# INTELLECTUAL PROPERTY AND THE RIGHT TO CULTURE

by

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## 1. Introduction

This paper considers the meaning, content, and role of the right to culture on the occasion of the 50th anniversary of the proclamation of the Universal Declaration of Human Rights (the UDHR). Specifically, what is the relationship between culture and intellectual property? What is culture, and the preservation of culture? Is it a collective or individual right? How, if at all, do individual property rights harmonize with collective rights of culture?

Culture reflects the common meanings of a society. Cultural meaning, whether presented as a common language, visual images, or traditional forms of performance, is imparted through the recognizability and readability of the visual and written language. If words, pictures, designs and variants, monuments, performance, and sculpture are to hold a common meaning, they must be used, adapted, and protected. Culture is transmitted in the form of the classical categories of the arts (dramatic and musical performance, writings, and visual arts), or in the form of traditional categories of the arts (images, symbols, crafts, oral and performance arts) rooted in tribal, religious or ethnic culture. Culture is protected, if at all, by a system of intellectual property. Intellectual property systems vigorously protect the classical categories of the arts, but these systems are less certain in protecting traditional forms of art.

The globalization of culture has consequences and counter-reactions. Demands for the possession of the past and control of representation of the present are numerous and varied. For example:

- the recent embargo on permitting the Chinese 400 year-old kunqu opera, "The Peony Pavilion", to travel to New York because the updated production skewed (and allegedly defiled) the traditional presentation of a Chinese cultural icon;

- the on-going demands from source countries for repatriation of, most notably, the Elgin Marbles, and other treasures of cultural property;

- recognition of the ethical and moral imperative to right the wrongs of cultural despoliation by Nazi forces in World War II;

- the international meeting of cultural ministers held in the summer of 1998 to protest popular cultural dominance by the United States of America (the U.S.A.) and discuss preservation and protection of nations' cultures (the U.S.A. was not invited to participate, but did attend as an observer);

- control over the representation and dissemination of cultural traditions of indigenous people, including protests against fashion uses of cultural symbols that represent certain traditional ceremonies and spiritual endeavors, where these symbols are used in ways that are offensive to the culture; and

- numerous other instances of interested parties seeking to claim and control cultural metaphors.

Cultural autonomy and preservation are at the heart of the right to culture; how does a society balance the competing right of private ownership against collective use of protected intellectual property?

This paper proceeds from the experience of a legal practitioner under the intellectual property system of the U.S.A., where a separate right to culture is not expressly recognized, but where the established principles of constitutional law balance individual ownership of rights with collective social rights. The tension, and its resolution, is nowhere more apparent than in the cultural arena. American intellectual property law is contained in the body of the U.S.A. Constitution, which also contains the First Amendment, the source of expressive liberties. These expressive rights include the right of all persons to enjoy freedom of speech, freedom of religion, freedom of assembly, and other rights commonly cherished as American cultural ideals; these same rights have a prominent place in the UDHR.

Although not expressly acknowledged as a "right to culture", the U.S.A. constitutional system provides a balance of economic and non-economic cultural ideals.[1]

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[1] This is in contrast to constitutions of certain nations established in the latter part of the Twentieth Century. For example:

India (1950):

The constitution of India declares in Part III Fundamental Rights, that the state will support the cultural and educational rights of the people of different religious, cultural, and language backgrounds. Article 29 clause (1) of the constitution provides that "Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." This clause protects minorities' interests in cultural rights. India's constitutional expression of a right to culture advances one of the goals of the Declaration of Human Rights.

The Republic of Benin (1990). Title II. Individuals have equal access to health, education, culture, information.

Equatorial Guinea (1991). Title I, Articles 2-8 outlines the role of the state in defending the sovereignty of the nation and promoting culture, creativity, research, and conservation.

Constitution of the Congo (1992).

Title II Fundamental Rights and Liberties

Article 35 [Culture]

"(1) Citizens shall possess a right to culture and to the respect of their cultural identity. All the Communities composing the Congolese Nation shall possess the freedom to use their languages and their own culture without prejudicing those of others.

