Protecting Architectural Forms as Traditional Cultural Expression? Why WIPO Should Go Back to the Drafting Table

In recent decades, developing countries and indigenous communities have increasingly asserted the necessity of protecting so-called “traditional cultural expression”—the array of creative expressions integral to the cultural and social identities of indigenous and local communities—from improper exploitation. Among the more prominent voices responding to such calls has been the World Intellectual Property Organization (WIPO), which has worked to develop an international framework affording traditional cultural expression and folklore sui generis rights. This Note examines WIPO’s recently promulgated Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, which would, among other things, loosely define “architectural forms” as a protectable traditional cultural expression. In evaluating the proposed protection for “architectural forms,” this Note simultaneously assesses the profound tensions WIPO’s Revised Draft Provisions create with respect to the existing U.S. intellectual property regime and identifies the general limits of WIPO’s current vision for protecting traditional cultural expression in general. Ultimately, this Note argues that WIPO’s proposals should not include the vaguely defined category of “architectural forms” as protectable subject matter because the currently broad language would raise serious issues as to public domain and free speech rights, and could seriously impair creative expression, cultural development and the progress of an important professional service.

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I. INTRODUCTION: CULTURAL COMMODIFICATION

In October 2011, Sasha Houston Brown, a member of the Santee Sioux Nation, walked into an Urban Outfitters store in Minneapolis and discovered a “Navajo”-labeled and Native American-inspired clothing and accessory line that included goods such as the “Navajo Print Fabric Wrapped Flask,” the “Peace Treaty Feather Necklace,” the “Staring at Stars Skull Native Headdress T-shirt” and the “Navajo Hipster Panty.”


2. While many of the original items included in the Navajo product line are no longer available via the Urban Outfitters online store, some of the products are featured on various blog sites and online news articles discussing the incidents in this article. See, e.g., Tamara Abraham, Furious Native Americans Force Urban Outfitters to Remove ‘Navajo’
Outfitters online, chiding the retailer for selling “tacky products” that “make a mockery of [Native Americans’] identity and unique cultures.” According to Brown, Urban Outfitters’ “Navajo” line typified a larger cultural problem of commercially exploiting and misappropriating Native American cultures:

Urban Outfitters, Inc. has taken Indigenous life ways and artistic expressions and trivialized and sexualized them for the sake of corporate profit. It is this kind of behavior that perpetuates the stereotype of the white man’s Indian and allows for the ongoing commodification of an entire ethnic group. Just as our traditional homelands were stolen and expropriated without regard, so too has our very cultural identity.

Brown was not alone in her response to the “Navajo” line. Indeed, even before Brown’s public rebuke of Urban Outfitters, the Navajo Department of Justice sent a cease-and-desist letter to Urban Outfitters’ CEO, Glenn Senk, regarding the company’s potential liability for trademark infringement for use of the Navajo name on Urban Outfitters’ products. Facing growing hostility from online bloggers—and the Navajo Nation itself—Urban Outfitters ultimately removed the term “Navajo” from its product line. However, the products remained available for purchase, albeit under different names, well after the public backlash.

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4. Id.
7. Through November 2011, for example, many of the Navajo-line products were being sold on the Urban Outfitters online store under the label “Printed,” such as “Printed Hipster Panty,” the “Obey Printed Crew Pullover,” and the “Printed Fabric Wrapped Flask.” See Jenna Sauers, Urban Outfitters Gets Rid Of All Its ‘Navajo’ Products, JEZEBEL (Oct. 19, 2011, 7:00 PM), http://jezebel.com/5851441/urban-outfitters-gets-rid-of-all-its-navajo-products (noting products available under different names as of October 2011).
The dispute over Urban Outfitters’ “Navajo” product line is but one of many disputes involving the use of indigenous and indigenous-inspired “expression.” In 2004, for example, the hip-hop duo “Outkast” sparked a backlash from Native American groups when it used Native American chants and imagery that many regarded as perpetuating “tomahawk-and-teepee stereotypes” during its performance of “Hey Ya!” at the Forty-Sixth Annual Grammy Awards. In letters addressed to CBS, the National Academy of Recording Arts and Sciences, Arista Records and the FCC, Tex G. Hall, President of the National Congress of American Indians, called the performance “degrading, insulting, and racist.” In each of his letters, Hall emphasized the cultural significance of the symbols used in Outkast’s performance:

I watched in shock as this Nation’s native cultures and religions were painfully caricatured by this performance. Perhaps most disturbing was the use of faux

Moreover, the Navajo tribe filed suit against Urban Outfitters in late February 2012 alleging trademark infringement and violation of the Indian Arts and Crafts Act on the grounds that while Urban Outfitters had removed the Navajo-labeled products from its website, it continued to sell such products through subsidiaries. See Tim Gaynor, Navajo Files Trademark Suit Against Urban Outfitters, REUTERS, (Feb. 29, 2012, 6:43 PM), http://www.reuters.com/article/2012/02/29/us-navajo-urbanoutfitters-idUSTRE81S2IT20120229; Felicia Fonseca, Navajo Nation Sues Urban Outfitters Over ‘Navajo’ Trademark, USA TODAY (Feb. 29, 2012, 10:42 AM), http://www.usatoday.com/money/industries/retail/story/2012-02-29/navajo-trademark-urban-outfitters/53299172/1.

8. Jan-Mikael Patterson, Grammy TV Show’s Use of Sacred Song Causes Outrage, NAVAJO TIMES, Feb. 12, 2004, at A1 (noting that the introduction to Outkast’s performance used the Beauty Way song, which is intended to restore peace and harmony).


11. See Letter from Tex G. Hall, President of the National Congress of American Indians, to Michael Smellie, CEO, Arista Records (Feb. 11, 2004) (on file with NCAI); Letter from Tex G. Hall, President of the National Congress of American Indians, to Les Moonves, President, CBS Television (Feb. 11, 2004) (on file with NCAI); Letter from Tex G. Hall, President of the National Congress of American Indians, to Michael K. Powell, Chairman, Federal Communications Commission (Feb. 11, 2004) (on file with NCAI); Letter from Tex G. Hall, President of the National Congress of American Indians, to Neil Portnow, President, the National Academy of Recording Arts and Sciences (Feb. 11, 2004) (on file with NCAI) [hereinafter Letters from Tex G. Hall].
Indian headdresses by band performers. Our peoples' headdresses are very sacred, and it is a rare privilege to wear one. Such blatant mockery of these sacred traditions is sacrilegious and deeply offensive.12

Indigenous groups outside the United States have also been the victims of "cultural commodification." Cultural symbols of the Maori, the indigenous Polynesian peoples of New Zealand, have frequently been employed for commercial purposes.13 Ford Motor Company, for instance, "inspired by the resurgence of rock-and-roll and the current fascination with body art," utilized the Maori moko—a type of Maori tattooing—to promote its F-150 Lightning Rod Concept at the 2001 Chicago Auto Show.14 "In Maori culture, an elegantly tattooed face was a great source of pride to a warrior, for it made him fierce in battle," a Ford representative explained, drawing comparison to the F-150 by adding that "[t]he F-150 has a great history and has consistently been the leader among full-size pick-ups—it is certainly fierce in battle."15 Lego has also made use of Maori culture for commercial purposes, spawning a lawsuit by a group of Maoris that alleged Lego's "Bionicle" computer game misappropriated Maori words and cultural stories.16

Efforts by indigenous groups to protect their cultural expression have also extended to the performance of cultural ceremonies. When self-help guru James Arthur Ray was charged with manslaughter for three deaths occurring at his "Spiritual Warrior" retreat in Sedona, Arizona—at which he charged participants $10,000 to participate in a ceremony similar to a Native American sweat lodge ceremony—Native American groups used the trial to voice their objection to what they perceived as the cultural co-optation and commercialization of the Native American sweat lodge ceremony.17 Ar-

12. See Letters from Tex G. Hall, supra note 11.
17. Jessica Ravitz, Sweat Lodge Trial Fuels Native American Frustrations, CNN (Mar.
arguing that Ray’s practices amounted to an “abuse and misuse” of their ceremonies, members of various Native American groups brought suit on behalf of their respective tribes, claiming that sweat lodge ceremonies were cultural property subject to protection under the federal Indian Arts and Crafts Act. The court dismissed the claim, holding that “services,” such as the sweat lodge ceremony, could not be protected under the Act like goods.

