Technology, the Cultural Appropriation of Music and the Creative Commons

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Introduction: Intellectual Property, Technology and Culture.¹

Kathy Bowrey summarises the interaction of intellectual property and culture;

"... the example of law creating the conditions of culture referred to is intellectual property... In creating private ownership rights these law affected the way culture can be expressed, related to and how ideas circulate in the market place."²

As to the form of this relationship Coombe argues the relationship of law and culture should not be defined, she prefers:

"An ongoing or mutual rupturing - the undoing of one term by the other- may be a more productive configuration than the image of a relationship or rejoinder."³

The cultural analysis of intellectual property has been stoked, and in part driven by developments in a third element, digital technology and projects such as Creative Commons⁴ which have urged for culture to be freed from an increasingly overarching intellectual property regime. In Full Fat, Semi-skimmed No Milk Today – Creative Commons Licences and English Folk Music⁵ using this framework the authors consider the impact on folk culture of intellectual property regimes. How is traditional music and folk culture being affected by the encroachment of intellectual property and does salvation lie in the projects spurned by technology? Traditional music we defined as: "Music

originating among the common people of a nation or region and spread about or passed down orally...” The complete intellectual property regimes (or full fat in the context of the title) we concluded may have a negative effect on the development of the folk music tradition and in addition increases in the scope of intellectual property may also be seen to be actively harming these traditions. Of the more liberal intellectual property licence regimes through the Open Source and the Creative Commons movements, these were the ‘semi skimmed’ regimes of our title, they are offered as a hope to the encroaching intellectual property regimes. These initially seem tailor-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.” But the Open Source and Creative Commons are systems designed to be used within an existing intellectual property regime, 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. We concluded that the Creative Commons and Open Source movements although widely touted have a fundamental flaw, which is they have their roots in western intellectual property regimes based systems. Such systems whilst empowering some 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... 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 that 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."

An analysis of music publishing shows it to be dominated by a small number of global players with unrivalled resources that have been given the opportunity to draft legislation. The result is an intellectual property system, driven by these global players, which benefits only the industry, where many of the rights such as fair use only exist in theory and result in a system that appears to lack any consideration of the consequences and social

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6 Fn.5, p.270.
The legal provisions as they impact around folk culture become only one of many elements and facets of the debate. Technology and social functions are seen as acting upon these regimes. These provisions are being continually ignored by individuals or are subject to concerted efforts to circumvent. In such an environment perceptions develop of the law serving only the needs of the globally rich and powerful by protecting them from demands of the weak and poor, or as is more common a perception that big is bad and small is good, or that the new is to be encouraged and tradition to be abhorred. The result is as highlighted by Bentley and Sherman:

"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."

1. Legend of Tom Dooley

Tom Dula (pronounced Dooley) was hanged on 1st May 1868 for the murder of his fiancée Laura Foster. The lyrics of the song were written down soon after the hanging by a local poet Thomas C Land and reflect the eternal triangle that existed between the musician and ladies man Dula, Laura Foster and her cousin Ann Foster. On Tom’s return from the civil war he renewed his relationship with both ladies, even though Ann had during Tom’s absence married James Milton. Accounts vary but whatever the details what is clear is that Laura Foster was found murdered. Both Dula and Ann were charged but only Dula went to trial and eventually to his death having been found guilty of Laura Foster’s murder.

Some say Tom himself composed the ballad of Tom Dooley as he was waiting to be taken to the gallows, but there is little evidence for this, whatever the truth the became well known and was song by many folk singers during the next century. In the 1940’s folk song collectors, Anne and Frank Warner collected the song Tom Dooley after hearing it sung by Frank Proffitt. The song was later published in John and Alan Lomax’s book Folk Songs USA with the credit “words and melody adapted and arranged by Frank Warner”. In 1958 the song was recorded by the Kingston Trio, a recording later to be credited as beginning the folk revival of the decade. It was Warner’s arrangement that was mistakenly used by the Kingston Trio. The resulting

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settlement of copyright infringement means that royalties from this recording continue to be paid to the heirs of Proffitt, Warner and Lomax.

