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Natural Rights and Ancestral Writings

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The 2024 WIPO Treaty on Genetic Resources and Traditional Knowledge acknowledges formally the existence of traditional knowledge of Indigenous peoples and local communities. Recognition of this knowledge as a matter of intellectual property law has been a subject of important and contested debate, including among scholars whose views on the justifications for proprietary models for traditional knowledge meaningfully differ. The WIPO Treaty does not address the rationale for giving legal protection to Traditional Knowledge. This Article supplements the existing literature on such rationales, broadening their potential base but also suggesting considerations that limit them.

The Article examines bases on which Indigenous rights over the copying of Traditional Cultural Expression ("TCE") might arise. The Article takes issue with the common scholarly practice of borrowing criteria for legitimacy from the standards and policies of Western IP rights and criticizes the way Western IP is itself misunderstood. There may be routes through which Western law could open its doors to some rights aimed at protecting Indigenous privacy and preserving existing Indigenous culture.

Table of Contents

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INTRODUCTION

This Article critically examines arguments that oppose the grant of certain Indigenous intellectual property ("IP") rights. In particular, the Article targets claims that rights against the copying and display of expressive works should not be attached to Indigenous cultural creations[1] unless (a) those rights have purposes that are consistent with the policies that Western copyright[2] is meant to serve and (b) the rights satisfy Western copyright requirements of limited duration. The topic is not new, but many aspects of the issue remain unresolved. Revisiting the topic now is timely given the recently concluded World Intellectual Property Organization's ("WIPO") Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.[3]

1. This Article defines "Indigenous cultural creation" as a fixed or unfixed work of authorship: something that ordinary copyright laws would have protected if it were made more recently and fixed. A work of authorship is an intangible pattern of choices that are creatively "selected, coordinated, or arranged," 17 U.S.C. § 101 (2010), which, if followed, would generate a sequence of words, colors, shapes, notes, body movements (e.g., choreography), or other communicatory or expressive elements. It can be an "Indigenous cultural creation" even if the existing version (say, a mask) is a copy of a copy of a copy of something an ancestor made. What matters is that an Indigenous group values the pattern because of its ties to the past, the earth, or other aspects of its heritage. This definition focuses this Article on a narrower range of questions than embraced by most literature on Indigenous intellectual property rights. Compare my approach with, for example, the breadth of William Fisher, *The Puzzle of Traditional Knowledge*, 67 DUKE L.J. 1511, 1513 (2018) (defining traditional knowledge to include "skill" and "understanding"). This Article intends to drill down on a narrower question, namely, works of authorship that have not been created within the period of ordinary copyrights. Whether rights should attach to the "skills" used to generate such works is outside the scope of this Article.

2. For ease of exposition, I will often use U.S. copyright law as a placeholder for, and an example of, the many Industrial Age copyright laws.

3. Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, *WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, WIPO Doc. GRATK/DC/7 (May 24, 2024); *see also* WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], WIPO TREATY ON INTELLECTUAL PROPERTY, GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE: INFORMAL SUMMARY 1 (2024), https://www.wipo.int/edocs/mdocs/mdocs/en/gratk_dc/gratk_dc_exsum.pdf [https://perma.cc/U455-V5ZX]. "The term 'traditional knowledge' or its abbreviation 'TK' is sometimes used as

The arguments targeted include the implicit claim that Indigenes,[4] if seeking to be freed from Western copyright's fixed duration for works of expression, would be demanding something special that violates principles of equality. This Article also targets the connected claim that it would be very costly and would distort the overall law of property and intellectual property to adopt "robust" IP rights for Indigenous works, particularly rights lacking ordinary durational limits ("ancestral works").[5]

It further critiques the implicit claim that the best way to analyze the appropriateness of extending IP rights to ancestral Indigenous works is by applying policies drawn from existing IP and property doctrines in Western law.[6] Scholars whose first recourse is to seek a parallel doctrine in the details of current intellectual property law, the Article argues, are potentially misled by a search for a kind of "essence" to intellectual property that does not exist.[7]

The Article then turns to the accusation that adding ancestral works to the list of IP-protected subject matters would twist Western law of general property out of shape. To address that query, the Article turns to John Locke's *Second Treatise of Government,* and interprets it through a focus on Locke's conceptions of equality and harm.[8] Locke's theory of property shows some difficulties when applied to ancestral Indigenous works, but no prima facie disqualification appears.[9]

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shorthand for the entire field of TK and TCEs," and the 2024 WIPO Treaty touches on TCEs (works of expression) as well as the scientific matters which are its focus. *See* WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions 13, WIPO Pub. No. 933E (2020) [hereinafter WIPO Pub. 933E], https://www.wipo.int/edocs/pubdocs/en/wipo-pub-933-2020-en-intellectual-property-and-genetic-resources-traditional-knowledge-and-traditional-cultural-expressions.pdf [https://perma.cc/XE3M-RAZK].

4. I use the term "Indigenes"—a noun that covers both the collective (for example, a group or clan) and the individual—to avoid a difficulty raised by Bowrey. *See generally* Kathy Bowrey, *Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices*, 6 Macquarie L.J. 65 (2006). One of Bowrey's sources posits that Indigenous persons can only speak for themselves as individuals and that notions of political representation are foreign to them. *Id.* at 65–66.

5. *See, e.g.*, Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 Cardozo Arts & Ent. L.J. 37, 40 (2009) ("Whether looked at individually or collectively, the chief arguments employed in the moral, political, and legal philosophies of property do not justify a robust package of rights in TK [Traditional Knowledge]."); *see also id.* at 45–46 for the authors' definition of 'robust.'

6. *Id.* at 76.

7. *Id.* at 65.

8. Scholars usually consider Locke a "natural law" writer. "Natural law" has many meanings. I do not mean it in the moral realist sense of a category that distinguishes legitimate from non-legitimate law, or real law from purported law. Instead, I view the natural law writers as a source of wisdom, who have nominated a set of practices for law that satisfy the core of the Western tradition. *See* John Locke, Two Treatises of Government, 287 (2nd Tr., § 4–16) (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698, corrected by Locke).

9. This Paper draws on Locke's general positions and does not address his particular views on the property claims of indigenous peoples.

The Article has a special concern with noncommercial works and noncommercial uses. It therefore discusses a conflict over an ancestral mask in a religious ceremony. The example comes from Chinua Achebe's classic novel of colonialism in Africa, *Things Fall Apart*.[10] Using that hypothetical, the Article will suggest that the most difficult aspect of the ancestral works issue might not be defining protectable subject matter, but rather the scope of remedial rights and duties.

Are Intellectual Property Rights Available Only for a Limited Set of Policy Goals?

