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## Protecting the unknown author

A research project on folklore  
and intellectual property

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HÁSKÓLI ÍSLANDS

# Protecting the unknown author

## A research project on folklore and intellectual property

Valdimar Tr. Hafstein

A mere three decades ago, copyright was a relatively arcane and rather unexciting area of law that inspired little in the way of public interest. Its study was hardly attended to outside of a small circle of specialists. All that has changed in the past quarter century to such an extent that copyright – and other intellectual property rights – now make headlines every week. Digital technologies have created an environment where reading, viewing, and listening all involve making copies. In a digital environment, artistic works circulate in unprecedented ways and with unprecedented speed, and so do claims to copyright. New forms of collaboration are constantly emerging in new musical forms, in new modes of representation, on social networking sites, in the user-generated content and creative reappropriation you-tube and vimeo and similar sites, in Internet-based fan communities as well as in the academy. Digitization expands the horizon of creative possibilities – as well as means of circulation – and in doing so puts pressure on the viability and applicability of legal regimes constructed around analog technologies of reproduction. Moreover, the politics of intellectual property are steadily increasing in complexity as new actors emerge, new stakeholders identify themselves and make new kinds of claims using the language and law of copyright. This capacity of legal and discursive regimes to constitute subjects is not new, however, as is evident in the modern figures of the author and the folk, explored in the project described in this paper – a three-year project launched at the end of June 2010 and funded by HERA (Humanities in the European Research Area) and RANNIS (Icelandic Centre for Research).

### State of the art

Not only does the current state of affairs bring scholarly attention to copyright, it also challenges scholars to push beyond conventional disciplinary boundaries that were forged by older interests in an analog world. Interdisciplinary scholarship on copyright and other intellectual property rights is flourishing and now constitutes one of the most fruitful intersections of legal scholarship with the humanities (esp. literature) and social sciences (esp. anthropology). In particular, the historical relation between the construction of authorship and the development of copyright has attracted the attention of literary scholars (Fukumoto, 1997; Hesse, 1989, 1991; Loewenstein, 2002a, 2002b; Meltzer, 1994; Porsdam, 2006; Porter, 1992; Rose, 1993; Saunders, 1992; Saunders & Hunter, 1991; Sherman & Strowel, 1994; Stillinger, 1991; Waldron, 1993; Woodmansee, 1994; Woodmansee & Jaszi, 1994; Zebroski, 1999). The attention of anthropologists, ethnobotanists, and ethnomusicologists has been drawn particularly to cultural appropriation and biopiracy from local and indigenous communities and to the claims that such communities make to collective property rights in their cultural expressions and traditional knowledge (Brown, 1998, 2003; Brush & Stabinsky, 1996; Coombe, 1998, 2003, 2005, 2008; Dutfield, 2004; Escobar, 2001, 2008; Feld, 1996, 2000; Greene, 2004; Hayden, 2003; Mills, 1996; Rioth-Arriaza, 1997; Shand 2002). And scholars in various other fields, from law (Boyle, 1996;

Gibson, 2006; Lessig, 2001, 2004; Macmillan, 2006; Sunder, 2006) to communication studies (Gaines, 1991; McLeod, 2001, 2005; McLeod & Kuenzli, forthcoming; Vaidhyanathan, 2001, 2004) and from information science (Hemmungs Wirtén, 2004, 2007, 2008; Hemmungs Wirtén, & Ryman, 2009) to philosophy (Appiah, 2006; Drahos & Braithwaite, 2003) have weighed in, each speaking from the vantage point of their discipline but to an audience across the humanities and social sciences.

In the past decade, my own fields of Folkloristics and European Ethnology have contributed in important ways to this growing international and interdisciplinary body of scholarship on intellectual property rights (Bendix & Hafstein, 2009; Hafstein, 2004a, 2007a, 2010; Honko, 2001; McCann, 2003; Noyes, 2006; Rikoon, 2004; Scher, 2002, Tauschek, 2007; Welz, 2007). Building on this body of work and engaging with the major strains in the scholarship – legal studies of copyright in social context, literary studies of authorship and copyright, and the anthropology of cultural appropriation – the current project focuses on the relationship between folklore and authorship and its impact on and through copyright. It takes a genealogical approach to the discursive and legal regimes of authorship and copyright with the ultimate aim of re-imagining creativity and arriving at alternative terms in which to think about creative processes as collaborative, incremental, distributed, and collective – like folklore.

