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"The sleeping lion needed protection" – lessons from the Mbube* (Lion King) debacle

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Abstract: *In 1939 a young musician from the Zulu cultural group in South Africa, penned down what came to be the most popular albeit controversial and internationally acclaimed song of the times. Popular because the song somehow found its way into international households via the renowned Disney's Lion King. Controversial because the popularity passage of the song was tainted with illicit and grossly unfair dealings tantamount to theft and dishonest misappropriation of traditional intellectual property, giving rise to a lawsuit that ultimately culminated in the out of court settlement of the case. The lessons to be gained by the world and emanating from this dramatics, all pointed out to the dire need for a reconsideration of measures to be urgently put in place for the safeguarding of cultural intellectual relic such as music and dance.*

1. Introduction

Music has been and, and continues to be, important to all people around the world. Music is part of a group's cultural identity; it reflects their past and separates them from surrounding people. Music is rooted in the culture of a society in the same ways that food, dress and language are". Looked at from this perspective, music therefore constitute an integral part of cultural property that inarguably requires concerted and decisive efforts towards preservation and protection of same from unjust exploitation and prevalent illicit transfer of same. The duty to do so becomes even more necessary and critical in countries such as South Africa and a majority of other first and third world countries sharing the common characteristic of being multi-cultured.

In 1939 a young musician from the Zulu cultural group in South Africa, penned down what came to be the most popular albeit controversial and internationally acclaimed song of the times. Popular because the song somehow found its way into international households via the renowned Disney's Lion King. Controversial because the popularity passage of the song was tainted with illicit and grossly unfair dealings tantamount to theft and dishonest misappropriation of traditional intellectual property, giving rise to a lawsuit that ultimately culminated in the out of court settlement of the case. The lessons to be gained by the world and emanating from this dramatics, all pointed out to the dire need for a reconsideration of measures to be urgently put in place for the safeguarding of cultural intellectual relic such as music and dance.

In this exposition various ways of protecting cultural music and/or dance within the broad category of folklore, as well as ways of preventing the illicit dealing thereof are investigated. This is done by firstly presenting a brief outline of the Solomon Linda story accompanied by the shortcomings and/or dramatics relating thereto. This is followed secondly by a discussion of various initiatives, (be they suggested, proposed or otherwise) taken both territorially and in the international arena, and also geared towards preserving and protecting cultural property. In this feat, the paper will touch on and address where possible, both the following aspects, which are :(a) Intangible cultural expression (music) in the context of intellectual property and copyright regimes; (b) Intangible cultural expression (music) in the context of indigenous traditional knowledge systems. Lastly a review of the progress regarding endeavours (if any) made by South Africa and pertaining to

* Zulu word for lion.

the preservation and protection of cultural music in the aftermaths of the Solomon Linda debacle, will be succinctly set out.

2. The story of Solomon Linda and Mbube

Solomon Popoli Linda was born near Pomeroy, in the impoverished Msinga rural area of Zululand. In 1931, he like many others his age trekked to Johannesburg in search of work. In 1933 he formed a music group called the Evening Birds and continued to serenade crowds with Zulu choral music until his demise in 1962.

2.1 The song

The song "Mbube" was first recorded back in 1939 by Solomon Linda who sang it with his aforementioned backing group. It ought to be emphasized at this point and strictly for the purpose of this exposition, that Linda's writing was not per se the origination of the song under discussion, but that it simply 'was Linda's inspired cross-over rendering of a wedding song composed by young girls from Msinga to commemorate the killing of a lion cub, called "*Imbube"* (Lion)',[1] and should rather more aptly be described as Linda's commoditization of pre existing cultural material and also keeping in mind that 'many musicians from traditional cultures are partaking of the fruits of a burgeoning music industry that considers traditional forms of music marketable commodities on the "World Music" scene.[2]

The commoditized song was then appropriated by Gallo Record Company which at the time is believed to have paid Linda a single fee estimated in the region of ten shillings for the recording and no royalties whatsoever.[3] Becoming an instant hit throughout the country (i.e. South Africa), the song managed to reach a record sale of about 100,000 copies during the 1940s.

