

THE ROLE OF THE UNESCO PRELIMINARY DRAFT CONVENTION FOR THE
SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE IN PROTECTING
NATIVE LANGUAGES IN THE UNITED STATES

by

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(Under the Direction of James K. Reap)

ABSTRACT

The United States has recognized for several decades the importance of preserving our nation's cultural history. The National Historic Preservation Act created a nationwide system of preserving and respecting the tangible cultural heritage of the United States. However, the NHPA and others statutes do not include mechanisms for preserving intangible cultural heritage, such as languages. Each language, as the method for communication, contains culturally specific meanings. In this way, language is an important aspect of culture that is worthy of preservation. The UNESCO Convention for the safeguarding of the intangible cultural heritage provides a framework for protecting such resources and should be ratified by the United States.

INDEX WORDS: UNESCO, Intangible cultural heritage, Language, Historic Preservation

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B.A., The Pennsylvania State University, 2001

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment
of the Requirements for the Degree

MASTER OF HISTORIC PRESERVATION

ATHENS, GEORGIA

2006

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TABLE OF CONTENTS

	Page
CHAPTER	
1. INTRODUCTION.....	1
A. Definition of intangible cultural heritage.....	3
B. Role of language in cultural heritage.....	4
C. Role of native speakers in maintaining language.....	6
D. Advantages of bi-lingualism.....	7
E. Importance of the description of language.....	8
F. Role of non-governmental organizations.....	10
G. Previous UNESCO programs.....	10
2. BACKGROUND.....	13
A. Why intellectual property is inadequate protection.....	13
B. Protection afforded to tangible cultural heritage.....	16
C. Language policy in the United States.....	21
D. Native American Language Act.....	23
3. ANALYSIS OF THE CONVENTION AND APPLICATION IN THE UNITED STATES.....	25
A. The Convention for the safeguarding of intangible cultural heritage.....	25
1. Broad definitions.....	26
2. Creation of an Intergovernmental Committee.....	28

3. Necessary actions of individual States Parties.....	29
4. Provision for international assistance.....	31
5. Provision for financial assistance.....	32
B. Comparison of Convention to the Native American Language Act.....	33
C. Comparison of the Convention to National Historic Preservation Act.....	35
D. Integration of heritage programs.....	37
E. Opposition.....	38
F. Affect on the native languages in the United States.....	38
4. SURVEY RESULTS.....	41
5. TREATY RATIFICATION IN THE UNITED STATES.....	47
6. CONCLUSIONS.....	49

CHAPTER 1

INTRODUCTION

Languages have been slowly dying in the United States for centuries. Hawaiian, a language that developed independent of other language influences, is a prime example.¹ European contact began in what is now Hawaii with the export of sandalwood around 1800.² Initially, communication between the two cultures was through pidgin Hawaiian, but in a short time English became the predominant language.³ English eventually developed into the language of trade, education, and legislation.⁴ Currently, Hawaiian is a language used mostly for the benefit of tourists.⁵ Unfortunately, “[E]very language that disappears for good is likely to take a culture with it, as Hawaiian will do... much is already lost... Hawaiian was a language of politics, of a rich oral literature, and of many technical skills: some of this is recorded in English, but much is not.”⁶

Due to disease, warfare, and forced assimilation, the United States has one of the worst records for contributing to the disappearance of original languages.⁷ A recent study concluded

¹ **Andrew Dalby, *Language in Danger: The Loss of Linguistic Diversity and the Threat to Our Future* 207** (Columbia University Press 2003).

² Id. at 208.

³ Id.

⁴ Id. at 208-209.

⁵ Id. at 209

⁶ Id. at 210-211.

⁷ **Atlas of the World’s Languages in Danger of Disappearing** 23 (Stephen A. Wurm ed., UNESCO 1996) [hereinafter *Atlas*].

that out of 175 indigenous languages still spoken in the United States,⁸ only 20 were spoken from mother to child,⁹ 30 were spoken by parents and grandparents,¹⁰ 70 were spoken only by elderly members,¹¹ and 55 were spoken by less than 10 elderly people.¹² Linguists have been diligently working to study and document the indigenous languages in the United States,¹³ but nothing can be done to maintain the use of the language unless the speakers choose to do so.¹⁴ If they do not, the notes serve as inspiration for future generations to reclaim their linguistic heritage.¹⁵ The United States can preserve this element of cultural heritage by ratifying the United Nations Educational, Scientific and Cultural Organization's Convention for the Safeguarding of the Intangible Cultural Heritage and integrating protection for languages and other intangible cultural heritage into existing systems provided for tangible cultural heritage.

⁸ James Brooke, Indians Striving to Save Their Languages, N.Y. Times, Apr. 9, 1998, at A1.

⁹ Id. (These languages included: Navajo, Western Apache, Hopi, Zuni, Yupik, Choctaw, Cherokee, and Lakota-Dakota).

¹⁰ Id. (These languages included: Gwich'in, Mesquakie, Cheyenne, Crow, and Jicarilla Apache).

¹¹ Id. (These languages included: Tlinglit, Yuma, Passamaquoddy, Winnebago, Oneida, Seneca, Hidarsa, Comanche, Nez Perce, Kalispel, Makah, and Yakima).

¹² Id. (These languages included: Eyak, Washoe, Penobscot, Omaha, Tuscarora, Mandan, Pawnee, Wichita, Chehalis, Clallam, Cowlitz, and Snohomish).

¹³ Atlas, supra note 7.

¹⁴ David Bradley, Language Attitudes: the key factor in language maintenance, in **Language Endangerment and Language Maintenance** 1,8 (David Bradley and Maya Bradley, eds., RoutledgeCurzon 2002).

¹⁵ Id.

A. Definition of intangible cultural heritage

On October 17, 2003, the United Nations Educational, Scientific, and Cultural Organization (hereinafter UNESCO) adopted a draft convention regarding the protection of intangible cultural heritage.¹⁶ It is the result of a long progression of increased understanding in this area.¹⁷ But what is intangible cultural heritage? According to the Preliminary Draft International Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter Convention), intangible cultural heritage includes “practices, representations, expressions, skills- as well as the instruments, objects, artefacts[sic] and cultural spaces associated therewith- that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”¹⁸

The issue of the preservation of intangible cultural heritage came to light as the effects of globalization diminished the unique culture of many communities.¹⁹ As the world becomes

¹⁶ See UNESCO Press Release, at

http://portal.unesco.org/en/ev.php@URL_ID=16783&URL_DO=DO_TOPIC&URL_SECTION=201.html (indicating the date and general information of the Convention).

¹⁷ Id.

¹⁸ Preliminary draft international convention for the safeguarding of the intangible cultural heritage and report by the Director-General on the situation calling for standard-setting and on the possible scope of such standard-setting, available at <http://www.unesco.org/confgen/2003/intangible> (broadly defining cultural heritage that is able to be protected for the first time).

¹⁹ Leon Pressovyre, The past is not just made of stone, 12/1/00 UNESCO 18 (2000).

more interconnected, many different cultures come into contact. When one group is initially economically stronger than the other, the weaker group is often forced to adapt its method of communication to be able to take advantage of the economic opportunities afforded by the stronger group.²⁰ This “voluntary” assimilation creates a sense of inferiority of language and begins to erode the pride in cultural values.²¹ This perceived choice is worsened by the actions of the governing culture that discourage native speakers.²² One way this has been expressed is the direction of preservation and maintenance efforts solely to tangible items while ignoring knowledge, processes, and language.²³

B. Role of language in cultural heritage

Knowledge is the only intangible mentioned in the World Heritage Convention. However, it is only in terms of maintaining the world’s tangible cultural heritage, not as an element of heritage itself.²⁴ In recent years, scholars and indigenous communities have come to

²⁰ Atlas, supra note 7, at 4.

