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## Desettling Fixation

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## DESETTLING FIXATION\*

EMILY BEHZADI CÁRDENAS\*\*

*Scholars have long contemplated how the effects of colonialism have permeated even race “neutral” laws. This Article scrutinizes the ways Eurocentric copyright systems have failed to protect, and have even encouraged, the unauthorized uses of indigenous heritage in derivative subject matter, exposing how settler colonialism in copyright law has entrenched an unequal hierarchy among communities seeking copyright protection. Due to its ephemeral nature, intangible cultural heritage constantly faces the threat of exploitation by dominant cultures. The intangible heritage of indigenous groups has been particularly vulnerable to illicit and uncompensated commodification. Intangible heritage, such as oral histories and traditional dances, is often of great social, psychological, and political importance for indigenous communities. The current national and international legal regimes have failed to protect indigenous communities from the misappropriation of their cultural resources.*

*Building on a comparative analysis of the fixation requirement in other countries, this Article proposes a reformation of the “fixation” requirement in American copyright doctrine, which requires a work to be “sufficiently permanent” for a period of “more than a transitory duration.” By allowing authors to establish copyright in ephemeral works, communities may be able to protect more effectively their intangible cultural heritage from commodification and misappropriation. This Article joins the call for reconsidering how copyright law reinforces structural inequities and proposes a novel solution. This Article is the first in legal literature to apply the process of desettling to a legal problem derived from settler colonialism. Through the desettling of fixation in copyright law, true “progress” can be realized.*

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\*\* Associate Professor of Law, California Western School of Law. Many thanks to those who have provided valuable feedback on this Article. In particular, a special thanks to Professor Emile Loza de Siles and all of the participants at the AALS New Voices in Justice and Inequality panel, as well as Andrew Gilden, Karen Sandrik, and the entire faculty of Willamette University College of Law for allowing me to workshop this Article. I’d also like to thank the participants at the Latin American Studies Conference; Association for Law, Property, and Society Conference; and Law and Society Conference for their helpful remarks. A special thanks to Dean Leticia Diaz from Barry University School of Law, as well as Professors Erin Sheley, Catherine Hardee, and Pooja Dadhania of California Western School of Law for their astute commentaries. Finally, I am grateful for the exceptional research assistance of Danielle Joyner and Jocelyn Perez. All errors and omissions are solely those of the author.

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## INTRODUCTION

There are 476 million indigenous peoples around the world across ninety diverse countries.<sup>1</sup> Of the five thousand different groups of indigenous peoples

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1. *Indigenous Peoples*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/indigenous-peoples/> [https://perma.cc/Q7P8-MZ8A]. The term “indigenous” will be used throughout this Article to denote all

communities, peoples and nations . . . which, having a historical continuity with preinvasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or part of them. [Indigenous

in the world, each has unique customs and traditions that are significant parts of their identities.<sup>2</sup> The intangible heritage of indigenous groups has continuously been exploited by dominant cultures. This Article is the first in legal literature to apply the process of desettling as a mechanism to effectively protect intangible cultural heritage from illicit commodification.<sup>3</sup> The expression of indigenous identity is manifested through cultural heritage. Cultural heritage is distinct from other forms of property. In addition to its scholarly and aesthetic value, a community's cultural heritage serves as the indelible link between the past, present, and future. While heritage originates from a singular community, cultural heritage, in a broader sense, is erroneously regarded by the international community as belonging to all people, irrespective of national and international borders.<sup>4</sup> The protection of cultural heritage is particularly important to protect indigenous autonomy and cultural existence.<sup>5</sup> Without the capacity to exercise control over these forms of expression, they could be usurped by noncommunity members, who may threaten the community's sense of self, its spirituality, and its overall well-being.<sup>6</sup>

Cultural heritage of a community or group is the consequence of profound intergenerational social and artistic processes.<sup>7</sup> Cultural heritage is dynamic and manifests itself in both tangible and intangible ways. Intangible cultural heritage ("ICH") denotes living cultural expressions, often exhibited through

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communities] form at present nondominant sectors of society and are determined to preserve, develop, and transmit to future generations their . . . ethnic identity, as [a] basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

José R. Martínez Cobo (Special Rapporteur on the Problem of Discrimination Against Indigenous Populations), *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Mar. 1987). However, "there is not an international consensus on who indigenous peoples are: the term cannot be defined precisely or applied all-inclusively." Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. INT'L AFFS. 7, 9 (2008). For further discussion on the challenges associated in defining "indigenous peoples," see Karin Lehmann, *To Define or Not To Define—The Definitional Debate Revisited*, 31 AM. INDIAN L. REV. 509, 513–17 (2006); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 814–18 (2008); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663 n.4 (1990).

2. AMNESTY INT'L, *supra* note 1.

3. The term "desettling" is a way to deconstruct racial and colonial basis. In this Article, the term "desettle" is used instead of "decolonize." See *infra* Section II.B.

4. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention pmbl., May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 240 ("[T]he preservation of the cultural heritage is of great importance for all peoples of the world and . . . it is important that this heritage should receive international protection.").

5. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1034 (2009).

6. Paolo D. Farah & Riccardo Tremolada, *Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage*, 94 OR. L. REV. 125, 126 (2015).

7. *Id.* at 131.

oral traditions, performing arts, social practices, rituals, festive events, knowledge, and practices.<sup>8</sup> Also known as “living cultural heritage,” intangible cultural heritage is an enduring cultural resource, primarily passed down from generation to generation. A distinctive characteristic of intangible cultural heritage is its dynamism; it enjoys the space to naturally evolve over time.<sup>9</sup> This dichotomous nature of intangible cultural heritage—both enduring and evolving—leaves it particularly vulnerable to exploitation.

Intangible heritage is too often perceived to be unrestricted and free for use in the public domain. Large-scale examples of misappropriation of ICH exist in various forms throughout the marketplace. From fashion to the entertainment industries, authors and corporations have profited from the exploitation of intangible heritage. For example, in the movie *Lilo & Stitch*, Disney incorporated Native Hawaiian *mele inoa* (sacred name chants) in its animated film.<sup>10</sup> Disney later copyrighted the incorporated music and earned millions from this appropriation.<sup>11</sup>

The international community has attempted to create measures to safeguard intangible cultural heritage and to raise awareness of its importance.<sup>12</sup> However, these international instruments were primarily created by dominant cultural, political, and economic classes. In furtherance of their protective measures, dominant societies have sought to disseminate intangible cultural heritage through tourism, commodification, and digitalization.<sup>13</sup> Distribution of intangible cultural heritage through various technologies has allowed it to materialize in dominant communities. Relatedly, neocolonialist practices of resource expropriation often lead to inequities in ICH protection. The collective rights of indigenous peoples’ heritage often go under protected, mostly due to the ephemeral nature of intangible heritage.<sup>14</sup> This lack of protection often leads to illicit and uncompensated commodification.<sup>15</sup>

8. *What Is Intangible Cultural Heritage?*, UNESCO, <https://ich.unesco.org/en/what-is-intangible-heritage-00003> [<https://perma.cc/M8C2-FZJL>] [hereinafter *What is Intangible Cultural Heritage*].

9. *See id.*

10. Richard Awopetu, Comment, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY L.J. 745, 769 (2020). As another example, in OutKast’s performance at the 2004 Grammy Awards, the group used a sacred Navajo song. Native American activities were angered by the performance because it was “disrespectful to their culture and a perpetuation of tomahawk-and-teepee stereotypes.” *CBS Apologizes for OutKast’s Performance*, TODAY (Feb. 13, 2004, 4:43 PM), <https://www.today.com/popculture/cbs-apologizes-outkasts-performance-wbna4264467> [<https://perma.cc/KQ2T-QWLD>].

11. Awopetu, *supra* note 10, at 769.

12. *See infra* Section I.A.

13. *See* Jessika Eichler, *Intangible Cultural Heritage, Inequalities and Participation: Who Decides on Heritage?*, 25 INT’L J. HUM. RTS. 793, 794 (2021).

14. Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 188 (2007).

15. Chante Westmoreland, Note, *An Analysis of the Lack of Protection for Intangible Tribal Cultural Property in the Digital Age*, 106 CALIF. L. REV. 959, 960–61 (2018).

Recognition of the atrocities committed against indigenous cultures must continue to permeate our global conscience, and the law must adapt to prevent the degradation and continued commercialization of these oppressed groups.<sup>16</sup>

This Article contributes to the rich body of scholarship that recognizes the harms associated with the misappropriation of intangible heritage of indigenous peoples and the need for national and international remedial measures.<sup>17</sup> Discourse over the appropriation of indigenous cultures has occurred for decades.<sup>18</sup> Scholars have documented the failure of modern legal regimes to prevent the appropriation of intangible heritage.<sup>19</sup> Scholars have similarly acknowledged the inherent challenges associated with employing intellectual property law as a mechanism for safeguarding cultural resources of indigenous populations.<sup>20</sup>

Eurocentric copyright laws have perpetuated the settler state, which operates as an arm of imperialism, utilizing internal and external forms of

16. See, e.g., Ron Rosenbaum, *The Shocking Savagery of America's Early History*, SMITHSONIAN MAG. (Mar. 2013), <https://www.smithsonianmag.com/history/the-shocking-savagery-of-america-early-history-22739301/> [<https://perma.cc/78FX-7PNL>].

17. See Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMPAR. L. 633, 636–38 (2003) (discussing the challenges faced by indigenous peoples in asserting ownership for intangible cultural heritage); Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 278 (2001) (recognizing the importance of protecting traditional knowledge); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205–14 (2000); Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 312–16 (1994) (defining folklore and discussing problems with utilizing copyright for its protection).

18. See generally Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016) (examining the colonial dynamics and normative arguments of cultural appropriation); MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003) [hereinafter BROWN, NATIVE CULTURE] (providing case studies of cultural appropriation); Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L J. CULTURAL PROP. 40 (2005) (examining how information society has contributed to cultural appropriation); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002) (examining the history of appropriation and the “right to culture” of indigenous groups); Rosemary J. Coombe, *The Properties of Culture, and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249 (1993) (exploring the controversy of cultural appropriation within the wider lens of colonial discourses).

19. See Stephanie Spangler, Note, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions Through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709, 720–21 (2010); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 259–60 (2001). See generally Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355 (1998) (considering collective intellectual property rights for indigenous culture); Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred “Folklife Expressions”—Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. BALT. INTELL. PROP. L.J. 99, 101–03 (1998).

20. See Farah & Tremolada, *supra* note 6, at 158–61; Paterson & Karjala, *supra* note 17, at 646–52.

colonization to continue the colonial project.<sup>21</sup> Through this continuation of the settler colonial state, copyright laws have ignored and even encouraged the expropriation of indigenous intangible heritage.<sup>22</sup> Settler colonialism manifests itself in indigenous intangible heritage through instances of cultural erasure and cultural appropriation.<sup>23</sup> Acknowledgement of the harm underpinned by settler colonialism and white Western dominance within the realm of copyright law is necessary to remedy past injustices that incurred through expropriation of intangible heritage. It is through the process of “desettling” that we can begin to deconstruct settled power hierarchies within copyright doctrine.

The fixation requirement for copyrightability is viewed as a significant barrier to protection.<sup>24</sup> To be copyrightable, a work must be fixed, which means it must be “sufficiently permanent” for a period of “more than a transitory duration.”<sup>25</sup> The condition of fixation has placed an immense burden on indigenous peoples who seek to prevent exploitation of their intangible heritage through copyright protection. By its very nature, the concept of fixation excludes cultural production that encompasses nonfixed forms of expression, such as folklore, oral histories, and shared rituals.<sup>26</sup> In order to qualify for copyright protection, indigenous peoples would be forced to transform their

21. See generally Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y, no. 1, 2012, at 1, 4–5 (explaining external and internal colonialism).

22. Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CALIF. L. REV. 1373, 1377 (2021) [hereinafter Reed, *Fair Use*] (“Indigenous peoples have intuited for centuries—that cultural appropriation functions as an extension of European-settler conquest, which has systematically dispossessed Indigenous communities of their lands, natural resources, family relationships, identities, and even their own bodies.”).

23. “Settler colonialism refers to a history in which settlers drove indigenous populations from the land in order to construct their own ethnic and religious national communities.” WALTER L. HIXSON, AMERICAN SETTLER COLONIALISM: A HISTORY 4 (2013).

24. Riley, *supra* note 17, at 195 (noting that “[t]he ‘fixation’ condition of copyright places an immense burden on indigenous communities seeking to protect their intellectual property”); see also Trevor Reed, Note, *Who Owns Our Ancestors’ Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 305 (2016) [hereinafter Reed, *Who Owns*] (“Many important Native American creative works fall outside the scope of copyright protection due to: (1) the nature of their creation, which may not be strictly human in origin, (2) differing concepts of ‘fixation,’ where a work need not be embodied in a material object for it to be considered ‘fixed’ for a given indigenous community . . . .”); Farah & Tremolada, *supra* note 6, at 153 (“Another relevant hindrance is the copyright requirement of fixation . . . which conflicts with the oral nature of most ICH.”); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL’Y & L. 365, 371 (2008) [hereinafter Greene, *Intersection*] (“[F]ixation deeply disadvantages African-American modes of cultural production, which are derived from an oral tradition and communal standards.”).

25. 17 U.S.C. §§ 101, 102(a).

26. See Agnès Lucas-Schloetter, *Folklore*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY 339, 341–42 (Silke von Lewinski ed., 2d ed. 2008). It should be noted that the term “folklore” has been considered a static term that is inadequate to describe the dynamic living traditions of indigenous peoples. 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, 55 (2004).

works to conform to Western legal principles. A reduction of indigenous cultural expression to tangible form “requires putting spoken language into contrived, articulable rules.”<sup>27</sup> As courts are already implicitly permitting copyrightability for some arguably ephemeral works, courts should reframe the fixation requirement to provide protections for traditionally excluded works.

Overall, this Article proposes the reformation of the “fixation” requirement in both national and international copyright doctrine, as a possible mechanism to adapt copyright law to better protect indigenous intangible heritage. Through a comparative analysis of civil law systems’ copyright law, this Article aims to demonstrate that the “fixation” requirement, as it is currently interpreted, is not necessary in American copyright doctrine. Part I defines intangible cultural heritage and examines the inadequacies of national and international legal schemes to prevent expropriation of intangible cultural heritage by dominant cultures. Part II provides an overview of settler colonialism theory and how it applies to copyright law in the United States. Part II also explains the theoretical approach of “desettling” and its function in the broader context of anticolonial praxis. Part III explores how copyright law, in its current state, is ineffective in protecting intangible heritage and analyzes the fixation requirement’s disproportionate impact on communities of color. Part IV undergoes a comparative analysis of civil law–based copyright systems. Finally, Part V reframes the fixation requirement to better protect intangible cultural heritage. This Article addresses the dearth of scholarship at the cross section of settler colonialism and copyright. Only by eliminating disparities and structural hierarchies in copyright law can meaningful “progress” be achieved.

## I. INTANGIBLE CULTURAL HERITAGE AND THE PROBLEM OF MISAPPROPRIATION

### A. *Intangible Cultural Heritage*

Cultural heritage is “the entire spirit of a people in terms of its values, actions, works, institutions, monuments, and sites.”<sup>28</sup> While many equate cultural heritage to the visual arts, it applies broadly to “history, language, art,

27. April M. Hathcock, *Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion*, 25 AM. U. J. GENDER SOC. POL’Y & L. 239, 253 (2017).

28. Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means To Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL J. ART & ENT. L. 201, 204 (2006). Within the sphere of cultural heritage law, many international instruments use the term “cultural property” to denote these types of objects. This characterization has been criticized for its emphasis on Western ideals of property ownership. See Lyndel V. Prott & Patrick J. O’Keefe, “Cultural Heritage” or “Cultural Property?,” 1 INT’L J. CULTURAL PROP. 307, 309–10 (1992).



traditions, oral compositions, written works, [architecture], and more.”<sup>29</sup> Cultural heritage is often intergenerational and reflects a community’s historical, cultural, and social identity. Within the category of cultural heritage, there are subcategories: tangible cultural heritage and intangible cultural heritage.<sup>30</sup> Tangible cultural heritage refers to the physical manifestation of a group’s culture such as monuments, artwork, and sites of “historical, aesthetic, archaeological, scientific, ethnological, or anthropological value.”<sup>31</sup> On the other hand, intangible heritage is defined as “traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts.”<sup>32</sup>

Intangible cultural heritage (“ICH”) is significant in the transmission of knowledge and skills from one generation to the next. ICH’s intergenerational function parallels the dynamism of a community’s development. It “can only be heritage when it is recognized as such by the communities, groups or individuals that create, maintain and transmit it—without their recognition, nobody else

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29. Sarah La Voi, Comment, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875, 880 (2003). Indeed, the World Heritage Convention considers “cultural heritage” as:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

30. La Voi, *supra* note 29, at 875; *see also* Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 300 (1999) (describing how various international instruments define cultural heritage).

31. Slattery, *supra* note 28, at 206.

32. *What is Intangible Cultural Heritage*, *supra* note 8. Intangible heritage can be encompassed under the definition of “Traditional Cultural Expression.” As outlined by the World Intellectual Property Organization, “traditional cultural expression” includes verbal expressions (such as “[folk] tales, [folk] poetry, riddles, signs, . . . words, symbols, and indications”), musical expressions, and expressions by actions “whether or not reduced to a material form.” WORLD INTELL. PROP. ORG., INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE, AND TRADITIONAL CULTURAL EXPRESSIONS 17 (2020).

can decide for them that a given expression or practice is their heritage.”<sup>33</sup> Unlike tangible heritage, the inherent value of ICH does not derive from physical properties. Instead, intangible heritage serves as an invisible bridge between inherited traditions and the contemporary practices of a diverse cultural group.<sup>34</sup> Of course, the inherent value of the transmission of such knowledge can be seen as both social and economic to the respective cultural groups. However, this transmission of knowledge is also important to those outside the cultural group as it offers a way to build “mutual respect for other ways of life.”<sup>35</sup>

The recognition of the need to safeguard intangible heritage has been a gradual process. However, global attention toward its protection has gained momentum in more recent years.<sup>36</sup> Since 2003, under the auspices of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), approximately 180 countries have signed the Convention on the Safeguarding of the Intangible Cultural Heritage (“Intangible Heritage Convention”).<sup>37</sup> Entered into force in April 2006, the goals of the Convention were to “safeguard . . . intangible cultural heritage,” “ensure respect,” and “raise awareness” of the significance of these materials, as well as to “provide for

33. *What is Intangible Cultural Heritage*, *supra* note 8.

