

CLAIMING THE GLASS SLIPPER:
THE PROTECTION OF FOLKLORE AS
TRADITIONAL KNOWLEDGE

Michael Jon Andersen*

TABLE OF CONTENTS

I. INTRODUCTION.....	148
II. DEFINING FOLKLORE.....	150
III. FOLKLORE AS TRADITIONAL KNOWLEDGE	152
A. <i>The Convention on Biological Diversity</i>	153
B. <i>Folklore Protection Under the TRIPS Agreement</i>	154
C. <i>WIPO Committee Sessions on Folklore</i>	156
IV. AUTHORSHIP OF FOLKLORE.....	158
V. ARGUMENT FOR THE PROTECTION OF FOLKLORE UNDER COPYRIGHT REGIME	162

I. INTRODUCTION

Cinderella sat down on a stool, and, taking off her heavy wooden shoes, put on the slipper, which fitted her to a shade; and as she stood up, the Prince looked in her face, and, recognizing the beautiful maiden with whom he had danced, exclaimed, “This is my rightful bride.”¹

In the version of the folktale *Cinderella* told by the Brothers Grimm, Cinderella lives with her step-mother and her two step-sisters, who force her to sleep by the hearth and heap a constant barrage of insults and chores upon her.² Because of her disheveled appearance, her step-mother bans her from attending

* Publication Editor, Case Western Reserve Health Matrix: Journal of Law and Medicine; Senior Editor, Case Western Reserve Journal of Law, Technology & the Internet; J.D., Case Western Reserve University School of Law (expected 2010). The structure of this note was inspired by Susanna Frederick Fisher’s treatment of the Dick Whittington folktale found in Susanna Frederick Fischer, *Dick Whittington and Creativity: From Trade to Folklore, From Folklore to Trade*, 12 TEX. WESLEYAN L. REV. 5 (2005-2006).

¹ JACOB GRIMM & WILHELM GRIMM, *Cinderella*, in GRIMM’S FAIRY TALES 86, 92-93 (George Stade ed., Barnes & Noble Classics 2003) (1869).

² *Id.* at 87.

a festival at the King's palace where the prince intends to choose his bride. Cinderella is able to attend the festival by praying at her mother's grave under a hazel-tree, leading a bird to throw down a dress of gold and silver.³ Every night, Cinderella dances with the Prince. And every night, she runs home and returns to the hearth so her step-mother and step-sisters will not know she was gone. On the third night, the Prince concocts a plan to make Cinderella lose her shoe, and proclaims he will marry whomever the shoe fits. In a desperate attempt to cram her feet into the golden shoe, one sister cuts off her great toe, while the other cuts off her heel. The Prince sees through the deception and carries Cinderella off on his horse to be married.⁴

The *Cinderella* folktale offers the alluring promise of instantaneous ascension from rags to riches, through the favor of a young girl's dead mother as well as the girl's natural beauty and charm.⁵ Many developing countries such as Tunisia, Bolivia, and Burundi view property rights in folklore as a path towards their own personal *Cinderella* story.⁶ With a little help from an intellectual property regime, the essence of their country's folklore can be safeguarded from outside influence. If aspects of their oral histories can be fit into popular storytelling molds, these countries might recapture some of the profits realized through mass market retellings of old stories. But just as the step-sisters in *Cinderella* thought they could cut off their feet in order to capture future benefits, creating a separate class of protection for folklore under the auspices of traditional knowledge severs a country's living tradition, without providing clear guidance for the future creative development of folktales.

In Section II, this Note analyzes how the legal community defines folklore, focusing on the oral tradition of storytelling. Section III addresses the treatment of folklore as traditional knowledge under international treaties and agreements. In Section IV, this Note explores the difficulties in definitively determining authorship for folklore. Finally, Section V argues in favor of protecting folklore through traditional copyright regimes rather than under a new, *sui generis* umbrella of traditional knowledge.

³ *Id.* at 90.

⁴ *Id.* at 92-93.

⁵ Rob Baum, *After the Ball Is Over: Bringing Cinderella Home*, 1 CULTURAL ANALYSIS 69, 69 (2000).

⁶ Susanna Frederick Fischer, *Dick Whittington and Creativity: From Trade to Folklore, From Folklore to Trade*, 12 TEX. WESLEYAN L. REV. 5, 29 (2005-2006) (noting that Tunisia, Bolivia, Chile, Iran, Morocco, Algeria, Senegal, Kenya, Mali, and Burundi extended copyright laws to specifically protect collective and collaborative works of folklore in the 1960s and 1970s).