The above events all concern the misappropriation of what many scholars and advocacy groups in the intellectual property community have labeled “traditional cultural expressions” or “expressions of folklore.” For the past several decades, various intellectual property scholars, advocacy groups and international organizations have not only debated the meaning of traditional cultural expressions but also the degree of protection that should be afforded to such expressions. While many groups have been active, perhaps none has been more prominent than the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations devoted to promoting economic, social and cultural development through a balanced international intellectual property system. Since the late 1970s, WIPO has worked to develop an international framework for sui generis rights for the protection of indigenous peoples’ folklore, traditional cultural expression, traditional knowledge and genetic resources.

This Note examines WIPO’s most recent proposals and assesses the tensions such proposals create with the existing intellectual property framework in the United States. In particular, this Note focuses on the inclusion of so-called “architectural forms” as protectable subject matter in WIPO’s Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, a provision that has received scant attention in the exist-

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18. Id.
19. See id.
20. These terms will be used interchangeably throughout this Note.
21. See Assemblies of Member States of WIPO, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 31 Decision, 40th Sess., Sept. 26–Oct. 5, 2011, available at http://www.wipo.int/tk/en/documents/pdf/decision_assemblies_2011.pdf (renewing its mandate “to expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs”).
22. WIPO, Revised Draft Provisions for the Protection of Traditional Cultural
ing academic literature despite the fact that WIPO leaves “architectural forms” essentially undefined and declines to provide examples of misappropria
tion. In doing so, it is the general aim of this Note to explore the limits of proposals for protecting traditional cultural expression through the lens of “architectural forms.” Ultimately, this Note argues not only that WIPO’s current proposals are generally in profound tension with the existing U.S. intellectual property regime, but also that WIPO’s proposals should not be adopted to include “architectural forms” as a type of protectable subject matter under the present language of the WIPO proposals. Protecting architectural forms under the currently broad language raises serious issues as to public domain and free speech rights and may greatly impair creative expression, cultural development and the progress of an important professional service.

II. BACKGROUND: CONTEXT OF THE INTERNATIONAL EFFORT

The effort to protect expressions of folklore and traditional cultural expression as intellectual property on an international level is not new. For several decades, various advocacy groups, national governments and intergovernmental organizations have discussed the types of protections that ought to be afforded to elements of indigenous cultural heritage and expression. Much of this discussion has been carried out under the leadership of WIPO and the United Na
tions Educational, Scientific and Cultural Organization (UNESCO), which have launched various, albeit thus far unsuccessful, campaigns to provide an effective international legal framework for cultural protection. Although but one actor in the international debate, WIPO’s activities are particularly important; as the primary United Nations organization devoted to intellectual property issues, WIPO possesses significant clout in the international community regarding the establish
tment of international standards and norms for intellectual property protection.23 However, to better understand WIPO’s current activi

23. See JANE E. ANDERSON, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW 173 (2009). For example, WIPO, among other things, administers roughly twenty-four multilateral intellectual property
ity and proposals—and the legal issues arising therefrom—it is useful to first briefly survey the history of the international discussion on the protection of folklore and traditional cultural expression.

A. The Berne Convention

There is, perhaps, no “best” point from which to trace the origin of international efforts to protect traditional cultural expression and expressions of folklore as intellectual property. However, the 1967 Stockholm Revision Conference of the Berne Convention for the Protection of Literary and Artistic Works stands out as one of the more significant early efforts. At the Conference, various countries proposed to amend the Berne Convention to protect “folklore.” A Working Group considered the proposal and declined to incorporate the word “folklore” into the treaty due to the difficulty of formulating a precise definition. However, recognizing the need to protect works of folklore, the Working Group adopted Article 15(4) of the Convention to protect “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the [Berne] Union.”

B. WIPO Model Provisions

In 1976, a second attempt for the protection of folklore was made via the Tunis Model Law on Copyright for Developing Countries (Tunis Model Law), which was adopted by the Committee of Governmental Experts of UNESCO and WIPO in 1976. Although treaties and oversees international systems to resolve intellectual property disputes. See What is WIPO?, WIPO, http://www.wipo.int/about-wipo/en/ (last visited Mar. 1, 2013).

24. The Berne Convention for the Protection of Literary and Artistic Works is an international copyright agreement first adopted in 1886 that aims to safeguard and respect the intellectual property rights of authors who are nationals of countries that are party to the convention.


26. Id. ¶¶ 249–53.

adopted to provide an international model for copyright in general, the Tunis Model Law contained specific sui generis rules for “works of national folklore,”28 including a definition of folklore,29 a provision that fixation would not be required for protection of folklore30 and a rule protecting works constituting folklore into perpetuity.31 The Tunis Model Law also required royalty payments for the use of works of folklore that had fallen into the public domain.32 While such provisions were better adapted to the nature of folklore than prior efforts—and achieved a degree of success by being partially incorporated into some national laws—the Tunis Model Law contained a number of deficiencies, not the least of which was its failure to account for the collective nature of folklore production.33

In the 1980s, WIPO and UNESCO attempted to expand on, and clarify, the types of protections provided by the Tunis Model Law with drafting of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions).34 With the exception of certain accepted uses, the Model Provisions protected both tangible and intangible “expressions of folklore” from unauthorized publication, performance, distribution or transmissions made with “gainful intent” outside the “traditional customary uses” of such expressions of folklore.35

C. Deferring an International Treaty Effort

While the Tunis Model Law and the Model Provisions achieved some success through their adoption by developing coun-

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29. Id. § 18(iv).
30. Id. § 1(5bis).
31. Id. § 6(2).
32. Id. § 17.
35. Id. §§ 2–4.
tries, they had little to no international impact. Believing international measures to be integral to the success of the protection of folklore and traditional cultural expression, WIPO and UNESCO jointly convened the Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property in 1984 to consider proposals for international regulation and protection of folklore as intellectual property. Ultimately the Group of Experts decided that while international cooperation was a necessary element of an effective legal regime in an age of transnational technology, development of an international treaty was premature at that time, particularly given the limited feedback as to the effectiveness of the Model Provisions and the Tunis Model Law at the national level.

D. Revival of the Folklore Discussion

Discussions on the protection of folklore and traditional cultural expression were relatively quiet for the ten years following the Group of Experts’ decision to forego proposals for an international treaty. In 1996, however, the conversation was revived during the development of two WIPO treaties—the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty—where the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms recommended the development of “an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different regional interests.” WIPO and UNESCO organized such a forum in 1997, wherein a “Plan of Action” was adopted to address the need for an international standard of folklore protection. As part of this effort, WIPO conducted

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36. TSHIMANGA KONGOLO, UNSETTLED INTERNATIONAL INTELLECTUAL PROPERTY ISSUES 51 (2008).