Copyright law now extends virtually worldwide, supported by a network of treaties. Under much of that geography, a craftsperson or artist can obtain copyrights without any governmental paperwork. The rights usually arise automatically when the artwork takes physical form, or if not physical, when it is made visible or audible in a way that the creator records it or permits another to record it.[11]

Indigenous persons would seem to be as able to get copyrights as anyone else under the usual Western recipe: Start with a common culture, add one or several artists, stir with the artists' creativity, mix in a physical substance sturdy enough to serve as evidence, and copyright should arise. However, Indigenous communities may have customs or customary laws that alter the pattern, perhaps pointing to common rather than individual ownership,[12] or in other ways disclosing a need for protection of ancient works in ways that do not well match what Western copyright has to offer.

One important issue is the question of how long rights against copying should last. Many Indigenous groups place special weight on traditional ties to ancestors, and in light of that temporal focus, the only meaningful term for them might be a term far longer than the number of years copyright law usually grants. Some Western commentators fear that 'stretching' a paracopyright to

10. Chinua Achebe, Things Fall Apart (Anchor Books ed., 1994).

11. U.S. copyright law requires works of authorship to be "fixed," that is, recorded in some sort of touchable, physical form. *See* Douglas Gary Lichtman, *Copyright as a Rule of Evidence*, 52 Duke L.J. 683, 683–743 (2003). Some nations do not require physical form as a prerequisite for protection. *See, e.g.*, Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1067–68 (2003).

12. Sometimes the person or persons who participate in producing whatever sculpture, painting, song, or other expressive work at issue may be drawing on traditional images or patterns. If so, occasional official courts have ruled that the individual artist receives less than full copyright. The Indigenous artist might, for example, hold rights in the new artwork only in a fiduciary capacity for his clan or tribe—or might share ownership with others, for example, council elders or tribal heads who might act as some kind of fiduciary for the larger group's multiple stakes in the tradition. *See* Brigitte Vézina, *Moral Rights: Shortcomings and Drawbacks Addressing Misuse*, *in* Ensuring Respect for Indigenous Cultures: A Moral Rights Approach 11, 11–12, (Ctr. for Int'l Governance Innovation 2020) (discussing Australian cases).

the length of years that some Indigenes may need, may 'stretch' ordinary copyright out of recognition and usefulness.[13]

It is true that a statute whose goal is encouraging culture and creativity (like Western copyright) probably needs a *finite* copyright term to be effective. After all, the power of a right to collect royalties shrinks as the potential royalty date moves ever further to the future, while the future public's obligation to pay royalties remains constant so long as the copyright lasts.[14] But laws that seek to serve other goals might be able to succeed through other means.

For example, Professor Justin Hughes points out that, independent of any interest in incentivizing the creativity of current artists, Indigenes may be seeking the preservation of heritage.[15] Although there may be dangers in a preservation rationale,[16] their cure does not necessarily rest in limiting the duration of the rights.

Preservation is not a free-floating policy. It is derivative from the preservers having some claim of right or justice to affect the subject matter. Whether possession is backed by a right to exclude is a complex question of settings, norms, and circumstances. In the instant context, preservation is dependent on the kind of connection that exists between living Indigenes and the culture.

Preservation policy is not necessarily derivative from creativity. To a polity engaged in efforts to preserve historical neighborhoods, for example, the contributions of a creative author (or sculptor or architect) may be the least of the factors that matter to the local preservation commission.[17] The style of architecture and its consistency with the neighborhood are usually more important than the identity (even if known) of the artists involved.[18] Similarly, an ancient mask might be valued not for its aesthetic qualities, but for its cultural ties.

Consider the way much Western law values the trademark for its communicative ability, not for how witty or attractive a symbol, emblem, or logo might be. Consequently, a creative trademark that communicates nothing about the source of the products on which it appears deserves no trademark

13. *See infra* note 20 and accompanying text (discussing *Eldred v. Ashcroft*).

14. Property law exists in part to undo market failures. One that most famously afflicted authors was their inability to sell copies of their work and restrain strangers from reproducing and selling in competition without the costs of creation. Other kinds of IP rationales and structures exist. On copyright, see Wendy J. Gordon, *The Core of Copyright*: *Authors, Not Publishers*, 52 Hous. L. Rev. 613, 623 (2014). On market failures, see generally Wendy J. Gordon, *Fair Use as Market Failure*, 82 Colum. L. Rev. 1600 (1982); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 Chi.-Kent L. Rev. 1367 (1998).

15. Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 San Diego L. Rev. 1215, 1218–20 (2012).

16. Preservation can overlap with asset protection in ways that put pressure on intellectual property law. *Id.* at 1243, n.117 (discussing the impact of asset-protection arguments on the constitutionality of copyright term extension).

17. *Id.* at 1244.

18. *Id.* at 1244–45.

right. Conversely, a mark that continues to communicate can be protected indefinitely.[19]

Yet one can understand hostility to extending IP rights' duration. The United States recently lived through copyright term extensions that are likely to reduce the growth of the overall culture.[20] To contemplate the possibility that copyright terms might be stretched again, even to help a worthy neighbor, may feel like too much.[21] Nevertheless, there does seem some exaggeration in the push-back against different lengths for Indigenous ancient works. A key to the phenomenon seems to be a perception, mentioned above, that admitting ancient works to Western IP would twist recognizability out of both Western IP and its property doctrines.[22]

To address this set of concerns, this Article will turn to an ancestor on the Western side, a philosopher sometimes considered the father of Western property: John Locke. His work may tell us something about what rights Indigenous authors should have, and what shapes those rights might take, that could (or could not) be consistent with Western tradition. The issues we will consider include: To achieve legitimacy, must creativity be the policy fulcrum of anything called "IP"? If creativity is required, how closely must a claimant be to the originator, the creative one?

John Locke looks at a state of the world imagined without governments: nothing is individually owned. He asks how without government the riches of the world could be distributed to people who could actually use them. His answer was not that one needs a king to distribute the resources, nor that one needs to seek universal consent to any distribution. He knew that a consent requirement would cause gridlock. What Locke does is define something that he argues is *as good as consent*: namely, that if an ownership claim over a particular distribution *does no harm*, then it can proceed. While the situation of traditional cultural expression for Indigenes may not take the form of a simple common, one can use Locke's technique of asking if there are niches where resources could be claimed that cause no harm. If so, the Lockean approach might work for some Indigenous claims.

As I have argued elsewhere, the foundation of Lockean natural law "is a duty, imposed on all, not to inflict harm on others."[23] The basic structure

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19. Lawyers tend to call something an 'intellectual' property or resource when it has a non-physical, 'moral' existence, like an invention, a design, or a sequence of musical tones.

20. *See generally* Jessica Litman, Digital Copyright (2d ed. 2006) (discussing legislative dynamics in copyright law); Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding the constitutionality of certain copyright term extensions).

21. *See, e.g.*, Munzer & Raustiala, *supra* note 5, at 40.

