THE LEGAL CONSIDERATIONS OF PRIVACY, PROPERTY, COPYRIGHT, AND UNFAIR PRACTICES IN THE PUBLICATION OF FOLKLORE MATERIAL*

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Folklore material which has been collected in the field and is stored in an archive is becoming an increasingly important source of research information for scholars. Frequently, the fruit of researching archive texts does not ripen into published form; when it does not, there are no questions raised regarding legal infringements. Occasionally, however, archive texts are analyzed and fitted into a written work which is eventually published. When this happens, the person who has put the material together and caused it to circulate in literary form is potentially vulnerable to legal attack on several fronts. The informant from whom the text was recorded, the field worker who collected the material, and the archive which accessioned the lore all combine to form a chain of people and events which link a variety of legal interests and rights to the scholar who later uses this text in a published article or book. This linking does not threaten the scholar if the necessary "release" forms have been obtained along the way. But without these releasess he is subject to legal action by any one of the persons (or by several of them in combination) who has been involved. A partial list of the grounds for legal action they might bring against him would include such topics as privacy, copyright, property, and unfair practices, and the relief granted by a court could range from awarding an injunction to actual (monetary) damages. One topic may overlap another in a given fact pattern and it is often difficult to draw clear lines between the issues.

This discussion is an attempt to present some broad, legal points to a folklore audience and should neither be regarded as an exhaustive exploration of the topic nor as a substitute for qualified legal counsel on any specific matter. It is a report on a portion of the applicable law and case decisions; this is a matter of general interest and, accordingly, required dealing primarily with the federal laws. The age of some decisions does not alone render them less valid today--older cases are frequently cited by contemporary judges, particularly where the principle has been well-established or where the opinion is by an esteemed judge (for example, John Marshall). The topics which have been omitted should also be mentioned: not included here are issues of music recorded from a folk performer and the question of lore in the "public domain." Music is sufficiently complex to require a separate study. While there does not appear to be a specific case in which a genuine folk music performer has contested the use of his song material, there are volumes of cases containing actions brought by popular musicians against those who have recorded their performances. All of these cases would have to be analyzed before an informative statement could be presented. The question of whether or not folklore is in the "public domain" (as news items and public characters are) is too speculative to approach here.

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*This article considers in depth some of the problems raised in the preceding pages ("Folklore Archives: Ethics and the Law," Folklore Forum 6 (1973):

Legal writing style has been used because the citations are made from law source materials. "32 ALR 3d 618" refers, for example, to volume thirty-two of the American Law Reports, third edition, page 618 (San Francisco, 1970) and Title 17, Ss 2 refers to the United States Code: Annotated, Section 2 (Saint Paul, Minnesota, 1952 and updated with cumulative annual pocket parts). Where the designation "f" appears after the first two digits it refers to the record of federal case decisions and where an abbreviation for a state appears in that location it refers to that state's published record of case holdings. No one of the following cases pertains specifically to folklore but they all contain important similarities; some use of imagination is required to construct the fact pattern as it would have arisen regarding the uses of texts.

The matter of a basic right to privacy in personal affairs is being stressed more and more as the information-gathering social scientists penetrate into what were recently forbidden areas of private lives. Credit investigators are doing "in depth" evaluations of many persons daily in order to fill their computer centers. The mass media systems both gather and dispense personal information with an alarming indifference to privacy. And the multitude of government services are creeping into every aspect of private life from mental health to education. These phenomena, and the broader trends toward diminishing privacy they manifest, combine to make the "folk" conscious of their "lore" in a new dimension. The folklorist who ignores these social factors does so at his own peril for no longer will he necessarily be regarded as a "curious fellow" who has come to gather "odd" stories: he may well be thought of as one more annoying outsider who is intruding into private domain--and the reaction he gets may be open hostility or a legal contest subsequent to his having published the material. The "folk" are more cognizant of their legal position now than they have been in the past, due to media saturation, and the right to privacy is an old (if elusive) one.

This right to be left alone is commonly stated by judges to have arisen from natural law and from the United States Constitution's guarantees of "... life, liberty, and the pursuit of happiness."[1] Of course, this right may be waived (usually in the form of a signed release, drafted by an attorney, which permits the future publication of the material gathered) but, if it has not been waived, the informant has solid legal grounds for action against the one who causes it to be published. And either the texts or the informant data could serve as a basis for the suit. In one (perhaps extreme) instance, a publisher hired a student to take notes on a certain professor's lectures and then published these notes for sale to other students: the professor won his case and was even awarded punitive damages because the publisher's actions, in the judge's opinion, were regarded as malicious.[2] Two physicians who photographed an unconscious patient and later used the photographs in an illustrated, printed article were ordered to pay damages to the patient for an invasion of his privacy.[3] These examples show that the taking of another's property (notes) or privacy (pictures) can, when published without the permission of the party involved, leave a person vulnerable to possible legal action. There is a similarity between taking notes from an informant and noting a lecture when either item is published. The field-worker is left even more vulnerable in the area of publishing informant data. The trend in folklore field-work toward providing extensive background informant data to accompany the texts increases

