



(Don't) Stop the Cavalry. Traditional Music, Intellectual Property, Globalisation and the Internet.

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Abstract

Last year, I published, with Euan Cameron, a paper entitled *Full Fat, Semi-skimmed No Milk Today – Creative Commons Licences and English Folk Music*.¹ The title wouldn't mean much to you unless you were a fan of the 60's pop group Herman's Hermits, and even if you were it still may not be that clear. What we were trying to do (and capture in the title) was, in the context of traditional (folk) music; examine the impact on the development of such music of intellectual property regimes (intellectual property regimes). Traditional music we defined as: "*Music originating among the common people of a nation or region and spread about or passed down orally...*" The full on intellectual property regimes (or full fat in the context of our title) we concluded had a negative effect on the development of the folk music tradition and in addition what was more worrying was that it was getting fatter and more harmful. But we had hope, maybe the cavalry was coming in the shape of the internet. After all the internet has the ability to allow mass communication and has brought with it more liberal intellectual property licence regimes through the Open Source and the Creative Commons movements. These were our 'semi skimmed' and we did the same for them as we did for full fat, we considered how well they would foster and develop the traditional and folk music tradition. We started with high hopes as these systems seemed ready made for traditional music – for example the Creative Commons 'Sharing Licence' contains the phrase: "*This licence allows others: To take a sample from your song and include it in their own.*" The Creative Commons and Open Source movements have had striking successes but they suffer from a fundamental flaw in that they have their roots in western intellectual property regimes based

systems. Such systems whilst empowering some endeavours disempower others. Unfortunately then we concluded that this time this was the wrong cavalry – we commented:

“Folk culture is not merely the mechanical mixing and joining of tunes and lyrics, it is a set of values reflected in a set of processes where the music is refreshed, emphasising variation and selection but with little thought to individual rights.”²

I suppose at this point we should have been true to our title and considered non intellectual property systems, our no milk today option, but we had really said enough and we contented ourselves with making a few general comments. But now one of us has regrouped and is ready to take on the challenge. Digging a little more into the literature of those promoting initiatives such as the Creative Commons it became clear that the arguments rely on a set of arguments that look very familiar, they are those used to dis-empower indigenous and ethnic minority groups, at times when dominant cultures were trying to force these groups to ‘assimilate’ to the prevailing cultures and norms of that dominant culture. In this paper I, as the cavalry in now down to its last man, will draw upon the literature relating to ethnic minorities and indigenous peoples and see how that battle, the battle against assimilation, has been fought and in part won and see, as all good generals do, what lesson can be learnt from this for the coming battle of traditional music, the internet and intellectual property.

1. Introduction

Last year, I published, with Euan Cameron, a paper entitled *Full Fat, Semi-skimmed No Milk Today – Creative Commons Licences and English Folk Music*.³ The title wouldn't mean much to you unless you were a fan of the 60's pop group Herman's Hermits, and even if you were it still may not be that clear. What we were trying to do (and capture in the title) was, in the context of traditional (folk) music; examine the impact on the development of such music of intellectual property regimes (intellectual property regimes). Traditional music we defined as: *“Music originating among the common people of a nation or region and spread about or passed down orally...”* The full on intellectual property regimes (or full fat in the context of our title) we concluded had a negative effect on the development of the folk music tradition and in

addition what was more worrying was that it was getting fatter and more harmful. But we had hope, maybe the cavalry was coming in the shape of the internet. After all the internet has the ability to allow mass communication and has brought with it more liberal intellectual property licence regimes through the Open Source and the Creative Commons movements. These were our 'semi skimmed' and we did the same for them as we did for full fat, we considered how well they would foster and develop the traditional and folk music tradition. We started with high hopes as these systems seemed ready made for traditional music – for example the Creative Commons 'Sharing Licence' contains the phrase: *“This licence allows others: To take a sample from your song and include it in their own.”*

2. Why CC not the answer –intellectual property regimes and PD

We concluded that the Creative Commons and Open Source movements have had striking successes but they suffer from a fundamental flaw in that they have their roots in western intellectual property regimes based systems. Such systems whilst empowering some endeavours dis-empower others – we commented:

“Folk culture is not merely the mechanical mixing and joining of tunes and lyrics, it is a set of values reflected in a set of processes where the music is refreshed, emphasising variation and selection but with little thought to individual rights. Herein lies the weakness of the Creative Common system, the reluctance of folk music composers and performers to enforce copyright in their works. This then leaves these works vulnerable to the copyright claims of others. As McCann comments:

“The reluctance of traditional composers to copyright their tunes... stems from a complex web of social relationships and a recognition of a tradition that incorporates past, present, and future generations. Eroneous copyrighting of these tune and songs means that ... amateur traditional musicians may eventually be deprived of the free use of the music.”⁴

This is affirmed by WIPO in their report Intellectual Property and Traditional Cultural Expressions;

“... non- Indigenous and non- traditional persons... are able to acquire copyright over “new” folkloric expressions or folkloric expressions

incorporated in derivative works, such as adaptations and arrangements of music.”⁵

Therefore whilst providing much welcomed flexibility to creators of ‘original’ (but not in its extended form) copyrightable works these licences focus on the sharing and distribution of new music and are therefore less useful in the protection and encouragement of folk music where reliance is placed more on adaptation and development than on the creation of the new. Thus even with the extensive use of such licences there inevitably continues to be, with the present extension to the copyright regimes, an erosion of amount of music available for free use.”⁶

I would just like to take a moment to review and elaborate slightly on the background to this conclusion. Our gripe was that Open Source and Creative Commons are systems designed to be used with an existing intellectual property regimes, indeed the trick of open source is to utilise the licensing provisions of copyright law to tie subsequent developers to the openness of the work. The schemes work and are dependant upon intellectual property regimes. Now these intellectual property regimes are not perfect and do seem to have some problems when dealing with traditional knowledge and folklore. Of course many of these sources of knowledge tend to be within the developing world. The relationship of the intellectual property regimes of the developed world and the developing world has always created some tensions. This was highlighted by Bentley and Sherman who comment:

“the globalisation of intellectual property standards has largely been a process whereby the wish-lists of various developed-world lobby groups are inscribed into public international law.”⁷

If I could draw upon how this is played out in the context of access to drugs in the developing world. The context within the AID's epidemic is frightening. Whilst Sub-Saharan Africa, for example, holds just over 10% of the world's population, it is estimated to be home to more than 60% of all people living with HIV—25.8 million.⁸ Yet many in these areas have no access to appropriate drugs. The oft-quoted reason is the high cost of drugs.⁹ In turn the high cost of drugs is seen to be the result of the wide-ranging patent protection given to drug companies.¹⁰ Attempts have been made, within existing intellectual property regimes to combat the problem, in 2001 at Doha

the WTO, the custodian of TRIPS¹¹, passed a ministerial declaration that recognises the primacy of right to life and health over the protection of intellectual property rights. The declaration states:

“We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members rights to protect public health and in particular to promote access to medicines for all.”

The Declaration introduced a number of initiatives now commonly referred to as the Doha Development Agenda – including rights of member states to enact compulsory licence legislation in cases of national emergency. Some years later in 2005 the WTO made permanent the Doha Declaration.¹² How has this initiative fared? It doesn't look good. As at 2005 the top ten pharmaceutical companies control almost 59% of the world market as opposed to 'only' 53% in 2001. As Vandana Shiva comments

*“The issue of the right to medicine was supposed to have been addressed in Doha in the public health declaration. However, the "permanent solution" for TRIPS and health in para. 40 is making permanent a non-solution contained in the general council decision of 30 August 2003 on the implementation of para 6 (above) of the Doha declaration on the TRIPS agreement and public health. This mechanism has not worked for any country... It is also estimated that 90% or more of those in need of antiretroviral drugs in countries such as Ethiopia, Ghana, Lesotho, Mozambique, Nigeria, the United Republic of Tanzania and Zimbabwe were not yet receiving them by mid-2005.”*¹³