Intellectual property provides a conditioned monopoly, a property right flowing to creators or to purchasers of the intellectual labors of others. The property right is limited by certain societal interests that make the monopoly less complete. For example, the long duration of ownership a copyright owner enjoys is significantly limited by fair use; patent protection provides societal benefit by providing a short duration of exclusivity; trademark protection requires strict procedural proof and constant use in order to retain the exclusive rights attached to the mark.

The rights of an individual, whether personal or corporate, to enjoy the ownership of intellectual property are limited, and this delicate balance takes many forms. There are instances where the rights of an individual will supersede the property rights of another individual or of a community. For example, the Visual Artists Rights Act of the U.S.A. gives to an individual artist who has parted with a work certain rights that are not possessed by the owner of the work (or by the copyright holder if different from the artist); the rights of free speech may allow an individual to make use of the work of another without restriction or permission. The copyright principle of fair use, allowing one to use the protected work of another without permission, fosters the very creativity copyright law was designed to protect. In certain instances, such as zoning regulations or censorship laws, the rights of the community may supersede those of the individual, and inhibit a copyright owner's exclusive right to display a work as the owner sees fit; architectural schemes are protected, but can be "borrowed" for certain uses; the rights of Native American tribal groups challenge long-standing notions of ownership. This paper examines these tensions with particular reference to copyright and trade mark law, comments on the resolution, and concludes that the system provides a robust American right to culture.

## 2. Intellectual Property Defined

The Constitution of the U.S.A. encourages cultural development and dissemination by promoting the progress of science and useful arts. Article I, Section 8 delegates the power to Congress to grant copyright protection. It states:

> "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."
> (Article I, Section 8 of the Constitution).

The goal of copyright and patent law is "to promote the progress of science and useful arts."

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(2) The State shall have the duty to safeguard and promote the national values of civilization, such spiritual materials as well as cultural traditions."

Article 55 [Right to Development]

"The Congolese People shall have the right to economic, cultural, and social development."

(i) Copyright

The scope of copyright in the U.S.A. is defined in the Copyright Act, 1976, Title 17, U.S. Code:

"§102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."

Copyright owners have certain exclusive rights. These include the rights:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

For a work to be protected by copyright, it must be original and contain an expression of the author's creativity. The amount of originality or creativity needed to

pass the threshold is not high; a change in color or medium is not enough to pass the threshold, but a change in angle or lighting might be. To be protected, the work must be fixed in a tangible medium of expression, so that an object can be perceived, reproduced, or expressed for more than a brief duration. Copyright protects expressions, but not ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. The copyright holder's rights include the economic rights to reproduce, create derivatives, distribute, display, perform, and alter the work. These "bundled" rights are divisible, and it is assumed that the right remains with a creator unless explicitly transferred. These rights are not unlimited, however; it should be noted also that the Copyright Act places certain statutory limitations on the exclusive rights of copyright owners.[2]

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[2] Limitations on the exclusive rights of copyright owners are contained in the Copyright Act (Title 17, U.S. Code). These include:

1. §106A--Visual Artists Rights Act--provides limited rights of attribution and integrity to prevent intentional distortion or mutilation of work prejudicial to author's reputation.

2. §107-- Fair use (see Section 3 "Limitations" below.)

3. §108--Reproduction by libraries and archives under certain limitations and for certain purposes.

4. §109—"First Sale" doctrine-- owner of a copy may sell or display it without permission of copyright owner.

5. §110--Performance or display for instructional activities (face-to-face teaching), or transmission in educational setting, or certain performances for the benefit of charities.

6. §111--Secondary transmissions to private lodgings or by nonprofit organization.

7. §112--Ephemeral recordings for archival preservation.

8. §113--Limits scope of exclusive rights in pictorial, graphic, and sculptural works.

9. §114--Limitation on exclusive rights in sound recordings.

10. §115--Compulsory license for making and distributing phonorecords.

11. §116--Compulsory licenses for public performances by means of coin-operated phonorecord players.