### 2. Folk Music and the Folk Process

Traditional (folk) music may be defined as:

> "Music originating among the common people of a nation or region and spread about or passed down orally, often with considerable variation."

Such songs are said to develop through a process. This process (the folk process) was described (although not so named) by Cecil Sharp in 1907 as he commented 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.) This is elaborated by Berman who comments:

> "In furtherance of this project, Sharp published in 1907 his theoretical work on folk song, English Folk-Song: Some Conclusions. His key points were that folksong is anonymous, multiform, and that folk tunes are modal in nature. He proposed an evolutionary model for folk song comprising continuity, variation, and selection. Continuity refers to the persistence of recognizably the same songs in different places and at different times; variation to subtle differences in words and melody which render each manifestation of the song the same but different; and selection to the way in which a singer may introduce their own variations into words and tune, but the community will favour certain alterations over others and so determine which forms of a song are preserved and transmitted."  

The process stands in contradistinction to the perceived creative process within the law of copyright which is centred on the singular author providing original creative content. Therefore conflicts between traditional musicians and intellectual property are inevitable and most recently have involved Woody Guthrie (a prolific and influential folk singer and writer) who is intimately linked with the fight to retain a folk process. There is recounted, by Timothy Phillips, the following story involving Woody’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,

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Stealing, plagiarism. They used to call it all kinds of terrible names until Pete come along and renamed it "the folk process".¹²

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 oun, cause we don’t give a dem. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that’s all we wanted to do."

Guthrie, his songs and the folk process were subject of proceedings in 2004 involving a Guthrie song called “This Land is Your Land”. Guthrie composed the lyrics in 1940. Although a copyright registration for words and music was obtained in 1956 and renewed in 1984 it appears Guthrie first published the song in 1945, a copied broadsheet dated 1945 is in the Library of Congress (copy at http://www.eff.org/IP/20040823_Jibjab_Copyright_Scans.pdf) In this case failing renewal after 28 years the song would then enter into the public domain. There was no renewal in 1973. In 2004 Ludlow Music initiated infringement proceedings against JibJab, a California based company producing artistic products for infringement of melody, harmony, rhythm and structure of the song. JibJab had created a web animation parodying the US Presidential Election between George W. Bush and John Kerry using this song. The animation was very popular being seen by millions. The case of JibJab 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 tune of the song from The Carter Family who had recorded some 10 years earlier than Guthrie a song called "When the World’s on Fire"¹³ from which Guthrie had ‘stolen’ the tune. Added to this was the fact that Guthrie’s lyrics, first published in 1945 had not been renewed led to Ludlow dropping the action.¹⁴

¹³ 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
¹⁴ As the defence pleading comment In fact, where transformative works are concerned and a parodical purpose is apparent, "quantity" is not the relevant measure Seel. eibovitz v. Paramount Pictures, 137 F.3d 109, 116 (2d Cir. 1998) (amount and substantiality taken has little weight where first and fourth fair use factors favour parodist). In any event, "This Land" does not borrow too much. As to the lyrics, "This Land" borrows only a handful of words. As to
2.1 Folk Music Survivalists

From the early twentieth century English folk music has undergone a revival, a with movements made up of singers, dancers, and members or organisers of folk clubs, working to ensure that music outside commercial control, remained alive.

Prominent in the revivals of both the folk songs of the USA and England have been the activities of the survivalists (or collectors). Foremost in England was Cecil Sharpe and in the USA Anne and Frank Warner and Alan and John Lomax. In Cecil Sharpe: *English Folk Song. Some Conclusions*, the main activist of the revival period in the early 20thC, for Sharpe the imperative was to find, collect and transcribe the folk song that had ‘survived’ as a vestige of some earlier cultural observance. The folk song was seen to have been passed on by the ‘folk’ who had no conception of this process and in consequence made no creative contribution to the song.

