

**Legal Access To Our Musical History:
An Investigation into the Copyright Implications of Archived Musical
Recordings Held at the International Library of African Music (ILAM)
in South Africa**

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Abstract

This thesis explores the South African Copyright Act No. 98 of 1978 as it pertains to the archived holdings at the International Library of African Music (ILAM) situated at Rhodes University, Grahamstown, South Africa. The purpose of analysing this law is to advise and assist ILAM in fulfilling royalty payment obligations as stipulated in a contract signed between ILAM and the Smithsonian Global Sound (formally Global Sound Network) in 2001.

In order to clearly comprehend the scope of the royalty payment clause in the Smithsonian Institution's contract with ILAM, this research includes an examination of: the history and nature of South African copyright as a sub-structure of intellectual property; specific internationally documented copyright infringement cases; the recording and documentation practices of Hugh Tracey (ILAM's founder and director from 1954 to 1977); the contract between Global Sound Network and ILAM; and contentious issues surrounding collective ownership and indigenous knowledge.

In conclusion, this research suggests equitable solutions to ILAM's copyright concerns and proposes the Eastern Cape Music Archiving Project (ECMAP) as a practical vehicle to assist the South African Department of Trade and Industry in implementation of the South African Intellectual Property Amendment Bill (2008) if, and when, it is passed.

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Chapter One

Introduction



Hugh Tracey recording a woman playing the makhwenyana bow, Nkanilimis kraal, Zululand, 1939.

Photograph supplied with permission from ILAM.

At the beginning of the 21st century the human race has entered into one of the greatest growth periods of creative expression. This growth is largely due to advances in technology which have contributed to the ease with which people can access and disseminate information. Creative expressions, such as music, inventions and writing, are human characteristics that set us apart from other species and have become highly valued commodities to many people. Creative expression is a form of property and can therefore be owned. In legal terms it is divided into two broad categories of property: real property and personal property (Moser 2006:2). Creative expression falls under the macro-subject known as personal property, more commonly called intellectual property. The influence of intellectual property and its related rights and the regulations that govern it have become the subject of vigorous international debate on themes ranging from economic development and globalisation to access to medicines and the use and exploitation of traditional knowledge. This thesis relates to

the latter: it is an examination of contemporary issues in current South African copyright law (South African Copyright Act 98 of 1978, hereafter referred to as the Act) as it pertains to early archived music recordings (both original and collectively composed) from the 1930s to the 1970s.

Before the 1990s intellectual property law was regarded as dry and tedious (Woker 2006:36). Renewed interest from industrialised nations needing to enforce their national intellectual property laws and anxious to avoid trade sanctions has elevated the status of intellectual property rights and awakened international debate over their implementation (ibid.). Intellectual property is divided into two branches: “industrial” property, which includes inventions (patents), trademarks and industrial designs; and “copyright”, which protects literary and artistic works (<http://www.wipo.int>, accessed 25 March 2008). As a sub-category of intellectual property law, the status of copyright has been elevated. This has happened particularly in emerging economies where people are becoming aware of the gross misappropriation of collectively authored works because of their lack of knowledge and/or through lack of adequate protection from exploitation.

This research aims to explore copyright’s elevated position in contemporary South African legislation with the International Library of African Music (ILAM), Rhodes University, Grahamstown, South Africa, hereafter referred to as ILAM, being used as a case study to explore the ramifications of the above mentioned South African copyright law.

The catalyst for this research project, concerned mainly with the implementation of South African copyright law as it pertains to archived music, was a simple clause in a contract executed between the Smithsonian Institution, U.S.A. and ILAM for the Smithsonian Global Sound Network Project (hereafter referred to as the GSN/ILAM Contract) brought to my attention by Professor Diane Thram, ILAM’s Director. This clause, requesting ILAM to trace performers of archived materials in order to pay them royalties, opened a proverbial “can of worms” and through it I was introduced to the heated debate surrounding traditional music and copyright. Therefore, this thesis will contribute to the body of knowledge pertaining to the ethics of marketing and sale of early archived sound recordings within the legal paradigm of collective versus

individual creativity and collective versus individual ownership of intellectual property in South Africa.

Research Goals

Using the ILAM/GSN Contract as a case study, the following goals of this research have been identified:

1. To present a synopsis of copyright law as it impacts upon music archives that operate under South African law. Here, I intend to highlight concerns relating to archived musical holdings recorded before terms such as ‘royalties’ and the ‘public domain’ were used as common practice. A variety of copyright and other related legislation will be explored to clarify relevant legal issues. This legislation will include amongst others: The South African Copyright Act 98 of 1978; the British Copyright Act of 1911; the U.S.A. Copyright Act of 1976; the Sonny Bono Copyright Term Extension Act of 1976; and the South African Patents Amendment Act 20 of 2005;
2. To report on, investigate and determine equitable solutions to royalty-sharing difficulties that have arisen out of the ILAM/GSN Contract and the subsequent on-line sale of negotiated musical tracks from the ILAM archive. In terms of this licensing agreement ILAM is obliged to contact the performers on these tracks, or their descendants, to make them aware of their copyright privileges and the potential for subsequent royalties. To date ILAM has not been able to deal significantly with this issue due to logistical, geographical and financial impediments. Comparisons will be made between data obtained from the Indian based Archives and Research Centre for Ethnomusicology (ARCE), which signed a similar contract with Smithsonian GSN and the situation currently applicable to ILAM.
3. To present a proposal regarding the launch of a pilot project in the Eastern Cape (provisionally named the *Eastern Cape Music Archive Project* or ECMAP) aimed at remedying ILAM’s current predicament. The intention is to approach the project from an applied ethnomusicology perspective and introduce facets of proposed copyright legislation amendments applicable to the enforcement of the newly proposed (2008) Intellectual Property Amendments Bill.

Research Methods, Procedures and Techniques

Due to the diverse nature of this study, the research has been conducted utilising various approaches, namely qualitative, quantitative and historical, accomplished through substantial internet and library research coupled with source field research. Recorded interviews provided essential historical and qualitative data, while quantitative data existed from published sources, the ILAM/GSN Contract and the GSN Sales Report of 2007. This research concentrates on the 1000 tracks from the *Sound of Africa Series*¹, which were delivered to the Smithsonian Global Network (GSN) E-Commerce Project under a licensing agreement executed in September 2001. An analysis of the collection and recording practices used by Hugh Tracey (1903-1977) is undertaken in Chapter 4 to establish the copyright status of his musical recordings. The main body of investigation regarding specific recordings is based on published tracks from the ILAM collections that include the *Historical Recordings by Hugh Tracey Series*, the *Sound of Africa Series* and the *Music of Africa Series*.

In an endeavour to assess the feasibility of the GSN/ILAM Contract I have conducted and documented field investigations using both video and audio recording devices to detail the complications of trying to locate, if not the original performers, then the surviving members of their families in South Africa. This field research took place in the Eastern Cape of South Africa and was confined to a performer who was recorded by Hugh Tracey in the *Ngqushwa* (Peddie) District. With the help of Sindi Zamani, my Xhosa field-assistant, I recorded the costs and difficulties of this process. The findings are documented and assessed in an attempt to determine whether it is realistic to pay royalties to individuals or if a different, more community-based approach should be implemented.

Like Angela Impey (2002: 14), who calls herself an advocacy ethnomusicologist, I believe that my role as an aspiring ethnomusicologist researching legislation that pertains to music “presents the opportunity for new multidisciplinary intersections...(that) demand that one gains knowledge of new discourses and disciplinary trajectories.” As such, the research developed into a persistent search for the most current copyright information. Because of the rapidity of contemporary

¹ The Sound of Africa Series was recorded, produced and published over a 30 year period with the first recordings made in 1948. The final compilations were produced by Andrew Tracey after Hugh Tracey's death in 1977.

copyright development, this search could only be executed through the World Wide Web. As much of the debate surrounding copyright in the global arena pertains to the digitisation and dissemination of music on the Web, sourcing information in this manner was deemed appropriate. Thus this research now presents an enormous amount of Web-based information.

Interface Research

Alan P. Merriam (1923-1980) defines ethnomusicology as “the study of music in culture” and proffers a threefold strategy for investigation: 1) the gathering of materials in the field; 2) transcription and analysis and 3) application to relevant problems (Merriam 1960:109 in M. McLean 2006:66). My research focuses only on the last of Merriam’s three strategies but is nevertheless ethnomusicological in nature. This is supported by Mervyn McLean’s contention in the introduction to *Pioneers of Ethnomusicology*, that ethnomusicology is “like a discipline without agreement on where it is going, or perhaps where it has been...” (2006:12) and his conclusion that the best solution to the question “what is ethnomusicology?” is to “redefine the subject as: ‘The scholarly study of world music’”, namely the application of scholarship of any kind to music of any kind (ibid.:13). McLean argues that although this definition is broad, ethnomusicology encompasses all types of musical research except for historical musicology which remains “out of its orbit” (ibid.). Therefore I submit that this research project, which specifically focuses on archived “traditional”² music at ILAM, is a legitimately ethnomusicological one.

In formulating a methodology definition appropriate to this study I consider Richard Kurin’s publication about “brokering cultures.” He says, “Culture brokers study, understand and represent someone’s culture to non-specialised others through various means and media” (1997:19). His use of the word “broker” suggests negotiation and mediation by one party for the benefit of another or acting as a middleman. Applied or practice ethnomusicology aims to empower the community from which the music research originated; and as Jeff Todd Titon (1992:315) states, this “is what ethnomusicologists do in the public interest.” This research does not fulfil Daniel

² While it is understood that the meaning of the word “traditional” is contentious in the South African idiom, in the context of this research, I will use the term to mean “of indigenous origin.”

Sheehy's four strategic aims of applied ethnomusicology³ and cannot therefore be described as an applied project, nor does it present any cultures to a wider audience and can therefore not be linked to Kurin's "brokering cultures." It can, however, act as precursor or model research for ethnomusicologists who undertake applied projects or work as "culture brokers" in that this research aims to work in the public interest and broker information in order to empower South African musicians, researchers and archivists. In particular the results of this thesis are aimed at those people who, or institutions that create or research traditional or indigenous music, to better understand fundamental realities that pertain to the protection of their or others' intellectual property.

Researching multi-disciplinary subject matter is not new, and in the context of this research project I concur with Impy's statement that,

The challenge of placing one's footprint across academic/professional sectors may be equalled by the challenge of repositioning oneself within one's own disciplinary territory (2002:14).

Researching copyright law in relation to traditional music has been both challenging and rewarding; but like Impy, I have found it difficult to place this research within the parameters of discipline-specific terminology and methodology. I therefore submit that research that reaches across disciplines, in the public interest, be labelled "interface research". The word "interface" suggests a crossing-point or border that, without the correct knowledge, can act as a barrier, but empowered with the correct knowledge, can act as a bridge across a gulf. It is my intention that this "interface research" project will act as a link to support interested parties, particularly ILAM and archives like it, in their quest to understand copyright and traditional music issues in contemporary South Africa.

Literature Review

The current body of literature pertaining specifically to copyright and *archived* musical material is insubstantial (see Chaudhuri, 2004; A. Seeger, 1996 & 2004; Mills, 1996; McCormick, 2007; McCann 1998 & 2001). However, bodies of work and research from both ethnomusicological and legal research show that this topic is

³ Sheehy describes the four main aims of applied ethnomusicology as: developing new performance frames; feeding back musical models to the communities that created them; empowering musical members to become musical activists; and developing broad structural solutions (Titon 1992:317).

currently part of the crucial, evolving discussion concerning collective knowledge and the digital age. Primary sources of legal literature include the doctoral thesis and South African copyright handbook by Owen Dean, a practicing copyright expert based at the legal firm Spoor and Fisher in Johannesburg. His body of work deals with South African copyright and remains current with continuously updated articles on the Spoor and Fisher website (<http://www.spoor.com>). The Rhodes University Copyright Handbook entitled *The Law of Copyright © and Trade Marks ® TM 2007*, compiled by Sarah Driver, has proven to be an invaluable source of information and a worthy guide to various legal sources which include works by Woker, 2006; Golvan, 2007; Alpern, 2002; Moser, 2006; and Tallmo, 2005. Thoroughly studying various copyright acts and amendments as well as continually scrutinising the intellectual property websites WIPO (World Intellectual Property Organisation <http://www.wipo.int>) and Intellectual Property-Watch (<http://www.IP-watch.org>) and information from the South African Department of Trade and Industry (<http://www.thedti.gov.za>) will enable these references to have significance.

Important ethnomusicological sources include articles by A. Seeger (1981, 1987, 1995, 1996), Chaudhuri (2004), Thram (2004 & 2007), McCann (1998 & 2001), and Mills (1996). These publications teamed with works by Dean (1998, 2006 & 2007) and Rian Malan's (2004) excellent research and legal victory concerning Solomon Linda's *Mbube*, which can be found on the hugely informative website 3rd Ear Music (<http://www.3rdearmusic.com>), have also been extensively quoted. In addition, mention must be made of specific journal editions which have dedicated entire volumes to copyright issues. These include *The Yearbook for Traditional Music* vol. 28 (1996) and *Critical Arts*⁴ vol. 20 (1) (2006). This thesis would not be complete without information gathered from the extensive audio recordings, research documents, field card documentation, correspondence, books and other information from Hugh Tracey's legacy and many of the facts documented in Chapter 4 are taken from works compiled by Hugh Tracey.

⁴ "Critical Arts is an academic journal which examines the relationship between texts and contexts of 'media in the Third World', cultural formations and popular forms of expression. It aims to create a space for an African and Third World perspective on media (both formal and informal) in culture and society theory. It aims to challenge and engage conventional academic practices that reinforce undemocratic relations in society" (Ronning *et al* 2006: inside cover).

Correspondence with experts from both legal and ethnomusicological disciplines has proven to be an invaluable source of information, especially in circumstances where copyright issues are understood in one way from a legal perspective, but put into practise by musical practitioners in another. Key informants for historical and legal contextualisation will include Prof. Andrew Tracey (former Director of ILAM), Prof. Diane Thram (current Director of ILAM), Rob Allingham (archive manager of Gallo Records, South Africa), Dr. Shubha Chaudhuri (Director of the ARCE, India), Sarah Driver (copyright and patent lecturer at the Rhodes University Law Department) and Atesh Sonneborn (Assistant Director, Smithsonian Global Sound/Smithsonian Folkways Recordings).

From the standpoint of collective knowledge and benefit sharing, this research is taking place at a time when WIPO, the Convention on Biodiversity (CBD), UNESCO and other international instruments and agencies are coordinating processes and dialogue between developed and developing countries on intellectual property, genetic resources, traditional knowledge and folklore (<http://www.wipo.int>, accessed 29 September 2007). Furthermore, an examination of events leading to the amendment to the South African Patent Act No. 57 of 1978 which has recently been passed (South African Patents Amendment Act 20 of 2005) may suggest a moral and legal solution to the royalty sharing problems currently emanating from ILAM (See Foster, 2006 and Luterek, 2006).

Chapter Summaries

Although a large body of work on current copyright advancement (and failure) regarding the development of the South African music industry exists, this thesis will restrict itself to copyright issues pertaining to archived musical works only.

In Chapter 2 a brief description of the purpose of archives is given, concentrating on their function rather than on contemporary issues, such those examined in the various articles in *Refiguring the Archive* (2006). Coupled with an introduction to copyright, this chapter provides the background knowledge essential to a clear understanding of the focus of the thesis, namely the GSN/ILAM contract.

Chapter 3 discusses South African copyright issues relevant to ILAM that have come to my attention during the research for this thesis and reports on three copyright infringement cases in order to clarify the information introduced in Chapter 2. Although all three cases represent different levels of infringement and do not directly relate to any situation that ILAM is currently experiencing, the cases serve as a warning for possibly hazardous copyright circumstances that traditional musicians, researchers and archives should be aware of. In addition to this a study of copyright would not be complete without discussing the Solomon Linda/*Mbube* case and the Fadhili William/*Malaika* case. Hugo Zemp's experience with copyright infringement and the 'Are'are people of the Solomon Islands is presented for its relevance to copyright and ethnomusicology.

I have prepared a compact disc (CD) compilation of musical tracks that illustrate the three above-mentioned instances of copyright infringement by providing the original recordings and examples of the recordings that infringed upon them. The final track on the compilation is Hugh Tracey's recording of Iris Mjekula singing *Tula Tula* (sic), which is discussed in Chapter 5.

Chapter 4 provides an historical contextualisation of the project as it pertains to Hugh Tracey and ILAM while Chapter 5 introduces the focus of the research: the GSN/ILAM Contract. A detailed analysis of the GSN/ILAM Contract is followed by a description and findings of my fieldwork, which took place in the *Ngqushwa* area of the Eastern Cape. The issues that arose from the fieldwork with suggestions for solutions are discussed in Chapter 6 and as central to the solutions put forward, the proposed SA Copyright Amendment Bill and East Cape Music Archive Project (ECMAP) are introduced and discussed in detail. Finally, Chapter 7 presents conclusions drawn from this research and their implications for the broader scope of communally composed archived music throughout the world. This chapter also gives suggestions for relevant research and potential educational initiatives on adherence to copyright law by music archives and researchers dealing with traditional music.

Chapter Two

Archives and Copyright



Part of the ILAM archive instrument collection with the library in the background (B.McConnachie 2007).

What is an archive?

Often the immediate image conjured up of an archive is that of an old and dusty space filled with untouched boxes and cobwebbed books – a place that belongs in the past rather than in the future. It is difficult for the broad public to envisage how archives could possibly empower them in any way at all and yet that is one of the many aims that modern archives strive to achieve. The old, dusty stereotype is incorrect: many archives are well organised, technically advanced institutions that endeavour to serve the public by preserving and promoting their past and present. Anthony Seeger (1996:89) writes, “Archives can be a place of discovery and rediscovery, basements filled with delight, creativity, confirmation, and enjoyment.”

Archives are not libraries and differ from them in that they collect both published and unpublished materials while placing a stronger emphasis on preservation for future

use (Chaudhuri 2004:2). Hamilton, Harris and Reid write, “Literature, landscape, dance, art and a host of other forms offer (future) archival possibilities capable of releasing different kinds of information about the past, shaped by different record-keeping processes” (2002:10). Although many people are more familiar with paper archives, audiovisual archives have become invaluable organisations following the advancement of audio and visual media. Documentation has changed from the subjective, written medium to the more objective capturing of events in real-time, allowing subjects the chance to report on situations in their authentic voice (Chaudhuri 2004:3). Music can now be *heard* using recording equipment instead of read through transcriptions which, although useful, are merely a representation and may lack important facets of a performance.

Various organisations collect audiovisual material: radio and television archives keep copies of their broadcasts, record companies keep copies of their publications, and national archives now include recorded material to add to their written archive collections. The use of recording technology in many academic research fields⁵ has also led to the establishment of research audiovisual archives and it is these archives, and ILAM in particular, that have directed the course of this study.

As a leading African audiovisual archive, ILAM preserves the life’s work of the ethnomusicologist Hugh Travers Tracey. Although Tracey acknowledged that he was neither an anthropologist nor a musician (McClellan 2006:235), his extensive sound recordings, photographs, recorded radio shows, books, field cards, personal correspondence and instrument collection make up the bulk of the holdings at ILAM. Every portion of this collection makes this audiovisual archive invaluable. As the International Association of Sound and Audiovisual Archives (IASA) states,

Audiovisual archives hold cultural heritage covering all spheres of musical, artistic, sacred, scientific and communications activity, reflecting public and private life, and the natural environment, in the form of published and un-published recorded sound and image. Archives are responsible for the preservation of these holdings to enable both present and future access (Guidelines and Policy Statement [online] <http://www.iasa-web.org>, accessed 7 December 2007).

The primary aim of an archive is to ensure that people can use its holdings. In order to achieve this access, audiovisual archives have to deal with modern complications

⁵ These include, amongst others, Linguistics, Folklore, Anthropology, Oral History, Musicology and Ethnomusicology (Chaudhuri 2004:3)

resulting from technological advancement. For centuries paper archives have stored books and other manuscript documentation which ages, if preserved carefully, very well⁶. Audiovisual archives are a relatively new occurrence and the recording media for sound and visuals changes every decade, if not more frequently. It was estimated in 2007 that over 200 million hours of audio and videotape stock is kept in archival custody, with a significant proportion conserved in various dated forms. Deterioration of the carriers on which the sound recordings are saved is forcing heritage institutions and archives such as ILAM to convert their holdings to new forms of media (<http://www.unesco.org>, accessed 12 June 2008). This makes preservation extremely difficult, expensive and specialised. In addition, as Chaudhuri and Seeger write, it "... makes the amount of documentation required to make a collection of recordings useful ... different from that for a collection of papers" (ibid.).

Researchers deposit field recordings into audiovisual archives which have to operate under strict regulations⁷ concerning the storage and use of the material. These systems are in place to protect not only the archive and material but also the composers, authors, producers and performers. Allowing access to holdings must not be done at the expense of the creators of the audiovisual material and the archives must ensure that the rights of these individuals and communities are safely guarded. Anthony Seeger (1996:89) writes, " Archives are ...important because without them most audio and video recordings will not survive...(These) recordings will be the major sources for the future musicological scholarship on this century – just as manuscripts have been for previous centuries."

The role of the modern audiovisual archive has changed worldwide. Indigenous Knowledge Systems have attracted the attention of individuals in both developed and developing countries and the importance of identifying and protecting indigenous knowledge is receiving increased attention from policy makers the world over. Countries such as Senegal and Malawi have made significant strides already (See

⁶ The Diamond Sutra, which bears the date 868 AD, was found in a well preserved state a walled-up cave in Dunhuang, north-west China, in 1907, along with other printed items (BBC News 2004 [online]).

⁷ Researchers and archivists decide on the storage directives which usually include regulated access to the original recordings in order to preserve the recording medium. Thereafter policies are put into place according to the directions given to the researcher by the communities or individuals on the recordings.

Chapter 6). Rob Adam, the Director-General of the South African Department of Science and Technology writes,

Despite the clear association with heritage and cultural tradition, indigenous knowledge is very much at the cutting edge. For example, the problem of how to define the ownership of intellectual property by a traditional community rather than by an individual or a company has exercised the finest legal minds and challenges the boldest policy makers (2006 [online]).

Interest in heritage and indigenous knowledge systems has elevated the position of South African archives considerably with unfortunately not wholly positive results. As Carolyn Hamilton (2002:225) writes, “A great deal has been written recently about museums, archives and monument commissions as institutions rooted in nineteenth century knowledge practices designed to underpin colonial dominance.” In an attempt to transform “old apartheid and colonial heritage institutions (into a form) that benefits both academic historians and other producers of historical knowledge” (ibid.:226), Section 4 of the South African National Heritage Council Act (No. 11 of 1999) states the objectives of the Act as being, inter alia,

- to develop, promote and protect the national heritage for present and future generations
- to protect, preserve and promote the content which resides in orature in order to make it accessible and dynamic
- to promote and protect indigenous knowledge systems;
- to intensify support for the promotion of the history and culture of all our peoples.

This interest in individual and collective identity and culture is confirmed by Valmont Layne who writes about the sound archives at the District Six Museum saying, “...(they have) had a profound effect on heritage work” (Layne 2004:183). ILAM has also benefited from the stipulations of the South African National Heritage Council Act. It is through this cultural awareness, amongst other factors, that ILAM has managed to secure funding to begin the process of digitising its holdings.

Considering the Heritage Act’s objectives, coupled to the advancement of the World Wide Web, the trend towards digital formatting has become essential not only for preservation purposes but also so that archival institutions can make their collections accessible on-line. These digital technologies and the internet offer unique opportunities for the promotion, preservation and protection of intangible cultural heritage such as traditional music. The digitisation and dissemination, however, of traditional cultural expressions can lead to their misappropriation and misuse. Therefore, as audiovisual archives digitise and reformat their holdings for

preservation and access, the copyright status of the music needs to be clearly understood. This international phenomenon is addressed by Kate McCormick (2007:26) who says of the impact of US copyright law on audio archives, “Part of the challenge to preserve and provide access to audio recordings are the professional, ethical, and legal obligations of librarians and archivists to adhere to copyright law.” McCormick’s concerns are central to the theme developed throughout my research.

South Africa has four UNESCO (United Nations Educational, Scientific and Cultural Organisation) registered audiovisual archives⁸. They are the Gallo Music Archive, the National Film Video and Sound Archives (a sub-directorate of the National Archives of South Africa), the Photographic Society of South Africa Archives and the International Library of African Music (ILAM) (<http://www.unesco.org>, accessed 12 June 2008). Each of these archives concentrates on different, unique aspects of southern African heritage. The focus of this study, being musical, will therefore concentrate on the holdings of ILAM with mention made of the Gallo Music Archive collection.

What is Copyright?

Ethnomusicologists in the 21st century ought to have sufficient knowledge to comply with current copyright laws when undertaking the recording or documenting of music for research and eventual deposit in an archive for use by future researchers. For this reason an introduction to copyright is taught in ethnomusicology programmes at many universities, including South African universities e.g. Rhodes University, University of South Africa (Unisa), University of Cape Town (UCT) and the University of the Witwatersrand (Wits). Knowledge of copyright law associated with archiving is enhanced through professional bodies such as, *inter alia*, the International Association of Sound and Audiovisual Archives (IASA), the World Intellectual Property Organisation (WIPO) and the Association of Recorded Sound Collections (ARSC) and publications from these various bodies which report on research projects and trends in handling current heritage and intellectual property law⁹. While the body of

⁸ Although other museums, such as the District Six Museum in Cape Town, have music archives they are not recognised as purely audiovisual institutions.

⁹ The IASA Journal is published bi-annually while the ARSC Journal is published semi-annually (<http://www.arsc-audio.org/journal.html> & http://www.iasa-web.org/pages/06pubs_02_1.html, accessed 12 June 2008).

literature on copyright law may be vast, comprehending correct application of copyright law and its implications for the legal use of current musical recordings, as well as for recordings that predate this detailed attention to the law, is complex and frequently misunderstood.

Copyright Law: a Brief Overview

A detailed analysis of the intricacies of copyright law is beyond the scope of this research. It is, however, important to have a working understanding of the concept for the purposes of this thesis.

Copyright, as mentioned earlier, is a branch or legal sub-structure of intellectual property (IP) law which Andrew Alpern (2002:2) defines as “...a term for certain *results* of ideas, but not the ideas themselves.” Intellectual property law includes, in addition to copyright: utility patents, design patents, plant patents, trademarks, trade secrets and publicity rights (ibid.). Copyright includes most creative areas such as music, film, newspaper articles, novels, poems, maps, photographs, painting, sculpture, dramatic works and even private letters which can be bought and sold like any other property (McCann 1998:1). It is thus an intangible property right that controls, amongst other artistic endeavours, the use of music and makes it possible for copyright owners to control access to and use of their works (Smith 1996:1).

Thus the purpose of copyright is to protect the rights of artistic or creative people. Copyright can be considered an unusual branch or legal sub-structure of intellectual property law in that once the requirements (propriety, originality, material form and authorship¹⁰) are met, copyright automatically subsists (Woker 2006:40). This is in contrast to most intellectual property laws where a formal registration procedure is required in order to be recognised as an intellectual property holder. Section 6 and 9 of the Act, provide that the person who owns the copyright is protected from having his/her music translated, reproduced, performed or recited in public, broadcast, or adapted without receiving compensation or authorising advance permission.

¹⁰Propriety is explained in section 2(3) of the Act which stipulates that copyright will not subsist if during the making of the work, there was infringement of the copyright of another work. Section 2 (1) of the Act states that the work must be original while section 2 (2) of the Act clarifies that the work must be in a material form. Finally section 3 (1) stipulates that the author needs to be a qualified person (is of South African origin).

There are three types of copyright: graphic rights (printing or publishing), mechanical rights (the right to record), and performing rights (performance in public or broadcasting). Copyright allows the owner to make copies and then to sell copies in order to make a profit from his/her music. Infringement occurs when there is copying of all or part of the melody or lyrics of the song, deliberate registration or claim made to the song by another individual, and when piracy takes place (ibid.)¹¹. In musical works, the law distinguishes between the writer of the music (the composer) and the writer of the lyrics (the author).

Copyright has a limited life span which in South Africa lasts for 50 years (Section 3 (2, 3 &4) of the Act)¹². Copyright laws in numerous countries around the world have undergone dramatic change in the last decade, and the copyright duration in certain countries including the U.S.A, Australia and various European countries has been extended by 20 years (thus now 70 years), others by more¹³. After the stipulated life-span of the copyright, the musical work becomes part of the “public domain”. The public domain is the body of creative works and other knowledge - writing, artwork, music, science and inventions - in which no person or organisation has any proprietary interest or claim and has effect on a national as well as an international level. Music without an identifiable author is deemed to be part of the public domain unless otherwise stipulated by the legislature of the country where the music originated. Thus, copyright protects the originators of the work and sets up channels in which they are compensated for their time and effort (Moser 2006:38).

The Nature of Copyright

“Copyright, as defined by the Berne Convention¹⁴, means the set of rights *in rem* (real rights) and *in personam* (personal rights) conferred on the creators of literary and artistic works. Neighbouring rights are the rights allied to copyright

¹¹ Section 9 of the Act stipulates that the copyright owner has the right to make a record embodying the sound recording. Record piracy involves reproducing copyrighted sound recordings and then distributing the unauthorized reproductions (Moser 2006:83).

¹² Fifty years is the general rule but different rules apply to the different types of copyright. See page 80.

¹³ These changes have come about due to Big Business Corporations’ (such as Walt Disney) desire to extend their copyright terms in order to retain royalty benefits. See page 81 regarding the Sonny Bono Extension Act.

