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TRADITIONAL MUSIC AND COPYRIGHT - THE ISSUES

1. INTRODUCTION

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

Copyright is an intellectual property right, meaning that it can be bought or sold like any other form of property. The first owner of a copyright is the creator of a literary or artistic work. The owner of copyright in a work has the exclusive right to do, or to authorise anyone else to do certain things with the whole or any substantial part of the work. These things are called the acts restricted by copyright and they are as follows:

- To copy the work
- To issue copies to the public
- To lend or rent copies to the public
- To perform, play or show the work in public
- To broadcast the work or include it in a cable programme service
- To make an adaptation of the work or do any of the above in relation to an adaptation

The standard set in adjudicating originality is very low. "Original" here means only that the work has its origin in the creator. There is no requirement that the work be different from all that has come before. It need only embody a minimum level of creativity and owe its origin to the author or composer claiming copyright. Copyright in a literary, dramatic, musical, or artistic work lasts until the end of the seventieth year after the death of the author.

There is already a measure of European Community-wide "harmonisation" as a result of directives on copyright and neighbouring rights applied throughout the European Market (e.g.

EC Directive 93/98), and these will herald major changes in the music industry and other cultural industries in the European Union. These moves towards greater harmonisation serve to emphasize the importance of copyright and neighbouring rights, and to consolidate their position within Europe:

"Copyright and Neighbouring rights form the foundation of intellectual creativity and the propagation of culture. Protection of these rights guarantees the maintenance and development of creativity and cultural diversity to the benefit of authors, of performers, of cultural industries, of consumers and ultimately of society at large" (The Commission of the European Communities 1991).

Because of the recognition of copyright's role and economic importance, however, "copyright law has been dragged out of its slightly eccentric legal resting-place to become an issue of international conflict, a new locus for debates over political access and monopoly power" (Boyle 1997). It is in this context that this paper outlines some of the issues involved in the debates concerning the application of copyright and neighbouring rights to traditional music and song.

2. OUTLINE OF THE PAPER

Copyright in the arts as we know it today is based on a narrowly-defined, text-based concept of the "literary or artistic work" as it has developed since the enactment of the Statute of Anne in 1709, which has at its core particular philosophical premises relating to authorship, creativity, originality, individualism, and intellectual property; most of which received their elaboration during the Romantic Movement. This elaboration of the work-concept and the resultant premises of copyright are well suited to the processes of commodification within a capitalist system.

However, traditional culture, and traditional music and song in particular, comes into conflict with this conceptual framework in two fundamental ways:

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

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

As a result of this divergence at a conceptual and practical level, traditional cultures find themselves with a problem. Many musicians from traditional cultures are partaking of the fruits of a burgeoning music industry that considers traditional forms of music marketable commodities on the "World Music" scene, thereby unknowingly working within two fundamentally contradictory, if not at least paradoxical worldviews. The hegemonic nature of the capitalistic ethos, its inherent ability to predominate and penetrate at all levels of culture, and

the natural attractions of a full-time career in the music industry for musicians who love what they do, combine to increasingly commodify the musical expressions of traditional culture, making them available for financial exploitation. If the advancing commodification of traditional culture is allowed to go unhindered, without adequate and sympathetic official protection for the originating non-market community system, then the transmission process itself, as a vital scene of community cohesion and humanising personal development, will itself be placed under threat.

"In order to fairly assess the need for the intellectual property protection of folklore, the frame of reference from which we are accustomed to viewing the spectrum of legal traditions must be set askew" (Weiner 1987:57).

3. THE PHILOSOPHICAL BASIS OF COPYRIGHT

3:1 Authorship

3:2 The "work"

3:3 The basic inadequacies of copyright

Copyright in the arts as we know it today is based on a narrowly-defined, text-based concept of the "literary or artistic work" as it has developed since the enactment of the Statute of Anne in 1709 (Rose 1994). Music did not gain inclusion until 1842, when it was added to a definition of "books", and did not get treated as a separate art form until 1882 (Mills 1996). Hence the conceptual framework around which legal structures dealing with copyright in music have been built is a literary one.

