

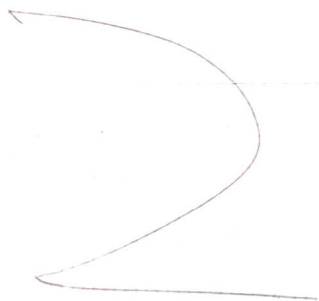


BOSHI WENKU
〔法学·民商法学〕

民间文学艺术的法律保护

MINJIAN WENXUE YISHU DE FALÜ BAOHU

黄玉焯 著



知识产权出版社

教育部哲学社会科学研究重大课题攻关项目 (2004年度哲学社会科学规划课题) 《“十一五”时期文化体制改革与发展研究》阶段性研究成果之一

D922.16/59

2008



BOSHI WENKU
〔法学·民商法学〕

民间文学艺术的法律保护

MINJIAN WENXUE YISHU DE FALU BAOHU

黄玉焯 著

知识产权出版社

内容提要

本书分6章,分别是:民间文学艺术概念辨析、民间文学艺术法律保护价值论、民间文学艺术保护的制度变迁与观念演进、民间文学艺术保护的法律模式、民间文学艺术专有权的构建、我国民间文学艺术法律保护的构建。本书既有理论探讨,又有制度设计,所提出的相关法律的建议稿值得重视,对我国民间文学艺术保护的理论和实践有着重大的现实意义。

责任编辑:刘睿

责任校对:董志英

特约编辑:徐学

责任出版:杨宝林

图书在版编目(CIP)数据

民间文学艺术的法律保护/黄玉焯著. —北京:知识产权出版社, 2008.3

(博士文库)

ISBN 978-7-80198-844-7

I. 民… II. 黄… III. ①民间文学-保护-法律-研究
中国②民间工艺-保护-法律-研究-中国 IV. D922.16

中国版本图书馆CIP数据核字(2008)第023438号

民间文学艺术的法律保护

黄玉焯 著

出版发行:知识产权出版社

社址:北京市海淀区马甸南村1号

邮编:100088

网址:<http://www.ipph.cn>

邮箱:hjb@cnipr.com

发行电话:010-82000893 82000860 转8101

传真:010-82000893

责编电话:010-82000860 转8113

责编邮箱:liurui@cnipr.com

印刷:北京富生印刷厂

经销:新华书店及相关销售网点

开本:880mm×1230mm 1/32

印张:8.625

版次:2008年4月第一版

印次:2008年4月第一次印刷

字数:224千字

定价:20.00元

ISBN 978-7-80198-844-7/D·561 (1877)

版权所有 侵权必究

如有印装质量问题,本社负责调换。



序 言

民间文学艺术，是现代法律制度尚未解决的难点问题。民间文学艺术的具体类型类似于《建立世界知识产权组织公约》所规定的知识财产形式，但它与现代知识产权客体又有着明显的区别，它是基于传统产生而不是新的智力创造，是附属特定部族或地域而不是个人的智力成果。长期以来，民间文学艺术一直被简单地归属于共有领域，任由他人自由而无偿地获取、利用。在国际社会，以知识产权名义所进行的文化创作、生产、传播行为，对他种类型的文化表达和知识形式等进行不当占有和利用，往往损害了文化的多样性，影响到优秀文化遗产的传承与发展。我们看到，发展中国家经过千百年实践积累下来的传统知识、民间文学艺术，正被一些发达国家无偿利用，甚至成为这些国家的知识产权。迪斯尼动画片《狮子王》在当年获得了极高的票房收入，其中一首“雄狮今夜沉睡”的配乐，其版权使用收入在2000万美元左右。这首乐曲最初是由非洲祖鲁族歌唱家林达根据本民族歌曲改编的，林达仅拿到象征性的1英镑。好莱坞根据中国传统故事“木兰从军”拍成的娱乐大片，在全球赚取了20亿美元的票房收入，中国观众观看也必须付费。