This ‘revival’, prompted by collectors such as Sharpe and the consequent survivals theory is not without its critics. In the early days of the revival there was an underlying philosophy among some practitioners and collectors (not to be too naive) of a communal effort where commoditisation of the product was undesirable or even unavailable. As Boys comments;

"...by constructing the concept of a rural, uneducated, uncreative Folk as the cultural source of their definition, the proponents of the survivals thesis obviated the need for close examination of the role and individual contribution of performers of all folk traditions... As mere temporary custodians of a common culture, they had no individual rights of ownership in what was clearly a heritage of the nation as a whole."16

Atkinson affirming this also echoes Woody Guthrie’s copyright notice by commenting:

*As they live in an organic community ~ buttressed, almost to the present day, from the corrupt outside world ~ any song belongs to all and none belongs to anyone in particular. Thus it is not the singer who sings the song but the song that sings the singer, and therefore in performance it is the singer, not the song, that is the aesthetic*

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artefact, the work of art. In a perfect world, in the future, everyone will live this way. 17

The accusation then is that those advocating a survival theory are undertaking an exercise in the artificial. They have created rather than discovered the concepts of ‘the village’, ‘folk’ and ‘folk song’. These creations were to replace an ailing and perverted national culture. For survivalists;

"artistic, social and political salvation lay in the pure, quintessentially English culture of the rural Folk.” 18

For others, including Boyes, the concept of the folk song as ‘surviving’ is fundamentally flawed and ignores the creative role of the performers, and their communities. This creative role will involve in addition to performance new arrangements, the mixing of lyrics with different tunes and more complex mixing and sampling techniques, all allowing for the evolution and development of the song and tradition.

2.2 Folk Music Secondary meanings

Folk music has in addition acquired a number of secondary meanings related to style and philosophy. It is not necessary to reduce it to the absurdem whereby every acoustic singer/songwriter is called a folk singer – a trend particularly noticeable in USA. But historically many tunes that became part of the folk repertoire have a traceable author. Likewise, it would take a real purist not to acknowledge that much modern music has been written in a traditional style and assimilated to what many would now call folk music. Fortunately there is relatively little attempt to monopolise style (which would fall foul of expression/ idea dichotomy) but there is always need for vigilance.

3. Folklore

Folklore is the embodiment of the traditional, anonymous culture of indigenous peoples. Significant inroads have been made into the broadening of the protection of folklore and traditional knowledge. The first effort to protect traditional knowledge was taken by WIPO (United Nations Educational, Scientific and Cultural Organization (UNESCO)) in 1978. In 1985 WIPO and UNESCO produced Model Provisions for National Laws on the Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions embodying the following definition.

"... productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community... or by

18 Boyes, G. op cit p. 27.
individuals reflecting the traditional artistic expectations of such a community.”

This WIPO and UNESCO definition is then elaborated into four categories, verbal expressions (folk tales), musical expressions (folk songs), physical expressions (folk dance) and tangible expressions (to include drawings and paintings). Five acts are then defined as giving cause for action – illegal exploitation, failure to acknowledge appropriate source for the material, failure to acquire the necessary authorisation, passing off an expression as deriving from a community and distorting an expression. These are embodied in Model Provisions that may be incorporated into national statutes.

3.1 Needs and Expectations of Holders of TK

In 1989 the International Labour Organisation Convention No. 169 of 1989 concerning Indigenous and Tribal peoples obliged states to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories or both"(article 13)’

The draft UN Declaration on rights of Indigenous peoples 1994 continued: “Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.”’The draft Declaration, if adopted, would be a significant step in protecting the rights of indigenous peoples’.

WIPO’S direct and positive involvement in the issue of TK continued and in 1998 its 26th session, the WIPO General Assembly established the Inter Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC’S actions so far have focused on trying to understand the needs and expectations of traditional/local communities, ascertaining the adequacy of current methods for protecting TK and surveying proposals to enhance such protection.’

The strong position taken by the developing countries on the protection of TK within the trade environment has led in another forum, the World Trade Organisation (WTO), to its inclusion in the WTO Doha Ministerial Declaration in November 2001. Some years later in 2005 the WTO made permanent the Doha Declaration. However a review of the effectiveness of the initiative

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20 The tenth session of the IGC (December 2006) in Geneva agreed on a number of issues to be addressed http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=71413
21 WTO Ministerial Declaration on Doha Work Programme 18th December 2005.
shows a disappointing conclusion, and indeed negotiations were suspended due to lack of agreement in July 2006, although they have now been restarted within each of the strands.

