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THE ALLOCATION OF PROPERTY RIGHTS TO INTANGIBLE CULTURAL ASSETS

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Abstract

This paper provides an economic justification for the protection of cultural property rights of indigenous groups. Cultural property either in the form of traditional knowledge or folklore carries the potential to increase wealth by adding to the knowledge base of an economy. But in order to ensure efficient use of cultural assets, the law should provide protection from overexploitation which is likely to occur as cultural assets can be characterized as a common pool resource. In contrast to other intellectual property such as inventions cultural goods are primarily provided by intrinsic motivation. External effects of using them in the production of other goods could crowd out this motivation. If cultural assets are part of the knowledge base of an economy, as argued here, protection of cultural assets should be implemented by either specific regulation by the state or the creation of property rights which can be traded on markets. International law should endeavour to provide a framework with lowest possible transaction costs while securing cultural assets.

JEL Classification: Z1, O34, H41

Keywords: Intellectual property rights, Cultural property rights, common pool resource, knowledge base

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Content

1 Introduction

The cultures of indigenous people are increasingly becoming the focus of international academic and political debate. In 2001, the annual general meeting of the World Intellectual Property Organisation (WIPO), part of the United Nations, established the Committee for the Protection of Traditional Knowledge, Folklore and Genetic Resources, in order to discuss the effective protection of indigenous knowledge in a broad forum and to develop solutions. This founding act was a result of increasing globalisation and fiercer competition among companies in the development of new products in which indigenous knowledge is increasingly in demand. Normally such knowledge is used without asking permission or allowing indigenous peoples to participate in the profits achieved. This exploitation is increasingly being viewed as unjust and unacceptable by the global public. Large non-government organisations and native countries of indigenous peoples are fighting at an international level for better protection of indigenous knowledge.

The increased level of political controversy in the debate has also attracted the attention of academia. However, efforts here are being concentrated on ethnological and sociological research. Specialised legal work is also being carried out, mostly in relation to the question of how to apply existing legal provisions to provide protection via intellectual property rights for indigenous knowledge. There is little evidence of applying the economic approach until now even though this can provide a crucial justification for the protection of cultural assets. The result of research work until now has often been a call for the establishment of new legal framework, specifically designed for the protection of indigenous knowledge and internationally enforceable (for an overview see von Lewinski 2004).

This paper provides an economic justification for the protection of such cultural property, and postulates the implementation of specified and tradable property rights for intangible cultural property. In section 2, the economic nature of indigenous knowledge is determined and the concept of intangible cultural property is defined. Section 3 explores how intangible cultural property can be protected more efficiently. On the basis of welfare economics the papers analyses the distinction between the public domain solution and the complete prohibition solution and proposes the more efficient compensation solution. Section 4 argues that the most efficient form of implementing protection of cultural goods would be to introduce specified and tradable property rights.

2 The nature of intangible cultural property

2.1 Definition of cultural property

Indigenous knowledge is diverse and difficult to define. The WIPO particularly uses the two concepts of *traditional knowledge* and *folklore*. Traditional knowledge is defined as: "all tradition-based intellectual creations and innovations, in the very broadest sense, which are constantly evolving in response to a changing environment und are generally regarded as pertaining to a particular people or territory" (WIPO 1999). Traditional knowledge is often connected to genetic resources in this context. The knowledge about the correct use of genetic resources is often more useful than the resources themselves and it is often impossible to differentiate between a genetic resource and the knowledge about its application (Barsh 1999). The concept of genetic resources is defined by the United Nations Convention on Biological Diversity (CBD) as "genetic material of actual or potential value" (United Nations 1992, § 2). Folklore is defined by the WIPO and also by UNESCO as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community." (UNESCO and WIPO 1985). In summary, the concepts thus describe traditions and forms of expression handed down orally, performing arts, the customs, rituals and celebrations of a society, methods related to nature and the universe, and special knowledge about traditional craft techniques. UNESCO refers to this as intangible cultural heritage. It concerns "practices, performances, forms of expression, knowledge and skills – as well as the related instruments, objects, artefacts and cultural areas – which communities, groups and individuals consider to be a part of their cultural heritage. This intangible cultural heritage, which is passed on from one generation to the next, is constantly renewed by communities and groups in their interaction with their environment, with nature and their history, and gives them a feeling of identity and continuity." (UNESCO 2003).

