

**IUSTIFYING GROUP INTELLECTUAL PROPERTY: APPLYING WESTERN NORMATIVE  
PRINCIPLES TO JUSTIFY INTANGIBLE CULTURAL PROPERTY**

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**I. INTRODUCTION**

What does Yoga,<sup>1</sup> the German band Enigma,<sup>2</sup> fan fiction,<sup>3</sup> anti-fungal properties of Neem,<sup>4</sup> Wikipedia,<sup>5</sup> the Chain Art Project,<sup>6</sup> and aboriginal paintings have in common? They all belong to a legal lacunae, a lacuna relating to group-rights (or collective rights) in Intellectual Property Law. Intellectual Property ('IP') has almost consistently, since its inception, romanticized the idea of a sole creator, or individual genius.<sup>7</sup> This has deprived vast numbers of small, creative groups and indigenous people of IP protection, which has had varied effects on them, ranging from moral disparagement,<sup>8</sup> to economic deprivation,<sup>9</sup> and even cultural misappropriation.<sup>10</sup> These events have not been ignored either at the domestic or international level however, with a steady consensus building up in favor of Cultural Property ('CP'),<sup>11</sup> particularly following the

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<sup>1</sup> Stuart Schüssel, *Copyright Protection Challenges and Alaska Natives' Cultural Property*, 29 ALA. L. REV. 313, 315 (2012).

<sup>2</sup> Timothy D. Taylor, *A Riddle Wrapped in a Mystery: Transnational Music Sampling and Enigma's "Return to Innocence,"* in MUSIC AND TECHNOCULTURE, 64, 68 (René T. A. Lysloff & Leslie C. Gay, Jr. eds., 2003).

<sup>3</sup> Margaret Leidy, *Protecting Creation: The Twilight Series, Creation Stories, and the Conversion of Intangible Cultural Property*, 41 SW. U. L. REV. 509 (2012).

<sup>4</sup> Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 11-12 (2001).

<sup>5</sup> JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN

A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 145 (4th ed. 2015).

<sup>6</sup> Margaret Chon, *New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 266 (1996).

<sup>7</sup> See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, DUKE L.J. 455 (1991); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 357 (1998); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279-287 (1992).

<sup>8</sup> See Liz Clarke, *In North Dakota, Controversy Has a Name: NCAA, University and Native Americans Are at Odds over "Fighting Sioux,"* WASH. POST, Nov. 6, 2005, at E01.

<sup>9</sup> Renata Huang, *Golden Oldie: A Respected Ami Tribe Elder Seeks Recognition for His Chart-Topping Chants*, FAR E. ECON. REV., (1995).

<sup>10</sup> Suketu Mehta, *A Big Stretch*, N.Y. TIMES, May 7, 2007, at A21.

<sup>11</sup> I use the term cultural property in this paper to mean Intangible cultural property, and cover both Traditional Knowledge and Traditional Cultural Expressions. While there are certainly marked differences between the two, for the purposes of this paper, my analysis would be limited to a gestalt view of Intangible Cultural property covering both TK and TCE. It must be pointed out that many commentators are in disagreement as to the contours of TK and TCE respectively, including something as primary as its definition.

Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 ("TRIPS").<sup>12</sup> Cultural Property or Cultural Heritage,<sup>13</sup> is defined to include "*tangible Cultural Heritage, such as movable Cultural Heritage (paintings, sculptures, coins, manuscripts), immovable Cultural Heritage (monuments, archaeological sites, and so on) and underwater Cultural Heritage (shipwrecks, underwater ruins and cities) on the one hand, and intangible Cultural Heritage: oral traditions, performing arts, rituals.*"<sup>14</sup> In this paper, I deal purely with Intangible Cultural Heritage/CP. With the rise of CP protection debates, innumerable intricacies have arisen, with varying viewpoints taken by different sides. Some of the literature on CP assumes that CP ought to be protected, and focuses instead on how to do so: to revamp the patent system, to create *sui generis* rights via international treaties, to build global databases of CP that can be used to block patent applications, and so forth.<sup>15</sup> Other analysts consider the more basic question of whether IP protection is in order, or is some other form of protection that is in fact required.<sup>16</sup> Still, others claim that CP would affect the sacred or cultural heritage of indigenous peoples.<sup>17</sup>

I however do not wish to delve too deeply into the question of 'How' but would much rather prefer to take a step back and deal with the question of 'Why'? At the outset, I wish to make it clear that I do not mean to analyze current IP regimes in order to match its suitability to collective property. For example, questions such as whether the 'work of joint authorship' provision in Copyright Law should be amended or if Patent Law should move on to a multi-inventor status as opposed to continuously romanticizing the sole creative genius, is beyond the scope of this paper. Rather, I aim to seek the help of normative principles of property, to justify a group property right in the IP regime, with particular attention to CP.

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<sup>12</sup> Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 38 (2009); Graham Dutfield, *Trips-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 235 (2001).

<sup>13</sup> While I recognize the differences between the two terms, I use them interchangeably here. For a discussion as to the semantic value of the monikers please read Lyndel V. Prott & Patrick J. O'Keefe, "*Cultural Heritage*" or "*Cultural Property*"?, 1 INT'L J. CULTURAL PROP. 307, 311 (1992).

<sup>14</sup> *What is meant by Cultural Heritage*, UNESCO, available at <http://www.unesco.org/new/en/culture/themes/illegal-traffic-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/>.

<sup>15</sup> Gurdial Singh Nijar, *In Defence of Local Community Knowledge and Biodiversity: A Conceptual Framework and the Essential Elements of a Rights Regime*, 1 THIRD WORLD NETWORK 22-24 (1996).

<sup>16</sup> See Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 147 (2001); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 983 (2007).

<sup>17</sup> Pat Roy Mooney, "*Why we Call it Biopiracy*" in RESPONDING TO BIOPROSPECTING: FROM BIODIVERSITY IN THE SOUTH TO MEDICINES IN THE NORTH 37 (Hanne Svarstad & Shivcharn S. Dhillon Eds., 2000); VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* 72-79 (1997) [hereinafter Shiva 1].

Those who posit that CP should be protected, usually invoke concepts of property regimes in order to justify their claims.<sup>18</sup> I continue on this path to assess and analyze whether there exist normative justifications for CP to be a form of property, and specifically IP. Attempts to justify property rights in CP using western ideologies of property have been mostly met with severe opprobrium.<sup>19</sup> The censure is prevalent at least in part due to the intuitive feeling amongst different scholars that western philosophy is highly individualistic and ignores any form of community-based rights.<sup>20</sup> They argue instead, that other justifications must be looked at, which do not have a 'western-tinge' to them. They argue in part that western colonization and imperialism in the 19<sup>th</sup> and 20<sup>th</sup> Century has been replaced with western misappropriation and embezzlement in the 21<sup>st</sup> Century.<sup>21</sup> They point out that traditional IP systems are incompatible to protect the eclectic nature of CP, and claim that this is evidenced by the fact that the West refuses to protect CP such as folklore, traditional know-how, etc. but has no problem with patenting or copyrighting innovations or expressions based on the same. According to James Boyle of Duke University:

*"The author concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favor the developed countries' contributions to world science and culture. Curare, batik, myths and the dance 'lambada' flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham and the movie 'lambada!' flow in - protected by a suite of intellectual property laws, which in turn are backed by trade sanctions."*<sup>22</sup>

They also point out the intransigence of the West to recognize materials, which while clearly deserving of some sort of IP protection, are denied due to their non-compliance with stringent statutory standards. For example, traditional medicines and know-how which may have been in existence for thousands of years, are not allowed to be patented, because they are not in a

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<sup>18</sup> See Shiva 1, *supra*; Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, Zed Books Ltd. (2001) ["Shiva 2"]; see also KRISTEN A. CARPENTER, SONIA K. KATYAL, AND ANGELA R. RILEY, *In Defense of Property*, 118 YALE L.J. 1022 (2009) [hereinafter Carpenter 1].

<sup>19</sup> See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 225 (2000); John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 487 (1988).

<sup>20</sup> Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 697 (1993).

<sup>21</sup> See Michael J. Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U. L. REV. 1678, 1700 (1995); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 115-23 (1993).

