# Denying Cultural Intellectual Property: An International Perspective on Anjali Vats's *The Color of Creatorship*

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## INTRODUCTION

In *The Color of Creatorship*, Anjali Vats offers a compelling analysis of intellectual property (IP) laws through the lens of critical race theory. Providing a persuasive account of the role of racialized perspectives and colonial histories in the making of IP laws, Vats calls on activists to "persuade lawmakers that knowledge production comes in a variety of forms." She makes a valuable contribution to the literature on race and IP, asking us to think about IP citizenship and how this has been framed in the United States. In this brief essay, I will connect Vats's analysis to some of the issues that arise in relation to international IP.

While she acknowledges the global issues and histories, Vats focuses primarily on the role of race in shaping IP law in the United States. However, the book engages in some discussion of the international aspects, primarily focusing on the Indian Traditional Knowledge Digital Library (TKDL).[1] Vats connects her theories to traditional knowledge discussions and dignity-based analyses of IP. At its core, this critical race framing calls for an acknowledgement of the personhood and dignity of creators of color. This aligns with the language one might find in an international human rights approach to IP, which requires recognition for the basic dignity of every person by virtue of their humanity. This essay will elaborate on these points, discussing the book in relation to traditional knowledge, human rights, and human flourishing approaches to IP.

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1 *See generally About TKDL*, TKDL: TRADITIONAL KNOWLEDGE DIG. LIBRARY, https://perma.cc/R2EU-5ETJ (last visited Jan. 27, 2022).

## I. Traditional Knowledge, Racist Branding, & Cultural Patents

As I have argued elsewhere, there is a cultural divide in global IP law.[2] The "whiteness as property" narrative that Vats applies to her analysis of IP is readily applicable to critiques of international IP and to the traditional knowledge debate in particular. Vats deftly incorporates this into her discussion of decoloniality, stating:

> The project of remaking intellectual property law, then, must address the centrality of the state and the centrality of whiteness in the formation of intellectual property policy and its underlying ideologies and cultural formations. This does not mean doing away with the nation-state or completely disempowering white people. Instead, it means confronting the role of the nation-state in its epistemic violence and its complicity in white supremacy.[3]

This racial structure of IP is well illustrated by the various forms of racially offensive branding and the failure to protect traditional knowledge. For example, in the fall of 2019, the luxury French fashion brand, Christian Dior, found itself embroiled in controversy relating to the use of Native American culture to promote the "Sauvage" perfume. The advertisement, a one-minute film titled, "We are the Land," featured American actor, Johnny Depp.[4] In the advertisement, a Native man dressed in full regalia appears to be doing a traditional Native American dance, while Depp plays the guitar and gazes at the landscape. A voiceover at the end asserts, "We are the land." The perfume name "Sauvage" translates from French to English as "savage." Amid backlash, Dior eventually pulled the ad. Although no particular Native group was identified, a generic Native American identity was portrayed.

This Dior advertisement could be considered an example of racially derogatory branding, particularly because of the association between the Native motif and the "savage" theme. It also involved traditional cultural expressions or expressions of folklore, which the World Intellectual Property Organization (WIPO) defines to include, among others, "music, dance, art, designs, names, symbols, performances, ceremonies, architectural forms, handicrafts and narratives."[5] WIPO continues to work on its *sui generis*

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[2] *See* J. Janewa Osei-Tutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1640 (2012).

[3] ANJALI VATS, THE COLOR OF CREATORSHIP 200–201 (2020).

[4] Maanvi Singh, *Dior Perfume Ad Featuring Johnny Depp Criticized over Native American Tropes*, THE GUARDIAN (Aug. 30, 2019, 10:23 PM EDT), https://perma.cc/436T-NHE9.

[5] *Traditional Cultural Expressions*, WIPO: World Intellectual Prop. Org., https://perma.cc/ED94-HC8Q (last visited Jan. 27, 2022).

legislation to protect traditional knowledge and traditional cultural expressions.[6] Yet, little progress has been made over the years, and there remains no international agreement to address claims of cultural appropriation.

In chapter 4, Vats discusses the value of India's TKDL in making Indian traditional knowledge prior art. She also identifies what she describes as a legal error in the Indian discussions of cultural property, explaining how some in the Indian community use "malapropisms" by discussing yoga piracy and cultural patents.[7] This is partly an act of resistance and reframing, as Vats points out. It is also an indication of the failure of the current international IP system to reflect a diversity of perspectives.

