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Folklore 2.0: Preservation through Innovation

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The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.

-- Tom Greaves, Intellectual Property Rights for Indigenous Peoples, A Sourcebook

Societies without change aren’t authentic; they’re just dead.
-- Kwame Anthony Appiah, The Case for Contamination

Commentators agree: traditional culture is in danger. As the effects of globalization extend their reach to the world’s far-flung corners, it is putting pressure on pockets of cultural diversity that have hitherto resisted change. The question is what should policy-makers do in response.

This Article explores two approaches to regulating traditional culture within intellectual property law. We can characterize these contrasting approaches as offering a choice between preservation vs. innovation. Preservationists seek to harness intellectual property rights to safeguard traditional culture in its authentic form. By contrast, an innovation approach encourages tradition to evolve into new forms of expression. Because an innovation model offers the most viable strategy for sustaining traditional culture in the long run, this Article argues that global policy efforts should be reweighted accordingly.

As the dueling quotations above intimate, the preservation and innovation models stem from diverging conceptions of the challenge facing traditional culture. Preservationists, such as Tom Greaves, locate the ‘threat’ externally in the corrupting influence of global markets: The commodification of cultural heritage contaminates its source, distorting the meaning of tradition in ways that imperil the survival of both the heritage and its people.

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4 Greaves, supra note 1, at ix; Riley, supra note 3, at 81-82; Farley, supra note 3, at 11-12.
By contrast, Kwame Appiah locates the ‘threat’ internally: By failing to adapt traditions to new circumstances, societies hasten their own demise; embracing change becomes the key to long-term survival. Far from bemoaning compromises to authenticity, Appiah celebrates contamination as enriching traditional culture.\(^5\) Appiah also challenges claims that global markets threaten cultural diversity, noting that producers of traditional handicrafts benefit from increased sales.\(^6\)

These diverging diagnoses point to very different policy prescriptions. The preservation model sees intellectual property rights as the means to inoculate cultural heritage against contamination. Empowering source communities with exclusive rights over use of their traditional cultural expression would allow them to prevent inauthentic forms of exploitation. To determine the corpus of protected subject matter to which rights would attach, the preservation model adopts the perspective of an ethnographic museum curator who catalogues the characteristic expressive forms and content of each traditional culture.\(^7\) Yet, the aim of preservationists goes beyond the purely archival.\(^8\) Rather, by protecting tradition in its authentic form—call it Folklore 1.0—preservationists seek to ensure the continuing viability of traditional communities as custodians and practitioners of their intangible heritage.

By contrast, the innovation model operates under very different premises. It begins with skepticism toward notions of authenticity that often prove essentializing or coercive.\(^9\) It views traditional culture—like all culture—not as an assemblage of canonical forms governed by fixed meanings, but rather as a dynamic system of shared understandings that are contingent, evolving, and subject to contestation.\(^10\) Rather than seeking to preserve “authentic” expression in its original form, the innovation model actively encourages hybridity, experimentation, and subversion. Such processes of semiotic renewal allow the source community to reclaim its own traditions, reinventing meanings and adapting forms to reflect contemporary values. Call this ripping, mixing, and burning of culture, Folklore 2.0.

The two models differ in their approach to intellectual property law in both method and purpose. Where the preservationist agenda seeks to recognize a new form of intellectual property (IP), the innovation model relies on existing IP rights long-established in law. Instead of creating new rights in old things (tradition), these “old” IP rights focus on protecting new things—innovation. These contrasting

\(^5\) Appiah, supra note 2, at 34; see also Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 MICH. J. L. REFORM 751, 788 (1992).
\(^6\) Appiah, supra note 2, at 34. Indeed, as we will see, the real challenge for traditional culture is arguably a lack of economic viability; indifference may be a greater threat than exploitation. See infra notes 207-08 and accompanying text.
\(^7\) We normally associate museums with tangible artifacts displayed on physical shelves, but the focus here is on protecting intangible heritage—songs, dances, designs, stories, etc.—as distinct from tangible media in which such content is embodied—hence the domain of intellectual property law.
\(^8\) Preservationists thus depart from salvage ethnographers content to chronicle the dying gasps of indigenous cultures without forestalling their demise. See Jacob Gruber, Ethnographic Salvage and the Shaping of Anthropology, 72 AM. ANTHROPOLOGIST 1289 (1970).
\(^9\) See Appiah, supra note 2, at 34 (authenticity is “telling other people what they ought to value in their own traditions”).
models reflect very different normative conceptions of intangible property. IP rights are conventionally justified to encourage innovation. By vesting exclusive rights in authors, for example, copyright law provides an incentive to create and disseminate original works of creative expression. Society, in turn, reaps the benefit of a richer storehouse of knowledge and creativity. Yet, far from encouraging innovation, preservationist IP rights seek to uphold tradition. Instead of adding to the storehouse of knowledge, such rights would, at best, prevent its diminishment by preserving intangible cultural heritage.

Whereas copyright laws have long been established, traditional culture rights are an emerging norm. Use of Indian mascots by American sports teams offers perhaps the most prominent domestic controversy; yet, traditional culture rights have been asserted in a dizzying array of contexts ranging from OutKast’s Grammy Awards performance of a sacred Navajo melody to Vietnamese carpet designs copied from Australian aboriginal bark paintings. A growing number of jurisdictions have backed such claims by enacting specific protections for intangible heritage both domestically and abroad. Moreover, the World Intellectual Property Organization (WIPO) has recently made remarkable advances in multinational negotiations. A comprehensive treaty mandating exclusive rights in traditional cultural expression (abbreviated “TCE” and also known as folklore) has advanced to a near-final draft.

This Article argues that the propertization of tradition contemplated by the WIPO draft treaty is fundamentally misguided. It echoes previous critics of TCE/folklore rights who have warned of impingements upon free speech and the public domain. It also aligns with commentators who deplore such rights for

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11 Robert Paterson & Dennis Karjala, Looking Beyond Intellectual Property In Resolving Protection Of The Intangible Cultural Heritage Of Indigenous Peoples, 11 CARDOZO J. INT’L & COMP. L. 633, 647-48 (2003). The limited duration of the rights balances the need for authors to recover their creative investments against the social costs of exclusivity. Id.
12 Id. at 639. Protection of intangible heritage would also continue indefinitely, and the rights are communal rather than individual in nature. Id. at 639-41.
13 See Carpenter, et. al., supra note 3, at 1105-1112 (describing controversies involving Washington Redskins, Cleveland Indians, and other professional and collegiate teams).
14 Riley, supra note 3, at 70-71, 75; Farley, supra note 3, at 4-8.
15 See Carpenter, et. al., supra note 3, at 1106 (describing NCAA’s regulation of Indian mascots and team names); id. at 1104-05 (describing US Congress’ overhaul of 1935 Indian Craft Protection Act, via 1990 and 2010 amendments).
17 See WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles, WIPO/GRTK/IC/17/4 (Sept. 21, 2010) [hereinafter WIPO Draft Treaty]. WIPO has drafted separate treaties on traditional knowledge (governing technical know-how) and genetic resources. This Article focuses solely on the TCE/folklore treaty.
departing from the progressive mission of intellectual property rights. However, the focus here moves beyond existing critiques. Instead, this Article challenges the preservationist approach to traditional culture on the preservationists’ own terms. It argues that far from preserving traditional culture, exclusive TCE/folklore rights could jeopardize its survival, harming the very communities that such rights purport to protect.

Instead, this Article argues that an innovation model offers a better way forward. Traditional culture will only endure to the extent that it retains meaning and value to the source communities that perpetuate it. This requires the freedom to creatively adapt and hybridize tradition to keep it responsive to current needs. Rather than calcifying traditional expression in “authentic” forms that inhibit such innovation, the law should facilitate the dynamic development of culture. Copyright is better suited for this purpose because it encourages tradition and innovation to work hand in hand rather than opposing them as antagonists.

To develop these arguments, the article presents the Nigerian video film industry—“Nollywood”—as a case study. Nollywood provides a striking example of an indigenous culture industry that has thrived by reinventing folkloric tradition to achieve popular and commercial success. Largely overlooked by Western commentators, Nollywood has emerged as a major creative force that is, by some measures, the second or third largest film industry in the world. Nigerian movies are watched all across Africa and increasingly beyond. As such, Nollywood provides an important corrective to prevailing narratives of cultural imperialism that has particular implications for the traditional knowledge debate.

On one level, the extraordinary success of Nollywood is a story of technological empowerment. Nollywood shows how digital technologies can serve as a “leapfrog” technology, leveling the global playing field by dramatically lowering the costs of cultural production. Nollywood forms part of broader landscape of emerging culture industries in the Global South that are driving both commercial and cultural development in ways hitherto unimaginable. They have spawned a flowering of creative production that holds enormous significance for public discourse, democracy, cultural sovereignty, and much else.

The implications for global intellectual property norms, in particular, merit attention. The rise of commercial industries whose livelihood depends on original creative content is creating a powerful set of stakeholders in developing countries for whom copyright protection represents opportunity rather than threat. Such developments carry obvious benefits for IP exporting countries such as the United

20 Nollywood’s annual production of 1,500+ feature films rivals that of India, the world’s leader, and is roughly double the output of its American namesake, Hollywood. To be fair, the Hollywood figures only count box office releases rather total American film production. See Ramon Lobato, Creative Industries and Informal Economies: Lessons from Nollywood, 13 INT’L J. OF CULTUR. STUDIES 337, 339 (2010). Yet, the mere fact that Nollywood can be mentioned in the same breadth as these longstanding industry heavyweights shows the democratizing potential of digital technology.
22 See infra notes 126-143 and accompanying text.
States. However, the implications for developing countries are equally profound: They suggest recalibration of the cost/benefits of pursuing preservation strategies at the expense of innovation.23

Nollywood’s experience has direct relevance to the TCE/folklore debate for another reason: the portrayal of traditional culture in Nigerian videos provides much of the films’ appeal and competitive advantage. Such use of folklore by an indigenous industry again provides a positive counter to the usual narrative of Western neocolonial appropriation—here the Nigerians themselves are commercially exploiting their own culture. In doing so, they are perpetuating the underlying cultural traditions, but not necessarily in their original form. Rather, by adapting and remixing folkloric elements, Nollywood films repurpose them to serve new narrative contexts and, in the process, infuse tradition with fresh meaning and relevance.24

Yet, herein lies the problem: while such semiotic renewal—Folklore 2.0—represents a healthy, even praiseworthy phenomenon, it runs contrary to Folklore 1.0 conceptions of tradition as cherished heritage whose authenticity must not be compromised. Nollywood’s folklore remixes therefore potentially conflict with the preservationists’ emerging norm of TCE/folklore rights. Enforcing such rights against the Nollywoods of the developing world could inhibit socially valuable innovation and deter much-needed investment.

Given a choice between promoting innovation vs. reifying the past, the normative argument for the former is clear: a dynamic conception of culture is far more conducive to commercial and cultural development. Such creativity offers the best hope for the long-term survival of traditional culture. Accordingly, to encourage the remixing of tradition that Nollywood epitomizes and to clear a path for other creative industries to emulate its example, we must avoid shackling folklore to the dead hand of preservationist heritage rights.

Previous commentary has often discounted the prospect of TCE-based innovation, either by ignoring it or assuming incremental rates of development based on artisanal production.25 In doing so, critics of TCE/folklore rights arguably radically underestimate the true costs to innovation. The Nollywood case study in this Article serves to remedy that gap.

The argument proceeds as follows: Part I provides an overview of TCE protection, describing the scope of the draft WIPO treaty and the rationales behind it. Part II-A introduces Nollywood, the Nigerian video film industry. Nollywood exemplifies the potential for creative industries to harness digital technologies for creative and commercial development. Part II-B explains how much of Nollywood’s success depends upon its hybridized adaptations of traditional cultural sources. Part III explores the normative implications of the Nollywood case study. It underscores the advantages of innovation over preservation and explains how TCE rights could jeopardize the progressive promise that Nollywood remixes epitomize. Part IV

24 See infra notes 173-86 and accompanying text.
argues for greater emphasis on adapting copyright law to serve the needs of emerging creative industries. Part V concludes.

I. Overview of the WIPO Treaty – Rights & Rationales

A. Scope of Proposed Protection

Meeting in Geneva for the past several years, WIPO’s Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, has made steady progress toward fashioning international consensus around a treaty to protect traditional cultural expression. Although the language of the treaty remains subject to negotiation, the broad outlines of the protections it contemplates have become clear.

1. Subject Matter

The WIPO treaty casts a wide net embracing all manner of expressive subject-matter, in both tangible and intangible embodiments, including “stories, epics, legends, poetry, songs, rhythms, instrumental music . . . dances, plays, ceremonies, rituals, carvings, sculptures, pottery, textiles, glassware, carpets, costumes, and handicrafts.”

To qualify as a protected tradition, however, the treaty stipulates that the cultural expression in question must be (a) “passed on from generation to generation” within an identifiable community and (b) “authentic,” i.e. “characteristic” of that community’s “social identity and cultural heritage.”

The first requirement—transgenerational transmission—imposes a retrospective frame of reference. The second requirement, in referencing authenticity, pushes toward essentialism. Together, these definitional requirements privilege stability over innovation. Cultural expression that conforms to settled conventions and accepted paradigms will qualify; experimental works that challenge them are unlikely to. A broad communal esthetic likewise trumps individual creativity and subcultural variation.

This definitional bias toward canonical works is reinforced by treaty’s registration provisions for TCE/folklore having “particular value or significance.” Folkloric traditions singled out for registration will likely be those that enjoy either widespread acceptance or the backing of controlling elites; disfavored genres reflecting minority viewpoints will likely be excluded. Such selective pressures accentuate the treaty’s conservative bias against innovation.

While relatively clear on what qualifies as traditional expression, the treaty offers less guidance as to who the corresponding source communities might be. While indigenous peoples remain the paradigmatic example, the treaty extends its protection much more broadly to embrace “traditional and other cultural

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28 Id. at Art. 7(2) (providing for either registration or notification of particular works). In theory, a community could register every aspect of its culture. But assuming transaction costs, one can expect selection pressures to favor works with the most powerful constituency behind them.
communities”; these more nebulous categories are left undefined. Such definitional lacunae arguably invite undesirable strategic mobilizations around identity politics, a prospect compounded by the inevitability of conflicting TCE claims.

2. Rights

Having established the corpus of protected traditional expression, the treaty then proceeds to define three tiers of protection, which depend on whether the TCE/folklore in question (a) has been registered or notified; (b) is deemed “secret”; or (c) falls within the default category: “other.” A range of specific legal protections follows. Much of these protections extend basic unfair competition principles to TCE/folklore. For example, the treaty requires appropriate attribution of the source community for works adapted from TCE, and, conversely, forbids “false, confusing or misleading indications” of origin or sponsorship. The treaty also safeguards secret TCE/folklore against unauthorized disclosure.

The foregoing provisions have much to commend them. Accordingly, this Article will restrict its critique to non-secret traditional cultural expression, the use of which is not misleading as to source or sponsorship. The critique focuses instead on the treaty’s anti-copying protections that bypass such requirements. These more robust, copyright-like restrictions on TCE use come closer to asserting a property right in traditional culture.

The treaty affords its strongest protection for registered TCE/folklore; it imposes a blanket ban on “reproduction, publication, adaptation, broadcasts, public performance, communication to the public, distribution, rental . . . and fixation” of such expression. Such broad language essentially replicates the exclusive rights afforded under copyright law, but without the term limits and much of the exceptions that ordinarily circumscribe copyright. In addition, the treaty provides blocking rights to prevent third parties from acquiring intellectual property rights in derivative forms of TCE.

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29 Such broad definitions might embrace communities as diverse as Louisiana Cajuns, Scottish Highlanders, Jamaican Rastafarians, Mardi Gras “Indians,” . . . and maybe even California surfers.
31 See MICHAEL BROWN, WHO OWNS NATIVE CULTURE 19-21 (2003); Paul Kuruk, Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal Of The Tensions Between Individual And Communal Rights In Africa And The United States, 48 AM. U. L. REV. 769, 803-05 (1999). While the treaty acknowledges the potential for conflicting claims asserted by rival communities, it defers to national authorities to resolve them. WIPO Draft Treaty, Art. 7. Such purely national solutions cannot resolve conflicts that cut across international borders.
32 WIPO Draft Treaty, Art. 3.
33 Id. at Art. 3(1)(a)(ii), 3(1)(b-c), 3(2)(a),(c).
34 Id. at Art. 3(3).
35 Munzer & Raustiala, supra note 18, at 45-47.
37 The scope of such blocking rights remains unsettled. As currently drafted, registered TCE are protected only against “unfair” acquisition or exercise of intellectual property rights. Compare WIPO Draft Art. 3(a)(iv), with 17 U.S.C. § 103 (2006). However, the negotiating record of the treaty
Somewhat narrower protection applies to non-registered works, which are protected only against uses that involve “distortion, mutilation or other modification of, or other derogatory action.” This provision parallels the moral right of integrity afforded to authors of copyright expression. While the scope of such protection remains subject to interpretation, read expansively, it could afford veto-power over virtually any modifications that traditionalists find objectionable.

