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Contemporary Intangible Cultural Heritage: Between Community and Market

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I. Introduction

Once upon a time in the not very happy world of what Laurajane Smith describes as the authorized heritage discourse[1] we had a pretty good idea of what cultural heritage was. Based on Cartesian dualisms[2] of nature and culture, tangible and intangible, we had some reasonable sense of certainty. Of course, imbricated in that certainty were particular ideas of nation, class and ethnicity.[3] But this could hardly be regarded as a surprise for a concept that was cooked up in the West and embedded in the post-World War Two regime of international policymaking and heritage law, represented by bodies like ICOMOS and UNESCO.[4] Under this regime, and reflecting its Western philosophical roots, the authorized heritage discourse, took on the characteristics of what must have seemed like the only comparable Western legal concept. Consequently, the international legal regime for the protection of cultural heritage came to reflect occidental property law distinctions.[5] One of these is the distinction between things that are said, by law, to be "fixed" to a particular place and those that are said to be moveable. Another, of course, is the distinction between tangible and intangible things.

Until the twenty first century, the distinction between tangible and intangible heritage appears to have given very little trouble to the authorized heritage discourse as embodied in, and authorized by, the ICOMOS-UNESCO regime. Its overwhelming focus on tangible stuff, fixed or moveable, denominated as heritage by reference to a set of intangible values, provided a neat way of dealing with the tangible/intangible distinction, without losing the similarly overwhelming occidental focus on the tangible heritage object. This is well demonstrated by both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, dealing with moveables, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention, as it is popularly known), dealing with legally denominated immoveables. The World Heritage Convention, for example, limits

[1] See L Smith, *Uses of Heritage* (London & New York: Routledge, 2006), from which I draw this expression and concept, used and developed throughout this chapter. As (I hope) a legitimate development of this concept, I place emphasis in this chapter on the role of the relevant international legal texts as both authorizing, and being authorized by, this discourse.
[2] On the Cartesian dualisms of the authorized heritage discourse, see R Harrison, *Heritage: Critical Approaches* (London & New York: Routledge, 2013), ch 9.
[3] Smith 2006, n 1 *supra*, 29ff; F Macmillan, "The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural 'Patrimony' or Private Property" (2013) 64(3) *Northern Ireland Legal Quarterly* 351-364.
[4] For account of the relationship between ICOMOS (International Council on Monuments and Sites) & UNESCO, & its role in relation to the authorized heritage discourse, see Smith 2006, n 1 *supra*, ch 1.
[5] See further F Macmillan, "Cultural Property and Community Rights to Cultural Heritage" in T Xu & J Allain (eds), *Property and Human Rights in a Global Context* (Oxford & Portland, Oregon: Hart Publishing, 2015), 47, in which I note that the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) & the Convention for the Protection of Underwater Cultural Heritage (2001) stand in some respects outside this classification.

its concept of protected tangibles by reference to obviously occidental concepts such as "outstanding universal value from the point of view of history, art of science" and "outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view"[6] According to both Conventions, which dominated the international legal protection of heritage in the twentieth century, heritage was what the state said it was, or in the case of the World Heritage Convention, what the state said it was as endorsed by a UNESCO listing.[7] And what the state said was heritage was governed by dominant national discourses that tended, and still tend, to privilege the largely Western ideas that dominant elites have about things that are important to history, art, literature, science, anthropology and ethnology.[8] A result of this is that the notion of intangibility was always linked to tangible objects. The possibility that the intangible could take flight on its own account and start to fray this straitjacket may have been raised from time to time in international contexts – and especially by subaltern voices[9] – but for a considerable period it was in little danger of toppling the operation of the authorized heritage discourse. The process leading to the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions started chipping away at all this certainty. Now that both these Conventions have come into force it seems that the limits on the possible expansion of the heritage concept that were imposed by the linkage between the tangible and the intangible have been abandoned. And with their loss the authorized heritage discourse seems in danger of losing its moorings. If heritage can be just intangible, casting away the limitations of the tangible, then there seems no limit to its expansion.

Viewed from this perspective, intangible cultural heritage might be just about anything at all to which we might attach descriptions like "culture" or "cultural".[10] If everything intangible that we do is intangible cultural heritage then at least one consequence of this is that the idea of subjecting it to some sort of regime of legal protection or recognition is problematic. This risk is, of course, recognised by the authorized heritage discourse, which seeks to put some limits on the concept of intangible cultural heritage and thereby resists disintegrating under the weight of its own expansion. However, as this chapter argues, we should be wary of assuming that this authorized discourse, as embodied in things like the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (CICH), correctly identifies what is intangible cultural heritage or properly protects it. These problems are particularly acute in relation to intangible cultural heritage as a contemporary phenomenon, which not only presents an intrinsic challenge to the authorized heritage discourse but also seems particularly likely to have some overlap with the type of cultural creativity that is subject to the competing protection of the intellectual property regime. In order to analyse these issues, this chapter is divided into three substantive parts. The first attempts to lay down some parameters for the concept of contemporary intangible cultural heritage. The second part measures these parameters against the international legal superstructure, in which the authorized heritage discourse might be regarded as finding its particular expression. And in the third part the relationship between contemporary intangible cultural heritage and intellectual property rights is considered.