While, according to Western IP laws, it is legally inaccurate to speak of yoga patents or to insist on ownership of yoga as Indian cultural heritage, it is not an incorrect approach, but rather a different approach to IP rights. It is legally inaccurate, perhaps because those voices were not sufficiently incorporated in structuring the modern international IP system and these perspectives are not reflected in the World Trade Organization (WTO) 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Cultural patents and yoga piracy are not legally cognizable because international IP law has been structured to exclude such claims. If we look more closely at the justifications for the IP rights that protect collective interests, including group rights, the concept of yoga piracy is not such a stretch.

As Vats points out, Indian assertions of infringement do not align with existing IP structures. Understanding the use of Indian traditional knowledge as a violation of IP rights is an example of a different cultural perspective regarding what is proprietary. Intangible cultural property may not be recognized by Western IP laws, but it may very much be recognized by national or traditional customary laws of a country in the "Global South." The existing international IP system has been criticized as having been developed from a Western perspective for the benefit of industrialized nations. Indeed, when the WTO TRIPS Agreement was implemented, there was concern from developing countries as well as critical scholars. The purpose of the TRIPS agreement is to create minimum standards for the protection of IP, thereby ensuring that multinational corporations from industrialized nations would have their economic interests protected when they did business overseas.

How does one confront the cultural assumptions that underlie global IP

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[6] *See id.*

[7] VATS, *supra* note 3, at 172.

policy? One important step is to identify and acknowledge the clear but not easily justifiable differences when it comes to protecting, and even expanding, certain IP protections while denying others. The traditional knowledge discussions are a terrific example. There are several critiques of the failure to protect indigenous and cultural IP from international law perspectives, such as Third World Approaches to International Law (TWAIL).

TWAIL is a critical approach that offers a relevant critique of the traditional knowledge debates and, like critical race theory, comes from the perspective of historically disempowered persons. Both TWAIL and critical race theory identify some of the structural flaws in international IP structures. As James Gathii explains, there are differences between critical race approaches to law, which come from the perspective of race in the U.S., and TWAIL, which focuses more on the post-colonial critiques of international law.[8] However, these two approaches have some similarities.

As applied to international IP, both TWAIL and critical race theory might lead us to ask: What makes traditional knowledge public domain material and free for all to take while other forms of creation are not available as the common heritage of mankind? Vats writes about "the complex ways that whiteness and its attendant property interests structure intellectual property law, often in the guise of equality and race neutrality."[9] Vats argues that IP laws protect the interests of white people and devalue the IP interests of people of color.[10] Applying her analysis to the struggle to create international legal protection for traditional knowledge and traditional cultural expressions, it is apparent that the very structure of the laws and the justifications for these laws support her claim.

## II. International IP—Defining IP to Exclude Cultural IP

There is a stark contrast between the willingness and ability of nations to come together to implement the TRIPS Agreement[11] and the significant challenges in obtaining an international agreement to protect traditional

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[8] *See generally* James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 28–29 (2011), https://perma.cc/NHE2-J73W.

[9] VATS, *supra* note 3, at 2.

[10] VATS, *supra* note 3, at 3.

[11] Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1177 (1994) [hereinafter TRIPS Agreement].

knowledge.

WTO members agreed to extend copyright protection to databases, protect geographical indications, ensure medicine patents, and establish a global minimum term of patent protection of 20 years from the date of filing. These changes were not insignificant. For instance, prior to the TRIPS Agreement, some countries—including India, which is a major producer of generic medicines for the Global South—did not provide patents for medicines. In addition, patent terms may have been shorter, and most countries did not provide protection for geographical indications. But for intangible cultural heritage, there has been little to no progress over the past several years. Even though WIPO has taken the lead on negotiating an international instrument to protect traditional knowledge and traditional cultural expressions, the progress has been halting at best. The attempt to protect indigenous traditional knowledge has been ongoing at WIPO for several decades now. International law recognizes intangible cultural heritage but there is no legal protection for this type of knowledge that approximates the protection for classic IP rights.

