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**Sui Generis Rights on Folklore
Viewed From a Property Rights Perspective**

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Sui Generis Rights on Folklore Viewed From a Property Rights Perspective*

Ejan Mackaay[†]

Abstract

This paper looks at *sui generis* rights claimed for the protection of folklore. Since rights should not be created in any which way if one is to avoid privileges and rent-seeking, it is important to be clear about design constraints stemming from such rights being species of property rights, adapted to deal with the particular content of information structures that need special encouragement or protection. Examination of the logic of property rights in general and of intellectual property rights in particular reveals that intellectual property rights are sought because of their decentralised incentive and information effects, but that they need to be circumscribed because of the monopolistic effects they entail. The trouble with monopoly is that whilst it is in place, one does not realise the creativity that is prevented from emerging. All intellectual property rights reflect compromises of these contradictory tendencies and as a result, more and stronger intellectual property rights are not necessarily better from a general welfare point of view.

The forms of *sui generis* rights proposed for folklore appear modelled on copyright, but with the removal of several key features that define the equilibrium inherent in copyright: no originality requirement; no known creation date or creators; indefinite duration. Folklore kept secret is altogether taken out of commerce. As a result, these rights strike a balance very much more to the monopoly side of the spectrum than do existing intellectual property rights and hence risk severely constraining creativity. This may seem like an acceptable constraint given the objective of preservation, but one must realise that it will affect the future carriers of the protected information. Faced with severe restrictions on ways they can improve their lives within the protected setting, they may well opt for the exit option and head for greener pastures. This would severely strain efforts to preserve whatever the *sui generis* rights aim to protect. Information lock-up may not be the most promising formula for preservation.

Mots clés : Property rights, intellectual property, copyright, sui generis rights, folklore.

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Introduction

Folklore is one form of cultural expression for which currently new ways of legal protection are being sought. In earlier contributions, the Göttingen Cultural Property Research Team have addressed the questions of what constitutes cultural expression or property writ large and why it may need special protection.¹ One contribution argues for protection only where the identity of the carriers of the cultural expression is at stake.² Various means of protection have been examined, some legal, some non-legal, some already available, others needing yet to be articulated and enforced as legal institutions: regulation of use, trade, import and export; certification and licensing; intellectual property rights; geographical indicators and other collective trade-marks; subsidies or tax advantages; nationalisation.³

This paper focuses specifically on *sui generis* rights as a means of legal protection for folklore. Folklore, in the understanding of the WIPO Intergovernmental Committee of intellectual property and genetic resources, traditional knowledge and folklore, in 2011, refers to:

- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
- (b) [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;]
- (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
- (d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and sacred places.⁴

The protection claimed by various groups advocating it aims mostly at use of folklore outside of its traditional context.

The term *sui generis rights* is used here to designate legal institutions that are similar to intellectual property rights but do not fit within the mould of the existing rights of patent, copyright and trade-mark. The term came into vogue to designate the special data base protection rights instituted by the European Union in 1996.⁵

Advocating *sui generis* rights for folklore raises the question of why the

¹ Bendix 2010.

² Bicskei 2010.

³ Mackaay 2010, at 265.

⁴ See WIPO 2011, art. 1.

⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJEC of 27/3/1996, L77/20.

existing intellectual property rights do not work. Whatever the answer, if one accepts that protection by other means is needed, a second issue arises, namely that of constraints on the design. Rights cannot be fashioned in any which way if we are to avoid granting privileges, which create rents for particular groups and needlessly curtail the functioning of market processes, as opposed to property rights, which are the very foundation of market processes. Privileges are unsustainable in open market processes. Intellectual property rights borrow the essence of the logic of property rights, whilst at the same time adjusting it to accommodate their specific object, which are information structures. Adaptations of general property rights logic need not go against the grain of market processes. Other such adaptations have occurred elsewhere: shares in commercial enterprises; tradable rights in objects that will become available in the future ("futures"); tradable pollution permits or landing rights, to name just a few.

In what follows, we summarise the logic of property rights as it has evolved for tangibles and has been clarified in the economic literature over the past half-century.⁶ This should explain why an institution discovered by our distant ancestors is still useful in modern society, whose economic and social organisation is vastly more complex. We then look at the specific adaptations required to make this logic applicable to the intangible content of intellectual property rights. This prepares the scene for a discussion of why these structures appear not to work for folklore and the merits of proposals for sui generis rights.

I Property rights – general logic⁷

A Property and scarcity

1 PROPERTY RIGHTS ARE A RESPONSE TO EMERGING SCARCITY

Property rights in tangibles are a response to scarcity. The need to establish them will be perceived when a resource that was previously abundant becomes scarce because new uses for it are discovered and start to compete with known uses. Emergent scarcity manifests itself in disputes and even conflict over who can use what, when multiple uses are no longer simultaneously possible. One solution is to fight it out with the winner taking all. But this is not a recipe for improving the welfare of society as a whole, or indeed for lifting oneself out of the subsistence cycle. History teaches that a more promising formula is to attribute the right to decide what shall be done with the newly scarce resource to a single person or group, to the exclusion of others, and to attach to it the right to trade it to someone else: property rights in the broadest (economic) sense. Paradoxically, by lifting scarce resources out of open accessibility, one ends up making them more

⁶ See for instance Alchian 1973; Barzel 1997; Anderson 2003; Colombatto 2004; Bizer 2010.

⁷ See further Mackaay 2006, 2008, forthcoming.

available. Furthermore, by establishing clearly who is responsible for what, property rights tend to prevent or soothe conflict; they are "pacifying".

