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Cultural Rights And Intellectual Property Debates

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As the mounting controversies around pharmaceuticals, genetically modified organisms, technology transfer, and school readings make clear, the expansion of corporately-held intellectual property rights can conflict with other recognized human rights such as rights to health, food security, economic development, and education. One prominent response has been the movement to “free culture,” based upon the widespread conviction that the expansion and enforcement of intellectual property have a chilling effect on cultural creativity and the sharing of public goods. We cannot deny a need to protect the public domain from overzealous and sometimes inhumane intellectual property enforcement, particularly when driven by corporate interests. Unfortunately, however, in the words of legal theorists Anupam Chandler and Madhavi Sundar, this newfound “romance of the public domain” sees *all* forms of cultural protection as equivalent forms of nefarious censorship, according little respect for the distinctive rights of indigenous peoples and other minorities to their intangible cultural heritage.

An Ami troupe shares its cultural traditions through music.
Photo by Tony Coolidge/Courtesy of ATAYAL

The rights of peoples with respect to their cultural heritage pose new and necessary challenges for balancing the exercise of intellectual properties with individual freedoms of creativity. These include a need for the international human rights system to pay greater attention to potential violations of the cultural rights of minorities and indigenous peoples. Obligations to protect traditional environmental knowledge and to respect indigenous cultural heritage are already internationally recognized. States are seeking to meet their legal obligations under the Convention on Biological Diversity and to respect international principles established by the Draft Declaration on the Rights of Indigenous Peoples. The World Intellectual Property Organization (WIPO) has, likewise, recognized a need to reach out to “new beneficiaries” if the intellectual property system is to achieve global legitimacy. This includes an extensive effort to articulate the principles through which traditional knowledge and traditional cultural expressions are best recognized, maintained, and protected. All of these initiatives involve the elaboration of cultural rights, although they are rarely framed as such.

Cultural rights have largely been ignored in contemporary debates about the extension of intellectual

property rights and the endangerment of the public domain. Perhaps this is because Americans operating within the United States legal tradition are the most publicized intellectual property activists. For these activists, the remedy for corporate over-reaching is a robust jurisprudence of “fair use” together with the constitutional protection of free speech. These are understood to balance the use of copyrights and trademarks, permitting transformative, critical, or noncommercial usages of cultural works. Such a perceived conflict between intellectual property rights and the expressive rights of individuals has a strong legal foundation in the United States.

The United States has not, however, ratified the International Covenant on Social, Economic, and Cultural Rights. This international framework—in which rights of intellectual property are both specified and limited—is governed by the overarching obligation to identify and to take specific measures to improve the position of the most vulnerable and disadvantaged groups in society. This Covenant has, unfortunately, remained largely outside of the purview of most intellectual property activists. Moreover, the U.S. Government has historically distanced itself from UNESCO—the UN body responsible for preparing and interpreting international normative principles and instruments with regard to cultural rights. This lack of a U.S. commitment to the Covenant and to UNESCO has limited recognition within contemporary debates that intellectual property rights are also cultural rights within international law and thus must be balanced with other cultural rights claims and obligations.

The rights of communities to participate in decisions that involve the use of their cultural heritage are affirmed in too many international and national legal instruments to be ignored. Particularly in Europe, we can point to the promotion of the ethnic, cultural, linguistic, and religious identities of national minorities. Such developments acknowledge the need to preserve and promote cultural diversity as a public good within and between societies. Renewed attention to the rights of minorities to enjoy and to develop their own cultures together with a growing recognition of cultural diversity as grounds for sustainable development suggest that we are moving toward a greater appreciation for the understanding of culture as a resource. This understanding can be applied to current discussions about intellectual property.

The influential assumption that there should be a singular or unitary public domain of cultural materials—including the concept of a digital “creative commons”—cannot embrace the range of concerns expressed by ethnic minorities and indigenous peoples. These might include an understanding of cultural heritage as the basis for group identity and as an integral resource for the continued survival of a people. A more inclusive public domain must acknowledge and respect a wider range of social relationships to cultural forms than is recognized by fair use and freedom of speech. The cultural survival of peoples demands that we formulate new principles governing the use of cultural heritage to ensure the conditions necessary to foster diverse forms of cultural creativity.

In a global environment where opportunities for cultural representation are so unequally distributed, vague fears about “copyrighting culture” cannot ethically be met with mere assertions of individual liberty or the importance of the undifferentiated public circulation of culture. We should be working toward cultural policies that enable more peoples with distinct traditions to participate in the cultural life of their own communities, in new and emergent forms of cross-cultural dialogue, and in a more inclusive public domain. A case involving the music of the Ami of Taiwan illustrates this potential.

In 1978 visiting researchers in Taiwan recorded for archival purposes what was then considered an oral performance of the folk music of a minority ethnic group, the Ami. Unknown to the performers of this music, the recording made its way into a compilation of Chinese folk music on a record album released in France. Twenty years later a European band used a sample of this recording to create a musical composition, which received widespread acclaim. The music performed by the Ami singers was neither individually authored nor fixed in material form. Therefore, it was squarely in the public domain, and not eligible for copyright protections. Its use by the band was not in violation of any laws in force. The European composition, “Return to Innocence“, was a global hit and the Olympic Committee chose it as an anthem for the 1996 Olympic Games in Atlanta. In the absence of global information and transportation technologies, it is unlikely the original performers would even have learned of the appropriation. But news of their voices in the recording reached the elderly performers. Ultimately, with the help of a local record company and sympathetic lawyers, a little known international legal provision that prohibited the unauthorized appropriation in material form of performances was used to effect a settlement that recognized the contributions of these talented vocalists.

Compensation for the two singers was arguably the least of what was accomplished here. More importantly, the case conveyed to a global audience an acknowledgement of Ami oral culture, which enabled the establishment of a foundation for the preservation and revitalization of Ami tribal music. It also drew world attention to the cultural traditions of Taiwan’s indigenous peoples, affirming their existence as distinctive first peoples after years of state denial. Many groups, whose languages and traditions were considered extinct by scholars and who had been repressed by the state, found new means of pursuing cultural self-determination through the incentives and opportunities for musical contribution and collaboration afforded in the case’s aftermath. In short, the case provided a means for the revitalization of endangered traditions.

This experience suggests that rights of acknowledgement or attribution—ideally coupled with legal requirements for prior consent and mutually agreed upon forms of compensation for culturally distinctive forms of creation—can enable cross-cultural dialogues that foster the growth of cultural diversity. Such cultural exchange and creativity are not nourished by the protection of market-circulated commodities as intellectual properties in what is otherwise a global public domain. Neither are they nourished by an exclusive commitment to a cultural or creative commons and the vigorous defense of free speech and individual creativity. Our challenge, therefore, is to pursue a more inclusive and culturally pluralist public domain when considering the privileges to be accorded to intellectual property. Doing so recognizes that the objectives of sustainable development, the promotion of social cohesion, and the support for democracy all require respect for the *full* range of cultural rights provided by international law.

For a related perspective on the conflict between the international intellectual property system and the rights of local and indigenous communities see Justin VanFleet's "Protecting Knowledge," from the Globalization issue of *Human Rights Dialogue* available online at http://www.carnegiecouncil.org.

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