12. §117--Reproduction of computer programs for use of computer programs or for archival purposes.

13. §118--Use of copyrighted material by educational broadcast stations.

14. §119--Secondary transmissions for private home viewing.

15. §120--Modifies Architectural Works Protection Act to allow pictorial representations of copyrighted architectural works and allowing owners of copyrighted architectural works to alter or destroy them.

(ii) Trade Marks

Trade marks are signifiers used by manufacturers and merchants to identify goods or services and to distinguish them from those of other manufacturers and merchants. A trademark may protect words, marks, designs, colors, sounds, names, symbols, clothing, and buildings.[3] Rights in a trade mark generally depend on the actual use of the mark on goods that are sold in connection with the advertising or sale of services. These rights can continue indefinitely as long as the mark is neither abandoned nor improperly used, so as to become generic.[4]

Restricting the use of a trademark in some circumstances is acceptable, but controlling or inhibiting a trade mark use may stifle cultural development and limit freedom of expression in violation of the Constitution.[5] Trade marks or trade dress (*i.e.*, protection for the way a thing looks) hold great promise for protection of traditional design and craft. The issues are many: what are the protectable elements?; what is the "mark?", the "actual use?", and the "goods?"; who owns it?; where is the mark registered, and for what purposes? Exploiting the economic value of intellectual property is an important goal in protecting cultural expressions, not only to provide control over uses of cultural elements, but also to generate needed revenue for development of future projects that protect and preserve cultural expression.

3. Limitations on Ownership of Intellectual Property

(i) Free Speech

The First Amendment to the U.S.A. Constitution affords the expressive protections of speech, assembly, and religion, ensuring the rights to practice and preserve culture. Artistic expression often takes the form of symbolic or visual speech that

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[3] A successful use of intellectual property rights to enforce a cultural product is found in the longstanding and careful enforcement of the term "champagne", sought to be used generically to describe sparkling wine, but diligently controlled as the designation of products from one wine-producing region of France.

[4] In 1946, the U.S. A. Congress codified trademark protection in the Lanham Act. The Lanham Act recognizes that individuals associate a mark or symbol with a party's goodwill and reputation in goods or services. It restricts the mark's use to the exclusive trademark owner, rewarding the party that expended resources to develop a mark of identification for the product. Traditionally, trademarks aid consumers in identifying products and protect consumers from deceptive advertising about a product's source and quality. The goal of trademark protection is to ensure commercial morality, foster creativity, and encourage fairness to consumers. S.Rep. No. 1333, 79th Cong. 2d Sess. (1946), reprinted in 1946 U.S.C.C.A.N. 1274.

[5] One U.S.A. appellate judge, dissenting in a carefully-watched case, *White v. Samsung Electronics America*, 989 F.2d 1512 (1993), summed up the potential to stifle creativity and development of national culture. "Clint Eastwood doesn't want tabloids to write about him. Rudolf Valentino's heirs want to control his film biography. The Girl Scouts don't want their image spoiled by association with certain activities. George Lucas wants to keep Strategic Defense Initiative fans from calling it 'Star Wars'. Pepsico doesn't want singers to use the word 'Pepsi' in their songs. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve." (at 1512-13.) Note that this example raises not only trademark parody, but also the right of publicity (in contract) and the right of privacy (in tort).

expresses critical social commentary, satire, and religious or political ideas through stories or images.[6] Courts examine, when affording protection to artwork, whether the protection extends to the message, (*i.e.*, the values depicted in the image), or to the visual image itself. The First Amendment triggers protection where the social or political message is at the heart of the visual image. For example: the First Amendment protects parody when the parody comments on the original work;[7] a symbol placed on an American flag is protected by the First Amendment as a non-verbal expression of protest and dissent;[8] a mural portraying the plight of Mexican-American laborers constitutes a form of expression protected by the First Amendment;[9] a political cartoon representing critical opinion in symbolic form expresses an idea rooted in art and is protected by the Constitution;[10] a poster featuring a drawing of a scantily-clad politician with propaganda supporting equal rights for women represents a visual expression of a political message, and constitutes free speech.[11]

Historically, the First Amendment has been concerned with keeping particular spaces open to free speech – spaces such as public squares, broadcast channels, publications such as books and newspapers, and recently cyberspace; whereas intellectual property, a bundle of property rights, has traditionally been concerned with fencing the space and narrowing the unregulated reach of that space. It must, however, be emphasized that both concepts are concerned with artistic creations and inventions because intellectual property protects users as well as owners.

