community that is the owner of the work of folklore, they act as an incentive to preserve and communicate the values enshrined in the work, and at the same time they are of economic benefit to the community concerned. Both of these are praiseworthy results and in line with policies aimed at satisfying the immense needs of developing countries").
121 WIPO GUIDE, *supra* note 21, at 43 (Art. 6bis(2)).
rights nation, the injured author must settle for reputational remedies, which may not rectify the damage done to the work itself. Thus, mandatory moral rights protection is necessary if cultural contributions are to maintain their original form and integrity.

Although moral rights have been characterized as reputational in nature, a state's justification for granting explicit moral rights must extend beyond the author's own reputational needs. The rights of paternity and integrity denote a collective cultural interest in preserving the work itself; otherwise, why would a state enact provisions specifically protecting integrity when artists have defamation weapons at their disposal? The public has a legitimate interest in ensuring that its cultural works are preserved as their creators intended so that their inherent cultural value will not be lost or distorted. Some states recognize this interest by directly creating a public cause of action for integrity violations.

This public interest justification also cohesively links moral rights with a state's rationalization for copyright. If the goal of copyright is the creation of works for society, it is counterproductive for works to be inaccurately disseminated, particularly if cultural works tell members of a society who they are. For example, if a contemporary Shakespeare transferred the copyrights to his play, "A Midsummer Night's Dream," and the new owner deleted Acts 1, 2, and 3 before releasing the play to theatres, Shakespeare would have no direct legal remedy for the distortion of his original work. Moral rights prevent this distortion by requiring accuracy in the reproduction of an original work.

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122 Merryman describes this interest as a social abhorrence for cultural counterfeiters who distort cultural identity by inaccurately recreating works. Merryman, Bernard Buffet, supra note 24, at 1041; Public Interest, supra note 9, at 359-60.

123 See, e.g., Cultural and Artists Creations Preservation Act, CAL. CIV. CODE § 989, (West Supp. 1994) (stating that "there is a public interest in preserving the integrity of cultural and artistic creations"), reprint ed in MERRYMAN & ELSEN, supra note 15, at 165. See also Edward J. Damich, State "Moral Rights" Statutes: An Analysis and Critique, 13 COLUM.-VLA J.L. & ARTS 291, 293 n.8, 339 (1989) (listing state moral rights laws and classifying these statutes according to level and extent of protection). Damich's article considers these state statutes in light of the Berne Convention's moral rights requirements and concludes that these laws provide insufficient protection to comply with the Berne convention. Id. at 299, 338. Damich also considers the possible preemption of these statutes due to the United States becoming a Berne signatory. Id. at 329-38.

Integration of paternity and integrity rights can ensure proper attribution of origin and prohibit modifications that can alter a work's valued expression. A work is best served by vesting these moral rights in the work's creator, much like the copyright infringement delegation, because the creator is more knowledgeable of the work's usage and personality (which is his own) than the policing arm of the state.

To be effective, these entitlements must be inalienable or non-transferable; otherwise, the author's protection could be divested with the transfer of the work's economic rights. Moral rights must parallel economic rights in duration and must be granted to all artistic works that qualify for copyright protection; otherwise, value judgements will too narrowly determine the kinds of cultural contributions that ought to be protected. The remedies granted can vary among the different subject matters, but moral rights must be non-discriminatory for protection to be universal.

States, however, cannot afford to allow authors the unfettered exercise of moral rights if intellectual property industries are to flourish. The ability to waive contractually some alterations of a work is necessary for the publication, distribution and transfer of mediums to be manageable. Even France, which grants extensive and inalienable moral rights, has judicially recognized the need to sustain consensual changes. States also must acknowledge that violations of moral rights must be objectively determined in light of the artist's personality and of the particular medium of expression chosen. As scholars attest, moral rights cannot be applied rigidly in all instances due to the variation in use of copyrightable works. For example, works that are intended to be

125 Statutes that extend moral rights only to selected subject matters discriminate against works that have immeasurable cultural impact. Recent U.S. legislation, for example, denies protection for motion pictures, broadcasting, or newspapers, yet these mediums are the predominant means by which Americans receive input about their culture. See Visual Artists' Rights Act (U.S.A.), supra note 34 (section 602 defining “work of visual art”).

