

Research on Legal Protection of Intangible Cultural Heritage from the Perspective of Intellectual Property Right

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Abstract: With the development of economy, intangible cultural heritage is facing a tremendous impact. Nowadays, administrative protection methods cannot meet the protection needs of intangible cultural heritage. Based on the relationship between intangible cultural heritage and the intellectual property protection, intangible cultural heritage should be protected from the perspective of intellectual property. This paper gives the legal protection strategies of intangible cultural heritage from the perspective of intellectual property rights, and provides reference for relevant researchers.

1. Introduction

The intangible cultural heritage is the sum of the spiritual wealth of a country and a nation [1]. It embodies the cultural connotation and historical heritage of a nation and has an important impact on the cultural development of a country. Under the trend of economic globalization and cultural globalization, the commercial utilization of intangible cultural heritage is no longer confined to our country. However, in the process of transnational utilization of intangible cultural heritage, it will not only cause the loss of its commercial value, but also easily lead to the distortion and vilification of intangible cultural heritage due to cultural differences. Therefore, many countries have adopted legislation to protect their intangible cultural heritage, and relevant international organizations are also building a unified national standard system for the protection of intangible cultural heritage. Taking intellectual property law as the center, perfecting the means of legal protection and strengthening the legal protection of intangible cultural heritage are the effective ways to ensure the stable inheritance of intangible cultural heritage. The protection of intangible cultural heritage is a concentrated expression of a country and a nation's respect for history and traditional culture. Rational development and utilization of intangible cultural heritage can promote the better development of intangible cultural heritage, and also can make intangible cultural heritage obtain certain economic value in the process of development and utilization. However, the globalization of economy and culture has also brought great crisis to our non-hereditary inheritance and protection work. The loss, plagiarism, abuse and distortion of intangible cultural heritage are everywhere. Some valuable intangible cultural heritage is facing the danger of marginalization and gradual extinction. Therefore, it is urgent to strengthen the protection of intangible cultural heritage. We must constantly improve relevant laws and regulations, strive to reach agreement with relevant international laws and regulations, constantly improve the protection mechanism, and give effective protection to the inheritance and development of intangible cultural heritage [2].

2. Current Situation of Legal Protection of Intangible Cultural Heritage

The intellectual property protection law has the closest adaptability to the protection of intangible cultural heritage. The functions of intellectual property law are mainly embodied in protecting the legitimate rights and interests of intellectuals, mobilizing people's enthusiasm and creativity in scientific research and literary creation, providing legal guarantee mechanism for the popularization, application and dissemination of intellectual achievements, and providing legal mechanism for international economic, technological trade, cultural and artistic exchanges. In recent years, the use of

intellectual property rights to protect intangible cultural heritage has received widespread attention from the international community. Due to historical reasons, most intangible cultural heritage cannot be fully expressed in words to convey its connotation and denotation. Generally speaking, it is conceived in oral language. On many occasions, they still like to sing or narrate in oral language. They are constantly pondered and processed by numerous singers, narrators, performers, ceremonial directors and craftsmen, and at the same time they are integrated into it. The opinions and interests of many audiences and audiences have enriched the cultural connotation. Although it is difficult to include the protection of intangible cultural heritage in the existing intellectual property system, it should be considered that a compromise has been reached. Existing intellectual property rights systems, including copyright and adjacency rights, patent rights, unfair competition and trade secrets, appearance design, trademarks and geographical indications, can play a role in protecting intangible cultural heritage under certain circumstances. For example, the author and other copyright owners can directly obtain the protection of copyright in the works created by using traditional techniques and traditional forms of expression; the works formed by collating, annotating and translating ancient myths, legends, poems, fables, stories, proverbs, etc., enjoy copyright in their deductive works by their collators, annotators and translators. Therefore, it is possible and reasonable to use intellectual property system to protect intangible cultural heritage. The protection objects of intangible cultural heritage and intellectual property rights are homogeneous. The intangible cultural heritage embodies the results of the wisdom of the whole tribe or nation, and is the embodiment of thought and expression. Whether or not these ideas or expressions are presented through certain media, they have the characteristics of invisibility [3].