²¹ Id.

²² Id.

²³ Convention concerning the protection of the world cultural and natural heritage, opened for signing November 23, 1972, 27 U.S.T. 37 (protecting only tangible cultural resources, such as buildings and sites, and natural resources)(hereinafter World Heritage Convention).

²⁴ Id.

recognize that language is essential to giving a population the ability to communicate its unique knowledge and tradition.²⁵ It is this ability that creates cultural identity.²⁶

Linguists have reported that out of over 6,000 languages globally, 50 to 95 percent will become extinct sometime in the next 100 years.²⁷ Most of these languages are spoken only, and therefore lack the tangibility of writing.²⁸ However, if needed, a language can now be documented using video and audio tape.²⁹ The problem is then whether the method of recording will be accessible in the future.³⁰

These issues of forced tangibility represent one of the superior reasons, in addition to the preference for sustaining culture, for creating a program of maintenance over that of preservation. The difference lies in both the method of preventing the death of the language and

²⁵ UNESCO Intangible Heritage, What for, and for whom?, at

http://www.unesco.org/culture/heritage/intangible/html_eng/index_en.shtml (last visited December 21, 2003). See National Association of Tribal Historic Preservation Officers, News-Native Languages at <http://www.nathpo.org/News/newswire-language.htm> (last visited February 21, 2005) for articles on the importance of language in native cultures.

²⁶ Id.

²⁷ Richard Kurin, Preserving the Magic, 9/1/01 UNESCO 41 (2001).

²⁸ Id.

²⁹ Andy Webster, Digital Race to save languages, BBC news, available at <http://news.bbc.co.uk/2/hi/technology/2857041.stm> (Decemeber 20, 2003).

³⁰ Id.

the result. Maintenance, or the reinvigoration of a language, ideally creates daily active speakers.³¹ Preservation, on the other hand, is obtained by documenting a language.³²

C. Role of native speakers in maintaining language

A language is endangered if it is not used in everyday interaction and parents have stopped teaching it to their children.³³ This occurs due to a number of factors, including the age of the speakers, the convenience of other languages, the feelings on cultural identity, and the language used in governmental and educational interaction.³⁴ Each endangered language represents the collective knowledge of a population that is lost when a language dies.³⁵

³¹ See generally Stephen A. Wurm, Strategies for Language Maintenance and Revival, in **Language Endangerment and Language Maintenance** 11 (David Bradley and Maya Bradley, eds., RoutledgeCurzon 2002) (explaining that in order to create a program of language maintenance, several conditions, such as attitude and proximity, must be in place).

³² See Miriam Corris et al., Dictionaries and Endangered Languages, in **Language Endangerment and Language Maintenance** 329, 330 (David Bradley and Maya Bradley eds., RoutledgeCurzon 2002) (stating that dictionaries have been “mainly concerned with the task of preserving the languages for future study or revival” but adds that they may have a secondary symbolic purpose of proving to the potential speaker that the language is equal to other languages and worth speaking).

³³ SIL International, FAQs about Endangered Languages, at <http://www.sil.org/sociolx/ndg-lg-faq.html> (last visited February 2, 2004).

³⁴ Id.

One of the most important factors in language maintenance is how the speakers of the language feel about the language itself.³⁶ The shift of indigenous groups in developed countries towards linguistic diversity from acceptance of English is a major contribution towards the maintenance of the language.³⁷ For example, a language program was created for the Quileute,³⁸ a tribe of the Northwest Coast of the United States.³⁹ The goal, to see Quileute spoken in everyday scenarios, failed miserably.⁴⁰ The attempt failed because the students did not wish to learn a language system so different from English and desired only to know enough to assert themselves as a culturally distinct group.⁴¹

D. Advantages of bi-lingualism

³⁵ Kurin, supra note 27.

³⁶ Stephen A. Wurm, Strategies for Language Maintenance and Revival, in **Language Endangerment and Language Maintenance** 11-15 (David Bradley and Maya Bradley, eds., RoutledgeCurzon 2002).

³⁷ Bradley, supra note 14, at 7.

³⁸ Nicholas Thieberger, Extinction in Whose Terms?, in **Language Endangerment and Language Maintenance** 319 (David Bradley and Maya Bradley, eds., RoutledgeCurzon 2002).

³⁹ See Quileute Natural Resources, at <http://www.quileutetribe.org/index.html> (indicating the location of the Quileute tribe).

⁴⁰ Thieberger, supra note 38.

⁴¹ Id. at 320.

The feelings of the dominant language group cannot be underrated. This group's attitude controls the policy of the region in which the minority language is contained.⁴² If negativity toward minority languages and bi-lingualism is the policy, minority languages will continue to be endangered.⁴³

Bi-lingualism affords many "intellectual and emotional advantages"⁴⁴ over monolingualism. First, people fluent in two languages are able to understand information in both languages, the semantic differences between the two, and have more flexible minds as a result of switching between the two.⁴⁵ Second, bi-lingual persons are more likely to be open minded and respectful to different cultures.⁴⁶ Third, because they are exposed to different cultural concepts, they are more balanced in their perception of the world and more likely to comprehend all sides of an issue.⁴⁷

E. Importance of the preservation of language

⁴² Stephen A. Wurm, Strategies for Language Maintenance and Revival, in **Language Endangerment and Language Maintenance** 15 (David Bradley and Maya Bradley, eds., RoutledgeCurzon 2002).

⁴³ Id.

⁴⁴ Atlas, supra note 7, at 8.

⁴⁵ Atlas, supra note 7, at 8-9.

⁴⁶ Atlas, supra note 7, at 9.

⁴⁷ Id.

There are three major reasons why the preservation of endangered languages by description is crucial. First, each language has its own grammatical and semantic expression.⁴⁸ Therefore, language study is important in recognizing the full potential of the patterns of human thought.⁴⁹ Second, study and description of a endangered language prevents total loss if the language dies.⁵⁰ This not only enables linguists to study the language, but also allows future generations to revive the language.⁵¹ Third, each language represents the culture of the people who speak it, allowing a better understanding of belief systems.⁵²

The abovementioned description of language preservation is the appropriate course of action for languages that are close to dead, or moribound.⁵³ The detailed description of every facet of a moribound language allows for its ongoing preservation.⁵⁴ As for endangered languages, description in addition to maintenance is the proper method, if the speakers so desire.⁵⁵ Maintenance programs provide for the education of the community in the endangered language.⁵⁶

⁴⁸ Mark Janse, Introduction to Language Death and Language Maintenance: Theoretical, Practical and Descriptive Approaches, at xiii (John Benjamins 2003).

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Atlas, supra note 7, at 14.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

F. Role of non-governmental organizations

Non-governmental organizations have for years been both documenting languages and initiating programs to boost their use. Specifically in the United States, the Indigenous Language Institute has programs like field surveys, seminars, youth language fairs, and honoring events.⁵⁷ Internationally, Terralingua has been involved in researching the connection between cultural diversity, including linguistics, and biological diversity.⁵⁸ The organization promotes linguistic rights and perpetuates linguistic diversity through the research of their volunteer board and staff members.⁵⁹ In addition, SIL International is a service organization that has been documenting primarily unwritten languages for over 50 years.⁶⁰ Their work with governments and other agencies have increased awareness of the value of linguistic diversity and allowed them to be granted consultative status to UNESCO.⁶¹

G. Previous UNESCO programs

⁵⁷ See Indigenous Language Institute, at <http://www.ipola.org/programs/index.html> (last visited December 4, 2004) (describing the programs of the organization).