3:1 Authorship

At the centre of the copyright paradigm is the "author", the "creator", as a distinct and discrete entity. In earliest times "Creator" was a name of Divine privilege, the human creative process finding its expression in ideas of craft and craftsmanship. The notion that the writer or composer is a special participant in the production process, indeed the only one worthy of attention, is a relatively recent one, "a by-product of the Romantic notion [18th - 19th centuries] that significant writers break altogether with tradition to create something utterly new, unique - in a word, 'original' " (Woodmansee and Jaszi 1994:16). Incorporated in this more recent formulation of authorship are assumptions founded on an individualism that developed in the seventeenth century, replete with a conception of the individual as the proprietor of his own person or capacities, which became one of the major influences on related ideas of originality and creativity as they took hold on the literary, legal, and public imaginations through the "cult of the artist".

3:2 The Work

An acceptance of the "author" or "creator" as a discrete, autonomous individual is usually coupled with the acceptance of a concept of the autonomous "work", a term signifying the abstraction that receives physical manifestation in a particular "copy" or "copies". This notion is

first and foremost of text-bound provenance, but the acceptance of perceived musical aesthetic autonomies took hold in the Western Art or Classical music tradition in the late eighteenth or early nineteenth centuries:

"The work-concept of music not only provided musicians with a theoretical equivalent to the tangible and highly valued objects of painting and sculpture, it served to conceal music's social and performative aspects by diverting attention away from musical processes to musical outcomes conceived as autonomous objects" (Elliot 1995:25).

Together with "authorship", the formulation of the work-concept consolidated the power and influence of Romanticism in the development of societal structures, to the point that it became taken for granted as the only valid explanation for creative realities, and therefore the only possible foundation for legal philosophy:

"The view of the musical world the romantic aesthetic originally provided has continued, since 1800, to be the dominant view. This view is so entrenched in contemporary thought that its constitutive concepts are taken for granted. We have before us in fact a clear case of conceptual imperialism" (Goehr 1992:245).

3:3 The Basic Inadequacies of Copyright

a) *Collectivity of Creativity; Organic Nature of Creative Systems*

In recent times, cultural theorists such as Michel Foucault and Roland Barthes, and legal theorists such as James Boyle and Peter Jaszi, have uncovered many of the shaky foundations that have supported the construct of autonomous "authorship", deconstructing the assumptions of originality and individualism to reveal the collaborative and collective nature of cultural production. But whereas cultural and legal theorists have signalled a need for a complete reassessment of "authorship", "originality", and copyright, there has been little or no response at a practical legislative level, with the consequences that such a failure to address this problem entails.

"The 'authorship' concept, although highly visible in contemporary copyright law, usually appears as a focus of consensus rather than debate. 'Authorship', as deployed in texts and in cultural understandings, has been anything but a stable, inert foundation for the structure of copyright doctrine. Rather, the ideologically charged concept has been an active shaping and destabilizing force in the erection of that structure" (Jaszi 1991:456).

The recent groundbreaking, interdisciplinary Bellagio Declaration (1993) stated clearly:

"In contemporary usage an 'author' is the sole creator of unique works of art, the originality of which warrants their protection under laws of intellectual property known as 'copyright' or 'author's rights'. So firmly established is this notion that it persists and flourishes even in the face of contrary experience. For on reflection it is evident that our creative practices are always derivative, generally collective, and increasingly corporate or collaborative. Yet we continue to

think of 'genuine' authorship as solitary and originary, and may even imagine that the value we assign it is timeless and universal" (Bellagio 1993).

Musicologist Charles Seeger once wrote:

"It is well known that conscious and unconscious appropriation, borrowing, adapting, plagiarizing, and plain stealing are variously, and always have been, part and parcel of the process of artistic creation. The attempt to make sense out of copyright laws reaches its limit in folk song. For here is the illustration par excellence of the Law of Plagiarism. The folk-song is, by definition, and as far as we can tell, by reality, entirely a product of plagiarism" (Seeger 1992:450).