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[6] World Heritage Convention 1972, art 1.

[7] Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property 1970, art 1, which protects "cultural property" falling within a closed list of categories all subject to the prerequisite that it is "on religious or secular grounds … specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science"; World Heritage Convention 1972, art 11.

[8] See, eg, Smith 2006, n 1 *supra*; & Harrison 2013, n 2 *supra*, .

[9] Smith 2006, n 1 *supra*, 106-113.

[10] Which provides hardly any limit at all bearing in mind the totalizing nature of the concept of "culture": see, eg, J Blake, "On Defining Cultural Heritage" (2000) 49 *International & Comparative Law Quarterly* 61, 67-68, quoting G M Sider, *Culture and Class in Anthropology and History* (Cambridge: Cambridge University Press, 1986), 6.

II. Intangible Cultural Heritage as a Contemporary Phenomenon

It is, of course, not only the authorized heritage discourse that has a problem in defining the concept of intangible cultural heritage, let alone its contemporary instantiation. The need to find some meaningful way of delimiting the field presents us with definitional problems around questions of both the meaning of the concept of heritage and of what work the idea of the "contemporary" does here. Strangely, in the present context, the question of what is intangible seems comparatively less problematic. Perhaps the long occidental obsession with the tangible/intangible distinction turns out to be some help after all. The only point to make at this stage, and it is one to which this chapter will return, is that as much as it is true that all tangible heritage is inherently connected with the intangible values that make it heritage and not just a pile of old junk, is also arguably the case that all – or nearly all - intangible heritage is connected to the tangible or material world. The type of intangible practices that likely constitute intangible cultural heritage are, as Harrison argues, "thoroughly embedded in a set of physical relationships with objects, places and other people".[11] While forms of cultural heritage that are digital may present some challenges to this characterization, an intangible place - like cyberspace – might nevertheless count as a place.

At this point, I can no longer (as much as I would like to) postpone some type of definitional engagement with the contemporary phenomenon of intangible cultural heritage. It seems to me that, in the contemporary context, intangible cultural heritage embraces two apparently different ideas. One of these is the contemporary obsession with the past; and the other is the equally obsessional quest to call everything that seems to be a present day "cultural" practice intangible cultural heritage. My (modest) suggestion is that thinking about how these two different ideas relate to each other might be of some definitional assistance. Both involve a type of *pas de deux* between past and present, the first more obviously so, which is reflected in modernity's relationship with time. As Harrison writes of modernity:

> [I]t constantly creates the present as "contemporary past" whilst it anticipates the future as embodied within its present. In other words, modernity creates for itself a past that is perceived to be both immanent (contained within) and imminent (impending) in the present … One important outcome of this rather peculiar relationship with time is that in its obsessive attempts to transcend the present, modernity becomes fixated on the past in several distinctive ways. In the first instance, it is haunted by the idea of decline or decay … Secondly, in attempting to define itself in opposition to tradition and the past, modernity becomes concerned with defining and categorising it.[12]

While this obviously addresses what I have described as the obsession with the past, it also links this with our obsession about the value of contemporary cultural practices. The critical point is that this *pas de deux* between past and present is immanent in the very notion of heritage, which is always contemporary and also always past. It is always contemporary because it is only in the present that it is recognised as heritage, but also always past because even what we might describe as contemporary intangible heritage, in the sense of contemporary cultural practices, has to have already

[11] Harrison 2013, n 2 *supra*, 14.
[12] Harrison 2013, n 2 *supra*, 25-26 (references omitted).

happened, even if it has only just happened, for us to be able to reflect on it and identify it as heritage.[13] This element of reflection is essential to the concept of heritage, which is constituted by those things we select from the past (including the near past) as having the sort of value that makes them worth passing on to the future.[14] There is, of course, an obvious political element in identifying what is considered to be worth handing on to the future[15] and this carries with it a degree of malleability and slipperiness. Thus, what we understand to be cultural heritage reflects current political concerns. One result is that the idea of heritage has become a rhetorical moving feast that enjoys potency in cultural and political discourse, and which is capable of both affirming or opposing its own authorized discourse. As Smith argues:

> Heritage *is* dissonant – it is a constitutive social process that on the one hand is about regulating and legitimizing, and on the other hand is about working out, contesting and challenging a range of cultural and social identities, sense of place, collective memories, values and meanings that prevail in the present and can be passed on to the future".[16]

