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Intellectual Property and Competition – Human Economic Universals

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Abstract
My contribution to this workshop is an approach to answering the question whether property, in particular intellectual property, and competition for the acquisition of such property, are innate building blocks of human behavior “deep in our brain” and inherited characteristics of our human nature, or whether they are cultural attitudes and abilities which we have to learn because we are not born with it. In the first case we would call them human universals, in the second cultural specificities. Also, a way has to be shown how we can know the one or the other.

Keywords
Intellectual Property, culture, biology
Intellectual Property and Competition – Human Economic Universals or Cultural Specificities?: A Farewell to Neoclassics**

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This is a paper in progress, 2nd draft (September 12, 2006); publication pending in Bepress Publ., Berkeley, CA.
I. The Status of the Issue in the Social Sciences

My contribution to this workshop is an approach to answering the question whether property, in particular intellectual property, and competition for the acquisition of such property, are innate building blocks of human behavior “deep in our brain” and inherited characteristics of our human nature, or whether they are cultural attitudes and abilities which we have to learn because we are not born with it. In the first case we would call them human universals, in the second cultural specificities. Also, a way has to be shown how we can know the one or the other.

Can intellectual property and competition be both, universals and cultural specificities? Maybe, if there are, in the human brain, programmed predispositions to have and possess a thing, and later in the course of human life a concrete shape is given to certain forms of property, and competitive behavior to gain and hold such property, our answer could be: both. Still, if we would come to this result, we would implicitly have said yes to at least some universals of doing business among humans.

The field which we enter when we discuss these issues is so broad that it is impossible to cover all aspects involved. All the more some words are in order to pin down the status of the issue as it will be discussed here in the total framework of the social sciences, because a number of possible accentuations are on offer. The approach chosen here is not psychological, nor sociological, nor sociopolitical. It uses of the tools of micro-economical and legal empirical anthropology.

Empirical anthropology (as opposed to unempirical philosophical anthropology) is a social science to be divided into cultural and biological anthropology. Both these branches try to research and define the conditions of the human being in a comparative way, and in their
mutual interdependence.\textsuperscript{1} Regarding the subjects of this paper: intellectual property and competition, the biological branch will research possible innate predispositions, and the cultural branch the various cultural shapes which intellectual property and competition may take in legal-economical reality.

Our chosen micro-economical and legal approach forces upon us to decide a preceding issue: (1) are there economic laws and other generalities that are valid in all cultures, and which therefore have to be observed first, such as the laws of supply and demand, limited resources, unlimited needs, rational decision, utility maximizing, marginal utility, cost, perfect competition and market, property rights, and acting under risk and uncertainty, before there can be a cultural specification; or, (2) do we first have to ascertain the cultural variations of doing business (including the handling of intellectual property and competition) before there can be talk of economic and legal generalities.

This is the form in which the search for universals presents itself in economy and law. Only when we have decided this issue we are allowed to further investigate whether intellectual property and competition are human universals. The issue, just formulated, is the methodological main topic in economic anthropology.\textsuperscript{2} In this debate, the first position, the one that starts from transcultural economic generalities (such as the doctrine of marginal utility) and applies cultural variations in the second place, received the name “formalism”.\textsuperscript{3} The second position, the one that starts from the wealth of cultural variations and cautiously asks for common points of view and points of contact for comparisons, is called “substantivism”.\textsuperscript{4}

As remarked before, we have to opt for one or the other doctrine before we can go on.

\textsuperscript{1} W. Fikentscher, Law and Anthropology, Reader Law 265.7 & LS 190, University of California School of Law at Berkeley, Spring 2000, 2; cf., idem, Modes of Thought, 2d ed. Tübingen 2004, 77, 91.


\textsuperscript{3} Chief protagonists: Raymond Firth (1952; 1967); Melville Herskovits (1952); H. K. Schneider (1974).

\textsuperscript{4} Chief protagonists: Bronislaw Malinowski (1920; 1922); Karl Polanyi (1957); George Dalton (1961; 1965); Marshall Sahlins (1969; 1974). Why the opposing doctrines received
I. A Substantivist Perspective, the Two Determinisms, the Role of Empiricism, and a Farewell to Neoclassics

1. The Formalist Argument

The strength of the formalists’ argument rests upon the success of neoclassic economic theory which in the years after 1870, based on the writings of Gossen (1854), W. S. Jevons, L. Walras, C. Menger, A. Marshall, F. Y. Edgeworth, J. B. Clark, V. Pareto) etc., turned classical economics (Adam Smith (1776), David Ricardo (1817), Th. R. Malthus, N. W. Senior, J. Mill, J. St. Mill, J. B. Say, etc.), a theory that tried to explain observed economic behavior, into a science that postulated economic behavior under certain fixed theoretical requirements.\(^5\) Such requirements came to be marginal utility, rational choice, perfect competition, perfect market, property rights, and the other beforementioned “generalities”.\(^6\) The formalist camp finds the neoclassic economic concepts and laws to be so strong and convincing that they are valid for preindustrial and industrial peoples alike. Raymond Firth and Melville Herskovits took the lead of the formalist group.\(^7\) The leading German economic ethnologist Martin Rössler shares the formalist view because “economy follows always and everywhere certain inherent patterns of regularity”\(^8\).

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\(^6\) This change of paradigms is also called the „marginalistic revolution“, for details see, e. g., Blaug 1985, Boland 1985, Rössler (2005), 35 – 45, 128 – 131.

\(^7\) See note 3, above.
However, also Rössler stresses the frequent shortcomings of neoclassic economic theory to do justice to the economic specificities of many preindustrial ethnic groups. Nonetheless, Rössler holds the basic ideas and laws of neoclassicism in principle applicable to all economies in the world.