38. Id. at 22–23.


40. See Consolidated Analysis of the Legal Protection of Traditional Cultural Expression/Expressions of Folklore, Background Paper No. 1, supra note 37, at 24;
intensive fact-finding missions in twenty-eight different countries throughout 1998 and 1999 to identify the intellectual property related needs and expectations of the holders of traditional knowledge and traditional cultural expression.\footnote{Lewinski, \textit{The Protection of Folklore}, supra note 33, at 755.}

In late 2000, WIPO member states established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to further develop international standards for the protection of traditional cultural expression. Although member states have recommended that the IGC “initiate steps for the development of a \textit{sui generis} form of binding legal protection at national and international levels,”\footnote{See, e.g., Intergovernmental Committee on Intellectual Property, and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., Apr. 30–May 3, 2001, \textit{Final Report on National Experiences with the Legal Protection of Expressions of Folklore}, WIPO Doc. WIPO/GRTKF/IC/3/10, ¶ 113 (Mar. 25, 2002), \url{available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.pdf} [hereinafter \textit{Final Report on National Experiences}].} it is, at this time, unclear whether the IGC’s current efforts are directed toward a binding legal document or toward the creation of a more comprehensive set of model provisions.

\section*{III. WIPO’S REVISED DRAFT PROVISIONS}

WIPO’s latest quasi-treaty effort for the protection of traditional cultural expression is the \textit{Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (Revised Draft Provisions)}.\footnote{Revised Draft Provisions, supra note 22.} First adopted at the Ninth Session of the IGC in 2006,\footnote{See Intergovernmental Committee on Intellectual Property, and Genetic Resources, Traditional Knowledge and Folklore, 9th Sess., Apr. 24–28, \textit{The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles}, WIPO Doc. WIPO/GRTKF/IC/9/4 (Jan. 9, 2006), \url{available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_4.pdf}.} the \textit{Revised Draft Provisions} have since been the focus of the IGC’s work. Whether the \textit{Revised Draft Provisions} will ultimately form the basis of a binding international treaty proposal remains uncertain. WIPO’s own summary of the provisions remains ambiguous about the purpose of the document, stating only that the \textit{Revised Draft Provisions} “are being used as points of reference in a
range of national, regional and international policy discussions and standard-setting processes.” Nevertheless, WIPO’s summary of the draft materials does mention that while the materials currently lack any formal status, “they could suggest possible frameworks for the protection of traditional cultural expressions.”

A. Objectives and Principles

Underscoring the Revised Draft Provisions are thirteen named policy objectives derived from discussions of the international community over the past three decades. In general, the objectives underlying the Revised Draft Provisions center on the need to recognize the value of traditional cultural expression and folklore to indigenous communities by creating a flexible instrument to prevent the misappropriation of cultural expression beyond its traditional context in ways that might deprive indigenous groups of the value of those expressions. In doing so, the IGC hopes to empower indigenous communities, to preserve cultural diversity and to promote innovation, creativity and artistic freedom.

B. Protected Subject Matter

WIPO’s Revised Draft Provisions define “traditional cultural expressions” and “expressions of folklore” interchangeably to include both tangible and intangible forms in which “traditional culture and knowledge are expressed, appear or are manifested.” Accordingly, the range of protected subject matter is broad. For example, the Revised Draft Provisions protect three categories of intangible expressions: (1) Verbal expressions (such as stories, epics, poetry, words, signs, names and symbols); (2) musical expressions; and (3) “expressions by action” (such as dances and performances).


46. Id. ¶ 4 (emphasis added).


48. Id. at 4.

49. Id. art. 1(a).

50. Id. art. 1(a)(i).

51. Id. art. 1(a)(ii).

52. Id. art. 1(a)(iii).
The Revised Draft Provisions also protect “tangible expressions” such as drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments and, as shall be the focus of this Note, architectural forms.\(^{53}\)

The Revised Draft Provisions provide that, in order to be eligible for protection, tangible expressions must satisfy three conditions. First, the tangible expression must be the product of “creative intellectual activity,” which includes both individual and communal creativity.\(^{54}\) Second, an expression must be “characteristic of a community’s cultural and social identity and cultural heritage.”\(^{55}\) As noted in the commentary to the Revised Draft Provisions, the “characteristic” component is meant to require the protected expression to have some linkage to the community’s identity and heritage, meaning that the relevant source community views the protected expression as “authentic[,]” “genuine,” “pertain[ing] to” or as an “attribute of” the community.\(^{56}\) Finally, a tangible expression must be “maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”\(^{57}\)

C. Scope of Protection

Article 3 of the Revised Draft Provisions protects three classes of subject matter from acts of misappropriation. The first protected class is traditional cultural expressions “of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7.”\(^{58}\) When registered under Article 7, a traditional cultural expression may not be used in certain ways absent the “free, prior and informed consent” of the relevant community.\(^{59}\) With respect to words, signs, names and symbols, a community may prevent any use of the expression or a derivative thereof that “disparages, offends or falsely suggests a con-
nection with the community concerned, or brings the community into contempt or disrepute.” 60 Concerning expressions other than words, signs, names and symbols registered under Article 7, the community may prevent: (1) The “reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public, and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof”; (2) uses which fail to appropriately acknowledge the community as the source of an expression; (3) distortions, mutilations, modifications, or derogatory acts with respect to an expression; and (4) the acquisition or exercise of traditional intellectual property rights over an expression properly owned by the community. 61

The second protected class is “other traditional cultural expressions/expressions of folklore,” for which the Revised Draft Provisions suggest four levels of protection. First, the Revised Draft Provisions suggest that national governments develop measures to enforce proper attribution to the relevant community as the source of any derivative work. 62 Second, the Revised Draft Provisions recommend that national governments enact measures to prevent uses that distort, mutilate, modify or otherwise take derogatory action with respect to a traditional cultural expression, and that such uses be subject to civil or criminal sanctions. 63 Third, the Revised Draft Provisions seek to prevent unfair competition by prohibiting uses of traditional cultural expressions that falsely, confusingly or misleadingly indicate an association, linkage or endorsement with the source community. 64 Finally, the Revised Draft Provisions suggest measures for “equitable remuneration” or benefit-sharing whereby a party’s use or exploitation of an expression was for “gainful intent.” 65

“Secret traditional cultural expressions/expressions of folklore” constitute a third class of protectable subject matter under the Revised Draft Provisions. The Revised Draft Provisions lack specificity as to how this class ought to be protected. Rather, the Revised Draft Provisions suggest only that national governments create effective legal measures to prevent “unauthorized disclosure, subsequent

60. Id. art. 3(a)(ii).
61. Id. art. 3(a)(i).
62. Id. art. 3(b)(i).
63. Id. art. 3(b)(ii).
64. Id. art. 3(b)(iii).
65. Id. art. 3(b)(iv).
use of and acquisition and exercise of [intellectual property] rights over secret traditional cultural expressions/expressions of folklore." 66

According to Article 4, the traditional community, or an agency authorized by the community to act on its behalf, would have the sole authority over the management of its intellectual property rights. 67 Under Article 4, if an agency is authorized as the manager of the community’s rights, the agency must consult with the traditional community before giving consent to use a given expression and must act in accordance with the community’s “traditional decision-making and governance processes." 68

Importantly, Article 6 states that protection of traditional cultural expression should “endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions” or satisfy various registration formalities within the Revised Draft Provisions. 69 Consequently, protection may (but does not necessarily) continue into perpetuity.