4. Music and Technology

There is no doubt that the increasing encroachment of intellectual property (to which I will return later) is seen to be partially driven by developments in technology. Technological determinism argues that a society’s technology determines its cultural values which the law may then choose to shape change or modify. How then has technology affected the culture of music and in particular the ‘folk process’?22 Prior to 1800 all music was, what many consider the folk process still to be, an oral tradition, a process whereby music was handed from singer to singer. Similar processes could be seen within all musical genres from classical, to opera, to variety halls. This process was to be affected by technology. The development of notation and printing promoted originality by allowing composition of the new rather than the building on previous works. Notation freed the author from the existing and enabled them to create new original, multi part pieces.23 The cottage (upright) piano and its large sales led to creating a mass music for musical sheets. The piano roll began a series of recording and playing technologies that progressed through the vinyl disk through to the cassette tape (1963), CD (1982) and DVD (1996). Such reproduction technologies, allowing for the reproduction of the performance, would have numerous and diverse effects including the tendency to lead to homogeneity of musical forms such as jazz24, and adding to the activities of piracy, plagiarism and allusion (rife in the 19thC), duplication, thereby ushering in mass copying25 and sampling.26

As the process changed so did the regulatory concepts, particularly those in copyright. Notation led to the promotion of the concepts of originality27 and

http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm
22 The folk process can be defined as 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. 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. Sharp, C J. English Folk Song: Some Conclusions, (London: Simpkin; Novello) 1907, p.16.
26 For a detailed discussion on the case law around sampling see: Demers J. Steal This Music, (University of Georgia Press: London) (2006)
authenticity which in turn led to the opposing concepts of reproduction and copying.\textsuperscript{28}

"Copyright has changed from a tool to control printing or counterfeiting of books into a widely exclusive law that prohibits 'reproduction' in 'any material form' or 'fixation'.\textsuperscript{29}

The law through the varying concepts legitimated some technologies and activities and illegitimated others. The first statutory references to music appeared in the British Dramatic Copyright Act 1833 and the United States Copyright Act 1831. Despite this, it was not until the following decade that the British further categorised ‘sheet of music’ under the heading of book\textsuperscript{30} and attempted to deal with the then greater threat of performance exploitation.\textsuperscript{31} However the law did little to extinguish the black market in reproduction which, with the gaining popularity of the phonograph, continued to gain momentum towards the end of the 19th century. It was evident that music required stronger protection\textsuperscript{32} and the US Copyright Act 1909 and the UK Copyright Act 1911 were introduced to fulfil this need. The 1911 Act consolidated provisions on copyright into one Act and created the proposition that protection was to arise out of the act of creation, without the requirement of registration. Copyright terms were extended to be the author’s life and 50 years. In addition records, perforated rolls and sound recordings gained protection in the UK but not in the USA where there continued to be a lack of protection until 1971. Authors had continue to argue against the neighbouring recording right, fearful of the effect on the main copyright, the matter was however settled by the Rome Convention 1961. The Act also abolished the traditional requirement of Stationers Company registration before suing. There was no attempt to protect performance rights in the 1911 Act, after some half heated attempts in the Performers’ Protections Acts 1958-1972 it was not until 1995 that a performance copyright would be introduced into English law.

Recording technology enabled folk song collectors to capture the Ballard of Tom Dooley. It becomes therefore on of numerous examples illustrating the

\textsuperscript{29} Teilmann, S, On real nightingales and mechanical reproductions. Chapter 2, In Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity, Edited by Pordam, H (Edward Elgar Publishing:Cheltenham) 2006, p.31
\textsuperscript{30} s.2 of the British Dramatic Copyright Act 1842
\textsuperscript{31} s.20 of the British Dramatic Copyright Act 1842
\textsuperscript{32} The courts were struggling to come to terms with the new technologies – see White-Smith Publishing Co. v. Apollo Co. [1908] 209 U.S. 1, which ruled that a mechanical reproduction was not a copy of the "underlying musical composition"; hence publications are not an infringement as this would imply the distribution of "copies". In reaching this decision the Supreme Court stated that a "copy is that which comes so near to the original as to give every person seeing it the idea created by the original...These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies."
tensions that exist between recording artists, traditional materials and copyright,\textsuperscript{33} which mirrors the tensions found in other forms of Traditional Knowledge.