2. The Substantivist Answer

The substantivists point to the many forms of economic behavior which, under the terms of Western economic science, can only be labeled irrational, such as potlatch give-aways, or circular gift-giving in the Kula style. To quote merely one voice: “Western economists assume that scarcity is universal, which it isn’t, and that in making choices, individuals try to maximize personal profit. However, in non-industrial societies, as in our own, people maximize values other than individual profit. Furthermore, people often lack free choice in allocating their resources”.

It might be added that also the other neoclassic tenets show significant flaws when applied to the wealth of economic reality, even beyond the doubts Rössler is mentioning himself: The laws of supply and demand do not work in moneyless societies. As Kottak remarks, resources are often unlimited. Needs, always unlimited in neoclassics, are often limited. Rational decisions are lacking in ceremonial exchanges. In turn, utility maximizing and the concept of marginal utility often yield to seeming irrationality. Cost calculation is missing whenever ideologies prevail. Perfect competition and perfect market exclude rivalry and are therefore opposites of competition and market. Property rights may take very different shapes and

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9 e. g., at 37 f., 42 ff., 67 f., 72, 76 f., 95, 101, 159 f., 165 f., 171, 179 ff., 230.


11 C. Ph. Kottak, 4th ed. 1987, 144. For other substantivists, see note 4, above. My own position in Culture, Law and Economics, Berne & Durham 2004, is substantivist, without giving detailed reasons. For literary attempts – none of them having seemingly been convincing - at bridging the opposing views, see, e. g., Rössler (2005), 128 - 131.
lack a coherent theory of cost and participation. Acting under risk and uncertainty is just as culture-specific as, for example, societal structures.

3. Two Determinisms Conflicting

The main incongruency between economic neoclassics and economic ethnology consists, however, in the clash of two determinisms: Neoclassic economy does not aim at explaining observations of economic occurrences, but at establishing a model for a given economic behavior, namely, rational, utility maximizing, cost conscious, etc. Thus, neoclassics deductively and normatively postulate correct acting of *homo oeconomicus* in accordance with economic generalities. Neoclassics are not relevant for reality, and defy empiricism. Economic ethnology, on the other hand, is determined culturally by observable economic behavioral specificities, and has no *raison d’être* but empiricism. These two determinisms run against one another, and meeting half-way miss each other. This may be a reason why conciliatory theories are so difficult to find.

4. A Medieval Dispute

Which determinism will bear the palm, the economic or the ethnological? The decision seems to depend on the role to be assigned to empiricism. There is a debate on generalities and specificities, dating back to the 12th, 14th and 15th century, the famous medieval debate on *universalia*. The issue of this debate was whether universal concepts such as grace, sin, spirit, family, people, property, etc., contain a thing that in reality exists, or whether universal concepts represent no real life but are just names, designations, for summed up bits and pieces, specificities so to speak. The first position was called universalism, the second nominalism. Since the Church believed in, and taught, concepts of universal nature,

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13 See, e.g., Rössler (2005), 97 f. on the one hand, and W. Fikentscher, Culture, Law and Economics (2004), 37, 185, on the other.

14 W. Fikentscher, Modes of Thought (2004), 183, and at the different modes of thought.

15 Rössler (2005), at 36 f., 39, 71. Obviously, globalization seems to support neoclassics.
universalism was methodologically convenient for its work, whereas nominalism sometimes got the smell of criticizing religious dogma.\textsuperscript{17}

Famous \textit{universalists}, also called \textit{realists}, are William of Champeaux and Duns Scotus. In essence, they adhered to the Platonic conception of ideas, existing \textit{in reality}, and to be learned and known by human investigation and dialog, \textit{detached} from the ideas themselves, a conception introduced into Christianity by St. Augustin (\textit{universale ante re}). The empirical element of this line of thought consists in the admonition to check and judge the truth of the existing ideas.

The most renowned \textit{nominalist} is William Ockham, a skeptic of \textit{realiter} existing universals, and as such an empiricist (\textit{universale post rem}).

Abélard and Thomas Aquinas developed a mediatory theory holding that universals exist but only to the degree the investigator decides what he or she wants to know, and the act of identifying the contents of the concept \textit{not to be detached} from the universal to be known (\textit{universale in re}). This third, mediatory, theory carries Aristotelian \textit{entelechia}, inherent purposefulness, into the knowing of universals and is thus in conformity with other Thomist thinking. But it is not empirical.\textsuperscript{18} After pre-Socratic theory of judgment, Socratic belief in the existence of ideas, and Platonic dialog as a means of interpersonal probing ideas with the aim of assertion and acceptance, Aristotelian \textit{entelechia} was an animistic atavism harking back to pre-axial-age belief in soul-and-meaning carrying things. It became of historical importance that both Islam and Thomism learned from Aristotle, not from Parmenides and Plato.

5. \textbf{Empiricism}

Thus, the background to the three theories of the medieval universalia debate is the degree of permission to empirically check truth. The medieval philosophers, when dealing with the universalia problem, were looking out for freedom of judgment founded on empirical research. Therefore, a historical argument leads to the result that in view of the two

\textsuperscript{17}In recent times, the universalia debate has regained philosophical importance in connection with issues such as rationalism, skepticism, empiricism, and relativism, see W. Stegmüller, Glauben, Wissen und Erkennen: Das Universalienproblem einst und jetzt, 1965, 1974.
conflicting determinisms empiricism, and thus the ethnological - cultural - determinism wins over the economical one. This facilitates the question for modern universals: Starting point is ethnological empiricism, human universals have to be gained by induction. They are not preconceived generalities. Hence, the issue whether property and competition are human universals or cultural specificities should be tackled from the empirical ethnological side.

Therefore, the next question can be asked: How do we empirically ascertain human universals? And more precisely in our context: Are tangible and intellectual property among them?

6. Where Neoclassic Economics Fail

It cannot be denied that the empirical approach to a decision between universals and specificities taken in the above text raises a serious conflict with neoclassic economics. It is not only empiricism as being the hub of the medieval dispute about knowing things that demands us to follow the empirical path. These medieval controversies lie way behind now-a-days’ issues of philosophy and the humanities. They are certainly far away from modern theories of economics and hardly mentioned at all when there is talk of epistemological alternatives.