Taken to extreme logical conclusions this recognition of collaborative production provokes extreme, uncompromising responses, which call for the eradication of all intellectual property regimes:

"Copyright is theft because it claims ownership of a common cultural heritage. It loots ideas, images and sounds from the naturally free-flowing cultural milieu. To copyright something is to deny sources. Copyright presents as the property of one, that which is taken from the lives of many. Authors imperialize their influences when their work is copyrighted" (McGraith 1990).

Simon Frith marries the assault on "authorship" with a critique of the fixation that musical copyright implies in trying to explain many of the problems relating to intellectual property, e.g. sampling, that currently beset the music industry:

"Until recently...it was taken for granted that 'music' (a particular organisation of sound) was constituted as something fixed, something authored, and something that exists as property. These assumptions reflect the two sides of the bourgeois ideology of art, its simultaneous stress on individual creativity and individual ownership, on the Romantic-capitalist ideology which has survived both the rise of the mass media and the development of electronic means of cultural reproduction. During the last two hundred years, though, the contradictions involved in this account of art have become harder and harder to manage - hence the huge elaboration of legal and institutional mechanisms to contain them, to sustain the belief that a work of art expresses an individual sensibility (even when collectively produced, as in the cinema, television and recorded music), and to keep in balance the theory of intellectual property (something abstract, 'owned' by its creator) and the practice of the intellectual commodity (creatively realised in a material object, something to be 'owned' by its consumer)" (Frith 1993:1).

b) *Recombination and the Nature of the Musical Work in Traditional Music*

Keeping these things in mind, it is no surprise that the musical application of copyright, born of the Western Art tradition, has been found to be almost entirely inadequate when faced with traditional musics in particular, as has been recognised by the World Intellectual Property Organisation:

"It seems that copyright law may not be the right, or certainly the only, means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author - at least in way in which the notion of 'author' is conceived in the field of copyright - is absent" (WIPO 1997:5).

As we have already seen, fundamental difficulties arise from the application of ready-made conceptions of the "author" or the "work" to traditional musics. It is perhaps tempting on the basis of experience to apply the term "work" in a traditional context. We already speak of songs or tunes as discrete entities, but our perception even of these may be unconsciously influenced by the underlying assumptions of the work-concept. Traditional songs and tunes seem to conform more to a model of a "consensus of practices". As Ciaran Carson has written of Irish traditional music, "The same tune is never the same tune twice. A traditional tune printed in a book is not the tune; it is a description of one of its many possible shapes" (Carson 1986:8).

It is interesting to now note that even in the Western Art tradition the idea of tangible fixation of a "work" that copyright requires is now deemed inadequate:

"Musical works enjoy a very obscure mode of existence; they are 'ontological mutants'. Works cannot, in any straightforward sense, be physical, mental, or ideal objects. They do not exist as concrete, physical objects; they do not exist as private ideas existing in the mind of a composer, a performer, or a listener; neither do they exist in the eternally existing world of ideal, uncreated forms. They are not identical, furthermore, to any one of their performances. Performances take place in real time; their parts exist simultaneously. Neither are works identical to their scores" (Goehr 1997:2).

In traditional music there is the added issue of the continual reworking of available material, or "recombination" that takes place within the traditional musical system. As folklorist W.F.H. Nicolaisen has written, variation in folklore is creative because it is the result of, "deliberate, intentional, and therefore far from accidental, changes and choices introduced by the individual folk artist whose creative genius is not content with mere imitative repetition in the process of appropriating a variant of a tale (or song) as his or her own personal version. Far from being at odds with each other, creativity and tradition, individual and community, together produce vital variability thus keeping alive the very items that their integrated forces help to shape" (Nicolaisen in Bronner 1990:45).

At no point, moreover, is it to be denied that creative individuals contribute new tunes and songs to be played or sung:

"The personality of the artist is often an important factor in folklore expressions, and individual contributions to the development and maintenance of such expressions may represent a creative

source of enrichment of inherited folklore if they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations" (WIPO 1997:6).

