FEAR, HOPE, AND LONGING FOR THE FUTURE OF AUTHORSHIP AND A REVITALIZED PUBLIC DOMAIN IN GLOBAL REGIMES OF INTELLECTUAL PROPERTY

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I could begin this Article by describing it as a "work in progress" but I have begun to think about that seemingly innocuous phrase as a form of conceit that obscures particular privileges. For authorship is, I believe, the special privilege of having one's creative efforts recognized as creating a "work" and the capacity to appeal to the state to protect that work because it is a contribution to something we call "progress" in the arts or sciences. The moral right (in some jurisdictions) to control the contexts in which one's work circulates is a rarer privilege still. Authorship, I will suggest, is a status that gives rise to rights, but it might also be considered a position of responsibility. Moreover, it should also be considered a political accomplishment, and one that peoples throughout the world struggle to achieve. In this Article, I wish to articulate two visions—one of fear and one of hope, and, to suggest a point of reconciliation of these visions located in a broader frame of reference, the place of creativity in the international human rights framework and its integral relation to issues of cultural life and identity.

Let me make it clear at the outset that I will be using "authorship" in a broad sense, to refer to the practice of state recognition of intellectual investment in "works," whether this be expressive creativity (in copyright fields), scientific invention (the domain of patents), the

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production of marketing vehicles (trademarks), the promotion of celebrity or the design of integrated circuit topography. In short, I mean to allude to all of the domains of protection afforded by intellectual property for so-called intangible assets. Putting to one side the dispute in legal scholarship about the centrality of the author and his or her alleged "death" under conditions of postmodernism (one that demonstrates a remarkable ignorance of the sociological meaning of the term),[1] it is hardly necessary to insist upon the hegemony of the "Romantic" author,[2] to assert that intellectual property philosophically and rhetorically relies upon a set of modern European understandings about the importance of authorial works as contributions to human progress in the arts and sciences and thus to human civilization.[3] These understandings, moreover, pose great challenges for non-Western peoples who seek to project and to protect alternative forms of creative world making, and to new forms of creativity enabled by digital technologies.

Authorship, to the extent that it holds the promise of recognition for those who have traditionally been excluded from its purview, is a status that brings benefits that many aspire to. However, our intellectual property regimes have developed in such a way that we recognize an increasingly expanding field of authorial rights, disassociated from any sense of authorial responsibilities; to this extent, the concept may be too narrow for many political purposes. From a global rather than

1. For example, Jane Ginsburg does not find it necessary to engage with any of the extensive interdisciplinary literature on the topic relevant to considerations of intellectual property in her dismissal of postmodernism in her article in this volume. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003). For an extensive discussion of the cultural, sociological, and historical meaning of the term and its various permutations and their significance for considerations of intellectual property, see ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW (1998).

2. For discussion of romantic authorship see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 S. ATLANTIC Q. 947 (1996). For a more critical view of the role of this figure in intellectual property law generally, see Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. Rev. 873 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)). For an overview of the controversy and further development of the argument, see Ryan Littrell, Note, *Toward a Stricter Originality Standard for Copyright*, 43 B.C. L. REV. 193 (2001).

3. *See* Rosemary J. Coombe, *Works in Progress: Traditional Knowledge, Biological Diversity and Intellectual Property in a Neoliberal Era*, *in* GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW AND IDENTITY (Richard W. Perry & William Maurer eds., forthcoming 2003), *available at* http://www.yorku.ca/rcoombe (on file with author); Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3 (2001); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

narrowly North American perspective, there may be too many authorial rights and too few authorial responsibilities. Too much of what we now protect under the guise of authorship is not creativity or innovation, but merely investment. Too much of the world's creativity is unrecognized, and when it is recognized, our global intellectual property regimes provide rights without recognizing the responsibilities that many peoples in the world hold—responsibilities to others, to their ancestors, to future generations, and to the plants, animals, and spirits that occupy and animate the worlds they inhabit. Can authorship be revitalized to encompass this wider field of human obligation and energy? Can the exercise of intellectual property rights, like the exercise of real property rights in the twentieth century, be limited and shaped to address a larger range of social objectives?

One emerging and increasingly dominant position answers the latter question with a resounding "No!" This is a position of fear. It encompasses, but is far broader than Jane Ginsburg's observation that "copyright is in bad odor."[4] It is a position assumed by a number of scholars, activists, Non-Governmental Organizations (NGOs), feminists, advocates on behalf of the poor and subsistence farmers, and some indigenous peoples.[5] Among legal scholars, this is usually a protest against the unprecedented expansion of copyright, trademark and patent protections (although the criticism is most vocal within the United States, such tendencies are arguably more profound elsewhere). Legal protections for intellectual property are expanding to the detriment of new creators, shrinking the size and scope of the creative commons, threatening freedom of expression, putting obstacles in the way of important research and innovation, and stifling important forms of democratic dialogue.[6] In the United States, the argu-

4. Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM.-VLA J. L. & ARTS 61, 61 (2002).

5. In international policymaking circles, one increasingly hears NGO representatives arguing that the patent system was designed for machines and manufacturing and has no place in the life sciences. The "No Patenting of Life" movement, one of the many forms of resistance to the implementation of the TRIPs Agreement, adopts this position, as do many farmers groups and food security activists. For a discussion of civil society resistance movements, see Susan K. Sell, *Post-TRIPS Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 FLA. J. INT'L L. 193 (2002).

