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Paper: Notions of Property and Property in Notions

Author: Mat Callahan

Notions of Property and Property in Notions

Abstract

There are basic assumptions underlying copyright and patent law. These include: the individual is the basic unit of society, self-interest is the principle motive for all individuals, monetary reward and personal prestige are the most important incentives for creative work (artistic or scientific) and the framework of private property protected by the State is both the inevitable result and best of all possible outcomes of human evolution. Furthermore, these are universal characteristics of human beings, applicable anywhere in the world. That these assumptions contain inherent contradictions and are challenged by many people for diverse reasons is often obscured by legal technicalities, particularly at national, regional and international policy making level. But this will not make the problems go away. Indeed, two specific developments in the last 20 years have forced everyone involved to reconsider. One is file sharing. The other is Indigenous Peoples' and emerging nations' claims to collective ownership of medicinal and agricultural products. These two developments have been accompanied by a third which, I will argue, is the inevitable result of the copyright and patent regimes' inherent inconsistencies: Piracy.

By challenging the assumptions underlying present copyright and patent regimes on historical and philosophical grounds actors as diverse as musicians and farmers can participate in shaping policy. I will show that the expertise of musicians and farmers, among others, is at least as important as that of lawyers. I will argue that the dominant notions of property are not the only viable ones in existence. Indeed there are better ones. I will argue further that there cannot be property in notions or ideas except by common agreement which must therefore refer back to the common good, the basis of law in the first place. This, in turn, must be measured against what actually advances society's interests which is fundamentally a political issue. In other words, who decides?

Lastly, I will advance a proposal that has been made to the World Intellectual Property Organization (WIPO) which contains specific suggestions regarding the Public Domain and its use in the protection from misappropriation and misuse of Traditional Cultural Expressions, more specifically, music.

Property and Protection

What do composers of music have in common with Inuit women? What do open source software developers share with the Maasai? What unites the demands of artists, scientists and educators for a revitalization of the Public Domain with the demands of Indigenous Peoples for copyright and patent protection of their traditional knowledge and genetic resources? On the surface it would appear that these positions are opposed to one another. It even seems paradoxical that collectivities-in this case Indigenous Peoples-would be seeking property protection while individuals-in this case authors, musicians, inventors, etc.-would be seeking restrictions on property protections in the interest of the common good. Based on the history of copyright, patent and trademark, one might reasonably expect the reverse: individuals clamor for maximizing the scope of private property while collectivities or communities strive for the protection of the commons. But such are the peculiar twists that have been thrust upon the world by a convergence of factors, namely technological change, growing recognition of the legitimacy of the claims of Indigenous Peoples and the consonance of these claims with those of environmentalists and producers of organic food and medicinal plant crops, whether farmed or wild harvested, applying traditional knowledge for sustainable resource managment. In the broadest sense they are part of the world's response to the privatization and globalization that have characterized government and business strategy since the Reagan and Thatcher era. With the "collapse of communism"[1], this strategy has gathered force raising alarm from many quarters over its dire consequences for the earth and all its inhabitants.

One thing all the diverse actors demand is *protection*. But protection of what and from whom? In the case of Indigenous Peoples it's clear that they seek protection from corporations and individuals that have for many years been taking traditional knowledge, cultural expressions and genetic resources that originated among specific tribal or ethnic groups to then turn them into copyrighted or patented works owned, not by the people who originated them but by those who market and distribute them to the world. (Or in many cases, the "patent owners" assign or license the rights to market and distribute their

[1] This is an often repeated phrase in the western media that is meant to imply that capitalism has triumphed over its arch-rival communism. But is this really true (yet)? Would the remaining countries that legally classify themselves as "Communist States" agree (yet) that communism has collapsed? Democratic People's Republic of Korea, Lao People's Democratic Republic, People's Republic China, Republic of Cuba, and Socialist Republic of Vietnam? But even though the P.R.C. classifies itself as a Communist State, within that structure is the State Intellectual Property Office of the P.R.C.: http://www.sipo.gov.cn/sipo_English