以知识产权的形式对民间文学艺术进行保护是必要的，它有利于民间文学艺术的保存、保护与弘扬，有助于形成民族的文化认同感和民族的凝聚力，有效维护国家文化主权和文化安全，在国际间实现文化生态的平衡，化解经济全球化与世界文化多元化之间的矛盾和冲突。但当代国际知识产权制度在这方面存在明显的不足。以世界贸易组织（WTO）《与贸易有关的知识产权协定》（英文缩写“TRIPs”以下简称《知识产权协定》）为核心的



知识产权国际保护制度，极力保护的是文化表达的独创性、新颖性，立足于知识财产的私权属性，着力于与贸易有关的知识产权保护，却忽视了现代文学艺术创作的源泉——民间文学艺术的保护问题。没有民间文学艺术的存在，文化创作就成为无源之水，文化创作自由也就无法实现。对中国而言，在《知识产权协定》框架下，过多强调知识产权的弱保护已无多少意义，关键在于我们如何利用国际协调机制对抗发达国家超越协定标准、超出我国国情的知识产权强保护要求，发挥传统文化大国的优势，争得国际规则制定的话语权，为保存与发展传统文化而争取有利条件。中国和其他发展中国家应致力于制度创新，对民间文学艺术采用与现行知识产权制度有别的保护机制，避开倾覆知识产权制度根基的法律变动。同时，中国和其他发展中国家应争取更多国家的理解和支持，在达成共识的基础上逐步建立起民间文学艺术知识产权利用与保护的法律制度体系。

近年来，民间文学艺术的保护逐渐成为国际社会的重要议题，在承载了五千年辉煌文明的当今中国，这一议题更是备受瞩目。在国际层面，社会各界十分重视民间文学艺术的保护问题，并对这种制度安排进行了有益的探讨。1982年，联合国教科文组织与世界知识产权组织通过了《关于保护民间文学艺术表达、防止不正当利用及其他损害性行为的国内法示范条款》；联合国教科文组织于1989年通过了《保护民间创作建议案》，1998年发布了《人类口头及非物质文化遗产代表作宣言》，2003年通过了《保护非物质文化遗产公约》；世界知识产权组织大会在2000年成立了一个有关知识产权与遗传资源、传统知识及民间文学艺术表达的专门的政府间委员会，至2007年10月，该委员会已经召开过11次正式的会议；多哈宣言之后，世界贸易组织及其《知识产权协定》理事会也开始关注传统知识、民间文学艺术的保护问题。在国内层面，我国政府从2003年起就开始在全国范围实施大规模的民族民间文化保护工程，2004年加入了《保护非物



质文化遗产公约》；2007年，民间文学艺术作品的著作权保护已经进入国务院立法议程，《非物质文化遗产保护法》将于2008年10月提交给全国人大。

在这样的背景下，黄玉焯博士以“民间文学艺术的法律保护”作为学位论文的选题，可以说是恰逢其时。在通过答辩后，她又利用到美国伊利诺理工大学肯特法学院从事访问研究的机会，对论文进行反复修改，才最终定稿，交出版。概而言之，本书既有细致入微的理论探讨，又有切合实际的制度设计，其提出的《〈中华人民共和国民间文学艺术保护法〉专家建议稿》值得各界重视，希望该书的出版对我国民间文学艺术保护的理论与实践都能产生积极的影响。

黄玉焯是我指导的博士生，她本科即就读于原中南政法学院，毕业后一直在母校任教，并迅速成长为教学和科研骨干。20世纪90年代和本世纪初，又先后在我指导下在职攻读民商法学硕士和博士学位，其间还两次负笈海外，进行访问研究。近年来，其研究领域不断拓展，在著作权、基因专利和知识产权国际保护等领域都有高质量的成果问世。“民间文学艺术的法律保护”更是一个跨学科的课题，对研究者的理论素养和学术能力都是一个严峻的考验。如今，论文即将由业界素负盛名的知识产权出版社出版，作为导师，我颇感欣慰，聊记数语，以示祝贺和鼓励！

