

Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore

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[“Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore” was originally published in three places. The version of the essay from which this text is derived (with a few spelling and grammatical alterations) appeared in Copyright Bulletin, vol. XVII, no. 1, 1983, pp. 10-14 (a quarterly review published by Unesco in English, French, and Spanish editions). It also appeared in IFPI News, No. 15, 1982, and in Public Policy Issues and Latin American Library Resources, Papers of the 27th Annual Meeting of the Seminar on the Acquisitions of Latin American Library Materials, Washington, D.C., March 2-5, 1982. SALALM Secretariat, University of Wisconsin, and UCLA Latin American Center, Los Angeles, California, 1984.]

The telephone jingles at the Archive of Folk Culture at the Library of Congress. A blues researcher, devotee, and promoter is calling on behalf of his friend and client, an elderly blues singer from Mississippi. The singer and two friends recorded a blues song in 1928 that attained some popularity among blues audiences of the era. It was subsequently recorded by other blues artists, then adapted and arranged in the 1940s by a prominent bluegrass musician from Kentucky, then adapted and arranged by a well-known Chicago rhythm-and-blues musician in the 1950s. From there it “hit the charts” in a big way, being arranged and re-recorded by a prominent British rock group in the 1960s; the LP on which the item appears sold over a million copies. Why, the caller wants to know, has his friend, the elderly blues singer, not received a cent in royalties? The singer claims that he actually made up the song, and a copyright notice was filed when the recording was made.

Although it is of course possible that “making it up” in this context means adaptation of floating blues lyrics and melodies that formed the tradition out of which our Mississippi blues singer created, the cause nevertheless seems worthwhile, and a copyright lawyer is enlisted. He assembles the facts and decides to write strong letters demanding royalty payments to the author / composer from the various record companies involved over the years. Some of the companies come through with a check, others ignore it, and one company protests that it has already paid royalties for that song to someone else (holder of the claim for a different song with a similar title). Legally and philosophically considered, the resolution of the problem is messy at best, but it has the practical effect of rewarding our elderly blues singer and helping him out during a period of straitened circumstances. So everyone is happy, and the case is closed.

A delegation of Navajo Indians, including a rug weaver, a trading post manager, and a friend, calls for an appointment with the Library’s American Folklife Center. On arrival they explain that they are very concerned about the use of Navajo rug patterns by

non-Navajos, and particularly by overseas factories that reproduce rugs in the Navajo style with cheap materials and cheap labor, thus undercutting the Navajo themselves in the market for their famous rugs. The delegation wonders whether the traditional rug patterns could be copyrighted; whether the Navajo could have a special trademark with official sanction; or perhaps a law could be passed prohibiting the import of the imitative rugs. The director of the American Folklife Center points out that the Department of the Interior has legal authority to develop a sort of trademark (or perhaps we should say “tribemark”), but that tribal participation in the system for one reason or another has not always been regular or effective. An appointment is arranged with officials in the Department of the Interior, and the delegation leaves perplexed but moderately pleased that some people in Washington are at least interested in the problem.

A letter arrives at the American Folklife Center from the chairman of the education committee of a Plains tribal council. The writer is agitated about a recent glossy publication that both describes and (in part) transcribes the sun dance. The sun dance is a sacred and secret ritual, she urges, and should never be published in a book aimed at general audiences; the participants in the sun dance are the only persons who have a right to this information. What can be done to stop this publication? Also what procedures should the tribe use to copyright rituals like this so that they cannot be published?

None of these three instances is actually true, but all of them approximate the day-to-day experiences of a cultural specialist working in Washington. Each reflects certain special complications and circumstances, and there may be no single solution to the three problems presented by them. Nevertheless, they all represent an area of widespread anxiety and concern in the United States and around the world – particularly among Third World countries – and underlying them are certain profound legal dilemmas that face all governments developing laws and policies for the nurture of their indigenous cultural traditions.

The impetus for protecting folklore, both nationally and internationally, is a deep-seated but inchoate concern or anxiety, which does not translate easily into clear-cut issues. Nevertheless, here is a taxonomy of the anxiety.