3. Main Problems of Legal Protection of Intangible Cultural Heritage from the Perspective of Intellectual Property Right

3.1 The Originality is Hard to Identify

Intellectual property law protects original works, and most intangible cultural heritage is preserved in the form of inheritance, so it is difficult to identify its originality. If a work protected by copyright law must surely bear the mark of personal originality. The emergence of folk literature and art is often the result of creative activities of a group in a specific community environment in a way of continuous imitation, and this creative activity has undergone a continuous and slow process, and its creative subject has the characteristics of group and uncertainty. Therefore, when disputes arise over non-material cultural intellectual property rights, inconsistent understanding of originality creates obstacles to the realization of the rights of the oblige. Intellectual property law protects the achievements of knowledge-based labor in modern society, while intangible cultural heritage protects historical and cultural heritage. The contents of its objects are different. Some intangible cultural heritage is not only scientific, but also mythical or feudal superstitious, which is a major challenge to intellectual property protection [4].

3.2 The Subject of Right cannot be Ascertained

The subjects of copyright rights are mostly determined natural persons, legal persons and other organizations, while the formation and development of folk intangible cultural heritage is the result of the continuous creation of a nation or a region, and its subjects of rights are not specific, so it is often impossible to determine a specific oblige in judicial practice. At the same time, the exercise of rights is different. Copyright and property rights can be transferred and allowed to be used by others; the exclusive owner of folk literature and art can allow others to use their folk literature and art, but cannot transfer their economic rights, because folk literature and art are the reflection of their cultural characteristics. If the subject of rights changes based on the transfer, it will lose its due significance. The main difficulty of using copyright law to protect intangible cultural heritage is that it is difficult to determine the subject and object of the right, and the protection requirements are different for the duration of protection and after entering the common domain. Therefore, the current copyright law is

difficult to play a real role in the process of protecting the intangible cultural heritage.

3.3 The Deadline is Uncertain

The economic rights in copyright are limited by time, while the exclusive rights of folk literature and art are not limited by time. For example, the formation of folk literature and art is often not achieved overnight, but through generations of generations of creative products produced in the process of social development, and in successive generations of transmission of folk literature and art continue to process, supplement and improve, its creative process has the characteristics of long-term and sustainability; while copyright law only for the author before and after his death for a period of time. Periodic protection cannot provide long-term effective protection for folk literature and art. It can be said that the current intellectual property law system is not effective in protecting intangible cultural heritage. The current intellectual property law encourages invention and creation in value orientation, promotes social progress and the development of the times, and promotes cultural prosperity and artistic dissemination by stimulating creativity. The value orientation of intangible cultural heritage lies in protecting the diversity of history and culture, respecting and recognizing various cultural forms in the course of human development. The basic requirement of trademark system for its object of protection is to be identifiable, not to protect the creativity and novelty of the object. Therefore, the intangible cultural heritage will not be rejected by the trademark system because of the lack of novelty.