The questions of whose identity prevails, whose collective memories survive and who gets to decide what is passed on to the future are all intensely political questions "tied to claims to and expressions of power"[17] by a community. And it is in this mutually constitutive relationship between heritage and community that the particular power and importance of heritage lies. Not only does cultural heritage belong to communities, but it also defines them and confers them with cultural, social and political power.[18]

This mutual relationship between heritage and community tends to reinforce the essentially intangible nature of all heritage.[19] It also means that some understanding of the nature and identity of community is an essential part of any attempt to conceptualise cultural heritage. At the same time, it is precisely at the interface of cultural heritage and community that a particular challenge is flaunted in the face of the authorized heritage discourse as it is contained in the international legal instruments. While this will be addressed in more detail in the next section of this chapter it is, perhaps, useful to preface the current discussion by noting that, for most purposes, the authorized heritage discourse understands the cultural heritage community as being national. In order to suppress dissonance, it *often* ignores the fact that community identities are formed at multiple levels and in multiple layers.[20] It *necessarily* ignores the fact that one of the more contentious levels of community identity may be that of the nation.

The assimilation of the idea of community into that of nation is the target of Anderson's famous critique of nationalism.[21] Anderson proposes that the central foundational concepts around which community rotates are identification and memory, which are reflexively linked to one another. For Anderson, communities are always imagined.[22] By this he means not that they are fake or false, but

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[13] See also, eg, Harrison 2013, n 2 *supra*, 14: "heritage is formed *in the present* and reflects inherited and current concerns about the past" (italics as in the original).
[14] See also, Blake 2000, n 10 *supra*, 68-69; F Macmillan, "Arts Festivals as Cultural Heritage in a Copyright Saturated World" in H Porsdam (ed), *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property* (Farnham, Ashgate, 2014); & Macmillan 2015, n 5 *supra*.
[15] See also Blake 2000, n 10 *supra*, 68.
[16] Smith 2006, n 1 *supra*, 82.
[17] Smith 2006, n 1 *supra*, 192.
[18] See Smith 2006, n 1 *supra*, 288.
[19] See also Smith 2006, n 1 *supra*, eg 3 & 307.
[20] See also Smith 2006, n 1 *supra*, 53.
[21] B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London & New York: Verso, 2006,first published 1983).
[22] With the possible exception of "primordial villages of face-to-face contact": Anderson 2006, n 21 *supra*, 6.

rather that they are created by the imagination, that is by being imagined. Accordingly, he observes that "[c]ommunities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined".[23] These observations do much to enrich the foundational relation of identification and memory. There are three, in particular, that go to the heart of how community is imagined. First, Anderson notes the "deep horizontal comradeship"[24] that characterizes the imagined community – something that might also be referred to as solidarity. Secondly, he places emphasis on the temporal aspect of community, "this sense of parallelism or simultaneity".[25] The temporal dimensions here are both horizontal and vertical. Horizontal because comradeship and solidarity carry with them some notion of a shared temporal space. Vertical because if memory is critical to the imagined community then this implies a shared concept of the community's history and its temporal progression. Following on from this, the third aspect of Anderson's study that has particular resonance is exactly this question of how a community imagines its relationship with its own past. Thus we arrive at the critical question of the reflexive relationship between community and memory. The process of remembering and forgetting things is the way in which the heritage community forms its identity, selecting those things from the past – including the very recent past – that it wants to celebrate and pass on to the future. This process of remembering and forgetting lies at the heart of the discourse of the imagined community[26] and, at the same time, it is the key to identifying that community's cultural heritage. Accordingly, as Smith argues, heritage is best understood as "a constitutive cultural process that identifies those things and places that can be be given meaning and value as 'heritage' reflecting contemporary cultural and social values, debates and aspirations".[27]

As all this suggests, the concept of community that is in play here is a subjective one. Accepting that communities can be formed by less than the public at large in any given nation-state, the question of their subjectivity is an important one. When we talk about the reflexive relationship between identification and memory in the context of community formation, whose identification are we talking about? Whose memory? In particular, if the narrative of community built on collective memory is also about forgetting, who is remembering and who is forgetting? It is in relation to questions of this sort that Anderson's insight that communities are imagined is particularly useful. This is because it is clear from his focus on comradeship-solidarity, and his focus on common perceptions of time and history, that the communities he is talking about are imagined *from the inside out* rather than the other way around. This suggests, of course, that not only is community a subjective concept, but also that the identification of oneself as a member of a community is subjective both for the individual and the community. The complication here is that a community may, and often does, impose objective requirements for community membership. But such requirements cannot work to change the essential nature of community formation. As Christodoulidis argues, community comes about "around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally; and with no measure of authority, force, persuasion and violence capable of upholding it externally".[28]

Where does all this leave us with respect to the question of contemporary intangible cultural heritage? It should be evident from the foregoing that the importance of the concept of community in relation