Now here is not the place to develop a full-blown critique of intellectual property regimes's but I do think this example shows us two things. One is that intellectual property regimes 's do, as suggested by Bentley and Sherman, benefit some at the expense of others (in this case the developed as opposed to the developing world), and secondly that it is difficult to modify within these intellectual property regimes so that this imbalance is addressed. Why is it that benefit of intellectual property regimes's is not even, well it appears to some that intellectual property regimes's have become imbalanced. Writers such as Lessig¹⁴ and Boyle¹⁵ argue that it is the size of

intellectual property protection that reduces the public domain and thereby stifles activity and creativity. Boyd describes this as the second enclosure movement,

“the enclosure of the intangible commons of the mind,” ... but once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights.”¹⁶

We commented:

“The relationship between the public domain and copyright is at the heart of Lessig’s concerns relating to overweening Intellectual Property rights. In various fields, we see attempts to privatise common heritage, common knowledge, and public domain information. The question should always be what do we want from our Intellectual Property systems?”¹⁷ page 3

The solution of these writers, within the context of intellectual property regimes is to reduce the size of intellectual property protection and thereby increasing the amount within the public domain, the Creative Commons initiative tries to do something about this. But as we concluded this doesn't seem to work. It doesn't work and I would venture to suggest it doesn't work because what we are trying to do doesn't fit it into an intellectual property regimes mould.

Let's just take the language of intellectual property regimes – which are designed to give rights to an individual for the creation of something new. It requires there to be an enclosed area and a public domain. The words time limited rights to individuals who create the new do not sit comfortably within the context of traditional music where, if I may repeat *“reliance is placed more on adaption and development than on the creation of the new.”¹⁸* Thinking of traditional knowledge and folklore words such as responsibility replaces the word rights, collective replaces individual, hand me down replaces new, perpetuity replaces time limited.

Further the whole structure of the enclosed and the public domain (and changing the balance between the two) appear to be the wrong intellectual framework. Take for example the concept of the public domain, a concept that depends on intellectual property regimes . It is adequate for my purposes to consider the public domain as what is left after intellectual property has taken its fill, in other words the public

domain is intimately connected with the concept of intellectual property. Dan Hunter in *Culture Wars*¹⁹ provides a comprehensive history of the concept of the public domain in copyright law. The assumption that increasing the public domain will deal with the problem is, in the context of folk music, wrong. Cancer and Sunder in *Romance of the Public Domain*²⁰ show this clearly. They carefully deconstruct the concept of public domain and find it wanting. For example they argue that the public domain may disempower some groups²¹ that for some there is an inability to exploit public domain but the nature of things making a bigger public domain will also increase the size and value of private interests.²² Finally they make a point, similar to one I made about drugs, that in reality intellectual property rights are predominantly granted to and exploited by the developed world.²³

3. Approached used to discredit non-intellectual property regimes

So why haven't non-intellectual property regimes system been embraced more within a pluralistic regime of knowledge regimes? I now come to my main argument, those most benefiting haven't embraced them because of a campaign by intellectual property regimes to attack the veracity of other systems. These attacks rely on a set of arguments that look very familiar, they were those used to disempower indigenous and ethnic minority groups, at times when dominant cultures were trying to force these groups to 'assimilate' to the prevailing cultures and norms of that dominant culture.

These arguments fall into three groups, they are firstly the moral arguments, the 'we have right on our side, inventors should benefit from the fruits of their labour, your approach is repugnant to the way we do things', kind of arguments. Secondly the arguments that question the motives of those proposing alternative, what are your real motives, you are out to destroy our system/civilisation arguments. Thirdly those arguments based upon 'public policy' whatever that may be. Or as Raz commented

*"there is the view of the superiority of the secular, democratic, European culture, and a reluctance to admit equal rights to inferior oppressive religious cultures, or ones whose cultural values are seen as limited and less developed".*²⁴

We said that:

*“The justifications given for intellectual property rights can be conveniently divided between the ‘moral’ grounds and the creativity grounds. Morally it is argued that it is right and proper to recognise these rights, or as is more commonly put in literature from the US, that the author has a moral right to own and exploit the fruits of their labour.”*²⁵

