

# Research on Copyright Protection of Folklore and Art Works

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## Abstract

China has a wide variety of folklore and art works, and rich and diverse traditional cultural resources. Article 6 of the Copyright Law clearly states: "Measures for the copyright protection of folklore and art works shall be separately prescribed by the State Council." However, the Regulations on Copyright Protection of Folklore and Art Works (Draft for Opinion) drafted by the State Copyright Administration has not yet come into effect after more than 30 years, which stems from the great interest and difficulty of protection. In the process of inheritance and development, folklore and art works have been subjected to protection dilemmas such as lack of legislation, uncertainty about the subject of rights and the distribution of benefits, the scope of reasonable use, and the legal status of re-creators. Improving the relevant legislation, clarifying the subject of rights, setting up a special foundation to solve the problem of benefit distribution, and clarifying the scope of reasonable use and the legal status of re-creators will help to promote the excellent traditional culture, enhance China's cultural soft power, and realize a strong cultural country.

## Keywords

Folklore and art works; Copyright protection; Rational use.

## 1. Current Status of Copyright Protection for Folklore and Art Works

In its long history, the Chinese nation has created a vast and colorful array of folklore and art works, forming a valuable cultural heritage and spiritual wealth in China. After the reform and opening up, China gradually recognized the importance of the protection of folk literature and art works, and in 1990, Article 6 of the Copyright Law clearly stipulates: "The State Council shall separately stipulate the measures for the protection of the copyright of folk literature and art works." However, after more than thirty years, this protection method has still not been introduced. Nevertheless, after the promulgation of the Copyright Law, China's academic circles set off a climax in the study of the legal protection of folk literature and art works, and gave a variety of different legal protection programs. Some scholars proposed that folk literature and art works should be regarded as ordinary works and be protected by copyright law. Some scholars have also proposed certain modifications to the copyright law system to protect folklore works. There are also scholars who propose to construct a special right protection model outside the copyright law system to protect folklore works. Of course, there are individual scholars who oppose the use of copyright law to protect folklore works and advocate protection through public law. At the same time, the National Copyright Administration accelerated the relevant legislation and issued the Regulations on Copyright Protection of Folk Literature and Artistic Works (Exposure Draft) (hereinafter referred to as the "Exposure Draft") in September 2014, which has been delayed in coming into effect due to excessive skepticism. In recent years, hundreds of cases involving the protection of the copyright of folk literature and artistic works have occurred in China's judicial practice, but individual courts have refused to accept them on the grounds that there is no method for the protection of the copyright of folk

literature and artistic works. Other courts have heard a number of influential cases based on the principles of copyright law, such as the "Ussuri Boat Song Case", which, as the "first case" of the copyright protection of folklore works, reasonably coordinated the interests of the parties concerned and promoted the development of the cultural industry, which has had a good social impact. However, there are also some judgments that have caused a lot of controversy. It can be seen that it is of great significance to construct a theory of copyright protection for folk literature and art works with Chinese characteristics. It is worth mentioning that on November 30, 2020, General Secretary Xi Jinping emphasized in the 25th Collective Study of the Political Bureau of the CPC Central Committee that it is necessary to "timely study and formulate protection methods in the fields of traditional culture and traditional knowledge", which highlights the urgency of constructing a theory and system of copyright protection for folk literature and artistic works with Chinese characteristics. This emphasizes the urgency of constructing a theory and system of copyright protection for folk literature and art works with Chinese characteristics.

## **2. The Dilemma of Copyright Protection for Folklore and Art Works**

### **2.1. Lack of Legislation**

China's copyright law clearly for folk literature and art works of copyright protection to be separate provisions, but so far the special provisions have not been introduced. In judicial practice, most of the disputes over the copyright of folk literature and art works arise because of the lack of legal provisions of this major premise. No clear legal provisions, there is no clear and strong punishment for infringement. Although in practice, the court will not ignore the infringement, may be based on the spirit of the law or the relevant provisions of the copyright law, but this protection is far from enough. Making up for the lack of legislation and formulating clear legal provisions as the basis for adjudicating cases is an indispensable step for the copyright protection of folk literature and art works.