II. DEFINING FOLKLORE

Before discussing the protection of folklore, it is first necessary to establish a working definition for the term. As Dan Ben-Amos notes, “[d]efinitions of folklore are as many and varied as the versions of a well-known tale . . . folklore became the exotic topic, the green grass on the other side of the fence, to which they were attracted but which, alas, was not in their own domain.”⁷ Thus, a discussion of folklore calls upon the folklorist to cautiously navigate a number of disciplines as stories flit across media, cultures, and languages as they evolve over the passage of time.⁸

In the field of folklore studies, discussions of folklore often gravitate toward the terms *oral tradition* and *culture*, and researchers tend to justify their research as an analysis of “commercial culture, popular entertainment, mass media, or tourism.”⁹ According to the American Folklore Society, folklore is a broad umbrella term that encompasses traditional art, literature, knowledge, and practice disseminated largely through “oral communication and behavioral example.”¹⁰ While folklore scholars tend to disagree about how far the scope of folklore extends, there appears to be a consensus that the term is relatively broad, and is deeply rooted in an oral tradition centered in local communities.¹¹

Given how the international community of folklorists has been hard-pressed to reach a consensus on the term’s meaning, it is understandable that the international legal community is equally hard-pressed to reach a consensus. In 1982, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) and the World Intellectual Property Organization (“WIPO”) adopted the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (“Model Provisions”).¹² The Model Provisions suggest that nations adopt

⁷ Dan Ben-Amos, *Toward a Definition of Folklore in Context*, 84 J. AM. FOLKLORE 3 (1971).

⁸ *See Id.* at 4.

⁹ Barbara Kirshenblatt-Gimblett, *Folklore’s Crisis*, 111 J. AM. FOLKLORE 281, 281 (1998).

¹⁰ American Folklore Society, *About Folklore, What is Folklore*, <http://www.afsnet.org/aboutfolklore/aboutFL.cfm> (last visited May 1, 2010) (noting that folklore includes folk traditions ranging from planting practices, dance, instructions on how to build an irrigation dam, and stories).

¹¹ Kirshenblatt-Gimblett, *supra* note 9, at 286.

¹² *See* World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, ¶¶ 22, 24 (1985) [hereinafter *Model Provisions*], available at <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>.

sui generis intellectual property protections for folklore as defined by its “artistic heritage.”¹³ This “artistic heritage” standard is vague and confusing, and provides little actual guidance.

Eventually, WIPO settled upon treating expressions of folklore and traditional cultural expressions as synonymous terms for the purposes of describing folklore for international regulation.¹⁴ Under the current draft of guidelines for WIPO, expressions of folklore are defined as:

any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested . . . which are: (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community’s cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.¹⁵

This broad definition of folklore includes a wide range of creative works. The definition purposefully avoids limiting its scope to works fixed in a tangible medium. Thus, countries have no affirmative duty to physically collect culturally significant works in order to receive protection. Both individual and anonymous communal works may qualify as expressions of folklore.¹⁶ The forms folklore may take range from stories and oral narratives to glassware and architecture.¹⁷ These diverse creative endeavors have the potential to interact with copyright, trademark, and patent regimes. For the purposes of this Note, I focus on verbal expressions of folklore, in particular the oral tradition as exemplified through “stories, epics, legends, poetry, riddles and other narratives.”¹⁸ Oral narratives have been viewed in some circles as the “highest and truest expression of . . . authentic national culture and the appropriate foundation . . . of

¹³ *Id.* ¶ 34 (noting that artistic heritage excludes traditional beliefs, scientific views, substance of legends, and practical traditions from the operative definition of folklore); Fischer, *supra* note 6, at 34.

¹⁴ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Twelfth Session, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO Doc. WIPO/GTRKF/IC/9/4, ¶ 21(a) (Dec. 6, 2007), available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=89833.

