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Intangible Heritage

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Away From Place: Expanding Intangible Cultural Resource Protections Under U.S. and International Law

EMILY BERGERON

Whether due to war and political unrest, economic hardship, natural disasters, or other forces, communities around the world, throughout history, have been displaced from their homelands or other places of cultural connection. Climatic activities, including global warming, pose growing threats. From the obvious effects of catastrophes like Hurricane Maria in Puerto Rico or the wildfires in Paradise, California, to the slower, less-publicized impacts of sea level rise on the Alaska Native village of Newtok or the residents of Isle de Jean Charles, Louisiana—environmental events have caused people to be increasingly separated from place. One estimate puts the number of Americans migrating in 2017 alone due to disasters at 1.6 million (IDMC, 2019). By 2050 climate change could force more than 140 million people to migrate within their own countries, including the United States (Rigaud, et al, 2018).

Community-wide relocation is best approached through managed retreat, which will require some focus on protecting heritage after its dislocation from place, as well as protecting the cultural rights of refugees (Kim, 2011). Deliberate migrations force individuals to abandon built structures, land, and natural features. But they should provide people who are migrating with opportunities to plan for the protection of their heritage even though it will be untethered from a specific location. This will make legal protections of intangible resources an important next step.

Seeking to protect what remains of natural resources also warrants the protection of traditional knowledge about those resources. As researchers and policy-makers are increasingly realizing, traditional knowledge, on everything from architecture to land management, has been integral to indigenous survival for

The artisanal process of harvesting and drying the materials used to make pintao hats in Panama is an example of intangible heritage.

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thousands of years—often providing more effective environmental approaches than those of mainstream science—and have great potential to stop (or at least slow) the tide of environmental destruction (Hermann, 2016). But the potential for commercial exploitation of this information at the expense of indigenous people is also great.

Protecting what UNESCO refers to as living culture could help maintain diversity amid increasing globalization, promote international exchange despite increasing nationalism, encourage the transmission of knowledge and skills from generation to generation, and ensure that the social and economic value of both natural and cultural resources remains in the community of origin. International conventions set forth by UNESCO, as well as laws ranging from statutory protections to policy-level initiatives in countries around the world, have demonstrated that laws can successfully be enacted and enforced to protect intangible cultural heritage. But the U.S. response, both in adopting international conventions and in establishing its own, has been regrettably slow. Changing the U.S. regulatory framework to address resources that are not completely reliant on their connection to place would encourage more equitable preservation and avoid the constraints of physical integrity, which has been criticized for limiting the protection of resources of traditionally underrepresented communities.

INTERNATIONAL CONVENTIONS

The most widely recognized international convention concerned with Intangible Cultural Heritage (ICH) was established in 2003: the UN Convention for the Safeguarding of the Intangible Cultural Heritage (Convention on ICH), representing a conceptual shift in what heritage, and therefore historic preservation, actually are. Before that, there were other international laws and conventions to address heritage,[1] but these were often faulted for being Eurocentric to the exclusion of indigenous culture in determining how heritage is assessed and managed, and for favoring the interests of research communities over the culture bearers (Smith and Akagawa, 2019).

The Convention on ICH seeks to protect traditions and living expressions, including assets like oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe, and the knowledge and skills to produce traditional crafts (2003). It asserts that it is not the *product* but the *knowledge* and *skills* represented by the product and the process of creating it that must be recognized for preservation. The convention also authorizes the UNESCO Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage to compile a Representative List of the Intangible Cultural Heritage of Humanity. This list moves away from documenting the monuments, sites, objects, and Western values associated with the World Heritage List and is not restricted by the same notions of "pastness" that other registers are constrained by (Smith and Akagawa, 2019: 20). Nonetheless, it has been criticized as yet another exclusive and excluding list.

The connection between intangible heritage and indigenous communities is also acknowledged in international law, recognizing the importance of preventing the exploitation of traditional knowledge and the misappropriation of traditional practices. In 2007 the General Assembly of the United Nations recognized the need for indigenous people to have agency over their intangible cultural heritage in the Declaration on the Rights of Indigenous Peoples (DRIPS). The Declaration states that:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and

> traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures… They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Such provisions also exist outside the bounds of the United Nations. For example, a similar recognition of the need to protect indigenous people is evident in the Andean Community of Nations', *Elementos para la protección sui generis de los conocimientos tradicionales colectivos e integrales desde la perspectiva indígena* (2005).[2] This collective from the northwestern part of South America, including Bolivia, Colombia, Ecuador, and Peru, formally recognizes the need to protect intangible heritage, including traditional knowledge associated with uses of biodiversity, to maintain the social and economic benefits of ICH for indigenous people (Elementos 11). It also addresses the need to protect traditional knowledge for reasons of human rights and intrinsic values such as cultural identity, equity, and as a defense against misappropriation of intellectual property (Elementos 14).

INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS

Protecting ownership and preventing commercial exploitation of ICHs are central principles of many of the existing regulatory frameworks and were key reasons for creating the international conventions. In fact, the term "cultural heritage" is often used interchangeably with the term "cultural property." Intellectual property is essentially a 19th-century concept, fostered by the desire to protect innovations in technology. Only relatively recently has cultural resource protection been considered in this arena. Specialized organizations such as the World Intellectual Property Organization (WIPO) have started examining intangible cultural heritage and traditional knowledge as part of a broader concept of heritage protection. To that end, it established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2000 to address the

misappropriation of folklore, traditional knowledge, and indigenous practices (Antons and Logan, 2018). Further, existing laws can and have been used to protect these resources.

Intangible cultural heritage can be divided into public and non-public knowledge, and this distinction limits what can be protected under intellectual property law. The U.S. has a legal framework for protecting intellectual property that may also be suitable for protecting intangible cultural heritage and the products derived from it. The current system offers design patents, trademarks, copyrights, protection for trade secrets, utility patents, and even plant patents. Special case protections also exist that may provide unique protection of resources not specifically covered under other laws. If something is known or is obvious, then legal protection will likely not be available.

Internationally, protection is similar, relying on concepts such as novelty. Some of these laws allow lessening enforcement of rights against some communities or more stringently protecting the rights of others.[3]

The protection of ICH through the concept of intellectual property poses a number of challenges. For example, since something must be novel (35 U.S.C. §102) and nonobvious (35 U.S.C. §103) to be patentable, those terms must be defined and interpreted. Something known by "others" for more than one year prior to the date of "invention" is not novel. In the case of ICH, one must also determine who "others" may be for the purposes of defining public disclosure, particularly when a practice is known to an entire community. And in that case, should the entire community, or just some or its members, be entitled to own and benefit financially from the patent?

The artisans who make pintao hats in Panama also plant and process the raw materials needed to make the braids used to create the hats.

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INTANGIBLE CULTURAL HERITAGE IN THE UNITED STATES

Protecting culture has not been high on the domestic or foreign policy agenda of the U.S., or subject to much regulation. Laws that do exist are closely attached to monuments, sites, and objects. The National Historic Preservation Act, for example, as well as other federal laws relying on the National Register of Historic Places to prioritize resources worthy of preservation, protects buildings, sites, objects, districts, and structures. To be eligible for listing, a resource's significance must be linked to a place, and that place must meet a standard for "integrity" of location, setting, design, materials, workmanship, feeling, and association. This privileges places that remain intact thanks to the owners' status and financial means, or to political will. This arguably limits the types of resources included on the register associated with minority cultural groups, thus reinforcing a Eurocentric history of the U.S. as opposed to an actual diverse one (Brookstein, 2001).

Laws protecting archaeological resources—likely the strongest protections for heritage in the U.S.—are also strongly linked to the physical place or object, considering those separately from any living traditions associated with them. Such was the case in the 1974 Ninth Circuit opinion in United States v. Diaz,[4] in which the court declined to interpret "object of antiquity" to include long-standing religious or social traditions for failure to meet the commonly held understanding of the meaning of the term antiquity (1974). This requirement for something to be understood as old to warrant protection not only left a portion of the Antiquities Act void for vagueness, it also demonstrated a disconnect between protecting culture versus artifact.

Within the existing U.S. regulatory framework, the best protection for intangible aspects of heritage is the provision that a Traditional Cultural Property (TCP) may be eligible for inclusion on the National Register because of its association with cultural practices and beliefs that are (1) rooted in the history of a community, and (2) important to maintaining the continuity of that community's traditional beliefs and practices (National Register Bulletin 38). This does reflect a growing recognition that culture is a living thing, but still requires that for intangible heritage to be recognized, it must

be rooted to place rather than to individuals or communities. For example, National Register Bulletin 38 lists the sedge fields along the Russian River in California as a potential TCP. Although the bulletin acknowledges that the site lacks individual distinction, it is considered significant as the source of the roots needed to make Pomo's famous basketry, an ongoing cultural practice linked to a place (14). Compare this to UNESCO's Intangible Cultural Heritage List which recognizes the artisanal process of planting, gathering, preparing, and weaving plant fibers to make pintao hats in Panama. It is the *process*, not the *place* where it is done, that is identified as representative of the Intangible Cultural Heritage of Humanity (UNESCO, 2017).

In addition to having weak federal laws addressing heritage, the U.S. also resists adopting international conventions. Its failure to ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict until 2008, despite the role of the now well-known Monuments Men and the U.S. Committee of the Blue Shield, demonstrates a reluctance to formally adopt restrictions on actions. So does the fact that the U.S. was one of only four countries that voted against the UN Declaration on the Rights of Indigenous Peoples in 2007, and the last of those four to have reversed its opposition; and that the U.S. joined only a handful of nations in abstaining on the vote for the 2003 Convention on Intangible Cultural Heritage. The U.S.'s 2017 withdrawal from UNESCO, although not the first such withdrawal, indicates that its lack of international involvement is not likely to change soon.