22. *Id.*

23. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1538 (1993).

of his analysis follows from there: A person's body and her labor belong to her. If she labors to take things from the common, she joins her labor to what she has gathered. If a stranger who has "enough and as good" available to him in the common chooses not to gather his own resources but instead chooses to take the things that the earlier laborer has gathered, he takes her labor which is attached to the things she gathered. This harms her and violates a Biblical duty. He therefore has a duty to leave these objects alone. The duty is owed to her. Therefore, she has property in the objects.[24]

Locke himself indicates that any act of appropriation—such as the uncreative acts of digging ore from the ground or taking a fish from a stream—is sufficient to justify the appropriator taking and keeping the resource himself, so long as these provisos are satisfied:[25] (1) that the act of appropriation leaves "enough, and as good" for others;[26] (2) that the appropriator does not let the resource spoil;[27] and (3) that the appropriator, if he has more than enough to survive, must share the property with persons in dire need.[28]

The provisos are important.

IP Has No 'Essence'

Scholars make a fundamental mistake when they attribute the particular goals of copyright to the general category called IP. Intellectual property is just a structure, a collection of legal relations that can be used and is today used for a multitude of ends.

IP has no 'essence.' Unless a nation's constitution or statutes provide otherwise,[29] there is nothing about intellectual property that restricts its various doctrines to providing incentives for creativity and rewarding creativity. Any legal right that restrains the use of a pattern—i.e., that restrains strangers from copying or making something that resembles or duplicates a pattern—tends to be labeled 'intellectual property,' even though the patterns and proscriptions might serve widely disparate ends.

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24. *Id.* at 1544–45.

25. *See, e.g.*, Locke, *supra* note 8, at 303 (2nd Tr., § 25–51).

26. *See generally* Gordon, *supra* note 23. The Locke proviso that most concerns ancestral works is the "enough, and as good" proviso. Locke, *supra* note 8, at 306 (2nd Tr., § 28).

27. *Id.* at 308 (2nd Tr., § 31–32).

28. In the First Treatise, Locke writes: "But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please . . . he has given his needy Brother a Right to the Surplusage of his Goods . . . so Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise." *Id.* at 170 (1st Tr., § 42); *see also id.* at 270–71 (2nd Tr., § 6) (emphasis omitted).

29. This Article puts aside the question of how the Intellectual Property Clause of the U.S. Constitution might affect the argument. U.S. Const. art. 1, § 8, cl. 8.

To see this, consider the disparities among IP's constituent fields: Trademarks are usually classified as intellectual property, yet there is no creativity required for marks to be valid.[30] Trade secrets are intellectual property, yet creative expression is not required in most trade secrets.[31] Copyright and patent are both intellectual property, but they use crucially different standards for infringement: independent creation is no defense in patent law, but freedom for independent creation is central to copyright law.[32]

Richard Stallman observes:

> There is no such unified thing as 'intellectual property'. It is a mirage, which appears to have a coherent existence only because the term suggests it does.
>
> The term 'intellectual property' operates as a catch-all to lump together disparate laws. Nonlawyers who hear the term 'intellectual property' applied to these various laws tend to assume they are instances of a common principle, and that they function similarly. Nothing could be further from the case.
>
> These laws originated separately, evolved differently, cover different activities, have different rules, and raise different public policy issues.[33]

Ordinary copyright can be interpreted as focusing on giving positive incentives to authors rather than on deterring bad acts.[34] After all, through the Lockean lens, I proffer that copying is not by itself wrongful; it is only wrongful if it is harmful. Harmless copyists might not be engaged in any wrongful activity.[35] So, my focus tends to be on incentivizing plaintiffs rather than on discouraging defendants.[36] But many other kinds of property rights are used to disincentivize bad acts by non-owners: to make strangers stay away and not destroy the resource.

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30. William Cornish et al., Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 699 (Sweet & Maxwell 8th ed., 2013). The point of trademark law is primarily to lessen confusion in markets, not to encourage the production of charming, fixed logos or aesthetically appealing marks.

31. *Id*. at 756.

32. *Id*. at 168–69.

33. Richard M. Stallman, *Did You Say 'Intellectual Property'? It's a Seductive Mirage*, 4 Pol'y Futures Educ. 334, 334 (2006).

34. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326, 332, 344 (1989).

35. *See* Benjamin Kaplan, An Unhurried View of Copyright 2 (1967) (arguing that copying is fundamental human behavior and is how learning occurs); *see also* Gordon, *supra* note 23, at 1544–48. Free riding would seem to offend Locke's property—based as it is on rights against harm—only if the free-riding injures others.

36. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600, 1609–14, 1620, 1656 (1982).

Professor Justin Hughes takes a valuable angle in questioning whether creative desert is necessary for a right to property.[37] He draws two policies from existing law—protecting privacy and preserving heritage—that can provide the foundation for Indigenous IP rights and are not dependent on creativity.[38]

What Is an Intellectual Product?

Intellectual property as a legal category is identified with the use of a particular phenomenon: an intangible or intellectual product, which many can use at the same time without interfering with one another's activities. Some IP rights pertain to the deceptive use of an image, others to the secret bowers in which information is being held, yet others to copying or practicing what a pattern teaches.

To illustrate how owning 'intellectual" products differs from owning "physical" products, copyrights and patents are useful examples. Remember, however, that copyright and patent constitute only a subset of many IP forms.

Consider the standard relationship between a physical ("tangible") object and the pattern (or design, structure, or set of decisions)[39] embodied in the creation of that physical object.[40] For example, a painting is the tangible embodiment of a set of design decisions, and a machine is the tangible embodiment of an invention.

If a stranger walks off with the physical painting or physical machine, state tort laws such as conversion will give the owner remedies.[41] To visualize copyright in action, imagine that instead of someone physically taking the object, a person views the painting and mentally captures its intangible visual components, leaving the painting on its owner's wall, but then goes on to paint and

37. *See* Hughes, *supra* note 15, at 1215, 1243.

38. *Id*. at 1223–24.

39. Copyright protects the *way* that components are mixed. To borrow from the definition of "compilation" in U.S. law, copyright protects *how* words, sounds, colors, shapes, and other elements "are selected, coordinated, or arranged." 17 U.S.C. § 101 (2010).

40. The United States Copyright Act provides this definition: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (2010). Some nations protect works of authorship regardless of whether they are "fixed" (recorded) in physical form. *See* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063, 1067–68 (2003) (explaining that some civil law countries do not require fixation for copyright protection).

41. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 201 (2d Cir. 1983) ("Conversion, as thus described, is a tort involving acts—possession and control of chattels—which are qualitatively different from those proscribed by copyright law . . . ."), *rev'd on other grounds*, 471 U.S. 539 (1985).

possibly sell the same composition.[42] Similarly, imagine an engineer passes by the machine and, without touching it, intuitively reverse engineers its functions and discovers its inventive components. The engineer then creates and sells a machine that works the same way. These latter acts are the province of copyright and patent, respectively.

