Between Intellectual and Cultural Property:
Myths of Authorship and Common Heritage in the Protection of Traditional Cultural Expressions

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Abstract
Since the 1970s international law has tried to provide protection for traditional knowledge (TK) and traditional cultural expressions (TCEs). Academics, activists and policymakers have discussed how to apply a legal framework based on Western norms of authorship on various forms of creativity that exist in different traditional communities. While aiming to acknowledge indigenous rights, this discourse also reflects assumptions and distinctions regarding differences between indigenous and non-indigenous cultures, relating to concepts of commons as well as individual and collective authorship. Here certain norms of cultural creativity are taken for granted, not only with regards to indigenous cultures but also regarding a Western cultural heritage. This article questions these assumptions by analyzing international legislation regarding the protection of TCEs and comparing them to the articulation of creativity and cultural entitlements in European cultural and legal discourses. It takes a particular paragraph in the Swedish copyright law, regarding the so called "protection of classics", as a case study to discuss the inconsistencies between individual authorship and collective cultural entitlements within Western copyright law. Eventually it takes a decolonizing perspective on dichotomies between concepts such as: Western/non-Western; modern/traditional; authored/non-authored and intellectual property/cultural property.

Keywords: intellectual property, cultural property, authorship, traditional knowledge, biopiracy, "protection of classics", commons

Introduction

> If we as an international community of critical scholars want to tackle the problem of how to embrace non-Western framings of law, we have to confront the supposed absence of myth in "modernity". The birth of the rational man and modern law are indeed just as mythical; the portrayal of the lawless nature of the savage has been used to justify the need for rationality and universality, but these concepts are just as mythical as the savage's supposed irrationality and bestiality. Instead of exoticising the other, the law needs to decolonise internally, only by "exoticising" its own myths can it de-exotise the other. (Vermeylen 2013, 200)

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As Saskia Vermeylen points out, dichotomies between Western and non-Western, or traditional and non-traditional, cultures convey preconceived images of "the other", but they also convey preconceived images of "oneself". The challenge when speaking from a culturally dominant position is not so much to deconstruct the image of the other, but to deconstruct the image of oneself and acknowledge the power that image exercises. This article addresses how the dichotomy between commons and authorship—between collective creativity and private appropriation—is inscribed in a colonial imagination. The discursive polarization between "traditional" culture and "modern", "Western" culture incorporates different understandings of authorship, commons, and intellectual and cultural property. This article analyses how authorship and the commons are conceptualized in a legal discourse on traditional and non-traditional cultural expressions, approached through a decolonizing perspective which takes the colonising culture, and not the colonised, as its object of deconstruction.

The article begins with an overview of how the discourse on traditional cultural expressions has changed since the 1970s and how it relates to the parallel and partly intertwined discourse on biopiracy and the protection of traditional knowledge and genetic resources. This highlights the impossibility of making clear-cut distinctions between natural and cultural—material and immaterial—resources. This is followed by a discussion on the romantic idolisation of the individual author but also of collectively created folk art and how this challenges the dichotomy between Western and non-Western art as one between individual and collective authorship. This leads up to an analysis of a particular paragraph in the Swedish copyright law, known as "the protection of classics", which serves as a case study that exemplifies how a Western law, based on individual rights of authorship, also acknowledges works of particular importance as common cultural property. Looking at the protection of classics contributes to an internal decolonisation of Western law by exposing the inconsistencies hiding behind the myth of rationality. The last section relates the question of authorship to a hierarchy of different property regimes and discusses what these different perspectives on traditional and non-traditional, cultural expressions actually say about how we can view authorship, commons and intellectual property. Finally the article reflects on how the protection of classics offers a space of intervention where an internal decolonisation of Scandinavian copyright law can take place.

From Folklore to Traditional Cultural Expressions

Since its adoption in 1886, the *Berne Convention for the Protection of Artistic and Literary Works* has been one of the most important instruments for the international harmonization of national copyright laws. When the Berne Convention was revised at the Stockholm meeting in 1967, an amendment was passed that protected anonymous and unpublished works. This was the first attempt to provide some kind of international copyright protection for expressions of folklore (Hemmungs Wirtén 2010; Hafstein 2014). It coincided with a global development towards decolonization, in which some nations were gaining independence from former colonial empires while other, sovereign, developing nations were claiming participation and influence

in international politics. At the Stockholm meeting, the issue of global justice took an important position on the Intellectual Property Rights (IPR) agenda which lead to, for instance, a discussion of the global exchange of knowledge. Representatives of the developing world criticized the global IPR regime for maintaining colonial inequalities that positioned them as "recipients of knowledge ultimately produced somewhere else", while it discarded and excluded folklore and traditional knowledge as not qualified for protection (Hemmungs Wirtén 2010, 550).

During the 1970s, developing countries saw how traditional patterns and expressions of folklore were being increasingly commercialized, and called for the United Nations Educational, Scientific and Cultural Organization (UNESCO) to establish protection for folklore. UNESCO turned to the World Intellectual Property Organization (WIPO) and together they developed the "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions". This document was presented in 1985 as a model for the protection of folklore that states could utilize in national legislation at will. The model provisions were originally intended to lead to an international convention. Although this never happened, the model provisions did have an impact on national legislation. One example is Ghana, which incorporated a protection for folklore into its national legislation the same year that the model provisions were released (Perlman 2011; Boateng 2011; de Beukelaer & Fredriksson forthcoming).

The political landscape changed in many ways during the 1990s. Global justice remained a core issue, but a wider range of social interests, such as the environment and indigenous rights, made their way onto the political agenda. These perspectives were also present in the *Convention on Biological Diversity* (CBD), which was adopted by the UN in 1992. The main focus of the convention was environmental protection, but it acknowledged indigenous rights, with Article 1 of the CBD calling for a:

> …fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. (CBD Article 1)

This statement refers not only to biological resources, but also to the rights of indigenous people to the traditional knowledge that they hold about those resources. This was intended to address the problem of biopiracy that had grown throughout the 1980s. Biopiracy refers to the illegitimate appropriation of locally held knowledge by non-local commercial actors. It is usually associated with Western pharmaceutical companies who forage the rain forests of biodiversity-rich developing countries to exploit and commercialize biological substances that have been used by indigenous people for generations.