126 For example, a court would not necessarily grant the same relief for the alteration of a Picasso painting that it would for changes to a compilation, but the latter merits at least minimal moral rights redress as a cultural contribution to society.

127 See, e.g., Copyright Act (England) ch. 4, § 87, supra note 23, at 81 (codifying consensual waiver of moral rights); see also Damich, supra note 123, at 325-29 (considering alienability and waiver of moral rights from American perspective).

128 See Strauss, supra note 25, at 515-16, 537.
performed, by their nature, are subject to individual nuances. Consumers of those works must not be inhibited from using the work freely; otherwise, such copyrightable works can never be performed without violating the creator's moral rights.\textsuperscript{129} Best stated, "the goal of moral rights protection should be to protect as completely as possible the personality of the artist embodied in the work without seriously impairing the competing rights."\textsuperscript{130}

Once states adopt domestic moral rights legislation, more universal international protection will automatically result. The national treatment guarantees and international minimum standards of the U.C.C. would ensure protection for U.C.C. works. The increase in the number of protecting forums would strengthen the punch of Berne's Article 6bis. Mandatory recognition of paternity and integrity as moral rights in both conventions would best achieve the universal protection that intangible cultural products need.

B. ADOPTION OF PUBLIC DOMAIN LEGISLATION

The second step towards adequate protection is providing continuous integrity for works that lie outside copyright through the medium of public domain laws. By extending moral rights into perpetuity, states can ensure that the "cultural and human value of works in the public domain" is preserved for future generations. Mark Twain's novel, "The Adventures of Tom Sawyer,"\textsuperscript{131} for example, which reflects life on the Mississippi River during the 19th century, could be protected from editorial enhancement or deletion. After all, "the moral value of a work [does] not change after its author's death."\textsuperscript{132} Mouchet classifies this elongation of protection as a state obligation, because perpetual moral rights are "based on the need to defend the cultural heritage of the collectivity. This is a matter of protecting and defending a literary or artistic work as cultural—not merely economic—property."\textsuperscript{133}

Perpetual moral rights can vest in either (i) the descendants of

\textsuperscript{129} See Merryman, Bernard Buffet, supra note 24, at 1043-47.
\textsuperscript{130} Damich, supra note 123, at 302.
\textsuperscript{131} MARK TWAIN, ADVENTURES OF TOM SAWYER (1936).
\textsuperscript{132} Second Committee, supra note 51, at 31.
\textsuperscript{133} Mouchet, Problems, supra note 29, at 145-146.
the work's creator as legitimate heirs to his estate or (ii) the state as heir to the creations of its nationals. Although the author's direct descendants might have closer personal interests in preserving the author's work, uncertainty can arise as the lineage becomes more distant from the author and subdivided among several families. Delegation to a state department, on the other hand, can provide the system with consistency and certainty.

One major criticism of state control over a public domain work's integrity is the potential for censorship by the state, i.e., the state can control current creations by controlling access to their public domain inspiration. To avoid censorship possibilities, a state would need to implement guidelines as to what preserving the integrity of a work entails. A forum should be provided for consultation of public domain use issues. Experts suggest that designation of a publicly accessible, national depository, like the National Library of Congress, can act as a reference for satisfying the use guidelines and as a resource for accuracy in dissemination.\(^\text{134}\) One should note that these laws must balance preservation interests and public usage interests so that cultural development will continue to progress.

International perpetual moral rights legislation can be achieved under Article 6bis(2) of the Berne Convention.\(^\text{135}\) The strength of Article 6bis moral rights protection, however, is limited to those countries that perpetuate moral rights in their domestic legislation and that allow entities other than the work's creator to assert moral rights.\(^\text{136}\)

Amendments of Article 6bis to require mandatory public domain legislation were proposed during the Brussels Revision of the Berne Convention in 1948, but were tabled because of resistance by common-law countries. The proposal read as follows:

The countries of the Union undertake to accord the


\(\text{\textsuperscript{135}}\) See WIPO GUIDE, supra note 21, at 43 (stating that moral rights "shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed").