For the purposes of this paper, an intangible cultural asset could be described as an individual aspect of this intangible cultural heritage; an intangible cultural asset is therefore an individual custom, a process for using genetic resources or a form of religious expression. Viewed this way, the intangible cultural heritage of a group is thus the sum of all intangible cultural assets. Another way to describe the problem of cultural property is to distinguish between material and immaterial aspects. The distinction could be important when defining the objects of protection (see section 3). In the context of this paper, it is important to realize that cultural property is not merely ideas and knowledge put into material goods or other tangible forms but also covers intangible, immaterial contents behind them

2.2 Intangible cultural property as a common pool resource

According to the UNESCO definition, cultural heritage and consequently also intangible cultural property convey a feeling of identity. The practice of certain rituals, the pursuit of certain forms of artistic expression as well as the passing on of knowledge about the land and its flora and fauna has a bonding function for the respective group (Brown, Barnes, Cleveland et al. 1998, WIPO 1999, Fikentscher/Ramsauer 2001). As a consequence of this effect, passing on cultural knowledge to people outside the group and the practice of customs by outsiders is often not desired by the respective group and is perceived as disturbing or even intolerable (see Nordmann 2001). This particularly applies to sacred items, locations and deities of indigenous groups. An example for this type of violation is the filming of tribal rituals. Due to the religious significance of such rituals, outsiders are normally excluded from the observation and filming is not desired. However, researchers or interest groups frequently do not respect this wish and even film the rituals from helicopters (Fikentscher/Ramsauer 2001).

The filming of tribal rituals is a graphic example of the economic nature of intangible cultural assets. On the one hand, such property cannot be excluded from the use by others. In the described case, indigenous people were not able to stop the film crews from working, either by legal or other means. However, they did not wish to have outsiders present at the rituals because they disturb the performance of the ritual and reduce its utility for the indigenous people. In economics, goods with such characteristics are described as common pool resources. They are non-excludable but rivalrous in consumption.

On the other hand, rivalry in the case of intangible cultural assets only applies in relation to outsiders. Indigenous people may and even must take part in the ritual without other group members being disturbed, so they are not rivalrous within the group. These characteristics of non-excludability and non-rivalness in consumption define public goods. An intangible cultural asset therefore can have a dual economic nature depending on the reference frame. In relation to group members it is equivalent to a public good; in relation to outsiders it is a common pool resource.

2.3 Intrinsic motives in the provision of intangible cultural assets

The UNESCO definition of cultural heritage also states that it is passed on from generation to generation and renews itself through interaction with nature, the environment and history. Its provision frequently takes place on the basis of so-called intrinsic motives (Dutfield 2002, Frey/Oberholzer-Gee 1997). Intrinsic motivation can only be effective if individuals have a sense of belonging, self-determination and self-definition. As long as intrinsic motivation works, no external incentives such as

monetary payments are required for the preservation and cultivation of indigenous culture. This is fundamentally different to other intangible goods such as inventions. Due to the low intrinsic motivation to make inventions and introduce innovations, the costs and effort of the inventor are reimbursed via temporary protection provided by patents or copyright. The inventor's motivation is of an extrinsic nature, which does not imply that it is costless. After the protection period expires, the protected knowledge passes into the public domain. Such incentives are not necessary in the case of intangible cultural goods. But the fact, that intrinsic motivation is responsible for the provision of intangible cultural does by no means imply that the provision is insensitive to rewards. Frey/Oberholzer-Gee 1997 show that intrinsic motivation is easily crowded out by external reward mechanisms.