The most obvious problem with biopiracy is that it reinforces economic inequalities through a neocolonial appropriation of commercially valuable resources from the developing world. There is, however, also a cultural side to biopiracy, since it tends to decontextualize resources—not only the plants and species themselves, but also

locally held knowledge on how to use them—that play an important role in local traditions and cultures. There are, in short, cultural and religious values to these resources that are neglected and violated when they are commercialized as products for Western consumers (Shiva 2007; Oguamanam 2006; Robinson et al. 2014; Dahlin & Fredriksson 2017; Fredriksson 2017). The debates about patenting of traditional knowledge speaks to the impossibility to make a clear distinction between natural and intellectual resources in traditional communities, as well as to the problems that arise when alienating certain resources from their original context.

Throughout the 1990s, the views held by WIPO and UNESCO on folklore began to change. Cultural expressions increasingly came to be regarded as embedded in holistic cultural systems, much like traditional knowledge. Erica-Irene Daes concluded in a WIPO report from 1993 that "A song, for example, is not a 'commodity', a 'good', or a form of 'property', but one of the manifestations of an ancient and continuing relationship between the people and their territory" (Daes 1993, in Perlman 2011). At the WIPO and UNESCO World Forum in Phuket in 1997, representatives of indigenous peoples in Australia criticized the concept of "folklore" for being: "narrowly defined". They argued that it should not be limited to artistic expressions but should include "knowledge systems and biological diversity". Since the word "folklore" was seen to connote inferiority, they recommended replacing it with "indigenous intellectual and cultural property" (Perlman 2011). In the following years, UNESCO and WIPO undertook a number of fact-finding missions. The term "traditional knowledge" became increasingly used, and came to encompass expressions of folklore.

UNESCO and WIPO issued their "Revised Provisions for the Protection of Traditional Cultural Expressions/Expression of Folklore" in 2005. This was an attempt to create guidelines for the protection of folklore, which in the document was primarily defined as traditional cultural expressions (TCEs). This change of terminology marked a turn in views of folklore/TCEs.

There are several significant differences between folklore as it is defined in the model provisions and the understanding of TCEs that underpins the revised version. The model provisions saw folklore as an artistic expression, while the revised version sees TCEs as an expression of "traditional culture and knowledge". The revised version acknowledges that traditional cultural expressions need to be protected as emanating from and representing not only an individual creator but also a specific, cultural community. Furthermore, the model provisions saw the community as a "beneficiary of protection", while the revised version sees it as an "independent normative realm whose customary laws are to be respected" (Perlman 2011, 127). The revised version recognizes that indigenous people are not only subject to, and protected by, domestic laws, but also have their own customary rights that both domestic and international laws must respect. Unlike the model provisions, the revised version refers explicitly to indigenous people as rights holders.

As this new paradigm emerged, folklore also came to be defined as one form of traditional knowledge. WIPO presented in 2001 a model in which folklore (i.e. cultural expressions) and indigenous knowledge (i.e. environmental, medical and technical

knowledge) together constitute traditional knowledge. This is, in turn, part of the entire heritage of a cultural community. Perlman (2011, 128) concludes that "The indivisibility of TCEs and traditional knowledge […] also echoes the holism espoused by many in the indigenous people's movement, given global resonance by the drive to conserve the world's biodiversity."

The shift towards TCEs tends to move the discussion towards another legal sphere: if folklore as a cultural expression is a copyright issue, then traditional knowledge is primarily protected or exploited through patents (Strather 2011). This brings us back to the issue of biopiracy, which may be the most blatant example of the problems of expropriation that threaten both cultural and natural resources. The problem with biopiracy as well as with the abuse of TCEs is that a resource that has been commonly used and governed within a community is being appropriated and privatized by external actors, who might exploit it in ways that disempower that community and violate its cultural values and natural resources.

The Romantic Author and the Cult of the Collective

The primacy of individual ownership that underpins biopiracy is equally central to a traditional Western understanding of art and culture. In her ground-breaking article "The Genius and the Copyright" from 1984, Martha Woodmansee examined the concept of "authorship". She describes how English and German romanticists gave birth to a new understanding of authorship that German authors used as an argument in their campaigns for a federal copyright law among the German states. While the pre-romantic author had been regarded as a learned craftsman who wrote in accordance to existing aesthetic rules and conventions, the romanticists minimized the elements of craftsmanship and defined the process of aesthetic production as an expression of the author's own, internal creative capacities. The author was sanctified to what Edward Young called an "original genius" and the work of literature was no longer the product of an intellectual craft but rather a unique and original expression of the author's personality—an immediate outflow of the superior creator's exceptional inner qualities (Young, 1759/1918). This redefinition of authorship created an essential bond between the author and the work which the German writers could use to legitimize their own claims of literary ownership and argue for a federal copyright law (Woodmansee, 1984).

Since then, a great deal of academic research has looked at how the romantic author has become an ideal type of creator in Western copyright laws that have, consequently, been modelled on the concept of the author as an individual, original creator (Rose 1993; Hemmungs Wirtén 2004; Fredriksson 2012; 2014). Basing the legal definition of authorship on this romantic myth has come to deny legal recognition to forms of creativity that do not fit that conception of authorship, such as Traditional Cultural Expressions which are usually associated with a more collective creative process. This definition of authorship has generally tended to favour creators from a Western cultural sphere at the expense of non-Western of indigenous creators. Intellectual property, with its emphasis on originality and individualism, thus becomes a "language of

entitlement" that developed countries can utilize to exploit resources from developing countries (Boyle 1997, 173).[1]

At the same time, the romantic preoccupation with folk art acknowledges a creative potential of the collective. In the late 18th century, Johan Gottfried Herder and other prominent romantic thinkers embraced folk art, in literature and in music, as the expression of a collective *volksgeist*. Folk culture was cherished as an expression of collective traits and values, shared by a nation or a cultural community. This was evident in, for example, the romanticists' interest in the Grimm brothers' collection of fairy tales, and in the cult of the Celtic bard Ossian.