34. *Id.*

35. *Id.*

36. See generally Jack Tsen-Ta Lee, *Sense of Place: The Intersection Between Built Heritage and Intangible Cultural Heritage in Singapore*, 4 J. COMPAR. URB. L. & POL’Y 604 (2020) (exploring the issue of intangible heritage protection in Singapore); Madeline Roe Flores, Comment, *May the Spirit of Section 106 Yet Prevail?: Recognizing the Environmental Elements of Native American Intangible Cultural Heritage*, 92 TUL. L. REV. 667 (2018) (analyzing the failure of the National Historic Preservation Act to protect intangible cultural heritage); Christina Maags & Heike Holbig, *Replicating Elite Dominance in Intangible Cultural Heritage Safeguarding: The Role of Local Government-Scholar Networks in China*, 23 INT’L J. CULTURAL PROP. 71 (2016) (examining the role of the local networks in the protection of Chinese intangible heritage); Sarah A. Garrott, Comment, *New Ways To Fulfill Old Promises: Native American Hunting and Fishing Rights as Intangible Cultural Property*, 92 OR. L. REV. 571 (2013) (arguing for protection of hunting and fishing rights as a part of intangible cultural heritage for indigenous tribes); Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433 (2008) (exploring the challenges associated with protection of cultural resources under an intellectual property regime); Jonathan Liljebblad, *The Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) and the Control of Indigenous Culture: A Critical Comment on Power and Indigenous Rights*, 26 WM. & MARY J. RACE GENDER & SOC. JUST. 281 (2020) (discussing the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) and its critiques); Slattery, *supra* note 28, at 203 (“examin[ing] the importance of intangible cultural heritage as well as the 2003 UNESCO Convention, and analyz[ing] the Convention’s likelihood of success in preserving such heritage in the United States”); Paterson & Karjala, *supra* note 17, at 635 (evaluating “the various claims and desires of indigenous peoples, and others whose needs arguably justify specific legal recognition and protection”).

37. Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, Convention for the Safeguarding of the Intangible Cultural Heritage, U.N. Doc. CLT-2022/WS/3, at v (2022).

international cooperation and assistance.”<sup>38</sup> The United States is not a party to the Convention.<sup>39</sup>

In 2005, delegates from 148 countries reunited again to adopt the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>40</sup> The Diversity of Cultural Expressions Convention emphasizes the importance of “the diversity of cultural expressions” as circulated and shared through “cultural expressions” and “goods and services.”<sup>41</sup> Its main goals were “to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner,”<sup>42</sup> “to encourage dialogue among cultures,”<sup>43</sup> and “to strengthen international cooperation . . . to protect and promote the diversity of cultural expressions.”<sup>44</sup> On the other hand, the Convention “reaffirm[ed] the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”<sup>45</sup> The nonbinding principles of this Convention showcase that it was not meant to be compulsory amongst state parties.<sup>46</sup> Rather, the Convention aimed to provide a mechanism by which state parties could engage in intercultural dialogue and encourage cultural exchange amongst disparate groups of peoples. The Convention was entered into force in March 2007. Unlike the Intangible Heritage Convention, the United States is a state party to this Convention.<sup>47</sup> However, the United States has never ratified it.<sup>48</sup>

Within the sphere of human rights, intangible cultural heritage has also been protected under international instruments through the principle of cultural rights. The International Covenant on Civil and Political Rights (“ICCPR”) is one of the primary human rights instruments that tackles the

38. Convention for the Safeguarding of the Intangible Cultural Heritage art. 1, Oct. 17, 2003, 2368 U.N.T.S. 3.

39. *Convention for the Safeguarding of the Intangible Cultural Heritage: States Parties*, UNESCO, <https://www.unesco.org/en/legal-affairs/convention-safeguarding-intangible-cultural-heritage> [<https://perma.cc/UBF3-WP69>]. See generally Richard Kurin, *U.S. Consideration of the Intangible Cultural Heritage Convention*, 36 *ETHNOLOGIES* no. 1-2, 2014, at 325 (examining the role of the United States in the deliberations over the 2003 UNESCO Convention).

40. Convention on the Protection and Promotion of the Diversity of Cultural Expressions pmbl., Oct. 20, 2005, 2440 U.N.T.S. 311.

41. *Id.*

42. *Id.* art. 1(b).

43. *Id.* art. 1(c).

44. *Id.* art. 1(i).

45. *Id.* art. 1(h).

46. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 *COLUM. L. REV.* 2004, 2013 n.35 (2007).

47. *United States of America: Conventions*, UNESCO, <https://www.unesco.org/en/countries/us/conventions> [<https://perma.cc/UC2S-YU5W>].

48. *Id.*; see also Mira Burri, *The UNESCO Convention on Cultural Diversity: An Appraisal Five Years After Its Entry into Force*, 20 *INT’L J. CULTURAL PROP.* 357, 360–69 (2013) (examining the progress of the implementation of the convention).

rights to culture amongst minority groups.<sup>49</sup> In particular, Article 27 of the ICCPR provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>50</sup>

In addition to the ICCPR, the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) address cultural rights. The UDHR provides a dual-protection mechanism for intangible cultural heritage. Under Article 27, everyone has the right “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”<sup>51</sup> as well as to protect “the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>52</sup> The ICESCR similarly provides recognition of the rights to intangible cultural heritage. Article 15 recognizes the right of everyone “[t]o take part in cultural life” and “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>53</sup>

In addition to the broad rights under the UDHR, ICESCR, and ICCPR, in 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples (“DRIPS”).<sup>54</sup> Unlike the human rights conventions, DRIPS provided specific protection of the intangible cultural heritage of indigenous peoples. Article 31 provides:

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

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49. Hum. Rts. Comm., *Background to the International Covenant on Civil and Political Rights and Optional Protocols*, U.N. HUM. RTS. OFF. HIGH COMM’R., <https://www.ohchr.org/en/treaty-bodies/ccpr/background-international-covenant-civil-and-political-rights-and-optional-protocols> [<https://perma.cc/57TY-56AR> (staff-uploaded archive)].

50. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171. The Preamble also recognizes the importance of cultural rights as follows:

[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . . .

*Id.* pmb1.

51. G.A. Res. 217 (III)A, art. 27(1), Universal Declaration of Human Rights (Dec. 10, 1948).

52. *Id.* art. 27(2).

53. International Covenant on Economic, Social and Cultural Rights art. 15, ¶ 1(a), (c), Dec. 16, 1966, 993 U.N.T.S. 3.

54. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>55</sup>

Additionally, Article 11 recognizes the right of indigenous peoples “to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”<sup>56</sup> The adoption of DRIPS was seen as a major victory for human rights of indigenous peoples. Victoria Tauli-Corpuz, the Chairperson of the United Nations Permanent Forum on Indigenous Issues, touted the declaration as a necessary tool for “protection, respect, and fulfillment of indigenous peoples’ rights.”<sup>57</sup> However, she also warned that “[e]ffective implementation of the Declaration will be the test of commitment of States and the whole international community.”<sup>58</sup> Australia, Canada, New Zealand, and the United States, all settler colonial states, have not adopted DRIPS.<sup>59</sup>

These international conventions, declarations, and policy discussions establish a legal and political framework for the protection of intangible cultural heritage. The significance of cultural heritage to indigenous communities extends outside westernized value-based precepts of property. Instead, cultural heritage acts as an indelible link between community and cultural identity. Protection of cultural heritage then becomes a physical manifestation of the preservation of the community’s culture. However, it is vital to differentiate between the preservation of intangible heritage, as articulated by the UNESCO Intangible Heritage Convention, and the protection of intangible heritage from unauthorized commodification. The former seeks to safeguard intangible cultural heritage for future generations, while the latter refers to the prevention of unauthorized uses by third parties. Any unauthorized appropriation of cultural heritage is not only seen as an affront to the property interests of a

55. *Id.* art. 31(1).

56. *Id.* art. 11(1).

57. Victoria Tauli-Corpuz, Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples, U.N. GAOR, 61st Sess. (Sept. 13, 2007), <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/STATEMENT-VICTORIA-TAULI-CORPUZ-IDWIP-2007.pdf> [https://perma.cc/9RRH-6VL5].

58. *Id.*

59. While the United States is not a signatory of DRIPS, it maintains “support” of the “aspirations” reflected in the instrument. Letter from Jordyn Arndt, Adviser, to Chair, Explanation of Position on “Rights of Indigenous Peoples” (Nov. 7, 2019) (on file with the North Carolina Law Review).

group, but also to its cultural identity. The misappropriation of indigenous cultural heritage is a product of both a desire to commodify indigenous fetishization, as well as to exploit laws that offer little to no protection for intangible heritage. Most often, this commodification occurs through the process of “cultural appropriation.”<sup>60</sup> The international community has attempted to prevent ICH expropriation through existing intellectual property structures.<sup>61</sup> However, such efforts have been largely unsuccessful.<sup>62</sup>

#### B. *Appropriation of Intangible Heritage*

In the late nineteenth century, Mennonite missionary H.R. Voth began research on the Hopi religion as part of his conversion mission.<sup>63</sup> Voth gained access to private Hopi ceremonies, which allowed him the opportunity to profit financially from his studies.<sup>64</sup> He published photographs and wrote detailed descriptions of the Hopi religious rituals.<sup>65</sup> The knowledge he gained from this exploitation afforded him lucrative financial opportunities. He was hired to produce major displays of Hopi altars for museums and tourist sites.<sup>66</sup> His images are still reproduced in magazines and books to this day.<sup>67</sup> Voth’s publication of Hopi heritage directly offended their ritualistic practices and their commitment to secrecy.<sup>68</sup> Voth’s exploitation of the Hopi religion is just one of many examples of the way in which settler societies illicitly commodify intangible heritage.

The Western concept of property falsely assumes that expressions of indigenous communities are free to use.<sup>69</sup> Although international instruments have aspired to protect intangible cultural heritage from extinction, these measures have not prevented its exploitation and commercialization by

60. See generally Willajeanne F. McLean, *Who Are You Wearing? Avatars, Blackface and Commodification of the Other*, 61 IDEA 455, 456 (2021) (discussing how “consumers are challenging various corporate entities to abandon or to avoid practices of cultural appropriation and commodification”).

61. COMM’N ON INTELL. PROP. RTS., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 79 (3d ed. 2002).

62. See *supra* notes 19–20 and accompanying text, for a discussion of how intellectual property regimes have failed to successfully protect ICH against illicit commodification.

63. BROWN, NATIVE CULTURE, *supra* note 18, at 12.

64. *Id.*

65. Naomi Palosaari, Comment, *Intellectual Property Rights and Informed Consent in American Indian Communities: Legal and Ethical Issues*, 41 AM. INDIAN L. REV. 125, 127 (2016).

66. *Id.*

67. A book about Hopi names published by H.R. Voth can actually be purchased at Walmart for a mere \$40. See *Hopi Proper Names*, by H. R. Voth. *The Stanley McCormick Hopi Expedition. Volume 6, No. 3 (1905) [Leatherbound]*, WALMART, <https://www.walmart.com/ip/Hopi-proper-names-by-H-R-Voth-The-Stanley-McCormick-Hopi-expedition-Volume-6-no-3-1905-Leatherbound/1005450284> [<https://perma.cc/PF4Q-NERV> (staff-uploaded archive)].

68. Palosaari, *supra* note 65, at 127.

69. Farah & Tremolada, *supra* note 6, at 128.

dominant market figures.<sup>70</sup> Examples of this exploitation can be seen from fashion to music and movies, where companies have been using elements from intangible cultural heritage without permission. The problem of misappropriation of cultural heritage largely impacts indigenous cultures.<sup>71</sup> When companies or individuals appropriate intangible heritage, there is little evidence that any profits derived from such commodification are shared with the communities from which the intangible heritage was appropriated. Recently, the denouncement of “cultural appropriation” has resulted in a global reexamination of such practices.

Corporations continue to face criticism for their appropriation of intangible cultural heritage. In particular, fashion designers have faced criticism for drawing inspiration from indigenous patterns, symbols, and traditional attire and presenting these elements as original creations.<sup>72</sup> Fashion is a manifestation of a community’s intangible cultural heritage. It serves as a means of expressing dynamic traditions, values, and histories through the transmission of distinct styles and designs. The act of appropriating such symbols, styles, or designs is really an appropriation of the culture’s collective identity. There have been numerous examples of appropriation specifically within the fashion industry.<sup>73</sup> In 2012, the Navajo Nation filed a lawsuit against Urban Outfitters for selling goods, under the Navajo name, that mimicked “Navajo tribal patterns, including geometric prints and designs fashioned to mimic and resemble Navajo Indian and tribal patterns, prints and designs.”<sup>74</sup> Other companies such as Zara, Anthropologie, Patowl, and Shein have also been accused of stealing various indigenous patterns and designs from Mexico for

70. Tania Phipps-Rufus, *Companies Accused of Exploiting Cultural Identity of Kenya’s Maasai*, GUARDIAN (Aug. 8, 2013, 5:08 PM), <https://www.theguardian.com/sustainable-business/ethical-exploit-cultural-brands-masai> [https://perma.cc/E6Q2-QYQU]; see also Valeria Maria Salvetti Falla, *Limits to Cultural Celebration: Effects of Cultural Appropriation on Consumer Behavior 1* (July 9, 2021) (Master’s work project, Nova School of Business and Economics) (on file with the North Carolina Law Review).

71. See *supra* notes 17–19 for scholarly works on the impact of cultural appropriation on indigenous cultures.

72. See, e.g., *infra* notes 72–79 and accompanying text.

73. See, e.g., Tonya Blazio-Licorish & Obi Anyanwu, *How Cultural Appropriation Became a Hot-Button Issue for Fashion*, WOMEN’S WEAR DAILY (Nov. 3, 2020, 12:30 AM), <https://wwd.com/fashion-news/fashion-features/how-cultural-appropriation-became-a-hot-button-issue-for-fashion-1234579968/> [https://perma.cc/UK3N-3ZUU]; see also *Crimes of Fashion: Intellectual Property and Indigenous Dress*, INT’L & AREA STUD. LIBR. (Apr. 13, 2016), <https://publish.illinois.edu/iaslibrary/author/sbirch2illinois-edu/> [https://perma.cc/A6YM-5ZXD].

74. *Navajo Nation and Urban Outfitters Reach Settlement over Trademark Rights*, COLUM. J.L. & ARTS (Aug. 2, 2019), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/42> [https://perma.cc/X2VX-GXDJ]; Nicky Woolf, *Urban Outfitters Settles with Navajo Nation After Illegally Using Tribe’s Name*, GUARDIAN (Nov. 18, 2016, 7:22 PM), <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement> [https://perma.cc/X4KN-3F5K (dark archive)].

their clothing.<sup>75</sup> Zara has been accused of using patterns distinctive to the indigenous Mixteca community of San Juan Colorado.<sup>76</sup> Anthropologie has been accused of having used an embroidery design developed by the Mixe community of Santa Maria Tlahuitoltepec.<sup>77</sup> Shein has been accused of using patterns from the Yucateca origin.<sup>78</sup> Nike has had to cancel the launch of their “Puerto Rican” version of an Air Force 1 sneaker after the objection of the Guna community of Panama.<sup>79</sup> Not only have massive retailers been accused of stealing patterns and designs, but even high-end designers have been criticized. Alejandro Frausto, the cultural minister of Mexico, wrote a letter to Carolina Herrera, accusing her of using embroidery techniques and patterns specific to certain indigenous communities.<sup>80</sup>

Aside from fashion, the exploitation of intangible cultural heritage can be found in music, movies, and even random objects, like dolls and cigarette boxes. In the music industry, the popularity of reggaeton has created a so-called “Despacito effect” which “echoes broader patterns of appropriation and consumption of Caribbean music genres by Euro-American markets.”<sup>81</sup> Most recently, Rosalia, a Spanish singer, has been accused of cultural appropriation due to her growing popularity within the reggaeton genre compared to native singers like Bad Bunny.<sup>82</sup> With respect to movies, Disney has been at the receiving end of many of the numerous cultural exploitation accusations. For example, Disney produced the movie *Coco* in 2017.<sup>83</sup> In this film, Disney presents the Mexican ceremony of the Day of the Dead.<sup>84</sup> Disney was accused

75. See Megan C. Hills, *Mexico Accuses Zara, Anthropologie and Patowl of ‘Cultural Appropriation,’* CNN (May 31, 2021, 9:40 PM), <https://www.cnn.com/style/article/mexico-zara-anthropologie-cultural-appropriation/index.html> [https://perma.cc/5HDK-LA74].

76. *Id.*

77. *Id.*

78. Niza Rivera, *Marca Yucateca Acusa a Shein pro “Plagio” del Diseño de un Huipil; Cultura Pide Explicación,* PROCESO (July 21, 2022, 12:35 AM), <https://www.proceso.com.mx/cultura/2022/7/21/marca-yucateca-acusa-shein-por-plagio-del-diseno-de-un-huipil-cultura-pide-explicacion-290000.html> [https://perma.cc/QW7G-E7ZT].

79. Karu F. Daniels, *Nike’s ‘Puerto Rico’ Sneaker Given the Boot After Objection of Indigenous Panamanian Group,* N.Y. DAILY NEWS, <https://www.nydailynews.com/news/national/ny-nike-cancels-puerto-rico-sneaker-20190522-g4ybfwwrpnfp3p7fbb25egx6ce-story.html> [https://perma.cc/CJY9-CQML (staff-uploaded, dark archive)] (last updated May 22, 2019, 7:03 PM).

80. Vanessa Friedman, *Homage or Theft? Carolina Herrera Called Out by Mexican Minister,* N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/fashion/carolina-herrera-mexico-appropriation.html> [https://perma.cc/24FF-TFJT (staff-uploaded, dark archive)].

81. Ellen Rebecca Bishell, *Reggaeton Violated by the New Conquistadors,* MORNING STAR (Apr. 13, 2022), <https://morningstaronline.co.uk/article/c/reggaeton-violated-new-conquistadors> [https://perma.cc/7HKL-3EBN (staff-uploaded, dark archive)].

82. *Id.*

83. Rebecca Domas, *Unmasking the Mouse: Cultural Appropriation in Disney Films 85* (Dec. 2021) (B.A. thesis, Kutztown University).