In 1950 an original recording of the song somehow found its way into the hands of an American musicologist by the name of Alan Lomax, who almost instantaneously passed the recording to his friend who was none other than Peter Seeger of the folk group referred to as The Weavers. In November 1951, after much public rendition of the original song at various concerts, The Weavers and copying from the original recording, released their version which was then titled "Wimoweh". Except for the obvious mispronunciation of the phrase 'uyimbube' (meaning "you're a lion") and some few additions, the bulk of the recording and melody was taken as is from the original song. As if that was not enough, the song was then credited exclusively to Paul Campbell, a fictitious entity used by a certain Mr. Richmond to copyright material in the public domain.

2.2 The song's successes and the ensuing copyright dispute

In 1952 The Weavers recorded another version which then went on to become a top-twenty hit in the United States, followed by their live 1957 recording which further turned it into a major song. The same version was covered in 1959 by Dave Guard, Bob Shane and Nick Reynolds who performed as The Kingston Trio.

New lyrics based very loosely upon the meaning of the original song continued to be written and added to the song. In 1961, a cover of a version written by George Davis Weiss, Luigi Creatore, and Hugo Perreti and performed by the Tokens, rose to number one on the Billboard Hot 100. In the United Kingdom, an up-tempo,

[1] See Liz Gunner 'Zulu Choral Music—Performing Identities in a New State', *Research in African literatures*, Vol. 37 (No. 2 - Summer 2006), 83 - 97 on page 86
[2] See Anthony McCann, 'Traditional Music and Copyright - the issues'. A paper presented at "*Crossing Boundaries*, "the seventh annual conference of the International Association for the Study of Common Property, Vancouver, British Columbia, Canada, June 10-14, 1998, at 2
[3] Riaan Malan., *Where does the lion sleep tonight?* Retrieved April 7, 2009 from http://www.3rdearmusic.com/forum/mbube2.html.

yodel-dominated rendering was a top-ten hit for Karl Denver and his Trio. In 1971, Robert John also recorded this version, and it reached number 3 on the Billboard Hot 100 in 1972. Since then, “Wimoweh / The Lion Sleeps Tonight” has remained popular and frequently covered. However, since Solomon Linda's 1939 rendition, the song "Mbube" was apparently not under any copyright protection. TRO (short for The Richmond Organization) founder Richmond had himself claimed authorship to “Wimoweh” using a pseudonym, in this case “Paul Campbell”. By so claiming authorship, TRO thus secured for itself a nice chunk of the songwriters' half as well as the publishers’ entire share of the song's earnings

In 2000, a South African journalist wrote a feature article for Rolling stone magazine, highlighting Linda's story and estimating that the song had earned U.S. $15 million for its use in the movie “The Lion King” alone. This prompted the South African documentary “A Lion's Trail” which was screened in 2006 and which fully documented the song's history. In July 2004, the song became the subject of a lawsuit between the family of its writer (i.e. Solomon Linda) and Disney. The family claimed that Disney owed in the region of $1.6 million in royalties for the use of “The Lion Sleeps Tonight” both in the film and stage production of The Lion King.

In February 2006, Solomon Linda's heirs reached a legal out of court settlement for an undisclosed amount with Abilene Music, who by then were the holders of the worldwide rights and had licensed the song to Disney. This settlement has applied to worldwide rights, not just South Africa, since 1987.

3. Protective initiatives: territorial and international

The entire drama surrounding the unlawful dealings of the Mbube song pointed out to an increasingly manifest and internationally widespread commercial appropriation of a variety of indigenous artefacts such as, but not limited to images, patterns, designs, symbols, music and many others. This endemic problem has been largely exacerbated by globalisation and the information technology revolution which for the most part assisted in increasing the demand for adequate and proper protection of cultural property across the territories of sovereign states. The demand becomes even more evident in countries that experienced colonial history or rather put differently, some form of colonisation of the indigenous populations at some point in their history. It is in this context that the exposition now turns to look at and compare various initiatives in the form of national laws of several such countries, primarily focussing on countries such as United States, Canada, Australia and also looking into international reactions to the problem at hand. This exercise will be performed within the following two parameters, which are: (a) Cultural music in the context of intellectual property and copyright regimes and (b) Cultural music in the context of indigenous traditional knowledge systems.