“invention” to other marketers.) Such, for example has been the case with the parka, the kayak, bungee jumping, and a host of traditional food and medicinal plant products, varieties and practices. The famous case of Lego being forced by the Maori to stop using Maori words in their game "Bionicle" is a rare one in which resolution of such a dispute favored the indigenous group in question. But this is the exception that proves the rule. More common is the situation faced by Pauktutit, an organization of Inuit women seeking protection for a garment called the Amauti, which is of Inuit origin but whose design is coveted by clothing manufacturers in Toronto, Ontario and beyond. After seeing the parka-also of Inuit origin-used to make millions for others, the Pauktutit are struggling to defend themselves and their impoverished community. Such disputes abound and are not as easily addressed as the Lego/Maori example might imply. The difficulties are evident in the widespread incidence of bio-piracy. Bio-piracy, itself a contested term, brings up more than simply competing claims of ownership. Indeed, it raises questions about how laws governing property, terrestrial or intellectual, are presently constructed. An article that appeared in the *Market News Service for Medicinal Plants and Extracts, Issue Nr. 21 (December 2006)* illustrates the point by addressing the issue of patents awarded US and Japanese firms for methods of preparation and “new” uses of the traditional food and medicinal plant maca root (*Lepidium meyenii*) which grows in the Andes. It presented the position of a group convened by the Peruvian government, the National Anti-Biopiracy Commission, to investigate the matter. The article also quoted the ETC Group of Ottawa, Ontario, "According to the ETC Group (Action Group on Erosion, Technology and Concentration), 'Biopiracy refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge. ETC group believes that intellectual property is predatory on the rights and knowledge of farming communities and indigenous peoples' (ETC Group, 2006)." On the one hand, Indigenous Peoples seek to use IP law to defend themselves, on the other they are attacking its use as bio-piracy. What's going on here? To answer this question it is necessary to penetrate the fog of legal jargon and identify who the opposing forces actually are.

Opposing Forces

A statement read by a representative of the Tulalip Tribe of Washington State, USA, at a WIPO meeting in December 2006, offers this insight: "Indigenous peoples are trying to adapt in a holistic manner to many changes in their economies, cultures and environment that

imperil their traditional ways of life. Many are engaged in desperate battles for cultural survival, with loss of and threats to their ancestral homelands, the loss of cultural resources necessary to the practice of their traditions and to maintain their cultures, and the degradation and loss of traditional knowledge, tribal integrity and tribal identity." It should be added that it is not only Indigenous People or other non-state actors that are involved. There are many emerging nations from Vanuatu to Bolivia, from St. Lucius to Mongolia that are seeking such protection as well. All, however, target large multinational corporations headquartered in rich countries of the global "North". While cultural practices and products such as art and music are crucial, the greatest importance overall is attached to agriculture, more specifically, the growing, harvesting and preparation of traditional food and medicinal plants. Carlyle, Archer Daniels Midland, Syngenta, Nestles, Pfizer, Roche, GlaxoSmithKline are among the corporations that have systematically pursued the traditional knowledge, cultural expressions and genetic resources of the world in order to patent and trademark "new" foods and drugs. The notorious story of Basmati rice gives a glimpse at the procedure. Basmati rice, as perhaps most people know, was developed and has been grown for millennia by Indian farmers. A Texas based company, Rice-Tec, was awarded a patent and trademark on Basmati rice by the US Patent and Trademark Office. Eventually, this was disallowed after years of litigation by the Indian government.[2] Aside from the disreputable claim of "novelty" (a requirement under patent law) was the implication that anything that is not owned by an individual or corporate entity could be appropriated for commercial exploitation. I will return to this point further on.