¹⁵ *Id.* ¶ 24.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

national literature.”¹⁹ Therefore, oral narratives provide unique insight on the development of an intellectual property regime centered on protecting national identity and culture.²⁰

III. FOLKLORE AS TRADITIONAL KNOWLEDGE

The debate over the inclusion of folklore within international intellectual property regimes began at the Stockholm Diplomatic Conference for the Revision of the Berne Convention in 1967.²¹ At this conference, the Indian delegation proposed including “works of folklore” in Article 2(1) of the Berne Convention as a protected work.²² The proposal by the Indian delegation was rejected because, as Section II established, the term folklore is difficult to define.²³ Instead, a special working group on folklore at the Stockholm Conference (“Working Group”) drafted Article 15(4), which stated that for unpublished works by unpublished, unknown authors, where “there is every ground to presume that [the author] is a national of a country of the union,” such country could draft laws to designate a competent authority to represent the author, thus entitling the work for protection under the Berne Convention.²⁴

In 1982, UNESCO and WIPO drafted the Model Provisions to provide guidance to countries forming *sui generis* regimes to protect their own folklore.²⁵ The Model Provisions recognized that in the face of accelerated technological innovations, there was potential for the exploitation and commercialization of folklore, and thus the possibility of national identity being distorted.²⁶ The Model Provisions first suggested that countries attempt to protect folklore through existing intellectual property regimes, such as copyright and trademark law.²⁷ However, the Working Group believed additional measures were necessary to expand the scope and duration of protection for folklore.²⁸ Therefore, the Working Group proposed a new *sui generis*

¹⁹ RICHARD BAUMAN, *STORY, PERFORMANCE, AND EVENT: CONTEXTUAL STUDIES OF ORAL NARRATIVE I* (1986) (referring to the views of the German philosopher Johann Gottfried von Herder in particular).

²⁰ *Id.*

²¹ See Fischer, *supra* note 6, at 27-28.

²² *Id.*

²³ *Id.* at 28.

²⁴ *Id.*; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. Treaty Doc. NO. 99-27, 828 U.N.T.S. 221, art. 15(4)(a).

²⁵ HARRIET DEACON ET AL., *THE SUBTLE POWER OF INTANGIBLE HERITAGE: LEGAL AND FINANCIAL INSTRUMENTS FOR SAFEGUARDING INTANGIBLE HERITAGE* 48 (2004).

²⁶ Model Provisions, *supra* note 12, ¶¶ 1-2.

²⁷ *Id.* ¶ 12.

²⁸ *Id.* ¶ 13.

regime, with an unlimited term of protection for expressions of folklore that contained “characteristic elements of the traditional artistic heritage.”²⁹ These types of folklore expressions would be forever protected against publication or recitation for profit without authorization by a competent authority.

The Model Provisions carve out fair use exceptions for the use of otherwise protectable folklore in the following cases: “utilization for purposes of education; utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice; borrowing of expressions of folklore for creating an original work of an author or authors”;³⁰ and the case of incidental use.³¹ The Model Provisions additionally recommend either a willfulness or negligence standard for the *mens rea* needed to create infringement liability.³² The terms of the Model Provisions have been adopted in many African countries.³³

Since the Berne Convention of 1967 and the Model Provisions of 1982, international protection of folklore has developed through three main sources of authority: the Convention on Biological Diversity (“CBD”), the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) Agreement, and a series of WIPO Committee sessions.

A. *The Convention on Biological Diversity*

The CBD originated as an ad hoc working group of experts on biodiversity, formed in response to a request by the United Nations Environment Programme’s Governing Council in 1987.³⁴ Mostafa Tolba, former Executive Director of the United Nations Environment Programme, prepared a first draft of the CBD in February of 1991.³⁵ After consideration by the Intergovernmental Negotiating Committee, the text of this draft was adopted in Nairobi on May 22, 1992.³⁶

The Preamble of the CBD explicitly recognized the intrinsic value of “ecological, genetic, social, economic, scientific, *cultural*, recreational and aesthetic values of biological diversity

²⁹ *Id.* ¶ 25(2).

³⁰ *Id.* ¶ 25(4).

³¹ *Id.*

³² *Id.* ¶ 25(6).

³³ *Fischer, supra* note 6, at 34.

³⁴ CBD News, *The Convention on Biological Diversity: From Conception to Implementation* (Secretariat of the Convention on Biological Diversity, Montreal, Que.), 2004, at 4, available at <http://www.cbd.int/doc/publications/CBD-10th-anniversary.pdf>.

³⁵ *Id.*

³⁶ *Id.*

and its components.”³⁷ In particular, Article 8(j) of the CBD provides that each contracting party to the treaty shall:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.³⁸

While the CBD’s text does not explicitly mention folklore as a type of traditional knowledge, the inclusion of cultural biological diversity in the text’s Preamble opens the gate for folklore’s inclusion under this umbrella. Thus, the practice of extending protection to folklore has been adopted by many contracting parties under the CBD.