5. Digital Technology

Digital technologies pose both quantitatively and qualitatively different challenges to the role and scope of IPR.\textsuperscript{34} Digitization of recording and compression of songs twinned with the internet has led to the rise of peer to peer systems with the consequent increase and rapidity of dissemination of music. The nature of digital technology means listening and sharing now involves copying, challenging tradition ideas of use.\textsuperscript{35} Computerised sampling and personal computing allows recording and mixing at a fraction of the cost of professional studios, removing the distinction between producers and consumers, enabling new forms of creativity born of the technology, but relying on the intellectual property of others. These so called “non-exclusive” rights economies are by their nature stifled by intellectual property regimes born of exclusivity. The problem then as Renee Marlin-Bennett comments is:

"Who is making the rules about property rights? How are the rules being made? Are protections for rights holders strong enough? Do we need more rights and better enforced rights? How is the public interest protected? Are we preserving a global knowledge commons?"\textsuperscript{36}

Reaction by rights holders such as the Recording Industry Association of America (RIAA)\textsuperscript{37} and the British Phonographic Industry (BPI)\textsuperscript{38} was to point to figures indicating that unit sales and profits had slumped. Doubts have been expressed as to whether this was the case. Lessig observed that "when Napster usage fell after the court restricted access, album sales fell as well.

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\textsuperscript{33} For a discussion of three songs, including Tom Dooley see Irvine, P. *Folk Music, Copyright, and the Public Domain*. The case involving Enya, also discussed by Irvine is reported at: *Sanga Music v. EMI Blackwood Music*, 1994 WL406103 (S.D.N.Y. 1994), aff'd 55 F.3d 756 (2d Cir. 1995). For other examples see Moby and the album *Play*, Paul Simon and album *Graceland*, and *Saints, Deep Forest*. Also see Elvis Presley’s *Love Me Tender* which used the American Civil War ballad Aura Lee.

\textsuperscript{34} Digital copies do not detract from the original. Economists define this in terms of non-rival goods those that may be used simultaneously by multiple parties and rival goods, those that the use of by one party prevents their simultaneous use by another.


Napster may indeed have helped sales rather than hurt them.\textsuperscript{39} This is confirmed by Felix Oberholzer-Gee and Koleman Strumpf who comment that peer to peer systems had 'lowered the protection of digital information goods quite drastically. Yet, this reduction apparently did not reduce the legal sales of recorded music, suggesting there is room for experimentation with weaker property rights for entertainment products.'\textsuperscript{40} Nevertheless rights holders succeeded in both developing and legitimating digital rights management systems (DRM) granting rights holders control over the distribution and use of their content. In the United States Digital Millennium Copyright Act (DMCA) 1998\textsuperscript{41} prohibits the circumvention of access or copy controls in DRM systems, this was mirrored by Article 6 of the EU Directive on Copyright in the Information Society (2001/29/EC) and implemented in the UK in Sections 296ZA-296ZE of the Copyright Designs and Patents Act (1988) added by the Copyright and Related Rights Regulations 2003 (SI 2003/2498). Implementation throughout the EU of these pro DRM measures has lacked consistency and has prompted claims that the Directive is "unimportant, and possibly invalid." \textsuperscript{42}

DRM enables content owners to determine how their content is used by consumers. This not only goes ‘against the way people experience, share and gift music, but, due to the contractual restrictions on use imposed by them, it has also been said that DRMs limit ‘fair use’ and ‘personal use’ of downloaded material.’\textsuperscript{43}

\textsuperscript{39} As quoted by Lawrence Lessig, \textit{The Future of Ideas}, page 199-200 from, Jeff Leeds, “album Sales test the Napster effect”, Los Angeles Times, June 20, 2001, C1