The Commons

Coming from a completely different legal angle and, in the main, a completely different set of people, a movement has been developing over the last decade that seeks to defend the Public Domain against its erosion by what is sometimes called the "Maximalist rights culture". Public Domain is a legal fiction created in 1710 by the first modern copyright law, the Statute of Anne, to provide a conceptual complement to the specific entities-books-that were being given property designation thereby. It can be viewed as the universe of thought

[2] This case is among others where the Indian Government became involved, particularly with the patents awarded in the U.S. for "neem" inventions. These were the genesis of the development and implementation of the Traditional Knowledge Digital Library (TKDL) a project of the Government of India Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha & Homoeopathy (AYUSH). See: http://www.tkdl.res.in.
See also recent article entitled: "Protecting traditional knowledge: India opens online database to EPO examiners" at: http://www.epo.org/topics/news/2009/20090211.html

inhabited by all human minds. It was originally conceived as a limitless resource from which could be derived some temporary and restricted monopolies for individual authors or inventors to provide remuneration for their efforts and spur creative work in the public interest. (another important function was to make sure copies were the ones intended by their authors-not fraudulent distortions) But this conception is under attack both ideologically and practically by, in the main, the same giant corporations seeking to plunder the traditional knowledge, cultural expressions and genetic resources of Indigenous Peoples and emerging countries. From their point of view, if it can be imagined it can be owned-and should be regardless of the consequences. What they never say is: *owned by them*.

The focus of the Public Domain or Creative Commons movement is the internet, the World Wide Web, rapid developments of digital technology and their embrace by literally millions of authors, composers, scientists and small businesses all over the world. Legal scholars such as James Boyle and Lawrence Lessig and organizations such as the Electronic Frontiers Foundation have pioneered theoretical and practical proposals that would encourage and facilitate the free flow of information in service of creativity, innovation and the public interest. In "A Manifesto on WIPO and the Future of Intellectual Property", James Boyle called for, "-a return to the rational roots of intellectual property rather than an embrace of its recent excesses. Patents, for example, have a restricted term and were always intended to work to fuel the public domain. Copyrights were intended to last only for a limited time, to regulate texts, not criminalize technologies, to facilitate rather than to restrict access. Even the *droits d'auteur* tradition was built around the assumption that there were social and temporal limitations on the author's claims; natural right did not mean absolute right. Neither Macaulay and Jefferson, nor Le Chapelier and Rousseau would recognize their ideas in the edifice we have erected today. In the name of authorial and inventive genius, we are creating a bureaucratic system that only a tax-collector or a monopolist could love. But genius is actually *less* likely to flower in this world, with its regulations, its pervasive surveillance, its privatized public domain and its taxes on knowledge."

Opposition to such ideas has come largely from the Entertainment Industry-mainly film, record and publishing companies-but these are clearly aligned with their counterparts in agriculture and pharmaceuticals. Besides, in the arcane world of transnational corporations it is difficult to know which business anyone is actually in. Thus Vivendi, which owns Universal Music, started off as a water bottler which went on to purchase Universal Music from Seagram, a whiskey distiller. In any case, the fear these corporations have is not only

that file sharing will deprive them of some profits from the sale of music, books and movies. Rather, it is the growing awareness that they perform no useful function at all. Their current practices are only tenuously connected to those that publishers, film studios and record companies necessarily undertook in past centuries. None have any expertise in the arts they market nor any particular interest in the legacy or future of the crafts involved. Use of the rhetoric of creativity and innovation conceals what is really at stake: control of copyrights and patents of which, lo and behold, they own the great majority.

Meanwhile, Public Domain defense is a call to go both backward and forward simultaneously. On the one hand a return to basic principles from the dawn of intellectual property law and, on the other, emboldened use of new technologies unhampered by unreasonable private property restrictions. Proponents draw the analogy with the environmental and social responsibility movements, respectively, where stewardship, sustainable use and harmony with the biosphere are fundamental principles. These provide the basis for- but place strict limits on-private appropriation, consumption and short-term profit. In a word-clean air, water and land are the basis for every human pursuit and must be protected now and in the future for whatever human communities decide to do.