In this, it engages also with scholarly debates on copyright in the digital age, open-source software, networks of innovation, and alternative models for managing the circulation of information on the Internet; debates that have fueled a critical discussion on the ownership of culture, knowledge, and technology (e.g., the “Creative Commons”) (Boyle, 2003; de Cock Buning, 2006; Drahos & Braithwaite, 2003; Hemmungs Wirtén, 2007, 2008; Hemmungs Wirtén & Ryman, 2009; Lessig, 2001, 2004; Macmillan, 2006; McLeod, 2001, 2005; McLeod & Kuenzli, forthcoming; Sunder, 2006; Vaidhyanathan, 2001, 2004).

## Objectives

In article 15(4), the Berne Convention for the Protection of Literary and Artistic Works protects “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union”. Concealed beneath this opaque formulation are negotiations in Stockholm in 1967 and Paris in 1971 about granting states the possibility to protect folklore – traditional cultural expressions in the form of music, dance, visual and verbal art – through the international copyright regime. So indivisible is copyright from norms of authorship that the Berne Convention can conceive of traditional expression only as the work of an “unknown author”. This is symptomatic of intellectual property: the concept of the creative process that underpins IP regimes is modeled on solitary genius. Canonized in international law, this Romantic norm has little patience for cultural processes or with products that are developed in a more diffuse, incremental, and collective manner, where it is impossible to fix specific steps like invention or authorship at any given point in time and assign them to a particular person.

Article 15(4) goes on to say, “It shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.” Having translated folklore into terms that are legible under copyright regimes, the committee revising the convention realizes that something has been lost in translation. After molding the creative agency in traditional expression into the shape of the universal individual subject, the convention therefore goes on to fill that empty subject with the will of the state, “which shall represent the author”.

In this regard, the Berne Convention illustrates the paradoxical relationship between copyright and folklore. This project begins with this paradox and seeks to unravel it through the study of particular controversies, shedding light on its historical provenance and present intricacies. The goal is to understand how creativity is channeled through copyright, authorship, and related legal and discursive regimes. Toward that end, I will bring to light how those regimes are constituted through an unprotected outside and trace their shifting borders.

The rights and responsibilities defined by IP regimes also help to constitute legal and ethical subjects. Intellectual property requires subjects to hold and manage the rights and bear the responsibilities, to negotiate and to benefit from any royalties or remunerations. If such subjects are not in place—and in the case of folklore usually they are not—then intellectual property regimes will bring them into being and vest them with power: individual, corporate, or collective, these subjects range from authors to local and indigenous communities, from corporations to the “folk”, and from individuals to nations. Intellectual property thus contributes to what we might call the proliferation of the social.

Copyright and other intellectual property rights shape the production and circulation of culture in important ways and they frame our understanding of creativity in ways that often go unnoticed. It is therefore crucial to devote critical attention to these rights.

I can sum up the objectives of this project thus:

- To shed light on the historical provenance and present intricacies of the paradoxical relation between folklore and copyright
- To increase understanding of how creativity is channeled through copyright, authorship, and related regimes
- To bring to light how those regimes are constituted through an unprotected outside and to trace their shifting borders
- To contribute to a genealogy of the “unknown author” in copyright
- To help imagine creativity differently than the dominant understandings given force in copyright and to think in alternative terms of creative processes that are collaborative, incremental, distributed, and collective

## Work Plan

In an age of file sharing, peer-to-peer networking, user-generated content and youtube, we need a new language to speak of collaborative creativity. In constructing that language, however, we must understand the discursive grid we are revising, so we do not wind up reproducing the same old discursive antagonisms with merely a new vocabulary. We need an alternative grammar of creativity and a renewed understanding of how cultural expressions circulate. With empirical touchstones in rich materials – involving multiple actors, debates, negotiations, and court cases – I want to lay bare the common grammar that conjugates the changing vocabularies of owners, authors, folk, communities, users, tradition, collectivity, originality, and creativity. Thus, the project is, among other things, an analysis of key concepts in the grammar of creativity. The materials emerge from four different contexts:

### 1) WIPO's Folklore Committees Now and Then

The first emerges from the work carried on in Geneva in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore. This committee convened for its 16th session in May 2010 to evaluate the need for legal protection for folklore and traditional knowledge and to negotiate a mechanism for such protection at the international level. I attended four of its sessions as an accredited observer in 2002-2005 and have written five articles on topics related to its work (Hafstein, 2004a, 2004b, 2007a, 2007b, 2010, 2012; Hafstein & Skrydstrup 2011). Building on my previous research, I will observe its sessions again to understand what is happening there now, 5 years onwards. In the work of the committee, one observes how previously colonized states and local/indigenous communities appropriate for their own ends the globalized paradigms of IP when they claim rights in melodies, patterns, or medicinal knowledge appropriated by the music industry, fashion houses, or pharmaceutical corporations. The debates that ensue shed unusual light on the production and circulation of cultural forms and legal concepts, and they disclose the foundational tenets and constraints of the IP system.

