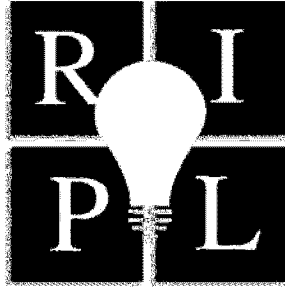


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## CAN COPYRIGHT LEND ITS CINDERELLAIC MAGIC TO CHINESE FOLKLORE?

DEMING LIU

### ABSTRACT

Folklore in China is disappearing and facing challenges for its very survival. To salvage folklore in China, some have called for immediate legislative action and proposed the law of copyright or *sui generis* protection as some potential solutions. However, copyright is traditionally concerned with the creations of individuals rather than the cumulative creations of an ethnic group or region. Furthermore, even *sui generis* protection, which is better adapted to folklore in theory, could be susceptible in practice to the abuses of private monopolies or state tyranny. Overall, the protection of folklore depends more on a consistent governmental policy of open-mindedness toward its use and dissemination than on any piece of legislation.

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# CAN COPYRIGHT LEND ITS CINDERELLAIC MAGIC TO CHINESE FOLKLORE?\*

DEMING LIU\*\*

## INTRODUCTION

With its long history, China has inherited rich folklore ranging from traditional operas, such as the Beijing Opera, to traditional Chinese brush painting, calligraphy, and paper cutting.<sup>1</sup> Folklore reflects China's cultural heritage and identity, and imparts national pride. However, folklore in China is disappearing,<sup>2</sup> and faces challenges for its very survival.

There may be many causes of the waning interest in folklore. A historical cause is the Cultural Revolution,<sup>3</sup> during which traditional culture was attacked, and anything associated with it was to be destroyed. For example, the wall enclosing Beijing was torn down for quarrying.<sup>4</sup> Also, many folk arts were attacked as “feudal superstitions”—“the continuing influences of traditional religions and philosophies and reverence for past imperial dynasties”—and the Red Guards were responsible for “wholesale destruction of heritage sites on a massive scale.”<sup>5</sup> The government's policy toward the fifty-five ethnic minorities, whose heritage embodied mainstream folklore, was to “uplift” them from “backwardness” and lead them by Mao's ideologies. Consequently, their folklore and customs suffered.<sup>6</sup>

Other causes of waning interest are more modern. For example, “[t]he diversification of cultural forms” exposes people to more choices; this modern

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\* The title of the article was inspired by Chafee's article—Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 503 (1945)—where he commented that “*Copyright is the Cinderella of the law*. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through mad mazes of a glamorous ball.” (emphasis added).

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<sup>1</sup> Chinese national folklore includes, without limitation, “myths, proverbs, music, dances, traditional operas, various forms of folk art, customs, dwelling houses with local styles, dresses and personal adornments, household utensils, [and] national sports.” Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Current Status on the Protection and Legislation of National Folklore in China*, WIPO/GRTKF/IC/3/14, (June 13–21, 2002), available at [http://www.wipo.org/documents/en/meetings/2002/igc/doc/grtkfic3\\_14.doc](http://www.wipo.org/documents/en/meetings/2002/igc/doc/grtkfic3_14.doc) [hereinafter *Current Status*]. “Chinese folk art has many genres, including painting, calligraphy, embroidery, carving and paper cutting.” Li Jinhui, *Folk Arts Call for Better Protection*, CHINA.ORG.CN, Jan. 20, 2003, <http://www.china.org.cn/english/2003/Jan/53975.htm>.

<sup>2</sup> Jinhui, *supra* note 1.

<sup>3</sup> See Trevor Sofield and Fun Mei Sarah Li, *China: Tourism Development and Cultural Policies*, 25-2 ANNALS OF TOURISM RES., 362–92 (1998) available at [http://www.wistp.murdoch.edu.au/publications/e\\_public/Case%20Studies\\_Asia/tourchin/tourchin.htm](http://www.wistp.murdoch.edu.au/publications/e_public/Case%20Studies_Asia/tourchin/tourchin.htm).

<sup>4</sup> Arthur Waldron, *Great Wall (China)*, Microsoft Encarta Online Encyclopedia 2005, [http://encarta.msn.com/encyclopedia\\_761569621/Great\\_Wall\\_\(China\).html](http://encarta.msn.com/encyclopedia_761569621/Great_Wall_(China).html).

<sup>5</sup> Sofield & Li, *supra* note 3 (internal quotations omitted).

<sup>6</sup> *Id.*

trend of aesthetics leads people to be less appreciative of folk arts and culture.<sup>7</sup> Accordingly, “[p]op songs are replacing local operas and cartoons are killing off shadow puppet plays. Most people see a centuries-old residential compound as shabby housing, while a section of an ancient city wall is merely an obstacle to traffic.”<sup>8</sup> Lack of interest often results in a lack of successors to folklore, with the effect of “leaving some of the traditional skills or folklore on the verge of being lost or disappearing completely.”<sup>9</sup> As Fan Xiaomei, a 25-year paper cutter who performed her skill for former U.S. President Bill Clinton, pointed out, “The paper-cutting art of northern Shaanxi Province is now in an awkward situation with no successors.”<sup>10</sup>

To salvage folklore in China, some have called for immediate legislative action, and proposed the law of copyright or *sui generis* protection as some potential solutions.<sup>11</sup> This essay examines whether copyright or *sui generis* protection can offer a sound and effective solution. The first part introduces the concept of folklore. The second part discusses the applicability of copyright to works of folklore. Having revealed that folklore cannot fit within the traditional copyright regime, the third part examines and evaluates the proposed *sui generis* protection for folklore. Further discussion reveals that such protection cannot save folklore either, and indeed may cause more problems than it proposes to resolve. Finally, this essay argues that, even in an era of global economic competition, folklore is better left outside the restrictive regime of copyright or *sui generis* protection: now that existing laws can address most problems related to folklore, folklore should be allowed to be disseminated, used, and developed without arbitrarily being burdened with copyright or copyright-like restriction.

