

Human Rights Brief

Volume 12 | Issue 3

Article 3

2005

Facing the Music: Traditional Knowledge and Copyright

Bryan Bachner

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Bachner, Bryan. "Facing the Music: Traditional Knowledge and Copyright." Human Rights Brief 12, no. 3 (2005): 9-12.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kcley@wcl.american.edu.

Facing the Music: Traditional Knowledge and Copyright

by Bryan Bachner

THE WORLD TRADE ORGANIZATION AND U.S. COURTS have developed a complex copyright system to safeguard the rights of musicians. Similar rights, however, are not extended to the traditional knowledge of indigenous communities because the dominant copyright system assumes a particularly Western approach to the creative process and intellectual property rights. As a result, there is an emerging problem concerning the governance of traditional culture, which has become acute in the area of profits from music sales. Courts in the United States are preoccupied with the notion that creativity depends exclusively on the assignment and exploitation of property rights over cultural works and consider traditional music to be part of the public domain. Consequently, composers are free to incorporate traditional tunes into modern melodies as they see fit. Not all cultures adopt the same view on the creative process and subsequent control over traditional culture as the United States and the World Trade Organization. Traditional groups are increasingly asserting that they have legitimate claims over the way their culture is used. This position conflicts squarely with the United States' status quo and the parallel legal framework in the World Trade Organization. These cultures argue that modern copyright law should be more than a measure to ensure the collection of royalties. The present system of copyright protection is unbalanced and impacts adversely music creation. The incorporation of equitable principles into the regulatory framework is an important step towards remedying the problem.

THE DEVELOPMENT OF COPYRIGHT LAW

"TRADITIONAL KNOWLEDGE" REFERS TO INDIGENOUS and local community knowledge, innovations, and practices around the world. Developed from experience gained over many years and adapted to local culture and environment, traditional knowledge is often collectively owned and transmitted orally from generation to generation. It takes the form of stories, songs, folklore, proverbs, cultural values, rituals, local languages, agricultural practices, and medical resources.

Copyright law in the United States and the copyright framework embodied in the World Trade Organization's (WTO) Agreement on the Trade Related Aspects of Intellectual Property (TRIPS) ignore traditional practices and incorporate a mercantilist approach to the creative process. This legal regime presumes that a single author merits exclusive rights over a copyrighted work because it is only through an author's individual genius that a copyrightable work can be created. This legal regime rests on the theory that by providing an economic incentive to authors, the creative process will be nurtured. Further, it assumes that the absence of any reward for the creative effort would undermine the creative process.

Copyright law formalizes the mercantilist approach by regulating the definition of work, the ownership of that work, and the

permissible uses of that work. Only original works that are fixed in a tangible medium are copyrightable. Copyright law affords the author of a work the right to reproduce, distribute, perform, display, or make derivative works from the copyrighted work. Infringement actions arise when third parties make use of the work or copy a substantial part of the work without permission from the author. Although observers describe this copyright system as an unbiased arbitrator of an individual's property rights and the freedom to express, dominant majority groups have exploited this system to profit from the works of ethnic minorities.

THE IMPACT OF TRIPS

THE COPYRIGHT SECTION OF THE TRIPS AGREEMENT embraces the notion that the assignment of exclusive rights to copyright owners is desirable for two reasons. First, it promotes international trade and investment. Second, it provides for the development of local cultural industries. A skeptical developing world, however, wonders whether such an approach protects traditional music that is not only a diverse and abundant resource but also a marketable commodity known as "worldbeat" that can be sold to developed countries.

The TRIPS framework is a pro-business regulatory framework designed to protect the trade in copyright works, amongst other intellectual property rights. Although TRIPS' avowed objective is to govern only the trade in intellectual property, the agreement obliges national legislators to amend domestic legislation and enhance protection for the author/owners of intellectual property. For instance, the 2001 amendments to China's 1990 copyright law, enacted to make China TRIPS-compliant, extend the scope of protection for copyright owners to include the right of performance, the right of broadcasting, the right of exhibition, the right of rental, the right of distribution, and the right of communication of information over the internet.

The main beneficiary of this new copyright law is the multinational corporation doing business in the developing country. TRIPS basically amplifies the economic rights articulated under the Berne Convention and strengthens the control of author/owners by obliging states to incorporate automatic grants of copyright, the inclusion of software into copyright protection, and the strengthening of enforcement procedures. Likewise, TRIPS dilutes the public interest side of copyright by formalizing the limitation of fair use exceptions and explicitly excluding moral rights protection. Vigorous compliance with TRIPS is assured due to the fact that any slippage is subject to adjudication under the WTO's dispute settlement procedures. Renowned economist Jagdish Bhagwati complained that TRIPS is really nothing but a royalty collection service. The protection of traditional knowledge was largely an after-thought.