Such strong exclusionary rights raise the specter of unintended harms and/or potential abuse. While TCE rights are ostensibly justified by the threat of external appropriation, their operative effect is not limited to outsiders. The treaty explicitly contemplates application against community members whose expression is deemed to stray beyond the “traditional and customary context.” The potential for such intramural application to discourage cultural innovation represents a central concern of this Article.

3. Control

The potential for abuse is exacerbated by the treaty’s assignment of control over TCE/folklore rights. As an initial matter, the treaty vests authority with the community to administer collectively according to “traditional decision-making and governance processes.” While respect for autonomous community norms is admirable in principle, the ill-defined nature of the communities thereby empowered raises concerns that self-appointed cultural guardians will manipulate the mantle of orthodoxy to stifle minority voices.

Worse, the treaty gives governments themselves the ability to commandeer enforcement of TCE rights. Although the source communities are supposed to remain beneficiaries and governments to act in consultation with them, there is very little to prevent governments from usurping such power for their own purposes—a danger, which, as we will see, is far from theoretical.

B. Rationales

If the strong property rights approach to TCE/folklore embodied in the WIPO Draft Treaty can be justified at all, that justification arises from preservationist concerns over cultural integrity. Other rationales for protecting traditional culture include unjust enrichment, unfair competition, reparations, and redistribution, anti-

suggestions that derivative rights claims by outsiders could be regarded as presumptively unfair. See WIPO Draft Treaty, Art. 3 n.100.

38 Id., at Art. 3(2)(b).
40 The capaciousness of terms such as “distortion” and “modification” combined with the lack of countervailing protection of free speech either in the treaty, or in the legal systems of many of the countries that will implement it, hardly inspires confidence. Moral rights regimes in Europe have allowed authors to block such modifications as colorizing a black-and-white film. See Cour de Cassation (Fr.), 1991 Bull. Civ. I, No. 172 (May 28, 1991). Given such precedents, virtually any modification can be presented as offensive by a sufficiently vehement complainant.
41 WIPO Draft Treaty, Art. 5(1)(a)-(b).
42 Id. at Art. 4; see also id. at General Guiding Principles (a).
43 Id.; see infra notes 291-300 and accompanying text.
commodification, and privacy.\textsuperscript{44} But these objectives could be served through a combination of inalienability and liability rules.\textsuperscript{45} The need for robust controls over use of TCE/folklore arguably becomes imperative only where the goal is to prevent traditional culture from being corrupted by inauthentic and/or external appropriation.

Cultural preservation rationales for TCE/folklore rights generally encompass two subsidiary interests: (1) preventing cultural harm and (2) fostering “sustainable development.” A brief discussion of each follows.

1. Preventing Cultural Harm

As noted, harm prevention focuses on warding off sources of cultural contamination that could compromise the integrity of traditional cultural expression. By attacking vital underpinnings of communal identity, such cultural injuries are said to inflict damage that, left unchecked, could jeopardize the very survival of the community and its traditions.\textsuperscript{46} The precise mechanism by which such harms take place often remains unspecified. Commentators invoke notions of distortion, disparagement, and displacement. They “worry that the expropriation of their living culture will cause their imagery to lose its original significance.”\textsuperscript{47} They warn of the “cultural or psychological harm caused by the unauthorized use.”\textsuperscript{48} They fear that inauthentic meanings will displace authentic ones, diluting the original meaning or tarnishing its significance and value.\textsuperscript{49} They fear such cultural dislocations will have follow-on effects that undermine the community’s distinctive identity and “lead to a disruption of [the community’s] beliefs and a dissolution of their culture.”\textsuperscript{50} Therefore, at their core, TK rights claims represent a “struggle over cultural meaning” and cultural identity.\textsuperscript{51}

Without a metric to measure the severity of any specific injury or its causal aftermath, such complaints are difficult to evaluate; claims are invariably couched within broader contexts of colonialism and subordination.\textsuperscript{52} As such, a normative basis for remedying such cultural injuries remains unclear.\textsuperscript{53} Some commentators contest the very premise of cultural preservation.\textsuperscript{54}

This Article pursues a different tack. While accepting cultural preservation \textit{a priori} as a goal, it advances a more practical objection: Cultural harm from


\textsuperscript{45}See Anupam Chander & Madhavi Sunder, \textit{The Romance of the Public Domain}, 92 Cal. L. Rev. 1331, 1357, 1369 (2004). If compensation is due, the WIPO treaty provides a mechanism for “equitable remuneration or benefit-sharing.” WIPO Draft Treaty, Art. 3(2)(d).

\textsuperscript{46}Tsosie, \textit{supra} xx note 44, at 308-310.

\textsuperscript{47}Farley, \textit{supra} note 3, at 15.

\textsuperscript{48}\textit{Id.}; see also Carpenter, \textit{supra} note 3, at 1109 (analogy to hate speech and racial harassment).

\textsuperscript{49}Beebe, \textit{supra} note 19, at 875.

\textsuperscript{50}Farley, \textit{supra} note 3, at 15.

\textsuperscript{51}\textit{Id.} at 10; Riley, \textit{supra} note 3, at 78; Tsosie, \textit{supra} note 44, at 313, 317 (“the primary harm is to negate the reality of Native peoples’ separate political and cultural status and transform them into some quaint aspect of the dominant society’s “culture.”).

\textsuperscript{52}See Riley, \textit{supra} note 3, at 78-79; Farley, \textit{supra} note 3, at 11-12.

\textsuperscript{53}See Munzer & Raustiala, \textit{supra} note 18, at 71-73, 80; BROWN, \textit{supra} note 31, at 220.

\textsuperscript{54}See Appiah, \textit{supra} note 2, at 33-34; Waldron, \textit{supra} note 5, at 762-63.
appropriation may occur, but because we have no way to evaluate its probability or gravity in particular cases, we arguably need to worry about overprotection, as much as underprotection. Otherwise, TCE rights may do more harm than good.

In particular, this Article focuses on the risk that TCE rights may themselves inflict cultural harms by calcifying traditional expression within a rigid conception of authenticity. Such self-inflicted injuries could occur on multiple levels: (a) the process of defining “authentic” subject matter could foster a repressive essentialism; (b) the glorification of tradition could discourage experimentation; and (c) enforcing TCE rights could directly obstruct cultural innovation.55 The resultant cultural atrophy could, in turn, jeopardize the survival of the very traditions that TCE protection purports to safeguard.56

By supplying a dynamic context to evaluate such concerns, Nollywood films underscore the tradeoffs between innovation and preservation. Using commercial mass media to reinvent tradition, such digital remixes exemplify the creative potential of the Folklore 2.0 paradigm and supply a powerful argument for favoring experimentation over authenticity.

2. Fostering “Sustainable Development”

TCE rights proponents generally dismiss the “cultural mummification” concerns described above as overstated. Far from confining traditional culture in a straightjacket of authenticity, proponents insist that TCE rights are compatible with a dynamic concept of culture in which practices and meanings evolve over time. The WIPO Draft Treaty acknowledges culture’s “constantly evolving character” and stipulates that “normal use . . . and development of TCEs” by community members does not infringe TCE rights.57

Cultural preservation rationales have themselves evolved beyond harm avoidance to advance an affirmative vision of “cultural stewardship” that views TCE rights as an instrument to promote both cultural and economic development. Rather than acquiesce in untrammeled exploitation of traditional culture, however, such “cultural stewardship” models contemplate benevolent guardians who will shepherd the development of traditional culture along responsible paths.58 This Article challenges the premise of such stewardship, arguing that it rests on an irredeemably flawed notion of “cultural sustainability.”

a. Cultural Development

As noted, the WIPO Treaty provides for “normal use . . . and development” of traditional culture, while stipulating that such development must take place “within the traditional and customary context.”59 Such constraints presumably seek to ensure that new uses remain compatible with existing traditions. Borrowing from

55 See BROWN, supra note 31, at 215-22; Mezey, supra note 30, at 216-220; Sunder, Dissent, supra note 10, at 500-01.
56 TCE rights could also exacerbate identity politics and empower reactionary elites. See Sunder, Dissent, supra note 10, at 504.
57 WIPO Draft Treaty, General Guiding Principles (e) and Art. 5(1)(a).
58 See Carpenter et. al., supra note 3, at 1069.
environmental policy, the animating concept here appears to be a notion of “sustainable development.”

Yet, the notion of “cultural sustainability” appears, at best, problematic. Sustainability of traditional culture is hardly analogous to fishery management, where empirical models of replenishment can determine responsible limits. Moreover, the idea that we can identify “normal” development in traditional culture is deeply suspect. It assumes that change can be made to unfold in gradualistic, evolutionary fashion and that we can meaningfully evaluate new developments as they arise. Yet, there are no extrinsic criteria by which to make such determinations. Cultural innovations are unlike executable software or blood types for which compatibility can objectively defined. Contemporary assessments of cultural value are notoriously problematic.

The WIPO Treaty sidesteps such ontological questions by opting for a procedural solution. It begins with the proviso that in order to qualify for the “development” exemption, innovations must originate within the community. Next, it stipulates that the allowance for “normal” development shall be “determined by customary laws and practices.” Finally, the Treaty suggests that communal consensus supplies the touchstone of legitimacy. In short, it envisions a process of cultural development emerging incrementally through communal consensus ratified by traditional practices. Rather than having change imposed by external forces, communities would thereby be empowered to embrace innovation selectively on their own terms.

Such appeals to cultural sovereignty are only persuasive, however, if we think that change can indeed be brokered consensually through autonomous processes. In fact, cultural change is often abrupt and riven by conflict, and the boundaries between internal and exogenous influences are seldom clear-cut. Nor does the WIPO treaty’s deference to customary norms offer a viable basis to navigate such conflicts. As we will see, its artful formulations elide deeper tensions that cannot be papered over. Cultural development requires experimentation; experimentation courts controversy; and controversy breeds conflict. The tensions between “development” and “tradition” are unavoidable. And the indeterminate nature of “cultural sustainability” offers no principled basis to resolve them. Moreover, the treaty could itself exacerbate matters by empowering cultural conservatives with the means to quash culturally heterodox voices, short-circuiting dialogue and deterring experimentation.

b. Economic Development

A further source of potential conflict arises from tensions between cultural and economic development. A goal of the WIPO Treaty is to enable source communities to exploit their traditional expression for commercial gain, leveraging their rights of

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60 See WIPO Draft Treaty, Objective (iii).
62 WIPO Draft Treaty, Art. 5(1)(a) (referring to development “by community members”).
63 Id. at Art. 5(1)(a).
64 See Id., at General Guiding Principles (h) (allowing for “contemporary use [where] the community identifies itself with that use”).
65 See infra notes 267-82 and accompanying text.
content exclusivity to economic advantage. Commodification of TCE/folklore would contribute to the livelihoods of source communities and thereby underwrite the continued flourishing of the underlying traditions. In this sense, economic development undoubtedly contributes to cultural preservation.

Yet, does a property rights model offer the best means to unlock the potential value of TCE/folklore and secure the benefits of such commodification to source communities? Leveraging exclusive use rights would undoubtedly extract some value in the form of monopoly rents. TCE proponents further claim TCE rights will bring benefits to source communities in the form of commercial certainty, loan securitization, and induced investment.  

However, much of these benefits are illusory, and, indeed, the opposite effects are likely to obtain. The amorphous nature and scope of TCE rights and their potentially contested ownership is likely to undermine commercial certainty rather than further it. Such overlapping and contested claims raise the specter of a TCE “anticommons” that would complicate licensing and deter investment. Moreover, by blocking uses that exceed the bounds of traditional and customary use, such rights could impede the kind of creative hybridizations needed to make TCE marketable.

This latter consideration points to the potential tradeoffs between preservation vs. innovation models. Traditional culture will rarely be marketable in its “raw,” authentic form. Rather, commodification of tradition typically entails adaptation. Catering to external markets requires varying degrees of cultural translation, mediation, and packaging. Evolving tastes at home may similarly demand variations and innovation. Such adaptations will likely be subject to copyright, which encourages the commercialization of traditional culture by allowing the improver to internalize the benefits of producing and marketing the adaptations.

By contrast, rather than incentivizing new versions of traditional culture, TCE-folklore rights push in the opposite direction by subordinating copyrights in derivative forms of TCE/folklore to preexisting claims to tradition in its original, “raw” form. At best, such rights undermine copyright incentives to innovate by imposing added transaction costs. At worst, they could block innovation directly through hold-ups and outright vetoes. Vesting “upstream” rights in source communities would therefore allow them to appropriate rents from the “downstream” adaptations that generate commercial value thereby undermining the incentives for creative development. Accordingly, the expected outcome would be economically suboptimal rates of commercialization and innovation.

In fact, TCE proponents generally do not claim that TCE rights represent an economically efficient solution. Rather, such rights are justified as a brake on

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66 Munzer & Raustiala, supra note 18, at 67-68.
67 Carol M. Rose, Property in All the Wrong Places?, 114 YALE L. J. 991, 999-1000 (2005).
68 See infra notes 222-23 and accompanying text.
69 The concerns over hold-up costs is especially salient because source communities, by TCE proponents’ own account, are not motivated by exclusively economic motives.
70 While the community may gain collectively from exploiting/licensing TCE rights, individual artists who generate commercially valuable innovations would not. Nor is there any guarantee that the most creative innovators would receive communal permission; rather, licenses could go to the highest bidder or those with the best connections.
otherwise unrestricted commercialization. Thus, the case for upstream vetoes over commodification ultimately reverts to cultural rationales. Propertizing tradition is not about wealth maximization, nor even about allocating the proceeds equitably. The point is to channel development along a “culturally sustainable” path. In theory, exclusive rights will allow source communities to selectively exploit the economic value of their TCE/folklore without compromising cultural integrity. Yet, the right to control commodification does not remove the conflict between development and preservationism: The impetus to exploit tradition for economic gain remains in tension with cultural integrity concerns.

As we have seen, the WIPO Draft Treaty envisions a harmonious integration of cultural and economic development will emerge through an unspecified process based on communal consensus and customary practices. Yet, conflicting imperatives and diverging conceptions of progress make such Panglossian faith hard to swallow. Autonomous decision-making offers no guarantee of sustainable outcomes. Rather, the unresolved contradictions within the cultural preservation model invite internecine struggles, unintended outcomes, and abuses.

The Nollywood case study that follows shows how the premise of “sustainable development” rests on a vision of cultural stewardship that is itself ultimately unsustainable. Nollywood’s creative hybridizations exemplify the autonomous development of tradition that TCE proponents purport to favor. Yet, as Part III demonstrates, TCE rights could block such socially valuable innovation in the name of cultural orthodoxy. As such, the cultural preservation rationale arguably fails on its own terms.

C. Why Not Innovation?

Given the pitfalls of the preservationist approach, why haven’t developing countries embraced innovation instead as the means to both revitalize tradition and reap the benefits of cultural and economic development? Arguably, much of the reluctance to embrace innovation springs from a lack of confidence. Developing countries have long viewed the global intellectual property regime as a stacked deck that serves the interest of powerful multinational firms and favors forms of innovation that developed countries already dominate. Conversely, the innovative capacity of developing countries, as well as their ability to project cultural identities through global media, has been seen as historically weak. Such perceived vulnerability has led to defensive policies designed to fend off “cultural

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71 A variety of motives are at play: distrust of market mechanisms; a Marxist disdain for commodification; and the suspicion that commercial exploitation is more likely to benefit Western appropriators than the source communities themselves. See Chander & Sunder, supra note 45, at 1337. However, as noted, inalienability rules and benefit-sharing could address these concerns.

72 These conflicts become even more stark when governments administer TCE rights on source communities’ behalf. See infra notes 294-95 and accompanying text.

73 See infra notes 216-18, 265-300 and accompanying text.

74 For now, place to one side the objection that innovation brings “contamination.” We will address this concern more fully infra, in Part III.

75 Such perceptions are exacerbated by a tendency to view intellectual property rights as concerned solely with patentable innovation, a realm where the relative disadvantage of developing countries is particularly skewed. See Schultz & van Gelder, supra note 23, at 85-86.
imperialism.” TCE/folklore rights form part of this larger fabric of counter-hegemonic resistance.

In fact, such embattled despair ignores the extent to which digital technologies have democratized cultural production. While Southern policy-makers cling to outdated assumptions of Western hegemony, developments on the ground justify a more optimistic outlook. As new technologies and business models rewrite the rules of creative economies, emerging culture industries across the developing world stand to number among the leading beneficiaries.

Over the last decade, commentators in the US and other advanced Western nations have celebrated the emancipating potential of digital communications in glowing, almost utopian terms. Pundits have hailed Web 2.0 as a radical shift away from centralized mass media toward more diverse forms of expression. By removing technological constraints on human creativity, such technologies are unleashing the ingenuity of ordinary citizens and delivering us a cultural cornucopia.