The first issue may be termed authentication. Concern for authentication of folklore comes in various forms. Native Americans and West Africans unite, for instance, in decrying the replication of their traditional crafts in overseas factories, which mass-produce the items with cheap labor and flood the international market, including local markets in Nigeria or the Southwest of the United States. Such replication constitutes not only an economic but a cultural and psychological threat to the authentic practitioners of traditional arts and to the traditional groups whose values those arts express. To take another example, the issue of authentication hovers about the frequently expressed complaint that outside researchers study and publish descriptions of traditional cultures and their practices without consulting the people being described. Though it sometimes appears that one person’s information is another person’s misinformation, the

worldwide anxiety about cultural misrepresentation is genuine; thus it is that this form of the authentication issue is often associated with calls for consultation.

The second issue I call expropriation. The expropriation issue represents an anxiety about the removal of valuable artifacts and documents from their place of origin. The great museums of Western civilization have heard for years the complaint that they have taken irreplaceable national treasures away from their homelands. I judge this concern to be still on the rise. But it is not limited to artifacts. I have heard fretting, within the United States and around the world, about photographs, motion-picture films, sound recordings, and other documentary materials being created, then taken away from the original community, region, or country that is the subject of documentation.

Third is the issue of compensation. Even when the national and international circulation of a folk cultural item is a source of local pride, or when it is conceded that such circulation is inevitable and proper, there is widespread resentment of the fact that the individuals and communities whence the item originated are not compensated for their contribution.

Fourth is what I shall call simply nurture. Although all the other issues seem to pertain to regulation of the circulation of folk cultural items outside their “native habitat,” in fact the worldwide expression of concern about these issues is regularly accompanied by a parallel concern for maintaining the health and vitality of folk culture itself in the face of “modernization” and “internationalization” in the flow of commerce and culture. Protests about the external exploitation of folk cultural items, in short, almost always betoken a harder-to-express fear about the disruption of folk culture itself.

This swirl of issues and anxieties has generated a variety of legal initiatives within various countries of the world. I should like to call special attention to an initiative developed by Unesco with which the World Intellectual Property Organization (WIPO), based in Geneva, was later associated as regards intellectual property aspects.

Most of the cultural issues I have just delineated focus not on culture as a whole, but on the creative expressions of the various traditional cultures of the world. There may be broader anxieties about the future of culture as a whole, but the anxieties are crystallized by discussions about the use or abuse of creative expressions such as songs, dances, and crafts. Thus it was inevitable that some legal solutions would be proposed in the sphere of intellectual property law.

“Intellectual property” as a term perhaps requires some explaining. It is used as the collective or generic term for that class of law that regulates and encourages the flow of creative contributions to society. Under the rubric of intellectual property come such categories as copyright, trademark, patent, appellation of origin, and the like. Copyright law had certain attractions as a framework within which to deal with the protection of the creative expressions of folklore. A folksong is, after all, a song. Songs as individual compositions can be copyrighted, thus asserting the author’s claim to control over and

compensation for the fruits of his creativity. Why not apply the same principles to folk music, folk art, and other creative genres of traditional expression?

As early as 1967 Bolivia passed a law providing legal protection of its national folklore, using a quasi-copyright framework, and some other Third World countries followed suit in the 1970s. At the urging of some of these countries, Unesco launched in 1973 an initiative to explore the protection of folklore as a legal issue. Later Unesco and WIPO agreed to collaborate with the result that a Working Group of legal and folklore experts was convened in Geneva to examine and comment upon a model law for the protection of folklore devised by legal experts of the two organizations. I participated in that Working Group as the United States representative. After several days of debate regarding the overall philosophy of folklore protection, the proper legal frameworks for such efforts, and the specific provisions of the draft model law, the Working Group adjourned with the resolution to meet again a year later.

The second meeting took place at Unesco headquarters in Paris in 1981. The Working Group was presented with a revised model law that incorporated the deliberations of the first meeting. Further debate ensued, but by the end of the second meeting there was a general consensus among members of the Working Group about the fundamental direction and most specific provisions of the model law. The issue will be brought before other international gatherings in the future.

