Sui Generis Rights on Cultural Property – an Introduction

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1 Introduction

When we started our research on cultural property we thought of it in analogy to many aspects of natural resources to which were assigned various kinds of private and public property rights within Europe and North America well after World War II. But certain resources received such attention much earlier. Usually, regulations and property rights are thought of once a resource becomes scarce. As soon as many people feel the scarcity, private property rights or public regulation or a mix of both can serve to control scarcity by excluding some from the use of the resource or at least restricting them.

We imagined that cultural goods could be perceived as increasingly scarce, for example, as a dominant western culture may induce many people to abandon their ethnic, religious, indigenous etc. culture.¹ If culture contains something potentially valuable, so we reasoned, such abandonment implies destruction of assets or resources. Now, it can be quite reasonable to neglect assets and resources. If you have a house in a deserted area where no one desires to live or stay, you should not invest to modernize the bathrooms, extend the kitchen or put in new floors. This simple consideration also holds for cultural assets and resources: If no one expects it to be useful in any sense of the word, one should not invest in keeping it. But

¹ See Bendix, Bizer and Groth (2010) for the diverse approaches to cultural property.
what if some individuals, some groups, some parts of society find certain cultural resources valuable? Could this give rise to specific property rights because they invest in keeping the resource?

This question puts us in the middle of the discussion of cultural property rights *sui generis*, meaning a special kind of property rights designed for cultural property and especially for traditional cultural expression (TCE), which are the focus of this volume. The discussion of such *sui generis* rights acknowledges two important restrictions. Firstly, we are discussing only this part of culture, which is not already protected by other rights such as simple property rights as are used on land, buildings and other *in rem*. Property rights usually are rather clear in scope even though they certainly differ across states with regard to public reservation of certain aspects such as airspace above, mineral resources below, protected species or biotopes within and the respective procedures as well as extent of recompense for attenuating the property right. What remains to be protected is cultural property in the realm of intellectual or immaterial property. The *World Intellectual Property Organization* (WIPO 2011) covers this by stating that traditional cultural expressions, folklore, and traditional knowledge related to genetic resources could be governed by specific *sui generis* rights.

Secondly, within the realm of intellectual property rights cultural property is covered in some instances by copyright law, sometimes by trademark and in other instances perhaps by geographical indications. But in general the broad ranges of existing property rights, which again differ across legal systems, seem ill-designed to address the specific circumstances of cultural property. *Sui generis* rights address this narrow band of additional intellectual property rights for immaterial cultural property.

Having in mind what we are looking at, we can turn to the reasoning of protection by asking for the purpose of property rights (Section 2). This will be followed by discussing the contributions of this volume (Section 3).

## 2 The purpose of property rights

Individuals display a significant endowment effect, if they own something.² Herbert Gintis (2007) interprets property as a basic function of this endowment effect, which means we attach things to ourselves, and whatever belongs to us is valued higher than something with the same characteristics not belonging to us. This endowment effect makes us want to keep something which we feel attached to. That is why an institution was created which we call property: If something is my property, I have the right to keep it to myself and to exclude others from it. Usually I also have the right to use the property. If it is a piece of land, I can sit on it and

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² See for this section Bizer (2010).
enjoy myself. I could gain some income from it by letting other people sit there and demanding a price for doing so. If my piece of land is not attractive enough for people to want to sit there, I can decide to grow potatoes — ploughing the land and changing its surface. And if I am sick of growing potatoes, I can also sell the land to someone else. All these rights are part of the concept of property.

Property serves as a means to provide security. In his history of property, Ludwig Felix (1883) remarks that in earlier times humankind depended in all aspects on nature. Property, in his view, allowed us to gain more independence from nature. Let us imagine for a moment a very simple world with two individuals and one good, say potatoes. Imagine further, that there is no other way to avoid hunger than to plough the land and to plant and harvest potatoes. As one of the individuals you can either plant and harvest or you can take a sunbath and wait for an opportunity to steal the other one’s potatoes. My wording suggests that private property rights are already in place, if taking available potatoes is ‘stealing’. Of course it is also possible to hold a property right jointly as a group, a collective property right. Economists traditionally argue that private property is better than a collective right because each individual will have sufficient incentives to work enough in their potato fields in order to avoid hunger. Within a group there is always some danger that one is free riding the others, i.e. is sunbathing while the other ones work in the field. The acceptance of private property then provides security for each individual and incentives to invest labor.