2 NO SCARCE OBJECT WILL BE LEFT IN OPEN ACCESS

The corollary of the first principle is that no scarce resource will be left in open access. Resources in open access will tend to be over-consumed and, where their availability requires human effort, under-produced. Resources that do not lend themselves to the establishment of property rights, as in the case of flowing unpolluted water, clean air or fish in open sea, may of necessity have to be left in open access. They will tend to demonstrate the deleterious effects of open access to resources that are really scarce: overfishing or pollution of the water and air. Of course, we can appeal to people's sense of responsibility or more forcefully, adopt rules to curtail consumption, but the logic of the situation is such that all persons, while paying lip service to the common weal, will be tempted secretly to pursue their private interest and consume more. Since all face the same incentives, collective ruin ensues. This development is known by the name of a scenario described by Hardin: the tragedy of the commons.⁸

B Conditions and effects of property rights

3 PROPERTY RIGHTS REQUIRE A MINIMUM OF EXCLUSIVITY TO WORK

Property rights are viable only in as much as use of the scarce object can effectively be reserved to the person or group designated as owners. For many objects this is unproblematic. You keep an eye on the food you just bought to eat; you keep your living quarters under lock. How serious you are about locking up depends on who you feel might be tempted to take things from you; in remote areas where you know all your neighbours, you may not need to lock up at all.

For some objects – open air and water were mentioned – it is difficult, with technology now known to us, to reserve use to particular persons. Here we face the problems of open access just alluded to.

We need to be more precise about what is to be reserved to owners. The viability of property rights depends on ways in which owners can effectively get their hands on the fruits flowing from the use of the scarce commodity. It will be helpful to use the term *fences* for a variety of devices and institutions used to accomplish this. Fences can be physical stops such as wooden fences, walls, hedges or ditches. The effect of fences may be dramatic: the invention of barbed wire allowed cattle to be bred in the American West on far smaller areas of land than before. The quality of the fencing technique deployed may change the viable uses of property. Fences can take many other forms as well: guard dogs and physical surveillance; tagging of animals in free roaming herds. Vending machines act as fences. The GPS system permitting instantaneously to locate cars contributes to fencing them in against theft. Doctors, lawyers and other

⁸ Hardin 1968. As a historical description this is no doubt inaccurate - see Ostrom 1990.

professionals provide information only to paying customers (unless they work *pro deo*), thereby solving the fencing problem, as do most performing artists charging for attending their live performances.

The cost of the fencing technique is part of the cost of using the property. As the former go up in relation to the latter, it may no longer be worthwhile to use a prevailing fencing technique, and one may have to resort to a simpler one (or invent a new one) and tolerate some slippage or lower quality use. In cinemas, seats are no longer individually assigned; each viewer finds a seat on a first come, first serve basis. But for theatre, concerts and opera, individually assigned seats – and the ushers to guide you to them – are still viable given the higher ticket prices.

Salt and pepper, once very dear commodities, are no longer individually rationed in restaurants, but provided free with any meal. This exemplifies a formula we encounter often in the world of intellectual property. Where it is not profitable to fence in an object by itself, the owner may yet succeed in getting paid for its use by tying it to a different commodity or combining it into a more expensive package – as in buffet style meals – which can be profitably fenced in. To put this differently, if a fencing technique no longer works so well, don't condemn property but change your business plan to collect revenue differently. The film industry thus discovered that they could make more money from home viewing, initially regarded as piracy, than from cinema viewing, if they sold videos at \$20 (rather than at \$100, as they first tried). Alternatively, go for a new and cheaper fencing technique. Fences are themselves economic goods, subject to innovation and trade.

Fences need not be fool proof; some pilferage can be tolerated so long as the owner can draw enough use or revenue from the fenced-in object. House ownership does not become unviable because of the risk of a break-in; it might, though, in areas exposed to repeated looting.

4 PROPERTY RIGHTS ARE DECENTRALISED AND CREATE INCENTIVE AND INFORMATION EFFECTS

With property rights, owners decide what shall be done with the property but also harvest the fruits of their decision or suffer the losses from sloth or misguided decisions. These features were already known in Roman law as *usus* and *fructus*. Combining them in one hand creates a feedback loop providing immediate, automatic and decentralised information on the quality of management decisions. Property rights give owners the incentive to manage wisely what they currently own (incentive effect), by comparing prospective returns from different uses of their property and choosing what looks most promising to them (information effect).

5 TRANSFERABILITY INCREASES THE INCENTIVE AND INFORMATION EFFECTS OF PROPERTY RIGHTS

The incentive and information effects are reinforced where property rights can be transferred to others – *abusus* in Roman law. This is by no means to be taken for granted. Roman law took quite a while to admit the transfer of immovables (real

estate), and initially only with cumbersome formalities. The possibility of transfer allows non-owners, as it were, to look over the shoulder of the current owner to see if they can imagine a more profitable use and if so, propose to buy the object from the latter. This extends the range of possible uses being compared. Where transfer takes place, it tends to move resources to higher-valued uses, which improves overall welfare.

Easy transferability of resources gives rise to markets, which in turn triggers the development of money as an open-ended means for storing value. Money will lead resources traded in the market to be priced and this further facilitates comparing different options for what may be done with scarce resources.

Taken together, these features of property rights explain why they play such a central role in the social organisation of developed societies and indeed why they may be considered an essential condition for economic development.⁹

C *Emergence and forms of property rights*

6 PROPERTY RIGHTS CAN ARISE BY PRIVATE INITIATIVE

Property rights as we know them are usually formalised in legislation. This does not mean that they must of necessity be created by legislation at the outset. Where a person can establish control over some scarce resource using means already owned, i.e. that are "part of the property order", that person has the *usus* and *fructus* components of a property right. If the legal system does not put restrictions on contracts that may be entered into, that person can agree with third persons on conditions for the latter to have access to the resource. Part of these conditions could be a clause obliging the third person to impose similar conditions on further persons to whom the resource might be transferred (as was customary in software licences). This simulates a crude form of "*abusus*".

The system can operate with mere background support from public authority enforcing public order, perhaps more explicitly only where "leakage" (third persons being given unauthorised access) needs to be curtailed through forms of civil liability (tort) law. Private actors can accordingly experiment the viability and usefulness of such prototype property rights. Public authority can in due course consolidate these efforts in the form of legislation or case law, which regularises them and makes enforcement easier.

Such a "discovery process" would seem to have been at work in the development of private enterprise (company) law, trade-mark law, plant-breeder's law in France¹⁰ and surely others. One might sum it up as control + freedom of contract (+ court help with leakage control) = prototype property right. This insight is helpful for getting a grip on how the property rights logic may be extended to new objects that might seem at first blush not to be readily amenable to it, as in rights to landing slots at busy airports, tradable pollution permits and so on.