¹⁴ The Berne Convention for the Protection of Literary and Artistic Works, Berne, 9 September 1886, came into force 5 December 1887.

which guarantee that certain classes of persons or enterprises contributing to a cultural act can derive an income from their activities” (Commission of the European Communities 1991 in McCann 1998:1).

Copyright law is also summed up by Article 1, Section 8, Clause 8 of the Constitution of the United States of America (“Copyright Clause”), written in 1787, which authorises their congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” This statement recognises the need to compensate people for their creative effort as well as copyright’s endeavour to encourage further ingenuity. However, this Western approach to the promotion of creativity, where art is referred to as a commodity (Seeger 1996:87), also imposes basic restrictions that could, in many non-Western parts of the world, be deemed limiting and oppressive. This litigious point will be expanded on later in the chapter.

The aim of copyright law in South Africa is similar. Dean writes,

(Copyright) seeks to create a system whereby the creator of original works or intellectual property is afforded a qualified monopoly in the use or exploitation of his work in order, first, to compensate and reward him for the effort, creativity and talent expended and utilised in the creation of his work, and secondly, to act as an incentive for him to use his talents and efforts to create more and better works or items of intellectual property (1988:1).

The intangible nature of copyright is one of its defining factors: it is a right that can be continually replenished. A work can be copied as many times as there is a demand for it and there are no finite boundaries restricting this. What is protected is the act of authorship. Colin Golvan (2007:2) writes of copyright, “It is one of the most ephemeral forms of protection known to the law, in that, as a property right, it is not based on something that can be measured, weighed, mapped or searched for in a register.”

Copyright infringement is a real threat in South Africa. For musicians, performers, archives and libraries to protect their musical works or collections of recorded music, they need to understand their rights and limitations. ILAM is continually involved in contract negotiation that allows outside parties the use of items from the archive. Without a clear working knowledge of South African, and other, copyright law ILAM is in danger of allowing the misappropriation of its holdings. In order to safeguard the

archive, staff members at ILAM have to ensure that they remain informed of copyright restrictions and current legislation. These rights and limitations can only be fully understood if one appreciates the origins of copyright in South Africa.

Origins of Copyright in South Africa

Copyright law is used primarily as a means of protection to benefit authors and other creators. Its original intention, however, was to protect the English Crown against authors who published and distributed books thought to be “seditious, heretical, or otherwise undesirable” (Alpern 2002:1). The Crown was the owner of all copyright and therefore controlled what could be copied and disseminated. The world's first copyright law, the Statute of Anne, was passed in 1710 and was the consequence of the competition between London's book publishers and pirate printers in the English countryside (Tallmo 2005:2). It was essentially a publishing law but the Statute represented a defining moment in the development of copyright because for the first time the author was recognised as the foundation of a system for protecting literary works for a restricted time (Dean 1988:6). This concept spread throughout Europe and eventually to South Africa through a primitive form of copyright that was introduced in the Batavian Republic in 1803 which, according to Dean (1988:220), included the overseas provinces or colonies of The Netherlands, and thus South Africa. After a period of time “formal ties between Roman-Dutch law in South Africa and the law of The Netherlands were severed” (Ibid.1988:222) and under British rule, the British Literary Copyright Act of 1842 was recognised in South Africa because section 2 of the Act provided that it included “all the colonies, settlements and possessions of the Crown which now are or hereafter may be acquired.”

The South African colonies or republics, except for the Orange Free State Republic, formulated their own copyright legislation shortly thereafter, with the Cape Colony passing Act No. 4 of 1854 which authorised the import of reprinted books. Natal's earliest copyright legislation allowed for the same copyrights as the Cape Colony Act, and the Transvaal Republic followed with its Copyright Act, No. 2 of 1887 (Dean 1988: 8).

After the formation of the Union of South Africa in 1910, Parliament passed the composite Patents, Trade Marks, Designs and Copyright Act, No. 9 of 1916. This Act

introduced South Africa to modern copyright and repealed all previous copyright legislation. The section dealing with copyright (Chapter 4 of the Act) was taken straight from the Copyright Act 1911 of the Imperial Parliament thus incorporating British law into South African law (Smith 1996:1). This Act will be discussed in Chapter 3, with reference to the Solomon Linda/*Mbube* royalty case and will be used to demonstrate how current copyright laws remain influenced by early legislation.

The Copyright Act of 1916 was subsequently repealed by the Copyright Act No. 63 of 1965 which was enacted on 11 September 1965. Once again, this Act was closely (but not entirely) based on the British Copyright Act which was passed in 1956. It was not until the Copyright Act 98 of 1978 that South African copyright legislation departed on its own independent legal route which differed from the British Copyright Act of 1956 (Dean 1988:11).

International Copyright Law

There is no universal 'International Copyright Law' that all the countries of the world adhere to or which automatically protects authors of works across international borders. Each country's copyright act varies to certain degrees with regard to duration, royalty share, the manner in which infringement is sanctioned and reciprocity. The South African Copyright Act deals only with works that were first published in South Africa. Section 37 (3) of the Act, however, makes provision for the Act to apply to works of foreign origin as long as they are party to a convention relating to copyright to which the Republic of South Africa is also a member. This means that works which originate in countries that have signed the same international conventions that South Africa has signed are protected in the same way as works that are first published in South Africa. They do not, however, have any wider protection in South Africa than in their country of origin¹⁵.

Conventions, Treaties, Agreements and IP Organisations

The Berne Convention

South Africa became a signatory in 1928 to the first international treaty on Copyright law: The Berne Union for the Protection of Literary and Artistic Property. Known

¹⁵ This is not the case with works from the U.S.A. due to the Sonny Bono Extension Act which is discussed in Chapter 5.

simply as the “Berne Convention”, it was introduced in 1889 and has subsequently been revised numerous times in order to keep pace with changing technology (Woker 2006: 38)¹⁶. The Berne Convention is a multinational agreement that enables equal copyright protection to be secured in member states as long as the author or copyright owner is a citizen of a member state or the work was first published in a member state (<http://www.lawdit.co.uk>, accessed 19 October 2007). It also lays down minimum standards of protection that are granted to all member countries (Dean 1998 vol. 1:91).

The signatories to the Berne Convention undertake to comply with the following regulations in their national copyright laws:

1. Each country must offer at least the same level of copyright protection to works originating in other signatory countries as the first country offers to works of its own citizens.
2. Copyright protection must be automatic and must not depend on registration of the copyright or inclusion of a copyright notice or symbol.
3. The minimum copyright protection afforded must be effective for a term of the author’s life plus fifty years.
4. Certain defined rights of acknowledgment and integrity must be protected under the signatory’s national law.
5. Copyright protection must be independent of the existence of protection in the country of origin.
6. The copyright holder must have exclusive rights of reproduction, translation, adaptation and public performance of the copyrighted work (Alpern 2002:6).

It is not a requirement of the Berne Convention that member countries must grant foreign works the same protection as enjoyed by their own country but since the Convention states that member countries must all adhere to a minimum standard of protection, in most cases, the protection is similar (Dean 1988:83). There are exceptions, such as copyright duration, and these will be discussed in detail in Chapter 5.

While a second convention exists, the Universal Copyright Convention (UCC) which dates from 1952 does not have effect in South Africa as South Africa is not a signatory. The UCC’s major signatory was the United States of America, which up until 1989 did not sign the Berne Convention¹⁷. The United States of America is now

¹⁶ Revisions to date are: Paris 1896; Berlin 1908; Berne 1914; Rome 1928; Brussels 1948; Stockholm 1967; Paris 1971 and 1979 (<http://www.wipo.int>, accessed 9 October 2007)

¹⁷ Dean (1998 vol.1: 92) writes: “The principal stumbling block to the United States of America adhering to the Berne Convention and thus the prime motivation for sponsoring the Universal Convention, was the Berne Convention precluded member states from prescribing any formalities for

a Berne Convention member and the UCC is no longer an important factor in international copyright (Dean 1998 vol.1:92).

The World Intellectual Property Organisation

There are two international organisations responsible for promoting the protection of intellectual property throughout the world and for the administration of various conventions dealing with both the legal and administrative aspects thereof.

The first of these is the World Intellectual Property Organisation (WIPO) which is an agency of the United Nations. Its origins can be traced back to the 1880s when the Berne Convention was adopted. WIPO now has 179 members and administers 23 national treaties dealing with different aspects of IP protection (Woker 2006:38). WIPO aims to protect the public interest while developing an accessible international intellectual property system. The Organisation was formally established in 1967 and is influential in current intellectual property research and policy drafting (<http://www.wipo.int>, accessed 9 October 2007).

WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

The WIPO Copyright Treaty (WCT) deals specifically with the distribution, rental and communication to the public of certain works with regard to computer programmes and data bases (ibid.). The main aim of the Treaty requires members to introduce methods to combat computer piracy.

The WIPO Performances and Phonograms Treaty (WPPT) deals with the rights of performers and sound recording copyright owners and also makes provision for performers to be granted moral rights to their performances. Dean (1998 vol.1: 94) writes, “Member countries are to provide performers and sound recording copyright owners the right to obtain a single equitable remuneration to be divided amongst them in consideration of the broadcasting and communication to the public of the sound recordings.” South Africa was an active participant in the conclusion of the agreement

the subsistence of copyright, whereas United States copyright law made provision for the registration of copyright as a condition precedent for the subsistence of copyright.”

and became a signatory on 12 December 1997 (<http://www.wipo.int>, accessed 13 October 2007). ILAM, therefore, is legally bound in terms of the Treaty to ensure that music recordings deposited into the archive are accompanied by signed royalty agreements that stipulate what payments have been or will be paid in compliance with the WIPO Performances and Phonograms Treaty. ILAM's compliance in this regard will be studied in detail within the body of this thesis.

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the World Trade Organisation

The second international body that administers intellectual property is the World Trade Organisation (WTO), formed in 1994. According to WIPO it was found that one of the weaknesses of the Berne Convention was that there were inadequate measures in place to ensure that the agreement is adhered to (*ibid.*). This shortcoming motivated the adoption of the TRIPS Agreement, which is an international agreement administered by the WTO, that sets down minimum standards for many forms of intellectual property regulation. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and joined by South Africa at its inception in 1994 (*ibid.*).

To date the TRIPS agreement is the most comprehensive multilateral agreement on intellectual property and provides minimum standards of intellectual property law protection. Signatory countries must recognise these principles including the rights of performers, producers of sound recordings and broadcasting organisations, as well as the minimum standards for proper enforcement of these provisions. The Agreement also provides for the WTO dispute-settlement mechanism to resolve disputes between member states (Woker 2006:39).

Works Eligible for Copyright

Section 2(1) of the South African Copyright Act 98 of 1978 lists the following original works as eligible for copyright: literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programmes. Unless these works (with the exception of a broadcast or programme carrying signals) have been written down, recorded or represented in digital form they do not qualify for copyright protection. This

limitation poses many problems for individuals, groups and institutions such as ILAM that deal with oral traditions and folk music where intellectual property is passed down orally. These works are not protected and the owners therefore cannot claim royalties when their intellectual property is utilised by others. This issue will be discussed in more depth in Chapter 5 with particular emphasis upon the GSN/ILAM Contract.

Exceptions from Protection and Fair Dealings

Not all users of intellectual property need to request permission from the copyright owner in order to use a particular work. There are instances where people can legally utilise musical recordings, quotes from literary works or samples from musical tracks without prior permission. These exceptions are referred to as “fair dealings” in South Africa (Section 12 of the Act) and “fair use” in the United States and are documented in Section 107 of the United States Copyright Act of 1976.

Article 9(2) of the Berne Convention allows member states to permit the duplication of works in certain cases provided that the reproduction does not prejudice the interests of the owner. In South Africa no royalty payment is required for the use of a musical work for the purposes of fair dealing which includes (amongst others) research and private study, review, newspaper and magazine articles, broadcast and cinematograph film - as long as the source is properly referenced (Section 12(1)(a)(b)(ci & c2)). The musical tracks included in this thesis are considered fair dealings because they are utilised as part of a research project. It is also considered fair dealing in South Africa if literary and musical works are used for teaching, lecturing and quoting if referenced correctly (Section 12(3) & (4) & (6a) & (6b)). This is obviously of great importance for institutions such as ILAM, and the organisations which it hopes to support, by providing a resource which may assist in educational endeavours.

The distinction between fair dealings and infringement of copyright, however, is unclear and not easily defined. South African law has no set standard and each case is determined according to its own unique factors. The United States, however, uses the following four-point test. Courts will balance and weigh:

1. the purpose and character of the use (non-profit or commercial use),
2. the nature of the copyrighted work (factual or creative),

3. the amount and substantiality of the portion used in relation to the whole (as the amount increases so the fair use decreases) and
4. the effect of the use on the potential market for the work (are the owners losing out on licensing and royalty fees?) (Woker 2006:43)

In the Australian case *Ladbroke (Football) v William Hill (Football) Ltd (1964)*1 *WLR at 293*, the judge, Lord Pierce said,

Whether a part is substantial must be decided by its quality rather than quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore not be protected (Golvan 2007:41).

In long works the use of a small passage or excerpt may be deemed as infringement because it is an essential part of the whole, while in another work of the same length it will be regarded as fair dealings (ibid.). It is important to note that acknowledging the source of the material is not a substitute for obtaining permission. But in the context of research at ILAM, students and researchers are free, and encouraged, to utilise the archive for academic purposes without the fear of infringing any copyright laws.

Original works

Under intellectual property law relating to patents and designs, works can only be registered if they “are not anticipated by prior publication – with the prior art base being the entire world” (Golvan 2007:11). Golvan refers here to the registered database of patents and designs that exists which is accessed in order to ascertain whether a patent or design has already been registered. Copyright law differs in this regard. There is no absolute test (such as the registered art base in patents and designs) and only when originality is challenged can its validity be assessed. It is therefore hypothetically possible to have two identical melodies which will be separately protected as long as it can be proven that the origins were not copied.

It is perhaps trite to state that authors often take inspiration from other works. This can and does lead to the development, in music, of a certain “sound” or genre. When this happens, it does not mean that the work is not original if the inspiration or copying is not deemed substantial or “that the extent thereof (does) not exceed the extent justified by the purpose” (Section 12 (3) South African Copyright Act 1978). Defining “substantial” is difficult and each case of copyright infringement is judged on its own merits, but the issue can be explained by realising that “... (T)he facts and

the themes and the ideas cannot be protected but how those facts, themes and ideas are put together can” (Golvan 2007:40).

As a result of this, works that have a similar source are not considered problematic, provided that the author is not taking the labour of another and passing it off as his or her own. This is especially important when dealing with the use of folklore/traditional music where the music is typically in the public domain and part of the collective knowledge of a certain community. Artists *can* use ancient or traditional songs as a basis for new creations without the fear of being penalised or denied the right to collect royalties (Woker 2006:40), but, their new creation must differ from the folk/traditional item that inspired it significantly enough to be considered original. This may be difficult to determine but is a necessary element in the development of traditional music where composition is often inspired by other works. These original compositions differ from “arranged” works where the musical item is immediately identifiable as the original work¹⁸.

Indigenous Knowledge

Many of the tracks housed at ILAM are “traditionally composed” items and are therefore authorless - that is, they have no single identifiable author. “Traditionally composed” music refers to pieces that have been orally handed down from generation to generation and therefore have no identifiable composer or author. They do, however, have identifiable arranging performers (Allingham e-mail correspondence 24 July 2007).

Copyright, as previously explained, is an individual right and in order for a work to be afforded protection it must be original, recorded in a material format and the property of one (or more) “qualified person(s)” or a “juristic person” (Sections 2 & 3 (1)(a) & (b) of the Act). Section 3 of the Act provides that a qualified person is one who, at the time of composing the musical piece or making the work, is a South African citizen, a resident of South Africa or in the case of a juristic person, a “body incorporated under the laws of the Republic”. If the work fails to comply with all of these stipulations it is

¹⁸ This issue will be discussed in Chapter 3 and audio comparisons can be heard on the compact disc supplied. Listen to track 1 (the original *Mbube* by Solomon Linda) followed by track 3 (an arranged version of *Mbube* sung by Miriam Makeba) as an example of an arranged song.

relegated to the public domain and the original owners lose their ability to collect royalties from its use.

Copyright, unless assigned to another, is (at least partially) owned by the author of the music. The author, with regard to a musical work, is the composer, but in relation to a sound recording the author is the person who was responsible for the making of the recording and arrangements for the recording of the music (section 1 (1)(iv) (a) and (c) of the Act). The authorship needs to belong to a specific “qualified” person(s) for the copyright law to be enacted. Alan Smith, a copyright expert, writes about his difficulty in accepting the definition of “author” regarding works such as sound recordings or cinematograph films, where whole teams of people are involved in the recording of the work (1996:2). Although South African copyright law does allow for certain groups to register as copyright owners (e.g. a juristic person); in the case of “traditionally composed music” where the author may be unknown and the song forms part of a community’s oral traditions, this is simply not sufficient.

The origins of copyright emanate from Britain and Europe, and although copyright has proven to be flexible¹⁹ one of its defining aspects is based on the ingrained Western cultural idea that “the regulation of copying (is) a hallmark of civility and proper cultural practice” (Golvan 2007:2). The South African Copyright Act 98 of 1978 was developed during a time when the country was intent on portraying its identity as “European” (<http://copyright.tsf.org.za>, accessed 10 June 2008). Coupled to this, as a member of the Berne Convention, it is the responsibility of each signatory country to design its legislation in line with internationally-accepted minimum standards while remaining true to the values to which the state subscribes (Woker 2006:38). The goals, therefore, of the Copyright Act of 1978 were not constructed with any consideration for the collective approach to knowledge/authorship to which many previously disadvantaged societies in South Africa (and in many other parts of the world) adhere. In reference to this issue, Anthony Seeger says,

Early European copyright legislation developed where literate people were creating works for publication...Since the rural and the poor were generally thought to be backward and ignorant, and the indigenous peoples of Africa, Asia and the Americas possibly less than human, little thought was given to their

¹⁹ This flexibility is particularly apparent in all amendments and “solutions” added to the various copyright acts of the world.

control over their knowledge. Under the terms established by the literate elite, knowledge that did not have a single, named author could not be copyrighted. Folklore - including folk music and many forms of traditional knowledge – is specifically excluded from the copyright acts of many countries (2004:160).

The issue of collective ownership and traditionally composed music has become increasingly relevant with global marketing of “world music” often originating in indigenous communities and considered part of the indigenous knowledge of those communities. It is also of particular concern to this thesis because much of the music archived at the ILAM falls under the rubric of “community authored/traditionally composed”. In the following section the case of the Suyá Indian’s attitude toward ownership of their various types of songs is used as an example of how indigenous knowledge does not conform to standards set by “international” copyright conventions.

Indigenous Authors and Ownership

Indigenous Knowledge (IK) is knowledge that is unique to a given culture or society (Mosimege 2005:2). Often referred to as “traditional²⁰” or “local”, it is “an all inclusive knowledge that covers technologies and practices that have been and are still used by indigenous and local people for existence, survival and adaptation in a variety of environments” (Onwu *et.al* 2004: 2). Like culture, it is not static and is influenced by changes in internal and external factors. According to Mosimege tradition-based knowledge refers to

Knowledge systems, creations, innovations and cultural expressions which: (i) have generally been transmitted from generation to generation; (ii) are generally regarded as pertaining to a particular people or its territory; (iii) and are constantly evolving in response to a changing environment (2005:3).

International ethnomusicological research reveals that although every society in the world performs structured sound similar to what in English is referred to as “music”, the reasons for the execution of these sounds differ considerably. Cultures have individual and varying ideas about the “origin, control, and rights over those sounds” (Seeger 2004:159) an example of which is discussed later in this chapter. This is particularly true of indigenous cultures whose communally authored/traditionally composed works are excluded from protection by Western-developed copyright laws.

²⁰ WIPO currently uses the term traditional knowledge (TK) to refer to tradition-based literary, artistic or scientific works; performances; invention; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields (<http://www.wipo.int>, accessed 12 June 2008).

Greg Younging of the Creators' Rights Alliance, an advocacy group in Canada that defends indigenous artists, points out that it is difficult to communicate indigenous ideas in the global legal context, as it is guided by a foreign system of standards from which indigenous groups are trying to decolonise themselves (Mara 2008 [online]).

Anthony Seeger's extensive research into the life and music of the Suyá Indians of Brazil (Seeger 1981, 1987) reveals a unique and collective manner of both ownership and authorship of the songs used for their various ceremonies. The Suyá village leaders are traditionally the owners or "controllers" of the songs of which there are two major types – individual (*akia*) and collective (*ngere*) (1992:347). Suyá men learn up to a dozen *akia* songs in their lifetimes which are passed on to them by a "person-without-spirit" who has learned the song from a non-human being e.g. plants, fish or other animals whilst walking in the forest (1992:348). *Ngere* songs are owned or controlled by groups and are either thought to have been sung at an original ceremony or are simply historical songs sung in unison. They are also created by animals and a "person-without-spirit" and are associated with the group that initially performed them (ibid.).

In terms of current South African copyright law both the *akia* and *ngere* songs of the Suyá people would not be protected in the manner that the Suyá hierarchy would deem appropriate. It is the leaders of the village that control *akia* songs under Suyá customary law, not individuals.²¹ *Ngere* songs are "owned" by groups and in both cases the original authorship is regarded as belonging to the animals from which the songs originated. Thus both collective ownership and authorship issues would confound registration officials. This intricate and un-Western manner of looking at intellectual property ownership rights would relegate the Suyá songs to the public domain. The law is simply not equipped to handle complex relationships such as those found among the Suyá.

In the case of South African "folk/traditional music" the issues of authorship are very complex. Many musical pieces from local communities as diverse as the Afrikaans *boereliedjies* (Afrikaans folk songs) to Xhosa *umgidi* (male initiation celebration

²¹Suyá Curing invocations (*sangere*) are treated differently and are regarded as individual compositions (Seeger 1992:349)

songs) are regarded as belonging to a collective group rather than an individual person. However, these songs can hypothetically make money for these communities through, for example, various channels in the mass media but, because they are not individually authored they do not currently qualify for copyright registration and therefore fall into the public domain. This fact, according to David Kerr (2006:146), “(is) undoubtedly (a) serious risk to indigenous cultures in the 21st century, particularly when the concept of ‘public domain’ is applied indiscriminately to all aspects of African oral culture.”

Debate on collective ownership versus intellectual property rights is a global phenomenon with web-sites such as “The Intellectual Property Watch” and WIPO reporting on current deliberations. Although many developed countries (particularly the U.S.A.) presently oppose any kind of international agreement with regard to intellectual property and indigenous knowledge, there are numerous countries, including South Africa, that are promoting radical amendments to the international copyright treaties in existence in order to accommodate indigenous societies. These member countries however, are divided on how to approach the issue (Mara 2008 [online]).

At the beginning of March 2008 representatives of global indigenous groups met in Geneva to discuss the role of intellectual property in the protection of indigenous and traditional knowledge and folklore. It was agreed that indigenous knowledge should be preserved and protected from misappropriation, but some members felt that intellectual property protection was completely inappropriate as a means of indigenous knowledge protection, while others felt that with careful consideration, workable amendments could be made. The Indigenous People’s Council on Biocolonialism (IPCB) director and founder, Debra Harry, argued that the intellectual property system as recognised by WIPO was unsuitable for indigenous knowledge protection as intellectual property rights are monopoly based and time-specific. She continued,

Intellectual property rights are also alienable²², and indigenous knowledge is by nature collectively held, inherent, inalienable, and held in trust for future generations. What is needed is a stipulation under access and benefit sharing

²² Capable of being transferred by a legal process to another owner.

requiring parties [to] uphold their obligations under agreements regarding the rights of indigenous people ²³ (ibid.).

The debate continues with no foreseeable solution and is complicated by concerns voiced by learned academics such as Gerhard Kubik and Betty Mould-Iddrisu, who dispute the fact that all African “folklore” is created anonymously or even collectively (Kubik 1987:35, Mould-Iddrisu 1997:18). Coupled with this issue is the argument put forward by David Kerr that, although there are risks that indigenous cultures’ traditional knowledge can be misused, it is simplistic to assume that indigenous knowledge can be or is managed in the same way by various different indigenous communities or that these communities want to be managed by a system that can also be perceived as “a betrayal of the alternative, anti-hegemonic creativity associated with participatory performance techniques” (2006: 154).

The available literature on the subject of indigenous knowledge and intellectual property protection is voluminous²⁴. But as Howell (2004: 3) writes, “Few (works) provide any attention to the detail of what should be done or how any remedial action should be formulated at a level of detail sufficient to have any effective implementation and enforcement.” I am of the opinion that collective ownership has a place within the parameters of intellectual property law but am wary of supporters of national ownership (which will be discussed in Chapter 6) as well as advocates who do not support intellectual property protection at all. Collective knowledge and therefore “collective creativity” is a reality in South Africa. Through commercial endeavours, the holdings at ILAM, which include many group performances of “traditional songs”²⁵, if preserved and marketed correctly, can potentially support the archive in its attempt to remain financially feasible. Ethically ILAM is, therefore, indebted to the performers on the various tracks. Had intellectual property laws at the time enabled these musicians to own their copyright, they too would have the capacity to earn a potential income for their various communities.

²³ As established in the 2007 “UN Declaration on the Human Rights of Indigenous People” Article 13.

²⁴ The scope of this thesis is not broad enough to include a wide selection of literature pertaining to indigenous knowledge and intellectual property. The bibliography therefore only includes works specifically referenced in the context of this work.

²⁵ *The Sound of Africa Series Catalogue* (1973) includes descriptions of the various tracks and many of these are of group performances.

Many developing countries have already implemented amendments to their copyright acts in order to accommodate indigenous knowledge and collective ownership with various degrees of success. South Africa is currently researching its options and during the writing of this thesis has (2008) proposed an Amendment to the Copyright Act of 1978 (see Chapter 6) which recommends significant changes to the Act in order to accommodate indigenous knowledge beliefs, systems and practices.

This chapter has served as an introduction to copyright in the South African context. The complex nature of intellectual property rights and infringement thereof is better understood by means of practical situation and in the following chapter, I present examples of copyright infringement in order to illustrate copyright as a working law.

Chapter Three

Working Examples of Copyright Infringement



Solomon Linda, composer of *Mbube*.

Photograph supplied with permission from the Gallo Africa Archive.

In order to illustrate the complexities of copyright law and to introduce examples of copyright infraction situations, this chapter examines two infringement possibilities that potentially threaten ILAM's on-line sale of music through its website (<http://www.ilam.ru.ac.za/>). Thereafter, three famous copyright infringement cases are presented with musical examples in order to elucidate the information presented in the previous chapter.

The digital age has brought about an intellectual freedom in which the access to and dissemination of knowledge has become almost effortless. Coupled to this ease of information transmission is the simplicity with which someone logged onto the internet can copy any item of interest. Copyright laws all around the world are struggling to keep up with rapid technological advances which facilitate this unrestricted breach of rights. But there are also strong voices that speak out against copyright protection by expressing the view that information exchange is being restricted and therefore negatively impacting on free-flowing intellectual barter. Golvan writes,

Legislating to achieve a proper balance between protection and access is invariably an unsatisfactory undertaking, and there are many obvious

shortcomings in the protections available under (any given Copyright Act), and the concessions to access which the Act(s) make... (2007:4)

He continues to make a disturbing point about copyright: “It is striking to me, as a practitioner in the field, just how many untried copyright points arise, and how unpredictable outcomes can be” (2007:6). This is not the first time that I have come across a lawyer or attorney making this observation and it highlights my concern that members of the public unversed in law will find it difficult to fully understand their copyrights.

South African Copyright Issues

Copyright law is not part of the material that artists and creators use on a daily basis. It can be roughly compared to property insurance that you have acquired and understand in a broad sense. You initially gloss over the fine-print but when your possessions are stolen or damaged you scrutinise the data and by then it is too late to protect yourself. You do assume however, that the insurers are clear about the details and can realistically protect your interests should you have followed their exhaustive system. This may be true of the insurance companies in South Africa but it is not entirely true for the South African Copyright Act, which according to Dean (2007 [online]) is, “inherently a reasonable piece of legislation” but currently “outdated and ineffective.” At the time of its inception it was regarded as modern and amendments during the 1980s and 1990s updated the Act to keep up with copyright advances elsewhere in the world. These updates ceased, however, at the turn of the century and the Act is now considered to be problematic (ibid.).

Many copyright issues have come to my attention through this study that could, in the future, affect ILAM in terms of potential income and self-sustainability in its general operations. Most of these problems are manageable in that ILAM can revise strategies in order to side-step them. Two copyright issues, reciprocity and digital infringement, however, are potentially challenging to ILAM and are not adequately canvassed by current South African copyright law.

Reciprocity

The first issue which affects both local and foreign copyright owners is that South Africa has not updated the Berne Convention list of signatory countries since 1996. As mentioned before, the Convention stipulates that member countries are afforded reciprocal rights, which means that when a new country signs the convention it should be protected by the South African Copyright Act. As a result, in 2007, 43 new countries were not protected, which is in contravention of the rules of the Berne Convention (Dean 2007 [online]). Reciprocity is vital to all institutions and businesses that deal with foreign investment and that use the World Wide Web as a commercial vehicle because each company can be affected by other countries' intellectual property laws. ILAM is directly affected by reciprocity issues because of the contract that it entered into, amongst others, with the American-based Smithsonian Institution. U.S.A. copyright laws, therefore, should play a role in future decisions made at ILAM with reference to on-line sales through the Smithsonian Institution's current music website, Smithsonian Global Sound, in order to avoid income loss. This situation and the repercussions are discussed in detail in Chapter 5. ILAM's holdings are also in danger of potential misappropriation by digital infringement because the Smithsonian Institution and ILAM make certain tracks available for commercial sale via the internet where they can be illegally downloaded.