是为序！

吴汉东

2007年12月16日

于中南财经政法大学文泓楼



摘 要

作为人类文明重要组成部分的民间文学艺术是一个民族所共有的文化，是人民群众智慧的结晶、智力创造的成果，是本民族基本的识别标志，是维系民族存在的动力和源泉。民间文学艺术既是一个民族文化特性的体现，又是现代科技与文化成果创新的重要组成部分，是现代文学艺术的创新之“源”。和自然遗产一样，文化具有一次性和不可再生性，民间文学艺术的消亡将意味着文化多样性的丧失。因此，展开民间文学艺术法律保护的研究，既是一个世界性的课题，也是中华民族优秀民间文学艺术源远流长的关键。

一、民间文学艺术概念的辨析

民间文学艺术法律保护研究首先要解决的问题是进行术语的选择，明确权利所指向的对象，理清各个概念之间的关系。本书在对国际与国内环境下的相关术语及其内涵与外延作了辨析之后，确定了“民间文学艺术”这一术语，认为这一术语体现了其文化内涵、表明该文化是一种“民间”文化、表明该民间文化的民族性、明确其所指的是传统的文化。其次，通过对民间文学艺术与相关概念的比较，进一步明确民间文学艺术的内涵与外延、界定了民间文学艺术的范围，民间文学艺术主要是与民族文化、民间文学、价值观相关联，保护的是其表达形式，而非思想内容。

传统知识是在民间文学艺术保护过程中广泛使用的一个术语，在国际上传统知识与民间文学艺术关系的理解与使用也比较混乱。鉴于传统知识与民间文学艺术的共性，如果为了在表述上简便起见，可以将传统知识与民间文学艺术笼统地合称为传统知



识或民间文学艺术，然后作广义解释。但严格地说，传统知识与民间文学艺术是两个不同的概念，不能将其混同。民间文学艺术主要是与民族文化、民间文学、价值观相关联，民间文学艺术专有权保护的是民间文学艺术的“表达”，而非思想内容；传统知识则更多地与农业、医疗、遗传资源和食品联系在一起，保护的是知识、技术、诀窍和经验。

二、民间文学艺术保护价值论

在国际人权法视野下，文化权是一种基本的人权。如同法律面前人人平等，各个民族的文化特性也是平等的，不应受到任何歧视，民间文学艺术应当受到法律的有效保护，人们有权保持自己的生活方式，保留自己独特的语言、风俗和文化。

在经济全球化日益发展的形势下，保护和发展民间文学艺术是一项非常紧迫的任务。保存文化的多样性是全球化时代的需求，而保护民间文学艺术是保存文化多样性的需要。

三、民间文学艺术保护的制度变迁与观念演进

在文化遗产保护的历史进程中，存在着两种思路，即文化国际主义与文化民族主义，两者都旨在保护文化财产，但它们把“保护”赋予不同的含义，体现了不同的价值定位，对不同利益的考虑是根本性的：文化国际主义是从全人类的利益出发来保护文化财产，避免战时冲突给文化财产带来损害而保护文化财产；文化民族主义强调的是民族利益，通过国际贸易对文化产品进行保护。

《伯尔尼公约》1971年文本确认了对“作者不明作品”的保护，表明民间文学艺术的价值与进行法律保护的必要性已为国际社会所认可。但是，该种保护模式并没有显得特别有效或有用，在著作权领域所采取的措施似乎不能有效地控制对民间文学艺术的商业性利用。1976年，世界知识产权组织（WIPO）与联合国