D. Exceptions and Limitations

Article 5 of the Revised Draft Provisions sets forth various expectations and limitations to the afforded protections. As with the fair-use exceptions in U.S. copyright law, the purpose of the Article 5 exceptions is to avoid unduly stifling creativity, artistic freedom and cultural exchange. 70 The exceptions also recognize some of the inherent limits of enforcement and monitoring. 71 Thus, Article 5 states that measures to protect traditional cultural expression should not restrict the “normal use, transmission, exchange and development” of traditional cultural expression within the traditional community, as defined by the laws and practices of the source community. 72 Article 5 further provides that the use of traditional cultural expressions as illustrations for teaching and learning, for non-commercial research or private study, for criticism or review, for the reporting of news or events, as part of legal proceedings, in the makings of recordings or

66. Id. art. 3(c).
67. Id. art. 4(a).
68. Id. art. 4(a)(i).
69. Id. art. 6.
71. Id.
72. Revised Draft Provisions, supra note 22, art. 5(a)(i)–(ii).
reproductions for archival and non-commercial heritage preservation, or for “incidental uses” will not be deemed acts of misappropriation provided that: (1) such uses are consistent with “fair practice”; (2) the relevant community is acknowledged as the source of expression where practicable and possible; and (3) the uses are not offensive to the relevant community.73

IV. THE ISSUE OF ARCHITECTURE

As noted above, WIPO’s Revised Draft Provisions include “architectural forms” as protectable subject matter. Inclusion of architectural forms is not entirely unexpected given that architectural forms appeared as protectable subject matter in the 1982 Model Provisions.74 However, even the Model Provisions included the term “architectural forms” in brackets to reflect the hesitation of some member states as to the inclusion of the term as protectable subject matter.75 Despite this acknowledged hesitation, little to no attention is given to the inclusion of architectural forms in either the academic literature or in WIPO documents surrounding the development of the Revised Draft Provisions. Accordingly, the remainder of this Note explores the limits and implications of WIPO’s proposal to protect architectural forms as a type of traditional cultural expression. In particular, this Note examines not only whether architectural forms “belong” in WIPO’s definition of traditional cultural expression, but also whether protection of architectural forms would be fundamentally at odds with existing legislative frameworks for protecting architecture as intellectual property and, furthermore, whether sui generis protection for indigenous architectural forms is even a necessary course of action.

A. “Architectural Forms” as Traditional Cultural Expression?

A critical question raised by WIPO’s definition of traditional cultural expressions is whether architectural forms “belong” within the definition of tangible traditional cultural expression. In contrast to other tangible forms of traditional cultural expression mentioned in the Revised Draft Provisions—such as drawings, designs, paintings, carvings, sculpture, pottery, mosaics, jewelry, baskets, glassware,

73. Id. art. 5(a)(iii).
75. Commentary to Model Provisions, supra note 34, ¶ 37.
musical instruments and handicrafts—architectural forms seem less likely to be the subject of exploitation that might unduly deprive indigenous groups of some economic benefit. Commentary to the Revised Draft Provisions provides little guidance in terms of the purpose of including architectural forms as protectable subject matter. Rather, the Revised Draft Provisions state only that “protection for ‘architectural forms’ could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.”

However, to assume that architectural forms do not deserve protection as traditional cultural expression merely because they are less likely to be the source of misleading economic exploitation overlooks the range of objectives identified by the Revised Draft Provisions. Although the Revised Draft Provisions are concerned with protecting the economic rights of indigenous peoples, they are also underscored by a desire to preserve the intrinsic social, cultural, spiritual and scientific value that traditional cultural expressions possess for indigenous communities. Misappropriation of traditional cultural expression may profoundly undermine the intrinsic value of traditional cultural expressions and effectively force the abandonment of such expressions by a source community.

The conceptual value of indigenous “architectural forms” is not immediately clear. In analyzing architecture, theorists and historians often employ a functional-aesthetic distinction to differentiate “vernacular” architecture from “polite” architecture. The former is usually described as more “professionally” designed and dominated by aesthetic considerations, while the latter denotes a form of architecture in which design is dominated by functionality, with little or no attention to aesthetic considerations. Indigenous architectural forms are often classified as vernacular. Accordingly, one might argue against the broad protection advanced in the Revised Draft Provisions on the grounds that functionality-driven architecture has no intrinsic value aside from utility.

Regardless of any validity in the functional-aesthetic distinc-

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76. See Revised Draft Provisions, supra note 22, art. 1(a)(iv).
tion, the distinction is not dispositive as to the appropriateness of including architectural forms as protectable traditional cultural expression. Indeed, non-economic cultural significance—such as social, cultural or spiritual value—is as identifiable in architectural forms as it is in other forms of traditional cultural expression recognized by WIPO. As noted by Peter Nabokov and Robert Easton in their study of Native American architecture, seemingly vernacular tribal architecture responds as much to cultural beliefs and ideas of social interaction as it does to elements of climate and geography. In fact, Nabokov and Easton point out that the evolution of particular habitations and building traditions were the consequence not only of an indigenous group’s environment and available materials, but also the group’s social organization, food gathering patterns, religious life, history and view of the cosmos. Early Navajo houses, for example, were modeled on mountains, with four posts symbolically equated with the cardinal directions and floor spaces divided into day and night areas. Considered in this respect, then, architectural forms—whether vernacular or polite—appear appropriately included, at least on a conceptual level, alongside the other examples of traditional cultural expression referenced in the Revised Draft Provisions.

B. The Difficulties of Application

While the inclusion of architectural forms as protectable subject matter under the Revised Draft Provisions seems conceptually appropriate, more difficult questions are presented as to the enforceability and application of the Revised Draft Provisions with respect to architectural forms. Principally, the Revised Draft Provisions leave open the question of which architectural forms constitute protectable traditional cultural expression. As noted above, for an architectural form to qualify for protection as a traditional cultural expression, it must be the product of intellectual creativity, characteristic of a community’s cultural and social identity and be maintained, used or developed by a community or authorized individual in accordance with the source community’s customary law and practices. Each of these requirements poses complicated questions, the answers to which substantially affect the potential range of architectural works.


82. Id. at 16, 38; see also Amos Rapoport, House Form and Culture 25 (1969) (“Materials, construction and technology are best treated as modifying factors, rather than form determinants, because they decide neither what is to be built nor its form . . . .”).

83. Nabokov & Easton, supra note 81, at 38.
eligible for protection.

The creativity requirement presents significant questions as to the scope of protection. In particular, how much creativity is sufficient to qualify an architectural form as a product of “creative intellectual activity?” Because the Revised Draft Provisions are currently written to apply, at least to some degree, retroactively to any works satisfying the subject matter requirements, one must ask whether the standard of creativity is assessed with respect to present conditions or to conditions existing at the time the traditional cultural expression was developed. For instance, would an Iroquois longhouse—an elongated, relatively simple architectural structure that obtained particular spiritual significance for some Iroquois under Handsome Lake—qualify as sufficiently creative? Or is the architectural structure of a longhouse so commonplace in contemporary society as to be deemed not creative? The same question might be raised with respect to a conical wigwam. Assuming that a conical wigwam possessed a particular cultural significance to an indigenous community (and was still used by such a community), is the general form of a conical wigwam sufficiently creative—irrespective of any ornamental decoration—to permit a misappropriation claim against a facility like the Wigwam Motel, a village-style motel in San Bernardino, California where guests may sleep in one of nineteen thirty-foot tall tepees made from wood framing, concrete and stucco? Resolution of these questions depends, in part, on whether WIPO’s decision to use the word “creative,” as opposed to “original,” indicates that WIPO did not mean to require that architectural forms be original.