Digital infringement

Digital technologies have revolutionised the dissemination of music in general but specifically via the internet. The development of the mp3²⁶ music compression format has transformed the way music is transmitted to listeners and consumers worldwide and its widespread use presents considerable challenges for owners of copyright. Any consumer with a home computer and modem can now buy music over the internet but likewise, can also make unauthorised copies of songs through that medium. As Jim Griffin, the music industry veteran recently hired by Warner Music Group says, "Today, it has become purely voluntary to pay for music. If I tell you to go listen to this band, you could pay, or you might not. It's pretty much up to you. So the music business has become a big tip jar" (Gustin 2008 [online]). Hundreds of websites that make this sort of mass piracy possible have proliferated in cyberspace with no real policing solution in sight. The music industry has shrunk from a \$15 billion to a \$10

²⁶ Otherwise known as a DAP or Digital Audio Player.

billion business in just over a decade due to the plummeting sales of compact discs and the increase of online music downloads. Acrimonious record industry litigation has proven ineffective, especially where the music giants file suit against students in their homes²⁷ (ibid.).

International attempts at solutions include those outlined in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty, concluded in 1996 and known together as the WIPO "Internet Treaties". The U.S.A. implemented the Digital Millennium Copyright Act consequent upon the "WIPO internet treaties" which stress the importance of internet service provider (ISP) liability. Unfortunately these treaties have proven unsuccessful in protecting either the internet down-loaders or the copyright holders. A 2005 WIPO seminar on copyright and internet service provider liability in Geneva concluded that more legislation was necessary and that the "internet user versus the music industry" issue remained unsolved (<http://www.edri.org/edriagram/number3.8/WIPO>, accessed 14 June 2008). The question remains, should more legislation be put in place to protect the rights of the internet user or rather to help the industry giants to hunt down the law breakers? One possible answer has recently been proffered by the music industry itself. Warner Music Group hired Jim Griffin to spearhead a controversial plan to add a fee onto consumers' monthly internet service bills in return for unlimited access to a "universal" music database (Gustin 2008 [online]). This would change the music industry from being a music provider to being a music service. Warner's intention is to have consumers pay an additional (but nominal) fee bundled into their monthly bill in exchange for the right to download, copy, upload and share music without restrictions. Other music industry players have similar ideas: Sony BMG Music Entertainment is reported to be developing an online subscription service giving users unlimited access to their catalogue while Apple is negotiating with record labels to offer clients free access to the whole iTunes database in exchange for a fee added once-off onto their product purchase price (ibid.).

The implementation and managing of an industry shaped in this manner is frightening to contemplate. How would they apply the tariffs in foreign countries where standards

²⁷ In 2007, following the "notice and take-down" rule 5400 threatening letters were sent to more than 150 schools by American music industry giants with settlements being reached for only 2300 accused. The remaining letters simply gained no responses (Gustin 2008 [online]).

of living and expenses differ vastly? How will people who never download music react to paying a fee for a service they do not use? How will archives and other smaller industry players benefit from the plan? Or will they simply be left to make another arrangement once the music industry giants have had their fill? Unfortunately these questions can only be answered at an undisclosed future date and in the meantime ILAM and other smaller institutions must concentrate on reviewing their current policies to safeguard against exploitation. ILAM is already involved in combating internet infractions. For the first time, in 2007, the ILAM website made digitised musical tracks available on-line for sale and research purposes. In order to protect these digitised holdings from copyright infringement, ILAM has supplied only a low resolution, compressed, 30 second mp3 sound file, attached to the meta-data file, for each sound item (track). This effectively combats infringement because the music file, which can be copied off the internet, contains only a portion of the track, is not of broadcast quality (low resolution and compressed) and is thus not suitable for resale. Uncompressed sound files are not available from the on-line archive and can only be obtained by contacting ILAM directly and seeking permission for use or purchase.

Famous Copyright Infringement Cases

Although copyright infringement occurs under many different circumstances the South African Copyright Act of 1978 (Section 23 (1)) states that:

Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize.

Copyright infringement also includes the importation of articles, the selling, letting, trading, selling or hiring out of articles, the acquisition of an article relating to a computer programme or the performance of a literary or musical work in a public place (Section 23 (2-3)).

In order to make copyright law more accessible I have chosen three famous copyright cases which demonstrate issues that have been discussed above. The first case will examine how the law denied the Walt Disney Company the right to forget about an African composer.

Mbube and The Lion Sleeps Tonight

Too many artists have been exploited by record companies and up till now none of them have received any attention. *Mbube* became an issue because of the Lion King (and the Disney connection), but if anyone took the time to investigate how royalties were paid to any major black African artists in the past decades, they would find the same story - which is why so many artists died in poverty (Willenberg e-mail correspondence 20 October 2004).

South African interest in Solomon Linda and his song *Mbube* (known to most as *The Lion Sleeps Tonight*) caught the attention of the public. Although Linda died in poverty, he was finally, albeit posthumously, granted his financial due. The route to this reward was valiantly championed by Rian Malan, a South African journalist, as documented in his article *In the Jungle* (2004 [online]) and the internationally-respected copyright specialist Dr. Owen Dean from the Johannesburg law firm Spoor and Fisher.

Solomon Linda, a South African Zulu man, migrated to Johannesburg in the 1930s where he looked for work along with thousands of other hopefuls. He was an enthusiastic musician and composed several songs which he performed with his newly-formed group *The Evening Birds* at local shebeens. In 1938 *The Evening Birds* were spotted by a talent scout, Griffiths Motsieloa, South Africa's first black producer, who recorded some of their compositions for Eric Gallo of Gallo Records. It was accepted practice at the time to pay musicians a once-off fee for their recordings (similar to Hugh Tracey's recording practices which are discussed in Chapter 4), which they were very happy to accept, after which the producers owned the music. For this reason Linda and his group were pleased to be asked back a year later to do some more recordings. It was during this second recording session in 1939 that *Mbube* was composed (listen to track 1 on CD)²⁸. Linda was paid a once-off fee of "around ten shillings" (Malan 2004 [online]) for the song and later signed a "Deed of Assignment" which allowed Gallo to register the U.S.A. copyright of the song in its name (Dean 2006:3). By 1948, the song had sold in the region of 100,000 copies for Gallo Records in South Africa (ibid.).

In the early 1950s, Hugh Tracey, who was working for Gallo at the time, forwarded a collection of recordings to Decca Records in the U.S.A. with the hope that some of

²⁸ *Mbube*, Solomon Linda's original *Evening Birds*. Refer to Appendix 1 for full CD track listing.

the music would be released internationally (Allingham e-mail correspondence 1 April 2008). None of the material was deemed suitable, but Alan Lomax²⁹, who was also working for Decca, passed it on to Pete Seeger, the well known American folk singer (Malan 2000 [online]). Seeger was immediately fascinated by *Mbube* and transcribed the song, incorrectly hearing the word *Mbube* as *Wimoweh* (Dean 2006:2). *Wimoweh* was released by *The Weavers*, Pete Seeger's band in the mid 1950s and became an American hit. When Seeger recorded *Wimoweh* its copyright became the property of the American company *Folkways*. Gallo entered into various agreements with *Folkways* in which they had rights to both *Mbube* and *Wimoweh* in Africa while *Folkways* owned the rights throughout the rest of the world (Dean 2006:3).

In the early 1960s a band called *The Tokens* decided to record the track (listen to track 2 on CD³⁰). With the help of George Weiss, a Julliard-trained composer, Hugo Prettì and Luigi Ceatore, the song, called *The Lion Sleeps Tonight*, was rearranged and new words were added (Dean 2007 [online]). It was an immediate number one hit, as Malan writes,

By April 1962 the song was topping charts almost everywhere and heading for immortality. Miriam Makeba sang her version at JFK's last birthday party, moments before Marilyn Monroe famously lisped, "Happy Birthday, Mister President!" Apollo astronauts listened to it on the takeoff pads at Cape Canaveral. It was covered by the Springfields, the Spinners, the Tremeloes and Glen Campbell. In 1972 it returned to the charts, at Number Three, in a version by Robert John. Brian Eno recorded it in 1975. In 1982 it was back at Number One in the U.K., this time performed by Tight Fit. (Even) R.E.M. did it... (2004 [online]).

(Listen to track 3 on CD.)³¹

Solomon Linda died in 1962 leaving his wife Regina to bring up their four daughters. In terms of the South African law of intestate succession³² at that time Regina was named as his heir. In 1982, the United States copyright registration of *Mbube* came up for renewal and Folkways secured an assignment of all rights from Regina and then registered the song in their own name. When Regina died in 1990 she left all her assets to her daughters, and they too were tracked down and persuaded to divest themselves of all rights pertaining to their father's song (Dean 2007 [online]).

²⁹ Folklorist and musical anthropologist (1915-2002).

³⁰ *The Lion Sleeps Tonight, The Tokens*.

³¹ *Mbube*, Miriam Makeba

³² When no legal will was made by the deceased.

In the mid-1990s Walt Disney used the song in their internationally-acclaimed musical and animated movie *The Lion King* (listen to track 4 on CD)³³. Although the *The Lions Sleeps Tonight* made a substantial amount of money before the Disney productions it was now a real money spinner. The South African origins were long forgotten however, and the song was credited as being a product of the Americans Weiss, Peretti and Ceatore. Folkways then became embroiled in a legal battle with another American company, *Abilene Music* who represented Weiss, Peretti and Ceatore and lost, leaving *Abilene Music* as the owner of *The Lion Sleeps Tonight* (ibid.).

When Malan came across this set of facts and met with the Linda family, their chance of getting their rightful due seemed remote. In fact, in the *Abilene Music* agreement a ruling was made that 10% of the performing rights³⁴ in respect of *The Lion Sleeps Tonight* should be paid to the heirs of Solomon Linda. This, along with assignments of rights signed by the daughters to Folkways suggested that the Linda family's chance of gaining a larger portion of the proceeds seemed impossible. Malan comments on the payments made,

It soon became clear that Linda's daughters had no understanding of music publishing and related arcana. All they knew was that 'people did something with our father's song outside', and that monies were occasionally deposited in their joint bank account by mysterious entities they could not name. I asked to see documents, but they had none, and they were deeply confused as to the size and purpose of the payments (2004 [online]).

Malan and Gallo (Africa) Limited decided that something had to be done and thus a mandate was sent to Dean, which read as follows:

Your mandate is to find a way and to do everything possible, to enable the children of Solomon Linda, the composer of a song called *Mbube*, which later evolved into the international hit song "The Lion Sleeps Tonight", to derive some financial benefit from the considerable revenues generated by the popularity of "The Lion Sleeps Tonight". You should recommend any reasonable course of action which you can conceive and we are willing to finance it even if it means conducting litigation abroad (ibid.).

³³ *The Lion Sleeps Tonight*, Walt Disney's *The Lion King*.

³⁴ This is unusual as Linda is not recorded on any of the broadcasts other than his initial one and he is not credited with his actual contribution: as composer.

The Legal Battle

In 1989 Dean was awarded his doctorate by thesis which is entitled: *The Application of the Copyright Act, 1978, to Works Made Prior to 1979*. This work introduced him to, amongst other things, the intricacies of the “Imperial Copyright Act of 1911”. In it (Section 5(2)) he found that if an author assigned his copyright to another during his lifetime, the copyright reverted to his heirs 25 years after his death, no matter what other assignments had taken place in the intervening time.

Through extensive research Dean found that although the Copyright Act of 1978 is retrospective (Section 43) and applies to works made before its commencement, paragraph (a) contains an exception. This states that the Act does not affect the ownership, duration or existence of any copyright which subsists under the Copyright Act of 1965. He then ascertained that Section 41(1)(2)(3) of the Sixth Schedule to the Copyright Act of 1965 preserved the subsistence, duration and ownership of copyright works made during the time of the previous Act as though the Act had continued in force. In other words the copyright granted by the 1911 Copyright Act continued to exist as though the 1911 Act had never been repealed by the Copyright Act of 1965 and 1978.

For *Mbube*, this meant that at the time of Solomon Linda’s death in 1962, although his wife inherited his rights to the song, they would only legally become hers 25 years later in 1987. Therefore, when Regina assigned her rights to Folkways she had no legal right to do so and their subsequent registration of copyright ownership in the United States could not be upheld. Dean also found that the other countries that were formally part of the British Empire also preserved the reversionary interest (Section 5(2) of 1911 British Imperial Copyright Act) and that whatever decisions were made about the case in South Africa would be upheld in countries that were formerly part of the British protectorate. A judgement was made that the rights of *Mbube* should be vested in the executor of Solomon Linda’s estate (who did not exist) and it was decided that one should be immediately be appointed (Dean 2007 [online]). Dean writes,

The main thrust of the Executor’s case against the defendants was that (they) had commercially exploited the song...without the authority of the Executor as the copyright owner of *Mbube*, from which “The Lion Sleeps Tonight” had been derived... (ibid.).

Damages of R15 million were claimed and although Disney fought back swiftly, an out of court settlement was agreed upon shortly before the trial date. Outcomes of the settlement were as follows:

1. Abilene undertook to pay to the Executor an undisclosed amount for the past uses of *The Lion Sleeps Tonight* and undertook to pay royalties for all future use of the song.
2. Public acknowledgement was made by the defendants that *The Lion Sleeps Tonight* was derived from *Mbube*.
3. Solomon Linda would be acknowledged in the future as co-writer of *The Lion Sleeps Tonight* (ibid.)

This outcome was monumental and has championed the way for heirs of other exploited South African musicians who created their works between 1916 and 1965 to claim their dues. While the result does not impact on many ILAM tracks because it is only in cases where there is a material copy of an agreement where copyright has been reassigned that the retrospective law applies, many archives that have written agents will be affected by it. In the case of the tracks at ILAM where no agreements are in place, the rights are as written in the Copyright Act of 1978 and will be discussed in Chapter 5.

In the next case it is clear that owning the copyright to a track does not ensure the author's proper treatment or payment of royalties due. This situation is particularly poignant in developing countries where musicians (or copyright owners) do not have the financial backing to utilise their own compositions.

Malaika

The song *Malaika*, which means “angel” in Swahili, is best known through Miriam Makeba's 1965 performance with Harry Belafonte (Lusk 2006 [online]) (listen to track 5 on the CD)³⁵. There is no dispute that it is East African of origin, but the rest of the song's history is less clear. It is one of many internationally recognised songs that come from small countries in less developed areas where traditional music is part of the public domain and where many musicians were, and still are, ill-informed regarding copyright law.

³⁵ *Malaika*, Harry Belafonte and Miriam Makeba

Fadhili William, the late singer, guitarist and songwriter claims to have authored and composed *Malaika*, and talks of his inspiration,

This girl was called Fennie and I nicknamed her Malaika, I played guitar while Andrea Cholo played the mandolin. Though I was deeply involved in teenage love, I had no money with which to pay bride price for Fennie who was from a wealthy family. She was instead given away to an older man who could afford her. I composed Malaika to let her know how I felt. I wanted her to remember me and the only way to do so was through music (Ondego 2006 [online]).

He says that this took place in 1959 just before he formed *The Jambo Boys Band*³⁶ and recorded a number of songs with East African Records including the world-famous *Malaika*. In 1963 *The Equator Sound Band*³⁷ was founded by producer and owner of Equator Sound Studios, Charles Worrod, who invited William to join the band. *The Equator Sound Band* modified *Malaika* and it was this recording that caught not only local but also global listeners' interest (ibid.). The 1963 version of the song is supposed to be the definitive version, but William's claims of ownership of the song are still under dispute, long after his death. Grant Charo, William's supervisor at the Equator Sound Studios in Nairobi in the 1960s claimed that he, not Fadhili William, had written the song. Worrod then insisted that he should have owned the copyright to the song. He said,

When Malaika was recorded by law all copyright belonged to the company because the musicians were employed for the purpose of writing and performing musical works. The idea supplied first by one man, was modified by mutual agreement and the lead guitar, rhythm and bass players devised their own parts (Ogova 2006 [online]).

Other East Africans claim to have written the song; these include Lucas Tututu from Mombasa and Adam Salim from Tanzania. Added to that it has also been documented that *Malaika* was simply a traditional Tanzanian song that William arranged and added words to (Paterson 2001 [online]). It was William, however, who as a member of the Performing Rights Society of Britain first registered his claim as author of the song *Malaika* (Wallis 1984:183).

In 1963 Pete Seeger was travelling around East Africa on a world tour but was also "collecting" local music. This was only thirteen years after he had established his

³⁶ was the first electric band formed in Kenya and it quickly made the band members national stars (Paterson 2001 [online])

³⁷ New band members were Peter Tsotsi, Adolf Banyoro, Nashil Pichen, Charles Songo, Gabriel Omolo, and Daudi Kabaka (Ogova 2001 [online])

career performing a version of Linda's *Mbube* (Malan 2004 [online]). Seeger had an ear for international hits and when he heard *Malaika*, he arranged with a United States based company, Fall River Inc., to acquire publishing rights outside of Kenya. This was done by signing a contract in Nairobi with the Equator Sound Studio. Fall River Inc. then granted publishing rights (known as sub-publishing rights) to publishers in other countries (Wallis and Malm 1984:182).

This is where Fadhili William's copyrights were infringed: these sub-publishers collected 100% of the mechanical royalties from artists' recordings of *Malaika*. They then forwarded 50% of what they collected to Fall River Inc. which kept 50% and gave the other half to Worrod's Equator Sound Studio who then split their income with Fadhili William (ibid.183), a diluted share of the original royalties. Taking into consideration that, although contested, Fadhili William is the accepted copyright holder, even receiving a small percentage of the royalties should have made him a rich man. Famous musicians like Miriam Makeba, Harry Belafonte and Benny Andersson (later of *ABBA* fame) recorded the song (ibid.) but even though Fall River Inc. claims that it sent money to Kenya and that all the cheques were cashed, Fadhili William claims he never received a cent from the mechanical copyright³⁸ (Ibid. 184). The copyright misappropriation did not stop there. In 1979 the group *Saragossa* recorded *Malaika* without any mention of Fadhili William and in 1981 *Boney M* released the track and maintained it was a traditional song and thus part of the public domain (see Chapter 5 for clarification of this contentious issue). The arrangers Farian/Reyam claimed all copyright money including the publishing rights (Farian and Reyam were *Boney M's* manager and owned the publishing house) and thus no money at all was getting to the rightful copyright owner. This situation was later resolved and *Boney M's* claim was rejected; but Fadhili William, although working with lawyers, still did not see any portion of the substantial royalties made from the recording (ibid.:187). Other claims of ownership submitted include Miriam Makeba's music company, despite her prior acknowledgement that Fadhili William should have the credit (listen to track 6 on the CD)³⁹. Makeba is not the only performer to have registered ownership of *Malaika*, as more than seven applications for copyright have been registered (ibid.:186).

³⁸ Recording rights.

³⁹ *Malaika*, Miriam Makeba.

William was never publicly recognised as the author of *Malaika*. He died in Nairobi in 2001 without being properly compensated (ibid). Although William enjoyed vast popularity in Kenya and made a certain amount of money from his local performances, he spent most of his life fighting for recognition and royalties from the international community for *Malaika*. Even though he worked in the music industry and was aware of the copyright laws, he could not claim what was rightfully his because he did not have the financial backing or professional influence that was needed in order to confront the copyright infringers. The copyright laws did not serve him or his country at all.

This case of copyright infringement can serve as a warning to copyright holders that even as the legal owners it is possible to be cheated out of equitable and just compensation. As a small institution from a country that is regarded in many parts of the world as a developing nation, ILAM needs to be vigilant in maintaining control of its intellectual property rights. The emergence of the public interest in South African heritage makes the archive and its holdings vulnerable to misuse. It is important therefore, to insist that every transaction that takes place with regard to the use of ILAM's tracks is carefully monitored and correctly recorded. Unfortunately this is not the only manner in which developing countries are at a copyright disadvantage.

Indigenous Knowledge Systems

Countries whose traditional songs have been arranged by famous musicians or arrangers have also suffered loss. As discussed previously, any member of the public has the right to use works in the public domain and reuse the creative work of others without financial or social burden. Therefore the cultural heritage of a country is disregarded and there is no financial benefit for the nation's people. The use of works in the public domain may be expedient in countries where citizens have access to the arranged works and where the money that is made remains in the country benefiting the local economy. This, however, is rarely the case in developing countries.

The final copyright infringement example in this chapter introduces the internationally debated topic of indigenous knowledge systems and the idea of collective copyright which will be discussed in detail in Chapters 5 and 6. Although there are many definitions of indigenous knowledge systems, the South African Department of Trade and Industry policy on Indigenous Knowledge Systems

(2004:10 [online]) defines them as: “traditional and local knowledge developed by and within distinctive indigenous communities” and “manifests itself in the areas (of) cultural and religious ceremonies, agriculture and health interventions.” This issue is at the helm of copyright debate around the world and has been discussed at multilateral forums including WIPO, the World Trade Organisation (WTO), the Food and Agricultural Organisation (FAO), the United Nations Education and Scientific Conference (UNESCO), the United Nations Environment Programme (UNEP) and the United Nations Conference on Trade and Development (UNCTAD) (Republic of South African Department of Trade and Industry 2008 [online]). Ethnomusicologists and other indigenous knowledge researchers have been troubled by this copyright issue as can be seen by Hugo Zemp’s experience with the ‘Are’are people of the Solomon Islands.

The ‘Are’are People of the Solomon Islands

The world-famous ethnomusicologist, Hugo Zemp,⁴⁰ began research in the Solomon Islands in August 1969 when he spent six months amongst the ‘Are’are people and six months making surveys among other people in the archipelago. The commercial product of this fieldwork constituted seven LPs which included three from the ‘Are’are (Zemp 1996:38) and the song *Rorogwela* (lullaby) by a performer called Afunakwa (listen to track 7 on C D)⁴¹. On his second field trip to the Solomon Islands, Zemp encountered resistance which stemmed from a situation in which an ‘Are’are musician had been badly handled by a record agency. Zemp, however, was very particular about ensuring that all royalties were sent back to the respective authorities⁴² and even sent battery-operated record players to ensure that the LPs could be played and heard by the musicians he recorded (ibid). His next field trip, which was initiated by UNESCO (1996:39), was also met with resistance as the people of the Solomon Islands became more aware of potential and actual musical exploitation by unsavoury record company talent scouts. After consultation with the Provincial and ‘Are’are Councils a permit was granted and Zemp continued to film and record music which was later published⁴³. Thus Zemp’s work and experience in

⁴⁰ Prof. Hugo Zemp is the Director of Research at CNRS, Paris, France.

⁴¹ *Rorogwela* (lullaby), Afunakwa.

⁴² Royalties were delivered to the Solomon Islands Museum Association, the Cultural Headquarters, custom chiefs and local schools (Zemp 1996:38).

⁴³ A double (15) and single (16) CD of ‘Are’are music were published in 1994 and 95 respectively (Zemp 1996:39).

the Solomon Islands, executed between 1969 and 1977, included many dialogues regarding future royalty payments and copyright issues. Zemp (1996:41) writes,

In the Solomon Islands...I paid performers small amounts from the research money provided by my employer...and corresponding to local daily wages for labour. But I personally arranged that, in the event of commercial exploitation in the form of released discs, royalty payments would come back to the Solomon Islands.

It was thus distressing for Zemp to encounter two situations in which the music of the 'Are'are was blatantly used without any royalties reaching the shores of the Solomon Islands.

Traditional Music and the Public Domain

The first infringement arose in 1979 when the French composer Michel Portal released an LP entitled *Dejarne Solo!* in which he borrowed a lullaby from one of Zemp's Solomon Island records. Zemp wrote to Portal years later in 1996 and reminded him that in his composition entitled *En el campo* he had stated he was the composer and had not mentioned that it was an arrangement of one of Zemp's recordings from the Solomon Islands by an artist called Afunakwa. Zemp questioned Portal's ethics, "... (T)raditional music is a matter of the public domain and, consequently, on the legal level, you had the right to use a tune without paying royalties to the true owners. But on a moral level (Zemp 1996:43)?" He never received an answer and the 'Are'are people were never remunerated for the use of their song.

Deep Forest

The second infringement took place in the early 1990s, when two Belgian musicians, Michel Sanchez and Eric Mouquet, contacted the Cultural Heritage Section of UNESCO to ask if they could use samples of African music from the UNESCO record Collection in honour of an international "Day of the Earth" (Zemp 1996:44). Zemp and fellow ethnomusicologist Simha Arom were contacted as the original collectors and asked for their permission to use the tracks. Zemp was assured that Arom had already given his permission but decided to decline stating that he was, "against this kind of exploitation and that UNESCO should promote its own records of traditional music..." (1996:45). After consultation with the African musician and composer Francis Bebey, Zemp however, changed his mind. He granted permission

which respected the intention of Sanchez and Mouquet who claimed that part of the royalties would be paid toward preserving and protecting tropical rain forests in the world (ibid.).

Zemp was left feeling dissatisfied with the dealings with the Belgian musicians and only listened to and read the contents of the CD when he was contacted by Sherylle Mills asking for information regarding his part in the *Deep Forest* issue (1996:46). When he listened to the tracks it became apparent that Sanchez and Moquet had not used the African samples they had requested from him. The *Deep Forest* track *Sweet Lullaby* used a track that was published on an entirely different LP, the UNESCO record *Fataleka and Baegu Music* from the Solomon Islands (listen to track 8 on CD)⁴⁴. Zemp contacted all parties involved and found that no permission was ever granted by UNESCO or their record company Auvidis to the composers Moquet and Sanchez to use the song. Sanchez and Moquet denied this and stated on the liner notes of the CD: “*Deep Forest* has received the support of UNESCO and of two musicologists, Hugo Zemp (sic) and Shima (sic) Arom, who collected the original documents” (*Deep Forest* CD Liner notes).

The *Deep Forest* CD, of the same name, and specifically the track *Sweet Lullaby* became an international hit but by 1996 no royalties had reached the people of the Solomon Islands or indeed UNESCO. In addition, the fund into which a percentage of the proceeds from the album were to be paid had mistakenly designated the wrong people as beneficiaries. (Mills 1996:60). Later the Norwegian saxophonist, Jan Garbarek, released a track in 1996 called *Pygmy Lullaby* on his album *Visible World* based on *Deep Forest's Sweet Lullaby*. In this album he mistakenly acknowledges the origins of the track as being from a “traditional African melody” (<http://www.soundjunction.org>) because of *Deep Forest's* inaccuracies (Listen to track 9 on the CD⁴⁵).

The website dedicated to *Deep Forest* (www.deepforestmusic.com) reports on *Sweet Lullaby's* continued success into 2008. Now however, Zemp and Afunakwa (the musician on the sample) are credited, as follows:

⁴⁴ *Sweet Lullaby, Deep Forest.*

⁴⁵ *Pygmy Lullaby, Jan Garbarek*

At the core of *Sweet Lullaby* is the voice and melody of Afunakwa from the Solomon Islands. Her singing was recorded in 1969 by ethnomusicologist Hugo Zemp in an effort to archive the traditions of a fading culture (ibid.).

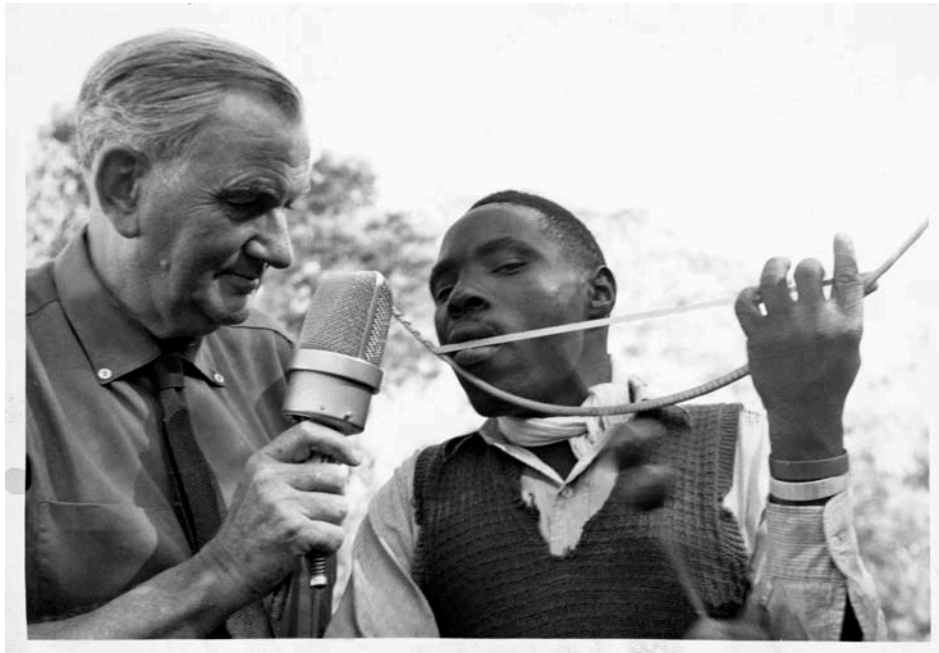
Deep Forest is ensured of continued royalties from *Sweet Lullaby* with the release of a CD 15 years after the song's debut. In 2007, Canadian-based *Existence Records* released an on-line compilation paying tribute to the ethno-electronic hit with sixteen new remixes from over a dozen DJs around the world (Deep in the Jungle 2007 [online]).

