

Sui Generis Rights for the Protection of Traditional Cultural Expressions

Policy Implications

by Kilian Bizer, Matthias Lankau, Gerald Spindler, Philipp Zimbehl, Göttingen*

Abstract: Within the international community there have been many calls for better protection of traditional cultural expressions (TCEs), for which classic instruments of intellectual property rights do not seem to fit. In response, at least five model laws have been advanced within the last 40 years. These are referred to as *sui generis* because, though they generally belong to the realm of intellectual property they structurally depart from classic copyright law to accommodate the needs of the holders of TCEs. The

purpose of this paper is to provide a well-founded basis for national policy makers who wish to implement protection for TCEs within their country. This is achieved by systematically comparing and evaluating economic effects that can be expected to result from these regulatory alternatives and a related system or private ordering. Specifically, we compare if and how protection preferences of local communities are met as well as the social costs that are likely to arise from the different model laws.

Keywords: Sui generis, traditional cultural expressions, policy, private ordering, law and economics

© 2011 Kilian Bizer, Matthias Lankau, Gerald Spindler, Philipp Zimbehl

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Kilian Bizer, Matthias Lankau, Gerald Spindler, Philipp Zimbehl, Sui Generis Rights for the Protection of Traditional Cultural Expressions: Policy Implications, 2 (2011) JIPITEC 114, para. 1.

A. What is the Regulatory Choice Problem?

1 Most of what is referred to as traditional cultural expressions or folklore (TCE) is unprotected and part of the public domain. Anybody may therefore make use of or market TCE even without the consent of its traditional owners. The relatively recent movie picture “Twilight Eclipse” is a case in point. Here, the founding legend of the Quileute, a tribe in the Western United States who believes that their ancestors were shape shifters between men and wolves, is employed for the plot of the movie. Rather frequently, traditional owners strongly disapprove of such uses by third parties, yet lack the legal instruments to control the terms of use or even prohibit access altogether. This could be the case when there is a perceived sense of injustice, for instance when local communities have no legal claim to a fair share of the revenues generated by third parties. Another reason can be perceived indignation when elements

of TCE with a high cultural meaning are misappropriated. As a result, for many years representatives of traditional communities have argued for a better protection of their TCE within the realm of intellectual property. These claims were carried to higher political levels and can now be considered a fixed agenda item within international negotiations on extensions of intellectual property such as the ones in the Intergovernmental Committee of World Intellectual Property Organization (Lankau, Bizer et al. 2010).

2 From a normative economic perspective, protection of TCE can be justified. It may prevent negative effects on the traditional owners holding TCE via acts of misappropriation. Bicskei et al. (2010) for instance show that such access can negatively affect the identity of cultural carriers and go as far as seriously impairing their fundamental dignity. Should this be the case, the authors argue for protection of these elements of TCE. This in turn gives rise to a regulatory choice problem: How should TCE

be protected? From a law and economics perspective one possibility is to allot property rights for traditional owners of TCE, which can exclude outsiders. It has been shown that approaches within the regular IPR-system, such as copyright, do not meet the requirements postulated by traditional owners (see for instance Lewinski (2007)). In response, the international community has developed model laws for the protection of TCE in the last decades, which may be used as a basis for the development of national legislation. These are referred to as “sui generis”, which signifies a status of its own kind. While they count as intellectual property, they systematically depart from classic copyright. This paper evaluates the regulatory alternatives in the sui generis model laws and the system of private ordering and develops policy guidelines for their implementation.

B. Introducing the Regulatory Alternatives

- 3 Sui generis rights must be classified as group rights for traditional communities aiming to protect their TCE¹ by extending the conventional forms of intellectual property rights. The alternative model laws are the (1) *Model Provisions of the UNESCO/WIPO* which were created in 1982 (2) the *South Pacific Model Law for National Laws* of 2002 (3) the *Tunis Model Law on Copyright for Developing Countries* of 1972, (4) the *WIPO Draft Provisions*² of 2004 and (5) the *ARIPO Provisions* of 2010.