84. See Revised Draft Provisions, supra note 22, art. 9.


87. The Oxford English Dictionary defines “creative” as “inventive, imaginative; or, relating to, displaying, using, or involving imagination or original ideas as well as routine skill or intellect, esp. in literature or art.” See OXFORD ENGLISH DICTIONARY (online ed., 2012) (emphasis added), http://www.oed.com/view/Entry/44072 (last visited Mar. 1, 2013). “Original,” however, is “having the quality of that which proceeds directly from oneself; such as has not been done or produced before; novel or fresh in character or style.” See OXFORD ENGLISH DICTIONARY (online ed., 2012), http://www.oed.com/view/Entry/132564 (last visited Mar. 1, 2013). Therefore, the terms are analytically distinct. Although U.S. copyright law does not equate originality with novelty, the Supreme Court’s interpretation of copyright’s “originality” requirement as demanding “independent creation plus a modicum of creativity” further shows that “original” has a more specific and limited scope than “creative.” See Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 346 (1991) (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879)).
If creativity does incorporate originality, then a “backward” looking view, which looks to the level of creativity at the time the architectural form was conceived, may drastically expand the range of forms subject to protection and the number of contemporary architectural forms deemed to be infringing. On the other hand, defining creativity with respect to contemporary standards may unduly restrict the range of protectable architectural forms and impair the effectiveness of the Revised Draft Provisions.

The requirement that a tangible traditional cultural expression be “maintained, used or developed” by the source community or an authorized agent in a manner consistent with the source community’s customary law or practices also raises interesting issues regarding the types of architectural forms protected. Consider, for example, the monumental Mayan pyramids of Chichen Itza. The pyramids of Chichen Itza certainly seem to qualify as products of intellectual creativity and are undoubtedly characteristic of Mayan cultural heritage. Yet, because the pyramids are presumably not “maintained, used or developed” by the source community, it is likely that they would not qualify for protection under the Revised Draft Provisions unless Mayan “customary law and practice” extends to include preservation and tourism. Accordingly, no cause of action would lie should, say, a Las Vegas real estate developer decide to develop a Mayan-inspired casino incorporating Mayan architectural forms—excepting, perhaps, tangential claims related to the use of particular ornamental Mayan art forms or symbols still in use by Mayan community members—even if the use of such forms was deemed culturally denigrating to members of the Mayan community.

Indeed, the Revised Draft Provisions’ requirement that a cultural form still be maintained, used or developed according to customary use by a source community or authorized agent may lead to perverse results. Hypothetically speaking, were a “dominating” culture to exclude an indigenous community from making use of, or having access to, particular architectural forms, the indigenous community would not be eligible for protection under the Revised Draft Provisions. How such a scenario might play out is admittedly difficult to conceive, especially in a world full of more human rights-conscious legal regimes. But it is conceivable that land use or building code regulations in certain parts of the world may preclude indigenous communities from employing traditional architectural forms. Such a possibility—however remote—points to the fact that significant architectural forms that might otherwise qualify for protection under the Revised Draft Provisions cannot satisfy the Revised Draft Provisions’ maintenance requirement due to the effects of a not-too-distant colonial history that deprived many indigenous communities
of control over their traditional territory, natural resources and customary ways of life.

In short, the Revised Draft Provisions leave much to be desired in terms of clear principles of application. At the least, the Revised Draft Provisions must do more to define the scope of the term “creative intellectual activity,” lest different national judges reach conflicting decisions on the level of originality (if any) necessary to invoke the Revised Draft Provisions’ protections and thereby leave today’s practicing architects and artists without clear guidance as to infringement. Moreover, WIPO ought to give more attention to the relative burdens placed on indigenous communities—and the potentially perverse outcomes—that arise from the maintenance requirement. Although the Revised Draft Provisions’ maintenance, use or development requirement prevents overprotection by targeting traditional cultural expressions with significant meaning to a community, it overlooks the possibility that expressions—including architectural forms such as the Mayan pyramids—may nonetheless occupy positions of substantial cultural significance even though they are no longer used in accordance with traditional principles.

C. UNESCO Conflicts

WIPO’s proposal to protect architectural forms as traditional cultural expressions also raises questions with respect to various UNESCO proclamations related to cultural heritage. At the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, UNESCO proclaimed that “architectural works” and groups of buildings which are of “outstanding universal value from the point of view of history, art or science,” were to be protected and “preserved as part of the world heritage of mankind as a whole.” \(^88\) UNESCO’s 1982 Recommendation on the Safeguarding of Traditional Culture and Folklore echoed the idea of collective cultural heritage, describing folklore as “part of the universal heritage of humanity.” \(^89\) The Recommendation also manifested the tension between the recognition of communal heritage and the desire for preservation, advocating, on one hand, restrictions on distributions


that “distort” a cultural expression while, on the other hand, proclaiming that “[i]t is essential for the items that make up this cultural heritage to be widely disseminated” in order to foster recognition of folklore’s value.90 A similar pronouncement was made in UNESCO’s 2001 Universal Declaration on Cultural Diversity, which emphasized the common heritage of humanity and the need to ensure widespread access and dissemination of cultural heritage.91 Such recurring proclamations of universal cultural heritage suggest that folklore and traditional cultural expressions—including those in architectural form—belong in a global “public domain,” with limited restricted uses intended to preserve the integrity of cultural heritage. The Revised Draft Provisions, however, appear to reconsider that public domain status by requiring, in the case of registered traditional cultural expressions, the prior and informed consent of the source community.92

Although the conflict with UNESCO proclamations applies to all forms of traditional cultural expression, more pronounced issues might arise with regard to architectural forms due to the functional qualities inherent in architectural forms. That is, while inhibiting the use of other traditional cultural expressions might deprive “non-indigenous communities” of certain aesthetic expressions or literary sources, restricting the use of architectural forms may deprive non-indigenous societies of the utilitarian advantages of certain architectural forms depending on the level of specificity by which an architectural form is protected. Accordingly, before any definitive action can be taken with respect to the Revised Draft Provisions on an international level, WIPO must resolve the existing tension its provisions create with respect to already adopted frameworks originating from UNESCO.

D. Conflicts with the Existing U.S. Intellectual Property Regime

While the ambiguities within the Revised Draft Provisions and the inherent tensions between the Revised Draft Provisions and international agreements promulgated by UNESCO pose interesting issues, the conflict with the existing U.S. intellectual property regime is, arguably, even more important.

As many scholars have pointed out, WIPO’s proposals for the

90. Id. para. E.


92. Revised Draft Provisions, supra note 22, art. 3(a).
protection of traditional cultural expression are, in many ways, at odds with the present intellectual property framework in the United States, particularly with U.S. copyright law.\textsuperscript{93} Notable points of conflict include the fact that U.S. copyright law aims to incentivize creation by affording protection to a distinct group of “authors,”\textsuperscript{94} that copyright law imposes a defined period of protection related to the life of the author whereas folklore protection may last into perpetuity,\textsuperscript{95} and that copyright law imposes a requirement of originality that is not likely satisfied by many examples of folklore.\textsuperscript{96} Importantly, it has also been pointed out that protection for traditional cultural expressions and folklore often verges on blurring the idea-expression distinction that stands as a fundamental pillar of U.S. copyright law.\textsuperscript{97}

Protection of architectural forms as traditional cultural expression may create additional conflicts with U.S. law since Congress has specifically legislated with regard to architectural protection. In passing the Architectural Works Copyright Protection Act of 1990 (AWCPA), Congress specifically limited protection to architectural


\textsuperscript{94} Lewinski, The Protection of Folklore, supra note 33, at 757–59.


\textsuperscript{97} Id.; see also 17 U.S.C. § 102(b) (1990) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).
works created on or after December 1, 1990. In doing so, Congress excluded from protection structures with arguably significant cultural importance, such as the Empire State Building. Such a decision reflects not only the difficulties of “line drawing,” but also a Congressional decision as to the effectiveness of retroactivity in “promoting the Progress of Science and useful Arts.” In contrast, the Revised Draft Provisions are, in theory at least, infinitely “backward-looking” in that they may protect any structure, irrespective of the date of construction, that satisfies the subject matter requirements of the Revised Draft Provisions.