3.1. Intangible cultural expression (music) in the context of intellectual property and copyright regimes

Like a majority of other countries, each of the abovementioned countries have in place copyright legislation obviously geared towards territorial protection of intellectual property. The Acts in question share the following common aspects normally encountered in the protection of intangibles property, and which are considered relevant to the current discussion. In the first instance all pieces of legislation lay emphasis on the originality of the work as a requirement for eligibility for protection.[4] In other words there should be a fair amount of originality of authorship. Secondly, there are limitations regarding the duration of protection. In the United States the duration is ‘for a term consisting of the life of the author and 70 years after the author’s death’,[5] whereas in Canada the term is ‘the life of the author, the remainder of the calendar year in which the author dies,

[4] S.102 of the United States Copyright Act of 1976 provides thus: “(a) Copyright protection subsists, in accordance with this title, in ***original works of authorship*** (my emphasis) fixed in any tangible medium of expression…”.S.5 of the Canadian Copyright Act (R.S., 1985, c. C-42) provides that : “Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every ***original literary, dramatic, musical and artistic work*** (my emphasis)…”, while S.32 of the Canadian Copyright Act of 1968 similarly states that : “Subject to this Act, copyright subsists in an ***original literary, dramatic, musical or artistic work*** (my emphasis)that is unpublished…”.

[5] S.302 of the United State Copyright Act

and a period of fifty years following the end of that calendar year',[6] Australia is similar to the United States with a term of 'until the end of 70 years after the end of the calendar year in which the author of the work died'.[7] In the third instance, the United States copyright legislation and in section 102 thereof, expressly require that the subject matter of the copyright be concretized in some tangible format. Although not expressly mentioned in the other copyright legislation, the requirement can however be implied from case law[8] in the case of Canada and the statutory terms[9] in the case of Australia. Fourthly, properly construed, the copyright regimes of the countries under discussion seem to lay much emphasis on the singularity or rather individuality of rights to be protected.[10] Lastly the copyright regimes under discussion make thorough provision for remedies in the case of copyright infringements. The remedies in question range from interdicts, action for damages, to confiscation and in some cases even destruction of the infringing copies.[11]

Although the copyright initiatives as examined above have been put in place in the countries under discussion, the initiatives as discussed though commendable, nevertheless also enjoy their fair shares of shortcomings. Much has been written in the literatures about the suitability of copyright legislation for the protection of cultural property (cultural music included). The general wave of sentiment amongst writers of indigenous scholarly work is that many copyright and intellectual property regimes are not suitable for the protection of cultural property mainly because in one respect or the other, cultural property will not meet with the prescribed pre requisites of those systems. First and as indicated above, fixation is required by copyright regimes which is a concept that is not available in cultural works. 'Song and dance, for instance, may be passed down from generation to generation through memorization but may never be recorded in any tangible form'.[12] Secondly protection under copyright law is usually for a period of time while cultural works is timeless. Again even, the limited term of protection is bound to work to the disadvantage of many indigenous groups since practically it will mean that cultural creations dating back thousand years will already be in the public domain and may therefore be used without authorization. Thirdly, as explained above, copyright law requires that a work be original to be eligible for protection. This creates problems for cultural work since such work is by definition ancient, with many of the art forms having been developed many generations ago. Fourthly, copyright regimes protect only the rights of individuals and do not as a result recognise collective rights. This obviously does not go well with indigenous creations since in most cases cultural relic is viewed as something belonging to the community, created and produced for the benefit of the community, to be used, owned and controlled by the community. In the fifth instance, copyright regimes have been found to be wanting when it came to the availing of remedies, such as damages to aggrieved parties in the context of cultural property. This is mainly so because some copyright systems limit damages to 'actual damages for economic loss suffered as a result of the infringement'.[13] It follows therefore that in cases of culturally offensive use of traditional artistry as in the matters of the Pitjantjatjara people[14] and Milpurrurru,[15] the true harm done to the aggrieved groupings, that is, the vilification and untimely release of sacred texts and artefacts would not be amenable to compensation or punishment as the case may be. Lastly the fact that the term "folklore" mostly used in academic writings to describe cultural creations, has not had consistent definition,[16] makes it increasingly difficult to extend copyright