IP rights take many forms and have various contours, but they generally share a common structure: an intangible pattern is identified, and a legislature or court grants the "owner" of the intangible a set of rights over how others use the pattern.[43] The uses that copyright owners can control include, for example, copying, public performance, public display, distribution, and adaptation of the intangible.[44]

Locke and the Acquisition of Property

The Article's next Part examines in more detail whether giving preservation rights to ancestral works—works whose primary creativity was employed long ago—could fit within Western notions of property. The vehicle of investigation will be a streamlined version of John Locke's so-called 'labor theory' of property.[45] We see that interpreting Locke's theory as founded on equality and harm avoidance may provide some flexibility in treating ancestral rights as eligible for some kind of protection.

Locke's Design: Centering on the Equity Strain

In the *Second Treatise,* Locke wrote that all the earth was given to everyone in common.[46] He was concerned that if everyone owned everything, how could any single individual justly pick and eat an apple from a wild tree? Shouldn't the apple picker make that piece of fruit available to all the other co-owners? How could any one person feel entitled to eat it?

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42. *See* Harper & Row, Publishers, Inc. v. Nation Enterprises, 501 F.Supp. 848, 852 (S.D.N.Y. 1980) (distinguishing a conversion claim, "the right to physical possession of the original typescript of the unpublished manuscript," from "rights which are equivalent to the rights protected under the copyright laws, i.e., the exclusive right to reproduce and distribute a copyrightable work"), *aff'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

43. Using the federal copyright law of the United States as the primary example, most of the exclusive rights can be found in sections 106 and 106A. 17 U.S.C. §§ 106–106A (2023). A copyright owner also has the liberty to "do" and to "authorize" any of the acts. 17 U.S.C. § 106 (2023); *see also* Richard A. Epstein, *The Basic Structure of Intellectual Property Law*, *in* The Oxford Handbook of Intellectual Property Law 25, 30–31, 35–36 (Rochelle Dreyfuss & Justine Pila eds., 2017).

44. *See, e.g.*, 17 U.S.C. § 106 (2023).

45. *See, e.g.*, Locke, *supra* note 8, at 303 (2nd Tr., § 25–51).

46. *Id.* at 289 (2nd Tr., § 7).

Locke took from the Bible an injunction that humans should not harm others.[47] This, too, emphasized the question: How could an individual justify taking nourishment from the earth when some other co-owner might also want it?

Locke's solution was to say the individual can eat and ingest rightfully, that is, can consume some things which, once consumed, are no longer available to the co-owners, as long as the appropriation left "enough, and as good for others."[48]

Rooted in a conception of equality,[49] that proviso is subject to much scrutiny in the literature.

I have argued that the "enough, and as good" proviso has two roles.[50] It can prevent property rights from attaching and can dissolve property rights when changing circumstances make those rights harmful. That is, the proviso can cut against perpetual protection.

Appropriation can be a simple act of labor. The person picks the apples or catches the fish. Once the person has it, they can keep it *if* enough and as good remains for others to appropriate.

This maintains some stability of expectation,[51] but there are no guarantees. Should an appropriation later cause harm, the situation will change, and an owner can lose property rights if they cause harm.[52] Loss of property rights can also occur to an owner who lets an appropriated resource spoil or fails to pay charity.[53]

Application of Locke's "Enough, and as Good" Proviso

Now, applying this Lockean proviso, there are two formulations that are largely equivalent. We can ask if the laborer failed to leave enough and as good

47. *Id.*

48. *Id.* at 287–88.

49. *Id.* The proviso is not violated simply because the appropriator has more possessions than their neighbors. Locke rules out envy as a legitimate basis for harm. "Locke suggested at one point that his proviso was intended only to protect the stranger who had an honest desire to work the previously-appropriated resource for himself, and not to protect the stowaway who 'desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common with others to labour on . . . .' Only the former had a right to complain or a potential right to use what the appropriator had produced. 'God gave the world . . . to the use of the Industrious and Rational . . . not to the Fancy or Covetousness of the Quarrelsom [sic] and Contentious.'" Gordon, *supra* note 23, at 1577 (quoting Locke, *supra* note 8, at 291 (2nd Tr., § 34)).

50. *See generally* Gordon, *supra* note 23, at 1545–48.

51. Stability of property or other expectations is probably essential for incentives. *See* Locke, *supra* note 8, at 306–07 (2nd Tr., § 28–30).

52. *Id.* at 320 (2nd Tr., § 51).

53. In the First Treatise, he writes: "Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise . . . ." *Id.* at 170 (1st Tr., § 42); *see also id.* at 270–71 (2nd Tr., § 6).

after his appropriation, or we can ask if the appropriation has harmed others. If the answer to either is yes, the appropriation does not mature into rightful ownership.

On the question of whether strangers are entitled to share in the knowledge of Indigenous treasures, do Indigenous persons necessarily cause harm in refusing the strangers entry or disclosure? Not necessarily. John Stuart Mill and others have argued that no one ever "loses" by being prohibited from "sharing in what otherwise would not have existed at all."[54] However, even a gift lost in the mail can harm us if the loss violates expectations.

In particular, if we learn about the new thing and change our position in reliance on it, we are harmed if we cannot use the thing to understand and articulate our new position.[55] Call this 'reliance harm.' We are harmed if the intellectual product is something we cannot quote from or otherwise use. Reliance harm can be quite broad, and is linked to issues of equality:

> [I]f there is only one culture (and whether technological or literary culture is at issue, the point is the same), a person who wishes to contribute to it usually is required to use the tools of that culture. Giving first creators ownership over any aspect of the culture, even if that aspect is newly created, may make a later creator less well off than he or she would have been without the new creation. Intellectual products, once they are made public in an interdependent world, change that world. To deal with those changes, users may have need of a freedom inconsistent with first creators' property rights. If they are forbidden to use the creation that was the agent of the change, all they will have to work from will be the now devalued common. The proviso [that 'enough, and as good' must remain] eliminates this danger [of reliance harm]. It [the 'enough, and as good' proviso] guarantees an equality between earlier and later creators.[56]

If the visitors have not been exposed to a hidden ritual song and have not integrated the contours of the ritual into their thinking, then they suffer no reliance harm from exclusion. If they never heard a particular song, it is hard to see how they might be *made worse off* by not being able to access it. Their condition is the same before and after the refusal: They do not have access.

And if giving them access would destroy the value of the song to the descendants of the people who wrote it, then that should give us pause before pushing it into the public.

The longer a work has been in existence, the higher the possibility that it will have "leaked"[57] in a way that makes the IP right impose harmful effects.

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54. John Stuart Mill, On Liberty 91–92 (Batoche Books 2001) (1859).
55. Gordon, *supra* note 23, at 1565–70.
56. *Id*. at 1570.
57. For discussion of cultural diffusion, see Michael F. Brown, Who Owns Native Culture? 61–63 (Harvard Univ. Press 2003).