Under the CBD, the protection of traditional knowledge is a general, amorphous, and unenforceable goal to strive towards. However, the CBD effectively placed folklore within the considered realm of traditional knowledge, and set the stage for future multinational agreements.

B. Folklore Protection Under the TRIPS Agreement

When the World Trade Organization (“WTO”) was established in 1994 in Marrakech, it acknowledged the importance of intellectual property rights by creating a Council for TRIPS.³⁹ This was one of three councils operating under the general guidance of the General Council.⁴⁰ The next year, the TRIPS Agreement was finalized, creating minimum levels of protection for cultural works of signatory nations. The goal of the TRIPS Agreement was to reduce the unbridled free-riding of intellectual property through selective legislation, and to grant

³⁷ United Nations, Convention for Biological Diversity, Preamble, 31 I.L.M. 818, 822 (1992).

³⁸ *Id.* at art. 8(j)

³⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 4(5), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 L.L.M. 1197 (1994), available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

⁴⁰ *Id.*

creators greater security in the enforceability of their works.⁴¹ Unlike the CBD and WIPO Agreements, the TRIPS Agreement had teeth. The WTO had significant independent enforcement powers through the TRIPS Agreement, both through transparent reviews of national implementation measures through the Council for TRIPS, and through the Dispute Settlement Body which had power to sanction offending parties with trade sanctions.⁴² Authorizations for WTO sanctions are rare, with only two in forty-three violations resulting in actual sanctions in the early years of the WTO.⁴³ However, the threat of trade sanctions provides a strong incentive towards compliance with the TRIPS Agreement.

Under the TRIPS Agreement, protection of traditional knowledge generally falls under Article 27.3(b), which allows for the development of *sui generis* regimes in order to “provide for the protection of plant varieties.”⁴⁴ Thus, the text of the TRIPS Agreement fails to explicitly provide for the protection of folklore under the guise of traditional knowledge. However, on November 14, 2001, the WTO released a Declaration on the TRIPS Agreement and Public Health at a ministerial session in Doha (the “Doha Declaration”). While the Doha Declaration was designed in large part to address public health concerns, it also called for an examination of the relationship between the TRIPS Agreement and the CBD, including “the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1 of the TRIPS Agreement.”⁴⁵ This examination would be guided by principles set forth in Articles 7 and 8 of the TRIPS Agreement, which set basic objectives and principles that underline intellectual property protection.⁴⁶ In light of this mandate to evaluate the role of traditional knowledge in the TRIPS Agreement, the TRIPS Council has placed the issue of *sui*

⁴¹ Frederick M. Abbott & Jerome H. Reichman, *The Doha Round's Public Health Legality: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INTL. ECON. L. 923, 923-24 (2007).

⁴² Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INTL. L. 1, 23-24 (2004).

⁴³ Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INTL. L. 792, 794 (2001) (noting that the two instances of sanctions resulted from violations by the European Communities involve trade disputes over bananas and meat hormones).

⁴⁴ Trade-Related Aspects of Intellectual Property Rights art. 27(3)(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 L.L.M. 1197 (1994), available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

⁴⁵ PADMASHREE GEHL SAMPATH, REGULATING BIOPROSPECTING 49 (2005).

⁴⁶ *Id.*

generis protection for traditional knowledge and folklore as a standing item on the agenda.⁴⁷

C. WIPO Committee Sessions on Folklore

Most of the discussion regarding the international protection of folklore as traditional knowledge has occurred through the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources and Traditional Knowledge and Folklore.⁴⁸ First convened in 2001, WIPO's Committee on Traditional Cultural Knowledge has held fifteen sessions, with a sixteenth session scheduled to take place from May 3, 2010 to May 10, 2010 in Geneva, Switzerland.⁴⁹

The WIPO Committee made note of the value that traditional cultural expressions such as oral narratives provide to communities, both as a repository of functional and historical knowledge, and as a means of defining cultural identity.⁵⁰ The WIPO Committee distinguished folklore from other creative works because of its dual purpose as both a source of cultural heritage and as an economic asset.⁵¹ In order to provide heightened protections for folklore while maintaining the balance between its dual purposes, the WIPO Committee recommended limiting the definition of folklore to creative products that are both characteristic of the community and kept current.⁵²

Qualifying works of folklore would be eligible for WIPO protection under three separate categories: registered cultural expressions, unregistered cultural expressions, and secret cultural expressions.⁵³ While expressions of folklore are entitled to protection upon creation under the proposed treaty,⁵⁴ communities may opt to register a folklore work with "a competent office or organization"⁵⁵ or with an agency authorized to act on behalf of the community.⁵⁶ For registered

⁴⁷ Hannu Wager, *Biodiversity, Traditional Knowledge and Folklore: Work on Related IP Matters in the WTO*, 3 INTERCULTURAL HUMAN RIGHTS L.R. 215, 224 (2008).