COPYRIGHT CONFLICTS

A NUMBER OF CONTROVERSIES ILLUSTRATE THE EMERGING conflicts between the assignment of exclusive rights to the copyright owner and claims by traditional music rights holders.

Bryan Bachner is an Associate Professor of Law at the City University of Hong Kong. He received his J.D. from American University Washington College of Law and his Ph.D. from Wuhan University in China. The current focus of his teaching and scholarship is intellectual property rights and environmental law. Bryan would like to thank Peter Jaszi and Joshua Sarnoff for their comments on earlier drafts.

"MBUBE" OR "A LION SLEEPS TONIGHT"

A recent case in South Africa that is still awaiting resolution deals with the modernization of traditional music and illustrates how modern copyright law can marginalize the value of traditional culture. This case involves a dispute between the estate of a Zulu songwriter, Solomon Linda, and the use of a song by Disney Enterprises, Inc. (Disney). Linda died a highly respected but poor Zulu singer/songwriter, and his family continues to live in poverty today. Linda's estate claims to have copyright over a song called "The Lion Sleeps Tonight" that Disney used in its 1994 movie entitled "The Lion King."

The claim arises over the lack of recognition by Disney of the alleged copyright deriving from the 1939 recording of "Mbube," sung by Solomon Linda and his band, The Evening Birds. During the creation of the song, the 1911 British Imperial Copyright Act applied in South Africa. In the 1950's, Linda assigned the rights of "Mbube" to Gallo (Africa) Limited for ten shillings, which then sought to commercially exploit the song in the United States. In the United States, folksinger Peter Seeger heard "Mbube" and from it adapted a song called "Wimoweh." Soon thereafter, "Wimoweh" was transformed into a new song called "The Lion Sleeps Tonight" by George Weiss, Hugo Peretti, and Luigi Creatore.

The British Imperial Copyright Act stipulated that, where the author of the work was the first owner and an assignment was made while the Act still applied to the work, an assignment would survive for only 25 years after the death of the author. After that period of 25 years, all assignments would revert to the original author's legal representative or estate. Neither Linda nor his estate was aware of the reversionary interest in the song. In 2003, when representatives of the estate learned that the reversionary interest may in fact exist, they appointed a new executor. On the contested assumption that "The Lion Sleeps Tonight" is a reproduction in substantial part of "Mbube," the executor claims that all uses of the song since 1997 required the express permission of the estate. In its absence, all uses of the song, claims the executor, including all uses by Disney in all jurisdictions of the commonwealth, are infringements of the copyright in "Mbube."

Although the hearing will not contemplate any collective right over the music by the Zulu community, it should be pointed out that Linda, as a result of the recording, had the good fortune of a sound individual copyright claim. This case is certainly the exception and not the rule, however, because indigenous communities typically are unaware of copyright law, do not assign individual responsibility to control creations, and do not record their works. The South African writer Rian Malan sums up nicely the legal status quo when he says, "[a]fter all, what is a folk song? Who owned it? It was just out there, like a wild horse or tract of virgin land on an unconquered continent. Fortune awaited the man bold enough to fill out the necessary forms and name himself as the composer . . ."

"SONG OF JOY" OR "RETURN TO INNOCENCE"

Another example of how conventional copyright law overlooks the interests of right holders of traditional music involves the appropriation of music from the Ami people of Taiwan. The Ami language has no written form and therefore the preservation of the group's cultural heritage depends upon the transmission of its language, normally through song, from generation to generation. One of the Ami tribal leaders, Lifvon Guo, devoted much of his life to safeguarding Ami folksongs. One day, the Ministries of Culture of Taiwan and France invited Lifvon to sing Ami songs in public performances across Europe. Without Guo's knowledge, the French Cultural Ministry recorded and distributed his music. German music producer Michael Cretu then purchased a license to use the music from the French Cultural Ministry. Guo's vocal performance soon ended up as the central component of a successful single "Return to Innocence" by a rock group called Enigma on their album "Cross of Changes."

In contrast to Linda, who had an individual claim, Lifvon, the protector of a cultural heritage that has no written form, could not make a legitimate claim to protect his own work. One commentator (Angela Riley) has noted that the emphasis of the current copyright doctrine on individualism devalues and trivializes conceptions of communal property of indigenous communities. As a consequence, the law offers the Ami no protection against the piracy of their work, no authority to determine the fate of their recordings, no opportunity to benefit from the rewards of their own music, and no control over distortions of their sacred work.



© Muff Andersson (from *Music in the Mix* by Muff Andersson © 1981)

The family of songwriter Solomon Linda (pictured above), composer of "Mbube," claim copyright over the song "The Lion Sleeps Tonight."