There are international instruments, such as the *Convention for the Safeguarding of the Intangible Cultural Heritage* (ICH Convention),[12] that recognize intangible cultural property and the rights of indigenous peoples to their cultural heritage. Intangible cultural heritage is broadly defined by the ICH Convention such that it would encompass traditional knowledge and traditional cultural expressions, as defined by WIPO. Intangible cultural heritage includes "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 recognize as part of their cultural heritage."[13] Notably, the heritage recognized by the agreements is only that which is consistent with international human rights. It can be oral traditions and expressions, knowledge, performing arts and other manifestations of cultural identity.[14]

The ICH Convention, which dates to 2003, has 180 state parties as of 2020.[15] This is an overwhelming majority of the world's nations, nearly all of

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[12] Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 Oct. 2003), 2368 U.N.T.S. 3, *entered into force* 20 Apr. 2006, https://perma.cc/6BNZ-QLQ7.

[13] *Id.* art. 2.

[14] *Id.*

[15] *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*, UNESCO: UNITED NATIONS EDUC., SCI., & CULTURAL ORG., https://perma.cc/JX9X-G3H7 (last visited Jan. 27, 2022).

which are members of the United Nations,[16] and more state parties than the WTO, which has 164 member states.[17] Other international agreements also recognize the value of one's cultural heritage. For example, Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* (UN DRIP), which was adopted by the UN General Assembly in 2007, recognizes that indigenous peoples have the right to control and protect their cultural heritage, including their traditional knowledge, traditional cultural expressions, and any related IP.[18] At the time of its adoption, the UN DRIP had broad support, with 144 states voting in favor of the declaration.[19] The 1992 *Convention on Biological Diversity* (CBD) addresses traditional knowledge in article 8(j), speaking about preserving traditional knowledge in accordance with local laws and encouraging the equitable sharing of the benefits arising from the use of such knowledge.[20] The CBD had 196 state parties as of 2021, which is also more than the TRIPS Agreement.[21]

Despite these various international instruments that recognize intangible cultural heritage, protections akin to IP remain elusive for traditional knowledge and traditional cultural expressions. However, the objections to protecting traditional knowledge are based on the very structure of IP law, which was devised to protect large corporate and commercial interests but not to protect human dignity or to recognize the human dignity of cultural minorities and post-colonial peoples.

For example, the concept of trade-related IP rights emphasizes the commercial aspect of these rights. This becomes problematic, particularly since the absence of commercialization is used to justify excluding intangible

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[16] *See About Us*, UN: UNITED NATIONS, https://perma.cc/DC4L-YG9U (last visited Jan. 27, 2022).

[17] *Members and Observers*, WTO: WORLD TRADE ORG., https://perma.cc/2TQF-4T6L (last visited Jan. 27, 2022).

[18] G.A. Res. 295, U.N. GAOR, 61st Sess., Supp. No. 49, vol. III, at 22–23, U.N. Doc. A/61/49 (vol. III) (2007), https://perma.cc/7QHN-G79J.

[19] *UN Declaration on the Rights of Indigenous Peoples*, OHCHR: UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/3QFB-P9VV (last visited Jan. 27, 2022).

[20] Convention on Biological Diversity art. 8(j) (Rio de Janeiro, 5 June 1992), 1760 U.N.T.S. 79, *entered into force* 29 Dec. 1993, https://perma.cc/7UJ8-A7S5 ("Subject to its national legislation, [each party shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.").

[21] *List of Parties*, CBD: CONVENTION ON BIOLOGICAL DIVERSITY, https://perma.cc/ACV3-BZSG (last visited Jan. 27, 2022); *Members and Observers*, *supra* note 17.

cultural heritage from legal protection. IP rights, according to the mainstream approach, are not designed to protect human dignity or promote human development but are primarily designed to provide economic incentives for innovation and creativity. TRIPS emphasizes the commercial lens through which we see IP rights.

But IP rights are not purely about commercial transactions. Copyright law, which protects literary and artistic works, has both economic and dignitary aspects. For example, the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) recognizes moral rights, such as the right of the author to be named.[22] The TRIPS Agreement, which emphasizes the economic utilitarian approach to IP protection, expressly excludes the protection of moral rights as an obligation. In addition, the TRIPS Agreement clarifies that copyright protection extends to databases.[23] This is not because databases have creative value, but rather because they have financial value. If these databases clearly met the standard requirements for copyright protection, there would be no need to specifically state in TRIPS that databases should be protected by copyright. They may not be sufficiently original and creative, but the copyright protection offers an economic incentive to compile databases. Though there were not many substantive changes to copyright under the TRIPS Agreement, the inclusion of databases and the exclusion of moral rights are illustrations of a willingness to expand the economic aspects of copyright while excluding the dignitary aspects.

