

A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions

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I. INTRODUCTION

Towards the end of 2007, Taiwan's Congress (Legislative Yuan) suddenly and unexpectedly passed the *Protection Act for the Traditional Intellectual Creations of Indigenous Peoples* (hereafter referred to as "Protection Act").¹ Little discussion of this protection act occurred in the academic community prior to its passage into law. Why was the protection act approved by the legislature? Is the model for the protection of traditional knowledge specified by the protection act appropriate? These questions warrant in-depth analysis.

The origins of folk traditions lie far back in the mists of time, making it difficult to obtain copyright protection for traditional cultural expressions. As a result, traditions have normally been considered to be in the public domain. Today, as part of the efforts to protect traditional cultural expressions by indigenous peoples, there is a movement to provide protection for traditional knowledge that is in the public domain.

Over the past few years, globalization has led to a steady increase in the scope of intellectual property rights protection. Some scholars have

¹ Lawbank, *Protection Act for the Traditional Intellectual Creations of Indigenous Peoples*, <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0202.asp> (last visited Jun. 12, 2009). Unlike the United States, Taiwan does not compile provisions into books or codes. Thus it is challenging for me to cite from a specific source. However, this is a trustworthy website that contains Taiwanese laws.

begun to voice concerns, opposing further expansion of the scope covered by intellectual property rights. They stress the importance of public domain, suggesting that the granting of excessive protection to intellectual property rights will increase the cost of creating new knowledge in the future.² These scholars have proposed a new concept, that of “access to knowledge.”³

The present study seeks to examine the logic that underpins these two movements. On the surface it appears that seeking to protect traditional cultural expressions and “access to knowledge” are completely opposed to one another, but is it possible that the two movements have more in common than meets the eye? What kind of protection strategies should we adopt with respect to the culture of indigenous peoples so that both of these apparently conflicting demands can be satisfied? This study examines a number of different models for the protection of traditional cultural expressions, and tries to determine which of them is best able to achieve the goals of both movements.

Section II of this paper begins with an overview of some of the models that have been proposed for protecting indigenous peoples’ traditional culture. Section III discusses the concepts of public domain protection and expansion of the scope of intellectual property rights, and explores the contradictions that these concepts embody with respect to the protection of indigenous peoples’ traditional culture. The paper then examines the “access to knowledge” movement that has arisen in opposition to the expansion of intellectual property rights, and considers how a compromise can be reached between this movement and the movement to protect indigenous peoples’ traditional cultural expressions, taking the controversy over the recent, highly successful Taiwanese movie *Cape No. 7* as a starting point. Section IV examines the legislative purpose behind the enactment of the *Protection Act*, and considers whether the protection model adopted in the *Protection Act* will actually be able to achieve these legislative goals. This section makes reference to the *Indian Arts and Crafts Act of 1990* in the U.S. The final section of the paper proposes that Taiwan should adopt the authentication model, the most suitable model for protecting the public domain while also helping to promote the traditional culture of Taiwan’s indigenous peoples.

II. MODELS FOR PROTECTING TRADITIONAL CULTURAL EXPRESSIONS

Numerous models propose protection of traditional and cultural expressions. For the purposes of this study, these models are divided into six categories: the public domain model, the customary law model, the authentication model, the commercial use and benefit sharing model, the trust model, and the ownership model. These models are discussed

² See *infra* notes 84-87, 112, and accompanying texts.

³ See *infra* note 112 and accompanying texts.

separately below, followed by a description of Taiwan's model.

A. The Public Domain Model

Knowledge in the public domain is not protected by intellectual property rights and can be shared, accessed, and used by anyone free of charge. Public domain knowledge provides a foundation on which knowledge can be revised, supplemented, and improved.

Adoption of the public domain model implies that traditional cultural expressions do not belong to any one individual; any person can freely make use of this knowledge. The advantage of this model is that it can promote sharing of knowledge, while reducing the risk that large corporations will use intellectual property rights as a means of exploiting indigenous peoples and stealing their knowledge.⁴

In reality, the adoption of the public domain model merely represents a continuation of the status quo. Under the status quo, existing knowledge (including creative works produced in the distant past) is not eligible for intellectual property rights protection.⁵

It is sometimes possible to make use of existing copyright systems to prevent the theft of knowledge by outsiders. One example is the dispute regarding the German pop group Enigma's use of the "Old People's Drinking Song" originally recorded by Kuo Ying-nan (a member of the Ami nation).⁶ Here, it should have been possible for the artists to ensure protection of their rights through the application of copyright law, specifically Article 7-1 of Taiwan's Copyright Law.⁷ This is what is sometimes referred to as "defensive protection" in discussions of the systems for protecting indigenous people's traditional cultural expressions. Defensive protection involves making full use of existing intellectual property rights legislation to protect oneself.⁸ Of course, where traditional

⁴ Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 112-15 (2003).

⁵ Regarding the protection of traditional cultural expressions under existing copyright laws, and the problems that this entails, see Dr. Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT'L & COMP. L. 747, 757-62 (2003).

⁶ This case attracted worldwide attention; see, e.g., Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155 (2006).

⁷ Chang Chung-hsin, 原住民族傳統智慧創作保護條例完成立法 [The Enactment of the Protection Act for the Traditional Intellectual Creations of Indigenous Peoples] (Dec. 9, 2007), available at <http://www.copyrightnote.org/crnote/bbs.php?board=4&act=read&id=178>.

⁸ Wang Zih-lung, 原住民族傳統文化表達保護之研究 [Protecting the Indigenous People's Traditional Cultural Expressions] 109-14 (June 2006) (unpublished Master's thesis, Fu-Jen Catholic University) (on file with author); Kuo, Hua-jen, Ch'en, Shao-hua, Ch'en, Shih-chang and Chou, Hsin-yi, 傳統知識之保護初探 [A Preliminary

cultural knowledge has already entered the public domain, it makes little sense to seek retroactive copyright protection for such knowledge.

B. The Customary Law Model

If indigenous people's traditional cultural expressions are in the public domain rather than in receipt of formal legal protection, then it may be possible to use the existing social structure and covenants of indigenous peoples – i.e. their customary practice – to protect their traditional culture.⁹

What is meant here by indigenous peoples' existing social structure and covenants is the customary laws that exist in many indigenous communities.¹⁰ A 2001 report by the World Intellectual Property Organization (WIPO) entitled *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* divided indigenous peoples' customary laws into a number of broad categories.¹¹

Types of customary law related to traditional cultural expressions are outlined below.

1. Customary Protocols Regarding Traditional Design, Music and Dance in North America

In some North American indigenous communities, protocols govern the exchange of traditional designs, music, dance and names. Canada's Kainai (Blood) nation has complex rules that determine who can create works using traditional designs, replicate them, revise them or display them.¹² They also have rules governing the transfer and delegation of these rights, as well as a dispute resolution mechanism that provides recourse when rights are violated.¹³ The holders of rights to use traditional designs may be individuals, families, or entire communities. For these purposes, the scope covered by traditional design includes clothing, hair ornaments, moccasins, baskets, tents, etc. Failure to abide by the rules

Exploration of the Protection of Traditional Knowledge], 2 TSINGHUA J. L. & TECH. POL. 49, 73-84 (2005).

⁹ Ghosh, *supra* note 4, at 112.

¹⁰ See Chou Hsin-yi, 傳統知識法律保護之研究 [Legal Protection for Traditional Knowledge], 106-08 (2005) (unpublished Master's thesis, Fu-Jen Catholic University) (on file with author).

¹¹ See World Intellectual Property Organization [WIPO], *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* 57-65 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.

¹² *Id.* at 58.

¹³ *Id.* at 59.

when using these designs constitutes a violation of customary law.¹⁴ With the exception of a limited number of sacred totems, the Kainai do not object to the commercialization of traditional designs, as long as such commercialization is undertaken in accordance with their rules.¹⁵

2. Customary Law Regarding Traditional Symbols and Art in Australia

In Australia's aboriginal nations, customary law dictates how existing totems and other cultural symbols can be used. Usually, such totems and symbols are considered to be the property of the tribe; the depiction of traditional symbols requires authorization from the tribe, as does the replication of such depictions. The Australian aborigines do not accept that rights to traditional culture can be held by an individual; these rights belong to the tribe as a whole, with a group of elders making the decision as to who is allowed to use traditional designs.¹⁶ Aboriginal communities do not believe that their culture should be commercialized, and they are reluctant to allow too many changes to be made to traditional designs; any such changes, and their subsequent use, requires approval from the elders or the tribal council.¹⁷

3. Summary

In reality, customary law can only regulate the behavior of indigenous people themselves; it cannot control outsiders' use of indigenous designs. While indigenous peoples have attempted to use existing practices and methods to protect their knowledge, this has generally not been sufficient to prevent theft of knowledge by people from outside the community.¹⁸

However, there are still those who advocate reliance on customary law, and who believe that governments should not intervene. Kathy Bowrey draws a parallel with the "free software" or open-source software movements, which rely on informal agreements rather than legal prescriptions to achieve their goals.¹⁹ Bowrey suggests that indigenous communities should adopt an approach similar to that used by the open-

¹⁴ *Id.* at 58.