Yet, empiricism is a backbone of modern epistemonology as much as it was since the musings of pre-socratic philosophers. Parmenides’ teachings got hold of what today is called Western (Greek-Judaic-Christian) thinking: that here is a subject, and out there an object, and that both are connected by a third to be called thinking. It is to that subject that is given the chance to make a judgment based on reasoning: “this is true because…..”, “this should be so because…..”, or “this beautiful because…..” The truth-related, the moral, and the esthetic judgment are the three propositions a human being can render, and everyone of these three judgments requires critical observation that precedes the reasoned judgment. This three-step process subject – thinking – object implies an activity of checking, finding out, probing – always against a background of doubt - , and it is called empiricism. Empiricism is an dispensable corollary of science, also of the science of economics.

The opposite of empiricism is the deduction from preconceived models, from ideal states.
be distinguished by belief or disbelief in the existence of general concepts. Second, there is empiricism v. deduction from models, to be distinguished by inductive concluding from observations or deductive applications of models. Thus, defensible are the following positions: empirical nominalism, model nominalism, empirical universalism, and model universalism. The approach chosen in this paper is empirical universalism.

The early modern economists were empiricists. Adam Smith, David Ricardo and the other theorists mentioned above, II., I., observed economic facts and drew their conclusions from such observations. The marginalist revolution (see again II 1.) contributed to defining ideal economic states (perfect competition, perfect market, marginal utility, *homo oeconomicus*, utility maximizing, “antitrust more economic approach”, non-time-related efficiency, etc.) and compared economic reality with them. Marginalism became a center piece of neoclassic economics. Economics became a postulative theoretical program. Empiricism did not disappear at all, but was degraded to an instrument for proving that reality did not meet the predefined model standards. This methodological syncretism mixes two incompatible standards: inductive conclusion based on empirical observation against deductive derivation from non-empirical prescript.

This is not the place to repeat the long list of shortcomings of neoclassic economics: non-competitive concepts of market, submarkets, and of competition itself; assumptions of market anonymity, misjudgment of market shares and their proof; misguided theory of socalled market failures; mistaking potential competition and contestable markets; misjudgment of substitutability, of “adverse selection”, and of appreciability of monopolies and less incisive restraints of competition; disregard of the factor time; unclear role of property, of intellectual property protection, and of private claims in market law; general unusability for national and international antitrust (including world trade) evaluations and policies (such as the relationship between “competition” and “trade” in WTO and ICN), deregulation, consumer, small business, and fair trade policies); mistaking the protection of free and fair competition as “paradoxical”; inability to explain the role of collective goods in a free economy; and of the working of rules of conflicts of law in competition law including attendant comparative law and culture comparison.¹⁹

There is at least one more reason why neoclassic economy meets a difficulty when exposed to the demands of practice-oriented economic theory and policy. The difficulty follows from economic needs and practices in less favored nations such as developing countries and countries which border at economically strong neighbors. Examples are Nigeria’s problems with big oil corporations, Indian reservations whose peoples’ traditions and skills are exploited by outside businesses, Ukraine’s dependence on Russian natural gas, and Canada’s general economic dependence on US. The legal protection of such economically weaker partners poses well-known issues. In the areas of intellectual property protection and unfair trade practices, it has been proposed to let the plaintiffs of the weaker economies resort to their own local courts which, jurisdiction assumed, apply their own laws and legal principles and ideas, and let the successful plaintiffs try to get titles of execution granted by the courts of the more powerful nations.\(^\text{20}\) There is no reason why this local-court-and-local-law approach should not work in antitrust matters in the same manner. Of course, the defendants in the economically stronger countries will ask their courts to block transborder execution by invoking public policy (lack of mutuality will not work). But it is a well-confirmed observation that courts are reluctant to rely on the public policy (or *ordre public*) defense against transborder executions when general concepts and values of law are involved, like property, free and fair competition, trust, reliance on a given promise, equal treatment under the law, non-discrimination, due process, etc. This reluctance gets even stiffer when these concepts and values have been recognized in international instruments such as the UN Charter, the Human Rights Declaration, WTO, or TRIPS.\(^\text{21}\) Law’s efficiency lies in its decentralization.

What makes these transborder effects of local legal protection so convincing is the general idea of law behind the claim in question. Reaping where one has not sewn, or abusive monopolistic behavior, are practices that meet disapproval in many jurisdictions, Nigeria, India, Ukraine, Canada, and other countries with economies that depend on or are exploited by their neighbors. These practices are not limited to modern economies, as seen in the examples from African tribes, Australian aborigines, Zuni Pueblo, NM, and the Hopi Nation.


\(^{21}\) A recent example of such reluctance: OLG Naumburg of Feb. 9, 2006, WuW 2006, 932 – 936, where service of a US American antitrust class action for treble damages was granted in Germany and the public policy defense raised against it by German defendants was dismissed although German law does neither know class actions in comparable cases, nor treble...
Thus, protection granted such behavior is based on universals. These universals are ideas the existence of which is assumed, and the assumption is based on empirical observation.

Parmenides’ judgments and Plato’s dialogical investigations are models of the epistemological methods being used for what may be called empirical universalism. No deductions from models occur. The empiricism of this universalism forbids the neoclassic approach. To solve the issues discussed, neoclassic economics must fail. To apply the local-courts approach, centralized law is just as dispensable as identical concepts of person, market, competition, contract, property (private or collective, tangible or intangible), cost, utility, institution, etc. This means, neoclassic concepts are not needed to establish ethnographic economics. They are even in the way of its establishment. One does not have to strive for the same economic concepts and evaluations in the different economies and the legal systems protecting them. It is enough that local courts decide according to local law and the other jurisdictions concerned do not accept the public policy defense because the legal policies pursued are similar. This makes commons (Allmenden) protectible in legal systems which do not know commons. This makes the droit moral to tribal secrets protectible in legal systems that have neither tribes nor secrets.