Nollywood videos are (literally and figuratively) worlds apart from the internet mash-ups and remixes we think of as epitomizing Web 2.0 content. Yet, if anything, the implications of digital technologies for developing countries may be even more dramatic. By empowering a new generation of homegrown cultural industries, digital production could banish lingering anxieties over cultural imperialism and jump-start economic development, while giving expression to popular voices that have too long been silenced. Last but not least, Folklore 2.0’s potential to remix tradition mirrors the promise of its cyberspace namesake: at stake, is the revitalization of folklore itself.

That such inspiring potential has gone unheralded in the West is unsurprising. That it remains unheeded in developing countries themselves is less understandable—and may reflect the vested interest of ruling elites in perpetuating narratives of imperialist exploitation. In belying such narratives, the transformative promise of digital technologies undercuts the rationale for TCE rights and invites a corresponding reappraisal of copyright law. As a step toward encouraging such normative reappraisal, this Article presents Nigeria’s video film industry as a case study in digital content production.

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76 Chioma Ugochukwu, Cultural Resistance and Resilience amid Imported TV Programming in Nigeria, 55 AFR. TODAY 35, 36-37, 41 (2008); J.P. Singh, Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond, 8 INT’L STUD. PERSP. 36, 40-44 (2007).
77 Munzer & Raustiala, supra note 18, at 50-51.
78 See infra notes 141-47 and accompanying text.
82 That autocratic elites abhor the grassroots empowerment that digital technologies bring is all the more reason to scrutinize skeptically their self-serving rationales for advancing TCE rights at the expense of innovation policies.
II. Nollywood

On its face, Nigeria is perhaps the last place one would expect to find a thriving digitally based culture industry. Africa is often stereotyped as the “Dark Continent,” perpetually undeveloped, ravaged by dictatorships, corruption, and conflict, and facing an ever yawning divide, digital and otherwise. ‘Creative industries’ in Africa calls to mind traditional handicrafts more readily than sophisticated filmmaking. Moreover, unlike, say, India’s Bollywood, Nigeria had very little in the way of an established filmmaking tradition prior to 1990. African cinema at that time was primarily associated with Francophone countries such as Mali and Senegal. And yet in little more than a decade, Nigeria’s video film industry has emerged as the one of the world’s leading players. Measured by number of films produced annually, Nollywood rivals Bollywood and far exceeds Hollywood’s output. And while its revenues are still a pale shadow of these cinema heavyweights, Nollywood’s rising share of global audiences gives it an extraordinary reach and influence.

Nollywood’s emergence is significant for two reasons. First, it calls into question the cultural imperialism thesis. In particular, it shows that far from intensifying existing inequalities, digital technologies can help to erase the development divide and level the playing field. Second, the use of traditional culture in Nigerian video films serves as a counter to the usual narratives of Western appropriation. Not only is African culture being commercial exploited by Africans rather than Westerners, but such uses reveal a transformative potential that contrasts favorably with the protectionist premises of TCE/folklore rights. We address each of these considerations in turn.

A. Empowering African Voices

Before Nollywood, African cinema was largely an elite phenomenon. Celluloid (analog) filmmaking is a capital-intensive, time-consuming, and technically demanding art form. It required specialized training, expensive equipment, and access to imported materials and overseas processing that consumed scarce hard

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85 Lobato, supra note 20, at 339; but see supra note 18.
86 Reliable estimates of Nollywood’s ranking among global film industries are difficult to come by. Some sources, however, place Nollywood third in global revenues. Evuleocha, supra note 21, at 409; UCHENNA ONUZULIKE, NOLLYWOOD VIDEO FILM: NIGERIAN MOVIES AS INDIGENOUS VOICE 23 (2010). What is clear is that its films enjoy audiences numbered in the hundreds of millions. Lobato, supra note 20, at 339; see also Lights, Camera, Africa, ECONOMIST, Dec. 18, 2010, at 85 (“Millions of Africans watch Nigerian films every day”).
87 See, e.g., Kelani, supra note 84, at 92.
Cinema distribution was limited to urban areas, and even here, Western-owned distribution monopolies favored imported content over African films. As a result, box office revenues could not possibly support domestic film industries. African filmmakers relied instead on funding from national governments or, increasingly, patronage from European sponsors. While African films earned praise from international festival juries, African audiences rarely saw them.

By most accounts, Nollywood’s commercial launch happened almost by accident. It started when an entrepreneur found himself with a surplus supply of blank videotape, decided they would sell better with content on them and so filmed Nigeria’s first commercial video film. The breakthrough success of Kenneth Nnebue’s “Living in Bondage” (1992) a few years later attracted widespread imitation, and an industry emerged virtually overnight.

The switch to video production dramatically altered the economics of filmmaking. Production of celluloid films in Nigeria had dwindled to an average of four movies per year in the 1980s and to roughly half that rate by the 1990s. By 2006, Nollywood’s annual output of video films exceeded 1500—more than three times as many movies as were made in the entire history of Nigeria’s celluloid production.

Nollywood started off using videotape and gradually switched to newer digital media. “Editing, music, and other post-production work is done with common computer-based systems. The films go straight to digital video disc (DVD) and video compact disc (VCD).” Digital media are much less expensive and easier to shoot in, edit, copy, and distribute than traditional celluloid film. Digital production allows full-length feature films to be shot on barebones budgets (around US $10,000-15,000) and completed within weeks (if not days). The lower costs of digital production/distribution make it possible to recoup investments on a far

89 John C. McCall, Madness, Money, and Movies: Watching a Nigerian Popular Video with the Guidance of a Native Doctor, 49 AFR. TODAY, no. 3, 2002 at 79, 85 [hereinafter McCall, Madness].
90 Pierre Barrot, Selling Like Hot Cake: Box Office & Statistics, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84, at 32, 39-40 [hereinafter, Barrot, Hot Cake].
94 Tunde Oladunjoye, Jumping on the Bandwagon, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84, at 62.
95 Evuleocha, supra note 21, at 408.
smaller revenue base.\textsuperscript{97} As a result, the industry has rapidly expanded its production volume, churning out new releases at a bewildering rate.\textsuperscript{98}

Nigeria provides a powerful example of how digital technologies can enable the democratization of cultural production. Lowering the barriers to entry has allowed the industry to remain extremely decentralized, with clusters of small-scale production located in each of Nigeria’s principal cities and films produced in all of Nigeria’s major indigenous languages, as well as in English.\textsuperscript{99} Because digital media require less technical expertise to work with, the emerging industry is populated by self-taught auteurs who have brought fresh visions to their craft and developed innovative approaches to guerilla filmmaking.\textsuperscript{100} A significant number of Nollywood directors and producers are women, who were excluded from traditional filmmaking.\textsuperscript{101}

Digital technology has proven equally revolutionary on the distribution end of the industry. Nollywood films are released direct to video, primarily for home viewing, with thousands of copies distributed across a decentralized network of market stalls countrywide.\textsuperscript{102} By reaching rural audiences who never had access to traditional cinema exhibition, Nollywood video dramatically expanded its potential market.\textsuperscript{103} Digital distribution has also enabled Nollywood access to audiences across Africa. Nollywood videos dominate markets and television programming in neighboring countries and have attracted mass audiences across sub-Saharan Africa.\textsuperscript{104} Web distribution also allows them to cater to a devoted following in diaspora communities of African émigrés.\textsuperscript{105}

The extraordinary popularity of Nollywood films has made the industry a socio-economic force of major significance not just for Nigeria, but for Africa as a whole. As a “model of indigenous entrepreneurial achievement in a country plagued with a troubled and investment-starved economy,”\textsuperscript{106} Nollywood has created new opportunities for development both material and cultural. With annual revenues numbering in the hundreds of millions (in US dollars), the Nollywood has become

\textsuperscript{97} Average sales are around $50,000, with blockbusters reaping several hundred thousand. Yet, some estimate that films can break even on as little as $10,000 in sales. Elizabeth March, \textit{The Nollywood Phenomenon: We Tell Our Own Stories}, WIPO MAG., June 2007 at 8, 8-9.


\textsuperscript{99} Evuleocha, \textit{supra} note 21, at 414.

\textsuperscript{100} McCall, \textit{Madness, supra} note 89, at 81.

\textsuperscript{101} Video-disks sell for the equivalent of $4 in market stalls and rent for around 50 cents. WIPO MAG., \textit{supra} note 97.

\textsuperscript{102} Video movies could be watched for the first time by women in conservative Northern Muslim states denied access to public cinemas. Brian Larkin, \textit{Hausa Dramas and the Rise of Video Culture in Nigeria}, in \textit{NIGERIAN VIDEO FILMS}, supra note 88, at 226-227 [hereinafter Larkin, \textit{Hausa Dramas}].

\textsuperscript{103} Evuleocha, \textit{supra} note 21, at 408; Pierre Barrot, \textit{Audacity, Scandal & Censorship, in NOLLYWOOD: THE VIDEO PHENOMENON}, supra note 84, at 43, 43-44 [hereinafter Barrot, \textit{Audacity}] (describing TV and satellite deals).

\textsuperscript{104} Evuleocha, \textit{supra} note 21, at 407, 410, 411; Barrot, \textit{Hot Cake, supra} note 90, at 39.

\textsuperscript{105} McCall, \textit{Madness, supra} note 89, at 92.
the country’s largest private employer, generating substantial economic benefits, both direct and indirect. Perhaps more importantly, in a strikingly entrepreneurial country where economic opportunities are practically nonexistent [and corruption pervasive], the video film industry has laid the groundwork for what might be called the Nigerian Dream—a genuine opportunity for legitimate financial success and even celebrity, open to just about anyone with talent and imagination.

The economic contribution of Nollywood, while substantial, arguably pales compared to its cultural significance. Africa has a deeply ingrained storytelling tradition, but has long lacked the means to harness its creative energies through the media of popular culture. For first time, Africans stories told by Africans can be shared by audiences across the continent. Where African cinema used to “refer to the films Africans produce rather than those they watch,” Nollywood has emerged as the vehicle by which the hopes and fears of Africa’s most populous nation can be captured and projected for mass consumption.

Nollywood is not without its critics. Its movies are “regularly taken to task by the Nigerian cultural establishment . . . for being escapist and politically irresponsible.” Critics savage the technical and artistic deficiencies of video films, drawing unfavorable contrasts with the masterpieces of African (celluloid) cinema. While such criticism has some basis, an examination of Nigerian videos in context justifies a more sympathetic account.

Nollywood’s technical shortcomings are undeniable. In part, they reflect the newness of an industry that is gradually professionalizing its operations. A more serious handicap is budgetary constraints. As Part IV explains, such constraints can be traced directly to the inability of filmmakers to enforce their copyrights, which deters investors from supporting more ambitious productions. The resulting low-budget assembly-line productions also account for much of Nollywood’s alleged artistic deficiencies.

Beyond that, criticism of Nollywood’s esthetics often tracks well-trodden critiques of commercial culture. Nollywood stands accused of pandering to base consumer tastes rather than challenging or edifying them. It puts profits above art and poisons impressionable minds with the cinematic equivalent of “fast food” culture, irresistible yet devoid of nutritional value.

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107 Lights, Camera, Africa, supra note 86, at 85; WIPO MAGAZINE, supra note 97. The industry also generates indirect benefits such as road construction by film crews in rural villages. McCall, Nollywood Confidential, supra note 91, at 102.
108 McCall, Nollywood Confidential, supra note 91, at 102.
109 Larkin, itineraries, supra note 91, at 180.
111 Haynes, supra note 88, at 9.
112 Barrot, Informal Sector, supra note 98, at 55-58; McCall, Madness, supra note 89, at 80, 87.
Yet, the mere fact that Nollywood videos are commercial and widely popular should not be cause to dismiss them.\footnote{Femi Shaka, \textit{Rethinking the Nigerian Video Film Industry: Technological Fascination and the Domestication Game}, in \textit{AFRICAN VIDEO FILM TODAY}, supra note 96, at 41, 46-49.} Cultural value may not be synonymous with market preferences, but neither are they antitheses. After all, Nollywood’s audiences are voting with their pocketbooks. At the very least, popularity is a sign of relevance. Very few Africans have seen the celluloid masterpieces that elite critics champion. By contrast, Africans are passionate about Nollywood’s lowbrow offerings; millions watch them weekly. Moreover, far from a monolithic industry purveying pre-packaged conformity, Nollywood’s decentralized structure ensures a multiplicity of perspectives compete for consumer patronage.\footnote{The sheer number of Nollywood videos being released and diversity of producers, combined with decentralized direct-to-video distribution and a low threshold for profitability, allows Nollywood to explore a broader range of topics/viewpoints than conventional cinema based on theatrical release.}

In this respect, it is instructive to compare the esthetic sensibilities of Nollywood videos with the earlier works of African cinema. The latter were primarily works of elite culture “framed by the aesthetic strictures of European film schools and foreign investors” and animated by strongly held ideological positions.\footnote{McCall, \textit{Madness}, supra note 89, at 80, 85; Haynes, \textit{supra} note 88, at 6.} African cinema aimed to elevate the consciousness of its audiences, to “decolonize the mind” and “put into images the African struggle against underdevelopment.”\footnote{Adesanya, \textit{supra} note 88, at 38; McCall, \textit{Madness}, supra note 89, at 87.} By contrast, Nollywood videos are works of popular entertainment “driven by local markets.”\footnote{McCall, \textit{Madness}, supra note 89, at 80.} “The realist verities of modernist development and cultural authenticity are rejected, as is any attempt toward a progressive political project.”\footnote{Larkin, \textit{Itineraries}, \textit{supra} note 91, at 180.} Instead, “Nollywood plots epitomize situations that people understand and confront daily; romance, comedy, the occult, corrupt cops, prostitution, and HIV/AIDS.”\footnote{Evuleocha, \textit{supra} note 21, at 408.}

As for Nollywood alleged flaws—a tendency toward melodrama, sensationalist, escapist, and/or “Westernized” formulaic plots, materialism, violence, immorality, and superstition—in many ways such perceived weaknesses are also its strengths. Nollywood offers its audiences “characters they can identify with in stories that relate to their everyday lives.”\footnote{Id.} No one would mistake its convoluted plots with their frequent recourse to magic for \textit{cinéma vérité}. Yet, in their embrace of African modernity, Nollywood movies mark a departure from celluloid film traditions. Where Africa’s cinema auteurs projected a vision of Africa as it ought to be, Nollywood videos engage the messiness of life as it exists today.

If Nollywood films are violent, they reflect the violence that is endemic in Nigerian society; and their escapist plots perform a cathartic function.\footnote{Nollywood’s portrayal of occult superstition similarly reflects traditional belief systems widely held—and practiced—by its audiences. \textit{See id.}} Likewise, a preoccupation with material wealth is understandable in a society marked by extreme income inequality, where vast oil wealth is monopolized by “a small cadre of well-connected thugs.”\footnote{McCall, \textit{Nollywood Confidential}, \textit{supra} note 91, at 102.} The voyeuristic pleasure that Nollywood audiences enjoy in
ogling the lifestyles of the rich and beautiful is frequently coupled with overtones of moral disapproval. More generally, the use of melodrama as a dramatic form is typical of cinema in transitional societies negotiating modernity’s destabilizing effects. By imposing a strong moral framework upon the storyline, melodrama helps audience recover their sense of traditional values.\footnote{Haynes, supra note 88, at 25-26.}

Furthermore, accusations that Nollywood’s movies are overly “Westernized” bear closer examination. When set against the explicitly anti-colonial ideology of traditional African cinema, Nollywood’s more accommodating stance toward Western influence seems clear; yet, it hardly amounts to the wholesale adoption of “homogenized” global forms that the opponents of cultural imperialism decry.\footnote{Larkin, Itineraries, supra note 91, at 180.} Rather, Nollywood videos “partake of a mix of local, national, and global discourses and aesthetics. They reproduce elements of Western cinema and indigenize those appropriations.”\footnote{Id.} The result of such hybridization is arguably a more authentic expression of African grass roots than the celluloid masterpieces of African cinema “edited in Parisian cutting-rooms.”\footnote{Id. at 92.}

Whereas earlier celluloid films were rarely seen by African audiences, inhabiting instead the rarified world of auteur cinema screened at international festivals and embassies,\footnote{Id. at 92.} Nollywood produces African stories that Africans themselves consume.\footnote{Id.} “One cannot underestimate the degree to which these videos have become a part of popular life in Nigeria. The characters, plot, and themes are now part of the everyday discourse of farmers, taxi drivers, market women, urban professionals, and native doctors.”\footnote{Id. at 92.} By holding a powerful mirror to the realities of Nigerian life, Nollywood has helped to redefine African modernity.\footnote{O\textsc{nu}zulike, supra note 86, at 5-6, 27-30.}

Nor can Nollywood films be dismissed as the vapid ‘brain candy’ that critics of commercial culture industries deplore. Many Nollywood scriptwriters were former journalists whose movie plots portray thinly disguised fictionalization of real-life incidents. Far from avoiding controversial issues, Nollywood seems to revel in role of provocateur. Its films address everything from polygamy, prostitution, teenage pregnancy, and AIDS to crime, drugs, police corruption, and coup d’etats in an energetic, no-holds-barred fashion. Nigerian directors “even manage to use religion to make people laugh, in a country where fanaticism and inter-denominational confrontations are rife.”\footnote{Barrot, Audacity, supra note 104, at 44.} That Nollywood films tackle these issues for purposes of entertainment does nothing to diminish their contribution to public discourse—indeed, the reverse is almost certainly the case.\footnote{Ogova Ondego, Kenya and Nollywood: A State of Dependence, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84, at 114, 117 n. 1 (noting Nollywood’s treatment of issues such as vaginal fistulas is “more effective than any kind of awareness-raising production tackling the same themes.”). Cf. Neil Weinstock Netanel, Asserting Copyright's Democratic Principles In The Global Arena, 51

\footnote{Barrot, Audacity, supra note 104, at 44.}
In attempting to work through the internal contradictions of modern Nigeria in a uniquely African idiom, Nollywood exercises a powerful mediating role not only in Nigerian society, but for audiences across Africa and the African diaspora. Rather than presenting a single state-approved perspective, Nollywood offers a multiplicity of viewpoints. While “[i]t may not be the African cinema that professional critics would choose, it is clearly the African cinema that has captured the imagination of the African continent.”