Hugo Zemp's attempt to contact the musicians heard on the *Deep Forest* album came to nothing and the 'Are'are people, despite his attempts, have never received their rightful royalties. Although Zemp was aware of the possible copyright problems that could arise and was vigilant about signing agreements for the transparency of royalty payments, he was unable to protect the 'Are'are people from being exploited. The legal system let him down: it does not adequately protect traditional music and musicians. Authorship of traditional music is a heavily debated issue and royalties from tracks that are subsequently arranged are rarely paid back to the originating community.

This situation is particularly relevant to current copyright issues faced by ILAM. The bulk of ILAM's holdings are traditional compositions recorded by Hugh Tracey. As these compositions are part of the public domain in South Africa, ILAM is therefore not legally bound to pay the composers of the tracks any percentage of the royalties that it earns. However, in light of current ethical research practices, members of the archive feel duty bound to compensate the composers and musicians for their efforts. Nor must Hugh Tracey be seen as an unsavoury talent scout who took advantage of the musicians he recorded. His meticulous work and sensitive research has culminated in the development of the finest collection of African music in the country, with an international reputation as a world-class archive. Recording practices and techniques during the development of ethnomusicology have evolved, as has the importance of copyright to the discipline. The following chapter provides an historical contextualisation of recording practises that led to the establishment of ILAM as well as an examination of Hugh Tracey's research methods. This chapter will therefore clarify the existing copyright status of the holdings at ILAM.

Chapter Four

Hugh Tracey and the International Library of African Music



Hugh Tracey recording a Zimbabwean musician playing a Chizambi friction bow (n.d.).

Picture supplied with permission from ILAM.

Hugh Tracey (1903-1977) was among the leading scholars of the 20th century⁴⁶ who saw African music as an artistic heritage that needed to be "shared, preserved, and promoted" (Nketia 1998: 51) and who worked tirelessly to encourage recognition of the significance of African music in social life. Diane Thram, the current director of the International Library of African Music (ILAM), writes,

Motivated by an intense fascination and love for the songs and folktales of Southern Africa, Tracey's achievements - documentation and preservation, research, publication, community outreach, and education - became and remain to this day the five-pronged mission of the International Library of African Music (ILAM) (2004:2).

Indeed these goals have remained steadfast: Tracey's vision was extraordinary and remains relevant in the current course that ILAM has taken. This was reiterated in an

⁴⁶ Other scholars included: John Blacking (1928-1990); George Hertzog (1901-1983); Curt Sachs (1881-1959); Charles Seeger (1886-1979) and Alan P. Merriam (1923-1980).

interview with Andrew Tracey (b.1936), Hugh Tracey's retired son and former director of ILAM (1978 - 2005). In this interview he states that, "The aim of ILAM is to conserve and promote African music by whatever means" (Tracey, A. interview 1 October 2007).

The impact of Hugh Tracey's lifetime of work is difficult to quantify. It is accurate to state, however, that no individual has collected as much African music, over as large a region as did he (Nketia 1998:53). Initially self-taught, with no formal training in music or anthropology, Tracey later became an internationally-acclaimed scholar. His work included research involving methodical survey-oriented fieldwork, extensive field recordings and a scientific approach to data collection and analysis (Thram 2004:1). In this regard Nketia notes,

Though he produced a few significant works..., he seemed to have been more concerned with what ethnomusicologists regard as primary research, involving activities such as recording, collecting information or background notes on recordings, identifying the music makers (so they could receive credit, especially on broadcasts), observing and cataloguing instruments and the process of their manufacture, assessing their tuning, taking note of what African musicians sang about, how they dressed and danced - in short, with information that could be documented, catalogued, and published with perceptive commentaries (1998:53).

Tracey (1954a:7) himself wrote, on the occasion of the publication of the first *African Music* journal, that in order to garner a fuller understanding and better classification of African music, one had to undertake a continual collection of African compositions by phonograph recordings and then publish these results in order to spread the information gathered. This commitment to the preservation, documentation and dissemination of African music began a series of events that culminated in the establishment of the ILAM in 1954, situated initially in Roodepoort⁴⁷ in the former Transvaal Province. Presently ILAM is located on the campus of Rhodes University in Grahamstown, South Africa having been moved there in 1978 by Andrew Tracey after his father's death in 1977. ILAM continues to motivate for funding in order to achieve the goals of Tracey's five-pronged mission.

⁴⁷ Roodepoort is situated on the West Rand 21 kilometres from Johannesburg's CBD (Automobile Association 13 February 2008).

The Early Days

Hugh Tracey, the ninth of eleven children, was born in 1903 in Willand, Devon in England. He lost his father, a medical doctor, during his youth and according to his son Andrew (interview 1 October 2007) he had a difficult childhood. Neither Hugh's parents nor his siblings had any formal musical training but it is thought that their love of singing was inherited from their father who was both artistic and musical. After school, Hugh, a talented rower and high-jumper, was offered a sports scholarship to attend Cambridge University. His mother was not interested in her son attending a university by virtue of sporting achievement, had him apprenticed to a boot-maker instead and started making plans for his further education (ibid.).

It was decided in the early 1920s that he should join his brother, Leonard, to farm tobacco in the former Southern Rhodesia, where Leonard had been given land as compensation for his role as a serviceman wounded in the First World War. The farm, called Willand, was situated between the villages of Chivu and Gutu in the district called Enkeldoorn. Hugh departed from his family with only £100 and a second-hand leather suitcase which he kept and used on all his subsequent recording trips (ibid.).

Tracey was immediately fascinated by the music of the Karanga people of the region, where he, "first sang and wrote down the words of African songs I heard in the tobacco fields of Southern Rhodesia" (Tracey, H. 1973:3). He learned to speak the *Karanga* dialect of the *Shona* language and developed an interest in the music he was performing and learning about. *Karanga* had been transcribed previously by missionaries in the area but Andrew Tracey contends that Hugh used the orthography of the time and if in doubt, his keen ear to spell phonetically (Tracey, A. e-mail correspondence 10 June 2008). But as Thram writes, "It was there, working with *Karanga* labourers in the tobacco fields, that he learned their language and developed his fascination with the social value of their music and folklore, and the ways it functioned in their daily lives" (Thram 2004:2).

In 1929, Tracey travelled approximately 800 kilometres to Johannesburg, South Africa with a group of fourteen⁴⁸ of the young *Karanga* men from whom he had

⁴⁸ H. Tracey, (1973:3), states that fourteen young men undertook the journey but later (1973:8) states twelve.

learned his first songs. According to Andrew Tracey (e-mail correspondence 10 June 2008), they travelled on his open trailer made from the chassis of a model T Ford, pulled by his model A Ford he called the “Camel”, the same outfit he used in his first research trip. The musicians included Babu, a Karanga farm labourer who became Tracey’s closest friend and personal assistant during his stay in Rhodesia. Tracey funded the trip himself and it was the first time most of the men had travelled beyond the borders of Southern Rhodesia. Tracey’s son Andrew (interview 1 June 2007) recounts a wonderful story from this journey when the musicians, who were housed close to the University of the Witwatersrand, a short distance from the Johannesburg Zoo, complained to Tracey that they could not stay in their current accommodation as it was dangerous because they had heard the lions roaring during the night. On this trip to Johannesburg, Tracey produced the earliest professional recordings of Rhodesian music stating that, “These were the first items of indigenous Rhodesian music to be recorded and published” (Tracey, H. 1973:3). The recordings were published by the Columbia Gramophone Company in 1930 under their Regal⁴⁹ label. Unfortunately only ten items remain from this historical recording session and are preserved in the ILAM archive.

Despite the fact that Tracey was self-trained as a researcher and not an academic, he was convinced of the importance and value of the music to which he was exposed. When he visited the Royal College of Music in London in 1931, Tracey was encouraged by composers Ralph Vaughan Williams (1872-1958) and Gustav Holst (1874-1934) to discover and record. Vaughan Williams and Holst were part of a movement of artists who feared that traditional songs and dances in England would die out and therefore spent time song-hunting in the English countryside in order to document the music (Hindley 1987:450). They were therefore supportive of Hugh Tracey’s efforts in southern Africa. Thram (2004:3) writes, “They advised him to carry on with the collect and classify aspect of his work, accumulate recordings and as much documentation of indigenous forms as possible, and let the transcription and analysis come later.”

⁴⁹ Regal started as a budget product and was introduced in May 1914. The label was taken over by EMI in 1932 (Thomas 2006 [online]).

To this end he managed to secure a Carnegie Fellowship grant to study the "background of the music of Southern Rhodesia" (Tracey, H. 1973:3.). He undertook this field work between June 1932 and July 1933, producing his recordings with a clockwork-powered, portable machine which ploughed a groove into an aluminium disc (Tracey, A. interview 1 October 2007).



Hugh Tracey's field trip into Central Zimbabwe – crossing the Devuli River (1932).

Picture supplied with permission from ILAM.

Tracey (1973:8) noted that in 1973, 159 aluminium discs from his first field recordings (including approximately 600 items) were preserved at ILAM (Roodepoort) and included *Karanga*, *Zezeru*, *Korekore* and *Ndau* music⁵⁰. The aluminium discs unfortunately deteriorated rapidly and oxidized but magnetic tape copies of the remaining discs were made and are still housed at ILAM in Grahamstown today (Tracey, A. interview 1 October 2007).

Because of technological constraints it was not possible to make copies of these early tracks and Tracey travelled to South Africa in 1933 to make other recordings using sixteen Karanga musicians (most of whom had been involved in the initial recording). The journey by train from Fort Victoria⁵¹ to Cape Town was essential to make use of the temporary visit of British recording engineers as "no efficient recording equipment was installed anywhere in South Africa and all master recordings had to be

⁵⁰ All these languages are Shona dialects, although Ndau is almost a language of its own. Hugh Tracey always recorded mbiras where possible, but all other types of music as well as stories, games, rhymes and dances (Tracey, A. e-mail correspondence 10 June 2008).

⁵¹ Fort Victoria is now called Masvingo.

made by a professional team of engineers sent out for the purpose from England" (Tracey, H. 1973:8). The turntables used by the English engineers were hand driven by manually wound gravity weights because electrically-driven motors were deemed unreliable (ibid.).

Although the white South African public at the time showed little or no interest in African music, recordings led the way for further academic study of "folk music" in southern and even Central Africa in the years to come (Tracey, H. 1973:3). Due to this indifference and the limited commercial value of African music, no further research funds were made available to Tracey. Without funding to carry on with his field recordings in Southern Rhodesia he moved to Cape Town where he began work as a recording engineer, producer and announcer for the African Broadcasting Corporation (ABC)⁵². There he gained experience on out side broadcasts using telephone lines and was recognised as a pioneer in the field once he moved to Durban and became head of the Durban division of the South African Broadcasting Corporation (SABC), from 1934-47 (Tracey, A. e-mail correspondence 10 June 2008).

During the twelve years that Tracey worked for the SABC, he pioneered many initiatives which may have been deemed provocative in a politically and culturally conservative South African climate. He introduced a Zulu language report of war news in 1941, and aired the first musical play of a Zulu folktale, *Chief Above and Chief Below* thus giving voice to local black artists (Gunner 2000: 224). According to Thram (2004:3) it was during his first year in Durban that Tracey initiated the earliest Zulu Ngoma Dance Competitions as an incentive for migrant labourers to continue with their indigenous dance practices. Although he certainly carried out research, was a leading figure in the development of the competitions of the Zulu Ngoma dance practice and produced *Ngoma, An Introduction to Music for Southern Africans* (1948), Tracey's involvement appears to have come about after the dance competitions' inception which casts doubt on Thram's use of the word "initiated". Marks (1989:232) claims, in her article about the politics of Zulu ethnic consciousness that the first dance competitions came about in Durban in 1933.

⁵² At this stage the South African Broadcast Corporation was known as the ABC (Africa Broadcasting Corporation) (Tracey, A. e-mail correspondence 10 June 2008).

Although this date is disputed it is clear that Tracey developed a passion for the dance competitions and the promotion of African music. He writes,

...for the next twelve years I took up broadcasting as a profession, taking every opportunity of introducing the elements of African music to the South African and other radio audiences. At the time the public showed little interest in African music and did not understand why I constantly stressed the social and artistic value of the music for future generations of Africans (Tracey, H. 1973: 3).

In 1939, Tracey organised a short recording tour of Zululand. Although Andrew Tracey (e-mail correspondence 10 June 2008) is unsure of who paid for the trip when questioned about this point answered, "I don't know (who paid for the trip), but would presume it was the SABC because he was head in Durban, and was busy introducing the country's first broadcasts in Zulu, and in Indian languages. The few photos that exist show what looks like SABC vehicles in the picture." While Director of the Natal Studios of the SABC, Hugh Tracey was responsible for many similar recordings made for the Corporation (1973: 8). He was using acetate discs (many still readable) to record the music and Andrew Tracey (1998) writes, "When listening to these recordings one marvels at their quality, remembering the conditions under which they were recorded and the state of electronics of the period" (Liner notes *Historical Recordings by Hugh Tracey Series*).

During 1940, Tracey funded his own trip to Mozambique where he researched and documented the Chopi *Timbila* xylophone orchestras of the region. The resultant publication entitled *Chopi Musicians, Their Music, Poetry and Instruments* published by Oxford University Press (1948) is one of his most respected works.

By 1946 Tracey (1973:4) was convinced that serious research and documentation was needed to "... (appraise) the social value of authentic African music." He left the SABC one year later, and together with Eric Gallo (1904-1998), of Gallo (Africa) Limited, established the "African Music Research Unit" based in Johannesburg. In the same year Tracey began the construction of the Gallo record factory which also served as the African Music Research Unit headquarters on land in Roodepoort that Eric Gallo had set aside for this purpose. According to Andrew Tracey (interview 1 October 2007), his father lived on the Gallo estate where the headquarters were built (which he called *Msafo*, Chopi for music festival) from the late 1940s until ILAM (Roodepoort) was completed in 1955. According to Tracey (1973:4), "... (Gallo) made

the next part of my research possible, by providing not only headquarters from which I could work but also the financial support for my preliminary expeditions into the more remote regions." Gallo undertook to press and publish suitable recordings from Tracey's field expeditions and so several hundred shellac discs were issued, the bulk of which were produced between 1947 and 1954 (Thram 2004:4). These discs are 78rpm coarse groove mass-replicated discs and although fragile do not suffer from many preservation problems except for degeneration with excessive use (Schuller 2004:17). ILAM is in possession of these discs which consist of over 1350 songs and music in 102 dialects. These musical items (or tracks) appear in the *Sound of Africa* L.P. Series, recorded by Hugh Tracey between 1948 and 1970.

In a document supplied by Rob Allingham, current Gallo Archivist and manager, Tracey writes of the goals and aims of the "African Music Research Unit" (n.d.),

... (At our) Research Headquarters, Recording Studios and Offices ... the Research Unit will work during the six months of the rainy season. This period will be devoted to the study of industrial and mine labour recreation as well as the music of detribalised Africans along the Reef. The other six months... will be spent in the country, recording genuine indigenous music, dancing and other arts, taking the various tribal areas in turn.

His thorough documentation and dissemination practices are noted when he continues,

After each expedition our knowledge will be consolidated at our Headquarters, textbooks, gramophone records and films prepared for publication and filed in a properly organised archive, and those items which warrant publication will be issued either in general or limited educational releases by our sponsors, Gallo (Africa) Limited.

In 1948, together with Winifred Hoernle (1885-1960), Tracey established the *African Music Society*⁵³ with the goal of discovering "...the disciplines and foundations of African artistry for future generations to build on" (1963:5). In order to report on the research undertaken by members of the *African Music Society*, Tracey edited a newsletter until 1955 when he launched the journal, *African Music*.

With the advent of tape in 1949, Tracey started using one of the first models of a studio EMI tape recorder. He comments that not only was the machine very cumbersome and that a dome had to be fitted onto the recording truck in order to operate and fit it in (1973:10), but also that, "It was not yet certain at that time that magnetic tape recordings would retain their quality over the years" (1973:9). During

⁵³ Nketia (1998:53) incorrectly claims that the *African Music Society* was established in 1947.

this time Tracey undertook a recording trip to Uganda in 1950 and again in 1952. While on the latter, he travelled through Northern Rhodesia (now Zambia) to Rwanda and the Belgian Congo (currently called the Democratic Republic of the Congo) where he recorded various styles of music including: music from rituals used to praise and support the kings of the *Ganda*, *Nyora* and *Ankole* people of Uganda, *Kalimba* and *Kalimbu* songs from Northern Rhodesia and *Mbuti* pygmy singing from the Belgian Congo (Cliff n.d. [online]). It was in Jadotville that Tracey and his second wife Peggy were introduced to and first recorded music by the legendary Jean Bosco Mwenda, also known as Mwenda wa Bayke (1930-1990). It was due to these initial recordings that Mwenda went on to be recognised as a legendary Katanga guitarist (Kubik n.d.:14).

Tracey's book, *African Dances of the Witwatersrand Gold Mines* (1952) was the culmination of the field research that he conducted at mining compounds in the Johannesburg area. In it photographs by Merlyn Severn, of traditionally dressed dancers engaged in various performances, are presented with meticulous notes on the specifics of performance. The diverse dances, particular ethnic groups, geographic regions and origin of each genre are identified and provide an example of Tracey's thorough documentation methods. Thram (2004:3) maintains that his work with mine labourers was an example of, not only his preservationist, but also "community outreach goals". Mark Hudson (2001), however, suggests that Tracey's involvement with inter-tribal dance competitions gave credence to South Africa's apartheid "divide and rule" policy. Veit Erlmann reports a less than favourable reaction by Durban Ngoma musicians to the proposed building of a commercial Ingoma Competition stadium in the mid 1930s, saying,

...(there was) some disquiet among a great number of ingoma dancers led by Mameyiguda. Apart from being an acknowledged dance leader, Mameyiguda was much in demand with the Durban broadcasting studio...(he) was thus well aware of his own commercial prospects and suspicious of moves to build the arena (1989:269).

Mameyiguda may well have been worried about his commercial prospects because Tracey's idea of building an arena made the competitions accessible to many more performers and thus created competition for his troupe. Competition dancing became popular and in the late 1940s mine-dance arenas were built in Johannesburg, using Hugh Tracey's design of the Ingoma Competition Stadium, with the first one built at CMR (Consolidated Main Reef) mine. I believe, like Thram, that Tracey's intentions

were research and outreach based. There is no documentation to suggest that Tracey had any involvement with the apartheid government of the time or that he coerced mineworkers into performing for these purposes. His son Andrew notes (interview 3 August 2007) that Hugh clearly explained his reasons for recording the music and dance to the performers. However, the Mining Industry of Southern Africa gave Tracey a substantial grant in 1954 which might suggest that they, at least, thought that he was providing a service to the industry and thus the apartheid regime by providing a form of entertainment to the “restless” workforce.

By 1953 it transpired that Gallo could not continue to fund Tracey's research and the *African Music Society* independently. Gallo maintained some support for Tracey however, by providing ‘various facilities’ through Gallo Records that included the use of the base of the record pressing-facility in Roodepoort which could continue to be used as headquarters for future development and research. During that same year, Tracey went on a lecture tour of several universities in the United Kingdom⁵⁴ that included an appearance at the Royal African Society in London. This resulted in a generous grant in order to set up a non-profit research organisation. On his return, the grant was doubled by the Mining Industry of Southern Africa and by mid-1954 the International Library of African Music, in cooperation with Gallo (Africa) Limited, was born (H.Tracey 1973:5).

The International Library of African Music – Roodepoort (1954-1977)

During Tracey’s lifetime, ILAM remained on the Roodepoort premises and it is there that the archive and research centre became well known. Hugh Tracey wrote,

Since that date the library has undertaken its own publications, provided headquarters for the African Music Society, edited and issued the annual journal *African Music* and has continually endeavoured to bring to the attention of the music world the cultural importance of this aspect of folk music and the potential genius of African musicians in their own right (1973:5).

In 1958, with the advent of LP technology⁵⁵, Tracey began the publication of his *Sound of Africa Series*, one hundred of the LPs being ready by 1960. With funding a constant worry, it was a relief to Tracey that he was invited by the United States State

⁵⁴ After consulting Andrew Tracey and searching documentation at ILAM, no confirmation could be obtained about which universities Hugh Tracey visited during this trip.

⁵⁵ The first Long Playing Record was produced on June 21, 1948 but it was not until 1950 that the invention was problem free (Penndorf 2001 [online]).

Department to visit America to lecture to a large group of universities that had African Studies programmes. As a result of this visit the Ford Foundation awarded ILAM a grant that enabled Tracey to publish a further one hundred LPs for the Series from materials that had already been collected. Later, the Ford Foundation granted ILAM a second sum which allowed Tracey to give the full set of two hundred and ten LPs to sixty selected universities throughout the world (Tracey, H. 1973:5). This had a major impact on ILAM's standing as a centre of research and established the archive's international reputation.



Hugh Tracey at ILAM Roodepoort, Msaho (1960s).

Picture supplied with permission from ILAM

Continuous advancement in technology led to many changes in the equipment that was used over the latter recording period of Tracey's lifetime (1950-1970). A new Phillips magnetic tape recorder was purchased, printing onto acetate test pressings, and then a Danish Lyrec which recorded the majority of the music available on the *Sound of Africa* Series at 15 ips (inches per second). This was followed by a Nagra Tape Recorder and finally a Stellavox Stereo Portable Transistor Recorder, which weighed just over 9 pounds and was operated by a torch battery. This improvement is impressive when one reads of the difficulty Tracey had during the earlier years of supplying electricity for the recording equipment,

We had...to provide our own electricity and this demanded a trailer with a 240 v. 50 cycle generator, a total weight of about half a ton. To this power supply I fitted a double silencer and a 100 yard long line so that it could be placed out of ear-shot behind an anthill or hut (1973:10).

Tracey also released the *Music of Africa Series*, a collection of selected items from the *Sound of Africa Series* intended for more general use. The *Sound of Africa Series*, still of great value to scholars of African music is a comprehensive collection of music from his field research in Central, East and Southern Africa that Tracey intended to be used for research and educational purposes. Throughout his lifetime he continued to work on dissemination and preservation methods to protect and conserve what he called the “real, genuine” African music for future generations of Africans and humanity as a whole. Thram elucidates,

To this end he formulated his “Codification and Textbook Project,” a grandiose design for the recording, classification, transcription, and publication of teaching materials of indigenous music from the whole of the African continent, to be accomplished over a 10 year period (2004:6).

In 1966 Tracey travelled to various African universities in order to gather support for his project, but it wasn't until 1969 that he published, with Gerhard Kubik⁵⁶ and Andrew (who joined his father at ILAM that year), an extensive guide to the project. It was his vision that recruited scholars from various African universities would research and record, classify and analyse different forms of indigenous music in their areas. The resultant music and data would be sent to ILAM, Roodepoort and the outcomes of the research would be published as textbooks, specific to each region. Tracey writes of the proposed archived recordings,

The Library (ILAM), which is a non-profit organisation, will also be responsible for all business arrangements concerning the pressing of discs and publication of the recordings of representative items of music submitted by each team. Four record pressing factories at convenient centres throughout Africa and one in Europe have already been approached and have expressed their willingness to undertake the work (1969:13).

Unfortunately, funding problems due to boycotts in the then apartheid South Africa meant that the “Codification and Textbook Project” never materialised (Thram 2004:6). Although disappointed, Tracey continued his large output of work and in 1973 he published a two volume catalogue to the *Sound of Africa Series*. This comprehensive work was the last major project Tracey undertook before he died in 1977 at the age of 74. His son, Andrew took over as director of ILAM and in 1978 moved the archive and library to its current premises on the Rhodes University campus in Grahamstown, where the family felt the holdings would be safer because of

⁵⁶ Gerhard Kubik (b. 1934), is a cultural anthropologist with extensive field work experience in Africa.

the political instability in South Africa at the time. According to Andrew Tracey, ILAM had been suffering for many years due to South Africa's pariah status in the world. He writes,

It had become impossible to raise overseas funds, which up to that time had been our chief support. If we had not moved to join with a larger institution we would have had to close down (e-mail correspondence 10 June 2008).

After canvassing several universities, Rhodes responded positively and ILAM had a new home.

Recording Tours 1948 – 1970

Tracey's 19 recording tours, which culminated in the publication of the *Sound of Africa* and the *Music of Africa* Series, were undertaken between the years 1948 to 1970. In an early document to Eric Gallo (n.d.) Tracey, lists his research objectives as being:

1. To record as wide a range as possible of African country music to preserve it from extinction.
2. To examine African Music critically and to compile works of reference upon its theory, so that in future it may be taught in schools with the same facility as European music.
3. To make a thorough study, by means of the many thousands of gramophone records we intend to record, of the tone system in African languages in conjunction with authorities in Universities and elsewhere.
4. To make the music of all the African people available to Africans both on records and on paper. At present they know only the music of their own small districts.
5. To make every practical use of the natural genius for music and other indigenous recreations not only in the country but in town locations, Mine Compounds and industrial communities.
6. To improve and, where desirable, to manufacture instruments which are capable of propagating and improving the natural music of the African people.
7. To publish books on the artistic and musical aspects of native life.
8. To apply our subject to future problems of town planning with regard to Native Locations⁵⁷, Industrial Compounds and Institutions.
9. To establish Schools of African Music where the national genius will receive its proper recognition on a thoroughly scientific basis.

Although some of his research intentions were never realised during his lifetime, Tracey's field trips were embarked upon with the meticulous intention to fulfil them all. His passion for the end-goal never dimmed.

Conditions in Central and southern Africa over this time varied considerably but as Tracey writes, "Each (trip) had to be done during the season when travel was possible

⁵⁷ The vocabulary used belongs to a previous era and should therefore not be misconstrued as derogatory towards any people.

by road and not during the rains when flooded rivers and mud made progress impossible” (1973:10). Preparation, including governmental permission, packing of delicate recording instruments, hiring of personnel and plotting of routes had to be undertaken with painstaking care. Vehicles had to be equipped to manage treacherous terrain, multiple break-downs and camping gear, while food supplies and drinking water had to be carefully packed in order to ensure a reasonably comfortable time in the field.

Trucks to carry the gear had to be carefully arranged. A complete list of essential transport is recorded on the second page of a document sent to Eric Gallo concerning the “African Music Research Unit” (See Appendix 2). Two field consultants, Sam Shabalala and Daniel Mabuto, remained faithful companions and assisted with the majority of the research trips that Tracey undertook during his time as director of ILAM. However, Andrew Tracey remembers how his father had problems with personnel over the years. He reports how Hugh (and he himself) struggled to hire qualified sound engineers who could both handle the rigours of research in Africa and perform a competent job. Andrew says, “Recording engineers were a problem: either they couldn’t handle living in Africa or they were terrible engineers” (Tracey, A. interview 1 October 2007).

Recording Technique and Documentation

Tracey’s recording technique according to his son Andrew, a field research expert himself, “was extraordinary” (interview 1 October 2007). Hugh would listen to a song first to hear the music cycle in order to ascertain where the end would naturally occur and how the recording apparatus would pick up the balance. Once this was determined he would place or move the performers if necessary and hand-hold the microphone throughout the recording. This technique enabled him to modify the focus to different instrumental or vocal parts when the soloist changed and in that way highlight the focal point of the performance (ibid.). Tracey himself writes that placing a microphone on a fixed stand would not have worked in the field as many performers would never have related to the recording equipment. He also emphasises that too much movement of the microphone could create a false impression and to that end would try to record the music in such a way so as to reflect the song in the way the performers themselves would hear it (1973:11). During the recording of his last

projects (such as the music of Princess Constance Magogo), Tracey used two microphones to make a stereo recording which separated various parts of the total sound and helped considerably with the analysis made afterwards. He concludes however that, “Experience and a thorough knowledge of the formal structure of the music are the best guides” (1969:33).



Hugh Tracey recording male singers in Namibia (n.d).

Picture supplied with permission from ILAM

This lifetime of experience was collected throughout 19 field trips which he undertook from 1948 to 1970 (See Appendix 3). In his booklet describing the *Codification and Textbook Project* (1969), Tracey uses this vast experience in the field to describe how a researcher should go about preparing for a field trip and clarifies this in his section on “Guidelines to Field Work” (1969:21). His chapter entitled “Making Contact with Performers” (1969:18) discusses his view on how to go about meeting musicians and lists paragraphs of well-worded advice. Tracey’s second wife, Peggy describes a different situation however, and comments about how they met Jean Bosco Mwenda in 1952. After asking the District Commissioner in Jadotville to tell them about musicians who they could record, she writes,

Later on my husband and I went for a walk in the streets of Jadotville and saw a young man sitting on the pavement who had a guitar. He must have heard that

Mr. Tracey had arrived to record musicians on tape; because he stood up and immediately greeted us...I asked him what he could play. He replied in French: “*Je peux tout jouer!*” (I can play everything)...Hugh then suggested that he should come at a certain time to the hall where he was going to record all the musicians later that day (Tracey, P. in Kubik n.d: 14).

Peggy accompanied him on many of his field trips and assisted him with the data capture on the field recording cards. Local interpreters were often used to help and Hugh observed,

The quality of the interpretation varied from brilliant in a few cases to nil in others when one was forced to do the best one could, relying on past experience, an accumulated glossary of musical terms and direct observation (1973:11).