## I. FOLKLORE AND COPYRIGHT

When the word “folklore” was first introduced internationally, some developing countries objected to it as “an archaism with the negative connotation of being associated with the creations of lower or superseded civilisations.”<sup>12</sup> However, the word continues to be used, though “traditional knowledge” (“TK”) or “cultural expression of indigenous peoples,” is often heard instead.<sup>13</sup> Folklore covers a wide range of subject matter. It can be broadly defined as “a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social

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<sup>7</sup> Jinhui, *supra* note 1.

<sup>8</sup> Li Jinhui, *Preserving Intangibles: China Takes a New Look at Ancient Traditions*, CHINA.ORG.CN, May 20, 2004, <http://www.china.org.cn/english/2004/May/95990.htm>.

<sup>9</sup> *Current Status*, *supra* note 1, at 4.

<sup>10</sup> Jinhui, *supra* note 1.

<sup>11</sup> *E.g.*, Mingde Li, *TRIPS Agreement and Traditional Knowledge, Genetic Resources, and Folklore*, JUDICIAL PROTECTION OF IPR IN CHINA, Sept. 2–5, 2003, <http://www.chinaiprlaw.com/english/forum/forum51.htm>; Zheng Chengsi, *A Treatise on the New Territories of Intellectual Property—the Protection of Traditional Knowledge and Biodiversity*, LEGAL DAILY, July 28, 2002, available at [http://www.legaldaily.com.cn/gb/content/2002-07/28/content\\_40691.htm](http://www.legaldaily.com.cn/gb/content/2002-07/28/content_40691.htm).

<sup>12</sup> Hugh C. Hansen et al., *The Law and Policy of Protecting Folklore, Traditional Knowledge and Genetic Resources*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 753, 756 (2002).

<sup>13</sup> Michael Blakeney, *Intellectual Property in the Dreamtime—Protecting the Cultural Creativity of Indigenous Peoples*, WP 11/99 OIPRC ELECTRONIC J. INTELL. PROP. RTS. (1999), available at <http://www.oiprc.ox.ac.uk/EJWP1199.html>.

identity.”<sup>14</sup> Under section 2 of the WIPO/UNESCO Model Provisions, which cover artistic heritage, “expressions of folklore” are understood as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.”<sup>15</sup> However, folklore encompasses more than *expressions* of folklore. Furthermore, *expressions* of folklore should be distinguished from *works* of folklore. The former lends itself to *sui generis* protection, and the latter to copyright protection.<sup>16</sup>

Though Chinese copyright law provides that “[r]egulations for the protection of copyright in expressions of folklore shall be established separately by the State Council,”<sup>17</sup> the drafted Regulations on the Protection of Works of Folklore of China have never come into force.<sup>18</sup> Inherent irreconcilability with the traditional concept of copyright may partly account for the reason.

To be protected under copyright law, folklore must qualify as “works” and satisfy the criteria for copyrightability. However, the traditional rationales for copyright law are based on the Western concept of private property—theoretically the incentives granted to authors, exclusive rights for a limited duration, would encourage trade and investment and enhance the ultimate dissemination of ideas when the duration expired.<sup>19</sup> When applied to the case of folklore residing predominantly in developing countries, traditional copyright law is ill-fitted.

First, copyright is a private property granted to authors, allowing them to exclude others from copying their works.<sup>20</sup> But folklore, part of traditional heritage, is often anonymous or the result of cumulative creation by an ethnic group or region. Where the latter is true, any individual in the community has the right to reproduce the work but cannot reserve that right to herself.<sup>21</sup> Thus,

<sup>14</sup> *Id.*

<sup>15</sup> WIPO/UNESCO, *The Protection of Expressions of Folklore: The Attempts at International Level*, Jan. 28, 2006, available at <http://dsir.nic.in/pubs/itt/itt9903/folklore.htm> [hereinafter *Model Provisions*].

<sup>16</sup> See Zongyuan Shi, *Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore—Response of China*, at 4,

<http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/china.pdf> (citing Regulations on the Protection of Works of Folklore of China, art. 2 (Draft Soliciting Opinion) (January 3, 1997)).

(1) verbal expressions, such as folk tales, legends, folk poetry, common proverbs and the librettos or scripts of ballad singers, etc.

(2) musical expressions, such as folk songs and national instrumental music, etc.;

(3) expressions by action, such as folk dance, folk operas, folk quyi (folk art forms including ballad singing, story telling, comic dialogues, clapper talks, cross talks, etc.), folk customs and rituals;

(4) tangible expressions, such as

a) production of folk art, especially drawings, paintings, murals (frescos), carvings, sculptures, pottery, mosaic, metalware, weavings and knittings, embroidery, ornaments and decorations, costume ornaments and designs, moulds of traditional arts and crafts and musical instruments;

b) artistic forms of folk architecture.

*Id.*

<sup>17</sup> Copyright Law of the P.R.C. art. 6, Sept. 7, 1990 (revised Oct. 27, 2001).