¹⁵ *Id.* at 58-59.

¹⁶ *Id.* at 64.

¹⁷ *Id.* at 63-65. Regarding the rules that Australian aboriginal communities apply to traditional cultural symbols, and the conflict with the concept of "authorship" as used in existing copyright laws, see Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51, 60-62 (2004).

¹⁸ Ghosh, *supra* note 4, at 115.

¹⁹ Kathy Bowrey, *Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices*, 6 MACQUARIE L.J. 65, 89-90 (2006), available at <http://www.austlii.edu.au/au/journals/MqLJ/2006/6.html>.

source movement, developing their own community protocols, rather than relying on external protection through the force of law.²⁰ While this approach may not allow indigenous peoples to control the actions of outsiders, at least it can prevent the application of a “one-size-fits-all” protection model by the state, and would help individual indigenous communities maintain their own existing practices.²¹

C. The Authentication Model

The authentication model advocates the use of an authentication mechanism, whereby only indigenous communities are entitled to determine which products are authentic and which are not products approved by indigenous people themselves.²² Authorized use is indicated by an authentication mark, while non-approved products do not bear this mark.²³ A system of this kind is already permitted under Taiwan Trademark Law providing for the establishment of “collective membership mark”²⁴ and “certification marks.”²⁵ Prior to the passage of the *Protection Act*, this method was commonly used to protect indigenous cultural traditions.²⁶ A similar model was incorporated into a draft version of the Free Trade Area of the Americas (FTAA) agreement.²⁷

Australia provides an example of the adoption of the authentication model. The Australian government realized that most of the profits from the rapidly growing market for Aboriginal art were being siphoned off by

²⁰ *Id.* at 90-92.

²¹ *Id.* at 92-95.

²² Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 817 (2001). Scafidi does not propose authentication as a protective model, but I think it can be a type of model based on its criteria.

²³ For a more in-depth discussion of this type of system, *see id.* at 817-20.

²⁴ Article 75 of the Trademark Act (Taiwan) states, “The use of a collective membership mark shall connote the indication of such mark on relevant articles or documents by the organization or its members in order to identify an organization or membership thereof.” Trademark Act, art. 75 (Taiwan), *available at* <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.

²⁵ Article 73 of the Trademark Act (Taiwan) states, “The use of a certification mark shall connote that the right holder of a certification mark, in order to certify the characteristics, quality, precision, origin or other matters of another person's goods or services, agrees the said person to indicate the said certification mark on articles or documents in connection with the said goods or services.” Trademark Act, art. 73 (Taiwan), *available at* <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.

²⁶ The U.S., Australia, and FTAA draft previously adopted this model, *see infra* notes 27, 28, and 143 and accompanying texts.

²⁷ *See* Anthony Cartee, *Protecting the Indigenous Past While Securing the Digital Future: The FTAA and the Protection of Expressions of Folklore*, 1 LOY. INT'L L. REV. 203, 212-14 (2004).

unscrupulous businessmen, with very little of the money actually reaching Aboriginal artists.²⁸ The businessman engaged in a variety of questionable practices. First, indigenous artworks have been infringed without permission of the original artist. Second, non-indigenous artists have copied indigenous styles and passed their work off as “indigenous.” Third, artwork being sold by “artists,” usually are not actually painted by indigenous artists as claimed. Fourth, product labels are usually misleading. This means that art dealers usually label their artworks as “authentic” Indian art, when in fact it is not. Fifth, engaging in unfair contracts in which art dealers take advantage of indigenous artists’ lack of legal knowledge. Finally, use of indigenous styles by other indigenous artists.²⁹

Dealers also engaged in misleading labeling. In the end, the government decided to adopt an authentication system, which was intended to achieve the following goals:

- (1) To protect the artistic culture of the Australian Aborigines and of the Torres Strait Islanders.
- (2) To ensure that Aboriginal and Torres Strait Islanders and other Aboriginal persons and Torres Strait Islanders can obtain fair, equitable compensation for their cultural products.
- (3) To ensure that consumers can purchase Aboriginal and Torres Strait Islander products, art and services with confidence.
- (4) To promote artistic diversity among Australian Aborigines and the Torres Strait Islanders.
- (5) Increasing understanding—both in Australia and internationally—of the cultural assets and art of Australian Aborigines and Torres Strait Islanders.³⁰

The legal method adopted in Australia to protect indigenous people’s handicrafts and art is similar to the certification marks provided for under Taiwan’s Trademark Law.³¹ Two types of authenticity certification are available: the Label of Authenticity and the Collaboration Mark.³² Only Aborigines may apply for a Label of Authenticity, which stipulates that holders must conform to tribal custom and ensure their

²⁸ WIPO, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* 135-36 (2003), available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf> (prepared by Terri Janke).

²⁹ *Id.*

³⁰ *Id.* at 137.

³¹ Trademark Act, art. 73 (Taiwan).

³² WIPO, *supra* note 28, at 138-39.

products reflect and connect to their tribal heritage and experience.³³ The Collaboration Mark is available only to businesses that sign fair and equitable contracts with Aboriginal artists. The National Indigenous Arts Advocacy Association, which administers the system, created sample contracts for businesses to follow when drawing up agreements with artists.³⁴

With regard to certain types of indigenous cultural products, the U.S. academic Susan Scafidi suggests that indigenous people do not necessarily object to these aspects of their culture being used and disseminated.³⁵ While the use of cultural products may lead to a weakening or distortion of the original cultural content or may damage the special characteristics that made these products unique, the commercialization of indigenous culture may also help to promote ethnic identification and encourage greater understanding between ethnic groups.³⁶ As Scafidi sees it, there is no need for excessive protection of some categories of commercialized cultural products.³⁷ All that is needed is an authentication system that distinguishes between products made by indigenous people or made with their consent, and those that have been pirated.³⁸

Some scholars in Taiwan support the adoption of a system of this type.³⁹ Wang Ssu-yuan describes the advantages this kind of system has in protecting indigenous cultural creations. First, the legal principles are readily understandable.⁴⁰ Second, it can avoid the types of legal and public interest disputes that the adoption of a rights system might lead to.⁴¹ Third,

³³ *Id.* at 142.

³⁴ *Id.* at 143.

³⁵ Scafidi, *supra* note 22, at 836-37.

³⁶ *Id.* at 837-39.

³⁷ *Id.* at 841-42. Scafidi's detailed analysis identifies four categories of cultural products; the discussion in this section is confined to those indigenous cultural products that can be commercialized. With respect to those indigenous cultural products that have religious or sacred significance, Scafidi proposes the use of protection methods based on a model similar to that employed to protect business secrets in a commercial context. *See id.* at 840-41.

³⁸ *Id.*

³⁹ *See, e.g.,* Lin K'ai-shih, 一個法案保護了什麼? [*What Does this Law Protect?*], 1 ANTHRO VISIONS 2, 4 (2008), available at <http://taiwananthro.wdfiles.com/local--files/anthro-visions:volume1/anthrovisions01-02.pdf>; Wang Ssu-yuan, 護原民 要智慧 [*Protecting Indigenous Communities Requires Careful Thought*], CHINA TIMES, Dec. 13, 2007, at 19.

⁴⁰ Wang Ssu-yuan, *supra* note 39, at 19.

⁴¹ *Id.*

this type of system can help maintain the autonomy of indigenous communities by preventing the piracy of indigenous art by outsiders, without forcing indigenous communities to adopt a new property rights system.⁴² Fourth, it can help protect the integrity of indigenous cultures.⁴³ While outsiders might continue to produce works similar to indigenous art, members of the public would have a means of distinguishing the two. Fifth, this type of system would not hinder the free flow of cultural transmission.⁴⁴

D. The Commercial Use and Benefit Sharing Model

1. Commercial Use

The term “commercial use” is used to refer to a situation where an individual who develops a commercial application for traditional knowledge has the right to protect the application and can obtain the relevant intellectual property rights.⁴⁵ Under this model, the reason for providing protection is not to encourage artistic creation as the traditional knowledge is already in existence. Rather, protection of the traditional knowledge would further investment opportunities and allow individuals developing commercial products from this knowledge to obtain a return on their investment.⁴⁶

If our aim is to protect indigenous people and enable them to profit from their culture, then it would appear that the commercial use model does not really provide adequate protection for indigenous peoples’ rights. The commercial use model is essentially a neutral model where anyone willing to pay money to commercialize traditional knowledge, or the first person to think of a way of commercializing it, can obtain protection. From this point of view the commercialization of traditional knowledge need not necessarily be limited to multinational corporations; indigenous people should in theory be able to commercialize their own knowledge. Of course, the financial resources of transnational corporations far exceed those of indigenous communities. While this model may seem on the surface to be fair and impartial, in reality it is likely to provide more benefit to multinational corporations.⁴⁷

2. Prior Informed Consent and Benefit Sharing System

When a multinational corporation commercializes, obtains

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Ghosh, *supra* note 4, at 115.