[23] Anderson 2006, n 21 *supra*, 6.
[24] Anderson 2006, n 21 *supra*, 7; see also Smith 2006, n 1 *supra*, 303.
[25] Anderson 2006, n 21 *supra*, 188.
[26] Anderson 2006, n 21 *supra*, ch 11; E Hobsbawm, *Fractured Times: Culture and Society in the Twentieth Century*, (London: Little, Brown, 2013), 150-151.
[27] Smith 2006, n 1 *supra*, 3.
[28] E Christodoulidis, *Law and Reflexive Politics* (Dordrecht: Springer, 1998), 237, citing R Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Review* 4-68, on the "hermeneutic of principle".

to the identification of cultural heritage of all types cannot be overstated. Community and heritage are mutually constitutive. If heritage belongs to a community, then it is also true that a community only exists and identifies itself through a common process of remembering and forgetting those things and practices that are essential to its identity. Cultural heritage, therefore, is drawn from a current and ongoing process of selection and identification, which reflects contemporary concerns and values.[29] And because cultural heritage is reflexive it changes with community practice.[30] Cultural practices that are no longer the values and practices of a contemporary community are not heritage. As a result, all cultural practices of communities, which those communities consider worth continuing, are the intangible cultural heritage of those communities. But it also the case that the more recent the cultural practice, and the formation of a community around it, the more unstable its identity is likely to be and the less likely it is that it will have a coherent capacity to reflect on the processes of identity-making, memory and reflection that produce and constitute its intangible cultural heritage.

III. Intangible Cultural Heritage in International Law

Can this mutually constitutive relationship between heritage and community be captured by law? Does it have the tools to recognise what Graham and Howard describe as "the interconnections of heritages and identities [that] are all around us, entwining the local with the regional, national and global, everyday life with political ideology"?[31] Community rates a mention in the CICH, as will be discussed in more detail below. Given the role of this convention in the authorized heritage discourse one might speculate, quite reasonably, that this mention is a type of inoculation against criticisms of the international legal regime for its statist nature. However, much as the authorized discourse may protest, the introduction of the concept of community into this instrument is compromised by the inescapably statist nature of the system and the consequent problem that "community" is not a term of art in international law and so presents the eye of the law with recognitional problems.

The significance of the statist nature of international law in eviscerating attempts to introduce the concept of communities as the holders of intangible cultural heritage should not be underrated. While the exact nature of the relationship between the nation state and the constitution of international law is a matter of debate,[32] there is little real hope of escaping from the conclusion that the juridical actors of international law are the states themselves and the supranational, international and intergovernmental organisations created through the mutually interdependent process of international law-making. Communities, despite being recognised in political theory as constituting the common political identity that forms the basis of the nation, and perhaps also the common cultural identity that precedes a common political identity, have traditionally received little formal attention in international law precisely because their identity has been submerged into that of the nation-state. This concept of international law and of international law-making is clearly exclusionary. One of its

[29] Smith 2006, n 1 *supra*, 3; see also Harrison 2013, n 2 *supra*, 14, quoted in n 13 *supra*.
[30] P Fitzpatrick P.& R Joyce, "Copying Right: Cultural Property and the Limits of (Occidental) Law" in F. Macmillan (ed), *New Directions in Copyright Law: Volume 4* (Cheltenham: Edward Elgar, 2007).
[31] B Graham & P Howard, "Heritage and Identity" in B Graham & P Howard (eds), *The Ashgate Companion to Heritage and Identity* (London: Ashgate, 2008), 13.
[32] *Cf* A Carty, "Myths of international legal order: Past and present", (1997) 10 *Cambridge Review of International Affairs* 3-22 & P Fitzpatrick, "'The new constitutionalism': The global, the postcolonial and the constitution of nations" (2006) 10(2) *Law, Democracy and Development* 1-20.

consequences is that in the post-colonial context Indigenous Peoples, not constituting a state in international law, have found themselves without a voice at the international law-making table. The particular injustice of this state of affairs might be seen as being mitigated to some effect by international legal language like that in the sixth recital of the CICH, which recognises "that communities, in particular indigenous communities, groups and, in some cases individuals, play an important role in the production, safeguarding maintenance and recreation of the intangible cultural heritage".

