
Protecting Traditional Cultural Expressions From a Copyright Perspective

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I 、 Brief introduction of TCEs

Folk literature and art^① is expressed as TCEs (traditional culture expressions) or EoF (expressions of folklore) by WIPO-IGC. Intellectual property system plays an extremely important role for legal protection of TCEs. Copyright law, trademark law, patent law, design law and anti-unfair competition law all make great contributions to the TCEs protection. I, however, here just want to analyze the TCEs protection from a copyright perspective.

II 、 Current situation of protecting TCEs in China

China is an old and historical country with fifty-six nationalities. Different nationalities have their own traditional culture and habits. But how to protect these abundant, special, original, colorful, precious heritage and culture is a big question to

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① Folk literature and art divide two parts: Folk literature contains legends, fairy tales, stories, fables, jokes, folk ballads, folk narrative prose and epics, comic dialogue and *dagu*, proverbs, folk adage, two-part allegorical saying, riddles and etc. Folk art contains folk songs, folk dances, folk painting, folk opera, folk acrobatics and unique skills, folk handcraft art and etc. The special characteristics of TCEs are: community, oral expression, transmission and variation.

modern society when facing the market economy and the invading of foreign culture. Although some organizations and institutions in international world such as WIPO and UNESCO try to reach some agreements and they have made significant progress in protecting TCEs, China, as a developing country, is still lag behind. Typical cases and disputes about folk literature and art are very common in recent years. The main reason for these is that Article 6 of the Copyright Law of P.R.C (1990): *“Measure for the protection of copyright on works of folk literature and art shall be established separately by the State Council”*. But until now (2007) the State Council has been avoiding its duty, they do nothing about it. On the one hand, the copyright law of china admits that the folk literature and art should be protected by the copyright law; on the other hand, they stipulate the State Council should establish the specific measures that don’t finish the task until now. So, when appearing conflicts about TCEs, there is no suitable law to bring into play. There is a blank existing in protecting folk literature and art in China. According current judicial experiences, the court apply the Copyright Law mechanically to deal with TCEs’ disputes. But the problem is **Copyright Law in most countries could protect TCEs derivative works though it has almost none saying on protect TCEs itself**. It is the same as China’s situation.

The following famous and typical case happened in China could elaborate the realistic problems——the case of “Bai Xiu’e Paper-cut”^②

Bai Xiu’e is a peasant lived in north of Shan’xi province; she came to Beijing and

^② WU Yueling: “Bai Xiu’e Paper-cut”, written down 《China Art》, July 21, 2004

settled down from 1996 living by selling paper-cuts. The dispute between her and China Post Office is whether she is the copyright owner of her paper-cuts which are derivative from the traditional folk paper-cut design in local area. After three trials (from the intermediate people's court to the Supreme Judicial Court) she has won the case finally.^③

The Chinese court from this case conveys a basic principle that the copyright law protects the TCEs derivative works so long as it involves creativities. However, the court doesn't illustrate explicitly that the TCEs itself should be protected or not and how to protect it with law.

III、 Analyze the problem

The case is over, but it initiates us to think deeply.

The above case has proved that the law has protected the author of the TCEs derivative works, we may put it aside in the paper, and discuss the protection of the TCEs itself, the right of TCEs owners, and the neighboring right of the TCEs.

TCEs in China are very plenty and various, especially in minority nationality areas and remote districts. I believe: the owners of the TCEs are the local people, tribes, or the governments of the minority autonomous areas whom I call "the genetic resources holder" who have been creating and maintaining the TCEs.

In market economy, it is very common that the person who compile, transmit, or

^③ Related news could be found at: http://www.legalfino.gov.cn/zt/2005-01/20/content_184025.htm
<http://bjgy.chinacourt.org/public/detail.php?id=13000>
http://news.xinhuanet.com/collection/2003-11/10/content_1168781.htm

record the TCEs could benefit a great deal without paying a penny in getting the resources, but the genetic resources holders could get nothing, most of them still living in poverty and the TCEs are withering. Furthermore, the right of the compilers, transmissioners, or the recording people could be protected by the copyright law in Article 12, 14, 35, 36, 37, and 38. In contrast, we couldn't find any law in current legislation system (including the copyright law) to protect the genetic resources holders and TCEs itself. I mean that the holders of TCEs should be protected too and the economic beneficiaries (e.g.: the compiler, transmissioner, or the person recording the TCEs.) should share their economic benefits with the holders. The economic beneficiaries may send up fees to the local government or get permissions from the local people or tribes. Meanwhile the government should work out related regulations to normalize the activities of the transmissioners, compilers, and the recording people.

I name the idea as **“sharing the benefits to protect TCEs and its holders”**.

If we take the derivative works of TCEs as the “stream”, then the TCEs is the “source”. If we take the genetic resources holder as the person who plants the trees, the derivative work's holder is the person who enjoys the cool. If we could not provide the measures to guarantee the genetic resources holder's rights and benefits, nobody is willing to creating and maintaining the TCEs. The “stream” will dry up soon for lack of the “source”.

IV、 How to resolve this problem?

My answers are as followings:

1. Taking the legal protection:

(1) We need to modify the present intellectual property system (including the copyright law) to meet the objectives by making use of every opportunity of law revision.

(2) It is better for us to establish the *sui generis* law in the regime of intellectual property for TCEs protection when conditions are fulfilled.

2. Some specific methods we could take now:

(1) Speed up to declare the “non-material cultural heritage”;

(2) Nominate some typical person and units which can inherit and pass on a certain branch of folk literature and art; set up the ecology museum in minority nationality regions;

(3) Draw up the local statutes and regulations through the local people’s congresses at various levels for there is no unified law to protect TCEs in China;

(4) Utilize proper administrative measures to support and supervise the protection TCEs plan.

June 9, 2007, is the 2nd “China Cultural Heritage Day”, I hope the folk literature and art (TCEs) like the flourishing and thriving tree enriching our spirits and stimulating our innovation endlessly!