Nollywood’s role as a driver of public discourse has political significance, as well as cultural. Media theorists highlight the role creative industries play as engines of democratic expression. As Neil Netanel has noted, this role can be particularly crucial in transitional states where democratic norms are still being negotiated. Such observations apply a fortiori in Africa, where the state has customarily exerted tight control over public media. In this context, the Nollywood’s freedom to portray an African reality that is “neither dictated nor controlled by outsiders or the government” is virtually unprecedented. Supported directly by its audience, Nollywood enjoys a financial independence that other African media lack. Moreover, its direct-to-video distribution helps to circumvent government censorship.

As an “outsider” cinema, Nollywood dramas frequently exploit their freedom of expression to criticize state authority and subversively spoof its corrupt and inept practices. Nollywood’s pan-African distribution gives such outspokenness potentially huge ramifications. Commentators have hailed its emergence as an awakening “giant of socio political commentary” that will demand a new level of accountability from the government. Whether Nollywood will live up to such weighty expectations remains to be seen. However, that such potential exists is cause for celebration in a continent whose political sphere has too long been stymied by corrupt authority.

As works of cinematic art, Nollywood videos are unremarkable and their technical quality deplorable. That across Africa such videos consistently outsell competing offerings from Hollywood, India, and Hong Kong made with far higher budgets and splashier special effects values testifies to the extraordinary and hitherto unmet demand in developing countries for locally produced audiovisual content. African audiences watch Nollywood videos not because of their intrinsic quality but

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VAND. L. REV. 217, 266 (1998) (noting “attempts to present information and opinion in a systematic ‘objective’ manner, distilled from entertainment values, may simply lose the audience”).

135 ONUZULIKE, supra note 86, at 27-30, 85-86.

136 Indeed, given its regional and linguistic fragmentation, it may be inaccurate to refer to Nollywood as a single industry at all.

137 McCall, Madness, supra note 89, at 92.


139 Barrot, Epilogue, supra note 132, at 131; Larkin, Hausa Dramas, supra note 103, at 211.

140 Barrot, Audacity, supra note 104, at 44, 46.


142 Foluke Ogunleye, Preface, in AFRICAN VIDEO FILM TODAY, supra note 96, at ix-x.
because their storylines speak to Africans in an accessible indigenous idiom that resonates powerfully with everyday realities.\footnote{Lobato, supra note 20, at 345, 348.}

The success of Nigeria’s video film industry has already spawned imitators across Africa.\footnote{Lights, Camera, Africa, supra note 86, at 88 (stating “South African, Tanzania, and Cameroon are now producing hundreds of films a year”). That such industries can flourish in much smaller domestic markets than Nigeria underscores digital technologies’ democratizing potential.} Ghana’s video film industry preceded Nollywood and has recently revived. None of these competitors have come close to rivaling Nollywood’s regional hegemony. However, they are already making a significant contribution to domestic discourse in their own countries.\footnote{Kenya’s “Riverwood,” in particular, is said to produce over 1000 films per year, and “is now beating Nigeria at its own award ceremonies.” Lights, Camera, Africa, supra note 86, at 88.} These emerging industries reflect a remarkable cultural renaissance that is giving voice to ordinary Africans in a manner hitherto unprecedented.\footnote{Singh, supra note 76, at 40-44.}

The success of African video film is part of a broader story of newly empowered creative industries in developing countries whose appearance is challenging traditional narratives of cultural imperialism. Beyond the cultural and economic dynamism they bring to their home markets, such industries hold the promise of a more diverse flows of global culture in the 21st century than the hegemonic order that preceded it.\footnote{See Diana V. Barrowclough, The Production of Knowledge, Innovation and IP: Creative Industries and the Development Agenda, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 331 (Neil Weinstock Netanel ed., 2009).}

Much of this burgeoning creative enterprise can be traced to digital technologies’ lowering of entry barriers.\footnote{See Mobile Telecoms in Africa: Digital Revolution, ECONOMIST, April 9, 2011, at 74.} That Nigeria should be responsible for developing the world’s first fully digital film industry underscores the potential for developing countries to leapfrog outdated technologies and become globally competitive. Furthermore, the full potential of these tools is arguably not yet realized. The introduction of 3G and 4G cellular networks across the developing world will open the door to creative innovation based on novel online platforms.\footnote{See Schultz & van Gelder, supra note 23, at 90.}

Nollywood’s successes to date already provide a powerful counter to the cultural pessimism that has dominated policy-making in the Global South. Moreover, it has repercussions for the discourse of global intellectual property rights in which creativity is too often presumed the sole preserve of developed countries.\footnote{Cf. id., at 87 (noting belief that “poor countries do not produce the sorts of innovation that benefit from copyright protection”).} As a fully-fledged culture industry built around the production of original copyrighted content, Nollywood belies assumptions that developing countries have little to gain from enforcing intellectual property rights.\footnote{Cf. id., at 87 (noting belief that “poor countries do not produce the sorts of innovation that benefit from copyright protection”).} Yet, as we will see in Part IV, lack of copyright protection poses a serious threat to Nollywood’s economic viability.
Enforcement of existing law here would arguably do more good than new fangled cultural heritage rights.\(^{152}\)

The normative implications of Nollywood on the traditional heritage debate do not end with copyright law, however. Nollywood films are noteworthy for their prominent use of traditional culture. Elements of traditional folklore are ubiquitous in Nollywood videos. Characters frequently speak in traditional proverbs; village drums beat the rhythms of daily life; folkloric costumes, carvings, and customs are all on display.\(^{153}\) Cultural traditions also permeate Nollywood storylines, most commonly in the form of supernatural elements whose appearance is often integral to the advancing plot. Such magical realism draws on traditional occult beliefs deeply rooted in West African culture.\(^{154}\)

Incorporation of traditional culture provides much of the appeal and perceived “African-ness” of Nollywood videos. However, folklore is more than just a marketing feature. Nollywood’s use of traditional culture has cultural significance whose implications for the traditional knowledge debate should not be overlooked. In their complex exploration of tensions between tradition and modernity and reliance on syncretic forms, Nollywood videos display a vital and innovative approach to traditional culture that cuts directly against the grain of current efforts to preserve traditional culture. Just as Nollywood the industry belies prevailing assumptions of cultural hegemony, so too Nollywood as an agent of cultural innovation calls into question the push to propertize traditional culture.

### B. Tradition Remixed

In this respect, it is worth contrasting the use of traditional culture in Nollywood with its more idealized presentation in African celluloid cinema. Nollywood videos are hardly unique in showcasing Africa’s rich folkloric traditions. However, Nollywood approaches traditional culture with a very different sensibility than its cinematic precursors. These contrasts make vivid the normative stakes of the traditional knowledge debate, as Part III elaborates below.

Africa’s celluloid filmmakers were auteurs of talent and conviction. However, their visions were compromised by the strictures of the system within which they operated. With limited opportunities for distribution, such films relied on state and foreign patronage rather than popular audiences for funding. Inevitably, such patrons influenced the content of the films in ways both subtle and direct.\(^{155}\) As a result, the presentation of traditional culture in African celluloid films reflected the

\(^{152}\) See infra notes 310-325 and accompanying text.

\(^{153}\) Evuleocha, supra note 21, at 414; ONUZULIKE, supra note 86, at 74-83; McCall, Nollywood Confidential, supra note 91, at 100; McCall, Juju, supra note 141, at 56.

\(^{154}\) ONUZULIKE, supra note 86, at 34-46.

\(^{155}\) See Haynes, supra note 88, at 5 (describing vetting of scripts by European funding agencies as well as influence exercised by French cameramen and editors); Moradewun A. Adejunmobi, Nigerian Video Film as Minor Transnational Practice, 3 POSTCOLONIAL TEXT 13, (2007) (explaining funders “are not likely to provide support for film projects that do not fit in with their own larger concerns); Garritano, supra note 114, at 23 (noting Ghanaian state “exercised complete control over the film industry” prior to video filmmaking); Haynes, supra note 88, at 10-11 (describing influence exerted through both positive and negative censorship).
need to cater to particular constituencies: government censors, foreign patrons, international film festival audiences, and critics.

A romantic, often sentimental portrayal of village life and folkloric heritage appealed to European stereotypes of exotic Africa. Such idealized evocations of African tradition also mirrored the cultural nationalist project of government culture ministries whose funding helped to underwrite such productions (and whose censors blocked works espousing oppositional ideals). “National films” served both as prestigious cultural trophies to impress European elites and as a vehicle to project a particular vision of African heritage for internal, ideological ends. African cinema was very much a post-colonial project, and culture served to unify the populace behind a shared vision of the nation state.

In throwing off the yoke of colonial dependency, filmmakers often sought to instill a new pride in African traditions. Rather than explore the relevance of such traditions to the present day, they sought to recover the bygone glory of the past as the guidepost to an equally glorious future. This vision of African cinema did not view tradition and modernity as in conflict but rather as complements. Inevitably, this heroic presentation of African tradition glossed over awkward details. The cultural heritage extolled in these films was often an imagined one that elided ethnic divisions in favor of a discourse of national unity.

The phenomenon of traditional culture pressed into the service of cultural nationalism is hardly unique to Africa. Indeed, the very notion of folklore began as an explicitly nationalist project of the Romantics. And film has often been the preferred medium for authoritarian nation building. Precisely because the underpinning of African nationhood are so clearly artificial, Africa’s authoritarian regimes have leaned heavily on cultural props to legitimize their authority.

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156 McCall, Madness, supra note 89, at 86-87; Haynes, supra note 88, at 5-7.
157 Lobato, supra note 20, at 340 (noting African film functioned “as a vehicle for propaganda, a signifier of Western modernity, and a status symbol for elites”).
158 Larkin, Itineraries, supra note 91, at 178-79 (describing national-filmmaking tradition “where the nation-state is posited as the definer and defender of cultural values”); Haynes, supra note 88, at 6 (noting centrality of “cultural nationalist project” within African cinema).
159 Birgit Meyer, Popular Ghanaian Cinema and “African Heritage,” AFR. TODAY 93, 102-03 (describing how film mirrored state policy to “retrieve and restore our history and heritage . . . as a precondition for development”); see also Kuruk, supra note 31, at 773 n.27 (describing critical “importance of folklore to national development, the promotion of national unity, and the assertion of national cultural values”).
160 Larkin, Itineraries, supra note 91, at 180; Haynes, supra note 88, at 10-11.
161 Monika Dommann, Lost in Tradition? Reconsidering the History of Folklore and Its Legal Protection since 1800, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSION IN A DIGITAL ENVIRONMENT 5-6 (Christoph Graber & Mira Burri-Nenova, eds.) (2008).
vision of traditional culture that emerges is sometimes as contrived as the colonial boundaries of the African states that espouse it.  

By contrast, Nollywood’s more ambivalent take on tradition reflects the ambiguous and contested role that tradition plays in the everyday reality. It chronicles a Nigerian populace torn between city and village, a world in which traditional values clash with modern lifestyles and African belief-systems compete against foreign ideas and technology. Nollywood offers a less sentimental view of Nigerian folklore, but one that mirrors the perspectives of its audiences. Unlike the romantic conceits of cultural establishment elites, Nollywood videos answer only to the market. Their grassroots tradition of popular filmmaking eschews any single approved narrative. Rather, Nollywood’s account of traditional culture reflects a multiplicity of perspectives. And in contrast to the ethnically cleansed vision of national cinema, Nollywood locates its films within Nigeria’s diverse populace and does not shy from acknowledging the tensions surrounding ethnic and religious fault-lines.

Critics frequently accuse Nollywood videos of portraying traditional culture in a negative light. Compared to the idealized vision presented in African celluloid cinema, this charge has some merit. Nollywood videos are primarily aimed at urban audiences some of whom regard traditional culture as “backwards,” the superstitious relic of country bumpkins. There is a subset of Nollywood films that openly pander to such urban disdain with such unsubtle titles as *I Hate My Village*. Another genre of Nollywood videos caters to Pentecostal Christians by portraying the societal upheaval unleashed by heathen rituals practiced by “native doctors”; the ensuing mayhem is invariably cured by the intervention of a cross-brandishing pastor who duly vanquishes his demonic antagonists “in the name of Jesus!”

Other Nollywood videos, however, present traditional culture in a more positive light. Some genres, such as vigilante films, celebrate traditional belief systems as an alternative to the discredited authority of the modern Nigerian state. McCall describes the depiction of pre-colonial practices in these films—among them the use of “truth-seeking jujus” to expose dishonesty—as a resurgence of “indigenous legal rationalities” that reflects the all-too real disillusionment that many Nigerians experience with Nigeria’s lawless present. Such portrayals of folkloric tradition are just as idealized as those of the African celluloid films. However, rather than

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166 Id. at 180-81.
171 Id. at 58-60.
functioning in service of the ruling regime, they are openly subversive of its authority.\footnote{Id. at 55 (describing film’s depiction of corrupt “village chiefs, elected officials, religious leaders, police, and venerable native doctors conspir[ing] in greed-driven murderous exploits”).}

In other cases, Nollywood’s presentation of traditional culture is neither positive nor negative but merely descriptive. Traditional values, belief systems, rituals, expressions, symbols, and artifacts pervade everyday life in Nigeria.\footnote{Id. at 59; McCall, Madness, supra note 89, at 90-91.} Oral traditions of storytelling keep folk tales, legends, and mythology a part of everyday consciousness. Even modern city dwellers maintain links to their ancestral villages, and the taproots of traditional culture run deep. In showcasing the rich tapestry of Nigerian heritage, Nollywood videos reflect its continued salience.\footnote{Id. at 59; McCall, Madness, supra note 89, at 90-91.}

Yet, Nollywood videos do more than hold a mirror to traditional culture. In many respects, both intentional and implicit, Nollywood critically interrogates the role of tradition, exploring its complex, fractured relationship with modernity. Portraying “characters torn between tradition and modernity,” the films both highlight conflicts but also serve to mediate them.\footnote{Id. note 86, at 74-83.} They are filled with “modern and traditional elements wrapping around one another until they become a contradictory whole.”\footnote{Id. at 91, at 109.}

Rather than reconciling such contradictions in a totalizing vision, Nollywood films often suggest that both tradition and modernity have their respective places today. This message is driven home in Osuofia in London,\footnote{Id., supra note 88, at 82-85.} one of the most popular Nollywood movies to date. Osuofia begins as a “fish-out-of-water” story exploiting the comedic mishaps of the titular protagonist, a country bumpkin transplanted from his Nigerian village to the modern Western metropolis. After a series of comedic bumbling, the bumpkin eventually proves more than master of his new surroundings. Indeed, the end of the film suggests that Nigerian villagers harbor a wisdom that, in some ways, surpasses their outwardly sophisticated urban counterparts.\footnote{Id. at 84 at 22-23. An inverted version of this “fish-out-of-water” scenario is exploited to similar comedic effect in Ikuku/Hurricane, which chronicles a foreign-educated nuclear physicist’s return to his rural Nigerian family when the physicist is unexpectedly recalled to assume the traditionally ordained role of priest of the village shrine. The film pokes fun at the cultural alienation experienced by the prodigal physicist while simultaneously lampooning the buffoonery of his traditionally-minded kinsmen. See Jonathan Haynes & Onookome Okome, Evolving Popular Media, in NIGERIAN VIDEO FILMS, supra note 88, at 82-85.}

A similar cultural ecumenicalism is conveyed explicitly in Tunde Kelani’s Thunderbolt Magun. The film begins by showing a model modern couple whose lives are disrupted by the intrusion of traditional village magic in the form of a curse (the titular magun). However, rather than demonizing tradition as a threat to modernist utopia, Kelani emphasizes that Africans ignore tradition at their peril. The Western-educated professionals in the film who scoff at superstition themselves fall
prey to the curse’s power. When Western medicine proves impotent, it is traditional native doctors who right the balance.\textsuperscript{179}