<sup>22</sup> JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 125, 192 (Harvard Univ. Press, 1996).

written form.<sup>23</sup> Similarly, folklore and dances, which are not fixed in any tangible medium, are immediately disqualified from Copyright protection. This dichotomy is further brought out when western systems have recognized materials and expressions which have departed, sometimes significantly, from traditional IP regimes, but refuse to extend the same courtesy to CP.<sup>24</sup> The criticism reaches its logical conclusion that if western systems based on western notions of property are incapable of protecting CP, then we must look outward and to new justifications for its protection.

I completely sympathize with and agree that the precious knowledge of indigenous peoples has been blatantly misappropriated by western companies and organizations, usually without any benefit reaching these indigenous peoples. Additionally, I also agree that the IP regime as it stands today has been largely incompetent in protecting the CP of these peoples.<sup>25</sup> However, I disagree with the proposition that we should turn a blind eye towards customary western normative justifications of property, for two reasons. First, I believe that most scholars, who argue for the IP protection of CP, refuse to deal with the fundamental question of 'Why' it deserves protection in the first place.<sup>26</sup> They presume that these truths are self-evident, and proceed to debate on how best to protect CP instead. Such an approach is myopic to say the least. It refuses to debate with individuals who fail to understand why CP should be protected, thereby immediately ostracizing those who might be 'on the fence' about the issue.<sup>27</sup> More importantly, by refusing to analyze normative justifications for CP, they neglect a large part of literary scholarship, which might help create innovative solutions to the problem of how to protect CP. As I will explain later, many current attempts to protect CP have a distinct Kantian, Rawlsian or Rawlsian flavor to it. Even if scholars deal with normative justifications, they refuse to analyze the works of western proponents of property, subscribing to conventional stereotypes (Locke is a libertarian, and Kant is an absolute individualist), instead of actually analyzing the veracity of these claims.

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<sup>23</sup> Sometimes this failure to pen down existing practices deprives Indigenous peoples the right to invoke the prior art clause to prevent patenting of their historic know-how. This has resulted in systems codifying existing their country's existing Cultural Property. The best example of this is the Traditional Knowledge Database library (TKDL) in India.

<sup>24</sup> See Dutfield, *supra* at 12.

<sup>25</sup> Carpenter 1, *supra* at 18.

<sup>26</sup> Munzer & Raustiala, *supra* at 12.

<sup>27</sup> See J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 452 (2000).

My second grouse with the skeptics, is strategic. To convince those in the western world of the validity of a property regime to protect CP, western philosophical justifications need to be invoked. If these justifications themselves support a robust property regime for CP, those against the protection of CP are in a normative quicksand. I understand that applying and justifying western normative ideologies might make some uneasy, even repulsed by the idea. However, you may treat this as a 'beat them at their own game' type of strategy. Further, it is always useful in the course of negotiations and discussions, to be more inclusive in nature, rather than exclusive.<sup>28</sup> By taking into account both western as well as traditional or cultural views of property, one is better equipped to arrive at a solution expeditiously. Rather than ostracizing those with divergent views, and risking the chance of being lost in translation, it is imperative that one speaks a universal language understood by all.

This, of course, is much easier said than done. Ideologically, the developing world and developed countries have always been at loggerheads. I aim to try to broker a compromise between these two rival groups with the aid of three philosophers: Locke, Kant and Rawls. The reason for choosing these three philosophers specifically is due to the prodigious influence Professor Robert Merges' book, *Justifying Intellectual Property*<sup>29</sup> had on me. I aim to employ a similar method of justifying group intellectual property in this paper. Part II of this paper seeks to analyze Locke's view on group property. I contend that Locke's views on property can be transported and applied to group property as well, as long as his requisites for labor, appropriation and the three provisos are satisfied. I expound on these Lockean principles and apply them to a parable involving apples and acorns to justify a collective property right. I go further and argue how even in the absence of the same labor as originally exerted, subsequent generations can still possess a property right. In Part III of the Article, I move on to analyze Immanuel Kant and his views on group property. I agree that at the outset that Kant's individualistic ideas are a tough barrier to get through, but go on to posit that if faced with a situation of misappropriation or ownerless property or a group property right, Kant would favor a collective property right. I further go on to address how, even if Kant does not support a full-blown collective property right, many aspects of Kant's views fit in quite perfectly with other aspects of CP. Part IV of this article goes on to analyze how a CP would fit within a

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<sup>28</sup> See Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371, 395 (2011).

<sup>29</sup> ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY*, (Harvard Univ. Press 2011) [hereinafter Merges 1].

Distributive justice system. I analyze the two rules of Rawls; Intergenerational Equity, and how as the ‘worst-off’ Rawls would find it justified to provide indigenous peoples a collective property right. I conclude in Part V by briefly dealing with criticisms to a robust protection of CP, including issues such as group ownership, and rights in perpetuity. We begin our journey now, by paying homage to the doyen of property, John Locke.

## II. COLLECTIVELY LOCKE-D

When we attempt to deal with any form of property rights, including IP, it is imperative that we begin with John Locke.<sup>30</sup> John Locke’s theory of property is primarily found in his Second Treatise, where he extensively lays down his views on who can have claims to property, what are the extent of property rights, as well as its limits. Property figures very strongly in the Lockean context, because for Locke, the civil state was created in order to protect the property rights of its citizens. Locke’s account of property rights focuses on the individual human - not an auspicious fact for an account of collective and community rights.<sup>31</sup> Despite this, I believe that collective creativity is compatible with classic accounts of intellectual property, including labor theory accounts, contrary to what many commentators have claimed.

I am in no way the first to recognize the potential of applying Lockean principles to collective labor. That privilege belongs to Robert Merges,<sup>32</sup> who posits that it should be possible “*to make out a fuzzy case for a group right on the basis of a generalized appreciation for collective labor*”<sup>33</sup> and that “*something like exclusive (or semi-exclusive) rights, to be held by groups who exert collective labor on things, would satisfy the basic requirement of rewarding Lockean labor.*”<sup>34</sup> Professor Merges’ biggest gripe with a Lockean justification to collective creativity isn’t as much normative as it is practical. He argues inter alia that he has concerns regarding “*the transaction costs required to administer such a group right,*”<sup>35</sup> and that it is difficult “*to figure out even a moderately workable structure for such a right.*”<sup>36</sup> Other scholars have also tried their

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<sup>30</sup> The reason to begin with John Locke is simple, his formulation of private property rights as natural rights, changed the lens through which property rights was viewed. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 92-120 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

<sup>31</sup> Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property*, 49 SAN DIEGO L. REV. 1215 (2013).

<sup>32</sup> Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1185 (2007) [hereinafter Merges 2].

<sup>33</sup> *Id.* at 1188.

<sup>34</sup> *Id.* at 1191.

<sup>35</sup> *Id.* at 1188.

<sup>36</sup> *Id.*

hand at forming a Lockean justification for collective labor, and CP in particular, with varied results.<sup>37</sup>

The literature on a Lockean justification for CP is undoubtedly at a very nascent stage, giving glimpses and subtle hints pertaining to what a robust Lockean justification might be. I go a step further in this part of my paper, by adding what I believe has been lacking in other scholarly works: parables with a Lockean shade to fortify the Lockean claim.

#### *A. Locke's views of Group Rights*

Despite Locke being painted with an individualistic brush, Locke does in fact deal with groups to a large extent. As Professor Merges rightly notes, according to Locke, “*the world and its contents were given initially to the largest imaginable group - to all humans.*”<sup>38</sup> Locke’s usage of ‘group terms’ is also quite apparent, with terms such as ‘mankind in common,’ ‘men in common,’ ‘all men,’ ‘all his fellow-commoners, all mankind,’ all figuring prominently in his literature.<sup>39</sup>

A microanalysis of Locke’s views on labor and property is called for at this point. The basic argument runs thus: I own myself; therefore, I own my labor; therefore, I own whatever my labor produces. Locke expresses his views by way of an illustration. According to Locke, during the time of the ‘commons,’<sup>40</sup> if an individual found an apple or acorn lying on the ground and appropriated the same in order to either satisfy his natural desire to survive or otherwise, the individual acquires a property right over that apple. Locke believes that such appropriation is based on two principles: (1) Labor ought to be rewarded with a property right, which is a claim that an individual (or I will argue, a group) has against others, and (2) The rights that the owner acquires, are subject to certain provisos or limits.<sup>41</sup>

#### *B. The Cave parable - A illustration of Lockean principles in Group Rights*

I adapt the Lockean illustration to a group rights context, using a simple thought experiment. Imagine that we dial back the illusionary hand of time to the state of the ‘commons’. In this

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<sup>37</sup>Hughes, *supra* at 31 (Arguing that many aspects of Locke can be applied, while expressing concern over the possibility of spoilage); Munzer, *supra* at 12 (Claiming that there exist multiple problems with a Lockean view of CP, namely lack of labor, and perpetual grant of rights).

