

# On cultural property and its protection - a law-and-economics comment

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## Introduction

The term *cultural property* seems to have come into vogue after the Second World War as part of efforts to prevent the recurrence of the massive war-time destruction of objects of cultural significance to various groups and, in some cases, to all of humanity. The 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>1</sup> symbolises those efforts.

Destruction is not the only doomsday scenario for cultural property. Removal of objects from their owners or region of origin is another concern. This, too, had occurred during the Second World War with the nazis' looting treasures of all kinds from occupied territories, not to mention the massive confiscation of the property of their Jewish victims everywhere. But the concern was older, as Merryman for one shows in the story of the Elgin marbles, brought from Greece

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<sup>1</sup> The Hague, 14 May 1954, [on line: [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html)]. The entire collection of UNESCO treaties on line is listed at [http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html)

to England during the 19<sup>th</sup> century.<sup>2</sup> This concern has found expression in a 1970 UNESCO treaty<sup>3</sup> and in a 1995 Unidroit Convention<sup>4</sup> seeking to halt international traffic in cultural property.

These concerns have been extended to prevent culturally significant objects or intangibles from falling into ruins, oblivion or insignificance by neglect or by commercial exploitation. Further objects of concern are traditional knowledge held by tribes and, within their environment, plants with medicinal or pharmaceutical significance for industries in the developed world; the concern here is not merely their possible disappearance but also their exploitation without due, in particular financial, recognition for current holders of that knowledge. The concern to protect traditional knowledge finds expression inter alia in the 2003 *Paris Convention for the Safeguarding of the Intangible Cultural Heritage*<sup>5</sup> and in the 2005 *Paris Convention on the Protection and Promotion of the Diversity of Cultural Expressions*<sup>6</sup>.

From here it is but one step to the question of the extinction of animal and plant species and the disappearance of rain forests as a result of encroachment by those seeking economic development. This concern – to maintain biodiversity – is generally considered to lie outside the perimeter of cultural property protection.<sup>7</sup>

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<sup>2</sup> Merryman, John Henry, "Thinking about the Elgin Marbles", (1985) 83 *Michigan Law Review* 1881-1923.

<sup>3</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, 823 U.N.T.S. 231, 9 I.L.M. 289 (entered into force 24 April 1972) [UNESCO Cultural Property Convention] [on line: [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) ]

<sup>4</sup> UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* (Rome, 24 June 1995) [on line: <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>]

<sup>5</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage 2003* (Paris, 17 October 2003) [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html) .

<sup>6</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Paris, 20 October 2005); on line: [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html) .

<sup>7</sup> For an overview of that subject, see Biller, Dan, The economics of biodiversity loss, in: *Solutions for the World's Biggest Problems: Costs and Benefits*, Bjørn Lomborg (ed.), Cambridge, Cambridge University Press, 2010, pp. 162-177.

## What is cultural property

This brief overview of treaties dealing with the protection of one or other form of cultural property makes obvious that the term is used to cover a wide variety of matters. What precisely should be included amongst the objects we seek to preserve because of their cultural significance, collectively designated as “cultural property” or “(cultural) heritage”? Surely not everything belonging to the lifestyles of earlier times would qualify, as that would simply stifle development. Cultural property appears to be reserved for objects, tangible as well as intangible, that are significant expressions of the culture or collective identity of humanity as a whole or of specific groups and that are considered to be particularly worthy of preservation because of artistic, archaeological, ethnological or historical interest.<sup>8</sup> Examples would be collections of fauna, flora, minerals or anatomy; historical buildings or landscapes, religious or other; antiquities; significant art of all kinds; traditional knowledge; folklore, customs and rites.<sup>9</sup> The French language used in Quebec might be seen here as cultural property to be preserved.