Communities of Interest

What has become clear in the last decade is that there is no community of interest between composers, authors, inventors and other creators and the corporate ownership of the copyrights, patents and trademarks associated with their creations. Indeed, the dirty little secret of IP law is that while claiming to protect the individual and his or her creativity a vast number of musicians and authors have been defrauded and a few large companies have profited. This is so obvious it hardly needs to be illustrated but two examples should suffice to make the general case: Blues, Jazz, Rhythm & Blues and Rock & Roll are traditional musical forms that arose amongst the descendants of Africans enslaved in the United States. These are not only rich musical traditions but are comprised of countless songs for whom none were credited or paid but which have made millions for record companies. Indeed, even when some among black musicians have been paid it has been but a fraction of the profit generated for the record and publishing companies that sold their works. The other famous example that typifies the situation is that of Solomon Linda. Solomon Linda was a South African musician who composed the song "Mbube". He sold the copyright to his song to Gallo Records, a South African firm, for a small sum. The original recording was a big hit

from which Linda derived no profit (although he became renowned in South Africa). But the story doesn't end there. The song was interpreted by Pete Seeger as "Wimoweh" and began a long journey through multiple hit recordings ending up in the Disney film "The Lion King". Linda, needless to say, died in poverty. His children managed to extract a settlement from the Disney Corporation so at least some justice was done in this case. But were it not for one intrepid South African journalist, Rian Milan, who had enough influence to get published in Rolling Stone magazine, nothing more would have been done. (It should be noted that long before the Milan piece appeared, Pete Seeger, upon discovering that there was indeed a living author of this song sent his personal share of the royalties to "Wimoweh" to the Linda family. This, however, was only a tiny portion of the millions generated by all the other uses of the song, by far the largest amount having gone to Disney for the version titled “The Lion Sleeps Tonight”.)

What has emerged from such experience in combination with the development of the internet is that an entirely new model is necessary to protect the interests of the vast majority of creators as well as the public that benefits from their effort. To begin with this means recognizing that the public has always and will always pay to sustain creative or inventive work. Whether this be by the purchase of the work directly or by taxation, it is always the general public that pays. This irreducible fact is glossed over and confused by ideologues of privatization, the "free market" and so forth but it is nonetheless true and it raises the question of what “free” means. For the general public free does not mean without cost, it means, unfettered access to and exchange of what is necessarily paid for by the general public itself. “Free speech” not “free beer”.

Secondly, what is of primary concern to creative people is credit and just compensation. Credit, meaning accurate attribution for original contributions and just compensation, meaning financial reward adequate to sustain ongoing work at a level commensurate with that of those who use the work-namely the general public. For the overwhelming majority of musicians, playwrights, authors, inventors and small businesses the issue is making a decent living from the work one loves to do as opposed to becoming rich and famous. Furthermore, it is clear from the example of Classical music that such a regime is already in existence, albeit in a very limited sphere. It is known by all involved that without the support of tax revenues and wealthy patrons the symphony halls, opera houses and conservatories of the world would very likely go dark. Yet these are considered cultural treasures to be maintained in the public interest, similarly to libraries, museums and other

such institutions. Why not extend this model to include all art and science?

To summarize this point: a true community of interests must be separated from the false one that is perpetually reinforced by the manner in which the debate is framed. On the one hand it is repeated *ad infinitum* that copyright and patent are designed to protect the individual creator. But this only serves to align such individuals with the corporations and governments that protect these corporations' hold on the majority of copyrights and patents. This hold in fact excludes the great majority of creators but it does so while giving the appearance of protecting them. The hoax was exposed when the music industry first reacted to file sharing by orchestrating a world-wide media offensive against "piracy". At first they were able-for a short time-to line up some famous musicians to berate their fans for stealing. Shortly after the notorious incident involving the rock band Metallica, however, the band itself backed off and many other musicians stepped forward to defend their fans and point the finger at the record companies. Now, a few years later, there are many musicians who are advocating that computer and telephone companies (among others) be charged a tax specifically to compensate composers for the use of their music which is used by computer and phone companies to attract customers. This is one among numerous practical reforms that do two things at once: first they offer viable alternatives for just compensation to composers. But perhaps more importantly, they expose the fraud that has been used to manipulate the public and the specialist alike for a long long time.