But an acceptance of creativity in traditional systems, or what we might call composition, does not automatically mean that we must subscribe to the philosophical, concept-laden frameworks of "composer" and "work" that have been passed down in the Western Art or Classical music tradition. Ethnomusicologist Colin Quigley, writing of French Newfoundland traditional fiddler Emile Benoit, makes clear that Emile's highly developed compositional skills were part and parcel of traditional expression:

"Emile's musical knowledge and skill were fairly typical of his musical peers. Creation of new strains and entire tunes is not uncommon or atypical, and most musicians have a few such pieces in their repertoires. Emile's intense level of commitment to the continuing search for creative musical expression, however, transformed his musical abilities into a powerful tool for composition. As an unusually prolific composer, he was not at odds with his tradition. Rather, he internalized its essential characteristics and actualized its inherent potential as a generative system of musical expression" (Quigley 1995:212).

Creative activity in traditional contexts must be assessed within its contexts of production and consumption, and cannot be understood as an autonomous realm, as copyright would encourage us to do. As a result, "the law is not so much systematically hostile to works that do not fit the individualistic model of Romantic 'authorship' as it is uncomprehending of them. Such works are marginalized or become literally invisible within the prevailing ideological framework of discourse in copyright" (Woodmansee and Jaszi 1994:302).

4. COPYRIGHT AS AN INSTRUMENT OF COMMODIFICATION WITHIN CAPITALISM

At this stage in history it is almost impossible to separate intellectual property from its role as an instrument of commodification within capitalist systems:

"In capitalist economies, one function of the market is to assure the public distribution of commodities, but the discipline of the market extends to the private attributes of individuals (personality, emotion, sexuality, artistic self-expression) only to the extent that these can be effectively 'commodified'" (Jaszi 1991:491).

In fact, their development throughout history has been concurrent. The appearance in the eighteenth century of things of the mind as transferable articles of property matured simultaneously with the capitalist system. It could be argued that the application of intellectual property in any circumstance assumes the *a priori* application of capitalism, where the production and distribution of goods depend on invested private cultural capital and profit making. If this is the case, then unlimited participation in a capitalist system, which seeks by its nature the furthestmost penetration of the market, and the unbounded acceptance of intellectual property as a legal solution, impose an unnecessarily individualist vision. Ecologist Vandana Shiva has written that:

"The first restriction of Intellectual Property Rights is the shift from common rights to private rights. This excludes all kinds of knowledge, ideas, and innovations that take place in the 'intellectual commons'. The second restriction of Intellectual Property Rights is that they are recognised only when knowledge and innovation generate profits, not when they meet social needs. This immediately excludes all sectors that produce and innovate outside the industrial mode of organization of production. Profits and capital accumulation are recognised as the only ends to which creativity should be put" (Shiva 1993:115).

This brings us back to an earlier point in relation to copyright. In clarification of what actually happens when copyright is vested in an individual, copyright and related rights give the holder sole and exclusive power to authorise or prohibit the use and reproduction of the whole or any substantial part of works and other protected matter. This is possessive individualism in practice. This degree of control, if applied to traditional music and song, bestows rights on an individual which they would not previously have had within the traditional practice of musical transmission, and which would in fact run contrary to the welfare of the transmission process (Bell 1985, Blaukopf 1990, Mills 1996, Weiner 1987). Even when dealing with the relatively unproblematic literary copyright the issue of restriction as a threat to the sensitivity to creative processes arises:

"Authorship is possible only when future authors have the ability to borrow from those who have created before them. If too much of each work is reserved as private property through copyright, future would-be authors will find it impossible to create. Society would presumably suffer from the decreased production of creative works. Proper construction of our copyright law therefore depends on striking a socially acceptable balance between the interests of authors and the public" (Woodmansee and Jaszi 1994:160).

The question, of course, then arises as to what exactly the rights of individuals are within a traditional music transmission process.