A collection of *The Songs of Ossian* was first published in 1765 by the Scottish writer James Macpherson. These were allegedly ancient Celtic poems attributed to the legendary bard Ossian, a well-known character from Celtic mythology. Macpherson claimed to have merely gathered these poems, but it later became known that Macpherson had written them himself. Ossian nevertheless became a cult figure for the romantic movement, as he personified the idea of the original visionary author. The songs of Ossian are interesting as they express both a fascination for folk art, emanating from a collective consciousness, and a cult that praises individual and autonomous genius.

The authorial voice of the Grimm brothers is equally ambiguous. On the one hand they made great efforts to collect and compile orally narrated stories that they considered typical for a popular German tradition. On the other hand, the Grimm brothers were, in the words of Jack Zipes:

> …not mere collectors. In fact, their main accomplishment in publishing their two volumes of 156 tales in 1812 and 1815 was to *create* an ideal type of literary fairy tales, one that was intended to be as close to the oral tradition as possible while incorporating stylistic, formal and substantial thematic changes to appeal to a growing middle-class audience. (Zipes1987, 68)

The work of Jacob and Wilhelm Grimm thus straddles the border between editing and writing, and the tales are a product of both individual and collective creativity: they are equally and simultaneously authored by the Grimm brothers and by the German *volksgeist*.

The romantic understanding of expressions of folk art as embedded in, and representative of, a holistic social and cultural system was akin to how traditional cultural expressions came to be defined in the 1990s. And yet, when this folk art became canonized, it was necessary for it to be, in one way or another, authored. Although the songs of Ossian and the tales of the Grimm brothers were assumed to be anonymous products of a collective imagination, they were attributed to individual collectors and scribes who emerged as their authors in place of an anonymous collective *volksgeist*. As I will return to later, this operation hides the fact that the chorus of indistinguishable voices that make up this anonymous, collective narration may very well consist of individual authors who are made indistinguishable by the label "folk art" or "traditional cultural expression".

This complex relation between individual authorship and collective composition is also evident in the discussions on folklore and anonymous works at the 1967 Stockholm meeting on the Berne Convention. Valdimar Hafstein has pointed out that even when the legislators discussed folklore—a form of art that is defined as collectively produced and reproduced within a cultural community—they defined it as the work of an "unknown author". The legal discourse could simply not address works as expressions of collective processes without a single point or person of origin (Hafstein, 2014, 18).

It is no coincidence that the romantic author and folklore were invented simultaneously, since the two were intertwined from the outset. Folklore is defined by its lack of individual authors, which makes it a binary, dialectic opposite to modern authorship. Hafstein argues:

> Folklore, in fact, came to be defined as such only with reference to norms of originality and ownership intrinsic to authorship and the intellectual property regime. A critical genealogy allows us to understand folklore as a constitutive outside of authorship. Folklore is the nonauthored. Better yet, it is the antiauthored. It circumscribes the discursive domain of authorship and defines the criterion of originality. Without folklore, no authorship—or at least it would not have the contours we know and recognize. (Hafstein 2014, 22)

The authored and the nonauthored are thus inherently interconnected, and both individual creativity and collective composition were idealized within romantic aesthetics.

Cultural Property and Commons

The romantic cult of folk art reminds us that the idea that artistic expressions are representative of an entire culture is not unique to indigenous or traditional communities but has been equally significant to Western culture since the late 18th century. The most important difference between TCEs and the Western canon might not be the nature of the works, but the different concept of authorship applied to them. While indigenous cultural expressions are seen as anonymous and collectively created, non-indigenous cultural expressions are assumed to be products of individual artists. This is primarily a consequence of how a Western discourse on art and creativity disregards creative agency from other parts of the world.

There are, of course, many examples of attributed works within traditional cultures. Accomplished craftspersons have been acknowledged as individual creators within their own community all across the world, but when their works are displayed in museums in Europe they become anonymized ethnographic objects representing an entire culture. This not only applies to material works of art. As anthropologist Joann Keali'inohomoku, has pointed out, dance within first nation communities often have its own highly respected dancers and choreographers, these are just not recognized as individual creators when Western dance scholars categorise their works into distinctions between artistic (Western) and ethnic (non-Western) dance

(Keali'inohomoku, 1970/1983). Indigenous cultural expressions are thus seen as representative of and belonging to a cultural community, while non-indigenous cultural expressions are representative of individual creators and belong to those individuals. Consequently, indigenous cultural expressions tend to be seen as part of a commons by default, while non-indigenous cultural expressions are seen as private property by default.

This corresponds to a distinction between intellectual property and cultural property. Cultural property has been described as the "fourth estate" of property, distinct from personal property, real estate property and intellectual property (Wilf 2001). The term "cultural property" is used to describe resources that carry particular meaning for a cultural community, and in this way are considered to belong to this community. The term was originally most often applied to tangible cultural artefacts, but it has increasingly come to encompass also intangible cultural heritage (Carpenter et al. 2009). Joseph Slaughter argues that the distinction between intellectual property and cultural property follows certain colonial boundaries:

> Accordingly, we in the West produce spontaneous original intellectual property: they in the rest of the world have a rich (though probably burdensome) collective legacy of cultural heritage and traditional knowledge that is, so the logic goes, part of what keeps their societies underdeveloped. (Slaughter 2011, 198-199)

As Fiona MacMillan points out, this is a mutual loss: while the assumption that "the West lacks intangible cultural property is socially (and culturally) impoverishing", the perceived lack of individual authorship in non-Western cultures can also expose those cultures to appropriation. (MacMillan 2015, 61).