Many of these films also juxtapose tradition and modernity in ways that simultaneously comment on both.\textsuperscript{180} Some set stories in ancient times that serve as a parable to comment on current history.\textsuperscript{181} Others transpose traditional sources to modern settings in unexpected ways. An example of the latter are the so-called “money cult” films, a cinematic trope that constitutes its own Nollywood genre.\textsuperscript{182} Currency fetishism—the West African equivalent of Mammon worship—is a long-established feature of Nigerian belief-systems. Ancient “money shrines” still command devotion in rural Nigeria.\textsuperscript{183} The “money cult” films transpose this traditional practice to imaginary urban settings. Instead of villagers in the jungle, the modern practitioners are portrayed as trusting businessmen whose pursuit of wealth and influence leads to a distinctly Nigerian version of the proverbial Faustian bargain: sacrifice of a loved one for material success, a tradeoff revealed to be the constructive equivalent of the loss of one’s soul.\textsuperscript{184} By deploying traditional beliefs as an interpretive lens, these films help Nigerian audiences make sense of an otherwise bewildering feature of Nigerian modernity: the extreme inequality and injustice of a petroleum-fueled kleptocracy. The films simultaneously explain the emergence of Nigeria’s moneyed class and condemn it in starkly moral terms.\textsuperscript{185}

In repurposing traditional culture into a vehicle for contemporary social criticism, such “money cult” films invariably adapt the underlying cultural traditions to their own ends. John McCall describes one of these films, Blood Money, as opening with a cluster of besuited businessmen seated around a plushly appointed boardroom. Any outward resemblance to a Rotary meeting is belied, however, when a panel slides open to reveal an animal totem whose hunger for human sacrifice provides the source of the cult-members’ occult power. Worship of animal totems is a traditional feature of Nigerian religion. However, the totem figure portrayed in this film is a vulture, an animal not traditionally the object of veneration. As McCall observes, however, vultures supply the perfect metaphor for the film’s indictment of capitalism.\textsuperscript{186}

Inevitably, such reinvention of tradition through popular culture has real-world repercussions. Both the tradition and its meaning become altered, and instances of

\begin{itemize}
  \item \textsuperscript{179} Film Profile No. 7: Thunderbolt Magun, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84 at 70.
  \item \textsuperscript{180} For example, several films, Thunderbolt Magun among them, draw explicit parallels between AIDS and traditional occult magic. Id.
  \item \textsuperscript{181} Witness Tunde Kulani’s trilogy of films using Yoruba court tales as a parable for Nigeria’s military dictatorship and subsequent restoration of democracy. Tunde Kelani, Film Profile No. 11: Agogo Eewo, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84, at 93.
  \item \textsuperscript{182} Wendl, supra note 168, at 12.
  \item \textsuperscript{183} McCall, Madness, supra note 89, at 82-83. Such shrines, festooned with a mishmash of monetary currency ranging from ancient cowry shells to colonial British schillings, make literal the Marxist concept of commodity fetishism. Id.
  \item \textsuperscript{184} Nollywood Dreams, supra note 92, at 59.
  \item \textsuperscript{185} Inevitably, by the end of these films, the outward success of the cult-member protagonist collapses under the weight of his/her moral depravity. The take-home message therefore becomes: If this how the rich get rich, I don’t want that. Id.
  \item \textsuperscript{186} See McCall, Madness, supra note 89, at 90-91.
\end{itemize}
life imitating art are well documented. Yet, rather than condemning such cultural “contamination,” we should arguably embrace it. Through these means, “tradition uses modernity to relocate itself in the modern era. If in the process it goes through self-modifications, that is only in order for it to emerge stronger. Tradition is modernized not rejected.”

III. Implications

The best African celluloid films are magnificent works of art, but their cultural significance for ordinary Africans remains marginal. By contrast, Nollywood films have many artistic faults. Yet, by almost any measure, they have had far greater impact on African society whose repercussions for public discourse and much else are still reverberating. The contrasts between these two cinematic oeuvres illustrate the normative stakes in the debate over TCE rights. In brief, propertizing traditional culture risks tilting future cultural production toward the state-sponsored orthodoxies of the celluloid tradition at the expense of the grass roots expression and imaginative repurposing of tradition exemplified by Nollywood. We should think twice before continuing down a path that would engender such tradeoffs.

There are at least four ways in which Nollywood’s example calls into question efforts to propertize intangible heritage: (A) As a commercial culture industry capable of “self-exploiting” its cultural heritage, Nollywood shows that developing countries can project their voices on a global stage. As such, it challenges the assumptions of Western hegemony by which developing countries have justified TCE rights; (B) By reinventing tradition in the process of perpetuating it, Nollywood represents a more dynamic approach to cultural preservation than the retrospective “museum view” that TCE rights contemplate. Nollywood’s decentralized, pluralistic production also offers a democratic alternative to the TCE right’s top-down model of managed “sustainability”; (C) The potential for direct conflict between these diverging approaches raises the specter that TCE rights could block or deter Nollywood and other creative industries from pursuing “sensitive” projects touching on traditional material. By walling off broad categories of expression as effectively off-limits, such TCE-enabled censorship could deter much-needed investment and stunt cultural and economic development; (D) Finally—as we see in Part IV—Nollywood illustrates the potential opportunity costs of the attention and resources devoted to the TCE campaign at the expense of convention IP rights. Conversely, it points to the comparative advantages of copyright law—as both an engine of cultural and commercial innovation and facilitator of public discourse.

A. Hegemony Dethroned: Giving Voice to Home-grown Expression

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187 For example, the popular Bollywood film, SHOLAY (Sippy Films 1975) featured a non-traditional melody in its depiction of the Hindu festival, Holi. The song subsequently become entrenched in popular imagination as the tune most associated with and widely played to celebrate the real-life holiday. Interview with Prof. Karin Zitzewitz, Michigan State University Department of Art History (July 3, 2010).

188 Wole Ogundele, From Folk Opera to Soap Opera: Improvisations and Transformations in Yoruba Popular Theater, in NIGERIAN VIDEO FILMS, supra note 88, at 89, 124.
As noted, Nollywood’s very existence challenges prevailing assumptions about cultural hegemony. Nollywood competes successfully with Western imports not only in Nigeria but all over Africa. Nor should Nollywood’s success be viewed in a vacuum. As digital technologies empower creative industries across the developing world, a newfound confidence has begun to take root. Casting off outdated narratives of dependency, such emerging industries are keen to project their cultural traditions and visions both at home and, increasingly, to a global audience.\(^{189}\)

This newfound confidence has been slow to filter through to government policy.\(^{190}\) As we saw, support for TCE rights has rested on perceived commercial and technological inequality translated into the rhetoric of exploitation: Western imperialists are unfairly profiting from “our” culture and imperiling its very survival. We cannot compete because the playing field is rigged against us. Exclusive folklore rights will both stanch the bleeding and allow us extract a “fair share” of the proceeds.\(^{191}\)

Nollywood supports a more optimistic counter-narrative in which digitally empowered upstarts can hold their own against established global hegemons. If home-grown culture industries in developing countries can exploit their own heritage, cultural protectionism becomes a less pressing need. After all, indigenous industries have superior knowledge of their own culture, and domestic audiences offer the most natural market for heritage-based content. The limiting factor was always capacity.\(^{192}\) Nollywood proves that such capacity is now within reach: Instead of watching Disney’s *Lion King* or *Jungle Book*, Africans can tell their own stories, transforming folkloric traditions into creative profit.\(^{193}\) Examples of such “self-exploitation” go well beyond Nollywood.\(^{194}\)

Cultural property rights are designed to prevent Western appropriators from exploiting traditional culture in ways that are inauthentic and/or offensive. However, rather than enjoining potentially harmful speech, digitally empowered creativity offers an alternative remedy in the form of counterspeech. So long as Africans can project their own cultural voices, the threat of Western adulteration recedes.\(^{195}\)

Yet, some would argue that, far from besting the imperialists, Nollywood videos compound their transgressions: By commodifying traditional culture in similarly inauthentic and offensive ways, they serve as vectors of contamination no less objectionable than the foreign content they emulate.\(^{196}\) To answer this charge requires attention to the differences between external appropriation and self-

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\(^{189}\) Singh, *supra* note 76, at 40-44.

\(^{190}\) *Id.* at 46-48.

\(^{191}\) Kuruk, *supra* note 31, at 772-75; Carpenter et. al., *supra* note 3, at 1103.

\(^{192}\) Chander & Sunder, *supra* note 45, at 1351-53.


\(^{195}\) Cf. Tsosie, *supra* note 44, at 357.

exploitation. To unpack this argument, we need to critically interrogate the underlying notion of authenticity.

**B. Contested Authenticities & Semiotic Consumers**

TCE rights are premised on a preservation rationale: the belief that traditional cultural expression is under pressure from outside influences. The question remains how best to avoid (or minimize) resulting harm.

As we have seen, the WIPO treaty proposes to prevent cultural harm by restricting the use of such traditions outside the traditional context. The treaty proceeds by identifying a set of canonical practices with a particular source community by triangulating along vectors of transgenerational stability, typicality (“characteristicness”), and salience (the link to “identity” and/or registration). Having identified “authentic” traditions in this manner, the treaty establishes exclusive rights to control their use.\(^197\)

Operating under the conceit that every people has an “authentic” culture that is stable, bounded, and homogenous, TCE rights hearken back to the premises of nineteenth century anthropology. Such essentialized notions of cultural community—Folklore 1.0—have largely been disowned by anthropologists today.\(^198\) Modern scholars resist the idea that culture can be pinned down and emphasize its instability, heterogeneity, contestedness, hybridity, and lack of boundaries. They warn that constructing a property regime around such fuzzy variables will prove both unmanageable and counterproductive.\(^199\) Critical studies perspectives also teach us that canonical notions as to what is accepted/valued reflect the coercive power of elites and argue that we should hesitate before validating such hierarchical constructs through law.\(^200\)

Beyond such postmodern qualms, a deeper challenge to TCE rights springs from the dynamic nature of culture. Cultures change as societies evolve; their meanings are constantly renegotiated. Whatever canonical set of practices we identify as “authentic” at a given point in time rests on contingent meanings subject to reappraisal and challenge.\(^201\) Far from constituting a threat, such dynamic meanings are, in fact, essential to cultural survival. Just as biological species evolve with changing environments, cultures must adapt to remain relevant to the communities that foster them.\(^202\) As Kwame Appiah reminds us, “[s]ocieties without change aren’t authentic; they’re just dead.”\(^203\)

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\(^{197}\) See supra notes 24-38 and accompanying text.
\(^{198}\) Mezey, supra note 30, at 2019, 2039-40; Brown, supra note 31, at 197; Sunder, Dissent, supra note 10, at 507.
\(^{199}\) Brown, supra note 31, at 213-14.
\(^{200}\) Mezey, supra note 30, at 2017-2018; Sunder, Dissent, supra note 10, at 509, 516-20.
\(^{201}\) Sunder, Dissent, supra note 10, at 515-23.
\(^{202}\) Nor is realistic to try to slow down the rate of change without altering the external environment. Delaying adaptation only makes it harder.
\(^{203}\) Appiah, supra note 2; cf. Jared Diamond, Collapse: How Societies Choose to Fail or Succeed 275-76 (2005). Nor is realistic to expect that cultures will evolve in isolation. Cross-pollination is both inevitable and desirable. Hybrid vigor is a source of strength, not weakness.
Nigeria is a very different country today than the Nigeria of traditional lore. It is deeply embedded in global contexts: as a petroleum exporter, a former British colony, and aspiring regional superpower. Its populace live hybrid lives enveloped in imported goods, technologies, communications, and ideas. An overwhelming majority profess religious faiths that originated outside Nigeria. The official language, English, is a colonial legacy that remains widely used in business, education, and government.\textsuperscript{204}

TCE rights would do nothing to eliminate such pervasive foreign influences in everyday life. To do so would require a systematic program of disengagement and isolation that few modern societies are willing undertake.\textsuperscript{205} Instead, traditionalists want to keep their culture and their iPhones too. To expect that TCE rights will square this circle is not only delusional, but outright dangerous. As with other forms of cultural protection, the cure becomes its own disease.\textsuperscript{206}

As we have seen, the epistemic practices by which the WIPO treaty constructs TCE rights favor a conservative, essentialized vision of culture.\textsuperscript{207} By blocking departures from such canonical forms, enforcement of TCE rights could stop the recoding of tradition needed to keep its meaning contemporary and relevant. The danger is that culture would therefore become a museum artifact, a set of “authentic” practices certified by experts, rather than a living, breathing thing that continues to evolve. Fetishizing tradition in this manner could reduce it to an empty shell bereft of content; over time, the expression thus “preserved” would become no more relevant to its source community than ancient hieroglyphs printed on papyrus scrolls are to contemporary Egyptians.

To mummify a culture thus, Egyptian-style, is to induce its own obsolescence. Such a prospect should give pause to TCE protectionists because the survival of traditional culture ultimately depends on the source community’s own commitment to perpetuate its heritage. Indifference is a far greater threat than exploitation. Practitioners of traditional culture already struggle with declining demand and lack of economic viability. The last thing we want is to increase such hurdles.\textsuperscript{208}

TCE rights can only block inauthentic use, they cannot ensure that authentic practices actually continue. The normative superiority of the folklore 2.0 model compared to the “museum” approach to preservationism is therefore clear. Nollywood has found a way to keep Nigerian audiences engaged with their own culture by revitalizing tradition and—not insignificantly—foster social and economic development in the process. Moreover, Nollywood operates through market forces, dispensing the need for government intervention and cumbersome bureaucracies.

\begin{itemize}
\item[\textsuperscript{204}] See Oladimeji Aborisade & Robert J. Mundi, Politics in Nigeria 39-43, 63, 80, 233.
\item[\textsuperscript{205}] In the US context, the Amish offer an example of the deliberate seclusion that would be required. See Wisconsin v. Yoder, 406 U.S. 205, 216-18 (1972). Internationally, only highly repressive states such as North Korea comes close to managing such a feat.
\item[\textsuperscript{206}] Cf. Sean Pager, Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade, 31 NW J. INT’L L. & BUS. 63, 92-94 (2011) (arguing European cultural protection has exacerbated the very failures it sought to remedy).
\item[\textsuperscript{207}] See supra notes 24-25 and accompanying text.
\item[\textsuperscript{208}] See Maureen Leibl & Tirthankar Roy, Handmade in India: Traditional Craft Skills in a Changing World, in Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries 54-60 (J. Michael Finger & Philip Schuler, eds., 2004).
\end{itemize}
However, preservationists may question whether Nollywood films represent a “sustainable” use of tradition. Without putting limits on cultural hybridization, what would stop Nollywood from diluting the distinctiveness of Nigerian tradition in a sea of foreign influences? Nollywood’s contribution assumes a less benign cast if its commodification of tradition harms the underlying source. As we have seen, critics have charged Nollywood with a multiplicity of transgressions: Its films are too commercial, too Westernized, too sensational, etc. Is there any difference then between Nollywood’s cultural appropriations and those of foreign imperialists?

Arguably there is. Nollywood films are made in Nigeria by Nigerians themselves and intended for Nigerian audiences. As such, they operate within the deep structures of Nigerian culture and must engage in discourse specific to that context. Therefore, on their face, they conform to the autonomous model of cultural development that preservationists purport to favor. Elites may disapprove of their content, but the films have clearly met the approval of popular audiences. If culture is understood as a set of shared discursive understandings endorsed by a relevant community, Nollywood films are arguably validated by the enthusiastic response they command.

What about their commercial nature? By pandering to vulgar consumer tastes for short-term profit, could Nollywood externalize harms to the larger cultural fabric? Perhaps, but we should balance the theoretical concerns associated with commodification against the benefits that markets provide. As we saw, Nollywood films do not offer a single homogeneous perspective on tradition. Rather, tradition becomes the site of competing discourses for which popular audiences remain the ultimate arbiter. Market success thus offers a tangible validation of cultural currency as well as an incentive for filmmakers to innovate. Furthermore, commodification allows culture to pay its own keep, offering a means of livelihood to practitioners who might not otherwise perpetuate the underlying traditions. Therefore, we should not condemn Nollywood ipso facto merely because it is commercial.

Similarly, charges that Nollywood movies are “too Westernized” cannot possibly justify categorical rejection of such works. As noted, Nigeria is a very different country today than the Nigeria of traditional lore. Its people are deeply embedded in global contexts on multiple levels. Nollywood films reflect the struggle to reconcile conflicts between these overlapping allegiances, offering creative syntheses that help African audiences find their own accommodation between

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210 See Baker, *supra* note 10, at 1366-68.

211 The decentralized structure of Nollywood-qua-culture industry also mitigates against commodification concerns by lowering the barriers to entry for diverse perspectives.

212 Some may be discomfited by notion of consumer exchanges supplying the “votes” in this marketplace for ideas. Commercial entertainment undoubtedly imposes biases that diverge from robust ideals of public discourse. Yet, adequate remedies arguably lie within the existing toolkit of media diversity regulation to enhance access for marginalized voices/genres.

tradition and modernity. To expect such expressions of Nigerian culture to remain divorced from Western influence is to advance an ideology of “authenticity” based on willful denial of reality.\textsuperscript{214}

As for Nollywood’s other supposed deficiencies, as we saw, much of this criticism reflects a paternalist conception of culture in which cinema is expected to project an particular vision of society. Nollywood’s real offense may be to peddle inconvenient truths that Nigeria’s elites would rather not acknowledge. This conflict between opposing normative visions of culture is directly germane to the debate over TCE rights. The choice between Folklore 1.0 vs. Folklore 2.0 is ultimately a choice between decentralized innovation mediated through market forces versus top-down regulation that purports to channel development in “sustainable” directions.

