

PROTECTING CULTURAL PERSONALITY

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ABSTRACT

When companies use cultural symbols or cultural heritage from an indigenous or local community without their knowledge or permission, it can lead to claims of cultural appropriation, particularly in the fashion industry. Yet, the law provides little to no remedy. Trademarks and geographical indications can be used to protect collective cultural identities. However, these intellectual property laws are not helpful if the affected cultural group has not commercialized its identity by offering goods or services to the public. This Article contributes to the literature by theorizing a dignitary-based intellectual property model for protecting cultural identities. It draws on the U.S. right of publicity (name, image, and likeness) and international human rights law to develop an original argument that justifies a novel and narrowly tailored cultural personality right to prevent commercial appropriation of cultural identities.

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INTRODUCTION

One cannot use the names or images of famous personalities such as Beyoncé, Taylor Swift, or Elton John without their permission. This is because, in the United States, various state laws allow an individual to prevent the unauthorized commercial use of their identities.¹ Drawing on intellectual property laws and international human rights law, this Article argues that we should also have a right to control not only the commercial use of our individual personal identities but also our collectively held cultural identities.

For example, companies periodically use cultural symbols or names to market and sell their products. Fashion houses and brands, such as Timbuk2 and Louis Vuitton, have designed and marketed clothing based on traditional ethnic clothing styles or symbols, or named their fashion lines after established cultural groups.² This is often done without the knowledge, consent, or involvement of the cultural group. Unlike brands such as Coca Cola, Nike, or Apple, or Taylor Swift, these cultural identities and their corresponding cultural heritages are perceived as belonging to no one and therefore free for anyone to take and monetize.

The commercial use of cultural names, symbols, patterns and other aspects of cultural heritage leads to different types of claims of cultural appropriation and the misuse of indigenous cultural heritage. As the examples will show, responses to claims that a business has made commercial use of a cultural identity are currently addressed through voluntary remedies rather than legal remedies. For instance, media personality and business owner Kim Kardashian faced heavy criticism in 2019 for cultural appropriation for branding her shapewear “Kimono,” which is a type of traditional Japanese dress.³ She later apologized to the many offended fans and rebranded

1. See generally Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020).

2. Amber Lee, *Homage or Faux Pas: Cultural Appropriation in Fashion Apparel*, CTR. FOR ART L. (June 29, 2020), <https://itsartlaw.org/2020/06/29/homage-or-faux-pas-cultural-appropriation-in-fashion-apparel/> [<https://perma.cc/P2MZ-P7X2>].

3. *Kim Kardashian West Changes Name of Shapewear Line After Accusations of Cultural Appropriation*, NBC NEWS (Aug. 28, 2019), <https://www.nbcnews.com/news/asian-america/kim-kardashian-changes-name-shapewear-line-after-accusations-cultural-appropriation-n1047266> [<https://perma.cc/W43J-H9GF>].

the shapewear line “Skims.”⁴ Similarly, actor Michael B. Jordan pulled the launch of his J’Ouvert rum brand after he was accused of misappropriating the term “J’ouvert,” which refers to part of a Caribbean cultural festival.⁵ In a different type of cultural appropriation claim, one which was based on cultural heritage symbols rather than cultural names, fashion designer Isabel Marant apologized in 2020 for selling a sweater that was nearly identical to a traditional Mexican outfit.⁶ In each instance, there was public pressure to address and remedy “cultural appropriation,” but it is rarely clear what this means, what its implications are, or what remedies, if any, are available.

Businesses may back down voluntarily, but the law is slow to catch up. For example, at the request of the Principal Chief of the Cherokee Nation, the maker of the Jeep Cherokee vehicle entered discussions with the Cherokee Nation and finally agreed in 2023 to stop using the name “Cherokee” on its iconic vehicle.⁷ However, that

4. Vanessa Friedman, *Kim Kardashian West and the Kimono Controversy*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/fashion/kim-kardashian-west-kimono-cultural-appropriation.html> (on file with the *Columbia Human Rights Law Review*); Caitlin O’Kane, *Kim Kardashian changes name of shapewear line after apologizing for cultural appropriation*, CBS NEWS (Aug. 27, 2019), <https://www.cbsnews.com/news/kim-kardashian-changes-name-of-shapewear-line-after-apologizing-for-cultural-appropriation/> [<https://perma.cc/62U4-MLUR>].

5. *Michael B Jordan renames rum after accusations of cultural appropriation*, THE GUARDIAN, (June 23, 2021, 6:25 ET), <https://www.theguardian.com/film/2021/jun/23/michael-b-jordan-renames-rum-after-accusations-of-cultural-appropriation> [<https://perma.cc/3GMK-W5LY>].

6. *Isabel Marant: Designer apologises for Mexican appropriation*, BBC NEWS (Nov. 17, 2020), <https://www.bbc.com/news/world-latin-america-54971582> [<https://perma.cc/V473-F8EM>]. Mexico passed a law to protect its intangible cultural heritage. See *Ley Federal de Protección del Patrimonio Cultural de los Pueblos y Comunidades Indígenas y Afromexicanas*, Diario Oficial de la Federación [DOF] 17-01-2022 (Mex.), <https://www.wipo.int/wipolex/en/legislation/details/21258> [<https://perma.cc/P7KT-EJLK>].

7. William Roberson, *Iconic Jeep Cherokee Heads for Retirement After Almost 50 Years In Production*, FORBES (Mar. 25, 2023, 22:45 ET), <https://www.forbes.com/sites/billroberson/2023/03/25/iconic-jeep-cherokee-heads-for-retirement-after-almost-50-years-in-production> [<https://perma.cc/3TJG-KMCT>] (announcing Jeep’s retirement of its Cherokee model in 2023); Jenny Gross, *Chief of Cherokee Nation Asks Jeep to Stop Using Tribe’s Name*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/business/jeep-grand-cherokee.html> [<https://perma.cc/3FXL-ZJJ8>] (reporting on the Principal Chief of Cherokee Nation’s discussions with Jeep in 2021 requesting Jeep to change the name of its Grand Cherokee vehicle model).

was a voluntary action, rather than something legally required. By comparison, trademark owners have threatened indigenous companies with legal action, even for the use of local indigenous words. For example, when the two co-founders of Colombian coca beverage company Coca Nasa received a letter from beverage giant Coca-Cola, they refused to discontinue using their name because using the coca leaf to chew and make different beverages has long been part of their indigenous cultural heritage.⁸ Coca Nasa makes food, drinks, and supplements made from the coca leaf, which is found in South America and has been part of indigenous cultural and medicinal traditions for generations.⁹ Coca-Cola attempted to stop Coca Nasa from selling its coca pola drink in Colombia, where “pola” is slang for beer.¹⁰ In that context, it is simply a name for coca beer. As a trademark, the word would, therefore, be descriptive term from their cultural perspective. When Coca Nasa challenged Coca-Cola on its use of their indigenous heritage and the use of the name “coca,” the company did not respond.¹¹

These cultural clashes are notable because, despite the expansion of intellectual property (“IP”) rights, international IP laws have continued to exclude intergenerational cultural heritage from

8. María Luisa Paúl & Bryan Pietsh, *Indigenous Colombian Coca Company Challenges Coca-Cola’s Trademark*, THE WASH. POST (Sept. 15, 2024), <https://www.washingtonpost.com/world/2024/09/15/coca-nasa-cola-columbia-indigenous> (on file with the *Columbia Human Rights Law Review*) (explaining a Coca Nasa co-founder’s view that “registering the trademark without consulting the Nasa indigenous community amounted to an ‘abusive and usurpative practice that violates our rights’”); Darian Woods & Wailin Wong, *The Story of an Indigenous Woman in Colombia Who Fought Back Against Coca-Cola*, NPR: BUSINESS (Oct. 10, 2023, 17:28 ET), <https://www.npr.org/2023/10/10/1204963469/the-story-of-an-indigenous-woman-in-colombia-who-fought-back-against-coca-cola> [https://perma.cc/EC3R-MZ7J] (demonstrating a Coca Nasa co-founder’s deep cultural ties to the coca leaf as a member of the Nasa people).

9. Paúl & Pietsh, *supra* note 8 (reporting that Coca Nasa’s products include food, drinks, and supplements made from the coca leaf); Amy Sue Biondich & Jeremy David Joslin, *Coca: The History and Medical Significance of an Ancient Andean Tradition*, 2016 EMERGENCY MED. INT’L, 1, 2–3 (2016) (discussing the indigenous people of the Andes’ well-established ritual, cultural, and physiological uses of coca for over 3,000 years).

10. Darian Woods & Wailin Wong, *The Story of an Indigenous Woman in Colombia Who Fought Back Against Coca-Cola*, NPR (Oct. 10, 2023), <https://www.npr.org/2023/10/10/1204963469/the-story-of-an-indigenous-woman-in-colombia-who-fought-back-against-coca-cola> (on file with the *Columbia Human Rights Law Review*).

11. Paúl & Pietsh, *supra* note 8.

substantive legal protection.¹² While classic IP, such as patents, trademarks, and copyrights, enjoy protection domestically and in cross-border transactions, the same is not true for intangible cultural heritage. IP laws, while frequently criticized by scholars for providing too much protection to IP owners,¹³ are also underinclusive—at least in relation to valuable intangible cultural heritage from indigenous communities and local communities from the global south.¹⁴ This allows corporations and those outside the community to capture and monetize this unprotected resource, which means that it is exposed and subject to misappropriation. But why must a cultural group commercialize its identity to protect that identity and why should only corporations enjoy perpetual identity protection through trademark law.¹⁵

As this Article demonstrates, with some modifications—including adequate flexibility to protect freedom of expression—a new cultural personality right modeled on the U.S. right of publicity could fill this gap. This novel cultural personality right would address the economic and dignitary interests of cultural groups, particularly those whose identities are regularly misappropriated for commercial uses. Drawing on the right of publicity, trademark law, and international human rights law, this Article presents the normative justifications for a cultural personality right to protect collective cultural identities. This proposal would fill a gap in the law by providing a means to prevent the unauthorized commercial use of collective cultural identities and cultural heritage, even if the identities are not used as commercial identifiers by the source community.

12. Paolo Davide Farah & Riccardo Tremolada, *Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage*, 94 OR. L. REV. 125, 131–35 (2015).

13. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 40–44 (2003).

14. See Lily Martinet, *The Interactions Between Intangible Cultural Heritage and Intellectual Property Law*, in INTANGIBLE CULTURAL HERITAGE UNDER NATIONAL AND INTERNATIONAL LAW: GOING BEYOND THE 2003 UNESCO CONVENTION 97, 100 (Marie Cornu et. al. eds., 2020) (“In 2019, there was still no authoritative definition in international law of traditional knowledge or traditional cultural expressions.”).

15. Trademarks can be renewed perpetually. See 15 U.S.C. § 1059. Geographical indications have no time limit. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) at arts. 22–24 [hereinafter TRIPS Agreement].

Rather than relying on the traditional incentive and innovation-oriented models that dominate IP law,¹⁶ this Article contributes to the literature by theorizing a dignitary model for protecting cultural identities from commercial misappropriation. It does so by drawing on a specific and normatively attractive conception of the U.S. right of publicity that is based in human dignity. This emphasis on individual dignity in controlling commercial uses of identity in U.S. law has been articulated by Jennifer Rothman, a leading U.S. scholar on the right of publicity in the United States.¹⁷

The approach this Article takes is also distinct from existing literature on traditional knowledge and traditional cultural expressions. Such literature often aims to create *sui generis* copyright and patent-style protections for indigenous traditional knowledge and traditional cultural expressions by characterizing this knowledge as innovative.¹⁸ Taking a different approach, this Article uses international human rights framing to underscore the dignitary aspect of protecting individual and collective cultural identities. The right of publicity, also known as image rights in the European context,¹⁹ provides the tools through which this objective can be achieved.²⁰ The proposed cultural personality right would protect interests similar to those protected by the contemporary right of

16. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1049–57 (2005) (explaining the basic economic justification for intellectual property law, which creates information scarcity to artificially boost returns to innovation, in effect allowing creators to charge sufficiently high prices to recoup their expenses).

17. See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018) [hereinafter *THE RIGHT OF PUBLICITY*] (tracing the history of the right of publicity and its predecessor, the right of privacy, and charting a proposed path forward for the right of publicity grounded in its privacy origins). Not all countries recognize the right of publicity or image rights. I have chosen to focus on the United States because it has relatively well-developed laws and jurisprudence in this area.

18. See generally J.J. Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (2011).

19. Tatiana-Eleni Synodinou, *Image Right and Copyright Law in Europe: Divergences and Convergences*, 3 LAWS 181, 183–84 (2014).

20. For more on various human rights approaches to IP, see generally LAUREN R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* (2011) (exploring the historic separation between human rights and IP and increasing consciousness of the links between human rights and IP from the 1990s to 2010 in the development of new rules and institutions).

publicity, which is admittedly quite variable throughout U.S. jurisdictions as well as internationally.²¹ The primary aim of this Article is to provide the normative justifications for the proposed cultural personality right, with a brief exposition of the mechanisms for implementation.

While this proposal aims to justify a new right to prevent the commercial misuse of collective cultural identities, it does not purport to provide a comprehensive solution to the complex question of how to provide legal protection for all intangible cultural heritage, traditional knowledge, and traditional cultural expressions. Rather, it is limited to cultural identities that are used for commercial purposes, particularly in artistic fields such as fashion and design, where unauthorized borrowing of collective cultural identities is prevalent. Part I explains the problem of the misappropriation of cultural heritage and differentiates it from the common understanding of cultural appropriation. Part II identifies some of the challenges of protecting intangible cultural heritage under the current legal structures, before defining the collective cultural persona. Part III illustrates the ways intellectual property laws protect dignitary interests and personal identities, while Part IV draws on a dignity-based version of the U.S. right of publicity and adopts a human rights framing to propose a new cultural personality right. Part V concludes.

I. INTANGIBLE CULTURAL HERITAGE AND CULTURAL APPROPRIATION

This Article proposes a new dignity-based cultural personality right to prevent the commercial misappropriation of cultural identities. However, the arguments presented here are not about cultural appropriation *per se*. Rather, the focus is on the commercial misuse of intangible cultural heritage and cultural intellectual property. There are various reasons for objecting to the appropriation of cultural heritage and cultural identities. However, the focus of this paper is on unauthorized commercial uses of intangible cultural heritage, not on racist branding or private non-commercial

21. See generally David Tan, *Commercial Exploitation of the Human Persona in the United States: Who Needs Trademarks When You Have the Right of Publicity?*, in THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW 353 (Irene Calboli & Jane C. Ginsburg eds., 2020) (providing an overview of the rationale for the right of publicity and what a plaintiff must show to establish a *prima facie* case that the right has been violated).

expression.²² As such, it is important to define the terms cultural appropriation, intangible cultural heritage, and cultural intellectual property as they are used here.

A. Defining Intangible Cultural Heritage, Traditional Knowledge / Traditional Cultural Expressions & Cultural Intellectual Property

Intangible cultural heritage can include cultural symbols and different representations of cultural identity, and it may enjoy some legal protection in the country of origin. The United Nations Economic, Social and Cultural Organization (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage provides a broad definition of intangible cultural heritage.²³ Intangible cultural heritage (ICH) means “practices, representations, expressions, knowledge, skills . . . that communities, groups, and in some cases, individuals recognize as part of their cultural heritage.”²⁴ This ICH is intergenerational heritage that has been passed down in the form of art, songs, or folklore, for example.²⁵

Similarly, the World Intellectual Property Organization (“WIPO”) defines traditional cultural expressions to include, among others, “music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives”²⁶ Traditional knowledge includes knowledge, know-how, and skills that are passed down within a cultural community from one generation to another. These traditional expressions and traditional knowledge are different kinds of ICH. This intergenerational ICH is connected with physical cultural heritage and traditions.²⁷

22. While race and culture are often related, they are not the same. Regardless of race, an individual may have a particular cultural background as result of their heritage, but also where they were raised, for example.

23. See Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35 [hereinafter ICH Convention].

24. *Id.*

25. *Id.*

26. *Traditional Cultural Expressions*, WORLD INTELLECTUAL PROP. ORG., <https://www.wipo.int/tk/en/folklore/> [<https://perma.cc/3D3M-4HNM>].

27. Patricia Covarrubia, *Enredados – Detangling Definitions and Strengthening Views. A Lexicon of Relevant Terms Institutions and Legislations*, in TRANSBOUNDARY HERITAGE AND INTELLECTUAL PROPERTY LAW: SAFEGUARDING INTANGIBLE CULTURAL HERITAGE 6, 6–7 (Patricia Covarrubia ed., 2023) (discussing the inseparability of cultural heritage and intangibles and

In addition to ICH, I have previously used the term cultural IP to refer to “a narrow category of intangible cultural goods that could be protected under copyright or trademark law if temporal limitations or commercial use requirements were removed.”²⁸ I have used the term cultural IP to make it clear that there are many ways in which ICH is akin to existing forms of intellectual property.²⁹ Not only does the law have an expressive function, but the words we choose when attempting to create shifts in the law matter.³⁰ Not all ICH can be the subject of intellectual property style claims or a cultural personality right of the kind being asserted here. It is important to recognize, however, that much of what IP law protects for individuals and Western corporations is analogous to that which ICH protects for historically marginalized cultural groups.

This ICH and cultural IP often show up in fashion, music, art, and other cultural products.³¹ While claims to ICH are generally not property-based, the idea of claiming IP rights over certain aspects of intangible cultural heritage is something that already exists in

noting that Indigenous peoples do not accept this separation between tangible and intangible heritage).

28. J. Janewa Osei-Tutu, *Cultural IP vs. Commercial IP*, 12 LANDSLIDE 18 (2020).

29. The language used makes a statement and the approach to ICH has been that it belongs to everyone. Not only does the law have an expressive function, but also the words we choose when speaking about the law matter. Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (“I also argue that the expressive function of law makes most sense in connection with efforts to change norms and that if legal statements produce bad consequences, they should not be enacted even if they seem reasonable or noble.”).

30. *Id.* at 2031 (discussing how the law, using its moral influence to drive societal transformation, can either complement established social norms or intentionally challenge them).

31. See, e.g., Rob Picheta, *British Fashion Brand Timbuktu Accused of ‘Cultural Appropriation’ for Trademarking ‘Yoruba’*, CNN BUS. (May 25, 2021), <https://www.cnn.com/2021/05/24/business/timbuktu-yoruba-trademark-scli-gbr-intl/index.html> [<https://perma.cc/PHP2-ABTL>] (fashion); Janelle Griffith, *Kim Kardashian West Changes Name of Shapewear Line After Accusations of Cultural Appropriation*, NBC NEWS (Aug. 28, 2019), <https://www.nbcnews.com/news/asian-america/kim-kardashian-changes-name-shapewear-line-after-accusations-cultural-appropriation-n1047266> [<https://perma.cc/G3E5-STJ3>] (fashion); Mary Grace Antony, “*It’s Not Religious, But It’s Spiritual: Appropriation and the Universal Spirituality of Yoga*,” 37 J. COMMUN & RELIGION 63 (2014) (cultural practice and spiritual art); Marisa Shearer, *Mantras and Monetization: The Commodification of Yoga and Culture*, 21 VA. SPORTS & ENT. L.J. 38 (2022) (same).

international legal instruments.³² For example, Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) states, “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”³³ Importantly, Article 31 further provides that Indigenous peoples “have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions,” and requires states to work with indigenous peoples to recognize and protect their ability to exercise these rights.³⁴ The UNDRIP is not a legally binding instrument,³⁵ so it does not create a concrete legal obligation on states to protect indigenous cultural IP. However, the UNDRIP signals some commitment on the part of UN member states to recognize and protect indigenous cultural heritage.

Recognizing IP rights over ICH and cultural IP of the kind referenced in the UNDRIP is the focus here. More specifically, the proposed cultural personality right covers a narrow subset of ICH that has three core aspects. A cultural personality right would be a representation of ICH that: 1) is already protected under some national law, or 2) could have been protected under IP law but for the collective nature, temporal limitations, or lack of commercial use, (“quasi-IP”), and 3) is an identifiable representation of a particular cultural or ethnic group.³⁶

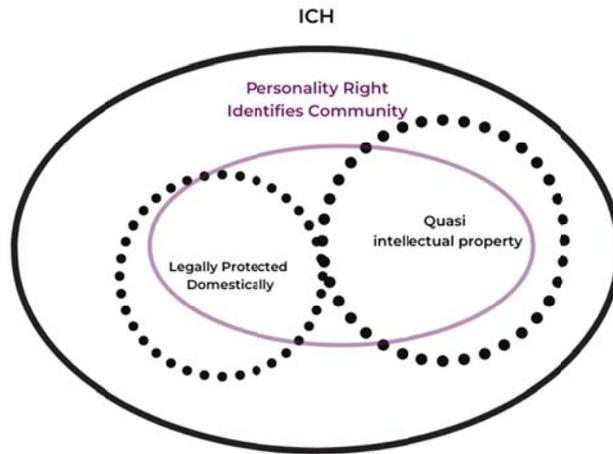
32. Martinet, *supra* note 14, at 114 (discussing the Swakopmund Protocol, which defines expressions of folklore as “any forms, whether tangible or intangible, in which traditional knowledge are expressed,” with Zambia and Kenya adopting similar definitions in their laws based on the protocol).

33. G.A. Res. 61/295, art. 31, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

34. *Id.*

35. U.N. Permanent Forum on Indigenous Issues, *Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples*, <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> [<https://perma.cc/W54Z-FCJT>] (“[UN] Declarations are generally not legally binding.”); *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. Dep’t of State (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/FDY7-M3L3>] (describing UNDRIP as “not legally binding or a statement of current international law” but possessing “moral and political force”).

36. Intangible cultural heritage is often wrongly seen as old rather than new and evolving. However, this is a mischaracterization of cultural heritage. It is not static. See Margo A. Bagley, *The Fallacy of Defensive Protection for Traditional Knowledge*, 58 WASHBURN L.J. 323, 328 (2019) (explaining that



This new right would be narrowly tailored to provide protection in specific instances. There must be an identifiable representation of a particular cultural group. This can be through the name of the group, such as Navajo or Cherokee, or through the use of clothing items, patterns, or other representations of the group identity through its cultural heritage. The important aspect for the purposes of the cultural identity right is that the group is identifiable through the use of its name or representations of its cultural heritage. This representation of the group could be through traditional cultural expressions such as clothing items, crafts, or songs.

This proposed cultural personality right offers a dignitary model for protecting collective cultural identities from commercial appropriation. It is important to note that only commercial uses of intangible cultural heritage will be covered by the cultural personality right. The private activities that individuals engage in will generally not fall within the scope of the right because they are a matter of personal expression rather than an appropriation for commercial purposes. Furthermore, since the focus here is on cultural heritage, the cultural personality right does not address all cultural appropriation issues or necessarily pertain to racial groups but rather to indigenous and cultural groups. Finally, though power dynamics are relevant, provided the criteria are met, a cultural personality right could as easily cover Scottish tartans as it could Navajo patterns and designs. In many instances, however, products from

traditional knowledge is not defined by its age, but is instead characterized by the community-based context of its creation).

industrialized countries will already be protected by classic IP rights and not need to rely on a cultural personality right.