\textsuperscript{40} Felix Oberholzer-Gee and Koleman Strumpf, \textit{The Effect of File Sharing on Record Sales - An Empirical Analysis}, June 2005, p. 36. \url{http://www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf}. In summary, the findings suggest that those who did download illegally either went on to purchase the music after sampling it, or would never have purchased the music and therefore no sales were lost. The factors behind the reduction in sales experienced by the music industry are most likely economic trends; for example high initial sales as consumers update old music formats to CD and a subsequent shift in spending as DVD and VHS sales increase by $5 billion between 1999 and 2003, whilst album sales dropped by $2.9 billion. The economic efficiency of music has also reduced, with DVD media and players dropping by 20% and 60% respectively since 1999 whilst CD prices increased by 10% during the same period. Additionally the videogame market has grown considerably by $3 billion since 1999 indicating that consumers spend less time listening to music, which would correspond with a drop in radio listeners by 7% over the same period.

\textsuperscript{41} The DMCA was first exercised in \textit{Universal v. Reimerdes}, 111 F.Supp.2d 294 (S.D.N.Y. 2000); appeal: \textit{Universal City Studios, Inc. v. Corley}, 273 F.3d 429 (2d Cir. 2001) in which the defendant had written code that circumvented CSS encryption used on DVDs and had posted a link to the code on a website. The courts ruled in favour of the plaintiff despite claims that doing so contravened the First Amendment.


The development and installation of DRM on all forms of digital media has raised concerns that rather than regaining the copyright balance, it has instead shifted the balance firmly in favour of the content owners, ushering in a cavalier attitude to consumer rights.

"In the content industry’s view, consumers don’t have rights; they have expectations. Consumers may not like DRM systems, but if “legitimate” content is available only on this basis, they’ll get used to it." 44

This has prompted much conjecture on the current policy decisions with regards to digital media. 45 A recent OECD review on ‘Digital Broadband Content: Music’ stated:

‘Policy should facilitate the fostering of robust technological development and the beneficial use of digital technologies. In this context, the interactions between technological development and the effective protection of intellectual property are of continued policy interest.’ 46

6. Folk Music and Intellectual Property

The culture of folk music provides what may be an insurmountable challenge to any intellectual property regime. The inevitable square peg in the round hole for the “… system of copyright focuses on exclusive, monopolistic and long-lasting ownership rights.” 47 Intellectual property regimes then seeks to privatize ownership and are designed to be held by individuals or corporations, whereas folk music is considered to have a collective ownership, rights are time limited whereas folk music is essentially passed from generation to generation. Rights are given 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 rather than rely on the new reliance is placed on continuity, variation and selection. 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.

44 See Jackson et al op cit at page 4.
45 Samuelson. P, DRM (and, or, vs) the law. Communication of the ACM April, 46 (4) 2003
The fundamental tenants of protected property and a public domain can therefore, in this context, be questioned. Rights, ownership and public domain cease to be relevant. Yet no alternative is offered, intellectual property (or a variant) is all that is on the table, justified by the claim that only enhanced (or reduced) intellectual property regimes will result in creativity and innovation.

The expansion in copyright from a regime concerned only with the prevention of literal copying to one that also prevents derivative and transformative use significantly impacts upon a number of musical genres including folk. This is evidenced by the impact of copyright law on digital sampling, (the manipulation of pre-existing recordings as components within new recordings). Music composition questions the feasibility of always and only creating from “scratch”, heightening the appeal of alternative movements such as sampling. The legality of sampling is contentious, which is said to “undermine the very definitions of “work,” “author,” and “original,”- terms on which copyright law rest.”

As such sampling has been stifled and artistes have either been forced to adopt alternative approaches or have moved away from the genre. In Bridgeport Music Inc. v Dimension Films 230 F.Supp2d 830, 841 (M.D. Tenn. 2002) the court ruled that even a three note sample was not fair use. The option for musician is to either obtain a license (often easier said than done) or cease sampling.

It is submitted that such concerted pressure from rights holders by analogy will cause other genres such as folk culture to become sterile and lifeless, suffering under forced homogeneity imposed by global music publishers. The conflict then is between

“two very different perspectives on creativity: a print culture that is based on ideals of individual autonomy, commodification and capitalism; and a folk culture that emphasizes integration, reclamation and contribution to an intertextual, intergenerational discourse.