Expertise and Authority

Before returning to the question of ownership, Indigenous Peoples and the Public Domain it is important to identify a special group of actors in this drama: those who are masters in the crafts of music-making and agronomy. Music-makers include composers, musicians, instrument builders and sound technicians. Agronomists include farmers, of course, but also those involved with natural resource management, wild and semi-wild plant collection and the sustainable use of forests and meadows. Most of the participants in the negotiations over treaties, laws and other agreements are lawyers and representatives of government or industry. These are augmented by NGOs some of which represent Indigenous People others which represent diverse professional organizations such as academics. But consider what is at stake when speaking of ideas. The actual originators, the creative or innovative thinkers, not to mention master craftspeople who maintain the skills that facilitate their practical expression, are rarely involved or consulted in these negotiations. This

excluded constituency is made up of the people with the skills needed to produce music and food of high quality. (naturally, this extends far beyond these two occupations but they are exemplary) Political maneuvering has nothing to do with the years of training, dedication and care that goes into the mastery of a craft or skill. Yet it is safe to say that practitioners of music and farming are largely frustrated by the decisions made by industry trade groups claiming to represent them but who in fact represent corporate interests in entertainment and agriculture. But the vast majority of musicians and farmers are poor. Only *within* the fields of music and agriculture are measurements of quality applied by which the merits or demerits of their ideas or practice can be judged. Day to day interactions happen all the time in local music venues and farmers' markets where such people and their clientele interact in transparent mutual exchange. This is where judgements are made out in the open without recourse to force or fraud. Indeed, it has been argued by historian Fernand Braudel that the existence of such real markets are essential to the structures of everyday life and have existed since time immemorial. These are exactly the opposite of the "market" as it is usually spoken of today. The current financial crisis is a stunning example of how little trust or transparency is involved in this type of "market".

It is true that specialization necessarily separates different disciplines. Certainly few musicians or farmers have the time to attend meetings in Geneva. But that is not the main problem here. The main problem is that legal or diplomatic expertise takes precedence over the expertise of producers of nourishment be it artistic or biological. Authority is vested in representatives of government and industry who are, in the main, incompetent to judge the quality of the intellectual products they are negotiating the rights to! More often than not, the actual people affected and their essential practices play no role in evaluating the efficacy of intellectual property legislation as it relates to its presumptive content. Instead of using the master musician's criteria of what is necessary to the maintenance of the highest standards applicable in any culturally specific setting we get intractable legal disputes. Instead of using the technical, aesthetic, emotional or sacred to evaluate the uses to which music can be put we get battles over jurisdiction that cannot cope with how music is made and transmitted. Yet, even something as mundane as assembling compositions to be contained in an archive for reference by jurists adjudicating claims cannot hope to be authoritative unless master musicians participate in the process.

The principles here apply to farming in a modified way. Though innovative ideas certainly arise amongst producers of food and medicinal plants and should be protected

similarly to those originating with composers or musicians the main concerns are for preservation of age-old techniques and the assurances that they will not be misappropriated or misused by anyone. This obviously applies to Indigenous Peoples but not only to them. The case of wild collected plants shows both the skills and the difficulties involved. An article in The Organic Standard, April 2009 articulates the problem and offers solutions. "As sustainable resource management systems interconnect elements of ecological, economical and social sustainability, it is difficult to evaluate ecological sustainability without considering the economical and social needs of the producer groups. Conversely, it is difficult to assess social sustainability of producer groups dependent on wild collection for their income, unless ecological and economical sustainability efforts are incorporated into the assessment." The article concludes: "The FairWild Foundation hopes that the major beneficiaries from the application of the standards are the wild collection communities, who will be supported and rewarded for implementing these sustainable collection practices in partnership with their trade partners up through the supply chain. The marketing of FairWild certified ingredients and finished products will benefit companies who support ecological and social best-practice throughout the supply chain from processors and wholesale ingredient distribution companies to finished product marketers and manufacturers, finished product distributors and retailers of certified products."[3]