<sup>18</sup> *Id.* (revised Oct. 27, 2001).

<sup>19</sup> Carol M. Rose, *Book Review: Property in All the Wrong Places? Who Owns Native Culture?* By Michael F. Brown, 114 YALE L. J. 991, 995 (2005).

<sup>20</sup> See, e.g., L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 48–53 (1987); and J.H. Reichman, *Electronic Information Tools—The Outer Edge of World Intellectual Property Law*, 17 DAYTON L. REV. 797, 820–21 (1992).

<sup>21</sup> Zhang Jin, *Thinking on the Law of the Protection of Folklore with Comment on the Case of Wusuli Boating Song*, LAW APPLICATION, Oct. 20, 2004, available at <http://www.privatelaw.com.cn/new2004/shhtml/20041020-204352.htm>.

“Western notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions.”<sup>22</sup> Indeed, most intellectual property rights, whether under the Berne Convention, Paris Convention, or TRIPS Agreement, are concerned with creations of individuals.<sup>23</sup>

However, if we could grant the rights to the community at large, then each member would be entitled to terminate reproduction of the folklore, despite authorization of reproduction from all other members, leading to the so-called “tragedy of the anti-commons.”<sup>24</sup> Michael Heller coined the term to describe the situation where “multiple owners each have a right to exclude others from a scarce resource, and no one has an effective privilege of use.”<sup>25</sup> In such a situation, a user must obtain licenses from each owner, thereby increasing costs, and slowing or preventing reproduction. In the case of folklore, each member of the community could prevent an outsider from reproducing the subject matter, and an individual license from each member would be necessary, thus exponentially increasing the transaction cost. This rise in cost would undesirably decrease the availability of folklore, which directly contravenes the essence of copyright: encouraging innovation and dissemination of ideas.

In addition, one must consider that there may be various ethnic groups owning the same folklore, and they may not live within the same area or even the same national boundaries.<sup>26</sup> China’s Xinjiang Uygur Autonomous Region, Iraq, and Azerbaijan all play a certain music called *mukamu*. Kyrgyzstan and China’s Xinjiang share the same *Manasi*, one of the three epics of the traditional nomadic culture, and *Aken* balladry, a ballad sung to the accompaniment of a plucked instrument. China’s Inner Mongolia and the Republic of Mongolia both use *matouqin*, “a bowed stringed musical instrument with a scroll carved like a horse’s head.”<sup>27</sup> If these groups were to receive copyrights, then overlapping over ownership would lead to the above “tragedy of the anticommons” situation with all the undesirable effects. Furthermore, when clashes occur, the legal complexities may allow costs to accumulate quickly, especially in respect to the case where disagreements cross national borders; indeed, arguably, ethnic minorities could use the resources for much worthier purposes.

Another requirement for copyrightability is originality.<sup>28</sup> The work must “bear a decisive mark of individual originality.”<sup>29</sup> Folklore “is the result of an impersonal, continuous, and slow process of creative activity exercised in a given community by consecutive imitation.”<sup>30</sup> However, some folklore remains timeless, e.g., “sacred restricted ancestral designs must be replicated precisely.”<sup>31</sup> Thus,

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<sup>22</sup> Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 31 (1997).

<sup>23</sup> Hansen et al., *supra* note 12, at 798.

<sup>24</sup> Rose, *supra* note 19, at 997.

<sup>25</sup> Michael Heller and Rebecca Eisenberg, *Can Patent Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698 (1998), available at <http://www.sciencemag.org/cgi/content/full/280/5364/698>; see also Rose, *supra* note 19, at 999.

<sup>26</sup> Shao Mingyan, *On the Legal Protection of Folk Arts Arising from the Case of Wusuli Boating Song*, PEOPLE’S COURT PAPER (Oct. 11, 2005), <http://rmfyb.chinacourt.org/public/detail.php?id=88701>; Mark Liberman, *Legal, Ethical, and Policy Issues Concerning the Recording and Publication of Primary Language Materials*, Exploration 2000, Workshop: Web-Based Language Documentation and Description (Dec. 12, 2000), <http://ldc.upenn.edu/myl/webpanel.html>.

<sup>27</sup> Jinhui, *supra* note 8.

<sup>28</sup> 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2(2)(c)(i) (Lexis 2005).

<sup>29</sup> *Model Provisions*, *supra* note 15.

<sup>30</sup> *Model Provisions*, *supra* note 15, Introduction.

<sup>31</sup> Kamal Puri, *Protection of Traditional Culture and Folklore*,

arguably, the condition of originality is not satisfied. Sometimes though, an individual folk artist claims exclusivity over a folk art, for making a minor innovative improvement for example, which results in a copyright. Then the whole ethnic group(s) is prejudiced. This actually occurred in a case concerning the copyright over a paper cutting serving as the model for the Chinese year-of-the-snake postage stamp.<sup>32</sup> A cutter asserted copyright over her paper cutting whose patterns are widely known in China.<sup>33</sup> Based on some minor improvement over the patterns as presented to the court by the defendant, the court ruled in favour of the cutter.<sup>34</sup> By recognizing the minor improvement, the court failed to acknowledge the century-long, continuous, and slow evolution of creativeness and skill in paper cutting.<sup>35</sup> Indeed, it is a concept within the paper cutting culture that individuals copy each other's patterns. Also, the decision can be criticized, *inter alia*, for having deprived the paper cutting community of a unique opportunity to advertise its folk arts through the media of the postage stamp.