⁴⁶ *Id.*

⁴⁷ *Id.* at 115-16.

intellectual property rights, and makes a profit then gives part of the profit back to the indigenous people from whom the knowledge was obtained, it is considered a “win-win situation.”⁴⁸ When traditional knowledge is available only to indigenous communities, they may not be able to exploit its full commercial potential. If, however, a multinational corporation can use the knowledge to obtain intellectual property rights and then share the proceeds with the indigenous people, then from the point of view of the indigenous community, this may not be a bad thing.⁴⁹ The key issue here is how to design a set of mechanisms to ensure that multinational corporations share their earnings with indigenous people.⁵⁰ In order to ensure indigenous communities get their share of the profit, a different model may be required.⁵¹

Some experts suggest a compromise, whereby multinational corporations wishing to use traditional knowledge relating to resources indigenous people have inherited from their ancestors, would first be required to obtain the approval of the indigenous people and would be required to share the benefits with them.⁵² This concept derives from the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization*, created in 2002, in accordance with the Convention on Biological Diversity.⁵³ Article 15 of the Convention on Biological Diversity includes the following items:

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party. 6. Each Contracting Party shall endeavor to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties. 7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the

⁴⁸ *Id.* at 116.

⁴⁹ *Id.* at 116-17. In this case, the Tropical Botanical & Garden Research Institute put half of the proceeds in a fund to improve the lives of the *Kani* people. This resolved the conflict between the Institution and *Kani* People.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Chou Hsin-yi, *supra* note 10, at 89-91.

⁵³ *Id.* at 92-102.

commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.⁵⁴

E. The Trust Model

Under the trust model, the rights pertaining to traditional knowledge rest not with indigenous communities, but with some other body. These bodies may include a national government, a lower-level government agency, a non-governmental organization, or a tribal organization that acts as a trustee to protect the interests of traditional knowledge holders.⁵⁵

The basic concept behind this model derives from Article 8, item (j), of the Convention for Biological Diversity, which stipulates each signatory nation must:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁵⁶

Article 15 of the Convention states that the authority to determine access to genetic resources rests with national governments.⁵⁷ Therefore, any party wishing to commercialize genetic resources must negotiate with the national government to draw up a profit-sharing agreement. The payment made by the commercializing party goes to the national government.⁵⁸ Instead it should be used to benefit the indigenous

⁵⁴ Convention on Biological Diversity, art. 15, 31 I.L.M. 818 (June 5, 1992) [hereinafter CBD].

⁵⁵ Ghosh, *supra* note 4, at 117.

⁵⁶ CBD, *supra* note 54, art. 8.

⁵⁷ See CBD, *supra* note 54, art. 15. The full text of this article is as follows:

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation. 2. Each Contracting Party shall endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

⁵⁸ Ghosh, *supra* note 4, at 117.

community that provided the traditional knowledge in question.⁵⁹

Comparable to India's adopted stance,⁶⁰ Article 15, item (4)(a), of the Berne Convention embodies a similar philosophy:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the [European] Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.⁶¹

The advantage of the trust model is that it makes it easier for those interested in making use of traditional knowledge to find someone with whom they can negotiate licensing. It is very difficult to determine the owners of traditional knowledge, but if the national government negotiates on behalf of indigenous peoples, they are likely to take into consideration not only the welfare of the indigenous communities but also the needs of environmental protection and other aspects of cultural protection. National governments normally enjoy a stronger bargaining position and are more familiar with negotiating techniques rather than individual indigenous communities.⁶²

Ghosh, cited from Rosemary Coombes, and others have expressed concern regarding the use of the trust model because they are worried that civil servants acting as trustees ignore the interests of indigenous communities.⁶³ If this model is to be employed, the informed agreement of the indigenous people must be obtained in advance in order to ensure that indigenous communities are able to maintain their autonomy.⁶⁴ It is also suggested that the trust model be combined with some sort of registration system.⁶⁵

The trust model appears to be related to the “*domaine public payant*” concept.⁶⁶ This concept holds that, even when works have already

⁵⁹ *Id.*

⁶⁰ Dr. Silke von Lewinski, *supra* note 5, at 752-53.

⁶¹ Berne Convention for the Protection of Literary and Artistic Works, art. 15(4)(a), Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (revised July 24, 1971) [hereinafter Berne Convention].

⁶² Ghosh, *supra* note 4, at 117-18.

⁶³ *Id.* at 118.

⁶⁴ *Id.*

⁶⁵ Regarding the different types of registration systems, see Chou Hsin-yi, *supra* note 10, at 82-87.

⁶⁶ Li, Hui-shan, 原住民傳統智慧創作之保護 [Protection Act for the Traditional Intellectual Creations of Indigenous Peoples] ,

fallen into the public domain, outsiders should still be required to pay to make use of them, with the national government acting as custodian for the funds received.⁶⁷

F. The Ownership Model

The ownership model proposes that the rights to traditional cultural expressions rest with individuals or groups within indigenous communities. This model is relatively close to the prevailing intellectual property rights system. Recognizing the indigenous, individual, and group ownership of knowledge assures the welfare of indigenous people while also preventing outsiders from exploiting this knowledge unfairly.⁶⁸

This model has attracted criticism based on the fact that many traditional cultural expressions are sacred, making it inappropriate to commercialize them or turn them into intellectual property. Another problem is the lack of clarity regarding which indigenous persons should be considered the owners of traditional knowledge; there is usually no clear evidence of this (at best ownership may be ascribed in traditional myths or legends).⁶⁹ Thus, there is a conflict with the principles that underlie the concept of copyright.⁷⁰

However, the supporters of this model suggest that, when protecting indigenous peoples' traditional cultural expressions, there is no need to conform rigidly to conventional concepts of copyright.⁷¹ Revisions can be made to copyright law as needed to allow for the special characteristics of traditional cultural expressions, such as common ownership or the preference for settling disputes through arbitration.⁷² This form of protection is similar to the concept of "neighboring rights" that already exists in copyright law.⁷³

G. The Taiwanese Model

The *Protection Act* of 2007 bears pronounced similarities to

<http://www.copyrightnote.org/crnote/bbs.php?board=35&act=read&id=8> (last visited Sept. 15, 2008).

⁶⁷ Cartee, *supra* note 27, at 211; *Id.*

⁶⁸ Ghosh, *supra* note 4, at 118-19.

⁶⁹ *Id.* at 119.

⁷⁰ *Id.* at 119-20.

⁷¹ Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 324-25 (2006).

⁷² *Id.*

⁷³ Article 79 of the Copyright Law defines Plate Right which is similar to the "neighboring rights." According to this article, if literary or artistic works that have lost copyright protection or its copyright protection has expired, they can be reprinted and then also obtain protection for ten years.

legislation adopted in Panama.⁷⁴ The Taiwanese model is best described as a version of the ownership model that displays some aspects of the customary law model.

Granting of rights to “knowledge works” is administered through a government-supervised registration system where the “right to use knowledge works” requires government approval.⁷⁵ Once such a right is granted, the indigenous persons concerned can exercise it themselves and can implement licensing to others.⁷⁶ The state plays a supervisory role but it does not exercise ownership on behalf of indigenous people.⁷⁷ The state also restricts use of income from the licensing of traditional rights. This income must be paid into an indigenous people’s welfare fund and may not be used by individual indigenous persons for their own benefit.⁷⁸

The reason the Taiwanese model includes aspects that are more characteristic of the customary law model is that the rights to “knowledge works” rest with indigenous nations or tribes. The *Protection Act* states only that persons belonging to an indigenous nation or tribe may use and benefit from that nation or tribe’s knowledge works.⁷⁹ It would appear that this use is not subject to the restrictions of the tribe’s customary law; the agreement of the tribal elders is not required. The *Protection Act* clearly fails to state who has the right to license traditional knowledge. It only states that the tribe may elect an individual to serve as their representative for the purpose of applying for licensing rights, with the method of election to be decided by the competent government authorities.⁸⁰ The *Protection Act* does not specify who exactly will decide on licensing

⁷⁴ For more details of the legislation enacted in Panama, see Dr. Silke von Lewinski, *supra* note 5, at 765-66.

⁷⁵ *Protection Act*, arts. 6 & 7 (Taiwan).

⁷⁶ *Id.* art. 13.

⁷⁷ *Id.* arts. 11 & 12.

