Romancing Tradition: A Cautionary Note on Traditional Knowledge-Folklore Rights

Sean A. Pager
Assistant Professor of Law, Michigan State University

ABSTRACT

Are intellectual property scholars incurable romantics? Some say copyright law itself was born in a romantic fiction whereby publishing monopolists disguised their self-interest at the altar of authorial genius. Exposing the trope of romantic authorship in turn led to the “romance of the public domain.” Yet, by masking inequalities in the construction of the commons, this new romance blinded us to claims to protect traditional knowledge/cultural expression-folklore (TK). As the TK movement has gathered steam in recent years, all signs now point to our kindling of yet another romance—a romance with tradition.

Each romance seeks to resolve a set of tragic circumstances and, in doing so, spawns the seeds of the next tragedy. While traditional knowledge advocacy begins from very different normative underpinnings, it parallels the prior romances of authorial genius and the public domain in celebrating “the emancipatory potential” of TK rights in ways that are often “naïve, idealistic, and removed from reality.” Fallout from this latest infatuation could pose just as dangerous as that of its predecessors. Far from a cost-free panacea that will legislate global inequality out of existence, chasing the chimera of tradition could sacrifice real prospects for cultural innovation and economic growth.

This Article argues that behind the romance of tradition lies a reciprocal despair about Southern innovative potential. Calls to propertize traditional culture are often accompanied by plaintive statements that TK is “all we have.” Yet, in fact, for copyright-based culture industries such despair is unfounded. Nollywood, Nigeria’s video film industry, illustrates the potential for digital technologies to empower creative industries in the developing world. By some measures, Nollywood has grown to become the world’s second or third largest film industry. It has done so by exploiting hitherto untapped demand for indigenous African content throughout Africa and African diaspora communities. Such emerging industries promise both commercial and cultural development in ways that were hitherto unimaginable.

And herein lies the danger. Pursuing traditional knowledge rights could distract from efforts to realize this potential, if not impede them directly. Enforcing exclusive rights in traditional cultural expression would both limit the potential for socially valuable forms of creative hybridization and deter much-needed investment (both internal and external) in developing creative industries. TK protection also jeopardizes a progressive vision of intellectual property that holds far more lasting promise for development. Accepting that trade-off would be tragic indeed. Given a choice between promoting cultural innovation vs. reifying the past, the normative argument for the former is clear: a dynamic conception of culture is far more conducive to commercial and cultural vitality. Ultimately, conventional copyright law may be better suited to foster such cultural dynamism than sui generis rights in folklore.