Ancestor works might, therefore, lose their copyrights as the work grows older—but unlike ordinary law on duration, the loss would be contextual and contingent (perhaps resembling fair use)[58] rather than a fixed term of years. The private nature of a work decreases the possibility of reliance harm.[59]

If the tourist is barred from a secret ceremony, she is likely no worse off than she would have been in a world where secret ceremonies do not exist. That is, excluding the tourist does no harm to her under a wide range of fact patterns. The question is more difficult when an anthropologist claims she needs access to secret ceremonies, to avoid harm in achieving the knowledge goals of her science. Her goal is to learn all the ways humans interact.

Generalized to scientists in general, exclusion from secret sources of information potentially ranks as a significant harm.

That still leaves some persons, like the tourists, who might be appropriately restrained by an Indigenous intellectual property right.

We are now in a position of asking, given that some Indigenous works *might* be appropriate for some property rights under a Lockean system, whether the fact that they are ancient should make a difference.

When an Ancient Author Cannot Be Identified

If creativity matters, for a work made many generations ago, it may be difficult to name the authors or, even if they are named, to identify their descendants or delineate where their creative works begin and end. The question of what kind of relationship creates an identity sufficient for the transmission of rights is worth exploring.[60]

This Article suggests that in addition to inheritance, and other claims made through the original artist, the currently living Indigenes may have a claim based on their own nonderivative interest. Western property law is open to giving credit through various kinds of relationships. Not only does Locke present contract as the foundation of civil government, but Locke even articulates a kind of farmhand work-for-hire: "[T]he turfs my servant has cut," Locke writes,

58. *See* 17 U.S.C. § 107 (1992) (fair use). *See generally* Wendy Gordon, *Fair Use as Market Failure,* 82 Colum. L. Rev. 1600 (1982).

59. Note that ordinary copyright law covers some secret works as well as published works. On registering computer "Code with Trade Secret Material," the U.S. Copyright Office provides the following guidance: "If the source code does contain trade secrets, you must indicate in writing to the Office that the code contains trade secret material. Using one of the following options, submit a portion of the code for the specific version you want to register: One copy of the first ten pages and last ten pages, blocking out none of the code . . . ." U.S. Copyright Office, Circular 61: Copyright Registration of Computer Programs (2023), https://www.copyright.gov/circs/circ61.pdf [https://perma.cc/85Z8-M2YK] (emphasis omitted).

60. *See* Munzer & Raustiala, *supra* note 5, at 65.

are as much Locke's property as if he personally cut them.[61] Copyright law, unlike the U.S. patent law, does not require the name of the person whose intellect is the source of the intangible sought to be protected.[62]

That raises additional questions of what kinds of relationships other than "hiring" can suffice. But at a preliminary stage, it might be appropriate to keep an open mind as to what relationships other than straight-line descent from authorship might qualify as a vehicle for claiming ownership and what kind of current connections have the most normative significance. The lack of knowledge as to which particular ancestor or group member created something looks not like an insuperable barrier to at least the possibility of protection for Indigenous works.

Who Lacks Equality? Who Has Special Treatment?

Munzer and Raustiala are two scholars whose conclusions advise against adopting 'robust' intellectual property rights in Indigenous ancestral works.[63] Here is the "central argument" of Munzer and Raustiala: ". . . unless one can somehow justify carving out a special set of rules for [I]ndigenous groups in the IP system that no other group possesses, desert is too thin a reed to support the robust package of protection . . . ."[64] They see the "central problem" as being "to show why [I]ndigenous groups should receive a form of IP protection that no other contemporary group does."[65] They see a demand for special treatment.[66]

Meeting the equality claim of Munzer and Raustiala, we see similar language by Professor Ruth Okediji, a prominent scholar on the opposite side of the debate: ". . . Arguments that attributes of [I]ndigenous knowledge do not meet requirements for the main categories of IP (patent, copyright, and trademark) elevate form over substance . . . . Rules that categorically eliminate entire

61. *See* Locke, *supra* note 8, at 307 (2nd Tr., § 29–30) ("Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg'd in any place where I have a right to them in common with others, become my Property, without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my Property in them.") (emphases omitted).

62. *See* 35 U.S.C. § 115(a) (2022) (requiring that a patent application name the inventor of the claimed invention); *see also* U.S. Copyright Office, Circular 30: Works Made for Hire, (2024), https://www.copyright.gov/circs/circ30.pdf [https://perma.cc/Z7UL-NY6S] (explaining that copyright law does not always require attribution of individual creators); *cf.* 17 U.S.C. § 201(b) (2022) (stating that, in the case of a work made for hire, the employer or commissioning party is considered the author, rather than the actual creator).

63. *See* Munzer & Raustiala, *supra* note 5, at 61.

64. *Id.*

65. *Id.* at 77.

66. *Id.* at 62.

bodies of knowledge fail to meet the standards of justice required by any of the leading accounts . . . ."[67]

Okediji places a burden of justification on her counterparts. It is they who must "meet the standards of justice."[68] Further, her perspective suggests that Indigenes now receive something *less than* equal treatment and that what Indigenes seek is equality.

The two sides are being represented by the same kind of argument—namely, that the other side wants *special treatment* rather than equality. Although the valences are reversed, the form of argument used on both sides demonstrates that each sees equality as essential to its normative projects. Comparing the material conditions of the two groups suggests that the equality claim of the Indigenes is likely to be stronger. Bolstering the position of the Indigenes is the importance of non-monetary value to many Indigenous communities.

Non-Monetary Value and Its Implications for Equality

The debates over Indigenous IP rights borrow norms from many theoretic positions, among them the law and economics movement associated historically with Professors Posner, Coase, and Calabresi.[69] Exponents of law and economics typically favor tailoring the law to encourage productivity and maximize societal wealth. Such an analyst might recommend whatever constellation of entitlements would interact to produce a higher total societal wealth than would other configurations. If the resulting increase is enough to outweigh what is lost by adopting the new configuration, there has been an increase in social welfare. The societal winners can compensate the losers.[70] Should they do so? Should they pay (via compensation or otherwise) those who didn't gain?

The ethical soundness of seeking efficiency has been much discussed.[71] For myself, I think the maximizing principles are appropriate only when accompanied by some constraints, among which compensation should play a

67. *See* Ruth L. Okediji, *Is the Public Domain Just? Biblical Stewardship and Legal Protection for Traditional Knowledge Assets*, 45 Colum. J.L. & Arts 461, 503 (2022).

68. *Id*.

69. *See, e.g.*, Richard A. Posner, Economic Analysis of Law 12–15 (9th ed. 2014); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 970–74 (2001); Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26–30 (1970); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092–102 (1972); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 10–15 (1960). *See generally* Richard A. Posner, Economic Analysis of Law (9th ed. 2014).

70. *See* Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 Econ. J. 549, 552–56 (1939).