A third requirement of copyrightability is that the work must be fixed in a tangible medium.<sup>36</sup> Most folklore is communicated orally from generation to generation, and may never be fixed in any tangible form.<sup>37</sup> Folk dances, folk tales, and folk songs are several examples of this type of folklore. This fact, however, may not be particularly damaging to copyright principles. Those who write down the folk tales or songs, or make a video of the folk dances do not enjoy the authorship of the underlying materials, but rather retain the interest, in trust, for the community.<sup>38</sup> In simple terms, "the film-maker is the author of the film, not of the underlying dances or music that she captures on film."<sup>39</sup> Hence, she must receive authorization if the underlying materials themselves are copyrighted.<sup>40</sup> As one person has pointed out, the fact that folklore is not generally fixed might actually enhance its protection to the extent that the term of any copyright in the folklore would not begin to run until it was fixed with such authorization.<sup>41</sup>

In the case where one has adapted a previously existing work, he may have a copyright over the adapted work.<sup>42</sup> However, under Chinese copyright law, the original work must be acknowledged in the new work.<sup>43</sup> In a dispute over the tune for a pop song, wherein the singer failed to make any acknowledgement of the original folkloric work, the Chinese Heze ethnic minority sued the singer, among others, claiming that the music was adapted from its folklore, and thus required acknowledgement.<sup>44</sup> In addition, the ethnic minority also sought money

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[www.folklife.si.edu/resources/unesco/puri.htm](http://www.folklife.si.edu/resources/unesco/puri.htm).

<sup>32</sup> Liu Aijun, *How to Protect "Works of Folklore"—Disputes over the Snake Year Paper Cutting Stamp Exposed the Vacuum of Copyright Regime*, LEGAL DAILY, Apr. 12, 2002.

<sup>33</sup> Anomymous, *Topic on the Reuse of Folk Arts Arising from the Dispute over the Copyright of the Year of Snake Stamp and Paper Cutter*,

<http://sh1.eastday.com/epublish/gb/paper4/2/class000400004/hwz569918.htm> (last visited March 12, 2006).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2(2)(c)(ii) (Lexis 2005).

<sup>37</sup> Farley, *supra* note 22, at 29–30.

<sup>38</sup> *Id.* at 29 n.113.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 22.

<sup>42</sup> Copyright Law of the P.R.C., art. 12, Sept. 7, 1990 (revised Oct. 27, 2001).

<sup>43</sup> *Id.*

<sup>44</sup> P.R.C. Supreme Court Announcement (2004) Issue 7, 10 July, 2004 [hereinafter *Announcement*].

damages from the adaptation of its original folkloric work.<sup>45</sup> The Court found that the tune was adapted from the minority's folklore, and ruled that the folklore must be acknowledged, but refused to grant the minority's request for any economic compensation.<sup>46</sup> This leaves open the question of whether, and at what point, the adaptation right for the original work should be paid.<sup>47</sup> Moreover, it is still unclear exactly when folkloric works stop being ideas upon which a new work can be built without seeking permission, and when they start requiring acknowledgement. The aforementioned case is unique in that the ethnic minority based their evidence on songs published in the 1960s in which the minority was clearly acknowledged as the originator.<sup>48</sup> With respect to the vast majority of folkloric works that have never been fixed, the line between mere ideas and previously existing works is much harder to draw.

A prominent feature of a copyright is its limited term of protection; the underlying rationale is to grant authors a limited period of exclusivity over their works to induce their creative efforts, after which the works will become public property and be free to all.<sup>49</sup> However, folklore has existed for thousands of years, and evolves from one generation to the next. Thus, copyright cannot offer folklore a sufficiently long term of protection. Once the copyright expires, the folklore would "end up in the hands of non-indigenous people."<sup>50</sup>

Some believe that copyrights should be protected in perpetuity.<sup>51</sup> Such perpetual protection can hardly be accommodated under the TRIPS Agreement because in some member countries, such as the United States, it may be unconstitutional. Under the U.S. Constitution, authors are allowed protection for their works only for "limited Times."<sup>52</sup> This makes perpetual protection of Chinese folklore in the United States impossible.

## II. *SUI GENERIS* PROTECTION

In dealing with foreign protection of folklore, international efforts are directed toward *sui generis* protection because of the realization that "the copyright regime is not adequate to ensure [the] protection [of folklore]."<sup>53</sup> Under

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Zang Xiaoli, *Protection of Our Country's Folkloric Works' Copyright Urgently Needs Perfecting*, THE CENT. U. FOR NATIONALITIES WKLY. Issue 1081 (2004). Indeed, the point in dispute for the protection of folklore for most countries is whether the adaptation right should be granted at all. See Zheng Chengsi, COPYRIGHT LAW 131 (China People's University Press 2d ed. 1997).

<sup>48</sup> See *Announcement*, *supra* note 44.

<sup>49</sup> [T]he limited grant [of monopoly privileges through intellectual property] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984).

<sup>50</sup> Jeroline Akubu, *Challenges of Current Copyright Regimes in Protecting Indigenous Knowledge and African Traditions*, Uganda Law Reform Commission, [www.nlu.go.ug/dwnld/jeroline.pdf](http://www.nlu.go.ug/dwnld/jeroline.pdf).

<sup>51</sup> See Mingyan, *supra* note 26.

<sup>52</sup> U.S. CONST. art. I, § 8. cl. 8.