While the idea of cultural property in some senses rely on a colonial cultural distinction, it also serves to protect traditional culture from a form of appropriation that threatens all resources that can be perceived as commons in the sense that they lack clearly distinguishable individual owners. In some indigenous communities certain resources—such as traditional knowledge or environmental resources—are managed as a form of a commons, in the sense that they are being collectively shared within a community according to certain norms. The discussion on biopiracy is one example of how indigenous uses of biological material and traditional knowledge can be a kind of commons that is often under threat of being privatised and exploited.

It is important to remember that uncritically associating traditional knowledge—or other indigenous resources—with commons runs the risk of reproducing a colonial logic of dispossession by regarding indigenous spaces as a *terra nullius* in which indigenous resources are there for the taking, as long as they have not been claimed by anyone who can act as a legitimate owner under Western law—in this case intellectual property rights. If the concept of cultural property aims to prevent such appropriation of cultural resources, then the Convention of Biological Diversity tries to offer a similar kind of protection for genetic resources.

Before the CBD, genetic resources had been defined as the "common heritage of mankind" which, in this case, had the consequence that they could be freely

exploited by any commercial actor (Hemmungs Wirtén 2007). The doctrine of the common heritage of mankind grew out of the same global justice movement that put folklore onto the IPR agenda in the 1970s. The term had originally been used to refer to global commons such as outer space, the ocean bed and Antarctica, and the motive for declaring such resources to be the common heritage of mankind was to prevent them from being privatized and exploited by individual states or corporations. The United States, on the other hand, preferred another interpretation, and argued that the common heritage of mankind merely meant that "no country has sovereignty over a common space but may acquire exclusive property rights in its resources". This was taken to mean that no one could own the land but anyone could exploit it (Noyes 2012, 451). This interpretation eventually came to apply to the definition of biological resources as a common heritage of mankind. The CBD responded to this by redefining genetic resources as the property of sovereign states in order to give national legislators the right to prevent foreign companies from appropriating such resources without the consent of local owners.

This reflects a certain confusion regarding what a commons actually is. Most people working with, or studying, commons as a form of resource management agree that a resource that is free for anyone to use in any way is not really a commons but rather an *open access resource* (Dahlin & Fredriksson 2017; Ostrom 1999; Bollier 2002). A commons is, in contrast, defined by the fact that its use is formally or informally regulated and restricted to a specific community. The way that the concept of a "commons of all mankind" came to be applied to genetic resources, thus made them open-access resources rather than commons. In this regard, the CBD can be said to enclose these resources, but in a way that makes it possible to manage them as commons rather than as open-access resources, which ensures a more sustainable exploitation.

Conflating commons with open-access resources in this way runs the risk of disregarding the norms and rules that already exist within the local communities that have governed the resources for generations. Furthermore, assuming that those resources are ungoverned and unaccounted for also reproduces the stereotype that Vermeylen describes as the "lawless nature of the savage". The problem is thus not a lack of property rules in indigenous communities; the problem is that the customary laws that exist and that have been adapted to those resources are overruled when another property system takes precedence through international regulations and trade agreements such as Trade-Related Aspects of Intellectual Property Rights (TRIPS) (de Beukelaer & Fredriksson forthcoming; Fredriksson 2012; Drahos & Braithwaithe 2002). Such agreements impose a Euromerican system of intellectual property rights as an international one-size-fits-all model, in spite of the fact that it is associated with a certain—rather narrow—type of cultural creativity formulated by European romanticists in the late 18th and early 19th centuries. The significant difference between customary law and international regulatory regimes is one of power and subordination, since the social system that spawned Western law and the property regime that it supports has come to dominate the world through colonialism and subsequent neoliberal globalization.

The Protection of Classics: Cultural Property as Intellectual Property

The view of Western law as a homogenous body of consistent ideas, norms and rules is yet another myth of modernity. It has been emphasized, repeatedly, that copyright law is crafted around the rights of the individual creator, drawn from the romantic notion of an original genius. However, romanticism also acknowledged collective composition, and not only romantic aesthetics, but also the law, can incorporate contradictory perspectives on literary rights and authorship. An example from Scandinavian copyright law that illustrates this heterogeneity of perspectives is the so called "protection of classics" ["klassikerskyddet"], which undermines the idea of a consistent, legally codified, authorial subject by incorporating an alternative way to acknowledge cultural entitlements, similar to that of cultural property, within the copyright framework.

The protection of classics was formulated in the 1950s and still formally exists in several Scandinavian copyright laws. The following discussion will focus on the Swedish Act on Copyright to Literary and Artistic Works (SFS 1960:729) but an almost identical provision exists in the Finnish copyright act (1961/404, § 53), and a similar one can be found in the Norwegian copyright act (§ 48). The protection of classics is codified in Paragraph 51 of the current Swedish copyright act (SFS 1960:729), stating that:

> If a literary or artistic work is rendered in a way that offends the interests of spiritual cultivation, a court may, at the request of an authority appointed by the government, prohibit distribution and sanction a fine. What is here stated shall not apply to reproductions rendered during the lifetime of the author.[2]
>
> SFS 1960:729, § 51

When it was passed in 1960, this paragraph was intended to protect older works of art that were in the public domain, and considered to be of particular cultural importance, against derogatory adaptions. The preamble that preceded the law stated that the objective of the paragraph was to give "the public the authority to interfere to protect the moral values in the more significant works of art and literature", and "to protect the free works, primarily the classical masterpieces, against being rendered in a way that can be regarded as a distortion" (SOU 1956:25, 403).[3] Examples of such distortions were jazz adaptions of classical masterpieces, and semi-pornographic editions of literary classics.[4]

The protection of classics can be described as providing an eternal moral right to works of particular cultural significance, but it defines "society", rather than the original author's estate, as the rights holder. The interest of society in this case is represented by the Swedish Academy, the Musical Academy and the Academy of Fine Arts, and the preamble to the law argued that only these institutions should have the right to prosecute according to Paragraph 51 (SOU 1956: 25, 410). In practice, the academies have been very reluctant to prosecute, and in the few cases in which individuals have reported possible violations of Paragraph 51 to the academies, they have never taken a case to court (Fredriksson 2009; Österlund 2013).