\(\text{\textsuperscript{136}}\) Id.
right of respect to works fallen into the public domain, and particularly to important works generally admired, irrespective of the time period to which they belong or their country of origin. Literary, theatrical, musical, plastic, cinematographic or other adaptations of the said works are only permitted on condition that they do not travesty or falsify them in their spirit by distortions, mutilations, changes, cuts or additions capable of falsifying them and seriously injuring the beauty of the work and consequently the moral right of the author and his reputation. Parodies which are presented as such without causing possible confusion with the original work are nonetheless authorized.\textsuperscript{137}

Adequate international protection could be achieved for post-copyright works if this proposal were reintroduced and adopted.

The most forward-looking efforts at international public domain coverage are embodied in UNESCO's \textit{Draft Recommendation to Member States on the Safeguarding of Works in the Public Domain.}\textsuperscript{138} These proposals reflect ten years of research into public domain issues and are derived from two separate committees of governmental experts, corresponding state responses to those committees' recommendations, and selected reports that reflect the viewpoints of particular interest groups.\textsuperscript{139} Although these

\textsuperscript{137} Reprinted in Ricketson, supra note 21, at 463-64.
\textsuperscript{138} Draft Recommendation to Member States on the Safeguarding of Works in the Public Domain: Item 7.5 of the Provisional Agenda, U.N. Doc. 25 C/32 (1989) (available upon request from UNESCO) [henceforth U.N. Doc. 25 C/32]; see also Working Group, supra note 48, at 33-34 (noting UNESCO's ambition "to guarantee the authenticity of works of the mind in the face of the dangers of distortion, disfiguration and deformation of said works which result from popularization and commercial exploitation which [had] become more and more marked, especially in the case of works that have fallen into the public domain").

\textsuperscript{139} See, e.g., Committee of Governmental Experts on the Safeguarding of Works in the Public Domain: Quest for Ways and Means of Preventing the Distortion of Works in the Public Domain, and Study of the Possibility of Formulating Draft Recommendations Applicable at the National and International Levels to Serve as the Basis for the Preliminary Study on Technical and Legal Aspects, Which is Due to be Submitted to the Executive Board of Unesco at its 116th Session, U.N. Doc. PRS/CPY/DP/CEG/I/10 (1982) (available upon request from UNESCO) (providing cohesive digesting of selective reports and state responses); U.N. Doc. PRS/CPY/DP/CEG/I/4, supra note 53 (outlining particular state
recommendations are being revised with a view to stipulating an appropriate treaty, the General Conference publication encourages UNESCO members to implement domestic laws that will comply with the draft text. This text recommends that (i) prior authorization be eliminated, (ii) performance needs be met, and (iii) freedom of use be preserved through the allowance of parody and translations. Paternity and integrity rights are specifically enumerated, and special concessions have been given to some countries in that the text recognizes alternative means to public domain protection, such as perpetual moral rights and unfair competition or consumer protection. Violations are to be sanctioned domestically with the imposition of domaine public payant remaining optional. Lastly, international cooperation is advocated but only at the instigation of individual nations. This document provides states with an excellent place to start protecting those elements of their cultural heritage that currently rest in the public domain wilderness.

C. PROTECTION FOR NON-CONFORMING WORKS—FOLKLORE

Despite the broad protection that these international measures could potentially afford, public domain laws are limited in scope to works whose copyright protection has expired or works that would

responses to initial working group's conclusions); Experts on Public Domain, supra note 134 (documenting committee's findings in light of the information obtained from latter reports and state responses); Study: the Public Domain, supra note 47 (exposing then current national measures for comparison and example); Working Group, supra note 48 (illuminating group's initial findings and choice of moral rights as best to serve their goals).


have been protected under copyright law had such a system existed at the time of the works' creation or had such a system protected their particular subject matter. These draft measures specifically exclude protection for non-copyrightable segments of a nation's cultural heritage such as folklore.¹⁴² Thus, implementing global protection for those forms of intangible cultural property that otherwise would never be entitled to copyright protection should be pursued as the third step towards universal protection.