Compare and contrast this principled approach to the Basmati rice case mentioned above or other notorious examples such as two recent patent challenges – on the extraction method and the exclusive use of pelargonium root (*Pelargonium sidoides* and/or *Pelargonium reniforme*) in AIDS treatments - which are being brought by the community of Alice with the African Centre for Biosafety (ACB). The pelargonium is a type of geranium native to the Eastern Cape of South Africa and has become popular in European countries also as an over-the-counter (OTC) medicine under the trademarked! (indigenous) brand name of Umckaloabo®.[4] The most notorious example, however, is not taking something *from* farmers but forcing something *on* them. This is the "Terminator Seed" produced by Syngenta to replace normal potatoes with those requiring annual repurchase from, you guessed it, Syngenta. This "sterile seed" program is part of Big Agriculture's GM food strategy.[5]

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[3] Brinckmann J. FairWild and ISSC-MAP: Wild collection standards under one roof. *The Organic Standard*. April 2009, Issue 96, Pages 3-7.

[4] See: http://www.schwabepharma.com/international/products/umckaloabo/index.php

[5] Further examples include the famous case of Canadian farmer Percy Schmeiser vs Monsanto: http://www.percyschmeiser.com

A Question of Justice

It must be stated that between the Indigenous Peoples and defenders of the Public Domain there is a major difference and it is not only over legal terminology. The former are, by and large, defending definite communities in specific territories. The latter are defending indefinite, disparate constituencies of vocation which could, theoretically at least, comprise all of humanity. While the Maasai may form a unified front with the Inuit or the Maori they do not do so on the basis of the Public Domain. They are concerned that the Public Domain will be used to make their communities vulnerable since bio-piracy justifies itself on that basis. Advocates of the Public Domain often acknowledge such concerns but focus on already globalized space both terrestrial and virtual. Moreover, the Public Domain they are struggling to protect is a component of already existing IP law recognized by States and international treaties. Yet resolution of these differences is possible and it could produce desirable outcomes for all concerned.

In the broadest sense any such resolution must be based on a balancing of liberty and equality in pursuit of justice. More specifically, prevailing notions of property should not be privileged when seeking to resolve conflict. Indigenous Peoples frequently argue that for IP rights to be constructively assigned they must include two elements frequently omitted: collective or communal property and customary law. For many, private property rights militate against the way in which traditional knowledge has been developed and is maintained. (and by whom within the group-elders, women, master craftspeople, priests, shamen, etc.)[6] Generally speaking, this is codified in the customary laws that express what it is to be a member of the group. This does not automatically mean that it would be forbidden for a song or medicinal plant to be used by the world at large but any prior, informed consent has to include decision making processes considered legitimate by the group. Clearly, this presents an obstacle to the states and corporate interests that are seeking to "harmonize" all IP legislation in the world into a "one size fits all" framework. But it does not present insurmountable difficulties for defenders of the Public Domain. For one thing, Indigenous Peoples are not the only ones who uphold the merits of communal or collective ownership (e.g. the North American Amish and Hutterite religions, respectively, maintain principles of

[6] Both the ISSC-MAP and FairWild Standards include the principle of Customary Rights: Local communities' and indigenous peoples' customary rights to use and manage collection areas and wild collected medicinal and aromatic plant (MAP) resources shall be recognized and respected. Refer to Principle 4 of the FairWild Standard at: http://www.forum-essenzia.org/PDFs/FairWild-Standards.pdf or Principle 4 of the ISSC-MAP at: http://www.floraweb.de/proxy/floraweb/map-pro/Standard_Version1_0.pdf .

common ownership of property and communal living). Moreover, there are in fact millions of people throughout the world who are members of cooperative enterprises that are efficient, sustainable and democratic. (Mondragon comes to mind and the International Cooperative Alliance claims there are 800 million people in cooperatives world-wide) Space does not allow for a thorough discussion of the distinctions between collective, communal and cooperative ownership but for the purposes of this argument these differences are less important than their similarity. At the most fundamental level, such forms of ownership challenge the notion that the individual is the basic unit of society by advancing an opposing one, namely, that humans are mutually dependent social creatures residing in groups that must cooperate to sustain the group and the individuals within them. This has obvious implications for the digital commons as well. The origins of the World Wide Web and Wikipedia demonstrate the potential that shared resources have both for increased social responsibility and the nourishment of creativity. Indeed, any concept of common ownership, even with explicit limits to protect personal property, emphasizes what people *share* including goods, services and ideas. Another advantage, also relating to the Public Domain is that collective, communal or cooperative ownership is an assumption of responsibility for the maintenance and improvement of what is owned. The ownership of land for example, makes one responsible to leave it in as good condition as one found it, or to improve it for succeeding generations' use. Finally, if we return to our master music-maker or farmer we have the specialists within the communities in question that are best equipped to maintain tradition as well as to nurture creativity in successive generations. This is certainly a common characteristic of Indigenous Peoples worldwide but it is also a common feature of the arts and sciences generally.