教科文组织（UNESCO）一起为发展中国家的著作权保护制定了《发展中国家著作权保护突尼斯示范法》，该示范法采用的是著作权保护模式，并根据民间文学艺术的特点规定了与传统著作权法不同的保护条件和保护内容，但仍然不足以保护民间文学艺术。1982年，在WIPO和UNESCO的努力下，通过了《关于保护民间文学艺术、防止不正当利用和其他不法行为的国内法示范条款》，基于民间文学艺术的特点而建立起了知识产权特别权利保护体系。虽然该特别立法模式获得了UNESCO和WIPO的推荐和支持，也获得了许多发展中国家的欢迎，但20年过去了，该示范条款并没有获得世界上大多数国家的采纳，而且其确立的保护民间文学的规则尤其未能在发达国家的立法中见到踪影。2003年，联合国教科文组织大会通过了《保护非物质文化遗产公约》，该公约确定了较为广泛的除了自然遗产以外的保护范围，对非物质文化遗产创作主体的群体性予以了认可，为确保非物质文化遗产的生命力而采取了多种保护措施。

为保护本国的民间文学艺术，许多国家采取了一些有效的措施，制定了相应的政策或法律。长期以来，文化政策是法国的重要国策之一，保护民族文化、维护民族利益是其宗旨；加拿大实行多元文化政策，鼓励各族裔在加拿大发扬光大自己的文化遗产；日本立法保护民间文学艺术，建立“人间国宝制度”，认定“重要的无形文化财”；1967年，突尼斯成为世界上第一个使用国内著作权法保护民间文学艺术的国家；菲律宾于1997年颁布了土著人权利法案来保护土著人的民间文学艺术。

四、民间文学艺术保护模式

民间文学艺术具有知识产品的本质属性，具有非物质性、创造性和价值性，是知识产品之一种。民间文学艺术的知识产权特性决定了其应当在知识产权体系内予以保护，宜采用知识产权法的私法保护模式；同时基于民间文学艺术的私益与公益的双重属



性，在私法保护之外，还可辅以公法。又由于民间文学艺术与现有知识产权客体的不同，难以符合现有知识产权保护条件，使得民间文学艺术无法得到有效的保护，因此需要根据民间文学艺术的特点建立起民间文学艺术特别权利保护体系。当然，在民间文学艺术特别权利体系之外，还可以适用其他的法律制度，彼此并不排斥。民间文学艺术是民族的，也是世界的，文化多样性是人类的共同文化遗产，保护人类民间文学艺术是普遍的意愿和共同关心的事项，有必要在国内与国际范围内进行保护，因而，进行国际合作是不可或缺的，民间文学艺术保护应该是一个全球性的行动。

五、民间文学艺术专有权的构建

相应于民间文学艺术的特性及价值，保护民间文学艺术的政策目标可概括为三个方面：承认价值与增进尊重、有利于保持文化的多样性以及促进文化的交流与创新，其他的目标可以通过这三个方面或者在具体制度的制定中予以体现。

民间文学艺术权作为知识产权之一种，在确认权利主体时，应坚持知识产权权利主体认定的一般原则，即“创造性活动是权利产生的源泉”。根据这一原则，民间文学艺术的权利主体呈现出多元化和群体性的特点，既可以是个人或家庭，也可以是某一个民族或国家的全体人民，但主要是某个群体。传承人不仅对民间文学艺术的保存与传播起到了重要作用，而且在传承的过程中也付出了创造性的劳动，传承人根据其创作活动可分别享有邻接权、著作权以及根据国家有关政策获得荣誉和奖励的权利。

从作者精神权利产生的学说基础来看，民间文学艺术创作者也应当享有发表权、表明身份权、保护完整权等精神权利。综合保护民间文学艺术的目的以及民间文学艺术经济权利产生的法律基础，民间文学艺术经济权利包括复制权、发行权、摄制权、表演权、展览权、播放权、信息网络传播权、放映权、出租权、翻



译权、改编权和汇编权等。此外，基于知识产权保护的法律基础——利益平衡理论，还要对民间文学艺术的经济权利予以限制，即为了公共利益的目的使用已经公开的民间文学艺术，可以不必征得权利人的许可，也不必支付使用费。

六、我国民间文学艺术保护法的构建

为保护和弘扬民间文学艺术，我国采取了一些具体措施并颁布了相关法律，但没有建立起完备的法律制度，与我国民间文学艺术的保护、传承和发展，以及文化事业可持续发展的总体需要相距甚远。因此，构建我国的民间文学艺术知识产权保护特别权利体系是本书的落脚点。