In addition to the work of this committee, I will analyze a collection of documents from the work of a joint WIPO-UNESCO committee (1979-1984) that created the "Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action". The Draft Treaty was voted down in 1984 in both organizations, but documents I have come across from its drafting are fascinating for their intricate considerations of collective authorship, with detailed written contributions from around the world. My analysis of this first set of materials – from the work of current and past WIPO committees – will interrogate key concepts around which much of the discussion at WIPO revolves, such as collectivity of creation, traditionality, and ownership.

### 2) Article 15(4)

The second set of materials is entirely archival and concerns the drafting of article 15(4) of the Berne Convention (see B.5.1 above). As yet this remains largely unstudied even though 164 states have adopted the article into their legislation. My analysis will shed light on the coming into being of the "unknown author" in order to illuminate the concept of creativity that underpins copyright regimes.

### 3) Ballad War

The third set of materials is in the Danish Folklore Archives at the Royal Library in Copenhagen. They document the so-called ballad war, or "Kæmpevisestriden", that erupted around the publication of *Danmarks gamle Folkeviser*. A comprehensive edition of all known texts and recordings of the Danish popular ballads, Danish folklorist Svend Grundtvig began this megaproject in 1853 and the last volume was published in 1973. In 1847-1848, the most prominent Danish literati of the era took part in the polemics surrounding the ballad edition, and intellectuals from Sweden, Germany, and the United Kingdom chimed in. Carried on in a number of newspapers and journals as well as in booklets devoted entirely to it, "Kæmpevisestriden" illuminates the relation between authorship and its outside, as well as the politics of voice involved in the making of the folk, the editor, and the author.

The most contested aspect of Grundtvig's editorial policy was his unyielding (and as others saw it, irrational) commitment to publishing verbatim all variants of every ballad, rather than a standardized and sanitized selection (as had been customary). Subsequently, Grundtvig's policy became the standard scientific procedure in ballad editions in Europe and America. Defending it in 1847, Svend Grundtvig wrote "Every recording from the tongue of the folk, every ballad text collected directly from folk

tradition, is authentic – for they all have the same source of authentication, the only one possible: the voice of the folk. They are all first-hand, from the author’s own hand.” That is because, says Grundtvig in one of his contributions to the polemics,

“The folk individual as such, not human individuals, is the ballad composer. That is why we do not know the composer of any ballad, because it is not the work of any one man; he is but the occasion of its appearance, perhaps he vocalized its first words, which were then formed and reformed in diverse ways on their travels on the tongue of the folk through different lands. The folk, that is, are the author...”

As this quote suggests, the issues at stake in “Kæmpevisestríden” rhyme with but also complicate those that produced the “unknown author” of the Berne Convention and are still at stake in WIPO’s negotiations. Grundtvig and his interlocutors debated collectivity and the diffuse, cumulative creativity characteristic of traditional expression, although they did so using the 19th century vocabulary of the universal individual subject and the “folk individual”. I have for some time been convinced that “Kæmpevisestríden” provides rich materials for a genealogy of the “unknown author” and of the discursive grid that the proposed study seeks to lay bare.

#### **4) An Icelandic Lullaby**

The fourth set of materials dates from the last two decades and concerns “Vísur Vatnsenda-Rósu”, a traditional Icelandic lullaby. Archived in multiple versions in the Árni Magnússon Institute collections in Reykjavík, this lullaby was recorded and released in dozens of versions in the last quarter of the 20th century and the first decade of the 21st, and featured in film, theater, and television. Its inclusion on CDs and the soundtracks of two feature films provoked a prolonged copyright dispute between Icelandic composers and recording artists, involving also Icelandic and British record labels and copyright collecting societies, British, German, and Nordic film companies, and the internationally acclaimed artist Björk (Iceland), composer and producer Hector Zazou (France), and producer and recording artist Nâid (aka Martin Lindquist, Sweden).

The dispute surrounding “Vísur Vatnsenda-Rósu” is of particular interest for what it reveals about the shifting boundaries of authorship and its outside and the way they relate to the circulation of cultural forms and legal concepts. It complements the “travels” of ballads “on the tongue of the folk through different lands” with transmission through digital reproduction in various media and attempts to limit those “travels” with recourse to the regimes of copyright and authorship. This part of the project is conducted in collaboration with Egill Viðarsson, who will write an MA-thesis on the modern travels and travails of this traditional lullaby.