### **2.2. Definition of Subjects of Rights**

Folklore and art works may be created by individuals or groups at the very beginning, but in the process of inheritance and development, such works are completed by a certain group or a certain ethnic group. From this aspect, the subject of the rights of folk literature and art works is somewhat different from the authors of general works under the copyright law. As a special form of literature and art, the copyright law and related laws and regulations have not yet reached a conclusion on how to define the identity of the subject of folk literature and art works. The definition of the identity of the subject of the right is essential to determine the attribution of the right as well as to solve the problem of infringement. Therefore, we need to clarify what criteria are used to classify the subject of rights of folklore works. Without a clear definition of the subject of the right, it is impossible to implement the protection of the right.

### **2.3. Distribution of the Benefits of the Work**

In order to make folklore better inherited and developed, commercial subjects or re-creators should pay appropriate remuneration when utilizing folklore. Firstly, the use of folk literature and art works should be permitted by the right holder or the administrative department concerned with copyright protection; secondly, the benefits obtained should be attributed to the right holder if the attribution of power is clear, and should be maximized for the further development of folk literature and art if the attribution of power is unclear. The draft also provides that within five years, if the benefits cannot be distributed because the right holder cannot be identified, the part of the remuneration that cannot be distributed will be used to encourage the promotion, inheritance and development of folklore. However, the Exposure

Draft does not provide for the distribution of benefits from the income of folklore works without right holders.

#### **2.4. Setting of Rational Use**

The fair use system provided for in the Copyright Law specifies that the works of copyright holders may be used without permission and without payment in twelve specific cases, such as for personal study, reporting current news, and the performance of official duties by state organs. This system is set up to meet the needs of the public interest at the expense of some of the rights enjoyed by copyright holders, and is a weighing and trade-off between personal interests and social public interests. At present, the scope of fair use of folk literature and art works is not clearly defined, although it can be presumed to apply the fair use system in the legal right of copyright, but as mentioned above, folk literature and art works have their own special characteristics compared with general works, and it is necessary to consider the setting of the fair use system separately. The scope of fair use is too large or too small will be contrary to the original intention of protecting the copyright of folk literature and art works, which is not conducive to the inheritance and development of China's outstanding traditional culture.

#### **2.5. Clarification of the Legal Status of Re-creators**

Folklore works are often closely linked to the production habits and daily life of a group or a people. With the process of modernization, such works have taken on new forms by combining with new things such as the Internet, resulting in re-created works. Re-created works to a certain extent conducive to the inheritance and development of folk literature and art works, but inevitably, in this process, there will be re-creators, resulting in more complex legal issues. So, how should the rights of re-creationists be protected? In this regard, the theoretical and practical circles are also divided. It is also worthwhile for us to consider how to reasonably protect the rights of re-creators.

### **3. Proposals for Copyright Protection of Folklore and Art Works**

#### **3.1. Improving Relevant Legislation**

In accordance with article 6 of the Copyright Law, the State Council should expedite the promulgation of regulations on the copyright protection of folklore and artistic works, clarifying the scope of folklore and artistic works, the subject of rights, the content of rights, and the duration of rights protection. Folk literature and art works are different in nature from the general works protected by the copyright law, and cannot be generalized, therefore, in the process of protecting folk literature and art works, the establishment of the corresponding system needs to give special consideration to the specificity of its nature. In addition, with the development of science and technology, social progress, folk literature and art works appear in new forms, this type of dispute will also come. If the court has been based on the spirit of the law or the relevant provisions of the copyright law to adjudicate cases is bound to lag behind the development of social practice. Therefore, regulations on the protection of the copyright of folk literature and art works should be introduced so as to better guide judicial practice.

#### **3.2. Clarification of the Subject of the Right**

The formation and development of folk literature and art works is a long-term process, in which different people will continue to improve and innovate them, and the works will slowly take on regional characteristics, which is also different from the general works. Works under copyright law usually have an identified author, and it is not difficult to adjudicate disputes because the author cannot be identified. However, in judicial practice, it is often difficult to determine the author of folk literature and art works, which makes the case difficult to continue. According to the principles of copyright law, unidentified natural person members of a group or nation who

created the original version of an original folklore work and the subsequent version of an original folklore work should be identified as the author, who may be several members of a group or nation or dozens of members, the number of which is not certain. The advantage of such a definition is that it recognizes both the legal status of the creator and the creative contribution of different individuals at different stages of the process, which is conducive to mobilizing members to create new works.