Property rights technically may include doing whatever you want with something you own: As mentioned above you can modify it. You can reap the benefits. You can also allow someone else to do so by renting or leasing something. And you can sell it to someone else. All these characteristics can be provided by the formal title you have over your property. In most cases we transfer ownership in quite casual ways. Buying a coffee to go in a café works without a formal exchange of ownership. Still, even in this case there is a receipt, which provides some proof of payment and therefore ownership. Land titles by contrast are in many countries formalized ways to secure ownership. However, in all cases we should always ask what rights are included. In probably all countries, I believe, you may own even a big part of land but you cannot prohibit others from using the airspace above. And if the police are suspecting a crime or imminent danger you have to accept that they search your woods or fields or even your house. You own a title, but the property right is limited in certain respects by the law.

Back to our example we could also imagine that both individuals decide to work together in the potato field. In some cases, it might be much better to act together. For example, if we imagine living in a bigger group of twenty individuals and add to our simple world a mammoth. Such a mammoth provides a lot of meat, which is especially valuable if the only other food is potatoes. Yet, mammoths are hard to hunt. It is practically impossible to do so alone successfully. If our twenty individuals decide to hunt together they have to agree on how to share the meat. There are plenty of possible models of benefit sharing, but the crucial problem will
be to avoid free riding on the part of one of the hunters who might not put all his energy in hunting the mammoth. By limiting his own effort, his individual chance of survival might be higher, because he will save his energy, but he will also endanger the collective objective to get the mammoth. If all individuals would do so, there is no chance to get the mammoth. It is because of such free riding, that many economists argue that private property will be more efficient than collective property rights.

However, you cannot hunt a mammoth by yourself. In this case, the group must find some mechanism to organize the hunt so that everybody’s effort can be observed by the others. If this is possible with little effort, group activities can be very successful and a division of labor might even increase efficiency of the group. Everybody in the group can live more easily than alone. Collective rights and institutions ensure that comparable efforts are made by each individual.

Such a simplified world can only provide limited insights. Still, it shows two main property regimes: individually (“private”) and collectively owned property rights. Both may be possible and under certain circumstances the best choice. There is no easy way to decide which one the best choice is under given circumstances. Two criteria might help: If no one can be excluded from consumption for technical reasons or because it is prohibitively expensive to do so (“non-excludability”), and if the good can be consumed by many at the same time (such as the judicial system providing security and justice for all) (“non-rivalry in consumption”), then it is called a public good, which must be taken care of collectively. Anything else will be inefficient. If everyone else can be excluded from consuming the good and if there is rivalry, then private property rights will be most efficient. The potatoes in our simple world are a private good. Consumption by me excludes you from consuming the potato. But if our small world were inhabited by many potato farmers, they could agree to hire a watchman to police the potato fields at night to avoid theft. In this way, they create a public good, security, from which an individual farmer is not excludable. The watchman would walk the fields and discourage any potato thieves no matter whether one farmer said that he did not need a watchman. If all agree on the watchman, they also have to pay for him to provide his service. An individual farmer, then, has a strong incentive to quit participating: he would not have to pay but still profit from the watchman walking the fields. In such a case, each farmer has the same incentive to free ride the collective decision and there will be no watchman in the end as no one wants to pay his share. The result is inefficient. Our potato farmer society needs a collective choice mechanism from which no one can defect. Such a mechanism can be a political representation connected with a mandatory tax system, which provides the funds for financing the public goods, in other words: a communal government or, if we consider many villages and towns, a state.

Cultural property is diverse in its forms and functions (see Bicskei, Bizer and Gubaydullina 2012). It is also diverse with respect to property designs. Currently
some cultural property is protected by traditional property rights, for example, by a land title if a historic site is concerned. Others are protected by copyright, if a book, a film or a recording of music is concerned. Still, there are many forms such as traditional cultural expressions, which are not covered by copyright or any other form of individual property right. For example, traditional cultural expressions are within the public domain that is free for everybody to use.

In the case of other individualized intellectual property rights, such as patents, it is argued that a time-limited monopoly on a specified invention is providing a substantial incentive to create more innovations. For this reason, society grants a patent running over twenty years. The overall increase in innovations is supposed to compensate the entire society for the higher monopoly prices. If nothing would protect the innovator from being copied, it is usually argued, he would be less innovative. Similarly the argument runs with copyright: Because authors can reap benefits from their creation as no one else may sell their text, film or music, they will be more creative.