⁴⁸ *Id.* at 224.

⁴⁹ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Sixteenth Session, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO Doc. WIPO/GRTKF/IC/16 (May 7, 2010), available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=20162.

⁵⁰ *Id.* at Annex 5.

⁵¹ *See id.* at Annex 10.

⁵² *Id.*

⁵³ *Id.* at Annex 21-22.

⁵⁴ *Id.* at Annex 33.

⁵⁵ *Id.*

⁵⁶ *Id.*

works, an agency or organization can seek redress under a misappropriation theory for:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof.⁵⁷

A rights holder could also claim misappropriation of the expression of folklore involving words, signs, names and symbols, if the use or derivative “disparages, offends or falsely suggests a connection with the community...[involved], or brings the community into contempt or disrepute.”⁵⁸ Thus, individuals seeking to use registered expressions of folklore would have to seek permission from the community before use. Furthermore, the community would maintain significant control over the nature of their use even after authorization.

For unregistered expressions of folklore, the rights holder or an authorized agent can claim their work was misappropriated if a user failed to properly attribute the folklore’s origin or if the attribution created a false or misleading impression of endorsement by the community. Additionally, unregistered works can be protected from distortion, mutilation or modification, and their rights holder is entitled to equitable remuneration.⁵⁹ While unregistered expressions of folklore would not be subject to prior consent or authorization requirements, communities would still be able to exercise

⁵⁷ *Id.* at art. 3(a)(i).

⁵⁸ *Id.* at Annex 25.

⁵⁹ *Id.* at Annex 26.

control over the nature of their subsequent use following publication.

Finally, communities can protect expressions of folklore intended to be secret from unauthorized disclosure and subsequent use. This protection is in line with the Mataatua Declaration of 1993, which recognized that indigenous peoples have the right to protect and control the initial dissemination of their knowledge.⁶⁰ The Mataatua Declaration created a right akin to the right of first publication in copyright law.

While the WIPO Committee's proposal is not yet in force, it provides the most comprehensive analysis of how a *sui generis* regime might protect folklore at the international level. Thus, the following sections will concentrate on exploring the ramifications of the WIPO Committee's proposal as it currently stands. Legislation originating from any international bodies, if passed, would likely extend *sui generis* protection to folklore. It would do so by enabling unidentified individuals and communities to achieve unlimited terms of protection for their unrecorded work, at an international level, upon a showing of cultural significance.

IV. AUTHORSHIP OF FOLKLORE

One of the biggest challenges posed by offering *sui generis* protection to folklore for an unlimited term is the difficulty of ascertaining the proper authorship for a folktale. Because the proposed protection covers works such as oral narratives, which have not been fixed into a tangible medium, the challenge of tracing authorship for these stories is a difficult one. Joseph Campbell, a well-known folklore scholar, theorizes that there is an underlying mono-myth that underlies storytelling: "Whether presented in the vast, almost oceanic images of the Orient, in the vigorous narratives of the Greeks, or in the majestic legends of the Bible, the adventure of the hero normally follows the pattern of the nuclear unit."⁶¹ Thus, under Campbell's theory, storytelling around the world follows a set pattern with particular stages of development, with a limited number of distinct iterations.

The structure of oral narratives like folktales also poses a unique challenge. As a functional matter, orally transmitted narratives are fond of repetition as a source of rest and recall.⁶² The storytelling format relies on the almost verbatim repetition

⁶⁰ *Id.* at Annex 29.

⁶¹ JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 35 (1949).