71. *See, e.g.*, Jefferson White & Dennis Patterson, Introduction to the Philosophy of Law 94–117 (Oxford Univ. Press 1999); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

role. If the best way to justify the economic approach is on a principle of compensation: If the laws are shaped to increase total wealth, and in the process, the interests of some groups or individuals are sacrificed, the sacrificing persons (the 'losers') can and should be compensated by the winners.[72]

Compensation can be accomplished by various techniques (e.g., reciprocity, governmental payment, or insurance).[73] Unfortunately, compensation is often not provided at all. But even if the sacrificed persons *are* compensated, the Indigenes are likely to be treated less well than others. That is because persons whose primary goals are non-economic *cannot as easily be compensated* as people who easily accept commodification. Indigenes may have primarily non-economic goals.[74]

Equality and Sameness

Equality does not necessarily require sameness. To illustrate, consider a hypothetical constructed by philosopher Gregory Vlastos. Two residents of a city may be in quite different positions: one may have received a persuasive threat of near-immediate violence, while the other is subject only to ordinary urban risk. To give both residents the same police response would be to treat them quite unequally; temporarily giving the especially endangered person "a greater allocation of community resources . . . is made precisely because [that person's] security rights are equal to those of other people" in the city.[75]

So 'sameness' of treatment does not guarantee equality. But once we leave the test of 'sameness,' a multitude of equality conceptions can compete for sway. Some of the debates about Indigenous rights are driven by competing notions of equality.

Systemic Costs of Achieving Justice

What Munzer and Raustiala often repeat, which comes closest to explaining why they might think the burden of justification should be placed on the other side, lies in the supposed vastness of the changes required to accommodate rights in ancestral works: "Meaningful protection (for ancestral works) will therefore require a major deviation from established legal as well as philosophical doctrine," requiring "substantial changes to existing IP law."[76]

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72. *Id.* at 99–104.
73. *Id.* at 94–117.
74. *See* Robin Gregory et al., *Compensating Indigenous Social and Cultural Losses: A Community-Based Multiple-Attribute Approach*, 25 Ecology & Soc'y 4, 4–5 (2020).
75. Gregory Vlastos, *Justice and Equality*, *in* Theories Of Rights: Oxford Readings in Philosophy 41, 49–51 (Jeremy Waldron ed., 1984).
76. *See* Munzer & Raustiala, *supra* note 5, at 40.

Perhaps they are merely casting speculation based on unspecified disasters, or perhaps they are alluding to the monetary cost of adapting the law to the form Indigenes desire. If the latter, it is essentially an argument that allows administrative and other transaction costs to trump the aims of justice. Is that logic any better . . . or is that the disaster they are predicting?

Munzer and Raustiala's critique is based in part on the argument that it would be expensive to switch systems—as if the cost of justice should reduce its pursuit.[77] While there may be extreme cases where cost becomes a factor, it is misguided to let the cost of administration be a primary determinant of justice. In a classic article, Gregory Vlastos persuasively argues that for human rights, what should matter is not the cost of providing aid but the extent to which the recipient receives aid.[78]

Once we are in the territory of philosophy and justice, unfettered consequentialism is dangerous. I think that it is misguided to count the cost of becoming "just" against the determination of what justice is. Among other things, such an approach has perverse implications. The small injustices, because they are small, might be correctable at low administrative and systemic costs. The worst injustices are likely to require the most change and the most cost. The approach that counts against justice the cost of making changes therefore tends to leave the worst injustices uncorrected.

What Property Embraces

Munzer and Raustiala focus on a question of "property": whether the legal changes sought by Indigenous peoples could constitute 'property' in our legal system without fundamentally altering the ordinary concept of property.[79] They remind their readers, for example, that they are not addressing questions of human rights or distributive justice.[80] However, property *is* a subject of both human rights and distributive justice, as generations of jurisprudence suggest. Munzer and Raustiala are tethering their conclusions to a set of policies and practices based on a narrow conception.

In the Western canon, "property" can embrace a broad sphere.[81] For Locke, "property" can encompass a comprehensive conception of the self and its interests.[82] At one point, Locke defined property as consisting of life, liberty, and estates, as if to emphasize the non-monetary.[83]

77. *Id*. at 12.
78. *See* Vlastos, *supra* note 75, at 40–76.
79. *See* Munzer & Raustiala, *supra* note 5, at 40–41, 58.
80. *Id*. at 58–59.
81. *See* Locke, *supra* note 8, at 316–17 (2nd Tr., § 44).
82. *Id*. at 341–42 (2nd Tr., § 87).
83. *Id*.

"Estates"—lands and chattels owned—are only the third and final component of what matters in this analysis.[84]

This is not to deny that there might be a limit to the number of forms that law in a particular culture can usefully take.[85] There will be important interrelationships in the sense that, if you have a resource intended for a particular purpose, such as trade, certain characteristics will be necessary for property law to create a resource that is tradable or suitable for the purpose imagined.

If Munzer and Raustiala had plausible grounds for implicitly putting the burden of persuasion on Indigenes, it had to do with their sense that it is not possible to fit what Indigenes are seeking into our current laws without great expense and perhaps rethinking of fundamentals.[86] From their article, it was however hard to see how adding a new kind of para-property right was going to be revolutionary to property. In a more recent article, Munzer broadens his concern to embrace some issues of free speech. Assessing a regulatory tool being currently debated, Munzer writes, "It could be difficult to justify prohibiting parodies of [I]ndigenous artworks and beliefs without having a similar prohibition on all other artworks and belief."[87]

It is possible to imagine a seismic conflict evolving from tensions between the First Amendment on the one hand, and rights against 'offensiveness' that might be sought by TK advocates. In the United States, our laws are based on a commitment to free speech and separation of church and state that could be threatened by rights mandating freedom from "spiritual offense."

A related difficulty Munzer and Raustiala cite is one of "fit" and line drawing.[88] It is as if they fear that if Indigenous works get a long duration, all copyright owners would want it. They refer to how difficult it is to define and distinguish the groups that are entitled from those that are not entitled.[89] They point in particular to the fear that indefinite duration will slip into other forms of intellectual property and extinguish standard copyright expirations.[90]

This is a difficult issue. Slippery slope problems are reduced by reasoned distinctions and careful drafting, but not eliminated.[91] Making clear in the wording of the laws that the Indigenous statutes for ancestral work are based on current ties between living persons and the culture being preserved, should help minimize the problematic spread of indefinite durations.

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84. *Id*.

85. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle,* 110 YALE L.J. 1, 9 (2000).

86. *See* Munzer & Raustiala, *supra* note 5, at 76.

87. Stephen R. Munzer, *A Framework for Managing Disputes Over Intellectual Property Rights in Traditional Knowledge*, 29 MICH. J. RACE & L. 31, 57 (2024).

88. *See* Munzer & Raustiala, *supra* note 5, at 78.

89. *Id*. at 76–77.

90. *Id*. at 65.

91. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985).