(ii) Visual Artists Rights Act (VARA)

A recently-enacted U.S.A law limits the exclusive rights of a copyright owner in a manner different from the First Amendment. The Visual Artists Rights Act (VARA)[12] amends the Copyright Act by granting additional rights (prospective only) to artists that are independent of the rights of reproduction, adaptation, derivative preparation, and performance. The law provides, in essence, that an owner of a work of art (or the copyright thereto) is not free to alter or mutilate the work. The Act provides limited

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[6] Visual artwork is equally an embodiment to artistic expression as is written text, at times they are indistinguishable. *Bery v. City of New York*, 97 F.3d 689, 695 (2nd Circuit 1996).
[7] *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group* (2nd Circuit 1989) 886 F. 2d 490.
[8] *Spence v. Washington*, 418 US 405, (1974); See also, *Radich v. New York,* 401 U.S. 531, rehearing denied 402 U.S. 989 (1971). Radich used the American flag as a tool to create art and to make a political statement protesting the Vietnam War. The sculptures constituted an expression of speech which constitutes both a work worthy of copyright protection and protection by the First Amendment freedom of speech clause.
[9] *Latin American Advisory Council v. Withers*, No. 74 Civ. 2717 (N.D. Ill. Nov. 22, 1974) (Mem. and Order); (Protection afforded to the mural as an artistic expression of an idea).
[10] *Yorty v. Chandler*, 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970) (dismissing defamation claim based on political cartoon depicting Mayor of Los Angeles surrounded by medical orderlies, insinuating his mental state); *Hustler Magazine v. Jerry Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (parody advertisement for liquor, portraying a conservative religious public figure in an unflattering context, was protected as an artistic expression of an idea and constitutional).
[11] *Penthouse International, Ltd. V. New York City Transit Authority*, 599 F. Supp. 1338 (S.D.N.Y. 1984) (discussing poster in New York City subway system depicting former Vice President of the United States wearing "ERA-Yes" banner).
[12] 17 U.S.C. §106A (VARA also amended the "work of visual art" defined in 17 U.S.C. § 101.)

moral rights; it grants the visual artist the limited rights of integrity and attribution. These rights are independent of the exclusive rights of copyright and are "personal" rights (as contrasted with the "property" rights of copyright). The Act covers works of visual art, including: "pictorial, graphic, or sculptural works; paintings, drawings, prints, sculpture, and still photographic images produced for exhibition" in a single copy or limited edition of at most 200 copies signed and consecutively numbered by the artist, or bearing an identifying mark if a sculpture.[13] The Act provides:

- two types of *integrity* rights:

1 - the right to prevent deliberate mutilation, distortion or modification of work if prejudicial to the artist's reputation; and
2 - the right to prevent destruction of a work of recognized stature.

- three types of *attribution* rights:

1 - the right to have artist's name appear when the work is on display;
2 - the right to prevent use of artist's name with work the artist didn't create;
3 - the right to prevent use of name with work that has been mutilated, distorted or otherwise modified in a way prejudicial to the artist's honor or reputation.

The rights are personal to the artist, and exist only for the artist's lifetime. Thus, one may transfer the copyright interest in a work, in whole or in part, but retain, by operation of this law, the personal rights of attribution and integrity. The rights may be waived by the artist, but cannot be transferred, sold or otherwise alienated. The Act also provides that an artist has the right to claim the work as his or her own and to disclaim work created by others that are misattributed. The Act has not generated significant case law,[14] but this is expected to be a growing area of the law.