Many aspects of the protection of classics makes it an anomaly in current copyright thinking. First of all, the protection applies a normative standard that is alien to copyright thinking in general, where the definition of a protected work relies on originality and not on artistic quality. Secondly, it extends the rights indefinitely, which is contrary to copyright tradition in which the temporality of the rights of authorship have always been a cornerstone. Thirdly, the rights are attributed not to an individual author or rights holder, but to an obscure cultural community.

It is not clear whose interests the law is intended to protect. Initially, the preamble discusses the law as an extension of the moral rights of the author, where the public acts in the name of the author (SOU 1956:25, 407). A few pages later, however, the general public emerges as the entity whose interests are to be protected. The protection of classics has become distinct from the moral rights of the author, and it is stated that the protection of classics gives "the public an independent right, apart from the moral right [of the author], to interfere against such abuses" (SOU 1956:25, 410).[5] It is also significant that although the report discards the idea that the public should interfere with a living author's work, it maintains a distinction between the interests of the author and the interests of the public. That the protection of classics arises immediately after the death of the author, furthermore, means that the public could act against distortion of a work even if the author's inheritors or other secondary copyright holders have accepted it. Thus, in this case the rights of the public would be given priority over the rights of the secondary copyright holders (SOU 1956:25, 410).

The definition of the "public", whose interests are to be protected by this law, is equally diffuse. The preamble clearly states that a revision of a work must be perceived as offensive "by the educated public" in order to be a violation but makes no suggestions about who or what can constitute such an "educated public" (SOU 1956:25, 409). The fact that the origins of the work are not geographically defined—i.e. the law can in theory apply to works from anywhere in the world—indicates that it is not only a protection of a national heritage. The reference to "classical masterpieces", the examples from a Western canon and the fact that the protection is enforced by the academies of art however indicate that the is intended to protect some form of Western cultural heritage.

Similar provisions had been previously proposed in Sweden, but never accepted. On this occasion, however, the act was passed without any significant opposition, and although the legislators at the time acknowledged that it had potential implications for free speech, the need to protect the cultural heritage was considered to be more important. Furthermore, it was claimed that the protection of classics was not unique to Swedish law and that similar statutes existed in several countries including Denmark, Finland and Italy. When the Berne Convention was discussed at the Brussels Conference in 1948, it was proposed that the convention include a form of *droit au respect* that was particularly adapted for protecting works of exceptional cultural significance that had passed into the public domain (SOU 1956:25, 405).

The fact that this paragraph is introduced as late as the 1950s may appear anachronistic but is actually a very timely reaction to the growth of popular culture.

The examples mentioned in the preambles and the few cases that were raised but never taken to court often concern jazz adaptions or other forms of new cultural genres, and they all tell the same story: the Western tradition needs to be protected against commercial culture (Fredriksson 2009; Österlund 2013). What makes the protection of classics particularly interesting in this context is that it is essentially a cultural heritage clause embedded in a copyright law. As such, paragraph 51 of the Swedish copyright act addresses the object of protection—the work of art—not as intellectual property, belonging to the individual, but as cultural property belonging to the people, or the "educated public". Consequently, the protection of classics not only questions the internal consistency of Swedish copyright law and the assumption that the West has not cultural property, it also compromises the distinction between intellectual and cultural property.

New Perspectives on Authorship, Collectivity and Property

Swiss folklorist Eduard Hoffmann-Krayer wrote in 1903: "The 'soul of the folk' does not produce, it reproduces".[6] Drawing on Antonio Gramsci, Hafstein reformulates this to: "*The subaltern do not produce, they reproduce*" (Hafstein 2014, 25). This applies not only to the European peasants that Hoffman-Krayer originally referred to, but to all subordinate groups who are, or have been, denied an authorial voice. In the bourgeois household, women, for example, were assigned the role of reproducing not only the family, but also "national culture", by passing it on to the children in the form of "the mother tongue, folktales, lullabies, foodways, costumes, and customs" (Hafstein 2014, 25). They were, nevertheless, not considered capable of creating art or holding property. Many of the story tellers the Grimm brothers consulted when gathering tales for their compilations were young, middle-class women (Zipes 1987). We can assume that these women—like most carriers of an oral tradition—made their own adaptions of the stories depending on the audience, but none of them embodied an authorial persona in the way that the Grimm brothers did.

Today, we may use the same formulation to describe how indigenous cultures are ascribed a reproductive form of creativity that idealizes them as carriers of ancient traditions and custodians of cultural property but refuses them the capacity to create works of individual authorship that qualify as intellectual property. The problem with this logic is not the insight that the creativity of the "folk"—or the subaltern—is collective and reproductive. The problem is the assumption that the authorial voice cannot be collective, and that there is a clear distinction between the productive and the reproductive, between creating *ex nihilo* and crafting without any original contribution.

Like Vermeylen, Hafstein implies that it might be more important to deconstruct Western society's myths about itself than its myths about the other:

> Instead of granting folklore a degree of originality by postulating individual origination, I propose that we recognize the cult and concept of originality for what it is: a Romantic relic and the ideological reflex of a particular economic order. Rather than claim a measure of originality for folklore, we should repudiate originality

> itself and embrace instead a social concept of creativity, along the lines of theories of intertextuality and distributed innovation. (Hafstein 2004, 308)

As Hafstein implies, cultural theory abandoned long ago the ideas of the autonomous artist and artwork that underpins the logics of intellectual property and replaced them with a more intertextual understanding of art and creativity as socially and semiotically intertwined processes (c.f. Barthes 1968/1977; Foucault 1969/1977).