Despite the contextual association with the position of Indigenous Peoples the operative provisions of the Convention on Intangible Cultural Heritage make it clear that the concept of community in this Convention is, however, not to be read as limited to Indigenous communities. Particularly important in this respect is the Convention's definition of intangible cultural heritage. According to Article 2.1 of the Convention, 'intangible cultural heritage' means:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and in some cases, individuals recognise as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

The Convention does not seek to define the concept of community. Nor does it attempt to indicate expressly how a community might be recognised by the law, although perhaps the reflexive relationship between community, types of intangible things ("practices, representations, expressions, knowledge, skills") and a tangible or spatial dimension ("instruments, objects, artefacts and cultural spaces") in this definition provide some orientation points.[33] At the national level this reflexive relationship has generated legal provisions geared to the question of community recognition. For example, particularly in states having an Indigenous population that predates the establishment of the state, the Indigenous population is recognised as a community enjoying, at least, a distinct identity and, often, also particular rights. The same is also true in relation to states in which ethnic or linguistic minorities live. To some extent, these types of rights reflect obligations (actual or hortatory) in international law even though their origins might not be directly attributable to such obligations. However, there are also other well-known examples in national law of the recognition of community and associated community rights, where community is less than the public at large. It is common, for example, for legal systems to recognise community rights in property based on customary use.[34] An interesting variation on this is the recognition, nationally and internationally, of certain rights associated with the marking of products made in a certain geographical location.[35]

The pivotal question here is not whether we can find a basis in law for delineating a community, which might then lay claim to certain community rights. It follows from the argument about the

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[33] See also L Zagato, "The Notion of 'Heritage Community' in the Council of Europe's Faro Convention. Its Impact on the European Legal Framework" in N Adell, R F Bendix, C Bortolotto & M Tauschek (eds), *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage*, Göttingen Studies in Cultural Property, Volume 8 (Göttingen: Göttingen University Press, 2015), 153.

[34] A Clarke, "Property, Human Rights and Communities", in T Xu & J Allain (eds), *Property and Human Rights in a Global Context* (Oxford & Portland: Hart, 2015).

[35] N Aylwin & R Coombe, "Marks Indicating Conditions of Origin in Rights-Based Sustainable Development" in R Buchanan & P Zumbansen (eds), *Human Rights, Development and Restorative Justice: An Osgoode Reader* (Oxford: Hart, 2013).

nature of community in the previous section that community comes before the law[36] and so cannot be constituted by it. However, at the same time, we may be able to find some indicia in existing legal accounts around which to build a concept of community that might then be the carrier of certain cultural heritage rights and obligations in law. The types of (overlapping) indicia that seem to be important in national systems as they relate to communities that form less than population of the state as a whole are: common political identity; common ethnic identity; common language; common religious identity; common geographical location; common sustenance practices; common history. Although we tend to get stuck in a rather circular line of reasoning here because, as will be evident, with the possible exceptions of common language[37] and common religion,[38] these are all also indicia of the type of communities that constitute nation states in international law. These indicia are also all, in some sense, objective or externally observable criteria, which interact with the subjective indicia of solidarity, identification and memory that have been discussed above. And it is precisely here that law's problem with recognising the indicia of community formation is exposed. If community is, as argued above, a subjective concept, employing objective criteria as part of that subjectivity, then law's problem with it will always be that it will see the objective criteria, but not necessarily their relationship to the subjective identification of community. This is one of the reasons why law has such difficulty in recognising community outside easily identifiable constellations such as the nation state. At the same time, the fact that the types of communities with which the CICH is concerned form around particular "practices, representations, expressions, knowledge, skills" and in relation to "instruments, objects, artefacts and cultural spaces" perhaps has the effect of adding useful semi-objective criteria that might contribute reflexively to the definition of community. Further, there is also the reasonable hope of what Zagato describes as a "(fruitful) contamination"[39] between the meaning of "community" in the CICH and the more fully articulated concept of "heritage communities" in the Council of Europe's Faro Convention.[40]

Without labouring the point unduly, it is clear that what constitutes "practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith" in article 2.1. of the CICH must be understood to be in a reflexive relationship with the community to which they belong. The risk that we start to enter into an endless circularity of vague uncertainty is mitigated to some extent by article 2.2 that provides an inclusive definition of the intangible objects of protection to which further reference will be made in the following section of this chapter. Armed with this guidance on the type of stuff that constitutes intangible cultural heritage, and tactfully avoiding the problem of community identification, we might say that the CICH makes quite a reasonable job of identifying the sorts of intangible things that might be the reasonable object of protection as forms of heritage. This even extends to its acknowledgement of the role of the tangible and spatial dimensions of this type of heritage.[41]

Or, at least, things seem this way until one turns from the gilded cage of the CICH's text to its real operative life. At this point, things start to look a bit less rosy for three reasons in particular, all of which are part and parcel of the essentially state-based nature and occidental framing of (not only) this convention (but also all international law). First, the patterns of state adherence to the CICH may reasonably be interpreted as expressing the continuing unease that the authorized heritage discourse

[36] See Christodoulidis 1998, n 28 *supra*.
[37] See Anderson 2006, n 21 *supra*, 196; Hobsbawm 2013, n 26 *supra*, 147.
[38] See Hobsbawm 2013, n 26 *supra*, 147.
[39] Zagato 2015, n 33 *supra*, 153 & see esp *ibid.*, 153-159.
[40] Framework Convention on the Value of Cultural Heritage for Society (adopted in Faro, 27 October 2005).
[41] But without, of course, challenging the Cartesian dualism that permeates the UNESCO Conventions: see Harrison 2013, n 2 *supra*, 137.