<sup>53</sup> The Plan of Actions as adopted by the participants from about 50 countries. UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket from April 8 to 10, 1997, *Intellectual Property in Asia and the Pacific*, January-June 1998, No. 56/57, WIPO



the *sui generis* regime of the UN/WIPO Model Law, expressions of folklore are given protection with no time limits and with no requirement of fixation.<sup>54</sup> However, such a regime is open to criticism and may create more problems than it can resolve.

First, the perpetual rights may be misjudged. The ethnic communities have enjoyed their own folklore in perpetuity, and are free to do with it anything they find appropriate, including commercializing it. But under the regime, the perpetual rights are property rights; hence, they can be bought and sold through the administration of a competent authority.<sup>55</sup> Then, multi-national corporations (“MNCs”) such as Disney and Sony would be able to obtain exclusive licensing rights over such property, thereby controlling the folklore in perpetuity.<sup>56</sup> Thus, the folklore could be lost to MNCs and its fate controlled by the market rather than the ethnic communities themselves.

The regime is also criticized because it does not specify the ownership of folklore.<sup>57</sup> Ownership is not always specified because, in some countries, folklore is regarded as the property of the state while other countries vest ownership in the indigenous group.<sup>58</sup> However, the UN/WIPO Model Law stipulates that control over folklore is to be exercised by the competent authorities provided that, subject to certain exceptions, the folklore is “made both with gainful intent and outside their traditional or customary context.”<sup>59</sup> This law has the undesirable effect of weakening or even depriving the ethnic communities of the independent private rights of their folklore by interfering with their full right of control over their own folklore, in whose creation the state arguably did not participate.<sup>60</sup> As such, third party control may also hinder the development of folklore because indigenous artists, who want to move their artistic traditions forward by reinterpreting traditional motifs in new ways, may be inhibited by the interference of the “competent authorities.”<sup>61</sup> Furthermore, tyranny may result if a governmental minister is empowered to punish a member of a community for expressions that are “distorted in any direct or indirect manner prejudicial to the cultural interests of the community concerned.”<sup>62</sup>

Overall, by vesting property rights over folklore, the *sui generis* regime ignores the case where a community may not be interested in money. While the government would serve its own monetary interest by acting as the recipient of any capital generated from folklore, there exists a serious concern that such economic benefit would be absorbed into general government funds, never reaching the community where the folklore originated.<sup>63</sup>

### III. RETHINKING COPYRIGHT PROTECTION OF FOLKLORE

We have seen that folklore cannot fit within the bounds of traditional

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<sup>54</sup> *Model Provisions*, *supra* note 15, § 2.

<sup>55</sup> *See* Liberman, *supra* note 26.

<sup>56</sup> *Id.*

<sup>57</sup> *Model Provisions*, *supra* note 15.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 3.

<sup>60</sup> Yun Fei, *Whose Cheese Is the Intangible Cultural Heritage?*, CHINAART NEWS, Dec. 2, 2005, available at [http://www.cflac.org.cn/chinaartnews/2005-12/02/content\\_5727370.htm](http://www.cflac.org.cn/chinaartnews/2005-12/02/content_5727370.htm).

<sup>61</sup> *See* Farley, *supra* note 22.

<sup>62</sup> Liberman, *supra* note 26.

<sup>63</sup> Hansen et al., *supra* note 12, at 795–96.

copyright law, and that the international initiative on *sui generis* protection of folklore is stricken with problems. To resolve the issue, developing countries will inevitably continue to battle with developed countries over whether and how to protect folklore. Developing countries have increasingly realized that intellectual property rights regimes are predominantly one-sided, protecting the assets of the developed countries, whereas the assets of developing countries, such as folklore and genetic materials, are left outside the scope of such protection and are free for all to use.<sup>64</sup> There is a “very strong feeling around the world,” as the USPTO’s Bruce Lehman stated, of “unfairness, that somehow or other these people [of the developing countries] have been forced into the TRIPS regime; we [the developed countries] are patenting things, they are forced to recognize our patents, but somehow or other what they have is not being recognized.”<sup>65</sup> Now, the developing countries are pressing for property rights in their assets with the expectation that such rights would serve as a counter balance to the developed countries’ dominance in the IP regime.<sup>66</sup> Despite the international squabbling, the solution to the problem must be found in the problem itself. Circuitous as it sounds, this realization impels us to keep our eyes on essence rather than form.

Folklore is different from the works within the ambit of traditional copyright. As far as the latter is concerned, the success or failure of copyrighted works is largely at the disposal of the market. In actual fact, only a fraction of works enjoy success, while the majority simply vanish into obscurity. Society does not really have a duty to save them. In contrast, folklore is regarded as a matter of national pride; in China, “the Chinese national folklore is just like a shining treasure house that symbolizes national unity and bridges China with the world.”<sup>67</sup> As it stands, the survival of folklore in China is threatened, but it cannot simply be put at the disposal of the market.

The reason for such endangerment of folklore in China does not fall within the “chicken or the egg” dilemma insofar as ability or disability to copyright is concerned, but rather, as mentioned, it is related to willful historical destruction and the diversity of choices for people in modern times. Furthermore, in finding a solution, the voice of the indigenous people should be heard. However, the psyche of the indigenous people and folkloric artists is varied. Some may not be interested in money. Others may be glad to share their folklore, and still others

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<sup>64</sup> See, e.g., The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge, Submission by Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand, Venezuela, IP/C/W/403, the WTO, June 24, 2003; see also Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Peru, Thailand, Venezuela, Zambia and Zimbabwe, I/C/w/356; Brazil, IP/C/W/228; India, IP/C/W/195, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/w356.doc>; Submission by The United States, IP/C/W/257, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/w257.doc>; Agarwal & Narain, *Pirates in the Garden on India [The Neem Tree]*, NEW SCIENTIST, Oct. 26, 1996, at 14. There was hardly any financial return to the indigenous peoples while world sales of medicines derived from plants discovered by them amounted to \$43 billion in 1990. See Butler, *World Bank Calls for a Fairer Deal on Patents and Knowledge*, 392 NATURE 535–540 (1998). But see Dalton, *Bioprospects Less Than Golden*, 429 NATURE 598, 599 (2004).