5. COMMUNITY ECONOMY

Following the work of Stephen Gudeman (1996), I believe it is useful to examine the traditional music transmission process as an example of a Community Economy. In so doing, I believe that we can come to a greater understanding of the responsibilities and duties of members within traditional music communities, and through this understanding we may begin to unravel the processes at work when intellectual property, as an instrument of a Market Economy, is applied within those communities.

Some of the characteristics of a Community Economy are as follows:

a) Innovations are Product and Property of a Group

We have already seen how recombination and collective innovations provide the core of traditional music practices. It is as a result of reciprocal practices that the corpus of traditional

music and song is perceived as a common pool of material, the product of a group rather than of individuals, the whole of which emerges as a continually developing consensus of practices and expectations that defines a community.

"But group pooling does not always imply open access or equality of shares. Social rules may sustain power differences, and distribution of resources may depend upon age, gender, or kinship differences. Particulars aside, a community does not allocate shares by calculating the marginal efforts and yields of individuals. Of course, community sectors today are increasingly dominated by market principles, but even within the competitive market itself communal practices are encountered. Pure gifts, charity and altruism remain important in market economy, even if they do no more than indicate the suspension of self-interest and an ephemeral commitment to community" (Gudeman 1996:106).

b) *Innovations Emerge Through Practices as Ends in Themselves*

In the commercial realm goods circulate through trade. One of the vital keys to understanding traditional musical forms is in the predominance of participation as an end in itself, as the means whereby circulation of knowledge, in this case musical knowledge, takes place. "Based on the commensality of its participants, the community economy emphasizes qualities such as sharing and reliance upon others. An economy of trust and fostering, these qualities extend to all who make up the community" (Gudeman 1996:105). Variation, recombination, and even new compositions primarily serve to feed the system of participation rather than draw overt attention to individual contributions. "The aim is to sustain or maintain a way of living; and this is understood in a total sense: well-being in the community is defined in terms of participation and social continuity as opposed to individual acquisition" (Gudeman 1996:105). Although hierarchies of talent and status undoubtedly evolve over time, nevertheless traditional forms invite musical interaction at all levels of ability, making the musical practice a means to an end of social interaction and community cohesion, a domain of gift. This stands in marked contrast to a market economy, where intellectual property rights connote that the property has value as a means to accumulate more wealth or money.

c) *Material Processes are Cyclical or Self Contained*

In traditional communities music was constantly reinvested through performance into the cyclical process of transmission. This still occurs, but problems have manifested themselves through the participation of outside agencies with no sense of the reciprocation required by the musical community; e.g. the use of traditional material by record companies and non-traditional groups. The reluctance of traditional composers to copyright their tunes, thus leaving their work vulnerable to piracy, stems from a complex web of social relationships and a recognition of a "tradition" that incorporates past, present, and future generations. Erroneous copyrighting of these tunes and songs means that neither the original composers nor traditional music communities will benefit from royalties, and amateur traditional musicians may eventually be deprived of the free use of the music. In many cases individuals have personally appropriated traditional tunes or songs by way of registration; a peculiar version of "first-come-first-served" and "what they don't know won't hurt them". No one is suggesting that traditional cultures can

survive in cocoons, but as Stephen Brush states in relation to the application of intellectual property in biodiversity and genetic engineering:

"Common heritage does not mean that a person who seeks to obtain genetic resources has no obligation to those who provide them. On the contrary, common heritage implies a reciprocity between the collector of genetic resources and the producer. The reciprocity is that collective knowledge flows in both directions" (Brush 1996:148).

6. PUBLIC DOMAIN

The term "public domain" is often used in relation to traditional music and song, but, in much the same way as the terms "author" and "work", "public domain" at the present time finds itself under threat. John Frow, of the University of Queensland, has written that:

"The concept of public domain has a precise application in modern legal systems, where it forms the cornerstone of copyright law and indeed of Intellectual Property doctrine generally. Yet the concept is a purely residual one: rather than being itself a set of specific rights, the public domain is that space, that possibility of access, which is left over after all other rights have been defined and distributed. It has had a shadowy legal presence through common-law principles such as fair use but its lack of positive doctrinal elaboration leaves it vulnerable to erosion. It is a concept which is in many ways in crisis" (1997:209).