We can now see neatly these three sets of arguments used to justifying the inherent rightness of intellectual property regimes²⁶ in the context of drugs. Firstly those advocating intellectual property regimes ensure as Sherwood suggests, that the focus is development not trade, this places intellectual property regimes in a good light, that of enabling development²⁷ Jorda also quotes Mansfield, for whom, ‘the patent system is a very important instrument as regards the technological development, because he understands that investment in R&D (research and development) always depends on the degree of protection of intellectual property.’²⁸ Love and Hubbard consider that high drug prices are justified ‘because of the need to provide incentives for research and development.’²⁹ The next line of approach is to denigrate non intellectual property regimes regimes, Jorda continues in relation to countries with no intellectual property regimes that there are ‘none of the incentives provided by such a system, which is prejudicial to technological development and economic growth.’³⁰ Thus, it may be surmised that, for Jorda at least, intellectual property rights are vital to the investment in, and subsequently encouragement of, technological advancement. This notion is further explored by Love and Hubbard who consider trade agreements involving intellectual property rights (e.g. TRIPs) or drug prices are justified ‘because of the need to provide incentives for research and development.’³¹

To summarise then whilst the internet is truly a global phenomenon it is hard to escape the view that it is reflective of western jurisprudence and of western customs and values. This is understandable given the origins of the internet, its governance and its availability. It is equally understandable that those who have attempted to deal with the over reaching of intellectual property have based their solutions on westernised concepts of intellectual property regimes.

4. A Small Case Study

Now if I may I will illustrate the conflict between intellectual property regimes and folk music with an example from Woodie Guthrie (a prolific and influential folk singer and writer) how inappropriate intellectual property regimes system of any form are for folk music. (I am indebted to Philip Leith for pointing this case out to me.) First some background. There is recounted, by Timothy Phillips, the following story involving Woodie's son, Arlo.

"At a concert in Okemah, Oklahoma, on July 12th 2003, Arlo Guthrie introduced his father's version of the song "Gypsy Davy" (Child Ballad 200) by noting that his father Woody Guthrie wrote many songs, and also "stole" many songs. He went on to say, Stealing, plagiarism. They used to call it all kinds of terrible names until Pete come along and renamed it "the folk process".³²

The Pete here is Pete Seeger, another influential folk singer and activist. Now Pete Seeger also tells a story about Woody Guthrie at:

www.geocities.com/Nashville/3448/guthrie.html he states:

"When Woody Guthrie was singing hillbilly songs on a little Los Angeles radio station in the late 1930s, he used to mail out a small mimeographed songbook to listeners who wanted the words to his songs, On the bottom of one page appeared the following:

"This song is Copyrighted in U.S., under Seal of Copyright # 154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do."

I hope you can see from this that Guthrie as a folk singer wanted no truck with the copyright system and that as folk singer he was well versed in the "folk process".³³

But as anyone who knows anything about copyright systems it is not based upon registration, copyright is thrust upon you whether you want it or not. Of course it is up to you to dispose of it if you wish through assignment but if you don't it passes on

your death to your heirs. And so in this case the copyright in this song passed to Ludlow Music Inc. who were rather upset when an internet base company called Jib Jab created an animation parodying the US Presidential Election between George W. Bush and John Kerry using a Woodie Guthrie song called "My Land". The case of *Jib Jab Media Inc v Ludlow Music Inc* (2005) was barely off the ground when it was discovered, much to the embarrassment of Ludlow Inc., that Guthrie had in fact 'stolen', in the context of the "folk process", the song from The Carter Family who had recorded a song some 10 years earlier than Guthrie called "*When the World's on Fire*"³⁴

I hope this illustrates that in the context of a reasonable small area that any solution that is based on intellectual property regimes and developed from through the internet and no matter how skimmed is an inappropriate solution in folk music.