[6] S.6 of the Canadian Copyright Act
[7] S.33 of the Australian Copyright Act of 1968
[8] See *Canadian Admiral Corporation v Rediffusion Inc*. [1954] Ex. C.R 382 (Can)
[9] See S32 (1) read with S22(1) of the Australian Copyright Act of 1968
[10] In the definition section of the United States Copyright Act, "Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, is said to refer to the owner of that particular right, whereas S.13 of the Canadian Copyright Act dealing with ownership of copyright refers to the author of the work as being the first owner of the copyright therein
[11] See SS.34,39 of the Canadian Copyright Act , SS.502,503 of the United States Copyright Act and SS.115,116 of the Australian Copyright Act
[12] See Christine Haight Farley, 'Protecting Folklore: Is Intellectual Property the Answer?', *Connecticut Law Review*, Vol. 30, 1997, at 28
[13] See for example S.504 of the United States Copyright Act, and S.115(2) of the Australian Copyright Act of 1968
[14] See *Foster v Mountford* (1976) 14 Australian Law Reports 71
[15] See *Milpurrurru v Indofurn Pty. Ltd.* (1994) 54 F.C.R 240 (Austl)
[16] See the disagreements about the definition of the tern as succinctly described by Michael Blakeney in 'Intellectual Property in the Dreamtime. Protecting the Cultural Creativity of Indigenous Peoples.' *Oxford Intellectual Property Research Centre*, Research Seminar. (1999.) Retrieved April 7,2009 from http://www.oiprc.ox.ac.uk/pastserminars1999-2000.html

protection to cultural property, since 'we cannot protect what we cannot identify'.[17] The above observations relating to the inadequacy of copyright regimes for cultural property protection can be summed up as follows:

"However, traditional culture, and traditional music and song in particular, come into conflict with this conceptual framework (*copyright*) in two fundamental ways:

a) In the everyday practice of these cultural expressions tunes or songs are conceived of as the consensus of practices, with the emphasis on process, variation, and individual contributions over time, alongside the recognition of the contribution of creative individuals in adding to a corpus of communally practiced and disseminated repertoire.

b) The key to understanding transmission in traditional musical expression, the perpetuation of these forms at amateur and community level, is the concept of Community Economy, a system of reciprocal exchange which privileges participation, the "doing of the doing", and generosity of distribution; none of which conform readily to the concepts of Market Economy, private property, commodification, and copyright".[18]

3.2 Possible ways to revive or enhance the efficacy of copyright and intellectual property regimes

Having delved into the subject matter of the territorial initiatives and also having acknowledged the shortcomings thereof, the enquiry whether (if at all) there can be possible ways of overcoming such short comings is clearly inescapable. The discussion will therefore at this point turn to focus at some of the various suggestions that have been put forward in literature with the intention of closing the gap between what the intellectual property and copyright regime is offering as protection to cultural property and what is actually required as the ideal scenario for the protection of such property.

3.2.1 Judicial discretion

In terms hereof, the creativity of the judiciary is resorted to in order to bring the various issues of illicit dealing of cultural property within the ambit of the protection of copyright regime. The courts will approach each case by looking at the factual matrix of same and making a value judgement .This entails determining whether on the facts thereof, there is justification and/or compelling reasons for extending the protection afforded by the copyright regimes to the prevailing situation of cultural property infringement. A classic example of how this can take place in practice is the famous by now Australian case of Milpurrurru.[19] In that matter the court laid down a good foundation by dedicating half of its judgement to explaining the importance of the traditional images in question and the repugnant nature of the offence caused by their production, and decided on that basis to afford copyright protection (even though prima facie appearing not to be possible)[20] to Aborigine artists. The obvious problem with this approach is that it appears to be a part solution in the sense that it functions well in localities where cultural activism and the spirit of public litigation or class actions is widespread and established. In other words, the courts will have to wait until some conscious community members decide to bring a lawsuit, before the court can exercise it powers in this regard.

[17] See Lucy M Moran, 'Folklife Expressions- will remedies become available to cultural authors and communities', *University of Baltimore Intellectual Property Law Journal*, Spring 1998, at 2.
[18] See Anthony McCann, " Traditional music and copyright - the issues" Irish World Music Centre, University of Limerick, Ireland at 2
[19] See *Milpurrurru v Indofurn Pty. Ltd* above and a host of other cases in other jurisdictions
[20] See Michael Blakeney,'Milpurrurru and Ors v Indofurn Pty. Ltd and Ors - Protecting expressions of aboriginal folklore under copyright law', E LAW | *Murdoch University Electronic Journal of Law*, volume 2 (Issue no 2) 1995, retrieved on April 15,2009 from http://www.murdoch.edu.au/elaw/issues/v2n1/blakeney21.html

3.2.2 The use of joint authorship, transfer of rights and the work made for hire concepts to individualise collective rights[21].