The use of the term often leads to confusion in traditional music, implying anonymous or unknown authorship, meanings which are often attributed wrongly to the word "traditional" itself. As has been shown, however, "traditional" implies the presence of a community economy, in which authorship is certainly not a central concern. The concept of public domain, in the sense of unlimited access to all who wish to participate in the community economy, is such a given - for newly composed material as well as for the musical heritage that has been passed down through the generations - that its use as a term would seem superfluous. Composers in traditional communities allow their material to be subsumed into the traditional participatory processes in return for the very participation that begot their efforts in the first place. This fluidity of musical practice across complexly layered communities makes intellectual property rights difficult to assign and equity hard to achieve.

The conceptualization of the public domain as "that space, that possibility of access, which is left over after all other rights have been defined and distributed" (above), is once more a product of a copyright-bound worldview that does not allow for an alternative reality; the product of a world view that can ultimately be traced back to Platonic and Cartesian mind/body dichotomies. Continual and unexamined application of such concepts leads to further misunderstanding of the issues at stake. It leads us to persist in our understanding of the stuff of life as products and not process. As Stephen Gudeman has written in the context of biodiversity:

"The expression, 'intellectual property rights', with its emphasis on the mind, connotes abstraction, decontextualization, formalization, and the use of written information. Through the concept of intellectual property rights we deploy widely accepted Western assumptions. We

assume that innovations as products or processes have a technical essence that can be identified; once distinguished, this core can be abstracted from its context of use, converted to a written form, transported home, and tested in a laboratory. The implication is that local knowledge, if it is valid knowledge, can be restated within a scientific and general language that we possess. If local knowledge cannot be fitted to this discourse, it must be faulty" (1996:112).

7. INTELLECTUAL PROPERTY AS A THREAT TO COMMUNITY LIFE

The continued application of the principles of intellectual property within community economies carries within it the threat of breakdown of a human community whose relationships are expressed through and maintained by creative expression and resources. Community economies still exist as realities, despite the blurring of community boundaries and the imposition of market principles, and despite the assumption that *communitas* is merely a fanciful ideological reconstruction of the Sixties Folk Revival. "Vernacular cultures have not been wholly subsumed into mass commodity culture, despite - in some respects because of - the threat of a universalization of the marketplace. The two react against each other, colliding into and at certain points galvanizing each other in a continual process of tension and contradiction" (Pickering and Green 1987:34). Recognition of the place of community economy within traditional culture, and recognition that copyright and intellectual property is not going to go away, makes it tempting to just accept that intellectual property is the lesser evil. But again, unchanged application of intellectual property rights carries profound implications, as Stephen Gudeman rightly points out:

"In my view, the use of intellectual property rights on an international scale to compensate nonmarket economies not only raises problematic issues but presents a paradox. Some people would use the legal and monetary entitlements afforded by intellectual property rights to protect and foster the local knowledge and innovations of a folk in order to secure global equity and help them preserve community identity. But if intellectual property rights is a property and component of Western capitalism, then abetting its acceptance elsewhere must lead to economic transformation or adoption of the market form exactly among those people whom it is said to protect. Here we need to distinguish carefully between using intellectual property rights to protect innovations within a market economy and using them between economies" (1996:104).

We have to be careful that our actions do not simply reproduce a long history of transforming all aspects of pre-industrial forms of community economy into post-industrial models of capitalist market economies, for in doing that we subvert the humanising ingredients of the mix. "The argument for extending the market's logic to community economies is not an argument for achieving greater efficiency within the market, but often a justification for market penetration and private engrossment. Extending an intellectual property rights system to a community commons is a way of parsing and converting it to the market form, where it may be used for individual gain. This subverts the trust and mutuality of which the commons is an expression" (Gudeman 1996:112). It is a common problem for all traditional musics as they strain under the weight of the growing penetration of the market economy and intellectual property. As Sherylle Mills has concluded, "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).