### **3.3. Establishment of Specialized Foundations**

Since copyright law is a private law, and the special protection regulations established under it should also be private law, the subject of the right is entitled to the right, that is to say, the subject of the right to a work of folklore is entitled to the exercise of the property right deriving from the work. In the case of such works, if the subject of the right can be identified as a specific nation, ethnic group or community, the subject of the right has the right to ownership of the proceeds from the use of the work of folklore. In addition to the distribution of interests in this section, the distribution of interests in the proceeds of folklore works in which the subject of rights cannot be identified is also included. The original purpose of copyright protection for folklore works is to pass on the excellent culture, so it is the proper meaning of copyright protection to utilize this part of the proceeds for the subsequent development of folklore works. Consideration can be given to the establishment of a special foundation to engage in relevant social welfare activities, the use of folklore works of art can not determine the rights of the subject of the proceeds of the foundation, which uphold the purpose of the most favorable to the folklore works of art at its disposal. Of course, the activities of the foundation should be supervised in accordance with the law.

### **3.4. Setting Up Rational Use**

It is indeed necessary to set up fair use for folklore works, and not all uses of such works require authorization and payment. Most scholars in China are of the opinion that copyright restrictions on folklore works should include the following situations: first, use by members of the community within the scope permitted by traditional customs; second, use for the purpose of teaching, research and personal enjoyment; third, appropriate citation of works created by an individual for the purpose of introduction and commentary; fourth, for the purpose of reporting current events and news, inevitably reproduced in the news media; fifth, for the purpose of reproduction for display or preservation of editions by libraries, archives, museums and art galleries; sixth, for the purpose of carrying out State official duties, Museums, art galleries, etc. for the purpose of display or preservation of the version of the need to copy; six for the performance of official state duties; seven of the folk literature and art and its interpretation of the work of copying, painting, photography, video; eight is the use of folk literature and art and its interpretation of the work of the public interest of the community. It can be seen that scholars in China are mainly based on the fair use system to construct the copyright restriction system of folk literature and art works. As for the specific setting of fair use of folklore works, it is suggested to adopt the mode of "general provisions + specific enumeration". The general provision on fair use can be stipulated as follows: "The use of folklore works of art and literature in the following circumstances may be made without the authorization of the copyright holder and without payment of remuneration to him, provided that the source of the work and the name of the work are specified, and that the normal use of the work is not affected or the lawful rights and interests of the copyright holder are not reasonably jeopardized." As for the specific circumstances of fair use, we can refer to the views of the scholars mentioned above.

### **3.5. Clarifying the Legal Status of Re-creators**

In social practice, China adheres to the concept of promoting the integration and development of the cultures of all ethnic groups, and its attitude towards adapting, organizing or recreating

folk literature and art works is supportive and encouraging. In the Huangmei opera singing case, the Shanghai Film Products Factory filmed the opera movie "Match of Heavenly Immortals" which was based on the Huangmei opera "Match of Heavenly Immortals" starring Yan Fengying, and Yan Fengying's legal heirs filed a lawsuit as plaintiffs on the grounds that Yan Fengying enjoyed the copyright of the design of the singing voice and the right to perform it, and demanded that the defendant stop the infringement and compensate for the damages. In the opera "tianxian match", yan feng ying according to their own knowledge of opera and voice of the opera "tianxian match", belongs to the traditional huangmei singing re-creation behavior, should enjoy the re-creation of the copyright works, its legal heirs filed a lawsuit to defend the rights and interests of the lawful, that is, there is an original subsequent creation should be protected by law, make a contribution to re-creation of the author should be protected by law. It should be noted that, although, according to the long-established folk custom, re-creators generally do not need to seek the consent of the authors of the original version of the work, the subsequent re-creative behavior should follow the custom of the community from which the work originated in terms of the use of the work, or else it will hurt the feelings of the creators of the community, and there is a legal risk of infringing on the original author's right to protect the integrity of the work.

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