⁵⁸ Terralingua, What we stand for, at <http://www.terralingua.org/AboutTL.html#standfor> (last visited December 4, 2004).

⁵⁹ Id.; What we do to support diversity, at <http://www.terralingua.org/AboutTL.html#standfor> (last visited December 4, 2004).

⁶⁰ What is SIL? at <http://www.sil.org/sil/> (last visited December 4, 2004).

⁶¹ Id.

UNESCO itself has initiated several programs on its way to adopting the Convention safeguarding intangible heritage. The “Living Human Treasures” program promotes “the transmission of traditional knowledge and skills by artists and artisans before they are lost through disuse or lack of recognition.”⁶² The guidelines of the program state that the appointees “should” improve, transmit, record, and present their skills, and that there is a “possibility” of financial rewards.⁶³ In addition, the “Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity” is an international distinction that began in 1998 for remarkable oral and intangible heritage.⁶⁴ The program encourages governments to safeguard intangible heritage, including languages, through recognition, but affords no protection itself.⁶⁵

The Convention proposes to strengthen intangible cultural resources by “identification, documentation, research, preservation, protection, promotion, enhancement, transmission ... as well as the revitalization of the various aspects of such heritage.”⁶⁶ The Convention advises that “each State Party shall endeavor to”⁶⁷ promote policy in favor of safeguarding intangible cultural

⁶² UNESCO, Living Human Treasures, at

http://portal.unesco.org/culture/en/ev.php@URL_ID=2243&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited December 4, 2004).

⁶³ Id.

⁶⁴ UNESCO, Proclamation of Masterpieces, at

http://portal.unesco.org/culture/en/ev.php@URL_ID=2226&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited December 4, 2004).

⁶⁵ Id.

⁶⁶ Convention, supra note 18, art. 2.

⁶⁷ Id. art. 13.

heritage, form competent bodies to further this goal, encourage studies of intangible cultural heritage, and establish measures that offer legal, technical, administrative, and financial support in the creation of institutions for the safeguarding of intangible heritage.⁶⁸ By integrating a system under the Convention that protects intangible cultural heritage into the system already in place for historic properties, the Convention is progress towards the goal of decreasing the rate of language disappearance in the United States.

⁶⁸ Id.

CHAPTER 2

BACKGROUND

While tangible cultural heritage has been afforded international legal protection for decades, the UNESCO draft convention is the first international legal instrument designed to protect intangible cultural heritage. Prior to this, folklore and other expression of culture were analyzed in terms of intellectual property.

A. Why intellectual property is inadequate protection

Previously, UNESCO had a copyright committee that encouraged governments to protect the work of its artisans by enacting copyright laws and administered advice on how to implement these programs.⁶⁹ In 1999, UNESCO held a world forum on the Protection of Folklore to evaluate the identification and conservation of heritage on a national level, analyze existing national and international law, recognize the need for a new legal basis of protection, and assist “developing countries in their efforts to ensure the legal protection as well as the preservation and conservation of this rich heritage of humanity.”⁷⁰

⁶⁹ UNESCO, Copyright: UNESCO Sector for Culture, at
<http://www.unesco.org/culture/copyright/> (last visited December 4, 2004).

⁷⁰ UNESCO, Copyright: Protection of Folklore, at
http://www.unesco.org/culture/copyright/folklore/html_eng/index_en.shtml (last visited Feb. 4, 2004).

When cultural heritage is appropriated by outsiders, indigenous people have been forced to rely on copyright law as protection.⁷¹ However, indigenous art differs from the traditional items protected by copyright law in three ways.⁷² First, it is normally unwritten, passing orally through generations.⁷³ Second, its origin can not be traced to a specific author.⁷⁴ Third, the indigenous community is continually using and adapting the art.⁷⁵

For these reasons, fitting folklore, art, symbols, dance, and other indigenous cultural heritage into the intellectual property scheme encounters six major problems.⁷⁶ First, in the member states of the Berne Convention, copyright protection is afforded for a period equal to the life of the author plus fifty years.⁷⁷ This is problematic not only because there is no author, but because in this scheme, indigenous cultural heritage would have already entered the public domain because the time period is insufficient.⁷⁸ Second, copyright protection is based on originality, which is not an element of indigenous cultural heritage.⁷⁹ Third, in order for

⁷¹ Christine Haight Farley, Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, 30 **Conn. L. Rev.** 1, 6 (1997).

⁷² Id. at 9.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id. at 17.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id. at 18-20.

something to be copyrighted, it must be “fixed in a tangible medium.”⁸⁰ As previously stated, indigenous folklore, dance, and songs are often only expressed orally. Fourth, the basis of copyright is individual rights.⁸¹ The indigenous group as a whole owns the right to its intangible cultural heritage, creating a clash with the very premise of copyright law.⁸² Fifth, the fair use exception in copyright law provides that individual exceptions can be made in cases that are deemed appropriate based on purpose, amount of material and harm.⁸³ However, there is uncertainty as to “what constitutes fair use where sacred and secret images are concerned.”⁸⁴ Finally, damages for copyright are based on economic harm.⁸⁵ In the context of cultural heritage, the indigenous group would rarely exploit sacred materials for economic gain, which means that there is no economic harm to them when others choose to do so.⁸⁶

Even if authorship, term, tangibility, originality, and fair use were stretched to incorporate other forms of intangible cultural heritage, the protection afforded would not apply to language. Language is not a capitalistic endeavor, which is the root of intellectual property

⁸⁰ Id. at 27.

⁸¹ Christine Haight Farley, Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, 30 **Conn. L. Rev.** 1, 29 (1997).

⁸² Id. at 29-30.

⁸³ Id. at 36.

⁸⁴ Id.

⁸⁵ Id. at 39.

⁸⁶ Id.

law.⁸⁷ Intellectual property law protects only harm that can be measured in economic damages,⁸⁸ which, unfortunately, does not cover the destruction of cultural identity. What is needed is a new legal framework of language preservation and maintenance, provided by the Convention.⁸⁹

B. Protection afforded to tangible cultural heritage

In sharp contrast to the protection afforded intangible cultural heritage, is that afforded to tangible heritage.⁹⁰ The United States has a variety of federal laws intended to affect the public's view of tangible cultural heritage as cultural property.⁹¹ The Antiquities Act of 1906⁹² implemented minor penalties for defacing in any way property with cultural significance found on federal lands.⁹³ The National Historic Preservation Act of 1966⁹⁴ (hereinafter NHPA), which

⁸⁷ David B. Jordan, Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?, 25 **Am. Indian L. Rev.** 93 (2000-2001).

⁸⁸ Farley, supra note 71, at 39.

⁸⁹ Convention, supra note 18.

⁹⁰ See generally World Heritage Convention, supra note 23 (safeguarding only tangible cultural and natural resources); National Historic Preservation Act, 16 U.S.C. 470-470w-6 (1988).

⁹¹ James A.R. Nafziger, The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage, 30 **Willamette L. Rev.** 581, 582 (1994).

⁹² 16 U.S.C. 431-433 (1988).

⁹³ Id.

will be the focus of the discussion on tangible cultural heritage here, established the National Register of Historic Places and created tax benefits for the restoration of historic properties.⁹⁵ The Archaeological Resources Protection Act of 1979⁹⁶ defines archaeological material as tangible remains of past human activity that is over 100 years old and provides stiff penalties for harming these resources, but only on federal lands.⁹⁷ The Native American Graves Protection and Repatriation Act of 1990⁹⁸ vests ownership of remains and objects to federally recognized tribes, regulates the excavation, and provides for the repatriation of such material.⁹⁹

The National Historic Preservation Act states that “the spirit and direction of the Nation are founded upon and reflected in its historic heritage” and “the historic and cultural foundation of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”¹⁰⁰ The NHPA then limits heritage to sites, buildings, districts, and objects.¹⁰¹ Contrary to this notion, heritage is much more than property; it is the combination of everything passed down through generations.¹⁰²

⁹⁴ NHPA, supra note 90.

