

# The Intellectual Property Protection of Traditional Literature and Art

Fei Zhou  
Shandong University  
Law school  
Jinan, China  
zhoufei928@126.com

Xihua Zhang  
Shandong University  
Law school  
Jinan, China  
zhangxh@sdu.edu.cn

Liqin Cao  
Shandong University  
Law school  
Jinan, China

**Abstract**—the intellectual property protection of traditional literature and art caused great concern of the theorists in recent years; however, the process is difficult. The article analyzes the definition and the legal characteristics of traditional literature and art, combined with value significance of the protection of traditional literature and art, try to build special law protection system of traditional literature and art, including the protected subjects of rights, the objects of rights, contents of rights, period of rights, the limit tort liability of rights.

**Keywords:** *traditional literature and art, intellectual property, special law*

## I. THE DEFINITION AND CHARACTERISTICS OF TRADITIONAL LITERATURE AND ART

Traditional literature and art, also known as folk literature and art, is a expression form of traditional cultural, formed by a group of people or a certain tribe in long-term common life, and handed down from generation to generation. In knowledge globalization today, however, the traditional literature and art with huge commercial interests and economic value was distorted and arbitrarily abused in the process of transmission, which not only seriously hurt the source people's emotion and dignity, but also its economic interests cannot be protected, therefore, it is very urgent to protect the traditional literature and art. The expressions of traditional literature and art include Folklore, Expressions of Folklore and so on, which formed by a group or a tribe who lived together in the long-term and common natural and social conditions. In the process of inheritance from generation to generation, those expressions were maintained and developed to be the cultural traditions of the group or tribe's life history, customs, environment landscape, the psychological characteristics and so on. It includes the following forms: (I) linguistic forms, mainly include folk tales, folk poetry, etc; (II) musical forms, mainly include folk songs and folk instrumental music, etc; (III) action forms, include folk dance and drama; (IV) material forms, such as painting, sculpture, arts and crafts,

weaving products [1].

### A. *Characteristic of Collectiveness*

The creation subject of traditional literature and art is not a person as an individual, but a group; because traditional literature and art is collective crystallization. Even if one work was created by an individual in the beginning, but the inheritance process of the work condensed the wisdom and efforts of the countless people in the group, which makes the work, have the distinct local characteristics. In terms of the groups who created the traditional literature and art of a region or a tribe, they have the common desire natural environment, psychology, customs, thoughts and feelings. Therefore, traditional literature and art, not only in the beginning of creation, but also in the long historical development process, all reflects the common wishes and thoughts and feelings, and it has the tribal unique group color. The mass is the most essential characteristic of traditional literature and art different from individual creative art.

### B. *Regional*

Traditional literature and art has obvious regional characteristic, which is closely related to the creation groups' living natural environment, social environment, and national customs. And that, traditional literature and art is usually spread, preserved and inherited in a fixed area, it is because that the regional characteristic of the traditional literature and art itself makes it more easily to be accepted, preserved and inherited by the groups or tribes who have the same or similar natural environment, ethnic customs, religious beliefs. The communication of culture and information is always a certain degree of presence, even if in agricultural society whose transportation and information dissemination is underdeveloped. With the dissemination and exchange of culture, The traditional literature and art of a certain region may also be accepted by other people, and be fused with their existing literature and art, in this sense, this is expanding the geographical scope of traditional literature and art, and did not change the unique regional

characteristic of traditional literature and art.

### C. *Time Continuity and Variability of Inheritance*

The creation, preservation and inheritance process of traditional literature and art is a continuous process which shows the continuity of the time. The change of natural conditions and social life, the replacement of political pattern, the happening of the conflict, all don't interrupt the inheritance of traditional literature and art. Due to the characteristic of collectiveness, it makes the content and form of traditional literature and art have taken place some changes in the inheriting process. The inheritance of traditional literature and art is a dynamic process, which is also the way to rich and to continually develop it. The inheritance body of traditional literature and art is a group, though there are inevitably missing some details during the process of transmission, the dynamic and characteristic of mass creation still could enrich the content and form of traditional literature and art.