⁹ Amongst many: North 1973; Acemoglu 2005; Angeles 2011.

¹⁰ The story is told in detail in Hermitte 1988.

7 COMMON PROPERTY MAY APPEAR WHERE EXCLUSIVITY IS PROBLEMATIC OR DISADVANTAGEOUS

Not all commodities subject to property rights are individually owned. Some are owned by groups or communities. In a classical study on *Governing the Commons*, which has earned her the Nobel prize in 2009, Elinor Ostrom has shown that common ownership is not an anomaly but is widely practised in all regions of the world, for instance amongst farmers letting their cattle freely roam in the high Alps and in shared fishing waters.¹¹ Nearer to us, condominiums are examples.

Why is this, since surely decision-making by an individual would normally be easier than by a group? One set of circumstances where common property may be preferable to individual property have to do with the cost of fencing. Where, as in fishing grounds, it is difficult to allocate specific chunks of a common resource to individuals, though it is feasible to reserve the resource (such as fishing grounds) to the group as a whole as against outsiders, common property may be preferable.¹² Economists then speak of *club goods*.

To avoid a slide into a tragedy of the commons for common property, a set of rules for the governance amongst group members has to be put in place. They determine under what circumstances community members may use the common resource. The simplest rule is equal access for all, but many other rules are conceivable. The limits of use will be set so as to avoid exhaustion of what is scarce in the resource held in common. The rules will have to provide for supervision and for sanctions against those who transgress the rules, ranging from disapproval to exclusion, blacklisting, flaming and worse. Further rules will have to specify under what conditions new persons are admitted to the community and under which they can exit. Finally, rules will have to be set for collective decision-making concerning a change of the rules or the use of the common property.

A different form of cost of access is at stake in the creation of share spaces: open content,¹³ creative commons,¹⁴ community enterprises¹⁵ and indeed sharing of ideas within the scientific community, through SSRN and similar venues. Even industrial development of new products benefits from share spaces, if Saxenian is right.¹⁶ Here the cost of gaining access where exclusive rights are being exercised is thought to interfere with the rapid reciprocal stimulation of participants in creative work. Knowledge and culture, as we shall argue, tend to be cumulative: every addition builds on earlier ones; creativity will be facilitated by easy access to earlier work.

A third argument for common property, as some argue, is that open sharing

¹¹ See Ostrom 1990.

¹² For a comparison between individual and common property rights, see Rose 2002.

¹³ For a recent summary, see Lerner 2010.

¹⁴ See for instance Lessig 2004; Elkin-Koren 2005; Dusolier 2006.

¹⁵ Frey 2011

¹⁶ Saxenian 1994, 2006 ; see also Benkler 2005.

within a community is essential for creating and maintaining community spirit.

8 OBJECTS DECLARED OUT OF COMMERCE¹⁷

In most countries, some objects are declared out of commerce, though (property) rights may well exist on them. They may not be traded. The right to bring up a child cannot be traded; in many countries one cannot sell one's organs and in some neither can one sell one's own blood.

Economic analysis has identified three kinds of reasons invoked in support of such prohibition: self-paternalism, pure or "hard" paternalism and externalities. Self-paternalism refers to restrictions rational persons would, in their self-interest, impose on their own behaviour for times when they were less lucid. In *My Fair Lady*, Alfie Doolittle, set to engage in a last bout of drinking and frolicking on the eve of his wedding, beseeches his mates to stop him at whatever he will be doing so as to "get me to the church in time". Hard paternalism refers to restrictions imposed on persons because others consider the pursuit of their preferences socially unacceptable. This form of paternalism imposes the preferences of one group of citizens on others. Externalities refer to restrictions imposed on one person's actions because of negative effects on the life or livelihood of others, which are not properly taken into consideration in the decision to undertake those actions. It reflects a fundamental tenet of liberalism that one's liberty can stretch only so far as is compatible with equal liberty of others. Public authority may be used to prevent a person from inflicting harm onto others.¹⁸ Of these three justifications, pure paternalism is clearly the most difficult to justify morally.

The prohibition of trading particular objects, implying their removal from the official market, literally deprives them of a price. Yet their scarcity is by no means diminished and hence shortages may develop. This in turn may give rise to a black market.¹⁹

II Intellectual property rights

Intellectual property rights are adaptations of the property rights logic to specific kinds of information structures. To get a handle on the challenges this poses, we start by looking at some general features of information. This will lead us into the specifics of the adaptations that intellectual property rights represent.

A *What is peculiar about information?*

1 INFORMATION IS EVERYWHERE

In its broadest sense, information is the basic ingredient of all human decision-making. You are informed if you learn something you did not already

¹⁷ See Mackaay 2008, 239 f.

¹⁸ Mill 1859/1991, 14.

¹⁹ Mackaay 2008, 167 f. Mackaay forthcoming, chapter on the black market.

know; otherwise, what you learn is redundant. What you learn may help you make decisions more confidently or differently.

Information is everywhere. We express our thoughts by means of information structures such as natural language and specialised languages for different fields of knowledge, craft or trade; our culture is one complex set of information structures; so is scientific knowledge or news published in a variety of ways. Much of this information is generated almost unwittingly, as a by-product of daily activities undertaken for other purposes, and does not appear to require special encouragement to be undertaken. Whatever is generated automatically appears to be abundant in the sense that there will be enough for everyone, however it is used, and it can be left to flow freely.

2 MOST INFORMATION CAN BE REPRODUCED AT EVER LOWER COST AND CAN BE USED BY MANY PERSONS AT ONCE AND REPEATEDLY

Technological advances, in particular the digitalisation of just about any form of information known to humankind, make it ever easier to reproduce and disseminate information. The cost of both is coming down continually. Most information can be used by many persons at once without its utility to any one of them being diminished. The exceptions are forms like secrets or advance knowledge (such as is used in insider dealing): holders of information benefit from being in the know before the world at large is. But these are the exceptions – in most circumstances, information looks economically like a public good: its use is non-rival; exclusion is problematic.