⁹⁵ Id.

⁹⁶ 16 U.S.C. 470aa-470mm (1988).

⁹⁷ Id.

⁹⁸ Pub. L. No. 101-601, 104 Stat. 3048 (1990)

⁹⁹ Id.

¹⁰⁰ NHPA, supra note 90.

¹⁰¹ Id.

¹⁰² Sarah Harding, Defining Traditional Knowledge – Lessons from Cultural Property, 11

Cardozo J. Int. & Comp. L. 511 (2003).

The NHPA legally created a jumping off point for historic preservation activities, even though the movement had already been started by private non-profit organizations.¹⁰³ The NHPA recognized this contribution and continued to encourage the role of non-profits in preservation, but recognized the need for government intervention in order to increase preservation awareness and success.¹⁰⁴ One way to further this goal was to establish the National Register of Historic Places (hereinafter National Register).¹⁰⁵

The National Register is a program maintained by the Secretary of the Interior to which individual historic properties or districts are nominated for their significance in “history, architecture, archeology, engineering, and culture.”¹⁰⁶ The NHPA creates a duty to establish a uniform process for documentation of historic properties and storage of this information in the Library of Congress.¹⁰⁷ The NHPA creates State Historic Preservation Programs, led by a State Historic Preservation Officer and includes a review board and public participation.¹⁰⁸ It is the

¹⁰³ See Historic Savannah Foundation History, at <http://www.historicsavannahfoundation.org/history.htm> (last visited December 4, 2004) (stating that the organization was created in 1955 to preserve historic properties and city plan in Savannah, GA); See also Historic Charleston Foundation, at <http://www.historiccharleston.org/index1.html> (last visited December 4, 2004) (requesting volunteers for the organization’s 57th annual tour of homes and gardens)

¹⁰⁴ NHPA, supra note 90.

¹⁰⁵ National Historic Preservation Act, Historic Preservation Program, 16 U.S.C.A. 470a

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

job of the state office to nominate properties, establish a statewide historic preservation plan, advise on preservation issues within the state, work with local governments to further historic preservation efforts, educate the public on preservation issues, and consult with federal agencies whose activities may affect historic properties.¹⁰⁹ The establishment of certified local governments under the NHPA furthers preservation by enforcing state and local legislation, creating a review board for changes to historic properties, and creating inventories local historic properties.¹¹⁰

In addition, in 1990, National Register Bulletin 38 addressed the preservation of traditional cultural properties (TCPs).¹¹¹ TCPs are defined as property that is “eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”¹¹² Essentially, TCPs are places that matter to communities and are often associated with intangible cultural heritage.¹¹³ TCPs that are eligible for the National Register under the four criteria are required to undergo Section 106 review.¹¹⁴ This requires agencies to consider ways to avoid or mitigate damages to the site

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ National Register, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (National Park Service, Washington, D.C.) 38.

¹¹² Id.

¹¹³ **Thomas F. King, Places that Count: traditional cultural properties in cultural resource management** 1 (Altamira Press 2003).

¹¹⁴ Id. at 13.

with the consultation of interested parties, such as tribes and SHPOs.¹¹⁵ This is the current method involving the evaluation of intangible cultural heritage as related to National Register eligible historic properties.

The NHPA also requires that eligible properties be nominated to the World Heritage List as provided in the World Heritage Convention,¹¹⁶ which is a UNESCO document that provides protection for both cultural and natural heritage.¹¹⁷ The World Heritage Convention also cites the rapid destruction of places associated with culture and the want to maintain cultural heritage as its purpose, but includes the economic non-feasibility of some countries to provide resources for preservation on a national scale as a reason for the international agreement.¹¹⁸ In addition to announcing policy for the member states to adopt, the World Heritage Convention also establishes the World Heritage Committee within UNESCO, whose job is to maintain the World Heritage List.¹¹⁹ It is the duty of each member state to keep an updated list of eligible properties in its territory and submit the list to the World Heritage Committee.¹²⁰ The World Heritage Committee also receives requests from member states for financial assistance in conservation or rehabilitation.

¹¹⁵ Id.

¹¹⁶ National Historic Preservation Act, Historic Preservation Program, 16 U.S.C.A. 470a.

¹¹⁷ World Heritage Convention, supra note 23 (Cultural heritage is defined as monuments, groups of buildings, and sites).

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

C. Language policy in the United States

The preservation of native languages is somewhat in conflict with language policy in the United States. In the early 1980s, a faction of politicians began what is known as the English-only movement.¹²¹ The goal of this movement was to enact legislation that created a uniform America with a single language: English.¹²² Such legislation would have eliminated federal programs like bilingual education and bilingual ballots.¹²³ While this movement did not receive much support on a federal level, many states have passed legislation declaring English the official language.¹²⁴

Language rights are related to the legal treatment of linguistic minorities,¹²⁵ while language preservation and maintenance is an issue of safeguarding cultural heritage.¹²⁶ Language rights are seen as a debate between several views of language minorities: “as a

¹²¹ Rachel F. Moran, Irritation and Intrigue: The Intricacies of Language Rights and Language Policy, 85 **Nw. U. L. Rev.** 790, 791. (1991).

¹²² Id.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Cristina M. Rodriguez, Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States, 36 **Harv. C.R.-C.L. L. Rev.** 133, 135 (2001).

¹²⁶ Atlas, supra note 7, at 1 (explaining that “[E]ach language reflects a unique world-view and culture complex, mirroring the manner in which a speech community has resolved its problems in dealing with the world, and has formulated its thinking, its system of philosophy and understanding of the world around it.”)

deficiency to be overcome, a personal characteristic that deserves protection from discrimination, or a group status that demands preservation.”¹²⁷ This debate began with the birth of this nation.¹²⁸ Language preservation and maintenance, on the other hand, is a relatively new topic that has not been addressed in the United States.¹²⁹ While the two are not directly in conflict, any policy that inhibits the use of native languages or bi-lingualism limits the applicability of a language maintenance scheme by discouraging the use of other languages.¹³⁰ However, in areas where public opinion is against bi-lingual education, the two meet head on since education is a major element of a language maintenance plan.¹³¹ Even though Spanish is not an endangered language in the context of this note, it is worthy of noting that among immigrants “the first generation is monolingual, the second is bilingual, and in the third, English becomes the preferred language.”¹³² This indicates that even the language of a flourishing culture is in danger in the United States.

¹²⁷ Rodriguez, supra note 120.

¹²⁸ Rodriguez, supra note 120, at 134.

¹²⁹ See generally Convention, supra note 18; World Heritage Convention, supra note 23; NHPA, supra note 90; Nafziger, supra note 91 (demonstrating that preservation until recently has been limited to tangible items).

¹³⁰ See Convention, supra note 18, art. 13 (stating the need for States Parties to adopt a general policy in favor of “promoting the function of the intangible cultural heritage in society”).

¹³¹ See Convention, supra note 18, art. 14 (stating that each State Party shall endeavor to “ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through” various educational programs).

¹³² Rodriguez, supra note 120, at 139.

D. The Native American Language Act (NALA)

In 1990, the United States federal government declared as its policy, to “preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.”¹³³ The government gives several reasons for announcing this policy. In addition to the lack of consistent federal policy on this issue, NALA recognizes that “the traditional languages of the Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values” and that students are more likely to succeed if there is demonstration of respect for their first language.¹³⁴

NALA thus effectively limits itself to the encouragement of schools to use native languages to instruct students.¹³⁵ It also allows institutions to recognize proficiency in native languages to count for foreign language requirements.¹³⁶ While NALA recognizes the right of speakers of native languages to communicate using native languages and goes so far as to say that this use will not be restricted in any public proceeding,¹³⁷ NALA does not do anything to

¹³³ Native American Languages Act, 25 U.S.C.A. § 2903 (2000)(hereinafter NALA).