Neoclassic economic theory has its great merits in making many economic decisions more predictable, even calculable. But for modern, national and global, politico-economical statements, antitrust and unfair competition policies, discussions about economic justice, globalization issues, and consulting, it is time to say a farewell to neoclassics. At least in these areas, economic theory should return to empiricism and comparative concept-forming and evaluations. An Empirical Economic Theory fits our time better. For ethnoeconomics, substantivism is just a consequence.  

The empirical element of this theory may lead to the ascertainment of universals. As shown, they may be the result of comparison. How can universals be determined?

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22 One need not share radical tribal revivalism (e.g., Peters 2006; Lundberg 2006) to see that one day intertribal justice and trust may in part assume the role state sovereignty has played, since Hugo Grotius installed the sovereign nations, linked in trust (fides) to each other, in the place the Roman Empire held since Caesar’s times, cf., W. Fikentscher, De fide et perfidia, Der Treuegedanke in den "Staatsparallelen" des Hugo Grotius aus heutiger Sicht.
III. Universals – What Are They?


According to Donald E. Brown (who wrote the modern standard book on ethnological universals) a definition of universals to begin with, subject to future refinement, is:

“….. a trait or complex present in all individuals (or all individuals of a particular sex and age range), all societies, all cultures, or all languages – provided that the trait or complex is not too obviously anatomical or physiological or too remote from the higher mental functions”.\(^{23}\)

Examples are aggression and aggression control, reciprocity, etiquette, folklore, obstetrics, cosmology, courtship, incest taboos, residence rules, joking, and mourning.\(^{24}\)

\(^{23}\) cultural trait = singular attribute of a given culture, such as the British “bobby”, Bavarian Lederhosen, or Finnish sauna; complex = sum of cultural traits forming an assembly which is characteristic for a given culture such as the the Indian powwow, the Irish pub, or the Munich Oktoberfest.

In his foreword, Donald E. Brown declares his book to be directed against the – in his view – dominant anthropological tradition of cultural relativism, to be blamed on Franz Boas and his school, represented, for instance, by Ruth Benedict’s book “Patterns of Culture” (1934). It was Boas (1858 – 1942) who rejected both anthropological evolutionism and the functionalism of British social anthropology on the ground that all cultures exist in their own right and without serving purposes. Driven to an extreme, this view can be misunderstood as a vote against any cultural comparison and connection of one culture with another. Brown may have misunderstood Boas and his school in this way as extremely culturally “relativistic”. However, Boas would not have denied that cultures can be compared, and that any comparison contains a tertium comparationis as a common point of reference, and thus of universality, if to a less-than-worldwide extent.

The antonym to ethnological universal is, when we follow Brown, a trait or complex not present in all cultures but specific to certain cultures or to only one culture. Thus, the question raised by any search for human universals is whether a cultural trait or a complex has general importance for more than one culture, or whether it is – in its actual appearance - a specificity for a given culture.

Thus, we cannot speak of a universal only when we find a trait or complex in all the 10,000 cultures that are said to have existed in history and to exist in the presence. It ought to be


25 at vii.

26 Extreme cultural relativists who hold that no conceptional or evaluative way can lead from one culture to another. are hard to find. M. J. Herskovits is sometime quoted to this effect, but
enough to find a trait or complex in a high number of cultures, such as the trait mourning on the occasion of the death of a close person, and the complex of liminality (A. van Gennep, V. Turner) that divides practically every society in age groups such as newly born, toddler, infant, adolescent, etc. A universal is a trait or complex which is empirically found in so many cultures that there is a presumption that it may be found in other cultures, too.

This implies that there are exceptional cultures in which we do not find a trait or complex that we expect to find there from having seen other cultures. Thus, in all island and coastal populations we expect to find the complex of seafaring. However, there was a polynesian king who lost his son at sea. The king forbade his people any use of boats and navigation, a command that caused near starvation. The cultural complex of seafaring was missing, but this does not affect the universal character of seafaring among coastal and island populations. It may occur that a singular trait or complex is missing not only in a single culture, but that a whole group of cultures lacks a specific trait or complex. This may happen when a mode of thought that defines and shapes that group of cultures prevents the existence of that trait or complex. A striking example is Islam. At least ideally, Islamic monotheism is so strict and encompassing that all that develops in this world is predetermined by Allah, the Supreme, according to His gracious will. This deterministic holding prevents the Muslimic believer from rendering judgments for which she or he can assume individual responsibility. This may be why a Parmenidean judgment “this is true”, ”this is good”, or “this is beautiful” is so seldomly heard from a Muslim. Lacking the Parmenidean proposition, empirical-critical investigation across time of the true, the good, and the esthetic qualification is foreign to the pious Muslim mind as is the consequence of such investigation whenever more than one person participates in it: the Platonic dialog.

Universals are not the only generalities among cultures. Carl Gustav Jung (1875 – 1961) identified certain personal contents of the human unconscious which he called parts of the collective psyche. They consist in archaic images and symbols – so-called archetypes – which render reiterating experiences of mankind. Because of the similarity of human brains and their


28 On the lacking proposition of truth and its consequences, Lawrence Rosen, Bargaining for Reality: The Construction of Social Relations in a Muslim in a Muslim Community, Chicago
working in this world these archetypes can be found in all peoples at all times. They may be called cross-cultural unconscious universals. Based on Jung’s psychological writings and on his own theoretical studies as well as fieldwork, Mircea Eliade (1907 – 1986) created an elaborate work of comparative religion which focuses on magic-religious images and symbols. Eliade found, in many cultures, similar archetypical symbols for related cosmogenetic myths, such as the world tree and the central temple of the world, and similar activities of getting to know them, such as shamanism. These archetypical representations are of transsubjective and transcultural nature.

The natural sciences operate with the concept of natural constants, such as gravitation, masses and structures of particles, and the speed of light.