the importance of obtaining written releases for the information. Publishing informant data is not unlike publishing biographical information and the courts have been consistently strict regarding its unauthorized use, especially concerning "character sketches." Conversations revealing details of the subject's earlier life that were later included in a biography without his permission were held to be a basis for awarding damages in Reed v. Real Detective Publishing Company (1945).[4] And in a similar character sketch (of a life-long friend!) case, it was said to constitute libel when appearing without permission in a biography.[5] In addition to character sketches, the unauthorized publication of personal photographs is a very sensitive issue and one worthy of a special treatment which is beyond the scope of this paper. Moral: respect the private sensitivities of the "folk" in an era of diminishing privacy and get a signed release if the material is to be published.

Law, in the United States, is a combination of statutory law and the common law. But statutory law is changed, to some extent, by each newly elected legislative body, and common law, though quite stable in general, often exhibits the response of judges to changing social conditions. Change and response thus create one charadteristic of modern jurisprudence - complexity. Folklore, as recorded, may be regarded as a kind of property. It is the property of the folk with whom it has currency. It may, if properly released, become the property of the field worker (or his employer). And the collector may make a gift of it to an archive which then has the option of releasing it to another party to use in connection with a publication. This property question may also, at any step in the transfer process between performance and print, turn into a dispute over, inter alia, privacy, property in copyright or unfair practices.

Manuscripts (used here to include electronic recordings) may be copyrighted in either published or unpublished form, and a "common law copyright" may exist for material that has not been procedurally copyrighted by the federal government.[6] Items which have been formally copyrighted by the federal government, either in published or unpublished form, will not be considered here as problematic (although they can be and frequently are). The "common law copyright" (or right to first publication) is of greater interest because it often takes legal priority over a formal copyright and it is the form most likely to be encountered by the folklorist. That it has precedence over the statutory law is clearly stated in Title 17, Ss2: "The passage by Congress of the copyright statutes has not abrogated the common law property right of an author to his unpublished manuscript."[7] The nature of these rights was succinctly phrased in Wheaton v. Peters (Pennsylvania, 1834):[8] "By the common law, authors were protected in the exclusive use of the pecuniary rights theref and the right still exists...." This copyright is a monopoly which prevents others from using an author's work.[9] It remains an open question, in the absence of a sample case, whether or not the telling of a tale by an informant is a "literary or artistic production," but it could be considered as such, especially if the narrator was thought of as a performing artist and the recording had been done without his permission. More to the point is the right of the collector((or the scholar) who later publishes the material). Consideration of these roles requires a "value added" approach. The assumption is that the collector (or scholar) has created something of value from what had been valueless texts. The amount of this value added could be apportioned if two or

more parties had each made a contribution to the final form. Telling a tale to a specific person in a distinct social setting and, also, the writing of notes to field collections are both very similar to the writing of a letter, and "the property rights of a sender in a letter are well recognized, and publication may be prevented by injunction."[10] The law also protects the original treatment of material even if the material is in the public domain; the novel treatment of the life of an historical personage has been viewed as a property right worthy of protection.[11] An informant could be viewed as an author or creator and, using the value added concept, so could the collector or the subsequent scholar who has the lore published. An actual case might vest these rights in all three parties at the same time, but to various degrees. If these rights have been waived (released) or sold (contracted), there would seldom be any problem but, if they have not been waived, a myriad of legal complexities may arise when publication is made. Moral: respect the property rights and the copyrights of the "folk" and get a signed release if the material is to be published.

One final, and seemingly unrelated, legal problem area appears when property and copyrights are investigated further - unfair practices. Originally this body of law dealt with the general area of "unjust enrichment" in business practices but it is now used in cases involving the "... misappropriation of a benefit or property right belonging to another."[12] Legal remedy was previously confined to cases of "palming off" (another's work as one's own), and the parties had to be in actual competition, but this is no longer true -- even the requirement that fraud be proved has been deleted.[13] The point is that property rights of value will be protected and judges will use the law to do so. These property rights mean, in legal terms, that the party whose rights have been violated will be afforded a remedy.

There are two primary types of remedies of concern to this topic - injunctive relief and monetary damages. The wronged party may be granted an injunction which will prevent either the original or subsequent publication of the material, or he may be awarded damages. If the infringed material is separable from the work as it appears in print, the infringer may be required to apportion the profits for which he has been called to account.[14] If, however, the infringed material is not separable from the larger work, the entire amount of profits may be awarded to the infringed party.[15] The courts do not consider the relative positions of the two parties before making decisions. And the intent of the litigants, where it can be proved, will often guide the final decision. A strong judgement was made, for example, in the case of the publisher who sold the pirated lecture notes because the intent was shown to have been malicious. But--and this is important to keep in mind when discussing legal matters--intent follows action. The publisher acted with malice thus proving a malicious intent. In earlier decisions on material published or shown nationally, the one who published it could have been brought to court (at least in theory) in each state wherein the work appeared. The concept of the "multi-state tort," as it was called, was finally put to rest in Bernstein v. National Broadcasting Company (District of Columbia, 1955),[16] the opinion establishing the current principle that an action may be filed only at the place of residence of the offended party. Given all of the people who may have grounds for suit against the publishing folklorist for his uses of unreleased material, it is refreshing to discover this "place-of-residence-only" rule!