There has to be a realisation that the world-view of economics is not an all-encompassing, universal truth, as is commonly assumed. Michael Pickering and Tony Green, in their article "Towards a Cartography of the Vernacular Milieu", have written:

"The threat of capitalist development in the modern world is the subsumption of all social life into the marketplace. This universalisation of the market is, as Braverman has put it, 'one of the keys to all recent social history'. It is not only material and service needs which are threatened by this development; 'emotional patterns of life' also become increasingly 'channelled through the market' and 'relationships between individuals and social groups' tend 'not to take place directly, as co-operative human encounters but through the market as relations of purchase and sale'" (1987:1).

The enclosure of the traditional transmission process by commercial concerns is jettisoning essential elements of community economy that maintain transmission in fluid motion, and is directly related to the decline of community level participatory forms of musical expression. The musical community economy, which has long contained the seeds of its regeneration, now invites with open arms the seeds of its possible destruction.

That the world of Homo Economicus is a significant, dominant, and oft times beneficial way of looking at the world at the end of the twentieth century there can be no doubt. But to suggest that there is no alternative, or to suggest that certain valuable aspects of traditional culture have no right to exist contemporaneously on their own terms is going too far down the evolutionist trail. Even the famed economist John Maynard Keynes warned us not to "overestimate the importance of the economic problem, or sacrifice to its supposed necessities other matters of greater and more permanent significance" (Schumacher 1978). E.F. Schumacher has stated it clearly: "The 'logic of production' is neither the logic of life nor that of society. It is a small and subservient part of both. The destructive forces unleashed by it cannot be brought under control, unless the 'logic of production' itself is brought under control" (1978:290).

In recent years there has been a general recognition of crisis in Legal, Economic, Scientific and similarly mechanistic systems in the light of their inadequacy to deal with an organic and highly complex reality. As Marilyn Ferguson has written, "When the puzzles and paradoxes cry out for resolution, a new paradigm is due" (1981).

Certain elements of the market economy in the form of intellectual property have come into contact with a largely incompatible traditional counterpart. A certain part of the body traditional is rejecting the transplant. That is not to ignore the question of overlapping practices or even the full-blooded participation of some traditional musicians in the capitalistics of the music industry. Neither is it to ignore the gift-bounded processes at all levels of the Music Business, or indeed any capitalist system. Polarisation in absolutes only produces oversimplification and distortion.

8. SUMMARY

At the recent UNESCO/WIPO World Forum on the Protection of Folklore (April 1997), it was admitted that:

"The participants [Phuket, Thailand] were of the view that at present there is no international standard of protection for folklore and that the copyright regime is not adequate to ensure such protection. They also confirmed a need to define, identify, conserve, preserve, disseminate, and protect folklore which has been a living cultural heritage of great economic, social, and political significance from time immemorial" (WIPO 1997).

It has been shown in this paper that the musical community economy that supports traditional music transmission abides by models of creativity, collaboration, and participation that together add up to the antithesis of the text-based, individualist and essentially capitalist nature of intellectual property regimes. All problems relating to copyright and neighbouring rights in traditional musics can ultimately be traced back to these issues, highlighting "the tension between two different visions of the individual's place in the community - one a characteristic of early modern, pre-industrial social thought and the other associated with post-industrial ideology" (Jaszi 1991:457). Hence the need to develop a *sui generis* system of protection for traditional culture and traditional musical expression, one that grows from the nature of traditional systems as they are, rather than one imposed on them as the way they should be. The challenge we face is to attempt to reconcile the two apparently irreconcilable worldviews in practical terms.

It is crucial that the legal system, informed by consultative scholarship, recognises the wealth, the breadth, and, most importantly, the social nature of traditional musics and transmission; and that it provides a fair, accurate, and proportioned representation of the music and its cultural context. To not do so would be an insult to the music, to the people at its core, and would threaten the very continuance of the music itself as a participatory phenomenon.