The inclusion of geographical indications in the TRIPS Agreement was a significant addition because before the TRIPS Agreement, geographic source indicators had not achieved international acceptance. Prior agreements that protected appellations of origin, such as the *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration* (Lisbon Agreement), had relatively few parties.[24] Appellations of origin can be described as the predecessor to geographical indications, but the Lisbon Agreement has only thirty-one signatories as of 2021 and had

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[22] *See* Berne Convention for the Protection of Literary and Artistic Works art. 6bis (Berne, 9 Sept. 1886), *amended effective* 28 Sept. 1979, https://perma.cc/99NS-BAPJ [hereinafter Berne Convention].

[23] TRIPS Agreement, *supra* note 11, at art. 10.2.

[24] Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration art. 2 (Lisbon, 31 Oct. 1958), *amended effective* 28 Sept. 1979, https://perma.cc/MM9U-KAKG (Article 2 defines an appellation of origin as "the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors").

even fewer when TRIPS came into effect in 1995.[25]

By comparison, the Berne Convention, which covers copyrighted works, and the *Paris Convention for the Protection of Industrial Property* (Paris Convention),[26] which addresses trademarks and patents, were widely accepted conventions.[27] While geographical indications, which are a variation of appellations of origin, had some recognition, the WTO significantly extended their reach. Importantly, the TRIPS Agreement was mandatory for all WTO members, which meant that member states could not opt out. Including minimum standards of protection for geographical indications was, therefore, a significant achievement. The inclusion of geographical indications in the TRIPS Agreement facilitates the protection of European cultural heritage, particularly with respect to the names and production methods for wines, spirits, and foods.

While the TRIPS Agreement extended protection to geographical indications and created harmonized standards for the classic forms of IP, traditional knowledge remains unprotected at the international level. There are many objections to protecting traditional indigenous knowledge, but the main objection to offering protection analogous to IP is that traditional knowledge does not fit within the traditional models for IP. For instance, copyright protection applies to literary and artistic works, but the works must be original, meaning that they are independently created and enjoy a modicum of creativity. However, a traditional cultural expression, such as a totem pole, becomes "traditional" because it is an accurate copy and not an original work. Furthermore, intangible cultural heritage is, by definition, communal rather than individual, but classic IP does not recognize the communitarian model where there is no identifiable individual creator. In addition, copyright protection is time limited, whereas intangible cultural heritage may require protection over a period that covers multiple generations. Trademarks can last indefinitely, as long as they are being used. However, trademarks for collective identity are not protected unless that

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[25] *Lisbon Agreement, Contracting Parties*, WIPO: WORLD INTELLECTUAL PROP. ORG., https://perma.cc/6REL-4JVH (last visited Jan. 27, 2022). Article 22 of the TRIPS Agreement, *supra* note 11, states, "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin."

[26] Paris Convention for the Protection of Industrial Property (Paris, 20 Mar. 1883), *amended effective* 28 Sept. 1979, https://perma.cc/YQ3F-5C3B [hereinafter Paris Convention]; Berne Convention, *supra* note 22.

[27] Berne Convention, *supra* note 22; Paris Convention, *supra* note 26 (Both the Berne Convention and the Paris Convention have over 170 signatories).

identity is being used in commerce as a source indicator.

The traditional IP models were developed from a Western perspective, including Western concepts of ownership, which means that alternate approaches to intangible rights are unlikely to fit easily within the regime. For example, the focus under the current IP model is to protect and incentivize innovation. It is less inclined to focus on a communitarian model or a model that protects non-commercial identities. This can be a difficult barrier to overcome. If existing IP structures are based on a western model, it is not surprising that an alternate model that protects traditional knowledge would not meet the criteria established by the current model.