3 Protection of cultural property from the perspective of welfare economics

Intangible cultural assets can therefore be either defined as common pool resources or public goods which are provided frequently on the basis of intrinsic motivation. These characteristics are of major significance for the question of why intangible cultural property should be protected. Due to the intrinsic motivation, no incentives are required for the provision of intangible cultural goods. Nonetheless, they require protection from outsiders due to their common pool resource nature. But to provide this protection raises an additional difficulty: Temporal limitations do not make sense in the case of property rights for intangible cultural assets, as neither their value is temporary nor is there any need – as with inventions – to provide an incentive for production. In addition, it is not only a matter of protecting individual assets which have been derived from a store of knowledge, but more important to protect the store of knowledge itself. This can have far-reaching consequences. At present, intangible cultural property is insufficiently protected by law (von Lewinski 2004). Anyone can use and disseminate cultural knowledge with hardly any restrictions. Only miscellaneous products which are obtained from cultural knowledge, or translated to a "tangible medium" (Brown 2003, S. 59) can be protected for a certain period via intellectual property. The problem of cultural property is not as simple as a usual "tragedy of the commons": it is not only the problem that the outsiders use the culture without paying for it; it is worse: paying for using the cultural property may destroy the culture or the incentives to produce and maintain it because of its intrinsic nature and crowding-out effect.

In general, there are three possibilities how to deal with intangible cultural assets. The first possibility is no protection at all as by and large in the present situation in which the cultural property is located in

the *public domain*. The second possibility is *complete prohibition* of the use of indigenous knowledge by the outsiders. And the third is a *compensational solution*, which implies the possibility of using intangible cultural assets of indigenous groups for some kind of monetary compensation. The next section analyses these three solutions from the perspective of welfare economics examining their social costs and benefits.

3.1 Intangible cultural property in the public domain

3.1.1 Social benefits

Free availability of intangible cultural property can trigger positive growth effects for modern economies which use and process indigenous knowledge. The existence of many potential users increases the possibility of new innovations, which in turn lead to the growth of the entire store of knowledge. According to Romer 2006, this growth of knowledge depends on the available knowledge, on the number of users and their productivity. On the other hand, the greater the stock of knowledge, the greater the opportunities for the development of new products. According to Romer 2006, the output of an economy therefore grows at the same rate as its knowledge stock. Per capita income will thus increase if the population remains constant. The individual's opportunities for consumption are extended. If one assumes that personal utility depends on the consumption which has actually taken place, the utility for each individual increases with the amount of the consumed goods. The total utility of a modern non-indigenous society increases as the consumption of the intangible cultural assets rises.

The National Indigenous Arts Advocacy Association in Australia estimates, for example, that the cultural sector annually generates a turnover of 200 million dollars on the basis of the knowledge of Aborigines (Wiseman 2001). Indigenous knowledge in the public domain can thus clearly increase the welfare of non-indigenous societies.

3.1.2 Social costs

Apart from social benefits also social costs accrue utilizing indigenous cultural assets. Two different types of costs should be considered. First, there are costs in terms of utility losses of an indigenous group which is affected by the consumption of cultural assets by the non-indigenous group. Second, the costs of a firm using cultural goods will be zero in the public domain (free availability), but there will be social follow-up costs because the knowledge base is reduced by disincentives to sustain and develop such knowledge within the indigenous group and this will bring about less growth.

Let us now turn to the costs accruing to the indigenous group at first. The decisive factors for this are the common pool resource characteristics of intangible cultural property and the concept of identity. Assuming that the identity provided to the indigenous group by its culture is reduced when the number of outsiders using it increases, the consumption of tangible cultural goods which depend on intangible cultural goods, leads to a loss of utility for each individual of the indigenous group. We do now discuss the complex concept of identity or multiple (plural) identities. But we assume that the identity provided by the common culture or consumption of cultural goods can be decreased or even destroyed if too many outsiders use it, so that the sense of belonging is getting lost. We further assume that cultural identification is of such high importance to a person that the loss or reduction of this particular identity is undesired. (See for example Sen 2007, Akerlof/Kranton 2000, 2005, Davis 2003 or Kirman/Teschl 2004). The utility of the indigenous individuals is reduced if the outsiders have negative effects on the identity of their group, and each unit of the cultural good consumed by an outsider decreases the utility of the indigenous group. This utility decrease can be seen as costs of the indigenous group.