6. For representative examples see EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Harry First & Diane L. Zimmerman eds., 2001); PETER DRAHOS & JOHN BRAITWAITE, INFORMATION FEUDALISM (2002); THE COMMODIFICATION OF INFORMATION (Neil Netanel & Niva Elkin-Koren eds., 2003). *See also* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001); JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Wendy J. Gordon, Eldred v. Ashcroft: *Intellectual Property, Congressional Power, and the Constitution: Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159 (2002); M. Heller & R. Eisen-

ment is that copyright and patent law has become unbalanced, and the constitutional mandate for these rights has been lost under the weight of a neoliberal vision that protects property at all costs and cannot recognize the value of maintaining public goods. The essential distinction between ideas and expressions (or discoveries of nature and innovations) has been eroding, monopolies have become longer, and opportunities to use works without the payment of monopoly rents have declined as a consequence of technological change and international trade regimes.[7] Copyright and trademark are increasingly used as tools of corporate harassment and censorship.[8] This is, moreover, no longer the position of a few critical legal scholars—the enormous success of Naomi Klein's book *No Logo* (and the anticorporate politics it both documents and incites) is evidence that the issue is becoming one of widespread social concern[9] (and not just amongst teenagers who want free music, as conservative legal theorists dub those who are committed to creating alternative moral economies of sharing intellectual work, creativity, and democratic dialogue in digital environments[10]).

An even more dire picture is painted by social theorist Jeremy Rifkin, whose work, *The Age of Access*,[11] suggests that under contemporary capitalist conditions, corporations focus on the management of their intellectual property and increasingly divest themselves of physi-

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berg. *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998); Arti Kaul Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999). David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation*, Duke University Law School's Conference on the Public Domain, Nov. 9-11, 2001 *available at* http://www.law.duke.edu/pd//papers.html (last visited Mar. 3, 2003); Pamela Samuelson et al., *A Manifesto Concerning the Legal Proteciton of Computerprograms*, 94 COLUM. L. REV. 2308 (1994); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); J.H. Reichman, *Database Protection in a Global Economy*, XVI REVUE INT'L DE DROIT ECONOMIQUE 455 (2002).

7. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001).

8. KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW (2001).

9. For a longer consideration of Naomi Klein's book and other recent considerations of the social and cultural impact of expanding intellectual property protections, see Rosemary J. Coombe, *Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research, in* A COMPANION TO LAW AND SOCIETY (Austin Sarat ed., forthcoming 2003) (on file with author).

10. For recent discussions of new moral economies in digital environments, see Rosemary J. Coombe & Andrew Herman, *Culture Wars on the Net: Trademarks, Consumer Politics and Corporate Accountability on the World Wide Web*, 100 S. ATLANTIC Q. 917 (2001); Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconstructing Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121 (2003).

11. JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM, WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE(2000).

cal property, real estate, and employees. The phenomena of "lean production" suggests that companies shed themselves of all forms of capital other than intellectual property, which can be licensed rather than assigned, ensuring a continuous flow of revenue with none of the burdens that attach to holding other forms of property. The strategic licensing and pooling of trade secrets, patents, trademarks, copyrights, and publicity rights creates new networks of control that are concentrating more and more power in fewer corporate hands to the detriment of research, innovation, and human health and food security. The exercise of patents over gene sequences, for example, has created circumstances of extortion that limit human access to vital health technologies (breast cancer tests being a recent example).

Rifkin makes this point using a number of examples. He shows how the strategic use of intellectual property rights is being used to eliminate markets and restrict competition. For instance, the phenomenal growth of franchising has usurped small businesses across North America; today's franchisees bear all of the financial risks and all of the burdens of employing people and owning property but have no opportunity to develop independent goodwill. They are subject to strict scrutiny and surveillance by those who hold the intellectual property rights (in the name, logos, trade dress, packaging, etc.) who are in a position to dictate the conditions under which business is done; they are at continuous risk of losing their licenses. Unlike small businesses of the past, these outlets are not free to adapt to local circumstances, support local causes, or respond to local needs. Those who hold the real power by exercising the intellectual property rights are not accountable to those who live in the communities from which they extract profits, and their licensees are restricted in their capacities to do so by the very terms of the contracts that govern their use of the intellectual property.

Another example concerns the conditions under which films are produced. Rifkin sees the "Hollywood Organizational Model" as exemplary of a "network-based approach to organization" that threatens to become dominant in a number of fields.[12] Whereas the early film industry relied upon Fordist mass production principles and vertical integration (control over theatres and box offices), the forced divesture of cinema chains under antitrust law compelled the industry to consider new methods of production that relied upon more customized creation of fewer products—the "blockbuster"—whose value was built through the careful management of public relations, advertising,

12. *Id.* at 24-29.

and merchandising tie-ins. Such values relied upon legal recognition of more and more aspects of the expressive product and its merchandising as exclusive properties. Securing and managing these intellectual property rights enabled companies to ensure streams of revenue by linking films to expanding realms of popular consumption while outsourcing the film's production. More and more small companies are involved in production, but they are dependent upon fewer and fewer industrial players for investment capital and will see none of the royalties from the film's performance, distribution, reproduction, or derivatives. The burden of owning assets, employing people, and the environmental costs or other negative externalities of production can thus be avoided by producers whose profits are dependent primarily upon the management of intellectual property rights. For Rifkin, this model is paradigmatic of tendencies in all "information-based" industries, whose major assets are intangible ones, protected by intellectual property rights. As increasing numbers of industries aspire to become more "knowledge-intensive" then, it would seem to follow, control of intellectual property will ensure greater concentrations of power and less accountability of such power to workers, communities, consumers, or environments of habitation.