This shift is present not only in cultural theory. Hafstein emphasises that collaborative creativity is becoming increasingly dominant for contemporary cultural production. The idea of individual authorship is incompatible with a wide range of cultural expressions today, from industrial design and large movie productions to digital remixing and swarm intelligence. If the (constructed) distinction between traditional and non-traditional cultural expressions has been exaggerated throughout history, then these (imagined) differences are further compromised as cultural production becomes increasingly digitized, and promotes collaborative and reconfigurative ways of creating art. And as Hafstein argues, many of these examples show that "The language of folklore often captures creative processes and products more accurately than the language of authorship" (Hafstein 2014, 36).

These new modes of creativity have led to extensive conflicts between copyright holders and pirates, and arguments over the rights of authorship, access to culture and creative liberties to remix and reproduce copyrighted material. To some extent, creative commons licenses and open-access publishing have provided alternative ways to regulate the distribution of, and access to, culture and information within the IPR system (Dahlin & Fredriksson 2017; Fredriksson 2015). On the whole, however, such initiatives come across as *ad hoc* solutions to problems associated with a system that is becoming increasingly unable to serve its purpose and protect and promote culture and creativity.

Many have concluded that IPRs are insufficient to capture the cultural entitlements that are related to traditional knowledge and traditional cultural expressions. In the discussion of how the global IPR regime does not correspond to the needs or conditions of indigenous creativity, traditional cultural expressions are generally portrayed as an anomaly that deviates from international norms of property rights. The recent destabilisation of the IPR regime in the face of new modes of cultural production, however, raise the question of whether, in fact, the inverse is true: is the IPR regime the anomaly?

When Shubha Ghosh calls for a new and more user-friendly approach to IPR, he elaborates on the idea of conceptualizing IP as a matter of stewardship rather than of ownership. He argues that

> designated owners are just stewards for a broader class of users, which consists of, among others, consumers, future generations, and constituents that rely on property but may not have not [sic] a direct ownership stake. (Ghosh 2012, 1007)

Ghosh's vision of stewardship recalls the indigenous relation to biological resources that is often evoked as a contrast to the extractive and exploitative practices of biopiracy. However, Ghosh applies this view of stewardship to intellectual property in general, challenging the universal primacy of individual ownership from a position that is similar to a traditional indigenous approach to resource management.

In a sense, a similar idea of stewardship is expressed in the protection of classics where society is entrusted the responsibility to ensure a respectful treatment of a collective cultural heritage. In light of that, maybe the protection of classics is not such an anomaly after all. In its current condition the protection of classics is hardly enforceable and lacks any practical significance. But let me, for the sake of argument, end this article by asking if the protection of classics could be employed to protect TCEs. Some of the characteristics that make the protection of classics an anomaly in copyright law would actually make it particularly applicable to protect TCEs.

First, the fact that the protection of classics is not limited in time makes it more suitable to protect TCEs, which are often inherited cultural customs, dating back several generations. Secondly, the lack of an individual or identifiable author is often presented as an obstacle that makes it hard to incorporate TCEs in existing IPR legislation. The protection of classics however does not rely on the rights of an individual author. Thirdly, the protection of TCEs is not only about protecting the rights of a creator but the rights of a cultural community. It assumes that the defamation of certain significant expressions of this culture offends the members of that culture as a collective. This is alien to copyright in general but corresponds directly to the logics of the protection of classics.

Originally, the protection of classics was, indeed, designed to protect a Western cultural canon and it is to be enforced by institutions that embody colonial power and lack legitimacy or competence to represent indigenous cultures or other minorities. The fact that the law does not define the origins of the protected work or the nature of the cultural community it belongs to however makes it theoretically applicable to indigenous cultural expressions as well. Paragraph 51, furthermore, clearly empowers the government is decide which bodies are to enforce the protection of classics. It would thus be perfectly possible for them to appoint a self-governing indigenous body—such as the Sami Council which represent indigenous people in Northern Scandinavia—to enforce the protection of classics with respect to Sami cultural expressions. Such a decision would give the Sami council legal grounds to act against different forms of cultural appropriation.

In that way, hacking the protection of classics could, at least theoretically, enable indigenous agency within existing legislation and contribute to a decolonization of intellectual property rights. Although this game of thoughts is not likely to ever be of more than academic interest, it points to the fact that also Western laws have their hidden spaces of intervention: internal inconsistencies that open up possibilities for new legal subjects to make alternative interpretations.

Conclusion

This article has shown how binaries collapse under closer scrutiny. We see how the dichotomies that seem self-evident in a (post)colonial world dissolve one-by-one. The entire discourse on the protection and promotion of traditional cultural expressions is based on a distinction between Western culture, described as individual and authored, and traditional culture, described as collective and anonymous. This distinction has never been valid. Not only does it disregard the dimensions of collectivity in Western cultural production: but the very dichotomy is ambiguous, as the authored and the non-authored are a mutually dependent historical construction.

Both the Swedish example of the protection of classics and the case of the Grimm tales indicate that the distinction between intellectual and cultural property is not as clear as it appears. The protection of classics can be seen to transform intellectual property into cultural property, within the structures of a Western copyright law. The Grimm tales, on the other hand, can be seen to transform cultural property into intellectual property by translating folktales into authored texts, without relinquishing the claim that the texts represent a cultural community. These examples show that neither authorship nor the law are homogenous and consistent. The rationale of the authorial voice and that of intellectual property begin to crumble, together with the colonial distinctions on which they are based.