Nevertheless, even the most skillful drafting might not suffice. Industry forces for years have influenced copyright law in the United States and elsewhere.[92] Among their effects is an expansion of regular copyright terms.[93] Those pressures will no doubt be present if ancestral works gain protection. Industry lobbying can re-oil the slippery slope downward. Concern for the spread of copyrights possessing open-ended length is not a worry that is easily dismissed.

Where Would a Streamlined Locke Lead?

Locke's purpose in writing the *Second Treatise* was political.[94] He wished to persuade his countrymen that all have equality and that kings have no divine right to rule.[95] One goal of the *Second Treatise* was to rebut an argument by Sir Robert Filmer, who asserted that a king was a practical necessity in carrying out God's plan.[96]

Filmer argued that the Bible directs mankind to make the earth plentiful, but the only way to allocate the earth among persons—a necessity for this productive use—would be either to have a king make the decisions and parcel out the properties or to obtain unanimity from all mankind whenever some use was sought.[97]

Pointing to the plain impracticality of universal consent, Filmer argued that only a king could carve the earth into manageable chunks.[98] Without universal consent, even ingesting fruit from a tree or eating fish from a stream would have been wrongful unless accompanied by the permission of the king.[99] The impossibility of achieving universal consent, in Filmer's view, left kings secure in their divinely appointed roles.[100] (Filmer may have overstated the strictness of the commons ownership to make single ownership by a king seem more sensible.)

Locke starts with a premise he shared with Filmer: The earth was given to mankind to make it productive.[101] Locke also believed that all people have a

92. *See generally* Jessica D. Litman, Digital Copyright (Prometheus Books, 2006), *available at* https://repository.law.umich.edu/books/1 [https://perma.cc/7QUH-L2C3] (discussing the influence of lobbyists in the development of copyright law).

93. *Id*. at 23–24.

94. *See generally* Locke, *supra* note 8.

95. *Id*. at 287 (2nd Tr., § 4).

96. Robert Filmer, Patriarcha, or the Natural Power of Kings (London, Richard Chiswell 1680), *reprinted in* The Online Library of Liberty, at 30, (Liberty Fund 2011).

97. *Id*. at 40.

98. *Id*.

99. *Id*. at 42.

100. *Id*. at 12.

101. *See* Locke, *supra* note 8, at 304 (2nd Tr., § 26).

natural law duty not to harm each other.[102] This puts Locke up against Filmer's problem—how to justify individual acts of survival if we need universal permission every time we ingest food.

Locke's self-appointed task was to find a way to reconcile three things: (1) the duty divine law places on all persons to avoid harming others (which he treats as Biblically derived);[103] (2) the ownership of the earth which all persons share (which he also treats as Biblically derived);[104] and (3) the need for a mechanism through which various parts of the earth could be rightfully used up (eaten, consumed) without violating principles of equality.[105]

Locke's solution was to look for something as good as consent. He argued that to take something harmlessly was "as good as taking nothing at all."[106] Therefore, if an individual took a fish and "left enough, and as good for others," the individual caused no harm and was not acting wrongfully by gathering and ingesting it.[107]

So, his concern was how humans could stake a claim that others should respect. There is no great creativity in the labors depicted by Locke—someone picks acorns, drinks water, or catches fish.[108] They also plow land, giving rise to debates about whether the "meum" (from the Latin meaning "a part of me") covers just the produce or the land itself.[109] Throughout all this, Locke's focus was on how to identify rightful human action, and the answer was to either obtain consent from those affected, or avoid imposing harm.[110]

Protection of Indigenous Culture: Is Protection Harmless? Is Lack of Protection Harmful?

It is clear that at least some Indigenous cultural activities are immensely deserving on multiple metrics. To the extent the outside world has never been exposed to the activities or images, outsiders might have no reliance interest that could interfere with an Indigenous property claim.[111] One such claim might

102. *Id*. at 288–89 (2nd Tr., § 6).
103. *Id*.
104. *Id*. at 304 (2nd Tr., § 26).
105. *Id*. at 305 (2nd Tr., § 27).
106. *Id*. at 309 (2nd Tr., § 33).
107. *Id*.
108. *Id*. at 306 (2nd Tr., § 28).
109. *Id*. at 309 (2nd Tr., § 33).
110. *Id*. at 289 (2nd Tr., § 6).
111. *See* Okediji, *supra* note 67, at 512.

be rooted in the desire of some Indigenous peoples to have protection against intrusions or disclosures that could disrupt their ability to serve each other, their land, their community, and (most importantly for the current debate) their ancestors.[112] One form of disruption might be the use of sacred images by a stranger who places the images on carpets as if they are mere ornaments deserving to be trodden on. Indigenous peoples may seek rights in or over creations like works of art (patterns) and artifacts (physical embodiments), for which they have stewardship responsibilities.[113]

There is a wide range of practices and customary laws regulating them, which in varying ways tie a people to their ancestors.[114] The practices often involve pictorial, choreographic, written, and sung elements that could have copyright protection under standard law, if only they had not been brought into being so many generations ago that their copyrights would have expired.

The stewardship models described by Okediji suggest that what many Indigenous groups may be seeking is protection for their usefulness to the land and their connection with the ancestors.[115] In other words, Indigenous demands seem to focus on protecting their abilities to carry out their duties, which is quite different from the usual rights that Western litigants seek. Western litigants—at least their stereotypical counterparts—are famous for seeking rights because they want to place duties on someone else (usually duties to pay). [116] The stewardship obligation requires a shift in perspective.

The importance of ancestors—and the dangers to equality—are illustrated by the turning-point scene in Chinua Achebe's *Things Fall Apart*.[117] In this scene, an African tribe member named Enoch, who has been converted to Christianity by European missionaries, verbally disrupts an Indigenous religious ceremony. In the resulting mêlée, Enoch removes the ceremonial mask of a clan member who is depicting an ancestor. By removing the mask and letting the "profane gaze" of non-celebrants see the human face beneath it, Enoch "murders" the ancestor.[118] The Europeans' inability to understand the significance—or even the occurrence—of this "murder" leads to more deaths.[119]

Members of the clan are given no chance to communicate to the Europeans how Enoch, by unmasking a celebrant, had committed a kind of murder on an

112. *Id*. at 511.
113. *Id*. at 492. Ownership of physical artifacts is outside the scope of this Article.
114. *See id.* at 484.
115. *Id*. at 503.
116. Professor Bowrey suggests that the GNU license and copyleft might be an exception. Bowrey, *supra* note 4, at 66.
117. Achebe, *supra* note 10, at 186–87.
118. *Id*. at 186.
119. *Id*. at 186–87.

ancestral spirit (represented by and referred to as the "egwugwu").[120] It appears that the Europeans do not care to even hear the whole story.

In the novel, the murder of one person and the suicide of another follow the murder of the ancestral spirit.

Could Formal Law Provide a Remedy?