⁷⁸ *Id.* art. 14, which provides:

If the exclusive right to use any intellectual property is obtained by an aboriginal group or tribe according to the provisions in Article 7, subparagraph 1 or subparagraph 2 herein, the income derived there from shall be used to set up a mutual fund benefiting the relevant aboriginal groups or tribes; the income, expenses, method of custody and utilization in connection thereto shall be determined separately by the competent authority.

If the exclusive right to use intellectual creations is obtained by the indigenous peoples in their entirety, the income derived there from shall be included in the consolidated development fund of the indigenous peoples and be utilized for the purpose of promoting the cultural development of aboriginal groups or tribes.

⁷⁹ *Id.* art. 10, para. 3.

⁸⁰ *Id.* art. 6, para. 2.

issues.⁸¹ This suggests that the intention is to respect tribal customary law, with decisions regarding the granting of licensing to be made in accordance with the community's own traditional practices.⁸² From this point of view, it could be said that Taiwan's *Protection Act* represents a fusion of the ownership model and the customary law model.

III. REFLECTIONS ON CRITICISM OF EXPANSION IN THE SCOPE OF INTELLECTUAL PROPERTY RIGHTS COVERAGE

Towards the end of 2007, Taiwan's Legislative Yuan suddenly and unexpectedly passed the *Protection Act for the Traditional Intellectual Creations of Indigenous Peoples*. Prior to its passage into law there was little discussion of this Protection Act in the academic community. Was this sudden enactment of the Protection Act appropriate? Among experts on intellectual property rights, there is a school that has adopted a critical stance towards the continuing expansion of the scope covered by intellectual property rights.⁸³ In the past, this school's criticism largely focused on mainstream international intellectual property rights issues. Taiwan's sudden enactment of the *Protection Act for the Traditional Intellectual Creations of Indigenous Peoples* has attracted relatively little attention outside Taiwan. This section examines the following question: What results can be achieved by an analysis of this unusual expansion of the scope of intellectual property rights coverage based on a critical approach to the concept of intellectual property?

A. Opposition to Expansion of the Scope of Intellectual Property Rights

1. Protecting Public domain

The concepts that underlie the public domain model derive from recent work by a group of scholars critical of what they see as excessive expansion of the scope of intellectual property rights. These academics believe that the steady expansion of intellectual property rights over the past two decades has encroached on territory that was originally in the public domain, reducing the amount of basic material that future creative work can be undertaken with. The best known of these "anti intellectual property rights" scholars include James Boyle,⁸⁴ William W. Fisher III,

⁸¹ *Id.* art. 13.

⁸² In her analysis of Panamanian law regarding indigenous people's traditional knowledge, Dr. Silke von Lewinski notes the similarities between Panamanian law and Taiwan's Protection Act for the Traditional Intellectual Creations of Indigenous Peoples, and suggests that both are based on a customary law model. See Dr. Silke von Lewinski, *supra* note 5.

⁸³ See *infra* notes 84-87 and accompanying texts.

⁸⁴ JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS (1996) [hereinafter SHAMANS, SOFTWARE, & SPLEENS]; James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

Yochai Benkler,⁸⁵ Lawrence Lessig,⁸⁶ Jessica Litman,⁸⁷ and Siva Vaidhyanathan.

Most of these scholars have focused their attention on the growth of the Internet and its interaction with the expansion of intellectual property rights. Relatively few authors have addressed the issues relating to protection of indigenous people's intellectual property. In some cases, their work on protection for indigenous people's traditional knowledge is criticized as an erosion of the public domain. In reality the vast majority of those who oppose the expansion of intellectual property rights have not entered into the debate over indigenous people's traditional knowledge.

The earliest and best known of these opponents of intellectual property rights expansion is James Boyle. Boyle is strongly in favor of providing protection for indigenous people's traditional knowledge while opposing the expansion of intellectual property rights.⁸⁸

2. Compensating Indigenous Peoples

James Boyle is arguably the earliest academic to express vocal opposition to the expansion of intellectual property rights and is seen as the leader of this movement. His 1996 book *Shamans, Software, & Spleens* is a seminal work that exerted a major influence on subsequent scholarship, encouraging many other scholars to enter the field.⁸⁹

Boyle stresses the importance of the public domain.⁹⁰ He compares the recent expansion of intellectual property rights to the enclosure movement of the 15th century that saw a gradual privatization of common land. Boyle has gone so far as to describe the recent trend as a "second enclosure movement."⁹¹

The theory espoused by James Boyle might be considered analogous to environmentalism. As Boyle sees it, protecting the public domain means protecting the cultural environment so that later generations

⁸⁵ Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

⁸⁶ Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Lawrence Lessig, *THE FUTURE OF IDEAS* (2001).

⁸⁷ JESSICA LITMAN, *The Public Domain*, 39 EMORY L.J. 965 (1990); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

⁸⁸ SHAMANS, SOFTWARE, & SPLEENS, *supra* note 84, at 125-30.

⁸⁹ Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 102 (2007).

⁹⁰ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 39 (2003).

⁹¹ *Id.* at 37.

will be able to share in it.⁹² He refers to this philosophy as “cultural environmentalism.”⁹³

In his earlier work, *Shamans, Software, & Spleens*, Boyle criticizes the concept of “romantic authorship” because he believes intellectual property rights today place too much emphasis on originality and creativity. Boyle views inventions and artistic works as the fruit of the creator’s innovation, while ignoring the extent to which the creator has relied on the knowledge of his or her forerunners.⁹⁴ The focus on romantic authorship hinders the protection of indigenous people’s traditional knowledge.⁹⁵

Traditional knowledge of indigenous peoples in developing nations is being constantly exported and cannot receive protection within the current international intellectual property rights system. At the same time, the cultural and industrial products of the developed nations continuously flood into undeveloped nations, and those products benefit from intellectual property rights protection. Boyle views this situation as contributing to a grossly unfair distribution of wealth.⁹⁶

For this reason, Boyle feels that the traditional knowledge of indigenous peoples is excluded from the international intellectual property rights system, despite his opposition to the expansion of the scope of intellectual property rights and the shrinking of the public domain. This knowledge is treated as a kind of raw material that can be exploited in the creativity and invention of future generations without showing any gratitude to the indigenous people who have kept this knowledge alive and helped to maintain biological diversity for so many years. Boyle believes that it is now time to start compensating indigenous people by providing protection for their traditional knowledge.⁹⁷ Boyle views this as “making amends,” and as recognition of the contribution that indigenous people have made to cultural preservation and to the protection of the public domain.⁹⁸

3. The Internal Contradictions in These Theories

Boyle’s theory has two aspects to it: on the one hand he criticizes the expansion of the scope of intellectual property rights, while on the other hand he also advocates attaching more importance to indigenous

⁹² Sunder, *supra* note 89, at 100.

⁹³ *Id.*

⁹⁴ SHAMANS, SOFTWARE, & SPLEENS, *supra* note 84, at xii.

⁹⁵ *Id.* at 51-60, 125-130.

⁹⁶ *Id.* at 141-42.

⁹⁷ *Id.* at 192-98.

⁹⁸ *Id.* at 198.

people's traditional knowledge. How can these two apparently opposing goals be harmonized? Boyle's discussion of this question is limited to saying that, while protection should be given to the traditional knowledge of indigenous people, this protection should not be excessive.⁹⁹ It should be limited to "neighboring rights" protection with an emphasis on fair use.¹⁰⁰

This does not eliminate the contradictions in Boyle's theory. Madhavi Sunder argues that due to the importance that Boyle attaches to the public domain, the model that he proposes for the protection of indigenous people's traditional knowledge does not go beyond compensating them for their contribution.¹⁰¹ There is no active recognition of the innovative aspect of indigenous knowledge. As a result, the protection model adopted by most of the international treaties on biodiversity is not the ownership model (as outlined above), but rather the trust model. Such agreements recognize that national governments have authority over the genetic resources that exist within their national territory, while accepting that indigenous peoples have the right to compensation. As Sunder sees it, this line of thinking constitutes an obstacle to the protection of indigenous people's traditional knowledge, representing the granting of protection that is closer to the ownership model.¹⁰²

Other scholars who stress the importance of the public domain question the need to protect indigenous people's traditional knowledge. In one example, Debora J. Halbert expresses sympathy for the plight of indigenous peoples, devoting one chapter of her book, *Resisting Intellectual Property*, to a discussion of the protection of indigenous peoples' traditional knowledge. In this chapter, Halbert repeatedly stresses the need to design a protection model for indigenous knowledge different from the conventional western intellectual property rights model.¹⁰³ However, she does not appear to be in favor of any of the types of protection model outlined above. Halbert concludes her discussion by questioning whether indigenous peoples wish to have their culture commodified.¹⁰⁴ It seems that Halbert's opposition to the expansion of intellectual property rights makes her unenthusiastic about the idea of extending intellectual property rights protection to indigenous peoples.