AMERICAN EXAMPLES

Finally, it is important to point out the inconsistency of a U.S. foreign copyright policy position that claims to promote the best interests of local cultural development while the United States' record at home reveals a pattern of discrimination against the right holders of traditional music.

Another observer (KJ Greene) explains the variety of means by which the dominant white culture in the United States has, as a matter of course, misappropriated traditional black music. First, a manager of a successful group would register the copyright for a song written by members of the group in order to take advantage of singers and composers who were often illiterate. Second, innovative musicians, such as Little Richard, would sell their rights to a song for meager sums to record producers or other music industry authorities. For example, the story goes that DJ Alan Freed would not give Chuck Berry's "Maybellene" play-time on his radio show unless he received a percentage of the royalties. Third, white performers would literally imitate innovative genres or styles of black performers and enjoy the economic benefits exclusively. Led Zeppelin's "Whole Lotta Love" was an adaptation of a Willie

Dixon song, for example. Fourth, white performers would imitate, dilute, and often distort black music in a way that would be palatable to white audiences, such as through minstrel shows, which were very popular and profitable for the mainstream music industry.

Greene has highlighted that, despite the claims of neutrality and the pretense of equal protection, the copyright regime over-protected author/owners and treated black music prejudiciously. He further argued that the recognition of moral rights would serve as a first step toward preventing present songwriters/singers from suffering the same fate. A further indication of the concern about the discrimination against the traditional culture of ethnic minorities is the recent research that Native American communities, frustrated with the absence of state-sponsored protection, are promulgating their own cultural rules.

Proponents of the copyright status quo may argue that the market has intervened to remedy any harm that may have been imparted during the early days of black music. Although increased awareness about racial prejudice, evolving tastes of music consumers, and increased sophistication of minority record producers has altered the balance of power in the musical industry, cultural piracy has been perpetuated. For instance, during the last Grammy Awards, Hip-Hop band Outkast sampled Native American chants, appropriated their sacred symbols, and wore their hallowed clothing without consent or acknowledgement. In the absence of new laws, the opportunity will continue for unfettered and newly dominant cultures to take advantage of freshly minted power over musical creators of novel or traditional musical genres.

INTERNATIONAL LAW PROTECTING TRADITIONAL CULTURE

DESPITE THE ENACTMENT OF THE TRIPS AGREEMENT and its implementation by all 148 member countries of the WTO, developing countries and emerging customary international law are pushing back against this imposition on sovereignty. Multilateral treaties and developing case law suggest that the present copyright regime's exclusive incorporation of individualism is not consistent with the process of cultural creativity embraced in the developing world. In contrast to the TRIPS model, the international community has asserted the right of indigenous communities to protect their heritage in copyright law.

For instance, both Article 27 of the 1948 Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social, and Cultural Rights hold that everyone has the right to participate freely in the cultural life of the community, to enjoy the arts, and to the protection of the moral and material interests resulting from their artistic production. Additionally, article 8(j) of the 1992 Convention on Biological Diversity provides that nation states must respect, preserve, and maintain traditional knowledge 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. Nation states must also encourage the equitable sharing of benefits arising from the use of that knowledge. Lastly, the World Trade Organization, the World Intellectual Property Organization, and the Conference of the Parties under the Convention on Biological Diversity have established working groups to study the relationship between traditional knowledge and intellectual property.

These emerging laws acknowledge the contributions that traditional cultures have made to modern civilization by conveying to them control over its use. The common principles arising from these international rules are that the traditional contributors to modern work ought to be guaranteed continued access to their own resource; that any benefits arising from the use of the work that derive from their contribution ought to be apportioned fairly; and that traditional custodians, at a minimum, ought to be acknowledged as the creators of the contribution. Although intellectual property owners may claim that such over-protection will deter their interest in research and development, it is also equally problematic that under-protection will cause traditional right holders to construct regulatory fortresses to keep intellectual property innovators out or simply keep their resources secret. One balanced proposal to resolve the ownership problem is to heighten the originality requirements for copyright in order to prevent author/owners from controlling works they did not create. Likewise, to prevent traditional right holders from excessive control, they could be allowed to make a claim only over works that they continue to use. A recent Chinese case illustrates how local jurisdictions there are seeking to redress the imbalance.

CHINESE CUSTOMARY LAW

A CONFLICT EMERGED BETWEEN A MODERN HAN COMPOSER of a traditional ethnic minority song and the ethnic minority over recognition of the ethnic minority's contribution to the new song. In November 1999, the Chinese Central Television Station (CCTV) organized a musical broadcast that featured the performance of the song "The Wusuli Chantey" by vocalist Guo Song. The presenters announced that although it had previously been reported as an adaptation, it was actually an original work. The CD's packaging did not mention that the song was an adaptation.