<sup>65</sup> Hansen et al., *supra* note 12, at 798.

<sup>66</sup> Zheng Chengsi, *A Treatise on the New Territories of Intellectual Property—the Protection of Traditional Knowledge and Biodiversity*, LEGAL DAILY, July 28, 2002, available at [http://www.legaldaily.com.cn/gb/content/2002-07/28/content\\_40691.htm](http://www.legaldaily.com.cn/gb/content/2002-07/28/content_40691.htm).

<sup>67</sup> *Current Status*, *supra* note 1.

may not want the government to control or interfere with their folklore. The current task facing the government is to implement a favorable and consistent policy toward ethnic minorities and the protection of their folklore, and to tailor such policy to the different needs of the indigenous peoples. To salvage folklore, it is crucial to popularize and disseminate it to the young generation, ensuring wide exposure.<sup>68</sup> However, because folklore has more than a commercial quality, it cannot be left solely in the hands of copyright protection.

The effect of a blanket copyright on folklore can be examined in the following light. Considering the appallingly low acceptance of most folklore by the consumer market as it is, most folklore does not make an attractive candidate for commercial investment. When investment does occur, only a fraction of these investments will produce returns. Furthermore, these products are subjected to the vicissitudes of the market place. Given all these variables, it is wrong to assume that folklore will be saved by copyright and the marketplace; indeed for the vast majority of folklore that never attracted investment, copyright would not lend any advantages. On the contrary, copyright would deprive folklore of those potential undetermined investors and users which might otherwise invest in or use folklore were it not for the added complexity and cost of copyright licensing. Thus, the marketplace could ultimately lead to the hastening of the demise of folklore rather than its salvation.

The widest dissemination of folklore would be promoted without copyright hindrance. This would ultimately benefit the ethnic minorities by further helping them to survive and maintain their folklore. Indeed, in the aforementioned case, when the singer, through his adapted song, first introduced the Heze minority's beautiful folklore and natural scenery to the outside world, no copyright existed to hinder such dissemination.<sup>69</sup> The popularity of the song triggered tourism, and the minority have since become a well-renowned tourist destination,<sup>70</sup> thus providing more reason and more opportunity to take pride in and maintain their unique folklore and customs. Had a copyright been in the way, the minority may have never been known to much of the outside world, as numerous minorities in China are not known today. The latter are experiencing poverty and a decline in folklore, while the Heze minority are enjoying sizeable revenues from tourism each year, with their prospering folklore being enjoyed and treasured by the whole nation.<sup>71</sup>

In another case, a cloth tiger unique to a county of Shanxi Province was chosen as the picture for the year-of-the-tiger postage stamp.<sup>72</sup> Upon issuance of the stamp, the cloth tiger turned the county into a popular area, with every family beginning to manufacture the tiger; the total annual revenue for the county amounted to U.S. \$60 million.<sup>73</sup> In addition, the neighboring counties also began

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<sup>68</sup> "Two problems need resolving, namely, first, what should we protect in folklore? I.e. what needs protecting, folk tales, folk songs, paper cutting, puppet show, etc. and what has been in the public domain? Second, to what extent should folklore be protected without hindering the dissemination of folkloric works?" Liu Aijun, *How Should "Folkloric Works" Be Protected?*, LEGAL DAILY, Apr. 12, 2002.

<sup>69</sup> See *Announcement*, *supra* note 44.

<sup>70</sup> See the local government's website promoting its tourism with the folksong and the minority as the selling point: <http://www.jxzf.gov.cn/index/jx02/jxs-02/jxd04.htm>.

<sup>71</sup> See *id.*

<sup>72</sup> Anomymous, *Topic on the Reuse of Folk Arts Arising from the Dispute over the Copyright of the Year of Snake Stamp and Paper Cutter*, <http://sh1.eastday.com/epublish/gb/paper4/2/class000400004/hwz569918.htm> (last visited March 12, 2006).

<sup>73</sup> *Id.*

manufacturing cloth tiger.<sup>74</sup> In contrast, the year-of-the-snake stamp was involved in a copyright dispute over who owned the copyright of the traditional paper cutting depicting a snake entrapping a rabbit—a lucky symbol in the Chinese tradition.<sup>75</sup> The paper cutting community hence lost a unique opportunity of free advertisement, and the attendant monetary gains, via the stamp.

But concerns arise where persons “alter in an arbitrary way the connotation of folklore so as to accommodate the needs of the modern society and to gain commercial profits. . . . There [are] also some [who] violate taboos in some national folklore, thus damaging the feelings of communities that have created the national folklore expressions.”<sup>76</sup> It could be argued either that folklore should develop and accommodate the needs of our times, or that it should be kept intact.<sup>77</sup> The latter argument only applies to a very small fraction of folklore, such as when sacred ancestral traditions are to be repeated precisely. But for the vast majority of folklore, insistence on the latter path would “freeze the culture in a historic moment, allowing us to think of indigenous peoples as romantic relics from a lost time, and to deny them a contemporary voice.”<sup>78</sup> In a general sense, however, to arbitrarily unify the path of the development of folklore goes against the spirit of folklore—adapting or refusing to adapt its own style of existence and development with the times of its own accord.