⁶² MAX LUTHI, THE EUROPEAN FOLKTALE: FORM AND NATURE 46 (John D. Niles trans., Indiana University Press 1986) (1947).

of segments of the story, both to ease the burden of memorization on the storyteller and to draw attention to the commonalities in the story.⁶³ This creates a storytelling convention that necessitates a compact story, turning on slight changes, thus reducing the number of original elements in the story. In the version of *Cinderella* recorded by the Brothers Grimm, Cinderella goes to the prince's ball for three nights in a row. Each night, Cinderella receives a dress of silver and gold from the hazel tree under her mother's grave. Each night, the Prince dances with her and claims her as his partner, to the exclusion of all others. And each night, she escapes home to her hearth.⁶⁴ According to Max Luthi, the repetition present in folktales like *Cinderella* creates a self-enclosed and self-sufficient iteration of the folktale that is merely retold in the eyes of the audience.⁶⁵

There have been a number of efforts to chronicle the histories of folklore. One of the most famous attempts can be found in the work of the Brothers Grimm themselves. The brothers started their academic careers as legal scholars at the University of Marburg.⁶⁶ The first edition of *Kinder- und Hausmärchen*, a collection of children's and household tales, was written as a scholarly work and is replete with copious prefaces and scholarly notes supplementing the folktales themselves.⁶⁷ The stories collected by the Brothers Grimm furthered the purpose of preserving cultural heritage. In Elizabeth Dalton's introduction to the collection, Dalton notes:

[i]n the preface to the first edition, the Grimms celebrate the purely German and authentically oral and peasant origins of the tales. They had the good luck, they say, to find a village storyteller, Frau Viehmann, whose tales were 'genuinely Hessian'...[t]he folktales, they write, 'have kept intact German myths that were thought to be lost'...[t]he German and oral roots were emphasized again and again.⁶⁸

Based on the guidelines established by the WIPO Committee, the works assembled by the Brothers Grimm, including *Cinderella*, would be prime candidates for protection as expressions of folklore. The stories collected by the Brothers

⁶³ *Id.*

⁶⁴ GRIMM & GRIMM, *supra* note 1, at 90-91.

⁶⁵ Luthi, *supra* note 62, at 50.

⁶⁶ GRIMM & GRIMM, *supra* note 1, at xvii.

⁶⁷ *Id.* at xviii.

⁶⁸ *Id.* at xix.

Grimm were authentically and uniquely German, and celebrated the country's rich culture.⁶⁹ Thus, based on the claims made by the Brothers Grimm, Germany could register the work and receive compensation for subsequent uses of the stories, either on its own behalf or on behalf of the Hessian community. Companies like Disney that wished to retell the story in another medium would have to seek German's permission before moving forward with the project. Even if Germany did not register the work, it could argue for attribution in the film's credits, or argue for economic recompense for the resulting distortion of a story integral to Germany's cultural heritage.

Starting in the 1880s, Finnish scholars operating under the theory that every tale has a single originating author, applied scientific methods to catalog the diffusion of stories.⁷⁰ In 1928, Stith Thompson built upon the work of the Finnish scholar Antti Aarne and released *The Types of the Folktale*, a catalog of folktale variants.⁷¹ While the original catalog focused on Western folktales, Hans-Jörg Uther updated the classification system to incorporate international folklore.⁷² The Aarne-Thompson-Uther index classifies *Cinderella* as 510A.⁷³ Scholars such as Swedish folklorist Anna Birgitta Rooth have identified more than 700 variants of *Cinderella*.⁷⁴ The earliest known record of the story dates back to approximately 850 CE, with the Chinese story *Ye Xian*.⁷⁵ Variants of the story have been recorded in the folklore of Japan, Russia, Brazil, Italy, France, and Africa, and include many of the same elements found in the version recorded by the Brothers Grimm.⁷⁶ The Disney movie version of *Cinderella* is based on Charles Perrault's French version of the folktale, *Cendrillon*.⁷⁷ Arguably, individual elements of the story such as the use of a pumpkin as transportation can be traced back to an individual recorded source. But since *sui generis* protection of folklore expressions does not require that a story be fixed in a medium, a country could employ this protection as a shield to prevent even

⁶⁹ *Id.* (citations omitted).

⁷⁰ Lee Haring, Book Review, 20 *MARVELS & TALES: JOURNAL OF FAIRY-TALE STUDIES* 103 (2006) (reviewing HANS-JORG Uther et al., *THE TYPES OF INTERNATIONAL FOLKTALES: A CLASSIFICATION AND BIBLIOGRAPHY: BASED ON THE SYSTEM OF ANTTI AARNE AND STITH THOMPSON* (2004)).