Unlike tangibles, most information can be used repeatedly without wearing out. Think merely of reading, arithmetic, writing skills. Information may become obsolete and be discarded when newer information replaces it. Our arithmetic skills may go that way as a result of the advent calculators and computers; dictation software may put our writing skills under strain. In neither case, however, have these skills worn out. Where information can be used repeatedly, it is like a capital good in economic terms, which increases the effort and cost one will be prepared to expend to acquire it.

3 MOST INFORMATION IS CUMULATIVE: NEW INFORMATION IS CREATED USING OLDER FORMS

An invention or creation is rarely produced *ex nihilo*. It is almost always based on already known information structures. Every existing invention or creation can thus be the springboard for new ones. This is referred to as *follow-on* innovation. New discoveries in science are glimpsed “by standing on the shoulders of giants.”²⁰ In technology, the cumulative effect is evident in the concern to make systems interoperable and compatible, in the quest for shared standards,²¹ and in the

²⁰ Echoed in the title of Scotchmer 1991. See also http://en.wikipedia.org/wiki/Standing_on_the_shoulders_of_giants.

²¹ Economist 2005, 4; Elkin-Koren and Salzberger 2003, 41, 83; Tirole and Henry 2003, 26.

desire to ensure that essential facilities are accessible.²² Human progress is by nature cumulative.

In order to foster the accumulation of knowledge, we need to give future creators access to existing creations. Any increase in the cost of access to existing creations tends to reduce follow-on innovation; lasting monopolisation of existing creations would seriously hamper the overall creativity of a society in the long term. We should expect the accumulation of knowledge to be an essential consideration in the design of the institutions for stimulating creativity and inventiveness.

4 SOME INFORMATION REQUIRES SPECIAL EFFORT TO BE GENERATED

Some information clearly would not be forthcoming without special effort by particular persons to create it: books, lists of addresses, artwork, musical comedies, architectural drawings, scientific discoveries, technological advances, etc. Such creations are scarce in a sense, but the scarcity is not located in the object created. The scarcity lies in the creative talent that must be devoted to the creation of these objects. To draw the creative talent into this special effort may require specific incentives.

The need for specific incentives – to direct creative talent towards one type of creation rather than others – will be perceived as increasingly pressing as, thanks to mass production and advances in distribution technology such as printing presses and industrial production, the fruit of creativity and inventiveness can be made available and shared with a great many persons, much beyond those whom the creators know personally. If part of the benefits that all the beneficiaries experience thanks to the creation could be gathered and used to lure the creators, the incentive would be much more powerful than what the creators could make from their own work and personal contacts alone. It thus becomes useful to look for institutions that can “concentrate” incentives for creators to engage in creation and invention for the benefit of the community. The advantage to the community lies in the fact that everyone will have access to and be able to use the creations relatively easily, in comparison with a situation in which creators keep their secrets to themselves.

B Incentives for creating information

1 INCENTIVE STRUCTURES – HISTORICALLY

The ubiquity of information and its mostly unwitting creation militates for a base rule of letting information flow freely, which is indeed the one observed in the legal systems of developed nations. The cumulative character of information is helped where persons can rip-mix-burn unhampered. The public good character of information suggests that government may consider itself obliged to step in to stimulate its creation, an investment all the more worthwhile as the information can be used repeatedly. Perhaps, to take just one example, public schools teaching the

²² Lévêque and Menière 2004, 105; Tirole 2003, 5, 27.

three r's (reading-writing-arithmetic) to all comers could be justified this way, although it must be noted that most parents already perceive that need for their offspring independently.²³

Where special effort is required to create information, in many cases it may be called forth by the prospect of increased revenue the creators can draw from deploying the information in their daily activities or trade, or from their having a head start in bringing objects incorporating it to market (*first mover advantage*). Many past advances in agriculture and handicraft may be due to this logic. For a long time violin builders kept their trade knowledge secret so that they could earn money on it through the sale of their special instruments. They would pass the knowledge and skills on to their offspring. Effective as this approach may be for capitalising on knowledge, it has the disadvantage of not sharing knowledge widely and runs the risk of knowledge disappearing where it cannot be passed on.

For this reason, other procedures, involving sharing of knowledge, have been tried: grants, scholarships, sponsoring, pensions and annuities, lotteries, awards, prizes, medals and other honours, tax incentives, monopolies, procurement contracts (for military inventions in particular) and intellectual property.

If we knew precisely what we wanted to develop and who could do it, we might well be indifferent amongst these various means of encouraging creativity. You contract with a builder to erect the house of your dreams precisely as you want and specify it. If we had all that information, a central planner could bring about the right kind and amount of creativity for a society. For military innovation, one can sometimes proceed that way.

In most circumstances, however, we do not have that information and discover things "on the go". We did not, for instance, know that the system of easy communication amongst scientists had the potential to become the worldwide universal communication system that the internet now is. We did not know that it would be profitable to put all communicable information in numerical form. Rather, these discoveries were most fortunate side-benefits made available to us because our discovery processes are largely decentralised and open-ended, and serendipity can play its part. The most valuable creativity for society is perhaps the kind for which it is by and large uncertain where it will take us, and which involves entrepreneurial gambles.

2 DESIGN CONSTRAINTS FOR INTELLECTUAL PROPERTY RIGHTS

We are therefore looking for open-ended institutions creating decentralised incentives. Putting it this way immediately points to the property rights logic. But property rights require exclusivity to function and this interferes with the free flow of information, which as we saw is the base rule in most legal systems, and with the cumulative character of knowledge. Furthermore, information does not lend itself easily to exclusivity and so legal help may be required to make that happen. This

²³ See for instance Tooley 2009, 17, 259.

means that the law has to be pressed into service to create a monopoly – an uncomfortable situation at best. If the property rights logic is to be deployed for setting up decentralised special incentives for creativity, the law will have to back it up by enforcing some monopoly power, but this monopoly power will of necessity, given the nature of information, have to be circumscribed.

From this a fundamental principle follows: *All intellectual property rights are a compromise*. They are, on one hand, species of property rights sought for their incentive and information effects and decentralised character, but, on the other, are tempered to circumscribe the monopoly effect they inevitably require. These rights should be framed so as to generate the minimum incentive desired, but reach their limit where their cost in terms of reduced potential for follow-on creation would surpass the benefit of that incentive.