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Notes

1. These assumptions have recently been questioned. One example is a recent dissertation by Jens Eriksson that argues that romanticists like Fichte and Kant were very open to acknowledging remixes of existing works as original works, and that this affected the German copyright laws. These, in fact, allowed for rather extensive copying… (Eriksson 2016).
2. ”Om litterärt eller konstnärligt verk återgives offentligt på ett sätt som kränker den andliga odlingens intressen, äger domstol på talan av myndighet som regeringen bestämmer vid vite meddela förbud mot återgivandet. Vad nu är sagt skall ej gälla återgivande som sker under upphovsmannens livstid.”
3. ”ge det allmänna befogenhet att ingripa till skydd för de ideella värdena hos de mer betydelsefulla litterära och konstnärliga verken” […] ”skydda de fria verken, främst de klassiska mästerverken, mot att de återgivas på ett sätt som är att betrakta som förvanskning”, (SOU 1956:25, 403).
4. The report mentions a Danish edition of Balzac’s novel *Esther* that had been edited down from 350 pages to 90, filled with suggestive titles and illustrations, and advertisements for contraceptives (SOU 1956:25, 409).

5. 'det allmänna en självständig, vid sidan av den ideella rätten stående befogenhet att inskrida mot sådana missbruk'.
6. "Die Volksseele produziert nicht, sie reproduziert"

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Collective Creativity and Collective Ownership

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This highly original article makes a welcome contribution to a decades-old debate. Although formulated in the esoteric terms of intellectual-property law, it is a debate that seems to expose deep and wide-ranging conceptual divisions in our cultural lives (the individual versus the communal, innovation versus tradition, the Self versus the Other). Martin Fredriksson (MF) makes a genuinely new intervention by drawing attention to a little-noticed provision in the copyright laws of certain countries—what in Sweden is called *klassikerskyddet,* the protection of classic works.

MF uses this relatively obscure provision to shine new light on a set of familiar notions, especially 'authorship,' 'folklore,' and the 'commons,' as well as making larger points about legal imperialism and the incoherence of normative systems. The central binary he examines is "the dichotomy between commons and authorship—between collective creativity and private appropriation." In developed-world legal systems, because 'works of authorship' are seen as the unique products of individual genius, they are protected by intellectual-property (IP) law, with ownership vested in their creators. However, because the "traditional cultural expressions" (TCE) of indigenous peoples are seen as anonymous and collectively created, international IP law—which ethnocentrically fails to recognize or value communal creativity—offers them no protection. This binary is what makes Sweden's *klassikerskyddet* so interesting since it seems to be a cultural-property provision embedded in developed-world IP law. Since it is inconsistent with the fundamental principles of the IP system, its presence there exposes that system as incoherent, and questions the dichotomies of individual authorship versus collective creativity and private appropriation versus the commons.

In what follows I'll offer a few scattered thoughts on MF's dichotomies, but I would first like to comment on legal incoherence in general, and its possible usefulness. The internal inconsistency MF uncovers in Swedish copyright law is one example of a broader phenomenon. Incoherence, we might say, is the default condition of law. This is true for at least two reasons.

Legal concepts are elaborated over time by drawing on "legal formants" (Sacco 1991), a disparate set of authorities, not all of which are mutually consistent. Consider, for example, the multiplicity of definitions of 'originality' that frustrate US jurists. This criterion of copyrightability has been both historically inconstant and doctrinally uncertain. Jane Ginsburg argues that there are two de facto originality thresholds: one protecting the creative presence in "high authorship" works like novels, and one protecting the sweat of the brow in "low authorship" works like telephone directories (1990:1870). Hence the enduring tension between creativity and expenditure of labor as the criterion of copyrightability.

Second, the piecemeal, cumulative process of law-making is a potential

threat to whatever degree of consistency a statute may possess. Since legislation is the result of a drafting process that often involves compromises—which are not necessarily conceived of as compromises between general principles (Litman 2001:77)—a statute can seem to embody internally inconsistent logic. Indeed, given the trade-offs and log-rolling that drive the legislative process, such inconsistency might be the most likely outcome: "the existence of a coherent overall framework would be a miraculous accident" (Liu 2001:1299). Far from being inherent in law, coherence is a hard-won accomplishment. The price of statutory consistency, we might say, is ceaseless vigilance.

Throughout history, IP laws have accrued provisions that seem to contradict their own basic principles, and which are sometimes opportunistically exploited for various purposes. One recent example is the European Union's "publication right" (as described in Article 4 of the EU Directive 93/98/EEC of 1993), which covers the publication of an out-of-copyright work that has not been previously published. Another is the *domain public payant*, a regime imposed after the expiration of copyright protection, allowing use of the work upon payment to the State of some predetermined amount. In both cases, protection does not benefit the author, but an actor (the publisher or the State) which need not have played any role in the creation of the work. (The latter regime is especially interesting because it has been justified in several different ways. The revenue collected could be used by the State to assist struggling young artists at the dawn of their careers, or to provide an old-age pension for those at the sunset of theirs. It could be used for the promotion of culture in general. It could even be used to support collective rights organizations in developing countries that lack them; Perlman 2018).

Like the "publication right" and the *domain public payant*, "classics protection" fits uncomfortably within the doctrinal framework of copyright. But MF does not merely identify a moment of internal contradiction in Swedish law, he suggests using it to decolonize IP jurisprudence. By "hacking the protection of classics" indigenous peoples might be able to make their voices heard, and their perspectives acknowledged. I won't comment on the feasibility of this ingenious idea—MF himself seems to consider it no more than a thought experiment—but will only point out that the strategy he adopts here has a distinguished pedigree. His discovery of this "hidden space of intervention" looks to me like an application of the "deviationist doctrine" of the Critical Legal Studies movement, in which partially submerged contradictions in existing law are revalued to "transform the deviant into the dominant" (Unger 1986:60).

