

民俗創作保護之研究

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摘 要

民俗創作常為表彰一個國家、族群的特性及維護人類文化多樣性(cultural diversity)的重要力量，卻正面臨新科技、文化及商業全球化所帶來一致性(uniformity)的威脅。原住民文化遺產的三項要素，遺傳資源 (genetic resources)、傳統知識 (traditional knowledge) 及民俗創作 (folklore/traditional culture expressions)，近年來於國際會議如 WTO 已將此三者合併討論。世界智慧財產權組織 (WIPO) 自 2001 年亦已成立「WIPO 智慧財產權與遺傳資源、傳統知識及民俗創作政府間委員會」，就此三項議題長期進行討論。

本文研究方法，主要藉由對保護民俗創作、文化多樣性相關的國際公約、地區性條約及 WIPO 國際會議文件的整體研究，提供我國是否通過「原住民族傳統智慧創作保護條例」之參考，尤其 WIPO 於 2001 年對會員國進行保護民俗創作國家經驗問卷調查所作國際實證研究的詳細統計及總結，足供我們瞭解各國對以特別立法保護民俗創作的不同意見。另我國原住民族傳統智慧創作，究竟有那些種類能納入草案受到保護，這些受保護的智慧創作，在我國各族群民俗創作中所占的數量與比例，是否值得特別立法加以永久保護，保護是否會對傳統著作權之原創性、可得確定的著作人、有限保護期限及公共領域等要件造成破壞。

本文所研究者，設定在民俗創作，主要探討民俗創作之概念、民俗創作與其他相關概念之比較、民俗創作的特徵及其法律保護的必要性、民俗創作以現有智慧財產權制度或其他非智慧財產權法制或新興權利方式保護的可行性、民俗創作過程相關主體的法律地位、國際公約及地區性條約對民俗創作的保護、相關國家及我國法律對民俗創作的保護、法院實務對民俗創作是否保護的可能考量因素，簡介原住民族傳統藝術內容、原住民族傳統文化保護之現況及從民俗創作探討我國「原住民族傳統智慧創作保護條例」草案內容，並提出建議。

關鍵字：民俗創作、傳統文化表現形式、著作權、原住民族傳統智慧創作。



A Study on the Protection of Expressions of Folklore/Traditional Cultural Expressions

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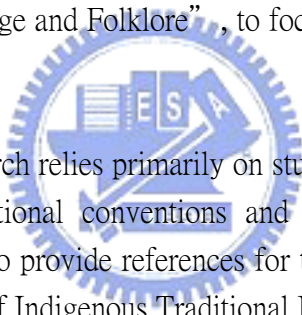
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ABSTRACT

Folklore, an important force in expressing the characteristics of a nation and an ethnic group as well as in maintaining the cultural diversity of the world, is threatened by the “uniformity” brought about by the globalization of technology, culture and commerce. The three key elements of indigenous cultural heritage, which include genetic resources, traditional knowledge and folklore/ traditional culture expressions, have been identified and discussed in international conferences, such those by the WTO, in recent years. Since its inception in 2001, the World Intellectual Property Organization has also established the “WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore”, to focus on the long term discussion of these three topics.



The approach of this research relies primarily on studying related WIPO international conference documents, international conventions and regional treaties, which protect folklore and cultural diversity, to provide references for the debate on whether to pass the “Draft Act for the Protection of Indigenous Traditional Intellectual Creation” (The Draft) legislation. In particular importance are the detailed statistics and summary which the WIPO obtained from its survey of the members on national experiences with the legal protection of expressions of folklore in 2001. The experiences can aid our country in understanding different countries’ opinions regarding whether to protect the folklore by special legislation. Moreover, this research also seeks answers to the following questions: 1) which indigenous traditional intellectual creations can actually be protected by The Draft? 2) What's the quantity and proportion of protected intellectual creations in the folklore of every local community? Is it significant enough to warrant a special legislating to protect it forever? And, 3) will the legislation cause damage to traditional copyright requirements such as originality, identifiable author, limited term and public domain.

In this thesis, the author focuses the research primarily on different aspects of folklore including 1) the concept and characteristics of folklore, 2) comparison with other related concepts, 3) the necessity of legal protection for folklore, 4) the practicality of protecting

folklore using the existing IP system, using non-IP options or the newly arising rights, 5) the legal status of the relevant subject in the course of creation of the folklore, 6) protection of folklore under international conventions and regional treaties, 7) legal protection of folklore in relevant countries and the R.O.C., 8) possible factors and considerations related to folklore infringement in local court judgments, 9) a brief introduction of the indigenous traditional artistic content, 10) current situations involving the protection of indigenous traditional culture, and 11) the status of the “Draft Act for the Protection of Indigenous Traditional Intellectual Creation” legislation. All of the topics are addressed individually and suggestions are provided.



Key words : expressions of folklore, traditional cultural expressions, copyright, Indigenous traditional intellectual creation.

誌 謝

轉眼間，於交大科法所新竹、臺北兩地奔波的學習之旅即將譜下休止符，回顧三年求學期間，能與來自不同領域的優秀同學，腦力激盪，異業交流，跳脫了傳統法律人思考的窠臼，讓我於科技法律及英美法的學習受益良多。

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特別感謝摯友許智誠律師不但長期提供優美的事務所辦公環境，且於論文寫作期間提供諸多寶貴意見，讓論文內容增色不少。若無許獻進律師的激勵，我很難於不惑之年後，再以在職進修方式進入學術殿堂充實自我。當然在科法所求學期間，每位老師無私地傾囊相授，同學在工作、學業上熱心地提攜與關懷，讓我於治學或待人接物，皆能獲得許多寶貴的啟示；在人生的旅途中，三年的交大求學經歷，絕對是一段珍貴的回憶。

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