(iii) Fair Use

A prominent limitation on the exclusive rights of an intellectual property owner is the concept of fair use. Fair use, an equitable doctrine that balances the rights of a copyright owner with those of society, speaks to specific uses of copyrighted works that

[13] VARA excludes reproductions such as "posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures and other audiovisual works, books, magazines, newspapers, periodicals, databases, electronic information services, electronic and similar publications, advertising, merchandising, promotional and packaging materials", and excludes also any works made for hire.

[14] The only significant cases to date raising questions under VARA are *Moncada v. Rubin – Spangle Gallery, Inc.,* 835 F. Supp. 747 (S.D.N.Y. 1993) (Artist's mural painted over.); and *Carter v. Helsmley – Spear, Inc.,* 861 F. Supp. 303 (S.D.N.Y. 1994), rev'd and vacated in part, affirmed in part, 71 F.3d 77 (2d Cir. 1995), cert. denied, 116 S.Ct. 1824, 134 L.Ed.2d 930 (1996). (Site-specific sculpture dismantled.) An earlier celebrated case involving the large-scale sculpture of Richard Serra, *Titled Arc*, was decided against the artist on a work for hire theory in the pre-VARA era. *Serra v. United States General Services Administration*, 847 F.2d 1045 (2d Cir. 1988) affirmed 667 F.Supp. 1042 (S.D.N.Y.) 1987). The obvious inequities of this case played prominently in the passage of VARA.

are considered *fair* under the Copyright Act. Fair use is not, on the one hand, "free" use, nor, on the other, "fettered" use. It acknowledges the tension between an owner's financial security interests and society's access to intellectual property. Fair use strives to ensure that an author's exclusive bundle of property rights will not hinder the very creativity the law was designed to foster. Recognizing that new works draw inspiration from older works and that productive use of older works promotes the progress of science, arts, and literature, fair use permits certain good faith uses that, in another context, would be infringement. These uses can include criticism, comment, news reporting, teaching, scholarship, and research.

The fair use test is a four-pronged, case-specific analysis.[15] It examines (1) the purpose and character of the new work's use; (2) the nature of the original work; (3) the amount and substantiality of the portion used in relation to the original work as a whole; and (4) the economic effect on the original work's actual and potential markets. The prongs cannot be evaluated in isolation as a mathematical formulation, but rather the test is a "totality of the circumstances" analysis. The flexibility inherent in the test often leaves users and providers unsure whether the contemplated use is a fair use, but the case-by-case analysis is a precisely-tailored discipline that serves to curb excessive or sweeping misuses. Because of the uncertainty inherent in the fair use test, users often prefer licensing schemes that grant permission for blanket uses.

The four-part test contained in copyright law is not the only measure of fair use; courts look to other factors as well. For example, it is relevant whether the taking is socially desirable or creative conduct that stimulates the public interest. Occasionally, the public interest is considered to be a fifth prong. Courts disagree as to whether obscene use bars a fair use finding, and lack of good faith generally weighs against fair use, as does failing to provide credit or attribution (thus akin to plagiarism). Some commentators note that these other factors should be weighed because copyright takes

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[15] §107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

place in a social context and certain considerations may influence equitable outcomes. Other commentators view additional factors - good faith, artistic integrity, and privacy - as distractions in balancing the goals of copyright.

Trade mark law, like copyright law, contains fair use principles that mediate potential conflicts with free speech and expression. Artists often use in cultural expression the symbols and images protected by trademark. An individual's artistic interpretation or use of a product as a commercial or societal icon does not, generally, confuse or diminish the owner's exclusive product identification. One prominent example of this use is the work of Andy Warhol, an artist who never sought permission for depictions of his frequently-used commercial products, including his signature portraits of the Campbell's Soup cans.[16]

Fair use in the trademark context arises where a trademark becomes part of the product, such that its role as an identifier becomes less important than the functional characteristics of the product.[17] In the U.S.A., it is a *fair* use for a competitor to describe aspects of his own goods by using a competitor's registered trademark.[18] Parody traditionally constitutes a fair use of a trademark if consumers clearly understand that the trademark is the subject of comment and not sponsored by the trademark's owner;[19] examples of trademark parody are many and varied, but the most significant is where the trademark is the prime target of parody,[20] such as in the case of Warhol's depictions of ordinary commodities, because that use triggers the fair use defense as a cultural representation.