¹³⁴ Id. § 2901.

¹³⁵ Id. § 2903.

¹³⁶ Id.

¹³⁷ Id. § 2904; This is the only provision that can be interpreted as creating affirmative action from the states in carrying out the stated policy goal. Allison M. Dussias, Waging War With Words: Native Americans’ Continuing Struggle Against The Suppression of Their Languages, 60 **Ohio St. L.J** 901, 969 (1999).

encourage, much less create, structure for heritage programs regarding language, even though the same Act recognizes language as the means of transfer and continued existence of culture.¹³⁸

Thus, NALA is essentially a declaration of policy of the federal government and creates no affirmative action in the states to carry out the policy.¹³⁹

¹³⁸ Id. § 2901.

¹³⁹ Dussais, supra note 132.

CHAPTER 3

ANALYSIS OF THE CONVENTION AND APPLICATION IN THE UNITED STATES

A. The Convention for the safeguarding of intangible cultural heritage

From September 29 to October 17, 2003, UNESCO members met and created the Convention, the first binding multilateral agreement for the protection of intangible heritage.¹⁴⁰ As of February 21, 2005, the Convention has been ratified by eleven state parties.¹⁴¹ Among the reasons listed describing its necessity are the importance of intangible heritage in sustaining a culture, the intertwined nature of tangible and intangible heritage, and the impact of the conditions that destroy intangible cultural heritage.¹⁴² The Convention then states its purpose to be:

¹⁴⁰ Convention, supra note 18.

¹⁴¹ UNESCO, Legal Instruments, Convention for the Safeguarding of the Intangible Cultural Heritage. Paris, 17 October 2003, at <http://erc.unesco.org/cp/convention.asp?KO=17116&language=E> (last visited February 21, 2005) (stating that the Convention enters into force three months after the date of the 30th State's "ratification, acceptance, approval or accession" but only to those 30 States. Otherwise, it enters into force three months after a State ratifies, accepts, approves, or accedes. Already listed are Algeria, Mauritius, Japan, Gabon, Panama, China, Central African Republic, Latvia, Lithuania, Belarus, Republic of Korea).

¹⁴² Id.

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide international assistance.¹⁴³

The Convention accomplishes these goals by broadly defining both “intangible cultural heritage” and “safeguarding,” creating an International Committee, delineating the necessary actions of the individual nations, providing for international cooperation and assistance and providing for financial assistance.

1. Broad definitions

A major problem with previous documents is the limitation of the protected heritage to tangible resources, either cultural or natural.¹⁴⁴ This limitation has led to a worldwide ignorance of a variety of cultural resources. The Convention combats the problem of specificity by broadly defining intangible cultural heritage and its means of protection.

Intangible cultural heritage is defined in the Convention as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts

¹⁴³ Id. art. 1.

¹⁴⁴ See generally World Heritage Convention, supra note 23 (safeguarding only tangible cultural and natural resources); NHPA, supra note 90.

[sic] and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”¹⁴⁵ The Convention then recognizes that such intangibles evolve as they pass through generations and adapt to the current environment.¹⁴⁶ This definition expands intangible cultural heritage to the needs of specific communities, while providing examples of the manifestation of intangible cultural heritage, instead of limiting it to one culture’s understanding,.¹⁴⁷

Furthermore, the Convention does not limit its actions in the definition of “safeguarding.” Under the Convention, safeguarding includes “identification, documentation, research,

¹⁴⁵ Convention, supra note 18, art. 2.

¹⁴⁶ Id.

¹⁴⁷ Id. (stating that intangible cultural heritage is expressed inter alia through “(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) the performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.”); Some participants in drafting the Convention were hesitant to include languages in their own right and the qualification “as a vehicle for cultural heritage,” was added as a limitation on the broad view. However, language is as specific to a culture as other intangible cultural heritage and is often essential to express certain ideas, beliefs, representations, etc. In this way, language itself does need to be preserved. UNESCO, Intangible Cultural Heritage, FAQ: Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Question 10, at http://portal.unesco.org/culture/en/ev.php-URL_ID=21589&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited March 24, 2005).

preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.”¹⁴⁸

With such a broad definition, the Convention is not restricted to current trends in historic preservation, but can use whatever means are appropriate at the time for a specific culture.

These definitions protect and ensure respect for intangible cultural heritage by being broad enough to incorporate any aspect of a specific culture.

2. Creation of an Intergovernmental Committee

The Convention also establishes an Intergovernmental Committee (hereinafter the Committee) consisting of 18 States Parties when the Convention enters into force¹⁴⁹ and 24 States Parties when the membership reaches fifty.¹⁵⁰ The members of the Committee are elected to terms of four years and are subject to “principles of equitable geographical representation and rotation.”¹⁵¹ This guarantees that the composition of the Committee fairly distributes its efforts to all geographical and cultural areas. The Committee’s duties include keeping two lists and creating programs.

The first list is entitled the “Representative List of the Intangible Cultural Heritage of Humanity.”¹⁵² It is created after the individual nominations of the States Parties. The purpose of

¹⁴⁸ Id.

¹⁴⁹ Id. art. 34

¹⁵⁰ Id. art. 5.

¹⁵¹ Id.

¹⁵² Id. art. 16.

this list is to provide visibility and protection for intangible cultural heritage and its significance.¹⁵³ The Committee is also responsible for creating a set of criteria for the Representative List.¹⁵⁴ The second list created by the Committee is the “List of the Intangible Cultural Heritage in Need of Urgent Safeguarding.”¹⁵⁵ Items on this list are also nominated by States Parties, but unlike the Representative List, they are included upon a request of the State.¹⁵⁶ This allows the Committee to provide for an emergency in the event of degradation of an intangible cultural resource.

The Committee is also required to create programs to further the viability of intangible cultural resources.¹⁵⁷ These programs are chosen on a national, subregional, or regional level to best reflect the aims of the Committee.¹⁵⁸ The creation of the Intergovernmental Committee and assignment of its specific duties reflects the Convention’s purpose of raising awareness of the value of intangible cultural heritage at local, national, and international levels.

3. Necessary actions of individual States Parties

The Convention uses mandatory language when describing the actions of the States Parties. The use of the word “shall” creates a duty of the States Parties to comply with the

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id. art. 17.

¹⁵⁶ Convention, supra note 18, art. 16, 17.

¹⁵⁷ Id. art. 17.

¹⁵⁸ Id.

requirement of the Convention to inventory intangible cultural resources, not just to sponsor the policy behind it.¹⁵⁹ However, the Convention then takes a slightly less affirmative tone by declaring that States Parties “shall endeavor” to take a variety of other measures,¹⁶⁰ but does state that “Each State Party shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory.”¹⁶¹ A logical interpretation of this wording would be that each State Party is required to take any and all of the other measures necessary to protect intangible cultural heritage.

The inventory required by the Convention is a list of intangible resources identified and defined.¹⁶² The State Party is to cooperate with communities and non-governmental organizations in the preparation of the inventory.¹⁶³ The inventory is geared to the needs of each State Party, but is regularly updated and submitted to the Committee. This check assures that each State Party is following the stated purposes of the Convention.