Nollywood is not National Geographic. Its films exist to entertain audiences, not necessarily to educate or edify.\textsuperscript{215} Yet, collectively, they function as the site of competing discourses on tradition whose validity is left for audiences to endorse with their patronage. By allowing cultural meaning to be determined through such “bottoms up” processes, Nollywood’s discursive pluralism aligns well with ideals of semiotic democracy.\textsuperscript{216}

The question then is whether adding a regulatory layer of TCE rights would improve on this existing cultural marketplace. Far from reifying tradition, proponents of TCE rights insist that such rights are compatible with cultural innovation. They would not stop Nollywood from making movies or audiences from watching them. They would just safeguard the integrity of traditional content and curb potential abuses. Such protections would correct market distortions and ensure new development remains appropriately respectful of the past.

Implicit in this undertaking is the premise that cultural progress can be rationally guided. Yet, to do so, enforcers of TCE rights will have to determine not just what is/is not authentic from a historical perspective, but also which innovations represent positive vs. negative contributions. This requires defining contamination as something more than merely ‘new’ or ‘foreign.’ Instead of allowing tradition to evolve through organic processes, enforcers of TCE rights would enforce their vision of “sustainability” by extrapolating from some ill-defined notion of cultural continuity to determine the limits of acceptable progress.

To say that such assessments would be subjective is an understatement.\textsuperscript{217} There is neither a neutral vantage point from which to judge these questions, nor a pure source to refer back to as antecedent. Culture is both amorphous and entirely intersubjective.\textsuperscript{218} The WIPO treaty recognizes this fact when it invoke community

\textsuperscript{214} See Waldron, supra note 5, at 763 (accusing traditionalists of “inauthenticity” for this reason).
\textsuperscript{215} If the films sometimes exceed the boundaries of good taste, that can be addressed by narrowly tailored speech regulation enforcing community standards of decency. This Article only criticizes efforts to protect the integrity of tradition beyond such generalized standards.
\textsuperscript{216} Cf. John Fiske, TELEVISION CULTURE 12-14 (1987).
\textsuperscript{217} What counts as healthy development? What counts as harm? When does commercial pandering cross the line? Which “Western” borrowing is acceptable? What evidence would be accepted to resolve these questions?
\textsuperscript{218} Mezey, supra note 30, at 2041-41; Sunder, Dissent, supra note 10, at 513-18.
acceptance as the touchstone of acceptable development. But consensus itself is subjective and evolving. Much will turn on what questions you ask, as well as whom and when. Moreover, we can expect the cultural equivalent of Heisenberg’s uncertainty principle to apply: the administrative mechanisms to implement such rights will impose their own systemic distortions.

In disrupting the natural evolution of culture and substituting bureaucratic judgments for the wisdom of crowds, TCE rights effectively advance a theory of intelligent design without benefit of divine omniscience. Even assuming the best intentions, the epistemic challenges are daunting. Yet, as will see, implementation of TCE rights is vulnerable to hijacking by a variety of actors whose intentions may be less than pure. The result could inflict far more lasting harm than it prevents.

C. A Manageable Conflict?

Defenders of TCE rights could several possible rejoinders. First, they might argue that TCE rights are primarily intended to prevent foreign appropriations (i.e. use by those outside the community). Second, they would likely suggest that internal conflicts can be managed consensually or mitigated through selective prosecution.

Unfortunately, neither ground offers much assurance. It is true that the main rhetoric of TCE protection is directed against external commodification. Rather than preventing Nigerians from exploiting their own culture, TCE rights are supposedly aimed at keeping out “foreigners”—predatory multinational corporations who want to appropriate folklore for off-shore exploitation. Yet, nothing in the WIPO treaty precludes internal application. On the contrary, the exclusive rights the treaty establishes apply to any use of traditional culture that takes place outside the “traditional and customary context.”

Nollywood videos present traditional culture in a medium that inherently transcends the customary context; the films also routinely adapt and remix traditional sources, often in controversial ways. Such “inauthentic” uses therefore offer prime targets under a future TCE regime.

The potential for internal application cannot be dismissed as a *de minimis* concern that must be tolerated as “collateral damage.” As we have seen, uses of traditional culture are pervasive in Nollywood. They constitute a large part of Nollywood’s distinctive appeal and competitive advantage vis-à-vis foreign imports. Denied the ability to tap into the wellsprings of traditional culture, Nollywood—and other creative industries—would be seriously handicapped. Folklore is the source of the archetypal myths and foundational concepts from which so much of contemporary culture is derived. Its essential infrastructural role is precisely why existing copyright law consigns such cultural building blocks to the

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219 WIPO Draft Treaty, General Guiding Principle (h).
221 WIPO Draft Treaty, Art. 3, 5(1).
222 *See supra* notes 140-52 and accompanying text.
public domain where they can be accessed by all. By stamping a “no trespass” sign on such resources, TCE rights could cut off a vital source of creative inspiration.

By contrast, the interest of foreigners in appropriating traditional culture is much more sporadic and haphazard. Defenders of indigenous culture like to demonize the “cannibal culture” that drives Western multinational industries to pervasively commodify traditional sources. In fact, such commodification occupies at best a tiny niche within the global cultural economy. Although the rhetoric of commodification sometimes suggests culture is a globally fungible commodity akin to the oil that Chevron pumps out of Niger delta, traditional culture is mostly of interest to communities who have a connection to it. Because cultural appropriation begins at home, that is where most of the fights will occur.

While examples of intramural applications of TCE rights remain hard to find because such rights either do not legally exist or have gone unenforced, recent years have seen a steady drumbeat of cases involving local artists who recorded original works based on traditional melodies. Musicians in several African countries have also expressed concern over government plans to extract royalties for use of traditional drum cadences. Meanwhile, an internationally renowned Chinese filmmaker was sued last year for alleged misuse of traditional Chinese opera. While comparable TCE claims have yet to emerge against Africa film industries, government censors already regulate the presentation of traditional culture on quasi-moral rights grounds. Films and television productions in Ghana and, lately, Nigeria itself have run afoul of such cultural policing. And authorities in these countries are under pressure to increase their vigilance. Proponents of TCE protection assume that potential conflicts between traditional culture defenders and content industries such as Nollywood can be managed or mitigated; that Nollywood could find ways to use traditional culture compatible with TCE rights; that a community consensus would emerge as to appropriate boundaries; or that selective prosecution and forbearance would allow an accommodation to be reached. Such assessments appear far too sanguine.

TCE rights protection amounts to a (largely) unprecedented experiment, a newly minted body of law applying broad, subjective standards across a staggeringly

227 Take Justin Bieber, Lady Gaga, Harry Potter—most global media products are squarely rooted in mainstream Western culture. While world music does constitute a growing niche, such productions typically entail collaborations with artists from the source communities. Regulating such transactions is a different matter than simply saying “hands off” to foreigners.
228 It is no accident that American sport teams feature Native American mascots. See Mezey, supra note 30, at 2027-30.
230 Wüger, supra note 229, at 189.
231 See Guan Xiaomeng, Zhang Yimou Sued Over Opera Copyright, CHINA DAILY, May 12, 2010.
232 See infra notes 299-300 and accompanying text.
diverse range of materials currently in the public domain. The breadth of subject-matter potentially embraced by such protection, the uncertain scope of the rights, and the ambiguous identity and overlapping claims of rights-holders would all conspire to make TCE rights-clearance an entertainment lawyer’s worst nightmare. Creative industries are already high-risk businesses. Anything that adds uncertainty or delay will deter investments and discourage innovation. Nollywood might continue to make movies, but would likely avoid sensitive topics involving traditional materials. Such forbearance would not only undermine the marketability and appeal of the films, but arguably operate to the detriment of the very traditions supposedly being protected: Removing traditional culture from the public eye hardly helps its survival.

Nor does the WIPO treaty’s reliance on community consensus as a guidepost to resolve disputes provide a satisfactory solution. Art by consensus is a recipe for cultural stagnation. Great art provokes reactions, often violent ones. By transgressing boundaries and challenging taboos, it forces us to expand our horizons or confront contradictions in our values. Subjecting such expression to communal approval would hamstring the sources of innovations by which tradition is renewed.

We like to romanticize traditional culture as a collection of time-honored practices benevolently presided over by trusted elders applying settled customs to the collective approval of the community. In fact, traditional culture is just as subject to evolutionary pressures as any culture. Nor do the forces driving such changes operate in a genteel manner that can be consensually negotiated. Tradition is a natural lightning rod pitting “modernizers” against “traditionalists,” and the culture wars that TCE rights inspire are likely to prove unusually bloody.

If TCE rights become operational, then much will turn on the way they are implemented. In assessing which uses of traditional culture are likely to be endangered, a crucial question becomes who is empowered to enforce TCE rights against whom. We will consider three potential models: (1) a cultural semi-commons; (2) community custodianship; and (3) state control.

1. **Cultural Semi-Commons**

From the standpoint of encouraging cultural innovation, by far the preferred solution would be a cultural semi-commons model. Under this scheme, TCE enforcement would only apply to outsiders; members of a source community would

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233 Chander & Sunder, supra note 45, at 1368.
234 Rose, supra note 67, at 999-1000 (describing anti-commons problem).
235 Pager, supra note 206, at 103 & n.239.
236 Liu, supra note 213, at 211 (arguing “[t]o salvage folklore, it is crucial to popularize and disseminate it to the young generation, ensuring wide exposure”).
238 That a culture remained stable during a period of isolation offers no assurance that it can smoothly navigate externally imposed changes once they arrive. Waldron, supra note 5, at 788.
239 Id.
retain carte blanche to do whatever they wished with their own culture.\textsuperscript{240} Remixes and adaptations would be tolerated internally without any limits.\textsuperscript{241}

In practice, a cultural semi-commons would be difficult to implement, however, for three reasons: First, cultural boundaries are too amorphous to establish workable boundaries separating “insiders” from “outsiders.” Second, the arbitrary line-drawing necessary to make such boundaries enforceable may prove commercially disabling. Third, a semi-commons model is likely to prove politically unpalatable.

To take Nigeria as an example, the country contains more than 250 ethnic groups, all of whom could potentially claim folklore rights as “traditional communities” under the WIPO Draft Treaty (which does not currently define “communities”).\textsuperscript{242} However, the boundaries between such groups are ill-defined and fluid, and many of the larger groups encompass subgroups fractured across multiple cross-cutting lines of identity: language, religion, geography, and lifestyle. In many cases, group identities perpetuate colonial distinctions resting on questionable ethnography.\textsuperscript{243} Even if we could decide which particular groups constitute a “traditional community” for purposes of TCE claims and reliably identify their individual members, we would still need some way to determine which cultural practices belong to which groups as well as to define the traditional parameters of authentic practice.\textsuperscript{244} The director-general of the Nigerian Copyright Commission has testified to the daunting nature of this task:

It is not uncommon to observe similar songs, craft, or painting in a given area covering a collection of communities. . . . It will therefore be difficult to single out the particular community from where a folklore work emanates. Even where ownership is shared between certain communities, delimiting such communities will still be difficult. In some occasions the meaning and usage of a particular folklore will differ in these communities. This makes it even more difficult to protect the moral right.\textsuperscript{245}

Nor would the task remain a dispassionate, bureaucratic exercise. Nigeria’s identity politics are a combustible mix of identity politics, ethnic rivalries, religious sectarianism, localized rent seeking, and historical grudges.\textsuperscript{246} Making competing claims to tradition the subject of potentially valuable commercial monopolies would exacerbate such inter-group conflicts.\textsuperscript{247} Nigeria fought a civil war in the 1960s

\textsuperscript{241} Such a rule would go against the grain of the WIPO treaty in so far as it dispenses with the requirement of community consensus for uses of TCE outside the traditional context. WIPO Draft Treaty, Art 5(1)(a); General Guiding Principles (h).
\textsuperscript{243} APRIL A. GORDON, NIGERIA’S DIVERSE PEOPLES 4, 83-84 (2003).
\textsuperscript{244} See Kuruk, supra note 31, at 803-804; Mezey, supra note 30, at 2019.
\textsuperscript{245} Adebambo Adewopo, \textit{Protection and Administration of Folklore in Nigeria}, SCRIPT-ED 8-9, Mar. 2006.
along ethnic lines and continues to suffer from localized insurgencies and sectarian violence.

Accordingly, the potential for TCE rights to exacerbate ethnic tensions should not be lightly dismissed.

Assuming we can overcome such hurdles and construct appropriate group lines for our cultural semi-commons, presumably the rule would then become that only “insiders” can exploit their communal culture. In Nigeria, this might mean, for example, that only Yorubas could make films dealing with traditional Yoruba culture. But questions would then arise as to who exactly is making the film. Does the producer have to be Yoruba? The director? The actors? The financing sources? All of the above? A majority? Whatever test we devise will engender arbitrary results. Moreover, by enforcing a “cultural apartheid” on Nollywood sets, such rules would have the perverse outcome of reinforcing existing divisions and undercutting the message of national integration that Nollywood’s multicultural productions deliver.

Nigeria could attempt to circumvent these challenges by extending the semi-commons into a general license for all Nigerians to exploit Nigerian culture. However, while the WIPO treaty appears to countenance such a national license, granting one could potentially run afoul of international trade & IP rules that prohibit discrimination by nationality. Moreover, a national semi-commons would still confront the issue of ethnic groups that straddle Nigeria’s national boundaries. It would seem odd that a Hausa from Northern Nigeria could exploit Yoruba culture while Yorubas living in neighboring Benin are excluded. The national semi-commons would also have to address the status of the sizable Nigerian diasporal communities overseas. Contributions from diaspora communities can bring valuable know-how and global connections. Many of India’s most successful film exports, for example, have been produced through collaborations with members of India’s diaspora populations. Making nationality a strict criterion for cultural access could block such profitable collaborations.

Perhaps nationality rules could be bent to recognize these groups too as Nigerian. However, a national semi-commons would also inhibit transnational co-productions. Nigeria and Ghana have collaborated on a number of successful joint productions, and Nollywood is increasingly a pan-African cinema drawing talent from across the Continent. The ability to form co-productions could be even more vital for creative industries in countries with smaller home markets than Nigeria.

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248 BAH, supra note 246, at 43-54; Gordon, supra note 243, at 260-62
249 Countries that subsidize domestic audiovisual industries struggle with analogous issues in defining national production. They typically employ multifactor tests that require cumbersome bureaucracies and invite gamesmanship and abuse. See Pager, supra note 206, at 133-34.
250 Philippe Descola, Comment on Can Culture Be Copyrighted?, 39 CURRENT ANTHROPOLOGY 208 (1998); Barrot, Audacity, supra note 104, at 44.
251 See WIPO Draft Treaty, Art 5(2) (allowing for national license where consistent with customary norms).
252 General Agreement on Trade & Tariffs, Art. III; TRIPS Agreement, Art. 4.
253 See Adewopo, supra note 245, at 8; Kuruk, supra note 31, at 804-05. Africa’s arbitrary colonial boundaries make such cross-border issues pervasive.
255 Lights, Camera, Africa, supra note 86, at 85-86.
Such collaborations constitute a well-recognized strategy to pool resources and more effectively compete in global audiovisual markets.\textsuperscript{256}

Restrictions on TCE-based productions could also deter valuable foreign investment and distribution deals.\textsuperscript{257} Nollywood has already benefitted from technical improvements brought by foreign partners and attracted interest from Hollywood investors and distributors.\textsuperscript{258} US financing have also underwritten fledgling film productions in other African countries, while French funding continues to sustain filmmaking in Francophone Africa.\textsuperscript{259} As with diaspora populations, foreign partners often bring know-how, financing, and distribution networks that can prove critical to industry development.\textsuperscript{260} Again, to use India as an example, it took English filmmaker, Danny Boyle, to achieve global breakthrough success with his 2008 Academy Award-winning Best Picture, \textit{Slumdog Millionaire}, as a Bollywood collaboration.\textsuperscript{261}

It is easy to demonize foreign investment as “imperialist exploitation,” but the reality is that developing countries stand to benefit. Especially where the cultural works in question are aimed at domestic audiences, there is no reason to assume that foreign involvement will “taint” the end product.\textsuperscript{262} And even export-oriented projects can indirectly benefit domestic production through cross-subsidies and shared infrastructure.\textsuperscript{263} Foreign commodification can also sustain traditional cultural practices suffering from neglect at home.\textsuperscript{264}

The mere hint of TCE complications could torpedo foreign partnerships. Financing for transnational projects is highly risk-averse, especially where creative industries are concerned.\textsuperscript{265} Anything that increases transactional costs, complexities or uncertainty can be a deal-breaker. The ill-defined parameters of TCE rights would therefore constitute a serious deterrent. Without the ability to safely and efficiently clear the necessary rights, prospective foreign partners are likely to look elsewhere. A restrictive semi-commons could therefore hamper emerging creative industries. On the other hand, overly lax rules on internal-external collaborations

\textsuperscript{256} Europeans filmmakers used this model successfully in the early postwar years until protectionist policies forced a destructive balkanization of production. \textit{See} Pager, \textit{supra} note 206, at 93.
\textsuperscript{257} \textit{Cf. id.} (arguing restriction on American investment in national films shot European filmmaking in the foot).
\textsuperscript{258} Barott, \textit{Informal Sector, supra} note 98, at 55 (noting South African TV funded sound upgrades);
\textsuperscript{260} Pager, \textit{supra} note 206, at 93, 117.
\textsuperscript{261} \textit{Id.} at 116 n.318. A similar story can be told of Hong Kong kung fu filmmaking’s breakthrough success with \textit{Crouching Tiger, Hidden Dragon}.
\textsuperscript{262} Again, the European example is instructive. Far from corrupting European auteur traditions, Hollywood financiers have underwritten a number of quintessentially European films. Pager, \textit{supra} note 206, at 93.
\textsuperscript{263} \textit{See id.} at 95-96, 126-27.
\textsuperscript{264} \textit{See} Liu, \textit{supra} note 213, at 214-15 (describing Disney film’s revival of Chinese interest in its own folklore).
\textsuperscript{265} \textit{See} Pager, \textit{supra} note 206, at 103.
would invite “front-man” arrangements whereby community members serve as sham participants to legitimize access.\(^{266}\) A semi-commons model therefore needs to negotiate these tradeoffs carefully.