5. Solution?

I would not like to finish by giving the impression that there is not an appreciation of this issue within the intellectual property community. WIPO has for many years been looking at the issue of traditional culture and folklore. In 1982, WIPO worked with the United Nations Educational, Scientific and Cultural Organization (UNESCO), to develop a *sui generis* model for the intellectual property -type protection of traditional cultural expressions: the **UNESCO-WIPO Model Provisions** (1982). The policy objectives contained in this and later versions are very laudable and include and I quote:

“

- (i) *Recognize value*
- (ii) *Promote respect*
- (iii) *Meet the actual needs of communities*
- (iv) *Prevent the misappropriation of traditional cultural expressions/expressions of folklore*
- (v) *Empower communities*
- (vi) *Support customary practices and community cooperation*
- (vii) *Contribute to safeguarding traditional cultures*
- (viii) *Encourage community innovation and creativity*

- (ix) *Promote intellectual and artistic freedom, research and cultural exchange on equitable terms*
- (x) *Contribute to cultural diversity*
- (xi) *Promote community development and legitimate trading activities*
- (xii) *Preclude unauthorized intellectual property rights*
- (xiii) *Enhance certainty, transparency and mutual confidence”*³⁵

In broad terms one solution that has been proposed is the development of *sui generis* legislation that has been developed specifically to address the positive protection of traditional knowledge. I would wish to develop this further and even within the context of countries that have intellectual property regimes advocate a pluralistic approach that enables some activities to operate under separate and distinct non intellectual property regimes systems, in other words a pluralistic approach. The concept of legal pluralism has only recently been introduced to legal studies.³⁶ The idea itself is not new, but has never been encouraged by lawyers, especially in Western Europe, where the predominant view is that different legal systems cannot exist within the one-nation-state structure. In the ‘ideal’ model, administration of justice and government is structured within a monistic framework. Pluralist structures and ideas were considered cumbersome, difficult to administer and dangerous. Yet opposition to pluralist theory did not prevent European jurists and policy makers from encouraging former African and Asian colonies to practise legal pluralism!

Legal pluralism contradicts the notion that law is a monolithic, unified set of rules and advocates respect for alternative systems Progress towards acceptance of pluralism has been hampered by the difficulty of finding a sufficiently robust definition of the term. Sally Falk Moore proposed the following definition, the “*presence in a social field of more than one legal order*”³⁷ In this model, the state laws still have a role in regulating individual behaviour whilst allowing personal laws and customs to be used in matters specific to particular communities and situations. The context here is normally in family matters, marriage divorce etc. but could this be ported across to say the folk music community? The difficulties are obvious, whereas the Open Source Initiative and the Creative Commons work with intellectual property regimes, using copyright to enable the original author to claim copyright and then licence the

work out on specific terms, a pluralistic approach would require a separate regime to coexist with the existing intellectual property regimes. For example a regime where Woodie Guthrie could place his song in the public space and it and any derivative works would stay there. This would require not only legislative intervention but also a willingness by the courts to uphold the approach and not allow purely derivative works to claim, as is now, copyright on the original. This will not be easy but if we can make special rules for a boy who never grows up³⁸ then surely it is worth trying to do it to retain distinct and valuable cultural traditions.

¹ Jones, R and Cameron, E. (2005) Full Fat, Semi-skimmed No Milk Today – Creative Commons Licences and English Folk Music, *International Review of Law, Computers and Technology*, (2005) Vol. 19 No 3, p.259-275.

² Fn 1, p. 13

³ See Fn 1.

⁴ McCann, A., *Traditional Music and Copyright – The Issues*. Presented at "Crossing Boundaries," the seventh annual conference of the International Association for the Study of Common Property, Vancouver, British Columbia, Canada, June 10-14, 1998. page 9. For an exploration of the issues facing Irish Traditional Music in the context of performance rights see McCann A., *All that is Not Given is Lost: Irish Traditional Music, Copyright and Common Property*, *Ethnomusicology*, Vol. 45, No. 1 (2001) <http://www.indiana.edu/~iascp/abstracts/367.html>

⁵ Intellectual Property and Traditional Cultural Expressions, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO (2003) www.wipos.int/en/cultural/background/issuesspaper.html

⁶ Fn.1, p.270.