The other measures mentioned by the Convention create the ability for each State Party to tailor its program to safeguard intangible heritage to its specific needs. These measures span fields such as law, technology, and education. First, legal measures include adopting and promoting policies that enhance the function of intangible cultural heritage and creating a competent governmental body dedicated to safeguarding.¹⁶⁴ Second, technological measures

¹⁵⁹ Id. art. 12.

¹⁶⁰ Id. art. 13, 14.

¹⁶¹ Id. art. 11.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id. art. 13.

consist of fostering studies, including research methodologies, and creating documentation institutions.¹⁶⁵ Third, educational measures are comprised of programs to raise awareness. They additionally provide access to intangible heritage while respecting it and creating programs within the affected communities.

4. Provision for international assistance

The Convention acknowledges that the safeguarding of intangible cultural heritage is a collaborative effort that benefits all.¹⁶⁶ International assistance is one of the purposes of the Convention and aids in the fulfillment of the other aims.¹⁶⁷ To that end, the Convention provides a set of circumstances under which international assistance can be granted and the means by which a State Party may be assisted.¹⁶⁸

The Convention states that international assistance may be granted in four situations. First, an item on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding must be safeguarded.¹⁶⁹ Second, assistance will aid in the preparation of inventories.¹⁷⁰ Third, programs to further the safeguarding of intangible cultural heritage will be supported.¹⁷¹ Fourth, it will be

¹⁶⁵ Id.

¹⁶⁶ Convention, supra note 18, art. 19.

¹⁶⁷ Id. art. 1. (Convention)

¹⁶⁸ Id. art. 20, 21. (Convention)

¹⁶⁹ Id. art. 20.

¹⁷⁰ Id.

¹⁷¹ Id.

supported by any purpose necessary determined by the Committee.¹⁷² These broad areas for assistance create in the Committee the ability to further any of the aims of the Convention with international aid.

The Convention then lists several forms of international assistance.¹⁷³ When requested, any of these forms may be used in the safeguarding of intangible cultural heritage:

a) studies concerning various aspects of safeguarding; (b) the provision of experts and practitioners; (c) the training of all necessary staff; (d) the elaboration of standard-setting and other measures; (e) the creation and operation of infrastructures; (f) the supply of equipment and know-how; (g) other forms of financial and technical assistance, including, in certain circumstances, the granting of low-interest loans and donations.¹⁷⁴

As with the broad reasons for granting international assistance, the Convention is also broad in the ways in which it will assist a State Party, which furthers the purposes of the Convention by creating more situations in which intangible cultural heritage can be successfully safeguarded.

5. Provision for financial assistance

¹⁷² Id.

¹⁷³ Id. art. 21.

¹⁷⁴ Id.

The Convention specifically creates the “Fund for the Safeguarding of the Intangible Cultural Heritage.”¹⁷⁵ The Fund is comprised of donations made by the States Parties, appropriations from UNESCO, and private donations.¹⁷⁶ The Fund will be distributed under the guidance of the Committee, to further the aforementioned objectives in safeguarding intangible cultural heritage.¹⁷⁷

B. Comparison of the Convention to the Native American Language Act

The fundamental difference between the Convention and NALA is the reason for their creation. The Convention is very clear about its purpose- to safeguard intangible cultural heritage.¹⁷⁸ In contrast, NALA was enacted solely for the purpose of declaring the policy of the

¹⁷⁵ Id. art. 25.

¹⁷⁶ Convention, supra note 18, art. 25.

¹⁷⁷ Id.

¹⁷⁸ Id. art. 1 (stating that the reasons for the Convention are as follows:

- (a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance.)

United States.¹⁷⁹ NALA is limited in scope, while the Convention creates standards for programs and a wider range of instruments with which to protect intangible cultural heritage.

While NALA states the importance of indigenous languages and pledges the responsibility of the United States government to the protection of such languages, it has no mechanism to carry out these objectives.¹⁸⁰ The only provisions that even allude to a program are the exceptions to teacher certification for those who teach in indigenous languages, the encouragement of schools to implement programs to teach indigenous languages, and the allowance of native languages in any public proceeding.¹⁸¹ NALA has no guidelines, no structure, and does not create a cause of action for those whom it is intended to protect.¹⁸²

On the contrary, the Convention creates standards for programs safeguarding intangible cultural heritage and provisions for assistance with such programs in the future.¹⁸³ As noted earlier, the Convention not only calls for mandatory inventories of intangible cultural heritage, but also provides a series of other measures that are appropriate depending on the

¹⁷⁹ Allison M. Dussias, Waging War With Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages, 60 **Ohio St. L.J.** 901, 968-969 (1999) (explaining the ruling of the federal court in *Office of Hawai'ian Affairs v. Dept. of Education*, 951 F.Supp. 1484 (D. Haw. 1996)).

¹⁸⁰ NALA, supra note 128.

¹⁸¹ NALA, supra note 128, § 2903.

¹⁸² NALA, supra note 128; *Office of Hawai'ian Affairs v. Dept. of Education*, 951 F.Supp. 1484 (D. Haw. 1996) (holding that NALA provided no cause of action).

¹⁸³ Convention, supra note 18.

circumstances.¹⁸⁴ The Convention then provides a check on each State Party by requiring their inventories and reports to be submitted to the Committee.¹⁸⁵

The Convention is also much broader with respect to defining heritage under its protection. While NALA limits its applicability to indigenous languages in the educational arena, the Convention states that each State Party should adopt policies that are “aimed at promoting the function of the intangible cultural heritage in society.”¹⁸⁶ In this way, languages are able to be safeguarded on a variety of levels including documentation, awareness, and education.¹⁸⁷

Unlike NALA, the Convention goes further than declaring empty policy with no enforcement. It provides for program ideas and structural aid in the future while being sensitive to the unique aspects of each State Party.¹⁸⁸ For these reasons, the United States should become a party to the Convention in order to sufficiently protect its indigenous languages.

C. Comparison of the Convention to the National Historic Preservation Act

The main difference between the NHPA and the Convention is the type of protected cultural heritage. The Convention covers what has been left out of the NHPA, intangible cultural heritage. However, the two share similar purposes and lay out similar programs.

¹⁸⁴ Id. art. 12, 13.

¹⁸⁵ Id. art. 16, 17, 29.

¹⁸⁶ Id. art. 13.

¹⁸⁷ Convention, supra note 18.

¹⁸⁸ Id.

The purposes of the NHPA and the Convention are the same. In the NHPA, Congress finds that the nation's cultural heritage is being systematically destroyed and that their intervention is needed.¹⁸⁹ In addition, the government finds that on this heritage rests the "spirit and direction of the Nation,"¹⁹⁰ and officially declares historic preservation as a policy of the federal government.¹⁹¹ Comparatively, the Convention recognizes the disappearance of intangible cultural heritage as an issue, understands the connection between tangible and intangible heritage, and declares the need to safeguard intangible cultural heritage.¹⁹² The NHPA and the Convention have essentially the same goal: to preserve cultural heritage. This common goal gives credence to the ratification of the Convention by the United States.

The programs organized by the NHPA and the Convention are similar. First, the Convention calls for the safeguarding of intangible cultural heritage by identifying and defining these resources with the help of communities and non-profit organizations.¹⁹³ Each State Party is required to create and regularly update a list of resources identified.¹⁹⁴ This list serves a similar function that the aforementioned National Register serves for historic properties.¹⁹⁵ While the National Register list is not required to be sent to an intergovernmental committee,

¹⁸⁹ NHPA, supra note 90, § 470.

¹⁹⁰ Id.

¹⁹¹ Id. § 470-1.

¹⁹² Convention, supra note 18.

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ NHPA Program, supra note 105.

select eligible properties are nominated to the World Heritage List.¹⁹⁶ In the case of intangible cultural heritage, the requirement to submit the list to the Committee is not a substantial additional effort, making the requirements essentially the same.