This failure of traditional knowledge to meet the existing criteria is then provided as a justification for not protecting traditional knowledge or other intangible indigenous cultural property. Yet, IP laws are not static, and the same IP model is expanded when there is a desire to expand it, even if the claimed justifications are not objectively supported. In addition, it is not clear how much IP protection actually incentivizes innovation. Some authors have argued that, at least in some industries, innovation flourishes where there are minimal IP rights.[28]

## III. Collectives and Corporations

The objection to traditional knowledge as a collective right is an example of the way IP prioritizes the interests of major corporations. Prioritizing group interests raises some legitimate concerns about whether the group will oppress individual liberty. However, the law has demonstrated its capacity to address collective interests as well as individual rights. For example, if the collective is organized as a corporation, the questions relating to groups seem not to raise the same concerns. The leadership and structure of a corporation are made clear through corporate document. The leadership and structure of a cultural group that is claiming cultural IP rights can, and should, also be made clear. Importantly, the collective, structured as a legal corporation, does not become inherently more or less oppressive simply because it is commercial rather than cultural in its focus.

What we protect and how we protect it also has implications for *who* we protect. This is where the classic IP narrative enables the protection of major corporations and those who are well-informed and benefiting under the existing system. When looking at why we are willing to protect certain kinds of intangible goods but not others, it is impossible to simply dismiss the lens

[28] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006) ("[C]opying may actually promote innovation and benefit originators.").

that Vats applies in her explanation of IP laws in the United States as a story of racial capitalism[29] and the systematic exclusion of people of color.

The question we must ask is: what makes the economic, commercially driven model of IP justifiable, whereas a cultural or dignitary model is not acceptable? The analysis of this question is affected by original assumptions made by those who were most influential in creating the relevant legal structures. The current international IP system has not been structured with a view towards human rights, nor to the interests of collective groups or developing nations. Instead, it protects the national and international commercial interests of wealthy, industrialized countries.

International IP clearly protects commercial identities in the form of trademark and geographical indications. However, before IP law will protect cultural identity, those advocating for its protection are asked to identify the economic value that can be attached to these identities. We are also asked to explain how cultural identities, traditional knowledge, and traditional cultural expressions can be justified under labor or incentive theory. The argument is that these are not innovative, or creative works, and that there has been no labor invested in these creative creations; therefore, they should not be protected. Why, we might ask in reply, is labor theory the standard? Moreover, labor theory is not a consistent justification or rationale, because even when it comes to inventions and creative works, there is no requirement to demonstrate a significant investment of labor before IP protection becomes available. Nor do we give longer terms or broader rights to an invention that requires more investment in time and resources than we do to an accidental invention. Furthermore, it takes work to maintain one's identity, whether individual or collective.

The truth is that we could reject labor theory completely. Insisting on labor or incentive theory reinforces a structure that justifies property from a particular perspective. For instance, the Lockean notion that when you labor with something you take it out of the common state and can appropriate it to yourself is very much an individualistic approach, and not one that embraces a communitarian or collective vision. By default, this approach works against collective cultural identities as well as traditional knowledge and cultural expressions. Yet, this is not the only possible approach to IP rights. Indeed, IP rights are often justified based on labor theory, or utilitarian economic incentive theories. But other theories, such as human rights and human flourishing, could be integrated into the mainstream IP models. One way to shift the current model to one that is more inclusive of diverse cultures is to challenge the legal justifications and theoretical barriers

[29] *See generally* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013).

that exclude recognizable cultural identities from obtaining legal protection because of their poor fit into an IP model that has yet to embrace diverse perspectives.

## CONCLUSION

This essay has assessed the ideas of *The Color of Creatorship* from an international perspective, focusing on traditional knowledge and intangible cultural heritage. The challenge in obtaining international protection for traditional knowledge, despite decades of negotiations, is an example of the race-based critique that Vats presents in her book. While the critical traditional knowledge literature tends to be based on TWAIL and anti-colonial narratives, critical race theory and TWAIL both offer a structural critique that demands that human beings are placed at the center, regardless of race, color, or creed. Vats invites us to re-think the structure of IP law. Ultimately, what Vats proposes fits within a TWAIL critique of IP. It is also an argument in favor of a human rights approach to IP, in which human dignity is valued within IP law, rather than being subjugated to the commercial interests of multinational corporations.[30]

[30] VATS, *supra* note 3, at 208.