A cultural personality right is a proposed expansion of IP protection but not on the basis of economic incentives, as was the case for expanding copyright protection to databases,³⁷ for example. IP rationales based on human rights, human dignity, and human flourishing provide a strong support for this expansion of the individual personality right.³⁸ This is not to say that there are no economic aspects to the proposed model. A dignity-based model can also support the human rights and human development of historically marginalized people, including their economic development. It allows indigenous and local communities to control the commercial use of their identities and how they are portrayed to the public, even if they choose not to commercialize those identities.³⁹ Furthermore, it prevents others from commercializing and benefiting from their cultural identities without permission or compensation. Such unauthorized uses may not only be unwelcome but, as discussed below, they can be harmful to the affected communities.

When speaking of unauthorized uses, it can cross into general discussions of cultural appropriation that go beyond the scope of the proposed cultural personality right. Since the term cultural appropriation is used in various ways, it is important to define what that term means so that it is clear how cultural appropriation relates to the types of claims that would be covered by a cultural personality right.

37. See TRIPS Agreement, *supra* note 15, at art. 10(2) (requiring copyright protection for compilations of data). *Sui generis* regimes exist in other areas, such as database protection in Europe. See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 (explaining the *sui generis* regime in database protection); see also Mark Schneider, *The European Union Database Directive*, 13 BERKELEY TECH. L.J. 551, 552–54 (1998) (further explaining the *sui generis* regime in database protection).

38. See generally Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 Corn. L. Rev. 991 (2019) Margaret Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982) Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287 (1988) Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 Ga. St. Univ. L. Rev. 709 (2007).

39. Janet Blake, *On Defining the Cultural Heritage*, 49 THE INT'L COMPAR. L. Q. 61, 77 (2000) [hereinafter *On Defining*] (“when cultural heritage is treated as an element within human rights . . . [that sense of identity] is, for most people, essential to their dignity and self-confidence, values that underlie in part of the concept of human rights itself.”)

B. What is Cultural Appropriation?

Cultural appropriation is a term that describes the use of cultural heritage or cultural products by someone who is not a member of the cultural group in question.⁴⁰ Academics have long discussed cultural appropriation of indigenous cultures in the form of art, songs, and other cultural works.⁴¹ Artists frequently borrow from one another to create new works, and this is considered a form of legitimate appropriation or taking something for your own use.⁴² In the artistic context, using building blocks or artistic elements from other works to create your own content is often considered a normal part of the artistic process rather than as something negative.⁴³ Cultural appropriation, however, is distinct from this artistic appropriation that is normally part of the creative process. Cultural appropriation arises when members of one cultural group use items for their own purposes that have been created by, or are part of, the cultural heritage of another group, often without acknowledgement of the source community.⁴⁴

Importantly, cultural appropriation is considered problematic because of the power imbalances that are frequently present in these situations.⁴⁵ Often, a dominant group is using the cultural names, creations, or other aspects of cultural identity of a historically marginalized or oppressed group. It is less common to see a

40. JAMES O. YOUNG, CULTURAL APPROPRIATION AND THE ARTS 5 (2008). While this general definition of cultural appropriation does not treat appropriation as necessarily problematic, Young distinguishes cultural appropriation which is acceptable from that which is not.

41. *See generally* SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW, (2005).

42. YOUNG, CULTURAL APPROPRIATION AND THE ARTS, *supra* note 41 at 4.

43. *Id.* (“By *artistic elements* I mean styles, plots, music themes, motifs, subject matters, genres and similar items. They are not themselves works of art.”).

44. Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 585–86 (1998).

45. *Id.* (“The concept of cultural appropriation has been developed in the field of intellectual property to refer to processes by which dominant groups take, and often profit from, the artistic, musical, and knowledge productions of subordinate groups.”); YOUNG, CULTURAL APPROPRIATION AND THE ARTS, *supra* note 40, at 59 (discussing how a moral asymmetry exists in cultural representation and the potential harm that occurs because a representation by an outsider of minority culture may be more harmful than when minority members represent dominant cultures).

marginalized group appropriating from a dominant group.⁴⁶ In addition to the power dynamic, this kind of appropriation can erode the identity of the non-dominant group by misrepresenting the group or diluting the strength of its cultural identity.⁴⁷ When a dominant group takes from the culture of a historically subjugated or marginalized group for its own use, including for profit, this is considered harmful cultural appropriation or cultural misappropriation.⁴⁸

Cultural exchange naturally takes place between all groups, so one might ask why the power imbalance is relevant and whether it warrants new rights.⁴⁹ The power imbalance matters for several reasons. First, it is important because the creative products and cultural heritage of dominant groups can be more readily protected by existing intellectual property laws that were developed from the perspective of those dominant cultures.⁵⁰ Furthermore, these power

46. Aman K. Gebru, *The Piracy Paradox and Indigenous Fashion*, 39 CARDOZO ARTS & ENT. L. J. 607, 621 (2021) (observing that the dynamic of cultural appropriation almost exclusively flows from dominant to non-dominant groups, and that the reverse—involving of a marginalized community appropriating from a dominant one—is comparatively rare and legally distinct).

47. For example, while many in the West treat yoga as a form of exercise, the practice of yoga originates in India and some practitioners express concern that the practice has been divorced from its cultural and religious roots. See Soren Askegaard & Giana M. Eckhardt, *Glocal Yoga: Re-appropriation in the Indian Consumptionscape*, 12 MKTG. THEORY 45, 50–57 (2012) (discussing six ways in which yoga has become re-appropriated); Mary Grace Antony, “It’s Not Religious, But It’s Spiritual.” *Appropriation and the Universal Spirituality of Yoga*, 37 J. COMM’N & RELIGION 63, 67–68 (2014) (finding that Western appropriation of yoga discursively severs it from its Hindu cultural and religious origins, misrepresenting the practice and diluting its significance for the source community); Marisa Shearer, *Mantras and Monetization: The Commodification of Yoga and Culture*, 21 VA. SPORTS & ENT. L. J. 38, 63 (2022) (identifying commodification’s social consequences, including erosion of yoga’s cultural identity through commercial misrepresentation that distances the practice from its holistic Indian heritage).

48. See Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2028 (2007) (describing how dominant white Americans appropriated Native American iconography to construct an authentic American identity and legitimize their own presence in the New World).

49. Engle Merry, *supra* note 44, at 585–86 (discussing how cultural appropriation mainly involves dominant groups taking from subordinate ones—though it can occur in reverse—how power relations are central, and how this concept problematically assumes bounded cultural systems).

50. See *infra* Part II.A (discussing the inadequacy of classic IP rights for intangible cultural heritage and the structural exclusion of indigenous communities from IP protection).

dynamics are affected by the history of colonialism and the subjugation of cultures of non-dominant groups.⁵¹ Cultural appropriation can contribute to negative stereotypes of historically subjugated groups and marginalized cultural identities. For the purposes of this Article, therefore, the term cultural appropriation refers to the harmful misappropriation of cultural heritage or products from historically marginalized or subjugated groups.

In common parlance, cultural appropriation claims may also refer to the use of derogatory racial terms such as “redskins” or branding that plays into racial stereotypes.⁵² For instance, the Washington Redskins football team, which has now been renamed the Washington Commanders, had variations of an indigenous man wearing a native headdress with feathers at the back as its logo.⁵³ It did not represent any specific indigenous group but rather was suggestive of Native American culture in general. Examples such as the Redskins, while often classified as cultural appropriation, are more accurately referred to as racist branding.⁵⁴ This is racist branding because the term “redskins” is a derogatory way to refer to American indigenous peoples.⁵⁵ Racist branding may evoke stereotypes but there is not always intangible cultural heritage present. There may be some overlap between racist branding and cultural appropriation, and while some observers may include racist

51. See *infra* Part IV for a discussion of the relevance of colonial history.

52. Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705, 1748–49 (T.T.A.B. 1999) (canceling “Redskins” trademark registrations as disparaging to Native Americans under § 2(a) of the Lanham Act), *rev’d on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003).

53. WASHINGTON REDSKINS, Registration No. 986668; see, e.g., Mezey, *supra* note 48, at 2034 (“Chief Illiniwek, the University of Illinois’s revered Indian mascot . . . was an immediate and huge success and would appear at halftime for the next eighty years.”).

54. Deborah R. Gerhardt, *The Last Breakfast with Aunt Jemima and Its Impact on Trademark Theory*, 45 COLUM. J.L. & Arts 231, 242 (2022) (discussing the racial stereotypes and implications of the Aunt Jemima brand); Mezey, *supra* note 48, at 2036 (“It is important to see that there is both imperialism and nostalgia in the Indian mascot, but it is more than that as well. It is the more profound reinvention of the American self through the internalization of the Indian, an internalization that is made possible only by the virtual elimination of “real” Indians from the cultural landscape.”).

55. Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080, 1082–83 (T.T.A.B. 2014) (finding “redskins” disparaging to a substantial composite of Native Americans at the time of registration, based in part on the term’s historical use as a racial epithet and scalping-bounty connotations), *aff’d*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *vacated*, 709 F. App’x 182 (4th Cir. 2018) (vacating in light of *Matal v. Tam*, 582 U.S. 218 (2017)).

branding within the broader cultural appropriation discussion, racist branding is not the subject of this Article. There must first be some intangible cultural heritage or indicia of a specific identifiable cultural group before the cultural personality right would apply.

The commercial misappropriation of cultural identities could be regulated not unlike the way we prevent the misuse of commercial identities, such as the Nike brand⁵⁶ or Taylor Swift's identity.⁵⁷ The idea of providing legal protection for intangible cultural heritage is not new. A number of countries have protected their intangible cultural heritage,⁵⁸ and the WIPO continues to negotiate an international instrument to protect indigenous intangible cultural heritage.⁵⁹ As the next section explains, there is a long history of attempting to protect the valuable cultural resources that come largely from indigenous communities and local communities in developing countries.

56. Nike, Inc. v. MSCHF Prod. Studio, Inc., 617 F. Supp. 3d 154 (E.D.N.Y. 2022) (preliminarily enjoining sale of "Satan Shoes" (customized Nike Air Max 97s) as likely to cause consumer confusion and dilute Nike's trademark); *see also* Nike, Inc. v. Drip Creationz, No. 5:21-cv-00148 (C.D. Cal. 2021); Nike, Inc. v. Ciambrone, No. 1:24-cv-05765 (S.D.N.Y. 2024).

57. Swift's management entity, TAS Rights Management LLC, has registered trademarks covering her name, fandom name ("Swifties"), and song lyric phrases, actively enforcing them against unauthorized commercial use. Christina Tabacco, *Taylor's Trademark Era*, LAW STREET MEDIA (Oct. 25, 2023), <https://lawstreetmedia.com/insights/taylor-swifts-trademark-era/> [<https://perma.cc/3TWG-YHZS>] (documenting Swift's extensive trademark portfolio and enforcement efforts); *see also* Hall v. Swift, No. 2:17-cv-06882 (C.D. Cal.) (copyright infringement claim alleging Swift lifted lyrics from plaintiffs' 2001 song for "Shake It Off," dismissed after parties' stipulation in 2022).

58. *See Traditional Knowledge, Traditional Cultural Expressions, & Genetic Resources Law*, WIPO, <https://www.wipo.int/en/web/traditional-knowledge/databases/tklaws/index?> [<https://perma.cc/6AP6-AEFE>] (search results listing laws, treaties, and regulations that protect intangible cultural heritage).

59. ASSEMBLIES OF THE MEMBER STATES OF WIPO, REPORT OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) DECISION, Agenda Item 15(v), at (a), (July 6–14, 2023), <https://www.wipo.int/export/sites/www/tk/en/igc/docs/igc-mandate-2024-2025.pdf> [<https://perma.cc/32ES-XDND>].

C. Examples of Unwelcome Commercial Uses of Cultural Identity & Intangible Cultural Heritage

Culture is complex and can be understood in different ways, including as the creation of artistic or scientific works.⁶⁰ For the purpose of this work, the focus is on culture as part of one's identity, and more specifically, the right to develop and maintain one's identity.⁶¹ This section starts by offering three examples of commercial use of collective cultural identities in the fashion industry. Each example involves what would be considered traditional cultural expressions or expressions of folklore.

The first example involves the use of a traditional Adinkra symbol from Ghana, West Africa, on a Vera Bradley bag and other fashion items that were offered for sale online.⁶² Adinkra symbols are a group of traditional symbols used by the Asante people of the Akan region, and each symbol has a meaning.⁶³ Adinkra symbols are protected under Ghana's copyright law as part of the cultural heritage of the Ghanaian people.⁶⁴ The symbol was used in what appeared to be a decorative manner, and the pattern was called

60. Marcella Ferri, *The Recognition of the Right to Cultural Identity Under (and Beyond) International Human Rights Law*, 22 J.L. SOC. JUST. & GLOB. DEV. 15, 19 (2018) (surveying international human rights instruments' treatment of the right to cultural identity and noting that culture is variously understood to encompass participation in artistic, scientific, and creative production).

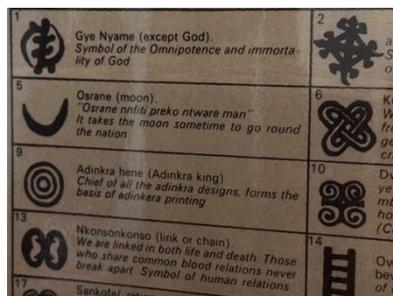
61. *Id.* (citing Stavenhagen on definitions of cultural rights, including Stavenhagen's description as a "coherent, self-contained system of values and symbols that a specific cultural group reproduces over time"); *id.* at 4 (citing Stavenhagen to conclude that "the right to culture must be defined as the right to maintain and develop one's own culture, or in other words, the 'right to cultural identity'"); Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L J. CULTURAL PROP. 40, 43 (2005) [hereinafter *Heritage Trouble*] ("[c]ultural identity itself may become . . . a scarce resource to be defended as another form of property"); see Yvonne Donders, *Human Rights and Cultural Diversity: Too Hot to Handle?*, 30 NETH. Q. HUM. RTS., 377, 378 (2012) (describing culture as "a concept with a dynamic and changeable character, being not only a product but also a process"); see generally Yvonne Donders, *A Right to Cultural Identity in UNESCO*, in CULTURAL HUM. RTS., 317–40 (Francesco Francioni & Martin Scheinin eds., 2008) (providing background on UNESCO's work in advancing a right to cultural identity).

62. J. Janewa Osei-Tutu, *Harmonizing Cultural IP Across Borders: Fashionable Bags & Ghanaian Adinkra Symbols*, 51 AKRON L. REV. 1197, 1198–99 (2017).

63. *Id.*

64. Copyright Act, 2005 § 76 (Act No. 690/2005) (Ghana); see also Martinet, *supra* note 14, at 105 ("The Malawi law on Copyright . . . mentioned the notion of folklore and . . . it uses the concept of 'expressions of folklore.'")

“Cuban tile.”⁶⁵ Ghana could not prevent the use of the symbol because it was used outside of Ghana and there is no international legal protection for intangible cultural heritage.⁶⁶ Classic copyright is ineffective because the symbols are intergenerational and communal. However, the Adinkra symbols fit within the scope of the proposed cultural personality right because they are cultural symbols that are protected cultural heritage related to Ghanaian culture.



A second example is the famous French luxury brand Louis Vuitton’s controversial “Masai Collection.”⁶⁷ The Maasai are an indigenous group based in Kenya and Tanzania.⁶⁸ The Maasai wear certain distinctive and identifiable traditional clothing and colors.⁶⁹ Louis Vuitton launched a “Masai” clothing line that used colors, designs, and styles based on the clothing traditionally worn by the Maasai.⁷⁰ It is clear that the Maasai cultural identity in the form of

65. Osei-Tutu, *supra* note 62, at 1198–99 (discussing the Akan people’s Adinkra symbols as protected cultural heritage under Ghanaian copyright law and the inability of Ghana to prevent their unauthorized reproduction on U.S. merchandise due to the absence of international protection for intangible cultural heritage).

66. *Id.* at 1200.

67. Lee, *supra* note 2.

68. For more information about the Maasai, see *The Maasai People*, MAASAI ASS’N, <http://www.maasai-association.org/maasai.html> [https://perma.cc/66PC-2E6W].

69. During my time in Tanzania, it was quite evident when someone was dressed in traditional Maasai clothing. The clothing is distinctive not only from Western clothing, but also from other traditional African outfits.

70. Tania Phipps Rufus, *Companies Accused of Exploiting Cultural Identity of the Maasai*, THE GUARDIAN (Aug. 8, 2013), <https://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai> (on file with the *Columbia Human Rights Law Review*).

their traditional clothing and name were used by Louis Vuitton.⁷¹ However, since they had not claimed and used their traditional cultural expressions as trademarks in the relevant jurisdiction, the Maasai were left with no remedy.⁷²

Distinct from the Ghanaian and Kenyan situations, the dispute between the Navajo Nation and Urban Outfitters in the United States provides an example of a cultural group that enjoyed partial success by relying on U.S. trademark law.⁷³ In *Navajo Nation v. Urban Outfitters*, the Navajo Nation was able to litigate because the Navajo had successfully registered several trademarks under the Navajo name.⁷⁴ Urban Outfitters, an American fashion brand, used the name Navajo and “Navaho” to market and sell a number of its products.⁷⁵ In addition, Urban Outfitters had used traditional Navajo patterns on certain products, including underwear and flasks for alcohol.⁷⁶ The Navajo Nation alleged trademark infringement and dilution, unfair competition, false advertising, and violations of the Indian Arts and Crafts Act.⁷⁷ Trademark infringement requires the plaintiff to show that there is a likelihood of confusion between their marks and those of the defendant in relation to similar goods or services.⁷⁸

Urban Outfitters defended its use of the Navajo name by making several arguments, including that Navajo was either generic for Indian-styled items, or, alternatively, that its use was descriptive fair use.⁷⁹ The court found that “Navajo” was not generic and that the evidence showed that the Navajo Nation had been known by that name since 1849 and had been marketing and selling clothing, jewelry, and other items under the Navajo name and marks since

71. *Id.*

72. 15 U.S.C. § 1127 (defining “use in commerce” as prerequisite to trademark rights); *cf.* *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147, 1150 (D.N.M. 2013) (Navajo Nation able to bring trademark claims only because it had registered and used its marks in commerce)

73. Lee, *supra* note 2.

74. *Navajo Nation*, 935 F. Supp. 2d at 1166.

75. *Id.* at 1153–54.

76. Nicky Woolf, *Urban Outfitters Settles with Navajo Nation After Illegally Using Tribe’s Name*, THE GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement> [https://perma.cc/9QGG-QYCK].

77. *Navajo Nation*, 935 F. Supp. 2d at 1155.

78. 15 U.S.C. § 1114.

79. *Id.* at 1161–62.

1941.⁸⁰ In its decision, the court acknowledged that the name Navajo was similar to a geographic descriptor, but concluded that it is also distinct because, while it has a geographic aspect, the term refers to the Navajo people.⁸¹ The court denied Urban Outfitters' motion to dismiss.⁸² Ultimately, the parties reached a settlement.⁸³

If they had not used their name in commerce, it would have been very difficult for the Navajo Nation to prevent Urban Outfitters from using its name to market its products. When protected cultural heritage is present, there is a strong justification for protection, even without commercial use as a trademark, particularly if one is inclined to respect international law and the laws of other countries.⁸⁴ The aim here is not to prevent all stereotypes or racist or derogatory depictions of a community or to prevent freedom of speech. Indeed, the U.S. Supreme Court already struck down the prohibition on registering offensive trademarks as unconstitutional viewpoint discrimination.⁸⁵ Rather, a collective cultural personality right would protect the commercial use of cultural identities, not unlike the way trademark law protects corporate brands, and the way the right of publicity protects individual identities.

D. What is the Harm?

Our ability to control how we present ourselves and the way we are presented to others is tied to our sense of dignity and autonomy as human beings. The law recognizes these interests, typically through privacy laws and through the right of publicity or

80. *Id.* at 1166 (explaining that “Navajo” is not generic because the Navajo Nation has alleged use of the name since 1849 and marketed clothing, jewelry, and household products under it since 1941 which established secondary meaning).

81. *Id.* at 1163 (“It is true that ‘Navajo’ has a geographic component, as well, linking members to a particular geographic region that encompasses the Navajo Nation. Unlike other purely geographic marks, however, ‘Navajo’ refers to the Navajo people and the Navajo tribe, and the tribe is the legal entity that has registered the ‘NAVAJO’ marks in question.”).

82. *Id.* at 1178.

83. Woolf, *supra* note 76.

84. *But see* Kal Raustiala & Christopher Jon Sprigman, *Cultural Appropriation and the Global Fashion Industry* (UCLA Sch. of L., Public Law & Legal Theory Research Paper No. 23-23, 2023), <https://ssrn.com/abstract=4576505> (arguing that appropriation is not necessarily disrespectful).

85. *See* *Matal v. Tam*, 582 U.S. 218 (2017) (holding that the disparagement clause of the Lanham Act prohibiting the registration of offensive trademarks is a violation of the Free Speech Clause of the First Amendment).

image rights.⁸⁶ But can we also exercise some degree of control over our collective cultural identities? Canadian anthropologist and law professor Rosemary Coombe explains the importance of intellectual property rights in shaping social and cultural constructions.⁸⁷ Intellectual property laws are also relevant to the shaping of our social identities.⁸⁸ When companies adopt trademarks featuring cultural names or symbols, for example, they are helping to shape the public perception of that cultural identity.

One might argue that the desire to protect cultural identity is primarily about protecting some groups from having their feelings hurt and that there should not be a remedy for hurt feelings or offensive conduct. But the harm to communities is about far more than hurt feelings. For example, one of the harms is the cultural subjugation of the group, while a related harm is the lack of control over representation or self-definition. Professor Trevor Reed explains:

When all Indigenous peoples have left is their culture—when political autonomy has been destroyed, rights to land and resources diminished or taken outright, the right to practice Indigenous religions all but extinguished—the last place where Indigenous peoples can be sovereign and experience the real nature of their culture is through modes of expression. Those modes embrace shared symbols, stories, songs, performed social norms, and ways of relating with one another.⁸⁹

When a collective identity is appropriated for use by a corporation the cultural group may experience another form of subjugation and subordination.⁹⁰ The ability to retain control over

86. Post & Rothman, *supra* note 1.

87. See generally ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 6 (1998) (“The rights bestowed by intellectual property regimes . . . play a constitutive role in the creation of contemporary cultures and in the social life of interpretative practice . . . the imagery of commerce is a rich source for expressive activity.”).