Table 1: Sui Generis Model Laws

Model Law	Year	Abbreviation
Tunis Model Law on Copyright for Developing Countries	1972	TML
Model Provisions of the UNESCO / WIPO	1982	MPUW
South Pacific Model Law for National Laws	2002	SPML
WIPO Draft Provisions	2004	WDP
ARIPO Provisions	2010	ARIPO

- 4 These model laws share many features. For instance, all sui generis rights contain rules of exclusion of the public and mechanisms of benefit sharing. Also, their protection solely targets uses of TCE that occur beyond rather than within its traditional context by granting economic as well as moral rights to the traditional owners. In addition, they recognize group ownership, seek protection in perpetuity and do not require any kind of formality for protection to come into effect. Yet, the sui generis rights differ with regard to the holders of rights. For the sake of this article right holders can be split into (1) legal owners (title holders) of TCE, (2) beneficiaries of

protection, i.e. the actors entitled to receive compensation, and (3) actors responsible for negotiating access with non-traditional users.

- 5 Basically, there are three systems of allocating the rights. Within the first system all of the mentioned rights in TCE are allocated to a central state agency (see the TML). Within the second system all rights are allocated to the local communities that hold the TCE (WDP, SPML). The third system establishes a mix of right holders (ARIPO). While the community is entitled to their elements of TCE, a state agency is responsible for negotiating access with non-traditional users. It is, however, not completely free in its decisions, as the respective community has to approve of any decision taken. Collected proceeds are directly transferred to the community from which the folklore originates.

C. Which Political Level Ought to Address the Protection Issue?

- 6 Any allocation of exclusive rights would have to live up to the ubiquitous character of TCE as an immaterial good. International protection in the sense of trans-border protection is still very weak in the field of immaterial property. The principle of country protection, which is part of the Revised Berne Convention, the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights), and the WIPO Performances and Phonograms Treaty ensures that the criteria for what kind of work and how protection is granted are only to be found in the respective country's legislation (*lex loci protectionis*). Thus, even if a sui generis right is granted in a particular country, the protection would only apply within this country. In order to broaden the scope of protection, any of the mentioned systems of exclusive or partly exclusive rights would have to be implemented in as many states as possible. The foundation of such an implementation should be an international treaty setting out minimal standards of protection, like the Revised Berne Convention or the World Copyright Treaty do for patents and copyright. Consequently, an individual state should address protection of TCE not only on the national level but also within the international community in order to create effective protection.

D. Evaluation of the Alternative Sui Generis Rights

- 7 Sui generis rights can be compared according to how protection preferences of traditional owners are met within the different systems as well as according to the social costs that they are likely to cause. Social costs are incurred by restricting society's non-tradi-

tional access to folklore and thus the pool of knowledge enabling socially desirable innovation. These costs may well be substantial,³ as for instance the boundaries of the rights (which elements of TCE are protected and which not) are unclearly defined (Bessen and Meurer 2008) and rights are granted automatically without any formalities and limitations in time.

- 8 Complete local right holder assignments, such as in the WDP and SPML, are likely to result in protection that is oriented at the preferences of the indigenous communities holding the TCE. This is because the decision making process lies with the actor incurring costs and benefits, that is with the indigenous groups themselves, which ascertains that TCE is only used externally if the group obtains a net benefit. It will thus be unlikely that groups grant access to elements of TCE if this affects their fundamental dignity in a disparaging way. As a result, protection is very likely to be differentiated according to the value of TCE as perceived by the communities of origin. Yet, such a system is also likely to result in substantial social costs. First of all, local TCE ownership may raise transaction costs merely through the intricacies of clearly determining exactly whom the rights should be allocated to. For instance, even if an element of TCE is currently practiced by Group A, it may very well be rooted in traditions of Group B. There are also transaction cost issues in the process of negotiating access with traditional owners. If, for instance, representation is contested, or if many group actors hold exclusive rights on the TCE elements demanded, negotiation could turn out to be very costly, as every single right holder would need to be compensated. This is likely to result in an underuse of folklore, which could cause a tragedy of the anti-commons (Heller 1998). These cost and thus usage effects can even multiply, should there be more than one group holding rights over an element of TCE. Negotiation would then have to be carried out with each owner.
- 9 Within a system that allocates all rights to a state agency, the situation is likely to be reversed. There are almost no costs of identifying the state agency as the owner and negotiations of access with a single actor are by far not as cost intensive as what could be expected to result from a local allocation of rights. But due to principal-agent problems it is very likely that local preferences for protection are not taken into consideration to the same extent as they are in the case of a local right allocation. The degree of departure from local preferences hinges on the assumptions of how the state agency acts. If regular arguments of the economic theory of bureaucracy hold, the leading bureaucrat can be expected to show budget maximizing behavior in order to increase personal utility (Niskanen 1971). This being the case, there would be clear incentives to lower restrictions and to increase the number of non-traditional access