In her argument, Halbert suggests that, viewed in terms of indigenous culture, the adoption of a western-style protection model may

⁹⁹ *Id.* at 197-200.

¹⁰⁰ *Id.*

¹⁰¹ Sunder, *supra* note 89, at 104.

¹⁰² *Id.* at 105.

¹⁰³ DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY* 135-63 (2005).

¹⁰⁴ *Id.*

help to protect indigenous people's knowledge assets in the short term.¹⁰⁵ In the long term, it can be expected to lead to the commodification of indigenous culture.¹⁰⁶ Totems and other aspects of indigenous culture that originally had sacred significance will become commercialized.¹⁰⁷ Many experts on traditional customs support this view.¹⁰⁸

Other scholars are more forthright in their opposition to giving special protection to indigenous people's traditional knowledge. The anthropologist Michael F. Brown suggests that providing excessive protection to indigenous traditional knowledge and turning this knowledge into "rights" will contribute to the shrinking of the public domain and will restrict the free flow of information.¹⁰⁹ In his view, incorporating traditional culture into the scope of intellectual property rights protection will lead to knowledge that was formerly "secret" in the public domain.¹¹⁰ Having access to this "secret knowledge" goes against the values of a liberal democracy, and violates the right to free speech.¹¹¹

B. The Conflict between the Access to Knowledge Concept and Protection of Indigenous Peoples

1. The Treaty on Access to Knowledge

Over the past few years, scholars who are opposed to the expansion of the scope of intellectual property rights have placed great emphasis on the importance of the public domain, so that knowledge can be shared and accessed by all. This "access to knowledge" (A2K) movement led to the holding of a large-scale, international conference where a draft, "Treaty on Access to Knowledge," was approved by those present.¹¹²

¹⁰⁵ *Id.* at 161.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., Kuo, P'ei-Yi, 法律是解藥還是毒藥[*Does the Law Kill or Cure?*], 1 ANTHRO VISIONS 6 (2008) (Taiwan), available at <http://www.taiwananthro.org.tw/local--files/anthro-visions:volume1/anthrovisions01-03.pdf>.

¹⁰⁹ Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 195, 198 (1998), available at <http://lanfiles.williams.edu/~mbrown/Brown-CopyrightingcultureCA98.pdf>.

¹¹⁰ *Id.* at 198.

¹¹¹ *Id.*

¹¹² Treaty on Access to Knowledge, Draft, May 9, 2005, available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf [hereinafter Treaty on Access to Knowledge (Draft)]. For more information about the "Access to Knowledge" movement, see CPTech.org, Access to Knowledge, <http://www.cptech.org/a2k/> (last visited Jun. 2, 2009).

The text of the proposed Treaty on Access to Knowledge focuses heavily on the general issue of access to knowledge, but there is no article that specifically targets the traditional knowledge of indigenous peoples. Scholars however, note two aspects of this Treaty that are related to indigenous peoples.¹¹³

First, Article 4 (dealing with patents) states that a patent should not be granted for an invention developed through the use of biological material “if the inventor failed to obtain prior informed consent of the country of origin, or fails to fairly and equitably share the benefits derived from the use of that biological material.”¹¹⁴ Scholars see similarities here with the prior agreement and equitable sharing of benefits mechanisms provided for by the Convention on Biological Diversity.¹¹⁵

Second, regarding copyright, Article 3-7 of the draft Treaty on Access to Knowledge stipulates that “Facts and works lacking in creativity should not be subject to copyright or copyright-like protections.”¹¹⁶ It is suggested that this implies protection should not be extended to traditional culture, including traditional legends and folk art.¹¹⁷ Moreover, Article 3-8 of the Treaty states that:

- (a) Members agree to implement measures that ensure access to works that are unidentifiable, un-locatable or unresponsive, referred to as orphan works;
- (b) Use by reproduction in copies or phone records or by any other means of use within the rights of the copyright owner, is not an infringement of copyright when the user has conducted a reasonable investigation and can conclude that the work is an orphan work.¹¹⁸

Usually original authors of indigenous arts and crafts are unidentifiable, so it suggested that the government should ensure access to those works. And people can use those works without permission if they conducted a reasonable investigation.

2. Building Consensus between the Access to Knowledge Movement and the Movement to Protect Traditional Knowledge

It appears that the main goal of the Access to Knowledge Movement is to ensure that as many people as possible can access knowledge, while strengthening protection of the public domain and

¹¹³ Long, *supra* note 71, at 319.

¹¹⁴ Treaty on Access to Knowledge (Draft), *supra* note 112, art. 4-1(b)(iii).

¹¹⁵ Sunder, *supra* note 89, at 105.

¹¹⁶ Treaty on Access to Knowledge (Draft), *supra* note 112, art. 3-7.

¹¹⁷ Long, *supra* note 71, at 319-20.

¹¹⁸ Treaty on Access to Knowledge (Draft), *supra* note 112, art. 3-8.

preventing expansion of the scope of intellectual property rights. There is a conflict here with the movement for protecting indigenous people's traditional knowledge.

However, some scholars are not convinced that the two movements need necessarily be in conflict with one another. Doris Estelle Long, for example, sees considerable similarities between the movements. As she sees it, both movements seek to overturn existing concepts of knowledge as property, replacing them with greater flexibility.¹¹⁹

Long emphasizes that protection of indigenous peoples' traditional knowledge should not mean protecting exclusivity or monopoly. She suggests that if indigenous people are willing to accept the commercialization of their traditional culture, a mechanism could be adopted whereby, in principle, outsiders are not prohibited from accessing traditional knowledge. The profits made as a result must be shared with the indigenous people, so the goals of access and fairness would both be served. However, for sacred aspects of traditional culture that indigenous people are unwilling to see commercialized (for example, aspects of folk art that indigenous people want presented in exhibitions, but do not want sold for profit), then their right to control the use of their culture should be protected. There is also the question of authentication. Indigenous people may be willing to accept imitation of their traditional art by outsiders, as long as the imitators do not try to fool consumers into thinking that their products were actually made by indigenous people.¹²⁰

C. Leaving Room for Fair Use

1. Protecting the Rights of Indigenous People Should Still Leave Room for Fair Use

While James Boyle advocates providing some form of protection for the traditional knowledge of indigenous peoples, he is opposed to using existing intellectual property rights concepts to protect traditional knowledge. Instead, he proposes the adoption of the "neighboring rights" or "related rights" concept, which would provide a lower level of protection.¹²¹ Reflecting his opposition to the erosion of the public domain, Boyle emphasizes that public access to this knowledge should be protected while still giving protection to indigenous people. This requires the development of a model that integrates fair use and compulsory licensing. Boyle believes that it is vitally important not to make the mistake of allowing unlimited expansion of intellectual property rights protection with respect to traditional cultural knowledge.¹²²

¹¹⁹ Long, *supra* note 71, at 320-21.

¹²⁰ *Id.* at 322-23.

¹²¹ SHAMANS, SOFTWARE, & SPLEENS, *supra* note 84, at 198.

¹²² *Id.* at 198-99.

It can be seen from the above that, to achieve an acceptable compromise between open access and the protection of indigenous peoples' traditional knowledge, ensuring the possibility of fair use is extremely important. The following sections will discuss those provisions of Taiwan's *Protection Act* relating to fair use.

2. The Movie *Cape No. 7* and the controversy of Taiwan's Paiwan Glass Bead Handicraft

As the *Protection Act* only recently came into effect, there have been no major lawsuits relating to the *Protection Act* so far. In this section, the author uses the popular 2008 Taiwanese film *Cape No. 7* as an example, which explores conflicts between different cultures, including Japanese culture, indigenous Taiwanese culture, traditional culture of Taiwan's ethnic Chinese inhabitants, and the popular culture of Taipei. There is a scene in *Cape No. 7* that shows necklaces called "Beads of Courage" and "Peacock Stars" that are based on the traditional glass bead handicraft tradition of the Paiwan Tribe.

So far, no indigenous community has brought a lawsuit against the film's producers. However, the film's official website notes that the necklaces used in the film were made by the Dragonfly glass bead workshop in Santimen Rural Township, Pingtung County.¹²³ The website asks people to refrain from using the names used for the necklaces in the film, on the grounds that this would constitute intellectual piracy.¹²⁴ Furthermore, the Dragonfly workshop announced they are the only authentic glass bead manufacturer, and anyone else producing these beads is engaged in piracy.¹²⁵ In reality, glass bead making is a traditional indigenous handicraft of the Paiwan Tribe. Is it reasonable to suggest that no other indigenous persons have the right to make and sell these beads? Why should they be prohibited from using the necklace names?

Subsequently, Rulandeng Umass, the "father of the Paiwan glass bead industry," announced on his blog that the glass bead necklace design is in question. Of the necklaces referred to in the film, only the "Sunlight Beads" were not named by him; he suggested that this name was a mistranslation of the Paiwan name "Exalted Beads."¹²⁶ Following Umass'

¹²³ "海角七號"官方網站 ["Cape No. 7" official website], <http://cape7.pixnet.net/blog/post/21564709> (last visited Oct. 21, 2008).