## II. THE VALUE AND SIGNIFICANCE OF THE PROTECTION OF TRADITIONAL LITERATURE AND ART

### A. *The Cultural Value of Traditional Literature and Art*

As a part of traditional culture, traditional literature and art deeply rooted in the blood and soul of a nation, which is transmitted through successive generation and embodies the wisdom and talent in literary art of a nation. Owing an ideological and artistic content, traditional literature art covers a rich variety of high cultural value. In terms of the ideological content, traditional literature and art also reflects the development of a country and a nation's philosophic values, character and mentality, modes of life, moral dimension, manners and customs, etc, carrying the historical memory and emotion for generations. What's more, traditional literature and art is the "root" of modern culture and contemporary literature and art, from which the modern literature and art tends to learn abundant nutrition so as to promote its innovation and development. In addition, the integration of cross-curricular interests inevitably happened between the traditional literature and art and other natural sciences, such as literature, psychology, folkloristic, sociology history and the science of law, etc. And plenty of valuable materials will be provided for the studies of these subjects.

### A. *The Productive Value of Traditional Literature and Art*

The economic and productive values of traditional literature and art are reflected in the fields of construction, service, publishing, tourism, film and TV industry, handicraft manufacturing, etc. Possessing a unique national style and spiritual content, the volume of business transactions in the handicraft productions occupies a large portion in the global market. For example, in Australia, the volume reaches to AU\$200 million per annum [2]. The success of tourist industry in Yunnan, Guizhou, Sichun, Xizang, Guangxi provinces relies on there traditional art resources. The rapid development of contemporary video

and music productions also benefit from the traditional literature and art. For example, the famous American singer Paul Simon released his album Graceland and Rhythm of the Saints successfully, using the traditional African and Latin American music respectively [3]. What is noteworthy is that a large amount of literary work and film-television programs, which come out of the ideas of traditional literature and art, are not only protected by the modern intellectual property system, but also obtained huge profits economically. For the people who live in the birthplace of traditional cultures and their protectors and successors, their national emotions and religious mentality will be hurt if the original works were willfully distorted and abused. The original purpose of the intellectual property system is to protect the results of people's intellectual results. However, it can not be restrained by the exsisting intellectual property system in the fact that the developed countries abused the traditional literature and art of the developing counties without consideration Therefore; it is a must to construct a new system to protect the traditional literature and art.

## III. THE IDEA OF INTELLECTUAL PROPERTY RIGHTS SPECIAL LAW PROTECTION SYSTEM OF TRADITIONAL LITERATURE AND ART

The legal protection mode of traditional literature and art is selecting and using what kind of legal system, or several kinds of legal system to form a legal system which could protect traditional literature and art [4]. At present, the researches of the protection mode of traditional art and literature mainly include copyright protection mode [5], comprehensive protection mode [6], etc.

The intellectual property special law of traditional literature and art is a special law, which will be established under the intellectual property department law and be in parallel with Copyright Law and Trademark Law, according to its colonial, regional, historical inherited characteristics. Only bringing traditional literature and art into the special law protection could effectively protect the development and inheritance of Chinese traditional literature and art, and always keep the creativity and vitality of traditional literature and art.

### A. *The Right Subject of The Intellectual Property Protection of Traditional Literature and Art*

The right subject of traditional literature and art should be source group who create it. First of all, as for the production of traditional literature and art, it is composed by groups; its author is not an individual who be rich in originality, but the groups with full of wisdom. The general international intellectual property attribution principle is who created the intellectual property; the intellectual property right belongs to whom [7]. As a result, defining individuals as the subject of right of the traditional literature and art is inappropriate, and this is inconsistent with the group characteristic of traditional literature and art, so, the really author of traditional literature and art is the groups who create it together.

Secondly, as for the development of traditional literature and art, a particular form of traditional literature and art

exists in the specific source groups. The heritage, innovation and development of traditional literature and art is closely related with the production and living of source group who are the dynamic subjects of the innovation and development of traditional literature and art. Will source group as the subject of right of traditional literature and art can make source groups have intense sense of identity and sense of belonging for it, and this can stir up the initiative and enthusiasm to protect, inherit and innovate traditional literature and art. Traditional literature and art only in the corresponding natural environment, religious belief, psychological character, historical tradition of the groups, could it be inherited and developed well, and won't produce the alienation of distort meaning and the recession of artistic value.