88. *Id.* at 29 (“Individual and collective identities are actively created by human beings through the social forms through they become conscious and sustain themselves as subjects in communities of similarity. It is now widely acknowledged that the laws interact with other forms of discourse and sources of cultural meaning to construct and to contest identities, communities, and authorities.”).

89. Trevor Reed, *Fair Use as Cultural Appropriation*, 109 CAL. L. REV. 1373, 1390 (2021).

90. See, e.g., Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 868 (2016);

one's identity as reflected by one's cultural heritage is a matter of national sovereignty and self-determination.⁹¹ In many ways, protecting cultural group identity is about recognizing and respecting cultural boundaries or national sovereignty.⁹²

Related to cultural subjugation is the lack of control over representation. As Professor Madhavi Sunder, writes, "at the heart of recognition claims lies a desire to control how cultural groups are represented to the world."⁹³ Cultural domination played an important role in colonial history, with indigenous and other cultural groups having their cultures and identities subjugated and suppressed as inferior.⁹⁴ Indeed, the importance of representation in public spaces, the freedom to speak one's language of origin⁹⁵ and the freedom to carry out and preserve rituals and traditions are integral to one's liberation and ability to flourish. Among the most effective tools of colonial domination was the imposition of the colonizer's culture as inherently superior, a strategy designed to delegitimize indigenous cultural identities and justify their subjugation.⁹⁶

Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002).

91. Siegfried Wiessner, *Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 127 (2011); Riley & Carpenter, *Owning Red*, *supra* note 90, at 868.

92. Cynthia Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J.L. REFORM 433, 441 (2006) (arguing that national sovereignty provides the appropriate framework for understanding indigenous communities' objections to unauthorized appropriation of their cultural and genetic resources, as such appropriation implicates the community's right to control resources and knowledge within its own boundaries).

93. Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION 164, 167 (Martha M Ertman and Joan C. Willis eds., 2005).

94. Judy M. Iseke-Barnes, *Politics and Power of Languages: Indigenous Resistance to Colonizing Experiences of Language Dominance*, 39 J. THOUGHT 45, 51–52 (2004) ("In my grandmother's schooling, not only the language was suppressed. The children were also taught and learned that not only their language was 'inferior' but all things Cree were inferior—the traditions, the habits, the worldview, the people.").

95. *Id.*

96. Aziz Rahman, Mary Anne Clarke & Sean Byrne, *The Art of Breaking People Down: The British Colonial Model in Ireland and Canada*, 49 PEACE RSCH. 15, 22 (2017) (discussing how before the late 20th century, previously British colonized Western democracies like the United States, Canada, Australia, and New Zealand systematically suppressed Indigenous cultures through land seizure, cultural restrictions, and undermining self-governance to force assimilation and eliminate cultural distinctiveness); *see also* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Pmbl., art. 8.1

Writing about race and diversity in the United States, Professor Nancy Leong describes the efforts by individuals or institutions from white majority cultures to be affiliated with minority cultures for some social or economic benefit as “racial capitalism.”⁹⁷ Leong argues that “nonwhiteness” has been used as a justification to commodify non-white persons in the United States.⁹⁸ Although this Article is not about race or the performative diversity that Leong critiques, questions of cultural appropriation intersect with race and racist branding. As such, some of the harms of racial capitalism, such as the broader societal effect of inequality, are pertinent to this discussion of protecting cultural identities from unauthorized commercial appropriation.⁹⁹

Commercializing cultural identities of indigenous and post-colonial peoples has been controversial because the current IP laws allow powerful and well-resourced individuals and entities to define and commodify historically subjugated identities.¹⁰⁰ This is harmful because it is not only about who controls and benefits from commercially valuable identities, but also about the ability of the affected group to exclude others from creating and defining the construction of that identity.¹⁰¹ The ability of a historically

(Sept. 13, 2007) (“Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”).

97. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013) [hereinafter *Racial Capitalism*]. In a related article, Leong expands the racial capitalism argument to discuss how different identities related to gender, race, and sexual orientation may be exploited by majority groups. See Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333, 1337 (2016) [hereinafter *Identity Entrepreneurs*] (describing how in-groups derive social and economic value from out-group identities); see also Minh-ha T Pham, *How to Fix the Fashion Industry’s Racism*, THE NEW REPUBLIC (Apr. 18, 2019) (describing that companies may see themselves as benefitting from placing a small number of people of color in visible positions), <https://newrepublic.com/article/153596/fix-fashion-industrys-racism> [<https://perma.cc/DF2R-25HJ>].

98. Leong, *Racial Capitalism*, *supra* note 97, at 2151, 2155.

99. *Id.* at 2217 (explaining how racial capitalism impedes progress toward racial equality in light of history of slavery and oppression of Native Americans in the United States).

100. See *supra* Part I.C (discussing examples of commercial appropriation of Maasai, Navajo, and Ghanaian cultural identities by well-resourced corporations without authorization or compensation); see *infra* Part II.A (analyzing the structural features of trademark and copyright law that systematically advantage sophisticated commercial actors over indigenous cultural communities).

101. Leong, *Racial Capitalism*, *supra* note 97, at 2159 (discussing “whiteness” as property).

marginalized or oppressed cultural group to control their identity—and the way that identity is presented to the world—is connected to the dignity and personhood of the group.¹⁰² Dominant cultural groups, by comparison, are generally represented positively in the media, in advertising, and in commercial settings.¹⁰³ Historically marginalized groups should have the same ability that modern corporations and celebrities enjoy so that they have the power to decide how, and if, they want to commercialize their identities.

This potential commodification of cultural identities may itself be seen by some as harmful. Michael Sandel, a professor of political philosophy at Harvard University, identifies two main objections to commodification in general.¹⁰⁴ The first is a concern about coercion since market exchanges are not necessarily voluntary or egalitarian.¹⁰⁵ Someone who is poor, desperate, or less powerful may have limited choices and may even be willing to sell their organs so that they can have money to buy food.¹⁰⁶ This is not a fair exchange but rather one where the seller has been effectively coerced into an exchange that they otherwise would not make. The second problem Sandel identifies is that of corruption based on the moral conception that certain goods are degraded or diminished if they can be bought and sold.¹⁰⁷

These concerns about commodification, while perhaps valid in some respects, are not equally applicable here. First, the commercialization of cultural identities is already occurring, and existing IP laws make it possible for sophisticated and powerful actors to commodify the cultural identities and intangible cultural heritage of indigenous groups without their involvement or permission.¹⁰⁸ A well-resourced cultural group that is interested in

102. Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in RETHINKING COMMODIFICATION, 178, 178 (Martha M. Ertman and Joan C. Williams eds., 2005) (“A people expresses its personhood collectively through its culture.”).

103. Riley & Carpenter, *supra* note 90, at 868–70.

104. See generally Michael J. Sandel, *What Money Can't Buy: The Limits of Markets*, in RETHINKING COMMODIFICATION 122, 124 (Martha M. Ertman & Joan C. Williams eds., 2005) (arguing that commodification raises concerns of both coercion and corruption of goods that lose value when subjected to market exchange).

105. *Id.*

106. *Id.* at 122.

107. *Id.* at 122–23.

108. Riley & Carpenter, *supra* note 90, at 868 (arguing that current U.S. IP law not only fails to protect indigenous cultural property but actively enables its

branding and commercializing its identity could use current trademark laws to do so.¹⁰⁹

Second, the commercial misappropriation of cultural identities could be regulated much in the same way that commercial identities, such as the identities of Nike or Coke, are protected from commercial misuse.¹¹⁰ A cultural personality right would simply level the playing field by empowering affected communities, especially those who do not have their own lawyers on speed dial, to control and prevent the commercialization of their collective identities.

Finally, the proposed cultural personality right aims to protect the dignity of identifiable cultural groups and their intangible cultural heritage. Human trafficking, for example, fails to recognize the basic humanity of the person. However, the proposed cultural personality right promotes human dignity and is justified by drawing on several human rights, including the human right to culture, the right to development, and the right to self-determination.¹¹¹

commercial exploitation by outside actors); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 259–61 (2006) (demonstrating that IP law systematically advantages sophisticated commercial actors who can mobilize legal regimes unavailable to traditional cultural communities); Osei-Tutu, *supra* note 62, at 1228 (observing the “dilemma” created when existing U.S. IP law permits commercial actors to exploit Adinkra symbols despite Ghanaian law’s protections, because no international framework bridges the gap).

109. See, e.g., *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013) (Navajo Nation successfully invoked the Indian Arts and Crafts Act and Lanham Act to challenge unauthorized commercial use of the “Navajo” name, illustrating how a resourced group can leverage existing trademark frameworks).

110. Existing IP law already robustly protects the commercial identities of corporate actors from unauthorized use, but no equivalent framework shields the cultural identities of indigenous peoples from commercial exploitation. See, e.g., *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1252 (9th Cir. 1982) (holding that serving Pepsi in response to orders for “Coca-Cola” without disclosure constituted trademark infringement and unfair competition under the Lanham Act); *Coca-Cola Co. v. Koke Co. of America*, 254 U.S. 143, 146 (1920) (Holmes, J.) (enjoining sale of imitation beverages, characterizing “Coca-Cola” as “a single thing coming from a single source and well known to the community”).

111. See International Covenant on Economic, Social and Cultural Rights art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3 (right to culture); G.A. Res. 41/128, Declaration on the Right to Development, art. 1 (Dec. 4, 1986) (right to development); International Covenant on Civil and Political Rights art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 171 (right to self-determination); G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples arts. 3, 31 (Sept. 13, 2007) (consolidating all three rights as applied to indigenous peoples).

The next section will elaborate on the challenges of protecting cultural identity.

II. THE CHALLENGE OF PROTECTING CULTURAL IDENTITIES

A. Classic Intellectual Property Rights are a Poor Fit

Trademark and copyright laws protect brands and artistic works,¹¹² which makes them particularly relevant for cultural identities. Trademark laws are an essential legal tool for protecting and developing corporate and individual brands, while the right of publicity can be used to protect individual brands and identities.¹¹³ Cultural identities and products have also been characterized as a type of cultural identity branding, which is why there is an overlap with IP.¹¹⁴ In many ways, the protections that are available to companies to protect their brands and geographical indicators are relevant to the cultural heritage that some communities may wish to commercialize and that others may wish to protect from commercialization.¹¹⁵

Yet, there are several challenges to address with respect to protecting intangible cultural heritage. Most scholars agree that claims of misappropriation of intangible cultural heritage are generally not cognizable under the existing law—at least not across

112. Lanham Act, 15 U.S.C. §§ 1051 et seq. (trademark); Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (copyright); see also J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (5th ed. 2024) (describing trademark law as protecting source-identifying marks used in commerce); WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 1:1 (2024) (describing copyright as protecting original works of authorship fixed in a tangible medium of expression).

113. See *infra* Part III further discussing these rights.

114. JOHN L. COMAROFF & JEAN COMAROFF, *ETHNICITY INC.* 18 (2009) (discussing the branding of cultures, and quoting Martin Chanock, “[t]o survive, concludes Chanock, ‘[c]ultures, like brands, must essentialise . . . successful and sustainable cultures are those which brand the best’”).

115. Ave Paulus & Aleksei Kelli, *Intangible Cultural Heritage and Intellectual Property Protection as Two Sides of the Same Human Rights Coin: Memoryscapes and Traditional Boatbuilding in Estonia*, 41 *NORDIC J. HUM. RTS.* 28, 43 (2023) (comparing the protection of geographical indications (GIs) with intangible cultural heritage, mainly looking at article 3(1) of the Geographical Indication Protection Act which states that geographic indications are “the name of or a reference to a geographical area which indicates the specific geographical origin of a good or service’ . . . [l]ike ICH legal protection,” there is not a term limit).

borders.¹¹⁶ Additionally, some express concern that these claims represent an attempt to protect knowledge and culture in a way that goes beyond current rationales for protecting IP rights.¹¹⁷

Copyright is not well suited to protecting traditional cultural expressions because of its focus on originality, individual creatorship and conceptions of ownership, the fixation requirement, and limited

116. Osei-Tutu, *supra* note 62, at 1203 (observing that without internationally enforceable minimum standards, Ghana cannot prevent unauthorized use of its protected cultural symbols outside its borders under existing IP law); see, e.g., Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOB. LEGAL STUD. 489, 491 (2008) (arguing that existing patent frameworks are structurally ill-equipped to accommodate the communal, intergenerational nature of traditional medicinal knowledge); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 32 (2001) (concluding that neither copyright nor trademark law adequately protects traditional indigenous knowledge because this knowledge does not have the individual authorship and commercial use that these frameworks require); Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 251, 265 (Dan Danielson & Karen Engle eds., 1995) (arguing that existing IP frameworks fail to recognize indigenous communities' claims to cultural property because those frameworks privilege Western individualistic conceptions of ownership over collective cultural identity); Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, MICH. STATE L. REV. 137, 141 (2005) (arguing that the TRIPS Agreement's minimum IP standards do not extend to traditional knowledge and proposing TRIPS-compatible modifications to address this gap); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 238 (2001) (observing that TRIPS provides no meaningful protection for traditional knowledge and that developing countries have long sought but failed to achieve international recognition of their intangible cultural heritage claims); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L. J. 37, 40 (2009) (questioning whether traditional IP frameworks can or should be extended to traditional knowledge, and concluding that existing doctrinal categories are a poor fit for the communal and historically continuous nature of indigenous cultural production).

117. JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 231 (2015) ("the premises on which IP rules have been developed are contradictory to the needs of much traditional culture and knowledge, and of the communities that have created and maintained it"); Miranda Forsyth, *How Can Traditional Knowledge Best Be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach*, 25 THE CONTEMP. PAC. 1, 20 (2013) ("[T]here is no underlying intellectual property right in traditional knowledge, the underlying law in the context of traditional knowledge would have to be customary law").

terms of protection.¹¹⁸ Originality in particular is challenging for indigenous communities seeking to protect non-contemporary forms of traditional cultural expressions or pre-existing folklore.¹¹⁹ Due to the collective and historical nature of cultural works, absent specific legislation, copyright would not clearly rest with an identifiable creator or group of creators.¹²⁰

Cultural groups could protect their names and symbols as trademarks or geographical indications if they use these elements of their cultural identity to sell goods or services.¹²¹ Geographical indications are indications of source where some quality, reputation, or characteristic is attributable to the geographic origin.¹²² Because of the connection between culture and geography, these indications have a strong relationship to cultural products.¹²³ Indeed, various scholars have made the connection between cultural heritage and geographical indications and have analyzed the possibility that geographical indications can be used to protect intangible cultural heritage.¹²⁴

118. Copyright Act of 1976, 17 U.S.C. § 302 (1998); WORLD INTELL. PROP. ORG. [WIPO], CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE, 36–42 (2003), available at https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf [<https://perma.cc/7XEN-M79H>].

119. WORLD INTELL. PROP. ORG. [WIPO], *supra* note 118, at 38; WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT GAP ANALYSIS 34 (2018) (discussing how copyright protection fails to address the needs of indigenous authors because of certain features, including the limited term, of copyright protection and the tension between the rights of a copyright holder and parallel customary responsibilities).

120. Osei-Tutu, *supra* note 62, at 1213–14.

121. Note that, under U.S. law, transporting goods across state lines can be considered “use” for trademark purposes. *See, e.g.*, Martinet, *supra* note 14, at 118–19 (explaining how the Indian Arts and Crafts Act reserves to Native Indian tribes the right to sell their products as “Native Indian,” however, it “does not protect the themes, patterns or Native Indian Styles” because it is a “truth-in-advertising law”).

122. TRIPS Agreement, *supra* note 15, at art. 22.

123. KALLIOPI DANI, COMMUNITY COLLECTIVE MARKS: STATUS, SCOPE AND RIVALS IN THE EUROPEAN SIGNS LANDSCAPE 32 (2014) (“GIs are closely connected to history and customs, as they are the outcome of traditions and/or lifestyle existing in a place thus being considered as part of the cultural heritage of the respective locality or even as a symbol of that place in some cases.”).

124. Dev S. Gangjee, *Geographical Indications and Cultural Heritage*, 4 WIPO J. 85, 90 (2012) (“This reconstitution of the link to place has paved the way for regional specialties to be rendered as symbols of regional or national heritage in policy debates . . . GIs have a ‘high heritage dimension’. Developing countries

Attempts to use certification marks and geographical indications may not be effective in preventing offensive uses of the cultural names and traditional heritage.¹²⁵

However, trademarks and geographical indications, which effectively protect corporate brands or identities, are based on unfair competition and authenticity rather than dignity.¹²⁶ Trademarks and geographical indications could protect the names that indicate the authenticity of some cultural goods in perpetuity—but only if the name is used in commerce as a source identifier.¹²⁷ In the United States, use in commerce is defined as “the use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.”¹²⁸ This requirement can be met if the mark is placed on goods and the goods are “sold or transported in commerce.”¹²⁹

One of the main challenges faced by intangible cultural heritage is that it may be used predominantly as cultural symbols rather than commercial symbols. First, for a variety of complex reasons, cultural groups may not want to use their cultural heritage as commercial symbols on goods and services.¹³⁰ Second, obtaining

are also interested in this potential.”); Madhavi Sunder, *The Invention of Traditional Knowledge*, L. & CONTEMP. PROBS. 97, 98–99 (2007) [hereinafter *Traditional Knowledge*] (“In a country such as India, which has a vast cultural heritage and a store of traditional knowledge dating back to the Vedas, the GI Act is seen as a potentially important source of recognition and income for India's rural poor—the very same poor who otherwise have been displaced and forced further into poverty by globalization.”) (footnotes omitted).

125. Susy Frankel, *The Overlap of Intellectual Property and Traditional Knowledge*, in OVERLAPPING INTELLECTUAL PROPERTY RIGHTS 553, 561 (Neil Wilkof, et al. eds., 2d ed. 2023) (“Trade mark registration will not necessarily prevent culturally offensive uses of traditional knowledge by others, as this is not its primary purpose. As discussed later in this chapter, some trade mark registration systems address aspects of this problematic overlap, but many do not.”).

126. GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY 1–39 (6th ed. 2022).

127. 15 U.S.C. §§ 1051, 1125. For the internationally accepted standard, see TRIPS Agreement, *supra* note 15, at arts. 15–16, 22–23.

128. 15 U.S.C. § 1127.

129. *Id.*

130. See Law & Intellectual Property, *The Intersection of Trademark Law and Cultural Heritage* (2024), available at <https://www.hfgip.com/news/intersection-trademark-law-and-cultural-heritage> (noting that “the widespread commercial use of culturally significant symbols can dilute their original meaning and value”); Kennedy Wilson, *Unprotected Heritage: The Inadequate Safeguarding of Traditional Knowledge and Cultural Expressions under Intellectual Property Law and the TRIPS Agreement*, 3 INTL. L. REV. ASS'N:

and enforcing trademark rights in various jurisdictions is expensive and requires the brand owner to sell goods and services in various relevant markets to maintain their trademarks.¹³¹ This is financially challenging for cultural groups, especially if they do not have the resources of a large corporation. Third, the current economic innovation-focused model, which is the dominant model, is not well suited to protecting valuable cultural identities that are not primarily aimed at innovation and revenue generation.¹³²

To protect their identity, for example, the Maasai could have employed a few strategies, including becoming a legal corporation, regularly using their name, traditional colors, and patterns as source indicators for any goods and services, and registering trademarks in Kenya and Tanzania where they are located.¹³³ Yet, none of this would have prevented the use of their name and identity by Louis Vuitton if they did not also register and use their marks in the jurisdictions where Louis Vuitton was showing and selling its “Masai” line.¹³⁴

ONLINE FORUM 1, 6 (2024) (describing that commercial use of cultural symbols “poses a direct threat to the sanctity and sacredness of indigenous communities and their heritage which further underscores the need for legal adaptations that genuinely respect and preserve the cultural and communal nature of indigenous innovations”).

131. See generally Vina L. Nguyen, *The Cost of Maintaining the Rights of a Trademark*, 45 AM. J. TRIAL ADVOCACY 189 (2021) (describing the legal and litigation costs of establishing and litigating trademark rights); Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOU. L. REV. 887, 908–09 (2005) (discussing the “use” requirement for trademarks, noting that “courts continue to engage in micro-analysis of local markets to determine the reach of the goodwill embodied by a mark”).

132. See Jessica Myers Moran, *Legal Means for Protecting the Intangible Cultural Heritage of Indigenous People in a Post-Colonial World*, 12 HOLY CROSS J.L. & PUB. POLY 71, 80 (2008) (“Trademark law’s focus is on commercialization for individual profit, whereas the indigenous people value the knowledge as part of their cultural identity. Ideally for them, the heritage never enters the marketplace.”); Siegfried Wiessner, *Defending Indigenous Peoples’ Heritage: An Introduction*, 14 ST. THOMAS L. REV. 271, 272 (2001) (“The indigenous view of the world, generally speaking, is the antithesis to the Western paradigm: communitarian, not individual, focused on sharing rather than shielding things, respect for land and all living things as sacred rather than as objects ripe for exploitation and consumption.”).

133. See Moran, *supra* note 132 (describing that some native peoples have successfully evoked trademark law to protect their rights).

134. GRAEME B. DINWOODIE & MARK D. JANIS, *TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY* 9 (6th ed. 2022) (“It remains a cardinal premise of

To assist this indigenous group, many of whom live in poverty, a non-governmental organization (NGO) called Light Years IP launched a Maasai Intellectual Property Initiative.¹³⁵ The goal was to help the Maasai regain control over the Maasai cultural brand and to generate income from the brand in way that was acceptable to the Maasai people.¹³⁶ The founder of Lightyears IP observed that Taylor Swift would be able to insist on a fee for the use of her image, stating “a human being can stop others from using their image. With the Maasai, this is an asset that belongs to 2 million people.”¹³⁷ The challenge the Maasai faced was the absence of a legal regime that would enable them to control the use of their name and cultural heritage without using their name and cultural heritage as trademarks.¹³⁸ Private actors can be of assistance, but without any legally enforceable rights, there are limits to what an NGO can accomplish.

The right of publicity, which is the model adopted here, does not protect collective rights and is not federally regulated in the United States, or internationally.¹³⁹ However, with the advent of

international trademark law, however, that, despite the internationalization of commerce, trademark rights remain territorial in nature.”)

135. Meg Brindle & Natalia Florman, *The Maasai Intellectual Property Initiative: A 20TH-Century Model for Turning Assets Into Income*, 2 J. FAIR TRADE 5, 5, 8 (2021) (describing that a feasibility study, funded by Comic Relief, was conducted to determine whether the Maasai could gain control over their intellectual property, finding that “it was and is” possible); David Pilling, *Warrior Tribe Enlists Lawyers in Battle for Maasai ‘brand’*, FIN. TIMES, (Jan. 19, 2018), <https://www.ft.com/content/999ad344-fcff-11e7-9b32-d7d59aace167> (on file with the *Columbia Human Rights Law Review*). This organization no longer appears to be in existence. See also “Maasai Intellectual Property Initiative,” at <https://maasaiintellectualpropertyinitiative.org/faqs>.