⁷ Bentley, L. and Sherman, B. *Intellectual Property Law*, 2nd Ed. (OUP:Oxford) p.9

⁸ UN AIDS Epidemic Update 2005 'Sub-Saharan Africa Factsheet; 21/11/2005'
Source: http://www.who.int/hiv/FS_SubSaharanAfrica_Nov05_en.pdf

⁹ United Nations Programme on HIV/AIDS (UNAIDS) <http://www.unaids.org/>

¹⁰ Davies, C GLAXO V DOWELHURST: A NEW TWIST IN THE TALE *European Intellectual Property Review* 2005 27(4), 127-132 Editorial at p.127

¹¹ The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs) The Agreement was the product of the WTO's 1988-94 Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations..

¹² *WTO Ministerial Declaration on Doha Work Programme 18th December 2005.*
http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm

¹³ Vandana Shiva at <http://www.zmag.org/bios/homepage.cfm?authorID=90>

¹⁴ Lessig, L. (2001) *The Future of Ideas, The Fate of the Commons in a Connected World*, Vintage Books:New York

¹⁵ Boyle, J. (2003) The Second Enclosure Movement and the Construction of the Public Domain, <http://www.law.duqe.edu/journals/66LCPBoyle>.

¹⁶ Fn. 20

¹⁷ Fn 1 p.3

¹⁸ See Farrell, M. op cit.

¹⁹ Hunter, D. Culture War (August 10, 2004). Available at SSRN: <http://ssrn.com/abstract=586463>

²⁰ Chander, A. and Sunder, M. (2004) The Romance of the Public Domain, *California Law Review*, Vol. 92:1331.

²¹ Fn20 p. 1335

²² Fn 20 p.1345

²³ Fn 20 p.1347 and pp.1351-2.

²⁴ Raz, J. [1974]: 'Multi-culturalism: A liberal perspective'. In: [1974] *Dissent*, p.70

²⁵ Fn 1 p.2

²⁶ For the range of justifications see Bently, L. and Sherman, B.(2004) *Intellectual Property Law*, 2nd Ed. (OUP:Oxford) pp.3-5.

²⁷ Sherwood, R. M. 'Intellectual Property and Economic Development' Westview Press 1990 p.5

²⁸ Jorda, Prof. Karl F. *Industrial Property, Scientific and Technological Development, Integration and Growth* Symposium, Buenos Aires, June 18-20, 1996 Para.1.B

²⁹ Love, J. & Hubbard, T. *Comment-Make Drugs Affordable: Replace TRIPs-plus by R&D-plus* BRIDGES Monthly Review, Year 8 No.6 June 2004. International Centre for Trade and Sustainable Development. Available at <http://www.ictsd.org/monthly/bridges/BRIDGES8-6.pdf>

³⁰ *Ibid.* Para.1C

³¹ Love, J. & Hubbard, T. *Comment-Make Drugs Affordable: Replace TRIPs-plus by R&D-plus* BRIDGES Monthly Review, Year 8 No.6 June 2004. International Centre for Trade and Sustainable Development. Available at <http://www.ictsd.org/monthly/bridges/BRIDGES8-6.pdf>

³² <http://home.telepath.com/~hrothgar/ttarchive2003.html#20030726>

³³ The folk process was described by Cecil Sharp in 1907: The "development of a folk song involves the three principles of *continuity*, *variation*, and *selection*. *English Folk Song: Some Conclusions*, London, 1907, p.16. Italics in original.

³⁴ The Jib Jab animation is available at <http://www.jibjab.com/162.html>

and The Carter Family recording at [www.eff.org/intellectual property /Carter/When.mp3](http://www.eff.org/intellectual%20property/Carter/When.mp3)

³⁵ These draft provisions are reproduced from the Annex of document WIPO/GRTKF/IC/8/4, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore ('the Committee') at its eighth session. <http://www.wipo.org/ik/en>

³⁶ Griffiths, J. (1986): 'What is legal pluralism?'. In: Vol. 24 *Journal of Legal Pluralism and Unofficial Law*, pp. 1-56

³⁷ Quoted in Merry, S .E. [1988]: 'Legal pluralism'. In: Vol. 22 Part 5 *Law and Society*, pp. 869-896

³⁸ s. 301 Copyright, Designs and Patent Act 1988, the Peter Pan exception.