Cultural property need not necessarily take traditional forms, although much that is currently recognised as such does. In his interesting paper elsewhere in this volume, Johannes Müske stresses that new technologies can be used to capture the expressions of cultural property, such as sounds and tones, or the funeral rituals on Bali. But that is not the end of the story, since if culture is taken as “the whole way of life”, much of current culture is expressed in ways conditioned by newly available technologies and hence evolving at the pace at which these technologies appear. This is obvious for communications technologies, from the telephone, through television, to mobile phones, Skype and web 2.0, as much as for transportation technologies which give us a mobility inconceivable until now, as well as the identity, social and artistic practices that come with them. So technology does not necessarily erase culture, but may also give expression to new forms of it. Science, for one, will never be the same since the internet. Art may not be either, if it is separated from the physical supports with which it had become associated in the older culture. What of all this wealth

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<sup>8</sup> Merryman, John Henry, « Two Ways of Thinking about Cultural Property », (1986) 80 *American Journal of International Law* 831-853.

<sup>9</sup> See, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, art. 1; [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) .

of new cultural expression is significant and how it should be preserved and made accessible in digital form are unresolved questions lying ahead of us and requiring our attention. Authenticity may take on an altogether different meaning in this context.<sup>10</sup>

## **What is special about cultural property**

The use of the term “cultural property” suggests that there is something special about the class of phenomena so designated that requires our attention and perhaps specific measures for their protection or preservation. Special protection should not be granted lightly, since elites and other special interest groups in society have been known to clamour for special protection as a cover for preserving their privileges; the effect of such protection has invariably been to slow down innovation to the detriment of society at large and of the less well-off in particular.

The argument that special measures are necessary because the commodities or services are essential to our well-being is not in itself convincing either. Many essential commodities and services are available through ordinary market processes with the associated property rights and other legal infrastructure, without most of us giving it a second thought. This is obvious for food and other current consumption objects. Closer to cultural property, the preservation of antiques seems to work well enough through private markets. For individually produced or very rare artefacts like paintings, public initiative such as museums may have to complement market processes.

So what is special about cultural property? In their paper elsewhere in this volume, Biksei, Bizer and Gubaydulina point to its being associated with personal identity and dignity of members of a group. In a recent book Akerlof and Kranton argue that identity makes a useful addition to the economist’s toolkit, as it explains how persons assume roles, accept norms and make decisions.<sup>11</sup> Their view is that it allows one to account for some decisions that in the traditional full rationality model used by economists would appear anomalous, such as why immigrant children adopt the accent of their peers rather than that of their parents or

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<sup>10</sup> Bendix, Regina, *in Search of Authenticity - The Formation of folklore Studies*, Madison, WI, University of Wisconsin Press, 1997.

<sup>11</sup> Akerlof, George A. and Rachel E. Kranton, *Identity Economics: How Our Identities Shape Our Work, Wages, and Well-Being*, Princeton, Princeton University Press, 2010.

how Codes of honour operate effectively in military and other circles.<sup>12</sup> In their contribution to the volume, Hauser-Schäublin and Klenke explicitly link identity and cultural heritage. For our purposes, the argument would be that imperilling cultural property that supports persons' identity or dignity would dissolve (some of) the cement of society.

Why can the provision of this kind of cultural property not be left to ordinary market processes? Economists would look for an answer in the public good characteristics of the phenomenon in question. It is perhaps helpful to look for inspiration at a recent contribution to that literature dealing with biodiversity.<sup>13</sup> The central reasons for biodiversity requiring our attention consist mainly of three factors:

- a potential large "scale" effect;
- irreversibility;
- uncertainty, to which one might add that
- few ecosystems are undisturbed by human activity.

It is worth pondering to what extent these factors are transposable to the cultural diversity context; "human activity" might be taken here as the corrosive effect of contact with cultures based on a developed economy, mass production and standardised language. Irreversibility and uncertainty appear to be present for some forms of cultural property as well. Is protection of cultural property somewhat like erosion control in ecosystems? That would raise a collective action problem: the result will only come about with everyone or nearly everyone contributing. The temptation to free ride may be too strong for some and the enterprise may come to naught unless public authority steps in.