<sup>38</sup> Merges 2, *supra* at 32.

<sup>39</sup> Locke, *supra*, at § 25, at 327, § 27, at 328-29, § 32, at 332-33, § 34, at 333.

<sup>40</sup> The state of nature before individual appropriation, when God had given all resources to all of mankind to be held in common. Hence the term ‘Commons’.

<sup>41</sup> Locke, *supra*, § 31, at 290. The language of limitation could hardly be more forceful: “The same Law of Nature that . . . give[s] us Property, does also bound that Property too.”

state, let us envision that four individuals in particular,<sup>42</sup> each with his own personality, are searching for an apple or acorn. At the beginning of their search, they have neither the necessity nor the interest to band together to search for the apple or acorn, but once they get to talking, they realize that they all have some similarities, and form a sort of filial bond. The four individuals after a long arduous journey through the commons are unable to find anything worthwhile of appropriation, until 'A' notices something resembling an apple, which is visible to him. Although the fruitlet is visible to 'A', its appropriation seems to be near impossible. The apple is located inside a cavern, at an excessive distance away from where our four protagonists are located. Driven by their hunger, need for survival and zeal to self-actualize, they hatch an ingenious plot to secure the apple. 'C' will be tied to a harness, which will be made by 'D',<sup>43</sup> and held by 'A' who will pull and release the harness as required. Finally, 'B' would be in charge of directing 'A' to pull or release the harness accordingly, as 'C' heading down into the trenches would be out of sight of 'A.' The design is set in motion, and everything works to a tee; 'D' creates a steady harness, and attaches it to 'C,' while 'B' provides 'A' instructions in order to make sure that 'C' is not injured in any way during the daredevil act, and is able to appropriate the apple.

Let us analyze the situation just described, and see if it fits within a Lockean model to justify a property right. Was there labor? Yes. Was the purpose for this appropriation legitimate? Yes, it was for survival/human thriving, which is highly important in the Lockean context.<sup>44</sup> Was it only by one individual? No. All four of them exerted a form of labor in furtherance of usurping the apple. Not only that, the contribution of each member was indispensable towards the bigger target of appropriation. Without a properly built harness, there would have been no way of probing the cave. Without 'B' providing directions, 'A' would not have known whether to pull or release the harness etc. The point being that each individual exerted labor, and none of these were greater or lesser than the other. Another simplified version of this illustration would be to think of an apple or acorn in the state of nature, which is too heavy to be appropriated by one person and thus requires multiple entities to lift the same. Alternatively, an apple that is

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<sup>42</sup> Let us call the four individuals 'A', 'B', 'C', and 'D'.

<sup>43</sup> A little suspension of belief is required, admittedly when claiming that the state of commons contains materials necessary to build a harness to hold a grown man. Let us assume for the sake of the thought experiment that 'D' was a skilled harness builder, or simply that the material available was exotic. Either way, this tiny leap of faith does not take away from the fact that group labor is exerted for obtaining the apple.

<sup>44</sup> Merges 1, *supra*. ("Property and human flourishing— that is the key relationship. Locke's theory is less about the nature of the objects appropriated— whether they are tangible and rivalrous, or intangible and non-rivalrous—and more about human prospering through individual appropriation").



designed in such a way that it cannot be held by a sole being and requires the abetment of multiple personnel. What these illustrations aim to show is that there are examples of situations even in a Lockean context for materials in the state of nature to be appropriated through collective labor. Therefore, according to Lockean principles, they all deserve a group property right for the labor that they have exerted.

*C. Forecasting criticism to the Lockean Parable.*

A prescient intuition tells me that my parable is bound to raise a few eyebrows, and call into question the viability of a 'working structure' based on these principles. In fact, the criticism surrounding Lockean justifications for Collective Labor are usually threefold; (1) How do Lockean justifications hold true when individuals have not exerted any labor, as occurs over generations? How do members of a group still have a right over that particular property? Skeptics might argue that I have cheated a bit by not addressing a thought experiment where one acquires property rights even in the absence of labor, and in the absence of labor, the Lockean bulwark crumbles. An allied concern is that (2) even if a property right may be given in the absence of exerting labor, how does that justify property rights being handed down over the generations in the first place, particularly for a right held in perpetuity? The final concern is one expounded by Prof. Merges that (3) Locke recognizes that a single entity or author is necessary to be a focal point for the purposes of transactions, and in the absence of which transactions of the group with outsiders as well as internal group dynamics would be highly bewildering. I shall attempt to tackle these seemingly justified criticisms, by invoking Lockean principles, his provisos, and of course, more allegories.

*1. Locke on Inheritance*

The argument against lack of labor through generations goes along these lines: Assuming that the ancestors of the present generation of indigenous peoples had in fact exerted labor, and acquired a property right over a know-how or a folk-dance, how does that justify the present generation from having a similar or more robust property right? If Locke centers his argument for the grant of a property right on the exertion of labor, how do the present generation retain a property right? Would that not be unjust enrichment? The concomitant criticism stemming out of the same is how CP is transferred amongst generations in the first place. There are multiple responses to this criticism, chief amongst which is the assumption that any labor needs to be exerted by subsequent generations in the first place. If there is no requirement for

labor to be exerted by subsequent generations, then the criticisms following it become pointless.

This takes us to an unusual location in order to justify valid inheritance: Locke's charity proviso.<sup>45</sup> Locke articulates a charity principle by which, in extreme circumstances, commoners have a right to take and consume the private resources of others.<sup>46</sup> However for the purposes of our discussion, what we are interested in are the words Locke uses in the Charity proviso, namely, "*... as Justice gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man...*"<sup>47</sup> This makes it clear that if the original acquisition by the ancestor(s) is legitimate, the corollary is that subsequent rights held by the descendant is in turn authentic. I believe that this is Locke's test for a valid inheritance. Undoubtedly, the property right that the descendant acquires would be subject to the same provisos of his forefathers, but this does not take away from the vesting of the right itself.

A thorny issue however is the question as to whether the present generation adequately represents the past, that is, are they the true representatives of the past generation of indigenous people to whom the right was first vested?<sup>48</sup> This is a question I am quite torn on, while on one hand, I find no evidence either in Locke's treatises or in any form of inheritance law which requires members of future generations to 'adequately represent' their forefathers, apart by way of blood,<sup>49</sup> the criticism does hold some water. Imagine a situation where the indigenous group has evolved over the generations to an extent to which their practices/rituals have all become archaic and anachronistic. Is vesting such a group with an interloping CP claim still legitimate? I truly do not believe Locke expressed any requirement for future generations to 'adequately represent' their ancestors and I contend that a lack of labor from future generations is justified for a property right. Situations like the one I described above are circumstances which arise once in a blue moon. Indigenous creations defy the concept of individual authorship, because the sanctity of the work itself derives, in part, from the import placed on the collective creation of the piece. The group product in the indigenous society is

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<sup>45</sup> Locke, *supra* at 170.

<sup>46</sup> *Id.* at § 42, at 188.

<sup>47</sup> *Id.*

<sup>48</sup> *Merges 2, supra* at 1190.

<sup>49</sup> This criticism if extended to regular inheritance law, it would forbid a grandson who inherited a house from his atheist grandfather to convert the house to a religious shrine etc. This is bordering on absurdity.

the medium through which all tribal members, living, dead and unborn, speak their voice and become a part of the tribal way.<sup>50</sup> It isn't merely an identity that one changes with the lines.

## 2. Identity Crisis?

However, assuming that there is an identity representation issue, the only exit route would be to agree that Locke requires some sort of labor at each generation. Locke hardly provides any information as to what the extent or amount of labor must be by subsequent generations, but only says, when dealing with original appropriation, that God gave the Earth to "*the industrious and rational ...not to the fancy or covetousness or the quarrelsome and contentious.*"<sup>51</sup> This hardly serves as an adequate barometer to judge the validity of the claims of the subsequent generations. However, we shall plunge ahead with the assumption that labor is required at each generation, and it should be rational, and not contentious. Even then, CP can be justified.