136. Brindle & Florman, *supra* note 135, at 8–10; Pilling, *supra* note 135.

137. Pilling, *supra* note 135.

138. See Brindle & Florman, *supra* note 135 (proposing that an “atypical Fair Trade model” involving a licensing agreement would be most acceptable for the Maasai people, as opposed to traditional trademark rights, since this arrangement would “respect and honour the companies using the cultural brand whilst creating a modest revenue for the people who served to create that value”).

139. Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1359–62 (2006) (describing that the right of publicity was historically understood as a de facto property right and is thus regulated by the states, even though other theoretical foundations for the right—such as expanding federal unfair competition law—were available); Lisa P. Lukose & Shilpika Pandey, *Protection of Celebrity Rights: A Comparative Analysis of Relevant IPR Laws in US, UK, and India* 14 J. INTELL. PROP. 88, 97 (2019) (describing that there is a “lack of international laws for protection of publicity or personality rights of celebrat[ies]”); Bzhar Abdullah Ahmed, *Critical Analysis of*

artificial intelligence and “deepfakes” online, there is growing interest in developing a more robust and coherent federal right of publicity in the United States.¹⁴⁰ This may lead to this right becoming more widely accepted and consistent across jurisdictions in the future.

Rather than expand IP rights, some have argued for other approaches. For instance, some countries have previously suggested using contract law and informal methods to address the appropriation of traditional knowledge and traditional cultural expressions rather than creating international legal protection.¹⁴¹ However, this approach would be ineffective for a few reasons. First, the local norms would have to be recognized by the outsider.¹⁴² Second, these norms would need to be respected by the outsider, which they often are not.¹⁴³ Finally, for these contracts to have any value, these norms would need to be enforceable outside the source country.

Modern international IP agreements, for instance, provide for border enforcement of copyrighted and trademarked goods, partially due to the challenges involved in enforcing IP rights once infringing goods enter the market.¹⁴⁴ There is an even greater need for states to

the Right of Publicity: A Comparative Study, 34 REVISTA ELECTRÓNICA DE DIREITO 10, 36 (2024) (describing that the right to publicity is not explicitly included in the European Convention on Human Rights, but arguing that the right should be recognized as implicit in the treaty's right to privacy).

140. NO FAKES Act of 2024, S. 4875, 118th Cong. (2024) (a bill “[t]o protect intellectual property rights in the voice and visual likeness of individuals, and for other purposes.”).

141. Comments of the United States, Traditional Cultural Expressions/Expressions of Folklore and Traditional Knowledge 6 (2007) (suggesting unfair competition law as an alternative), https://www.wipo.int/export/sites/www/tk/en/igc/docs/usa_tk-tce.pdf [<https://perma.cc/2CAE-YZHR>].

142. See generally Dalindyabo Shabalala, *Do We Need Exit Rules for Traditional Knowledge? Lessons from the Solomon Linda, and the ‘Mbube’/The Lion Sleeps Tonight” Case*, 12 QUEEN MARY J. INTELL. PROP. 532 (2023) (explaining that national and regional legislation to protect traditional knowledge and traditional culture that is directed at actions by “outsiders” may be too weak because outsiders they are “not subject to the authority, jurisdiction or political power of the community from which the TK or TCE was misappropriated”).

143. Brown, *supra* note 61, at 44 (“Respect is notoriously difficult to guarantee by legislative means, even if minority communities can be afforded legal safeguards to protection from overt discrimination.”).

144. Jessica C. Lai, *Border Enforcement of Intellectual Property Rights: A Look at New Zealand*, 50 INT. REV. INTELL. PROP. & COMP. L. 792, 793 (2019) (investigating New Zealand Customs Service’s role of detaining goods and items

take a role in assisting some of these communities, which generally have far less resources to enforce IP rights as compared to a nation-state or a major corporation. Yet, there is no protection for intangible cultural heritage in jurisdictions outside of the national location where the cultural heritage originates. Thus, a cultural personality right requires international recognition and protection in addition to the local laws and regulations that identify and protect the relevant cultural heritage.

There is no strong justification for requiring a cultural collective to commercialize its identity to protect it, while corporations enjoy perpetual identity protection through trademark law.¹⁴⁵ Collective cultural identities are meaningful and worthy of protection even if they have not already been used for commercial purposes. The need to first commercialize before one can protect a collective identity recognizes the commercial and transactional value of trademarks for commercial identities while excluding other conceptions of collective identity, such as one grounded in dignity. Yet, human dignity and IP protection are not at odds. Various scholars have made the connection between IP and international human rights, with some even arguing that IP protection can, in some cases, be considered a human right.¹⁴⁶ Culturally identifiable groups should not be required to use their identities as commercial source identifiers—as trademarks—before they can prevent the

that appear to violate intellectual property laws); *see also* TRIPS Agreement, *supra* note 15, at art. 41 (requiring border enforcement to prevent the importation of “counterfeit trademark or pirated copyright goods”).

145. Trademarks can be renewed perpetually. *See* 15 U.S.C. § 1059. Geographical indications have no time limit. *See* TRIPS Agreement, *supra* note 15, at arts. 22–24.

146. *See* Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, in PANEL DISCUSSION ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS 2 (1998) (explaining the differences between a human rights approach to intellectual property and intellectual property law); *see also* Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 48–49 (2003) (describing a school of thought that argues that human rights law and intellectual property law are “essentially compatible”); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1043 (2007) (discussing “the various attributes of intellectual property rights that are protected by international human rights instruments and distinguishes these human rights attributes from others that have no human rights basis at all”); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 977 (2007) (discussing the “need to develop a comprehensive and coherent ‘human rights framework’ for intellectual property law and policy”).

commercial misappropriation of their intangible cultural heritage or choose how, when, and if their identity should be used as a commercial product. They should not be compelled to play this “IP priority” game.

This Article does not purport to substantiate a broad claim to a general “Indigenous” identity or “African” identity, as such. Nor does it propose regulation of individual uses of cultural items to regulate personal choices of clothing, food, or hairstyle. The question here is whether specific, identifiable cultural groups, such as the Maasai or the Navajo, should be able to prevent their collective identity from being appropriated and used for commercial purposes—typically by large corporations—without permission and/or compensation and without having to use their identities as trademarks. The next section will outline the international efforts that have been made to protect IP and intangible cultural heritage.

B. International Efforts and Sui Generis Protections

Intellectual property scholars have been critical of the expansion of IP rights, the increasingly longer terms of protection, the excessive focus on capturing all the benefit for the IP owners, and the negative effects on the public domain and creative output.¹⁴⁷ That is what makes the different treatment for intangible cultural heritage more glaring.¹⁴⁸ Intellectual property rights have continued to expand—in terms of length and subject matter—over the past several decades.¹⁴⁹ As this part explains, the international

147. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 38 (2003); see also LAWRENCE LESSIG, *FREE CULTURE HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 181–82 (2004) (in context of discussion of music piracy, arguing that complete intolerance of piracy will quash commercial and cultural innovation).

148. See Sunder, *supra* note 93, at 169 (“Outright rejection of indigenous claims for property in their knowledge effectively suppresses their challenge to current social relations and turns a blind eye to new assertions by individuals to exercise authorship over their lives.”).

149. See *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980) (allowing patent for a human-made, genetically engineered bacterium); see also *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 145–46 (2001) (plants and plant seeds can be protected under a utility patent); Patent Act, 35 U.S.C. § 154 (2013) (amending the Patent Act); Copyright Act of 1976, 17 U.S.C. § 302 (1998) (increasing copyright protection for works copyrighted before January 1, 1978 to 95 years); TRIPS Agreement, *supra* note 15, art. 10 (“Computer programs, whether in source or object code, shall be protected as literary works under the

agreements provided concrete legal protection for IP rights, but little to no protection for intangible cultural heritage.

The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which came into force in 1995, established harmonized minimum standards for IP protection.¹⁵⁰ These minimum IP standards were put into place, even while critics observed that the standards were not well suited for developing countries.¹⁵¹ Since then, there have been other regional agreements aimed at improving protection for copyright, trademarks, and patents in cross-border transactions.¹⁵²

In stark contrast to the progress in protecting and expanding classic IP rights under international law, there has been little progress in relation to intangible cultural heritage.¹⁵³ Developing countries have been seeking protection for their intangible cultural

Berne Convention (1971) . . . [C]ompilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.”)

150. TRIPS Agreement, *supra* note 15.

151. Ruth L. Gana, *The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*, 18 L. & POL’Y 315, 317 (1996) (discussing how developing nations faced consistent pressure from WIPO and industrialized countries—especially the U.S.—to adopt developed-world intellectual property laws and join international IP agreements despite potential negative effects on development and disregarding the principle of self-determination).

152. Cynthia Ho, *Current Controversies Concerning Patent Rights and Public Health in a World of International Norms* in PATENT LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH, 673, 698 (Toshiko Takenaka, ed., 2008); *see also* Anti-Counterfeiting Trade Agreement, opened for signature May 1, 2011, available at Office of the United States Trade Representative (international agreement that never entered into force seeking to enforce intellectual property protections against counterfeiting and piracy); United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302 (2004) (implementing free trade agreement, including chapter 15 on intellectual property protection and enforcement); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77 (2003) (implementing free trade agreement, including chapter 17 on intellectual property rights); United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283 (2006) (implementing free trade agreement, including chapter 15 on intellectual property rights).

153. *See generally* Olufunmilayo Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights*, Nw. Pub. L. Rsch. Paper No. 07-13, 55 (2007) (on file with the *Columbia Human Rights Law Review*) (discussing the challenges of an IP maximalist framework rooted in a property rights paradigm for protecting intangible cultural products).

heritage long before the TRIPS Agreement came into force.¹⁵⁴ Countries attempted to protect intangible cultural heritage through the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and World Intellectual Property Organization (“WIPO”) in the 1970s and 1980s.¹⁵⁵

The work of creating a legal mechanism to protect intangible cultural heritage eventually moved to WIPO with the creation of an Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.¹⁵⁶ Recently, there has been some movement on the recognition of traditional knowledge in international IP. In 2024, WIPO concluded a treaty requiring disclosure of traditional knowledge related to genetic resources in patent applications.¹⁵⁷ While it represents movement towards acknowledging traditional knowledge, this international agreement

154. TRIPS Agreement, *supra* note 15.

155. Daniel Wüger, *Prevention of Misappropriation of Intangible Cultural Heritage through Intellectual Property Laws*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 183–84 (J. Michael Finger & Philip Schuler eds., 2004) (discussing the 1976 Tunis Model Law on Copyright for Developing Countries, the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, and the 1989 UNESCO Recommendation on the Safeguarding of Folklore).

156. *Id.* at 184; Martinet, *supra* note 14, at 100 (“The mandate of [the Intergovernmental Committee on Intellectual Property] is to reach ‘an agreement on an international legal instrument(s) . . . which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions.’”).

157. Press Release, WIPO, WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, PR/2024/919 (May 24, 2024), https://www.wipo.int/pressroom/en/articles/2024/article_0007.html [<https://perma.cc/FR7U-2RCG>]; Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources; WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, art. 3.2, May 24, 2024, GRATK/DC/7, WIPO.int (“Where the claimed invention in a patent application is based on traditional knowledge associated with genetic resources, each Contracting Party shall require applicants to disclose: (a) the Indigenous Peoples or local community, as applicable, who provided the traditional knowledge associated with genetic resources, or, (b) in cases where the information in Article 3.2(a) is not known to the applicant, or where Article 3.2(a) does not apply, the source of the traditional knowledge associated with genetic resources.”).

does not create any positive obligations to protect intangible cultural heritage.¹⁵⁸

Another important source of international law is the 2003 Convention for the Safeguarding Intangible Cultural Heritage (“ICH Convention”). It aims to safeguard, raise awareness of, and ensure respect for intangible cultural heritage.¹⁵⁹ As previously discussed, intangible cultural heritage is intergenerational and includes cultural expressions that are consistent with international human rights law, and provides communities, groups, and individuals “with a sense of identity and continuity.”¹⁶⁰ The non-exhaustive list of examples include oral traditions, performing arts, social traditions, and traditional craftsmanship and traditional knowledge.¹⁶¹

Unfortunately, the ICH Convention does not create legal mechanisms for protecting and enforcing rights in intangible cultural heritage.¹⁶² It creates limited obligations and clearly states that it should not be interpreted as interfering with international protections for IP rights.¹⁶³ While the ICH Convention is valuable insofar as it recognizes intangible cultural heritage, it is relatively weak from a legal perspective, and classic IP rights are clearly prioritized.¹⁶⁴ Article 3(b) of the ICH Convention, for example, states that nothing in the Convention should be interpreted as affecting the

158. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, May 24, 2024, WIPO Doc. GRATK/DC/7, available at https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf. (on file with the *Columbia Human Rights Law Review*).

159. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 42671, <https://www.unesco.org/en/legal-affairs/convention-safeguarding-intangible-cultural-heritage#item-2> [<https://perma.cc/42TG-BV6R>] [hereinafter ICH Convention]. As of 2025, 185 states had ratified the Convention for the Safeguarding of Intangible Cultural Heritage. *Id.* Article 1 of the ICH Convention states: “The purposes of this Convention are: (a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.” *Id.*

160. *Id.* at art. 2.1.

161. *Id.* at art. 2.2.

162. Gangjee, *supra* note 124, at 93 (discussing how the Convention emerged as a counterpoint to the Western notion of the “shared heritage of humanity”); Martinet, *supra* note 14, at 98 (explaining that the ICH Convention excludes IP from its implementation scope); ICH Convention, *supra* note 153.

163. ICH Convention, *supra* note 23, at art. 3(b).

164. *Id.*

rights or obligations of states under international agreements relating to intellectual property.¹⁶⁵ Countries are not obligated to create any legal protections to prevent the misuse of intangible cultural heritage.

In the United States, limited protection for indigenous cultural heritage is available. Under the *Indian Arts and Crafts Act*, one cannot sell or offer to sell arts and crafts as “Indian” if they are not made and sold by federally registered Indian persons.¹⁶⁶ Thus, even under U.S. law, there is some limited protection for the cultural works of indigenous peoples.¹⁶⁷ This legislation, which is a form of “truth in advertising” law, protects the authenticity of the work, not unlike geographical indications.¹⁶⁸ Although the *Indian Arts and Crafts Act* has a limited scope and was justified in economic terms, it can also protect the dignity and identity of the affected groups.¹⁶⁹ Federally-recognized Indian tribes can also register their tribal insignia with the United States Patent and Trademark Office. However, the United States Tribal Insignia database does not create any legal rights with respect to the protection of the indigenous insignia.¹⁷⁰

Having outlined the limited protections available for intangible cultural heritage, the next section will explain how

165. *Id.*

166. Indian Arts and Crafts Act Of 1990, 104 Stat. 4662, 101 P.L. 644 (1990) (25 U.S.C. § 305(e)(b) states that the Attorney General, acting on behalf of an Indian tribe or and Indian arts and crafts organization may “bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization); *see also* Dalindybo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1150 (2017).

167. Mezey, *supra* note 48, at 2014 (“The Indian Arts and Crafts Act [allows] both criminal and civil actions against anyone who sells a good ‘in a manner that falsely suggests it is . . . an Indian product,’ [which] effectively helps Indians and tribes brand themselves and protect the value of their brands.”).

168. Indian Arts and Crafts Act Of 1990, *supra* note 166.

169. *Id.*; An Act to protect Indian arts and crafts through the improvement of applicable criminal proceedings, and for other purposes, H.R. 725, 111th Cong. (2010), <https://www.doi.gov/sites/doi.gov/files/uploads/PLAW-111publ211.pdf> [<https://perma.cc/8ATM-MCVF>].

170. *Native American Tribal Insignia*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia> [<https://perma.cc/4A4V-WGA9>].

intangible cultural heritage and cultural identity relate to the concept of a collective cultural persona.

C. The Collective Cultural Persona

Just as individuals have personalities and a right to protect their dignity, cultural groups can have identifiable personalities based on the right to protect their collective dignity. A cultural personality right would protect the dignity and autonomy of a cultural group. International IP law protects identities that are used in commerce, while international human rights law requires states to respect and protect human dignity.¹⁷¹ As such, a human rights framing can help to bring a dignity perspective to IP. This section will elaborate on some of these terms before discussing cultural persona.

i. Culture and Identity

The definition of culture has long been challenging and controversial because the term is used in a variety of ways.¹⁷² One commonly used definition of culture is “that complex whole which includes knowledge, beliefs, arts, morals, laws, customs, and any other capabilities and habits acquired by [a human] as a member of society.”¹⁷³ Cultural identity “can be seen as the personification of culture.”¹⁷⁴ But this does not mean that cultural identity is static or homogenous but rather complex and evolving.¹⁷⁵

Like individuals, cultural groups have identities and personalities that are deeply connected to their dignity. These cultural identities could be buttressed by local rules and norms, as in the case of protected cultural heritage, or based on characteristics and qualities of a cultural group that result in an identifiable

171. Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 48 (2003).

172. YVONNE M. DONDEES, TOWARDS A RIGHT TO CULTURAL IDENTITY 24–29 (2002) (describing how the meaning of culture has changed over time).

173. UNESCO Commission Forty First Session, 23-6 February 2010, Background Document, *UNESCO 2009 Framework for Cultural Statistics*, <https://unstats.un.org/unsd/statcom/doc10/Bg-FCS-e.pdf> [<https://perma.cc/3MNQ-SU7J>]. *But see* Mezey, *supra* note 48, at 2017 (“Defining groups too closely around a set of shared things and practices not only limits redefinition, but also conversely encourages conformity and suggests ‘authentic’ ways to perform one’s identity.”).

174. DONDEES, *supra* note 172, at 30.

175. *Id.* at 30–31.

collective. Protecting cultural identities is a conversation about boundaries. These boundaries may be based on commercial identities or geographic location, but boundaries can also be based on cultural identities. Still, there is a tendency to draw the line when it comes to culturally identifiable *groups* rather than individuals or corporations.

Commentators raise objections to collective rights due to concerns about tying up culture and concerns about fair use.¹⁷⁶ Of course, these are questions which are relevant even with the market-based analysis of IP, which is why there is a need for balance between protection and access.¹⁷⁷

ii. Collective Personality or Identity

One might ask whether there is such a thing as a group personality or a collective dignity interest that should be recognized as a new type of IP right.¹⁷⁸ Perhaps the Hegelian concept of personality cannot extend to a group, but perhaps it can. In discussing a personality theory justification for intangible cultural heritage, Professor Justin Hughes suggests that the main problem is that it requires the recognition of a group personality.¹⁷⁹ He notes, however, that even without a cohesive theory of group rights, Radin's personhood theory of property could justify a collective cultural personality as necessary for individual personhood.¹⁸⁰

176. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE 236–48 (2003) (arguing that from an indigenous rights perspective, the public domain is the problem, not the solution) [hereinafter WHO OWNS NATIVE CULTURE].

177. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 43 (2003) (explaining the argument “that the increasing importance of information-value-added and information-intensive products to the world economy means that protection must increase”); *Traditional Knowledge*, *supra* note 124, at 103, 109, 121 (2007); Brown, *supra* note 61, at 40.

178. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (“Like the labor theory, the personality theory has an intuitive appeal when applied to intellectual property: an idea belongs to its creator because the idea is a manifestation of the creator’s personality or self. The best known personality theory is Hegel’s theory of property.”).

179. Justin Hughes, *Traditional Knowledge, Cultural Expression and the Siren’s Call of Property*, 49 SAN DIEGO L. REV. 1215, 1252 (2012) (“The problem in applying a personality justification directly to TK/TCE rights held by a group would be the recognition of the group, whether indigenous tribe or local community, as having its own ‘group personality.’”).

180. *Id.*

A group “personality” can be identified in relation to intangible cultural heritage. Groups are comprised of individuals, whose individual identity and cultural group identity may be strongly connected.¹⁸¹ Indeed, an individual identity can flourish within the context of a group, whether that group is based on cultural identities or national borders. Our understanding of a personality and identity in a globalized world cannot be limited to western individualistic perspectives of IP and human rights. Furthermore, what we can objectively perceive as a particular culture could be described as the group personality or cultural identity.

Admittedly, it may be challenging to identify a cultural group.¹⁸² Recognition by outsiders of a cultural group may be relevant when it comes to the perception of some collective identity, but it is not the role of those outside the group to define the group boundaries. Rather than imposing a definition on an indigenous group, the group must be able to self-identify and define its boundaries based on its own rules, traditions, and customs.¹⁸³

The International Labour Organization (ILO), for instance, has been dealing with indigenous issues since the 1920s and is responsible for the Indigenous and Tribal Peoples Convention.¹⁸⁴ Article 1 of the ILO Convention emphasizes the importance of self-identification stating, “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the

181. DONDEERS, *supra* note 172, at 33 (“[C]ultural identity has an individual and a collective dimension, although this distinction is not always clearly made. The individual dimension reflects that individuals derive their cultural identity from participation in different communities. Some argue that individual can, therefore, have ‘multiple cultural identities.’”).

182. Blake, *supra* note 39, at 79 (“In the case of rights related to cultural identity, this is compounded by the fact that the concept of a ‘people’ is difficult to define without reference to cultural criteria (including that of an identity) while it is difficult to define ‘culture’ . . . without reference to the concept of a ‘people.’”); Covarrubia, *supra* note 27, at 15 (“Traditionally, cultural heritage, be it tangible or intangible, has a linkage with identities.”).

183. See Covarrubia, *supra* note 27, at 14 (“Human rights instruments approach the term *Indigenous peoples* based on self-identification, rather than providing a definition. In that regard, self-identification and consent of the group is required. UNESCO also refers to a description rather than a definition when mentioning Indigenous peoples. The ILO Convention 169 refers to self-identification as a fundamental criterion and so does UNDRIP.”).

184. *Indigenous and Tribal Peoples: Introduction*, ILO, <https://www.ilo.org/topics/indigenous-and-tribal-peoples> [<https://perma.cc/M2MF-LR4E>].

groups to which the provisions of this Convention apply.”¹⁸⁵ For example, some groups define membership based on the mother or father having been a member of that group.¹⁸⁶ Others may require a member to live within the community or to have a certain blood lineage.¹⁸⁷

Self-definition is also important because there are various understandings of who is “indigenous” or “tribal” in international law.¹⁸⁸ A person may be considered indigenous because they are associated with a particular place, the original inhabitants, or the first inhabitants in a post-colonial society.¹⁸⁹ Some international institutions and instruments refer to “peoples,” while others use the

185. Indigenous and Tribal Peoples Convention art. 1, June 17, 1989. As of the date of writing, this Convention had 24 ratifications. ILO, *Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, <https://www.ilo.org/topics/indigenous-and-tribal-peoples> [<https://perma.cc/VF9P-7FUQ>] [hereinafter ILO, *Ratifications of C169*]

186. See, e.g., Nat’l Cong. of Am. Indians, *Tribal Sovereignty and Enrollment Determinations*, <http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm>. (on file with the *Columbia Human Rights Law Review*).