The recording of detailed information on the field cards remains one of Hugh Tracey’s greatest legacies and is now the source of the meta-data being captured in the ILAM Cataloguing and Digitising Project. In both his *Codification and Textbook Project* (1963:35) booklet and the *Librarians’ Handbook* (n.d.: 6-8) Tracey carefully outlines essential categories that he deemed important to document. He lists the following which appear on each ILAM field card:

Title of Item	Date
Translation of Title	Item Number
Type of Performance	Tape Number
Accompaniment	Duration
Name of Performer	Speed of Tape
Origin of Item	Measurement of the Scale
Language	Photograph No.
Name of the Composer or other traditional origin	Translation No.
Where recorded	Transcription No.

CODE NOS.	Type 20.12	Class TAM	Accompaniment —
TITLE	Tula, tula. (H)		
TRANSLATION OF TITLE	Hush, hush.		
TYPE	2 Lullabies.		
ACCOMPANIMENT	—		
PERFORMER	Iris MJEKULA		
ORIGIN OF ITEM	Peddie District, Ciskei, E. Cape, South Africa.		
REMARKS	<p>(before like a colored woman)</p> <p>a) The singer changed changed the tune to a European one half-way through - ^{Her} Baby co-operated well -</p> <p>b) The second tune was sung by a woman in traditional costume - The same baby, held in its mother's arms, was too charmed by the song to cry, so had to be tickled + patted into co-operation -</p>		
RECORDED BY	H.T.	ADDRESS	

Hugh Tracey's handwriting on an original field card from 1957.

Supplied with permission from ILAM.

Each category is self-explanatory, but the detail of the documentation is important to note. Tracey made a point of recording the performers' details. He lists appropriate personal details that should be noted as follows:

- a) The name of the performer, the performing group, or its leader.
- b) Sex and approximate age.
- c) The ethnic group of linguistic origin of the performers...
- d) The name of the *home* (his emphasis) village or district...
- e) The present address of the performers so that contact can be made with them again (1969:38).

His two-volume *Catalogue of the Sound of Africa Series* is a detailed testament of the performers and musicians that he recorded and Tracey's prescience has proven invaluable in the context of this research (see Chapter 5) and for future projects that ILAM is planning to embark upon (see Chapter 6). This insight into, and dedication to scrupulous preservation makes ILAM's holding invaluable in South Africa's current atmosphere of heritage regeneration because the archive contains aural (recordings), physical (instruments) and documented (field-cards and photographs) details from performances and can therefore thoroughly inform future researchers and general listeners. However, Tracey could not ensure that all information was complete or correct. He explains,

The name of the original composer of a piece of African music is rarely known. Most melodies in an aural tradition are, in fact, adaptations of previous times. However, musicians frequently claim to be the original composer, whereas in fact they are only the aural arranger of a particular version of a well-known style of music (1969:39).

He continues however to note that,

When an original composer's claim proves valid, then his full name and address should be noted so that he may benefit from his original work, should it be published (ibid.).

Indeed Rob Allingham notes that "Hugh himself clearly recognized those minority instances where he recorded songs that were clearly created by the individual performer and that is how the likes of Jean Bosco Mwenda and August Musarurwa⁵⁸ came to sign proper deeds recognizing them as the composers of their songs" (e-mail correspondence 24 July 2007).

Owing to the quality of recording and documentation that took place during Tracey's lifetime, the published material emanating from ILAM has always been of a high standard, for both scholars and recreational listeners and readers alike. The transfer to CD format of the *Sound of Africa* and *Music of Africa* LP Series produced from Hugh Tracey's field recordings, along with Michael Baird's *Historical Recordings* Series has led to much of Tracey's original work being more readily available for reasons other than educational ones. This commercial use of the tracks makes the current ILAM organisation liable for royalty payments to, not only the few original composers that Tracey came across, but also to the performers concerned. This is a complicated process and the aim of this research project is to determine equitable solutions to ensure a moral and legal outcome.

The International Library of African Music – Grahamstown (1978 – current)

As mentioned previously, soon after Hugh Tracey's death ILAM was moved to premises on the Rhodes University Campus. His son, Andrew (Director of ILAM from 1978-2005), negotiated the move to Rhodes University in order to safeguard the collection and the University received ownership of ILAM's holdings, excluding the instrument collection, which remains on permanent display at ILAM but is owned by the Tracey family.

⁵⁸ The Bulawayo band leader, August Musarurwa, of the *Cold Storage Band* is the composer of the hit *Skokiaan*, recorded by Hugh Tracey, in the early fifties and promoted by Gallo (Tracey, A. e-mail correspondence 10 June 2008).

Andrew Tracey's contribution to ILAM and the development of African music studies should not be underestimated. Having graduated from Oxford in 1959 with a Pass Degree⁵⁹ in Modern Languages (French, German) with Social Anthropology he returned to South Africa to join his father (Tracey, A. e-mail correspondence 10 June 2008). His promotion of the continued practice of African music as performed in its original environment has inspired many students. His efforts included the creation of the Ethnomusicology Symposium and Jamboree from 1980 to 2004. This was a forum for research papers which were presented (and subsequently published by ILAM) by various academics and students and African music and dance groups were invited to perform at the Symposium Jamboree concerts.



Hugh and Andrew Tracey recording a Hera mbira player, Nyungwe, Mozambique.

Picture by Volkmar Wenzel, supplied with permission from ILAM

After Andrew Tracey raised the necessary funds from the private sector⁶⁰ for a purpose-built building and its subsequent construction, ILAM moved to its current

⁵⁹ A Pass Degree from Oxford matures into a Master's Degree after a certain number of years (Tracey, A. e-mail correspondence 10 June 2008).

⁶⁰ Donations were made by Mr Alan Byrd of Harmony Trust; The Chairman's fund of Anglo American and de Beers; Gallo (Africa) Limited; Johannesburg Consolidated Investment Company limited; The Stella and Paul Loewenstein Trust; The Anitha and Ruth Wise Trust and Desmond Niven of the Robert Niven Trust. Andrew Tracey (e-mail correspondence 10 June 2008) writes, "The first and biggest donor was the Harmony Trust in Durban, which came about as a result of an old family friendship with artist Eric Byrd, who had done the illustrations for HT's book 'The Lion on the Path'. His cousin Alan

location on Rhodes Campus in 1991. The current premises consist of a reception area, library, sound studio, production room, a lecture/workshop room, two offices and a temperature controlled archive. The archive holds, along with Hugh Tracey's recordings and photographic collection, field research deposits by Andrew Tracey from his research on *Chopi* and *Shona* music from Zimbabwe and Mozambique respectively as well as recordings of Xhosa music from the Eastern Cape by Prof. Dave Dargie⁶¹ (Thram 2007:2).

Since 1999, ILAM has provided academic courses in Ethnomusicology⁶² and practical training in African music at undergraduate and post-graduate level. This training takes place through the Rhodes University Department of Music and Musicology and is currently run by Prof. Diane Thram, ILAM's present Director. In addition to this, ILAM's current projects include the digitising of the documents and ephemera of Hugh Tracey's career plus all of his sound recordings archived at ILAM with funding from the South African Music Archive Project (SAMAP), the Rand Merchant Bank Expressions Fund and the Mellon Foundation, the digitising of the ILAM photograph and film collections, the editing and publishing of *African Music*, ILAM's accredited journal, and various community-outreach projects with local musicians and schools (Thram 2007:2). Every three months ILAM holds an open concert in the amphitheatre where local music and dance from Grahamstown and the surrounding areas (including performers from as far afield as Fort Hare University) is presented and recorded. It is initiatives such as these that will ensure that ILAM remains integrated and involved in the growing performance culture of the Eastern Cape.

Conclusion

These present undertakings described above are vital to the growth and survival of an archive such as ILAM where access to information by all levels of society is the ultimate goal. In undertaking this objective, ILAM faces many hurdles: legal,

Byrd had founded the trust. The whole cost of the building was about R500 000 and the architect was Jan van Heerden, the university architect at the time and father of Rick van Heerden."

⁶¹ Professor Dave Dargie was the former H.O.D. of music at the University of Fort Hare and wrote the seminal book *Xhosa Music* (1988).

⁶² These include classes on World Music and Culture; ethnomusicological theory; ethnomusicology research and field work and postgraduate research projects.

logistical and financial. Continued investigation by researchers and students adds to the body of knowledge needed by professional institutions to engage in forward thinking and to embark on contemporary projects that keep their facilities up to date. To this end, the following investigation of the copyright implications of Hugh Tracey's recording and documentation practices does not intend to discount his contribution to the study of African music, but rather to enhance the manner in which his field recordings can benefit the communities from which they originated, the academic community, the general music listener and the International Library of African Music itself.

In order to clarify these and other intricacies of the South African Copyright Act 98 of 1978 that pertain to archives and in an attempt to resolve some of ILAM's current copyright issues, I have analysed a digitising and supply contract signed between ILAM.DIG (The International Library of African Music Digitizing Project) and the Smithsonian Institute's Global Sound Network (GSN) in 2001. Although ILAM is a co-signatory to the contract, written permission had to be granted by the Smithsonian Institute in order for this research to take place⁶³. The research will concentrate on this contract signed between ILAM and the Smithsonian Institution, with comments made about the negotiation of the second contract, taking place during the course of 2008.

Chapter Five

⁶³ This was at the insistence of the Smithsonian Institution.

The 2001 GSN/ILAM Contract



Women sitting outside a Xhosa hut, Eastern Cape (n.d).

Picture supplied with permission from ILAM.

With a grant from the Rockefeller Foundation⁶⁴, Smithsonian Global Sound received funding to establish the Global Sound Network⁶⁵ with the intention of creating an e-commerce website to sell or license the use of recordings from participating archives, *inter alia*, ILAM and the India-based Archives and Research Centre for Ethnomusicology (ARCE). ILAM and the ARCE were the two archives chosen as the participants to receive funding from the GSN Project. The Smithsonian Centre for Folklife and Cultural Heritage states that its objective for establishing the Global Sound Network (GSN) is to:

⁶⁴ “The Rockefeller Foundation was established in 1913 by John D. Rockefeller, Sr., to “promote the well-being” of humanity by addressing the root causes of serious problems. The Foundation supports work around the world to expand opportunities for poor or vulnerable people and to help ensure that globalization’s benefits are more widely shared” (http://www.rockfound.org/about_us/about_us.shtml, accessed 14 June 2008).

⁶⁵ When the Smithsonian Institution negotiated the 2001 contract the organisation was known as the Global Sound Network (GSN). It is now known as Smithsonian Global Sound (SGS) and found at www.smithsonianglobalsound.org. Because the GSN/ILAM Contract names the two parties involved as ILAM and GSN, however, for purposes of this research the names will remain as stated in the initial contract.

...preserve and digitise the collections of select audio-visual archives around the world, provide long-term income to such archives, support traditional arts by providing a heretofore unavailable royalty stream, and create a resource for scholars, interested public, and businesses for access to high-quality, well-documented audio/visual recordings which have been cleared for both research and commercial uses (Smithsonian GSN/ILAM contract 2001:1).

As an archive with an established infrastructure, ILAM was contacted by Anthony Seeger (former curator of Smithsonian/Folkways Records) and Jon Kerzer from Smithsonian Global Sound Network to join their project in 2001. After 11 months of negotiations with Prof. Andrew Tracey, a contract was signed on 14 September 2001 licensing to GSN the use of 1000 individual selections or tracks of ILAM master recordings from the *Sound of Africa Series* as well other unspecified⁶⁶ published and unpublished material for six years (see GSN/ILAM Contract, appendix 4a-j). In exchange for the use of the 1000 tracks of music, ILAM was given a substantial grant which was dispersed over three years (29 November 2001: R 483 550, 25 January 2002: R 327 000 and 28 January 2003: R 176 600.) This grant was used to re-start the ILAM digitising project, which was begun with a grant from NORAD (Norwegian Radio) in 1998. Importantly, ILAM was also provided the rights to a royalty of fifty percent (50%) of all income received by Smithsonian from sales and/or for the use of any of the tracks provided (GSN/ILAM Contract 2001: section 3b).

As described in the previous chapter, other compilations of music have been assembled at ILAM. These include tracks from the *Music of Africa LP Series* (25 LPs) and the *Historical Recordings by Hugh Tracey Series* (a 22 CD series) published by Stichting Sharp Wood Productions (St.SWP) from 1998-2008, as licensed to Michael Baird⁶⁷ for a period of 5 years by ILAM in September 1998 and renewed for another 5 years in 2006 (Baird, e-mail correspondence 21 July 2007). Although beneficial to both parties, the contract between Stichting Sharp Wood Productions and ILAM adversely affected the negotiations that took place between the GSN and ILAM in 2001 because of licensing details that ILAM bound itself to without fully considering the implications.

Licences

⁶⁶ The contract did not specify exactly which tracks would be used.

⁶⁷ Michael Baird is the owner of SWP Records, a small independent record label based in The Netherlands. Born in Lusaka, Zambia in 1954, he is also a drummer, producer and composer (http://www.swp-records.com/pages/index_html.html, accessed 14 June 2008).

In terms of section 22 of the Act, a copyright licence is a contract that the owner of the copyright enters into with a third party to allow the third party rights to the owner's intellectual property. In other words, although the copyright owner remains the holder of the rights, he allows the licensee to exercise that right (Dean 1988:77). There are two types of rights that can be licensed: an exclusive and a non-exclusive right.

At the outset of the negotiations of the GSN/ILAM contract, the Smithsonian Institution made it clear that they wanted exclusive e-commerce rights to the tracks that they used. In the contract between St.SWP and Rhodes University (on behalf of ILAM), ILAM gave St.SWP, “the sole and *exclusive right* to use the sound recordings, photographs and information connected with the ...productions for the production (sic) of audio-mediums for the duration of this agreement” (emphasis added) (clause (6)(a)). An exclusive right or exclusive licence is,

a licence authorizing a licensee, to the exclusion of all other persons, including the grantor of the licence, to exercise a right which by virtue of this Act would, apart from the licence, be exercisable exclusively by the owner of the copyright; and ‘exclusive licensee’ shall be construed accordingly (Section 1 (1)(xxiii) of the Act).

As a result, any right that is transferred in an exclusive capacity effectively stops the original owner from using that work for the licensed purpose.

Exclusive licensing can have the unexpected effect of limiting the original creator’s other rights. Alpern explains that,

A transfer of exclusive publication rights in a particular part of the world would bar publication of a derivative work in that part of the world unless the transfer was carefully phrased to restrict the exclusive publication right to the entire work as originally written (2002:31).

The sound recordings that St.SWP contracted to utilise were not pre-selected, thus Baird, the producer of the St.SWP compilations, was given the rights to choose any tracks that he wanted in order to create his compact disc series. Therefore St.SWP had exclusive material rights to the ILAM’s entire collection until September 2003. Because St.SWP had the right to choose any tracks from the ILAM archive for their future CD compilations, and GSN had not yet chosen their 1000 tracks (in fact they intended to use many more) the real possibility existed that GSN would be prevented from using tracks despite having contracted to do so. This situation was unacceptable to the Smithsonian Institution and resulted in prolonged negotiation between Andrew

Tracey and Jon Kertzer regarding the exclusivity clause and the impact it would have on the existing contract between ILAM and St.SWP.

GSN's Jon Kerzer reported back to Andrew Tracey after discussions with the Smithsonian Institution's legal division, Richard Kurin (Director, Smithsonian Centre for Folklife), Dan Sheehy (Director of Smithsonian/Folkways) and Atesh Sonneborn (Marketing Director for the GSN website),

We all agree that we have no interest in the production of CD's or other physical versions of the music in the ILAM archive - but we do not want any restrictions placed on the access to your materials for on-line distribution - aside from the understanding that we will not package these as albums in format (similar to Sharp Wood Productions) but only as individual tracks... We would like to work with ILAM on this project, but we all feel that we must have access to as much of your holdings as possible to make our site as complete and robust as possible (e-mail correspondence 18 April 2001).

This was positive as only two weeks previously Baird had written to Andrew Tracey to inform him that he was not opposed to the GSN being granted the exclusive rights to disseminate any 1000 tracks, provided that the exclusivity was restricted to internet downloads and that none of the tracks were made available through physical media. Baird then stipulated, however, that if GSN wanted to use any of the tracks that were available on his published CD series, they were not allowed to use more than 20% of the content of one CD (Minutes of meeting between ILAM and St.SWP 3 April 2001). Smithsonian did not accept this proposal and after a week of intense negotiation ILAM and GSN came to an alternative agreement (e-mails dated between 19 April 2001 and 26 April 2001). In this agreement, it was decided that ILAM would stipulate which tracks GSN could use which would not interfere with the agreement with St.SWP and that ILAM would sign an agreement indemnifying the GSN in full for any claims against them (Kerzer e-mail correspondence 25 April 2001).

In the "grant" clause of the final draft of the GSN/ILAM contract there was no mention of St.SWP regarding the use of tracks (Smithsonian contract 2001: clause 1b). The Smithsonian Institution did however deal with the St.SWP issue in the next section of the contract under "Smithsonian-Produced Compilations" (1c). Here the contract clearly states that should any tracks that St.SWP utilised for its CD series be used on a GSN compilation, permission should be sought through sub-licensing. With these complications taken care of, the GSN/ILAM Contract granted Smithsonian the

exclusive right (emphasis added) throughout the world, to perform, display, use, copy, distribute, sublicense, sell and otherwise exploit the 1000 licensed tracks by any means other than the manufacture and distribution of physical media⁶⁸ until September 2007, (subsection (1) (ii) (b)).

Had ILAM used a non-exclusive licence in both the contracts with St.SWP and GSN, this situation could have been avoided. A non-exclusive licence can be granted to any number of persons, while the licensed material may still be used by the original creator (Alpern 2002:31). This allows the owner of the copyright the freedom to use his/her work while allowing others to also use the work. In the case of an archive such as ILAM, this would allow the institution the freedom to exploit its holdings to maximum effect while avoiding complicated legal negotiations with the various licensees involved.

Sub-licensing

A sub-licence, if approved by the copyright owner, is used by a licensee to allow a third party the rights to use the product in question. This means that although the copyright owner has no relationship with the third party, that third party has the right to use the copyright owner's property. A sub-licence is only allowed to be granted by the licensee if the copyright owner has given sub-licensing permission (Dean 1988:78). In the Smithsonian/ILAM contract, the GSN has to contact ILAM for permission to sub-licence, thus giving ILAM full control of any third party activity (GSN/ILAM Contract 2001: clause 1d). It is important to note that even if an exclusive right were granted, a sub-licence is not a certainty and every contract should clearly state exactly what the parties have agreed to.

Royalties

The term royalty refers to the financial compensation that is due to the owner of the copyright if a third party uses the work for personal financial gain. In the case of a musical work, this would mean that if reproduction, publishing, performance in public, broadcast, transmission or adaptation of the piece were undertaken royalties would have to be paid to the relevant owner (Section 6 (a-g) of the Act). In the case of

⁶⁸Physical Media: physical recording i.e. refers to LP, CD, cassette and/or other physical media (Smithsonian contract 2001:2).

a sound recording, royalties would be paid if letting, broadcasting, transmission or communication of the track were undertaken (Section 9 (a-e) of the Act)⁶⁹. The Act specifies that (9A(1)):

- a. In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording ...without payment of a royalty to the owner of the relevant copyright.
- b. The amount of any royalty contemplated ...shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their representative collecting societies.

What immediately becomes evident from these provisions is that firstly, the manner in which royalties are shared is something that needs to be agreed upon, and secondly, there is no prescribed manner to share royalties. Thus revenue sharing as described in the GSN/ILAM contract was always going to be difficult to achieve.

Revenue Sharing with Original Artists

One of the conditions agreed to by ILAM was a clause titled: “Revenues Sharing with Original Artists” (Smithsonian Contract 2001: clause 2b). Here the Smithsonian Institution required that,

ILAM.DIG use (its) best efforts to share an equitable portion of the revenues (it) receives via (the) Agreement with the respective original artists represented on Global Sound Network tracks, the respective artists’ communities, or some other organization as mutually agreed upon by Smithsonian and ILAM.DIG. For this purpose, ILAM.DIG shall dedicate at least one ILAM.DIG employee to research the identity and current residence of performers appearing in the ILAM Archive and serve as liaison to ILAM.DIG and Smithsonian on this subject. ILAM.DIG and Smithsonian shall mutually agree as to what constitutes as “equitable” portion of revenues (ibid).

The contract goes on to specify that,

Upon receipt of royalties from Smithsonian, ILAM.DIG shall promptly pay all amounts due to the person or entity that has a right to receive any royalty or other payment as a result of the transmission or other use of ILAM Archive content as contemplated by or provided under this Agreement, as soon as such person or entity has been identified (GSN/ILAM Contract 2001: section 6aii).

The contract then states that as soon as this person has or these people have been located, their share of the royalties should be paid over to them as "expeditiously" as possible (Smithsonian Contract 2001: section 6iii). From Anthony Seeger's article on the "...Shifting Ethics of Intellectual Property" (1996), it is clear that this clause follows the policy that he put into place when he took over as Curator of Folkways

⁶⁹ Section 9 amended by s.2 of Act 9/2002

Records in 1988. He writes, "I devoted large amounts of money and staff time to setting up royalty records and paying royalties on all contracts where royalties were stipulated" (1996:94).

The ILAM /GSN contract is clear: if ILAM was sure that it owned full copyright to the supplied tracks, it could retain the complete share of the royalties that were paid by GSN. If, however, ILAM was unsure of the copyright status of the tracks, it was obligated to find and notify the various performers on the 1000 tracks available on the Global Sound web-site (or their surviving family members), that they had royalties due to them. While the contract was clear on what was to be done, there was no clarity on how it was to be achieved at ILAM because the archive has no documentation regarding the copyright status of any of its holdings.

There are no records to suggest that Hugh Tracey, like many researchers who worked before intellectual property rights were common knowledge, signed contracts or made any compensation payments to the musicians he recorded. As discussed in Chapter 4, however, Rob Allingham notes that Hugh Tracey did sign royalty agreements in the case of Jean Bosco Mwenda and August Musarurwa, both of whom he clearly recognised as composers of the music they performed (e-mail correspondence 24 July 2007). Andrew Tracey notes in correspondence with Jon Kerzer (20 August 2001) that performers during the time when much of ILAM's holdings were recorded, were not considered by most researchers to own copyright of their performances. He suggests that this was because their names were not recorded and the music was held to be traditional music or communally composed, and points out that Hugh Tracey acknowledged and promoted performers and "took care of their rights in the all-too-rare cases where their recordings earned any significant income" (ibid.). Tracey's licensing of his recordings of Jean Bosco Mwenda and Arthur Masururwa to the artists is evidence to this effect.

When asked what he remembered about his father's negotiations with musicians, Andrew Tracey recalled that, "As far as I'm aware his basic rule was, don't pay." He elaborated,

It would have been quite impossible for him to pay musicians in the modern sense anyway, because he never had the money. But what he always did... is that he always made it clear why he was doing it. Not in order to make money or hit

records or anything like that, but for the sake of preservation of the music. Even in his time African musicians were aware of the fact that things were changing and that instruments were being lost and he always explained that quite clearly. There was certainly no form of pressure on the musicians to record. Mostly, especially in the early days, they were delighted just to do the recordings and to hear themselves being played back. The whole moral and intellectual atmosphere in those days was quite different from what it is today (interview 3 August 2007).

Rights Clearance

During the GSN/ILAM Contract negotiations, Andrew Tracey and the lawyers representing Rhodes University at the time were concerned that ILAM did not have written clearance from the original artists on Hugh Tracey's recordings or indeed any documentation at all regarding the copyright status of the music (Brody 2001:3). Andrew writes,

I have only my father's assurances which I often heard him state, that all performers were remunerated at the time, and that the purpose of the recordings was explained to them, i.e. that they were not for commercial exploitation, but for archive purposes for their children's future...In other words, we hold that ILAM has no legal obligations to the originators of the music, on the basis of 'work for hire', but we fully accept that ILAM has a continuing moral and cultural obligation to them (e-mail correspondence 20 August 2001)⁷⁰.

Currently the method of paying a musician a once-off fee is commonplace; particularly when producers hire session musicians. These musicians are paid at the time of the recording session for their work and by accepting payment sign away their rights to any future royalties from their performance (Section 9A(2)(d) of the Act). Hugh Tracey may have employed this manner of payment. Andrew Tracey says,

I know he did pay on certain occasions, but I can't tell you exactly what they were. I know that he often helped musicians in many ways, apart from making a payment for the recording. For instance his best known early recording was to take a group of Shona musicians, first to Cape Town and then to Johannesburg, this was in the early 30s and I don't think he paid them, but he had to find lots of money to finance the whole trip (Tracey, A. interview 3 August 2007)

Section 9A of the South African Copyright Act 98 of 1978 provides that all recordings are required to have signed agreements relating to their ownership and royalty share status. In the case of an archive this would mean that all recordings that are submitted are required to have signed agreements between the researchers and the performers and/or authors of the music. These agreements should then state whether a once off payment has been made by the researcher or whether a royalty split has been decided upon because the payment of the royalty is a legal requirement. ILAM is

⁷⁰ There is a contradiction in what Andrew Tracey wrote and then said in a later interview. When asked, Andrew explained that remuneration did not always mean payment in money but may have been in tobacco or food (Tracey, A. interview 3 August 2007).

busy compiling agreements for future researchers and musicians to use and is doing so in consultation with both the Smithsonian Institution and the ARCE (McConnachie e-mail correspondence 7 May 2008 and 11 June 2008).

Clauses 2ci and ii of the GSN/ILAM Contract state that the onus is on ILAM to determine all rights and licenses and gain performers' permission in order to authorise the use of the tracks to the GSN. In response to these clauses the attorneys acting for Rhodes University wrote,

...if the written authorisation is received from the original artists, there should be no difficulty in respect of these rights. If there is no written authorisation, then there may be an infringement of rights of privacy, copyright, trade mark and any other broadcasting rights. Infringements of such rights could expose the consultant to a possible claim of damages from the original artists, and would also result in a breach of contract in respect of the license agreement, given the fact that the onus is upon the consultant to "clear" these rights with the original artists (Brody 2001: 5).

Since there is no documentation regarding the copyright status of the tracks, the contract stipulates that ILAM is obliged to contact the performers and gain their permission for the use of the tracks. The need to get in touch with the musicians (or their descendents) was therefore twofold: to gain permission for the use of the tracks and to make them aware of their intellectual property rights. The Smithsonian Institution did not stipulate, however, what percentage of ILAM's royalties should be transferred to the performers. According to Section 9A(1)(c) of the Act, if there is no contract in place, or in the absence of such an agreement, where the copyright is owned by two or more individuals (as may be assumed in this case: i.e. ILAM and the performers), the royalty share is determined later by an independent arbitrator.

Percentage of Payment

ILAM received its first 50% royalty share payout from the GSN in 2007⁷¹. Possible solutions regarding the GSN/ILAM Contract's requirement that a share of the royalties be paid to the performers or their descendants were not discussed with the Smithsonian Institution prior to the payment. When I contacted the Archives and Research Centre for Ethnomusicology (ARCE) Director, Dr. Shubha Chaudhuri, she explained that their agreement with the Smithsonian Institution stipulated royalties be

⁷¹ This payment covered the period from February 2005, when the GSN e-commerce site was launched, to June 2006.

equally shared between the performers and the ARCE i.e. a 50% royalty split (e-mail correspondence 7 August 2007).

The royalty share of 50% of the initial profit from the sale of tracks that GSN granted to ILAM in the Contract (Smithsonian/ILAM Contract 2001: clause 3b) was exceptionally generous. It is unusual for a producer or licensee to give half of the profits to a copyright licensor. However, in both the St.SWP records contract and the Smithsonian contract this was the case. During negotiations that took place in 2007 St.SWP asked for a 80/20% split for the last three releases in *the Historical Recordings by Hugh Tracey* series, and Smithsonian (GSN) tried to negotiate for an 80/20% split, because this ratio is more in line with accepted industry standards for licensee-licensor contracts. St.SWP was granted its request for 80% of the royalties for the last three CDs of the series. However, because of its need to be as self-sustaining as possible, ILAM has decided to argue this point with the Smithsonian Institutions and has requested that the royalty payout remain a 50/50% split (McConnachie 2007 GSN re-negotiation contract).

The Public Domain

With the exception of a few tracks from recording trips such as the one in South Africa and the Rhodesias in 1957/8, a few in 1963 and the Princess Magogo recordings made in 1972, most of the published recordings at ILAM have fallen into the public domain in terms of South African law. Anthony Seeger writes, "This is a kind of well of ideas that may be used by anyone, without permission or payment, to create more new things" (2004:158). The term "public domain", however, forms what John Frow of the University of Queensland calls, "...the cornerstone of copyright law and indeed of intellectual property doctrine generally" (1997:209). Once in the public domain, commercial access to the music is a free-for-all; because if you can prove that a composition is in the public domain, you can - without prior approval from the copyright owner - arrange, reproduce, perform, record, or publish it. This part of copyright is particularly fraught with complexities and problems, especially when it relates to (or in most cases fails to relate to) the authorship of traditional music. Consider Anthony Seeger's pertinent question: "How does one copyright a performance originated by an ancestor in the distant past who may continue to live in a parallel present 'dream time' as declared by some Australian Aboriginal

communities? The 'life plus 50 years' will be difficult to agree upon across cultures" (1996:90).

As mentioned in Chapter 2, the public domain includes music in which the copyright has expired as well as other music that never qualified for copyright such as folklore and many forms of traditional music that require a specific author to meet the requirements for copyright registration. It was assumed by the authors of copyright law that all cultures share the same understanding and ideas "about the origin, control, and rights" of music (Seeger 2004:158). This is clearly not the case. As Sherylle Mills points out, "Western Law has evolved in tandem with Western Music, focusing primarily on the protection of individual property rights and financial profits. Thus traditional music and Western law clash at the most fundamental level" (1996:57). This issue and its implications for ILAM is explored in more detail in the following chapter.