The same could be true for cultural property such as traditional cultural expressions: They could be valued so highly that people who take care to maintain dances, rituals, recipes and so forth would have the exclusive rights to practice them. Such an incentive could enhance the attraction of many traditional cultural expressions, which otherwise might be lost entirely. Certain groups could gain income from practicing them. But of course, there are many issues to be considered first. Who values the traditional cultural expressions so highly that they require additional effort? And would it not be easier to provide subsidies to those who maintain them rather than creating a new form of cultural property right? Also, who should own the right of traditional cultural expression? Usually, entire clans or societies practice the traditional cultural expressions. Should all of them own the right with each one having veto power? How should one determine who belongs to the group and who does not? In addition, it is important to clarify the duration of the property right: With traditional cultural expressions a limited duration makes little sense. But should an unlimited duration be granted?

3  The contributions of this volume

The approaches of the papers are very diverse in this volume. That is partly due to the interdisciplinary research group on Cultural Property, which brings together disciplines such as anthropology, private law, international law and economics. It is also due to the topic and the many related issues, which come with the discussion of sui generis rights.

In her essay „Herausforderungen eines sui generis Rechts auf internationaler Ebene“ [Challenges of a sui generis law on the international level] Sabine von Lewinsky, an expert on international law and intellectual property rights, provides a short history of the debate on sui generis rights within WIPO and suggests that it is
too early to demand an international agreement on the issue. Since she observed the process since 2001 firsthand, her account provides a deep insight into the workings of international deliberations. She focuses on folklore and describes how the discussion moved forward in revising the Bernese treaty of 1967, but remained largely ineffective by including folklore via an open list of examples without mentioning it explicitly. The characteristics of a work of folklore were described as normally unpublished and created by an unknown author who can be assumed to have lived and created the work in the interested country. The country was to register the work with the Director General of the WIPO. Only India, Lewinsky summarizes the ineffectiveness, has made use of this provision. Later on these rather timid attempts came to a halt altogether and several moves within WIPO were pointed rather backwards by collecting more material and gaining deeper insights into the specific character of folklore. Lewinsky concludes that apart from Panama there are no national experiences with *sui generis* laws for folklore, and in Panama the law failed to have a positive effect because indigenous groups would have to register their folklore with a national agency in the capital. In the absence of positive national experiences the WIPO cannot be expected to move towards an international treaty even if that would only include a general recommendation.

Following this contribution a closer look at the intertwining discourses of the local and the international level reveals how any concept of international law is contingent on its context. The “right to be indigenous”, which may serve as a basis for *sui generis* rights, might be taken for something else on the local level than intended for at the international level. The social anthropologist Karin Klenke and international law scholar Philipp Socha analyze in their paper “Emerging Indigeneity – Völkerrechtswissenschaft und ethnologische Praxis subnationaler kultureller Gemeinschaften“ [Emerging Indigeneity – The study of international law and anthropological practice of subnational cultural communities] how the international discourse on indigeneity is influencing local practices. Their interdisciplinary effort exemplifies how legal scholar’s insights is informed by the anthropological study of local practice and the anthropological study of local practices gains by a deeper understanding of the international law discourse, which seems prevalent as an undercurrent to the local debate.

They argue that the implementation of Art 3, 4, and 5 of the UN *Declaration on the Rights of Indigenous Peoples* will in fact destabilize nations, which are not classic settler states like Canada, New Zealand and Australia, but which consist of only indigenous peoples as is the case in Indonesia. Such nations would possibly lose their capability to provide a coherent legal framework for the use of resources. The international law perspective suggests that the nation state is responsible for protecting human rights on the individual level as well as finding practical solutions for balancing them with rights assigned to certain groups. Group rights cannot interfere with the core of individual human rights, but it is open for interpretation what will be taken as the core. In any case, the authors conclude, the state cannot
withdraw itself from protecting individual human rights by implementing group rights. Or, in other words, the creation of group rights may not reduce the core of individual human rights, but should support the cultural rights of individuals by implementing group rights. Such group rights should not be used, as seems to be the case with the Toraja, to strengthen antidemocratic decision processes with reference to a traditional hegemony of a ruling class.