Criticism in this regard fails to take into account the changing nature of CP over time, a dynamic form of CP, which the indigenous group constantly modifies and changes.<sup>52</sup> This critique also misfires because the people responsible for the initial appropriation form a group of generations who speak pretty much the same language and have highly similar and evolving practices, and ways of life over centuries. Therefore, it is the group, rather than the individuals included in the group, that possesses the claim of CP, and the group transcends its current membership.<sup>53</sup>

## 3. Labor vis-à-vis protection

The third rebuttal is that each generation, by preventing other groups or corporations from accessing the CP are themselves performing labor. As long as the indigenous peoples are taking reasonable steps to protect their CP, they 'labor' on the CP by protecting the same.<sup>54</sup> This view of labor has also been suggested by A. John Simmons, in *The Lockean Theory of Rights*, when he claims that "*we bring things within our purposive activities ("mixing our labor" with them) when we gather them, enclose them, and use them in other productive ways.*"<sup>55</sup> A parable might

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<sup>50</sup> Riley, *supra* at 194.

<sup>51</sup> Locke, *supra* note 30, § 34, at 333.

<sup>52</sup> See Jaszi, *supra* at 455; Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS. 97, 110-111 (2007) (Discussing examples of dynamic TK/TCE); also see Carpenter 1, *supra* (about Dynamic stewardship).

<sup>53</sup> See Munzer & Raustiala, *supra* at 65.

<sup>54</sup> See Dr. Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371 (2011) (A famous way of looking at the idea of protecting information is through the Trade Secret regime).

<sup>55</sup> A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 273 (Princeton Univ. Press 1994).

be useful here, imagine that in the state of commons, a person finds an apple, but has to answer the call of nature,<sup>56</sup> and cannot take the apple with him, neither does he want to leave the apple unguarded in fear of misappropriation. Instead, he encloses the apple using sticks or leaves. Once again, by exerting labor, and enclosing the apple from the ravenous eyes of outsiders, he has acquired a property right over the apple. Therefore, a related justification for labor by the present generation is simply the fact that by preventing other people from accessing the fruits of their labor, the present generation is exerting a form of labor justifying group right protection.

#### *4. The indigenous way of doing things*

We now come to the final pseudo-criticism of Lockean justifications for collective creativity. I call it a pseudo-criticism because while Prof. Merges does not deny that an IP right should exist, but is merely skeptical as to how it would practically function.<sup>57</sup> This is an important principle that many scholars in this field recognize as well. However, mere doubt cast about the practicability of a right should not serve as an impediment towards the granting of the right in the first place.<sup>58</sup> Moving on to the crux of the matter, what is important to understand with regards to transaction costs is that they exist even in status quo with traditional IP systems, where there exist IP rights which are group rights (sometimes numbering in the thousands for a motion picture, for example), yet there seems to be no great obstacle in distributing those rights. Naturally, there are disputes over ownership and inventor-ship, but such disputes are the exception.<sup>59</sup> There should be no reason to doubt the capabilities of Indigenous peoples to obtain similar results through their own mechanisms and group dispute resolution mechanisms.<sup>60</sup> What needs to be kept in mind, and is often recklessly forgotten by western scholars, is that indigenous peoples have been working amongst themselves for many centuries now, and have adapted to issues such as sharing, as well as distributing resources

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<sup>56</sup> Or he has to take after his child, if a less garish example, appeals to your sense of aesthetics more.

<sup>57</sup> Merges 2, *supra*, at 1188.

<sup>58</sup> Rosemary J. Coombe, Steven Schnoor & Mohsen Ahmed, *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891, 916 (2007); Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J. L. & POL'Y 313, 329-330 (2005); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1194 (1988) (Claiming that the unavoidable flexibility of group boundaries, however, should not dissuade discussion of Grouphood).

<sup>59</sup> Graham & McJohn, *supra*, at 330.

<sup>60</sup> Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV. L.J. 51-78 (2004) (proposing "the incorporation of collective and communal notions of authorship, the expansion of the originality requirement to reflect these forms of authorship, and the application of limits on the duration of copyright protection in a broader community context").

amongst themselves.<sup>61</sup> Most of such groups have micro-federal structures within the group itself, which governs the rights and duties of the group members. According to Russel Barsh, an indigenous people's scholar and representative:

*"Indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the nature of the rights and responsibilities which attach to possessing knowledge."*<sup>62</sup>

Such customary rules are highly efficient forms of dispute resolution within the group context, and employ elaborate property rights.<sup>63</sup> For example, among the *Shuar* of southeastern Ecuador, a certain sub-group amongst the *Shuar* are *Shamans* (Medicine men). However, in order to accumulate knowledge that the rest of the *Shuar* do not get, they must complete an apprenticeship with an established *Shaman*. There are then, two different types of property rights at play amongst the *Shuar*. One, information that belong to all the *Shuar*, and two, certain information that belong only to those who pass the apprenticeship to be a *Shaman*.<sup>64</sup> The point I am making, is that there already exist viable models for transacting with indigenous groups both within the group and with outsiders, therefore the concerns over a workable model, albeit justified to some degree, is a puzzle waiting to be solved.

Therefore, what I have attempted to demonstrate, is that Lockean justifications are apposite to collective property, including something as complex as CP. I have hopefully, proved that if labor by many individuals has been mixed onto an object, then they can also have a group property right (limited by the Lockean provisos of course). Further, the fact that the reason for the labor is in furtherance of human flourishing is beneficial for proponents of CP, since most CP is tied to something as basic as survival. I now take on a bigger challenge by attempting to try my hand at justifying CP through the individualistically tinted lens of Immanuel Kant.

### **III. A-Kant-ing for the group**

Before I kick-off my discussion of Kant, I must address the doubting Thomases that might be mildly curious but certainly highly skeptical when it comes to the application of Kantian views

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<sup>61</sup> Dutfield, *supra*, at 245-246.

<sup>62</sup> Russel Lawrence Barsh, *Indigenous Knowledge and Biodiversity*, in *CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY* 73 (Darrell A. Posey ed., 1999).

<sup>63</sup> Philip A. Dennis, *Herbal Medicine among the Miskito of Eastern Nicaragua*, 42 *ECON. BOTANY* 16, 16 (1988).

<sup>64</sup> Janet Wall Hendricks, *Power and Knowledge: Discourse and Ideological Transformation among the Shuar*, 15 *AM. ETHNOLOGIST* 216, 222 (1987).

to group property. This fear is not unfounded, many would claim that the views of Kant are antithetical to the idea of collective rights, with his focus on the individual. In fact, Kant has been widely credited as the initiator of the notion that individuals are sovereign in terms of their choices and unconstrained by society;<sup>65</sup> a very popular tenet of the single author romanticism movement. Those who share the same views know that you are not alone. I certainly share some but not all of those views. I aim to show two things in this part of the paper, (1) if Kant was stuck between the devil, the deep blue sea and granting a group property right, he would choose the latter. I realize the momentous weight of this burden, but I truly believe that an edgy justification can be formed. Additionally, I argue that even if Kant himself is not a viable role model, the followers of his school of thought have many beneficial aspects that can be used by proponents of CP. These include concepts of Property and Personhood, the importance of the identity linked to an object and the identity of the people who are so linked to the object. I now explore these ideas in some amount of detail.

#### *A. Kant: the individual rights champion?*

Immanuel Kant's views on property are inextricably linked to his views on the individual. Being a staunch individualist,<sup>66</sup> Kant's entire set up of social institutions begins with property; the individual exerts his free will and decides to appropriate an object, and from there, society springs up.<sup>67</sup> For Kant, it was the autonomous individual, ruled by rationality, with unique desires and characteristics, who was supreme, not society or other social institutions. This is quite contradictory to the views of other philosophers at that time, like David Hume, who could not envision property in the absence of society.<sup>68</sup>

Kant's view on property was simple, he believed that the individual could imprint some aspect of himself (his will) on the object, and by this exertion of will, the object would be appropriated. The will has three distinctive qualities: it is personal, autonomous, and active.<sup>69</sup> The concept of 'will' however is quite unlike the Lockean concept of 'labor' that we perused earlier. While the 'will' is a metaphorical concept and is highly individualized, (taking into account each individual's unique personalities and desires), labor does no such thing. A simple

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<sup>65</sup>See Dougherty, *supra*, at 357.

<sup>66</sup> LEWIS WHITE BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON, 180 (Univ. of Chicago Press 1960).

<sup>67</sup> See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY, 67 (Harvard Univ. Press, 1st ed., 2009).

<sup>68</sup>Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1645- 1646 (2008).