What could unite the demands of both groups here is more than a common enemy. It is that there are key principles that link the oldest traditions to the newest technologies and the people making the most creative use of them both.

References:

1.Tulalip Statement: *intervention made Dec 4, 2006 to10th session of the Intergovernmental Committee on Traditional Knowledge (TK), Traditional Cultural Expressions (TCEs) and Genetic Resources (GR) of WIPO in Geneva by a spokesperson for the Tulalip Tribes of Washington State, USA.*

2. Boyle, James, "A MANIFESTO ON WIPO AND THE FUTURE OF INTELLECTUAL PROPERTY" *DUKE LAW & TECHNOLOGY REVIEW No. 9 2004*

"THE SECOND ENCLOSURE MOVEMENT AND THE CONSTRUCTION OF THE PUBLIC DOMAIN" *LAW AND CONTEMPORARY PROBLEMS [Vol. 66:33 Winter/Spring 2003]*

3. Braudel, Fernand, "Civilization & Capitalism 15th-18th Century", *Harper and Row 1981*

4. International Co-operative Alliance http://www.ica.coop/al-ica

Appendix

The following proposal was made in April, 2006 to the Intergovernmental Committee on Traditional Knowledge (TK), Traditional Cultural Expressions (TCEs) and Genetic Resources (GR), convened in Geneva, Switzerland by the World Intellectual Property Organization (WIPO). My NGO, Music In Common, is accredited by WIPO. The proposal was originally conceived and written by Pete Seeger. Following the advice of the Secratariat at WIPO and in consultation with Pete, I completed the "plan for implementation" in order to present the proposal to the Intergovernmental Committee.

January, 2006

Old songs, worldwide, now in the Public Domain are often 'adapted and arranged' and the new song copyrighted. We propose that a share, .01% or 99.99%, of the mechanical, print, and performing royalties go to the place and people where the song originated. Every country should have a "Public Domain Commission" to help decide what money goes where.

Pete Seeger
The Committee for Public Domain Reform

Plan for implementation proposed by Music In Common:

The duties or functions of a Public Domain Commission would fall under three main categories. Preservation and Development, Resource Allocation and Accounting and Accountability. Each category is further defined below.

1. Preservation and Development-The Conservatory
    a. Canon formation

b. Archive/library
c. Masters/teachers

Exemplary works held to be so by general acclamation of the community, tribe, ethnic group or nationality involved would be assembled and performed by similarly exemplary masters of the tradition. These might be recorded in both print and sound forms but they would necessarily be carried on in oral form to be passed on as they have already been for generations or centuries. (this has been accomplished in some cases, has been partially done in others, and has yet to be undertaken systematically in still others)

2. Resource Allocation
a. Funds for training youth
b. Funds for exemplary performance (regular festivals, customary events, etc.)
c. Funds for instrument building and performance space construction and maintenance
d. Funds for sustaining Master crafts people (instrument builders, performers and composers)

To ensure the traditions are kept vital and alive new generations must be introduced to them in a way that honors the music itself as well as those who maintain its highest forms of expression. Infusions of new energy and enthusiasm must be balanced with the mastery of the spiritual and practical skills needed to perform the music well. Structures suited to local conditions and histories should be constructed to ensure long-term sustainability.