Overstretching intellectual property rights is likely to produce the perverse effects of monopoly generally. To illustrate what this means, consider the story of the Bell telephone empire in North America. Up until the early 1970s, telephone services were considered a natural monopoly, and throughout North America were offered by companies belonging to the Bell Empire (AT&T). The companies were private but their rates were subject to government regulation. Public wisdom had it that regulation would allow the companies to make reasonable returns on investments but prevent them from exploiting their monopoly to the detriment of telephone users. At the time, the North American telephone industry prided itself on offering consumers the best telephone system in the world at the lowest prices. Bell Laboratories made fundamental discoveries that regularly won prestigious awards.²⁴

What about consumers? Virtually the only model they could rent was the black rotary telephone, admittedly indestructible. If they wanted a white phone or one with buttons, they had to pay extra. Telephones could be installed only by Bell technicians.

By the mid-1970s, a timid experiment was conducted in the United States: the “interconnect” market of devices that could be hooked up to the telephone network was “freed.” The effect was immediate and dramatic: there was a proliferation of new devices and new functions. Within a few years, a wave of innovation spread across the entire developed world. Since then, deregulation has extended to most areas of telephone service worldwide. Quite possibly the internet and mobile telephony would not have emerged, or at least would not have grown so quickly, had the monopoly not been broken. In this case, as elsewhere, competition has turned out to be a powerful discovery procedure.²⁵

If we may extrapolate from this, the lesson for intellectual property seems clear: a state run monopoly does not prevent invention, but it redirects creativity towards creations and inventions that serve the purposes of their creators, for

²⁴ Kay 2004, 258.

²⁵ Hayek 1978 was the first who clearly articulated the idea.

example, the Bell Laboratories researchers, but that do not necessarily benefit consumers. The problem is that the delay caused by monopolies is visible only retrospectively.

While the monopoly is in place we will not become aware of the creativity of which we are depriving ourselves. If legislation creates intellectual property rights that lead to too strong a monopoly, it can divert creativity away from what is most desired by consumers and towards what best suits industry. It will not be easy to measure the creativity that has been prevented from emerging.²⁶ This perverse effect may occur even though consumers continue to purchase large quantities of the product in question (such as rotary telephones).

Home video recording (on videocassettes), file sharing by Napster, Kazaa, Grokster, Gnutella, Morpheus, and other forms of P2P communication were all originally considered simple pirating tools, to be eradicated. Were they perhaps indicators of consumer preferences? In the third millennium, do we need to interpret open content software and creative commons in the same vein? Whatever the answer, given the impossibility of directly calculating the effects of overly strong monopolies, we can at least describe the scenarios of perverse effects that should be suspected.²⁷

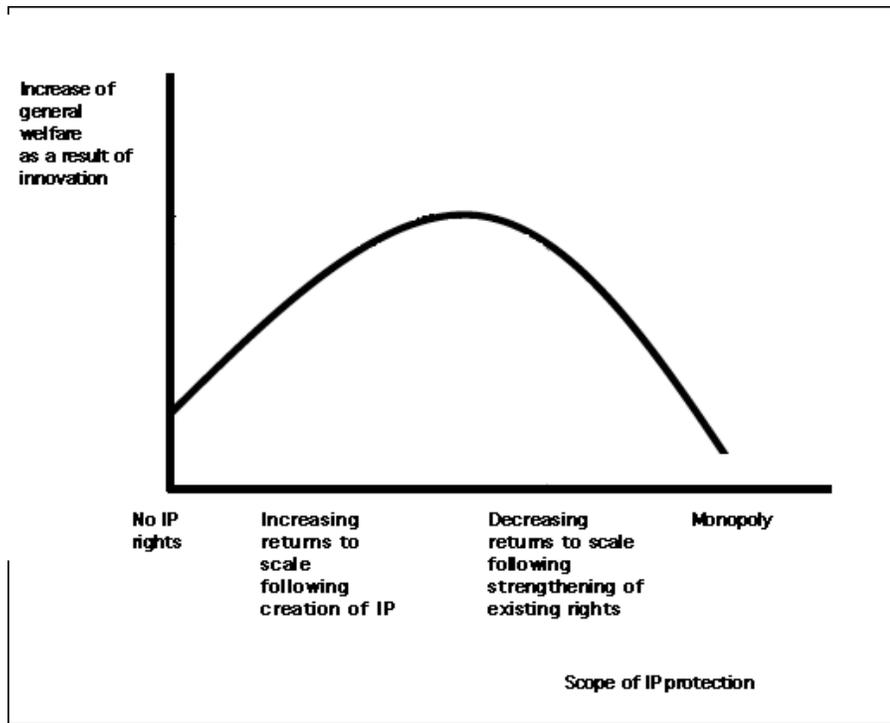
The foregoing considerations have led researchers to postulate an inverted U-shaped relationship between the scope of intellectual rights and the increase in general welfare, as mediated by the level of innovation. The scope of the right is reflected in four dimensions: the objects it covers; the conditions for obtaining it and the potential title holders; the practices it allows the holder to prohibit and the sanctions available to back up that prohibition; the term of the right.

Diagram 1 Relationship between the strength of intellectual property and the increase of general welfare (as mediated by the level of innovation)²⁸

²⁶ Sag 2006, 212; Benkler 2002.

²⁷ Werin 2003, 32.

²⁸ This presentation draws on Sag 2006, fig. 1 (p. 206) and 3 (p. 216), and on Valkonen, 2006.



In the absence of formal protection of intellectual property, interested persons can still secure their creation by keeping it secret and insisting on confidentiality agreements when giving access to it. So the left hand side of the graph does not start at the horizontal axis. When formal protection is weak, strengthening it should have the effect of improving overall creativity in society.²⁹ Beyond a certain point, however, strengthening it further will reduce overall creativity as the monopolising effect of the rights crowds out follow-on innovation. If this relationship is as hypothesised a further founding principle follows: *More or stronger intellectual rights are not necessarily better from the perspective of general welfare.*

C Intellectual property rights in practice

3 CONSTRAINTS BUILT INTO IP LEGISLATION

Too strong intellectual property rights create monopoly effects. Monopoly effects might be controlled through competition law (antitrust law in the US), but this is a crude tool that should perhaps be left as a means of last resort. Better to build anti-monopoly restrictions into the laws that define intellectual property rights. Upon closer inspection, most restrictions of copyright and patent, the main intellectual property rights, make sense from the perspective of curtailing the monopoly power these rights inevitably confer. Let us consider each of the four dimensions briefly.