Finally, establishing source groups as the right subject of traditional literature and art status is helpful to protect the interests of the source groups. Will the right subject of source groups' position be legally confirmed, that could ensure that the spiritual rights and economic rights and interests will not be damage, and can also help the source groups use legal means to protect their own legitimate rights and interests when the infringement occurs.

#### *B. The Object of Right of the Intellectual Property Rights Protection of Traditional Literature and Art*

Extension of traditional literature and art has the characteristics of extensiveness, uncertainty, whether according to the WIPO's official publication, or "Demonstration Law" set by WIPO and UNESCO, or "Bangui agreement" of African intellectual property organization, all the extension of traditional literature and art they identified is extremely broad. The extensions of traditional literature and art mainly include literature and art form, folk custom, religious ceremony, folk sports, folk games, traditional medicine, the traditional science knowledge, etc. In view of the object and range of traditional literature and art is complex and difficult to ascertain, some scholars of our country think that there is no need to give a concrete description in legislation, it just needs to set the definition of the protected traditional literature and art. In judicial practice, there is no problem to ascertain the object of the specific case [8].

But the determination of the object of traditional literature and art itself is a difficult problem in theory, which makes it more difficult to determine the object in the judicial practice. When judges determine the object of traditional literature and art in specific cases according to the abstract definition, there are usually too wide or too narrow problems on the understanding, finally, which is unfavorable for the protection of traditional literature and art, so we should reasonably define the scope of the object of traditional literature and art on the basis of the definition of traditional literature and art. Therefore, according to the connotation of traditional literature and art, we define the concept of traditional literature and art within the scope of "literary and art form". As a result, the objects of traditional literature and art do not include folk customs, folk games, traditional sports, religious tradition consciousness, and

scientific and technological knowledge and work belongs to the category of traditional knowledge, such as, traditional pharmaceuticals, diagnosis and treatment, metallurgy, textile, agricultural knowledge.

#### *C. The Right Content of the Intellectual Property Protection of Traditional Literature and Art*

The protection content of the intellectual property of traditional literature and art includes the moral rights and economic rights of the source group. Moral rights include the right of indicating the source and. The right of indicating the source refers that, when anybody uses the traditional literature and art, he should mark that where it comes from, which community or tribe it derives from, which region it is from, namely the right of indicating the identity of the author of traditional folk literature and art. "The folk literature expression protection treaty" (draft) stipulates this right: "Everyone should note the source of the folk literature expression when use it. [9]" The right to ban distorting refers that anyone, in the process of using traditional folk literature and art, shouldn't directly or indirectly distort, disparage, and tamper with traditional folk literature and art in any way, in order to protect the personality interests of the source group of the folk literature.

Economic rights refers that the right subjects of traditional literature and art have the right to permit others to use and dispose, and they reap the benefits, Economic rights includes exclusive right of use, permissive right of use and right to remuneration. Exclusive right of use refers that the subject of right could copy, publish, perform, recompose, translate, rent, exhibit the traditional literature and art which they preserved, developed and inherited, they also could obtain remuneration. The permissive right of use is the right that the subjects of right could permit others to use this traditional literature and art, and they get paid. The right to remuneration is that whether the subjects of rights use their own traditional literature and art, or permits others to use their traditional literature and art; they could all get the remuneration. The remuneration belongs to the source group of traditional literature and art, and it is used for the protection and development of traditional literature and art or other public welfare undertakings, rather than redistribution between group members.

The discoverers, recorders, gatherers and collators of traditional literature and art are the persons who discover, record, gather, collate the traditional literature and art materials and sort the materials into more complete, fixed forms of traditional literature and art. The discoverers, recorders, gatherers and collators make a great contribution to traditional literature and art; therefore, they shall enjoy the following rights: (I) the right to show identity; (II) the right to remuneration. The recreated work of traditional literature and art is more original work, which is completed by the recreation people, reference to the comprehensive elements of traditional literature and art, such as, style, elements, techniques, lasting appeal, etc. The recreation people are original authors, so we should give them independent rights, including the right of authorship, alteration and integrity,

exclusive right of exploitation, permissive right of use and right to remuneration.