U.S. copyright law also provides important exemptions for architectural works visible in a public space. That is, architectural copyright “does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.” In Congress’s view, ad hoc fair use determinations were overly burdensome, since architecture constitutes a “public art” and the “important public purpose” served by such uses neither harmed the copyright owner’s market nor impaired the “normal exploitation of architectural works.” Under the Revised Draft Provisions, however, such uses would often be classified as acts of misappropriation where they are inconsistent with the source community’s customary use of the expression, degrading to the expression or source community, or, if registered under Article 7 of the Revised Draft Provisions, if such uses were not authorized by the source community. In effect then, the Revised Draft Provisions create an entirely more restrictive approach to third-party creative expression, which may inhibit the distribution and progress of cultural forms.

The Revised Draft Provisions’ lack of distinction between functional and aesthetic elements of traditional cultural expressions also raises concern. Legislative history of the AWCPA evinces Congress’s intent to preserve the “useful articles doctrine” in U.S. copyright law. “A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article


100. 17 U.S.C. § 120(a).

or to convey information.” 102 Under the Copyright Act, the “mechanical or utilitarian” aspects of a pictorial, graphic or sculptural work are excluded from copyright eligibility. 103 Prior to the passage of the AWCPA, architectural works were typically considered useful articles outside the scope of the Copyright Act. 104 In amending the Copyright Act to include “architectural works” as protected subject matter distinct from pictorial, graphic or sculptural works, however, Congress noted that it did not intend to ignore the aesthetic-functionality distinction. 105 Rather, Congress suggested a two-step test that first asked whether an architectural work contained original design elements, and then asked whether such design elements were functionally required. 106 Thus, under U.S. copyright law, architectural works only receive copyright protection if original design elements are not functionally required. 107 In contrast, WIPO’s Revised Draft Provisions give no attention to the potential protection of an architectural form’s utilitarian components. As noted above, uncertainty over the breadth of “forms” protected may, therefore, result in the removal of utilitarian components from the existing public domain. Such a result not only conflicts with U.S. intellectual property law, but may also undermine WIPO’s stated objective to “[e]ncourage community innovation and creativity.” 108

Two other tensions with U.S. intellectual property law are worth mentioning. First is the issue of the public domain, which was previously alluded to in the above discussion of UNESCO proclamations and is widely discussed in the academic literature. WIPO is well aware that its proposed protections for traditional cultural expressions decrease the number of works available in the public domain. 109 In fact, several WIPO member states have criticized

103. Id. ("[Pictorial, graphic, and sculptural] works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.").
104. See Leicester v. Warner Bros., 232 F.3d 1212, 1216 (9th Cir. 2000).
106. Id.
107. See id.
WIPO’s actions with respect to the public domain on the grounds that the public domain status of many traditional cultural expressions and expressions of folklore might actually be beneficial because it encourages new creations by contemporary artists and helps to keep “pre-existing cultural heritage” alive.\textsuperscript{110} As others have recognized, any proposal for the protection of traditional cultural expressions must properly consider not only the interests of the indigenous communities but also public domain interests and the interests of society in developing future works.\textsuperscript{111} The relative ambiguity of the current Revised Draft Provisions, however, suggests a tendency toward broad protections that resist allowing traditional cultural expressions to fall into the public domain.

The second remaining tension worth mentioning involves the U.S. doctrine of fair use. In some respects, the exceptions and limitations identified in the Revised Draft Provisions parallel the fair use exceptions in the Copyright Act.\textsuperscript{112} Among the uses recognized by courts as fair use is parody.\textsuperscript{113} According to the U.S. Supreme Court, “the heart of any parodist’s claim . . . is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.”\textsuperscript{114} Significantly, “[p]arody needs

\textsuperscript{110} Id. ¶ 102.


\textsuperscript{112} Compare Revised Draft Provisions, supra note 22, art. 5(a)(iii) (permitting uses for teaching, learning, criticism or review, reporting, legal proceedings or archival purposes), with 17 U.S.C. § 107 (recognizing copying and uses for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” as fair uses not infringing on a copyrighted work).

\textsuperscript{113} See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (“Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under [17 U.S.C.] § 107.”); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1270 (11th Cir. 2001) (recognizing The Wind Done Gone as a non-infringing parody of Gone With the Wind because it was “principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of [Gone with the Wind]”).

\textsuperscript{114} Acuff-Rose, 510 U.S. at 580; see also Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub, Grp., Inc., 886 F.2d 490, 494 (2d Cir. 1989) (“A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.”).
to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.”\textsuperscript{115} WIPO’s Revised Draft Provisions appear hostile to parody. In fact, Article 3 of the Revised Draft Provisions not only classifies “any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore” as an act of misappropriation, but also prohibits uses that “disparage” or “offend” the source community.\textsuperscript{116} Thus, the Revised Draft Provisions effectively prohibit many arguably parodic uses of architectural forms that qualify as traditional cultural expressions.\textsuperscript{117}

Because the courts have recognized parody as a right protected by the First Amendment,\textsuperscript{118} U.S. adoption of the Revised Draft Provisions in their current form would implicate constitutional questions of free speech. While one might recognize the intention to protect the cultural, religious or spiritual significance of traditional cultural expression, one is led to ask why a legal regime favoring indigenous peoples over current parodists and artists is necessary.\textsuperscript{119} Although it may be true that free speech does not always trump the right to redress from the exploitation of creative expression,\textsuperscript{120} it is far from clear that the balance weighs in favor of protecting indigenous architectural forms. It could easily be argued that maintaining relatively light restrictions on the development of architectural forms

\textsuperscript{115} Acuff-Rose, 510 U.S. at 580–81.

\textsuperscript{116} Revised Draft Provisions, supra note 22, art. 3.

\textsuperscript{117} For example, a Las Vegas casino, a theme park attraction, or even a themed restaurant or resort might constitute infringing works under the Revised Draft Provisions despite their permissible use as works of parody.

\textsuperscript{118} Cliffs Notes, Inc., 886 F.2d at 493 (recognizing that “parody is a form of artistic expression, protected by the First Amendment” in both copyright and trademark).

\textsuperscript{119} As Williams College anthropology professor Michael F. Brown argues, “[O]ne begins to wonder where the legal prohibition of religious ‘trivialization’ or sacrilege might lead. Would citizens therefore be subject to civil and criminal penalty if they trivialized any religious symbols? Would indigenous peoples themselves be subject to reciprocal fine or arrest if they manipulated Christian imagery for their own purposes? One can easily imagine conservative evangelical groups taking offense at the use of Christian symbols by members of the Native American Church during peyote meetings. In the American context, certainly, legal efforts to prevent parodic or creative appropriations of religious symbols would present a serious challenge to the First Amendment.” Michael F. Brown, Can Culture Be Copyrighted?, 39 CURRENT ANTHROPOLOGY 193, 199 (1998).

creates a more substantial benefit—such as the advancement of the built environment—than does one-sided protection for indigenous architectural forms. After all, an architect is, in essence, a service provider whose principal task is to develop a structure satisfying the needs of a client or developer.121 Except in cases where a client desires an absolutely unique design, drawing upon or incorporating already-existing design solutions is an efficient means for an architect to render his services and satisfy the needs of his client.122 In creating “backward-looking,” potentially limitless, restrictions on the use of indigenous architectural forms, the Revised Draft Provisions fundamentally reduce the availability of optimal design solutions for societal needs and thereby impair the efficient development of the built environment.123 Moreover, since architectural creativity is often rooted in the fusion of previously used elements into new forms expressing “both the new context of the work and the originality of the architect,”124 the Revised Draft Provisions run counter to the constitutional aims of U.S. copyright law to promote creativity and the development of new works.125

E. Does Architecture Need WIPO’s Protection?

Thus far, this Note has analyzed the ambiguities, difficulties and conflicts arising from WIPO’s Revised Draft Provisions. In doing so, this Note has focused largely on the relationship of the


122. Id. at 189.

123. See id. (noting that architectural copyright protection under the AWCPA already restricts the availability of design solutions).