Reference to the concept of joint authorship is found in the copyright legislation of the three countries under discussion.[22] This concept allows multiple owners of a work to become co-owners of the copyright in the work. However according to Haight[23] several problems accompany the applicability of the concept to cultural property. First, since it is practically unthinkable for the whole community to be involved in the creation of a work all at the same time, the concept will vest the rights only in the persons who at the time are seen to actually make the work to the exclusion of the rest of the community. In my opinion this will also indirectly lead to the unwarranted situation similar to that of the Mbube song especially keeping in mind that a term is attached to a copyright protection. Secondly a person who dictates a song, dream or vision to a scribe will not qualify to be a joint author since having a dream or vision is not copyrightable as required by the copyright regime.

The transferring of rights which entails the passing or flow of rights from the person involved in the creation of a cultural work at the time, to the elder, chief or a corporate entity,[24] is also found to be laden with difficulties, as generally clans may not like the idea of someone exercising this authority over them,[25] or artists may not after all transfer the rights to the clan and thereby altering the relationship between the artist and the clan or community.

The work made for hire concept, contained in all copyright regimes[26] involves characterization of the community/clan elders (often the dictators of the work) as the employer and the particular creator of the work as the employee to enable the former to claim authorship rights in their capacities as employers. The problem herewith is that under normal circumstances artist are not strictly seen as employees of the clan or elders, except in most sophisticated of the cultural communities, a fact that is not after all an everyday occurrence.

3.2.3 Looking beyond Copyright and Intellectual property law regimes

This entails coupling existing copyright regimes (without reformulation thereof) with other possibilities such as moral rights, public domain statutes and Domaine Public Payant and other laws such as competition laws (i.e. Patents and Trade marks), and Trade secrets laws.[27] However a number of writers have posed questions as to the relevance and amenability of private law remedies to issues falling within the traditional domain. In this regard Blakeney [28] mentions that: 'For example, Rosemary Coombe questions the applicability of private law concepts

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[21] For a detailed account of this approach, reference is herein made to Christine Haight Farley, 'Protecting Folklore: Is Intellectual Property the Answer?', *Connecticut Law Review*, Vol. 30, 1997

[22] S.1 of the Australian Copyright Act dealing with definitions provides: '***"work of joint authorship"*** means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'.S.10(1) of the Canadian Copyright Act dealing also with definitions provides: '"collective work" means (*c*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated'.S.201(a) of the United States Copyright Act states that: '**(a) Initial Ownership.—** Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co owners of copyright in the work'.

[23] Ibid at 33.

[24] To possibly hold the rights in trust and for the benefit of the clan or community.

[25] Although in countries such as Australia and a majority of African countries, it is common to come across individuals and families designated as elders and accepted as such. See in this regard Kimberley Christen, 'Changing the Default: Taking Aboriginal Systems of Accountability Seriously,' *World Anthropologies Network* 2 (2006): 115-126.

[26] S.201 (b) of the United States Copyright Act, S.13 (3) of the Canadian Copyright Act and S.35 (6) of the Australian Copyright Act.

[27]See Christine Haight Farley, 'Protecting Folklore: Is Intellectual Property the Answer?', *Connecticut Law Review*, Vol. 30, 1997 at 47-54

[28] Michael Blakeney, 'Intellectual Property in the Dreamtime. Protecting the Cultural Creativity of Indigenous Peoples,' *Oxford Intellectual Property Research Centre*, Research Seminar,(1999) at page 10 and the following authors quoted therein : R. Coombe, 'The Cultural Life of Intellectual Properties: Authorship, Appropriation and

to cultural expressions. Puri, questions whether property concepts are cognizable under customary Aboriginal law. Daes, explains,

> …indigenous peoples do not view their heritage as property at all- that is something which has an owner and is used for the purpose of extracting economic benefits- but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.'

Nevertheless, Haight[29] maintains that the above remedies go some distance in alleviating the sometimes problematic application of Copyright and Intellectual Property regimes to folklore situations.

3.3 Initiatives at international law level

The starting point at the international law level was the Berne convention, shortly followed by the Tunis Model Law on Copyright (1976).Though representing the initial attempts at providing responses at international law level geared towards resolution of the problems posed by folklore protection, the two documents have however been found by a large number of commentators[30] to be fundamentally deficient when it came to the envisaged protection of cultural relics.