to TCE, as this justifies raising the number of agency employees needed and the prestige associated. Consequently, we would expect higher numbers of non-traditional access than when rights are locally allocated. Conversely, bureaucrats could be assumed to behave altruistically towards local communities. Communities' preferences will then be strongly regarded in access negotiations with non-traditional users, resulting in very few principal-agent problems. Yet, it is debatable whether such behavior can be assumed to be in equilibrium. Lastly, we can assume bureaucrats to be susceptible to fraudulent behavior by third parties that wish to gain access to TCE, for instance by bribery. In that case preferences of local communities may not be regarded at all given that outsiders seeking access to TCE have a higher willingness to pay than local communities to secure bureaucratic support. This can lead to numerous access decisions that are completely disconnected from local communities' preferences. In general, assessing the likely behavior of state agency bureaucrats will be a key decision factor in determining which system of sui generis rights is appropriate.

- 10 Within the ARIPO system of mixed ownership, effects in terms of protection as well as social costs are likely to be in the middle of the spectrum that is created by the local and central allocation of rights. While the state agency is responsible for negotiating access with third parties, its decisions may always be vetoed by the respective communities. It therefore enjoys much less slack as is the case when rights are allocated centrally. Yet, the representation of traditional preferences may still not be perfect, because there will be information asymmetries between agency and communities. The costs of determining traditional owners will be similar to other local right allocation systems, yet costs of negotiating access will be reduced as outsiders only have to deal with the state agency.

E. Administration through Private Ordering

- 11 If a form of sui generis right is established, the rights still require administration. In cases where the rights are allocated to the owners on the local level, two specific tasks must be addressed. The first consists in ensuring a balance between non-traditional access and privatization of the cultural foundations (Brown 2005) – aligning the private domain where every use is exclusive with the public domain of collectiveness is essential for every system of IP rights (Dusollier 2007). The second entails assisting the local groups in managing their rights with the first task in mind. These tasks can be supported by systems of private ordering of rights which are already established in the world of Open Access Publishing (Dusollier 2007).

They aim to keep the balance between the authors and the general public's interest.

- 12 If a sui generis right is in place, a system of private ordering could strengthen the position of the owners of the TCE. For instance, they could demand from the licensees to comply with certain standards in use and licensing of folklore. Such restrictions may concern the prohibition of misappropriate actions or the obligation to enforce the owners' conditions vis-à-vis third parties. A system working through private ordering can be very flexible in view of the right holders, uses and benefit sharing mechanisms. A potential form of control executed through private ordering could require that every deriving work be under a license that complies with the original license.⁴ Nevertheless, control could go beyond that. Under another possible scheme, the rights on every deriving work could be reassigned to the owners of TCE, while the creator of the derivative only gains the right to receive a license, which entitles him for uses in compliance with the rules of the indigenous groups.
- 13 A group could determine the restriction for every use on a case by case basis. An innovative use, which is not seen as disparaging, could be allowed while a use that is more likely to conflict with the interests of the owners of TCE can be prohibited. In addition, the boundaries could be negotiated for every single use or object. A licensing system like the one described above, where the creator of a derivative has to assign all his rights to his original licensor, the owner of TCE, would create strong incentives for owners of TCE to implement a flexible system. A more open licensing means more chances of benefits, while a very wide licensing system, on the other hand, could threaten their own identity.⁵ The licensee who seeks to create a derivative work has the strong incentive to comply with the requirements of the license and to be aware of the wishes of the owner, since he is constantly facing the risk of losing his license not only for the original folklore but for the derivative, as well. A system of private ordering, which relies on numerous license agreements is likely to cause high transaction costs since every license would have to be negotiated. This could be overcome by standard licenses, a trend observable for open source software (OSS) and open access (Spindler and Zimbehel 2011). Such a system could serve as a supplement to the sui generis rights described above. A sui generis protection that targets all elements of TCE of a certain traditional community can serve as the basis of a system of private ordering.