On the global front, perspectives on intellectual property are no more sanguine. The position of fear is more accurately sounded as a cry of alarm. The role of multinational business elites—the world's most powerful industrial authors—in incorporating intellectual property under global trade regimes has been described as manipulative, coercive, and instrumental[13]—taking exploitative advantage of huge inequalities of bargaining power to force developing countries into an agreement that was never in their interests—and continuing to use the trade dependency that the United States has cultivated to push states to implement even more extensive intellectual property protections than the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) itself requires.[14] Some critics have even called this "a planned attack on the institutions of civil society."[15]

Communications scholars bemoan the fact that through the TRIPs Agreement, international informational liberalization policies have assumed hegemony, limiting the ability of states to ascertain public in-

13. Peter Drahos, *Global Property Rights in Information: The Story of TRIPs at the GATT*, 13 PROMETHEUS 6, 9 (1995).

14. Sell, *supra* note 5.

15. John Frow, *Public Domain and the New World Order in Knowledge*, 10 SOC. SEMIOTICS 173, 176 (2000).

terests for their citizens in the arena most essential to democracy itself—namely the structure, form and accessibility of expression in the public sphere.[16] The proprietary rights of industrial authors have completely eclipsed other rights—rights of cultural self-determination, rights of creators to their moral interests, rights of access to information, rights of citizen access to media and communications forums, and rights to pursue independent national cultural policies. Again, it might be too early to make such dire predictions; the radical privatization of the culture of the public domain will face a number of challenges as states create national exemptions[17] and hopefully, tailor local regimes to meet democratic (and I would add, developmental and cultural) objectives.[18] However, the growing tendency of the United States and Europe to put trade pressure on developing states to sign onto bilateral treaties that demand an even higher level of intellectual property rights than required by TRIPs Agreement has recently limited optimism on this front.

By now, no doubt, you are anxious for me to articulate a position of greater hope for authorship's futures. There is hope, and a great deal of energy, going into the project of making intellectual property less Eurocentric in the forms of authorship it recognizes, the creative activity it embraces, and the values that it can be used to protect. The World Intellectual Property Organization (WIPO) has embarked on a new mission to "reach out to new beneficiaries"—sending fact-finding missions around the world to ascertain how the intellectual property system could be used, amended, or altered, to better protect "traditional or indigenous knowledge" as well as putting renewed energy into mechanisms to protect folklore.[19] This mission is supported by a number of other United Nations (U.N.) institutions, such as the U.N. Environment Programme, the U.N. Conference on Trade and Development, the U.N. Educational, Scientific and Cultural Organization

16. Shalini Venturelli, *Cultural Rights and World Trade Agreements in the Information Society*, 60 GAZETTE: INT'L J. FOR COMM. STUD. 47 (1998).

17. J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441 (2000).

18. Nell Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998).

19. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is a forum where governments discuss matters relevant to three primary themes. These themes concern intellectual property issues that arise in the context of: (i) access to genetic resources and benefit-sharing; (ii) the protection of traditional knowledge, innovations and creativity; and (iii) the protection of expressions of folklore.

Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore: Intergovernmental Committee (IGC) Overview: Establishment and Mandate, at http://www.wipo.int/globalissues/igc/index.html (last visited Mar. 6, 2003).

(UNESCO), and the U.N. Development Programme, all of whom are invested in ensuring that intellectual property serves a larger range of human rights commitments.

For more than 180 states, the use of intellectual property to further the protection of biological diversity, contribute to sustainable development, and "protect, promote, and encourage the use of the knowledge, innovations, and practices of indigenous communities and communities embodying traditional lifestyles" to further these ends is a legal obligation embraced by virtue of ratifying the Convention on Biological Diversity. To the extent that state parties have also committed themselves to ensuring that their intellectual property protections are used in a fashion conducive to these ends, this has created some guarded hopes (as well as some anxieties) that intellectual property laws might begin to recognize, *inter alia*, the authorship of traditional healers, rural plant breeders, female cultivators, and ecological landscape designers. The activities of these peoples are increasingly recognized as creative, innovative and valuable contributions to sustainable development—works, in other words, that contribute to a new understanding of human progress.[20] These works are also recognized to be cultural in nature, occasionally held by individuals, but more often by families, clans, lineages, and moieties. The peoples who create these works do so in culturally specific ways; to the extent that their languages and cultures are threatened by linguistic assimilation, logging, mining, and modern agricultural encroachment, efforts to protect and preserve their traditional knowledge may also be a means of pursuing cultural self-determination.[21]

Scientists, social scientists, and policy-makers are increasingly aware that biological diversity is not something "discovered" in nature, but something that has been cultivated by human beings over extensive periods of time. Nature, in other words, may be one of the biggest human artefacts, in two senses. First, the Western world created the concept, which is largely a mythic one, of pristine wilderness to advance its own colonial and imperialist agendas. Second, those areas of the world we regard as the most pristine, in fact appear to be the product of complex human landscape management[22] (a term which does an injustice, I believe, to the cosmologies of those peoples who regard

20. For a longer discussion of this topic, see Coombe, *supra* note 3.

21. For a longer discussion, see Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001).

22. For a popular discussion, see Charles C. Mann, *1491*, 289 ATLANTIC MONTHLY 41 (2002). Ethnographic and historical work in the Amazon reveals the complex ways in which the rainforest, rather than being a pristine environment, has been constructed by human cultural intervention. *See* HUGH RAFFLES, IN AMAZONIA: A NATURAL HISTORY (2002).

themselves as parts of an ecosystem of interdependence and ongoing responsibility—resource management being an inappropriate industrial term). The world environmental community now understands forests as anthropogenic, habitats as culturally inscribed, and seeds as cultivated, not simply in breeding labs, but in the smallest of farmers' fields. Nature, in other words, is a product of human creativity. Not surprisingly, the rhetoric of authorship has been increasingly deployed to draw attention to these accomplishments.