Intangible cultural property that operates outside the norms of intellectual property protection should not be overlooked because of its nonconforming status. These works comprise a valuable part of a nation's cultural heritage and merit accurate recreation and preservation. International agreements have been developed that recognize this gap. For example, the Berne Convention has altered its authorship provisions to include anonymous folklore protection, but the scheme is flawed. Revision of the Berne Convention to accept national folklore as protected subject matter (along the lines of the Tunis Model Law) could provide the desired protection, but most commentators reject the use of copyright as inadequate to fully protect folklore.¹⁴³

UNESCO's efforts, in contrast, have produced results that both facilitate folklore usage and preserve this artform from destruction. As early as 1977, UNESCO began to investigate the then current systems of protecting intellectual property and absorbed all the best features of those systems to create a new framework for folklore protection.¹⁴⁴ In an attempt to incorporate preservation, conservation, utilization, and identification measures into one document, UNESCO's experts generated the 1981 Model Provisions for National Laws on the Protection of Expressions of Folklore and

¹⁴² See Experts on Public Domain, supra note 134, at 30 (denying folklore's inclusion in the otherwise broad meaning of public domain).
¹⁴³ See Bell, supra note 109, at 4; Jabbour, supra note 85, at 13; Masouyé, supra note 83, at 8; Niedzielska, supra note 80, at 344-46; Puri, supra note 82, at 23-24. But see Gavrilov, supra note 80, at 77-78.
¹⁴⁴ The initial committee of 1977 analogized protection of folklore to that of computer programs. Any attempt to incorporate computer programs into either the copyright system or the industrial property system had resulted in a distortion of protection for computer programs; folklore exhibited the same unadaptability. Legal Protection of Folklore, supra note 87, at 34.
Commentary, which was further qualified in 1982 by attaching a protocol, Against Illicit Exploitation and Other Prejudicial Actions. This model law concerns only commercial use of folklore and features exclusions for uses like education or inspiration, exclusions for new works, paternity rights acknowledgement through its origin designation requirements, an option for domaine public payant to generate funds for administration, and the establishment of a competent body authorized to enforce designated sanctions. These measures stimulated ample regional discussion on the merits of national folklore statutes and on the need for a complementary international instrument.

WIPO and UNESCO responded by unveiling their Draft Treaty for the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which was the work product of numerous meetings held during the intervening years. This Draft Treaty recognized the need for international protection in light of the “uncontrolled use of such expressions by means of


For commentary on these provisions, see Gavrilov, supra note 80, at 76-79 (noting author’s belief that “the establishment of legal protection for works of folklore would enable international cultural interchange to take place in a more orderly fashion”); Jabbour, supra note 85, at 12-14; Masouyé, supra note 83, at 10-24.


modern technology, beyond the limits of the country of the community in which they originate.\textsuperscript{150} Under the Draft Treaty, national treatment is imposed on any commercial use of folklore subject to authorization by each state authority delegated to administer and enforce the treaty.\textsuperscript{151} The Draft Treaty provides remedies for folklore of multinational origin in that regional centers can register such works and authorize their use.\textsuperscript{152} Specific exceptions to use authorization requirements are granted for educational and inspirational purposes.\textsuperscript{153} Paternity rights arise from source acknowledgment provisions of the treaty (community or regional), as do the offense designations containing misrepresentation or consumer-protection elements.\textsuperscript{154} Although domestic remedies and sanctions are mandated, national measures remain intact because the treaty is only supplemental, if such national measures predate the treaty’s adoption.\textsuperscript{155}

The protective scope of this treaty, however, was limited to illicit export of folklore and did not effectively protect the integrity of folkloric works. UNESCO formed a second committee to explore this issue. The 1985 Committee called for the preservation, registration, conservation (archival), dissemination, and controlled usage of folklore within a framework of international cooperation.\textsuperscript{156} The Committee’s recommendations set out specific obligations for member states to implement domestically, such as

\textsuperscript{150} Id. at 23; \textit{Preamble}, Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action, \textit{reprinted in Copyright Bull.}, vol. 19, no. 2, at 34 (1985) [hereinafter Draft Treaty].

\textsuperscript{151} Draft Treaty, art. II, \textit{supra} note 150, at 35.