The violation of the ethnic minorities’ customs is a criminal offence under Chinese Criminal Law.<sup>79</sup> Furthermore, the Chinese Constitution stipulates that “all minorities have the freedom to keep or reform their traditions and customs.”<sup>80</sup> Moreover, Chinese Trademark Law prevents registration of marks “having the nature of discrimination against any nationality” and “those detrimental to socialist morals or customs, or having other unhealthy influences.”<sup>81</sup>

Other concerns including fake products and copying of unique national products, such as Huishan mud human figures or Yixing teapots made of purple sand, are prevalent and adversely affect the market supply.<sup>82</sup> Such problems should be examined in two perspectives. Where competition is proper, the national tradition of making unique items should be open to all and reserved exclusively for no one. Indeed,

just as indigenous artists can adapt techniques and styles from outside their group and incorporate them into new designs based on their own cultural heritage without harming artistic traditions outside their group,

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Current Status, supra* note 1.

<sup>77</sup> See Ma Yang & Hua Chunyu, *Can Chinese Folk Arts Leave Workshops and Go into Factories?*, (China Central Television broadcast Sept. 3, 2003). Some believe that folkloric artists should accommodate market needs. *Id.* Without a market, the arts would die with the artists. *Id.* In contrast, some believe that the integrity of the art should be kept. *Id.* However, “[t]he best way to protect folkloric arts is not hanging it on the wall or writing it down in books, but rather sending it back among the people.” Zhang Bin, *Waging the Protection War of Folklore*, LIBERATION DAILY, Aug. 9, 2003. In other words, folkloric artists should combine artistic skills with modern enterprising skills. *See id.*

<sup>78</sup> See Farley, *supra* note 22.

<sup>79</sup> Chinese Criminal Law, art. 179, Mar. 14, 1997.

<sup>80</sup> Chinese Constitution, art 4, Mar. 29, 1993.

<sup>81</sup> Trademark Law (promulgated by the standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983), art. 10, (1982) (P.R.C.), *translated at* <http://www.chinaiprlaw.com/english/laws/laws11.htm>.

<sup>82</sup> Yao Yuan, *Folklore Calls for Protection*, CHINA INTELL. PROP. DAILY, July 4, 2003.

indigenous culture is not harmed when an outsider takes one of their publicly known designs and commodifies it, with proper attribution.<sup>83</sup>

But where privacy and confidentiality are involved, or where competition is improper, then appropriate laws such as trade secret law can be used to protect the production and marketing of folk arts.<sup>84</sup> Misrepresentation and unfair competition laws<sup>85</sup> may also come into play. This would, in one way or another, address the concerns over copying of folk art that is prevalent in China.

Further concerns include “increasingly serious cultural pillage causing great losses of cultural resources.”<sup>86</sup> Note, though, that this loss of cultural heritage is not due to lack of copyright protection: in 1982, the Law on the Protection of Cultural Relics in China became effective to protect tangible cultural heritage. Also, there are international laws and bilateral treaties forbidding the trading of tangible cultural relics. However, in order to effectively protect against stealing cultural heritage, national law must be more strictly enforced and international cooperation enhanced.

Having said all this, the protection of folklore depends more on the government’s consistent policy toward folklore and toward the minorities embodying it rather than on a piece of legislation, such as copyright. Recent history demonstrates that the willful vagaries of a few people in powerful positions are capable of causing irreversible destruction to Chinese folklore.<sup>87</sup> The Chinese government’s policy toward folklore and minorities during the Cultural Revolution provides a good example.<sup>88</sup> Another example where folklore and the interests of the underlying minorities were sacrificed for the government’s policy toward economic development is the 3-Gorges Project in China. Primarily aimed to satisfy the energy needs of the emerging economy of China, the Project, when finished in 2009, will create a reservoir 600 feet deep, 1 mile wide, and 400 miles long,<sup>89</sup> covering 1,080 square kilometres and turning the Gorges mountaintops into 100 or so islands.<sup>90</sup> The rising water will inundate numerous

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<sup>83</sup> Robert Paterson and Dennis Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT’L & COMP. L. 633, 670 (2003).

<sup>84</sup> *Current Status*, *supra* note 1. “Technology secrets and trade secrets in respect of traditional arts and crafts are also protected by law in China.” *Id.*

Trade secrets is also the best form of intellectual property for protecting any kind of undisclosed information. The object is to lawfully prevent information (which is a secret having commercial value) within the control of a person from being disclosed to, acquired by, or used by others without consent, in a manner contrary to honest commercial practices. The reasonable person test is used to determine whether there has been any misuse of the information.

Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 21 (2001); *see also* Farley, *supra* note 22, at 53–54.

<sup>85</sup> “Unfair competition laws are designed to protect consumers and competitors from the misrepresentation of products on the market. Indigenous groups may use these laws to prevent outsiders from marketing goods as ‘Indian made’ or as being produced on indigenous lands.” Farley, *supra* note 22, at 40; *see also* Studies on the Legal Protection of Traditional Knowledge (confirming that in China, unfair competition law can provide a fundamental protection for traditional knowledge). For other laws than copyright that may apply to the protection of folklore, *see* Paterson and Karjala, *supra* note 83.

<sup>86</sup> *See Current Status*, *supra* note 1.

<sup>87</sup> *See* Sofield & Li, *supra* note 3.