84. *Id.* at 88.



of exploiting the Mexican tradition soon after the success of *Coco*.<sup>85</sup> Disney launched a marketing campaign which gave rise to steep profits emanating from conceptual ideologies encompassing building altars and holding ceremonies at Disney Parks and selling themed merchandise; rumors ultimately spread indicating that Disney attempted to trademark the Day of the Dead.<sup>86</sup> Subsequent to Disney's success associated with the release of the Day of the Dead theme, Mattel decided to join in on the profit.<sup>87</sup> Mattel released a Day of the Dead Barbie, which was to be retailed at \$75.<sup>88</sup> The doll featured a black mermaid-style dress decorated with monarch butterflies, marigolds, and roses.<sup>89</sup> Her face is adorned with Calavera Catrina makeup, and her head is embellished with a crown of marigolds, common with the Day of the Dead ceremony.<sup>90</sup> Finally, even Marlboro has been accused of exploiting the cultural heritage.<sup>91</sup> In Mexico, Marlboro began producing cigarette boxes that showed ofrenda symbols on their packs of cigarettes during Mexico's holiday season.<sup>92</sup>

Regardless of the industry, there have been various examples of using intangible cultural heritage in an effort to make a substantial profit under the guise of cultural appreciation and representation. Corporations often do not compensate or even acknowledge the communities from which this heritage derives. This unsanctioned and uncompensated use derives from a settler colonialist and colonialist presumption of entitlement to all cultural resources owned by those considered outside of dominant societies. In particular, settler societies, such as the United States, have used expressions of colonized cultures to unify their diverse populations.<sup>93</sup> This notion of "shared heritage" allows the settler state to mobilize citizens under the precept of nationalism.<sup>94</sup> The hegemonization of intangible heritage may result not only in the loss of intangible cultural heritage, but also "a uniformization of the different socio-

85. Juan Castellanos, *Coco: Capitalist Appropriation of Mexican Tradition*, LEFT VOICE (Nov. 22, 2017), <https://www.leftvoice.org/coco-capitalist-appropriation-of-mexican-tradition/> [<https://perma.cc/RV9F-UJZ3>].

86. *Id.*; see also Cindy Y. Rodriguez, *Day of the Dead Trademark Request Draws Backlash for Disney*, CNN, <https://www.cnn.com/2013/05/10/us/disney-trademark-day-dead/index.html> [<https://perma.cc/R9YD-SK6U>] (last updated May 11, 2013, 2:31 AM).

87. Sandra E. Garcia, *Día de Muertos Barbie: Respectful Tribute, or 'Obviously Cultural Appropriation'?*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/us/dia-de-muertos-barbie-mattel.html> [<https://perma.cc/HU2B-5QHT> (staff-uploaded, dark archive)].

88. *Id.*

89. *Id.*

90. *Id.*

91. Grazielle Grilo, Joanna E. Cohen, Luz Myriam Reynales-Shigematsu, Kevin Welding, Maria Guadalupe Flores Escartin, Alena Madar & Katherine Clegg Smith, *Cultural Appropriation on Marlboro Packs in Mexico: Ofrenda Symbolism a Cruel Irony*, 32 TOBACCO CONTROL 806, 806 (2023).

92. *Id.*

93. BROWN, NATIVE CULTURE, *supra* note 18, at 15.

94. *Id.*

cultural groups and their ways of thinking, living, and perceiving their surroundings.”<sup>95</sup>

It is within the interest of settler societies to keep intangible cultural resources within the public domain. Scholars have compared cultural appropriation to a violation of human rights.<sup>96</sup> Cultural appropriation is seen as an affront to a community’s self-respect and identity.<sup>97</sup> The consequences of cultural appropriation, in a greater sense, lead to a deterioration of indigenous autonomy and sovereignty. As outlined throughout this Article, the current copyright law reinforces the ability of colonialist and settler colonialist societies to inappropriately lay claim to intangible resources.

## II. DESETTLING: A CRITICAL APPROACH TO INTANGIBLE HERITAGE PROTECTION

### A. *Settler Colonialism in Intellectual Property*

Eurocentric concepts of culture and society have formed part of the now settler colonial United States. Colonialization has accomplished the subjugation of non-European culture. The scope of colonialism and its impact on laws and society can be looked at through the theory of settler colonialism.<sup>98</sup> Settler colonialism describes the process by which the West settled and exercised

95. Farah & Tremolada, *supra* note 6, at 173. While there may be an argument that larger companies’ utilization of ICH would result in its longer survival, that argument does not outweigh the harm that is derived from offensive appropriations. See Reed, *Fair Use*, *supra* note 22, at 1387–88 (“In addition to furthering the dispossession of Indigenous lands and resources, unauthorized appropriations of Indigenous cultures have had a tendency to compound psychological, social, and political harms already experienced by Indigenous peoples. Failure to combat unauthorized appropriations risks perpetually inflicting these harms on current and future generations.”).

96. See, e.g., Farah & Tremolada, *supra* note 6, at 126–27.

97. “[T]he line between cultural appreciation and appropriation is thin—one whose delineations have caused much spilled ink.” McLean, *supra* note 60, at 485. According to Professor Kwame Anthony Appiah, “The offense isn’t appropriation; it’s the insult entailed by trivializing something another group holds sacred.” KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* 209–10 (2018).

98. There is a large body of scholarship that examines how the indigenous peoples within the United States are colonized. See generally Addie C. Rolnick, *Indigenous Subjects*, 131 *YALE L.J.* 2652 (2022) (tracing the recent attacks on indigenous rights in U.S. territories through exploration of federal Indian law, constitutional race law, and law of the territories); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 *CALIF. L. REV.* 173 (2014) (examining the application of human rights to indigenous peoples rights); Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 *ARIZ. ST. L.J.* 75 (2002) (analyzing indigenous sovereignty in the United States); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *HARV. L. REV.* 381 (1993) (examining the colonial roots of federal Indian law); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 *WIS. L. REV.* 219 (1986) (exploring the Eurocentric roots of federal Indian law).

sovereignty over the territories it occupied.<sup>99</sup> Upon arrival, settlers assumed entitlement of sovereignty and the right to exclusive control of the territory.<sup>100</sup> While the primary intent of settlement was territorial expansion, colonization further resulted in the ability to “create and control a society of their own imagining.”<sup>101</sup> Part of the colonization process was to exploit and profit off the lands indigenous peoples occupied. Indigenous peoples were seen as the “obstacle” that could only be overcome through what Patrick Wolfe observes as “a winner-take-all project whose dominant feature is not exploitation but replacement.”<sup>102</sup> Unlike other colonized nations, the settlers of the Americas did not just exploit the land and resources. Instead, the settlers occupied and expropriated land, and established a dominant society over the indigenous cultures.<sup>103</sup>

To fully comprehend the dynamic between the “colonizer” and the “colonized” it is important to extricate the purpose of colonization. Professor Antony Anghie describes colonialism as “the grand project that has justified . . . a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.”<sup>104</sup> According to Professor Katsu Saito, “the rationale for imposing extensive administrative structures . . . [is] to eradicate the cultures, languages, and histories, as well as the social, economic, legal, and political structures and institutions of the colonized.”<sup>105</sup> Through the creation of these

99. The United States has always maintained settler society. *See* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 21–22 (2014) (“While the United States has maintained external colonies, it is first and foremost a settler society. In other words, the early colonists of North America came not simply to exploit its land, labor, or natural resources and then return to their ‘mother country,’ but to settle permanently and, as part of that process, to exercise sovereignty over the territories they occupied.”); *see also* Patrick Wolfe, *Structure and Event: Settler Colonialism, Time, and the Question of Genocide*, in *EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY* 102, 103 (A. Dirk Moses ed., 2008) (“[S]ettler societies characteristically devise a number of often coexistent strategies to eliminate the threat posed by survival in the midst of irregularly dispossessed social groups who were constituted prior to and independently of the normative basis on which settler society is established.”).

100. As stated by aboriginal scholar Irene Watson, “The myth of colonialism is that it carried with it and applied sovereignty. The truth is that state sovereignty was claimed and constituted through colonialism.” IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW* 5 (2015).

101. Saito, *supra* note 99, at 26; *see also* GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 6–14 (2009).

102. PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPHIC EVENT* 163 (1999).

103. *See* HIXSON, *supra* note 23, at 4 (“What primarily distinguishes settler colonialism from colonialism proper is that the settlers came not to exploit the indigenous population[s] for economic gain, but rather to remove them from colonial space.”).

104. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 3 (2004) (focusing on the relationship between international law and colonialism).

105. Saito, *supra* note 99, at 23–24.

hegemonic structures within legal systems, settler colonial societies are able to maintain control over the colonized.<sup>106</sup> This system of control aids in the othering of indigenous cultures and facilitates the means by which the settler state can exercise legal, geographic, social, economic, and political subjugation of entire classes of people. Settler colonial societies often expound their own presumptively sacrosanct “democratic and humanitarian values” to continue a narrative that justifies its continued subjugation of indigenous peoples.<sup>107</sup>

The construction of the “us” and “them” dichotomy rationalizes the manufactured hierarchy created by settler colonial states to immortalize norms that continue the status quo of the settler colonial state. In a settler colonialist state, such as the United States, the aim is not only to extract resources but to permanently settle and form new sovereign communities on the newly “discovered” land.<sup>108</sup> This ongoing structure of invasion is omnipresent in the laws, institutions, and systems of governance within the American settler state.<sup>109</sup> While the definitional impacts of the settler colonialist state typically reference tangible land, the use of indigenous intellectual property is also applicable to the furtherance of the settler colonial state.

Intellectual property is generally founded in Western philosophical traditions.<sup>110</sup> The founding fathers were Anglo-American settler colonists, who constructed racial norms within the Constitution as a means of protecting their own privilege.<sup>111</sup> The westernized concept of “property” plays a fundamental

106. LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW* 32 (2010) (“[T]he defining borders separating settler normativity and non-settler alterities can be reinforced or undermined at different times and for different purposes. Indeed, a selective capacity to draw lines and/or to erase them depending on opportunity and local circumstances constitutes a crucial marker of settler substantive sovereignty.”).

107. Saito, *supra* note 99, at 27–28; ANGHIE, *supra* note 104, at 96–97. It is also important to consider how European ideals have shaped the way colonization has occurred outside of solely settler colonist societies. *See generally* ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN, AND FRANCE C.1500–C.1800* (1995) (discussing the ways that colonialism has shaped our porous and unstable, multicultural, and violent world).

108. JÜRGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* 10–12, 15–17 (Shelley L. Frisch trans., Markus Wiener Publishers 2d ed. 2005).

109. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388, 390 (2006) [hereinafter Wolfe, *Elimination of the Native*] (“Settler colonizers come to stay: invasion is a structure not an event.”); LORENZO VERACINI, *THE SETTLER COLONIAL PRESENT* 9 (2015) (“[S]ettler colonialism forever proclaims its passing but it never goes away.”).

110. Alpana Roy, *Intellectual Property Rights: A Western Tale*, 16 ASIA PAC. L. REV. 219, 219 (2008).

111. Saito, *supra* note 99, at 6; HIXSON, *supra* note 23, at 1–2 (“American settler colonialism evolved over the course of three centuries, resulting in millions of deaths and displacements, while at the same time creating the richest, most powerful, and ultimately the most militarized nation in world history.”). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (arguing for the existence of white status as a property interest for individuals and groups that did not disappear after the end of Jim Crow).

role in the continuation of the settler colonist state.<sup>112</sup> According to Professor Anjali Vats, “By treating colonies as functionally empty, via Lockean labor theory and property law, settler colonists legitimized not only their land claims but also the systems of knowledge that underwrote them.”<sup>113</sup> Eurocentric ideals of property are embedded in the construction of knowledge and culture in legal and nonlegal spaces.<sup>114</sup> Because intellectual property is so significant in the generation and dissemination of knowledge and culture, this entrenchment of Eurocentric ideals of property has resulted in the establishment of hegemonic systems aimed at protecting the beliefs and ideologies of the dominant society. These hegemonic structures not only work to enshrine settler colonialism in the enforcement of intellectual property regimes, but also to enable these legal frameworks to perpetuate colonialism.

Colonialism spread the European model of copyright protection to the various regions across the globe.<sup>115</sup> The creation of the Copyright Clause of the Constitution expounds similar structural implications manifested from settler colonist thought. The “idea” of copyright evolved from values of European Enlightenment, liberalism philosophy. Professor Shelley Wright argues that copyright continues to be one of “the quintessential representations of the modern, public world of bourgeois expansion, male dominance and European colonial influence in the creation of political and economic systems in Europe and the colonies.”<sup>116</sup> Western ideas of society and what is “protectable” are inextricably intertwined with copyright doctrine. Dr. Alpana Roy argues that “the concept of copyright has been infused with the ideals of the liberal legal tradition”<sup>117</sup> and “international agreements such as the Berne Convention and the TRIPS Agreement are not simply ‘agreements,’ but rather are multifaceted projects (or dominant narratives) which are laden with values stemming from particular cultural traditions, and which have evolved from particular historical moments in Western history.”<sup>118</sup>

In order to recognize these disparate racial dynamics as they pertain to copyright doctrine in the United States, it is important to acknowledge the

112. This is most notable in the precedential decision of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), which held that that title to land passed through the U.S. federal government was superior to that passed through the Piankeshaw Indians. *Id.* at 601–04.

113. Anjali Vats, *Mapping Property*, 105 Q.J. SPEECH 508, 509 (2019) [hereinafter Vats, *Mapping Property*]. The Lockean Labor Theory asserts that individuals are entitled to private property acquired from the fruits of their own labor. Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136, 141–42 (2020).

114. Vats, *Mapping Property*, *supra* note 113, at 510.

115. SHELLEY WRIGHT, INTERNATIONAL HUMAN RIGHTS, DECOLONISATION AND GLOBALISATION: BECOMING HUMAN 119 (2001).

116. *Id.*

117. Alpana Roy, *Copyright: A Colonial Doctrine in a Postcolonial Age*, 26 COPYRIGHT REP. 112, 112 (2008).

118. *Id.*

United States' status as a settler colonial society, created by settlers "who arrived with a presumption of sovereign entitlement and an unshakeable belief in their right to establish a state over which they could exercise permanent and exclusive control."<sup>119</sup> Ultimately, this entitlement has fostered white supremacist beliefs in the superiority of white peoples over all races.<sup>120</sup> This notion of superiority has resulted in a fabricated belief in the rightful possession and control over indigenous land and labor.<sup>121</sup> The idea of the rightful possession of indigenous land can also be analogized to intellectual property. Indeed, the boundaries of intellectual property have been compared to real property.<sup>122</sup> The deployment of targeted strategies of erasure and subjugation has permeated to laws served to eliminate indigenous culture and replace it with settler culture. As John Fiske articulates, "Popular culture always is part of power relations; it always bears traces of the constant struggle between domination and subordination, between power and various forms of resistance to it or evasions of it . . . ."<sup>123</sup>

Notwithstanding the seemingly neutral status of copyright law, there is a rich trove of literature about the implicit hierarchical nature of U.S. copyright law.<sup>124</sup> This hierarchical structure manifests itself through doctrines that define

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119. Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of COVID-19*, 11 CALIF. L. REV. ONLINE 517, 518 (2020).

120. See Shannon Speed, *The Persistence of White Supremacy: Indigenous Women Migrants and the Structures of Settler Capitalism*, 122 AM. ANTHROPOLOGIST 76, 82 (2020) (explaining the racially fueled structures that underpin U.S. settler colonialism and that the manifestation of white supremacy occurs within processes of indigenous dispossession, slavery, and immigrant exploitation).

121. *Id.*

122. See Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 435 (2005). But see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 971, 1000–04 (1990) ("Treating intellectual property as if it were real property, of course, can be problematic."); Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 389 (2003) ("To conceive of copyright as essentially private property, akin to rights in land, is to ignore the important historical and realist tradition that has envisioned real property as an instrumental construct designed to pursue certain social and political goals, as opposed to protecting pre-social and pre-political rights.").

123. JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* 17 (Routledge 2d ed. 2010).

124. See generally Anjali Vats, *The Racial Politics of Fair Use Fetishism*, 1 LSU L.J. FOR SOC. JUST. & POL'Y 67 (2022) [hereinafter Vats, *Racial Politics*] (critiquing the fair use doctrine as a tool of "racial and (post)colonial domination"); Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEX. A&M J. PROP. L. 5 (2020) [hereinafter Rosenblatt, *Copyright's Excess*] (examining the inherent preference for corporate interests in connection to copyright protection); Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735 (2018) (examining the framework for Critical Race IP within wider scholarship); Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274 (2017) (examining the inequality musical vocalists face under the U.S. Copyright Act); Reed, *Who Owns*, *supra* note 24, at 275–310 (discussing the inequalities in the U.S. Copyright Act in relation to sound records and nondramatic music performances); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513 (2016) (examining copyright law against the framework of

the contours of what is deemed protectable.<sup>125</sup> Professor Elizabeth Rosenblatt has suggested that “copyright law implicitly defines a hierarchy that values certain kinds of creations and creators over others by deeming some expressions protectable and others not, and giving some creators exclusive rights to control the tools of discourse.”<sup>126</sup> This structure is reinforced through the settler state and strengthened through inequitable application of the law, historical discrimination, and societal forces. Authors of color, particularly indigenous creators, have seen a disparately unfavorable impact on the protection of their creative work as a direct result of the inconsistent application of copyright laws.

Examining copyright through the lens of settler colonist theory unmasks the Eurocentric view of the progression of “science and useful arts.”<sup>127</sup> Copyright is another byproduct of colonization and imperialism.<sup>128</sup> The use of copyright to facilitate the commercialization of indigenous heritage is antithetical to numerous cultural values and customs. Yet, the law of copyright implicitly communicates this employed ideology of superiority and sovereignty over indigenous land and culture. As a result, the settler colonial state continues to exercise “legitimate” means to propagate the colonist state’s dominant culture. Through this legitimization of the dominant culture, the settler colonial state can continue to expropriate cultural resources.

#### B. *Desettling as a Critical Approach*

Desettling is an innovative theoretical method that was developed by a group of education experts with the intention of disrupting established,

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distributive justice); Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88 (2013) (examining distributional concerns of the fair use doctrine); John Tehrani, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237 (2012) [Tehrani, *Towards a Critical IP Theory*] (analyzing copyright as a reification of societal and hegemonic structures); Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829 (2011) (discussing visual-textual bias in copyright law); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179 (2008) (arguing for atonement for cultural appropriation of the cultural production of black artists); Greene, *Intersection*, *supra* note 24, at 365–85 (“compar[ing] how both blacks and women have a shared commonality of treatment with indigenous peoples and their creative works” within copyright laws); Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 (2009) (addressing the challenges of copyright social justice with the Copyright Clause mandate of social utility); Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717 (2007) [hereinafter Aoki, *Distributive and Syncretic Motives*] (discussing the distributive effects of intellectual property regime).