<sup>69</sup>Merges 1, *supra*, at 76.

example would help explain the difference. Back to the Lockean context, if someone put a gun to your head and commanded you to pick up an apple, you might have exerted labor in terms of appropriating the apple and satisfied Lockean requisites for acquiring a property right (although it might be vitiated by the “terms of employment” doctrine that Locke uses, if a gun to your head can be termed as employment!). However, it would certainly fail in its bid to justify a Kantian claim. No ‘will’ could have been said to be exerted in that case, ergo, no property right. This distinction is crucial to understand when exploring Kantian principles. Kant requires not just a mere act for the performance of a particular object, but laces it with the condition that the act must be one in which the metaphorical ‘will’ is exerted, which allows to imprint some aspect of the person on the object.

### *B. Group Rights in a Kantian Context? Devil and the Deep Blue Sea!*

So with that brief understanding of Kantian ‘will’, the question arises, how do we justify the island that is Group rights in the ocean of individualistic rights? I argue that the devil and the deep blue sea analogy comes to our rescue. Here, I believe that Kant is lodged between the devil (Universal Principle of Right) and the deep sea (*Res Nullius*) when it comes to CP. The methodology employed by the analogy is that of the famous quote from Sherlock Holmes, when Holmes famously remarked to Watson, “*how often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?*”<sup>70</sup> In our paradigm, the ‘improbable’ that Holmes refers to is the fact that Kant will justify group rights. Here is how.

#### *1. The Universal Principle of Right alias the Devil*

The answer lies in two different parts of the Kantian ideology. The first is the Universal Principle of Right (‘UPR’). One of the solitary references Kant makes to society in general when dealing with property is the trans-temporal right that he provides to the society at large. According to the UPR, “*laws secure our right to external freedom of choice to the extent that this freedom is compatible with everyone else’s freedom of choice under a universal law.*”<sup>71</sup> The scope of the property rights granted therefore, are limited from its inception, to the extent that they must not interfere with the freedom of fellow citizens. This serves as an extremely strong check on the individual’s will, by requiring the individual to take into account the conscience of the

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<sup>70</sup> ARTHUR CONAN DOYLE, *THE SIGN OF THE FOUR*, 111 (1890).

<sup>71</sup> B. Sharon Byrd & Joachim Hruschka, *The Natural Law Duty to Recognize Private Law Ownership: Kant’s Theory of Property in His Doctrine of Right*, 56 U. TOR. L.J. 217, 219–221 (2006).

community as such. As Prof. Merges notes, the reason he does this is clear, he considers the needs and potential claims of others just as important as those of the owner.<sup>72</sup>

It is within this ambit of Kant's ideologies that I wish to thrust in CP. CP for a long time has been the victim of blatant corporate misappropriation, by western and native companies alike.<sup>73</sup> Rural communities, indigenous peoples, subsistence farmers, forest dwellers, healers, and other marginalized groups now struggle to prevent local knowledge and resources from being reduced to mere data for the information-intensive industries of the new economy.<sup>74</sup> What's more, this misappropriation is not of any casual unimportant knowledge that the traditional community creates, instead this misappropriation is at many times of sacred information.<sup>75</sup> Further, this knowledge is inextricably tied to their livelihood and personality (even survival),<sup>76</sup> and is something that embodies their personhood or group-hood.<sup>77</sup> It wouldn't be a stretch to call it something that they have exerted their collective will on. Therefore, when a corporation or any other organization attempts to exert its will and appropriate the CP, this would be in clear violation of the UPR. As Kant himself notes, in cases in which someone else's freedom of choice is violated by my taking and eating an apple, then that apple indeed cannot be mine.<sup>78</sup>

It is important to note that even in the absence of any group ownership right, any sort of appropriation attempt would violate the freedom of the indigenous peoples or groups. Kant does not require that only the freedom of ownership be violated by the appropriation.<sup>79</sup> Any appropriation by those who are outside the indigenous peoples should not be allowed vis-à-vis the UPR, since the fact that they have exerted minimal will on the CP compared to the group is another clinching factor. In our devil and the deep-sea idiom, the UPR reasoning serves as the Devil.

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<sup>72</sup> Merges 1, *supra*, at 91.

<sup>73</sup> See Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 170-78 (2006) (detailing several instances of corporate appropriation of traditional knowledge).

<sup>74</sup> Coombe, et al., *supra*, at 896.

<sup>75</sup> Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1131-38 (2005) [hereinafter Carpenter 2].

<sup>76</sup> Tom Holm, J. Diane Pearson & Ben Chavis, *Peoplehood: A Model for the Extension of Sovereignty in American Indian Studies*, 18 WICAZO SA REV. 7 (2003).

<sup>77</sup> Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800-07 (2007).

<sup>78</sup> Kenneth R. Westphal, *Do Kant's Principles Justify Property or Usufruct?*, 5 JAHRB. RECHT & ETHIK 141, 153-154 (1997).

<sup>79</sup> Byrd & Hruschka, *supra*, at 251.



Many scholars have employed the UPR reasoning for the purposes of defensive protection of CP.<sup>80</sup> However, purely based on Kantian principles, there has been little support for the positive vesting of rights in favor of indigenous peoples. One reason for this is that scholars find it highly difficult to extrapolate a communitarian facet to vastly individualistic Kantian ideals.

## 2. *Res Nullius alias The Deep Sea*

However, I go a step further and ask, if the corporate appropriators do not have a right over the CP and neither does the community, then who owns the CP? In such a paradigm, ownership of the CP is left in limbo, and the object is itself rendered *res nullius* (ownerless). This would run grossly afoul of Kantian principles. According to Kant, no category of object ought to be absolutely excluded from the possibility of human possession.<sup>81</sup> By doing so, “freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used.”<sup>82</sup> It becomes pertinent at this point to distinguish between *res nullius* property, one that is not owned by anyone, and a *res vacua* property, one this is currently not being used by anyone. Kant allows for appropriation of property which is *res vacua* in the pre-institutionalization of property stage, but never after. Nonetheless, CP is in no way *res vacua*, it is constantly used by indigenous peoples and communities as the very backbone of their sustenance.<sup>83</sup> Therefore, *res nullity* acts as the deep sea in our devil and deep-sea idiom.

Thus analyzing the contours of Kantian philosophy, I make two extravagant claims. Firstly, I believe that Kant is truly stuck between the devil (UPR) and the deep sea (*Res Nullius*) when it comes to CP. CP is an oddball in this debate, as it can neither be owned by anyone outside the group, since doing so without permission of the group members would be in gross violation of the UPR nor can it be left orphaned. The key to solving this paradox is to concede that if Kant had to make a choice between providing rights to a defalcator, recognizing group rights, or leaving an object ownerless, he would tip the scales in favor of collective rights.

My second claim is that justification under Kantian principles does not require such a grueling analysis and strenuous interpretation. Kant himself, albeit in a fleeting reference, recognizes

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<sup>80</sup> See Carpenter 1, *supra*; Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008) [hereinafter “Carpenter 3”].

<sup>81</sup> Byrd & Hruschka, *supra*, at 253.

<sup>82</sup>C. Bricker, *A Kantian Argument for Native American Cultural Survival*, 76 U. DET. MERCY L. REV. 789, 793 (2003).

<sup>83</sup>See Dougherty, *supra*, at 357.

that individuals may will that their institution of property provide collective ownership as an alternative to individual ownership:

*“Again, can anyone have a thing as his own on land no part of which belongs to someone? Yes, as in Mongolia where, because all the land belongs to the people, the use of it belongs to each individual, so that anyone can leave his pack lying on it or recover possession of his horse if it runs away, since it is his. It is only by means of a contract, however, that anyone can have a movable thing as his on land that belongs to another.”<sup>84</sup>*

From this paragraph, it is clear that Kant acknowledges the possibility that reasonable people might opt for collective ownership as a viable alternative to individual ownership. This works especially well for proponents of CP, since this is exactly how most indigenous peoples or groups are formed. In Kantian lingo, each individual exercises his will to have his or her CP to be held in common by the members of the group, as an alternative to individual ownership. Kant’s reputation might rest in large part upon his contribution to the theory of individual freedom, but here he is, recognizing collective ownership. This also buttresses my previous proposition, that Kant would choose a group right in property over a muddled claim or an abandoned object.