## **Who decides what to designate as cultural property**

Since not all cultural expression is at once significant and in (apparent) need of protection, the question arises of who should decide what qualifies. In open economies, one would be tempted to reach for the background rule, which is to leave that decision with the owner of the object or the persons directly affected. The drawback of the first solution is obvious in the title of a book by Sax: should

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<sup>12</sup> Akerlof 2010, at 11.

<sup>13</sup> Biller, Dan, The economics of biodiversity loss, in: *Solutions for the World's Biggest Problems: Costs and Benefits* Bjørn Lomborg (ed.), Cambridge, Cambridge University Press, 2010, pp. 162-177, at 174.

one let Rembrandts be used as dartboards or ritually burnt during a funeral ceremony for a very wealthy deceased?<sup>14</sup> If the decision is left to a group, one faces the question of who controls the decision-making procedure within it. How are conflicting views reconciled or conflicts resolved (for instance as regards the filming of traditional funeral rites by western film makers, as highlighted in Engelbrecht's contribution elsewhere in this volume)? The preferences of the chief or of an elite might be imposed on the rest of the group, usually to the detriment of innovation by the unorthodox. When the decision is left with the authorities at the level of the nation state, how is one to ensure that what matters for persons' identity at the local level gets its due in a playing field comprising many millions of persons? In their conclusion, Hauser-Schäublin and Klenke express misgivings about how well local interests are going to be represented in the negotiations amongst nations states at the UNESCO level. The risk of infighting amongst interest groups is obvious.

The relevance of these considerations comes out when one considers what happens in the case of a mistaken decision. A decision to protect something as cultural property comes with restrictions on what can be done with it or to it. On experience, the locals may learn that the costs outweigh the benefits. Who should have a say in the decision to reverse the decision? Perhaps here too one should consider the principle of subsidiarity: leave the decision at the lowest possible level at which the interests of all persons affected will weigh in in the decision. Peselmann and Socha elsewhere in this volume examine the problem and how it was resolved in the case of the Elbe Valley.

The subsidiarity principle would be of little guidance where the object in question is designated as part of the common heritage of all of mankind. Merryman, in a path-breaking paper in 1982,<sup>15</sup> appears to have in mind this kind of object in highlighting the "internationalist" view of cultural property: look at cultural property as "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction."<sup>16</sup> He adds: "Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or

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<sup>14</sup> Sax, Joseph L, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, Ann Arbor, University of Michigan Press, 1999.

<sup>15</sup> Merryman, John Henry, "Two Ways of Thinking about Cultural Property", (1986) 80 *American Journal of International Law* 831-853.

<sup>16</sup> Merryman 1982, at 831.

ownership, and legitimizes national export controls and demands for the "repatriation" of cultural property. As a corollary of this way of thinking, the world divides itself into source nations and market nations."<sup>17</sup>

It appears, however, that the opposite or "nationalist" view of cultural property has carried the day: what is cultural property is decided by or within nation states. Where cultural property is considered of significance for all of humanity, even national authorities would have their hands tied. Yet how this works out in practice will very much depend on the priorities of those who provide the funds for preservation.

## How to protect cultural property

Considering the extraordinary variety of phenomena designated as "cultural property", it is hardly surprising to find a bewildering variety of institutions used or advocated for their preservation: regulation of use, trade, import and export; certification and licensing; intellectual property rights; subsidies or tax advantages; nationalisation. Most of these reflect the view that ordinary market processes with the associated property rights and legal infrastructure won't do the job because of the public good character of cultural property objects or significant negative externalities associated with their loss.

The large scale of the loss of cultural property, its sometimes unique character and the irreversibility of its loss would seem to militate for extraordinary measures of preservation. Yet the level of precautions against accidents is never boundless; it should be adjusted to, but limited by, the loss they are designed to prevent – a principle known in law-and-economics as the Hand test.<sup>18</sup> Given the uncertainty regarding the speed at which loss of cultural property will occur and the evaluation of the resulting loss, it may be difficult to determine the appropriate level of precaution with precision. Some will be tempted to err of the side of caution and invoke the – rather indeterminate – precautionary principle.<sup>19</sup>

Beyond these general considerations, can we develop some general guidelines? A good place to start may be Biller's policy recommendations in the

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<sup>17</sup> Merryman 1986, 832.