125. Elizabeth L. Rosenblatt, *Copyright’s One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 609 (2019) [hereinafter Rosenblatt, *Appropriation Ratchet*].

126. Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377, 379 (2019).

127. U.S. CONST. art. I, § 8, cl. 8.

128. See, e.g., Doris Estelle Long, *Traditional Knowledge and the Fight for the Public Domain*, 5 J. MARSHALL REV. INTELL. PROP. L. 317, 324 (2006).

invisible constructions that are present within the field of education. The process of “desettling” has never been used in a legal context.<sup>129</sup> However, there are numerous parallels between education and the law that can be used to reformulate the way in which settler colonial practices can be demolished. These commonalities can be used to help deconstruct the ways in which settler colonialism operates within the legal system. In Cheryl Harris’s *Whiteness as Property*, she defined settled expectations as “the set of assumptions, privileges, and benefits that accompany the status of being white . . . [that] [w]hites have come to expect and rely on” across the many contexts of daily life.<sup>130</sup> The legitimization of settler colonialism is evidenced by socially and ideologically constructed protections for dominant subsets of society.<sup>131</sup> These settled expectations are implicit and associated with institutionalized privileges and constructs.

In *Desettling Expectations in Science Education*, the authors utilize the construct of settled expectations from *Whiteness as Property* to serve as the underlying analysis of desettlement.<sup>132</sup> Within the context of education, the construction of settled expectations include “what constitutes an acceptable explanation, argument, or analysis; what ‘smart’ looks and sounds like; whose narratives and experiences are valued and for what purposes.”<sup>133</sup> Ultimately, these settled expectations operate normatively to create a divide that is defined by hierarchical terms as well as dominant understandings and practices.<sup>134</sup> These dominant constructions serve to marginalize and silence heterogenous activities and to alienate nondominant communities.<sup>135</sup> Settled knowledge relations within fields of education are historically defined by whiteness and dominant structures that continue inequalities in society and education.<sup>136</sup>

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129. To be clear, many legal academics have used the term “decolonize” to erase the effects of settler colonialism. See, e.g., Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 99 (2006). Decolonization refers to the termination of colonialism and the granting of peoples and territories their right to self-determination. Mohotaj Binte Hamid & Bruno Zeller, *Right to Self-Determination: Extended Roles of the United Nations Through the Decolonization Process*, 42 HOUS. J. INT’L L. 479, 490 (2020). As described in this section, this Article purposefully avoids use of the term “decolonize” in reference to the dismantling of colonial-made hierarchies within the sphere of copyright law in favor of the vernacular of “desettling.”

130. Harris, *supra* note 111, at 1713.

131. See *id.*

132. Megan Bang, Beth Warren, Ann S. Rosebery & Douglas Medin, *Desettling Expectations in Science Education*, 55 HUM. DEV. 302, 303 (2012).

133. *Id.*

134. *Id.* at 304.

135. *Id.*

136. *Id.* at 314–15.



The process of desettling requires the disruption of colonized practice so as to deconstruct settled expectations.<sup>137</sup> It necessitates an understanding of hierarchical relations in order to shift the settled constructions of human relationships.<sup>138</sup> It requires an explicit reworking of the divisions caused by hierarchical relations, historically structured inequalities, and assumed assimilation into particular paradigms.<sup>139</sup> The process of desettling can be accomplished through removal of barriers caused by historic inequities. It is important to divorce the concept of decolonizing from desettling. Like desettling, decolonization requires the recognition of the expropriations of land through the process of colonization. In Professors Eve Tuck and K. Wayne Yang's piece *Decolonization Is Not a Metaphor*, the authors explain that the term decolonization has been used too often as a metaphor to fix or improve our societies and schools.<sup>140</sup> In the context of settler colonialism, decolonization generally involves the repatriation of land. As Tuck and Yang explain, decolonization does not occur merely by the reframing of colonial practices.<sup>141</sup>

For example, the classroom is traditionally structured as a hierarchy—the professor stands at the front of the classroom, while the students are seated. This spatial configuration provides a hierarchical model where the professor remains at the top, with the students at the bottom. To desettle the classroom would be to put both the professor and the students seated in a circle.<sup>142</sup> By placing both students and professors in the classroom into a more equitable spatial configuration, it deconstructs the hierarchical model of the classroom. While this does not “decolonize” this classroom, it removes some of the inequities placed by traditional models.<sup>143</sup>

It is important to acknowledge that settler colonial societies, like the United States, operate in a way to continue the colonial project of expropriation, erasure, marginalization, and suppression of indigenous societies. Ultimately, the goal of desettling is to advance anticolonial goals that call into question settler perspectives. By disrupting colonized practices, desettling works to “untangle the entrenched patterns and practices of colonized and capitalistic thinking.”<sup>144</sup> While desettling does not amount to total decolonization, it can help to close gaps and inequities created by hierarchical systems of value.

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137. S. ROSE O'LEARY & BENEDICT TURNER, TOWARDS A DECOLONIZED FUTURE: DESETTLING HCI (2020), <https://educhi2020.hcilivingcurriculum.org/wp-content/uploads/2020/04/educhi2020-final50.pdf> [<https://perma.cc/8GKL-EULQ>].

138. Bang et al., *supra* note 132, at 315.

139. *Id.* at 304.

140. Tuck & Yang, *supra* note 21, at 1.

141. *Id.*

142. O'LEARY & TURNER, *supra* note 137.

143. *See id.*

144. *Id.*

### III. FIXATION IN COPYRIGHT LAW AS A CONTINUATION OF THE SETTLER STATE

The U.S. Constitution grants Congress the power to enact laws that grant, for limited times, exclusive rights to authors and inventors in their respective writings and discoveries.<sup>145</sup> The Framers of the Constitution regarded copyright and patent as forms of property that Congress is charged to protect in order to encourage “the Progress of Science and useful Arts.”<sup>146</sup> In *Mazer v. Stein*,<sup>147</sup> the Supreme Court reaffirmed the rationale underlying the constitutional copyright clause: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>148</sup> The Federalist Papers further evidence the intention of the Framers to secure individual intellectual property rights in furtherance of the public good.<sup>149</sup>

Copyright law in the United States specifically seeks to protect primarily an author’s pecuniary interests. The ultimate motivation behind these protections, however, is not to reward the authors, but to incentivize creative activity as an overall public benefit.<sup>150</sup> Under this strict view of copyright, authors are granted only the minimum rights required to fulfill the constitutional mandate to incentivize creation.<sup>151</sup> This materialism-centric

145. U.S. CONST. art. I, § 8, cl. 8.

146. *Id.*

147. 347 U.S. 201 (1954).

148. *Id.* at 219; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (“Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create.”).

149. THE FEDERALIST NO. 43, at 222 (James Madison) (George W. Carey & James McClellan eds., 2001). James Madison rationalizes intellectual property as a necessity for the public good:

The utility of this power will scarcely be questioned. The copy-right of authors has been solemnly adjudged, in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of congress.

*Id.*

150. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 1.03[A] (2023) [hereinafter NIMMER ON COPYRIGHT] (“[T]he primary purpose of copyright [is] not to reward [the] author[], but is rather to secure ‘the general benefits derived by the public from the labors of authors.’”).

151. *See, e.g.*, Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 996 (1990) [hereinafter Ginsburg, *A Tale of Two Copyrights*] (“The first framers of copyright laws, both in France and in the U.S., sought primarily to encourage the creation of and investment in the production of works furthering national social goals.”); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 290 (1970) (examining the rationales for copyright in books and arguing against extension of period of protection).

system of copyright often protects the commercial value of a work instead of the actual intellectual production by the author.<sup>152</sup> The economic view of copyright has developed exclusivity of protection for particular speakers and creators in particular marketplaces.<sup>153</sup> This results in the exclusion of certain authors whose works do not comport with copyright law's economic-based property right. Thus, the law seemingly provides value to certain types of works while excluding others. According to Professor Rosenblatt, this creates a power dynamic among those who engage in particular forms of expression and communication.<sup>154</sup> Eurocentric copyright law advances this "hierarchy" of expressions through the creation of doctrines that are artificially utilized to promote this framework. The fixation doctrine is a way in which copyright law has excluded certain forms of creative works from protection.

#### A. *Fixation: An Overview*

According to the late Professor Keith Aoki, "Fixation plays a crucial, though overlooked, role in the developmental history of U.S. copyright law."<sup>155</sup> For a work to fall within the confines of copyright law, it must be considered an "original work[] of authorship fixed in any tangible medium of expression, now known or later developed."<sup>156</sup> In order for the work to be considered adequately fixed it must be able to be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>157</sup> Section 101 of the Copyright Act provides further guidance: "A work is 'fixed' in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>158</sup> Fixation must be effectuated "by or under the authority of the author."<sup>159</sup> Under this

152. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 199–217 (2001) (commenting on the potential devastating power and effects of intellectual property law). Lessig argues that too much protection may stifle progress and result in an artificial system designed to promote anticompetitive interests. *Id.*; see also Shun-Ling Chen, *Exposing Professionalism in United States Copyright Law: The Disenfranchised Lay Public in a Semiotic Democracy*, 49 U.S.F. L. REV. 57, 68 (2015) ("Aside from the progress the Constitution seeks to promote, another important factor attributing to the previous expansion of copyrightable subject matter was copyright law's desire 'to protect the commercial value of the productive effort of the individual's mind.'").

153. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 601.

154. *Id.*

155. Aoki, *Distributive and Syncretic Motives*, *supra* note 124, at 758.

156. 17 U.S.C. § 102(a).

157. *Id.*

158. 17 U.S.C. § 101.

159. *Id.*; see Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 21 (2014) ("The historical media of authorship all required fixation, and in an important way they defined the concept. They were media, but they were a particular kind of media. They were media that involved an encoding of expression in a durable

definition, any work that is ephemeral in nature or incorporates elements that change over time may not be protected under copyright law.

The fixation requirement is a product of decades-long developments to federal copyright law. Prior to the 1976 Copyright Act, fixation was not a requirement for subject matter to qualify as copyrightable. The early copyright acts did not include fixation as a requirement because copyright protection extended only to specifically enumerated categories of works.<sup>160</sup> Since the inception of the first U.S. Copyright Act of 1790 through the amendments to the 1909 Act, fixation was superfluous, as these categories of works enumerated under the statutes were all fixed in their very nature.<sup>161</sup>

Under the 1909 Act, Congress expanded copyrightability to include “all the writings of an author.”<sup>162</sup> While “fixation” was not delineated in the 1909 Act, qualification for copyright protection required both that the work be “published” with requisite notice and a physical copy be deposited with the Copyright Office.<sup>163</sup> These requirements necessitated the incorporation of the underlying work into a physical form.<sup>164</sup> During the legislative debates surrounding the amendments to the 1909 Act, various congressmen proposed eliminating the fixation requirement.<sup>165</sup> In 1930, a revision was introduced to confer copyright protection to works “in any medium or form or by any method through which the thought of the author may be expressed.”<sup>166</sup> In 1936, Congress considered a similar revision, which further extended copyright protection to “all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other composition, whatever the mode or form of such renditions, performances, or interpretations.”<sup>167</sup> The intent behind these revisions was effectively to recognize that the purpose of copyright was to protect the intellectual fruit of

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physical form. They could be distributed, experienced, kept, and reused. Most importantly, they could be copied. Their value was intertwined with their vulnerability. Copyright law incentivized their creation by addressing the vulnerability while preserving the value.”).

160. Laura A. Heymann, *How To Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844 (2009).

161. For example, in 1790, maps, charts, and books were the first and only three subject matters protected by the 1790 Copyright Act. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124. The Copyright Act was amended in 1831 to protect musical compositions. Copyright Act of 1831, ch. 16, 4 Stat. 436.

162. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076.

163. *See id.*; Heymann, *supra* note 160, at 844.

164. Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2236 (2014); Heymann, *supra* note 160, at 844.

165. Carpenter & Hetcher, *supra* note 164, at 2237 (citing S. 3008, 88th Cong. (1964) (introduced by Sen. John McClellan); H.R. 11947, 88th Cong. (1964) (introduced by Rep. Emanuel Celler); H.R. 12354, 88th Cong. (1964) (introduced by Rep. William St. Onge)).

166. *Id.* (citing H.R. 6990, 71st Cong. § 1 (1930)).

167. *Id.* (citing H.R. 10632, 74th Cong. (1936)).

authors, regardless of whether the work is embodied in some sort of physical form.<sup>168</sup>

At the same time, Congress progressively increased the scope of copyright protection in order to accommodate rapidly evolving technology within the confines of copyright law. In 1965, the conversation around fixation appeared to reignite in various proposed revision bills.<sup>169</sup> These bills recommended that “the present implicit requirement of fixation . . . be made explicit in the bill, and that it be stated broadly enough to cover ‘any new forms or media [of fixation] that may be developed.’”<sup>170</sup> In 1976, Congress eventually deserted the category system in favor of a broader definition of copyright.<sup>171</sup> As technology advanced and authors found diverse mediums of expression, Congress added the fixation requirement “as a sort of flexible gatekeeper for the protection of new media.”<sup>172</sup> The implementation of the fixation requirement allowed for a new class of creative works that were beyond the “artificial and largely unjustifiable distinctions” presented in the early copyright acts.<sup>173</sup> While the elimination of the publication requirement allowed for new classes of creative works to be protected, the creation of the fixation requirement excluded certain classes of works that fell outside of commonly recognized subject matter.

#### B. *Scholarly Justification for Fixation*

Scholarly discourse surrounding fixation has predominately focused on justifications for fixation. These justifications serve to reinforce the hierarchical structures given to those works that are categorically common within the Eurocentric confines of copyright law. Professor Douglas Lichtman has stated that “the real purpose of the fixation requirement is to narrow copyright’s purview.”<sup>174</sup> The fixation requirement has been employed as a mechanism to exclude certain types of creative works from the realm of copyright protection. Numerous rationales for fixation have been proffered to align with the overarching goal of exclusion.

The predominant argument put forth by both courts and scholars centers around the concept that fixation is a constitutional requirement. Article 1, Section 8, Clause 8 of the U.S. Constitution charges Congress with the power to secure authors the “exclusive right to their respective Writings.”<sup>175</sup> The term

168. *Id.*

169. *Id.*

170. *Id.* (citing STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, pt. 6, at 4 (Comm. Print 1965)).

171. 17 U.S.C. § 102.

172. BROWN, NATIVE CULTURE, *supra* note 18, at 21–22.

173. Carpenter & Hetcher, *supra* note 164, at 2237 (citing H.R. REP. NO. 94-1476, at 52 (1976)).

174. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 729 (2003).

175. U.S. CONST. art. 1, § 8, cl. 8.

“Writings” has been interpreted to require that a work be fixed.<sup>176</sup> David Nimmer’s treatise on copyright reinforces this belief that fixation is a constitutional requirement:

Fixation in tangible form is not merely a statutory condition to copyright. It is also a constitutional necessity. That is, unless a work is reduced to tangible form it cannot be regarded as a “writing” within the meaning of the constitutional clause authorizing federal copyright legislation. Thus, certain works of conceptual art stand outside of copyright protection.<sup>177</sup>

Commentators and some lower courts still agree that the meaning of the term “Writings” is a constitutional requirement for fixation.<sup>178</sup> If fixation is a constitutional requirement, then Congress would not have the power to protect unfixed works.<sup>179</sup> Scholars have suggested that this constitutional requirement is considered necessary for administrative purposes for infringement cases.<sup>180</sup> One scholar proposed that “Writings” encompasses “fixation” as part of a

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176. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (“Without fixation . . . there cannot be a ‘writing.’” (quoting 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2010)); *Columbia Broad. Sys., Inc. v. DeCosta*, 377 F.2d 315, 320 (1st Cir. 1967) (finding that it is “sensible to say that the constitutional clause extends to any concrete, describable manifestation of intellectual creation; and to the extent that a creation may be ineffable, we think it ineligible for protection”); *United States v. Moghadam*, 175 F.3d 1269, 1273 (11th Cir. 1999) (referring to the fixation as a constitutional requirement throughout the opinion and stating that the “the fixation requirement . . . is said to be embedded in the term ‘Writings’”).

177. NIMMER ON COPYRIGHT, *supra* note 150, § 2.03[B]; *see also* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2023) (“Fixation serves two basic roles: (1) easing problems of proof of creation and infringement, and (2) providing the dividing line between state common law protection and protection under the federal Copyright Act, since works that are not fixed are ineligible for federal protection but may be protected under state law. The distinction between the intangible intellectual property (the work of authorship) and its fixation in a tangible medium of expression (the copy) is an old and ‘fundamental and important one.’ The distinction may be understood by examples of multiple fixations of the same work: A musical composition may be embodied in sheet music, on an audiotape, on a compact disc, on a computer hard drive or server, or as part of a motion picture soundtrack. In each of the fixations, the intangible property remains a musical composition.” (quoting H.R. REP. NO. 94-1476, § 201, at 124 (1976); S. REP. NO. 94-473, § 202, at 107 (1975))).

178. *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1409 (1995) (“[N]o respectable interpretation of the word ‘Writings’ embraces an untapped performance of someone singing in Carnegie Hall.”); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.6.1 (3d ed. 2023) (“There is little doubt that performances subject to protection are ‘writings’ in the constitutional sense for, beyond literalism, there is nothing in the mechanical act of fixation to distinguish writings from nonwritings.”).