REFERENCES

- Bell, R. 1985. "Protection of Folklore: The Australian Experience" Copyright Bulletin 19(2):4-14.
- Bellagio Declaration. 1993. Principle drafters: James Boyle, Peter Jaszi, and Martha Woodmansee. <http://www.cwru.edu/affil/sce/Bellagio.html>
- Blaukopf, K. 1990. "Legal Policies for the Safeguarding of Traditional Music: Are They Utopian?" The World of Music XXXIII(1).

- Boyle, J. 1997. "A Sense of Belonging" Times Literary Supplement London: July 4th.
- Bronner, S. J. 1992. Creativity and Tradition in Folklore: New Directions. Logan, Utah: Utah State UP.
- Brush, S. 1996. Is Common Heritage Outmoded? In Valuing Local Knowledge: Indigenous People and Intellectual Property Rights, edited by Brush and Stabinsky. Washington, D.C.: Island Press.
- Carson, C. 1986. Pocket Guide to Irish Traditional Music. Belfast: Appletree Press.
- Collinson, Francis. 1966. The Traditional and National Music of Scotland. London: Routledge and Kegan Paul.
- Commission of the European Communities. 1991. "Copyright and Neighbouring Rights in the European Community." Luxembourg (CC-AD-91-009-EN-C).
- Elliot, D. 1995. Music Matters: A Philosophy of Music Education. New York & Oxford: OUP.
- Ferguson, M. 1981. The Aquarian Conspiracy. London: Routledge and Kegan Paul.
- Frith, S., ed. 1993. Music and Copyright. Edinburgh: Edinburgh UP.
- Frow, J. 1997. Time and Commodity Culture. Oxford: Clarendon Press.
- Goehr, L. 1997. The Imaginary Museum of Musical Works. Oxford: OUP.
- Gudeman, S. 1996. Sketches, Qualms, and Other Thoughts on Intellectual Property Rights. In Valuing Local Knowledge: Indigenous People and Intellectual Property Rights, edited by Brush and Stabinsky. Washington, D.C.: Island Press.
- Howes, Frank. 1969. Folk Music of Britain and Beyond. London: Methuen and Co.
- Jaszi, P. 1991 "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" Duke Law Journal Durham, N. Carolina: Duke UP.
- Jaszi, P. 1992. "On The Author Effect: Contemporary Copyright and Collective Creativity" Cardozo Arts & Entertainment Review. New York: Cardozo Press.
- McGraith, D. 1990 Anti-Copyright and Cassette Culture In Sound By Artists Toronto: Art Metropole.
- Mills, S. 1996 Indigenous Music and the Law: An Analysis of National and International Legislation In Yearbook for Traditional Music.

- Pickering, M. and Tony Green. 1987. Towards a Cartography of the Vernacular Milieu In Everyday Culture: Popular Song and the Vernacular Milieu Milton Keynes: Open UP.
- Quigley, C. 1995. Music from the Heart: Compositions of a Folk Fiddler. Athens & London: U of Georgia P.
- Rose, M. 1993. Authors and Owners: The Invention of Copyright. Cambridge, MA: Harvard UP.
- Schumacher, E. F. 1978. Small is Beautiful. London: Abacus.
- Seeger, P. 1992. The Incomplete Folksinger. Lincoln: U of Nebraska P.
- Shiva, V. 1993. Biodiversity and Intellectual Property Rights In The Case Against "Free Trade" San Francisco: Earth Island Press.
- Weiner, J. 1987. "Protection of Folklore: A Political and Legal Challenge." IIC 18(1)
- Woodmansee, M., and Peter Jaszi. 1994. The Construction of Authorship: Textual Appropriation in Law and Literature. Durham and London: Duke UP.
- WIPO 1997. Introductory Seminar on Copyright and Neighbouring Rights: The Protection of Folklore. Geneva, Sept. 29.