<sup>18</sup> Mackaay, Ejan and Stéphane Rousseau, *Analyse économique du droit*, Paris/Montréal, Dalloz-Sirey/Éditions Thémis, 2008, (2<sup>n</sup>d ed.), no 188, at 335; Wikipedia United States v. Carroll Towing Co. [http://en.wikipedia.org/wiki/United\\_States\\_v.\\_Carroll\\_Towing\\_Co](http://en.wikipedia.org/wiki/United_States_v._Carroll_Towing_Co) .

<sup>19</sup> [http://en.wikipedia.org/wiki/Precautionary\\_principle](http://en.wikipedia.org/wiki/Precautionary_principle) .

paper on biodiversity:

- Eliminate perverse incentives
- Privatise protection where feasible and involve local communities
- Combine non-excludable attributes with excludable ones and take advantage of markets where these can deliver such tied goods
- Ensure the provision of cultural property related public goods.<sup>20</sup>

Perverse incentives are present when some persons can make money from activities that create losses to others (externalities) or can draw public money for activities without perceptible benefit to the public at large (rent-seeking). One may be tempted to think that trade in cultural objects, removing them from their region of origin, would qualify as an externality and that the appropriate answer would be to prohibit it. But this would increase the value of such objects, create a black market and draw in shady operators who can handle the risk of operating in such a market.<sup>21</sup> Surprisingly, we have learnt in trying to halt the decline of the rhinoceros and elephant populations in Africa, that it is better to allow some trade of the protected objects but in controlled fashion and to provide for access to interested persons to see them locally, giving locals an interest in providing the access (recommendation 2). It is not obvious whether this argument affects the question of whether cultural artefacts removed from their region of origin should be returned there – the Elgin marbles question mentioned above.

For intangible cultural property such as dance forms, discussed in Eggert's paper elsewhere in the collection, the broad guidelines suggest that experimentation of new forms should not be stopped (encouraging local entrepreneurship), though official certification might be reserved for the authentic forms. Some of the revenue generated by the marketing of new forms might be recycled into funds for research on the classical forms and training of young performers. This would seem to be a more promising tack than prohibiting any but the authentic forms from being expressed, as Lankau discusses in his paper in this volume.

Should one attempt to stop outsiders from drawing inspiration from these forms for developing further derivative art? This may look like a touchy subject, but consider Gauguin's paintings or van Gogh drawing inspiration from

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<sup>20</sup> Biller 2010, at 170-172

<sup>21</sup> Bator, Paul M., "An Essay on the International Trade in Art", (1982) 34 *Stanford Law Review* 275-384



Hiroshige,<sup>22</sup> which we seem to find unobjectionable? Fencing off intellectual creations from imitators and followers is done in the intellectual property world through intellectual property rights. But all of these have built-in limitations to restrict their effect to what is presumed to be minimally necessary to encourage those who make such creations, as Zimbehl explains in his contribution to the volume. Beyond it, information circulates freely and much of the economic development as we know it is based on innovations building onto earlier innovations. So far as we now understand it, this is not a constraint arbitrarily invented by the developed world to protect its privileged position, but fundamental to lifting oneself out of poverty through the advancement and application of knowledge. Whether there are other but equally promising ways of lifting the poorest nations out of poverty is an open question. Experimentation with other forms has not, so far, convincingly come up with any and has turned out in many cases to be extremely painful in terms of suffering of ordinary humans who were (unwilling participants in the experiment.