Another way to cross-cultural universals can be derived from the anthropological theories of analysis of foreign cultures. Starting point is componential analysis, a tool apt for identifying concepts and their compilations in other cultures. For evaluations, the next step is correlational analysis. Since both are “merely” emic, the discovery of the other (culture) must follow. Then, for comparing cultures, meta-concepts and meta-evaluations have to be

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32 For the following, see the detailed discussion, including the “Yale Ethnography”, in W. Fikentscher, Modes of Thought, 2d ed. Tübingen 2004 (1st ed. 1995): Mohr Siebeck, 116 ff., esp.130 – 149.

formed, a mental process strictly and consequentially to be separated from the forgoing emic research (“synepeia analysis”).

The meta-concepts and -values represent a “new etic”, which avoids to surreptitiously place one’s own emic (“Western rationality and systematization”) as etic for the others. By the same token, in an inductive and empirical manner, this procedure produces universals: Universals are the meta-concepts and -values needed for studying a foreign culture while coming from another culture. These universals are established only inasmuch they are needed for a given study. Thus, there is no unnecessary speculation. The independence of every culture is respected, and still cultural universals are conceivable and acceptable as invariants. For cultural anthropology, the analytical meta-level contains the universals. Universals become being drawn from the analyses of cultural anthropology. The differences are not all that should be of concern to anthropology.

The latter concept of universals as meta-concepts and -evaluations will be used in the subsequent investigation of property and competition as universals or cultural specificities.

2. Kinds of Universals

Universals are subdivided in different ways. Donald E. Brown uses no less than four levels of distinction. He categorizes:

a) Universals of classification have to be distinguished from universals of contents (48). Synonymously, Brown also calls the former formal, the latter substantive (49). Universals of

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34 Synepeia = Greek: consequence. The meaning of “synepeia analysis” is that three items: the foreign culture under study, the own culture of the researcher, and the meta-level used for the study, should each consequentially be distinguished, for clearer results, but mainly in order to avoid inserting (“smuggling”) conclusions from the meta-level into emic cultures, such as “tribal separation of political powers”, “Marxist human rights”, “Kula market”, or “dialog with Islam”.

35 see note 26, above, at 148.

36 this is the answer to Brown, p. 2 line 5.
classification are generated by emic or etic additions of singular items. Thus, different colors can be summarized to the concept “color”, various kinds of weather to the category “weather”.  

Universals of content exist without such preceding compilations, by virtue of their substance, such as risk, xenophobia, property, competition.

An excellent example of an emic universal of content may be found in Khaled Hosseini’s book “Kite Runner”. Baba teaches his son Amir: There is only one sin, one single sin. And this is theft. All other sins are just variations of it. When you kill somebody, you steal a life, you steal his wife her right to a husband, and his children their father. When you tell a lie, you steal another person’s right for truth. When you cheat, you steal the right for justice……There is no act more despicable than stealing. A man who takes what does not belong him, whether a life or a naan-bread, on this man I spit. If ever I should meet him, then God help him. Do you understand this? In this Afghan story, the content of property – tangible or intangible – makes up the only universal that counts.

b) Universals of essence, such as the difference between the female and the male sex, have to be distinguished from universals of accident, such as fire making and cooking.

c) Innate universals, such as the human ability to count, have to be distinguished from manifest universals which are shared by some cultures but not by all, such as the nuclear family. Gestures for approval or disapproval are universal, but their meaning can culturally differ: Shaking the head means disapproval in the majority of cultures, but consent in Greece.

d) Finally, emic universals (as exemplified by a Pashtuni-Muslim very extensive concept of property in Khaled Hosseini’s story of Baba and Amir) have to be distinguished from etic universals as used by the outside researcher.

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38 my examples. Brown’s text is brief here.

39 my examples. Brown mentions facial expressions of emotions and coyness.

These are the kinds of universals identified by Donald E. Brown, the most respected authority on ethnological universals.

Peter M. Hejl introduces another set of distinctions between universals. He points to a difference between universals of biopsychic and of functional origin. Biopsychic universals grow from evolution and thus cause homologic similarities (such as the correspondence between a fin, a wing, and an arm). Functional universals result from parallel contacts with the environment and lead to analogies (such as the largely identical form of a shark – a fish – and a dolphin – a mammal -. Swimming in water requires the form).

Obviously, property belongs to both categories. Some insects, most birds and many mammals defend their territory for reasons of reproduction and food resources. Reproducing societies, especially when the reproduced items have to be stored, need property as a functional institution. In hierarchically structured groups of mammals, possession and use of chattles may enhance status. Chimp researchers tell of toys, and tin cans by which noise can be made, that have been used for status improvement.

The same as of property can be said of competition. Competition for mating partners, for food and for shelter belongs to evolutionary routine. Once resources become scarce, there will be functional competition for them.

3. Murdock’s List and other Lists

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analysis depending on their factual or evaluative nature, etic universals belong to the meta-level of comparison and consequences to be drawn from comparisons.


In 1945, in context with preparatory work for the Human Relations Area Files, George Peter Murdock (1897 – 1985) published a compilation of universals which he called “partial list”. It became known as “Murdock’s List”. Brown cites the list. It contains 74 universals in alphabetical order and mentions “property” without distinguishing between tangible and intangible property. It does not mention competition, nor economy (but it lists “trade”).

Clark Wissler (1870 – 1947) drafted a “cultural scheme” of ethnographic themes for providing as framework for the collection and presentation of ethnographic reports. This list of classifications covers fields of ethnographic interests and is not meant as collection of universals. Nevertheless, Brown’s interpretation of the register correctly points to its possible use for identifying universals and their subspecies, for example, of classification and of content.