Let us now turn to social follow-up costs brought about by increasing demand of cultural assets by firms as an input factor. The cost functions of a firm which produces goods using intangible cultural assets basically depend on the prices of the input factors. Given a zero price for the indigenous knowledge (as far as public domain solution is applied) and under the assumption that the other factors prices are exogenous, the profit maximizing decision about the using cultural goods depends only on the price of (and consequently on the demand for) the cultural good in the respective economy. The greater this demand, the higher the price and the higher the level of production, and the greater the negative external effect on the indigenous groups.

If this effect is strong enough, it can be assumed that certain indigenous cultural aspects will lose attractiveness to such an extent that they are no longer cultivated or preserved by the indigenous group. Given the great efforts which indigenous groups invest in the maintenance and preservation of traditional knowledge (taking the example of genetic resources: Biber-Klemm 2000), this can actually lead to the disappearance of indigenous knowledge. In this way, the knowledge base of an economy would tend to be reduced by a high demand for it, and according to Romer its output would also fall. There would thus be a negative feedback effect – the more the indigenous knowledge is used the more the knowledge base of the economy will be reduced. For these social follow-up costs it is assumed that they are rising as the consumption of the intangible cultural assets grows.

3.1.3 The welfare of society

The effect of keeping intangible cultural property in the public domain is thus to increase the welfare of the non-indigenous group, while it has a negative impact on the indigenous group. In the long run and given sufficient strength, this can also have a negative effect on the non-indigenous society. In the short run indigenous people are losing and the non-indigenous society is winning. The social welfare function comprises the positive utility of the non-indigenous society, as well as the costs of the indigenous groups, and the social follow-up costs. The decisive factor now is how the increasing utility of non-indigenous society is related to the costs of the indigenous groups and the rising social follow-up costs. This depends on the value judgements in a society. The commitment to human rights in a society and the preferences of the majority group, for example, can play a role. It can be stated that the more important the indigenous groups are to the society, the lower the welfare of society as a whole will be if indigenous culture is increasingly exploited. In addition, the type of the social welfare function depends on the magnitude of the respective effect. So the outcome and the precise functional form of the social welfare function is determined by how much increased utility does indigenous culture provide to the non-indigenous society, how much do the indigenous groups suffer from the use of their culture by outsiders, and how much do the indigenous groups contribute to the preservation of indigenous knowledge and thus to the store of knowledge in the society. The level of social welfare which is created by indigenous knowledge in the public domain will thus vary considerably from one country to another.

Regardless of how high individual welfare levels are affected, the objective should be to attain the highest possible level of welfare for each society depending on its value judgements. However, it is highly questionable whether this can be achieved via intangible indigenous cultural property in the public domain. The production of cultural goods should be expanded until its marginal utility of the non-indigenous society is equivalent to the sum of the marginal costs of the indigenous groups and the social follow-up costs. However, the amount produced depends – under the conditions explained above – only on the demand for cultural goods and consequently the utility and the marginal costs rise and fall in proportion to the demand for them. There is no connection between the level of production and costs for cultural assets. The latter are not internalised via their price (due to the public domain solution). It is therefore very unlikely that an economy will achieve the optimal level of production if indigenous knowledge remains in the public domain. On the contrary, there will be regular overproduction of the goods and overexploitation of the indigenous intangible cultural assets.