Elsewhere I have described this process as one of redefining the location of the "raw and the cooked" on global terrain.[23] I believe that this expansion of the vocabulary of authorship is integrally linked to both trade liberalization and the growth of informational capital. The so-called "level playing field" for international trade ensures that some goods—like genetic resources, timber, textiles, know-how, practices, and knowledges extracted from developing countries—flow freely, whereas others—like genetically modified or industrially developed seeds, fertilizers, pesticides, software, and medicine—do not flow freely but are conveyed only as monopolies that command lengthy payments of rent for each use of their informational content. Those who are seen to provide mere resources, data, or information to a "common heritage" or "public domain" are at a great disadvantage compared to those whose creative contributions are recognized as authored works, protected by intellectual properties. To the extent that the information contained in genetic resources is understood to be created or authored by the innovative activities of rural peoples, then its availability can be circumscribed, and flows of such resources monitored and controlled to enable new forms of benefit-sharing. According to the logic of these propositions, these peoples, too, inscribe effort and expression into material forms to which they add value, and this value should be recognized when biodiversity is drawn upon in the activities of industrial authors.

There are many reasons to be uneasy about the prospects of expanding intellectual property rights wholesale to these newly recognized arenas of cultural creativity, and many of these objections have been made by indigenous peoples themselves (who insist upon tying any recognition of their intellectual properties to their heritage rights as indigenous peoples, and thus to their claims to territory, and eventually, forms of self-determination). Many are fearful of any attempt to expand intellectual property rights in these new directions. This so-called "copyrighting of culture" will only further imperil the public

23. Coombe, *supra* note 3.

domain; it may enable elites to enforce forms of censorship within communities; it has the potential to freeze cultural identities, and shut down desirable hybridities.[24] Peoples are members of societies, not cultures, and cultural forms cannot be located and sequestered inside artificial boundaries.[25] Communities should not be romanticized because their evocation often serves to reinforce constitutive forms of social exclusion and authoritarian forms of governance.[26] The distinction between traditional and modern knowledge is a specious one.[27] (This is not the argument that "information wants to be free" in John Perry Barlow's oft-quoted phrase, but that knowledge tends to flow and to develop, and in democratic societies, we regard this as a good thing.) Here, it would seem, the First Amendment and the fair use doctrine are at risk by overreaching natives—for some reason always imagined as male, patriarchal, and meanly protective of their traditional authority.

Such fears are both abstract and overstated; they certainly do not appear to be based upon any familiarity with actual international negotiations involving indigenous peoples, developing countries, and civil society organizations. Rather than assuming the scope and parameters of the public domain to be appropriate and just, we might consider the conditions under which the "properties" that indigenous peoples and local communities seek to protect were put into the public domain. To what extent did the publication of these materials involve the prior informed consent of the peoples who shared these practices, innovations, and forms of knowledge? To what extent did the use made of these properties accord with the understandings and agreements of the communities from which they derived? We need to be alert to the fact that breaches of fiduciary duty and breaches of confidence in government, academic and private research involving indigenous peoples and ethnic minorities were common in the past,

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24. *See* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (forthcoming 2003).

25. For examples of this argument, see Michael F. Brown, *Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193 (1998); Stephen B. Brush, *Bio-prospecting the Public Domain*, 14 CULTURAL ANTHROPOLOGY 535 (1999).

26. For a recent overview of the romanticism and social violence that often lies behind the evocation of community, see MIRANDA JOSEPH, AGAINST THE ROMANCE OF COMMUNITY (2002). For a consideration of issues of inequality and power that are often obscured by the evocation of community in participatory development, see THE MYTH OF COMMUNITY: GENDER ISSUES IN PARTICIPATORY DEVELOPMENT (Irene Gujit & Meera Kaul Shah eds., 1998). For the assertion that evocations of community often elide issues of governance, see Richard Peet & Michael Watts, *Introduction* to LIBERATION ECOLOGIES 5 (Richard Peet & Michael Watts eds., 1996).

27. Arun Agrawal, *Dismantling the Divide Between Indigenous and Scientific Knowledge*, 26 DEV. & CHANGE 413 (1995).

and that relations of trust were often violated.[28] These peoples have often been legally incapacitated in terms of protesting such injustices and seeking redress. However, the politicization of issues of cultural heritage through the articulation of the principles that animate the Draft Declaration of the Rights of Indigenous Peoples[29] may revitalize their claims. Throughout these and other related U.N. negotiations the dynamic and innovative nature of cultural tradition has been insisted upon and widely acknowledged, rather than any timelessness, purity, or essence. Moreover, the rights of women and children have been central to these new cultural assertions which are, significantly, made in a human rights framework in which other rights—such as freedom of expression, rights of access to human heritage and benefits from technology, and rights to benefit from the fruits of one's labor—must be balanced.[30] In any case, new regimes of rights will not be absolute but will require new principles of limitation and forms of exemption.