In essence this mismatch has led some writers to argue that what is happening is that the increase in the scope of intellectual property protection 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

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The relationship of intellectual property and innovation and development is at the heart of the critique of those advocating a reduction in intellectual property systems where the overarching intellectual property regimes are blamed for stifling creativity and with it development. The argument in summary seems to be follows. Intellectual property regimes exist to encourage development and innovation, but when intellectual property regimes become too overarching they reduce the scope for such innovation and development, in this case innovation and development will only continue to be encouraged by some lesser intellectual property regimes and a bigger public domain.

For these writers then the relationship between the public domain and copyright is then at the heart of concerns relating to overweening Intellectual Property rights. In various fields they illustrate attempts to privatise common heritage, common knowledge, and public domain information. The solution of these writers is to reduce the size of intellectual property protection, thereby increasing the amount within the public domain. The Creative Commons initiative tries to do something about this.

Some folk artists have found this model appropriate. Roger McGuinn comments on the Creative Commons website:

My main attraction to Creative Commons was the fact that it provides a level of sharing, which is exactly what I want to do with the songs in the Folk Den. My whole purpose for putting them up there is to keep them going. It occurred to me back in 1995 when I started the Folk Den that the traditional side of folk music was getting neglected because of the singer-songwriter phenomenon. New singer-songwriters are not doing traditional music anymore. So I ran it by Camilla, and she said, "Put your songs up on the Internet for free download.” So I posted the songs, the chords, the lyrics, and a little story about each, and I'm very happy that they're being shared. People download them and make CDs and give them to their friends -- and that's cool.

It is not immediately clear what McGuinn is referring to in the phrase “New singer-songwriters are not doing traditional music anymore.” If he is referring to the process of singing traditional songs it is difficult to see how a Creative Commons licence is going to enable this – if he means by this arrangement then again it is difficult to see how this system will help. If he is advocating the sharing of music in the sense of widening the audience then are the

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elaborate provisions of a creative commons licence necessary for this? It is as if the proponents of the Creative Commons through some invisible umbilical cord are tied to intellectual property regimes, or perhaps it may be a weary acceptance of the power of big business still rely on intellectual property rights; they argue that innovation and development will be encouraged by some lesser form of rights and an enhanced public domain. But surely the folk process is not an open source system and so does not fit seamlessly into such licences. \(^{53}\)

### 7. Why won’t the Creative Commons Work – the theory bit

“Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains. So too it is with intellectual property. Overprotecting intellectual property is as harmful as under protecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture.” \(^{54}\)

Judge Kozinski’s famous dissent in *White v Samsung Electronics* runs together many assumptions that will be examined in this section. The first that intellectual property provides an incentive for innovation. \(^{55}\) The relationship between intellectual property regimes and economic progress for some is clear, innovation drives economic progress. \(^{56}\) The utilitarian argument that intellectual property induces innovation and development abounds in the literature although it often is only part of a raft of justifications\(^ {57}\) and as part of a wider debate on the scope of such rights\(^ {58}\). Yet too often theory and

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\(^{54}\) Judge Kozinski in *White v Samsung Electronics* [1993] 989 F. 2d 1512


\(^{57}\) Zemer (2006:57) argues that theory and practice must not be isolated when considering any system of property rights; that theory must be considered more often if cultural and social aspects are to be correctly addressed.

\(^{58}\) Zemer L, *On the value of copyright theory*, Intellectual Property Quarterly, No. 1, 2006, p.57. Argues that theory and practice must not be isolated when considering any system of
reality never meet, intellectual property has been categorised as “an evidence free zone” 59. What evidence there is inconclusive and contradictory and would appear to point to there being many justifications for such regimes creating a “multi-tiered system for intellectual property theory that develops new themes”. 60. Intellectual property may encourage development and innovation in some situations but not all. In a developing country that lacks the ability to innovate intellectual property has little impact other than the effect of raising costs.