F. Recommended Procedures

- 14 As mentioned in section 3, each country that wishes to protect its folklore from misappropriation will

have to decide which of the sui generis rights best fits their national circumstances. We have shown that different right allocation systems come with diverse cost and benefit effects. A central right allocation saves transaction costs, yet can lead to strong principal-agent problems, potentially disregarding local protection preferences, while more local systems regard local preferences yet increase transaction costs. Consequently, each country will have to strike a balance between regarding the preferences of local communities and the needs of the general public.

- 15 National policy decision makers could for instance attach a higher value to preferences of local communities than to minimizing social costs. In that case, they should choose a sui generis right that allocates all rights locally, shifting the burden of protection to the general public. This would be the case when applying the WIPO Draft Provisions (WDP) and the South Pacific Model Law (SPML). Conversely, the minimization of the social burden could be the main concern over and above regarding local preferences, in which case decision makers ought to choose the central right allocation system that is proposed in the Tunis Model Law (TML).
- 16 It is conceivable, however, that both benefit as well as cost effects of sui generis rights are simultaneously taken into consideration. Whether the social cost saving alternatives really lead to a disregard of local preferences, crucially depends on the behavioral assumptions of the bureaucrats.
- 17 If bureaucrats behave altruistically towards the preferences of local communities, the solution to the regulatory choice problem is the central right allocation in the TML. When fraudulent behavior is prevalent and local preferences are regarded as important, a local right allocation is the superior solution. Then, WDP or SPML should be chosen. If bureaucrats are driven by selfish motives such as prestige, principal-agent problems are very likely to arise. Assigning rights locally (WDP and SPML) will circumvent these, yet higher social costs will have to be accepted. The ARIPO system of mixed right ownership is an alternative, since principal agent problems can be reduced due to the vetoing power of local communities.
- 18 If local communities are given the ownership of the rights, they face a globalized market for IP rights and the possible forms of infringement that come with it (Riley 2005). This is addressed in the SPML and the UNESCO/WIPO Draft Provisions (MPUW) which both aim to establish an authority to monitor the use of the rights. A private ordering approach as described above in connection with standardized licenses can support the local groups in the administration of their rights.

- 19 While domestic legislation is limited to state borders, the immaterial character of folklore brings the risk of trans-border infringements. Every system which allocates exclusive or partly exclusive rights would have to be implemented in as many states as possible. A standardized implementation of rights on the international level seems to be a very difficult task. Even in the field of copyright law, we are far away from a harmonized system. An approach to deal with this would be a set of bilateral contracts with cross approval under the shield of an international agreement which regulates minimal protection standards. The foundation of such an implementation should be an international treaty which sets out minimal standards of protection, like the Revised Berne Convention or the World Copyright Treaty.