Irenäus Eibl-Eibesfeldt and Wulf Schiefenhövel who both substantially worked on ethnological universals amended Murdock’s list by the following twenty universals: aggression and control of aggression, jealousy, genital shame, no coitus coram publico, empathy, curses involving sex or sacredness, sex-typical roles for man and wife, mimics, normative protection of marriage, binary or otherwise contrasting conceptualization, care for the ill, use of medications, ethnozoology, socialization of children, shame relating to excrements of the human body, hierarchies of rank, special funeral rites for close kin, distinguishing one’s own group from foreign groups with regard to hair styles, clothing, jewelry, dialect, tattoos and other arbitrary bodily changes, and having a calendar. Instead of property, Eibl-Eibesfeldt and Schiefenhövel speak of property rights, again without distinguishing between tangible and intangible property. Competition is not listed.

4. **Tangible Property**

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46 on p. 69-70.

The preliminary outcome as to the universal character of property is that having tangible property, for instance in territories, is evolutionary advantageous, and can be found in both animals and humans to such an extent that it is justified to speak of an ethnological universal. By consequence, property-directed brain activities are involved. Of course, there are variations of property in animals and in human cultures that amount to cultural specificities as well. A foxhole is different from a depot of negotiable instruments. But the essence of property, the assignment of a thing to a an animal or person is universal.

Therefore it is consistent that Donald E. Brown mentions property as a universal on many pages of his book, and the lists mentioned under 3. above contain property as well.

5. **Intellectual Property**

Intellectual property, such as patents, copyrights, trademarks, secret know-how etc. is intangible. It is a mental construct. Continental legal doctrine also uses the expression “immaterial goods”. Ethnological literature on universals does not expressly refer to intellectual property. Since it is not excluded from property, and the distinction between tangible and intangible property is well known beyond the limits of the law, it may be assumed that the universal called “property” also includes intellectual property.

But is there intellectual property in the animal world from where a universal concept of intellectual property could have developed into the traditions of humanity? Are intellectual property rights evolutionary building blocks for human culture? Cheating among animals is a well documented behavior, for example when blackbirds pretend limping in order to distract raptors away from the nest, or when foxes wipe out their foot traces that lead to their den.

If adaptive cheating includes having secrets and being induced to hide them, there is intangible property in knowing something that is protected. Squirrels hide collected hazel nuts and sometimes even find them again in the winter. When they keep their cache secret, they

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48 (property relations), 69 (in Murdock’s list), 130 – 1323, 174 (in a comment to A. Irving Hallowell), 182 (concept of property, in a comment to R. Linton), 196 (in a comment to L. Tiger and R. Fox).
own intellectual property. But do they rent out their knowledge to colleagues, in a kind of licensing agreement, in return for a favor? I never observed this, and it is unlikely that squirrels do engage in this kind of advanced capitalism. Bees are reported to tell their sisters from the same hive, not to bees from other hives, when a linden tree starts blossoming at some distance. Has anyone observed bees telling their discovery to foreign bees for a quid pro quo?

Among humans, knowing something, esp. knowing how to do something, is in pre-industrial and industrial societies often regarded as a value. The value may be regarded positively, such as the ability of a good tracker to lead the hunt, or negatively, such as in the pueblos of New Mexico and Arizona where traditionally knowing something raises the suspicion of being a witch.  

Australian aborigines withheld their knowledge of waterholes (billabongs) in the northwestern central part of Australia from the whites for many years. Water was the most precious thing and so had to be the knowledge of access to that water. At any rate, knowledge is protectable.

The delineation between tangible and intangible property is imprecise. Often it is not clear whether a piece of property belongs to the one or to the other category. The story of Baba and his son Amir mixes chattels and mental values as objects of theft. Many cultures know the theft of honor, or of the “face” that can get “lost” or “stolen”. The territory, in the Western conception is an area attributable to a person or persons and can therefore be tangible property of those to whom it is assigned.

But what about the intangible access to territory, for example to land good for hunting in winter time? Some Northamerican tribes such as the Southern Paiute, used to migrate from the mountains to the prairie in the fall, and back to the mountains in spring. Migration took place on traditional trails. Are these trails and the know-how to follow them tangible or

50 A probable reason for this is the danger of competition to the tribal upper class. Die Gedanken sind frei (thoughts are free) is no pueblo tradition. But works of art are freely copied from pueblo to pueblo. We see the reverse of the Western system.

51 Bayerischer Rundfunk “Bayern 5” in a report on Australian aborigines on August 2, 2006, 9 p.m.
intangible property? More the second than the first. And when a homesteader put up a fence that crossed that trail and demanded from the migrating Paiute to respect that fence and not to trespass on his land – what was violated by the homesteader: tangible or intangible property? When Taos Pueblo, New Mexico, won back Blue Lake after a lengthy trial involving Indian tribal and Federal Indian law, it did not only win back the lake and the forest around it as a piece of land or landscape, but as constituent part of tribal identity as intangible property. Thus, the limits between tangibility and intellect are fluent.

From all this it follows that the ethnological universal called “property” should include intellectual property. The particular concrete legal and economic shape of the goods to be protected under the shelter of the concept of property must be left to the different thought-modal or cultural circumstances. This is the world of cultural specificities. Examples are zoology knows both: A male singing bird marks his territory by his songs, a marten marks his trail: “Watch out, this is my way”.

53 Zoology knows both: A male singing bird marks his territory by his songs, a marten marks his trail: “Watch out, this is my way”.

54 On the difference between the (culture forming) modes of thought and the (modes-of-thought determined) cultures, W. Fikentscher, Modes of Thought, 99.