Reciprocal Duration of Copyright Term

The implication of the public domain with regard to the performers of the ILAM tracks (now available on the GSN e-commerce website) is that their claim to royalties expired when their music entered the public domain. As was explained previously, in terms of the Act, copyright ownership of musical works lasts for the life of the composer plus 50 years for the composer or owner of the composition (this can be bought and sold like any property). The performance copyright, however, lasts for 50 years from the end of the year that the recording was first broadcast or commercially sold. This factor needs to be considered to determine exactly if and when various tracks from ILAM, which are available for sale via the GSN e-commerce site, have fallen or will fall into the public domain.

Public Domain and U.S.A. Law

In the United States of America, where the Smithsonian Institution is housed, copyright duration differs considerably. Their protection period has changed dramatically and has been amended ten times since 1907 (Library of Congress incomplete citation). The U.S. Copyright Act of October 1976 states that duration lasts for 70 years for works created after 1978, but works that were registered before 1978 remain under copyright protection for 95 years as a result of the Sonny Bono

Copyright Term Extension Act, which was signed into law in 1998. Because of other amendments, this means that works published in the States in 1922 or earlier are in the public domain but that works published after that will only enter the public domain in 2019 (Crews 2001:3). The ramification for archives that are located in the United States of America is that the time frame for using their holdings to generate income is much greater than in South Africa, where all musical tracks that came into copyright through publication in 1957 fall into the public domain in 2007, 50 years having elapsed.

Many of the 1000 tracks that have been provided to and sold by GSN are in the public domain in South Africa. This point raises a crucial question: if the duration of copyright is ninety-five (95) years for tracks published after 1922 but before 1978 in the U.S.A., do the ILAM-supplied tracks benefit from this amendment to the law because they are being sold there? This has become one of the more urgent questions of this research. My efforts to answer the question, “exactly how does copyright reciprocity work?” have yielded conflicting opinions from various sources. As Alpern indicates, according to the basic requirements set out by the Berne Convention,

Each country must offer at least the same level of copyright protection to works originating in other signatory countries as the first country⁷² offers to works of its own citizens (2002:6).

This should mean that the U.S.A. must offer South African works (i.e. works first published in South Africa) a minimum protection of 50 years as is required by the South African Copyright Act of 1978. The question must be posed, “Why is the Smithsonian Institute re-negotiating a contract with ILAM if the tracks are now part of the public domain and available for use by anyone?” When I asked this question of Atesh Sonneborn, Marketing Director for the GSN website, he said, “Where terms differ, Smithsonian asks that any remote licensee honour U.S. law. Our response is also in accord with widely accepted international law” (e-mail correspondence 20 November 2007). Rob Allingham, Archivist for Gallo Records, agreed with Sonneborn. He said,

Because the GSN is housed in the States, the laws of that country will influence the duration of the copyright. Thus ILAM still has many years before the GSN could use the tracks without permission and payment (interview 16 August 2007).

⁷² First country refers to the first country of publication in any form.

However, both Sarah Driver from the Rhodes Law Department and Karen Willenberg (legal advisor to M-Net) disagreed and said that their understanding of the law was that the Berne Convention stipulated that the duration of copyright should follow the policy of the country of origin. Karen Willenberg qualified her response by saying that there could be other circumstances leading to the confusion and that in-depth legal research would be necessary to reach an assured conclusion (telephone interview 28 September 2007).

Sound recordings are in fact, not covered by the Berne Convention but by the Rome and Geneva Conventions to which South Africa is not a signatory. However, the TRIPS Agreement covers sound recordings and stipulates that there is a minimum protection and a duration period of 50 years afforded to member states (<http://www.wto.org>, accessed 14 June 2008). Sound recordings by countries that are World Trade Organisation (WTO) members will be protected, therefore, and South African published recordings such as those at ILAM will qualify (Dean 2006 vol.1:90A).

In his work on the expiration of Copyright protection, Prof. Kenneth Crews from the Indiana University School of Law, Indianapolis observes that,

The determination of whether a work is in the public domain depends on an extensive array of facts, including the place of creation, the date of creation and publication, whether it is a work made for hire, and the date of the author's death. Many other facts about the circumstances of publication, notice, registration, and renewal can also be determinative. Needless to say, the issue is highly complex. Moreover, many of the basic facts necessary for a final determination can be elusive, vague, and at times impossible to find with anything comparable to certainty (2001:3)

After a succinct, detailed description of the complex duration issues that surround works published in the U.S.A., Crews writes about the restoration of foreign copyrights. Before 1996, i.e. prior to the enactment of the Sonny Bono Copyright Term Extension Act, works of foreign origin published before 1978 lost their copyright protection if they did not give copyright notice to register as required by USA law⁷³. He explains that upon accession to the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements in 1993 and 1994, the

⁷³ This has changed in the U.S.A. and, like South Africa, no notice is required to register copyright if the works are original and in a fixed tangible medium (Section 102(a) of the U.S. Copyright Act of 1976) and Section 2(1) and (2) of the S.A Copyright Act 1978)

U.S.A. had to restore this protection in compliance with the multinational agreements (2001:8). South Africa, as an adherent to the Berne Convention, qualifies for this restoration. In practice this means that sound recordings published between 1923 and March 1989, both protected and in the public domain in South Africa on 1 January 1996, will only enter the public domain of the U.S.A. on 15 February 2067 (Hirtle 2008 [online]).

The public domain section of the law is particularly difficult to research and comprehend. In practice (within the music industry) the regulations seem to be dealt with differently from what is stipulated in the law. The South African lawyers consulted both agreed with the interpretation that the South African law applies, while the industry players who actually use the law on a daily basis agreed that the U.S.A. law applies. The conclusion to this matter is that Smithsonian GSN has provisionally agreed to extend their contract with ILAM for the same tracks as stipulated in the original contract, thus paying royalties to ILAM for music that in South Africa (but not the U.S.A.) is part of the public domain⁷⁴. This follows Sonneborn's statement, "the Smithsonian corresponds according to U.S. copyright law" (e-mail correspondence 20 November 2007) and is also in accordance with the GSN/ILAM contract which stipulates in clause 15 that the agreement will be governed by U.S.A. law. Thus, ultimately the Smithsonian GSN interpretation of the international standard for copyright adherence will benefit ILAM and possibly some of the descendants of the musicians recorded by Hugh Tracey over 50 years ago.

Reporting Period

Section 3(c) of the GSN/ILAM Contract stipulates:

On a semi-annual basis, Smithsonian shall furnish ILAM.DIG with all monies owed ILAM.DIG under this Agreement and statements properly itemised by transaction. Payments and statements shall cover the previous calendar period, thus January-June and July-December. Notwithstanding the above, if the accumulated royalty payment is less than Twenty-Five Dollars (\$25), Smithsonian may defer payment until the accumulated amount reaches Twenty-Five Dollars (\$25).

As previously mentioned, the first royalty statement received from Smithsonian GSN by ILAM was for the period dating from Feb 2005 – June 2006. During the writing of

⁷⁴ ILAM and the Smithsonian Institution are still negotiating the future contract at the time of writing.

this thesis, a second sales report was received for the period July 2006 to July 2007 but there is no other documentation regarding sales.

Failed Contractual Obligations

The Smithsonian Institution is therefore in breach of the contract, because it has not paid royalties to ILAM according to the 6-month intervals stipulated in the 2001 contract. The Smithsonian Institution's financial accountant, Betty Derbyshire, explained that the delay in payment of royalties was caused by their need to sort out their system for tracking sales (D.Thram correspondence 14 May 2008) and although commented upon during the re-negotiations Thram concluded, "True, they didn't manage to pay when they said they would in the contract, but at least when they did pay they did provide the accounting of sales that is required" (ibid.). ILAM too, failed to adhere to all the contractual obligations stipulated in the GSN/ILAM contract. On 3 October 2007, Thram, Sarah Driver and I met to discuss the imminent re-drafting of the Smithsonian contract and came up with the following amendments highlighted in italics⁷⁵:

1. Section 1a (i): Term. The "term" shall run from the Effective Date until *five (5) years* after the Effective Date.
2. Section 1b: Grant. ILAM grants to Smithsonian the *non-exclusive* right throughout the world during the Term to perform, display, use, copy, distribute, sublicense (*see section 1d.*) and otherwise exploit the ILAM Archive by any means now known or hereinafter invented other than manufacture and distribution of Physical Media...etc.
3. Section 2b: Revenue Sharing with Original Artists. ILAM shall use (*its*) best efforts to share a *fifty (50 %) portion* of the revenues ILAM receives via this Agreement with the respective original artists represented on SGS tracks *where the amount is deemed sufficient to warrant the attempt. If not successful the portion, with other monies accrued where the artists cannot be located or the amount is insufficient, shall be kept in a trust managed by ILAM. These royalties will be held by ILAM and, in consultation with SGS⁷⁶, be used to fund future community-based, musical projects.*
4. Section 3b: A royalty of Fifty Percent (50%). (This clause is to remain the same, and not be changed to a 20% cut as suggested in the 2007 draft).
5. Section 3c: Reporting Period. (This clause is to remain the same on p.3 and be implemented accordingly⁷⁷). Notwithstanding the above, if the accumulated royalty payment is less than *fifty dollars (\$50)*, Smithsonian may defer payment until the accumulated amount reaches *fifty dollars (\$50)*.
6. Section 6a (ii): upon receipt of royalties from Smithsonian, *ILAM will divert fifty (50) % of the monies received into a royalty trust to be dispersed in a manner agreed upon by SGS and ILAM in the future, unless the amount owed to a specific and identifiable descendant of an artist is sufficient to warrant his/her notification, in which case the artist will receive the royalty payment.*
7. Section 6a(iii): ILAM shall use its best efforts to identify, as expeditiously as possible, all applicable persons/or entities that have a right to receive any royalty or other payment as a result of the transmission or other use of ILAM Archive content *as stipulated in section 2b.*

⁷⁵ The redrafting of the GSN/ILAM Contract took place at the request of Prof. Diane Thram.

⁷⁶ Smithsonian Global Sound

⁷⁷ This stipulates the Smithsonian Global Sound will contact ILAM bi-annually with financial statements.

These amendments have been submitted to the Smithsonian Institution by ILAM and at the time of writing there has been no response. Nevertheless, in an attempt to find a solution to the problem of locating individual copyright owners of recordings archived at ILAM, or their descendants, as a component of the research for this thesis, I conducted fieldwork and developed a proposal to launch a pilot project in the Eastern Cape (provisionally named the *Eastern Cape Music Archive Project* or ECMAP) based on the idea of benefit-sharing.

ILAM and Royalty Distribution

Although the 2001 contract between ILAM and the Smithsonian Institute has expired, problems that arose with regard to royalty distribution still need to be addressed. The Indian-based ARCE also entered into a contract with the Smithsonian Global Sound Network in 2001 in which it was instructed to contact the musicians on their recordings to inform them of their intention to pay them royalties from the GSN initiative, when the proposed e-commerce site produces sales. The ARCE is managing to fulfil this clause (Chaudhuri e-mail correspondence 7 August 2007). There are, however, fundamental differences between the two projects. Firstly, Andrew Tracey signed the contract under the notion that ILAM would supply GSN with far more than 1000 tracks. Tracey says that, "At a certain point the Smithsonian cancelled and said there was no more money because the Rockefeller Foundation... (had) diverted their money" (Tracey, A. interview 3 August 2007). He further indicated that the original plan of having a full time staff member, as stipulated in the contract, to locate and pay performers, was impossible for ILAM to manage without further funding.

In 2007 the ARCE had only 200 tracks available for on-line sale from the GSN e-commerce website. These recordings, kept at the archive in India, were collected with a clear indication of who the performers were and how to contact them. Since many of the recordings were made for the GSN project Dr. Shubha Chaudhuri, the Director of the ARCE says, "Everything on the site has been cleared with the researchers through an agreement, and we have the performers' agreement, as well as an advance payment to the performers for the first 125 downloads" (e-mail correspondence 7 August 2007). Although Hugh Tracey was a meticulous record keeper, many of his field cards for his recordings do not specify who the individuals on the recordings were,

but rather state the performers as being, for example, a "Group of Married women of Nontshinga Location" (from the GSN on-line album *Threshing and dance songs and lullabies from the Ngqika people of South Africa*). This type of generic description makes locating the performers virtually impossible. Chaudhuri further commented on the costs of fulfilling the contractual requirement to contact the performers, "We have also taken the help of researchers to contact the performers in the field. The royalties will not pay enough for travel. But when we negotiated the first grant we made a little provision for travel" (ibid.).

The Case Study

In the case of the ILAM tracks, I examined the Smithsonian Global Sound Sales Report for February 2005 - June 2006 in order to estimate how much a performer could expect to make in a year. With the intention of locating the musicians, I looked at music recorded in and around the Eastern Cape where Rhodes University and ILAM are located (See amaXhosa share of royalties, Appendix 5) and found that out of 438 tracks sold by the GSN e-commerce site, 23 were of Eastern Cape origin. Assuming ILAM was to agree that 50% of their royalties should go to the performers (this is what the ARCE agreed upon with the Smithsonian Institute), of the \$990.86 in royalties paid to ILAM, \$17.25 would be made available to the various performers on the 23 tracks. If, as on the 10 April 2008, the dollar/rand exchange rate was R7.78 to the dollar, the amount in rand would be R134.21. Unfortunately, most of the tracks are group songs and so the amount would have to be shared amongst however many people were involved, if that could ever be discerned. If we had to assume, hypothetically, that there are 4 musicians per group song, the total amount of R134.21 will be shared by approximately eighty people. If, like the ARCE, we could locate these performers, we would be paying them a royalty of around R2 each, not a sum that would realistically be worth paying out.

Field Work in Ngushwa (Peddie) Eastern Cape

However, in an attempt to determine if it was possible to fulfil ILAM's contractual obligation, I set about trying to find at least one performer whom I could identify from the February 2005 – June 2006 sales account provided by SGN, in order to cost the exercise and discern whether the task set by Smithsonian was realistic or not.

As can be seen in Appendix 5, the performer Iris Mjekula is recorded as having made \$16.91. After ILAM's 50% has been subtracted, the amount \$8.41 would (using the exchange rate as mentioned previously) amount to R65.78. Through researching Hugh Tracey's *Catalogue of The Sound of Africa Series*, I found mention of Mjekula's name and of a specific place, Tuku's Location, near Peddie, Ngqushwa District in the Eastern Cape, where the track of Iris Mjekula had been recorded by Hugh Tracey in 1957.

AMA. TR-59 (B - 1 & 2). (L1G - 7 & 8) 1957			
21.21 TAm	— 12.03 —	60/1/2b	
"Emonti Mama Siyazalana."		Xhosa/Ngqika	
"East London Mother, we are related."		1m. 28s.	
"Deborah mntaka mama ngendi tshata 'nawe."		1m. 41s.	
"Deborah, my dear, I would marry you had I the cattle."	Young girls of Durban Location, Peddie.		
Two wedding songs with clapping.	Durban Location, Peddie District, Ciskei, Eastern Cape.		
AMA. TR-59 (B - 3, 4 & 5). (L1H-10a & b, L1E-7) 1957			
20.12 TAm	— 12.03 —	60/1/2b	
"Tula, Tula."		Xhosa/Ngqika	
"Hush, hush."		1m. 01s.	
Two lullabies.		1m. 24s.	
"Ngoma ya bantwana."		2m. 33s.	
"Song for the children."	a 1. The singer (believed to be a coloured woman) changed the tune to a European one half way through. Her baby co-operated well.		
A lullaby.	a 2. The second tune was sung by a woman in traditional costume . . . The same baby, held in its mother's arms, was too charmed by the song to cry, so had to be tickled and patted by its mother into co-operation.		
a. Iris Mjekula.	b. This lullaby was sung by about 50 mothers and grandmothers and one man.		
Tuku's Location, Peddie Dist., Ciskei, E. Cape.	"Tula Ntwana musukulula."		
b. Women of Kalana Location.	"Be quiet child and go to sleep."		
Kalana Location, King Williamstown District, Eastern Cape.			

Iris Mjekula entry (B – 3 & 4) in *Catalogue - The Sound of Africa Series* Volume 2 by Hugh Tracey (1973:110).

Since Peddie is only approximately one hour's drive from Grahamstown, I decided to try to locate this performer in order to hand over her royalties. Preparations included trying to locate a local councillor or resident of the Ngqushwa District to assist with the search, finding a Xhosa interpreter, securing money to cover expenses of the trip and organising transport. I was successful in all preparations except finding someone from Peddie to help me with my search. Although I sent two e-mails to the municipality (12 September 2007 and 22 September 2007) no response was forthcoming. A Xhosa colleague, Sindi Zamani, agreed to accompany me as a Xhosa interpreter and we decided that going to the municipal offices would be the best place to begin our search, where we would be guaranteed a response.

The Search for Iris Mjekula

On the morning of the 25 September 2007, at 8h30 we departed on our expedition to Peddie. After travelling approximately 75kms to the Ngqushwa district Municipality (Peddie), we found our way to the modern municipal building situated off the N2 highway. We apprehensively walked into the reception area and were greeted by a courteous receptionist who, although busy, quickly attended to us. I explained that we were looking for Iris Mjekula from the Tuku Location who had been recorded by the ethnomusicologist Hugh Tracey in 1957. I wrote in my field notes, “The receptionist was a little taken aback, but said that we would have to contact the councillor from the Tuku Location region and went on to explain that that person was in a council meeting (at the municipality) but that if we waited we could in all likelihood meet” (field notes 26 October 2007). This was a great coup for us as we happened to embark on our field research on the very day that all the councillors of the region were in one venue. Sindi and I took a seat (very comfortable and in sight of the front door and reception area so we had a view of the comings and goings of the day) and prepared ourselves for the wait. Within five minutes we were introduced to Councillor Thuliswa Camagu of District 6 in the Ngqushwa area, which included Tuku Location.



Sindi Zamani, Thenjiwe Mjekula and Thuliswa Camagu in Tuku Location C, 25 September 2007.

Picture taken by B. McConnachie

After we had explained the circumstances of our visit, she clarified to us that there are three Tuku location areas: Tuku A, B and C. She knew of two Mjekula families

within those locations and immediately telephoned one of the families in order to set up a meeting with them. The locations are approximately a 20 minute drive from the centre of Peddie, although not more than 20 kms away. We turned off the tar road (which connects the N2 highway to the coastal road between Port Alfred and East London) and continued on a dirt road through beautiful scrubland. We passed a new, well maintained school and turned left onto a rough gravel road that was lined with rural, electrified homesteads. Ms. Camagu pointed out a house on the left that she identified as a Mjekula household, but explained that she had called that house and that the person she wanted to speak to was not available. We drove further up the road, lined with communal taps and solar powered Telkom phones and parked outside a house in Tuku C. Ms. Camagu went ahead and asked the owner (Thenjiwe Mjekula) if we could come inside to discuss Iris Mjekula. Thenjiwe, who was approximately 45 years old, was adamant that no-one in her family was called or had been called Iris. She suggested that we go to another household in Tuku C.

With Councilor Camagu leading we walked for five minutes before we came to the other home and were invited in. Sindi, the Xhosa interpreter, explained the situation to Mrs Mambanjwa Mjekula and two family members who immediately became animated. They discussed the situation enthusiastically and decided to call one of their nephews, who worked at Grey Hospital in King Williams Town. Velile Mjekula spoke with Sindi on my mobile phone and established that his mother's English name was indeed Iris. We were all very excited by this news but after further discussion it was determined that she was his stepmother and was not married to his father in 1957. She would therefore not have been in Tuku Location at that time. Everyone was disappointed. After much debate it was decided that Nomvuselelo Mjekula (Velile's late aunt) could have been the Iris that Hugh Tracey recorded. She was very involved with music and was in Tuku C in 1957 but unfortunately no-one could remember what her "English name"⁷⁸ was.

⁷⁸ Sindi Zamani explains, "Older Xhosa people have both Xhosa and English names because white people could not pronounce their given names" (field notes 26 October 2007).



Mambanjwa Mjekula, Councillor Camagu and Sindi Zamani calling for information regarding Iris Mjekula, Tuku Location C, 25 September 2007.

Picture taken by B. McConnachie

Thuliswa Camagu would not give up. We got into the car and went to another house in Tuku C of yet another family which she had called earlier and spoke with an elderly man who just shook his head and said that he had no knowledge of Iris Mjekula. After making another phone call, Thuliswa explained that another Mjekula family in Tuku B also had no knowledge of Iris. We were losing hope. It was 12h30 and we were getting nowhere. As a last attempt Ms. Camagu decided that we should go to Tuku A, a more rural setting. After driving for ten minutes on a road not made for cars, we parked next to a seemingly desolate field and made our way towards the horizon. We walked for another ten minutes and came across two houses on a dusty and windy plot. Thuliswa introduced us to Mamfene Mjekula. In my field notes I wrote, “Mamfene spoke of a Xonya Mjekula who was a singer and used traditional instruments, but she couldn’t remember when she died” (field notes 26 October 2007). It was 13h20 and both Thuliswa and Sindi decided that it was time to give up. We headed back to Peddie and along the way discussed the morning. Thuliswa decided that one of the musicians mentioned must have been Iris Mjekula and that she had simply told Hugh Tracey that her name was Iris, thinking that he expected her English name and not her Xhosa name. After interviewing Thuliswa again, Sindi and I left feeling somewhat deflated that our attempt to locate Iris had failed.

When I later tallied the time spent on the search, I came up with the following synopsis of time spent:

IRIS MJEKULA TIMESHEET			
DATE	LOCATION	TIME SPENT	ACTIVITY
11 September 2007	VGHS	1 ½ hours	Setting up <i>excel</i> sheet to account money allocated to Iris Mjekula
22 September 2007	ILAM	2 ½ hours	Web search and e-mail to Nontyatyambo Bongqo, community services manager, Ngqushwa municipality
24 September 2007	VGHS	½ hour	Checking mail and calling Ngqushwa municipality for trip
24 September 2007	VGHS	½ hour	Organising interpreter
25 September 2007	<i>Ngqushwa</i>	8 hours	Trying to locate Iris Mjekula
26 September 2007	ILAM	3 hours	Post trip documentation
TOTAL		16 hours	

The costs of the trip were as follows:

Petrol for 198 kilometres R376.20⁷⁹

Payment for the interpreter R250

In total the cost of failing to find Iris Mjekula came to R626.20, excluding the salary of the person who would, hypothetically, undertake the task. Taking into consideration that her royalties amounted to R65.78, ILAM would have made a loss of R560.42⁸⁰. What is also noteworthy is that I specifically looked for a candidate who had a name and information with a specific, accessible location. Most of the ILAM tracks supplied to GSN are of a collective group of musicians in a general area, not of a specific performer with an address. How do you compensate a group of people that you will, in all likelihood, not be able to find and therefore contact?

⁷⁹ At the Rhodes University 2007 rate of R1.90/kilometer

⁸⁰ This does not include mobile phone costs.

In an attempt to furnish additional information regarding locating and paying musicians, I considered researching further a field. However, as can be seen in Appendix 5 (a summary of the AmaXhosa Share of Royalties from GSN February 2005- June 2006), Iris Mjekula is the only individual who is named from this list. The rest of the performers are groups of people who are not separately recognised. Due to the fact that this study is specifically looking the ILAM/GSN Contract I decided that further field research beyond the parameters of the amaXhosa royalty share, coupled with time restraints would have hampered the development of the full research project and would, in all probability, have provided the same results⁸¹.

Implications of the Field Work

Music archives will have varying legal requirements when dealing with contracts with external parties, depending upon the content and needs of their particular negotiations. It is vital, however, that when entering into a contract, all parties involved have a working knowledge of copyright in order to protect not only the institutions themselves but also the performers on the archived tracks and the researchers involved. Enabling an archive to be accessible to the public via the internet is important in the present atmosphere of heritage rekindling in South Africa. With the easy availability of information via the world-wide-web, directors of archives and their staff can inform themselves and stay informed of current legal debates and dialogues that take place regarding copyright. The WIPO website (<http://www.wipo.int>) makes these discussions available and directs interested parties to further areas of concern.

Despite the good intentions of all parties involved, the GSN/ILAM Contract can serve as an example of what details to guard against and what potential mistakes are to be avoided. This learning practice is positive for ILAM, however. As discussed in the following chapter, the South African Department of Trade and Industry is in the process of introducing new legislation regarding copyright and collectively-authored and owned intellectual property. With the experience that ILAM has gained through involvement with commercial contracts and indigenous music, the archive is well placed to assist and guide communities in utilising and storing their cultural heritage

⁸¹ Future research projects into this issue, however, could have many positive repercussions. These could include further recordings for archival purposes.

should the proposed bill go through. But ILAM remains indebted to the performers that Hugh Tracey recorded and whose music makes up the bulk of the archive. This debt alone justifies the need to find an answer to the royalty distribution problem.



Tuku Location B, 25 September 2007.

Picture taken by B. McConnachie.

Chapter Six

Solutions and Progress



Hugh Tracey recording Zulu women performing a country dance, Mholutini's kraal, Zululand (n.d)

Picture supplied with permission from ILAM.

A Possible Solution - Collective Royalties and Benefit Sharing

In an attempt to solve the ILAM royalty distribution dilemma from a moral perspective, I approached Sarah Driver, the copyright and patent lecturer in the Law School at Rhodes University. After reading the GSN/ILAM Contract and listening to the details of the fieldwork just described, she suggested that I look into current interest in patent law with regard to “benefit sharing” and the sustainable use of biological diversity.

The South African Legislature has passed laws (The Patents Amendment Act No. 20 of 2005), whereby users of traditional knowledge for modern inventions are required to sign a benefit sharing agreement or share a portion of the profit that they make with communities from which the traditional knowledge originated (Wynberg 2004:21). The landmark dispute between the South African San Council and the South African Council for Scientific and Industrial Research (CSIR) has made a marked contribution towards the development of the South African Patents Amendment Act (Foster 2006 [online]).

The South African San Council v CSIR (South Africa's Council for Scientific and Industrial Research)

Laura Foster, a researcher at the UCLA Centre for Society and Genetics has highlighted the importance of this case. *Hoodia gordonii* is a cactus that grows in the Kalahari Desert in the southern region of Africa. The succulent has been gathered and used by the indigenous San people for generations in order to suppress appetite during times of famine (ibid.). The CSIR identified the compound responsible for the appetite suppression (named P57) and patented it in 1996. In 1998 the CSIR granted exclusive rights to a British Company, Phytopharm, to develop and market P57 as an anti-obesity drug. Foster writes,

The story of Hoodia took an interesting turn in 2003 when scientists were asked how the knowledge of the San peoples contributed to their research on the plant. Scientists responded that the San peoples were extinct. This statement sent off a firestorm of criticism and the South African San Council initiated a lawsuit against CSIR and its licensees. The parties eventually settled the lawsuit and entered into a benefit-sharing agreement that required CSIR to give 6 to 8% of their profits to the San communities (2006 [online]).

Some of this money has been earmarked for bursaries and scholarships and it has been calculated that the San's portion of the royalties could reach up \$9.8 million in the 15 to 20 years before the patent expires (Wolfson n.d.:4). After the publicity surrounding this case (See Wynberg 2004, Kahn 2002) South African intellectual property policy makers in the Department of Trade and Industry, under which both Copyright and Patent law fall, introduced the benefit-sharing amendment to the South African Patent Act 57 of 1978. This constitutes evidence of a realisation that there is a place for the collective ownership of traditional knowledge in South African law. Upon further investigation I found that the South African Department of Trade and Industry was indeed looking at making changes to the Copyright Act in order to protect indigenous knowledge practitioners. These proposed amendments will be discussed below.

Collective Copyright Development in South Africa

In my opinion, many South African indigenous communities are struggling to adapt to advancing technologies and are attempting to implement changes in the treaties they are party to in order to ease their entry into, and profit sharing from, the global arena. When the TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement

was put into place in 1995, developing countries were put under pressure to comply with international standards in order to gain access to the world market. Although article 27(3)(b) of the TRIPS agreement empowers member states to explore ways to protect their indigenous knowledge using intellectual property systems, many developing nations continue to oppose other aspects of TRIPS that deny them the right to protect and benefit from *all*⁸² of their indigenous knowledge (Woker 2006:39). Amendments⁸³ to TRIPS were proposed by developing countries, but due to opposition from developed countries the discussions collapsed (South African Government Gazette May 5 2008:7). The World Intellectual Property Organisation Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore⁸⁴ has continually been stalled in its attempts to settle a draft treaty text on the protection of traditional knowledge and folklore or traditional cultural expressions (TCEs). Negotiations at these WIPO committee meetings regarding indigenous knowledge have been taking place since 2000 with no concrete results. In February 2008 the committee met in yet another attempt to generate progress on the issue which developing countries charge is subjecting their resources to misappropriation. William New (2008 [online]) from the Intellectual Property Watch writes, “Some developed countries have resisted such negotiations, arguing for years that more study is needed on the subject.”

South African policy makers are also making slow progress. During 1997 a draft Bill was prepared by the Department of Arts Culture Science and Technology with the objective of regulating the protection of indigenous knowledge as cultural property of South Africa. This draft Bill dealt with folklore, traditional arts and crafts as well as traditional medicines, foods and beverages (Whittle 1999 [online]). In 1999 the same Department recommended a policy change which encompassed more than was initially anticipated by the government. The Department of Arts Culture Science and Technology made several recommendations including the integration of indigenous knowledge into the national school curriculum, the implementation of research and development systems, the organised administration of indigenous knowledge systems,

⁸² Such as their inability to protect intellectual property that stems from collective knowledge.