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[16] *New York Times*, June 16, 1996, at 12A (John W. Smith, archivist of the Andy Warhol Museum in Pittsburgh.)

[17] A use of a trademark is fair if (1) the product or service in question cannot be identified without using the trademark; (2) only a portion of the mark, or marks, may be used as is reasonably necessary to identify the product or service; (3) the user must not do anything with the mark that suggests sponsorship or endorsement by the trademark holder. *New Kids on the Block v. News Am. Publishing, Inc.,* 971 F.2d 302, 308 (9th Cir. 1992).

[18] 15 U.S.C.A. 1115(b)(4). "That the use of the name, term, or device charged to be an infringement is a use, other than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin."

[19] *New York Racing Association, Inc.v. Perlmutter Publishing, Inc.,* 95 CV 994, 1996 U.S. Dist. LEXIS 11764 (N.D.N.Y. July 19, 1996) dismissed, 1997 U.S. Dist. LEXIS 4607 (N.D.N.Y. April 9, 1997). (Defendant's use of the association's registered trademarks in painting's title was protected by the First Amendment); *Yankee Pub. V. News America Pub., Inc.,* 809 F. Supp. 267, 272, 279 (S.D.N.Y. 1992) ("parody is merely an example of the types of expressive content that are favored in fair use analysis under the Copyright Law and the First Amendment deference under the Trademark Law.")

[20] For example, *Girl Scouts of America, v. Bantam Doubleday Dell Publishing Group*, 808 F. Supp. 1112 S.D.N.Y. 1992), affirmed, 996 F. 2d 1477 (2d. Cir. 1993) (discussing First Amendment artistic expression superseding property right afforded by trademark); *New Kids on the Block v. News Am. Publishing, Inc.,* 971 F.2d 302, 308 (9th Cir. 1992) (providing fair use test for trademarks); *Pillsbury Co. v. Milky Way Prods.,* 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981) (parody advertising characters engaged in lewd conduct does not infringe trademark); *L.L. Bean, Inc. v. Drake Publishers, Inc.,* 811 F. 2d 26 (1st Cir.) cert. denied, 483 U.S. 1013 (1987) (portraying fake products and nude models to parody a mail order catalog constitutes fair use of trademark); *Eveready Battery Co. v. Adolph Coors Co.,* 765 F. Supp. 440, 448-50 (N.D. Ill. 1991) (fair use of trademark for imitation of a trademarked character to hawk another type of product, where the parody is obvious to the viewer.)

Architecture is a form of cultural expression protected in the U.S.A by both trade mark and copyright. Copyright provides architects, as authors of architectural works, protection for their designs,[21] and grants to third parties the affirmative right to photograph publicly accessible buildings and to freely distribute and display those photographs. The free exchange of ideas, and the freedom to borrow and expand on those ideas, are integral to the design process; copyright protection tailored to the particular nature of architectural design benefits the public and advances cultural development.

In contrast, however, in trade mark law, architectural works are properly protected where the design is the "signature" style of the architect.[22] Copyright law permits individuals to photograph architectural designs, but trade mark law preempts the right freely to use a trade marked architectural creation. Some buildings in the U.S.A. currently under trade mark include the Chrysler Building and Guggenheim Museum in New York, the Transamerica Pyramid in San Francisco, the Wrigley Building and Citicorp Center in Chicago, and The Rock and Roll Hall of Fame in Cleveland. Trade mark protection for buildings is limited, however, as it precludes another party from designing a building in the same shape.[23]

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[21] Prior to 1990, copyright law gave virtually no protection to architectural structures, but in 1990 Congress amended the Copyright Act to include The Architectural Works Copyright Protection Act, meriting "architectural works" a category of copyrightable subject matter. The Act protects overall form, arrangement and composition of spaces, and elements in the design. 17 U.S.C. 101.