Many progressive North American scholars of intellectual property have placed their energies behind the revitalization of a "cultural public domain" and the maintenance of a "creative commons."[31] If, however, this exercise is going to serve the political aspirations of a wider range of creators, then a few caveats seem in order. A cultural public domain framed entirely by American legal principles, without consideration of the legal circumstances in which most of the world's peoples find themselves runs the danger of appearing to be both self-serving and imperialist. To the extent that we are committed to the *cultural* public domain, we need to consider a wider range of activities and practices than those that copyright law traditionally recognized as acts of authorship and those most characteristic of Western creators. A vibrant cultural domain will also require consideration of means to maintain cultural diversity and ongoing dialogue across and between cultural traditions.

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28. *See* MARIE A. BATTISTE & JAMES Y. HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE (2000).

29. *United Nations, Human Rights Comm. Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, 11th Sess., Annex I, U.N. Doc. E/CN.4/Sub.2 (1993).

30. For a longer discussion of the conflicts of rights that may be entailed by considerations of cultural rights in relation to traditional knowledge relevant to the conservation of biological diversity, see Rosemary J. Coombe, *Intellectual Property, Human Rights, & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998).

31. *Duke Law School's Conference on the Public Domain* (Nov. 9-11, 2001), *at* http://www.law.duke.edu/pd/papers.html (last visited Mar. 5, 2003); *Creative Commons*, *at* http://www.creativecommons.org (last visited Mar. 5, 2003).

Discussion of the public domain in North American legal academic circles tends to concentrate upon issues of fair use and the First Amendment, with some attention to new forms of contractual licensing in digital environments and vague allusions to common property regimes in political formulations, which are generally liberal, libertarian, or anarchistic. Intellectual property laws, however, have jurisprudential habitats other than the U.S. Constitution and European philosophical traditions. Intellectual property rights are human rights, as are rights of access to the public domain, rights of collectivities to maintain their cultural integrity and to participate in decisions involving the use of their cultural heritage.[32] The international human rights framework provides a rich and fertile source of legal and normative resources with which to consider limitations to intellectual property rights and principles for delineating the parameters of a public domain forged around a greater range of political aspiration and conceptions of social justice. To the extent that the United States (among Liberia, Turkey, and South Africa) has never signed and ratified the International Covenant on Economic, Social and Cultural Rights,[33] it is not surprising that it tends to be overlooked here, but it is important to realize that this is an isolated position and that these rights are accepted (even occasionally in the United States itself) as part of international customary law and thus as the normative framework through which national laws should be interpreted.

Proponents of the public domain should be aware that if we focus too exclusively upon concepts of fair use and the jurisprudence interpreting the intersection of copyright, patent, trademark, and the First Amendment, we are concerning ourselves with local ordinances in a world of global interconnections increasingly governed by neo-liberal trade regimes, which have a tendency to narrow the realms of their applicability. The First Amendment is a remarkable privilege; many peoples in the world, even those living in putative democracies, do not live in societies where free speech is recognized as an overarching value. Even those, like myself, who are citizens of states that do enjoy a constitutional right to freedom of expression may live with judicial systems unwilling to recognize that the exercise of intellectual property rights may conflict with fundamental expressive freedoms.

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32. For a consideration of the international cultural human rights framework in which intellectual property is situated, see Coombe, *supra* note 30 and literature cited therein.

33. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3. A list of signatory and nonsignatory states may be found at http://www.hri.ca/fortherecord2002/documentation/reservations/cescr.htm.

The situation with respect to fair use is more dire. For example, when Canada was in the process of considering legislative copyright amendments in order to comply with the North American Free Trade Agreement (NAFTA) and TRIPs Agreement, our legislators were greatly assisted by U.S. industrial intellectual property rights holders, who were the most organized and effective lobbyists on the scene. It was persuasively argued that Canada had no need for a fair use provision to replace its incredibly narrow "fair dealing" clause, which prohibits any balancing of interests. Indeed, the simultaneous proliferation of collecting societies (many of which bear nicely patriotic names, such as the Copyright Collective of Canada, who represents the U.S. independent motion picture and television production industry for all drama and comedy programming[34]) were designed to create conditions that reduced the transaction costs for the blanket licensing of copyright works to user groups. Under such conditions, it became reasonable to maintain the position that if a work could be easily licensed with minimal transaction costs, no use of a work (other than minor quotation news reporting or for critical review accompanied by an acknowledgement of the copyright holder) should be deemed a fair one. Nearly all unlicensed uses, in other words, were presumed to be unfair. We should also be cognizant of the fact that the major copyright industries have an interest in isolating the United States and its robust fair use jurisprudence and that these principles may be subject to challenge under international trade regimes. Recent regional trade agreements clearly reflect this tendency to narrowly enumerate permissible usages and thereby usurp the policy balances enabled by fair use determinations. As Ruth Okediji has argued, U.S. fair use provisions could easily be interpreted as impermissible usages even under the TRIPs Agreement itself (although she also provides an analytical framework that might be used to counter such assertions).[35] To the extent that the World Trade Organization is now opening itself up to more participation by global civil society organizations and is coming under the scrutiny of international human rights bodies,[36] we will forego a necessary and valuable opportunity if we continue to address the public domain only through the lens of national and parochial legal categories rather than through a body of

34. A list of Copyright Collective Societies may be found at http://www.cb-cda.gc.ca/societies/index-e.html.

35. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000).