In 1982 UNESCO and WIPO made further efforts to put in place a set of norms to protect folklore against exploitative activities. This took the form of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (1982).According to Adewopo[31] this provision created a course of action based on the following five acts or activities: (1) Utilization of folklore for gain outside its traditional or customary context and without proper authorisation,(2)Utilisation of such without acknowledging the source,(3) Failing to acquire the necessary authorisation,(4)passing off an expression as derived from a community when it is not, and (5) distortion of an expression in any manner (direct or indirect) prejudicial to the cultural interest of the community concerned. This document has unfortunately never been adopted by the United Nations (UN) or any nation and has no legal force whatsoever.

In June 1993, The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples was passed in New Zealand at the first conference bearing a similar name. This declaration acknowledged in the main the various and major inadequacies of the intellectual property regimes to the needs of folklore and called for the creation of a subject specific intellectual property initiatives addressing the shortcomings previously enumerated. According to Haight, 'because it is more a call to action than a proposal, it offers little guidance at how to achieve reconciliation. Unfortunately, no action has been taken in response to this declaration thus far'.[32]

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the Law', (Duke UP, 1998) and R Coombe, 'Critical Cultural Legal Studies', (1998) 10 *Yale Jnl of Law & the Humanities* 463, Puri, 'Cultural Ownership and Intellectual Property Rights Post Mabo: Putting Ideas into Action' (1995) 9 *IPJ* 293., Daes, 'Rights of Indigenous Peoples', paper presented at *Pacific Workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples*, Suva, Fiji, September, 1996,

[29] Haight, note 28 supra at page 47
[30] Ibid at page 42-44, and the notes referred to therein.
[31] See Adebambo Anthony Adewopo, 'Protection and Administration of Folklore in Nigeria', *Script-ed*, volume 3 (Issue no 1) 2006, retrieved on April 15,2009 from *papers.ssrn.com/sol3/papers.cfm?abstract_id=1127645*

3.4 Cultural music in the context of indigenous knowledge system

It is worth mentioning at this point that for a while and until of late, all the artistic creations and expression of traditional communities were classified together as "folklore". However with the passing of time, the rubric of folklore was for various reasons such as objections to the use thereof, gradually replaced by "indigenous knowledge". In my opinion there is not much real term differences between the two phrases except that using the latter sometimes lead to a change in discourse since traditional knowledge is broad enough to include the traditional knowledge of plants and animals as medicines and food. In this type of scenario therefore the discourse will shift from copyright protection to patents law[33] and biodiversity rights[34] protection. It follows therefore that for the purposes of this discussion as well as for the purpose of coming up with realistic and possible foolproof protection of music as cultural property, it is worthwhile referring to music more in the category of folklore (and therefore amenable to sui generis copyright protection) rather than as part of Indigenous knowledge systems.

4. Protection of cultural property in South Africa

For quite sometime, the intellectual property regimes of South Africa did not have nor make any specific reference to the protection and handling of traditional and/or cultural properties, meaning effectively that it was lagging behind in the feat for preservation and protection of cultural property. This was so even despite that the country had in recent times ratified or about to ratify and became signatory to a relatively significant number of international treaties having a bearing on the topic under discussion.[35] Often times the fact that the country was itself a new democracy was given as a reason for the hold-up.[36]

More recently however, developments in this regard took the form of a bill recently tabled before parliament. The bill in question is the Intellectual Property Laws Amendment Bill of 2007.The bill currently at its public commentary stage, seeks to deal with traditional or cultural property rights in the manner described hereinafter.

First, the Bill seeks to amend the Performers' Protection Act, 1967, by amending certain definitions and inserting new definitions. It also provides for the recognition and protection of traditional performances having an indigenous origin and a traditional character as well as providing for the payment of royalty in respect of such performances and for the recordal of traditional performances.[37]

Secondly, it amends the Copyright Act, 1978, by also amending certain definitions and inserting new definitions. It similarly provides for the recognition and protection of copyright works of a traditional character and for the establishment of a National Council in respect of traditional intellectual property. It furthermore provides for a national database for the recordal of traditional intellectual property as well as for the establishment of a national trust and a trust fund in respect of traditional intellectual property.[38]

Thirdly, certain definitions in the Trade Marks Act, 1993, are amended and new definitions are inserted. It provides for further protection of geographical indications and for the recognition of terms and expressions of