[22] Lanham Act §43 (a), 15 U.S.C. §1125 (a) (1988):

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representations of fact, which-

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[23] *Associated Hosts of California, Inc. v. Moss*, 207 U.S.P.Q. (BNA) 973 (W.D.N.C. 1979); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *White Tower System, Inc. v. White Castle System of Eating Houses Corp.*, 90 F.2d 67 (6th Cir.), cert. denied, 302 U.S. 720 (1973) (holding uniquely designed building could serve as distinctive mark); *Fotomat Corp. v. Ace. Corp.*, 208 U.S.P.Q. (BNA) 92 (S.D. Cal. 1980) (commercial "huts" in parking lots considered arbitrary and fanciful in their design). A recent U.S. case addressing trademark protection for prominent buildings is *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods.*, 943 F. Supp. 868 (N.D. Ohio 1996). In this case, the trial court enjoined the selling of a poster of a photograph of the distinctive I.M. Pei-designed building with the text: *The Rock and Roll Hall of Fame and Museum in Cleveland.* The trial court ruled that the museum's trademark in the building supersedes the photographer's right to sell the poster. The trial court explained that the "likelihood of confusion" between the poster and the museum's trademark would irreparably harm the museum's licensing program and revenues, but the appellate court disagreed, sending the case back to the trial court. It remains an open question, then, whether trademark protection safeguards the owner's right to decide

4. Limitations on Ownership of Cultural Property

The above provides examples of the intersection between artistic freedom and the regulation of intellectual property in order to support a culture that flourishes by virtue of owning and borrowing. Discussed below are two prominent examples of the right to culture in an emerging field, that address *physical* property, rather than *intellectual* property, although the intellectual property aspects and ramifications can be readily seen. These two areas are repatriation of Native American human remains and associated funerary objects, and repatriation of Nazi-era war booty that may be found in the collections of U.S. museums. These repatriation examples are instructive because they resolve difficult questions of ownership *versus* ethics in a responsible manner. These repatriation efforts are grounded fundamentally in morality and cultural imperative, and the principles of ownership and strict procedural proof are not the sole considerations.

(i) Rights of Indigenous Persons

The Native American Graves Protection and Repatriation Act (NAGPRA),[24] aims to protect Native American human remains and cultural objects that fall within the definition of cultural patrimony. Prior to the 1990 passage of NAGPRA, the Antiquities Act provided some protection for Indian tribal artifacts by prohibiting the excavating, injuring, appropriating, or destroying of objects of antiquity found on federal lands. It established criminal sanctions but failed to protect adequately Native American objects of cultural and historic importance. Private collectors freely bought cultural items, either looted or illegally purchased from a tribe, and money was to be made from knock-offs without any respect for the authentic. Pressure from tribal groups, a moral concern for preserving tribal culture, and ethical issues raised by collectors' actions, spurred legislators to enact NAGPRA.

The Act defines cultural patrimony, and institutes criminal sanctions for illegal trafficking. The Act protects Native American burial sites on federal and tribal lands and controls the removal of human remains, funerary objects, sacred objects, and items of cultural patrimony. It requires federal agencies and museums receiving federal funding to catalog human remains and associated funerary objects, to make the information available to tribal groups upon request, and to repatriate where appropriate.

The Act confirms that certain objects central to a tribe's culture or religion belong to that tribe and not to its individual members. NAGPRA will protect a cultural item as cultural patrimony only if the Native American group has considered it cultural patrimony and inalienable. Individual members cannot appropriate or convey cultural patrimony, but it should be noted that the Act does not prohibit the sale of personal property of tribal members. Thus, ambiguities or controversies can be expected to arise, and NAGPRA includes a mediation scheme for resolution of contested matters.

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what uses are deemed desirable, or whether protection stifles creativity and limits cultural dissemination; this area can be expected to give rise to additional case law.