<sup>88</sup> *Id.*

<sup>89</sup> ECA Watch: The Problems, [www.eca-watch.org/problems/asia\\_pacific/china/](http://www.eca-watch.org/problems/asia_pacific/china/) (last visited Mar. 9, 2006).

<sup>90</sup> Tong Wu, *Three Gorges: the Price of Progress*, ASIAN TIMES, Aug. 16, 2003.

cultural and historical sites; some of the thousands of species of plants and animals, many of which cannot be found anywhere else in the world, may be lost forever. Moreover, 1.2 million local residents will be displaced. The damage done to folklore and the folkloric groups is easily imaginable. As some pointed out,

the knowledge, innovations and practices of indigenous peoples and local communities are manifestations of their cultures. Protecting a peoples' culture means maintaining those conditions that allow a culture to thrive and develop further . . . protecting a peoples' cultural heritage involves inter alia maintaining the link between a people and natural features of the landscape and naturally occurring species of plants and animals.<sup>91</sup>

Indeed, the government must formulate a holistic policy toward the ethnic minorities; a policy free from the prejudices and vagaries of power holders, including a policy to prevent "the destruction of the traditional living space of indigenous and local communities" as well as a policy to account for "the real factors that put the preservation of TK at risk which include such things as security of tenure, control of resources, respect for traditional culture and ownership rights."<sup>92</sup> Such a policy would promote the success and solidify the future of Chinese folklore.

In an era of globalization, to sustain a rhetorical war in the international arena of intellectual property is politically admirable and heroic, but it would be wrong to engage in war without having goals and without knowing whether that war can help rather than hinder the achievement of one's goals. Maybe the international exploitation of Chinese folklore has its bright side. Lack of domestic funding may be compensated by international investment, and the lack of creative motivation or lack of domestic appreciation of the value of national folklore can be salvaged by international appreciation. In the instance of domestic political turmoil, national folklore may also be preserved internationally. The Chinese folk tale "Mulan" was traditionally embodied in the Beijing Opera or other forms of theatrical production, but because younger generations in China generally do not appreciate those forms of production, Mulan was on the verge of disappearing from their awareness, despite the fact that it is a highly educational tale. But when Walt Disney made Mulan into an animation, its popularity quickly spread among the Chinese youngsters, and has become highly appreciated throughout the world, furthering the worldwide understanding of the rich culture of China.<sup>93</sup> Another example is Feng Shui. Feng Shui was condemned as superstitious during the Cultural Revolution and, even today, the government does not allow it to be practiced publicly in China. Appreciation of its value

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<sup>91</sup> Graham Dutfield, *Rights, Resources and Responses*, in *CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY* 514 (Darrell Addison Posey ed., 1999).

<sup>92</sup> Carlos M. Correa, *TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY—ISSUES AND OPTIONS SURROUNDING THE PROTECTION OF TRADITIONAL KNOWLEDGE* 10 (The Quaker United Nations Office 2001), available at <http://www.quano.org/geneva/pdf/economic/Discussion/Traditional-Knowledge-IP-English.pdf>.

<sup>93</sup> See anonymous, *Studies on the Legal Protection of Traditional Knowledge*, [www.chinalawedu.com/news/2005/2/li4964253151622500210640.html](http://www.chinalawedu.com/news/2005/2/li4964253151622500210640.html) (last visited Mar. 9, 2006). Some argue that if folk tales like Mulan were granted copyright protection, then a whole series of popular Chinese plays based on folk tales would infringe, which would cause chaos in the society. See *id.*

internationally saved it from disappearance. Yet another example is acupuncture. For a time, acupuncture was given less credence in China than in Western cultures. However, its popularity is slowly picking up in China, partly because of the influence of such popularity outside China. The same is also true of Confucius and his doctrine, which was trampled defiantly as feudal ideology during the Cultural Revolution, and, as any folklore related to feudalism was, purged. China has now begun to study Confucianism. Part of China's recent motivation may be the shame that comes from not appreciating its own treasure of heritage. Indeed, any international exposure of Chinese TK benefits China, but it is unlikely that copyright protection of folklore will increase any benefits to China, just as some believe it will not benefit developing countries in the general sense.<sup>94</sup>

In essence, we should be open-minded about the heritage of humanity, even in an era of global economic competition. As some pointed out, "Masterpieces of the oral and intangible heritage of humanity refer to the culture of humankind and [we should] examine it from a global perspective. In this sense, culture is shared by the world."<sup>95</sup> Indeed, "[u]nlike natural heritage sites, which are fixed and unique, the 'masterpieces of the oral and intangible heritage of humanity' can be shared."<sup>96</sup>

#### IV. CONCLUSION

China claims that it highly treasures folklore, but folkloric development or, to be more exact, folkloric survival is experiencing problems. In part, it is due to the inconsistency of the Chinese government's policy toward its minorities and folklore protection. Also, modern generations have more choices over their preferences, and do not choose traditional folkloric forms. No resolution can be found in either copyright or with *sui generis* protection. Rather, we should be more open-minded toward the use and dissemination of folklore. In this way, folklore and residing ethnic minorities will achieve greater benefit than under the restrictive regime of copyright.

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<sup>94</sup> See Rochelle Cooper Dreyfuss, *Colloquium: TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 29 n.39 (2004).

<sup>95</sup> Jinhui, *supra* note 8 (quoting Professor Gao Bingzhong, of Peking University's Sociology Department and secretary-general of the China Folklore Society).

<sup>96</sup> *Id.*