⁷¹ *Id.*

⁷² *Id.* at 104-05.

⁷³ *THE GREENWOOD ENCYCLOPEDIA OF FOLKTALES & FAIRY TALES, VOLUME ONE: A-F* 201, 203 (Donald Haase ed., 2008).

⁷⁴ *Id.* at 203.

⁷⁵ *Id.* at 201.

⁷⁶ *Id.* at 201.

⁷⁷ JUDY SIERRA, *THE ORYX MULTICULTURAL FOLKTALE SERIES: CINDERELLA* 161 (1992).

academic use of a story it claims as its own. This would make it practically impossible to definitively determine the origins of many stories and its elements.

The Aarne-Thompson catalogue divided folktales into 2,499 types, with the majority of tales classified in the “Ordinary Folktales” category comprised of only 900 different types.⁷⁸ When Uther updated the catalogue in 2004, the number of folktales was reduced to 2,399 types. While the catalogue may provide an invaluable guide to communities attempting to establish authorship of their expressions of folklore, it raises just as many questions of authorship. The *Cinderella* story alone has developed into a folktale in hundreds of communities. Many of these communities claim the story as a piece of their national culture and identity, and might wish to assert control over the storytelling.

Allowing communities to restrict the subsequent use of folktales runs counter to the oft touted purpose of promoting expressions of folklore as a living tradition. The WIPO Commission recognized this purpose, noting that the form of protection should respond to the folktales “collective, communal and inter-generational character . . . and their constantly evolving character within the community”⁷⁹ that stems from cross-cultural exchange. Under both Joseph Campbell’s theory of the mono-myth and the Finnish model of individual authorship, many of the stories viewed as culturally significant folktales originate from a shared, evolving framework of storytelling. This framework relies on similar stylistic elements that develop freely across national, communal, and cultural boundaries. There is no definitive retelling of *Cinderella* because, in many ways, it changes with each retelling. Incentivizing communities and governments to register their folktales would likely have the effect of severing stories from their living tradition, while enabling protection for an artificial canonical version espoused by the community.

In the Brothers Grimm version of *Cinderella*, the Prince told Cinderella’s father that his bride “shall be no other than she whose foot this golden slipper fits.”⁸⁰ The two step-sisters were happy upon hearing this, since they had beautiful feet.⁸¹ When the shoe did not fit the elder step-sister, she cut off her big toe at

⁷⁸ Tormod Kinnes, AT Types of Folktales, <http://oaks.nvg.org/folktale-types.html> (last visited May 10, 2010).

⁷⁹ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Sixteenth Session, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, *supra* note 49, at Annex 11.

⁸⁰ GRIMM & GRIMM, *supra* note 1, at 91.

⁸¹ *Id.*

her mother's urging, since she would not need the foot after she married the Prince. But the Prince did not want the elder step-sister.⁸² When the shoe did not fit the younger step-sister, the younger sister cut off her heel at her mother's urging, since she would not need the foot after she married the Prince. But the Prince did not want the younger step-sister either.⁸³ Similarly, the international community is trying to create a working definition of expressions of folklore, which provides an unprecedented *sui generis* regime with no term limits. Many developing countries with established indigenous cultures support the idea of a *sui generis* regime, since they see a rich cultural heritage and valuable economic asset in their stories and folktales. However, in order to profit off of the stories, these countries would need to severely curtail the evolutionary growth of the stories by restricting who could participate in the process of retelling. In doing so, they would be removing one of the elements that gave the stories value as a reflection of society in the first place. Admittedly, there may be folktales, which develop in communities so insulated from outside contact that nothing would be lost by granting *sui generis* protection. These communal folktales would be the rare case where Cinderella's golden slipper would properly fit. The international community could grant protection from outside harm without destroying the process that gave rise to the folktales in the first place. However, there would still be a likelihood that authors and institutions would try to fit their works into the folkloric mold in order to profit off of enhanced *sui generis* protections. At what point do tales of Mickey Mouse and Ronald McDonald become as engrained in American culture as those of Pecos Bill, Johnny Appleseed, and Uncle Remus' Brer Rabbit?

V. ARGUMENT FOR THE PROTECTION OF FOLKLORE UNDER A COPYRIGHT REGIME

As this Note has shown, there is often great difficulty in ascertaining authorship for oral expressions of folklore.⁸⁴ Additionally, this ascertaining of authorship poses a threat to the future development of these oral expressions as part of a community's heritage and culture. Therefore, imposing *sui generis* protection on oral narratives is inadvisable. The temptation to abuse unlimited term limits for works with unidentified and often unascertainable authors would pose too great a danger to the future development of creative works. This Note relies on recognizing the value of a public domain in

⁸² *Id.*

⁸³ *Id.* at 92.