4. Legal Protection Systems of Intangible Cultural Heritage from the Perspective of Intellectual Property Right

4.1 Copyright Protection System

Copyright law in intellectual property law mainly protects the legitimate rights and interests of authors who have paid creative work in the fields of literature and art. Its object of protection is intellectual achievements, but it should have specific manifestations. For the part of the combination of the two objects, the intangible cultural heritage corresponding to this part can be directly included in the scope of copyright law protection, including literary, artistic and handicraft works created by non-hereditary inheritors based on their connotation or spirit. It is quite complicated to set up the subject of rights to be protected by copyright law. According to the characteristics of intangible cultural heritage, the subject should be divided into several types, including the subject of public rights, the subject of group rights and the subject of individual rights. The content of protecting the right should include the right of authorship of publication and the right of completion of works. In terms of protection period, it should be set for an indefinite period, or until the intangible cultural heritage disappears naturally. So far, more than forty countries in the world have explicitly stipulated the protection of folk literature and art in copyright law or regional copyright treaties. When the achievements of intangible cultural heritage take the form of stories, poems, music, dance, drama, sculpture, film and television works and audio-visual products, we can use the model clauses, the world intellectual property organization, the copyright treaties of the world intellectual property organization and the performance and recording treaties for reference, and adopt a unique system to protect the expression of intangible culture. According to the copyright law and the regulations on the protection of folk literature and art works, china indirectly protects folk literature and art such as songs, dances and puppets by protecting performer's rights. In this way, we should establish a strong mechanism to protect the copyright and related rights of intangible cultural expression and promote the protection of intangible cultural heritage.

4.2 Patent Right Protection System

At present, Kenya has passed a law allowing traditional medical knowledge to apply for small patents. Traditional handicraft products such as furniture, clothing, leather, wood and other design and shape can be protected by appearance design. Kazakhstan has begun to use the pattern of

appearance design protection for the protection of intangible cultural heritage such as headwear and carpets. When the achievements of intangible cultural heritage are shown in the handicraft skills, forging skills, weaving and dyeing techniques, handicraft products, batik dyeing and national medicine handed down from generation to generation in agriculture, science and medicine, the relevant provisions of the Patent Law are adopted to protect the intangible cultural heritage in China. Furthermore, a document system of intangible cultural heritage should be established on the basis of "application for heritage". When the invention involved in the patent application has specific cultural and spiritual significance for intangible culture, or when such application may be considered to infringe upon such community culture, the application should be rejected in accordance with the moral requirements of TRIPS agreement. According to the actual situation of intangible cultural heritage, when applying for patent, we should lower the access threshold of intangible cultural heritage. According to its characteristics, we should change the requirement of novelty into traditionality, but we must meet the requirement of practicability. Otherwise, even if we apply for patent successfully, it will be difficult to create economic benefits, which is inconsistent with the purpose of establishing intellectual property law. Creative requirements can be changed to special requirements, as long as intangible cultural heritage can play a unique role in a certain field, or rely on the special conditions of its inheritance region. On the subject of application, if the successor can be identified, the successor can apply for a patent, otherwise its patent should belong to the inheritance nation or group of intangible cultural heritage.

4.3 Trademark Right Protection System

Trademark law can provide direct protection for intangible cultural heritage, especially for its economic value. Trademark registration of intangible cultural heritage in some areas has brought objective economic benefits to the local area. In terms of protection mode, we should adopt both defensive and positive protection measures, which can effectively prevent others from abusing intangible cultural heritage for economic benefits. The establishment of the applicant for intangible cultural heritage shall be a registered government or an accredited organization, and the owner shall not charge any fee for the reasonable use of the applicant by the group in which the intangible cultural heritage is located. When using totems or graphic symbols full of rich ethnic folk culture as trademarks, they should be protected according to trademark rights, such as protecting special symbols and marks of indigenous communities. Trademark protection system has many advantages, such as low cost, can provide a renewable period of protection, promote the commercial development of intangible cultural heritage and so on. Therefore, many traditional communities are seeking ways to register collective trademarks and prove trademarks in order to protect and revitalize intangible cultural heritage. In addition, when the registration and use of a trademark may infringe upon an important part of intangible culture, or when a trademark is constituted by a false representation that is related to the intangible culture, or when a trademark insults or damages its reputation, the State shall refuse to register the trademark or revoke the trademark at any time.

5. Conclusion

In a word, with the globalization of economy and culture, the protection of intangible cultural heritage is facing more severe challenges. We must strengthen the relevant legislative work, take intellectual property law as the center, and provide strong protection for the inheritance and development of intangible cultural heritage through legal means.

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