G. Bibliography

- ▶ Bessen, J. and M. J. Meurer (2008). Patent Failure. Princeton, Princeton University Press.
- ▶ Bicskei, M., Z. Gubaydullina and K. Bizer (2010). Der Schutz kultureller Güter: Die Ökonomie der Identität. In: R. Bendix, K. Bizer and S. Groth, Eds. Die Konstituierung von Cultural Property: Forschungsperspektiven. Göttingen, Universitätsverlag Göttingen: 135-152.
- ▶ Boldrin, M. and D. K. Levine (2008). Against Intellectual Monopoly. New York, u.a., Cambridge University Press.
- ▶ Brown, M. F. (2005). "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property." 12(1): 40-61.
- ▶ Dusollier, S. (2007). "Sharing access to intellectual property through private ordering." Chicago-Kent Law Review **82(3)**.
- ▶ Heller, M. A. (1998). "The tragedy of the anticommons: Property in the transition from Marx to markets." Harvard Law Review **111(3)**: 621-688.
- ▶ Heller, M. A. (2008). The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives. Philadelphia, Basic Books.
- ▶ Jaffe, A. B. and J. Lerner (2004). Innovation and Its Discontent. How Our Broken Patent System is Endangering Innovation and Progress, And What to Do about It. Princeton, Oxford, Princeton University Press.
- ▶ Lankau, M., K. Bizer and Z. Gubaydullina (2010). Die verborgene Effektivität minimaler Resultate in internationalen Verhandlungen: Der Fall der WIPO. In: R. Bendix, K. Bizer and S. Groth, Eds. Die Konstituierung von Cultural Property: Forschungsperspektiven. Göttingen, Universitätsverlag Göttingen: 197-220.
- ▶ Lewinski, S. v. (2007). Adequate protection of folklore - a work in progress. In: P. Torremans, Ed. Copyright Law - A Handbook of Contemporary Research. Cheltenham, UK, Edward Elgar Publishing Limited: 207-231.
- ▶ Niskanen, W. A. (1971). Bureaucracy and representative government. Chicago, Aldine-Atherton.
- ▶ Riley, A. (2005). "Straight Stealing: Towards an Indigenous System of Cultural Property Protection." Washington Law Review **80(69)**: 24-27.
- ▶ Spindler, G. and P. Zimbehl (2011). The Way we Think About Creating: The Diverging Paths of Open Source and Open Content Licences. In: L. Guibault and C. Angelopoulos, Eds. Open Content Licences: From Theory to Practice. Amsterdam, Amsterdam University Press (forthcoming).
- ▶ WIPO (2006). Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Revised Provisions for the Protection of Traditional Cultural Expressions / Expressions of Folklore. World Intellectual Property Organization, WIPO. WIPO/GRTKF/IC/9/4 (Extract).

* This paper is a product of joint research within the project "The Law and Economics of Cultural Property: An Economic Analysis of the Institutions of Rule-Making" under the umbrella of the interdisciplinary DFG Research Group "The Constituting of Cultural Property: Actors, Discourses, Contexts, Rules" at the Georg-August-University Göttingen. Kilian Bizer holds the Chair of Economic Policy and SME Research and Gerald Spindler is head of the Department of Civil Law, Commercial and Economic Law Comparative Law, Multimedia- and Telecommunication Law both at the University of Göttingen. Matthias Lankau (corresponding author: matthias.lankau@wiwi.uni-goettingen.de; Economic Policy) and Philipp Zimbehl (Economic Law) are research associates at these chairs.

- 1 TCE are considered as such when having been handed over from generation to generation. Examples of this common definition are for instance be performances such as ceremonies, rituals or dances; musical expressions such as songs or verbal expression such as stories or legends (see for instance WIPO (2006)).
- 2 The version that is used here is WIPO/GRTKF/IC/9/4. By now there have been many discussions on how to improve these provisions. Yet, the ideas included in this document shall nevertheless serve as a first baseline of comparison.
- 3 Many authors have pointed to the high social costs in stifling innovations that are generated by the system of intellectual property rights. For more details see Boldrin and Levine (2008), Heller (2008), Jaffe and Lerner (2004).
- 4 This is the case with many Open Access and Open Source licenses which contain a, so-called, viral clause.

- 5 This is unlikely to happen. Concerning the minimal standard of protection an indigenous group will seek, see: Bicskei, Gubaydullina et al. (2010).