55 There are three alternative ways of approaching this concrete shape: (1) Western concepts of the protection of intellectual property, extant in national legislation and in an international treaty system that dates back to the Berne Conventions of 1883 and 1886, are being subjected to an – ethical - examination to which extent they can be mobilized and used for the protection of intellectual property in non-industrial societies; (2) for the protection of intellectual property in non-industrial societies, empirical studies in these societies are to be started and condensed to a sui-generis-right protection first on the international, later on the national level; (3) local courts in local jurisdictions, for example of non-industrial societies, decide according to local law of property and torts (including of unfair trading) against offenders, and execution in the home countries of the offenders is provided under the rules of international procedural law. See W. Fikentscher, Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie, in : Ansgar Ohly et al. (eds.), Perspektiven Geistigen Eigentums und Wettbewerbsrechts, Festschrift Gerhard Schricker on his 70th birthday, Munich 2005: C. H. Beck, 3 – 18, where materials to approaches no. (1) and no. (2) are collected and discussed, and approach no. (3) is theoretically developed and politically proposed. Since approach no (3) covers, besides the law of intellectual property, the law of unfair trade practices, there is no reason why approach no. 3 should not include local laws against restraints of competition, and local decisions applying it, too; see the following subsection on competition. On such legal practices observed in the field: Robert D. Cooter & W. Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part I, 46 American Journal of Comparative Law 287-330 (1998); idem, Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part II, 46 American Journal of Comparative Law 509–580 (1998); idem, American Indian Law Codes: Pragmatic Law and
the forms of copyright, moral rights to a ceremonial dance, rights in a traditional song, pilgrimages to a shrine, the yearly Hopi salt expedition.

6. Competition

Franz Böhm (1895 – 1977), one of the fathers of the German antitrust law (that went into force in 1958) once said that competition has no lobby. It may be added that competition has not much social-science theory either. The human freedom to economically act, for example in production and trade, is used as an inexhaustible resource as a matter of course. When this kind of economic acting meets scarce supply, rivalry occurs and competition results. Thus, competition is economic acting under certain conditions, but it shares economic acting’s fate. Competition is the reverse side of the coin called property.

The question to be asked should therefore rather be whether economic acting is a universal. However, because of the context just established, it is also permitted to ask whether competition is a universal. One must only keep in mind that competition is a form of economic acting under certain requirements, and similarly, competition itself is a phenomenon that may take different forms under different requirements. These requirements cannot be studied and discussed here in detail. It is obvious that in a hunters and gatherers’ society such as that of Northamerican Indian runners who run for ceremonial reasons perform a kind of competition different from the competition among the members of a modern rifle association and of the competition between modern chain stores and mom-and-pop shops. Among the Indians, competition is one-dimensional and aspective (who is ahead of the others?), the rifle owners’ competition is both competitor- and association-bound (who is the best of the club?) and thus perspective,56 and the rivalry between chain stores and small business concerns competition between channels of distribution on another (perspective) macroeconomic level.

56 W. Fikentscher, Modes of Thought (2004), 254 f.
It should be noted that competition in the sense used in the above text is competition defined by rivalry. Therefore it is not perfect competition in the neoclassic sense which for informational requirements is defined by the absence of rivalry. For the same reason rivalrous competition does not take place on a perfect market.\textsuperscript{57} Rivalry involves a subjective (= individual) market. Among other consequences, this means that from a neoclassical point of view competition cannot be identified as an ethnological universal. In turn, this confirms the foregoing decision for the substantivist and against the formalist approach.\textsuperscript{58} That perfect competition is no competition forces a decision in favor of the subjective (=individual) market, because only non-perfect markets know rivalry. At least at this point, ethnology has to say farewell to neoclassical economics.\textsuperscript{59}

The fact that the word and concept of (rivalry-defined) competition is being used in the foregoing comparisons justifies, under the test developed before,\textsuperscript{60} to speak of competition as a universal.

7. Reasons for Positing Generalities and Invariants as Universals. Postmodernism

The reason why tangible and intellecction property as well as competition have been ascertained as ethnological universals is the necessity to have \textit{tertia comparationis} for comparing various situations in different ethnic groups, situations in which tangible and intangible things are assigned to persons or groups of persons in an exclusionary manner, or in which such assignments move from person to person, group to group, person to group, or group to person.\textsuperscript{61} It makes no difference whether these points of comparison are called archetypes, constants, or meta-concepts and -values.

\textsuperscript{57} For details, W. Fikentscher, Culture, Law and Economics (2004),107 ff.

\textsuperscript{58} See II. 1., above.

\textsuperscript{59} See the discussion II. 6., above

\textsuperscript{60} See III., above.
This result contradicts postmodern holdings. Postmodernism rejects general concepts and values.\textsuperscript{62} In this, philosophical postmodernism is a flashback to nominalism.\textsuperscript{63} As in philosophical nominalism, an ideological underground criticism of alleged values seems to foment postmodernist fervor. There is a connection between evaluation and generalization, at least a psychological one, and both evaluation and generalization are aspects of the \textit{universalia} issue.

Authors who feel uneasy in front of values, tend to attack generalizations because the anti-generalization argument is less biting, less risky. It is no secret that a considerable number of postmodernist writers, for example in France, were in earlier years to be found in the Marxist camp. After 1989, they turned postmodern. A value system had broken up, so all or other values were put to doubt, so why not start with the tiny and small again, and fight generalizations, including universals? If I do not like the contents, let me argue methodologically. Hence, speaking in favor of universals, will draw postmodernist critique.

IV. Purposes of Protection and Fund Theory

To accept ethnological universals, for instance property and competition is only a more or less conceptional, and thus formal step. The much deeper going issues arise when one asks for the purposes to which the conceived universals are to be used, for example in economics, or in law.

