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Krister Malm

EXPANDING INTELLECTUAL PROPERTY RIGHTS AND MUSIC

AN AREA OF TENSIONS [1]

As you all know ownership of music is a complicated matter. There are many traditional notions of ownership in different parts of the world and among peoples with widely differing cultures. The Suya Amerindians in Amazonas traditionally consider that fish and other animals compose songs and that musicians merely are the keepers of the music, not the originators or owners. The notion that certain music belongs to a family or group of people who are considered the custodians of a specific musical tradition is very common all over the world.

The intellectual property rights that are covered by international conventions and most national legislation are referring to works by individuals. This is based on the romantic notion of the lonely genius creating a work of art out of nothing else but his or her creativity. This notion prevailed in Europe at the time of the introduction of intellectual property rights in the 19th Century. This notion is, of course, not correct. Instead any item of, let's say music, is the product of a combination of the creativity of a number of individuals. Every piece of music can be placed on a scale between total uniqueness and total generality, which is general traditional formulas and patterns that everyone knows. Of course, the extreme points of this scale must be considered as only theoretical positions.

Some musical works may be very unique to the point that very few can appreciate them at all. But the vast majority of works is not so unique but draw heavily on tradition. These works are closer to the general end

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of the scale. This means that present international agreements regarding intellectual property rights in the world are based on a false assumption that all works are unique works. This has created more and more tensions during the past decades when music via electronic media has started to travel freely in time and space.

International relations and national legislation concerning intellectual property rights is based on the Berne Convention for the Protection of Literary and Artistic Works, originally from 1886. The states that have signed the Berne Convention make up a union of signatories which in turn have formed the World Intellectual Property Organization (WIPO) within the United Nations framework. The Berne Convention defines the rights of, among others, composers of music and writers of lyrics. The basic principle is that all signatories of the Berne convention should treat intellectual property owners living in other signatory countries in the same way they treat their own intellectual property owners.

There are, however, slight differences in how states apply the Berne Convention in national legislation. The main difference concerning music is between the concepts of copyright and author's rights. The Anglo-American kind of legislation applies the concept of copyright, i.e. the owner or owners of a piece of music has the right to remuneration when the piece of music is "copied" in one way or another, for instance by being performed in public or recorded. The copyright or parts of it can be sold and transferred to some other party.

Continental European states apply the concept of author's rights which consists of two elements, copyright and in addition also moral rights. The moral rights mean that the composer of a piece of music has the right to forbid what he or she considers distortion or misrepresentation of the piece of music. The moral rights cannot be transferred to other parties. Thus the composer has a stronger position when author's rights are applied.

During the years the Berne Convention has been amended and supplementary conventions and agreements regarding so called neighbouring rights have been added. The most important of these are the Rome Convention from 1961 which covers the rights of musicians who perform on records and record companies, the Phonogram Convention from 1971

which concerns illegal copying of recorded music, so called piracy, and in 1995 the TRIPS agreement concerning trade related issues of intellectual property rights within WTO, the World Trade Organization.

The TRIPS agreement sets out the minimum standards of protection of intellectual property to be provided by each member of WTO. The agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, especially the Berne Convention, in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS member countries. The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The agreement lays down certain general principles applicable to all intellectual property rights enforcement procedures. TRIPS stipulates that the requirements should be fulfilled by all WTO member states by the year 2005 if they wanted to continue to fully participate in international trade. However, this was never implemented, but at the time of the agreement it was a real threat.

The background of the TRIPS agreement is that mainly industrialized countries had up till the early 2000s been signatories to the Berne Convention, while most of the states in the South or Third World have not previously signed the convention. This has a number of reasons and I can only briefly point at some of them here. As I said before it has been obvious that the 19th Century European idea of intellectual property rights is not compatible with most traditional notions of ownership, not only in Africa, Asia and other Third World regions, but also in a country such as Sweden. Items of traditional music in Sweden are considered to belong to a village (e.g. Orsa tunes) or a region (e.g. Halland tunes) or to a lineage of performers indicated by the word "efter" ("after", e.g. polska after Pekkos Per). There is no individual ownership even to the extent that traditional fiddlers who actually have composed some tunes of their own almost never have considered the possibility to register them with STIM, the Swedish composers' rights money collecting society. There have also been cases of acute conflict. When the tune Gardebylaten was registered as a composition by an individual and became a hit in the 1950s, fiddlers

from Rattvik in Dalecarlia in a very irritated mood invaded the office of the STIM director. They told him with threatening gestures that the tune had been played in their village for generations and belonged to them. However, this action had no effect. The legislation did not provide for rights owned by a team of village fiddlers. The registration of the tune as a composition by an individual prevailed.