As regards the subject matter of patent or copyright, both rights exclude general theories, pure ideas and abstract formulas. The contrary position might

²⁹ For some evidence backing this up, see Lerner 2005.

lock up foundational information and unduly interfere with follow-on innovation. Moreover, both rights can be granted only for specific crystallisations of new ideas, which patent law captures through the requirement of practical or industrial application, copyright through that of fixation in a tangible support.

Both patent and copyright set conditions for obtaining the right. For copyright, the creation must be original (which at the very least implies a personal contribution of the creator, beyond mere reliance on or copying of existing creations), but no formal request has to be made. For patent, a formal request is required and it must reveal the specific invention for which the right is claimed; that invention must be both objectively novel and not obvious to a person skilled in the particular field. Here again one can spot the desire to encourage the creator at the same time as that to avoid too easy interference with follow-on creation. In both cases, it is the creator who gets the right initially and, in the case of patent, who alone is entitled to put in the initial claim for it.

Copyright protects, as the name suggests, against direct copying, which has been extended to translations, adaptations (a novel into a film scenario, for instance), communications to the public and, somewhat uneasily, to forms of non-literal copying. It covers the original work as well as adaptations and translations. Against infringers, a range of measures can be applied including court orders to stop infringing, seizure of infringing copies, accounting for illicit profits, damages etc. Patent ranges even wider, covering any application of the protected invention by whatever name and in whatever form. Similarly, severe sanctions are available against infringement. To temper its monopolistic effect, copyright law exempts certain activities from control by the copyright holder. In the US, these exemptions are known as "fair use", in Commonwealth countries as "fair dealing".

Both rights are restricted in time. Patent, being the widest ranging right, is restricted to 20 years from the request for the right. Copyright was initially, in the British legislation of 1710,³⁰ granted for 14 years, but has been extended over the centuries to reach lifetime plus 50 or even 70 years for natural persons and 95 years for artificial ones. Whether this remarkable extension is anything else than rent-seeking without useful incentive effect on creation is a moot point.³¹

Together these four dimensions define the scope of the rights in legislation. The different dimensions are to an extent substitutes: as we just saw, a very broad right, as patent is in object and range of protection, calls for a relatively short protection period, as against copyright, which is more restricted in what it protects, but lasts far longer.

4 DOUBTS ABOUT WHETHER WE HAVE GOT IT RIGHT

Confident though we may feel that the general relationship between scope of intellectual property rights and creativity is as Diagram I indicates, and that this is

³⁰ See Bently 2010.

³¹ Mackaay 2011; Nimmer 2004.

reflected in the general outlines of intellectual property legislation, we are as yet unable to measure the precise form of the curve and locate where the scope of rights established within a particular legal system locates us on the horizontal axis, and hence whether we are at the optimal point of the curve.

Attempts are being made to overcome this limitation. Pollock, for instance, takes a stab at estimating the optimal term of copyright by means of a formal model.³² For parameters of copyright other than duration, one could take welfare to be indicated by the number of works created and make this depend on the stimulating effect of copyright, on one hand, and on its deadweight-loss effect (on follow-on creators) on the other. For the copyright term, however, a richer model is necessary which includes the consideration that copyright work produces welfare increases over time, but that these increases decline as time goes by ("cultural decay"). By building in the cultural decay factor as well as a standard discount factor for the value of money earned in the future, Pollock is able to estimate an optimal copyright term of 15 years in a steady-state model.³³ The estimate is, however, quite sensitive to the values of these parameters and putting them at the low end of the range, he arrives at an estimate of 52 years!³⁴ Considering these results, the jury still seems to be out on how to establish the optimal scope of intellectual property rights.

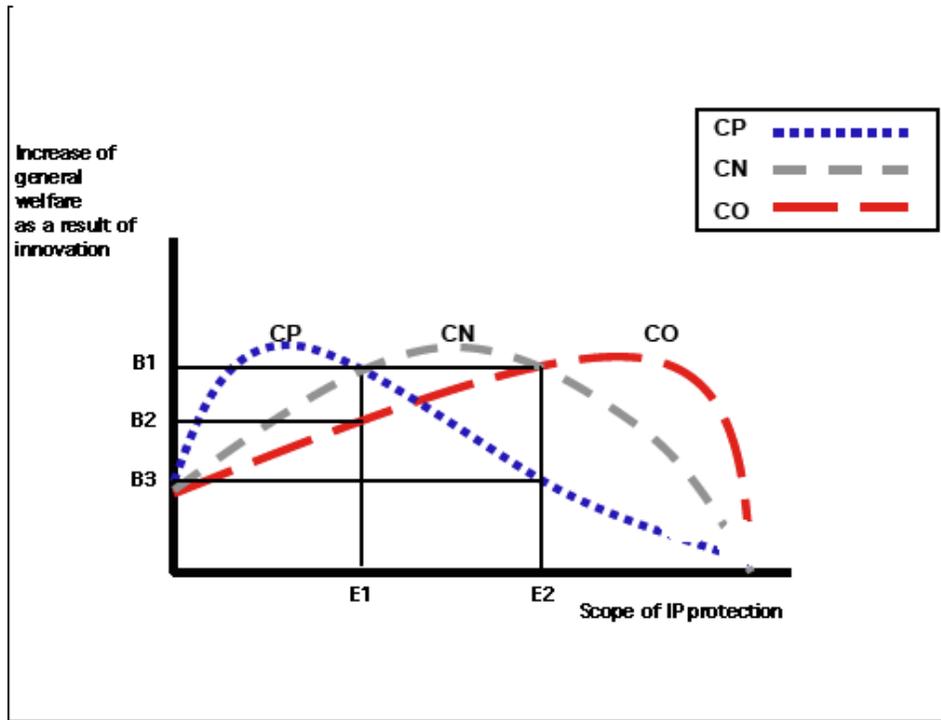
Our inability to "measure the curve" has serious consequences for policy options as regards intellectual property rights legislation. Consider point E1 in Diagram 2. If reality is as pictured by the pessimistic curve (CP – in blue), the scope of IP rights has been extended beyond what is socially optimal; further increasing it to point E2 would lead to welfare (innovation) loss. Restricting the scope of intellectual property rights (moving it to the left of E1 in the Diagram), making more work ineligible for it and hence relegating it to the public domain, would enhance economic welfare. By contrast, if reality is as the optimists would have it (the CO curve – in red), increasing the scope of intellectual property from E1 to E2 would lead to a welfare improvement.