#### *D. Limitations on Intellectual Property Protection of Traditional Literature and Art*

Performance of any right is not absolute and needs regulation by some system design. Limitations on intellectual property protection of traditional literature and art could draw on the experience of the system of "fair use" of the Copyright Law. In some cases, using traditional literature and art doesn't need to be approved by the holder of the traditional literature and art, and also doesn't need to pay the remuneration; but you should indicate the source to respect spiritual interests of the source group and shall not infringe the other rights of right subjects. The public have the freedom to the rational use of traditional literature and art situation including the following: In the following case, the public could freely and reasonably use traditional literature and art: (I) the use for personal learning, appreciation, research, etc; (II) the use for education teaching objective and scientific research; (III) Newspapers, periodicals, radio stations, television stations and other media use for news reporting; (IV) Library, art gallery, museum, in order to display or save versions, copy relevant works of traditional literature and art.

#### *E. Period of the Rights and Liabilities for Infringement of Intellectual Property Protection of Traditional Literature and Art*

The characteristic of mass and inheritance determine that the period of protection of traditional literature and art is indefinite. Due to the nature of private right of intellectual property rights, the following behaviors form torts to the traditional literature and art: used traditional literature and art without the permission of the right people and without the payment of remuneration, of course, not including the rational use of the law; the behaviors of distorting, slandering, tampering with traditional literature and art. The treatment measures for the above mentioned behaviors include civil liability, administrative responsibility and criminal liability. The civil liability is, according to the seriousness, to stop the infringement, eliminate the influence, to apologize and compensate for the losses. If the behaviors infringe on public interests, infringers should undertake administrative responsibility; and if serious enough to constitute a crime, they should undertake criminal liability.

### IV. CONCLUSION

Traditional literature and art forms in a nation or group of daily life, and it contains the rich spiritual connotation, and constitutes a part of life the source group. The religion, personality, values of source group passed down in the extensive and profound form, which is the summary of

natural and social knowledge they formed in one thousand years. The intellectual property protection of traditional literature and art is not only legal system construction, but also to fully realize the importance of intellectual property protection of traditional literature and art. We should form the protection consciousness, in order to make intellectual property protection of traditional literature and art not only be solved at the legislative level, but also be well implemented after the legislation.

### ACKNOWLEDGMENT

Fund project: the article is one of the initial achievements of "the protection of intellectual property rights of the traditional culture of Confucianism studies", the project is the independent innovation fund of Shandong university and the academic research project of Shandong University of Confucianism higher institutes (Project No. 2012032).

#### *Authors:*

1.Zhou Fei, Graduate student, Law School, Shandong University, Jinan, China, zhoufei928@126.com

2.Zhang Xi-hua, corresponding author, Researcher, Doctoral tutor, Law School, Shandong University, No. 27 south shanda Road, Shandong University Center Campus Academic Research, Jinan, China, zhangxh@sdu.edu.cn

3. Cao Li-qin, Law school, Shandong University, Jinan, China

### REFERENCES

- [1] Wu Han-dong, "Intellectual property law", China University of Political Science and Law Press, Beijing, pp.44-45, the third edition 2004.
- [2] Kamal Puri (Australia) authored, Gao Ling-han translated, "The preservation and maintenance of traditional folklore manifestations", Journal of copyright bulletin (Chinese version), April 7, 1998.
- [3] See Sheryl Mills, "Indigenous Music and the law: An Analysis of National and International Legislation", in Yearbook for Traditional Knowledge Music 1996, pp.57.
- [4] Yan Yong-he, "China's traditional folk literature and art legal protection mode selection", Journal of intellectual property rights, pp.69, May 2009.
- [5] Feng Xi-yan, "On copyright protection traditional folklore works", Journal of China University of Petroleum (social science edition), June 2011, pp.40-43.
- [6] Xie Hai-yan, "On construction of law protection model of China's national folk literature and art expression", Journal of Guizhou Minorities Research, March 2004, pp.40-43.
- [7] Jiang Qiang, Li Zi-zhu, Wu Jiang, "The New typical cases and projects guidance for copyright disputes", China Legal Publishing House, 2009, pp.202.
- [8] Guan Yu-ying, "Folk literature and art protection in the view of intellectual property", Law Press China, Version 1, November 2006, pp.189.
- [9] Tian Yan, "Traditional culture property system research", Minzu University of China Press, Version 2011, pp.186.