Over the years many traditional tunes have been "confiscated" or "stolen" and registered with collecting societies as compositions by an individual. Gradually more and more of the world heritage of traditional music is thus "privatized". This can happen in many different ways. For instance, in 1966 two ethnomusicologists, Simha Arom and Geneviève Taurelle, published a record in the UNESCO record series with music of the Ba-Benzélé pygmies in Central Africa. The music from this record has been used in radio and TV commercials, incorporated into compositions by Herbie Hancock, Madonna, Zap Mama and many others.

You may think: So what? But then consider that every time copyrighted music based on the Ba-Benzélé music is played in public: in concerts, on radio, TV and film, in commercials, in restaurants, barber shops and department stores, and for every record sold, copyright fees are paid by the users. I have tried to tentatively compute the amount of rights money generated over the years by the use of Ba-Benzélé music and paid to the exploiters of the music. Even a conservative estimate shows that if only some 10% of this money had been channelled to the Ba-Benzélé people they could have bought a large area of their rainforest and been able to legally own and remain on their traditional land! Thus, intellectual property rights could be of crucial importance also to African rain forest peoples in this globalized world where music and other cultural artefacts have been disconnected from their original space and time. But the intellectual property of collectives such as the Swedish fiddlers or the Ba-Benzélé musicians is not protected by the present system.

Another reason why Third World countries didn't sign the intellectual property rights conventions is the organizational infrastructure required for a successful implementation of intellectual property rights. Since it is not very practical for each and every rights owner to run around the place and try to collect their money, you need a functioning collecting society,

controlled by the rights owners, which can collect and distribute the money due for copyright. In order to collect the money you need a register of protected works. You also need means to identify the users of music and to sign agreements with them on how much they should pay. Since the legislation in most cases only secures the right to collect money but not how much, you need considerable negotiating power to enforce the rights. Collecting the money is, however, the relatively easy part. The hardest part is distributing the money in a fair way. To do this you have to know how much the different protected musical works have been used. Usually it is possible to in one way or another monitor the music played on radio, TV and as film music in cinemas. It is much harder to know what's going on at live public performances or discos not to speak of barber shops and stores. This leads to a lopsided view of the use of music and that the mass media output of music gets too much weight when the distribution of money is decided on. If then the media output is dominated by international hit music and the live scene by local music this means that the poor collecting society in a Third World country has to pay a lot of hard cash to rights owners in the industrialized countries while very little is paid to the local music makers.

Furthermore, in many Third World countries very little of the music of local music makers is published on records and even less is exported and played abroad. Thus very little money comes to the local collecting society from other countries. And even if local music from the Third World is used abroad and the country is a signatory to the intellectual property rights conventions it might, even if there is a composer, be considered traditional music in the so called public domain which should not be paid for. This can be due to the fact that the piece of music is not in the registers of the collecting society in the foreign country where it is used. And even if the piece is registered and the composer is known and money is actually paid the international flow of copyright money from the industrialized countries is constructed in a way that in most cases very little trickles down to the composer who is a member of a collecting society in an African or Asian country.

As you can see there are many reasons why Third World countries have hesitated to join the Berne convention. The TRIPS agreement simply forced them to do it, even if they were convinced that certain aspects of

the legislation would not be appropriate or beneficial to their countries. One of those aspects has been the issue of protection of traditional cultural expressions meaning traditional skills in music, dance, drama, ceremonies, crafts, medicine and other similar areas and the enacting/performance of these skills.