125. See U.S. CONST. art. 1, § 8, cl. 8 (stating that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). To the extent that the Revised Draft Provisions might be viewed as a fusion of copyright and trademark-like protection by protecting prior creative efforts and avoiding marketplace exploitation and consumer confusion, the Revised Draft Provisions would threaten to blur a distinction consistently defended in the courts. See, e.g., Dastar Corp. v. Twentieth Century Fox Film, Corp., 539 U.S. 23, 34 (2003) (noting that the courts must avoid creating a species of “mutant copyright law” limiting the public’s right to copy and use works in the public domain).
vised Draft Provisions to U.S. copyright law because the Revised Draft Provisions provide protections that, in many ways, resemble copyright protection. Advocates of sui generis protection for traditional cultural expressions, however, argue that the differences (and conflicts) between copyright law and the Revised Draft Provisions are, in fact, necessary to accommodate the social and cultural understandings of indigenous communities. Certain participants in the drafting of the Revised Draft Provisions, for example, point out that many indigenous peoples do not recognize the notion of the public domain and, furthermore, that entering the public domain presumes that traditional cultural expressions first enjoyed intellectual property protection.126 Others argue that copyright is insufficient to protect expressions of folklore since it relies on an individualistic conception of authorship that does not account for the fact that folklore emerges only after a creation has been “submitted to the changes and continuous developments by the community.”127 Indeed, to some indigenous communities, the concept of private ownership over a creation is entirely foreign.128

A critical question, therefore, is whether the sui generis regime envisioned in WIPO’s Revised Draft Provisions is an appropriate solution for accommodating this cultural divide and protecting indigenous cultural expressions, particularly with respect to architectural forms. The aims of protecting folklore and traditional cultural expression are basically twofold. First, protection of traditional cultural expressions seeks to safeguard traditional cultures and maintain the integrity of their creative expressions and traditions, which includes the recognition of those expressions’ non-economic values.129 While this goal is admirable, it is not clear that a regime affording specific protection only to an ambiguously defined group of “indigenous peoples”130 is appropriate. The framework leads one to ask


127. Lewinski, supra note 33, at 758.


130. The United Nations definition of “indigenous peoples,” for example, only lists various factors the United Nations looks for, including: (1) Self-identification as indigenous peoples; (2) historical continuity with pre-colonial and/or pre-settler societies; (3) a strong link to territories and surrounding natural resources; (4) distinct social, economic or political systems; (5) distinct language, culture and beliefs; (6) existence as a non-dominant group of
whether it makes sense to provide special protections to indigenous cultural expressions that lack traditional intellectual property protection based largely on the idea that the authoring communities form isolated components of society. Moreover, one might ask why the architectural forms of indigenous groups are any more deserving of “backward-looking” protections than the currently unprotected works of non-indigenous peoples. The logic cannot turn solely on the cultural significance of indigenous works, for one can quite easily think up countless architectural works by non-indigenous authors that possess cultural significance and yet lack intellectual property protection. Second, protection of traditional cultural expressions aims to eliminate the economic exploitation of indigenous cultural forms. As one scholar notes:

In the world of information technology, satellite broadcasting, and the Internet, expressions of folklore have gained more economic value due to their very own creativity, preserved and refined by the indigenous or local communities. The merchandising business associated with copyright works and expressions of folklore has become more prominent. A clear example is the merchandises [sic] associated with the Sydney Olympics, 2000, where products inspired by or based on the Aboriginal folklore and traditional knowledge had generated huge income. The fast increasing popularity of the entertainment portion in the Internet means greater demand for creative works. Expressions of folklore have become an obvious source of choice, as they are free of charge due to the lack of international legal protection.131

The United States has attempted to use more traditional forms of intellectual property to protect indigenous creations in a way that may present more workable alternatives to the issue of traditional cultural expression than the Revised Draft Provisions. Although not covering “architectural forms,” the Indian Arts and Crafts Act (IACA)132 provides an alternative model for protection more con-

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sistent with the United States intellectual property regime. Based on an unfair competition model, the IACA imposes criminal sanctions and provides civil remedies against any person who “falsely suggests [a good] is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization.” But, while providing such a cause of action, the IACA does not prohibit non-Native Americans from making derivative works based on Native American goods, folklore or cultural expressions, since such works are presumed to be in the public domain. Instead, the IACA seeks to protect Native American groups in the market for Native American goods by issuing certification marks that signify the authenticity of Native American products.

Since members outside the Native American community may still use Native American designs, the trademark and trade dress based model underlying the IACA admittedly falls short of entirely preserving the non-commercial integrity of traditional cultural expression. Nonetheless, the IACA likely does more than the Revised Draft Provisions to promote the creation of new works, which ought to remain an important consideration for U.S. legislators. The IACA model could conceivably be applied to architectural forms. For example, legislation could target the use of architectural forms that falsely or confusingly suggest connection to, or authorship by, indigenous groups. But, to the extent that protecting previously-developed indigenous architectural forms is desired, the IACA model may prove too limited, as a mere certification mark would not prohibit other architects or developers from utilizing the underlying forms.

Where the IACA model falls short, however, traditional trademark law may offer protection for indigenous architectural forms—including those that have fallen into the public domain—provided that an architectural form possesses sufficient distinctiveness and is capable of being represented as a mark. In the United States, San Francisco’s Transamerica Pyramid, Chicago’s Wrigley Building and New York’s Chrysler Building have all utilized trademark to protect their landmark architectural forms. At the very

134. Ruesch, supra note 96, at 376.
least, traditional trademark law might serve to protect aesthetic, non-functional elements of architectural forms deemed important to an indigenous community. To the degree that trademark law cannot protect architectural forms because such forms are generic or without secondary meaning, it is debatable whether protection that precludes the use of such forms is actually desirable.

Rather than provide sui generis protection, Australia—like many other countries—has sought to provide rights for indigenous communities within the framework of existing intellectual property legislation. For instance, Australian courts have used the common law doctrine of confidential information to prevent the publication of a book that might disclose information of religious and cultural significance to an aboriginal community. Australian courts have recognized a moral-rights like “cultural harm” as a relevant factor in awarding damages to aboriginal artists whose cultural works have been infringed, and have further held that an aboriginal artist owes a fiduciary duty to his tribe in obtaining a copyright for a creation based on his tribe’s traditional folklore. The Australian model, like the Revised Draft Provisions, leans toward recognizing copyright and intellectual property protection in an underlying idea. While, as mentioned earlier, this raises complicated issues as to the traditional contours of copyright under U.S. law, the Australian model could be applied to provide “forward-looking” protection for architectural

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140. See Milpurrurr u Indofern Pty Ltd. [1995] 54 FCR 240, 245, 276–79 (Austl.) (recognizing that although infringement damages normally concentrate on commercial loss, “culturally based harm,” including “[l]osses resulting from tortious wrongdoing experienced by Aborigines in their particular environments”—such as the exposure of aboriginal artists to “embarrassment and contempt within their communities”—are “properly to be brought to account” in calculating damages for the infringement of aboriginal works) rev’d in part by King v Milpurrurr [1996] 66 FCR 474 (Austl.) (reversing liability of certain defendants previously found liable as joint tortfeasors).
141. Bulun Bulun v R & T Textiles Pty. Ltd. [1998] 86 FCR 244, 262 (Austl.) (“The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. . . . The evidence shows that an artist is entitled to consider and pursue his own interests, for example by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of the Ganalbingu culture where action for that purpose is required.”).
forms. That is, the United States could begin to recognize notions of cultural harm and permit limited copyright and trademark protection for the underlying cultural significance of an architectural design or work in future claims, thereby avoiding the pitfalls and administrative complications of retroactivity and perpetual protection as embodied in the Revised Draft Provisions. In Canada, for example, traditional copyright and trademark have been used to protect word carvings by indigenous artists and indigenous rock paintings. Similar protections could arguably be applied to particular ornamental, non-functional elements of architectural forms, even though they might not be able to protect an entire structure.