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[32] Haight, note 28 supra at page 47
[33] See Michael Blakeney, 'Bio prospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: An Australian Perspective' [1997] 6 *EIPR* 298.
[34] See Michael Blakeney, 'Biodiversity Rights and Traditional Resource Rights of Indigenous Peoples' [1998] 2 *Bio-Science Law Review* 52.
[35] See South Africa Yearbook 2007/08 **,** at 83,91, retrieved on April 15,2009 from http://www.gcis.gov.za/docs/publications/yearbook/
[36] See the Education and Recreation Select Committee meeting dated 27 February 2001 and titled , Conventions dealing with cultural property, retrieved on April 15,2009 from http://www.pmg.org.za/minutes/20010226-conventions-cultural-property retrieved on 15/04/2009
[37] SS 1-4 of the Intellectual Property Laws Amendment Bill of 2007
[38] Ibid SS 5-16

indigenous origin, the registration of such terms and expressions as trade marks, and the recordal of traditional terms and expressions.[39]

Finally, it amends the Designs Act, 1993, through amendment of certain definitions and insertion of new definitions. It further provides for the recognition and registration of traditional designs of indigenous origin and to create for this purpose a further part of the designs register. The recordal of traditional designs is also provided for.[40]

Needless to mention this bill will if passed into law, obviously bring the country at par with the jurisdictions previously discussed. What is even more interesting to note for our purposes is the undeniable fact that the bill in its current state , does nothing but insert words having traditional undertones into the existing laws, without making any attempt whatsoever to devise and/or come up with legal provisions *sui generis* the traditional property context .In this sense therefore, one need not be a scary judge of character to come to the realisation that the same practical problems as previously discussed and which confronted the intellectual property regimes of the abovementioned jurisdictions, are by and large bound to rear their ugly heads even in the case of South Africa. It therefore remains to be seen whether measures such as judicial innovation or discretion will succeed in making sense of the suitability or applicability of the newly enunciated rules to the cultural domain and thereby allowing for some meaningful protection of cultural property.

5. Challenges facing South Africa

Like many of its African counterparts, South Africa faces many challenges in the battle for cultural property protection and preservation and the battle against illicit transfer of same. Apart from the normal problems encountered and indicated above, there also is the issue of resources required for the enforcement of current legislation in the face of strong international demand for African artistic expressions, a problem that seem to have been compounded by the information technology revolution currently hitting the global arena. Then there is the problem of lack of localised expertise in heritage protection as well as the overall lack of 'adequate training in heritage education'.[41] Another problem relates to the difficulty in most cases of determining (a) community/ (ies) who is/are the creators and as such owners of a particular expression of traditional artistry. Similar songs are for instance sung by different communities across the traditional spectrum.

It is accordingly suggested that the following measures, though not representing an exhaustive list in this regard, be urgently implemented:

a) Avail resources for enforcement of laws designed to optimise protection of cultural relic

b) Encourage academic and scholarly discussion on the subject

c) Encouraging participation and consultation of the owners of the heritage

d) Intensifying training at tertiary on the importance of preserving and protecting cultural property

e) Increasing level of awareness among various communities

f) Mobilisation of the Judiciary regarding problems posed by the illicit dealings of cultural property

[39] Ibid SS 17-26
[40] Ibid SS 27-36
[41] See Misiwe Madikane, 'Politics of display: Digging deep on exhibiting the indigenous collections at the University of Fort Hare's National Heritage and Cultural Studies Centre', paper presented at the Historical legacies and New Challenges Conference : 27 – 30 August 2003.

6. Conclusion

As the information technology revolution gradually sweeps across the world, cultural property is rapidly being exposed to increased incidences of exploitation and illicit dealings across the territorial divide. For South Africa and other countries sharing a history of colonisation, the sad tale of the classic song "The Lion sleeps tonight" or "Mbube" as should more correctly be known, spelled an urgent need for relevant measures to be put in place in order that the scourge be prevented. This newly magnified challenge does of necessity entail revisiting and reviewing previously suggested (national and international) ways of containing the rapidly evolving problem, not with the intention of copying same voetstoots, but with the more realistic aim of rectifying, revamping and reformulating same. A possible ultimate result hereof may be that new sui generis modalities for dealing with protection of cultural property (in whatever form) from illicit transfer thereof come into existence. While the process is still in its infancy in South Africa, it is nevertheless very clear that more localised and/or territory specific ways of speeding up the process should be investigated as a matter of extreme urgency and implemented hand in hand with the measures already in existence.

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