The strategy of Third World states regarding this issue after the TRIPS agreement became to try and get amendments to the agreement. Thus in 1996, the question of international protection of intellectual rights in traditional cultural expressions was raised by a number of Third World governments. This was done in the context of the preparations for the WTO meeting that took place in Geneva in January 1997. The move to get the issue onto the agenda of the WTO meeting failed, and thus there was no possibility to amend the TRIPS agreement.

The issue was, however, supported by so many governments that it could not be ignored altogether. It was diverted into a conference organized jointly by UNESCO and WIPO in Phuket, Thailand in April 1997. There were representatives of some 130 countries and Non-Governmental Organizations present at the conference. In spite of hard resistance from especially the US and UK delegates the Phuket meeting resulted in the so called "Phuket Plan of Action".

As a result of this plan the World Intellectual Property Organization has acted during the past years to move things ahead. During 1998-99 WIPO and UNESCO organized "regional consultative fora" in the regions of Latin America/Caribbean, Asia, The Arab Countries and Africa. In the reports from these fora there is an unanimous consensus that global commercial exploitation of folklore in different forms from World Music to design of T-shirts is rapidly increasing and that the profits from this commerce end up in private pockets. Furthermore, it is declared that the importance of traditions for cultural, societal and socio-economical developments is underestimated and thus also the negative effects of the exploitation of traditions are underestimated. The countries of the respective regions are asked to introduce national legislation on protection of intellectual property in traditional music and other folklore if they have not already done this. WIPO is asked to draft an international convention as soon as possible, just as in the Phuket plan.

The General Assembly of WIPO decided in October 2000 to set up an "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore". In this way the issue of legislation on protection of traditional cultural expressions (folklore) has been linked to questions of the exploitation of genes from animals, plants and microorganisms. From a legal perspective these issues are of similar nature. The committee had up to December 2010 held 17 meetings. Some of the needs stated regarding traditional cultural expressions are:

- control over disclosure and use
- commercial benefit
- promotion of and incentives for continued tradition-based creativity
- acknowledgment and attribution
- prevention of derogatory, offensive, and fallacious use.

It has been repeatedly stated that objectives in this area are not only (or purely) commercial. Relevant objectives have also been classified as: a defensive commercial interest, an active commercial interest and ethical concerns. A defensive commercial interest is relevant where cultural communities wish to protect their traditional cultural expressions from being exploited commercially by others. An active commercial interest would be relevant where communities wish to benefit from the economic advantage attached to treating their traditional cultural expressions as a commodity. Ethical concerns arise when cultural communities wish to protect their traditional cultural expressions so that its evolution faithfully respected their traditions and modes of life.

WIPOs Intergovernmental Committee is still working and makes very slow progress when it comes to bridge the gaps between the demands of holders of Traditional Cultural Expressions (TCEs) and present intellectual property (IP) systems as laid down in international conventions. The following table is an attempt to pinpoint the most apparent gaps.

Traditional Cultural Expressions subject matter:	**Desired protection:**	**Perceived shortcomings in present conventions:**
(i) literary and artistic productions such as traditional music and visual art	(i) protection of TCEs against unauthorized use	(i) the originality requirement
(ii) performances of TCEs	(ii) prevention of insulting, derogatory and/or culturally	(ii) ownership, the requirement of a known individual creator
(iii) designs	(iii) and spiritually offensive uses of TCEs	(iii) the fixation requirement
(iv) secret TCEs	(iv) prevention of false and misleading claims to authenticity and origin	(iv) the limited term of protection
(v) indigenous and traditional names, words and symbols	(v) the failure to acknowledge source when TCEs are used	(v) formalities of registration and renewal
	(vi) defensive protection of TCEs	(vi) exceptions and limitations
	(vii) unauthorized disclosure of confidential or secret TCEs	(vii) defensive protection

The perceived shortcomings in present international intellectual property systems can be further explored as follows:

(i) The originality requirement: copyright protects only "original" works, and many traditional literary and artistic productions are not "original" in this sense. Similarly, it has been suggested that traditional designs are not "new" or "original" for industrial designs protection. On the other hand, adaptations of TCEs can be protected as "original" copyright work and designs, leading to calls for "defensive protection" (see further below);

(ii) Ownership, the requirement of a known individual creator: copyright and industrial designs protection requires the identification of a known individual creator or creators in order to determine the holders of rights and to identify precisely who might benefit from such rights. It is difficult, if not impossible, however to identify the creators of TCEs, and hence the rights holders and beneficiaries in TCEs, because

TCEs are communally created and held and/or because the creators are simply unknown and/or unlocatable. The very concept of "ownership" in the IP sense may also be alien to many indigenous peoples.