has with the concept of intangible cultural heritage.[42] At the time of writing the CICH has 172 states parties,[43] which is a good overall level of adherence. There is a significant level of adherence amongst non-Western states. However, there are some interesting omissions amongst the parties to the Convention, especially if it is compared with other UNESCO conventions pertaining to cultural heritage. Australia, Canada, New Zealand, the United States and the United Kingdom, for example, are not parties to the CICH. Smith notes that for countries such as these, in addition, to unease with the idea of intangible cultural heritage, there is also doubt about its relevance: "one official in a leading government heritage in the United Kingdom having asserted the irrelevance of the Convention as the 'UK has no intangible heritage".[44] But even for those occidental states that are parties, it is evident that very little (comparatively speaking) has been listed. Non Western states have made an overwhelmingly greater use of the provisions to list intangible cultural heritage on the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, which are established under articles 16 and 17, respectively, of the CICH. A comparison with the use made by Western states of the listing facility under the World Heritage Convention, of which they have made extensive use, points up a notable lack of Western interest in intangible cultural heritage even on the part of signatory states to the CICH. This phenomenon Smith suggests "relates to the inability of intangible heritage to 'speak to' or find synergy with the dominant sense of historical and social experiences" on which the (Western) authorized heritage discourse is based.[45]

Of course, the very notion that listing something contributes in some way to its protection is part of the Western authorized heritage discourse that is largely concerned with materiality and monumentality. In the authorized heritage discourse these concepts represent values that can be captured in a list, frozen in time and rendered immutable. It is far from clear that it is meaningful to attempt to capture the vitality and mutability of intangible heritage in this way. Concerns have similarly been expressed that even the use made by non-Western states of the listing facility tends to favour things having the quality of "folklore" or of "traditional" practices: "the colourful and the exotic, those things that the West tends to romanticize".[46] More than this, these "colourful and exotic things" are being listed by states, not by communities within those states. Consequently, in the non-Western world, as much as in the Western world, alternative voices and communities forming less than the state as a whole are not necessarily well-represented,[47] despite the existence of provisions in the CICH designed to encourage community participation in the identification and safeguarding of cultural heritage.[48] As always, this has tended to penalise Indigenous Peoples, in particular. Adding insult to injury, it might also be noted that some of the Western states that have been noted above as not having adhered to the CICH are states that have significant and politically active Indigenous Peoples. The complications of colonial and postcolonial cultural appropriation, political contention

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[42] Smith 2006, n 1 *supra*, 55.
[43] http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E, accessed 06/03/2017.
[44] Smith 2006, n 1 *supra*, 109. If there are changes to this position they have not resulted in adherence to the CICH.
[45] Smith 2006, n 1 *supra*, 109.
[46] Smith 2006, n 1 *supra*, 112, citing R Kurin, "Comments" (2002) 43(1) *Current Anthropology* 144-145; R Kurin, "Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A critical appraisal" (2004) 56(1-2) *Museum International* 66-76; & B Kirshenblatt-Gimblett, "Intangible heritage as metacultural production" (2004) 56(1-2) *Museum International* 52-64.
[47] Kirshenblatt-Gimblett 2004, n 46 *supra*, 57, quoted in Smith 2006, n 1 *supra*, 112.
[48] Art 11 requires state parties to "identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations". Art 15 requires states parties to "endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit … [intangible cultural] heritage, and to involve them actively in its management".

(if not outright hostility), confusion about identity and about community formation at the state and sub-state level have perhaps made the idea of an authorized discourse of intangible cultural heritage too hot to handle for these states.

Despite the not unpromising text of the CICH, the reality of its operation does not suggest that it provides a particularly fertile ground for the protection of the sort of intangible cultural heritage that might be described as involving contemporary cultural practices. The more contemporary the practice, the more mutable it is, and the more fluid (or unstable) the community built around it, the less likely it is, in any case, to find its way to a listing under the CICH. Added to this, occidental discourses of heritage, which mostly seem to understand intangible heritage as something that "they" (non-Western states) have,[49] and the state-centric nature of both the CICH and its listing process all militate against such recognition. In particular, when communities can be formed online without any particular territorial limits, the artificiality of imagining the intangible cultural heritage community as co-terminus with the state becomes even more obvious. Although it is worth noting that the phenomenon of the trans-statal heritage community is not new: a number of Indigenous Peoples fall within this description. In any case, the important point to note here is that the type of things likely to be listed as cultural heritage are those that are represented by dominant narratives within a state. Communities that are less than, and contained within, the state as a whole, or have transcended the limits of state boundaries are unlikely to get much of a look in.