36. *See, e.g.*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., 25th Meeting, E/CN.4/Sub.2/2000, 17 Aug. 2000.

international law, which has the allegiance (in principle, if not always in practice) of a far wider community of nations.

I want to move here from positions of fear and hope to one more akin to longing or yearning. Although critical intellectual property scholars have long been concerned with the reckless expansion of intellectual property rights, many of us also had political aspirations for the future of intellectual property that were wider than simply protecting rights of access to cultural forms. For example, in the Bellagio Declaration of 1993, a group of us, including Jamie Boyle, Peter Jaszi, and Pamela Samuelson agreed that:

> In general, we favor increased recognition and protection of the public domain. We call on the international community to expand the public domain through expansive application of concepts of fair use, compulsory licensing, and narrower initial coverage of property rights in the first place. But since existing author-focused regimes are blind to the interests of nonauthorial producers as well as to the importance of the commons, the main exception to this expansion of the public domain should be in favor of those who have been excluded by the authorial biases of current law.[37]

Thus, we advocated consideration of *sui generis*, and/or neighbouring rights regimes to protect works of cultural heritage, folklore, and traditional environmental knowledge. The ecosystem knowledge of indigenous peoples and those whose traditional cultural knowledge of local ecosystems nurtures the ongoing creation of biological diversity upon which the world's food security depends, has since this time, become an issue of great importance within the United Nations. I have been privileged to work with the Indigenous Caucus of U.N. Working Groups under the Convention on Biological Diversity and to observe ongoing deliberations at WIPO on protections for folklore, traditional knowledge, and genetic resources. When participating in such deliberations, it becomes clear that for peoples whose creative efforts have for centuries been considered "the common heritage of mankind," the public domain is perceived as a concept that justifies their ongoing impoverishment. It is a term they hear as legitimating the appropriation of cultural forms that are reduced to mere resources, data, and raw material for the "works" recognized as the authorial properties of Western others. It functions, from their perspective, as a zone for expropriations that deny them their membership as peoples in the world of nations and respect as creators in their own right. I would hope that these peoples are taken into account when we consider issues of access in authorship. A cultural public domain might consider our re-

37. Jaszi & Woodmansee, *supra* note 2.

sponsibilities as well as our freedoms, recognizing that freedom is more than mere license, that liberties are not necessarily libertarian and that the acts of appropriation we champion are not only creative, critical, and transformative, but ethical—attentive to the conditions under which we come to have access to cultural resources and their meanings in the life worlds of others. The demand of indigenous peoples and traditional communities is not simply for compensation (although a liability rule regime such as Jerry Reichman has proposed might well accomplish local benefits in this area[38]) but for authorial recognition as peoples, partners, and participants in the preservation of cultural diversity to serve longer-term objectives for greater distributional justice.

In the next fifty years it is estimated that we will lose forever thousands of the remaining human languages in the world as well as the cultural knowledge that these languages embody. The peoples who speak these languages are under threat—their livelihoods are imperilled as they are displaced from ancestral lands by mining, timber companies, and modern agriculture, and pushed into urban economies that cannot support them. The biological diversity they nourish, they nourish precisely through their distinctive cultural knowledges of local ecologies. The environmental metaphor that James Boyle suggests we adopt when considering the politics of protecting the informational commons is apt,[39] but it is important to remember that the concept of ecology is not simply one of relationships between parts of a natural world or amongst social actors but also acknowledges the cosmologies that link people and environments with their ancestors, animal spirits, and obligations to future generations. Yale legal scholars may believe that First Amendment freedoms are the ideal embodiment of liberty for the human imagination,[40] but other peoples occupy other relationships to cultural forms—trust, secrecy, respect for the sacred, social institutional forms such as initiation, ritual regard, obligations to ancestors, descendents, and an ethics of care with regard to spirits and other nonhuman living things. The cultural survival of peoples—another recognized human right—will require that our authorial appro-

38. J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743 (2000).

39. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net*, *available at* http://www.james-boyle.com (last visited Jan. 25, 2003).

40. Jed Rubenfeld, for instance, believes that the current interpretation of the U.S. copyright statute is unconstitutional with respect to the making of derivative and transformative works because it conflicts with the human freedom of imagination most perfectly embodied in the First Amendment. *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

priations do not involve depredations or desecrations. Certain takings of cultural goods do create cultural, social and political harms to peoples for whom cultural forms are more tightly interwoven with specific forms of subsistence in local lifeworlds of meaning. For this reason, respect for the limited common property regimes of others (as Carol Rose has suggested[41]) should not be overlooked in the cultural public domain we seek to conceptualize and implement. Indeed, the U.N. Development Programme, the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, the Convention on Biological Diversity's Working Group on Access and Benefit Sharing, as well as the Working Group on the Draft Declaration of the Rights of Indigenous Peoples[42] have all in various ways commented negatively on the relentless expansion of industrial intellectual property rights, and, along with WIPO, proposed that indigenous customary laws be considered viable sources for judicial resources to inform model legal regimes at the international level.

A more inclusive public domain, however, is not one in which we are called upon merely to acknowledge closed local fiefdoms over cultural resources, but is more appropriately considered a space of opportunity for cross cultural dialogue. Let me conclude by providing three examples.