⁸⁴ See *supra* Part IV.

the development of folklore: and as one Egyptian folklore advocate icily proclaimed, “public domain is a *very* Western concept.”⁸⁵ It is important to recognize the value of folklore as an aspect of cultural and national identity. Listening to folkloric stories in social gatherings can provide a shared set of morals and experiences, which defines groups in stronger ways than lines on a map. In 1998, Disney adapted the Chinese folktale “The Ballad of Mulan” into an animated musical. Professors Weimin Mo and Wenju Shen accused Disney of being a “bulldozer [that] rolls over the Chinese culture” by modifying the story and removing the cultural context of the tale.⁸⁶ There is a concern that large corporations may supplant earlier versions of a work, corrupting the story’s message.⁸⁷ So, while there are significant concerns about the protection of folklore from misuse and misappropriation, this Note argues that existing intellectual property law regimes such as copyright law are sufficient to address these issues.

Unlike the proposed *sui generis* protection, copyright law requires that works by identifiable authors are entitled to protection for a limited term, as long as they are fixed in a tangible medium.⁸⁸ Requiring oral narratives to be fixed in a tangible medium presents a burden for communities interested in protecting their folktales. However, it also creates an incentive for communities to actively keep records of their history through audio and video recordings, as well as written records. This falls in line with the goal of preserving a message for future generations. Also, the commercial exploitation of folklore expressions almost always involves works that have already been fixed in a medium.⁸⁹ Therefore, requiring expressions of folklore to be fixed in order to receive protection is not an undue burden.⁹⁰ Furthermore, the originality requirement of copyright law does not provide too high a burden on protection.⁹¹ The perpetual evolution of oral histories when they are transmitted from generation to generation, likely rises to the relatively low threshold of originality set in most countries.⁹² Additionally, the creative effort expended in

⁸⁵ PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 10 (2003).

⁸⁶ Fischer, *supra* note 6, at 43.

⁸⁷ *Id.*

⁸⁸ *See, e.g.*, 17 U.S.C. § 102 (1990).

⁸⁹ Agnes Lucas-Schloetter, *Folklore*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY* 292 (S. von Lewinski ed., 2003).

⁹⁰ *Id.*

⁹¹ *Id.* at 293, 303.

⁹² *Id.*

creating collections and anthologies also typically satisfies the originality requirement.⁹³

Admittedly, copyright law does not provide for a communal copyright, which allows ownership to vest in unidentified authors.⁹⁴ However, supplemental licenses such as the Creative Commons License may allow identifiable authors to “mak[e] it easy for people to build upon other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work.”⁹⁵ By encouraging creators of works based on oral narratives to permit remixing and sharing of their works, the community can encourage the involvement of unidentified authors. While the additional contributions of unidentified authors would not be protected, subsequent additions incorporating the change would be subject to limited protection.

Finally, the limited term of protection under copyright law is appropriate for folklore. While communities could benefit from unlimited terms that allow them to easily safeguard cultural capital, granting protection for as long as the folklore is in use would create an undue burden on the future development of storytelling. Folklore through oral storytelling is meant to be a living tradition. While variations on a work may eventually supplant the original, they may also provide for a community’s cultural development by drawing attention to the differences that develop over time and geography. The folktale of *Cinderella* has been told countless times in countless variations over time. Granting one community the ability to permanently restrict the use of the *Cinderella* story may, in theory, preserve it in its original form. Yet, no one seems to know what *Cinderella* looked like in its original form. Also, too broad a protection stunts a story’s development and growth by allowing communities to create disincentives to innovate.

Folklore through oral narratives should not be protected based on respect for what the stories meant to communities in the past. Instead, it should be protected in order to safeguard the meaning the story holds to existing communities. While the use of copyright is far from a perfect solution, it does provide a sufficient resolution to the problem of protecting folklore. At the end of the *Cinderella* story, the Prince takes Cinderella away from her previous life and leads her to another life. The law should allow for more than one Cinderella, as told by more than one community, to be swept off her feet.

⁹³ *Id.*

⁹⁴ LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 282 (2004).

⁹⁵ *Id.*