NEXT STEPS IN THE UNITED STATES

Opportunities exist to strengthen and broaden existing U.S. laws to protect intangible cultural heritage as the permanence of place changes. One possible approach, being adopted in other countries, is to better integrate tangible and intangible heritage, diminishing the distinctions between the two. That could be done by expanding what is included on the National Register, taking a lesson, for example, from Japan's revision of its Law for Protection of Cultural Properties (LPCP),[5] enacted in 1950 and amended in 2007. Japan's law includes "intangible cultural property" in its overall definition of

A Panamanian artisan slitting *Carludovica palmata* fibers, an early step in the process of making pintao hats.

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cultural property as well as Intangible Folk Properties, which include manners and customs, folk performing arts, and folk techniques concerning food, clothing, housing, occupation, religious faith, and events. The national government designates especially significant practices, recognizes individuals or groups of individuals who are masters of the techniques concerned, and offers subsidies for individuals who are training successors and for public performances and exhibitions. Allowing the U.S. National Register to include not just the sedge fields in California but the basket weaving process itself would be similar to Japan's LPCP. This would further allow the recognition and protection of cultural practices that are being lost to economic forces like urban renewal and gentrification, or to environmental ones like climate change.

Something similar already exists at the local level: San Francisco's Legacy Business Registry (Ordinance No. 29-15). The program seeks to save long-standing community-serving businesses that are considered valuable cultural assets. To qualify, a business must have operated in San Francisco for at least 30 years with no more than a two-year break, although the business may have been in more than one location. Further, the business must contribute to the neighborhood's history and identity, and it must be committed to maintaining the physical features or traditions that define it,

such as craft, culinary, or art forms. In 2015 city voters approved the creation of a Legacy Business Historic Preservation Fund to help retain businesses at risk of displacement.

In the protection of ICH, there must also be standards for addressing issues of disrespect, exploitation, and misrepresentation for non-community members carrying out research or data collection. The law currently requires that any institution that engages in federally funded research involving human subjects must have an Institutional Review Board (IRB) (42 U.S.C. § 289; 45 CFR § 46.101 et. seq.; 21 CFR 50; 21 CFR 56). The IRB, an administrative body established to protect the rights and welfare of human research subjects, must review and approve proposals before any principal investigator (PI) engages in research. Before applying, PIs must submit to training on the ethics and implications of working with human subjects. The federal regulations do consider some populations, such as minorities or the economically disadvantaged, as "vulnerable" and therefore in need of additional consideration or protection. Additionally, some Native American Nations have Tribal IRBs that researchers must gain approval from before conducting their work. For example, the Navajo Nation Human Research Review Board addresses issues of consent, ownership of data, and review of manuscripts prior to publication (NNHRRB, 2019). In concert with these regulations, many institutions suggest working collaboratively with members of the study population to ensure the production of culturally appropriate materials, the additional consideration of benefits and harms accrued to the community, and the long-term implications of work. Expanding IRB requirements or creating new ones at the federal level, as well as mandating additional education prior to approval of research protocols addressing the harvesting of traditional knowledge and intangible cultural heritage, would create much-needed protections for communities whose resources have traditionally been exploited.

When U.S. laws addressing intellectual property were created, it was quickly understood that the concept of property rights needed to be stringent enough to foster further innovation but flexible enough to allow for wide use (Goldstein and Reese,

2008:18). A similar balance is needed in the regulation of intangible cultural heritage. It is significant that UNESCO has recognized and promoted the universal value of these resources, but in the wake of the interest and publicity this can bring, bearer communities may also need to be protected from outside exploitation of their cultural products and practices. Changes to the existing regulatory framework in the U.S. for the protection of something other than the tangible will require expanded definitions of cultural significance, changes in preservation law, and a willingness by those in preservation and related fields to take on new challenges. **FJ**

EMILY BERGERON, J.D., PH.D., is an assistant professor in the Department of Historic Preservation at the University of Kentucky. She can be reached at emily.bergeron@uky.edu.

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1 For example, there was a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1970 and the 1973 World Heritage Convention. Some conventions came closer to protecting intangible resources, particularly folklore and oral history. These included the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, the 1993 Living Human Treasures system, and the 1998 Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (Smith and Akagawa, 2019:13), and the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage.

2 http://www.comunidadandina.org/StaticFiles/OtrosTemas/MedioAmbiente/libro_perspectiva_indigena.pdf.

3 The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), for example, sets international minimum standards for protecting IP, while focusing on reducing and preventing impediments to international trade (WTO, Preamble 1994). TRIPs further recognizes, however, "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base." Alternatively, the rights of Indigenous people is called out specifically in the UN Convention on Biological Diversity (CBD), which states that member countries "subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" (1992: Article 8(j)).

4 US v. Diaz, https://scholar.google.com/scholar_case?case=9016663950726667490&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

5 Japan's Law for the Protection of Cultural Property, https://en.unesco.org/sites/default/files/japan_law_protectionproperty_entno.pdf.