“ . . . underprotection will
cause traditional right holders to
construct regulatory fortresses
to keep intellectual property
innovators out . . . ”

Guo Song had discovered the song during a field trip to the Hezhe minority region in Heilongjia province in 1962. This was reported in three separate publications of traditional folk song collections, each stating that "The Wusuli Chantey" was a song of the Hezhe Minority but was composed by Guo Song and a colleague.

The local government in Heilongjia province was given standing by the Beijing People's Second Intermediate Court in 2003 to litigate the case on behalf of the Hezhe on the basis that the folk song could be protected under the copyright law and the

song itself belonged collectively to the ethnic minority. The Hezhe minority demanded that any product or broadcast involving the song recognize their contribution. The court decided that, although the beginning and ending of the song were of independently high artistic value, the core of the song derived from the traditional songs of the Hezhe minority and that without it “the song would have lost its soul.” The court decided that “The Wusuli Chantey” was not an original composition but an adaptation of the Hezhe minority’s song. It required Guo Song to confirm this finding in all future publications. It also ordered the CCTV to advertise in the *Legal Daily* that its originally broadcasted statement was inaccurate. Both Guo Song and CCTV were ordered to pay court costs.

The Chinese judicial decision is interesting for a number of reasons. First, the fundamental presumption of the decision must be that it is unfair to adapt a traditional song without acknowledging the origin of that song, even if that song was in the public domain. Second, although not commenting on the economic rights of indigenous communities, the court recognized the importance of protecting the moral right of paternity by a collective group over a traditional song. This is quite unique as moral rights conventionally accrue to individual authors. The court did not explain its reasoning for protecting the moral rights of a collective group; however, it may derive from the 1991 Copyright Law’s stipulation that folklore should be protected. The details of the protection are meant to be set out by the State Council, but those provisions have yet to be drafted.

CONCLUSION

ALTHOUGH THE CURRENT COPYRIGHT REGIME INCORPORATES Western conceptualizations of ownership, originality, and integrity in a creative work, tensions will naturally arise where these normative rules regulate matters that are part of a different cultural milieu. Copyright’s exceptional jurisprudence in the United States and the TRIPS Agreement embrace an individualistic vision of authorship that discriminates against and marginalizes remarkable musical contributors to the modern cultural scene. By concealing multi-cultural notions of authorship and creativity, copyright law mandates the misappropriation of traditional cultures, undermines an important source of innovation, and diminishes the development of the global marketplace. United States and TRIPS law should be modified accordingly.

Copyright law should embrace cultural and economic realities. In order to achieve its objective of promoting creativity, copyright law must recognize that different cultures have different views on how to assert proprietary control over music and therefore provide some form of ownership rights that recognize not only private property claims but also the collaborationist nature of the creative musical process. Specific suggestions include the strengthening of originality standards, the clarification of duration for control over works, and the enhancement of moral rights. Such architectural changes are critical as a first step to the equitable empowerment of the traditional custodians of music, the actual protection of their economic and cultural rights, and the general enhancement of human rights.

HRB



Washington, DC

Academy on Human Rights and Humanitarian Law

Co Directors: Claudia Martin and Diego Rodríguez-Pinzón
MAY 31 - JUNE 17, 2005

three intensive weeks

Develop your knowledge in International Human Rights Law and Humanitarian Law.

- Classes about Regional Human Rights Approaches; United Nations; International Criminal Tribunal; Economic, Social and Cultural Rights; Women’s Rights; Terrorism and Human Rights; International Humanitarian Law; and many more
- Professors: Elizabeth Abi-Mershed, Victor Abramovich, Gudmundur Alfredsson, Philip Alston, Federico Andreu Guzmán, M. Cherif Bassiouni, Reed Brody, Antonio Cançado Trindade, Santiago Cantón, Sandra Coliver, Rebecca Cook, Ariel Dulitzky, Baltasar Garzón Real, Robert K. Goldman, Felipe González, Claudio Grossman, José Antonio Guevara, Christof Heyns, Fernando Mariño Menéndez, Elisa Massimino, Michael Shifter, Lyal Sunga, Brian Tittmore, Rodrigo Uprimny, Alejandro Vallencia Villa, Carlos Villán Duran, and Leo Zwaak.

APPLY ONLINE
www.wcl.american.edu/humright/hracademy

FOR MORE INFORMATION, CONTACT US AT:
American University Washington College of Law
Academy on Human Rights and Humanitarian Law
4801 Massachusetts Ave., NW
Washington, DC 20016-8181 U.S.A.
202.274.4070 Tel 202.274.4198 Fax
hracademy@wcl.american.edu

Sponsored By:

SIM 

NETHERLANDS INSTITUTE OF HUMAN RIGHTS (SIM)
Utrecht University, The Netherlands

ACADEMY ON HUMAN RIGHTS & HUMANITARIAN LAW

AMERICAN UNIVERSITY **WASHINGTON COLLEGE of LAW**