\textsuperscript{152} Id., art. III, at 35.

\textsuperscript{153} Id., art. VI, at 36.

\textsuperscript{154} Id., art. VII, at 37 (enumerating source acknowledgment provisions); id., art. VIII, at 37 (listing offense provisions).

\textsuperscript{155} Id. at 34.

\textsuperscript{156} Second Committee of Governmental Experts on the Safeguarding of Folklore, \textit{Copyright Bull.}, vol. 19, no. 2, at 39, 45 Annex 1 (1985) [hereinafter Second Committee on Folklore]. A Special Committee of Technical and Legal Experts met during the summer of 1987 to hone their ideas, \textit{see Safeguarding of Folklore, Copyright Bull.}, vol. 21, no. 3, at 51 (1987) (summarizing committee's discussions), before final presentation to the General Conference. \textit{See Recommendation on the Safeguarding of Traditional Culture and Folklore Adopted by the General Conference of UNESCO at its Twenty-Fifth Session, Copyright Bull.}, vol. 24, no. 1, at 8 (1990) [hereinafter Recommendation on Folklore] (recommending measures that member states should observe in promulgating legislative protection of folklore).
establishing national archives to preserve and catalog folklore, adapting educational programs to pique cultural awareness, and imposing disseminator restraints to monitor the use of folkloric works for accuracy. Most importantly, these recommendations provide a basis for states to expand their intangible cultural property protection to include such non-conforming works as folklore.

D. ADVOCACY OF EXPLICIT CONVENTION PROTECTION FOR INTANGIBLE CULTURAL PROPERTY

The final step towards achieving adequate and universal protection leads back to this Article’s initial inquiry into the convention measures covering tangible cultural property: should similar convention protection be extended or developed for intangible cultural property? Intangible cultural property not only warrants and merits such measures in its own right, but also merits such measures because the goals of the tangible conventions cannot otherwise be attained fully.

Intangible cultural property merits convention protection for several reasons. First, intellectual creations comprise a significant portion of a state’s cultural patrimony and are actual reflections of culture. Second, intangible property facilitates societal development because each intellectual work expresses the dimensions of a society and each work tells the members of its creating society who and what they are. Third, intangible cultural property evokes the same response of cultural nationalism from a nation’s people as tangible property. For example, “The Star Spangled Banner” instills the same sense of pride in Americans as the Washington Monument, yet only the Washington Monument is eligible for international convention protection. Lastly, intangi-

167 See Recommendation on Folklore, supra note 156, at 9-11 (recommending definition of folklore, procedures to identify folklore, and methods to conserve, preserve, disseminate, and protect folklore).
156 See supra note 18.
158 See supra note 28 and accompanying text (quoting Merryman’s exclamation on importance of art to society in non-denigrated form).
160 See Hague Convention, supra note 4, at ch. 1, art. 1, (defining cultural property as including architectural monuments).
ble cultural property constitutes part of the "common heritage of mankind" and, as such, merits protection from destruction similar to the protection afforded tangible cultural property segments of the "common heritage of mankind" under the Hague and Paris Conventions and the Antarctica under the Law of the Sea Convention.

Intangible cultural property also warrants convention protection because the same circumstances confront intangible cultural property that threatened tangible property prior to the enactment of its convention protection. National protection cannot adequately protect intangible property because of the international nature of abuse. Present international conventions inadequately protect existing creations from moral rights violations, and no relief has been provided for post-copyright works or for those unsuitable for copyright. Intangible cultural property faces the same threats of destruction and inaccurate preservation that haunted tangible property prior to the Hague Convention. Mass media and piracy undermine intangible property, rather than armed conflict. Abuses may take the form of incorporeal theft, as opposed to an actual physical taking governed by the Paris Convention, but the act is still theft and still destructive to a nation's intangible cultural heritage. Lastly, the "decontextualization" dilemma that plagued tangible property (i.e., if a work is taken out of context, a loss in value and information occurs) directly threatens forms of folklore and mirrors the loss suffered if