The first example is an intergovernmental and civil society initiative that indicates that the desire for a public domain premised on the affirmation of cultural diversity is widely shared. The adoption by acclamation of the UNESCO Universal Declaration on Cultural Diversity in November 2001 illustrates that many states desire recognition for "the legitimate right of States to support and create a favourable environment for the creation and expression of diverse forms of culture, through the creation of cultural policies."[43] The Declaration affirmed that cultural goods, as vectors of identity, value, and meaning, must not be treated merely as commodities or consumer goods. The underlying belief is that trade liberalization is undermining cultural diversity, but the position is not a defensive one:

> It is important to add, though, that even if globalization is changing national cultures in the anthropological and sociological sense, this

41. Carol M. Rose, *Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age*, *available at* http://www.law.duke.edu/pd/papers/rose.pdf (last visited Jan. 25, 2003); Conference on the Public Domain at Duke University, Nov. 9-11, 2001.

42. *United Nations Development Programme*, *at* http://www.undp.org (last visited Jan. 25, 2003); *United Nations Environment Programme*, *at* http://www.unep.org (last visited Jan. 25, 2003).

43. The Expert's Committee on the Strengthening of UNESCO's Role in Promoting Cultural Diversity in the Context of Globalization.

> does not mean that any political initiative that might influence these cultures in one way or another should be rejected. To assert the contrary would be to attempt to freeze these cultures and national identity and lend them a meaning that would only benefit those people who hope to turn them into instruments of political control. Any national culture to remain vibrant and alive must adapt over time to a variety of changes, both internal and external. The real problem that globalization poses for national cultures is whether the changes it brings about in values' lifestyles, and ways of doing things detract from the opportunity to '[translate], promote and maintain a pluralistic public space where citizens can access and participate in cultural life . . . whether it leaves enough space beyond the simple producer-consumer relationship for the democratic expression of the cultural choices that these citizens wish to make.[44]

This initiative brings together a group of fifty-three states and cultural policy ministries as well as a civil society network of cultural producers who are concerned that the strategy of "cultural exemptions" under trade agreements is ill conceived and that cultural diversity among and within societies needs to be positively affirmed as a fundamental social and public good, if not a human right. Cultural diversity promotes social cohesion, economic development, and democratic values and practices. It requires cultural exchange, international cooperation and dialogue, as well as positive policy measures to support minority cultures. Rather than "freeze" cultural identities, such measures are designed to enable more peoples with distinct traditions to participate in cultural life, which is after all, a fundamental human right.

A second instance involves a Western musical band named Enigma who developed a musical composition titled *Return to Innocence* that contained, *inter alia*, a sample of a recording of the music of an indigenous group—the Ami—residing in Taiwan. As this music was neither individually authored nor fixed in material form, it did not attract traditional copyright protection, even assuming that groups of rural people with oral traditions would have the capacities to secure the protections afforded by national copyright systems. It appears that the music was first recorded in 1978 by visiting researchers for what was locally understood to be archival purposes and later found its way, unbeknownst to the elderly singers, on a compilation of Chinese folk music and an album released in France.

The resulting lawsuit relied upon international conventions on performance rights to insist that indigenous peoples had the right to pro-

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44. Ivan Bernier, *A New International Instrument on Cultural Diversity: Questions and Answers*, *available at* http://www.incd.net/html/english/conf/bernier.htm (last visited Apr. 8, 2003).

hibit the use of fixations of performances that were unauthorized by the original performers. It received national support and international attention when the Enigma song, using the sample of the singers, remained on Billboard Magazine's international chart for thirty-two consecutive weeks, the album went multi-platinum and the song was chosen as an anthem for the 1996 Atlanta Olympics. Arguably the song's popularity enabled the original singers to discover the appropriation (friends who heard their voices in the song while traveling congratulated them for their international success). The artists were under contract to a Taiwanese record company who wanted to bring Taiwan's aboriginal music to a wider audience, and were no doubt concerned about losing its market share to Enigma and other world music bands who had access to these historical recordings. Certainly, without the record company's financing, it is doubtful that a lawsuit could have been launched or financed and without the help of international entertainment lawyers committed to the rights of third-world peoples, the suit would likely never have come to a settlement.

The ultimate settlement, however, provided more than mere compensation for the two singers whose performances were used.[45] Formal thanks were given by the defendant record companies for the contribution that their work as practitioners of oral culture made to the song, the singers were given full credit on liner notes in future releases of the work, and, more importantly, a foundation for the preservation and revitalization of tribal musical culture was established with the proceeds. World attention was drawn to the cultural traditions of Taiwanese first nations and several indigenous musicians representing different ethnic groups in Taiwan have now received recording contracts and incentives for the ongoing development of culturally distinctive musical traditions as well as opportunities to collaborate with musicians from other cultural backgrounds.

The historical particularities of Taiwan's indigenous peoples' relations with the state are significant here, for they illustrate just how resilient cultural traditions may be when people are given cultural opportunities.[46] In the late 1980s, few knew anything about Taiwan's groups of Malayo-Polynesian aborigines. Indeed, many of these social

45. There are a series of Internet news articles that contain details about the settlement. *See Taiwanese Settle Lawsuit Claiming Their Original Composition Was Stolen: They Will Now Set Up Foundation*, *at* http://www.geocities.com/enigma_monk/article4.html (last visited Jan. 25, 2003); *Ami Sounds Scale Olympian Heights*, *at* http://www.sinorama.com.tw/8508/508006e1.htm (last visited Jan. 25, 2003); *World Music Singer Difang of Taiwan's Ami Tribe Dies at 81* (Mar. 29, 2002), *at* http://geocities.com/enigma/air/rtiarticle6.html (last visited Jan. 25, 2003).