I understand that such an expansive view of Kant might appear to be exploitative of his theories; if not shake, wobble the foundation of Kant, the leader of individual freedoms. This striking revelation aside, I believe that even otherwise, Kant’s theories have managed to garner a lot of support for CP allied concepts.<sup>85</sup> Kantian views have influenced contemporary theorists such as Joseph Singer who suggests an amended view of the UPR; he states that in decisions about property distribution and entitlements, the law should and often does, take into account not only the owner’s rights, but also ‘the conflicting interests of everyone with legitimate claims’ to the land or other resource at issue.<sup>86</sup> Such an arrangement would be greatly beneficial towards a defensive protection model of rights for the indigenous groups. It opens up doors for transactional mechanisms between the appropriators and the group including equitable-benefit sharing agreements.

### *C. Kant and his legacy*

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<sup>84</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 68, 86 (Cambridge Univ. Press 1991) (1797).

<sup>85</sup> Carpenter 1, *supra*, at 1050.

<sup>86</sup> JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 91 (Yale Univ. Press 2000).

The greatest contribution of Kant, in the CP paradigm, however is the influence his creative genius<sup>87</sup> has had on his progeny, Margaret Radin in particular.<sup>88</sup> A full-blown exposition of Radin and her theory of 'Property and Personhood' and its application to Cultural Property is beyond the scope of this paper. However, it will suffice to say that there are currently many models of property and peoplehood building on the foundational work of Margaret Radin in the making, which holds great promise for CP aficionados.<sup>89</sup> I mention Radin primarily because of her belief that a person can be bound with an external 'thing' in some constitutive sense. In other words, the value of an object is intrinsically linked to the person possessing it. For example, Radin argues that "*if a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo - perhaps no amount of money can do so.*"<sup>90</sup> This directly coincides with the argument that cultural property carries with it, for indigenous people, the idea that some properties are so constitutive of one's identity that they demand treatment that transcends and surpasses that of an ordinary market transaction.<sup>91</sup> Therefore, the intricate link between the property and the person justifies a property right, and the same can be extrapolated to the community rights perspective as well.<sup>92</sup>

These strands of the Kantian philosophy, establish a strong claim for IP rights in CP. They prove that Kant can be used as a weapon to arm oneself in the battle for both positive and defensive protection. This view of Kant, as a champion of individual liberties by day and community sympathizer by night, is inchoate in scholarly work, despite the wave of work based on his scions. Another normative justification that has gained prominence in recent years is distributive justice mechanisms and its application to CP.<sup>93</sup> We next pay homage to the honcho of distributive justice and fairness, John Rawls.

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<sup>87</sup> Merges Creative genius, it is interesting to note, that one of the other few times Kant deals with the effect or influence of the individual on the community is in the realm of the creative genius, and how it sparks off brilliance in others.

<sup>88</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014-15 (1982) [hereinafter Radin 1].

<sup>89</sup> See Carpenter 1, *supra*; Carpenter 3, *supra*; DUANE CHAMPAGNE & ISMAEL ABU-SAAD, *THE FUTURE OF INDIGENOUS PEOPLES: STRATEGIES FOR SURVIVAL AND DEVELOPMENT*, (2003); For a critical view of "peoplehood," pointing out both its descriptive and normative weaknesses, see JOHN LIE, *MODERN PEOPLEHOOD* 191-231 (Harvard University Press 2004).

<sup>90</sup> See Radin 1, *supra*, at 958-953.

<sup>91</sup> Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 725, 749-53 (1997).

<sup>92</sup> Carpenter 1, *supra*.

<sup>93</sup> Hughes, *supra*, at 1256.

#### IV. Brawling over Rawls

Although many authors have dealt with the idea of redistributive justice, I restrict my analysis to John Rawls. My treatment of Rawls will be a marked distinction from how I have dealt with Locke or Kant due to the fact that the Rawlsian realm is much too broad to cover even in a paper as broad as this one. Therefore, in order to remain free from prolixity, I will use a two-pronged approach to analyze Rawls. First, I shall discuss how *ex-ante*, in the hypothetical original position, most individuals would agree that robust IP rights must be provided for group rights, and second, I will argue that *ex-post*, indigenous peoples remain some of the world's poorest, or in Rawlsian lingo 'worst-off'. I aim to prove how robust IP rights would alleviate their status.

##### A. Rawls and his Two Principles

Rawls' views on distributive justice are laid out in his seminal work, 'A Theory of Justice'.<sup>94</sup> His ambient structure is built on two principles. Rawls's first principle is that "each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all."<sup>95</sup> This appears to be similar to usual rhetoric that we hear from world leaders across the globe. That is, until we come face to face with his second principle, which states that "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>96</sup> This is very important to note for two reasons. Firstly, Rawls recognizes that inequalities can exist in society, however conditions that it be subject to the arrangement that they are to the greatest benefit of the least advantaged and that there are always fair and equal opportunities to apply to offices and positions, which attempts to quell the inequality. We shall get to the 'least-advantaged' and 'just savings principle' in a bit. However, armed with this basic knowledge of the Rawlsian set-up, we travel back to the inception of society, the Rawlsian Big Bang, aka the 'original position.'

##### B. Decisions Behind the Veil

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<sup>94</sup> JOHN RAWLS, A THEORY OF JUSTICE (Cambridge, MA: Harvard Univ. Press, 1971) (1971).

<sup>95</sup> *Id.* § 46, at 302.

<sup>96</sup> *Id.*

The ‘original position’ is a hypothetical situation in which all the prospective members of a given society come together to agree on how to set up the society’s basic institutions.<sup>97</sup> Deliberations in the original position take place under a ‘veil of ignorance’, wherein none of the participants know what jobs, skills, social rank, or other attributes they will have in society.<sup>98</sup> The question I wish to briefly explore is whether prospective members of a given society, would agree to provide robust IP rights for CP. I argue they would; members of the original position would posit that being a member of an indigenous community, usually meant being away from the mainstay of cultural, political and economic activity. Therefore these members would not have much to survive on apart from what they had created with their own labor and therefore, they would take every step necessary to make sure that those who belong to an already marginalized social group, are not ostracized further due to a lack of rights over what they created. I think that this view is further buttressed by the fact that members of the original position would not want to be put in a position whereby if they end up as a member of the indigenous community, they would not have the ability to lead a healthy social or economic life. Hence, they might feel that a robust IP right to a ‘not well off’ group, would be the right way to go.

For what it’s worth, the original position behind the illusionary veil of ignorance is exactly that, hypothetical. The original position discussion serves CP as well as a statement that ‘the state of nature was an example of collective ownership’ - healthy for the ears, deleterious for the brain.

### *C. Advantages to Destitution?*

For a more full-throated justification of group property rights, we must return to the two Rawlsian principles highlighted earlier. Rawls is quite clear that inequalities are allowed to exist in society as long as it helps improve the lives of the ‘worst-off’ class. Therefore, we need to first identify the worst-off class, and make sure that laws passed improve the lives of those people.<sup>99</sup> What does this have to do with CP? As Justin Hughes says, when discussing a Rawlsian justification for CP, “*we should rank our present circumstances - the existing international and national legal systems of intellectual property - against an alternative that would be the same legal systems of intellectual property with the addition of the best system of TK/TCE protection we believe we can reasonably obtain in the current political*

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<sup>97</sup> *Id.* at 11-12, 17-22.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 60; *Id.* at 78-79.

*circumstances.*"<sup>100</sup> Therefore, assuming that indigenous peoples are amongst the 'worst-off' class in society, will providing them with robust IP rights over their CP, improve their status? In other words, would wealth shift from other groups to the worst-off group, by providing robust IP rights?

To answer this question, we must understand that Rawls, in his first principle, includes the right to hold some property, however this is a very limited right, and only includes what he refers to as personal property, which is property necessary for a basic sustenance, not a lavish lifestyle. This does not mean that Rawls was totally opposed to property rights, he was more agnostic than anything else.<sup>101</sup> He certainly believed that a wide range of property rights might be established; however, he did not deem it worthy enough to be a liberty, as described in his first principle.