187. *Id.*

188. PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 33–60 (2002) ((discussing the difficulties of defining who is indigenous); when for example all in Asia and Africa could be described as indigenous) U.N. PERMANENT F. ON INDIGENOUS ISSUES, *Fact Sheet: Who are Indigenous Peoples?*, https://www.un.org/esa/socdev/unpfi/documents/5session_factsheet1.pdf [<https://perma.cc/N5WA-JVT4>] (“Considering the diversity of indigenous peoples, an official definition of ‘indigenous’ has not been adopted by any UN-system body. Instead the system has developed a modern understanding of this term based on the following: • Self-identification as indigenous peoples at the individual level and accepted by the community as their member • Historical continuity with pre-colonial and/or pre-settler societies • Strong link to territories and surrounding natural resources • Distinct social, economic or political systems • Distinct language, culture and beliefs • Form non-dominant groups of society • Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. A question of identity.”) (last visited Oct. 12, 2024); see ILO, *Ratifications of C169*, *supra* note 179 (Article 1 states: “This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”).

189. THORNBERRY, *supra* note 188, at 37–39.

term “indigenous and local communities.”¹⁹⁰ Some source communities that are holders of traditional knowledge and traditional cultural expressions may not be considered “indigenous” within their territories.

iii. Indicia of Identity

Nations have reputations and qualities that people associate with them. The same is true of cultural groups and individuals. Just as there are indicia of individual personality, there are cultural symbols that are indicia of group personality. This is easily defined when the cultural group has made efforts to maintain its identity. To some extent, the group identity can be likened to a national identity or to a “quality, reputation or other characteristic” which is an essential part of what makes something protectable as a geographical indication.¹⁹¹ Indeed, some intangible cultural property can be protected through geographical indications. The group name and the other indicia of their identity would fall within the scope of a cultural personality right. If the group has protected cultural heritage under its own national or tribal laws, that cultural heritage becomes part of the representation of the collective personality.

The Maasai name and cultural products, for instance, were utilized precisely because they were identifiable and valuable.¹⁹² Publicity rights protect individual identity while the proposed cultural personality right would protect collective identity. As such, one of the primary criteria is that the group, as represented, is identifiable. It is the use of the name and the Maasai colors without much adaptation that made the Louis Vuitton collection a clear commercial use of the Maasai culture.¹⁹³ The Maasai are identifiable

190. *Id.* at 40–41.

191. TRIPS Agreement, *supra* note 15, at art. 22.

192. Mark Brindle & Ron Layton, *The Maasai Intellectual Property Initiative: A 20th-Century Model for Turning Assets into Income*, 2(2) J. FAIR TRADE 5 (2021); see also Eleonora Rosati, *Protection of Traditional Knowledge and Cultural Expressions: The Case of 'Maasai IP'*, THE IPKAT (Jan. 30, 2018), <https://ipkitten.blogspot.com/2018/01/protection-of-traditional-knowledge-and.html> [<https://perma.cc/T8YB-PAJR>] (noting the Maasai name and reputation is used globally and worth billions of dollars); UCT IP Unit, *Multilateral Matters #8: Intellectual Property and Indigenous Names, Words and Symbols*, <http://ip-unit.org/2021/multilateral-matters-8> (2021) (on file with the *Columbia Human Rights Law Review*) (observing that indigenous names and symbols are among a people's most sensitive and valuable cultural expressions).

193. See *Want to Use the Maasai Name or Print? You Have to Pay for That*, THEFASHIONLAW (Sept. 18, 2025), <https://www.thefashionlaw.com/want-to-use->

because they have curated cultural traditions, heritage, and boundaries that enable them to maintain an identifiably distinct culture, even within Kenya and Tanzania.¹⁹⁴ It takes effort and consistency to maintain a distinctive cultural identity. Symbols, names, clothing, and food are connected to and are indicia of cultural identity.

These indicia of a cultural community comprise the cultural persona or identity, and these identities have value. Consider the use of the name Cherokee on Jeep vehicles. The name was used because the Cherokee are identifiable as a group and presumably have some reputation, quality, or characteristic that the manufacturers of Jeep wanted to associate with their vehicle. What does it mean to be a member of the Cherokee nation? What does membership symbolize such that a manufacturer is using the name to sell their trucks? The name has some commercial value to the makers of Jeep, which is why they used the Cherokee name to market their vehicle for several decades.¹⁹⁵ IP law protects the Jeep identity by protecting the name

the-maasai-name-or-print-you-have-to-pay (on file with the *Columbia Human Rights Law Review*) (noting that Louis Vuitton used the Maasai's most source-identifying cultural elements—their red-checked prints and colors—with minimal adaptation in its 2012 Spring/Summer men's collection); see also Ron Layton, *The Maasai Brand Is Valuable — And It Should Belong to the Maasai People*, ONE (Jan. 25, 2024), <https://www.one.org/us/stories/maasai-brand-cultural-appropriation> (on file with the *Columbia Human Rights Law Review*) (observing that products bearing Maasai name and imagery were sold for over 1,000 euros each without consent or compensation to the Maasai people).

194. See Gideon Nasila Tarayia, *The Legal Perspectives of the Maasai Culture, Customs, and Traditions*, 21 ARIZ. J. INT'L & COMP. L. 183, 186 (2004) (noting that the Maasai are distinguished from neighboring groups by their language, customs, and appearance); see also Moses ole Mpoie Sakuda, *Maasai Autonomy and Sovereignty in Kenya and Tanzania*, CULTURAL SURVIVAL Q. (2003), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maasai-autonomy-and-sovereignty-kenya-and-tanzania> [<https://perma.cc/CL4P-9WE2>] ((describing the Maasai's distinct territory with well-defined natural and cultural boundaries within which they have maintained their traditions)

195. See Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 76 (2005) (observing that Indigenous names are commercially exploited to evoke emotions that sell products); Jocelyn Hernandez, Note, *Tribal Trademark Law*, 76 STAN. L. REV. 661, 661 (2024) (discussing Jeep Cherokee as a prominent example of commercial use of an Indigenous tribal name without consent); see also Angela R. Riley, Sonia K. Katyal & Rachel Lim, *The Jeep Cherokee Is Not a Tribute to Indians. Change the Name.*, WASH. POST (Mar. 7, 2021) [<https://perma.cc/PD8V-XP5H>] (arguing that the use of the Cherokee name on a vehicle is commercial exploitation, not tribute).

“Jeep,” but can the law also protect the dignity and identity of Cherokee and other cultural groups? With some modifications, it could.

iv. What Would a Cultural Personality Right Protect?

Intangible cultural heritage is central to the proposed cultural personality right, which means the right is narrowly tailored and will not cover all culturally identifiable groups. First, there must be a cultural group that has sufficient boundaries and markers, or indicia, to identify it. One of the ways that a group can be identified is through cultural heritage items, such as a Scottish kilt or Ghanaian Kente cloth. Another way is the group name, like Cherokee (adopted by Jeep) or Tuareg (adopted by Volkswagen).¹⁹⁶ If there is no representation of cultural heritage that renders the group identifiable, then it does not fall within scope of a culturally identifiable group as defined for the purposes of the proposed right.

The group can, as discussed, be self-defining and it is not necessary for the public to have significant knowledge of the group. It suffices that the public is aware that an indigenous group called the “Cherokee” exists.¹⁹⁷ An awareness and understanding of the accurate representation of the cultural identity is not necessary. The fact that the appropriating entity is sufficiently aware of the cultural identity to adopt and use it for commercial purposes indicates not only recognition of the cultural personality but also of its potential commercial value.

196. See Annie White, *Chief of Cherokee Nation Says ‘It’s Time’ for Jeep to Stop Using Name, CAR AND DRIVER*, <https://www.caranddriver.com/news/a35568468/cheerokee-nation-jeep-stop-using-name/> [https://perma.cc/527C-VYE9] (March 4, 2021); Andrew Meldrum, *Tuareg v Touareg: What’s in a Name?, THE WORLD*, <https://theworld.org/stories/2016/07/31/tuareg-versus-touareg-whats-name> [https://perma.cc/YW5J-PCNE] (July 31, 2016)

197. Indigenous groups have the right to define their own membership and identity. See United Nations Declaration on the Rights of Indigenous Peoples art. 33, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Jocelyn Hernandez, Note, *Tribal Trademark Law*, 76 STAN. L. REV. 661, 665 (2024) (noting that indigenous communities have maintained the power to determine when and how their cultural expressions are owned and circulated); see also Wend Wendland, *Multilateral Matters #8: Intellectual Property and Indigenous Names, Words and Symbols*, UCT IP UNIT (2021), <http://ip-unit.org/2021/multilateral-matters-8> (on file with the *Columbia Human Rights Law Review*) (observing that the commercial value of an indigenous name derives from public association with the group, not detailed public knowledge of its culture).

Second, the cultural personality right would only protect representations of cultural identity that are either already protected as intangible cultural heritage under some national law or that could have been protected under IP law but for the collective nature, temporal limitations, or lack of commercial use. This latter category can be categorized as “quasi-intellectual property” for the purposes of this Article. Thus, the identifiable community must demonstrate the existence of either protected intangible cultural heritage or some type of quasi-intellectual property present before it can claim a cultural personality right. Third, the cultural identity must be used for commercial purposes without authorization. Private non-commercial uses would be excluded from protection.

This cultural personality right would, for example, enable the Maasai to effectively address their complaints against Louis Vuitton and empower the Cherokee to have greater recourse in their negotiations with the manufacturers of the Jeep vehicle. It would not, however, stop Justin Bieber or any other celebrity from wearing dreadlocks or any other hairstyle of their choice.¹⁹⁸

As the next section argues, IP laws also protect individual identities and personal autonomy. The challenge of using IP laws to protect collective identities can be overcome by moving to a dignity framework rather than one based predominantly on economic trade or economic incentives.

III. PROTECTING IDENTITY & DIGNITY THROUGH INTELLECTUAL PROPERTY LAW

It is evident from the traditional knowledge literature that the main concerns of cultural groups do not stem from a resistance to sharing their knowledge or culture but are based on a desire to be treated with respect, to receive appropriate recognition, and to have

198. See Riley & Carpenter, *supra* note 90, at 900–04 (arguing that legal remedies for cultural appropriation should target commercial exploitation of indigenous identity rather than individual personal expression); *cf. Justin Bieber Is Being Accused of Cultural Appropriation for Wearing Dreadlocks*, ABC NEWS (Apr. 28, 2021), <https://abcnews.go.com/GMA/Style/justin-bieber-accused-cultural-appropriation-dreadlock-hair/story?id=77365540> [https://perma.cc/MGA3-DUFN] (discussing public debate over whether personal hairstyle choices constitute actionable cultural appropriation, with many argue that no legal or moral claim arises where there is no commercial benefit).

sufficient control over commercial use of their cultural heritage.¹⁹⁹ Often, there is both a dignitary interest and a commercial interest at stake. Thus, the desire to prevent the misappropriation of traditional knowledge and traditional cultural expressions has origins in human dignity, much like the basis for the right of publicity or protection of reputation.²⁰⁰ For both intangible cultural heritage and publicity rights, human dignity is the basis. Before discussing dignity in IP law, it is necessary to first consider some of the theoretical justifications for IP laws.

A. Theoretical Justifications for Intellectual Property Rights

i. The Dominant Approach: Incentive Theory

IP rights, and their expansion, have different theoretical justifications, which have been the source of debate for several years.²⁰¹ In the United States, the incentive theory of IP protection has been the dominant approach. This theory holds that IP rights are justified as tools to incentivize innovation and creativity.²⁰² For example, patents and copyrights are often discussed in terms of

199. See Le Cheng & Yuchang Yuan, *Intellectual Property Tools in Safeguarding Intangible Cultural Heritage: A Chinese Perspective*, 34 INT'L J. SEMIOTICS L. 893, 898 (2020) ("With the development of the Internet, [intangible cultural heritage] can be easily replicated, disseminated on various platforms or infringed for commercial use. Establishing database[s] is one of the methods to protect national memory.").

200. See J. Janewa Osei-Tutu, *What Do Traditional Knowledge and Traditional Cultural Expressions Have to Do with Intellectual Property?*, 9(4) LANDSLIDE 1 (2017), https://repository.law.miami.edu/fac_articles [<https://perma.cc/X9QQ-QFC9>] (noting that a traditional knowledge right, like the right of publicity, would be grounded in the dignity interest of the creator); see also Tamara Petz, Comment, *WIPO's Proposed Treatment of Sacred Traditional Cultural Expressions as a Distinct Form of Intellectual Property*, 23 CHI. J. INT'L L. 1 (2022) (arguing that protection against misappropriation of TCEs is rooted in dignity, as treating indigenous creativity as a resource to extract without consequence undermines the inherent dignity of indigenous peoples).

201. Justine Pila, *Pluralism, Principles and Proportionality in Intellectual Property*, 34 OXFORD J. LEGAL STUD. 181 (2014) (reviewing Robert Merges's pluralistic, principles-based model of IP and arguing that while European jurisprudence broadly supports his operational model, Merges's framework reflects a utilitarian bias that undermines its pluralistic claims and highlights the need for greater engagement with IP's normative foundations).

202. U.S. CONST. art. I, § 8, cl. 8; see Lemley, *supra* note 16, at 1031 (stating that IP in the United States "has always been about incentives to create").

economic incentives for creators and innovators.²⁰³ Trademarks are justified as a way to promote efficiency of consumer choice and producer investment in their products, services, and the related goodwill.

ii. Alternatives: Human Dignity, Human Capabilities, & Human Rights

However, as I have argued elsewhere, this utilitarian approach is not the only model that can be used to justify IP rights. Various scholars have detailed the ways in which property law and intellectual property laws relate to human dignity.²⁰⁴ Recognizing that focus on economic incentives has its limits, some scholars have brought aspects of human rights in the form of human capabilities to the utilitarian model.²⁰⁵ Professor Margaret Chon advocates for a human capabilities approach to copyright and development, while Professor Margaret Radin articulates the relationship between property, personhood, and human dignity.²⁰⁶ Professor William Fisher

203. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1748 (2012) (observing that American patent and copyright law are grounded in utilitarian notions of providing limited economic incentives to create socially valuable works)

204. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1547 (1993) (explaining the connection between intellectual property and free speech interests and the “infusion of personality” from laboring for some purpose); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 315 (2006) (explaining the growth of intellectual property rights and its move away from public mindedness); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 1011 (2007) (concluding that social contract doctrines rightly influence intellectual property debates today); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE. L. REV. 65, 68 (1997) (noting how the systems in property law are not fully dependent on social utility); ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 3 (2011) (noting that courts often use rights-based explanations rather than utilitarian explanations to justify intellectual property).

205. See generally Brett M. Frischmann, *Capabilities, Spillovers, and Intellectual Progress: Toward a Human Flourishing Theory for Intellectual Property*, 14(1/2) REV. ECON. RSCH. COPYRIGHT ISSUES 1 (2017) (analyzing the relationship between the utilitarian model and human rights in the IP context).

206. See Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 818 (2007) (arguing for a bottom-up model for a human capability approach to capacity building); Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957–58 (1982) (“The premise underlying the personhood perspective is that to achieve proper self-

proposes what he describes as a “cultural theory” framework that is grounded in human flourishing to guide the protection of traditional knowledge.²⁰⁷ Professor Madhavi Sunder explains how the efforts to protect intangible cultural heritage through international human rights is also a property and personhood argument.²⁰⁸

Just as the dignity of the individual is affected by their control over their identity, the dignity of the group and individuals within the group may be affected by the ways their identities are presented in a commercial realm. The concept of dignity in IP is also found in natural rights justifications for IP protection. Natural rights IP scholars contend that rewarding the creative labor of the individual is a natural entitlement that can be justified based on Lockean theories.²⁰⁹ A natural rights approach to IP, for example, aligns in many ways with a human rights approach to IP protection.²¹⁰

Human rights approaches to IP also recognize the relationship between IP and human dignity. The human rights foundations of IP law are evident in human rights instruments, such as the Universal Declaration of Human Rights (UDHR), as well as in some early European copyright and patent laws. For example, Article 27 of the UDHR states that “everyone has the right to the moral and material interests arising from any scientific, literary, or artistic production of which he is the author.”²¹¹ The UDHR also states that everyone has a right to participate in cultural life.²¹²

development—to be a person—an individual needs some control over resources in the external environment.”).

207. William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L. J. 1511, 1550–51 (2018) (arguing that social and political systems, including law, should be designed to promote human flourishing).

208. Sunder, *supra* note 95, at 167.

209. See Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 38–41 (2005) (explaining how natural rights theorists view the “core or substance of property [as] the action that one takes to create and maintain the property.”).

210. See J. Janewa Osei-Tutu, *Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 VAND. J. ENT. & TECH L. 207, 210–11 (2017) (“Human rights are generally understood as natural rights as described by philosophers such as John Locke and Immanuel Kant. IP theorists also draw heavily on Locke’s labor theory for their natural rights analysis of IP. In both modern human rights law and natural rights IP theory, natural rights are described as those God-given rights that each human being enjoys by virtue of being human.”).

211. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 27 (Dec. 10, 1948) [hereinafter UDHR] (“1. Everyone has the right freely to

There are various scholarly opinions about the connection between IP rights and human rights. Some scholars argue that IP rights are human rights, while other commentators distinguish the two, concluding that human rights should be used to limit IP rights.²¹³ Other scholars emphasize that some attributes of IP rights have absolutely no human rights basis.²¹⁴ Those who argue that IP rights may conflict with human rights suggest that human rights should be prioritized over IP rights in the event of a conflict.²¹⁵ The alternate views frame human rights and IP rights as co-existing rather than conflicting insofar as both are asking how to balance protection for the products of intellectual creativity and innovation with public access to those creations.²¹⁶

General Comment 17 from the U.N. Committee on Economic, Social and Cultural Rights addresses “the right of everyone to benefit from the . . . moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.”²¹⁷ It contrasts human rights with IP rights, which are time

participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”)

212. *Id.*; see also International Covenant on Economic, Social and Cultural Rights art. 15(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] for similar language (“The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).

213. Peter K. Yu, *Ten Common Questions about Intellectual Property and Human Rights*, 23 GA. ST. UNIV. L. REV. 709, 710 (2007) (arguing for a human rights framework as intellectual property rights expand); LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* 65–67, 73–77 (2011). “One way to reconcile the relationship of human rights and intellectual property is to frame the two set of legal rules as fundamentally in conflict.” *Id.* at 65.

214. Yu, *supra* note 213, at 710–11.

215. HELFER & AUSTIN, *supra* note 213, at 67.

216. *Id.* at 73 (“In the U.N. human rights system, statements acknowledging the common objectives of the two regimes appear in numerous documents.”).

217. U.N. Comm. on Econ. Soc. and Cultural Rts., 35th Session, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant) at 1, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

limited and transferable.²¹⁸ General Comment 17 recognizes that human rights are fundamental, inalienable rights that belong to “individuals and, under certain circumstances, groups of individuals and communities.”²¹⁹ This document also stresses the importance, in relation to Article 15 of the ICESCR, of protecting the moral and material interests resulting from scientific, literary, or artistic productions of indigenous peoples, which are “often expressions of their cultural heritage and traditional knowledge.”²²⁰

Whether used as limits or as justifications, there are human rights dimensions to IP rights. However, as Professor Ruth Okediji observes, the current international IP structure was created without the involvement of developing countries who were under colonial rule at the time the foundational international IP agreements—the Berne Convention and the Paris Convention—were established.²²¹ This meant that a collective vision of dignity and a collective understanding of IP and intangible cultural heritage, which may better align with the views of indigenous peoples and formerly colonized peoples, was not contemplated. However, a human rights reframing of IP to protect the cultural identity rights of indigenous and local peoples also aligns with a personhood approach to property.²²²

B. The Right of Publicity: Protecting Identity, Dignity, and Autonomy

The philosophical foundations of IP law have strong elements of natural rights, including human dignity.²²³ For example, human dignity is evident in patent law through the right of the inventor to be

218. *Id.* at 2.

219. *Id.* at 1.

220. *Id.* at 32; *see also* UDHR, *supra* note 211; ICESCR, *supra* note 212.

221. Gana, *supra* note 151, at 329 (“As colonies, developing countries were not signatories to the early international intellectual property treaties although the treaty provisions often extended to them through the colonial administration. Once political independence was attained, international activity in the area of intellectual property focused on developing countries and their accession to the various treaties.”).

222. Sunder, *supra* note 93, at 167 (noting that “indigenous intellectual property campaigns merge traditional property and human rights” to highlight the relationship between property and personhood).

223. Gana, *supra* note 151, at 319–20 (discussing how human rights argument for intellectual property law are evident as far back as the French patent law of 1791 and are also found in Lockean justifications for IP).

named,²²⁴ as well as through the categories of the broader bundle of IP rights, such as the right of publicity.²²⁵ The dignity interest is recognized in copyright law through moral rights such as the right of attribution, which is the right of the author to be identified as the source of the work, and the right to the integrity of the work.²²⁶ Author's rights, which are recognized in Europe and many other parts of the world, are based on a natural rights approach to copyright which aligns with human rights.²²⁷ The WTO TRIPS Agreement does not appear to recognize moral rights or personhood approaches to copyright law, but author's rights remain an important part of copyright law outside the trade regime.²²⁸

224. 35 U.S.C.A. § 115 (1952).

225. Jennifer Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. J. 185, 187 (2012) [hereinafter *The Inalienable Right*] (arguing for a “shift in right of publicity law from thinking about “publicity-holders” to thinking about “identity-holders”); Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1352 (2009) (pointing to how right of publicity case law “reveals a marked lack of appreciation for the relevance of assaults to a plaintiff's dignity”).

226. Copyright Act of 1976, 17 U.S.C. § 106A (2022); Gana, *supra* note 151, at 319 (discussing the French approach to intellectual property that expanded Locke's labor theory by viewing creative works as fundamental expressions of the creator's personality that deserve protection as a matter of dignity which led French copyright law to recognize both economic rights and non-economic “moral rights.”).

227. Daniel Gervais, *Human Rights and the Philosophical Foundations of Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY, 89, 91 (Christophe Geiger ed., 2016) (“Author's rights were born in a normative cradle resembling modern human right.”).

228. TRIPS Agreement, *supra* note 15 (Art. 9.1 states “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.”); *see* Berne Convention for the Protection of Literary and Artistic Works, Paris 9 Sept. 1886 as am. 28 Sept. 1979. Article 6*bis* of the Berne Convention provides protection for moral rights. Article 6*bis* (1) states “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”; Gervais, *supra* note 227, at 92; “Natural law, as described by Locke, thus offers an interesting perspective, one that can be reconciled with the exegesis of Article 27 UDHR . . . Human rights, first and foremost, restore a degree of authorial dignity to copyright . . .” *Id.* at 94.

i. What is the Right of Publicity?