¹²⁴ *Id.*

¹²⁵ Tsou Nien-Tsu, 琉璃珠+海角=版權 可製珠勿擅用名號 [*Glass Beads + Cape No. 7 = Copyright; You Can Make the Beads But Don't use the Name*], LIBERTY TIMES, Oct. 21, 2008, <http://www.libertytimes.com.tw/2008/new/oct/21/today-show6.htm> (last visited May 3, 2009).

¹²⁶ 都是"海角七號"惹的禍-排灣琉璃珠問與答[It's all the fault of *Cape No. 7*: Paiwan Glass Beads Q&A], <http://tw.myblog.yahoo.com/umass->

complaints,¹²⁷ the Dragonfly workshop and the *Cape No. 7* official website dropped their claims to sole ownership of the rights to the necklace designs, insisting only that other bead necklace makers must not refer to *Cape No. 7* when promoting their products.

Umass learned the skills of glass bead making from tribal elders while conducting fieldwork.¹²⁸ He shared his knowledge freely with others because, as he saw it, the glass bead tradition belonged to the whole tribe.¹²⁹ Umass feels that it is completely unacceptable for the Dragonfly workshop to attempt to monopolize this handicraft tradition.¹³⁰ Umass stressed that:

. . . this is the shared property of all the Paiwan nation; nobody is entitled to give someone sole rights to sell Paiwan glass beads, and nobody should be allowed to defame people who are making the type of seven-bead necklaces worn by the actors in the film as being pirates, with the aim of forcing them out of the business; they simply don't care how much harm they are causing to other makers of these beads.¹³¹

3. What if the Protection Act for the Traditional Intellectual Creations of Indigenous Peoples had Come into Effect Earlier?

If the *Protection Act* came into effect prior to the making of the film *Cape No. 7*, then, in accordance with Paragraph 1, Article 7 of the *Protection Act*, the creator and namer of the glass bead necklaces would be able to apply for exclusive rights to the items in question. It is also possible that other people could be prohibited from creating or selling them. In this case, the makers of *Cape No. 7* would have had to pay royalties to Umass. Furthermore, in accordance with Item 3, Paragraph 2,

3jewelry/article?mid=1098&prev=756&next=1092 (last visited Sept. 23, 2008).

¹²⁷ See 排灣琉璃之父文化聲明(給海角七號官方網站) [Cultural Declaration by the Father of the Paiwan Glass Bead Industry for the Attention of the *Cape No. 7* (official website)], <http://tw.myblog.yahoo.com/umass-3jewelry/article?mid=1102&prev=1109&next=1098> (last visited Oct. 13, 2008); see also 海角七號官方網站頑強無視於排灣族人的權益等文[The *Cape No. 7* Official Website Ignores the Rights of the Paiwan People], <http://tw.myblog.yahoo.com/umass-3jewelry/article?mid=1109&prev=1110&next=1102> (last visited Oct. 14, 2008).

¹²⁸ Tsou Nien-Tsu, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 巫瑪斯回應海角官方網站 [In response to statements made on the *Cape No. 7* official website], <http://tw.myblog.yahoo.com/umass-3jewelry/article?mid=1110&prev=1111&next=1109> (last visited Oct. 14, 2008).

Article 10 of the *Protection Act*, Umass would also be able to prevent the makers of the film from using the names he gave to the necklace designs. Alternatively, bearing in mind that Umass' original goal was to make the Paiwan glass bead tradition available for all members of the Paiwan nation to share, the application for exclusive rights could have been made in the name of the Paiwan people as a whole. In this case every member of the Paiwan tribe would be able to use the designs and names.

It appears that if the *Protection Act* was enacted at an earlier date, then the conflict within the Paiwan tribe (between Umass and the Dragonfly workshop) need not have developed. On the other hand, if the *Protection Act* was already in effect at the time when *Cape No. 7* was made, then the filmmakers might have been obliged to pay royalties to the whole Paiwan nation. *Cape No. 7* was made on a very limited budget and if the Dragonfly workshop did not make the glass bead necklaces available free of charge, then it might have proved difficult to complete the film.

Article 16 of the *Protection Act* stipulates that:

Knowledge works that have already been made public may be used if any of the following apply: (1) If the work is used in a non-profit-making manner for personal or family use. (2) If the utilization of the work is necessary for reporting, critique, educational or research purposes. (3) If the work is used in a reasonable manner for other acceptable purposes. If a knowledge work is used in this manner, the source of the work must be noted. This restriction does not apply in cases where a knowledge work is used in such a way that does not conflict with the interests of the holder of the rights to the work, and which does not violate normal socially acceptable usage.¹³²

It would appear that this article of the *Protection Act* already provides some fair use for the utilization of traditional knowledge works. However, the *Protection Act* does not provide fair use for derivative works. Would the makers of *Cape No. 7* have been able to claim that their use of the bead necklaces conformed to this provision of the *Protection Act*? As a commercial film, *Cape No. 7's* use of the knowledge work in the film is not considered "personal or family use" as provided for by item (1) of Article 16.¹³³ As provided for by item (2), it also cannot be classed as educational use. However, can it be classed as being "used in a reasonable manner for other acceptable purposes" as provided for by item (3)? Can commercial use ever be deemed to constitute an acceptable purpose? And does the use of the ornaments in the film constitute being used "in a reasonable manner"? While Article 65 of Taiwan's Copyright Law

¹³² Protection Act, art. 16 (Taiwan).

¹³³ *Id.* at art. 16(1).

specifies four standards for determining fair use, the *Protection Act* contains no such provisions.¹³⁴

It can thus be seen that, if the *Protection Act* came into effect at an earlier date, *Cape No. 7*, a low-budget, but finely crafted Taiwanese film, might not have been made, or at least not in its present form. Providing excessive protection for intellectual property rights – even those protecting the traditional knowledge works of indigenous peoples – may impose restrictions on the fair use of knowledge that impede subsequent creation.

D. Summary

From the above analysis, expanding the protection provided to indigenous peoples' traditional knowledge works will lead to a shrinking of the public domain, and may restrict future generations' freedom to create.

With respect to indigenous peoples' traditional knowledge, many people sympathize with the plight of indigenous peoples. They feel that the Western-style intellectual property rights framework has brought no benefits to them and has contributed to their exploitation by others. Given that other people can secure intellectual property rights, there is a tendency to question why indigenous people should not be allowed to do the same? The global trend over the last ten years is gradually expanding the scope of intellectual property rights protection, while increasing the protection provided for indigenous peoples' traditional knowledge.

The author's personal take on this is that this kind of thinking may result in a vicious circle because rich nations are able to exploit intellectual property laws to pirate and steal indigenous peoples' traditional knowledge. Therefore, academics began demanding an extension of intellectual property rights to protect this knowledge and compensate for the indigenous peoples' loss. The logic seems to be: "I have a gun, so you should have a gun too." In this type of vicious circle, in which everyone is claiming intellectual property rights protection, the public domain will continue to contract.

Instead of advocating the extension of intellectual property rights protection to indigenous people's knowledge, it would seem to make more sense to prevent the abuse of intellectual property rights by multinational corporations. The emphasis should be on more "defensive" protection of indigenous people's traditional knowledge to ensure that this knowledge is not stolen by business enterprises. Ideally, it should be possible to gradually roll back the extent of international intellectual property rights protection, to restore the public domain to its original state.

¹³⁴ Copyright Act, art. 65 (Taiwan) is very similar to 17 U.S.C. § 107 (2010).

IV. THE PROTECTION MODELS VIEWED IN TERMS OF LEGISLATIVE PURPOSE

It can be seen from the above analysis that, regardless of how much we might sympathize with the plight of indigenous peoples, the adoption of a protection model based on ownership rights is likely to place undue constraints on the opportunities for creative activity by future generations. So what kind of protection model should be adopted? If the aim of providing protection for the traditional knowledge of indigenous people is to improve their economic well-being, then would it not be possible to use other mechanisms to achieve the same effect, without restricting future creative work? The following section examines the background to the enactment of the *Protection Act* and compares Taiwan's experience with that of the U.S. On the basis of this comparison, it is proposed that Taiwan would be better advised to adopt the authenticity model.