Second, the Convention calls for the creation of competent bodies for safeguarding intangible cultural heritage.¹⁹⁷ This is equivalent to the creation of State Historic Preservation Offices to evaluate and preserve cultural landmarks. For this reason, the creation of this unit to further the preservation of intangible cultural heritage is not unreasonable.

D. Integration of heritage programs

For the reasons stated above, namely the lack of protection under NALA and the similarity in policy and program structure to the NHPA, the United States should ratify the Convention and integrate the safeguarding of intangible cultural heritage into its current historic preservation programs. The adaptation would be minimal in comparison to creating an entirely new structure. First, the State Historic Preservation Offices could be designated the competent bodies for the preservation of intangible cultural heritage as well. This would expand their duties to provide the same efforts toward intangible cultural heritage as towards tangible cultural heritage. Aspects of intangible heritage would then be inventoried, just as significant properties are surveyed. Second, an implementation of a list of endangered intangible cultural heritage could mirror that of the National Register. Communities with eligible intangible heritage would

¹⁹⁶ Id.

¹⁹⁷ Convention, supra note 18, art. 13.

have the benefit of programs and studies aimed at maintaining or, if necessary, preserving their heritage.

E. Opposition

Those opposed to this proposition will present either or both of the following distinct, but intertwined arguments. First, State Historic Preservation Offices do not have the funds to integrate an intangible cultural heritage program. As they exist now, State Historic Preservation Offices do have small staffs and limited resources. While funds will need to be increased in order to implement an intangible cultural heritage preservation program, this is minimized by the absorption of an intangible cultural heritage program into an already created program and outweighed by the benefit of preserving our nation's heritage.¹⁹⁸ Second, it could be argued that including intangible cultural heritage will shift the focus from the already protected tangible heritage, the built environment. However, it is well recognized that intangible cultural heritage is closely related to tangible resources.¹⁹⁹ The incorporation of intangible cultural heritage only further affirms the status of tangible resources and adds to their interpretation.

F. Effect on native languages in the United States

¹⁹⁸ NHPA, supra note 90 § 470 (noting that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”).

¹⁹⁹ World Heritage Convention, supra note 23 (asserting in 1972 that knowledge is a resource in identifying and interpreting other tangible cultural heritage).

There is no guarantee that the implementation of this program will have a substantial effect on the status of indigenous languages in the United States. However, the critical nature of the situation requires that something be done. The benefit of implementing a program from a preservation standpoint is that the methods are not just education based. In a purely educational system, the language is taught to school-age children, while the rest of the community is excluded.²⁰⁰ This type of system creates an institutionalized form of language that should be a last resort.²⁰¹

A preservation program for language, created outside of the schools, involves participation from the community at large. Programs can be sponsored in community organizations that allow people of all generations to interact, an important aspect of language transmission.²⁰² A greater number of professionals are required to maintain the program, which increases the amount of academic study in the area of endangered languages. The best way to insure the vitality of a language is to have a dedicated community that is completely immersed in the language.²⁰³ However, in today's world, that goal is unrealistic. The implementation of a

²⁰⁰ Joshua Fishman, Maintaining Languages: What Works? What Doesn't? in **Stabilizing**

Indigenous Languages (G. Cantoni ed.,1996) available at

<http://www.ncela.gwu.edu/miscpubs/stabilize/conclusion.htm>

(adapted from the speech given by Dr. Fishman at the Second Stabilizing Indigenous Languages Symposium on May 4, 1995).

²⁰¹ Id.

²⁰² Id.

²⁰³ Id.

preservation program could be helpful in various cultures in the United States that are quickly losing their languages because of assimilation or death of members of the community.

CHAPTER 4

SURVEY RESULTS

In an effort to better understand the position of preservation professionals regarding the preservation of intangible cultural heritage, a survey was sent to 106 State Historic Preservation Officers, Tribal Historic Preservation Officers and Territorial Historic Preservation Officers.²⁰⁴ The survey results indicated various knowledge, programs, problems and solutions regarding the preservation of intangible cultural heritage. The survey asked the following questions:

1. As a preservation professional, do you think that there is adequate protection of intangible cultural heritage in the United States?
2. Are you knowledgeable of intangible cultural heritage within your jurisdiction?
3. Does your state/tribe provide any programs to further the preservation of intangible cultural heritage? If so, please describe.
4. Do you think that intangible cultural heritage deserves the same level of protection as tangible cultural heritage? If not, please explain?
5. Do you think that the UNESCO Convention should be ratified by the United States, requiring a definite framework for the preservation of intangible cultural heritage?
6. If the response above is no, is it primarily for fiscal reasons?
7. Should the preservation of intangible cultural heritage be incorporated into the current preservation framework? That is, incorporating the required list and programs into State Historic Preservation Offices.

²⁰⁴ The State Historic Preservation Officers, Tribal Historic Preservation Officers and Territorial Historic Preservation Officers are hereinafter “professionals.”

8. If not, please briefly describe an alternative solution.
9. Please briefly state any concerns you may have about the ratification of this Convention and preservation of intangible cultural heritage.
10. Do you think that the benefits of preserving intangible cultural heritage outweigh these concerns?

Of 106 surveys, only 13 were returned. Representatives of states, tribes, and territories responded with their professional opinions of the ten open-ended survey questions, but were not required to respond to all the questions. The details of specific intangibles and programs are withheld in the interest of confidentiality.

Question 1: As a preservation professional, do you think that there is adequate protection of intangible cultural heritage in the United States?

One professional responded, “yes.” The others answered in the negative for a variety of reasons. First, one professional commented that “if it is similar to tangible cultural heritage preservation there are inadequate resources to do the task. At the same time, I believe that there are many worthwhile effort & programs in place.” This view applauds already existing programs but reveals an underlying scarcity of financial resources. Another professional states that “[t]he concept of Intangible Cultural Heritage, or at least the term, is foreign to the rank & file person interested in preservation,” indicating little knowledge and interest on the part of preservation professionals. Finally, several professionals cite the lack of involvement of indigenous peoples in lawmaking as the reason for the oversight of intangible cultural heritage.

Question 2: Are you knowledgeable of intangible cultural heritage within your jurisdiction?

While one professional wrote “no,” most responded that they were at least somewhat aware of intangible cultural heritage in their jurisdiction. Some cited only their general professional knowledge. However, some professionals indicated specific aspects of intangible cultural heritage in their jurisdictions. These responses came from territories, tribes and states. However, the state response was tied to the Native American population in that state.

Question 3: Does your state/tribe provide any programs to further the preservation of intangible cultural heritage? If so, please describe.

There are folklore societies, historical societies, arts councils, and humanities councils in states and territories. States have programs that foster arts and folklore, and some programs assess intangible cultural heritage as support for tangible cultural heritage. Tribal governments do have some language programs, especially in the tribal school districts.

Question 4: Do you think that intangible cultural heritage deserves the same level of protection as tangible cultural heritage? If not, please explain?

Three positions emerged. First, three professionals answered “no,” one stating that the definition of intangible cultural heritage is too soft and two stating that the methods of preservation should be different. Second, eight professionals answered “yes.” Their position was best summed up by a State Historic Preservation Officer, “They go hand in hand. Either category loses meaning without the other.” Two of these eight discuss the importance of preservation of intangible cultural heritage to indigenous peoples, but not those in the dominant culture and the government. Finally, two professionals responded that intangible cultural

heritage in many cases deserves more protection than tangible cultural heritage. These cases are determined by the needs of the indigenous people, which are often different from those of the dominant culture.

Question 5: Do you think that the UNESCO Convention should be ratified by the United States, requiring a definite framework for the preservation of intangible cultural heritage?