Does this really matter at all? Do vibrant vital cultural practices need the protection of law? What could law possibly offer that is of use to them? It seems hardly worth lingering over the safeguarding obligations on states with respect to listed intangible cultural heritage that are contained in the CICH. These obligations, according to article 2.3 require states to put in place "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission … as well as the revitalization of the various aspects of such heritage". The very nature of these obligations tends to emphasize the folkloric and static nature of the things that are likely to be listed, and perhaps also their value in attracting tourism. My suggestion is that the form of legal protection that might conceivably matter for intangible cultural heritage, particularly in relation to some types of contemporary cultural practices, is one that is notably absent from the CICH: protection from the exercise of private intellectual property rights over cultural production.

IV. Intangible Cultural Heritage and Intellectual Property

Concepts of cultural heritage are strongly associated with the creative arts.[50] This is reflected in Article 2.2 of the Convention on Intangible Cultural Heritage, in which specific instances of the sort of stuff that falls within the general definition in Article 2.1, reproduced above, is listed inclusively as follows:

> (a) oral traditions and expressions, including language as the vehicle of the intangible cultural heritage;

[49] J R Slaughter, "Form & Informality: An Unliterary Look at World Literature" in R. Warhol (ed), *The Work of Genre: Selected Essays from the English Institute*, (New York: English Institute in Collaboration with the American Council of Learned Societies, 2011).
[50] Hobsbawm 2013, n 26 *supra*, ch 12.

(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship.

This list immediately suggests some sort of relationship between intangible cultural heritage and, at least, copyright law. But even without the aid the list in Article 2.2, it is clear that the association of the creative arts with intangible cultural heritage necessarily brings it into an engagement with copyright. This is because one of the markers of the social acceptance of a practice as part of the creative arts in occidental society seems also to be the fact that that practice then came to be protected as a copyright work.[51]

The question of the relationship between cultural heritage and intellectual property is a particularly fraught one.[52] It is clear that part of what might be considered to be intangible cultural heritage falls outside the copyright net because, even if its "authors" are identifiable, any copyright interest will have disappeared into the mist of the copyright duration rules. However, in the context of at least some things that fall within the idea of contemporary cultural heritage, the conflict between their identity as intangible cultural heritage and their character as a copyright work is alive and well. The central tension rests on the fact that while cultural heritage is something that "belongs" to a community, intellectual property including copyright is a rivalrous form of private property. Consequently, these two systems involve two very different ways of expressing value.

In the neo-liberal period there is a tendency for everything to be subjected to what has been described as "total market thinking".[53] Seeing the world through the spectacles of the neo-liberal framework leads to the conclusion that value can only be expressed through the market, which means that it can only be expressed in the form of a commodity. When we talk about the commodification of artistic works then the relevant instrument of commodification is almost always copyright because it is copyright that turns the relevant creative forms into private property. It is, therefore, critically important to distinguish between the fundamentally different concepts of not only copyright and cultural heritage, but also of the market and the community. This is because these are the two contexts in which copyright and cultural heritage, respectively, express and control the meaning of value. So while copyright as a private property right locates all relationships in the context of the market, the context of cultural heritage relationships is the community, of which the market forms a part but does not (or should not) control the whole.

In the world of total market thinking formal systems of private property rights such as copyright enjoy particular prestige. The more valuable the right in the marketplace the greater the prestige. In terms of the relationship between intellectual property and cultural heritage, it seems clear that cultural property/heritage has suffered from the ensuing prestige deficit, with a consequent impact on the way it is protected under international law.[54] However, if we want to have cultural practices that resist this reduction of everything to its value in the market, then we also need to find a device that resists the commodification, or creeping propertization, of everything and proposes an alternative basis for

[51] L Bently & B Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2009, 3rd ed), ch 2.
[52] See Macmillan 2013, n 3 *supra*; Macmillan 2014, n 14 *supra*; F Macmillan, "Arts Festivals: Property, Heritage or More?" in K Bowrey & M Handler (eds), *Law & Creativity in the Age of the Entertainment Franchise* (Cambridge: Cambridge University Press, 2014); Macmillan 2015, n 5 *supra*.
[53] E Christodoulidis, "The European Court of Justice and 'total market thinking'" (2013) 14 *German Law Journal* 2005-2020.
[54] See further Slaughter 2011, n 49 *supra*; Macmillan 2013, n 3 *supra*; Macmillan 2015, n 5 *supra*.

expressing and controlling value. At the moment, the best bet we have for this form of resistance is a more fully articulated concept of cultural heritage, which expresses and controls value according to the norms and identity of a community and not according to the market value of private property rights.[55] None of this is to say that copyright is not valuable to individuals working in all areas of creative production to which it applies. Copyright not only allows individuals to gain an economic benefit over their creative labour, it also confers control on them – although that control is considerably diminished if copyright does not remain in the hands of the original creator. However, private property rights like copyright are not a route to building a community of cultural and creative value. Such a community needs to be built by a bottom up commitment to the value of the artistic or cultural practice. Within such a community copyright will have a value for individual authors, but it is a value that should be limited by the rights that other members of the community have in their shared cultural heritage.