A. Legislative Purpose

1. The Legislative Purpose Was Not to Provide Incentives for Creative Activity

The theoretical foundation of the utilitarian approach to intellectual property rights (in the narrow sense, i.e. patents and copyright) is the idea that providing protection for inventions and creative works in the form of copyrights or patents will create an incentive for creativity and innovation.¹³⁵ In exchange for providing a monopoly for a fixed period, the state ensures that the fruits of invention or creation will eventually be shared with all of its citizens. The basic goal behind the design of intellectual property rights systems is thus to encourage knowledge creation.¹³⁶

In terms of the way it has been designed, the *Protection Act* basically represents a revision of Taiwan's Copyright Law. However, the content that the *Protection Act* seeks to provide protection for is knowledge that has already been in existence for a very long time. This knowledge did not depend on the enactment of the *Protection Act* for the Traditional Intellectual Creations of Indigenous Peoples to come into existence. It is thus readily apparent that the legislative purpose of the *Protection Act* was not to provide an incentive to encourage creative work.

Those academics who adopt a critical stance towards intellectual property rights would probably suggest that if a system provides

¹³⁵ William W. Fisher III, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 174-78 (Stephen Munzer-ed., 2001).

¹³⁶ See, e.g., WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

protection for intellectual property rights in the narrow sense but is not intended to provide incentives for creative work, then that system needs to be reconsidered.¹³⁷

In reality, there are examples of intellectual property rights models that are not intended to provide incentives for creative work. Two of the most obvious examples are the Bayh-Dole Act in the U.S. and Article 6 of Taiwan's Science and Technology Basic Law, which both make provision for patent protection for R&D results achieved through the use of government resources.¹³⁸ Given that the government already provides funding to enable the achievement of the R&D results, it should not also have to provide patent protection once the R&D is complete. The main legislative purpose here is surely to promote the commercial application of the R&D results that government resources make possible.¹³⁹

2. Boosting the Incomes of Indigenous Peoples

Article 1 of the *Protection Act* states that its legislative purpose is to protect the traditional knowledge works of Taiwan's indigenous peoples and to further the development of indigenous culture.¹⁴⁰ In reality, the *Protection Act* created mechanisms that require indigenous people to register their traditional knowledge, so that it can secure absolute use rights.

Judging from the way that the *Protection Act* is designed, the aim of giving indigenous people exclusive rights over their knowledge appears to ensure that they can obtain some of the commercial benefits deriving from these works, rather than having their culture pirated by outsiders. This income is then supposed to be paid into foundations to help promote

¹³⁷ For example, the U.S. Copyright Term Extension Act (CTEA) of 1998, which extended the term of copyright from 50 years to 75, attracted heated criticism from academics who felt that the extension would have no positive effects in terms of providing incentives for creation. See Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) at 5-6, 8-10.

¹³⁸ Science and Technology Basic Law, art. 6 (1999) (Taiwan). The article states that:

Projects in scientific and technological research and development to be subsidized, commissioned, or funded by the government shall be selected through a process of evaluation or review, and the results thereof shall be justified with reasons. The intellectual property rights and results derived from such a project may be conferred, in whole or in part, to the executing research and development units for ownership or licensing for use, and are not subject to the National Property Act.

¹³⁹ For further discussion of and reflections on this issue, see Rebecca S. Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663 (1996).

¹⁴⁰ Protection Act, art. 1 (Taiwan).

indigenous culture.¹⁴¹

However, is this model really conducive to the development and diffusion of traditional culture? Or will its main effect be to discourage outsiders from even attempting to commercialize indigenous people's knowledge works, with a pronounced negative impact on the promotion of indigenous culture?¹⁴² To put it another way, there is a strong possibility that the *Protection Act* not only will fail to bring in significant new revenue for indigenous people's cultural foundations, but it may also hinder the dissemination of indigenous culture.

What kind of approach would make it possible to both ensure the dissemination of indigenous peoples' traditional culture and to boost the incomes of indigenous people and their foundations? The following section examines the measures that have been adopted in the U.S. to protect indigenous peoples' art and culture.

B. The Indian Arts and Crafts Act of 1990 in the U.S.

1. Background

The first serious attempt to provide protection for Native American handicrafts in the U.S. was undertaken by Native Americans themselves. In 1974, a group of Native American artists and businesses established the Indian Arts and Crafts Association (IACA).¹⁴³ The IACA established a Code of Ethics which anyone wishing to join the organization was expected to adhere to; only those individuals and businesses that complied with the Code were permitted to make use of the IACA's mark.¹⁴⁴ The IACA could, of course, control only the activities of its own members. It had no authority over non-members and could only hope that consumers would display a preference for purchasing products bearing the IACA mark.¹⁴⁵

In 1935, the U.S. government established the Indian Arts and Crafts Board (hereinafter referred to as the "1935 Act"). It was created to combat the growing problem of piracy of Native American art and handicrafts; it created a Board that would contribute to the social and economic welfare of Native American communities.¹⁴⁶ The 1935 Act stipulated that anyone making unauthorized use of the Board's trademark for Native American arts and crafts products, or falsely claiming that their

¹⁴¹ *Id.* at art. 14.

¹⁴² Lin K'ai-shih, *supra* note 39, at 5.

¹⁴³ Jon Keith Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 490 (1993).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 25 U.S.C. § 305 (1935).

products are made by Native Americans, would be subject to criminal penalties.¹⁴⁷

However, the 1935 Act was vaguely worded, and the criminal penalties that it provided for were not particularly heavy. There was also a general reluctance among prosecutors to prosecute violators under the 1935 Act.¹⁴⁸ In addition, the trademark stipulated by the 1935 Act was held by the federal government of the United States. Native Americans themselves were not permitted to apply for trademarks.¹⁴⁹ As a result, many Native Americans distrusted this system. Those who sought to make use of the system had to go all the way to Washington D.C. (where the Indian Arts and Crafts Board was located) to register, which was highly inconvenient.¹⁵⁰

By the 1980s, Native American handicrafts were starting to command extremely high market values.¹⁵¹ The market was flooded with fakes made in Mexico, the Philippines and other parts of Asia.¹⁵² It is estimated that over twenty percent of the Native American handicraft products being sold in the U.S. were in fact fakes.¹⁵³ Unhappy with the ineffectiveness of the 1935 Act, Native Americans lobbied Congress to change the law. Their efforts led to the Indian Arts and Crafts Act of 1990 (hereinafter referred to as the “1990 Act”), a revision of the 1935 law.¹⁵⁴ The aim of the 1990 Act was to combat pirated products that were labeled as having been “made by Indians,” and to prevent these pirated products made in foreign countries from harming the economic wellbeing of Native Americans.¹⁵⁵ The new law specified more severe criminal penalties than those of the 1935 Act, and included a more precise definition of the term “Indian.”¹⁵⁶

The main objectives of the 1990 Act are to: (1) protect and promote Native American art; (2) help Native American communities become self-sufficient; (3) protect Native American culture; and (4) protect the consumer.¹⁵⁷ Some scholars have suggested that the primary

¹⁴⁷ 18 U.S.C. §§ 1158-59 (2010).

¹⁴⁸ Parsley, *supra* note 143, at 493.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 487.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 495-97.

purpose of the Act is to strengthen the economic wellbeing of Native American communities, and that the protection of Native American peoples' cultural inheritance is only a secondary goal.¹⁵⁸

2. Content

With the aim of preventing the violation of Native American trademarks, the 1990 Act stipulated that authentic Indian arts and crafts could obtain official trademarks from the Crafts Board in the Department of the Interior.¹⁵⁹ Also, the provision prohibits people from selling and reproducing any counterfeits or colorable imitations.¹⁶⁰ People are also prohibited from putting Government trademarks on their crafts illicitly.¹⁶¹ If they violate those regulations, they will be subject to fines and imprisonment.¹⁶²

The 1990 Act defines the term "Indian" as any individual who is a member of a U.S. Indian tribe. It also defines two types of Indian tribes:

- (a) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or
- (b) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.¹⁶³

Furthermore, the 1990 Act contains provision for claiming civil damages.¹⁶⁴

¹⁵⁸ Jennie D. Woltz, *The Economics of Cultural Misrepresentation: How Should the Indian Arts and Crafts Act of 1990 Be Marketed?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 443, 477 (2007).

¹⁵⁹ 18 U.S.C. § 1158 (2010).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at § 1159(c).