The right of publicity, which is often considered a type of intellectual property right, has the clearest connection to human dignity. It prevents the misappropriation or unauthorized use of one's name and likeness.²²⁹ There is no federal law governing the right of publicity in the United States. It is protected through state statutory and common law, so there are variations in the scope and duration of protection across the country. Importantly, however, the right can prevent commercial appropriation of an individual identity, even when that identity has not been commercialized by the identity holder.

The right of publicity does not protect corporate brands like a trademark but instead protects an individual's right to the exclusive commercial use of his or her name and likeness.²³⁰ For example, the unauthorized use of images may violate the right of publicity, as may the use of individuals in advertising for the purpose of evoking a particular celebrity. Although it is associated with celebrities, the right is not available only to them but is the right of every human being to control their identity and to recover damages in court for the use of their persona without permission.²³¹

Under U.S. law, both trademarks and the right of publicity fall under the broad category of unfair competition.²³² Commercial identity can be protected through trademark law or litigated as the tort of appropriation. The Restatement (Third) on Unfair Competition describes this right as being violated when one "appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."²³³ Right of publicity claims usually arise either because one

229. J. THOMAS MCCARTHY AND ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2024).

230. *Id.* (the "right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity").

231. *Id.* §§ 4.14–4.17.

232. *See generally* American Law Institute, *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* (1995) as am. 2024. Trademarks fall under Chapter 3, while the right of publicity falls under Chapter 4 of the Restatement (Third) on Unfair Competition.

233. *Id.* § 46; DAVID TAN, *Right of Publicity and the Appropriation of Commercial Value of Identity*, in *THE COMMERCIAL APPROPRIATION OF FAME: A CULTURAL ANALYSIS OF THE RIGHT OF PUBLICITY AND PASSING OFF* 106, 110 (2017) [hereinafter *Right of Publicity*] (recalling the Restatement (Third) definition as courts have not defined appropriation).

has appropriated the name and likeness of an individual literally, or because one has evoked the individual (usually a celebrity) by using different indicia of their identity that will make the viewer think of that individual.²³⁴

The right of publicity is also referred to as image rights in other jurisdictions. In their comparative work on publicity rights and image rights, Beverley-Smith, Ohly, and Schloetter characterize publicity rights as falling broadly into three models.²³⁵ The first model is a dignitary approach which involves defensive protection of personality interests primarily through tort law.²³⁶ This model does not allow the rights to be freely licensed, but post-mortem protection of personality is available.²³⁷ The second model, which these authors describe as “extreme” aligns with the U.S. approach.²³⁸ Under this model, the rights can be freely licensed and transferred.²³⁹ A third model, which aligns with the German approach, protects both dignitary and economic interests. It allows some licensing but not a full transfer of the image right.²⁴⁰

234. TAN, *supra* note 233, at 69.

235. HUW BEVERLEY SMITH ET AL., *PRIVACY, PROPERTY, PERSONALITY* 212 (2005).

236. *Id.* at 212 (“The model that conforms most closely to the traditional ‘dignitary’ approach is the concept of a purely defensive protection of personality interests, primarily by tort law. This model need not be rights-based. Its most important characteristic is the existence of rules prohibiting certain unauthorised acts such as the invasion of another person’s private sphere, the disclosure of confidential information or the use of another person’s name or picture.”).

237. *Id.* at 212–13 (“Under this model, however, licensing causes conceptual problems, since only positive rights can be licensed whereas a purely negative tort law protection can only be waived. The same applies to descendibility: only rights can be inherited. Nevertheless, post-mortem protection of a person’s reputation is possible under this model, since a legal system can provide rules that prohibit any interference with a deceased person’s reputation.”).

238. *Id.* at 213 (“The other extreme is the dualistic model that has developed in US law. Under this model there is a distinction between the protection of non-economic interests by the torts of defamation and invasion of privacy, whereas economic interests are protected by the right of publicity, which has developed into a fully fledged intellectual property right.”).

239. *Id.*

240. *Id.* at 214 (The German approach “is based on an analogy to copyright law which, according to German doctrine, protects the author’s *droit moral* and his or her patrimonial rights under one single right. The consequence of this approach is that a complete transfer of a personality right is ruled out. Licensing is possible, but ‘personality licenses’ may be revocable under certain circumstances. The more limited the permission granted, the shorter the duration

In many ways, publicity rights protect the same interests that indigenous cultural groups seek to protect when they assert that their cultural symbols, clothing, or practices have been misappropriated. These include the protection and recognition of human dignity and autonomy. In addition, some recognizable cultural groups may wish to protect the commercial value of their identities. Due to the similarity in interests sought to be protected, and the absence of requirement that the right holder uses her identity in commerce, publicity rights present a useful framework for protecting cultural group identities. Cultural groups seek a remedy for the appropriation and use of their cultural group identity without their knowledge or authorization. The unauthorized use of traditional knowledge and traditional cultural expressions are perceived as unjust enrichment and also as violations of one's dignity.

ii. Dignity and Publicity Rights

While U.S. jurisprudence has a strong focus on commercial interests, the origin of the right of publicity in the United States is rooted in respect for human dignity.²⁴¹ The leading U.S. treatise defines the right of publicity as “the inherent right of every human being to control the commercial use of his or her identity.”²⁴² Although the discourse around cultural appropriation and the misappropriation of traditional knowledge has not focused on the use of identity rights, the legal violation of the right of publicity is litigated as the tort of appropriation.²⁴³ The basis of a publicity claim is that the defendant has taken something of value from the plaintiff without consent, which can be seen as a form of unjust enrichment.²⁴⁴

of the licence, and the more precise the description of the envisaged use of aspects of personality, the less the licence will be held to be revocable.”)

241. THE RIGHT OF PUBLICITY, *supra* note 17, at 112 (“The most compelling justifications for a right of publicity are the same ones that justify the right of privacy—the promotion and protection of individual dignity, personhood, and liberty...”).

242. J. THOMAS MCCARTHY & ROBERT E. SCHECHTER, 1 RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2025); Jennifer Rothman also points out that the ROP protects both a dignitary and a commercial interest. *See* Rothman, *supra* note 225, at 187.

243. Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1 (2013).

244. TAN, *supra* note 233, at 111 (“The essence of a publicity claim is the defendant taking, or seeking to take, something of value away from the plaintiff without the plaintiff's consent”).

Various scholars have pointed out that the right of publicity protects a dignity interest and not merely the commercial interest.²⁴⁵ They have explained the right in relation to the protection of individual personality, autonomy, or identity in the right of publicity—the non-market, non-commercial offense.²⁴⁶ U.S. case law often distinguishes the right of publicity as addressing economic interests and the right of privacy as addressing dignity harms.²⁴⁷ In reality, Professor Roberta Kwall argues, “many actions based on the unauthorized use of personas involve both dignity and economic harms.”²⁴⁸ Even though the courts seem inclined to offer an economic analysis of the right of publicity, at its core, it is about the dignity and the autonomy of the individual and not just about economic loss.²⁴⁹

In her influential scholarship, Professor Jennifer Rothman demonstrates that the right of publicity is most well-justified as a protection of the dignity interest.²⁵⁰ Encouraging a return to its roots, she argues that the right of publicity in the United States has

245. Kwall, *supra* note 225, at 1352–53; Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 UNIV. PITT. L. REV. 225, 231 (2005) (offering a “framework for an autonomy-based identity appropriation claim); see Rothman, *supra* note 225, at 187 (“Publicity rights have been justified on a variety of grounds including autonomy, dignity, natural rights, labor-reward, and unjust enrichment.”); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, n.6 (1999) (arguing that “(“it would be demeaning to human dignity to fail to enforce” the underlying privacy rights which go beyond the commercial); Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Purpose and Scope of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 187 (2014) (quoting David Westfall & David Landau, *Publicity Rights As Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71, n.115 (2005)) (noting that publicity rights are independent of privacy rights, despite stemming from them); Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. UNIV. L. REV. 891, 902–03 (2017) (arguing that misappropriation and the right of publicity are one, including dignitary harm as part of that definition).

246. McKenna, *supra* note 245, at 231.

247. Kwall, *supra* note 225, at 1345–46 (pointing to fact patterns in seminal cases as a reason why the legal system has this distinction).

248. *Id.* at 1346.

249. *Id.* at 1348–49 (citing Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964)) (explaining that “[t]he significance of Bloustein’s analysis for purposes of this Article is his recognition of the dignity interests inherent in privacy, defamation and publicity actions.”).

250. See THE RIGHT OF PUBLICITY, *supra* note 17, at 112 (“The most compelling justifications for a right of publicity are the same ones that justify the right of privacy—the promotion and protection of individual dignity, personhood, and liberty and the recovery of (and prevention of) economic and emotional injuries to an individual.”).

expanded beyond where it should for the purpose of protecting individual dignity and autonomy.²⁵¹ This approach, grounded in dignity and autonomy rather than in an “incentive to create” style approach, aligns with the dignity-based human rights claims made by historically marginalized cultural groups.

Dignitary and commercial interests are precisely the interests that would be protected by the proposed cultural personality right, except that the proposed right would extend to collective cultural identities.²⁵² Rothman does not suggest that the right of publicity should be extended to groups but focuses on the rights of individuals.²⁵³ Indeed, given her criticisms of the trend of separating the identity holder from the publicity holder, Professor Rothman may well hesitate to adopt a right of publicity style of protection for groups, particularly if these collectives could include corporations. The proposed cultural personality right would extend to humans, but as a dignity-based right, it should not extend to corporate entities.

The more commercially-oriented approach to the modern day right of publicity stems from interpretations of cases, such as the decision of the Court of Appeals for the Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* and the U.S. Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Co.*²⁵⁴ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* was a contract dispute about the use of the image of baseball players in relation to the sale of a product.²⁵⁵ The player had entered into a contract granting Topps Chewing Gum the exclusive right to use his

251. *Id.* (“There are good reasons to have a right of publicity, but not for having the broad, expansive right we have in many states today. A serious interrogation of the purported justifications for the right of publicity suggests that the right makes the most sense when integrated with the right of privacy, rather than aligned with its purported cousins, copyright and patent law.”).

252. *See* Rothman, *supra* note 225, at 187 (“[I]t is necessary to make a distinction between the publicity-holder and what I call the identity-holder. The identity holder is the person whose name, likeness, or other indicia of identity is used and, when used without permission, forms the basis of a right of publicity violation. The publicity-holder, by contrast, is the person who owns the property interest in (commercial) uses of that identity.”). For a discussion of corporate ownership, see *id.* at 239 (discussing how corporate ownership of deceased celebrities’ publicity rights does not outweigh public interests in using these personalities).

253. *Id.*

254. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

255. *Haelan*, 202 F.2d at 867.

photograph in connection with the sale of its chewing gum.²⁵⁶ The defendant, a competitor, deliberately induced the player to authorize the use of his image in relation to the sale of its gum.²⁵⁷

As part of its analysis of the contract dispute, the court rejected the defendant's argument that all the plaintiff's contracts did was release liability and went on to state:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth... This right might be called a 'right of publicity.'²⁵⁸

Following the *Haelan* case, there were some influential legal articles written on the topic, including one by attorney Melville Nimmer titled *The Right of Publicity*.²⁵⁹ Building on a prior article by Professors Warren and Brandeis that is credited with developing the right to privacy, Nimmer argued that well-known personalities do not seek privacy, but that their "concern is rather with publicity, which may be regarded as the reverse side of the coin of privacy."²⁶⁰ Among other things, Nimmer argued that the right to privacy was inadequate because it was meant to prevent the publication of harmful information, was not assignable, and was a personal right available to human beings, but not animals or corporations.²⁶¹ Contrary to Nimmer's instrumentalist economic approach, Thomas McCarthy, a leading scholar on privacy and publicity, opposed the right of publicity for corporations, arguing that the right should maintain its essential justification as a natural right in every *human being* to control commercial uses of their identity.²⁶²

256. *Id.* at 867.

257. *Id.*

258. *Id.* at 868.

259. Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROB. 203, 204 (1954) (discussing how the Court in *Haelan Laboratories* treated publicity rights as an independent, legally cognizable right).

260. *Id.* at 204.

261. *Id.* at 205–10.

262. MCCARTHY & SCHECHTER, THE RIGHTS OF PRIVACY AND PUBLICITY § 4:38 (denying the right of publicity to "the identity of organizations like corporations and partnerships"); *id.* § 4:45 ("Undoubtedly the right of publicity is analogous to trademarks in some respects. It is also analogous to copyright, defamation, and the various forms of invasion of privacy. The right of publicity is

Noting that Nimmer was an attorney for the film industry, Professor Jennifer Rothman explains that his positions were influenced by the needs of that industry.²⁶³ She further argues that a careful reading of *Haelan* reveals that the case did not create a new right, but was a contract dispute, and that it recognized the existing right of privacy, which already protected what we currently recognize as the right of publicity.²⁶⁴ Notably, New York does not recognize a common law right of publicity and the only right of publicity in New York is called the right of privacy.²⁶⁵ The right to privacy can include publicity, as is evident from Prosser's Restatement (2d) of Torts.²⁶⁶ Prosser identified four categories of the right of privacy, of which one was the tort of appropriation, or the right of publicity, recognizing that the unauthorized appropriation of identity could result in both dignitary and economic harms.²⁶⁷

Rothman argues that the legal scholarship and the subsequent court decision in *Zacchini v. Scripps-Howard Broadcasting* severed the connection between dignitary and economic harms, thereby leading to an expanded right of publicity.²⁶⁸ Other

also analogous to both real and personal property. However, to look only at the points of resemblance to neighboring legal rights is to lose sight of the basic reason which emboldened courts to integrate the right of publicity into the law. That basic reason is the uniqueness of the human identity. The most persuasive rationale which gave rise to and continues to provide reasoned support for the right of publicity is that human identity is a natural and self-evident property right.”)

263. THE RIGHT OF PUBLICITY, *supra* note 17, at 69 (“It was therefore hardly a surprise that a studio lawyer, like Nimmer, would advocate for a transferable right of publicity. Such a right could take away the actors’ ability to control uses of their own name and likeness, and give legal control over their identities to the studios. Nimmer was upfront that this was his motivation.”).

264. *Id.* at 62 (“Despite the common broad reading today of the majority opinion in *Haelan*—as creating a new legal right, a right of publicity—neither the parties to the litigation nor the district court on remand though the opinion created a new, independent, quasi-intellectual property right under New York law.”)

265. *Id.* at 64.

266. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401–07 (1960) (identifying appropriation of name or likeness for commercial benefit as a distinct branch of the right to privacy).

267. *Id.*

268. THE RIGHT OF PUBLICITY, *supra* note 17, at 76 (“Above all, *Zacchini* shifted the right of publicity to a strong property-based framework by analogizing it to IP entitlements like copyrights and patents. By doing so, the Supreme Court broke the right free of privacy law, broadened out the right, and legitimized it in jurisdictions that had not yet adopted it.”).

scholars have criticized the modern U.S. right of publicity as overbroad, inconsistent, or creating bad law.²⁶⁹ According to Rothman, the shift to treating the right of publicity as IP led to its unjustified expansion.²⁷⁰ It is true that U.S. law offers a comparatively strong property model for the right of publicity because it appears to have separated, to some extent the dignitary interest, which it treats as the tort of privacy and the publicity right which protects the economic interest.²⁷¹ As Rothman, argues, however, this is not quite accurate and the separation, to the extent it exists, has been problematic.²⁷²

Further, Rothman concludes that neither incentive theory nor unjust enrichment provide adequate justifications for the right of publicity. Instead, the best justification for the right of publicity is a return to its roots: human dignity.²⁷³ An approach that separates dignitary harms from economic harms, and allows the right to be

269. See, e.g., Rebeca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 157 (2015) (“[C]ourts have allowed the right of publicity to distort the First Amendment.”); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL L. REV. 127, 127 (1993) (“Professor Madow argues that private, centralized ownership and control of celebrity images poses a more serious threat to cultural pluralism and self-determination than is some- times realized”).

270. THE RIGHT OF PUBLICITY, *supra* note 17, at 87 (“Once the Supreme Court in *Zacchini* officially placed the right of publicity in the pantheon of IP, it began to expand”).

271. Stacy L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1173 (2006) (“Haelan’s new cause of action differed from the right of privacy in several important ways. Most significantly, as an economic rather than a personal right, the right of publicity was fully alienable, meaning that third parties could acquire a celebrity’s publicity rights and have standing to sue for violations.”); see also MCCARTHY AND SCHECTER, THE RIGHTS OF PRIVACY AND PUBLICITY § 10:8. Right of publicity is property—Significance of the “property” label, 2 Rights of Publicity and Privacy § 10:8 (2d ed) (“The right of publicity is “property.” From that label flows a plethora of legal categorizations and conclusions, but Justice Cardozo warned us to beware of “the tyranny of labels.””).

272. THE RIGHT OF PUBLICITY, *supra* note 17, at 210 (“Often it is claimed that the right of publicity addresses economic injuries while the right of privacy addresses dignitary and emotional distress injuries. As I have revealed, such a division did not exist historically, is not enforced today, and makes little sense since injuries from the same harm of misappropriation can be economic, dignitary, and emotional.”).

273. THE RIGHT OF PUBLICITY, *supra* note 17, at 101–10; “One of the most convincing bases for having a right of publicity is rooted in the prevention and remedying of actual injuries to individual identity-holders.” *Id.* at 110.

separated from the person whose identity it protects—the “identity holder” has made the right of publicity overly broad.²⁷⁴

In contrast to Rothman, in their criticism of publicity rights, Professor Stacey Dogan and Professor Mark Lemley contend that the right of publicity should become more like trademark law.²⁷⁵ They argue that moral rights cannot provide a justification for the right of publicity, concluding that human dignity cannot provide a justification for this right because it does not fit easily with a right of publicity that aims to maximize profit from celebrity.²⁷⁶ These authors contend that neither labor theory nor incentive theories justify the right of publicity.²⁷⁷ However, like trademark law, the right of publicity aims to prevent the commercial misuse of names with the goal of preventing confusion, or false association in cases involving famous marks.²⁷⁸ For this reason, they suggest that trademark law is a better analogy. There is a harm to the celebrity and to the public because the public is misled.²⁷⁹

Indeed, the trademark consumer protection rationale also applies to the misuse of cultural names and identities. However, as discussed, the challenge with adopting a trademark model for cultural groups is that they may not be using their names or identities in a commercial context. In addition, most of these cultural identities are used across national borders,²⁸⁰ which makes it more

274. THE RIGHT OF PUBLICITY, *supra* note 17, at 112 (“There are good reasons to have a right of publicity, but not for having the broad, expansive right we have in many states today. A serious interrogation of the purported justifications for the right of publicity suggests that the right makes the most sense when integrated with the right of privacy, rather than when aligned with its purported cousins, copyright and patent law.”).

275. Dogan & Lemley, *supra* note 271, at 1190 (“Yet there is a compelling explanation for the right of publicity, albeit one that differs quite substantially from the scope of the right as it currently exists. The structure and content of trademark law provide a theoretical justification for a bounded right of publicity. Trademark law offers a far better lens than copyright law with which to understand what is going on in the right of publicity cases. It also offers what previous theories have not—a reason to protect publicity rights.”).

276. *Id.* at 1181–82 (arguing that human dignity does not justify a right of publicity that is focused on maximizing celebrity’s profit from identity).

277. *Id.* at 1190 (discussing why various theories—moral rights, allocative efficiency, and incentives—don’t adequately justify the right and explaining that privacy is a good justification, but not for the right in its current form.)

278. *Id.* at 1190.

279. *Id.*

280. See United Nations Educational, Scientific and Cultural Organization, *The International Round Table on “Intangible Cultural Heritage – Working*

difficult to argue that the public will be confused. There is, however, an argument that the public has been misled, even if they are not *aware* that they have been misled. Finally, trademark dilution, which provides a higher level of protection for famous marks, requires the public to have sufficient awareness of a famous mark before the mark can receive the level of protection that does not require consumer confusion.²⁸¹

A dignitary approach does not justify profit maximization in relation to celebrity, but this critique of publicity rights does not apply to marginalized cultural groups that seek to regulate the unauthorized commercialization of their cultural identities. Professors Dogan and Lemley also concede that a narrower right of publicity that is not focused on profit maximization may fit with the human dignity model.²⁸² If anything, human dignity is arguably the strongest in relation to protecting the identities of post-colonial marginalized cultural groups. Another advantage of publicity rights is that unlike trademark law, the individual right of publicity is generally protected even if one does not commercialize one's identity during life.²⁸³

The right of publicity is also valuable for cultural groups because it can be applied even where the image or name of the individual in question is not directly used. This includes cases that go beyond the protection of name and image, such as *Carson v. Here's Johnny Portable Toilets Inc.*²⁸⁴ and *White v. Samsung Electronics.*²⁸⁵

Definitions," 7 (2001) (describing that debates about intangible cultural heritage "raised the question as to how rights of communities whose boundaries do not correspond to the geographical boundaries of States can be protected both by State governments and international organizations").

281. 15 U.S.C. §1125.

282. Dogan & Lemley, *supra* note 271, at 1181 ("A human dignity approach may well support a more narrowly drawn right of publicity focused on uses that falsely suggest celebrity endorsement of commercial products.").

283. See, e.g., *Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 694 F.2d 674, 683 (11th Cir. 1983) (discussing the common law right of publicity in Georgia); *Right of Publicity Statutes & Interactive Map*, <https://rightofpublicity.com/statutes> [<https://perma.cc/MJ3T-2KQW>] (indicating that in Arkansas, for example, states that the right of publicity does not expire at death, even when not used during the individual's lifetime).

284. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) ("We believe that, on the contrary, the district court's conception of the right of publicity is too narrow. The right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's

In these cases, the identity of the performer was protected, even though their image was not used as part of these advertisements. In *Carson*, the phrase “Here’s Johnny” was found to be connected to the identity of the comedian and late-night show host, Johnny Carson.²⁸⁶ In *White v. Samsung*, a robot game show host in a blonde wig was held to be representative of the identity of game show host Vanna White.²⁸⁷ Cases such as these have been criticized as being an extreme application of the right of publicity which seems to be inconsistent with free speech.²⁸⁸ Nonetheless, these are examples of how variations of this law have been used to prevent the commercial exploitation of personal identity using a wide range of indicia.

iii. No Collective Publicity Right

The U.S. right of publicity protects individual dignity and identity but is rarely extended to collective identities.²⁸⁹ The U.S. right of publicity recognizes the individual dignity interest in protecting individual identities. There has, however, been litigation by groups regarding the misuse of their identity for commercial purposes. For instance, in *Tin Pan Apple Inc. v Miller Brewing Co Inc.*, a rap group called The Fat Boys sued for, among other things, a violation of their right of publicity.²⁹⁰ The plaintiff, Tin Pan Apple, was the owner of a service mark for Fat Boys as well as the owner of the copyright for various Fat Boys recordings.²⁹¹ Miller Brewing Co., a

identity may be exploited even if his name, John W. Carson, or his picture is not used.”).