Granting rights to communities without a clear justification of their incentive effects on creation requires an entirely different logic, as Hilty has shown in a recent paper.<sup>23</sup> Should such *sui generis* rights be granted as incentives to preserve traditional knowledge? To pursue the idea, those rights would have to be perpetual; there would be a problem of who decides on what to do with them: within the community holding the rights, there could be opposition between traditionalists seeking to keep knowledge local and innovators tempted to give access against payment or to become entrepreneurs exploiting the knowledge themselves. If the latter are allowed to pursue their preferred option, would the knowledge then – in due course – become part of the stock of accessible accumulated human knowledge? Moreover, effective exploitation of knowledge in the medicinal and pharmaceutical domains may require operation at a very substantial scale, given the size of the risks of harm to humans involved; this may act as an entry barrier, but how serious it is is unclear, considering the phenomenal growth of big pharma in India and Brazil. Furthermore, creating more rights carries the risk of an anti-commons, as Bizer and Spindler have stressed in their paper in this volume: for a project requiring the consent of

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<sup>22</sup> Geller, Paul Edward, "Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remedying Infringement", (1998) 46 *Journal of the Copyright Society of the USA* 39-70.

<sup>23</sup> Hilty, Reto M., *Rationales for the Legal Protection of Intangible Goods and Cultural Heritage*, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-10, 2009, <http://ssrn.com/abstract=1470602> .

various rights holders, having too many rights, each with an effective veto right, may effectively stifle development.<sup>24</sup> In some cases, such as the tradecraft of goldsmiths' being patented discussed in the Hauser-Schäublin and Klenke paper, the wiser course might be to leave this knowledge unpatentable, in the public domain, forcing people to make their money on the artefacts they can produce with it.

A brief observation should be added on the role of the UNESCO recognition of world heritage status to particular objects or monuments. It illustrates the difficulty highlighted above of who has a voice in the decision to recognise something as cultural property. The recognition itself acts economically like a – rather exclusive – standard or a collective trade-mark somewhat along the lines of geographical indications.<sup>25</sup> A trade-mark conveys to consumers information that would otherwise be much costlier or even impossible to glean, simplifying and accelerating their decision as to whether to acquire or go and visit the object in question. The trade-mark itself does not stop anyone from offering similar ware but with a different label, perhaps quite successfully as French wine growers, insisting on their *appellations controlees*, discovered to their dismay in competition with wines from Australia, South Africa and Chile: consumers were not willing to pay premium price for those labels. So whilst there appears to be much “horse trading” around UNESCO recognition of world heritage status, the result is probably less distorting of ordinary market processes than one might fear.

## Conclusion

Cultural property sounds like a powerful battle cry to spur people into action to protect common heritage. Terms matter, as Groth stresses in his paper in this collection. Stirring images can, however, be misleading. People may believe that extending copyright will protect poor authors, rather than the fat cats, or that a trade embargo is the best way of preserving cultural artefacts, whereas it is never fully effective and generally conjures up a black market with the attendant

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<sup>24</sup> Heller, who first articulated the concept in a paper in 1988, summarises the literature in a recent book: Heller, Michael A., *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, New York, Basic Books, 2008.

<sup>25</sup> A good summary of which may be found in Hughes, Justin, “Champagne, Feta, and Bourbon - The Spirited Debate About Geographical Indications”, (2007) 58 *Hastings Law Journal* 299-386.

corruption of officials who supervise the embargo. Good intentions are no excuse for bad results.

In this brief comment, I have raised doubts as to the soundness of cultural property as an analytical concept. Many of the concerns that lie behind it appear to mirror the North-South or developing-developed nations debate. A good part of significant cultural property or world heritage is situated in developing countries, whereas the greatest concern to preserve it may be present in developed countries. One may be concerned that economic development lifting the poorest nations out of their poverty may be bought with a significant loss of cultural property, and want to do something about it. Market processes are not naturally protective of cultural property unless it is backed by willingness to pay.

The difficulty is that the institutions that spring to mind to protect cultural property may have significant costs in terms of development and access to knowledge. The challenge is to understand the function of existing market and non-market institutions and to tailor adjustments to them so as achieve significant protection of cultural protection at acceptable cost.