179. Heymann, *supra* note 160, at 852.

180. Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595, 604 (1996) (noting “the constitutional writings requirement appears to be concerned with assuring the efficient administration of a copyright system or, perhaps more straightforwardly, to reflect the structure of a historically publication-based system of copyright”).

mutual exchange of interests between society and the author.<sup>181</sup> The requirement of fixation is fundamental to the bargain that allows authors a limited monopoly for which, in return, the work will eventually fall into the public domain.<sup>182</sup>

Scholars also set forth the argument outlining that fixation is important for evidentiary purposes. The argument proposes that a plaintiff that wishes to sue for copyright infringement must present the court with a copy of the infringing work.<sup>183</sup> This argument presupposes that only physical copies of the work are sufficient to present to the court as evidence in a copyright infringement case.<sup>184</sup> Professor Russ Versteeg argues that expanding the definition of fixation to allow for works that are ephemeral in nature is problematic for practical purposes.<sup>185</sup> He opines “one of the most important reasons for requiring fixation in a more or less permanent form as a condition precedent to copyright protection is to ensure that a copyright claimant will be able to provide a court [with] documentary evidence of the copyrightable subject matter.”<sup>186</sup> This argument has been set forth by other scholars, who emphasize that a work can only be proven to be copyrightable if there is a physical or tangible copy.<sup>187</sup>

Scholars have adapted this “parade of horrible” approach to the fixation, articulating that without a fixation requirement “copyright law would forever be mired in disputes over the definition and boundaries of the works.”<sup>188</sup> Using a similar argument, Professor Wendy Gordon analogized the fixation requirement as a “boundar[y] in the same way as the edges on personal property or physical boundaries around realty.”<sup>189</sup> These boundaries, according to

181. Joseph C. Merschman, Note, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress’s Copyright Power*, 34 CONN. L. REV. 661, 681 (2002).

182. *Id.*

183. 1 HOWARD B. ABRAMS & TYLER T. OCHOA, LAW OF COPYRIGHT § 8:3 (2023) (“[T]here could be a staggering problem of proof if there is no tangible copy to determine what the allegedly infringed work actually was for purposes of an infringement action. The erosion of factual certainty on the critical issue of the nature of the allegedly infringed work makes this a can of worms that is better left unopened.”).

184. See Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need To Be Archived To Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 118 (2008) (“In other words, an owner of copyright who wishes to sue another for the infringement of her work, needs a physical copy of her work, which she can present to the court as evidence.”).

185. Russ Versteeg, *Jurimetric Copyright: Future Shock for the Visual Arts*, 13 CARDOZO ARTS & ENT. L.J. 125, 132 (1994).

186. *Id.*

187. PATRY, *supra* note 177, § 3:22 (arguing that fixation is necessarily a requirement because it serves evidentiary purposes for both the contents of the work and also the existence of the work).

188. Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1400 (1997).

189. Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1383 (1989).

Professor Gordon, are functionally important in order to prevent a chilling effect on the use of unprotectable aspects of works.<sup>190</sup>

Scholars have also advocated for the fixation requirement to protect public interests in the accessibility of creative works. If a work of authorship is “fixed” then the work will be able to pass down from “place to place, person to person, and generation to generation.”<sup>191</sup> On the other hand, unfixed works are “difficult to transfer over time and space.”<sup>192</sup> This argument assumes that the fixation requirement will result in a rich public domain, which will in turn enrich society through access to more expression.<sup>193</sup> The perception of fixation as “cheap” and “easy” has led many scholars to prioritize its ostensible public benefits over the potential drawbacks associated with this requirement.<sup>194</sup> Professor Lichtman articulated that “[d]rawing this sort of distinction would be desirable because, while copyright is likely worth its costs in instances where it encourages expressive production, copyright might not be worthwhile in cases where the promise of protection did not in any way increase the incentive to create.”<sup>195</sup> The act of fixation has further been regarded as a reflection of an author’s inherent concern for the protection of their work—that is, if the author cares enough about their work, the author will fix it in a tangible medium.<sup>196</sup>

The propagation of these justifications has perpetuated an erroneous assumption that certain works which are readily fixable should ultimately be more protectable. The notion that works that are fixed are inherently more valuable than those that are not only gives credence to this hierarchical system. The dichotomy between the tangible and intangible has a profound impact on indigenous communities, particularly with those who tend to integrate primarily unfixed works into their cultural output. As a result, viewing fixation as a component of the colonial state will expose the inequitable flaws in the copyright system and initiate the desettling process.

### C. *Fixation in the Settler State*

Settler colonialist strategies of exploitation and exclusion are embedded in U.S. copyright doctrine. The law favors Eurocentric visions of the creative

190. *Id.*

191. Lichtman, *supra* note 174, at 723.

192. *Id.*

193. See Malla Pollack, *What Is Congress Supposed To Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 773–79 (2001).

194. Lichtman, *supra* note 174, at 724.

195. *Id.*

196. *See id.* (“A second and more promising rationale for the fixation requirement is that it helps to distinguish authors whose expressive activities were motivated by copyright from authors for whom copyright was an afterthought.”).



process.<sup>197</sup> Rosemary Coombe describes the law as “the official social text” that helps shape what conduct is considered legitimate or illegitimate.<sup>198</sup> The law reflects the societal constructs built by the settler state. In the context of copyright, protection is afforded more to those authors who utilize “raw materials” to build upon or reinforce the dominant culture.<sup>199</sup> “Aesthetic discrimination” has been criticized in the application of copyright doctrine to untraditional forms of art.<sup>200</sup> Notwithstanding, an aesthetic determination is often intertwined within judicial decision-making.<sup>201</sup> The legislative and judicial aesthetic judgments are informed by outside pressures derived from Eurocentric conceptions of artistic legitimacy.<sup>202</sup> Invariably, these aesthetic adjudications by courts lead to the preservation of existing power structures, which “serve as powerful tools for the regulation, control, and manipulation of meaning.”<sup>203</sup> Ultimately, the continuation of these structures serves to reinforce the cultural hierarchy and the hegemonic interests from which they are derived.<sup>204</sup>

197. See Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 598; see also Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016) (“Moreover, in trying to identify when a preexisting image or persona is sufficiently ‘raw,’ and therefore fair game for subsequent appropriation, courts repeatedly use reasoning infused with racial and gender hierarchies. In these cases, ‘anonymous’ women’s body parts, ‘generic’ black men, and Jamaican men in their ‘natural habitat’ all serve as raw material for fair use and free expression.”).

198. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 29 (1998).

199. “Raw material” is used as a phrase in copyright scholarship to denote “preexisting material used by an author.” Gilden, *supra* note 197, at 361. The consideration of the underlying works as “raw materials” creates a hierarchical dichotomy between what sources are worth protecting versus what are fair to be used by any subsequent author. See, e.g., Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1334 (2015).

200. *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 249 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); see also Jessica Silbey, *Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers*, 9 U.C. IRVINE L. REV. 405, 443 (2019) (discussing “*Bleistein*’s non-discrimination principle that bars aesthetic judgment”). See generally Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017) (addressing the misconceptions of the *Bleistein* decision and its impact on aesthetic progress); Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 309–10 (1991) (analyzing the contradictory applications of *Bleistein* in copyright jurisprudence impacting industrial art cases); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 811–15 (2005) (referring to aesthetic discrimination as a “‘doctrine of avoidance’ of artistic determinations”).

201. Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 2 (2001) (noting that often courts are required to make aesthetic determinations and sometimes “have little choice but do so, because such an assessment is required either by the Constitution or by the Copyright Act”).

202. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 610.

203. Tehranian, *Towards a Critical IP Theory*, *supra* note 124, at 1233.

204. *Id.*

The doctrine of fixation particularly ascribes value to certain types of creations above all others. The requirement creates what Professor Rosenblatt describes as “an artificial hierarchy by elevating works deemed fixed expressions over those deemed unfixed or ‘mere’ ideas.”<sup>205</sup> The requirement works on the assumption that an expression which is not fixed will always be viewed as an “idea.” Thus, a work that is orally expressed or transmitted is not recognized as a “work” deemed worthy of protection. The presumption is that only tangible expressions are reproducible.<sup>206</sup> However, numerous studies have demonstrated that the “power of memory” within oral societies, such as that of the Hopi, can be remarkably exceptional.<sup>207</sup> By employing “formulaic expressions and other mnemonic techniques, the sages of oral societies can conserve texts in basically unaltered form for generations.”<sup>208</sup> As stated above, there are many justifications offered for the principle of fixation. While some of those justifications are reasonable, it is impossible to divorce the rationale behind fixation from the Eurocentric standards created by the settler state. The valuation of works as qualified by the concept of fixation reinforces Professor Rosenblatt’s “discriminatory hierarchy” in copyright law. The discriminatory practice innately results in the practice of allowing appropriators from the dominant culture to claim ownership over the subordinate “unfixed” works.

To exemplify the ability of fixation to amplify the hierarchy of the settler state, it is important to consider how the logistics of fixation assign value to certain works. As described above, in order to be fixed, a work must be embodied in some form of writing or tangible device. For example, a person that creates an innovative performance piece cannot own that piece until it is recorded. However, if another person were to record that expressive performance piece, that person would become the owner.<sup>209</sup> Effectively, the mere act of fixation permits exploitation of another’s creative content. The result of this requirement is the exclusion of certain types of works that may not primarily be fixed, such as dance, storytelling, oral traditions, and even music.<sup>210</sup>

205. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 617.

206. David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CANADIAN J.L. & SOC. 129, 144 (1995).

207. *Id.* (citing RUTH FINNEGAN, *LITERACY AND ORALITY: STUDIES IN THE TECHNOLOGY OF COMMUNICATION* 106–07 (Oxford: Basil Blackwell, 1988)).

208. *Id.*

209. In societies that embrace communal notions of creativity, the identification of the “original” author can be considerably challenging. With indigenous cultural heritage in particular, the evolution of expressions across generations can pose challenges when attempting to ascribe originality in the context of Western notions of individual creations. *See* Riley, *supra* note 17, at 187–94. While originality and authorship are requirements that are problematic in their own right, those discussions are beyond the scope of this Article.

210. *See generally* Riley & Carpenter, *supra* note 18 (explaining how indigenous dances or ceremonies that are secretly recorded would not be protected under federal copyright law).

For example, scholars have addressed how, in the vast history of musical development, copyright protection for music was primarily a privilege enjoyed by upper-middle-class Anglo-educated musicians.<sup>211</sup> For example, certain practices of musical notation typically considered in contemporary copyright cases are dominated by European traditions.<sup>212</sup> Professor Michael W. Carroll explored the history of music commodification and protection and traced its roots to Eurocentric history into three periods: (1) the ancient world, (2) the medieval period, and (3) the Renaissance.<sup>213</sup> Certain European methods of music notation privileged certain groups, while disadvantaging non-European cultures whose works were primarily non-notated.<sup>214</sup> Thus, because of the fixed nature of notated musical compositions, these works would receive copyright protections over those that were not notated.<sup>215</sup> The late Professor Aoki describes the status of unprotected musical works as “intertemporal, intergenerational, anonymous, communal, or improvisational in their composition.”<sup>216</sup> “[I]n general, works that arose within collective experiences of slavery, the struggle for freedom, and post-Reconstruction subordination did not receive protection.”<sup>217</sup>

The fixation requirement “devalues participants in creative cultures that value performance excellence or distinctiveness.”<sup>218</sup> This devaluation leads to the marginalization of cultures that prioritize dynamic and ephemeral creativity in favor of those works that can be easily documented. Consequently, numerous forms of intangible works are excluded from the confines of copyright law. Because of this exclusion, copyright doctrine provides a mechanism for exploitation of performances from those considered outside the settler state.<sup>219</sup>

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211. See Olufunmilayo B. Arewa, *A Musical Work Is a Set of Instructions*, 52 HOUS. L. REV. 467, 487–93 (2014) [hereinafter Arewa, *Musical Work*] (exploring the relationship between historical development of copyright protection for musical compositions, the biases that derived therefrom).

212. *Id.* at 469. Arewa describes musical notation as follows:

A musical work consists of music notation, which includes musical notes, and sometimes lyrics. The nature of the musical work as a set of instructions may vary and is by no means always determinate. Notation as a set of instructions typically gives information and other indications about performance but may also be used for other purposes. In addition to musical notes, music notation characteristically includes information concerning note duration, dynamics, tempo, expressivity, and other musical features.

*Id.*

213. Michael W. Carroll, *Whose Music Is It Anyway?: How We Came To View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1419 (2004).

214. See Arewa, *Musical Work*, *supra* note 211, at 470.

215. Aoki, *Distributive and Syncretic Motives*, *supra* note 124, at 760.

216. *Id.*

217. *Id.*

218. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 619.

219. For example, Professor Greene explains that the musical creations of women of color have long been expropriated. Greene, *Intersection*, *supra* note 24, at 381.

The enduring consequence of the fixation requirement, according to Professor Rosenblatt, is “a discourse of value that reinforces a solitary and static Eurocentric form of creation over non-Western forms that embrace and recognize cumulative and improvisatory creativity, and creates a false dichotomy and artificial hierarchy between ‘creator’ (as composer, producer, choreographer, creator of value) and ‘performer’ (as passive direction-follower).”<sup>220</sup> Unfixed works deriving from cultures deemed outside the settler state are devalued and unacknowledged as a “work,” while those that are “fixed” within the settler state are embraced.

As Professor Laura Heymann stated, “Fixation is what allows the subject to be commercialized and analyzed.”<sup>221</sup> Once the work is fixed, the author has “propertized its subject, subordinating the work to the various laws and tropes that come with a property-based regime such as copyright law: ownership, transformation, borrowing, and theft.”<sup>222</sup> Consequently, the fixation requirement may allow “a gradual flow of material from floating free in minority cultures to being owned by individual dominant-culture authors or corporations.”<sup>223</sup> For this reason, Anglo-American musicians have been able to integrate indigenous music into their recordings, without ever having compensated the community which created and housed the music.

As an example of the above, German music mogul Enigma incorporated the ancestral folksong of the Ami tribe in the song “Return to Innocence.”<sup>224</sup> The Ami people have never transcribed their oral tradition, including their songs.<sup>225</sup> While Enigma gained international acclaim from the exploitation of the Ami intangible heritage, the Ami people received no remuneration.<sup>226</sup> Additionally, in 1990, famous American singer-songwriter Paul Simon released two albums, *Graceland* and *Rhythm of the Saints*, which each incorporated traditional African and Latin American music.<sup>227</sup> *Graceland* sold more than 3.5 million copies worldwide and *Rhythm of the Saints* sold over 1.3 million copies in the first four weeks after release.<sup>228</sup> While Paul Simon garnered enormous

220. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 620.

221. Heymann, *supra* note 160, at 830.

222. *Id.*

223. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 621.

224. Riley, *supra* note 17, at 175. The Ami is an aboriginal ethnic group of Malay living on the island of Taiwan. They are considered the single largest tribe in Taiwan. *Id.* at 176 n.3.

225. *Id.* at 176.

226. *Id.* at 177.

227. Sherylle Mills, *Indigenous Music and the Law: An Analysis of National and International Legislation*, 28 Y.B. TRADITIONAL MUSIC 57, 58 (1996).

228. Margaret Kartomi, *Ethnomusicological Education for a Humane Society: Ethical Issues in the Post-Colonial, Post-Apartheid Era*, 7 J. INT'L LIBR. AFR. MUSIC 166, 170 (1999) (“Although Paul Simon as an individual, treated the musicians of *Graceland* well, hiring African musicians rather than using sampled field recordings and paying them generously in both performing fees and royalties, copyright

profits from his exploitation, the communities in Africa and Latin America did not.<sup>229</sup>

These examples of the exploitation of intangible culture embody what Professor Rosenblatt considered to be “sacralization.”<sup>230</sup> Through the fixation requirement, an author such as Enigma or Paul Simon can incorporate an unfixed work into their own and now claim proprietary rights to the incorporated work, but also have the ability to change the work even if it contradicts the unfixed form. Through the process of sacralization, a form of “artistic amnesia” occurs, whereby the fixer is erroneously credited with being “original.”<sup>231</sup> The value placed on this originality favors the dominant culture over those with nonfixed traditions.

Within the indigenous community, authors have seen the fixation requirement as a hurdle for protection of their art.<sup>232</sup> Professor Christine Farley deems “folklore” the “antithesis of recorded culture.”<sup>233</sup> For example, many indigenous songs and dance are never recorded in tangible form. Instead, they are passed down from generation to generation through the process of memorialization.<sup>234</sup> Likewise, much of indigenous art is not meant to be permanent in form. Some visual works are created from natural materials that are ephemeral in nature, such as mud and grass.<sup>235</sup> For the most part, indigenous art is used for ceremonial purposes and then subsequently destroyed.<sup>236</sup> Another example is body paintings, which are also used for ceremonial purposes, but are only on the body for a short period of time.<sup>237</sup>

Intangible cultural heritage, such as oral histories, craft techniques, dances, and narratives, oftentimes is passed down over generations, without ever having

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laws would not have prevented many other musicians who were/are involved in the world music scene and copied Simon’s example from engaging in unfair contracts or even blatant appropriation of less sophisticated musicians’ music.”).

229. See Mark Beaumont, *Graceland at 35: How Paul Simon Recorded a Masterpiece in Apartheid South Africa*, INDEPENDENT (Aug. 24, 2021, 6:31 PM), <https://www.independent.co.uk/arts-entertainment/music/features/graceland-paul-simon-south-africa-b1904504.html> [https://perma.cc/5CSZ-RG9K] (explaining how the album was made).

230. Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 622.

231. *Id.*

232. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 17 (1997).

233. *Id.* at 28.

234. *Id.*

235. *Id.* at 28 n.106.

236. *Id.* at 10 (citing Kamal Puri, *Cultural Ownership, and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 298 (1995)).

237. Dean A. Ellinson, *Unauthorized Reproduction of Traditional Aboriginal Art*, 17 U.N.S.W. L.J. 327, 333 n.30 (1994).

been fixed.<sup>238</sup> Because these examples are not fixed, they are considered “ideas” and ineligible for copyright protection. As a result, the intangible heritage of the subordinate settled culture is often unprotected, and vulnerable to exploitation by the dominant appropriator. It is often the case that when authors from the dominant cultures retell the narratives from the subordinate culture’s intangible heritage, those retellings are protectable under copyright.<sup>239</sup> For example, an American production company could videorecord an ancient Navajo ceremonial dance and incorporate the videorecording into a film without any remuneration to Navajo tribe. The production company would then be able to register the videorecording under U.S. copyright law.<sup>240</sup> The result is that the appropriator from dominant culture, such as the American production company, has significant power over the heritage of the subordinate culture.

This appropriation of heritage by the settler is also inherent in a strategy of historical distortion which allows a reframing narrative in favor of the settler colonies.<sup>241</sup> A byproduct of this appropriation is the legitimization of a collective white-washed version of the past that may provide a new, inaccurate historical narrative.<sup>242</sup> Just as colonialists viewed the land and bodies of indigenous people as their own, so too has the expropriation of culture been justified and ultimately accomplished the colonial project. While the fixation requirement may seem facially neutral, it is one of the many colonial doctrines which have aided in the appropriation and commodification of indigenous peoples’ intangible cultural heritage.