3. Accounting and Accountability
a. Monitoring the health of the music, the musicians, and the community it arises from and serves
b. Monitoring the uses to which the music is put in the rest of the world
c. Collecting funds generated anywhere
d. Dispersing funds correctly according to the principles outlined above

Through international agencies, performing rights societies, governmental bodies or combinations of all three, the uses of music can be monitored and evaluated. That the Public Domain be maintained in the public interest and available to all, as is a library, should not mean that moneys generated by sale somewhere not be returned to their source of inspiration: namely the peoples or countries whence they arose. Indeed, it would be one function of the Public Domain Commission to ensure that two apparently contradictory purposes are served: to ensure preservation and development of a 'natural resource' for the benefit of all and at the same time limiting use by those seeking to profit from it and ensuring that a reasonable portion of those profits are returned to the source to sustain it. Ultimately, accountability to the local Public Domain Commission should be the rule. Thus, a universal principle would be applied locally by those entrusted to do so.

The composition of the Public Domain Commission should include music makers (musicians, composers and instrument builders) recognized as masters of their crafts. It might also include musicologists, historians and others sufficiently trained to ensure traditions are honored and healthily maintained. Educational and administrative

functions corresponding to local conditions need to be constructed but oversight should always include music makers.

A UN Public Domain Commission

There are three areas where a UN Public Domain Commission would be useful in the implementation of these proposals:

Origins, Jurisdiction and Rights Designation

The origins of much of the world's music precede the formation of present-day Nations. Indeed, much of the world's music continues to be made and used by tribal, ethnic or other groupings that reside in different countries simultaneously. Furthermore, there are cases where no national body is recognized or trusted by ethnic groups whose music is in question. In such situations a UN Public Domain Commission might afford the best solution.

This should not, however, be merely a juridical 'court of appeal'. On the contrary, the principal function of such a body would be to ensure the preservation and development of the music in question in accordance with the needs and wishes of the people actually involved in making it. If no local entity has the capacity or authority to carry out this task then the UN Public Domain Commission should undertake it.

In determining a specific music's origin the following questions should be answered:

-Who makes the music now?

-For what purpose is it made? (sacred, festive, work, education, etc.)

-How will this be preserved and developed in the future?

In determining what kinds of rights are applicable a UN Public Domain Commission should use the Conservatory model proposed above. The Conservatory's basic function is to ensure that the makers and users of the music in question continue to flourish. Prohibition or limitation of use is a secondary function only useful in the context of the successful fulfillment of the first. This means:

-Resources from taxation, charitable institutions or profitable sale should be directed, first and foremost, to the preservation and development of the music and music makers involved

-Access to music should not be limited unless those who make and use it specifically designate it secret, sacred or otherwise unavailable to the world at large (in which case its unauthorized appearance would not only constitute simple theft but desecration subject to human rights protections)

-Respect for the work, skill and creativity that have been and continue to be invested by those involved. This requires public education within and beyond the communities in question to ensure that all who hear the music know the history and present circumstances of the people who made it

Pete Seeger's examples:

"When I learned the story of how little royalties for the song "Mbube" ("Wimoweh" in the USA) had gone to the African author {Solomon Linda}, I

realized that this was a worldwide problem. Why not try to start solving it? I had been collecting book and record royalties for "Abiyoyo", a children's story I made up in 1952. It uses an ancient Xhosa lullaby. The royalties are now split 50-50, with half the royalties going to the Ubuntu Fund for libraries and scholarships for Xhosa children near Port Elizabeth, in southeast South Africa.

"Another example: in 1955 I put together a song "Where Have All the Flowers Gone". The basic idea came from an old Russian Folk song, "Koloda Duda". Some royalties for the song will now go to the national folk song archives in the Moscow library.

"In 1960 I put a melody and three words, "Turn, Turn, Turn" to a poem in the Book of Ecclesiastes, written 252 BCE. The English translation was done in London 400 years ago. I have decided to send some royalties to an unusual group in Israel which is trying to bring Arabs and Jews together.

"In the USA all the royalties for the song "We Shall Overcome" have gone, for 40 years, to the "We Shall Overcome Fund" which every year gives grants for "African American Music in the South". Bernice Johnson Reagan (Sweet Honey In the Rock) is the chairperson of that fund."