⁸³ It was suggested by the developing countries that article 27(3)(b) of the TRIPS agreements be amended to include protection of traditional knowledge that leads to an invention (South African Government Gazette May 5, 2008:7).

⁸⁴ The term Folklore is now referred to as “traditional cultural expressions” or TCEs by WIPO (New 2008 [online]).

and minimum funding and administrative imperatives (South African Government Gazette May 5 2008: 6). Although the Indigenous Knowledge Systems Policy was adopted by the Department of Arts and Culture in November 2004 (ibid.), it was in January 2008 that a document entitled “Policy Framework for Indigenous Knowledge through the Intellectual Property System”, as well as the first draft of an Intellectual Property Laws Amendment Bill, was submitted by the Department of Trade and Industry (DTI) to all the South African departments and parliamentary committees for comment. This belated step forward was prompted by the Patent Amendment Act No. 20 of 2005, but also by the slow pace of development with regard to the issue of indigenous knowledge protection in the international arena. Macdonald Netshitenzhe, Director of Commercial Law and Policy at the DTI, complained, “(T)alks at international level were deadlocked. In most cases, this arose as a result of pharmaceutical interests in the developed world” .
(http://www.sabinet.co.za/sabinetlaw/news_par560.html, accessed 14 June 2008).

“The Policy Framework for Indigenous Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Bill 2008” was gazetted for public comment on 5 May 2008, with the closing date for submission of comment due on the 15 June 2008. At the time of writing this thesis, this is where developments stand. Unfortunately it seems as if few members of the general public will be given the opportunity to access the material in order to comment. Denise Nicholson (e-mail D. Nicholson 9 May 2008), Copyright Services Librarian at the University of the Witwatersrand, sent out an open e-mail in which she wrote, “Here is an example where a public document (funded by public money) is not easily accessible by the general public. Not everyone has access to the printed version of the Government Gazette or subscription-based online services.” Although I believe it is important that members of the legal fraternity comment on the Bill, it has such far-reaching implications for members of traditional/indigenous communities that it could be argued that the state is failing in its constitutional duty to ensure that participative democracy is a reality.

The South African Intellectual Property Amendment Bill (2008)

The Department of Trade and Industry's Portfolio Committee on Trade and Industry states that the goals of The South African Intellectual Property Amendment Bill (2008) are fivefold:

1. To prevent registration (defensive protection) of IP rights that draw on indigenous knowledge without appropriate acknowledgment and benefit sharing⁸⁵.
2. To create a National Council to advise the Minister and IP Registrar.
3. To create business enterprises such as section 21 companies, close corporations and trusts that can be formed by communities in order to administer their royalties.
4. To create opportunities for local/indigenous communities to protect their IK by collective registration of IP rights.
5. To form a national trust that will manage the IP of owners not known or identified (2008: 11-12).

The proposed amendments to the South African Copyright Act 98 of 1978, as laid out in the Intellectual Property Amendment Bill (2008) and presented by the Department of Trade and Industry, include a sixth, important detail that the Department omitted to mention. It is proposed that Section 40(C) is added to the Act. This section refers to a national database which will record, amongst other things, information regarding traditional copyright works⁸⁶. These changes have many implications for indigenous communities in South Africa and can, if implemented and supported correctly, change many people's lives from a financial and potentially educational perspective.

South Africa is not, however, the only country to propose an amendment to their copyright laws. Many countries have enacted changes to their legislation in order to protect their indigenous knowledge. Although there are many different forms of legislation, there appear to be two main approaches to dealing with indigenous knowledge protection: 1) Amendments to intellectual property rights may provide *defensive* protection (i.e. preventing others from utilising aspects of indigenous knowledge) or 2) *positive* protection by providing rights to indigenous knowledge holders to enable them to utilise their indigenous knowledge (Howell 2004:18). Another manner in which indigenous knowledge framework policies can be analysed is provided by Sherylle Mills who gives an overview of Senegalese and proposed

⁸⁵ This would pertain to the Designs Act; Copyright Act; Performers Protection Act; Trade Marks Act and the Plant Varieties/Breeders Act (DTI Policy Briefing document).

⁸⁶ Due to this proposal, the South African Performers' Protection Act has proposed an amendment to Section 13(B) which will submit that the proposed national database will also serve as the database for traditional performances in South Africa (Republic of South Africa, Department of Trade and Industry 2008:3).

Brazilian legislation to demonstrate two directions indigenous knowledge framework policies may take,

The first approach regards traditional music as a ‘national resource,’ and, the second approach embraces the concept of ‘self-determination’ (which) asserts that traditional music is a type of property, which should be controlled by the originating community (1996:70&71).

Both structures have fundamental problems, but the proposed South African Copyright Amendment Bill is, in my opinion, a prudent combination of certain aspects of these two models of indigenous knowledge policy amendments.

National Ownership and Self Determination

The Senegalese Copyright Act of 1973 states in Article 9 that, “Folklore⁸⁷ shall belong originally to the national cultural heritage.” As Mills points out, this entitles the country to possess all musical works or “work inspired by (Senegalese) folklore” as a “national resource” (Mills 1996:70). The proceeds from royalties are managed by the *Bureau Senegalais du Droit D’auteur* (BSDA), which the Act states, “(are) used for cultural and welfare purposes for the benefit of authors”. Similarly the Ghanaian Copyright Act of 1985 stipulates that “Works of Ghanaian folklore are hereby protected by Copyright.” And that “The rights of authors under this Law in such folklore are hereby vested in the Republic of Ghana as if the Republic were the original creator of the works” (Article 5, Section (1)(2)).

Protecting folklore as national government property is a fairly common phenomenon, as the two examples above demonstrate. Most of the legislation allows for the use of folklore by paying a once-off fee on condition that the moral rights of the original community are recognised and respected (Ronning *et.al* 2006: 1-2). However, several dilemmas surround this type of protection. Consider Ghanaian indigenous musicians who are expected to pay a user fee for their own folklore. Artists calling themselves the Committee on Misgivings on Music Industry Practitioners (CMMIP) claim that,

It is unfair that Ghanaians are not exempted from paying for the use of Ghanaian folklore which is a heritage collectively bequeathed to all Ghanaians by their forebears. The Committee is therefore vehemently opposed to Ghanaians paying any fees or getting permission to use Ghanaian folklore as stipulated... (Amegatcher 2002:36).

⁸⁷ “Folklore” means all literary and artistic works created by authors presumed to be of Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the Senegalese traditional cultural heritage (Senegalese Copyright Act of 1973 Article 9(1)).

While safeguarding the rights of the artists, Ghana's defensive protection of folklore obstructs access to the very community from which it originated. The proposed amendments to the South African Copyright Act 98 of 1978 safeguard against this obstacle. Section 19C states that members of the indigenous community from which the work originated will be entitled to use the work as if they were an individual owner of conventional copyright (See the proposed section 11C in South African Government Gazette 2008: 12 -13).

However, the question remains, who decides where and how the royalty money should be spent? Many South African communities already have traditional leaders in place. Will these same leaders make financial decisions regarding the royalties? How will the government ensure that individual members of communities benefit from the royalties? Will these individuals have any say in the protection of their heritage? Will they be motivated to continue creating if their traditional music is deemed the property of their entire community? And finally, what will distinguish between works that qualify for protection and those that lie in the public domain?

The Malawian Copyright Act of 1993 incorporated a clause in order to protect its folklore⁸⁸ from becoming part of the public domain. This Act provides that works which fall into the public domain are those where "terms of protection have expired, where authors have renounced their rights" and "foreign works that do not enjoy protection in Malawi" (Government of Malawi 1993: cap.49.03 chapter V.25). This means that folklore does not fall within the public domain and is continually protected. The Act then clarifies this point by stating, "Copyright in expressions of folklore shall vest in perpetuity (sic) in the Government on behalf and for the benefit of the people of Malawi" (V.24). The South African Department of Trade and Industry has not proposed amendments as radical or far reaching. It suggests as an amendment to Section 3 of the Copyright Act 1978, that protection for traditional works will last for 50 years from the end of the year in which the Intellectual Property Laws Amendment Act comes into operation or from the date that the work was first communicated to the public with the consent of the owners, or whichever term expires last (2008:11).

⁸⁸ 'Folklore' is defined in the Malawian Copyright Act of 1993 as 'all literary, dramatic, musical and artistic works belonging to the cultural heritage of Malawi, created, preserved and developed by ethnic communities in Malawi or by unidentified Malawian authors' (Government of Malawi 1993: cap.49.03, part 1)

According to Mills, Brazilian draft legislation proposed to amend their copyright law in the mid 1990s. It was proposed that the need for an author of indigenous works should be eliminated, and that “there is also no tangibility or originality required to invoke protection”, and that works are protected “regardless of their time of creation...even if transmitted through oral tradition” (Mills 1996: 73). In addition it was planned that individual and collective authorships should also be recognised and the draft included a clause which would protect Brazilian folklore from entering the public domain or from becoming the property of the government. Therefore the ownership rights of indigenous music in Brazil would vest solely in the hands of the originating community (ibid.).

Circumventing the international copyright issues that prevent folklore from benefiting from intellectual property rights, the Brazilian model discussed above, had the potential to positively benefit indigenous communities. As Sherzinger (1999:117) points out however, “This kind of focus on discrete indigenous communities is probably more a reflection of current American identity politics than of pre-colonial African realities.” Once again questions arise: who decides who belongs to a community and can therefore benefit from royalties? Communities change along with traditions and cultures and if a community’s folklore is protected in perpetuity (there being no time frame allotted), will people be retrospectively compensated or will a new emerging society benefit from archived folklore? Although proposed in 1996, the Brazilian legislation was never passed. According to Anthony Seeger, “The Brazilian legislation was submitted to the legislature, but only passed one house of the legislature” (e-mail correspondence 7 May 2008).

Although not perfect, the South African Department of Trade and Industry proposes to incorporate aspects from both approaches (national ownership and self determination) to protect indigenous knowledge. The policy framework is calling for preventive measures to be introduced to stop indigenous knowledge from being exploited without consultation and owner consent (see point 1 of the Department of Trade and Industry’s Intellectual Property Amendment Bill (2008) above), while protecting indigenous music that has no identifiable owner (see point 5 above). The document also exhibits positive protection by proposing a radical change to the ownership registration of copyright, as it would allow collective groups to qualify for protection (see point 4 above) and thus

enable them, as a community, to utilise their intellectual property. By formulating a model which includes both national protection for indigenous knowledge that has no identifiable owner, as well as recognition of communities as rights owners, the South African draft policy has potential to achieve an important balance between collective and individual ownership which will assure both commercial viability and respect for the role of communal society.

Many other models have been proposed, including “a utopian model” (Sherzinger 1999: 118) by Charles Keil in which he wants to “record every single one of the world’s peoples into one hell of a beautiful bin down at the record store” (Keil and Feld 1994: 320). Similarly Amegatcher suggests a *sui generis* (laws of a special kind) protection⁸⁹ (the protection being particular to folklore) where folklore is compiled on a database and access to the information paid for and thus regulated (2002:40). The Department of Trade and Industry, as seen above, proposes to start such a database and thus the projected changes to the South African Copyright Act are at the cutting edge of international intellectual property legislation with regard to content. In addition, section 40D of the proposed amendment to the South African Copyright Act of 1978 introduces the establishment of a National Trust Fund whereby royalties from music where the author or origin is unknown will be deposited into the National Trust Fund and will be, “applied for the benefit of indigenous communities...” (Section 40D (4) (b)). Although the proposed South African fund is similar to the Senegalese fund, managed by the *Bureau Senegalais du Droit D’auteur*, it only applies to royalties from traditional music that has no identified owner, as opposed to the Senegalese trust fund that collects royalties from all traditional music. Therefore individual rights are also respected. Despite this seeming progressiveness, however, South Africa lags behind in terms of implementation and is currently playing “catch-up” with the rest of Africa⁹⁰.

As positive as this proposed amendment to the Copyright Act is, the burning issue is not about implementation at a national level but rather global recognition of this legislation. Without the developed nations signing an international treaty prescribing minimum protection standards, all indigenous knowledge is at risk of being misappropriated. It

⁸⁹ This suggestion was made with regards to Ghanaian music protection and was first suggested by Bleszynski of the Polish Society of Authors and composers (Amegatcher 2002:40).

⁹⁰ The disintegration of the apartheid regime and only recent revival of heritage issues in South Africa can be partly blamed for this.

remains up to the members of international organisations like WIPO to persist in their efforts to secure an agreement which will ensure fair but protected use of indigenous knowledge around the world. An agreement of this kind would ensure that holdings at archives such as ILAM remain secure and protected for future generations and that musicians feel safe in the knowledge that their music will be internationally protected. ILAM has not remained idle, however, and plans to implement research which may encourage self determination and community ownership of intellectual property are underway.

ILAM'S Proposed Project

At the 2007 South African Society for Research in Music (SASRIM) conference held in Bloemfontein, I presented a paper⁹¹ on certain copyright issues that have been discussed in this thesis. In the paper I proposed a project to investigate a suitable solution to the royalty distribution problem that ILAM faces. I wrote,

I am currently investigating the idea of starting a pilot project in the Eastern Cape where, after negotiation with leaders of the various royal households in the Eastern Cape such as Zwelivelile Mandlesizwe Mandela, head of the Mvezo Traditional Council in the Kingdom of the Thembu, and legal experts from a music rights organisation such as SAMRO for example, we deposit these royalties (divided into their various households) into national accounts. Although at first the amount would be insignificant, over a period of time it could amount to something that could be used to uplift the musical life of the community (McConnachie 2007:8).

After a failed attempt at contacting the head of the Mvezo Traditional Council in the Kingdom of the Thembu, (e-mails to Mandla Mandela 8 June 2007, 19 June 2007, 02 September 2007), I realised that I should formulate alternative arrangements in order to encourage the various Eastern Cape communities to become involved in a solution to ILAM's royalty distribution problem. The task of administering the project, provisionally named the *Eastern Cape Music Archive Project* or ECMAP, is daunting and the success uncertain. This project proposal, however, was created before the draft proposal to amend the South African Copyright Act of 1978 had been made public. In light of the proposed amendments to South African Copyright protection, the project could now be important to many other institutions in addition to ILAM. With legislation in place to assist communities in registering trusts and section 21 companies in order to administer their rights and royalties, the government backing

⁹¹ "Legal access to our musical history: an investigation into archived music recordings and copyright implications".

may alert the various community leaders of the importance of these issues. Moreover, I strongly believe that the project may assist the government in implementing their proposal.

ECMAP proposes to:

1. Identify local Eastern Cape communities that are eligible to claim ILAM royalties from music held in the ILAM archive.
2. Help set up trusts for the royalties.
3. Help set up administrative groups that will manage these royalties.
4. Manage the channelling of royalties into the various trusts or section 21 accounts that accumulate, first from ILAM, and later from other national institutions or companies.
5. Identify musicians whose royalties exceed a minimum amount and, with funding, locate and pay these individuals.
6. Encourage renewed recording of current traditional music for archiving at ILAM, in these same communities.
7. Encourage and give advice on the marketing of these tracks by the various communities.

When I first put the idea of the project to my colleagues, one of them commented, "Surely, any monies collected on the basis of a group trust are most likely going to be diverted for personal gain, rather than really being used to finance some kind of genuine communal cultural support system" (Rob Allingham, e-mail correspondence 24 July 2007). While this is obviously a worrying possibility, there will ideally be government intervention accompanying the proposed law and policies put in place to ensure that all members of the various communities benefit.

As mentioned previously, many of ILAM's holdings are older than 50 years and therefore part of the public domain. In terms of the proposed amendments this remains so. Amendments to section 3(1)(a) of the Copyright Act 98 of 1978 propose that copyright will exist if the traditional work was created on or after the date of commencement of the Intellectual Laws Amendment Act or within a period of 50 years preceding that date (2008:10). ILAM, therefore, is not legally bound to pay royalties. I argue however, that if archives are legally and ethically to make money from their holdings (current and future), there must be an attempt to share profits, whether the archives are legally bound to do so or not. An auxiliary benefit of ECMAP exists through the potential for contact with the musicians or their descendents instigating a rekindling of an interest in indigenous knowledge based music that is fading. In

addition to this, new field research projects on current musical trends in the identified communities could be conducted by university students which could, in turn, lead to the recording of new tracks. The recording of new tracks that could be deposited in the archives and generate further income for both the community and the archive will ensure that ILAM evolves as a living archive that has strong links to local communities and remains relevant as a depository for Southern African music.

Even though implementing such a project may seem technically challenging for small archives, both SAMRO and Gallo Records employ a royalty accumulation system that may serve as a blueprint for a project like this. These organisations have a minimum payment system where monies earned by composers or performers that are less than a certain amount (this is unstipulated in the case of SAMRO) accumulate in a group fund which is distributed between all the earning authors (telephone interview SAMRO 11 August 2007). Once the royalties pass or exceed this amount, the author not only gets his or her own payment, but also part of the accumulated funds. There is no question but that individual musicians who can be identified must be paid their royalties separately from the community. It is therefore vital that the amendment to section 19(c) of the South African Copyright Act of 1978 is fully understood by the trustees of the various communities. This clause clearly states that individual members of the communities can use the indigenous knowledge to compose and make music as if they owned the copyright themselves.

I submit that this project that could, potentially, solve a moral and legal dilemma. Peter Findlay from the British Library Archival Sound Recordings Project mentioned in his paper "End Users, Metadata and Copyright" that the British Library had to figure out a solution to a copyright challenge that arose in relation to one of their collections that they were making available on-line. The collection was of tracks made by South African researcher, David Rycroft (1924-1977) who often recorded musicians and singers along the road, thus making it, as with the case of ILAM, impossible to locate the individual performers in order to make them aware of their rights. Findlay writes, "Our approach was to contact the South African Musicians' Union and pay an agreed sum into a holding fund so that there was money available should a musician come forward claiming rights in the future" (Findlay 2007: 43). Whether or not any musicians

came forward to claim any funds was not reported on, but the fact remains that the British Library made an effort to apply British law.

Foreseeable Problems

The implementation of the amendments to the South African Copyright Act 98 of 1978 is an enormous task which will fundamentally change the way in which traditional music is viewed. This Bill proposes to empower South African indigenous communities and give them the ability to earn compensation for the use of their cultural heritage. Passage and implementation of the Bill will begin to repair the tragic damage done to indigenous/traditional communities by Apartheid, which used culture to undermine and demoralise black South Africans (Impey 2002:18). It is imperative, therefore, that the task of implementation of the amendments is undertaken in a culturally sensitive and organised manner.

Copyright in any form is burdened with complex issues. For most musicians, managing royalties and protecting the misuse of music is far removed from the artistic realities of making music. However, in order to earn royalties, musicians and composers have to learn about the administrative and business side of marketing their music. This type of education is offered at some South African learning institutions, as mentioned previously, but is most often discovered through personal experience. Musicians from previously (and to some extent currently) disadvantaged communities in rural areas of South Africa will find it difficult to gain access to information relating to copyright. It is promising, therefore, that the proposed amendments to the Act include a clause about members of a “National Council for Traditional Intellectual Property” who will be representative of the different cultures of the Republic (Section 40A(4)). These members will include six people: two with extensive knowledge in and patronage of traditional cultures and values of indigenous communities; two with extensive knowledge in and patronage of traditional artistic, literary, musical and performing arts; and two with extensive knowledge and expertise in intellectual property law. Although these knowledgeable people will be available to instruct and assist communities, if the Bill is passed, a large outreach and education drive needs to be planned in order to explain basic copyright issues to communities who might otherwise misunderstand their rights and financial potential. Although there may be many communities that can viably sustain projects from the royalties that accrue from the sales of their music, in other

communities little or no money will find its way to them. This fact must be clearly understood and the workings of the committees, from the National Council for Traditional Intellectual Property to the local community committees, must be organised in such a way that the internal decision-making structures are transparent and that members' voices can be heard.

Besides the implementation, other issues may cause concern. Who decides on the community boundaries? Will the government resort to using geographical structures implemented by the Apartheid government? As mentioned before, the amendment states (2008:11) that protection for traditional works will last for 50 years from the end of the year in which the Intellectual Property Laws Amendment Act comes into operation or from the date that the work is first communicated to the public with the consent of the owners, or whichever term expires last (Section 3(g)). This means that traditional South African music that comes about before the implementation date cannot be protected and more importantly ownership of traditional music has an expiry date. Can it be re-registered or is it then part of the public domain? As it stands, the communities will only benefit from their music for 50 years. In addition, it is unlikely that individual musicians in indigenous communities who make music will be at ease with the proposed legislation. Will these composers and performers have to prove their cultural ancestry to use their heritage? If so what will the criteria be? South Africa has become a cultural melting pot through the Apartheid government's creation of artificial homelands and forced removals. How undignified would it not be to a mature musician to insist that he prove his cultural identity or pay a fee in order to perform a song from his childhood? I also question the financial implications of the national database. If a piece of music is recorded onto the national database, does it become property of the state? If not, who is going to benefit from the "payment of the prescribed fee", as it is stated in section 40C(4) of the amendment document (2008:19)? It is also unclear whether the government plans to insist on payment after works recorded on the national database fall into the public domain.

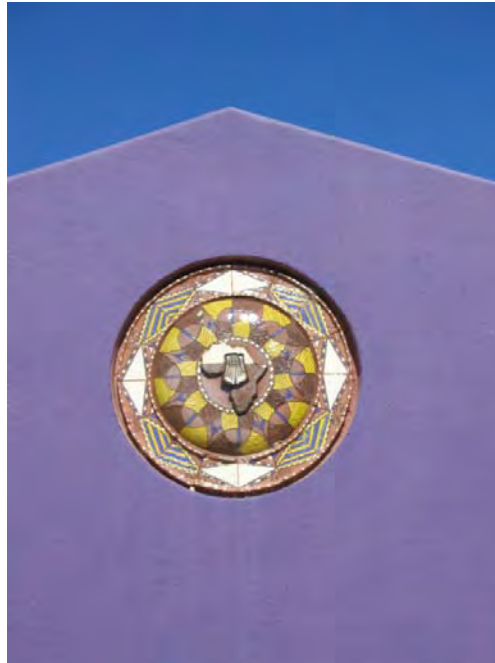
Conclusion

As an aspiring ethnomusicologist researching intellectual property law, the proposed amendments to the South African Copyright Act 98 of 1978, as laid out in The South African IP Amendment Bill (2008), fill me with optimism and national pride. The South

African Patents Amendment Act 20 of 2005 is accepted as a prototype in the field of benefit sharing and I believe that the proposed intellectual property amendments will also, if executed sensitively and transparently, be internationally recognised as ground breaking legislation. I would suggest however, that the legislators research the possibility of including a benefit-sharing policy in the proposed amendment to the Copyright Act of 1978. As an outcome of this research, it is apparent to me that South African communities must retain some form of ownership of their cultural heritage once it has lapsed into the public domain. Musicians and composers who use music from a certain indigenous community should be bound to share a small amount of the profit from their commercial project with the original owners. This fee could be managed by Section 21 companies or trusts that will already be in place as proposed by the South African Intellectual Property Amendment Bill (2008) and thereby ensure that South Africa's indigenous knowledge is not lost, but becomes a sustainable legacy that will benefit communities for generations to come.

Chapter Seven

Conclusions



The International Library of African Music (ILAM) Logo photographed on the current building, Rhodes University, Grahamstown, South Africa (B. McConnachie 2007)

The notion of intellectual property law is in constant flux. At the time of writing this conclusion (May 2008), the U.S.A. legislature has introduced a federal Bill which proposes to help libraries, museums and archives use material without copyright consent if the institutions have made a “reasonable effort” to find the copyright owners (Barrett e-mail correspondence 5 June 2008). Had this amendment to U.S.A. copyright legislation been contemplated two years ago, this research may have taken a different path. The instability of the subject matter makes this interface research project demanding because remaining informed about the most recent information on copyright is a daily challenge. It has been tempting to change research goals and aims because copyright trends constantly distort and evolve. The final outcomes of this research, however, are examined by a brief synopsis of the following issues: the implications of the GSN/ILAM Contract; the implications of the Sonny Bono Copyright Term Extension Act; the implications of on-line access; and the implications of pending South African legislation amendments.

The Implications of the GSN/ILAM Contract

As an internationally recognised archive of African audio-visual material, ILAM is regularly approached to become involved in both research and commercial projects. With ILAM's Director, Professor Diane Thram, securing funding for the completion of the cataloguing and digitising of the ILAM audio-video and photographic collections, and similar projects⁹², as well as other business-related endeavours, ILAM is constantly negotiating contracts. The analysis of the GSN/ILAM Contract has contributed greatly to the awareness of copyright issues at ILAM and management is now more attentive to details, such as licensing periods, when negotiating contracts. It is clear that the involved parties must ensure that all negotiated contracts are overseen by legal experts *as well as* involved ILAM representatives in order to agree to a practical, working contract. Generic audio-visual deposit agreements must be completed and signed when researchers deposit recordings into the archive in order to avoid copyright issues. It is now policy at ILAM to obtain a deposit and conditions of use agreement from all depositors.

With regard to benefit-sharing or royalty distribution, the ILAM/GSN Contract analysis has led to the development of many future research opportunities. In terms of South African law ILAM is not obliged to send royalties to past performers. As discussed, however, not only is it ethically the correct approach, but spin-off projects may encourage new musical and audiovisual deposits into the archive. In order to accomplish royalty distribution I intend to submit the *East Cape Music Archive Project* research proposal to the South African Department of Trade and Industry and SAMRO because both of these institutions can benefit greatly from the outcomes of the proposed project. If ECMAP is implemented, ILAM will be involved in applied research that will assist the communities from which the archived material originated and South African libraries, archives and museums in general.

A Potential Academic Project

Another potential project of great “interface research” value is a partnership between ILAM and the Rhodes University Law Faculty. Copyright issues are complex and the

⁹² These include a grant from the Mellon Foundation to undertake cataloguing and digitising of the all the documents and ephemera from Hugh Tracey's career and all other un-catalogued miscellaneous in-print materials in the ILAM library.

people that the copyright laws intend to protect are usually ignorant of their workings. I submit that an integrated project entitled “A Music Researcher’s Copyright Handbook” be written in order to facilitate the detailed negotiation of copyrights for recordings made in the course of field research. Similarly, an interdepartmental module on intellectual property could be devised in order to teach current music copyright issues at part of the B.Mus and law degrees. This module could be made available on-line and used by various universities’ faculty members.

The Implications of the Sonny Bono Copyright Term Extension Act

Resulting from the Sonny Bono Copyright Term Extension Act, sound recordings published between 1923 and March 1989, both protected and in the public domain in South Africa on 1 January 1996, only enter the public domain in the U.S.A. on 15 February 2067 (Hirtle 2008 [online]). All of ILAM’s current holdings fall into this bracket and are therefore commercially exploitable in America. This information has positive ramifications for ILAM and similar institutions: they can legitimately charge royalty fees for the use of archived holdings to any American-based company or organisation for another 59 years.

The Implications of On-line Access

The status of archiving in South Africa and around the world has been elevated resulting in a demand for the digitisation of holdings not only for preservation purposes, but also for easy dissemination. As ILAM awaits the Smithsonian Institution’s reply to the contractual changes to the GSN/ILAM Contract that were requested (as discussed in Chapter 5), staff continue to digitise and make accessible the musical legacy that Hugh Tracey left behind. In an attempt to facilitate public access to the archive, ILAM has a large portion of its Collections searchable online from the ILAM web-site (www.ilam.ru.ac.za). As mentioned before, in order to protect these digitised holdings from copyright infringement, ILAM has loaded short, compressed and low resolution mp3 files onto the site to combat infringement. Presenting the music files in this manner makes it unattractive to download as they are not commercially useful. This encourages members of the public who want to hear the whole track to contact ILAM and either buy the song or album or request permission to use it. In the context of research at ILAM, students and researchers are free (and

encouraged) to utilise both the on-line and the physical archive for academic purposes without the fear of infringing any copyright laws.

The Implications of Pending South African Legislation Amendments

While I have given an account of the implications for archived music as prescribed by the South African Copyright Act 98 of 1978 and international music copyright trends, future proposed South African copyright amendments may dramatically transform these findings. The Department of Trade and Industry has proposed bold changes that can, potentially, resolve collective authorship, and thus royalty issues that have long concerned indigenous music advocates. The proposed amendments can only benefit members of these communities, however, if the new laws are openly discussed and presented in an accessible and transparent manner. I suggest, therefore, that workshops be offered to interested parties at various locations, and through various mediums⁹³, in order to clarify the ramifications of the proposed South African IP Amendment Bill (2008). An excellent venue for initial workshops is the annual South African Society for Research in Music (SASRIM) conference, in order to introduce the new proposed laws to SASRIM members. These amendments will potentially affect every researcher of current and past folk and traditional music, and because the SASRIM Conference is a meeting place for music academics and researchers, it will be an effective venue for discussing further implementation suggestions and solutions. In addition, these implications can also be added to the various syllabi of the university courses that deal with copyright and music (mentioned earlier) and lecturers that attend the SASRIM Conference can actively ensure that current information is passed on to university undergraduate students as well.