#### IV. AN INTERNATIONAL COMPARISON: FIXATION AND INTANGIBLE HERITAGE IN THE INTERNATIONAL COMMUNITY

The American reliance on fixation is at odds with its foreign counterparts. It is worthwhile to note that the fixation requirement has been considered “decidedly American.”<sup>243</sup> Many civil law countries grant copyright protection

238. See Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, J. INTEL. PROP. L. 293, 310–11 (1994) (defining “folklore” as something that is “usually transmitted orally, by imitation or by other means”).

239. See, e.g., Chris Bodenner, *Does Disney’s Pocahontas Do More Harm Than Good? Your Thoughts*, ATLANTIC (June 30, 2015), <https://www.theatlantic.com/entertainment/archive/2015/06/pocahontas-feminism/397190/> [<https://perma.cc/3H8P-ZX86> (staff-uploaded, dark archive)] (discussing Disney’s use of the story of Pocahontas, portrayed from the Western perspective, as a source of pain for many indigenous peoples in the United States).

240. While copyright law only protects works by the person who fixes the work, “in practicality, such violations [are] difficult to detect, and difficult to enforce for low-status artists.” K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM’N & ENT. L.J. 339, 354 n.68 (1998).

241. See Saito, *supra* note 99, at 30–33.

242. *Id.*

243. Carrie Ryan Gallia, Note, *To Fix or Not To Fix: Copyright’s Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231, 240 (2007).

to a work without requiring fixation. However, the United States is not party to any international treaty that requires its current definition of fixation.<sup>244</sup> An examination of the fixation requirement in other countries is pertinent in order to ascertain its necessity in American copyright legislation.

#### A. *International Conventions*

The Berne Convention for the Protection of Literary and Artistic Works provides an international framework for copyright protection. The Berne Convention does not require fixation in any form.<sup>245</sup> Under the Berne Convention Article 2(1): “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as . . . three-dimensional works relative to geography, topography, architecture or science.”<sup>246</sup> Article 2(2) of the Berne Convention gives each signatory the prerogative to determine whether fixation is required for copyright protection.<sup>247</sup> While it is not incumbent on the United States to follow the international community, the lack of fixation in other countries evidences an ability of the copyright regime in the United States to function effectively without the currently configured fixation requirement. Indeed, one scholar has argued that the lack of a fixation requirement reveals a more modern evolution of a country’s copyright.<sup>248</sup> Without the requirement of fixation under Berne, the United States would better be able to accommodate other forms of creativity, like intangible heritage, which may not conform to its traditional definition of a protectable work. This

244. See, e.g., MIHÁLY FICSOR, WORLD INTELL. PROP. ORG., GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS (2004), [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf) [<https://perma.cc/3KJA-JBCY>] (providing an overview of the international treaties signed by the United States that incorporate copyright requirements).

245. Berne Convention for the Protection of Literary and Artistic Works art. 2(2), Sept. 9, 1886, S. TREATY DOC. No. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) [hereinafter Berne Convention]. The Berne Convention for the Protection of Literary and Artistic Works is an international agreement aimed at creating global norms for copyright protection. Elizabeth White, Comment, *The Berne Convention’s Flexible Fixation Requirement: A Problematic Provision for User-Generated Content*, 13 CHI. J. INT’L L. 685, 689 (2013). It was first entered into in 1886. *Id.* It was later revised in Paris in 1971 and amended again in 1979. *Id.* There are 181 total members, including the United States. *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/wipolex/en/treaties/ShowResults?search\\_what=C&treaty\\_id=15](https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=15) [<https://perma.cc/2SCZ-RLRK> (staff-uploaded archive)]. For more information on the Berne Convention’s history and the fixation requirement, see White, *supra*, at 689.

246. Berne Convention, *supra* note 245, at art. 2(1).

247. *Id.* art. 2(2) (“It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”).

248. Gallia, *supra* note 243, at 240.

flexibility allows the United States to align its policies with the more dynamic nature of other modern copyright regimes.

The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) extends copyright protection to expressions and not to ideas.<sup>249</sup> However, TRIPS extends protection to live performances.<sup>250</sup> Article 14 of TRIPS articulates the “Protection of Performers, Producers of Phonograms and Broadcasting Organizations.”<sup>251</sup> Paragraph 1 provides the following protections for a certain category of unfixed works:

In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing . . . the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing . . . the broadcasting by wireless means and the communication to the public of their live performance.<sup>252</sup>

This inclusion of the exception for live performances within the framework of TRIPS diminishes the significance of fixation itself. Indeed, this inclusion indicates that protections can be afforded to works that are dynamic and ephemeral in nature.

#### B. *France*

In France, copyright protects “*droit d’auteur*” or the “author’s right.”<sup>253</sup> French copyright doctrine is said to be much more “author-friendly.”<sup>254</sup> Unlike American copyright doctrine, France’s copyright law “adheres to the belief that copyright is a natural right, as an author’s creative works are an extension of his personality.”<sup>255</sup> In France, the purpose of copyright goes beyond the mere confines of economic maximization. Instead, the purpose of copyright is to secure the author’s ability to enjoy the legal protection in her work “by the mere fact of its creation.”<sup>256</sup> The late Henri Desbois, France’s leading modern scholar of French copyright, proudly explained France’s pro-author protections: “The

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249. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

250. *Id.* art. 14.

251. *Id.* art. 14.

252. *Id.* art. 14(1).

253. Chrissy Milanese, Note, *Lights, Camera, Legal Action: Assessing the Question of Acting Performance Copyrights Through the Lens of Comparative Law*, 91 NOTRE DAME L. REV. 1641, 1655 (2016).

254. *Id.*

255. *Id.*

256. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] [INTELLECTUAL PROPERTY CODE] art. L111-1 (Fr.); Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 564 (2006).



author is protected as an author, in his status as a creator, because a bond unites him to the object of his creation. In the French tradition, Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity.<sup>257</sup> By contrast, copyright doctrines in common law countries, according to Professor Linant de Bellefonds, “pay more particular attention to the exploitation of the work, pushing man into the background.”<sup>258</sup>

Like most European civil law countries, French copyright law does not impose a fixation requirement.<sup>259</sup> The French copyright code protects “the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.”<sup>260</sup> While the code does not specifically define “works of the mind,” protection is generally conferred to any “perceptible work borne of individual intellectual efforts.”<sup>261</sup> The code also provides that “[a] work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realization of the author’s concept, even if incomplete.”<sup>262</sup> As such, works that are predominately oral, such as “lectures, addresses, sermons, pleadings” as well as improvisational speeches or performances are copyrightable.<sup>263</sup>

By providing broader protections for expression of an author’s mind, France’s copyright law protects works that would normally fall in the United States’ public domain. In France, original works that are considered not permanent, such as air cutting or ice sculptures, may be protectable.<sup>264</sup> The emphasis is placed on the original creations from the intellectual activity itself, rather than the form for which that intellectual activity is expressed.<sup>265</sup> The principle that a work can be afforded protection even in the absence of a material or tangible form is exemplified by two rulings made by the Paris Court of First Instance.<sup>266</sup> The first is the *Lacan* case, in which a well-known conference speech by famous psychoanalyst Jacques Lacan was misappropriated by a third party.<sup>267</sup> The question before the court was whether Lacan and his

257. Ginsburg, *A Tale of Two Copyrights*, *supra* note 151, at 992 (quoting H. DESBOIS, *LE DROIT D’AUTEUR EN FRANCE* 538 (3d ed. 1978)).

258. Piotraut, *supra* note 256, at 552 (quoting XAVIER LINANT DE BELLEFONDS, *DROITS D’AUTEUR ET DROITS VOISINS* 454 (2002)).

259. See C. PROP. INTELL. art. L111-1, L111-2, L112-1; Piotraut, *supra* note 256, at 572.

260. C. PROP. INTELL. art. L112-1; see also White, *supra* note 245, at 695–96.

261. Jennifer Driscoll, Comment, *It’s a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT’L ECON. L. 939, 946 (1999).

262. C. PROP. INTELL. art. L111-2.

263. See *id.* art. L112-2(2).

264. Antoine Latreille, *From Idea to Fixation: A View of Protected Works*, in RESEARCH HANDBOOK ON THE FUTURE OF E.U. COPYRIGHT 133, 141 (Estelle Derclaye ed., 2009).

265. *Id.* at 142.

266. *Id.* at 141.

267. *Id.*

assignee could prevent others from using his speech.<sup>268</sup> The court held that the oral presentation was protected, without needing to be fixed in a tangible form.<sup>269</sup> Similarly, the *Barthes* case confirmed the holding in *Lacan*, finding copyright infringement when a third party illicitly published an oral presentation by Professor Roland Barthes.<sup>270</sup>

The French copyright regime provides an illustration that copyright can function without a fixation requirement. While fixation may prove beneficial for evidentiary purposes, it is not necessary for purposes of management of an effective copyright system. The French system of protection shows that works that are ephemeral or transitory in nature, like intangible heritage, can sufficiently be protected.

### C. *China*

Chinese copyright law does not explicitly state that there is no fixation requirement. Article 2 of the Implementing Regulations confines copyright protection to the works that are capable of being “reproduced in a certain tangible form.”<sup>271</sup> China’s requirement for tangibility has been stated to not “strictly apply” to all works.<sup>272</sup> In one case, a Chinese court reportedly found that a musical fountain show is copyrightable.<sup>273</sup> In regard to the tangibility requirement, the court reportedly found that since the water fountain would produce the same show, it satisfied the “replicability” requirement.<sup>274</sup>

Notwithstanding this requirement, China delineates oral works as copyrightable in its copyright regime.<sup>275</sup> Article 4(2) of China’s Implementing Regulations defines “oral works” as “works expressed in form of *spoken* language, such as impromptu speeches, lectures and court debates.”<sup>276</sup> Additionally, China has instituted protective measures under its copyright schemes to prevent

268. *See id.*

269. *Id.*

270. *See id.*

271. Zhonghua Renmin Gongheguo Zhuzuoquan Fa Shishi Tiaoli (中华人民共和国著作权法实施条例) [Regulations for the Implementation of the Copyright Law of the People’s Republic of China] (promulgated by the State Council, Aug. 2, 2002, amended Jan. 30, 2013, effective Mar. 1, 2013), art. 2, *China CN213*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/wipolex/en/text/456390> [<https://perma.cc/M24Y-E79X> (staff-uploaded archive)]. For more information on how the copyright law system functions in China, see Stephen McIntyre, *The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People’s Republic of China*, 29 UCLA PAC. BASIN L.J. 75, 104 (2011).

272. Abhijay Srekanth, *Copyrighting Musical Fountains: An Analysis of China’s Approach to Dynamic Artworks*, SPICYIP (Apr. 27, 2021), <https://spicyip.com/2021/04/copyrighting-musical-fountains-an-analysis-of-chinas-approach-to-dynamic-artworks.html> [<https://perma.cc/6WQQ-W8RN>].

273. *Id.*

274. *Id.*

275. Regulations for the Implementation of the Copyright Law of the People’s Republic of China art. 4(2).

276. *Id.* (emphasis added).

exploitation of folklore works.<sup>277</sup> China protects a form of unfixed ritual dance and pantomime called *qu yi*.<sup>278</sup> China also protects other forms of intangible cultural heritage such as music, traditional operas, folk art, dance, and characters.<sup>279</sup>

While China has a stricter requirement for tangibility, it attempts to conform its copyright scheme to include types of intangible heritage, specifically folklore. For example, under Chinese copyright law, a new work must acknowledge the original underlying work in order to create a derivative work.<sup>280</sup> In one case, the Chinese Heze ethnic minority sued a singer of a pop song that incorporated its original folkloric work without acknowledgment.<sup>281</sup> The court held that the song improperly adapted the tune from the Chinese Heze's folklore because folklore must be acknowledged.<sup>282</sup> Although there is some inconsistency as to the manner in which the Chinese government exacts folklore protection, acknowledgement of use is just one way to achieve greater respect for intangible heritage and the cultures from which it derives.

#### D. Mexico

Like in France and other civil law countries, Mexico protects "*derechos del autor*" or "rights of the author."<sup>283</sup> Mexico's copyright tradition is arguably in line with civil law countries in that the rationale behind protection is primarily to benefit the author.<sup>284</sup> Mexico provides copyright protection in order to promote national culture and to protect the works of various types of authors.<sup>285</sup> In order for a work to be protected under Mexican copyright law, the work must

277. Qi Lei, *A Brief Discussion on Copyright Protection for Folklore Works*, CHINA INTELL. PROP., [http://www.chinadaily.com.cn/m/cip/2011-12/28/content\\_14344619.htm](http://www.chinadaily.com.cn/m/cip/2011-12/28/content_14344619.htm) [https://perma.cc/ZK94-796Y] (last updated Dec. 28, 2011).

278. Regulations for the Implementation of the Copyright Law of the People's Republic of China art. 4(5); White, *supra* note 245, at 696.

279. Qing Lin & Zheng Lian, *On Protection of Intangible Cultural Heritage in China from the Intellectual Property Rights Perspective*, SUSTAINABILITY, Nov. 2018, at 9, <https://www.mdpi.com/2071-1050/10/12/4369/htm> [https://perma.cc/2982-GYTZ (staff-uploaded archive)].

280. Deming Liu, *Can Copyright Lend Its Cinderellaic Magic to Chinese Folklore?*, 5 J. MARSHALL REV. INTELL. PROP. L. 203, 207 (2006).

281. *Id.*

282. *Id.* at 208.

283. Ley Federal del Derecho de Autor [LFDA], Diario Oficial de la Federación [DOF] 24-12-1996, últimas reformas DOF 01-07-2020 (Mex.).

284. See Camila Chediak, *Star-Crossed Copyrights: The Story of How Mexico Defied Civil Law Traditions by Infusing Common Law Ideologies into Its Audiovisual and Motion Picture Copyright Regulations*, 53 U. MIA. INTER-AM. L. REV. 103, 111 (2022) ("Mexico's original moral rights system dating back to this early legislation was influenced by the French copyright system . . . just as it influenced many civil countries' copyright laws.").

285. See Peter Smith, *Ley Federal del Derecho de Autor*, 13 BERKELEY TECH. L.J. 503, 505 (1998) ("[C]opyright protection has been created to foster national culture and to protect the works of various types of authors and artists.").

be “reproduced in whatever form or medium.”<sup>286</sup> The Mexican Constitution recognizes the importance of preserving indigenous culture. Particularly, Article 2 of the Mexican Constitution recognizes indigenous people’s right of self-determination so that they can “preserve and enrich their languages, knowledge and all elements that constitute their culture and identity.”<sup>287</sup>

In 2021, Mexico enacted “Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican People and Communities.”<sup>288</sup> The law’s purpose is “to recognize and guarantee the protection, safeguard, and development of the cultural heritage and the collective intellectual property of the indigenous and Afro-Mexican peoples and communities.”<sup>289</sup> This legislation is significant because it prohibits the misappropriation, exploitation, or commercialization of indigenous cultural heritage.<sup>290</sup> Another important section of the law allows indigenous and Afro-Mexican peoples and communities, based on their self-determination and autonomy, to choose between mediation, a civil claim, or criminal complaint against any nonconsensual use of the elements of

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286. LFDA art. 3 (Mex.) (“Las obras protegidas por esta Ley son aquellas de creación original susceptibles de ser divulgadas o reproducidas en cualquier forma o medio.”).

287. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 2, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 06-06-2023 (“Preservar y enriquecer sus lenguas, conocimientos y todos los elementos que constituyan su cultura e identidad.”).

288. Ley Federal de Protección del Patrimonio Cultural de los Pueblos y Comunidades Indígenas y Afromexicanas [LFPPCPCIA], Diario Oficial de la Federación [DOF] 17-01-2022, últimas reformas DOF 29-11-2023 (Mex.).

289.

Cultural Heritage is defined as the set of material and immaterial goods that include the languages, knowledge, objects, and all the elements that constitute the cultures and territories of the indigenous and Afro-Mexican peoples and communities, which give them a sense of community with their own identity and that are perceived by others as characteristic, to those who have the full right of ownership, access, participation, practice and enjoyment in an active and creative way. Their traditions, customs, spiritual and religious ceremonies, sacred places and ceremonial centers, objects of worship, symbolic systems, or any other which are considered sensitive to the communities will have special protection to guarantee their forms of life and identity for their cultural survival.

*New Law in Mexico*, PANAMERICANA DE PATENTES Y MARCAS (Jan. 2022), <https://www.ppm.com.mx/en/pages/27-new-law-in-mexico.html> [<https://perma.cc/4RCF-XWGY>].

290.

Los pueblos y comunidades indígenas y afromexicanas tendrán el derecho de reclamar, en todo momento, la propiedad colectiva reconocida en esta Ley, cuando terceros utilicen, aprovechen, comercialicen, exploten o se apropien indebidamente, de elementos de su patrimonio cultural, incluyendo reproducciones, copias o imitaciones, aun en grado de confusión, sin su consentimiento libre, previo e informado.

LFPPCPCIA art. 19 (Mex.).

their heritage.<sup>291</sup> If an individual illicitly produces or sells indigenous heritage, the individual may be subject to up to a ten-year term of imprisonment.<sup>292</sup>

Some intellectual property attorneys believe this “law is too abstract” and “uncertain.”<sup>293</sup> It has been a source of debate as to whether Mexico’s intellectual property law finds itself to be in direct conflict with the country’s constitution.<sup>294</sup> As the law just reached full force in 2022, there remains much to be addressed with respect to its application, compliance, and enforcement. Mexico has sixty-eight different indigenous peoples and among them is “quite a lot of overlap because they’re related linguistically and culturally.”<sup>295</sup> The law demonstrates a substantive goal to protect the proprietary rights of indigenous peoples. It is yet to be seen as to whether the mannerisms of this type of *sui generis* legislation will have a positive impact on the rights of the indigenous peoples.

While the fixation requirements holds a prominent position within the American copyright regime, it is not universally embraced. This preceding assessment examines the efficacy of distinctive copyright regimes in protecting intangible works, highlighting their capacity to protect dynamic and evolving creative expressions. It is important to critically evaluate the significance and function of this requirement in light of the harm it may impose on indigenous communities. Consideration of other countries’ requirements could inform how the United States may shift its legal landscape to better protect valuable and diverse cultural expressions.

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291.