What formal legal right might have made a difference to the tragic outcome in Achebe's novel? Perhaps none.

First, the Indigenes concerned in such a matter might find IP law an inappropriate vehicle for such a sensitive set of issues. As one WIPO publication observes, "[I]nappropriate use of a sacred cultural artifact, symbol or design may not cause financial loss but can cause considerable spiritual offence. Therefore, remedy through litigation in a national court is not always possible or desirable."[121]

Second, from the perspective of the West, too, there might be a mismatch. It could be consistent with the goals of preservation for law to prohibit outsider acts that destroy cultural meaning, but it is hard to imagine a legal remedy that would prevent the harm without causing significant and perhaps intolerable disruption.

Consider the difficulty of enmeshing a governmental entity in disputes over religion and other matters of opinion and belief. In the United States, it has been held unconstitutional for Congress to take sides in a religious dispute by extending the copyright in one version of a controverted religious text.[122] Extending legal rights to shelter Achebe's imagined mask from being viewed could well embroil courts in similar religious matters or other contested matters of belief.

For a notable example, consider the U.S. fair use doctrine, which gives leeway to changing the audience's taste.[123] That is arguably opposite to many

120. *Id*. at 194.

121. WIPO Pub. 933E, *supra* note 3, at Box 19 page 46 (suggesting Alternative Dispute Resolution).

122. United Christian Scientists v. Christian Science Bd. of Directors, First Church of Christ, Scientist 829 F.2d 1152, 1154 (D.C. Cir. 1987) (private copyright bill, extending the term of copyright in a text of the Christian Science church, offends "fundamental principles of separation of church and state"). The legislation essentially took sides in a religious dispute.

123. Making a "distinction between potentially remediable displacement and unremediable disparagement," the Supreme Court wrote that "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act . . . . [T]he role of the courts is to distinguish between 'biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'" Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 591–92 (1994) (citation omitted). In a recent article, Munzer similarly notes the tension between the treatment of parodies under the First Amendment, on the

Indigenous goals. A sharp contrast might be drawn between the blame attached to Enoch's behavior for "murdering" the ancestor, and the respect accorded to U.S. defendants for parodic copying that "kills" demand.[124]

Also consider the role of gender and religious status. Property as a legal category defers to owners as mini sovereigns.[125] In that light, consider equality and anti-discrimination principles writ large. It is painful to imagine a Western court enforcing an outsider status on groups or categories, naming some of them (for example, a gender category) as incapable of ownership.

Other issues abound, picture the interactions between celebrants and non-celebrants. The Achebe story suggests that the parties were working out a modus vivendi, under which the celebration would withdraw briefly to permit those with 'profane' gazes to pass by.[126] It is difficult to imagine a formal law embodying such give and take and also somehow being capable of preventing breaches.

Perhaps customary law or alternative dispute resolution[127] would be a more appropriate avenue to pursue (a topic outside our scope). One might speculate on formal routes—perhaps the mask could have been subject to some kind of claim right that gave the clan a right for masks not to be gazed upon except by approved persons. It is not easy to imagine how that remedy would play out. It is hard to fit 'do not look at what is happening in the village center' into the usual IP litany of 'do not copy, do not publicly perform, do not make derivative adaptations.' Among other things, an exclusive right that controlled "looking" comes close to hanging liability on passive behavior rather than the usual premising of lawsuits on acts.

But even if there was such a formal right and remedy, could it help? Maybe some identification of what was at issue through a copyright-type process might have made the Europeans with their guns understand the significance of what was taking place. Perhaps the conventional claim of assault and battery would have been appropriate, too.[128]

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one hand, and the protection that might be sought by Indigenous groups seeking shelter from offensive uses. Munzer, *supra* note 87, at 57.

124. *See* the discussion of Campbell v. Acuff-Rose Music, Inc. in the preceding note.

125. Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1700–01 (2012).

126. *See* Achebe, *supra* note 10, at 186.

127. "[I]nappropriate use of a sacred cultural artifact, symbol or design may not cause financial loss but can cause considerable spiritual offence. Therefore, remedy through litigation in a national court is not always possible or desirable. Alternative Dispute Resolution (ADR) offers an option for tackling the disputes . . . ." WIPO Pub. 933E, *supra* note 3, at Box 19, 46. On the important and complex roles of customary law, see WIPO, Customary Law and Traditional Knowledge: Background Brief No. 7, at 2–5, WIPO Ref. RN2023-5.7EN (2023), https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-7-en-customary-law-and-traditional-knowledge.pdf [https://perma.cc/JK4J-PVAW].

128. Enoch removed the mask in response to one of the ancestral spirits hitting him, but the unmasking is highly unlikely to come under the shelter of self-defense. Achebe, *supra* note 10, at 186.

In addition, a 'do not look' remedy would have to be constrained to avoid being harmful to general liberty. For example, if a new law granted a large circle of privacy around an artifact, movements of the artifact (in a ceremonial procession) could make it impossible for some village residents to walk in much of their village.

A quasi-copyright with a 'do not look' remedy might be antithetical to the very search for knowledge, which is a part of the Enlightenment tradition on which much Western law still rests. If an ancestral work were fully protected against being seen by outsiders, that might, for example, stop most archeological digs.[129]

If one were going to craft an analogy for Indigenous cultural rights, Achebe provides all the ingredients here. At the center of community life is the way the clan honors their gods and their ancestors. The ancestor actually comes alive if honored appropriately. But when someone inappropriate, such as the women and children identified in Achebe's novel as having 'profane gaze,' sees the unmasking, it destroys the ancestor. The unmasking is more than the kind of technical disclosure that might occur in a trade secret case; it destroys a constituent part of what is being protected.

Equality

We must remember that at the core of natural law thinking, for Locke and many others,[130] is the notion of equality. If a clan sought intellectual property rights for a local custom that barred women or barred anyone of a particular status, might that not violate this key concern of natural law, namely equality, even while it seemed to satisfy the harmlessness criteria? On that point, we might find realistic the fears like those of Munzer and Raustiala: how much our law would change if status once more reared its ugly head in U.S. law.

Conclusion

In closing, let me mention Professor Okediji's recognition that money is not going to pay back Indigenous peoples who have somehow been unable to carry out their responsibilities to their ancestors and their land.[131] The inability of money to make people whole is probably more widespread in Indigenous societies than in industrialized ones. If an inability to be recompensed in money

129. I am indebted here to conversations with Dina Zloczower.

130. *See* Vlastos, *supra* note 75, at 41–44 (tracing equality arguments in natural law back to Aristotle).

131. *See* Okediji, *supra* note 67, at 465.

characterizes a large part of a group's value system, then members of that group will likely be "less equal" in an international system where money dominates.

Yet Western values such as free speech can also be injured in ways that cannot be recompensed in money. Some answers may lie in attending to very specific fact patterns, like the dilemma presented in Achebe's classic novel.