Diagram 2 Optimistic and pessimistic views of the relationship between the strength of intellectual property and the increase of general welfare (as mediated by the level of innovation)

³² Pollock 2009.

³³ Id. p. 52.

³⁴ Ibid.



5 FURTHER DOUBTS: INDUSTRIES GETTING BY WITH LITTLE OR NO IP

Doubts about whether current intellectual property rights are optimal, or indeed necessary at all, stem also from the observation that important industries and services get by with little or no intellectual property protection at all. Cooper Dreyfuss considers this to be the case for "fashion, stand-up comedy, magic, cuisine, and software (consider Linux, Apache, and Firefox)".³⁵ Fashion, in particular, is a very significant industry, taking in \$750 MM yearly worldwide, of which \$200 MM in the US alone, more than the cultural industries combined!³⁶ The concentration in this industry is significantly lower than in the cultural industries. It should be noted that, whilst the industry does not rely on protection for its designs, it relies heavily on trademark protection for its ware.

For stand-up comedy, most enlightening fieldwork shows how the sector gets by without intellectual property but with informal norms amongst participants.³⁷ Saxenian has eloquently made the case that share culture – absence of exclusive rights, until the stage of marketing finished products – is highly conducive to creativity in high tech industries.³⁸ Frey and others have followed up on this idea in describing the virtues of "community enterprises" such as those producing the wikis.³⁹ In academic research, in spite of copyright on the formal journals in which

³⁵ Cooper Dreyfuss 2010, at 1437.

³⁶ Raustiala 2006, 1693; Raustiala 2009, 1203.

³⁷ Orlitzky 2008 and 2009, Madison 2009.

³⁸ Saxenian 1994, 2006.

³⁹ Frey 2011.

papers are published – called "academic tombstones" by one author⁴⁰ – the most up-to-date results of academic research circulate freely in the form of working papers, with the help of organisations such as SSRN and academic repositories. Boldrin and Levine generalise from these and other findings to argue that intellectual property is altogether superfluous.⁴¹

6 MOVES BY MARKET PARTICIPANTS TO CREATE WIDER ACCESS

The monopolistic effects of IP rights can be curtailed by market participants themselves through such arrangements as cross-licensing, patent pools or clearing houses, as well as through open content and creative commons licences.⁴² Instituting such practices can be an answer to charges of anticompetitive behaviour by competition authorities. In terms of Diagram II, such arrangements would tend to shift the effective scope of the intellectual property right away from the monopoly pole of the spectrum. If intellectual property legislation protects more than is optimal, market participants have at their disposal some private actions to correct this (somewhat).

III Folklore and its protection

A *Inapplicability of existing intellectual property rights*

As a means to protect folklore, patent law appears to be at first sight of limited use because of the apparent absence of industrial applicability. Notice, however, that the Indian government has proceeded to film and publish 1300 or so traditional Yoga-postures, creating what is termed a "defensive database" in recent WIPO documents.⁴³ This would make them public knowledge accessible to all and prevent others from claiming a patent on them (for want of novelty). Moreover, such public dissemination would clearly establish the Indian origin of these cultural phenomena.⁴⁴

Can copyright serve to protect folklore? The match is problematic as well, though perhaps more subtly. First, there is no clear fixation, defining on what protection is to be granted.⁴⁵ Furthermore, there is no clear date of creation, which constitutes a problem for the term of copyright. If a right of indefinite duration is claimed, this goes directly against the grain of copyright as a compromise: it would raise fears of undue monopoly power. A third problem is the absence of known creators. Copyright, in the analysis presented above, serves to direct an incentive

⁴⁰ Paliwala 1996.

⁴¹ Boldrine 2008 and 2010.

⁴² See Van Overwalle 2011 for a review in the biotech sector.

⁴³ IGC 18 Update of 13 May 2011; http://www.wipo.int/tk/en/news/2011/news_0011.html

⁴⁴ Report in the *Times of India* of 20 April 2011; http://articles.timesofindia.indiatimes.com/2011-04-20/india/29450889_1_patent-applications-tkdl-traditional-knowledge-digital-library

⁴⁵ Hilty 2009, 7.

to create upon the specific person(s) of the creator(s). Related to this is the absence of originality – identifiable contribution by the creator(s) – as copyright requires it. One might debate, of course, whether a modified definition of originality stressing the unique character of the folklore, its being unlike other known expression, might not be more appropriate, but this is not within the purview of law as it now stands.

Copyright legislation acknowledges the possibility of authorship by a group of persons whose individual contributions in the creation cannot be distinguished. But the protection is still afforded to a known group of persons, on an original creation and for a limited time. So the creators, their contribution and the date of creation must be ascertainable. For folklore, these conditions are not satisfied. Copyright can serve in a circumscribed role through the right it grants performers in recordings to be made of their live performances.⁴⁶ But this is of only limited interest since it skirts the question of whether recordings should be made in the first place.

B A look at proposals for sui generis rights

To get a handle on what is being claimed as sui generis protection for folklore and other cultural expression, it seems appropriate to refer to draft provisions circulated in April 2011 on behalf of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, of WIPO.⁴⁷

A preliminary question is why this interest in protection groups holding traditional cultural expressions is springing up just now. Hilty suggests that it may well be that such groups have been able to trade their cultural objects on a moderate scale in the past and that, with growing globalisation, the interest for them has multiplied and increasingly risks being exploited by multinational operators, whose wherewithal local groups cannot match and risk falling victim to:⁴⁸ emergent scarcity, to use a term from the property rights logic.