## **Research Design**

Depending on the diverse national histories of how knowledge has been institutionalized, my field of study – European Ethnology/Folkloristics (sometimes known as “das Vielnamenfach”, the field of many names) – is sometimes independent but in other cases housed in departments of Anthropology and Social Science or in departments of Literature, Philology, or even History. It straddles the divide between social sciences and humanities, not only in its physical location on university campuses but also with regard to the sort of topics it deals with, the kinds of questions it asks of those topics, and the methods it uses to construct its answers. Its practitioners – ethnologists or folklorists, myself included – are trained to follow their objects of

study into whatever disciplinary enclaves or journals they lead them. Historically, the field relies on cross-disciplinary collaboration and pollination; much of the research carried on under its banner makes a virtue of this necessity.

I mention this here to throw light on the design of the proposed project. The research design is characteristic of ethnological approaches in its eclectic use of sources, combining legal instruments, archival documents and private correspondence with sources created through qualitative interviews and participant observation. Overall I am guided by methodological precepts developed in the qualitative research tradition in the social sciences. Thus I make no attempt to test hypotheses nor make quantifiable observations on the conjuncture between folklore and copyright. Instead, my approach tends more toward complexity than simplicity, and relies on richness of detail over economy of explanation. Firmly grounded in fieldwork and in-depth archival research, I hope to breathe life into theoretical reflection through thick description and detailed analysis.

While my sources are collected and created by various methods, I take the same basic approach to their analysis – accounting, of course, for the important differences in their provenance through the source criticism appropriate in each case. This approach is inductive and exploratory – in tried and true qualitative fashion – and relies on constant coding of the data for concepts and themes to allow the most important (and some unexpected) links and insights to emerge from the sources and research itself, though always in dialog with the scholarship and the problems posed.

My selection of sources is determined by the problems I would like to explore. To shed light on normative understandings of creativity that control the circulation of culture, my intention is to uncover layers of past meanings in concepts invested with power through the institution of authorship and the IP regime. Rather than seek out the origins of copyright and its conceptions of creativity, my aim is to shed light on the plural, contradictory pasts embedded in present-day practices so as to reveal the heterogeneity of a regime that represents itself as consistent and unified. By studying the paradox posed by the convergence of copyright and folklore, my ambition is thus to grasp how the former has been constituted through the exclusion of the latter. The materials identified here are, I believe, well suited to such a genealogical undertaking.

The objective of the genealogical method proposed is to investigate the various systems of subjection hidden in plain view in legal and discursive regimes. Ultimately, the point is to undermine the dichotomies reified in dominant understandings of creativity in order to help us imagine creativity differently and to think in other terms about creative processes that are collaborative, incremental, distributed, and collective. We may even find that these terms will help us describe creativity in all its varied guises.

### A note on collaboration

A team of three researchers at the Department of Folkloristics/Ethnology at the University of Iceland is involved in this project. Áki G. Karlsson and Egill Viðarsson collaborate with me on various and overlapping aspects of the research. Both are funded by RANNIS (Icelandic Centre for Research), and one will produce a PhD dissertation on the topic and the other an MA thesis.

Moreover, it ought to be noted that this project is one of five individual projects that together make up the transnational collaborative research project “Copyrighting Creativity”, funded by a three-year HERA (Humanities in the European Research Area) project grant. “Copyrighting Creativity” brings together five principal investigators from Denmark, Sweden, the United Kingdom, the Netherlands and Iceland. In addition to me, these are (dates in parentheses refer to works in

bibliography): Professor of American Studies Helle Porsdam (2006), University of Copenhagen, who will be the Project Leader; Professor in Library and Information Science Eva Hemmungs Wirtén (2004, 2007, 2008; Hemmungs Wirtén & Ryman, 2009) from Uppsala University; Professor of Law Fiona Macmillan (2006), Birkbeck School of Law, University of London; and Professor of Intellectual Property Madeleine de Cock Buning, University of Utrecht (2006). Associated partners in the project include the Danish Royal Library, the Danish National Museum, the Swedish Royal Library, the British Library, the Tate Modern, the Dutch Royal Library, and the Árni Magnússon Institute of Icelandic Studies. The research question that we will explore together is: “What is and what ought to be the relationship between creativity, cultural heritage institutions, and copyright?” The “Copyrighting Creativity” project website may be found at: <http://www.cultivateproject.dk/>

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