¹⁶⁴ 25 U.S.C. § 305e (2010) states the following:

Injunctive or other equitable relief; damages. A person specified in subsection (c) may, in a civil action in a court of competent jurisdiction, 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, resident within the United States, to — (1) obtain injunctive or other equitable relief; and (2) recover the greater of — (A) treble damages; or (B) in the case of each aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization,

3. Weaknesses

Despite its good intentions, a number of problems have emerged during implementation of the 1990 Act. It only stipulates that Indians can advertise their products as being authentic Indian products.¹⁶⁵ To be able to call oneself an Indian, one must be a member of an Indian tribe formally recognized by the Federal government or by a state government.¹⁶⁶ However, due to the oppression that Native Americans have suffered over the course of U.S. history, many communities with Indian ancestry were unable to secure formal registration as Indian tribes.¹⁶⁷ In addition, individuals whose parents or grandparents married a non-Indian may find that they are unable to secure formal Indian status. While the Act does state that anyone who is recognized by an Indian community as being an Indian artist can advertise their work as Indian art, the recognition process does not always work well in practice.¹⁶⁸

Native American artists who are unable to obtain formal recognition as members of an “Indian tribe” have been put in a position where they cannot describe their own work as being Indian art without fear of criminal prosecution. In fact, they are also prohibited from talking about their Native American heritage and cultural background when discussing their work. As a result, some have been forced to abandon their careers as Indian artists.¹⁶⁹

It also seems that the penalties provided for by the 1990 Act are severe.¹⁷⁰ For instance, for a first violation, an individual may be fined up to US\$250,000 and sent to prison for up to five years.¹⁷¹ A single conviction would thus be enough to cause bankruptcy for a person operating a small business.

not less than \$ 1,000 for each day on which the offer or display for sale or sale continues. For purposes of paragraph (2)(A), damages shall include any and all gross profits accrued by the defendant as a result of the activities found to violate this subsection. (b) Punitive damages; attorney's fee. In addition to the relief specified in subsection (a), the court may award punitive damages and the costs of suit and a reasonable attorney's fee.

¹⁶⁵ Parsley, *supra* note 143, at 497.

¹⁶⁶ *Id.* at 499.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 502-03.

¹⁶⁹ *Id.* at 504-06.

¹⁷⁰ *Id.* at 508.

¹⁷¹ 18 U.S.C §1159(b) (2010).

C. An Appraisal of Taiwan's Protection Model

1. Excessive Protection for Intellectual Property Rights

It is significant that while the protection model adopted in the U.S. employs a certification mechanism based on Trademark Law, it does not prohibit non-Indians from creating Indian-style art; it merely prohibits them from using Indian trademarks and from claiming that their products are authentic Indian products. In comparison to Taiwan's *Protection Act*, the U.S. model places fewer restrictions on non-indigenous persons.

However, reflecting the importance accorded to freedom of speech in the U.S., many U.S. academics have suggested that the trademark system represents a violation of the right to free speech. For example, Jon Keith Parsley points out that the definition of "Indian" used in the 1990 Act and the criminal penalties that it enforces, are both likely to impose serious constraints on the freedom of speech and artistic freedom of those Indian artists who are unable to obtain recognition from their tribe.¹⁷² Parsley goes so far as to suggest that the 1990 Act should be rescinded and replaced by a new law that would cause less harm. He points out that most of the pirated "Indian art" sold in the U.S. is made in Mexico, the Philippines, and other parts of Asia.¹⁷³ Parsley proposes that all Indian-style art and handicraft products imported into the U.S. from these countries should be compulsorily labeled with a non-removable label stating the country of origin to distinguish them from Indian art products made within the U.S.¹⁷⁴ Parsley feels that this would be sufficient to deal with the problem, and that there is no need to restrict the creative freedom of Indian artists working in the U.S.¹⁷⁵

The U.S. has generally led the way in promoting the expansion of intellectual property rights throughout the world. This aggressive promotion of intellectual property rights drew fierce criticism from scholars, who see the promotion placing severe restrictions on freedom of expression. However, this criticism is not stemmed from the ongoing expansion of the scope of intellectual property rights protection. When it comes to protecting indigenous cultural expressions, the U.S. adopted a far more cautious approach, employing a certification model that imposes relatively few constraints on non-indigenous persons.

Turning to Taiwan, we can see the need to conform to the requirements of the WTO's Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).¹⁷⁶ Taiwan falls into lockstep with the global

¹⁷² Parsley, *supra* note 143, at 497-508.

¹⁷³ *Id.* at 511.

¹⁷⁴ *Id.* at 511.

¹⁷⁵ *Id.* at 511-12.

¹⁷⁶ Taiwan officially joined the World Trade Organization (WTO) under the name of Separate Customs Territory of Taiwan, Penghu, Kinman and Matsu (Chinese

trends towards enhanced scope of intellectual property rights. Responding to the pressure exerted by the U.S. in bilateral negotiations, Taiwan has imposed criminal penalties even more severe than U.S. copyright law. As far as the protection of indigenous people's traditional culture is concerned, the present situation is that the U.S. is maintaining a far more conservative stance than Taiwan. Taiwan is moving faster than almost any other country in the world by introducing an ownership model aimed at protection of indigenous cultural expressions. The questions that remain are: Has Taiwan gone too far? And what kind of constraints is Taiwan imposing on future creative activity?

2. The Advisability of Adopting the Authentication Model

Of the six models for protecting indigenous people's traditional cultural expressions discussed there is no real conflict between the first three models. These three approaches can be employed simultaneously. Fundamentally speaking, all three approaches treat traditional cultural expressions as a form of public good that anyone is free to use and modify. Non-indigenous persons are free to commercialize such cultural expressions, thereby contributing to the diffusion of indigenous culture.

In reality, considering the disadvantageous economic situation in which indigenous people often find themselves, it is common for their art and handicrafts to be replicated in large quantities by non-indigenous businesspeople. This has a negative impact on the market value of indigenous arts and crafts products, and reduces the scope for indigenous people to gain economic benefit from their own cultural expressions.¹⁷⁷ To solve this problem, many people have advocated the adoption of some kind of certification system that would leverage Trademark Law to enable indigenous people to apply for certification marks or collective membership marks that would serve to distinguish authentic indigenous arts and crafts products from fakes. What national governments should really be doing is helping to promote indigenous peoples' culture and cultural products, rather than wasting money and resources on the establishment of new systems.

The National Indigenous Arts Advocacy Association (NIAAA), which oversees Australia's certification mark system, believes that their system can achieve the following goals:

- (1) Indigenous artists will be able to obtain more reasonable compensation for the indigenous artistic and cultural products and services that they provide.
- (2) Consumers will be able to verify that the products they are

Taipei) on January 1st, 2002. Prior to joining the WTO, Taiwan had to modify its copyright laws to meet TRIP requirements.

¹⁷⁷ Lin K'ai-shih, *supra* note 39, at 4.

buying were actually made by indigenous people, and that the indigenous people are using a reasonable method to tell their story.

- (3) Tourists will be able to acquire a more in-depth understanding of Australia's story by learning about the traditions and contemporary art of different indigenous peoples.
- (4) Art dealers and retailers will be encouraged to purchase and resell authentic, certified indigenous art and crafts products.
- (5) Firms engaged in the production and marketing of art will have more incentive to obtain licensing from indigenous artists.
- (6) Consumers will be able to verify that the indigenous art products they buy are authentic, not pirated.¹⁷⁸

If the legislative purpose behind Taiwan's *Protection Act* is to help improve the economic situation of Taiwan's indigenous peoples, it is more sensible to establish a registration system, rather than creating a complex registration system and restricting the opportunities for non-indigenous people to disseminate indigenous culture. Judging from Australia's experience, it appears that the adoption of such a system need not necessarily impede the transmission of indigenous culture. On the contrary, it can encourage people to purchase certified indigenous art products, thus creating economic benefits for indigenous communities.

At the same time, Taiwan should maintain its existing copyright system while using government funding to help its indigenous peoples defend against lawsuits by non-indigenous businesspeople who violate copyrights held by indigenous people (such as Kuo Ying-Nan's copyright as a performer).¹⁷⁹

If indigenous communities wish to retain a degree of internal control over traditional cultural expressions, they should be allowed to maintain these tribal practices since this is an area where different tribes have different ways of doing things. The advantage of this approach is that there is no need to force indigenous communities to conform to a single set of rules imposed by the national government.

Adoption of the certification approach has the additional benefits that the public domain can be protected without resorting to a further expansion of the scope of intellectual property rights, and that the transmission of indigenous culture can be protected while giving indigenous people the opportunity to gain economic benefit from their traditional culture.

¹⁷⁸ WIPO, *supra* note 28, at 145.

¹⁷⁹ However, there may be some argument as to whether the sampling of Kuo Ying-Nan's music by a German pop group really constituted a copyright violation. Those academics who oppose the expansion of intellectual property rights tend to view sampling as constituting acceptable use.

V. CONCLUSION

This paper is critical of the continued expansion covered by intellectual property rights and emphasizes the importance of the public domain. The author suggests that efforts to protect indigenous people or demonstrate concern for them should not lead to a contraction of the public domain and the placement of constraints on creative activity by future generations.

The paper advocates continuing to treat traditional cultural expressions of indigenous peoples as part of the public domain, so that anyone can make use of them and they can continue to change and evolve. Non-indigenous people should also be allowed to commercialize aspects of traditional culture, because doing so contributes to the transmission and dissemination of culture.

The author believes that the adoption of this approach will help to protect the public domain without resorting to a further expansion of the scope of intellectual property rights and will serve to protect the transmission of indigenous culture while giving indigenous people the opportunity to gain economic benefit from their traditional culture.