Amongst the aims listed at the outset of the WIPO document, one retains those of allowing the relevant communities to control the use of their traditional cultural expressions and to prevent the misappropriation and misuse of same as well as the grant, exercise and enforcement of intellectual property rights acquired "by unauthorized parties" on same.

Article 3-A mandates measures to stop fixation, disclosure, use or other exploitation of *secret* cultural expression.

Article 3-B reserves as collective rights to relevant groups defined in Art. 2 the prerogative to authorise or prohibit, as regards *non-secret* traditional cultural expressions "other than words, signs, names and symbols", a series of acts

⁴⁶ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; <http://www.wipo.int/treaties/en/ip/rome/> .

⁴⁷ WIPO 2011, Objectives.

⁴⁸ Hilty 2009, 8.

including "fixation; reproduction; public performance; translation or adaptation; making available or communicating to the public; distribution". As regards traditional cultural expressions which are words, signs, names and symbols, including derivatives thereof, the control extends to "any use for commercial purposes, other than their traditional use; acquisition or exercise of intellectual property rights; the offering for sale or sale of articles that are falsely represented as traditional cultural; expressions made by the beneficiaries as defined under Article 2; any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute".

Article 3-C aims to establish the right of attribution (to be recognised as the source of particular cultural expression), of reputation and integrity.

Article 4 deals with the management of such rights, in particular licences to use "outside the traditional or customary context" (art. 5). This power may be exercised by a body within the group itself or by an outside body, such as a government agency.

The right is essentially of indefinite duration (art. 6).

This brief overview suggests that *secret* traditional knowledge is essentially declared to be out of commerce and subject to what Hilty terms "cultural privacy".⁴⁹ On an economic analysis, privacy rights would be regarded as non-transferable property rights. These rights may have some of the side effects referred to above for objects declared out of commerce.

As regards the *non-secret* traditional expression, the provisions appear to be modelled on copyright law. There can be little quarrel with recognition – the moral right side of the proposed rights.⁵⁰ On the economic side of the right, there are essential differences with copyright in that the proposed right has no term, its object need not be fixated nor be in any sense original, and licences for use outside the original context are to be decided upon by a collective procedure or by a representative state agency. Where an outside agency administers the use of cultural property, public choice leads one to expect that they will take an expansive view of such use wherever they can so as to justify their mandate. Overall, these particular features constitute weighty transaction costs, likely to complicate any outside use contemplated.⁵¹

In terms of Diagram 2, the balance these sui generis rights propose to strike between protecting existing expression and openness to new expression appears to be dramatically shifted towards the monopolising side of the spectrum. Outsiders are to be discouraged from follow-on creation (derivatives) by heavy transaction costs preceding any venture.

The painful question which this position raises is whether such an extremely

⁴⁹ Hilty 2009, 10 and 23.

⁵⁰ Zimbehl 2010, 131, referring to Coombe 2003.

⁵¹ Zimbehl 2010, 129-130.

protective stance is helpful or harmful to the objective of preserving cultural expression. Is innovation unimportant, given the overriding concern to preserve traditional expression and lifestyle? Surely the viability of cultural expression will be increased if whoever uses or exploits it can expect to earn good money with it. Merely earning respect within the community may not be appealing enough. Creation within the traditional community is a very small market. Is innovation outside the community going to be open to any insider or to an outside group who have insiders as partners? If so, there may be a rush by persons seeking to find ancestry within the protected cultural group. The proposals are not entirely clear about it, but appear to lean towards a negative answer (controlling any outside use).

As regards what is authentic, the difficulty, as Zimbehl correctly points out,⁵² is who is to decide what is an authentic form, to be recognised, and whether non-authentic forms are prohibited or merely lack recognition as authentic, but can otherwise go forward as innovations. Restrictive regimes may interfere with freedom to criticise older forms (and their proponents) and to experiment with new ones. This in turn may affect the viability of the authentic forms. Mere certification marks or collective trade-marks for authentic forms may be a less intrusive and hence less damaging form of promoting authenticity.

Once an outside use is authorised, it ought to be governed by ordinary intellectual property rights logic with the balance of incentive versus openness they strike. The contrary position would commit us to unnecessary information lock-up or to granting privileges in the use of cultural expression.

Altogether, the adaptation the proposed sui generis rights strike with respect to copyright dramatically shifts the balance inherent in copyright to the side of more control or monopoly. Such a shift comes inevitably at the expense of openness to new creation. One must wonder whether young persons within the protected groups, who should be future carriers of cultural expression, find these prospects appealing enough or whether they would be tempted to exit altogether in search of a better future. Even where preservation is the objective, one still needs to create a climate in which future generations will find it worth their while to preserve rather than seek salvation elsewhere. Stifling innovation will undermine this interest and with it the viability of preserving what is valued. Information lock-up may not be the most promising formula for preservation.

Conclusion

This paper looks at sui generis rights claimed for the protection of folklore. Since rights should not be created in any which way if one is to avoid privileges and rent-seeking, it is important to be clear about design constraints stemming

⁵² Zimbehl 2010, 129.

from such rights being species of property rights, adapted to deal with the particular content of information structures that need special encouragement or protection. Examination of the logic of property rights and of intellectual property rights reveals that intellectual property rights are sought because of their decentralised incentive and information effects, but that they need to be circumscribed because of the monopolistic effects they entail. The trouble with monopoly is that whilst it is in place, one does not realise the creativity that is prevented from emerging. All intellectual property rights reflect compromises of these contradictory tendencies and as a result, more and stronger intellectual property rights are not necessarily better from a general welfare point of view.

The proposed forms of sui generis rights appear modelled on copyright, but with the removal of several key features that define the equilibrium inherent in copyright: no originality requirement; no known creation date or creators; indefinite duration. Folklore kept secret is altogether taken out of commerce. As result, these rights strike a balance very much more to the monopoly side of the spectrum than do existing intellectual property rights and hence risk severely constraining creativity. This may seem like an acceptable constraint given the objective of preservation, but one must realise that it will affect the future carriers of the protected information. Faced with severe restrictions on ways they can improve their lives within the protected setting, they may well opt for the exit option and head for greener pastures. This would severely strain efforts to preserve whatever the sui generis rights aim to protect. Information lock-up may not be the most promising formula for preservation.

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