285. *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992).

286. *Carson*, 698 F.2d at 836.

287. *White*, 971 F.2d at 1399.

288. Dogan & Lemley, *supra* note 271, at 1217 (discussing these cases in the context of the First Amendment).

289. ARIZ. REV. STAT. § 12-761 (LexisNexis 2025) (“The right to control and chose whether and how to use a soldier’s name, portrait or picture for commercial purposes is recognized as each soldier’s right of publicity”); CAL. CIV. CODE § 3344 (Deering 2026) (providing that a person who uses a person’s name or other likeness for commercial purposes is liable for damages); N.Y. CIV. RIGHTS LAW § 50 (Consol. 2025) (providing that a person who uses the likeness of a person without written consent is guilty of a misdemeanor); OKLA. STAT. tit. 12, § 1449 (2025); S.D. CODIFIED LAWS § 21-64-2 (2025) (providing that a person who uses the likeness of another for advertising or other commercial purposes is liable for damages and profits).

290. *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826, 828 (S.D.N.Y. 1990).

291. *Id.* at 827.

beer manufacturer, hired an advertising company to create an advertisement for beer.²⁹² When the Fat Boys, whose musical messages included encouraging youth to abstain from alcohol, refused to appear in the Miller beer advertisement, the advertising company hired three look-alikes to appear in the advertisement instead of the Fat Boys.²⁹³

The plaintiffs alleged that hiring of individuals who looked like and sounded like the members of the Fat Boys musical group violated Sections 50 & 51 of the New York Civil Rights Law, which prohibits the unauthorized use of one's name or portrait for advertising purposes.²⁹⁴ The court concluded that the prohibition is not limited to the use of an actual image, but extends to other physical representations of the person, a scope that includes look-alikes but excludes sound-alikes.²⁹⁵ The identities in question were not just those of the individual members of the Fat Boys on their own, but their identities together as a musical rap group.²⁹⁶ The court did not specifically address the issue of collective identity, and, importantly, the court did not say that the musical group could not have a right of publicity.²⁹⁷ This is one of very few cases on the right of publicity involving groups. This may be because musical groups will most likely use trademarks to protect the group brand and identity.

A musical group is different from a cultural group, and one might argue that the individuals within the group are individually identifiable. Still the idea of a collective cultural identity right based on a right of publicity model is justifiable, particularly when one considers the existence of collective ownership of intellectual property rights, as well as collective cultural rights under international human rights law. Further, unlike critiques of the right of publicity as a tool for protecting corporations or for enriching the wealthy,²⁹⁸ a cultural

292. *Id.* at 834.

293. *Id.* at 828.

294. *Id.* at 836.

295. *Id.* at 837–38 (dismissing the sound-alike publicity claim but denying the motion to dismiss the look-alike publicity claim).

296. *Id.* at 833 (describing plaintiffs' argument that defendants took advantage of the "commercial success and established good will associated with the name of FAT BOYS as a singing group" (emphasis added)).

297. *Id.* at 837 (declining to grant the defendants' motion to dismiss the plaintiffs' publicity claims based on their "look-alikes" theory).

298. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 136–37 (1993) (criticizing publicity

personality right would benefit groups that have historically been excluded from full participation in the IP system.

The law recognizes collective personality, primarily in the form of the legal corporation or business partnership.²⁹⁹ There are also some cultural groups that are incorporated as legal persons. To the extent that their commercial identity and cultural identity overlap, these groups can protect their identities through trademarks or geographical indications, like any other corporate entity. Cultural groups may also use collective marks to protect their identities through the use of collective marks. The Seminole Tribe in Florida, for example, has successfully used its legal personhood to protect its commercial identity and brand.³⁰⁰

However, protecting collective cultural identity through an expanded right of publicity is not without its challenges. The various types of publicity rights across the United States focus primarily on protecting the individual. But claiming group rights raises many objections. For example, who is within the group, when is a culture identifiable and who gets to decide what can be protected? To be sure, culture is not static, and cultural exchange is valuable to human beings as individuals and as members of communities.³⁰¹ Still, the idea of using the right of publicity, or image rights, to protect culture is not outside the realm of possibility.

In Italy, for example, the law does not protect cultural groups, as is being proposed here, but Italy has recognized an image right in cultural goods.³⁰² The famous sculpture, the David, is protected cultural heritage under Italian law, which means that it is a cultural

rights for redistributing wealth upward and providing additional income to well-paid artists and entertainers).

299. See, e.g., Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege*, 2005 COLUM. BUS. L. REV. 1 (2005) (discussing business entities and noting, particularly that all fifty states recognize the creation of LLCs and LLPs).

300. See SEMINOLE TRIBE OF FLORIDA, <https://www.semtribe.com> [<https://perma.cc/7S3A-GD8E>].

301. Sean A. Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 NW. J. INT'L L. & BUS. 63, 70 (2011) (“[C]ulture is constantly evolving”); UNESCO, WORLD REPORT: INVESTING IN CULTURAL DIVERSITY AND INTERCULTURAL DIALOGUE 39 (2009) (“Cultures are not self-enclosed or static entities”).

302. GRUR Int'l, *Copyright Law: Italy. Image Right Protection for Cultural Goods*, 73 GRUR INT'L 574, 574 (2024) (discussing how the unauthorized use of Michelangelo's *David* was a violation of the Italian Code on Cultural Heritage).

good that cannot be reproduced for commercial purposes without permission.³⁰³ When GQ Italia published an altered version of the David, without authorization from the Galleria dell Accademia, which is the museum that hosts the David, the Italian Ministry of Culture took legal action against the magazine publisher.³⁰⁴ This case is an example of a European nation controlling the commercial use of its cultural heritage. Furthermore, the court in that case noted that damages related to a violation of image rights could be extended to legal entities.³⁰⁵

This proposal does not adopt the Italian approach or suggest extending publicity rights to corporations. Corporate actors are not human beings and do not have human dignity concerns. Furthermore, they do not need the right of publicity because they can utilize trademark law and geographical indications to protect their commercial and corporate identities.³⁰⁶ However, this proposal does challenge the notion that a publicity-like right should only apply to human individuals to the exclusion of human group. An expanded right of publicity can serve as a model for protecting collective cultural identities because it addresses the dignitary concerns that are not addressed in a trademark model, as well as any economic harms that may have resulted.³⁰⁷

Protecting a collective cultural personality from commercial misuse is about protecting a collective dignity interest, rather than an individual dignity interest. Clearly, protecting collective identity is not foreign to IP law. Classic forms of intellectual property, such as copyright, patents, and trademarks, may be owned collectively and

303. *Id.* at 575–76.

304. *Id.* at 574, 577.

305. *Id.* at 576 (“The Supreme Court has even affirmed the enforceability of image rights with respect to mere goods, having mere economic relevance, clarifying that: ‘civil law protection for the name and image, pursuant to Arts. 6, 7 and 10 of the Italian Civil Code, can be invoked not only by natural persons, but also by legal entities and any person other than a natural person. In case of illegitimate use of the name and image of a good, the aforesaid protection pertains both to the user of the good under a leasing contract and to the holder of the right of economic exploitation thereof . . .”).

306. See Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS, 389, 396–98 (2019) (“I think there are several different explanations for the mutation of trademark law into a right of publicity law for corporate personas, many of which may be obvious to you.”).

307. THE RIGHT OF PUBLICITY, *supra* note 17, at 111 (“In the absence of control over our identities, we are all like puppets that can be sued to speak to others’ words and messages.”).

may be used to protect collective corporate identities.³⁰⁸ As Professor Barton Beebe has argued, trademark law increasingly operates as a form of corporate right of publicity.³⁰⁹ Other scholars suggest that trademark law and copyright law are already functioning to protect a type of moral rights for businesses.³¹⁰ Professor Guido Westkamp argues that under European human rights laws “the general human right to personal integrity may increasingly be relied upon by, in practice, corporations.”³¹¹ He also suggests that there appears to be a problematic expansion of intellectual property protection to include dignity-based concepts to protect corporations.³¹²

These warnings about the dangers of protecting corporate identities and reputation are an observation that courts may be willing to extend protections to corporations in ways that appear to be inconsistent with the underlying economic justifications for trademark law. The intersection between human rights and intellectual property in Europe is distinct from that of the United States because the Charter of Fundamental Rights of the European

308. See 15 U.S.C. § 1054 (the collective marks provision of The Lanham Act); 17 U.S.C. § 201(c).

309. Beebe, *supra* note 306, at 393–96 (“But probably the best expression of the mutation of trademark law into a right of publicity law for persons both natural and corporate is antidilution protection.”).

310. Guido Westkamp, *Intellectual property and human rights: Reputation, integrity and the advent of corporate personality rights*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND HUMAN RIGHTS 389, 391 (Geiger ed., 2015) (“[O]ne may group the trade mark doctrine of dilution by tarnishment together with the right of integrity as a moral, or personality right that exists under copyright law. Tarnishment is an action related to concepts such as unfair competition in Germany, or trade libel or defamation as it exists in the UK and US.”).

311. *Id.* at 394.

312. *Id.* at 390 (“In short, there may be a danger that a shift from the interpretation of statutory economic property rights (such as copying a protected work or using an identical sign for identical goods) towards a broader concept rooted in notions of personality protection would actually create an umbrella concept applicable to acts in competition Thereby, these rights in reputation may come into conflict specifically with free competition. There is, at present no doctrinal certainty that would provide meaningful guidance as to whether existing statutory IP rights should take precedence.”); *id.* at 408 (“If, then, reputation is ascribed to the owner of a mark as a mechanism to prevent undesirable but legitimate imitations of products, it may then be argued that this reputation protection rests, from the perspective of human rights protection, upon a right in property broad (because broad reputation protection is afforded even where the competing product is legitimate, and despite the fact that the use is, therefore, referential), and indeed a right in (corporate) reputation as a sub-category of a broader right of corporate personality”).

Union recognizes property, including intellectual property, as a human right.³¹³ Yet, scholars on both sides of the Atlantic Ocean have expressed concerns about the protections given to corporate identity.³¹⁴ Unlike corporations, who do not suffer dignity harms, cultural groups and the individuals within cultural groups can suffer dignity harms in relation to their group identity.

Meanwhile, there is no corresponding willingness to protect the identities of indigenous or local communities, who generally lack the resources, the wealth and the power to prevent others from using their identities for commercial gain. Large corporations can control their public images, but the law does not extend the same protection to cultural groups such the Masai or the Navajo nation if they are not incorporated.³¹⁵ It is ironic that the Cherokee, one of the largest indigenous groups in the United States, who have asked the company that makes the Jeep “Cherokee” vehicle to stop using their name on its Jeep vehicles, were not able to legally prevent this conduct.³¹⁶ The

313. Charter of Fundamental Rights of the European Union art. 17, Oct. 26, 2012, 2012/C326/02 (“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.”); see Westkamp, *supra* note 310, at 389.

314. See generally Beebe, *supra* note 306, at 391–92 (noting that corporations do not qualify for right of publicity protection); Westkamp, *supra* note 310, at 408 (discussing the corporate personality right).

315. See Lorie M. Graham & Stephen M. McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL’Y 313, 318 (2005) (noting that corporate interests have benefited from IP law’s expansion while indigenous cultural groups have received little concrete legal recognition); see also Kelly Bannister & Katherine Bennett, *Protecting Indigenous Intellectual Property Rights: Tools That Work*, CULTURAL SURVIVAL Q. (2003), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/protecting-indigenous-intellectual-property-rights-tools> (observing that exclusive community control over traditional knowledge mirrors corporate trade secret management, yet the law has not extended equivalent protections to indigenous groups); Allison Jones, *When Invention Exploits Tradition: Gaps in Native American IP Law*, HARV. UNDERGRADUATE L. REV. (Apr. 30, 2025), <https://hulr.org/spring-2025/when-invention-exploits-tradition-gaps-in-native-american-ip-law> [<https://perma.cc/Q2NR-4PJC>] (detailing how current IP statutes protect only tangible goods, leaving intangible and communal cultural heritage of unincorporated indigenous groups legally unprotected).

316. Jenny Gross, *Chief of Cherokee Asks Jeep to Stop Using Its Name*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/business/jeep-grand-choke.html?smid=url-share> [<https://perma.cc/6R3G-VUP6>]; William Roberson,

Cherokee nation can only make a request to the automaker.³¹⁷ Yet if the Cherokee nation started to use the name Jeep to sell their products, they would most certainly face serious legal troubles for using the Jeep trademark.

There are, no doubt, several challenges to overcome when seeking to protect cultural identities. These include how to define the scope of such rights, identifying the protectable subject matter and crafting the limitations and exceptions. This type of protection can also become complicated when the source communities are not located within a single border but live in different nation states.³¹⁸ However, IP law is not unfamiliar with such complexities, and it would be possible to engage in the same balancing of competing interests with a cultural personality right. A human rights framing brings additional tools for balancing competing interests while protecting human dignity.

Iconic Jeep Cherokee Heads for Retirement After Almost 50 Years of Production, FORBES (Mar. 25, 2023), <https://www.forbes.com/sites/billroberson/2023/03/25/iconic-jeep-cherokee-heads-for-retirement-after-almost-50-years-in-production/?sh=283d5690c8ae> [https://perma.cc/G78V-RWQU] (“In 2021, the indigenous Cherokee Nation Petitioned Stellantis to “retire” the Cherokee name amidst a general wave of rethinks around product names that some categorized as racist or appropriating.”). See CHEROKEE NATION, <https://www.cherokee.org/> [https://perma.cc/3HA8-3TQ5] (“Today, the Cherokee Nation is the largest tribe in the United States with more than 450,000 tribal citizens worldwide.”)

317. Gross, *supra* note 316 (“Suzan Shown Harjo, a scholar who has been at the center of efforts to persuade teams, schools and colleges to drop Native American names and mascots, said Jeep’s explanation for its use of the Cherokee name — that it was honoring the tribe — was just an excuse. ‘Of course it’s not an honor,’ said Ms. Harjo, the director of the Morning Star Institute, a group that promotes Native American causes. She said the use of Native American names has been particularly painful when companies and sports teams use them without permission.”).

318. Edson Beas Rodrigues Jr., *Brazil: Property Rights, Biocultural Resources and Two Tragedies—Some Lessons from Brazil*, in GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: CASE STUDIES AND CONFLICTING INTERESTS 113, 134 (Tania Bubela & E. Richard Gold eds., 2012). (“Specifically in the context of ATK [Associated Traditional Knowledge] and biological resources, a tragedy of the anticommons may arise in two situations: each of these resources may be held by two or more traditional communities or states; and a user may need to employ two or more IBRs [Intangible Biocultural Resources] on the same project.”).

IV. HUMAN RIGHTS, INTANGIBLE CULTURAL HERITAGE & CULTURAL PERSONA

A. Protecting the Collective Cultural Persona through Dignity and Autonomy

The International Bill of Rights, which is comprised of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, has several provisions which have been interpreted as protecting cultural rights. The Universal Declaration of Human Rights (“UDHR”),³¹⁹ is the foundational international human rights instrument, and it is considered part of customary international law.³²⁰ The UDHR recognizes the dignity inherent in each human being because “all human beings are born free and equal in dignity and rights.”³²¹ In addition to principles of non-discrimination,³²² and prohibitions against slavery³²³ and torture,³²⁴ which may come to mind when most people think of human rights, the UDHR addresses the right to culture.³²⁵ There are also human rights aspects to IP Law.³²⁶ Human dignity serves as the theoretical foundation for the right of publicity in the United States, but it is also the foundation for human rights to cultural identity.

As it relates to identity, the right to privacy and freedom from attacks on one’s honor and reputation found in article 12 of the UDHR is relevant to the ability to control the use of an individual identity.³²⁷ Because human rights are individualistic, the right to

319. UDHR, *supra* note 211.

320. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMPAR. L. 1, 1–5 (1996) (describing that the Universal Declaration of Human Rights as come to be understood as customary international law).

321. *Id.* at art. 1.

322. *Id.* at arts. 2, 7.

323. *Id.* at art. 4.

324. *Id.* at art. 5.

325. *Id.* at art. 27.

326. See generally *Intellectual Property Law and Human Rights* (ed. Paul L.C. Torremans, 2020) (discussing copyright as a human right, the right to freely receive and impart information, the conflict between the right to education and copyright, and other topics); *infra* note 147 (listing scholarship discussing the human rights aspects of intellectual property).

327. UDHR, *supra* note 211, art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon

privacy and reputation is not a right that is easily extended to a group. While it may not be based expressly on international human rights law, it is possible to have a collective reputation. Indeed, a collective reputation, whether as a body corporate or otherwise, is exactly what collective trademarks and geographical indications are designed to protect. While the human right to privacy is connected to the argument for a cultural personality right, the primary human rights that I will focus on here are those that are more expressly connected to cultural rights.

i. Cultural Rights

Cultural rights have received relatively little attention in international human rights law. This is because the international human rights system has focused on individual rights, with the rights of minorities and indigenous people being almost invisible.³²⁸ It is not surprising that Western colonial powers would be reluctant to focus on minority rights or concepts such as self-determination.³²⁹ The mainstream view in international human rights law was that protecting the rights of the individuals within a group was sufficient, and that to give rights to the group as a group would be potentially harmful to individual rights.³³⁰

Still, several human rights can support dignitary protections for collective cultural identities.³³¹ Cultural rights refer to human rights that expressly refer to the protection and promotion of culture or that support the human right to culture for individuals and

his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

328. Athanasios Yupsanis, *The Concept and Categories of Cultural Rights-Their Broad Sense and the Relevant Clauses of the International Human Rights Treaties*, 38 SYRACUSE J. INT'L & L & COM. 207, 231 (2010) (emphasizing that the rights of minority groups and indigenous peoples were invisible in the post-war system).

329. Molly Lollis, *Reevaluating Self-Determination in a Post-Colonial World*, 16 BUFF. HUM. RTS. L. REV. 229, 235 (2010) (arguing that post-colonial declarations on self-determination operated within a statist framework that ignored minority rights by treating colonized peoples as a homogenous group).

330. *Id.* at 231–32.

331. Yvonne Donders, *Foundations of Collective Cultural Rights in International Human Rights Law*, in CULTURAL RIGHTS AS COLLECTIVE RIGHTS: AN INTERNATIONAL LAW PERSPECTIVE 87, 90–91 (A. Jakubowski ed., 2016) (“Cultural rights can be broadly defined as human rights that directly promote and protect the cultural interests of individuals and communities”).

communities.³³² In international human rights law, cultural rights are expressed through various human rights, such as the right to participate in cultural life, the right to freedom of expression, and the right to self-determination, among others.³³³ Importantly, article 27(1) of the UDHR provides that everyone “has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”³³⁴ Similar language is found in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³⁵

The collective in the form of the “community” is mentioned in the UDHR and other human rights instruments in relation to the duties, where each individual has to the “community in which alone the free and full development of his personality is possible.”³³⁶ Similar language is found in the American Declaration on the Rights and Duties of Man, including the duty to conduct oneself such that everyone can fully develop his or her personality.³³⁷ While human rights are primarily individualistic, it is clear that some rights, such as the right to culture, can only be enjoyed within the context of a community.³³⁸ By definition, cultural rights imply some collective activity because culture is a collective, rather than individual, production.

332. *Id.*

333. See generally, DONDERS, *supra* note 172 (discussing how cultural rights are referenced in various international human rights); see also Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT'L 66, 69 (2004) (“The [2003 UNESCO Convention] views heritage as something shared within and symbolically identified with a cultural community, and traditional in that it is socially transmitted from one generation to the next.”).

334. UDHR, *supra* note 211, at art. 27(1); Helaine Silverman & D. Fairchild Ruggles, *Cultural Heritage and Human Rights*, CULTURAL HERITAGE AND HUMAN RIGHTS 4 (Helaine Silverman & D. Fairchild Ruggles eds., 2007) (“[Article 27], in particular, introduced the idea that culture was an aspect of human rights, although it did not elucidate the specific relationship between individuals, communities, and nations, and did not clarify how conflicts among these three entities could or should be resolved.”).

335. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15 (Dec. 16, 1966) [hereinafter ICESCR].

336. UDHR, *supra* note 211, at art. 29(1).

337. Organization of American States, American Declaration on the Rights and Duties of Man art. 29, May 2, 1948, E/CN.4/122 (“It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.”).

338. UDHR, *supra* note 211, at art. 27.

These cultural rights imply the ability to define cultural boundaries and create groups that include members with certain shared cultural experiences or heritage while excluding others. Cultural rights connect to various human rights interests, including the rights to sovereignty, development, expression, and the right to human dignity, which is the basis for all human rights.³³⁹ Cultural rights can also be viewed as property interests because property is, by definition, about defining the boundaries for inclusion and exclusion. Indeed, it is the right to exclude others that is the hallmark for both tangible and intangible property rights.³⁴⁰

The proposed cultural identity right, although not a human rights model, supports cultural rights as recognized under human rights law. The Fribourg Declaration, a declaration on cultural rights that was developed by a group of human rights experts, proposed a cultural right that embraces cultural identity.³⁴¹ It did not purport to create new rights. However, these experts gathered to define the rights that are already recognized in various human rights instruments.³⁴² The Fribourg Declaration was not adopted by states and has no legal status, but it is valuable because it reflects the views of academic experts in the field of cultural rights.³⁴³ Cultural rights as human rights supports a dignity basis for a cultural identity right

339. *Id.*

340. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (“The right to exclude is in this sense fundamental to the concept of property.”).

341. Fribourg Group, *Cultural Rights: Fribourg Declaration* 1, 12 (May 7, 2007), <https://www.unifr.ch/ethique/en/research/publications/fribourg-declaration.html> [https://perma.cc/PS6H-UZTW] (“The proposed text is a new, completely reworked version of a document drafted for UNESCO by the international working group known as the “Fribourg Group” because it operates out of the Interdisciplinary Institute for Ethics and Human Rights of the University of Fribourg in Switzerland.”).

342. *Id.* (“The recent development of the protection of cultural diversity can only be understood as an attempt to avoid relativism, anchored in the indivisibility and interdependence of all human rights, and more specifically by clarifying the importance of cultural rights. The present Declaration groups together and defines rights that are already recognized, albeit in a dispersed manner in many instruments. Clarification is necessary to underscore the crucial importance of these cultural rights as well as the cultural dimension of other human rights.”).