The legal interrelationships of the informant, the field collector, and the scholar who later has the material printed, and their overlapping rights of privacy, copyright, property, and fair practice, have been outlined above. One link in the chain remains to be discussed - the archive. The two basic questions on archive-held texts are whether or not the archive has legal title to the material, in the first place, and whether or not the archive has released its interests, in the second place.

The archive may either be the owner or the possessor of the folklore texts within its files. If the field collector obtained releases for his works, the question becomes one of "legal gift." Legal gift requires that the first owner had a "donative intent" (he intended to give the material to the facility and retain no control over it himself) and that "delivery" be made (usually the transfer of physical possession of the texts). The archive then becomes the legal owner; it is vested with rights akin to those discussed earlier as running to the other parties in the chain of events. But a donee received no better title to the goods than the donor had, and in the case of matter which has not been released by the informant, the archive possesses the texts without having legal title to them. In the case of an archive employing a professional collector (who will be presumed to have obtained informant releases), the situation becomes less clear. Traditionally, where a person has been employed to gather or prepare manuscripts, the manuscripts (according to the rules of "agency") would belong to the archive as employer.[17] An employee may, however, copyright work produced under contract when that was the intent of the parties.[18] And, directly related to the archive manuscripts, an employee is not debarred from making new compilations from the same, original sources he was employed to collect, and he may make use of experience and information gained in the employment.[19] The scholar who later puts archive material into print faces several important questions. Did the archive have legal ownership of the items? Did the informants specifically release the background information as well as the texts? And was the material properly released to the scholar for publication? The farther the author is removed from the original source of folklore, the more complex the issue becomes and the more vulnerable to a legal contest he stands.

What, in summary, may be concluded from this legal sketch? Very little is certain; no specific answer is given because no case in point has arisen. The actual chances of a folklorist being sued for the use of unreleased texts or informant data are slim. It is even less likely to happen because most of the published material appears in scholarly articles or books that have a very limited circulation. It is still possible, though, and because it could happen, the written release is very important. A friendly informant who generously grants oral permission to use his material may suddenly become a hostile plaintiff who initiates legal action for it having been published. And facts--in a legal sense--are what can be proved in a court of law; there is no necessary relationship between what really happened and what can be proved to a jury. Perhaps the value added principle would assist a defense--perhaps it would not. This has been a broad, general discussion of legal issues concerning the folklorist and, hopefully, one which will help make scholars more aware of what the "folk's" rights are in their "lore." Only two positive thoughts emerge from this paper - obtain a written release for any material that may later be published, and consult an attorney for legal advice on any specific matter that arises.

NOTES*

1. Voelker v. Tyndall, 1947, 226 Ind 43, 138 ALR 26.
2. Williams v. Weisser, 1969, 273 Cal App 2d 726, 40 ALR 3d 254.
3. Griffin v. Medical Society, 1939, 11 NYS (2d) 460, 138 ALR 24.
4. Ariz., 162 P2d 133, 168 ALR 460.
5. Cason v. Baskins, 1947, 159 Fla 31, 14 ALR 2d 752.
6. Title 17, Ss 2.
7. From Press Publishing Company v. Monroe, 1896, 73 F 196.
8. 33 US 591.
9. RCA Manufacturing Co. v. Whiteman, C.C.A.N.Y., 1940, 114 F 2d 86.
10. In re Ryan's Estate, 1921, 188 NYS 387.
11. De Acosta v. Brown, C.C.A.N.Y., 1944, 146 F 2d 408.
12. News Service v. Associated Press, 1919, 248 US 214, 40 ALR 570.
13. McCord Company v. Plotnick, 1951, 108 Cal App 2d 392, 40 ALR 568.
14. Title 17, Ss 101 (b).
15. 2 ALR 3d 1225.
16. 129 F Supp 817, 58 ALR 2d 660.
17. Uproar Company v. National Broadcasting Company, C.C.A. Mass, 1936, 81 F 2d 373, Title 17, Ss 8.
18. W.H. Anderson Company v. Baldwin Law Publications, 1928, 27 F 2d 82.
19. Collier Engr. Co. v. United Schools, 1899, 94 F 152, Title 17, Ss9.

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* Legal writing style does not require the inclusion of a separate section for the references utilized unless works which are not of a legal source are included. The listing of the standard journals and government case records within footnotes is considered sufficient, and this has been done in the preceding pages.