(iii) Fixation: the fixation requirement in many national copyright laws prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected unless and until they are fixed in some form or media. Even certain "fixed" expressions may not meet the fixation requirement, such as face painting, body painting and sand carvings. Yet, on the other hand, rights in recordings and documentation of TCEs vests in the person responsible for these acts of fixation, such as ethnomusicologists, folklorists and other researchers and not in the TCE bearers;

(iv) Term of protection: the limited term of protection in copyright, related rights and industrial designs protection is claimed to be inappropriate for TCEs. First, it fails to meet the need to protect TCEs in perpetuity or at least as long as the bearer community exists. And, the limited term of protection requires certainty as to the date of a work's creation or first publication, which is often unknown in the case of TCEs;

(v) Formalities: while there are no formalities in copyright and related rights, there are registration and renewal requirements attached to industrial designs and trade marks protection. Such requirements have been suggested to be obstacles to the use of these IP systems by indigenous and traditional communities.

(vi) Exceptions and limitations: aside from the limited term of protection for most forms of IP, it has been argued that other exceptions and limitations typically found in IP laws are not suitable for TCEs. For example, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. Some of these exceptions and limitations have been criticized by indigenous and traditional communities, and others have stressed the need for any exceptions and limitations to take into account the public interest.

> *(vii) Defensive protection*: Indigenous peoples and communities are concerned with non-indigenous companies and persons imitating or copying their TCEs or using them as a source of inspiration, and acquiring IP protection over their derivative work, design, mark or other production. For example, communities have expressed concerns over the use by external parties of words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. Furthermore, neither copyright nor industrial designs laws protect the "style" of literary and artistic works and designs, respectively.

It is certainly not easy to close these existing gaps. I think that one possible way out of this dilemma is that any amendment of the Berne Convention proposed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should contain **informed consent** as a key concept. An amendment based on this concept will make it compulsory for any exploiter of music or other traditional cultural expressions to obtain the informed consent of the bearers of the knowledge or expressions. Then this owner, may it be a community or individuals, can give the knowledge or expressions away for free or set conditions for the use such as royalty payments, specifications regarding the ways the knowledge or expressions could be used etc. Just as has happened within the present intellectual property system methods of handling this business through standard procedures involving licensing agencies, collecting societies etc. will develop. This new system will have the same weaknesses as the present system regarding administration of the rights, but it will at least give owners of collective cultural property a fair chance and stop the most blatant forms of robbery of traditional knowledge.

In this paper I have only touched on a few of the present tensions in the area of intellectual property rights and music. I have not gone into the tensions created by file sharing on the Internet or by the constant lobbying by the music industry for prolonged protection times. This would call for a separate paper.

Unfortunately, the Berne Convention and the many amendments and supplements made in attempts to keep up with rapid changes in technology

and communications have over the years grown into a legal maze that very few people master and certainly not many creators of music. This fact is also creating tensions.

On the one hand, I think it is patently obvious that creators of music shall have payment when their music is used by others. This should apply to all creators of music and not only to those who happen to comply with European 19th Century standards. On the other hand, I think that we should strive to keep as much as possible of the world's musical heritage in the public domain, free for all to use. Therefore, I don't like the trend to privatize music that is in the public domain and I don't like the lobbying by the industry for longer protection times. After all, intellectual property rights were created to protect the work of creators, not to protect investments within the music industry or any other cultural industry in order to make them more profitable. I think the whole future of the intellectual property rights system depends on if the legislators can manage to construct a more transparent set of principles and in so doing strike a balance between individual rights, collective rights and the interests of the general public in a way that most people consider fair.