With the exception of one negative response and one unanswered, all the professionals responded affirmatively. One clarified that he believed that this should not come at the expense of other programs. Two additional responses indicated the need for ratifying the Convention in the interest of maintaining cultural diversity.

Question 6: If the response above is no, is it primarily for fiscal reasons?

This question returned only two responses. One responded in the negative and the other stated that he was concerned about the lack of resources- both funds and people. This response was from the professional who limited his affirmative answer to the previous question with “But not at the expense of other existing programs.”

Question 7: Should the preservation of intangible cultural heritage be incorporated into the current preservation framework? That is, incorporating the required list and programs into State Historic Preservation Offices.

This question produced three positions. First, six professionals responded in the negative. However, two of these cited funding as the issue. Second, two professionals consider it a possibility. One cites the link provided by Traditional Cultural Property and one comments

on how integration would “allow (or force) people who view those resources as different to look beyond the material aspect of the resource itself to the cultural meanings that gave rise to the source.” Finally, five professionals agreed with integrating intangible cultural heritage into the various preservation offices run by states, tribes, and territories. Two of these responses also mention additional funding, while one states that “[r]esources are not or should not be the answer to every question.”

Question 8: If not, please briefly describe an alternative solution.

There were a variety of positions. First, six professionals left this question unanswered. Five of these were in agreement that integration was at least a possibility in the previous question. Interestingly, the sixth answered that the programs should not be integrated. Second, one professional affirmatively stated that it is best to unify the agencies, “so that decisions can be made by negotiating among people who hold these various perspectives.” Third, six professionals listed alternatives. The suggestions are universities, parallel or partner organizations (such as state historical programs), better funding for Tribal Historic Preservation Officers to identify traditional cultural properties²⁰⁵ and supporting tradition bearers.

Question 9: Please briefly state any concerns you may have about the ratification of this Convention and preservation of intangible cultural heritage.

Four professionals did not supply any concerns, while one admitted to not being informed enough to form an opinion. The remaining eight professionals had varying concerns. These include funding, the definition of intangible cultural heritage, perspective of the liaison to

²⁰⁵ Note that this method excludes intangible cultural property outside of reservations.

both the keepers of the intangible cultural heritage and the bureaucracy, the ability to keep information confidential, and the “ill-informed dissent” of the American public.

Question 10: Do you think that the benefits of preserving intangible cultural heritage outweigh these concerns?

Again, one professional responded negatively and one chose not to answer the question. The remaining eleven professionals answered affirmatively, though one qualified his answer with the requirements that it be “‘important’ cultural heritage (much like ‘eligible’ & ‘significance’ in historic preservation) and it is available to be known by all.”

It is difficult to draw any definite majority opinions from the professionals who responded. It is clear that almost all recognize the importance of intangible cultural heritage. Additionally, a main concern about the implementation of an intangible cultural heritage program is lack of resources. While professionals are split on the best method for implementing an intangible cultural heritage program, almost all agree that the benefits outweigh the concerns.

CHAPTER 5

TREATY RATIFICATION IN THE UNITED STATES

The Convention is a form of treaty and subject to the same process for ratification. The Constitution of the United States provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."²⁰⁶ Therefore, in order to ratify the treaty and have its contents be legally binding, it has to have significant backing in the Senate. States with more intangible resources are more likely to consent. Since the Convention covers all forms of intangible cultural heritage, political support would most likely come from agencies like the National Park Service, the Bureau of Indian Affairs, and the National Endowment for the Arts.

After the ratification of the Convention, implementing legislation is needed. This legislation must include a variety of elements. First, The Convention requires that a competent body be designated or established.²⁰⁷ The department created to deal with intangibles could be housed under the State, Tribal, and Territory Historic Preservation Officers to ease the conflict between intangibles used to interpret historic properties and intangibles themselves. To do this requires amending the National Historic Preservation Act to include these duties. Second, the Convention requires that inventories of intangible cultural heritage be taken.²⁰⁸ The implementing legislation should set forth standards for documentation. Third, the legislation must support education efforts.²⁰⁹ The method of education, however, should be left up to the

²⁰⁶ **U.S. Const.** art. II, § 2.

²⁰⁷ Convention, supra note 18, Art. 13(b).

²⁰⁸ Id. art. 12 and art. 13(c).

²⁰⁹ Id. art. 14.

regional or state office, as every community's educational needs are different. Fourth, evaluation of intangible cultural heritage should be implemented into planning programs.²¹⁰ The United States has already begun this step with the nomination of TCPs.

It is also important, as noted repeatedly in the surveys, for the program to be properly funded. If an unfunded mandate is created, it drains resources from other areas and nothing is accomplished. This would be a set back for not only intangible cultural heritage, but all preservation efforts.

The United States has an inconsistent history with the ratification of UNESCO conventions. In 1983, the United States accepted the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.²¹¹ In addition, the United States ratified the World Heritage Convention in 1973.²¹² However, the United States has failed to ratify the Hague Convention (1954) and the Convention on the Protection of the Underwater Cultural Heritage (2001). The Convention would need strong political and public support in order to be ratified.

²¹⁰ Id. art. 13(a).

²¹¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), States Parties, available at <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> (last visited March 7, 2005).

²¹² World Heritage Convention(1972), States Parties, available at <http://whc.unesco.org/pg.cfm?cid=246> (last visited March 7, 2005).

CHAPTER 6

CONCLUSIONS

Recognizing that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage.²¹³

This statement from the beginning of the Convention is at the heart of the need to protect intangible cultural heritage. By protecting intangible cultural heritage with a system mirrored after the Convention and integrated into the already existing historic preservation scheme, the United States will be able to maintain and preserve indigenous languages. The definition of intangible cultural heritage includes a wide variety of previously unprotected cultural resources,²¹⁴ almost none of which would be accessible without the culture's language. Language, as well as other intangible cultural heritage, defines a community. These irreplaceable forms of communication demonstrate unique belief systems and views of the environment. The interpretation and understanding of many cultures is in jeopardy.²¹⁵

Linguists have long since recognized the importance of preventing the disappearance of native languages. However, society has created a hierarchical system that arranges for the systematic destruction of cultural heritage, including languages, that are perceived as less

²¹³ Convention, supra note 18.

²¹⁴ See supra note 18, art. 2 and accompanying text.

²¹⁵ See supra note 25 and accompanying text.

worthy.²¹⁶ In this system, languages are rapidly disappearing as cultural groups become interconnected.²¹⁷

The United States has an incredibly poor record of enabling the continuing use of indigenous languages. Decades of disease, warfare, and forced assimilation have created an environment where indigenous speakers have abandoned their languages in favor of English.²¹⁸ It is time to actively support those who have been forced to conform for so long and encourage the preservation of their cultural heritage.

The prior intellectual property framework is recognized as ineffective to protect intangible cultural heritage. Intangible heritage lacks specific authorship, is potentially without a form of writing, is constantly being adapted, and is not a capitalistic endeavor.²¹⁹ All of these qualities make intangible heritage unable to be analyzed under a copyright scheme.

Even though the historic preservation professionals surveyed are split on the method of implementation for a program for intangible cultural heritage, the need for a solution is immediate. The same mechanisms for protection put forth in the Convention have been in place for decades for tangible cultural heritage. A comparison of these laws and an evaluation of the policies of the United States, require the conclusion that the Convention must be ratified by the United States. The integration of the requirements of the Convention into already existing framework creates few problems in implementation and can safeguard many indigenous languages.

²¹⁶ See supra note 7 and accompanying text.

²¹⁷ See supra note 19 and accompanying text.

²¹⁸ See supra note 7 and accompanying text.

²¹⁹ See supra note 71 and accompanying text.