While the example of the indigeneity discourse exemplifies how difficult it is to fulfill conceptual preconditions for an effective system of *sui generis* rights to serve the purpose of actually supporting the individual human rights rather than giving rise to the hegemonial interests of one specific group over another, the contribution by international law scholar Sven Mißling on „Überlegungen zur Rolle offentlich-rechtlicher Schutzinstrumente beim Schutz von immaterieller Kultur im internationalen Kulturrecht“ [“The role of public law in the protection of immaterial culture within the international cultural law”] locates the debate of *sui generis* rights within the greater scheme of an international body of (hard and soft) law aiming to support culture on all levels of law. He sees a potential for *sui generis* rights but makes it clear that solely on the basis of private law it will be not possible to bring about a sufficiently effective protection of culture. The state will be more than just a guarantor of private laws supplemented with *sui generis* laws. It will remain an important acting agent within cultural policy and balance cultural and other human rights, provide funding for certain cultural practices, and protect culture by restricting, for example, exports etc. While Sven Mißling sees *sui generis* rights as a helpful addition he argues that the crucial obligation of the state is to allow for cultural development and interaction rather than over-regulating exchanges. At the same time, he stresses that the need for protection of culture – however ill-defined it may be – can constitute a state obligation. Implicitly, Sven Mißling argues in favor of a responsive regulation, which interferes as much as is necessary but as little as possible with the individual freedom and their self-regulating power within their groups. Private law for the protection of cultural property is, from his perspective, just one arrow in the quiver of instruments available to the states and the international fora.

Private law scholar Philipp Zimbehl assembles in his contribution „Zwischen Innovation und Altbekanntem: Schutzrechte sui generis im systematischen Vergleich“ [Between Innovation and the Well-Known: Sui generis rights in a systematic approach] the existing model laws and compares them with respect to scope of the regulation, degree of protection, who is holding the *sui generis* rights, the intended limits of the provisions and the possibilities to defend the rights in case of violation. He shows that the crucial point of the more recent model laws is the balance between the interests of the groups and the general public. While the *South Pacific Model Law* outlines a stricter protection of the groups, the WIPO/UNESCO Model Provisions make only commercial uses contingent to consent. An open question in
all model laws, Zimbehl points out, is how to resolve conflicts between different groups, which have developed certain traditions in a parallel way.

The economist Matthias Lankau in his paper „Eine vergleichende ökonomische Analyse von Sui generis Rechten zum Schutz traditioneller kultureller Ausdrucksweisen“ [A comparative economic analysis of sui generis rights for the protection of traditional cultural expressions] takes up the model laws and analyzes them with regard to possible economic effects. He argues that due to the various characteristics of the sui generis rights suggested by the model laws there will be effects on transaction costs. His analysis results in an ordinal ordering of the model laws with regard to transaction costs as far as an underutilization can occur. His next step is to compare the model laws with regard to their potential to serve the preferences of the traditional groups and highlights this by showing a principal-agent-problem taking place if central agencies are provided by the model laws with a lot of bargaining power: In the end central agencies will serve their own purposes more than those who actually hold the sui generis rights.

In conclusion Lankau shows that there is a simple tradeoff between lowering social and transaction costs on one hand, which requires central agencies as intermediaries between outside users and traditional groups, and principal-agents-problems due to information asymmetries, if local groups are subject to the decisions of central bureaucrats. In the end, Lankau suggests, it is a political decision within this trade-off between lowering transaction costs and adequate representation of local preferences in TCE transactions.

Based on Zimbehl’s and Lankau’s earlier in-depth analysis of sui generis rights we provided a policy paper in 2011 (“Sui Generis Rights for the Protection of Traditional Cultural Expressions: Policy Implications” published in JIPITEC, 2(2): 114–119) drawing our conclusions with regard to sui generis rights from a positive perspective on them: What are their expected effects if they are implemented was the guiding research question. To the English reader this account by Kilian Bizer, Matthias Lankau, Gerald Spindler and Philipp Zimbehl summarizes the argument of their longer and more detailed German contributions in this volume.

The law and economics scholar Ejan Mackaay inspired, read and discussed these papers and earlier forms (see Bendix, Bizer and Groth 2010) with us as a visiting fellow of our Cultural Property Group. He provides in his paper “Sui Generis Rights on Folklore Viewed from a Property Rights Perspective” his perspective on property rights in general and with special regard to information economies, developing base rules. Mackaay goes on to apply these to folklore and traditional cultural expressions. Basically, he argues that intellectual property rights must serve a distinct purpose: And while their purpose is to foster innovation they are always in danger of creating a monopoly with the support of the state. In case of patents the limited monopoly seems justified as it increases incentives to invent while it is
providing the public with all relevant information about the invention published in
the patent application. In case of copyright Mackaay doubts that the time frame of
lifespan plus 70 years for natural persons and 95 years for artificial ones is anything
else but rent-seeking by interested parties. So even there the precarious balance
between the incentive to be inventive and the monopoly is lost. But what, Mackaay
argues, would be the justification in case of folklore? If the objective is to preserve
cultural expression why should *sui generis* rights be introduced that are even stricter
than copyright? Is innovation of so little importance with folklore Mackaay asks
rhetorically and answers that *sui generis* rights go too far towards granting a privilege
instead of balancing openness and monopoly in a sensible way.