Given the ambivalent attitude Rawls has towards property, what does he have to say about something resembling a group right in CP? Would he support providing the worst-off group with IP rights? I argue that he does, and place reliance on the fact that preservation of resources is one of the few justifications that John Rawls expressly embraces for property rights. In *The Law of Peoples*, Rawls offers the following reasoning:

*"An important role of government ... is to be the effective agent of a people as they take responsibility for their territory and the size of their population, as well as for maintaining the land's environmental integrity. Unless a definite agent is given responsibility for maintaining an asset and bears the responsibility and loss for not doing so, that asset tends to deteriorate. On my account the role of the institution of property is to prevent this deterioration from occurring."*<sup>102</sup>

In the CP context, this is ideal for a multitude of reasons. First, it is undeniable that the customs and traditions of the indigenous peoples are best protected by the people themselves. This can be due to either the sacred nature of the CP, or simply due to an intricate understanding of the know-hows and practices. In fact, most indigenous peoples have a sacred duty to protect and disseminate the CP within the group, and any failure to adhere to the principles would lead to strict censure within the group.<sup>103</sup> Conservation of CP is therefore, paramount, both by virtue

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<sup>100</sup> Hughes, *supra*, at 1258.

<sup>101</sup> Rawls, *supra*, at 270-274.

<sup>102</sup> JOHN RAWLS, *THE LAW OF PEOPLES* 8 (Cambridge, Mass Harvard University Press, 1999).

<sup>103</sup> Darrell A. Posey, *Preface* to *CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY*, at xvii, xvii (Darrell A. Posey ed., 1999).

of tradition as well as duty. Further, Indigenous peoples have an amazing record of conserving and transmitting information between generations, sometimes in writing but mostly orally.<sup>104</sup> Most of the information that is currently in use has survived hundreds of years, more than some civilizations even. Arguably, some scholars argue that not only have indigenous peoples maintained and conserved their CP, they have made constant increments to it through each generation. This is particularly highlighted in cases of tribal folklore, dances or songs, and is referred to as a dynamic CP.<sup>105</sup> Property rights to Indigenous peoples are also justified by the fact that there is usually no “wastage” of the CP within the group. CP are so inextricably linked to the survival and livelihood of these people that their entire lives will be in peril, if they squander their CP. In fact, by providing IP rights, we allow the individual groups to be the masters of both their past and future.

Additionally, the effects of such a bestowment is also economically and socially advantageous. By providing rights to the Indigenous peoples, you allow them to decide what CP they should and should not put on the market, depending on the collective decision of the group. This is particularly valuable in cases in which indigenous peoples do not want their sacred CP to be on the market.<sup>106</sup> This also gives the indigenous peoples, not the individual countries, the true reins to the flow of profits from the sale of CP.

Although traditional peoples and communities are responsible for the discovery, development, and preservation of a tremendous range of medicinal plants, health-giving herbal formulations, and agricultural and forest products that are traded internationally and generate considerable economic value, it is nearly impossible to estimate the exact economic contribution of CP to the global economy.<sup>107</sup> Such a study will need to take into account both misappropriated folklore music used in mainstream bands, and the revenue generated by their record sales, and online sales, on one hand, while also taking into account legitimate appropriation of plant-based medicine, its manufacture and its market sales - A Herculean task. Although attempts have been made in this regard (Estimated market value of plant-based medicines in OECD alone in

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<sup>104</sup> Kathleen Nortensent, *Poet Carries on Oral Tradition*, THE IDAHO STATESMAN, Sept. 21, 1996.

<sup>105</sup> Carpenter 1, *supra*, at 1083.

<sup>106</sup> See Radin 1, *supra*, at 1014-15; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin 2].

<sup>107</sup> United Nations Trade and Development Board, *Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices: Background Note by the UNCTAD Secretariat*, at 6, U.N. Doc. TD/B/COM.1/EM.13/2 (2000).

1990 was close to \$61 billion for example),<sup>108</sup> a thorough empirical study of the value of CP has not yet been conducted. If one was to be conducted, I wager it would reveal that most of the time, the indigenous peoples do not get a fair share, or any share of the profits derived from their CP. By providing them with strong IP rights, I contend that we will reverse the menace of appropriation.

#### *D. Dangers of the Benefactor/Provider Dichotomy*

However, one thing that must be kept in mind when providing such wide range of rights, is the question of who benefits from these rights? As the Tunis Model Law<sup>109</sup> and domestic statutes demonstrate,<sup>110</sup> most times, developing countries fail to take into account the views of the major shareholders in this debate, the indigenous peoples. Rather such legislations make the country themselves the de-facto owners, something that can have grave repercussions in unstable countries.<sup>111</sup> Further, in the International sphere as well, developing countries have used CP as a bargaining chip when criticizing western hegemony at the international level. However, they have shown little inclination on their part to involve the Indigenous peoples themselves at these negotiations.<sup>112</sup> The Tunis Model law, adopted by UNESCO, is a prime example of this. The law, under Section 6 and 18 provides that the holder of the CP rights will not be, the indigenous communities, but rather an obscure, 'competent authority'.<sup>113</sup> Providing strong IP rights directly to the affected groups must be tailored such that, we are able to circumvent such political games and give the Indigenous peoples the ability to exercise power over their CP.

Therefore, I argue that from both an ex-ante and an ex-post perspective, IP rights to members of cultural groups are justified under the Rawlsian context. This justification can be achieved in two ways. Either through the 'protection and preservation of resources' reasoning that Rawls explicitly agrees is a good justification for a property right, or by arguing that conferring IP rights on the indigenous peoples is a way of improving their 'worst-off' status in society. Irrespective, a Fairness or Rawlsian based justification seems to be the sturdiest normative

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<sup>108</sup> PETER PRINCIPE, *ECONOMICS AND MEDICINAL PLANTS*, 42, 44-45 (Timothy R. Tomlinson & Olayiwola Akerele eds., 1998).

<sup>109</sup> *Tunis Model Law on Copyright for Developing Countries*, UNESCO & WIPO, available at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=31318&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>110</sup> Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Art. 8(5), Mar. 2, 1977.

<sup>111</sup> Bangui Agreement, *supra*, § 6(1) and § 18.

<sup>112</sup> Dutfield, *supra*, at 239.

<sup>113</sup> Bangui Agreement, *supra*, § 6(1) and § 18.



justification for a group property right in CP. In the last part of this paper, we now move away from the narrow realm of theory into the expansive dimension of practice and analyze how IP systems around the world have evolved, with respect to group rights in general. We look at the criticisms that group rights have faced, CP specifically, and we look at some refutations to these unsubstantiated claims. In turn, we evaluate group right related solutions in major IP systems, and how despite its incipient stage, this might be the spark necessary to set off the wildfire that is CP.

## V. Group Rights in Status Quo

Some scholars tend to harp on the ramifications of granting group rights in CP. The argument runs that determining the appropriate group, arbitrating differences in opinion about exercising the rights, and providing means for others to deal with the group to seek permission to use the cultural elements, are all problems that need to be solved, even if normatively solutions are agreed to. In addition to this, the ‘perpetuity’ requirement of Indigenous peoples about their CP is in sharp contrast to the utilitarian idea of IP flowing back to the public domain.<sup>114</sup> Indeed, a common misconception that people have is the idea that CP is in the public domain and therefore no one is harmed by its appropriation.<sup>115</sup> This has led some to argue that what is already in the public domain under the IP regime cannot be individually appropriated again, and therefore Intellectual Property Law is inappropriate to protect CP. Such a blanket statement does not hold much water since Intellectual property law has actually been readily adaptable to new subject matter and to various types of group production and ownership.

### I. *A Gestalt Rebuttal to the Cynics*

First, it must be realized that despite IP Law romanticizing the sole creator, there are many areas which are created and held by groups. As Lorie Graham notes, “*a movie, for example, may be the product of creative contributions from dozens or hundreds of directors, writers, actors, costumers, special effects technicians, and more. Inventions from pharmaceuticals to software to aeronautics all require input from many people over a period of time. Trademarks often act as a banner giving an illusion of unity to vast international enterprises. The rights to copyrights and*

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<sup>114</sup>Munzer & Raustiala, *supra*, at 86.

<sup>115</sup>Dutfield, *supra*, at 238.