Abstract

As an important part of human civilization, expressions of folklore is the common national culture, which crystallizes the people's wisdom and shows the achievement of intelligent creation. It is also a sign of basic national identification and the fountain-head of power of the nation's existence. Expressions of folklore is not only the expression of national characteristic culture, but also an important constitution of modern technology and the cultural achievement innovation, exactly。 It is the source of innovation of modern literature art. Culture is disposable and non-renewable as natural heritage, that is, if expressions of folklore withers away, culture will lose its variety. Therefore, research on legal protection about expressions of folklore is not only a worldwide basic topic, but also the key point of the process that handing down expressions of folklore of Chinese nation.

The main text is divided into six chapters:

The first chapter discriminates the expressions of folklore.

The first thing to do with studying protection for expressions of folklore is to choose the right term, to make sure to whom the right be granted and to understand the differences among various conceptions. After discriminating its connotation and the extension, the author finally chose to use the term: "expressions of folklore" in this book. The author believes this term has such advantages as follows: it can show its meaning as a culture, which is folk, traditional and has its distinct nationality. Secondly, after comparing with other notions for "expressions of folklore", the author got more about the meanings of expressions of folklore and limited the scope of expressions



of folklore. Expressions of folklore is mainly related with national culture, folk literature, value and protects the forms of expression.

Traditional knowledge is a widespread terminology in the protection of expressions of folklore; they are often confused in understanding and usage of the relation between them. The book statement is, to be brief in the expression, we can use traditional knowledge or expressions of folklore to refer to both traditional knowledge and expressions of folklore generally, based on the same character between them, and then adopt the generalized explanation, but to be seriously, these two concepts are so different that they cannot be considered as the same. Expressions of folklore is mainly related to national culture, folklore, value and protects the forms of expression. While traditional knowledge has more relation with agriculture, medical service, heredity resources, food and protects knowledge, technology, knack and experience.

The second chapter is the theory of the value of protecting expressions of folklore.

Under the vision of international human rights law, the cultural right is one kind of basic human rights. Just as that everybody is equal before the law, and the cultural characteristics of each nationality is also equal, so the cultural rights should not be discriminated, expressions of folklore should be protected effectively by law, and people have the rights to maintain their own life style, retain their own unique language、 custom and culture.

Next, from the angle of preserving cultural multiplicity, protecting and developing expressions of folklore is an extremely urgent duty under the situation of the economic globalization. Preserving cultural multiplicity is the need of the era of globalization, and protecting expressions of folklore is the need of preserving cultural multiplicity.



The third chapter is the system vicissitude and the idea evolution of the expressions of folklore protection.

In the expressions of folklore protection historic process, there are two kinds of mentalities, which namely cultural internationalism and cultural nationalism, both intend to protect culture property, but they entrust "protection" with different meaning, which manifests the different value localization. Consideration of the divergent interest is fundamental: Cultural internationalism is embarks from the universe benefit to protect cultural property, avoiding harm to the cultural property during wartime conflict; while cultural nationalism emphasizes national benefit, and carries on the protection through international trade to the cultural product.

"The Berne Convention" in 1971 confirmed the protection of "unclear author's works" in the text, which indicated the value of expressions of folklore. And the necessity of carrying on legal protection has already been approved by international society. But, this mode has not been very effective or useful. What's more, the measures taken in the copyright domain seem not effectuet control commercial use on expressions of folklore. In 1976, WIPO and UNESCO formulated "Tunisian Provisions of Developing Nation Copyright Protection". This provision used the copyright protected mode, and has stipulated protection condition and the protection content according to expressions of folklore characteristic which is different from the traditional copyright law, but all of these are still insufficient to protect the expressions of folklore. In 1982, WIPO and UNESCO passed "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions", which established special right protection system of intellectual property rights based on the characteristics of expressions of folklore. This specially legislated pat-



tern gained UNESCO and the WIPO's recommendation and support, also gained many developing nations' welcome, But 20 years elapse, this provision has not been accepted by most countries. Moreover, the role of protection folklore its established can not be found especially in the developed countries' legislation. In 2003, UNESCO passed "Convention of Protecting Intangible Cultural Heritage", which had determined widespread extent of protection besides the natural heritage, given the approval to the creator community of expressions of folklore, and taken many kinds of protective measures to guarantee the vitality of expressions of folklore.