Las autoridades o instituciones representativas de los pueblos y comunidades indígenas y afromexicanas y, cuando corresponda, cualquiera de los integrantes de dichos pueblos y comunidades, podrán presentar ante la autoridad competente, la queja o denuncia por la apropiación indebida o el uso no consentido sobre su patrimonio cultural, para que, según el caso, se proceda a la restitución, pago, compensación, reposición o reparación de daños, con cargo a los terceros responsables.

*Id.* art. 20 (Mex.).

292. *Id.* art. 75 (Mex.).

293. Kyle Jahner, *Mexico Testing Limits of Using Law To Bar Cultural Appropriation*, BLOOMBERG L. (Apr. 11, 2022, 4:45 AM), <https://news.bloomberglaw.com/ip-law/mexico-testing-limits-of-using-law-to-bar-cultural-appropriation> [<https://perma.cc/V87U-WAYA> (staff-uploaded, dark archive)].

294. See Luis C. Schmidt, *New General Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities in Mexico*, NAT’L L. REV. (July 27, 2021), <https://www.natlawreview.com/article/new-general-law-protection-cultural-heritage-indigenous-and-afro-mexican-peoples-and> [<https://perma.cc/23Q9-2MS9>]. See generally Esteban Santamaria Hernandez, *Mexican Federal Law for the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities*, 72 GRUR INT’L 364 (2023) (examining the process by which the Protection of Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities law was enacted).

295. Jahner, *supra* note 293.

## V. DESETTLING FIXATION

The continued process of settlement and colonization has caused immense suffering among indigenous peoples. In particular, the misappropriation of culture “strikes at the heart of communal self-constitution and ritual expression.”<sup>296</sup> Desettling necessitates the disruption of colonized practices in order to undermine established expectations.<sup>297</sup> The social and ideological construction of protections for dominant subsets of society demonstrates the legitimization of settler colonialism. These established expectations are implicit and connected to institutionalized privileges in copyright protections. “Desettling” requires an explicit reformation of these divisions generated by hierarchical relationships, historically structured inequalities, and assumed assimilation into particular paradigms.<sup>298</sup> The process of desettling can be advanced through removal of barriers caused by historic inequities in our copyright system. Professors Vats and Keller advocate for a “decolonization of intellectual property” as a prerequisite to undoing racial hierarchies embedded in intellectual property law.<sup>299</sup> This Article proposes the reformation of the fixation requirement as the first step to “desettling” copyright doctrine. Reformation of fixation in favor of protecting expression in forms that are reproducible operates as an effective manner of desettling copyright doctrine.

A. *Reframing “Progress” and the Constitutionality Justification*

As articulated above, scholars have justified fixation as a constitutional requirement pursuant to Article 1, Section 8, Clause 8.<sup>300</sup> There has been no Supreme Court decision stating that the term “Writings” mandates fixation.<sup>301</sup> Likewise, the legislative history has not been consistent in recognizing the constitutional nature of fixation.<sup>302</sup> As one commentator stated, “the fact that a statutory requirement is based upon text from the Constitution does not automatically make it a constitutional requirement.”<sup>303</sup> The constitutionality of fixation has been questioned by some copyright scholars.<sup>304</sup> This Article

296. SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 105 (2005).

297. Bang et al., *supra* note 132, at 311.

298. *Id.* at 304.

299. Vats & Keller, *supra* note 124, at 791.

300. U.S. CONST. art. I, § 8, cl. 8.

301. Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 113–14 (2006).

302. *Id.*; see also Carpenter & Hetcher, *supra* note 164, at 2242.

303. Hubanov, *supra* note 301, at 114.

304. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1192 n.515 (2000) (noting that “we see nothing in the history or structure of the Clause to limit Congress’s authority to define

contends that the term “writing” does not require fixation as it is currently formulated in American copyright doctrine.

First, the three Supreme Court cases that dealt with constitutional requirements of “Writings” focus on the constitutionality of originality, not fixation.<sup>305</sup> Professor Dotan Oliar opines that the fact the Supreme Court did not mention a constitutional fixation requirement while undertaking an examination of “Writings” may indicate that fixation is not a constitutional requirement.<sup>306</sup> In comparing fixation with originality, Professor Jaszi articulates, “Unlike the administratively oriented fixation requirement for copyrightability, the originality requirement parsed in *Feist* . . . [has] its roots in constitutional notions of authorship.”<sup>307</sup>

In *Burrow-Giles Lithographic Co. v. Sarony*,<sup>308</sup> the Supreme Court had the opportunity to consider what constituted “Writings.”<sup>309</sup> In its pivotal decision, the Court recognized that the Framers did not contemplate all forms of expressive productions in drafting the Constitution.<sup>310</sup> The Court held that a “writing” could not be limited to the actual script of the author.<sup>311</sup> Instead, the Court interpreted the word “Writings” to include forms “by which the ideas of the mind of the author are given visible expression.”<sup>312</sup> There is no indication in any legislative history that the term “visible” must fit within the traditional

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‘writings’ broadly to include many different types of creations”); Riley, *supra* note 17, at 220 (“Recent cases interpreting the ‘fixation’ requirement in relation to modern technological innovations have shed new light on the potential scope of ‘writings.’ . . . It is not a great leap to assume Congress’ authority to expand the definition of ‘writings’ beyond that which has already been accomplished.”); Carpenter & Hetcher, *supra* note 164, at 2241–45.

305. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–60 (1884); *Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

306. Dotan Oliar, *Constitutional Challenges to Copyright: Resolving Conflicts Among Congress’s Powers Regarding Statutes’ Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467, 490 (2007); see also Justin Hughes, *Understanding (and Fixing) the Right of Fixation in Copyright Law*, 62 J. COPYRIGHT SOC’Y U.S. 385, 413 (2015) (“Moreover, the few times the Supreme Court arguably took up the meaning of Writings, it has been focused on the issue of originality, deriving the originality requirement from ‘Writings’ combined with ‘Authors.’ Next to nothing has been said on fixation, anything said has certainly been dicta, and scholars have generally recognized that the issue remains up for grabs.”).

307. Jaszi, *supra* note 180, at 605. Jaszi supports this proposition further: “More fundamentally, is the constitutional ‘Writings’ requirement any different in character from the reference to ‘limited times’ in the Patent and Copyright Clause, so that one can contemplate quasi-copyrights for unfixed works (even ones of indefinite duration) while rejecting Commerce-Clause-based extensions of duration (where writings are concerned) beyond the constitutionally fixed limited times? Again, the answer may well be in the affirmative.” *Id.* at 604.

308. 111 U.S. 53 (1884).

309. *Id.* at 56.

310. See *id.* at 57–58.

311. *Id.*

312. *Id.* at 43.

confines of “fixation.”<sup>313</sup> In 1973, almost one hundred years later, the Supreme Court had an occasion to revisit the definition of “Writings” in *Goldstein v. California*.<sup>314</sup> Similarly to *Burrow-Giles*, the Court interpreted “Writings” broadly, in that the requirement cannot be “construed in [its] narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles.”<sup>315</sup> The Court clarified that “Writings” could be “interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”<sup>316</sup> The Court’s decision evidences that interpretations of “Writings” should not be static. Furthermore, there is nothing in the 1976 Copyright Act or its legal precedents that imply that the Constitution prohibits the expansion of copyright protection for “Writings” considered nontraditional.<sup>317</sup> This is evidenced in Congress’s substitution in the 1976 Copyright Act of the term “Writings” with the term “works.”<sup>318</sup>

The scope of “Writings” has become so broad that even Professor Lichtman, who wrote about the evidentiary value of fixation, noted “it is difficult to imagine more permissive definitions than [those found in the statute] that would still pass constitutional muster.”<sup>319</sup> Professor Roberta Kwall recognized the constitutional grant of power to be “sufficiently broad to extend to any ‘writing’ as long as the writing is the product of an ‘author.’”<sup>320</sup> Professors Megan Carpenter and Steven Hetcher argued that the constitutional language of “Writings” “cannot be fairly interpreted to require fixation for more than a transitory duration.”<sup>321</sup> Unconventional forms of expression can fall within the definition even if they are not “fixed” in the traditional sense. Professor Kwall has concluded that a “physical rendering is not necessarily synonymous with a tangible rendering.”<sup>322</sup>

Fixation should not be framed as a constitutional mandate. The requirement for tangibility “represents not a constitutional mandate, but a misdirection of the Constitution’s clearer mandate of advancing inventors’

313. In *Burrow-Giles*, Justice Miller asserted that “writings in [the constitutional] clause [means] the literary productions of those authors, and [C]ongress very properly has declared these to include all forms of writing . . . by which the ideas in the mind of the author are given visible expression.” *Id.* at 58.

314. 412 U.S. 546 (1973).

315. *Id.* at 561.

316. *Id.*

317. See, e.g., *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding that work embedded in the RAM satisfied the fixation requirement).

318. See Copyright Act of 1976, Pub. L. No. 94-553, ch. 1, § 102, 90 Stat. 2544, 2544–45 (codified as amended at 17 U.S.C. § 102).

319. Lichtman, *supra* note 174, at 734 n.207.

320. Roberta Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA HIGH TECH. L.J. 1, 6 (2001) [hereinafter Kwall, *Copyright Issues*].

321. Carpenter & Hetcher, *supra* note 164, at 2241.

322. Kwall, *Copyright Issues*, *supra* note 320, at 8.



intellectual conceptions.”<sup>323</sup> The reframing of this requirement can be rationalized from the perspective of settler colonialist theory. By reinterpreting the Constitution through a critical lens, we may “undo[] the racial harms of copyright law” perpetuated by settler colonialism.<sup>324</sup> Because the settler colonial logic of elimination is manifested through racialized exclusionary practices, including that of intellectual property, desettling can occur through the reformation of “progress.”<sup>325</sup> Professor Vats argues that the terms “progress” and “useful arts” are “circumscribed by race” because they are defined by sets of cultural norms.<sup>326</sup> These cultural norms derive from a settler colonial conceptualization of property.<sup>327</sup>

In order to desettle these cultural norms, it is imperative to recognize how these terms are interpreted and how this interpretation positions different communities inequitably. Consider Professor Rosenblatt’s contention that an investment in social justice is essential to the “progress” required by copyright law. She articulates:

One might argue that many of these considerations fall outside copyright’s explicit priorities. . . . I suggest that even within the narrow instrumentalist vision of copyright, a more complex definition of “progress” that takes into account authors’ well-being and diversity reflects a more complete version of the “progress” that copyright should (but may not) serve. . . . Promoting diversity in authorship—that is, promoting the creation of works by the widest possible array of authors—doubtlessly promotes the creation of more works, not to mention more diverse works. And perhaps more importantly, if we think that promoting well-being and diversity among authors would not promote progress, we should rethink our concept of progress.<sup>328</sup>

The consideration of “progress” through the lens of social justice “forces ethical confrontation with the consistent refusal of copyright law to recognize the creatorial personhood” of indigenous people.<sup>329</sup> This creates a doctrinal shift from the overvaluation of white creativity to an augmentation of the value of creativity for people of color.

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323. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 163 n.95 (2001) (quoting Maryam Ahmad, *Fixated on Fixation: Reformulating the Constitution’s Copyright to Protect Orally Delivered Lectures* (unpublished manuscript)).

324. Vats, *Racial Politics*, *supra* note 124, at 81.

325. See Wolfe, *Elimination of the Native*, *supra* note 109, at 387.

326. Vats, *Racial Politics*, *supra* note 124, at 89–90.

327. See *id.* at 81.

328. Rosenblatt, *Copyright’s Excess*, *supra* note 124, at 11–12.

329. Vats, *Racial Politics*, *supra* note 124, at 91; see also Vats & Keller, *supra* note 124, at 765–66 (examining how people of color are treated under current copyright law).

A deconstruction of the hierarchies implicit in copyright law should start with the way in which the term “Writings” is interpreted. If “Writings” is limited to conventional tangible manifestations of creativity, a broad range of creative expression is excluded from protection. The interpretation of “Writings” should be grounded in the broad views of “progress” as argued by Professors Rosenblatt and Vats. This interpretation must encompass changing societal values, while also promoting notions of justice, equity, and diversity. Through a broader interpretation of “Writings”—specifically, to include both tangible and intangible forms—copyright protection can be extended to historically marginalized communities. This extension of protection may also facilitate “progress” through embracing nontraditional forms of authorship. Guaranteeing the protections of various and evolving manifestations of creativity serves only to enrich society and culture as proscribed by the Constitution. This will allow not only historically marginalized communities to control their own creative output, but to allow others to enjoy the fruits of that creative control. Through this reframing of the constitutional language, a more just allocation of copyrights may be awarded, thereby cultivating a more inclusive and diverse creative ecosystem.

B. *Rethinking the Evidentiary Justification*

In order to reassess the evidentiary rationale for fixation, it is crucial to challenge the prevailing assumption that the intangible nature of a work automatically renders it devoid of evidentiary significance. The argument that intangible heritage should not be protected because it cannot be replicated is fallacious. As stated above, intangible heritage can be reproduced.<sup>330</sup> Indeed, the very nature of intangible heritage negates this assertion. Intangible heritage is passed down from generation to generation. The unique nature in which intangible heritage is preserved through communicative processes affirms that it can be reproducible. Likewise, it should not be incumbent on indigenous cultures to have to conform to Western practices of embodiment to qualify as proper evidence.

A work can be copyrightable and have no evidentiary value. For example, a work can be fixed at one point and gain copyright status. In arguing against the “transitory duration” requirement of fixation as applied to artworks, Professors Carpenter and Hetcher make two significant arguments about the evidentiary value of the fixation requirement. The first argument against the evidentiary purpose is that of postcreation destruction. After the work is created, it can be destroyed. Such postcreation destruction does not impact the status of the underlying work as copyrightable.<sup>331</sup> If a work is destroyed at any

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330. See Howes, *supra* note 206, at 144.

331. Carpenter & Hetcher, *supra* note 164, at 2246.

point during litigation, it does not render it uncopyrightable.<sup>332</sup> This argument is confirmed by Professor Lichtman, who previously stated: “There is barely any difference between a case where there was never any fixation at all, and a case where there was a fixation that was destroyed before the relevant litigation commenced. Yet that is exactly the line drawn by the modern fixation requirement.”<sup>333</sup> As Professors Carpenter and Hetcher emphasized, “there is no requirement that the first fixation of the work (the ‘original’) *exists in any form* at the time of the infringement or the litigation.”<sup>334</sup> The goals of evidentiary longevity can be achieved through means outside of the fixation requirement.

The second argument offered by Professors Carpenter and Hetcher is predicated on the limitations presented for cases of infringement. The reproduction right requires the defendant to produce “copies” of the underlying work.<sup>335</sup> Under the 1976 Copyright Act, a copy includes “the material object, other than a phonorecord, in which the work is first fixed.”<sup>336</sup> Hence, in order to infringe the reproduction right, the infringing work must be fixed. On the other hand, to infringe on the derivative right, no fixation is required.<sup>337</sup> In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,<sup>338</sup> the court found that the definition of a derivative work lacks any reference to fixation.<sup>339</sup> The court provides that fixation is only required for a new work to be protectable, but not for the work to infringe on the derivative right.<sup>340</sup> As such, in order for the derivative work to infringe, it must incorporate some of the copyrightable elements of the original work.<sup>341</sup> This definitional difference between infringement of the derivative right versus that of the reproduction right showcases that the evidentiary parameters can still be effectuated when the infringing work is not “fixed.”

332. *Id.*

333. Lichtman, *supra* note 174, at 732–33.

334. Carpenter & Hetcher, *supra* note 164, at 2246.

335. *Id.*; *see also* 17 U.S.C. § 106(1).

336. 17 U.S.C. § 101.

337. H.R. REP. NO. 94-1476, § 106, at 62 (1976) (“[R]eproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.”).

338. 964 F.2d 965 (9th Cir. 1992).

339. *Id.* at 968. It should be noted, however, that this statement has been criticized by scholars as “contradictory.” *See* Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(GEN) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 991, 1004 (2004) (discussing the role of fixation in copyright law through an examination of case law related to fixation). While the court explicitly states it does not require fixation, it also provides an additional requirement that there be some sort of “concrete or permanent form.” *Id.*

340. *Lewis Galoob Toys*, 964 F.2d at 968.

341. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343–44 (9th Cir. 1988). This is further evidenced by the fact that the definition of “derivative work” under the Copyright Act does not refer to “fixation” or “making of copies.” *See* 17 U.S.C. § 101.

It is relevant to further reconsider a formal doctrinal interpretation of evidence. The rules of evidence were inherited by a structural colonial legal regime.<sup>342</sup> As a result, westernized perceptions of what is considered “evidence” underlie much of the American legal system. The lack of “sufficient” documentary information as required by traditional Anglo-American views of evidence has negatively impacted indigenous communities.<sup>343</sup> For example, courts have refused to admit oral histories as insufficient hearsay evidence.<sup>344</sup> Nonarchival or oral methods of evidence have been condemned as “at best embroidered [and] at worst fictitious.”<sup>345</sup> Furthermore, indigenous tribes have had to conform to these westernized evidentiary standards even if they clash with the sacredness of their own histories and communities:

Aboriginal peoples have at times been forced into a position whereby they must reveal sacred knowledge in order to show long-standing affiliation with land or objects. Such knowledge is typically held very secretly, passed down orally by women to women and men to men . . . . [After] oral knowledge is given as evidence, it becomes written text, available to be read by Native peoples and non-Native peoples alike. In short, Aboriginal peoples, in order to comply with Western legal procedures and to produce claims that are considered authentic and legitimate in Western courts, may be forced to compromise elements of their cultural identity and religious beliefs.<sup>346</sup>

The domination of westernized concepts of evidence is anachronistic and based on a presumption of exclusion.

Many scholars advocate for the use of oral traditional resources to establish historical or legal evidence.<sup>347</sup> Oral traditions can be used to establish evidence

342. For the historical foundations of the rule of evidence, see generally John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996).

343. See, e.g., *Coos Bay Indian Tribe v. United States*, 87 Ct. Cl. 143, 152–53 (1938) (claiming that the oral traditional evidence was insufficient to grant the tribal claimants title to the relevant land); *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347, 366–70 (1933) (contending that the oral traditional testimony was insufficiently reliable to grant the tribal claimants damages for the lost land); see also Rachel Awan, Comment, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?*, 118 DICK. L. REV. 697, 707–11 (2014); Taylor S. Fielding, *Evidence Issues in Indian Law Cases*, 2 AM. INDIAN L.J. 285, 297 (2017).