Wholly apart from these other drawbacks, however, a cultural semi-commons suffers from a more serious disability. For many traditional communities, the idea of unrestricted cultural experimentation is anathema. Many communities regulate cultural access and usage based upon customary norms and internal hierarchies.\(^{267}\) Such groups are likely to insist that their customary norms be respected, and the WIPO Draft Treaty unequivocably supports this position.\(^{268}\)

### 2. Community Custodianship

Accordingly, rather than issuing a “general license” for internal use to members of a traditional community, TCE regimes are more likely to vest control over folklore usage with designated traditional custodians and/or *sui generis* procedures. However, it is easier to demand cultural sovereignty than to agree on mechanisms to implement it. Commentary on TCE rights often presumes existing institutions such as a village chief or council of elders will assume responsibility. Yet, suitable institutions for this purpose in Africa are far from self-evidence, and difficult questions of jurisdiction, legitimacy, and overlapping claims would arise.\(^{269}\)

Furthermore, whatever institutional mechanisms emerge are likely to be stacked in favor of cultural conservatism. Generational conflicts constitute a particular concern. It is a commonplace of popular culture that each generation delights in scandalizing their parents with cultural innovations that seem subversive and threatening but later become accepted parts of the canon—only to be subverted and threatened by a new generation.\(^{270}\) This generational cycle from cultural rebel to establishment figure could be preempted, however, if elderly custodians become empowered to censor cultural insurgents before they have the chance to gain acceptance.

Even accepting a community has a legitimate interest in regulating uses of tradition internally, the risk posed by TCE rights are three-fold: First, bureaucratic mechanisms to implement TCE rights may short-circuit informal processes of dialogues that would otherwise occur within the community. If cultural conservatives can employ the law as a trump card, they may be tempted to impose their reactionary values more aggressively than they would if their authority remained ambiguous.

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\(^{266}\) Such front-men arrangements were, in fact, widely used to evade Nigeria’s media indigenization law during the 1970s. See ONUZULIKE, *supra* note 86, at 13-14.


\(^{268}\) See WIPO Draft Treaty, Art. 5.

\(^{269}\) Kuruk, *supra* note 31, at 787; BROWN, *supra* note 31, at 112-123.

\(^{270}\) Examples are legion: the waltz was banned as “immoral” in Vienna; the samba and tango rejected as “gutter culture”; Mozart’s operas faced censorship; Stravinsky’s music caused riots; the impressionists were shunned as “wild beasts,” modern art condemned as immoral; and rock-and-roll, jazz, rap, and hip-hop were/are attacked as vulgar, degenerate, or obscene. See Steven H. Chafee, *Popular Music and Communication Research: An Editorial Epilogue*, 12 COMM. RES. 413, 416 (1985); John Hood, *Hayek, Strauss, and the Political Waltz*, 55 THE FREEMAN 19, 19-21 (2005).
Second, the scope of TCE rights reaches beyond traditional contexts to affect creative expression in venues and media for which communal authority, as a practical matter, would not otherwise extend. Film, as a high-profile medium for projecting public values, supplies a natural target for self-proclaimed protectors of tradition. TCE rights would offer communal censors a legal basis to impose their will on such non-traditional spheres.

Finally, protecting “traditional values” can easily become a proxy for hidden agendas that themselves result in the distortion of tradition by its putative defenders—a further example of disease masquerading as cure. The inherent subjectivity of prohibitions against “prejudicial,” “offensive,” or “inauthentic” uses make TCE rights rife for potential abuse. Definitional disputes over cultural integrity may devolve into a form of proxy warfare in which competing factions deploy self-serving claims to authenticity. Such culture wars favor insiders over outsiders; the powerful over the weak—as scholarship have shown.

Even where the community exercises its cultural stewardship through more inclusive, democratic norms, a majoritarian bias would persist against countercultural perspectives: free-thinking bohemians, youthful visionaries, etc. Cultural innovations rarely arrive fully formed to be greeted by community acclamation. Artistic rebels often begin by experimenting on the margins. New movements provoke sharp breaks with the existing order. Creative breakthroughs arrive in provocative guises or couched in a language unintelligible to the larger community. By censoring those who subvert established conventions, the community would stifle the creative sources that hold the greatest promise to modernize tradition.

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271 In doing so, we would essentially be empowering grumpy old granddad to commandeer the stereo not just at home, but at the neighbor’s house—and even at the mall. By preventing ‘those kids’ from playing their ‘filthy noise’ anywhere in town, grandpa would make sure music would never advanced beyond the golden oldies of his youth.


273 Indeed, the WIPO treaty is intended to give TCE rights transnational reach, as enforcement would be binding upon all signatories.

274 Conservatives can be just as “activist” in their interpretation of tradition as progressives (and not just on the United States Supreme Court). See Sunder, *Fire*, supra note 272, at 87-90, 92 (describing how Hindu right-wing objections to depictions of homosexuality reflect a prudishness out of keeping with earlier traditions).

275 WIPO Draft Treaty, Art. 3(a)(iii).

276 See Sunder, *Dissent*, supra note 10, at 502-507 (arguing law “has become complicit in the backlash project” of suppressing dissenting conceptions of cultural traditions).


278 See COWEN, supra note 113, at 29.

279 Id.; BLEISTEIN, supra note 61.

280 Aragon & Leach, supra note 277, at 624.
Squashing Nollywood productions that veer in controversial or offensive directions would result in a defanged film culture robbed of its vital edge—the equivalent of cinematic musak. Nor is this threat merely theoretical. As noted, Nigerian authorities have been under increasing pressure to censor Nollywood films that present traditional culture in ways that are deemed “immoral.” While communal decency standards should not be confused with TCE rights, such conflation appears well underway. Igbo elders have filed a formal petition with the government complaining about misuse of Igbo tradition in Nollywood films. The concern is that use of traditional expression is being censored because it is “inauthentic” rather than being judged under more neutral standards of decency.

The mere threat of TCE hold-ups could encourage filmmakers to avoid engaging “sensitive” folkloric content. Yet, doing so would impoverish public discourse and stifle the creative renewal of tradition. Entrenching by default a privileged “snapshot” version of tradition, the TCE regime would impair the diversity and richness of the underlying heritage and “cripple the mechanisms of adaptation and compromise” which provide the source of its resilience. In the end, tradition may emerge more distorted than saved.

3. State Control

Even more likely—and less desirable—than communal custodianship is the prospect that governments will control TCE rights directly. The WIPO draft treaty explicitly sanctions such state authority, subject only to the caveat that it be exercised with “appropriate consultation” and for the “benefit of” the source communities. Because culture and tradition are deeply enmeshed with power and legitimacy, governments can be expected to resist ceding authority over such sensitive domains to anyone else. Indeed, government control is already the norm in the existing folklore statutes adopted in much of Africa and Asia. Such regimes regard traditional culture as belonging to the collective heritage of the nation, justifying centralized control by state organs. Lacking effective constraints, such public monopolies often wield TCE rights with effective impunity.

The prospect of government officials making decisions on behalf of indigenous communities introduces obvious agency problems, especially where the source communities comprise isolated minorities who lack effective political

282 McCall, Nollywood Confidential, supra note 91, at 107-08.
283 The examples above of film censorship based on lesbianism provide a useful illustration of the distinction. See supra note 269. If the Hindu and Muslim activists in each case had objected categorically to portrayals of lesbianism, such objections could reflect a general communal decency standard. However, the objections were more specific in nature: it was the juxtaposition of homosexual themes with traditional culture that aroused the activists’ ire.
284 The result would be a contemporary culture that is less authentic and reflective of the cultural traditions of its source communities.
285 Waldron, supra note 5, at 788.
287 Pager, supra note 206, at 70.
Subjective and amorphous standards, as well as built-in conflicts between commodification and authenticity, make such concerns particular acute in the TCE rights context.

Commercial development/tourism may trump sensitivity to local values and interests. A dominant ethnic group and/or well-placed insiders may usurp the lion’s share of benefits. Political or ideological imperatives may lead to distortions or deliberate favoritism in the construction and enforcement of TCE rights. An artificial nationalism may override both local variations and cross-border affinities. A recent study of Indonesia’s TCE/folklore regime found all of the above.

Even worse, tradition is also liable to be appropriated in service of the governing regime itself. Just as African national cinema often presented an idealized version of tradition, traditional culture in the grasp of government elites could emerge similarly distorted. The intimate links between culture and national sovereignty and its emotive pull on public heartstrings make tradition a natural target for authoritarian regimes. By manipulating TCE rights, such regimes could subvert tradition to buttress state authority.

Precedents for such authoritarian cooption of tradition are depressingly abundant. The Nazis melded ancient Indo-European symbols such as the swastika into a pastiche of Aryan mythology (real and imagined) that formed the ideological ballast for a racist genocidal state. Mussolini drew on Roman traditions to support his version of fascism in Italy; Ceausescu’s Romania appropriated the heritage of the ancient Dacians; Qaddafi’s Libya exalted traditional Bedouin culture. Mobutu Sese Seko’s Zaire built his regime upon an ideology of authenticité, whose bricolage of folkloric elements bore only nominal resemblance to actual indigenous tradition. Turkmenistan’s late strongman, Saparmurat Niyazov, played a similar game to even more bizarre effect. However, for sheer totalitarian chutzpah and aggression, it is hard to beat the spectacle of China’s officially atheist communist rulers promulgating regulations governing the reincarnation of Tibetan lamas.

Such blatant cooption of indigenous tradition doubtless contravenes both the letter and spirit of the WIPO treaty. However, it will serve as a precedent for similarly nefarious-minded regimes to wield TCE rights as an instrument of legitimization and power. Admittedly, none of these examples involved use of TCE rights as such. If governments want to coopt tradition, they can find ways to do so.

290 See supra notes 65-67 and accompanying text.
291 Aragon & Leach, supra note 277, at 612-16.
294 HELLER, supra note 293, at 92.
296 See Adelman, supra note 163, at 135-39; Ciaffa, supra note 163, at 129.
297 Slavomir Horak, The Ideology of the Turkmenbashy Regime, 6 PERSP. ON EUR. POL. & SOC’Y 305, 310-13 (2005).
The real concern is that the WIPO regime offers a framework to pursue such strategies with the patina of international legitimacy.\textsuperscript{299}

Audiovisual media offer a special attraction for authoritarian manipulation, with a lengthy pedigree of state propaganda.\textsuperscript{300} And there is no reason to think that Nigeria’s rulers would prove immune to the temptations that TCE rights offer. As noted, the Nigerian cultural establishment has long resented Nollywood’s populist pandering, and authoritarian power-mongers among the ruling elite distrust its subversive independence.\textsuperscript{301} Government censors have already begun to crack down on the perceived “immorality” of its videos, egged on by traditionalists.\textsuperscript{302} Given the hostile forces gunning for Nollywood’s demise, TCE rights could provide a convenient cudgel to curb its artistic freedom.

The result would be films and other forms of creative expression that conform to established orthodoxies rather than extend or challenge them; works that reflect elite sensibilities rather than popular tastes; and works that buttress existing power structures rather than encourage democratic alternatives. This bring us back to the distinction adumbrated above between Africa’s celluloid vs. video film traditions: Strong traditional knowledge rights are likely to result in a cultural output that more closely resembles the ideologically tinged narratives of national filmmaking than the hybridity, ambivalence, and conflict embodied in Nollywood films. Whether intended or not, we will get less of Nollywood’s creative reimagining of tradition and more celluloid paens to an idealized past.

Whereas digital technology has decentralized cultural production allowing filmmakers to evade government censors and offer diverse viewpoints, TCE rights could restore to governments a control over mass media that they hitherto seemed destined to surrender, allowing them to impose a distorted representation of tradition. Nollywood films may be crude, commercial concoctions marred by wooden acting and badly dubbed sound, but they have revitalized the public sphere in Africa and spurred much-needed development. Their presentation of African tradition is a complex, multivalent one that holds enormous promise as a crucible for a new African identity (or identities). The tradeoff seems clear: Whereas remixing tradition has fostered cultural and commercial vitality, propertizing it could do the exact opposite.

IV. Copyright

So far our account of tradeoffs between innovation and preservation has focused on the negative effects of TCE rights on creative works derived from traditional sources—with Nollywood remixes serving as the prime example. Missing in this

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\textsuperscript{299} A similar logic arguably propelled recent efforts to enact international norms against religious defamation. Illiberal use of blasphemy laws may provide a template for future TCE enforcement. Cf. Hannibal Travis, \textit{Tyranize Locally, Censor Globally, in Transnational Culture Flows in a Digital Age} (Sean Pager & Adam Candeub, eds, forthcoming, 2012).

\textsuperscript{300} See Pager, \textit{supra} note 206, at 88 & n.151-52.

\textsuperscript{301} Nollywood Dreams, \textit{supra} note 92, at 59; McCall, \textit{Nollywood Confidential, supra} note 91, at 107.

\textsuperscript{302} McCall, \textit{Nollywood Confidential, supra} note 91, at 107.
account is the role played by policies designed to affirmatively encourage such creative innovation.

At the top of the list is copyright law. While TCE rights can certainly coexist with traditional IP regimes such as copyright, there are significant tensions between the two. Most obviously, subordinating copyrights in derivative works based on tradition to upstream TCE rights undermines the former’s value—and with it the incentives to innovate. At the extreme, anticommons hold-ups may render some traditional subject matter effectively off-limits.

Apart from direct conflicts, there is also a normative divergence between the innovation and preservation models. The two regimes function at cross-purposes: one encouraging new things, the other trying to hold on to the old. The individualist orientation of copyright law also sits ill at ease with the collectivist paradigm of TCE protection: It remains unclear when should innovators within the traditional community be regarded as individual authors vs. mere vessels of the communal collective. The question has systemic implications as well. The private rights model of copyright law functions as a decentralized regime that empowers independent voices. Such unfettered discourse may challenge official orthodoxies and threaten entrenched powers. Given the tight control over culture and tradition exercised by many authoritarian regimes, a preference among such constituencies for TCE rights over copyright should not surprise us.

Some may argue that the preceding analysis overstates the potential harm from TCE protection. Given the lack of enforcement of existing TCE rights regimes, it is possible that the effect of the WIPO treaty will be largely symbolic. Developing countries will proclaim victory over Western hegemony and perhaps pursue a few high-profile cases against foreign “exploiters,” but little else will change on the ground. Even so, such gesture politics could still have pernicious effects both in terms of their symbolic message and opportunity costs.

By sending the message that traditional culture is imperiled by modernity, by legitimizing dirigiste policies that empower bureaucrats to “manage” cultural markets, and by equating innovation with contamination, a TCE rights regime feeds into a reactionary, defensive mindset among developing countries that is both unjustified and counterproductive. In exalting tradition as a form of indigenous intellectual property suited to development, TCE rights perpetuate the canard that developing countries are incapable of commercially significant innovation. In doing so, the TCE agenda reinforces convictions that conventional intellectual property rights do not serve the interests of development.