Ultimately, even if it survives the gauntlet of international deliberation, the model law is designed simply for recommendation to national legislatures. In other words, it is not a matter subject to formal international treaty, but simply a formally endorsed concept that will be presented to national legislatures for their consideration. Unesco and WIPO will presumably print up the model law and commentary on folklore protection, and it will enter the network of current ideas from which nations may select, as they choose, in devising or revising their statutes.

There is not space here for me to analyze in detail the provisions for the model law protecting expressions of folklore. For the moment, let me try to highlight what seem to me the fundamental dilemmas presented by efforts to protect folklore through an intellectual property framework.

First, the implication of such a concept is that traditional cultural groups possess intellectual property rights as groups to the creative expressions created and maintained by the group. Thus the sun dance of our earlier example is felt to be created, maintained, and thus owned by the adherents to the ritual. Copyright law, however it varies from nation to nation, has as its common denominator a concept of individual property rights arising from individual creativity. It in effect carves out a sphere of rights from what otherwise would be the free flow of creative ideas in the large "public domain." Protecting folklore means essentially acknowledging an intermediate sphere of intellectual property rights between individual rights, on the one hand, and the national or international public domain on the other. In terms of legal history and legal frameworks, this is a radical idea.

Second, the effort towards folklore protection raises fundamental issues about the concept of folklore and the concept of particular expressions of folklore which define that which is to be protected. Among some nations and peoples, there is a tendency to identify folklore with a vague tribal or peasant past, and to assume that expressions of folklore have rights because of their origins in an imagined primeval cultural source. For others (amongst whom I number myself) the word “folklore” should be applied to living creative traditions, shaped by powerful ties to the past but evolving creatively in the present. In terms of protection, then, it must be decided whether rights being protected proceed from what I shall term “ultimate origin” or “proximate origin.” Using the example of the Navajo rug, adherents of proximate origin might say that the living creative tradition implies collective intellectual property rights, even though that tradition evolved from earlier borrowings from other tribes, thence from Mexico, thence from Spain, and thence from Moorish North Africa. On this issue the draft model law has been oriented by the deliberations of the Working Group to emphasize protection of living traditions, rather than protection of historic or prehistoric creative forms.

Third, legal protection of expressions of folklore raises the question of who will judge. The inclination of most nation-states will be to create what lawyers call the “competent authority” as part of the national government, in a ministry of culture of the like. Given the structure of most national governments, that may be the only practical solution, but some of us in the Working Group struggled to interpose a concept of adjudication or consultation with the source-group itself. This is manageable where a traditional culture possesses formal legal sanction but not so easy where the group lacks sanction. The Navajo tribe, for example, has legal status in the United States and possesses an official tribal council; but there is no organization of blues singers. The skeptic will perceive, in the interest of Third World governments in their folklore traditions, the potential for a power grab. Indeed, some of the lawyers representing Third World countries wondered aloud whether this might be the occasion for implementing an old lawyer’s dream expressed by the French phrase “domaine public payant.” When there is no individual author, in other words, we should pay a royalty to the state. For me, without adequate safeguards to ensure that the source-group itself for an expression of folklore has some say in the matter, the concept of folklore protection is disquieting.

Fourth, all these legal dilemmas about protecting folklore are embedded within a larger dilemma regarding the relationship of the world’s traditional cultures to the nation-states within the legal frameworks of which they must exist. I am increasingly of the opinion that a great international issue of the coming decades will be the effort to define and protect the basic human rights of traditional cultures vis-à-vis the national governments under which they exist. Although the issue of folklore protection has sometimes been raised in a theoretical style suggesting that the enemy of and exploiter of folklore traditions is the world of international corporations and developed countries, in fact a thoughtful observer may have reason to fear that the greatest dangers to folklore, and to the cultures whence the folklore arises, come from national governments, including Third World governments. Rising concerns in such forums as Unesco about

dealing with “migrant populations” represent but the tip of the iceberg of this worldwide problem.

It is hard to predict in what form the internationally drafted model law will finally be published, but it seems certain to appear in one form or another. Yet other avenues remain to be explored, such as the framework of law usually termed “appellation of origin.” But I hope that in the meantime these reflections can help to clarify the nature of and developments in the subject of folklore protection. It is an important and challenging aspect of the rising international concern for defining, understanding, protecting, and nourishing the world’s cultural patrimonies.