3.2 Complete prohibition of the use of indigenous knowledge

A strict prohibition on the use of indigenous knowledge creates a similar problem. Intangible cultural property can no longer be used by non-indigenous groups. This means that a smaller portion of the knowledge base is thus available. This leads in turn (according to Romer 2006) to a lower growth of knowledge in an economy and consequently to reduced growth in output, as the costs of producing rise infinitely due to an infinitely high price of the cultural asset. As a consequence, no cultural goods are derived from indigenous culture for the non-indigenous society implying zero utility for the non-indigenous society. On the other hand, the indigenous group suffers no losses of utility and the indigenous knowledge base is not damaged (follow up costs are also zero).

However, this does not mean that conditions for the optimal level of production are fulfilled. This would be the case, if as soon as the cultural asset is used by an outsider, it becomes completely worthless for the respective indigenous group and loses its entire identity-providing effect. This could be true for sacred objects, for example. But there are certainly also intangible cultural goods whose use by outsiders – though not welcomed – does not lead to indigenous people immediately giving up their own use of these goods. The identity-providing effect in this case is reduced, but does not completely disappear, so that a level of production exists providing a utility increase for the non-indigenous society which compensates the utility decrease and the social follow up costs of the indigenous group. If the full prohibition was enforced, the optimal level of production could not be achieved. Instead, underproduction would be the result.

3.3 The compromise solution

The price for the use of indigenous goods should therefore assume any middle value between zero (public domain solution) and infinity (prohibition solution). Some positive price level leads to an increase of the production costs of the firm. Hence the production level for profit maximisation depends no longer solely on demand of cultural goods. The level of production with indigenous cultural assets would be lower than under the public domain solution if the compromise solution is established. The higher the price for the use of indigenous culture, the lower the output level for profit maximisation.

As part of a compensation solution, the indigenous groups should now receive the price payments. A condition for effective compensation is that the amount paid by firms to the indigenous people actually generates benefits for indigenous groups. If the compensating payments equal the utility loss connected with the outside use of the indigenous culture, the indigenous group would thus not suffer any loss of

utility and stay on the initial utility level. This would have the advantage that in this way a price for the indigenous knowledge would be set which limits output to the optimal amount.

Compared to the compensation solution, the prohibition solution is inferior as defined by the Pareto criterion (nobody is worse off while at least one is better off). This is partly due to the fact that the infinite price of the prohibition solution is also possible within the compensation solution. If, for example, sacred goods are concerned, the costs of the indigenous groups are infinitely high, which would imply infinite compensational payments and an infinite price for using indigenous culture, so that consequently the output volume is zero as well as the utility of the non-indigenous society. However, in the case of all other intangible goods with an identity-providing effect, the costs of the indigenous group is positive but not infinite so that a positive non-infinite price for the use of indigenous knowledge exists which ensures positive level of production and positive utility of the non-indigenous society. The compensation solution therefore always permits the optimal use of the respective intangible goods, depending on their type, here sacred versus non-sacred goods. The compensation solution is also superior to the public domain solution, as it always automatically leads to an optimum output. This optimum output level – from the efficiency point of view – includes the production of goods based on intangible cultural property.

4 Implementation of the compromise solution

In order to implement a compensation solution two basic approaches can be followed up: the state could specifically regulate protection by public law or else it could specify property rights and leave the actual allocation to markets according to private law. Both types of implementation of the compromise solution are briefly discussed in this section.

4.1 Protection by the state

In this approach, the state decides which aspects of indigenous culture are worthy of protection and which compensation should be made for their use. Then it grants user permits to businesses and levies a fee for them. The revenue would be passed on to the indigenous peoples. To which extent the compensation mechanism via the state is successful depends on how the state is modelled. If the state is seen as a benevolent social planner which maximises the welfare of its inhabitants, it will always ensure that all costs – the costs of the indigenous group and the social follow up costs – are internalised.

Moreover, it will only grant permission for the use of such indigenous cultural property where financial compensation is also possible. The only uncertainty in this setting is whether the state has the necessary information at its disposal, or whether it can obtain it. If the state cannot obtain the relevant information a government failure takes place. If the relevant information is available, the benevolent state will provide an optimal solution.