In order to protect country's expressions of folklore, many countries have taken some effective measures, and formulated corresponding policy or law. The cultural policy has been one of France's important national policies for a long time, and its objective is to protect national culture and nationality benefit. While Canada implement cultural multiple policy, which encourages various nationalities to carry forward their own cultural heritage. Japan legislates to protect expressions of folklore, establishes "the world national treasure system" and recognizes "the important expressions of folklore". In 1967, Tunisia became the first country that use domestic copyright law to protect expressions of folklore in the world. The Philippines promulgated the right bill of natives in 1997 to protect their expressions of folklore.

The fourth chapter is the research about the model of expressions of folklore protection.

As one kind of knowledge production, expressions of folklore has the essential attributes of knowledge production, which include non-materiality, creativity and value. The intellectual property characteristic of expressions of folklore decided that it should be protected by adopting the private law protective model in the field of intellectual



property. Meanwhile, based on the dual attributes of private benefit and public benefit, expressions of folklore, beside private law protection, can also auxiliary by the public law. Also because the different object between expressions of folklore and intellectual property, expressions of folklore can not conform to the protective requirement of intellectual property and is unable to obtain the effective protection, therefore it is essential to establish the sui generis of expressions of folklore. Certainly, outside the sui generic of expressions of folklore, other legal system also can be used, and they are not repel each other. Expressions of folklore belongs to the nationality, and also belongs to the world. The cultural multiplicity is the common cultural heritage of human. To protect human non-matter cultural heritage is the common wish and the item which cared about together. It is necessary to protect expressions of folklore at home and abroad, and international cooperation is indispensable. Protection of expressions of folklore should be a global action.

The fifth chapter is the construction of exclusive rights of expressions of folklore.

According to the characteristic and value of expressions of folklore, the policy objective of the protection includes three aspects: recognize the value and promote respect, benefit to the preservation of the cultural diversity, promote the communion and innovation of culture. Other goals can be manifested through these three aspects or in the concrete system formulation.

The expressions of folklore, as one kind of intellectual property, when confirming the subject own the right, should persist the principle of recognizing the subject of intellectual property, namely "the creative activity is the source of right produced". According to this principle, the subject of expressions of folklore presents the characteristic of



multiplication and sociality. It can be individual or family, and also can be a nationality or all people of a country, but it is mainly some community. Inheritor not only plays an important role in preservation and dissemination of expressions of folklore, but also offers the creative work during the inheritance process. According to his creative work, inheritor can enjoy the neighboring right, the copyright and the right of winning the honor and award according to the country's related policy.

From the theoretical foundation of author's mental right's produce, the creator of expressions of folklore should also enjoy some mental rights: the publication right, the signature right, and the right of protecting the completeness of expressions of folklore and so on. Combining the goal of expressions of folklore protection with the legal foundation of expressions of folklore's economic right produced, the economic right of expressions of folklore include: copyright, publishing, shooting film, performance, display, broadcasting, network dissemination, showing, rental, translation, adaptation and assembly. Furthermore, according to the legal foundation of intellectual property protection—benefit balancing theory, some limitation should be brought to the economic right of expressions of folklore. That is, it is no need to get the permission of the owner of right if using the published expressions of folklore for the public interest, and no need to pay, either.

The sixth chapter is the construction of the expressions of folklore protection law in our country.

In order to protect and bring honor to expressions of folklore, our country has taken some concrete measures and promulgated the correlation law, but has not established the complete legal system, which is far away from our country's overall needs of expressions of folklore pro-