Developing countries are rightfully suspicious of intellectual rights. The acrimonious history of the TRIPS agreement and the skewed flow of benefits thereafter have contributed to the perception of global intellectual property rights as a protection racket to line the pockets of Western multinational corporations. Yet,

303 At best, TCE rights impose added transaction costs for authors to clear permission; at worst, they pose the risk of an outright veto or loss of copyright title.
304 Netanel, supra note 134, at 228-29.
305 See Dutfield, supra note 289, at 273.
306 Schultz & van Gelder, supra note 23, at 87-90.
307 Id. at 85-86.
we need to take more nuanced view of intellectual property and development. It is not an all-or-nothing proposition. Copyright law is not same as patent. And within the realm of copyright law, one can support an expansive definition of fair use, for example, but still condemn commercial-scale, verbatim copying as piracy. 308

An obsession with the global inequities of transnational IP and culture flows has arguably led developing countries to overlook the potential for intellectual property rights to foster innovation and development at home. 309 Similarly, narratives of injustice and imperialism have blinded them to the opportunities afforded by the digital age. As we have seen, Nollywood exemplifies such digital opportunity. Yet, even if Nollywood is never directly targeted by TCE rights, it could still suffer indirectly to the extent that TCE rights come at the expense of innovation policies that would encourage the development of creative industries.

As we have seen, the administrative challenges entailed in implementing a full-blown property regime for TCE rights are enormous. Such efforts will divert resources and attention away from more progressive innovation policies. Even if TCE enforcement is never implemented, the investment of time and effort already devoted to this project at WIPO and other international organizations dwarfs any comparable efforts to promote domestic innovation in development countries. Given the limited resources and leverage that developing countries have to advance their agenda, we must therefore weigh the opportunity costs of privileging TCE negotiations over other potentially worthwhile initiatives. Nor are such forgone opportunities merely theoretical. There is a long list of practical steps that governments could take to improve the business conditions that creative industries in developing countries must navigate. 310 Topping the list are measures to address copyright piracy.

For all of its impressive successes, Nollywood’s business model is not without its flaws. The same digital technologies that enable Nollywood’s low-cost, direct-to-consumer distribution also make it all-too-easy for pirates to cannibalize its market. Nollywood filmmakers essentially rely on sales from new video releases in a handful of major Nigerian cities to recoup their production costs—and only have a short window before pirate copies flood the market. 311 Filmmakers have little control over distribution in the rest of the countryside—let alone in neighboring countries—and therefore obtain almost no revenues from these markets, despite widespread distribution and sales of their work. Nor do filmmakers receive royalties from the many thousand video film parlors (miniature theaters) where their works are screened for paying audiences; even films shown on television are rarely licensed. 312

308 See LESSIG, supra note 80, at 62-63, 68-73.
309 See Schultz & van Gelder, supra note 23, at 89-90.
311 Lights, Camera, Africa, supra note 86, at 85-86.
312 WIPO MAG., supra note 97.
Both physical and online distribution of Nollywood videos in diaspora markets are also plagued by piracy, with very little revenue accruing to content creators.\textsuperscript{313} The World Bank estimates that Nollywood forfeits $1 billion in annual revenue to piracy.\textsuperscript{314} Such lost revenues impose a straightjacket on artistic ambitions and investment.\textsuperscript{315} It makes no sense to bankroll elaborate productions when the opportunities to recoup such investments are limited. Assembly-line productions with formulaic scripts, wooden acting, and crude production values are the predictable result of the skinflint budgets and breakneck schedules on which Nollywood operates.\textsuperscript{316}

Lack of copyright protection also introduces perverse incentives. Filmmakers are forced to pursue a churn strategy that relies on a high volume of low budget offerings rushed to market weekly to beat the pirates rather than take chances on any one project.\textsuperscript{317} As a result, filmmakers rely on formulaic plots to generate cookie-cutter offerings, often copied verbatim from previous films.\textsuperscript{318} Without enforceable copyrights in their work, filmmakers cannot offer collateral to obtain financing. Instead, they must rely on informal short-term lenders at punitive interest rates—reinforcing the “rush to market” mentality that fosters slap-dash productions.\textsuperscript{319}

Lack of clear ownership rights also breeds distrust at all levels of the industry. Bickering between producers and distributors is legendary.\textsuperscript{320} Fear of script piracy has even led some directors to withhold scripts from their actors; instead, actors are only given their lines for individual scenes as they are shot.\textsuperscript{321} Copyright failures therefore significantly increase industry transaction costs.\textsuperscript{322} Such dystopian outcomes are entirely predictable under standard theoretical rationales for granting intellectual property rights.\textsuperscript{323} However, existing discourse on intellectual property & development seldom acknowledges such costs of weak copyright norms. Instead, most commentators begin with the premise that intellectual property rights overall represent a losing proposition for developing countries and rarely look past this global assessment.\textsuperscript{324}

\begin{itemize}
\item \textsuperscript{313} Id.
\item \textsuperscript{314} World Bank Appraisal, supra note 310.
\item \textsuperscript{315} Lights, Camera, Africa, supra note 86, at 85-86.
\item \textsuperscript{316} See Haynes & Okome, supra note 178 at 57.
\item \textsuperscript{317} Pierre Barrot, The Italians of Africa, in NOLLYWOOD: THE VIDEO PHENOMENON, supra note 84, at 12, 15.
\item \textsuperscript{318} Such herd-like tendencies are hardly unknown in Western audiovisual industries. However, copyright laws limit the extent to which ripoff artists can directly copy earlier works.
\item \textsuperscript{319} See Patrick J. Ebewo, The Emerging Video Film Industry in Nigeria: Challenges and Prospects, 59.3 J. Of Film and Video 46, 49-54 (2007).
\item \textsuperscript{320} Barrot, Hot Cake, supra note 90, at 34-36. Because distributors routinely underreport sales, producer-directors generally forgo royalties in favor of flat up-front fee. Haynes & Okome, supra note 178, at 69.
\item \textsuperscript{321} See Haynes & Okome, supra note 178 at 57.
\item \textsuperscript{322} Dayo Ogunyemi, Film Financing in Nigeria: Opportunities and Challenges, prepared for the Information Meeting On Intellectual Property Financing Organized by the World Intellectual Property Organization 8-12, March 10, 2009 (on file with author).
\item \textsuperscript{324} Schultz & van Gelder, supra note 23, at 84-86.
\end{itemize}
Some commentators have emphasized that piracy has also benefited Nollywood by supplying a ready-made distribution network that has helped the industry grow. Yet, without mechanisms to share the proceeds of such distribution, content producers are starved of the revenues needed to develop the industry beyond its current level of grade-C filmmaking. Piracy has become a cancer eating away at industry profitability. Unless this changes, Nollywood will remain a shadow of its potential.

Cyber-libertarians sometimes claim that intellectual property rights have become obsolete in the digital age, arguing copyright reflects assumptions rooted in an era of scarce resource constraints that technology has vanquished. Yet, if “information wants to be free,” commercial artists still want to be paid. Even operating at their current stunted level, Nollywood films regularly feature a cast of hundreds and require dozens of supporting professionals (make-up artists, cameramen, key grip, etc.). Sustaining such creative enterprises requires a solid revenue base.

Its digital pedigree notwithstanding, Nollywood remains wedded to a fundamentally 20th century business model based on the mass production and distribution of creative content embodied in physical copies. While cybertopians may envision a future in which web 2.0 platforms, long-tail economics, and/or ancillary revenues streams conjure up a digital cornucopia, such “free culture” models remains largely untested. Until the revenue potential of such alternatives has been proven, it seems rash to presumptively reject copyright as a part of the mix.

Indeed, the drawbacks of many of these alternatives are still being discovered. This applies as much to the public policy calculus as it does to commercial viability. In Africa, for example, the alternative to the market has tended to be state support, which has historically come at a price of heavy censorship. In this light, copyright law has been justified as a means to sustain a democratic discourse insulated from state regulation. Alternative funding mechanisms may not fare as well.

325 *Lights, Camera, Africa*, supra note 86, at 86.
330 *Nollywood Dreams*, *supra* note 92.
331 Moreover, the advent of internet distribution is unlikely to drastically alter the calculus for monetizing content.
332 See *ANDERSON, supra* note 79, at 88-89; *BENKLER, supra* note 81, at 1-2; *ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE* 20-22 (2009).
333 Barrot, *Audacity, supra* note 104.
335 Cyber visionaries proffering “flat-rate license” schemes should consider the record of gross inefficiency and corruption by African collective rights organizations. *See* Schultz & van Gelder, *supra* note 23, at 131-33. Nor is Africa entirely atypical in this regard. *See* Ariel Katz, *Copyright*
For example, Nollywood producers have increasingly relied on private sponsorship—a revenue model often touted by cyber-libertarians as an alternative to intellectual property rights. However, such sponsorship comes with strings attached. Marketers are unwilling to put up significant funds unless they gain substantial creative control over content, demanding blatant product placements that effectively transform movies into infomercials for everything from beer to Christianity to AIDS prevention to political campaigns. Far from enabling democratized expression, private patronage effectively substitutes a form of private speech control for public censorship. By contrast, copyright offers a more democratic alternative by allowing audiences to express their preferences directly in the creative marketplace. By aggregating consumer preferences, it orients content production around audience demand rather than narrow interest-group agendas.

Critics sometimes accuse copyright law of inhibiting diversity by conferring excess market power to industry conglomerates. On this view, the diversity of viewpoints that Nollywood movies currently provide is an artifact of weak copyright norms that prevent studios from investing in a bigger budget productions aimed at the mass market. Whatever the merits of this critique, however, Nollywood’s current structure lies so far to the other end of this spectrum, that a modest tradeoff of quantity for quality seems more than tolerable.

Copyright incentives only function when content producers are ensured adequate enforcement mechanisms. Nigeria has made recent efforts to crack down on copyright piracy with mixed results. Yet, Nigeria’s weak state institutions and lack of rule-of-law culture are unlikely to improve overnight. A good place to start would be focusing on providing quick remedies in clear-cut cases of commercial-scale piracy through streamlined judicial procedures and specially trained/dedicated staff. Impounding assets and providing for attorneys fees and/or statutory damages could also help to make private enforcement self-financing.

The piracy problem goes well beyond purely domestic concerns. As the marginal costs of digital distribution shrink, controls over copyrighted content abroad can be just as important as it is domestically. Moreover, in an increasingly
global marketplace, leveraging the economies of scale from export markets can be essential to the viability of domestic industries.\[343\]

Currently, distribution of Nollywood videos outside Nigeria is predominantly unauthorized, with very little revenue flowing to content producers.\[344\] As an export industry, Nollywood’s interest in cross-border copyright enforcement is obvious. Less intuitive is the interest that countries that are recipients of pirated content in blocking such unauthorized distribution. Yet, imported copies of pirated content undercut the market for legitimate sales by domestic producers. Other emerging African film industries have complained that pirated Nollywood films represent a form of unfair competition.\[345\]

A key obstacle to enforcing copyright is proving ownership.\[346\] The informal manner in which Nollywood operates makes it difficult to determine who is an authorized distributor (or, in many cases, even who is the copyright-owner).\[347\] This problem points to the need for a more effective system of copyright registries, preferably operating on a regional basis.\[348\] Collection action mechanisms for transnational licensing and enforcement could also play a role, perhaps focused on broadcast media and emerging e-commerce platforms.\[349\]

More could also be done to support exports by emerging creative industries to developed markets. While the latter have well established mechanisms for intellectual property enforcement, the transaction costs of long-distance enforcement actions (both informational and legal) often deter content producers from pursuing valid claims.\[350\] Moreover, in many cases, the difficulties in arranging authorized distributors leave pirate networks as the default providers.\[351\] Converted such networks into licensed distributors would allow filmmakers to benefit from existing distribution. To do this, however, rightsholders need a credible means of enforcement. Local connections and expertise here could prove an invaluable boost.

Even simple measures such a registering US copyrights would strengthen the hand of Nigerian exporters. Developing countries should demand greater assistance from Western governments with transnational capacity building along these lines.\[352\] While Western content producers may be understandably reluctant to offer support for potential competitors to enter their home markets, developed countries should insist on such assistance in return for their commitment to enforce global copyright norms. For their part, both Big Media and Western trade officials would show reap
public relations dividends by showing that they take all piracy seriously, not just piracy of their products.\(^{353}\)

In embracing copyright’s potential, developing countries need not embrace uncritically the high protectionist agenda on Big Media’s wish-list. Rather, the challenge is make copyright work for small media, focusing on low-cost mechanisms that make sense for emerging market producers. In this respect, the recently adopted WIPO Development Agenda represents a missed opportunity; it focused mostly on exceptions and limitations to intellectual property rights and/or technology transfer, with very little attention to realizing the upside potential of intellectual property rights.\(^{354}\) Yet, as Neil Netanel reminds us, copyright policy is about more than just economics. It exerts a powerful influence on democratic and cultural discourse.\(^{355}\) It is worth striving harder to get the policy framework right.

**V. Conclusion**

The WIPO Draft Treaty on TCE-folklore is intended to be legally binding. Yet, the exclusive rights it would establish are largely untested. They risk unintended consequences that may cause far more harm than good. This Article has argued that by placing undue restrictions on adaptation and commercialization, a strong property-rights model of TCE protection would inhibit the creative renewal on which the long-term survival of traditional culture depends. Placing a “no trespassing sign” on intangible heritage may preserve folkloric traditions in their “authentic” state, but to do so is to adopt the preservationism of a taxidermist.

The impulse of cultural guardians to preserve their heritage is understandable; it is a deeply rooted part of identity whose value should not be minimized. Yet, deliberate attempts to channel tradition along “sustainable” paths will ultimately prove counterproductive. Cultural guardianship should arguably be like parenting: as much as about learning to let go as it is about maintaining control.\(^{356}\)

None of this is deny the many legitimate concerns and grievances that animate the campaign for TCE rights. Nor does this Article dismiss the utility of further norm-development in the TCE domain. More modest protections akin to trademark or trade secret law do not raise the objections adverted to above. There may also be a place for narrowly-tailored inalienability rules curtailing the commodification of sacred traditions.\(^{357}\) Such safeguards would curb the worst abuses of which TCE

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\(^{353}\) Simply setting up an information clearinghouse to address basic enforcement needs would be a start. For example, such a clearinghouse might explain how filmmakers can register their works with the U.S. Customs’ border enforcement database and how they can take advantage of YouTube’s content-filtering mechanism.


\(^{355}\) Netanel, *supra* note 134, at 228-29.

\(^{356}\) Even communities such as the Amish, who cleave to traditional ways in near-holistic rejection of modernity’s influence, make allowance for cultural experimentation in just this manner. *See generally Tom Shachtman, Rumpringa: To Be Or Not To Be Amish* (2006) (describing custom by which Amish adolescents live outside the community before returning to be baptized).

\(^{357}\) Cf. Paterson & Karjala, *supra* note 11, at 659-60 (describing civil law doctrine of choses hors commerce applied to religious objects).
rights proponents complain. The critique here only targets the propertization of folklore through exclusive use rights.

A strong property rights model assumes that culture is a fragile flower whose integrity must be zealously defended. It seeks to safeguard tradition against insults and exploitation when more serious threats arguably arise from indifference, neglect, and lack of economic viability. Culture is far more resilient than we think, as empirical studies have consistently shown. To survive, however, cultures need space to breathe and adapt. Imposing a straight-jacket of authenticity, points traditional culture down the path of an evolutionary dead-end.

Some may argue that the value of more robust, copyright-style TCE rights is symbolic. It puts traditional artisans in developing country on a par with Western multinational corporations, allowing the Dinka and Disney to stand as co-equals. As a salve for Southern pride, such symbolism has a superficial appeal. Yet, the message it sends is ultimately pernicious. Creating intangible property rights in tradition turns the logic of intellectual property protection on its head. It perpetuates a myth of Southern incapacity to innovate that risks becoming self-fulfilling prophecy. Such pessimism does not reflect the reality of the creative industries emerging in developing countries nor the promise of digital successes yet to come.

Nollywood has already done more to foster Africans’ pride in their heritage than any cultural protection law. The films Nollywood makes may not always be dignified, but they have reinvigorated Nigeria’s folkloric traditions and given them new meaning and relevance. In doing so, they have helped to ensure tradition’s survival far more than TCE rights ever could. Yet, Nollywood’s continued viability depends on its ability to extract adequate returns on its creative investments. A more realistic appraisal of cultural priorities would therefore lead to a rebalancing of policy away from TCE/folklore rights and toward copyright law.

None of this is to suggest that copyright law will cause a field of digital dream factories to magically mushroom across the developing world. Copyright is neither a panacea nor self-executing norm. Much work is required to adapt existing systems to the demands of emerging industries. There is also clearly a need for supportive government policies beyond intellectual property enforcement. Indigenous peoples and other isolated or marginalized communities, in particular, may require affirmative assistance to enable effective cultural participation. All of this will require experimentation and adaptation. However, the sooner we move past the

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359 Overweaning enforcement of copyright is also subject to abuse, as the recent SOPA/PIPA debate reminded us. See Travis, supra note 299.

360 See Pager, supra note 206, at 124-30 (calling for cultural policy agenda based on decentralized subsidies); Barrowclough, supra note 148, at 333-35 (covering similar themes).

361 See, e.g., Sean Pager, Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?, in Pager & Candeub, supra note 299 (describing Brazil’s Culture Points program to empower digital creativity by disadvantaged communities).
chimera of tradition and focus on these tasks ahead, the sooner we can begin to build a viable future for the many diverse cultures and traditions that enrich our planet.