[24] 25 U.S.C. §§ 3001-3013.

It is, obviously, but a small step from control of objects, *per se*, to control of representations of those objects (including photographs, designs, film, or other images) and U.S.A museums have been respectful of those claims, although most would not consider the institution legally bound to do so. This area is being developed by case law in other countries, notably Australia,[25] where individuals and indigenous groups are testing in the courts issues of representations of their cultures.

(ii) Repatriation of Looted Property

The importance of cultural property is underscored as American and European nations grapple with the present day consequences of the Nazi-era despoliation of Jewish and other cultures through systematic looting and destruction of paintings, monuments, cultural artifacts, and other objects that hold and transmit cultural value. The recent guidelines promulgated by the Association of Art Museum Directors (AAMD), an organization of the largest U.S.A art museums, recognize the importance of art as a cultural vehicle and condemn a system that permitted its illegal seizure.

The guidelines advise each member museum to develop a policy governing the legal, ethical, and managerial practices concerning the legal status of the institution's collections; to review the provenance of works in their collections to determine whether the works should be restituted; to repatriate works where claims can be established; to request extensive documentation concerning the provenance of future gifts, bequests and purchases; and to make the collections information accessible to the public for examination and research. As is the case with NAGPRA, the guidelines contemplate a mediation process for handling and resolving claims that may be presented. By taking an active role in repatriating works of art unlawfully confiscated during the World War II-era, museums communicate to the public the significance of cultural property and the moral obligations that attach to it.

## 5. Conclusion

The right to culture gains a new meaning as new rules emerge for intellectual property in response to technological advances. Article 27 of the UDHR recognizes the importance of preserving culture: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and share in scientific advancement and its benefits".

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[25] Three recent Australian cases that have received wide attention are *Bulun Bulun v. Nejlam Investments and others* (Unreported Case, Federal Court Northern Territory (1989*) discussed in* Golvan, C., "Aboriginal Art and Copyright*", 1* (1996) *Media and Arts Law Review,* 151; *Yumbulul v. Aboriginal Artists Agency Ltd.* (1991) 21 I.P.R. p.481*;* and *Milpurrurru v. Indofurn Pty. Ltd. and others* (1995) 30 I.P.R. 209.

The major and, arguably most pervasive, systems for transmitting culture are the education system, the entertainment industry, and commercial advertising. These systems are built on intellectual property, including art and information concerning visual language. These areas have, to date, conveyed interpretations of culture in a one-way, content-controlled manner. Technological advances encourage the opportunity for many to participate and interact, and the opportunity to make new rules. The effect of technology on cultural property, including expressions of folklore, is not yet entirely clear, but the following expectations have emerged. Technology can:

- empower cultures because these tools can be used for identification, interaction, entertainment, and exchange of ideas;
- allow preservation of minority languages for communicating, teaching, and participating in the minority/majority dialog;
- enhance development and preservation of culture by aiding documentation of expressions of folklore;
- provide new marketing opportunities for cultural resources, including performance, handicrafts, the visual arts, and other cultural expression;
- enable monitoring and policing of illicit exploitation of cultural resources, because a system of rights without enforcement is merely an illusory right.

There are opportunities, but also challenges. It is recognized that globalization threatens community and local culture by virtue of the wide reach of communications tools dominated by a few select voices. The right to culture, then, must include the tools to own and preserve cultural manifestations and, at the same time, to utilize and exploit the cultural resources of the majority culture.

The intellectual property system of the U.S.A. may provide some guidance in enforcing the economic rights of culture; the U.S.A. assumes the "right to culture" through a strong property-based intellectual property system that protects works of artistic, literary, and other expression. It nourishes that system by allowing fair use of an intellectual property owner's exclusive rights in order to encourage the free development of a national culture. Intellectual property laws provide individual and communal rights to cultural property through a system of owning and borrowing, the "pull-and-tug" of, on the one hand, protecting commercial properties such as Hollywood hits or household products; and, on the other, protecting social protest and borrowing protected symbols for social or political comment.

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