1. \textit{What is to be protected?}

Concepts, including universals, are only meaningful when something depends on their proposition. In law, we ask for the consequences a concept may be used for. Property is a legal concept ordinarily used to protect someone or something. This side of the universals problem cannot be discussed \textit{in extenso} in this paper. Reference may be made to another

\textsuperscript{62} See, e.g., the reply to Sally Falk Moore in: W. Fikentscher, Ein juristisches Jahrhundert, Rechtshistorisches Journal 19 (2000), 560 - 567
publication that tries to draft a system of protectable interests (Schutzgüter) in the ethology of intellectual property protection.\textsuperscript{64}

There are three main reasons for the protection of intellectual property rights in pre-industrial societies: (1) to protect holders of traditional knowledge and similar items assignable to persons or groups of persons from theft, intrusion and other forms of disrespect ("taboo-zone", protected by the principle injunctive relief in general and for violations of droit moral in particular), such as secret tales, music, or dances; (2) to protect such holders against financial exploitation of these goods, through misrepresentations or misappropriations, by having the offender pay damages ("damages zone" protected by the principle that one should not reap where one has not sown); and (3) to provide for compensation (for example fictive licensing fees) in cases of "paid fair use", "paying public domain" or "non-injunction torts"\textsuperscript{65} ("paying public domain zone" protected by the principle of "takings" according to which there are limitations to tangible and intangible property that ought to be tolerated, but compensated). All three "zones" of protection of (tangible and) intangible property own their reason of protection to the idea that someone who contributed an achievement to the common stock of human havings ought to be rewarded for that contribution. To make such desirable contributions possible at all, the law of competition provides for the necessary flexibility, without which all ownership would not change anymore from one holder to another. Therefore competition must be free and fair. Competition law provides for a number of equitable remedies, all flowing from the underlying idea that earnings from restraints of competition and from unfair advantages deserve no reward but hamper those contributions.

In order to create consistent sanctions against such inequitable advantages, empirically to be derived and subjected to legal-political control, it is necessary to have generalized, invariant concepts, that is, tangible and intellectual property, and competition. The empirical-deductive development of the idea of universals on the basis of Synepeia analysis proves its worth (see III. 1.), above).


\textsuperscript{65} On the difficult English terminology of these permitted uses, which nevertheless are subject
2. Fund Theory

Why do human beings engage in activities that, at least in hindsight, are to be labeled to be economic? Carl Phillip Kottak developed a “fund theory” in order to distinguish the reasons why people do what as an observable phenomenon of life is called “economy”. There are five “funds” into which humans put their economically important achievements: (1) the “subsistence fund” is that kind of economy where performances go into nothing more than mere self-support. (2) “Replacement” combines self-support with a storage that after using some of it will be filled up again. (3) The “social fund” uses contributions to a common goal such as kiva or menstruation hut. (4) Similarly, the “ceremonial fund” collects contributions for the maintenance of a shrine or temple. (5) Only the “rent fund” knows a produce that numerically exceeds an input. Now savings can be used for rent-seeking. Lending and leasing out for interest follow from the possibility of having savings. Taxes become conceivable.

Kottak ascribes subsistence, replacement, social and ceremonial fund economizing to bands and tribes, rent fund economizing to states. This may be true for many societies, but taxes may also occur in proto-state kingdoms, and savings are possible in bands and tribes. Whatever the correlations may be, only the “rent fund” is able to acknowledge damages and paid fair use, while all funds, also the subsistence, replacement, social, and ceremonial funds will acknowledge a “taboo-zone”. Having an economy without rent-seekers, let alone utility-maximizers, offers no reason to deny injunctions in cases of disrespect of traditional values.

Whether Kottak defined the “funds” in a convincing way, and whether the funds have to be correlated to reasons for protecting property and competition in the above proposed or in a different manner, finally whether there more than one profit-enabling “fund”, are issues going beyond the object of this paper. What is important to note is that indeed the purposes of economic behavior relate to quite different economic “fund’s” in Kottak’s sense. No formalist author (an author who understands economic ethnology as an application of neoclassic economic theory *mutatis mutandis*, see I., above) has, to my knowledge, ever paid attention to different “funds”, however they may be characterized and arranged with one another. The undeniable existence of the “funds”, the reasons for engaging in economic activity, disturb the clarity of concepts neoclassics may duly claim. Formalists merely know what Kottak calls the
“rent fund”. Only substantivists can – based on empirical judgment – inductively acknowledge the existence of other funds. This is a further reason why the decision in favor of substantivism (see II., above) is the correct and the only theoretically promising one.

V. Conclusions

1. Economic ethology is a subfield of ethology as an empirical social science.

2. Ethnoeconomics is not accessible by deduction from neoclassic economic models because of their prescriptive character and because of theoretical requirements such as perfect competition, objective (instead of individual) market, marginal cost, utility maximizing and property rights.

3. In economic ethology, two determinisms run counter each other, the postulative model determinism of neoclassics, and the empiricism-based cultural determinism (insofar it is admissible). There is no bridge.

4. Universals are to be discussed from a substantivist, not formalist, perspective. This implies a rejection of neoclassic economics at least as far as universals are concerned. Moreover, for a large number of modern microeconomic and politico-economic ends, national and global, neoclassic economics should be given up altogether. An Empirical Economic Theory is needed instead. Part of it, and proof for it, is the empirical universalism proposed in this article.

5. The anthropological-analytical apparatus (compositional, correlational analyses, synepeia analysis) can easily be used for the identification of universals and specificities. Universals are what in these analyses count as meta-concepts and meta-values. They need not be “deep in our brain”, they result from comparison of cultures.

6. Under these standards, tangible property, intellectual property, and competition are ethnological universals. Thought-modal and cultural specificities,
specific culture carves out exceptions from a universal trait or complex, sometimes even a certain modes of thought – behind a group of cultures – carves out traits or complexes. Islam is an example where a mode of thought causes specifications for the universal human activity of rendering (Parmenideian) judgments.

7. Local courts are entitled to decide under local law, thus adding sanctions to breaches of the laws protecting property and competition. Executions of such local decisions in other jurisdictions require the absence of public policy defenses. Universals will often serve as reasons for such absence.

8. The purposes of protecting intellectual property and competition have to be correlated to the universals and an anthropological fund theory. Then they may result in adequate economic and legal sanctions against offenses. For example, *injunctive relief* against violations of traditional knowledge, which is taboo to outsiders, is an appropriate sanction in the subsistence, replacement, ceremonial, social, and rent fund. *Damages* and *paying public domain* (“paid fair use”, “non-injunction torts”) make only sense in the rent fund. Damages prevent reaping where one has not sown, paying public domain remedies prevent theft by good people, under the principle of takings (“endure but liquidate”).

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