Theoretical Conclusions

This Master's thesis is an analysis-based, interdisciplinary research project which has taken over two years to complete. As a student of ethnomusicology, researching and writing about legal material in a manner that is accessible to scholars of non-legal disciplines, has been demanding. In order to understand copyright I have had to learn new terminology and familiarise myself with the stylistic characteristics of certain legal texts. This issue, coupled to the challenge of maintaining a distinctly

⁹³ Forums such as the MIDI Trust (Music Industry Development Initiative), which tries to educate young musicians about copyright issues, can be contacted to help facilitate education initiatives.

ethnomusicological framework, has forced me to hone my research and writing style to suit both disciplines. It is thus that the concept of “interface” research was born. Maintaining a balance between two fields of research is difficult and throughout the writing of this thesis I struggled to find the common ground between the two disciplines. During the editing process I was struck by this inconsistency and am reminded of Impy’s statements (as discussed on p. 6) regarding interdisciplinary difficulties. Executing an ethnomusicology research project predominantly through the internet has concerned me from the outset. Learning to recognise which on-line sites deliver reliable information has been a process of trial and error, but I developed a deep respect for the power of the World Wide Web as a tool for further research. It cannot replace published sources but can greatly assist one in the search for relevant information.

This interface research, however, has not only been about transformation and growth. It has revealed many prospective projects, as discussed above, and I remain convinced of its importance. I hope that the results of this analysis will be valuable to archives and researchers alike and, in the future, to musicians who wish to deposit their music into archives for various purposes.

Reflections

The legacy that Hugh Tracey has left behind, in the form of ILAM, is an institution of international standing. This valuable establishment is proving to be the source of musical information that Tracey intended it to be. Indigenous knowledge in South Africa is finally being recognised as a valuable resource for the country’s various original inhabitants and the music that formed and forms an integral part of their lives can be and is carefully stored at ILAM.

Protecting archives of any kind must not be viewed as keeping a record of things past. This research has proven that archives store information for the future and are an integral part of the evolution of cultures. How information from the past is disseminated, affects how it is used in the present and therefore how much a part of the future it will become. Therefore, if institutions like ILAM can make holdings accessible to members of the public, use of the music in the present will influence how integrated and how remembered it will be in the future. Archives are

establishments for the future. Thus laws that protect these institutions are all the more important and their development must be vigilantly tracked in order to ensure that proper protection is fully accomplished.

CD Compilation Track List

1. **Mbube, Solomon Linda and the Evening Birds.** Off album *Solomon Linda's Original Evening Birds*. Rounder CD 5025, 1988. (Rec.1939 Gallo GB 829)
2. **The Lion Sleeps Tonight, The Tokens.** Off album *The Very Best of the Tokens 1964-1967*. Varese Sarabande, B0001JXQDS, 2004.
3. **Mbube, Miriam Makeba.** Off album *Africa (Live)*. RCA, B0000004Y0, 1991.
4. **The Lion Sleeps Tonight, Ronald Kunene, Lebo M., Ricky Nelson, Alfie Silas, Rose Stone, Maxine Waters, Lester Young.** Off the soundtrack *The Lion King*. Walt Disney, B0000018UZ, 1999.
5. **Malaika, Harry Belafonte and Miriam Makeba.** Off album *An Evening With Belafonte/Makeba. Songs from Africa. French reissue of 1965 album for the world music stars*. BMG, RCA Victor Europe, B00004SNG7, 2003.
6. **Malaika, Miriam Makeba.** Off album *Live from Paris and Conakry*: DRG, B0000000PFP, 1996.
7. **Rorogwela (lullaby), Afunakwa.** Off album *Solomon Islands - Malaita Fataleku And Baegu Music - Hugo Zemp*. Auvidis UNESCO,3298490080276, 1991.
8. **Sweet Lullaby, Deep Forest.** Off album *Deep Forest*. Celine Music/550 Music epic. Bx 57840, 1992.
9. **Pygmy Lullaby, Jan Garbarek.** Off album *Visible World*. ECM records. B0000031ZR, 1996.
10. **Tula Tula, Iris Mjekula.** Recorded by Hugh Tracey from the *Sound of Africa Series*. Supplied with permission from ILAM, TR 59 (B3, 4 & 5), 1957.

Hugh Tracey's letter to Eric Gallo (n.d)

Transport

It will be seen from this brief account that the key to the Research situation is the provision of adequate transport for my Research Unit when it goes into the country for six months of the year. I expect to have with me three or four Europeans, two native interpreters and two or three native attendants. It is our hope to accommodate this Unit as follows:-

1. (a) Recording Van (presumably a ton truck), in which the scientific recording equipment both for recording on discs and on tape will be permanently fixed. Other apparatus such as notation recorders, cameras and other mechanical devices will also be set up in this van, with their power supply for the motors and amplifiers.

(b) This van will draw a small Uccles caravan for the use of the Recording Engineer and one other European.

2. (a) Two Trucks, on which caravan bodies will be constructed, or otherwise adapted. These will be used by the remainder of the European personnel.

3. (a) A small 1-ton runabout Truck. This truck will be used primarily for fetching and carrying, to and from the main camping sites in each district. With the recording van it will take the personnel to the villages in the neighbourhood from the central camping site or, when supplies are distant, it will go to the nearest town to obtain provisions, petrol, groceries, etc. This would make it unnecessary to move the heavier trucks except between camping sites.

(b) This runabout will also tow a small trailer for carrying camping equipment, and particularly fresh water, which may often be some distance from the camp.

All these trucks will be specially fitted out with canvas tenting stowed on top for travelling, which can be readily unrolled to form tents on three sides and which will be used as offices, dining-rooms, etc., by the personnel at work. The whole Unit has to be completely self-contained and absolutely practical in all details, as the territories to be covered in this way are extensive and largely off the beaten track and will keep us busy for many years.

Objectives of the Research

1. To record as wide a range as possible of African country music to preserve it from extinction.
2. To examine African Music critically and to compile works of reference upon its theory, so that in future it may be taught in schools with the same facility as European Music.
3. To make a thorough study, by means of the many thousands of gramophone records we intend to record, of the tone system in African languages in conjunction with authorities in Universities and elsewhere.
4. To make the music of all the African peoples available to Africans both on records and on paper. At present they know only the music of their own small districts.
5. To make every practical use of the natural genius for music and other indigenous recreations not only in the country but in town locations, Mine Compounds and industrial communities.
6. To improve and, where desirable, to manufacture instruments which are capable of propagating and improving the natural music of the African peoples.
7. To publish books on the artistic and musical aspects of native life.
8. To apply our subject to future problems of town planning with regard to Native Locations, Industrial Compounds and Institutions.
9. To establish Schools of African Music where the national genius will receive its proper recognition on a thoroughly scientific basis.

Appendix 3

Hugh Tracey's Field Trips

1. 1948	Southern Rhodesia Northern Rhodesia Northern Transvaal, South Africa
2. 1948	Natal, South Africa
3. 1949	Mozambique Southern Congo Northern Rhodesia Nyasaland Southern Rhodesia
4. 1950	Southern Rhodesia Nyasaland Tanganyika Zanzibar Uganda Kenya Mozambique
5. 1951	Basutoland
6. 1951	Southern Rhodesia
7. 1952	Northern Rhodesia Southern Congo Southern Rhodesia
8. 1952	Kenya Tanganyika Uganda Ruanda Eastern and Northern Congo
9. 1955	Natal, South Africa
10. 1955	Mozambique
11. 1957	Ciskei and Transkei, South Africa
12. 1957	Southern Rhodesia Northern Rhodesia (Kariba Valley) Southern Congo Northern Transvaal, South Africa
13. 1958	Swaziland
14. 1958	Southern Rhodesia Nyasaland
15. 1959	Western Transvaal and Northern Cape, South Africa Bechuanaland
16. 1959	Basutoland
17. 1963	Mozambique Eastern Transvaal, South Africa Southern Rhodesia
18. 1966	South West Africa (now Namibia)
19. 1970	Mozambique

GSN/ILAM Contract

S.I. Contract # _____
Accounting & appropriations data
ACR# _____

LICENSING AGREEMENT

THIS LICENSING AGREEMENT is made and entered into on September 11, 2001, by and between the SMITHSONIAN INSTITUTION ("Smithsonian"), established by the Congress of the United States in 1846 (20 U.S.C. 41 et seq.) and having its principal offices at 1000 Jefferson Drive, S.W., Washington, D.C. 20560, and RHOLES UNIVERSITY, a non-profit educational establishment having its principal offices at Grahamstown 8140, South Africa on behalf of its INTERNATIONAL LIBRARY OF AFRICAN MUSIC (hereinafter "ILAM.DIG").

WHEREAS, the Smithsonian Center for Folklife and Cultural Heritage has established the Global Sound Network to preserve and digitize the collections of select audio-visual archives around the world, provide long-term income to such archives, support traditional arts by providing a heretofore unavailable royalty stream, and create a resource for scholars, interested public, and businesses for access to high-quality, well-documented audio/visual recordings which have been cleared for both research and commercial uses;

WHEREAS, for this purpose Smithsonian intends to create an e-commerce website to sell or license the use of recordings from participating archives ("GSN");

WHEREAS, ILAM.DIG maintains an archive of African music and related materials including without limitation those published recordings and materials described in a two volume document called "The Sound of Africa" as well as extensive further published and unpublished materials and accompanying texts and images (the "ILAM Archive");

WHEREAS, the parties desire that Smithsonian eventually make a substantial part of the ILAM Archive available via GSN and/or other means, but in any event within the first year of this Agreement not less than 1,000 individual selections and/or tracks from master recordings in the ILAM Archive (the "Tracks");

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties agree as follows:

1. GRANT OF RIGHTS.

a. Definitions.

i. Term. The "Term" shall run from the Effective Date until six (6) years after the Effective Date.

ii. Physical Media. Physical recordings (i.e., LP, CD, cassette and/or other physical media) shall be collectively defined herein as "Physical Media."

Contract 001001/Folklife/ILAM-2001

b. Grant. Subject to LLAMDIG's rights to sell the LLAM Archive on LLAM DIG's website and to "fair use" of the LLAM Archive as defined by the U.S. Copyright Act, LLAMDIG grants to Smithsonian the exclusive right throughout the world during the Term (and the nonexclusive right throughout the world thereafter) to perform, display, use, copy, distribute, sublicense, sell, and otherwise exploit the LLAM Archive by any means now known or hereinafter invented other than manufacture and distribution of Physical Media. Notwithstanding LLAMDIG's sales rights above, during the Term LLAMDIG shall not offer to sell any Tracks or other materials from the LLAM Archive for a lower price than that charged by Smithsonian nor provide access to the LLAM Archive to any third party for any of the uses described herein.

c. Smithsonian Produced Compilations. Notwithstanding the limitation described in Section 1.b. above, LLAMDIG specifically grants to Smithsonian the exclusive right throughout the world during the Term (and the nonexclusive right throughout the world thereafter) to exploit the LLAM Archive through the manufacture and distribution of Physical Media comprising compilations derived from license for cinematographic, TV, or occasional use as background and/or synchronous music. Until September 7, 2003, where such compilations include tracks which LLAMDIG has licensed to Seiching Sharp Wood Productions prior to the Effective Date for use in Physical Media, exploitation of such compilations shall be subject to the approval terms set forth in Section 1.d. below.

d. Sublicensing. Notwithstanding anything herein to the contrary, all Smithsonian sublicensing of the LLAM Archive shall be subject to LLAMDIG's prior written approval, not to be unreasonably withheld, conditioned, or delayed. However, all Smithsonian requests for approval (which may be by fax, e-mail, or other form of electronic transmission; in addition to those forms of notice provided in Section 1.g. of this Agreement, and which identify the substance, the subject matter, and the purpose of the sublicense) shall be deemed approved unless LLAMDIG provides Smithsonian written justification for its rejection of such request within forty-eight (48) hours of receiving such request.

2. DATES OF LLAMDIG.

a. Provision of Content. Throughout the Term of this Agreement, LLAMDIG shall provide Smithsonian with mutually agreed upon sound recordings, still and moving images, and writings from the LLAM Archive all in a mutually agreed upon digital format (including without limitation as a .wav file for Tracks, as a .jpeg file for images, etc.; all such files on a CD-R(s)) at LLAMDIG's sole shipping cost and expense. In the first year of this Agreement, LLAMDIG shall deliver to Smithsonian:

- i. On or before the Effective Date, one hundred (100) Tracks;
- ii. On or before November 10, 2001, an additional four hundred (400) Tracks; and
- iii. On or before June 10, 2002, an additional five hundred (500) Tracks.

b. Revenue-Sharing with Original Artists. LLAMDIG shall use best efforts to share an equitable portion of the revenues LLAMDIG receives via this Agreement with the respective original artists represented on GSN Tracks, the respective artists' committees, or some other organization as mutually agreed upon by Smithsonian and LLAMDIG. For this

Appendix 4c

purpose, ILAM.DIG shall dedicate at least one ILAM.DIG employee to research the identity and current residence of performers appearing in the ILAM Archive and serve as liaison to ILAM.DIG and Smithsonian on this subject. ILAM.DIG and Smithsonian shall mutually agree as to what constitutes an "equitable" portion of revenues.

c. **Rights Clearance.** ILAM.DIG, and not Smithsonian, shall be solely responsible for all costs, activities, obligations, and liabilities associated with:

i. obtaining all rights and licenses necessary for Smithsonian's authorized use of the ILAM Archive including, but not limited to, all copyright, trademark rights, rights of publicity and rights of privacy, and any broadcast, rebroadcast, or retransmission rights or permissions; and

ii. obtaining all necessary permissions and/or release documentation for all materials provided to Smithsonian from the ILAM Archive including, without limitation, all performers.

3. **PAYMENTS TO ILAM.DIG.** The Prompt Payment Act, P.L. 97-177 (31 U.S.C. Section 1801) is not applicable to the Smithsonian Institution, and funds for these expenses are provided from Trust Funds. By separate purchase order, Smithsonian shall pay ILAM.DIG:

a. One Hundred Thousand Dollars (\$100,000.00) as a non-recoupable grant payable to ILAM.DIG under this Agreement to complete the digitization project, upon receipt and acceptance of respective deliverables, in accordance with the following schedule:

i. 100 Tracks from the ILAM Archive – on or before the Effective Date, Fifty Thousand Dollars (\$50,000.00);

ii. An additional 400 Tracks from the ILAM Archive – within one hundred and twenty (120) days of the Effective Date, Thirty Thousand Dollars (\$30,000.00); and

iii. An additional 500 Tracks from the ILAM Archive – within nine (9) months of the Effective Date, Twenty Thousand Dollars (\$20,000.00).

b. A royalty of Fifty Percent (50%) of all income received by Smithsonian for exploitation of the ILAM Archive as provided by this Agreement.

c. **Reporting Period.** On a semi-annual basis, Smithsonian shall furnish ILAM.DIG with all monies owed ILAM.DIG under this Agreement and statements properly itemized by transaction. Payments and statements shall cover the previous calendar period, thus January-June (paid/sent in October of the reporting year) and July-December (paid/sent in March of the following year). Notwithstanding the above, if the accumulated royalty payment is less than Twenty-Five Dollars (\$25.00), Smithsonian may defer payment until the accumulated amount reaches Twenty-Five Dollars (\$25.00).

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4. BOOKS AND RECORDS.

a. **General.** Smithsonian shall keep accurate accounting and business records evidencing all transactions relating to this Agreement. Not more than once per calendar year, ILAM.DIG or any of its duly authorized representatives shall have the right at any reasonable hour of the business day to examine and to make copies and extracts of said accounting records with respect to this Agreement. ILAM.DIG shall retain this right of inspection and Smithsonian shall maintain and make available to ILAM.DIG such records for at least three (3) years after each payment under this Agreement, and Smithsonian agrees to permit inspection during such three (3) year period. Smithsonian shall not be obligated to retain such records more than three (3) years after a payment has been made.

b. Notwithstanding the periods of access and examination described above, for records which relate to the settlement of claims arising out of the performance of this Agreement, or costs and expenses of this Agreement as to which exception has been taken by ILAM.DIG or any of its duly authorized representatives, the right of inspection shall continue until such appeals, litigation, claims, or exceptions have been disposed of or until the expiration of the three (3) year period mentioned above, whichever time is greater.

5. **OWNERSHIP OF GSN/CREDIT.** Excluding only that content (e.g., the ILAM Archive) which Smithsonian may have licensed from ILAM.DIG and/or others, Smithsonian owns sole right, title, and interest, including without limitation the copyright, in the GSN. ILAM.DIG shall receive credit in conjunction with every Track used in GSN along with mutually agreed upon link(s) and identification in GSN of any extant Physical Media on which Tracks may appear. The manner and location of such links and identification shall be subject to Smithsonian's discretion.

6. REPRESENTATIONS & WARRANTIES.

a. ILAM.DIG represents and warrants that for the materials it is providing Smithsonian:

i. for those materials which are not in the public domain, ILAM.DIG either owns or has cleared all rights worldwide in perpetuity for music, images, voices, printed matter, and other materials in the ILAM Archive used by Smithsonian under this Agreement, in all media and all technologies now known or hereafter developed;

ii. upon receipt of royalties from Smithsonian, ILAM.DIG shall promptly pay all amounts due to the person or entity that has a right to receive any royalty or other payment as a result of the transmission or other use of ILAM Archive content as contemplated by or provided under this Agreement, as soon as such person or entity has been identified;

iii. ILAM.DIG shall use its best efforts to identify, as expeditiously as possible, all applicable persons and/or entities that have a right to receive any royalty or other payment as a result of the transmission or other use of ILAM Archive content as contemplated by or provided under this Agreement;

iv. ILAM.DIG has provided Smithsonian with complete and accurate copyright information for all materials in the ILAM Archive used by Smithsonian under this Agreement;

v. ILAM.DIG has full right to sign this Agreement for the grant of rights herein. ILAM.DIG agrees to bear all risk and liability arising out of any third party claim to rights in the ILAM Archive; and

vi. ILAM.DIG has not heretofore assigned, pledged, or otherwise encumbered the rights herein granted to Smithsonian, and, with respect to the Tracks provided to Smithsonian hereunder, ILAM.DIG is neither under nor will incur any obligation to any other party that might interfere with or injure Smithsonian's exercise of its exclusive rights herein.

b. Smithsonian represents and warrants that:

i. Smithsonian owns the trademark in its Names and marks;

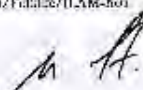
ii. Smithsonian has full right to sign this Agreement; and

iii. Smithsonian shall use its best efforts to monitor use of the GSN and to prevent copyright infringement of ILAM.DIG-provided materials via user education, design of the GSN, and, at Smithsonian's sole discretion, legal action. Smithsonian shall notify ILAM.DIG of any such copyright infringement incidents of which Smithsonian is or becomes aware.

c. Except as expressly set forth herein, Smithsonian DISCLAIMS any warranties, expressed or implied, including warranties of non-infringement or fitness for a particular purpose for the GSN as a whole, for any images or GSN contents to which Smithsonian lacks title and ownership, and for the actual security of the GSN with respect to user misuse of such materials or copyright infringement of ILAM.DIG materials by those other than Smithsonian.

7. **INDEMNITY.** The parties indemnify, defend and hold each other harmless from and against any and all loss, damage, liability, expense, claim, or action (including reasonable court costs and attorneys' fees) caused by or arising from any breach of warranty or this Agreement by the indemnifying party, or any act or omission in the execution of this Agreement of the indemnifying party, its representatives, agents, or employees, including claims of the employees, agents, third-party contractors, or distributors. The indemnifying party shall provide notice of any such claim or action to the other party. No settlement of any such claim or action shall be made without giving prior written notice to the indemnified party. The foregoing indemnification shall not diminish rights set forth elsewhere in this Agreement relative to a default or breach and shall survive termination or expiration of this Agreement. Nothing in this Section shall preclude either party, without limitation, from asserting or defending any claim or action involving any matter arising out of this Agreement.

8. **INSURANCE.** ILAM.DIG shall either procure and thereafter maintain (a) the insurance policies identified by Alexander Forbes Risk Services in a letter dated August 22, 2001 (which



is hereby attached and integrated to this Agreement) or (b) the following insurance policies (coverage afforded in the state(s) in which work is performed and with copays/yes) which have an A.M. Best's rating of A6 or higher), each at minimum in the respective amounts: Workers' Compensation (surrender limits), Comprehensive General Liability (e.g. bodily injury, property damage, and advertising injury) (\$1,000,000,000 per occurrence). Such insurance will provide for thirty (30) days advance written notice of any cancellation. LAMM DIG shall provide to Smithsonian certificate(s) of insurance evidencing the required insurance coverage within thirty (30) days following the signing of this Agreement. LAMM DIG shall be responsible for obtaining adequate evidence of insurance from all subcontractors, including coverage for loss of property and professional errors and omissions.

9. USE OF NAMES.

a. **Goodwill.** LAMM DIG and Smithsonian are hereby put on notice that they respectively own, control, and/or have registered the trademarks/service marks "International Library of African Music," "Smithsonian," "Smithsonian Institution," "Center for Folklife and Cultural Heritage," "Global Social Network," and the Smithsonian acornburst logo (the "Names"). Each party further acknowledges the great value of the prestige, publicity, and good will associated with their respective Names, and in such connection, acknowledges that such good will belongs exclusively to the owning party and that the Names have acquired a secondary meaning in the mind of the purchasing public as a source of museum services and museum products (for Smithsonian) and as a source of African folk music (for LAMM DIG). The parties respectively agree that they shall not knowingly harm, misuse, or bring into disrepute the Names, and will assist each other as they may reasonably request in preserving the integrity and dignity of their respective Names and any trademark interests therein.

b. **Restricted Uses.**

i. **General.** Except as may be otherwise provided herein, each party shall not without the owning party's prior, written approval refer to the other or to any of their respective museums, programs, organizations, or facilities in any manner or through any medium, whether written, oral, or visual for any purpose whatsoever, including but not limited to, advertising, marketing, promotion, publicity, solicitation, or fund raising.

ii. **Endorsement.** The parties are specifically barred from claiming any endorsement from one another or from claiming that it is a preferred provider or otherwise special among other similar providers.

iii. **Letterhead.** Neither party shall have the other's respective Names printed on its letterhead stationery or brochures advertising non-Smithsonian sponsored activities.

c. **Permitted Uses.**

i. **General.** Each party may make general reference to the other party's Names in a manner which is consistent with this Section 9 and in a way which is strictly limited to acknowledgment that Smithsonian owns and operates the GSN and that LAMM DIG has, under this Agreement, acted as contributor to the GSN.



ii. *Reverse Format.* Each party may make use of the other's respective Names in a client "resume" format, so long as the using party lists the other party among all of a significant portion of its other clients, without placing the Names in a prominent position, prominent or different typeface, or otherwise placing the Names so as to draw special attention to them among other client names. The preferred method is to arrange client names according to either alphabetical order or chronologically, according to number of years that the identified party has provided service to each client.

d. *Inclusion of Section.* Each party shall include the terms of this Section ("Use of Names") in any contracts with other parties providing services related to the performance of this Agreement, such as but not limited to subcontractors related to or performing the work contemplated in this Agreement.

10. TERMINATION

a. This Agreement may be terminated upon breach of any material term of the Agreement, provided that the party claiming a breach has provided written notice to the other party and offered such party thirty (30) days from the date notice is given, in which to cure such breach. If the breach is not cured, the Agreement shall terminate effective the thirty-first (31st) day following the date of notice, subject to the terms of Section 10.c, below.

b. *Force Majeure.* If by reason of fire, earthquake, flood, explosion, accidents, strikes, act of God, or war, ILAMDIG shall be delayed or prevented from performing its obligations under this Agreement, such delay shall be excused during the continuance of and to the extent of such cause, and the contract period for performance shall be extended for a period equal to the duration of such cause. If such delay exceeds ninety (90) days, either party hereto may terminate this Agreement, and all rights and obligations hereunder shall cease, subject to the terms of Section 10.c, below.

c. *Conduct Upon Termination.* Upon termination, the parties shall proceed in an orderly fashion to terminate any outstanding commitments and to conclude the work. The parties agree that in the case of termination, the parties respectively will return any original materials in possession, at the time of termination furnished or owned by the other party in conjunction with the performance of this Agreement. Within three (3) months of termination, Smithsonian shall cease the distribution of ILAM Archive materials and, excepting outstanding licenses on ILAM Archive material for which Smithsonian continues to receive revenue, Smithsonian shall be relieved of any and all liability for remaining payment obligations to ILAMDIG under this Agreement. Furthermore, ILAMDIG shall immediately cease to use the Smithsonian Name(s) and Logo, and shall not exploit in any manner its association with Smithsonian, unless the parties otherwise agree in the writing at the time of termination. ILAMDIG shall return to Smithsonian any payments made by Smithsonian for which services have not been rendered.

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11. AUTHORIZED REPRESENTATIVES.

- a. Contracting Officer. For the purposes of liaison and direction in contractual interpretation matters, dispute resolution, or for modification of this Agreement, Smithsonian shall be represented by the Smithsonian Contracting Officer.
- b. Contracting Officer's Representative. For purposes of liaison, providing guidance and direction in daily operational matters, granting approvals or withholding same, and for general contract coordination as detailed herein, the Smithsonian Contracting Officer shall be represented by Jon Kertzer, Director, Global Sound Network, Center for Folklife and Cultural Heritage. However, Mr. Kertzer is not empowered to change any of the terms or scope of this Agreement.
- c. ILLAMDIG Representative. ILLAMDIG shall be represented by Dr. Andrew Tracey, Director, or his representative.
- d. Substitution of Representatives. The parties shall advise one another in writing of any substitution for said representatives.

12. NOTICES. Any legal notices required to be given to ILLAMDIG and the Smithsonian Contracting Officer under this Agreement shall be in writing and deemed delivered upon actual receipt of such notice when hand-delivered or sent by certified mail, postage prepaid, return receipt requested, or overnight express courier to the following addresses. All written consents required hereunder shall be sent either as provided above or other method evidencing receipt to the following addresses:

TO ILLAMDIG:

Dr. Andrew Tracey, Director
International Library of African Music
Rhodes University
Grahamstown 6140
South Africa
Tel: 2746-803-8557
Fax: 2746-822-4411
E-mail: A.Tracey@ru.ac.za

TO SMITHSONIAN:

For Project Coordinator Matters:
Jon Kertzer
Director
Global Sound Network
Smithsonian Institution
1416 S. Jackson Street, 2nd Floor
Seattle WA 98144
Tel: (206) 368-0622
Fax: (206) 520-0098
E-mail: Jon@globalsound.org

For Contractual Matters:

Contracting Officer
Office of Contracting
Smithsonian Institution
Victory Building, Suite 6200
750 9th Street, NW
Washington, D.C. 20560 0907
Attn: Bruce Falk
E-mail: FalkB@contracting.si.edu

13. **AMENDMENTS.** No amendments, modifications, or waivers to this Agreement shall be valid unless in writing and signed by all parties to the Agreement.
14. **ASSIGNMENT.** No assignment shall be permitted absent the written approval of Southsonian. This Agreement shall be binding upon the heirs, assigns, executors, or administrators of Southsonian and upon the successors in interest of ILAMDIG.
15. **APPLICABLE LAW.** This Agreement shall in all respects be interpreted, construed, and governed in accordance with the laws of Washington, DC, regardless of the place of execution or performance, without regard to the conflict of laws provisions thereof.
16. **NON-DISCRIMINATION.** In fulfilling its obligations under this Agreement, ILAMDIG and Southsonian agree not to discriminate on the basis of race, creed, color, religion, sex, age, national origin, disability or for any other reason prohibited by United States Federal or applicable state law.
17. **NO WAIVERS.** The waiver by any party or the failure by either party to claim a breach or default of any of the provisions of this Agreement shall not constitute a waiver of any succeeding breach whether of a similar or dissimilar nature, nor shall any delay or omission on the part of either party to exercise any right that it has under this Agreement operate as a waiver of such right.
18. **NOT A PARTNERSHIP.** The parties, by this Agreement, do not intend to create a partnership, principal/agent, master/servant, or joint venture relationship and nothing in this Agreement shall be construed as creating such a relationship between the parties.
19. **NOT THIRD-PARTY BENEFICIARIES.** This Agreement has been made and is solely for the benefit of Southsonian and ILAMDIG. Nothing in this Agreement is intended to confer any rights or remedies under or by reason of this Agreement on any persons or entities other than the parties to it. Nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third persons or entities to any party to this Agreement.
20. **SEVERABILITY.** If any term or provision of this Agreement shall be held to be invalid or illegal, such term or provision shall not affect the validity or enforceability of the remaining terms and provisions of this Agreement.
21. **RECITALS & HEADINGS.** The recitals herein constitute an integral part of the Agreement reached and are to be considered as such. However, the captions and headings contained in this Agreement have been inserted for reference and convenience only and shall not be used in its interpretation.
22. **JOINTLY DRAFTED.** This Agreement shall be deemed to have been drafted by both parties and, in the event of a dispute, shall not be construed against either party as drafter.
23. **COINTEGRATED.** This Agreement may be executed in counterparts, each of which shall constitute an original.



Appendix 4j

24. EFFECTIVE DATE. Notwithstanding anything else in this Agreement including but not limited to the actual date(s) of signing, this Agreement shall be deemed to be effective as of September 14, 2001 (the "Effective Date") upon signature by all parties.

26. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements on this matter. There are no other written or oral agreements, representations, or understandings with respect to the subject matter of this Agreement.

ACCEPTED AND AGREED by the authorized signatories of the parties:

SMITHSONIAN INSTITUTION

INTERNATIONAL LIBRARY OF
AFRICAN MUSIC, RHODES
UNIVERSITY
("ILAM.DIG")

John W. Cobert
Contracting Officer

Dr. Stephen Fourie
Registrar, Rhodes University

Date

17. 10. 2001

Date

Thomas Charles Stephen Tagg
Member, Rhodes University Council

17. 10. 2001

Date

Appendix 5

AmaXhosa Share of Royalties from GSN February 2005- June 2006.

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