In this way market thinking would cease to be total and the market would become only one artefact of the ties that bind that community together. What is particularly important to emphasize here is that the private property relations of copyright, which are produced by the law, do not and cannot be regarded as constituting community or controlling all aspects of the relationships within it. As has been argued above, community is produced by a reflexive relationship between identity and memory. It imports, however, a concept of solidarity, of mutual obligation. It is not that property relations cannot have a place in community, but rather that they should be subject to the mutual obligations of community. The proper role of the law here is to give community the means to express its identity and the collective claims that flow from that identity, having reference always to the multiple and overlapping communities that form and give substance to human existence. However, the communities that form around and generate many contemporary cultural forms, some of which might fall within the definition of contemporary cultural heritage, do not exist in a legal environment that looks much like this. The international intellectual property law system, which defines ownership and controls the use of many forms of contemporary cultural production identifies value through a system of total market thinking. Its creation of an extensive system of private property rights over cultural products is designed to make those products into liquid investments. The result is that copyright law, the primary function of which is to protect investment and the accumulation of capital,[56] sustains a system of control of cultural output in the hands of a concentrated group of multinational corporate agglomerations.[57]

V. Conclusion

The state-based nature of international law creates difficulties for the law in recognising communities forming less than the public as a whole.[58] Nevertheless, international cultural heritage law, at least that part of it promulgated this century, shows some signs of recognising that the central function of cultural heritage law should be to provide community with the means to express its identity and the collective claims that flow from that identity. If this seems to be a departure from the authorized heritage discourse then perhaps this is because in some ways the very recognition of the concept of

[55] See further Macmillan 2013, n 3 *supra*; Macmillan 2015, n 5 *supra*.
[56] See F Macmillan, "Copyright and Cultural Rights" in L Belder & H Porsdam (eds), *Negotiating Cultural Rights* (London: Ashgate, 2017).
[57] A phenomenon that is becoming increasingly evident, see eg Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, *Copyright policy and the right to science and culture* (24 December 2014).
[58] See further Macmillan 2015, n 5 *supra*.

intangible cultural heritage creates the sort of noise that this discourse finds hard to absorb or normalise. Not only are the various dualisms on which the discourse is based held up for reconsideration, but the very idea of the legal protection of intangible heritage through a process of listing questions two of what Smith describes as "the underpinning assumptions" of the authorized heritage discourse: "firstly, that management and protection is indeed about, and should be about fossilization; and, secondly, that the inherent values of … heritage are immutable".[59] This suggests, as Smith continues, that "what the debate about intangible heritage as living culture also throws into relief is the idea that the listing process, either of tangible or intangible heritage, is itself a performance of meaning making".[60] But what then, in relation to intangible heritage, is the meaning that is being made? And how, in relation to what we might describe as contemporary intangible cultural heritage, does that meaning interact with other performances of meaning making, especially the performance that attributes value to it in the form of private property rights?

The law itself makes no attempt to understand the relationship between the way is meaning is made in relation to the same cultural practices in the two different systems of intangible cultural heritage protection and intellectual property protection. Consequently, unconstrained by any legally imposed attempt at balance or restraint, the transcendence of total market thinking in the neo-liberal period has prioritised private property rights and their market exploitation over the demands of the contemporary cultural heritage community.[61] Current practices of cultural production - instead of expressing the identity, solidarity and mutual obligations of community - are stymied and constrained by the deadweight of private property rights, often exercised not even by other members of the cultural heritage community but by the media and entertainment corporations who have commodified so much contemporary cultural output. This form of commodification can, perhaps be usefully contrasted, with other forms of commodification or commercialization of cultural heritage. Heritage is, for example, commodified through tourism and I would not be the first to voice the thought that the main function, in reality, of the UNESCO lists of tangible and intangible cultural heritage are as tourist guides. But the difference here is that, whatever the regrettable effects of this form of commodification,[62] at least the fundamental character of the heritage as heritage is retained. While it may not always work out this way, the fact that the cultural heritage community may, itself, control this process of tourist commodification is important. In such a case, perhaps we can understand the market as being embedded in community (or, at least, not completely abandon the hope of this). But no such assertion can be made when cultural heritage becomes private property and its fundamental character as a community artefact is overwhelmed and subsumed into the logic of rivalrous individual ownership. To have any meaningful role in sustaining the vitality of intangible cultural practices and holding up the contemporary cultural heritage community, it is against exactly this that the CICH should be offering protection.

[59] Smith 2006, n 1 *supra*, 111-112.
[60] Smith 2006, n 1 *supra*, 112.
[61] See further Macmillan 2015, n 5 *supra*.
[62] See, eg, Smith 2006, n 1 *supra*, 33-34.