Now let me return to the dichotomies at the heart of MF's paper, dichotomies of individual authorship versus collective creativity and private appropriation versus the commons. The former concerns the process by which works are made, the latter concerns assignment of ownership in the results of that process. MF clearly sees the two as closely related (indeed, at one point he seems to treat them interchangeably, referring to "the dichotomy between commons and authorship – between collective creativity and private appropriation"). He describes the assignment of ownership as to some extent motivated by judgments of authorship:

works of individual authors "are seen as private property by default," while indigenous cultural expressions which lack such authors "tend to be seen as part of a commons by default."

MF builds here on a well-established research program that traces the possessive individualism of IP law to the concept of the so-called Romantic author, the solitary creative genius thought to embody something of himself in his—usually his—works. Following Hafstein's suggestion that we "repudiate originality itself and embrace instead a social concept of creativity," MF proposes that the dichotomy between individual and group creativity is a false one. All creativity is collective, though IP law is structurally unable to recognize that fact.

This is where MF's argument might be brought into illuminating juxtaposition with recent historical research and with a more detailed examination of current legal provisions. For some time now a growing cohort of scholars has suggested that the appeal to Romantic ideology is a rationalization, an intellectual fig leaf to cover developments undertaken for more prosaic reasons such as interest-group politics, as well as economic forces ranging from the decline of aristocratic patronage to the rise of neoliberalism. There are quite a few critics who find the causal role attributed to Romantic ideology historically implausible (Kitch 1968, Posner 1988:351, Lemley 1997, Barron 2006, Bently 2008, Bracha 2008, Lavik 2014).

A careful study of both lay and legal methods for assessing authorial contributions today reveals elaborate mechanisms for domesticating and disciplining the inherently collective nature of authorship. Consider, for example, how creative credit is assigned for a popular-music recording. In US law, a distinction is sometimes made between a recording's "featured artist" and the other musicians who perform on it, whose contributions are considered to be "works for hire." (The "work for hire" doctrine defines circumstances in which the law will consider the author of a work to be, not the actual author, but his or her employer.) Unsurprisingly, the difference between a musical contribution that earns the musician a copyright and a contribution that (as a "work for hire") becomes someone else's property is contestable (Stahl 2013:183-225). While in such contests the two sides may make florid appeals to the ideology of Romantic authorship, these are unlikely to be decisive.[1] And in other contexts—such as apportioning "screen credit" among the writers of a film or television show—the arbitrariness of the determination is more or less openly admitted. The contributions of many writers are deliberately ignored, and the list of credited writers is kept as short as possible, in order to enhance the "dignity" of all writers (Fisk 2011).

Turning now to the other side of the dichotomy, what of TCEs? Are they seen as a commons *because* they are considered anonymous products of communal creativity? There is an ambiguity here since it's not clear which kind of commons is meant: an open-access regime, or a common-pool resource? Clearly, an open-access regime can coexist with even a strong ideology of individual authorship, for this is the case in developed-world IP law, where the "public domain" has endured for centuries as an open-access commons. Nor does anonymity and collective creativity strictly necessitate open access, since provisions like the "publica-

tion right" can create private ownership rights in uncopyrighted or even uncopyrightable materials, including TCEs.

What of the other kind of commons, the common-pool resource? As MF explains, a common-pool resource presupposes a social group (say, an indigenous community with a robust system of customary law) whose members alone have legitimate access to the resource and who respect the group's norms governing its allowable uses. But couldn't such a normative regime govern the assignment of ownership in TCEs without any reference to the nature of the creative process? Whether or not a work is communally produced may be entirely irrelevant to its ownership status, for customary law could dictate that even new works by known individuals immediately become group property.

Of course in many societies there are TCEs not governed by customary law, but which the society may still wish to treat as a common-pool resource. In such cases, it is possible to appeal to the collective contributions of the group's members that have shaped the TCE. However, given the porous nature of cultural boundaries, it's not always possible to determine if the creative inputs to a TCE came exclusively from the members of a single group. Societies have always borrowed from each other, and external influences are omnipresent in most traditions. It seems to me that communities wishing to claim ownership are more likely to appeal to the concept of group *identity.* A TCE (regardless of its ultimate origins) would be said to belong to a group insofar as it is emblematic of that group's identity—though it remains to be determined what precisely that phrase might mean (Perlman 2017, 183-185).

Sweden's *klassikerskyddet* is incongruous in the context of IP law since it ignores some of the latter's foundational principles (such as the limited duration of the right). I suggest that it is equally incongruous in the context of TCE protection since it ignores all issues of social identity. Indeed, as MF points out, it extends beyond the Swedish cultural heritage, reaching all "classics" regardless of origin. Any modification of *any* classic work from anywhere in the world can be proscribed if the Swedish Academy considers it offensive to the educated Swedish public. MF suggests that the Sami Council could be given a similar role "with respect to Sami cultural expressions." This qualification, though seemingly minor, in fact completely changes the nature of *klassikerskyddet* by assigning to each "classic" a cultural identity. At the very least it would require reconsidering the role of the Swedish Academy: would it retain authority over all Swedish cultural productions? Or to avoid possible clashes with the judgments of the Sami Council, would its authority have to be limited to non-Sami works?

In these brief miscellaneous remarks, I haven't pretended to offer a thorough consideration of MF's article, which raises many more important points than I can address here. Its richness and sophistication is heartening. Over several years of researching the legal status of TCEs, I have found it frustratingly difficult to communicate the depth and relevance of the issues involved to scholars outside of the legal academy. IP law is considered highly technical even by many attorneys, and it is rare to find detailed knowledge of it combined with a grasp of folkloristics and common-property regimes—all

of which are needed to attain a panoramic vision of the problem. Martin Fredricksson's contribution offers us a view of the scenery from a refreshing new angle.

Notes

1. As Jessica Litman remarked in another context: "One can greatly overstate the influence that underlying principles can exercise over the enactment and interpretation of the nitty-gritty provisions of substantive law. In the ongoing negotiations among industry representatives, normative arguments about the nature of copyright show up as rhetorical flourishes, but, typically, change nobody's mind" (Litman 2001, 77).

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