161 See U.N. Doc. 25 C/32, supra note 138 (preamble); Draft Treaty, supra note 150 (preamble).
162 See WILLIAMS, supra note 4, at 57-63 (exploring use of "common heritage of mankind" language in those documents).
163 See generally MERRYMAN & ELSEN, supra note 15, at 2-53; see also WILLIAMS, supra note 4, at 36-40 (analyzing aims of Hague Convention).
164 See supra note 87 and accompanying text (discussing exploitation of folklore).
165 See supra note 30 and accompanying text (discussing protection under Berne Convention).
166 See supra note 141 and accompanying text; RICKETSON, supra note 21, at 315.
167 See supra note 85.
168 See supra note 86.
works are not reproduced fully or accurately.170

Multiple goals motivate the tangible property protection offered by conventions.171 Although preservation of physical works is the obvious objective, such action serves to achieve other goals, such as maintaining the work's integrity, facilitating distribution or access, ensuring truth and certainty, preserving the cultural identity of a particular people as well as the expression "embodied in the work," retrieving information, and preserving a cultural creation for the benefit of the "common heritage of mankind."172 Each of these goals reflects the true interest in preserving the cultural embodiment in objects by protecting the physical work. But these tangible property goals are not met unless steps are taken to protect the intangible elements of the tangible objects by acknowledging the intangible elements as separate from the tangible. It is absurd to protect tangible objects so strongly and yet not take any steps to preserve that object's intangible elements that are valued above the physical. If states neglect to take steps to preserve the intangible, then when tangible property is lost by some external event, such as armed conflict, theft, or natural disaster, the only remaining source of information could be an inaccurate reproduction. Thus, all the time, energy, financial, and personal resources expended to preserve that physical property are wasted. Both tangible and intangible property preservation must be vigorously pursued for cultural property protection to be complete.

How can separate protection be achieved internationally? This

171 See generally the Hague and Paris Convention texts reprinted in UNESCO, MOVABLE PROPERTY, supra note 2, at 336-56.
172 Experts have also recognized these inherent rationales for protecting valuable cultural artifacts. See ISAR, supra note 85, at 21 (noting belief that tangible cultural objects warrant protection as "visual reminder[s] of cultural heritage" and as promoters of identity and concluding that "[a] people's awareness of cultural identity can be a force that supports economic development"); MCBRYDE, supra note 10, at 2-4 (stating that cultural identity derives from preservation of objects and sites and that tangible property laws preserve such ownership for "the common heritage of mankind"); Merryman, Public Interest, supra note 9, at 345-49 (designating identity, expression, truth, morality, and authenticity as sources of the public interest in protecting cultural objects); John H. Merryman & Albert E. Elsen, Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects, 12 J. ARTS, MGMT. & L. 5, 8-11 (1982) (denoting state motivations for monitoring exploitation of works including cultural value, information preservation, integrity, economic incentives, and artistic value).
can be done indirectly by taking steps in the private law arena to recognize moral rights, the public domain, and folklore. Adoption of these measures nationally raises the level of protection intellectual creations can demand in individual nations. If this increase in domestic protection is accompanied by convention amendments that explicitly cure weaknesses like the lack of effective protection for public domain or folkloric works, coherent protection will be secured for intangible cultural works.

A more effective means to ensure preservation is the establishment of a public international convention that explicitly offers tangible-property-type protection for intangible cultural property. Amending tangible cultural property conventions could achieve this goal but these convention provisions and remedies are not designed to protect incorporeal property. Thus, adequate protection would mandate the creation of specific provisions that recognize the incorporeal status of intangible cultural property and address remedies for transgressions from an incorporeal perspective. Such provisions and remedies could include affirmation of origin (paternity), proper labeling if reproduction is segmented, and injunctive relief for dissemination of inaccurate works.

The creation of a convention that pertains solely to the preservation and protection of intangible cultural property, a convention enforced apart from the existing tangible conventions, would be the optimal way to ensure distinct recognition of intangible expressions.

173 See, e.g., Hague Convention, art. 3, supra note 4, at 340 (concerning protection of "property situated within [a state's] territory") (emphasis added). Article 4 mandates restraint from use of property for protection from armed conflict while Articles 12 through 14 concern transportation of cultural property to safety zones. See UNESCO, MOVABLE PROPERTY, supra note 2, at 336-56.