*patents are often held by corporations with millions of shareholders.*"<sup>116</sup> Graham goes on to further note that the U.S. patent law was amended to treat teams, in effect, as a single inventor for determining whether a claimed invention was sufficiently 'non-obvious.'<sup>117</sup> Similarly, others have argued that a trademark is nothing more than a unifying group for a vast amount of individuals.<sup>118</sup> The consumer-friendly approach of Trademark Law has been met with approval by CP supporters. For example, under the Indian Arts and Crafts Act, all merchandise produced or manufactured by Native American groups will be certified, thus distinguishing authentic merchandise produced by the community from those which are cheap replicas.<sup>119</sup> In recent history as well, group rights for traditional groups has occupied the front pages, due to the use of Native American mascots by sports teams. Even in a non-indigenous people's context, the OSI Certified mark can be used on software to show that it conforms to the principles of the open source software movement - a large, dispersed group united mainly by certain beliefs about computer programs.<sup>120</sup> The Patent and Trademark Office is charged with the responsibility to cancel or to refuse to register a trademark if it determines that the mark may 'disparage' certain persons, a provision that led to an initial cancellation of the famous mark in the 'Washington Redskins.'<sup>121</sup> (A case that has recently gained notoriety for the filthy words used by the counsel for the Redskins in his brief).<sup>122</sup> Similarly, in the NCAA, college teams need permission from Native American groups before using their logos, providing a platform for Native American groups to dictate terms for the usage of their symbols.<sup>123</sup>

Calls for Intellectual Property Law to cater to group creations have existed for quite a while, even in a non-Cultural property context. Margaret Chon, while analyzing the IP protection afforded to the Chain Art Project, argued that collaborative works should be provided a group right, with a right to license non-exclusively, only with a duty to account to the co-owners.<sup>124</sup> Similarly, cohorts of Wikipedia, Fan art fictions, have all called for a more group-oriented

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<sup>116</sup> Daniel J. Gervais, *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467, 494-95 (2003).

<sup>117</sup> The Cooperative Research and Technology Enhancement Act, 2004, Pub. L. No. 108-453, 118 Stat. 3596.

<sup>118</sup> 15 U.S.C. § 1127 (2000).

<sup>119</sup> 25 U.S.C. § 305 (2000).

<sup>120</sup> See Open Source Initiative, <http://www.opensource.org>.

<sup>121</sup> 15 U.S.C. § 1052 (a) (2000).

<sup>122</sup> Erik Brady, *Redskins not only offensive name with trademark protection*, USA TODAY, Nov. 3, 2015 (<http://www.usatoday.com/story/sports/nfl/redskins/2015/11/03/team-redskins-not-only-offensive-name-trademark-protection/75115730>).

<sup>123</sup> Robyn Norwood, *NCAA to Crack Down on "Hostile" Nicknames*, L.A. TIMES, Aug. 6, 2005, at A1.

<sup>124</sup> Chon, *supra*, at 268.

approach to IP law. There is clearly a growing consensus amongst IP scholars and plebeians alike that the nature of IP law needs to change, to include a more group-oriented approach. I hope that the arguments I had provided analyzing the fluid nature of IP law, refute many of the reproaches that a group-oriented approach has had to face.

## II. *Rights in Perpetuity for CP?*

One criticism for CP, however sticks out like a sore thumb. It is a critique of CP that has plagued proponents of CP since the protection debate took center stage - A cornerstone of IP, the argument goes, is the fact that rights are not granted in perpetuity. They are granted to the creator for a specific duration of time, after which they are deposited into the rich repository known as the public domain, from which other creators may create new works, and the cycle continues. The argument continues that permanently vesting a right would grant undue monopoly to the creator(s) and would fail to advance social utility, amongst other harms.<sup>125</sup> This would obviously deal a severe blow to the supporters of an IP method of protection for CP. Indigenous peoples are most definitely not going to agree to partaking in any system where their entire culture is essentially time-bound. Therefore, we must first understand if the rebuke is valid in the first place.

This attack suffers from multiple defects. However, due to my desire to avoid verbosity, I will constrain myself to three short rebuttals. First and foremost, it must be remembered that CP isn't like any other form of property. It is uniquely placed in the property spectrum due to the innate attachment the community shares with their CP.<sup>126</sup> This can be due to the sacred nature of the property, or simply because of the fact that the CP is their primary, and in most cases only source of livelihood. It would not be an overreach to say that the survival of some indigenous groups is contingent on them being able to use their CP according to their own discretion. Imposing any sort of time duration on this pristine right, would not just violate their IP rights, but their very right to self-determination, an *erga-omnes* obligation in International Law.<sup>127</sup>

My second confutation revolves around the Rawlsian concept of the periphery and the core. Exquisitely explained by Prof. Merges, the idea is that every IP right includes two separate

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<sup>125</sup> Munzer & Raustiala, *supra*, at 86.

<sup>126</sup> See Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 154 (1995).

<sup>127</sup> Case Concerning East Timor (Port. v. Aust.), 1995 I.C.J. 4, 102, (June 30).

components: an inviolable individual contribution, which he calls the ‘deserving core’ of the work covered by the right and a component that can best be thought of as owing its origins to social forces and factors, which he calls ‘the periphery.’ Because the periphery is attributable to social forces, it represents the part of the work that society itself has a claim on, by way of its redistributive policies.<sup>128</sup> In the CP paradigm however, I believe that all societal contributions are taken care of within the core itself, since the society is the one who holds the right in common. What I am arguing for, in fact, is for a permeable core and periphery distinction, and a correspondingly strong or weak IP protection. Therefore, I argue that just like how providing a society/group an IP right are grounds for a high threshold of IP rights, similarly a lone creator, in a desolate island, with no ties to civilization also should be conferred with a high threshold of IP rights, due to the lack of societal input. In the first case there is not a lack of societal input, but the society itself holds the right in common, while in the second case, there is a total absence of societal contribution. Conversely, creation of a mere motley of existing works, should have a thin line of protection, similar to the idea/expression merger doctrine in copyright law.

Finally, I argue that IP rights can be seen as a very partial form of reparation of past wrongs, and therefore can hardly be seen to be excessive in nature.<sup>129</sup> This argument is related to my first rebuttal in that, widespread and systematic denial of indigenous peoples’ rights to their tangible and intangible property has resulted in a denial of their fundamental right to exist as distinct peoples. Perpetual protection of CP is therefore in my view, necessary and not in conflict with the IP regime principles. In status quo, the Law of Trademarks serve as a guiding light for perpetual protection of an IP right in this regard. All that is required is for the Trademarks to be systematically renewed, in order to make the protection permanent. An analogous system for the protection of CP can definitely be envisioned.

## **VI. Conclusion**

The Inter-Governmental Committee on Traditional Knowledge,<sup>130</sup> recently on October 14, 2015 had its mandate renewed for another two years, with the sole objective of breaking the deadlock that has engulfed the CP debate. Unfortunately, once again, the committee has had

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<sup>128</sup> Merges 1, *supra*, at 121.

<sup>129</sup> Graham & McJohn, *supra*, at 325.

<sup>130</sup> *Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, available at [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_1617.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_1617.pdf).

difficulties arriving at a consensus, and enters the General Assembly's October 2017 session with consensus on only a few issues, such as that the mandate should be renewed for two years.<sup>131</sup> I have argued in this paper that a universal solution starts with a universal language. The language here is western philosophical justifications of property. Many might find a different semantic to be more suitable for CP, that is fine as well. As long as the dialect is universally understood, it would solve most of the problems dogging the CP debate presently. I can certainly attest to the fact that there exist many models for the protection of CP in circulation amongst academic circles. Admittedly, none of these are the paragon for the protection of CP, however they certainly serve as prototypes. Prof. Merges ominously warns those ambivalent about collective property, "*isn't it better to adjust and adapt our conception of property than to restrict it to traditional channels, where it will preside, in all its formal rigor, over a still-large but backward-looking domain?*"<sup>132</sup> I go a step further and argue that our conception of property have been constantly evolving, engulfing many items which otherwise would not have an IP right, into the property net.<sup>133</sup> Why not CP as well? I find it baffling that items like folklore, folk dances, medicinal knowledge, etc. which are clearly within the confines of copyright law or patent law are ostracized and doomed to rest in 'The Twilight Zone' of Law merely because they do not adhere to the austere requirements of the outdated statutes. Therefore, I conclude this paper with a similar question as the one I proposed at its inception. What do Attila the Hun, Richard Leigh, Montesquieu, Rod Stewart and Earl Warren all have in common? They all agree that the spirit of the law is greater than its letter. It is by virtue of this alone, if nothing else, that group property rights in CP warrant merit.

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<sup>131</sup> Catherine Saez, *WIPO TK Committee Agrees To Continue Work, But Real Outcome Depends On October Assembly*, INTELLECTUAL PROPERTY WATCH, available at <https://www.ip-watch.org/2017/06/19/wipo-tk-committee-agrees-continue-work-real-outcome-depends-october-assembly/>.

<sup>132</sup> Merges 2, *supra*, at 1191.

<sup>133</sup> See Heading V - Group Rights in IP Practice.