343. Ferri, *supra* note 60, at 3 (“While the Declaration does not possess any legal status, it is of considerable significance. It does not define new cultural rights but has gathered in a single document all the cultural rights already recognised under international human rights law, albeit ‘in a dispersed manner’” (quoting the Declaration’s preamble)).

that is akin to a collective publicity right for cultural groups. Importantly, the cultural personality right, like the right of publicity, has its basis in human dignity.

ii. Self-Determination

Self-determination is one of the important reasons to protect indigenous cultural heritage.³⁴⁴ Boundaries enable individuals and groups to define their spaces of inclusion and exclusion. It is this ability to exclude others that is the hallmark for both tangible and intangible property rights.³⁴⁵ Misappropriation of cultural identity is based on taking what is perceived as belonging to another.³⁴⁶ From an individual perspective, this is about autonomy. But from a collective perspective, autonomy corresponds with sovereignty and self-determination. This is not simply a question of whether something should be classified as “property” per se. It is also about acknowledging boundaries and choosing to respect or cross those boundaries, which is why the proposed cultural identity right is fundamentally about the dignity interest.

While group rights and the right to self-determination are controversial for some scholars, others have pointed out that these concerns with international human rights law are based on Eurocentric views of the world.³⁴⁷ Non-Western approaches to international human rights law must also be taken into consideration. The African Charter, for example is a human rights instrument that recognizes individual human rights but also expressly acknowledges collective rights.³⁴⁸ The first part of the African Charter addresses individual rights, such as the inherent

344. Susy Frankel, *Using Intellectual Property Rules to Support the Self-determination Goals of Indigenous Peoples*, in RESEARCH HANDBOOK ON HUMAN RIGHTS & INTELLECTUAL PROPERTY 627, 632 (Christophe Geiger ed., 2015) (defining traditional knowledge without giving a full understanding to the traditional knowledge holders undermines self-determination).

345. Merrill, *supra* note 340.

346. See Part I.B. and accompanying footnotes (discussing the notion of cultural appropriation).

347. Will Kymlicka, *Linking Self-Determination and Human Rights: Comment on Peter Jones*, in HUMAN RIGHTS: MORAL OR POLITICAL? 460, 467 (Adam Etison, ed., 2018) (describing international law as Eurocentric).

348. African Charter of Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58 (discussing “peoples” rights in various articles such as Article 20).

dignity that we individually enjoy as human beings,³⁴⁹ and principles of equality and non-discrimination.³⁵⁰ Articles 19–24 of the African Charter set out the rights that are enjoyed collectively, as “peoples.”³⁵¹ This is important because it reflects a view of human rights that focuses on both the group and the individual. Article 19 states that “[a]ll peoples shall be equal,” that they should all enjoy the same rights.³⁵²

Intangible cultural heritage is often closely related to pre-colonial national identities.³⁵³ These may be different cultural or indigenous groups that do not necessarily correspond to the nation-state. However, the official boundary in international law is the nation-state and it is this structure that is recognized by international IP law.³⁵⁴ Alternatively, boundaries may be defined by a legal entity such as a corporation. As it relates to a collective personality, the boundary does not have to be the nation state or a legal corporation. It could be an identifiable cultural group.³⁵⁵ Indeed, on the African continent, for instance, nation-state boundaries that were imposed during colonialism may not reflect a collective or individual identity as much as pre-colonial cultural group

349. *See id.* at art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”).

350. For a principle of non-discrimination, *see, e.g., id.* at art. 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status”); *see also id.* at art. 3 (“1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law.”).

351. *See id.* at arts. 19–24.

352. *Id.* art. 19.

353. *See The Subtle Power of Intangible Heritage*, Human Sciences Research Council, 8 (2004) (“In developing countries, the intangible heritage that tends to be emphasised is the pre-colonial, indigenous and ethnic heritage.”).

354. Johanna Gibson, *Traditional Knowledge and the International Context for Protection*, 1 SCRIPT-ED 1, 58, 65 (2004) (arguing that the framework of TRIPs facilitates the sovereignty of nation-states).

355. Fiona MacMillan, *The protection of cultural heritage: common heritage of humankind, national cultural ‘patrimony’ or private property?*, 64(3) N. IR. LEGAL Q. 351, 352 (2013) (“The connection between heritage, identity and sovereignty is well known to those who have followed the debate in relation to the rights of Indigenous people over their cultural heritage.”).

boundaries.³⁵⁶ An inclusive approach to boundaries would embrace different kinds of cultural boundaries, including pre-colonial cultural distinctions that may remain to the present day.

As previously mentioned, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is important in the discussion about cultural identity. The UNDRIP specifically addresses the relationship between IP rights and cultural heritage.³⁵⁷ Article 31 of the UNDRIP states that indigenous peoples “have the right to maintain, control, protect and develop the cultural heritage, traditional knowledge and traditional cultural expressions,” as well as “the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”³⁵⁸ This international instrument is a declaration and does not impose enforceable obligations on States, but it has been widely accepted.³⁵⁹

Despite the existence of international legal frameworks to support protection for intangible cultural heritage, there is no legally

356. Pierre Englebert, Stacy Tarango & Matthew Carter, *Dismemberment and Suffocation: A Contribution to the Debate on African Boundaries*, 35 COMPAR. POL. STUD. 1093, 1093–1095 (2002) (“There is little disagreement that the boundaries of contemporary African states are unusually arbitrary as a result of their largely colonial origins There is no consensus, however, as to whether this has been a liability for African states Despite measurement difficulties, our findings are surprisingly strong and contrast with the hesitations of the literature: Arbitrary boundaries do magnify the likelihood of international and domestic conflicts and weaken the stability of governments.”); see generally Swati Parashar & Michael Schulz, *Colonial legacies, postcolonial ‘selfhood’ and the (un)doing of Africa*, 42 THIRD WORLD Q. 867 (2021) (discussing “the impact of colonialism on the postcolonial politics and decolonial developments in Africa”).

357. G.A. Res. 61/295, United Nations Declaration of Rights of Indigenous Peoples (Sept. 13, 2007).

358. *Id.* at art 31.1 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”).

359. Covarrubia, *supra* note 27, at 16–17 (“Adopted by the United Nations General Assembly in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has no legal binding effect. Some scholars nonetheless argue that it already reflects binding norms of customary law or that some of its parts can achieve the status of customary norms.”).

enforceable protection for intangible cultural heritage across borders and nothing to prevent anyone from making commercial use of a collective cultural identity for their own private commercial gain. While the proposed cultural personality right would not provide a general legal protection for intangible cultural heritage, it could address legitimate concerns about unauthorized uses of cultural identities to sell goods or services. This may be characterized as advocating for a property model for cultural identity. While a property model is not essential, as the next section explains, a property model should not be rejected outright.

B. The Value of Property Model for Intangible Cultural Heritage

Misappropriation of cultural identity is based on taking what is perceived as belonging to another. But this goes beyond the question of whether something should be classified as “property.” It is also about crossing boundaries, which is why it is fundamentally about the dignity interest, which serves as the theoretical foundation for the right of publicity but also a human right to cultural identity.

Admittedly, property-style protection that enables one to exchange rights for monetary compensation may not be appropriate for all kinds of intangible cultural heritage. For instance, communities may object to any uses of intangible cultural heritage that has religious or spiritual significance. Some commentators may reject a property model because they view property as a Western construct that does not align with non-Western values.³⁶⁰ However, in practical terms, affected communities are not sufficiently well versed in the intellectual property system to use it to their advantage.³⁶¹ Even if not all intangible heritage fits easily within a property model,

360. Lyndel V. Prott & Patrick J. O’Keefe, *‘Cultural Heritage’ or ‘Cultural Property’?*, 1 INT’L. J. CULTURAL PROP. 307, 310 (1992) (discussing how concepts of property and ownership that include exclusivity and alienability may conflict with heritage values and non-Western societies’ understanding of their relationship to cultural objects and sites).

361. See *Traditional Knowledge*, *supra* note 124, at 112 (“Only some of the people who hold traditional knowledge oppose the commodification of their knowledge on religious or cultural grounds; but *most* are poor, lacking in the infrastructure for production, and are ignorant of intellectual property laws and commercial knowledge of marketing and branding. Intellectual property ownership does not come naturally.”).

a limited property model is appropriate and justified in relation to cultural identities.³⁶²

Some cultural heritage scholars argue that cultural heritage should not be treated as cultural property and that property is a term that lawyers inject into the cultural heritage conversation, while historians, archeologists, anthropologists, and other researchers use the term cultural heritage rather than cultural property.³⁶³ Property, it is argued, “connotes ownership” rather than stewardship of cultural heritage for future generations and leads to the inaccurate perception that one can do as they wish with their property.³⁶⁴ However, as these authors note, this perception of absolute rights is not accurate, as there are several limitations to property of which the public may not be aware.³⁶⁵ The same may be true in relation to IP rights, but IP rights continue to be protected and even strengthened.

In addition, critics of a property model for intangible cultural heritage contend that it is harmful to cultural exchange and creativity to assert property rights over intangible cultural

362. Kristin Carpenter et al., *In Defense of Property*, 118 YALE L. J. 1022, 1100–01 (arguing for a stewardship approach to the management of indigenous peoples’ intangible cultural property given the complicated and nuanced system of laws); Sunder, *supra* note 93, at 169 (“Property rights are useful to the extent that they can transform the intangible harms of cultural imperialism and the loss of local knowledge, ideas, and dignity into tangible, legally recognizable harms capable of remedy.”).

363. Prott & O’Keefe, *supra* note 360, at 319 (“The concept of the ‘cultural heritage’ is one well recognized and universally used by historians, archaeologists, anthropologists and other researchers of human life both past and present. They virtually never use the term ‘property’ unless in a legal context. In the law which has embodied the notion of ‘property’ it is now coming to be recognized that this is inadequate and inappropriate for the range of matters covered by the concept of the ‘cultural heritage’.”).

364. Valentina Valdi, *Cultural Heritage in International Economic Law*, 32–33 (2023) (“While cultural property and cultural heritage sometimes are used interchangeably, strictly speaking, however, the term property connotes ownership’, emphasizes the economic value of cultural assets, and grants owners the right to prevent others from use and the right to transfer property to others” (internal quotations omitted)).

365. *Id.* at 310 (“Property connotes ownership and this, as stated above, has been defined in the Common Law as meaning the right to exploit, to alienate, to exclude. While that legal definition may not be consciously held in those terms by members of the public it is sufficiently strong for there to be a perception of ownership as being the right to do what one wishes with what one owns. That perception is of course over-simplified to the point of distortion. It is difficult to think of anywhere in the world where such a concept of absolute ownership applies.”).

heritage.³⁶⁶ Often, critics assert that traditional songs, dances, stories, symbols and knowledge that are passed down within communities are the common heritage of mankind and that creating property rights in this intangible cultural heritage reduces the materials that are freely available for use by anyone as part of the public domain.³⁶⁷ Those objecting to protection for intangible cultural heritage express concern that it will limit the public domain.³⁶⁸ This is because what is currently unrecognized by Western legal systems, intangible cultural heritage, is available to anyone to use. The “common heritage” narrative is, however, precisely the problem. Moreover, the concept of the public domain is not a neutral one. In addition to potentially favoring the creations by the wealthy over those of the poor, it privileges Western notions of property while leaving the intangible cultural heritage of the developing world unprotected.³⁶⁹ Writing about indigenous peoples in the United States, Professors Carpenter, Riley, and Katyal advocate for boundaries based on property law concepts.³⁷⁰

A property-based model is important because property gives one the right to exclude others. Definitions of property may differ, even within the Anglo-American tradition.³⁷¹ William Blackstone famously described property as an “absolute right, inherent in every Englishman, ...which consists in the free use, enjoyment, and

366. KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY, CREED, COUNTRY, COLOR, CLASS, CULTURE* 297–98 (2018) (“Once we abandon organicism, we can take up the more cosmopolitan picture in which every element of culture . . . is separable in principle from all the others.”).

367. WHO OWNS NATIVE CULTURE, *supra* note 176, at 236–48.

368. Brown, *supra* note 61 at 40 (stating that Rosemary Coombe “observes that the lively public domain sought by cultural internationalists can only prosper if minority cultures survive the current process of globalization.”).

369. *Traditional Knowledge*, *supra* note 124, at 106 (“Anupam Chander and I have argued that, while the banner of the public domain is taken up for all of humanity, a binary view of ‘intellectual property versus the public domain’ may not be to the benefit of the world’s poor. Often, we argued, the benefits of an open-access commons go to the richest and the strongest. Differences in wealth, gender, and class determine whether one will in fact be able to convert the riches of the commons into lucrative property.”) (footnotes omitted).

370. Carpenter et al., *supra* note 362, at 1029 (“Thus, without rejecting the force or utility of ownership, we propose that cultural property claims are often better explained and justified through a stewardship model that effectuates the dynamic pluralism of group-oriented interests.”).

371. Gregory S. Alexander & Eduardo Penalver, *AN INTRODUCTION TO PROPERTY THEORY 1* (2012) (“Defining property turns out to be a very challenging task. Indeed, as Jeremy Waldron has observed, some commentators have argued that the concept of property defies definition.”).

disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”³⁷² As some scholars have observed in relation to publicity and image rights, an interest may qualify as property although it does not have all the attributes of a property right.³⁷³ There are many nuances to property, but the right to exclude others is arguably its most essential defining aspect.³⁷⁴ Thus, even if a right does not have all the elements of property, such as the right to freely dispose of the property, there may still be a proprietary interest based on the right to exclude.³⁷⁵

This ability to control the use of one’s cultural heritage and collective identity by excluding those outside the community is one of the salient aspects of the debates regarding the misappropriation of intangible cultural heritage.³⁷⁶ The boundaries of the claimed

372. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, 134–35, 140–41 (1979).

373. HUW BEVERLEY-SMITH ET AL., PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION 215 (2005) (“Although an interest labelled as a property right normally possesses certain characteristics in that it may be transferred to others, may be bequeathed, or may be liable to be seized to satisfy a judgment, an interest may qualify as property for certain purposes even though it lacks some attributes that a property right might usually possess. The common forms of intellectual property are only property in a limited and metaphorical sense and the fact that they are labelled as property rights does not, in itself, determine their scope.”).

374. Alexander & Penalver, *supra* note 371, at 3 (citing Thomas Merrill stating that the right to exclude is not just essential to property, “it is the sine qua non. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.”).

375. For example, some commentators may argue that if you cannot transfer something, it is not truly your property. This is because, while some see exclusion as the very basis of property, it is also understood as involving a bundle of rights. Legal theorists have argued that neither the bundle of rights nor exclusion theory accurately define property. See generally Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 396 (2003) (“The substance of the concept of property remains uninformed by the right to exclude. For if one speaks only of the right to exclude, the unanswered questions remain: a right to exclude from what? And why a right to exclude? The answer according to the integrated theory of property is straightforward: it is the right to exclude from the right of use, or more specifically, from the rights of acquisition, use and disposal.”).

376. See Gibson, *supra* note 354, at 63 (discussing the irrelevance of an individualistic IP model for cultural heritage, but acknowledging the importance of boundaries: “Nevertheless, this irrelevance of Western-style ownership is not a license to abandon any concept of indigenous or traditional ownership at all, thus delivering traditional knowledge as a global resource to be exploited and removed to the private domain of individual commercial interests. On the contrary, it is the

property interest will depend on the heritage in question and will vary from community to community. However, it can be defined and identified because we are able to identify communities and the related intangible cultural heritage. We know, for example, that Jeep is a trademark that is owned by a corporation and protected by law. Similarly, we can recognize that Cherokee is a specific cultural group that can be identified and could be given legal control over the commercial use of their name as part of their collective identity.

It has been argued that the U.S. right of publicity does not protect identity as property but instead prevents the “unauthorized commercial exploitation of that associative value.”³⁷⁷ In the European context, the protection of the human persona is not as expansive as in the United States, and the EU does not treat persona as a property right.³⁷⁸ Thus, while control of identity and the right to exclude others is important, a right of publicity model does not necessarily have to be a property model with all the rights, such as full alienability, that may be associated with property. Importantly, without a broadly recognized property right or basis for at least a property-like claim, traditional and indigenous communities are completely dependent on individuals and organizations outside of the community to respect their cultural heritage purely out of some sense of morality or fairness.

As we have seen over the past several decades, there has been resistance to recognizing and respecting intangible cultural heritage.³⁷⁹ Completely rejecting a property model in favor of a stewardship model leaves communities with limited practical solutions, especially in light of the current international framework for IP protection. This is why the Cherokee were dependent on the

recognition of the difference in operation and process of ownership within a communal setting.”).

377. TAN, *supra* note 233, at 108–10, 114–16.

378. David Lefranc, *Commercial Exploitation of Human Persona in the European and French Law: Who Needs Trademarks When You Have Personality Rights?* in THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW 365, 381 (Irene Calboli & Jane C. Ginsburg eds., 2020) (“The question ‘who needs trademarks when you have personality rights?’ can be answered. In European and French law, trademark law is not being overtaken by personality rights. The main reason is certainly that celebrities are not as well protected as in the United States. The commercial exploitation of an individual’s fame is always treated by torts, without any recognition of some real property right.”).

379. See Wüger, *supra* note 155, at 184 (discussing the efforts since the 1960’s to protect intangible cultural property).

goodwill of the manufacturers of Jeep to stop using the Cherokee name.³⁸⁰ This is why the Maasai were not able to do anything to stop Louis Vuitton from using their name.³⁸¹ The reality that some cultural systems differ from existing international IP legal structures does not mean that these communities must choose to remain outside of these structures to their detriment.³⁸²

Without sovereignty and boundaries, cultural groups do not have the scope to monetize or prevent the monetization of their identities. The right of publicity in the United States protects individual dignity, and it is this dignity model which serves as a guide for protecting collective cultural identity. A collective cultural personality right can serve as a tool to protect individual dignity, collective dignity, and sovereignty. This ability to exclude others is essential to the ability to monetize one's identity or to prevent its commercialization if one so chooses. Just as corporations can control their brand identities through trademark law, a cultural personality right would support the human dignity of individuals and cultural groups by enabling identifiable cultural groups to protect their cultural expressions and identities, which are part of their intangible cultural heritage.

This is not to say that one *must* adopt a property model, but merely that it must be an option. Indeed, many countries, such as the United Kingdom, do not recognize a property right in one's image.³⁸³ A strong version of a cultural personality right may resemble a property right with a right to exclude others and the ability to license the interest, but perhaps not the right to transfer the interest. A more minimalist version of the cultural personality right may be characterized more as a tort-based claim or a privacy-based interest with the ability to defensively protect the intangible cultural heritage from unauthorized commercial use. However, to reject a property model for intangible cultural heritage due to its intergenerational and communal aspects or its cultural significance places unjustified limitations on the potential options for protection. There are also, for

380. *Supra* Part III.B.iii (No Collective Publicity Right)

381. *Id.*

382. Engle Merry, *supra* note 44, at 599 (explaining that the indigenous adoption of foreign legal systems to claim sovereignty represents resistance rather than surrender because power dynamics operate through cultural meanings while opposition manifests as counterhegemonies and non-compliant practices).

383. *Fenty v. Arcadia Group Brands Ltd.* [2015] EWCA (Civ) 3, [27] (U.K.) (“[T]he absence of an image right is a matter of law”).

example, approaches to property law that recognize property as a tool for human flourishing.³⁸⁴

The creation of a cultural personality right also raises questions related to freedom of speech and expression. Questions regarding freedom of expression, which go beyond the scope of the current Article, have been addressed by courts as they navigate the balance between copyrights, trademarks, publicity rights, and expression.³⁸⁵ This becomes a question of balancing competing interests. Under a dignity-based framework, it is important to acknowledge the rights of the individual to their cultural and individual expression and to balance that against interests of the group.

CONCLUSION

This Article has sought to present theoretical justifications for creating a cultural personality right. The scope of the right has been briefly outlined in this Article, but the precise application and limitations of such a right are important questions which will be addressed further in subsequent works.

As this Article has explained, classic IP rights have received harmonized protection under international law, while efforts to protect intangible cultural property have been thwarted.³⁸⁶ Yet, one

384. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law* 94 CORN. L. REV. (2009) 745, 749 (“Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally.”) *Id.* See generally Jose E. Alvarez, *The Human Right to Property* 72 U. MIAMI L. REV. (2018) 580 (discussing different conceptions of the international human right to property from individualistic to collective conceptions of property) *Id.* at 689 (“The least controversial normative justification for the international right of property (including the right to private property) may well be that it is essential to the advancement of human dignity, that is, the full development of ‘freedom, autonomy and the development of independence and responsibility’ of individuals.”)

385. See, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 579 (1985) (explaining that first amendment protections are embodied in the Copyright Act.); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (discussing the balance between freedom of expression and protection within the Copyright Act).

386. Wüger, *supra* note 155, at 184 (discussing the 1976 Tunis Model Law on Copyright for Developing Countries, the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, and the UNESCO Recommendation on the Safeguarding of Folklore).

area where developing countries and indigenous communities arguably have the potential to generate wealth is in relation to their cultural heritage and related products.³⁸⁷ Drawing on a dignity-based version of the U.S. right of publicity, trademark law, and human rights law, this Article has articulated the normative foundations to establish a legal framework for a cultural personality right. This Article focuses on the challenging first step of justifying a new cultural identity right rather than detailing the precise scope and limitations of such a right.

This proposal draws heavily on a dignity-based U.S. right of publicity as articulated by Professor Rothman, but it diverges from her conception by focusing on cultural groups and international human rights. This proposal for a cultural personality right turns to international law because protecting intangible cultural heritage across borders requires both domestic and international solutions. Indeed, many nations have domestic laws that protect their intergenerational cultural heritage, but there is a lack of international cooperation to protect cultural identities and symbols from commercial misuse.³⁸⁸ Without international recognition and enforcement, the domestic protection of intangible cultural heritage has limited effect. However, as this Article has argued, the existing IP framework can be modified to develop and incorporate a new cultural personality right that has its basis in human dignity.

387. Ron Layton, *Enhancing Intellectual Property Exports through Fair Trade*, in *POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 75, 84–85 (J. Michael Finger & Philip Schuler eds., 2004) (discussing the possibility of African music, traditional medicines, and other products as a source for wealth generation); *id.* at 85 (“In theory, every person in each developing country owns a share in some IP, such as its botanical assets, traditional medicines, designs, and artistic material owned by a tribe, regional, or subnational group or country. Poverty can be reduced if exploitation of that IP can provide some basic income to each family.”).

388. See, e.g., Cultural Heritage Protection Act, amended by Act No. 8346, Apr. 11, 2007 (S. Kor.), translated in UNESCO Cultural Heritage Laws Database, <https://www.wipo.int/wipolex/en/legislation/details/5799> [<https://perma.cc/Q595-CFEX>]; Law of the People's Republic of China on Intangible Cultural Heritage (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective June 1, 2011) 42 WIPO Lex (China); An Act Providing for the Protection and Conservation of the National Cultural Heritage, Strengthening the National Commission for Culture and the Arts (NCCA) and its Affiliated Cultural Agencies, and for Other Purposes, Rep. Act No. 10066 (Mar. 26, 2010) (Phil.); Heritage New Zealand Pouhere Taonga Act 2014 (N.Z.). See generally Covarrubia, *supra* note 27 (discussing how many international agreements regarding culture are not legally binding).