If the state is not assumed to be a benevolent social planner, but a structure dominated by selfish politicians, this result changes. In this view, politicians are above all interested in being re-elected. Factors such as the highly visible unemployment rate or growth rate of the economy have a decisive influence on re-elections. The problem is, now, that the figures of unemployment or growth can theoretically be improved through the use of indigenous culture as a factor of production. Politicians will follow their interests by permitting as many people as possible to use indigenous culture in order to increase growth or to lower unemployment. Apart from this, compensation payments to indigenous people are public expenditure. In negotiations with indigenous people, the state will try to reduce these payments. But as higher prices would have negative effects on business development, it is likely that the state would try to reduce the payments passed on to indigenous groups. The surplus could be spent on measures to improve re-election prospects. This can lead to a violation of the optimal compensation condition so that indigenous groups receive too little compensation. In addition, due to the usual four- or five-year election cycle, the time horizon of politicians is often very limited. The issue of long-term damage to the indigenous knowledge base is thus in particular danger of disappearing from the agenda. The danger of this type of failure on the part of the state is greater when the negotiating power of indigenous groups, which usually form a minority, is low, and when citizens show little interest in the preservation of indigenous culture as compared to economic growth. Then the majority would exploit the minority.

As the idea of a benevolent social planner is not very realistic, the state protection solution suffers under clear incentives not to provide the optimal compensation. This requires another solution which is independent of discrete political decisions – the establishment of cultural property rights.

4.2 Protection through establishment of property rights

The solution of the compensation mechanism under private law would have to take place via the establishment of property rights. According to Coase 1960, social costs can be internalised through adequate specification of property rights. A database similar to a land register would be necessary. This would have to contain information about who is entitled to dispose of which cultural property in which

way. These property rights would have to be enforceable in court. Indigenous groups would thus be equipped with statutory negotiating power. Businesses would have to negotiate with the respective group about possible compensation and its amount. Compulsory direct negotiations would guarantee that indigenous groups are fully compensated for their utility loss. The utilisation of various aspects of their culture for which no monetary compensation could be completely prohibited by the indigenous group. This opportunity for self-determination ensures that all social costs are internalised. The state would only need to guarantee and to protect such a structure of ownership.

5 Conclusion

This paper provides an economic justification for the protection of cultural property rights of indigenous groups and the establishment of cultural property rights. Cultural property either in the form of traditional knowledge or folklore carries the potential to increase wealth by adding to the knowledge base of an economy. But at the same time, cultural property shows characteristics of a common pool resource easily overused. Most important is that cultural property creates a sense of identity which can be destroyed if non-members of the group use the cultural goods. Free availability would reduce the utility for indigenous groups. In addition, many cultural goods are provided on the basis of intrinsic motivation. This distinguishes them from other intellectual assets such as inventions.

Basically there are three different approaches to handle cultural property. First, the status quo of most nations which we call the public domain solution. Within the public domain, cultural property will be used by the non-indigenous society for consumer products. This use will have negative effects on the indigenous group as well as on the knowledge base of the economy. Second, a strict and complete prohibition to use cultural property outside the indigenous group could be implemented. This would have negative effects because many goods will not be provided because they have some cultural content. The negative effects would reduce utility of the non-indigenous group. Third, there is a compromise solution putting into effect either regulation or the establishment of private property rights. In this context, indigenous groups can decide whether they rather keep or sell their intangible cultural assets. They would only sell them, if they derive a net benefit from selling, thereby increasing the overall social benefit of the entire economy. In conclusion, we suggest implementing a compromise solution based on the establishment of private property rights for intangible cultural assets.

Based on this conclusion, we further suggest, that international organizations such as the World Intellectual Property Organization should establish basic rules which are capable of reducing the overall transaction costs for states as well as private agents. Such a framework should take into account that

many cultural property rights will be transferred on an international level and not just within the jurisdiction of one state.

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