46. This discussion is drawn from Michael Rudolph, Heidelberg University Institute of Chinese Studies, *Taiwan Aboriginal Culture Resources: Die Ureinwoher Taiwars*, *at* http://www.sino.

groups and their languages were considered extinct. Taiwan's national government had denied their existence for years, actively suppressing any expression of ethnic diversity after 1945. Like most of the world's indigenous peoples, they were unable to study or speak their own languages and forced to abandon traditional lifestyles and resources. When the first Taiwan-born president in Taiwan's history was appointed in 1990, a multi-cultural Taiwanese identity was newly acknowledged and supported. Aboriginal groups were officially recognized as indigenous peoples with specific cultural rights in accordance with international human rights norms. This political recognition, however, is contingent and may at any time be put at risk depending upon the state of Taiwanese relations with People's Republic of China. The Chinese government asserts the cultural and genetic homogeneity of all Chinese peoples, including those in Taiwan who are thus implicitly deemed to be members of the ethnic Han majority. Given that as recently as the 1970s and 1980s many of these aboriginal peoples were widely considered to be extinct and their traditions endangered, if not lost to humankind, this revival of Ami musical traditions is a remarkable story of cultural revitalization. A political commitment to a creative commons, a robust public domain, and a vigorous First Amendment would not have been sufficient or even desirable to enable this cross cultural exchange, but more likely would have hastened this music's decline. The rights of Western authors to access cultural forms for the purposes of creative transformation need to be balanced with other human rights, if only because there may be no more of such music to sample from in the very near future, given the circumstances in which most of the world's indigenous peoples find themselves. In short, Western arts of appropriation might be practiced so as to further the maintenance of, or at least stem, the ongoing destruction of cultural diversity.

A third example also indicates the possibility that acts of appropriation may serve wider social purposes when the liberal impulse to seek resources from the so-called "public domain" is countered with the cultural rights claimed by others. In 2001, Maori lawyers who represented indigenous NGOs wrote letters of complaint to the Lego Corporation about the content of its "Bionicle" action toy figures, which used Maori words and historical figures combined ahistorically with terms and mythical figures from Easter Island and Polynesian cul-

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uni-heidelberg.de/staff/rudolph/aborres.htm (last visited Jan. 25, 2003). Rudolph maintains interlinked web pages on Taiwanese aboriginal culture.

tures.[47] When Maori lawyers brought their concerns to Lego lawyers, they made it clear that they had no desire to prohibit all representations derived from Maori culture from the international toy market. Rather, they objected to the fantastic hybridizations of cultural traditions the game effected and the unintentionally disrespectful use of religious terms such as the titles of healers and spiritual advisors. Maori groups offered to engage in a dialogue of reconciliation that would permit appropriate and respectful usages. Lego sent representatives to New Zealand to confer and, as a consequence of their meetings, the corporation agreed to engage Maori advisors as consultants in the development of a code of conduct for governing the use of traditional knowledge in the manufacture of toys. The Maori, in turn, will help Lego and other corporations make contact with indigenous peoples. Rather than protecting their cultures by isolating themselves and sequestering cultural forms, they sought to ensure that these mass-market appropriations served as educational as well as entertainment vehicles that promise greater recognition for indigenous peoples who too often have been reduced to primitive caricatures in Western mass media.

Unfortunately, there is little evidence that the Lego Corporation fulfilled its commitments. There is, however, ample evidence of a proliferation of Internet discussion between Lego Bionicle fans and Maori cultural activists about freedom of speech and the significance of cultural forms, the nature of language in shaping cultural identity, and relationships between power, privilege, and respect in digital environments. Not all of this communication is civil, some of it is vituperative, aggressive, and even hostile. Nonetheless, the mutual process of education around issues of cultural identity and the First Amendment is a hopeful sign for the future.[48]

Indigenous peoples (and local communities) active in global fora often seek forms of recognition that will enable their participation in new forms of collaboration that value the specificity of the knowledge they bring to global dialogues. By considering both intellectual property rights and rights to the public domain within a larger human rights framework, the social, economic and cultural rights of others

47. *See Lego Game Irks Maoris*, May 31, 2001, *at* http://news.bbc.co.uk/1/hi/world/asia-pacific/1362435.stm (last visited Mar. 7, 2003); Kim Griggs, *Maori Take on hi-tech Lego Toys*, Oct. 26, 2001, *at* http://news.bbc.co.uk/2/hi/asia-pacific/1619406.stm (last visited Mar. 7, 2003); *Lego Agrees to Stop Using Maori Names*, Oct. 30, 2001, *at* http://news.bbc.co.uk/1/hi/world/asia-pacific/1627209.stm (last visited Mar. 7, 2003).

48. For a discussion about this communication, see Andrew Herman & Rosemary Coombe, *Dancing Masks in Legoland: Cultural Wars of Property and Propriety in Cyberspace* (to be available at http://www.law.yale.edu/isp/democracy_conference_main.html) (on file with author).

assume a new significance. Ultimately, perhaps, we should work to ensure that respect for human creativity, aspirations for the "cultural public domain," and the protection of a creative commons, is a multicultural and dialogic activity that links culturally diverse commons through respectful negotiations that cross borders, build bridges, and open minds.