V. CONCLUSION

The need to adopt WIPO’s Revised Draft Provisions is far from clear. Indeed, the willingness to abandon the current framework of intellectual property protection is premature and may lead both to an undue focus on economic rather than non-economic protections and the growth of an unnecessarily complicated international administrative system. Moreover, the proposed protection for architectural forms as traditional cultural expression is, in many ways, more difficult and complicated than with other examples of traditional cultural expression identified by WIPO. In particular, the protection of architectural forms under the terms of the Revised Draft Provisions conflicts dramatically with the existing legal regime in the United States, in which Congress has enacted specific legislation regarding architectural copyright protection and has chosen to limit protection to a particular category of works as set forth in the AWCPA. More importantly, architecture, while an art form, is intimately connected with utilitarian considerations such as structural integrity, optimal utilization of space and design solutions that satisfy the functional needs of a paying client or developer. In barring the use of pre-existing architectural forms by non-indigenous groups, the broad-based protections of the Revised Draft Provisions threaten to deprive society of available sources for the development of a useful art.

142. Final Report on National Experiences, supra note 42, ¶ 126(iii); see also Willard v. Estern, 206 F. Supp. 2d 723 (D.V.I. 2002) (protecting the use of ancient petroglyph design when combined with the date “2000” to form an original calendar design logo).

As the examples noted at the beginning of this Note demonstrate, a great deal of cultural commodification occurs through the exploitation of traditional cultural expressions in ways that are often culturally insensitive. With respect to architectural forms, WIPO and other advocates for a *sui generis* protection regime have presented little—if any—evidence to suggest that architectural forms are the source of widespread exploitation or that indigenous groups have issued complaints as to the misuse of their traditional architectural forms. In fact, WIPO reports are virtually devoid of any factual data relating to architectural forms. Accordingly, it is difficult to conceive the breadth and scope of protection desired, let alone necessary, for architectural forms. Commentary to the Revised Draft Provisions is, as previously indicated, relatively unhelpful, and states only that WIPO is interested in protecting sacred sites. Yet, as written, the Revised Draft Provisions extend well beyond “sites” to cover a dramatically wider set of “architectural forms.” In doing so, the Revised Draft Provisions threaten to impair both the development of new works and the free speech rights recognized in the United States, including parody. A landmark work like Frank Lloyd Wright’s Hollyhock House, for example, might never come into existence under

144. See, e.g., P.V. Valsala G. Kutty, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia, and the Philippines, WIPO Doc. WIPO/GRTKF/STUDY/1 (Nov. 25, 2002), 22, http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf (stating, without data or citation, that “there is mass-scale exploitation resorted to by industrial houses” with respect to folk tradition of sculpture, paintings and architecture).


the regime envisioned by the Revised Draft Provisions since the Hollyhock House utilizes architectural forms derived from a number of Mayan and Native American sources. In effect, the Revised Draft Provisions remove sources of creative expression from the public domain and make the task of developing the field of architecture more difficult by granting potentially limitless protection to an array of possibly generic expressions.

In conclusion, WIPO’s Revised Draft Provisions, though well intended, should not be adopted in their current form with respect to the protection of architectural forms. Given the relative ease by which goods such as arts and crafts are used and exploited, and the more visible record of actual exploitation, it may be the case that the Revised Draft Provisions are a more suitable and sensible supplement to the existing intellectual property framework for other forms of traditional cultural expression. But, although architectural forms are conceptually similar to other traditional cultural expressions—in that architecture may reflect a culture’s history, religion, values or traditions—protecting architectural forms under the regime advanced by the Revised Draft Provisions presents its own unique conflicts with the existing intellectual property regime in the United States and elsewhere, especially given the “functional” considerations which shape architecture. Moreover, compared to other traditional cultural expressions, the use of indigenous architectural forms does not appear to be the source of widespread concern among indigenous communities. As such, it is uncertain whether the potentially expansive coverage of the Revised Draft Provisions is necessary, let alone desirable, for architectural forms.

Of course, all of these complications sit against the backdrop of the questionable constitutionality of a regime like that articulated in the Revised Draft Provisions. The current U.S. intellectual property regime rests primarily on two clauses: the commerce clause and the so-called intellectual property clause (Article 1, Section 8, Clause 8). It is unclear whether the “backward-looking” protection of architectural forms as traditional cultural expressions—let alone tradi-

148. See Buti v. Perosa, 139 F.3d 98, 102 (2d Cir. 1998) (“We recently affirmed that the ‘history and text of the Lanham Act show that ‘use in commerce’ reflects Congress’s intent to legislate to the limits of its authority under the Commerce Clause.”) (quoting United We Stand America, Inc. v. United We Stand, America New York, Inc., 128 F.3d 86, 92 (2d Cir. 1997)); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 100 (2d Cir. 1951) (“Congressional power to authorize both patents and copyrights is contained in Article 1, Sec. 8 of the Constitution.”).
tional cultural expression in general—can fall within these or any other constitutional authority of Congress.\textsuperscript{149}

It may very well be the case that protecting architectural forms and other traditional cultural expressions is a morally appropriate course of action. Few would argue against the proposition that the cultural and religious traditions of indigenous cultures ought to be respected. However, it is doubtful that WIPO’s Revised Draft Provisions strike an appropriate balance. Indeed, with regard to the protection of architectural forms, the harm caused to society may well outweigh the benefit received by indigenous groups. Of course, given the lack of factual data or findings produced by WIPO and advocates of the Revised Draft Provisions, it is nearly impossible for this Note to precisely state what balance ought to be struck and how such a balance is to be achieved. To do so would likely be premature. What can be said, however, is that the current language of the Revised Draft Provisions raises serious concerns about the protection of public domain rights, recognized fair use exceptions and free speech rights and the ways in which a sui generis regime would impair the development of new works in a field with great social value. The current version of the Revised Draft Provisions do not appear to give much attention to these concerns, and instead group a wide range of products, services and art forms into one umbrella category of “traditional cultural expression” all subject to the same, one-sided and potentially overbroad protections. For these reasons, the international community must insist that WIPO go back to the drafting table, produce more factual findings and reconsider whether the proposed sui generis protections for socially useful traditional cultural expressions like architectural forms is even appropriate.

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\textsuperscript{149} Section IV(D) identifies the major issues as to the intellectual property clause, among the most significant being copyright’s current originality requirement. As to the commerce clause, the lack of evidence concerning misappropriation leaves doubt as to the effect on interstate commerce. These objections aside, under the Court’s recent holding in \textit{Golan v. Holder}, it may nonetheless be possible to restore intellectual property protection to otherwise eligible traditional cultural expressions which never received intellectual property protection. \textit{See} Golan v. Holder, 132 S.Ct. 873, 887–89 (2012).

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