The Paris Convention's language is better suited for including intangibles, but its provisions are still tailored to physical property. For example, Article 2 mandates refraining from illicit practices that impoverish the physical cultural heritage of a particular nation. Article 5 authorizes creation of domestic measures (preservation, cataloging, archeological guidelines, etc.) to maintain the physical cultural heritage, while Article 7 implements museum controls to stem market demands. Article 9 mandates monitoring physical property import/export while Article 13 provides restitutional remedies for illicit exportation by providing that nations can declare certain cultural property pieces to be inalienable from that state. Id. at 357-64.

174 For example, tangible property provisions call for the return of illegally exported property; an intangible provision could require respect for intangible property that is transmitted beyond its native borders and proper attribution to the country or region where the work originated.
The convention document could usurp many of the tangible cultural property preambles, goals, and rationales with only a redirection of terms and language to fit its incorporeal object. Its provisions also could be adapted from domestic laws, such as moral rights laws, public domain laws, or folklore laws, and from proposed international instruments. One must note that commentators and UNESCO have suggested that the international public domain and folklore recommendations are mirror images of tangible cultural property conventions for certain segments of intangible cultural property.\textsuperscript{175} One also must note the highly positive response UNESCO received from its member nations which reiterated the need for intangible cultural property protection and stated their satisfaction with UNESCO’s draft rules as effective remedies for the abuses faced by public domain works and folklore. This positive member-state response would seem to indicate that adoption of international protection is both politically feasible and ripe.\textsuperscript{176}

An effective convention document would need teeth comparable to those in the tangible cultural property conventions. The convention document should include: (i) strongly stated protective (mandatory) duties for a nation’s own intangible cultural property as well as that of other states;\textsuperscript{177} (ii) ethical guidelines for industry practice;\textsuperscript{178} (iii) acknowledgement of state moral responsibilities to protect intangible cultural property as linked to the common

\textsuperscript{175} See Experts on Folklore, supra note 81, at 34; Second Committee on Folklore, supra note 156, at 41-42; U.N. Doc. PRS/CPY/DP/CEG/I/7, supra note 141, at 14; U.N. Doc. 25 C/32, supra note 138, at Annex II n.28.


\textsuperscript{177} Cf. supra note 7 (discussing Hague and Paris Convention obligations to protect cultural property extraterritorially).

\textsuperscript{178} Cf. Paris Convention, art. 7, supra note 5.
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heritage of mankind;\textsuperscript{179} (iv) specific enforcement designation;\textsuperscript{180} (v) specific means to protect intangible property that states must domestically implement or legislate,\textsuperscript{181} and (vi) the assurance of safeguards and respect for intangible cultural property, by implementing, for example, a minimum of paternity and integrity rights.\textsuperscript{182} The document should balance free use and dissemination with protection and preservation interests, but the retentive nationalism inherent in tangible property conventions should be tempered in favor of cultural internationalism for the common heritage of mankind to ultimately benefit.\textsuperscript{183}

Only when intangible cultural property has attained similar convention or international protection from abuse as tangible cultural property will uniform and universal cultural property protection be achieved—a worthy goal to aspire to meet for the sake of preserving the cultural patrimony of mankind.

\textsuperscript{182} Cf. supra note 7 (noting Hague and Paris Convention requirements of respect and protection from destruction).
\textsuperscript{183} Merryman has outlined the three basic tenets of cultural internationalism as preservation, integrity, and distribution/access. Unlike the perspective of cultural internationalism, cultural nationalism focuses on the identity of cultural property as belonging to a particular nation and on restitution of property to its originating nation. Merryman espouses that cultural nationalism is not the logical way to achieve protective goals, especially in light of the "common heritage of mankind" premise. See John H. Merryman, \textit{Thinking About the Elgin Marbles}, 83 MICH. L. REV. 1881, 1910-21 (1985); see also Merryman, \textit{Cultural Property}, supra note 169, at 842-53 (1986) (critiquing application of cultural nationalism principles in both Hague and Paris Conventions and concluding that cultural internationalism is preferential model for convention protection of cultural property).