344. *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 2 F.3d 219, 224–25 (7th Cir. 1993).

345. *Id.* at 222.

346. Nicholas Buchanan & Eve Darian-Smith, *Introduction: Law and the Problematics of Indigenous Authenticities*, 36 LAW & SOC. INQUIRY 115, 121 (2011).

347. See Awan, *supra* note 343, at 707–11. Academic scholars also affirm the reliability of oral testimony in substantiating documentary evidence. See Andrew O. Wiget, *Truth and the Hopi: An Historiographic Study of Documented Oral Tradition Concerning the Coming of the Spanish*, 29 ETHNOHISTORY 181 *passim* (1982) (examining the accuracy of oral traditions to corroborate documentary evidence); David M. Pendergast & Clement W. Meighan, *Folk Traditions as Historical*

because they are “premised on fact rather than imagination, and . . . both the nature and necessity of accurate recounting within oral societies make these histories valuable indicators of the past.”<sup>348</sup> Oral traditional evidence can be utilized to establish ownership of tangible property. Indigenous oral evidence has been utilized to establish valid land claims<sup>349</sup> and cultural artifacts ownership claims.<sup>350</sup> Establishing ownership over intangible works can similarly be accomplished through oral traditional evidence. As a result, in rethinking the evidentiary justification, it is important to adopt a new perspective on how courts and scholars view evidence in light of copyright requirements.

C. *Considering the Dilution of Fixation in Case Law Favors Different Ideas of “Progress”*

Courts have adapted their interpretation of the Copyright Act to comport with the ever-changing nature of digital technology.<sup>351</sup> Due to the complexity of these evolving technologies, courts have been charged with establishing the definitional contours of fixation. Scholars have suggested that “changes in technology gave rise to copyright law in the first place.”<sup>352</sup> Just as copyright has had to adjust to the technological transformation, courts have diluted the meaning of fixation to accommodate these changes. As articulated by Professor John Tehranian, “any gatekeeping function previously served by the fixation requirement has been rendered all but moot with the explosion of digital technologies.”<sup>353</sup> A broader reading of the fixation requirement has permitted authors to extend control over different digital technologies that are transitory in nature. An examination of the relevant case law evidences a preferential treatment for digital technologies over nontraditional forms of works of authorship.

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*Fact: A Paiute Example*, 72 J. AM. FOLKLORE 128, 132 (1959) (offering examples of the accuracy of folk history to substantiate historical facts).

348. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archaeological and Anthropological Theory*, 70 UMKC L. REV. 1, 46 (2007).

349. *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 504–09 (1964) (upholding tribal claimants’ title to land based in part on their oral traditional evidence).

350. *See, e.g., Bonnicksen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004) (reviewing but ultimately rejecting the Department of Interior’s decision to award 9,000-year-old remains to a coalition of Indian tribes based solely on oral tradition evidence).

351. *See* Brian A. Carlson, Comment, *Balancing the Digital Scales of Copyright Law*, 50 SMU L. REV. 825 *passim* (1997) (outlining the various ways in which Congress and the courts have adapted copyright law to comport to digital technologies).

352. Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 965 (2004).

353. John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright’s Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319, 1341 (2017).

*Williams Electronics, Inc. v. Artic International, Inc.*<sup>354</sup> is one of the first seminal cases to discuss the fixation requirement in relation to digital technology.<sup>355</sup> In this case, the court considered an action alleging infringement of an electronic audiovisual game.<sup>356</sup> The crux of the question before the court was whether newly generated and repetitive images of an audiovisual game were sufficiently fixed for copyright protection.<sup>357</sup> Defendants claimed that because the images were “transient” and created “new images” each time the game was in a different mode, the audiovisual game could not be fixed.<sup>358</sup> The court held that even though the program generated new images each time a different mode was displayed, the fact that the “original audiovisual features of the . . . game repeat themselves over and over” was sufficient for the images to qualify as fixed.<sup>359</sup> In rendering its decision, the court emphasized that the term “fixation” is interpreted broadly to encompass “technological advances.”<sup>360</sup>

*MAI Systems Corp. v. Peak Computer, Inc.*<sup>361</sup> offers another important jurisprudential discussion of the sufficiency of fixation when it comes to computer technology.<sup>362</sup> In *MAI*, the Ninth Circuit considered whether Peak infringed MAI’s copyright in a computer’s operating system software that was loaded onto the computer’s read-only memory (“ROM”) and subsequently made a copy in the random-access memory (“RAM”).<sup>363</sup> The crux of the issue turned on whether a RAM copy satisfied the fixation requirement because a RAM copy exists for a short period of time.<sup>364</sup> The Ninth Circuit held that the RAM copy was sufficiently fixed because the act of loading software into the RAM creates a “copy.”<sup>365</sup> Scholars have criticized the overbroad application of

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354. 685 F.2d 870 (3d Cir. 1982).

355. *Id.* at 874.

356. *Id.* at 873.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 877.

361. 991 F.2d 511 (9th Cir. 1993).

362. *Id.* at 519.

363. *Id.* at 517–19; see Melissa Bogden, Comment, *Fixing Fixation: The RAM Copy Doctrine*, 43 ARIZ. ST. L.J. 181, 190 (2011). RAM is defined as a “computer component in which data and computer programs can be temporarily recorded. . . . It is a property of RAM that when the computer is turned off, the copy of the programs recorded in RAM is lost.” *Apple Comput., Inc. v. Formula Int’l*, 594 Supp. 617, 622 (C.D. Cal. 1984).

364. *MAI Systems*, 991 F.2d at 518.

365. *Id.* at 519.

fixation to RAM copies.<sup>366</sup> However, courts have continued to rely on *MAI* to protect RAM copies.<sup>367</sup>

In *Micro Star v. Formgen, Inc.*,<sup>368</sup> the Ninth Circuit again had the occasion to consider fixation for digital technology.<sup>369</sup> In *Micro Star*, the Ninth Circuit considered whether a description of an audiovisual display qualified for copyright protection.<sup>370</sup> The court held that if a work is “described in sufficient detail to enable the work to be performed from that description,” then the work can be considered “fixed” under the Copyright Act.<sup>371</sup>

This case law reflects a dilution of the fixation requirement, particularly in favor of technology. Professor Jane Ginsburg went as far to say, “every time a copyright owner tries to control a new technology, technology wins.”<sup>372</sup> Such a relaxation of the fixation requirement, however, has not been applied equally. Courts have notably denied protection to ephemeral art forms. For example, the Seventh Circuit’s opinion in *Kelley v. Chicago Park District*<sup>373</sup> showcases this inclination to deny copyright protection to alternative art practices.<sup>374</sup> The Seventh Circuit was tasked with determining the copyrightability of Chapman Kelley’s natural art piece *Wildflower Works*, a garden which consisted of several hundred thousand seedlings.<sup>375</sup> After the Chicago Park District reduced the size of the garden to half of its original size, the artist brought suit under the Visual Artists Rights Act for the destruction of his work.<sup>376</sup> While the court acknowledged that the fixation requirement was broadly defined, it ultimately held that the garden was “alive and inherently changeable” and “not stable or permanent enough to be called ‘fixed.’”<sup>377</sup> Professor Zahr Said criticizes this holding as “in tension with well-settled case law that has held that some sorts

366. See Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1255 (2001) (“I think it is safe to say that many, if not most, commentators would prefer to see *MAI* relegated to an obscure footnote—an aberrant decision subsequently limited, confined to its facts, or rejected as wrongly decided.”).

367. Jonathan Band & Jency Marcinko, *A New Perspective on Temporary Copies: The Fourth Circuit’s Opinion in Costar v. Loopnet*, 2005 STAN. TECH. L. REV. P1 n.34 (2005) (discussing *MAI* and its progeny of cases that follow it); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (holding that computer files on a CD are fixed in tangible mediums of expression).

368. 154 F.3d 1107 (9th Cir. 1998).

369. *Id.* at 1110–12.

370. *Id.*

371. *Id.* at 1112 (quoting WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 243 (1994)).

372. Jane Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1619 (2001).

373. 635 F.3d 290 (7th Cir. 2011).

374. *Id.* at 302–06.

375. *Id.* at 291. Chapman Kelley is a nationally renowned installation artist, who is recognized for his work with wildflowers. *Id.*

376. In order to qualify for protection under the Visual Artists Rights Act (“VARA”), a work must fulfill the requirements of copyrightability under 17 U.S.C. § 102. *Id.* at 302.

377. *Id.* at 304–05.

of changes do not threaten a work's fixation status.<sup>378</sup> This holding implies that creative works that are inherently changeable by “forces of nature” or by actions beyond the control of the author are not sufficiently “fixed.” This holding deviates from those cases focusing on digital technologies, which, on the contrary, offer protection for changing or variable aspects of a work.

The court in *Kim Seng Co. v. J & A Importers, Inc.*<sup>379</sup> similarly deviated from the digital technology precedent.<sup>380</sup> In *Kim Seng Co.*, the court considered whether a “bowl-of-food” sculpture could be copyrightable.<sup>381</sup> The court held that food sculpture did not fall within the confines of copyright protection.<sup>382</sup> The court reasoned “because food is perishable, it cannot be considered ‘fixed’ for copyright purposes.”<sup>383</sup> Citing *Kelley*, the court further stated:

[L]ike a garden, which is ‘inherently changeable,’ a bowl of perishable food will, by its terms, ultimately perish. Indeed, if the fact that the Wildflower Works garden reviving itself each year was not sufficient to establish its fixed nature, a bowl of food which, once it spoils is gone forever, cannot be considered ‘fixed’ for the purposes of Sec. 101.<sup>384</sup>

Professor Said argues that the court erroneously interpreted the fixation requirement because it “does not require permanence, or even that a fixed work last very long.”<sup>385</sup>

The devaluation of food and flowers in *Kelley* and *Kim Seng Co.* reflects a longtime prioritization of certain forms of artistic expression over others. Both flowers and food are ephemeral in nature and do not encompass traditional forms of art that are celebrated in Western art canons. Likewise, the court in *Kelley* emphasized the link of flowers to their natural creation, reflecting a longstanding apprehension to protect things seen as commonly functional or quotidian. The perceived lack of value in flowers and food by the courts further demonstrates an outdated conception of the meaning of art in a contemporary context. The devaluation of art and flowers further ignores a nuanced understanding of how these nontraditional art forms may manifest an author's culture, tradition, and history. Consequently, these cases underscore a

378. Zahr Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 344 (2016); see also Michelle Chatelain, Note, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds That Gardens Are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385, 392–94 (2011) (criticizing the Kelley opinion because the court's broad standards would be difficult to apply to future works).

379. 810 F. Supp. 2d 1046 (C.D. Cal. 2011).

380. *Id.* at 1052–57.

381. *Id.* at 1052.

382. *Id.*

383. *Id.* at 1054.

384. *Id.*

385. Said, *supra* note 378, at 343.



fundamental problem within copyright law—the failure to adapt to evolving notions of creative expression.

The case law parallels copyright's systematic assignment of value to particular speakers and creations over others.<sup>386</sup> The promotion of “progress” is incentivized through the creation of works that advance digital technologies. If a work falls within the purview of copyright law, it is considered part of the exclusive category of works that American copyright law values as promoting progress.<sup>387</sup> The cases presented showcase that courts have a proclivity to protect works that are traditionally considered a “progression” of society (i.e., technology). This is evident if one evaluates the dilution of the fixation requirement. By contrast, other forms of nontraditional art that are similarly ephemeral in nature are not considered worthy of similar protection. This consigns value to certain works, such as digital technologies, over other types of works, regardless of their similarly transitory nature. As a result, courts are facilitating a process of “othering” of works that are not useful to the perpetuation of the West's global colonial domination.<sup>388</sup> Such ideas of “progress” continue to communicate the artificial system of hierarchy created by dominant speakers.

D. *Recalibrating Neoliberal Policy of Economic Development and Incentivization*

Reformation of the requirements of copyright has long occupied the minds of courts and scholars. The principal consideration regards how protection of a work will provide encouragement to the production of more creative works. The *sine qua non* of American copyright philosophy is primarily the economic rationale. The underlying presumption of copyright policy is that wealth or utility maximization is the only form of socially beneficial development. This rationale assumes that any incentive for an author to engage in creative works of value is predicated on economic benefits.<sup>389</sup> While neoliberal views of development emphasize that economic growth will eventually result in overall social welfare, this neocolonialist reliance on utility maximization “ignores distributional consequences.”<sup>390</sup> Such distributional consequences may result in the overprotection of essential goods and services necessary for human function, and the underprotection of certain works that need protection from illicit expropriation. This dichotomy largely impacts minority or marginalized

386. See Rosenblatt, *Appropriation Ratchet*, *supra* note 125, at 601.

387. *Id.*

388. See Vats & Keller, *supra* note 124, at 791.

389. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[Copyright] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

390. Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2832 (2006).

communities. Considerations of development and incentivization must take into account not only economics, but also social, cultural, and political benefits.<sup>391</sup>

The goal of development should not only encompass economic growth, but also intertwine dimensions of cultural, social, and political welfare. Professor Margaret Chon argues that the principle of “substantive equality” should be incorporated into intellectual property globalization.<sup>392</sup> She proffers that development should be measured by “welfare-generating outcomes not only by economic growth but also by distributional effects.”<sup>393</sup> Professor Madhavi Sunder further states that “law must facilitate the ability of all citizens, rich or poor, brown or white, man or woman, straight or gay, to participate in making knowledge of our world and to benefit materially from their cultural production.”<sup>394</sup> Her notion of “fair culture” requires examination of the goals of intellectual property through the promotion of cultural exchange on “fair terms.”<sup>395</sup> Fair culture involves “inter- and intra-cultural borrowing in a socially just manner.”<sup>396</sup> The notion of “fair culture” must question who creates the work, and who ultimately earns the money from such creativity.<sup>397</sup>

The traditional law-and-economics approach to copyright facilitates the generation of wealth for those creators seen as “valuable” and are able to generate economic benefits from their creations. Such economic inequality may be detrimental to the overall creative production encouraged by copyright. Inequality within the sphere of intellectual property may discourage creators from creating or sharing their works.<sup>398</sup> Such a reluctance to share works in the marketplace derives from a fear of exploitation or commodification. For example, indigenous communities who possess unique designs or motifs may be reluctant to share these with a broader audience, fearing that large corporations might commodify them. Likewise, emerging musicians may be reluctant to record and release their music out of fear of larger artists appropriating their work. For centuries, colonial powers have exploited resources for the benefit of settler colonialist goals. Without such protections for traditionally marginalized groups, there is no incentive to divulge creations to the dominant power. This ultimately frustrates the goals of copyright law. Protection of works that

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391. *Id.* at 2834.

392. *Id.* at 2835.

393. *Id.* at 2823.

394. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 2–3 (2012).

395. *Id.* at 94. Fair culture is defined as “the realization of cultural rights and inclusion of everyone in cultural signification, irrespective of their age, gender, ability, or ethnic religious or cultural background.” *Id.* at 88–89.

396. *Id.* at 94.

397. *Id.*

398. *Id.* at 88.

promote cultural diversity may spur creativity by affording “people near and far, and over generations, new ways of thinking by exposing them to more ideas.”<sup>399</sup>

The reconsideration of fixation should consider the impact of cultural and social representation on development and incentivization. Property law concerns the rights amongst people concerning things. As such, property law profoundly reflects certain social values and relations. Intellectual property, which falls under a broader subset of property, has a significant impact on the generation, distribution, and consumption of cultural production. It is difficult to divorce culture—and the representation of culture—from the developmental goals of intellectual property law. Cultural representation has the power to impact economic and social power.<sup>400</sup> The advent of technology has already challenged the fundamental concept of property, as well as our conventional understanding of ownership and rights. In light of the ongoing evolution or societal norms and values, as well as postcolonial recognition of the harms associated with settler colonialism, it is imperative that copyright laws adapt accordingly. Copyright law must recognize cultural differences in creation of works and adapt its policies in favor of cross-cultural production. Once these asymmetries in application of law are acknowledged and rectified, the goals of cultural production and development can coexist within cultures.

#### CONCLUSION

Western society has been described as a “devouring beast with a heart of ice, perpetually hungry for cultural difference which it can feed its imperial fantasies.”<sup>401</sup> The market for intangible heritage emanates from a Western search for novelty, or maybe even from a lack of imagination. The law currently favors economic remuneration over the concerns of indigenous communities.

Intangible heritage is seen as a resource in the public domain, available for commercial exploitation. For this reason, the consummation of intangible heritage has been a lucrative practice to maximize corporate profits. The Eurocentric concept of copyright incentivizes the Western idea of creative output: that is, new “things” that are economically beneficial. Yet, intangible properties, and in particular, intangible heritage play a vital role in the creative output of indigenous communities globally. Conservation of intangible heritage can only be effectual through efforts to preserve its integrity.

The copyright system is deeply flawed. The U.S. copyright system does not protect a work unless it is fixed. Indeed, a work is often stated to be “created

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399. *Id.* at 99.

400. *Id.* at 91.

401. BROWN, NATIVE CULTURE, *supra* note 18, at 4.

upon fixation.”<sup>402</sup> The significance of fixation is often overstated. Fixation is not essential to the utility of copyright. While fixation has evidentiary value, there are other methods of establishing copyrightability. An “unfixed” work does not necessarily render it “unoriginal” or merely an “idea.” These conclusions often lead to formal and informal biases in the protection of cultural production. Desettling fixation requires the disruption of colonized practices of protection. This means removing the hierarchies that are embedded in our copyright system. Copyright law still provides essential benefits for those who are able to seek protection. Shifting the conceptual meaning of progress from economic incentivization to cultural representation and social justice will aid in the creation of a more equitable copyright system.

Acknowledgment of the manner in which settler societies illicitly utilize indigenous heritage can no longer serve as the only solution for cultural appropriation. Intellectual property reformations are by no way the perfect solution. This Article does not argue that the total elimination of fixation will repair or remedy centuries of inequities created by settler colonialism.

However, reforming fixation is a small step toward removing hierarchies embedded in the means by which cultural production is protected. Copyright doctrine should be adapted to accommodate the uniqueness of indigenous cultural heritage. Fixation should be reformed in a way to protect intangible heritage, regardless of cultural differences. Through the process of desettling, we may find a way to promote and protect the works of those who have traditionally been excluded from the copyright system.

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402. Heymann, *supra* note 160, at 870.