"The World Bank (2002) has remarked upon how "at different times and in different regions of the world, countries have realised high rates of growth under varying degrees of protection". 61

Despite this lack of evidence 62, the market has demanded ever larger intellectual property regimes.

Underpinning the value of our creativity and ideas must be a robust intellectual property (intellectual property) regime. Without a robust and fair legislative regime to protect our creators, and those who invest in creativity, we put at risk the economic basis of the Creative Economy. There are other people, of course, who are important as well as the rights’ holders, but those who create and invest in creative material need effective and enforceable rights for the creative economy to flourish. 63

Intellectual property rights have therefore increased in scope (the matter covered), size (length or nature of protection and reach (to derivative rights

property rights; that theory must be considered more often if cultural and social aspects are to be correctly addressed.

60 Zemer (2006:70) and Dixon & Greenhalgh (2002:45) give a review the economic aspects of TRIPS and suggestions as to the most efficient policies and institutions that give incentives to innovate. “
62 Controversially some writers have suggested that the rate of innovation falling despite enhanced intellectual property regimes. See Huebner, Jonathon (2005) A Possible Declining Trend for Worldwide Innovation, Technological Forecasting & Social Change, October 2005, pp.980-6 who argues that innovation was highest in 1873 a date before international convention on intellectual property and times of generally weaker and smaller rights. See also The Lunar Men, The Friends who made the Future, Jenny Uglow (2002) (Faber and Faber: London)
and reduction in fair use) driven by a justification that such increases will enhance creativity and development.\textsuperscript{64}

Yet other policies and incentives may give greater incentives to innovate\textsuperscript{65}. Intellectual property expansion is often ‘faith based’, irrational and self legitimating. Landes and Posner\textsuperscript{66} in the context of the expansion of copyright into more and more derivative works conclude stronger copyright requires new authors to licence an increasing amount of copyright material, thereby raising the cost of new works and/or reducing their number. Similar economics apply to the cost of extending the copyright term.\textsuperscript{67} Boldrin and Levine comment; ‘\textit{[e]xtending the length of intellectual property protection does little to encourage the production of marginal ideas... It simply serves to increase rents and the monopoly distortion on good ideas}\textsuperscript{68}. In summary the link between intellectual property and innovation is not clear therefore it is hard to see how increased intellectual property regimes will enhance such growth.

At an industry level whilst records, perforated rolls and sound recordings gained protection in the UK lack of intellectual property protection in the USA for sound recordings appeared not to prevent the development of a recording industry\textsuperscript{69} the industry relying instead on other incentives to production. Recently it was argued by EMI and Phonographic Performance Limited (a collecting society for performers) before the UK Gowers Review on Intellectual Property (and rejected) that an extension of term (and revival, that is, including past performances) for performers’ rights was required as an incentive to the creative process. It is difficult to see the strength in this argument given that performers’ economic rights, at least in their modern form, did not exist until their introduction in 1996 (Copyright and Related Rights Regulations 1996) and there appeared to be no impediment to development before then. Are we to assume that creativity and innovation was stifled to this point?

Within the folk music genre ‘revivals’ which have encompassed creativity and innovation have occurred as a result of a diverse range of factors, apparently with little or no links to changes in intellectual property regimes. Motives have included, political environments -1940’s USA Woody Guthrie, 1950’s in the UK with the meeting of left-wing artists Ewan MacColl and Bert Lloyd and again


\textsuperscript{69} Drahos & Braithwaite 2002:181
in the UK in the 1980s with artists such as Billy Bragg. Youth culture in the 1960’s when the hippie generation repackaged folk music to appeal to a wider audience. In the 1990’s when second generation artists and children of the 1960’s artists began to impact on the music scene they seemed merely to be following the folk tradition. For "...tradition can be an important source of creativity and innovation."  

Public Domain

The increase in intellectual property rights, has led some to argue that intellectual property should be reduced thereby increasing the public domain and with it encouraging creativity. But how valid is the view that an enhanced public domain enhances creativity? The proponents of the Creative Commons argue that the public domain is shrinking and with it the potential for creativity. No justification is given for this as Mahoney comments:

"In places Free Culture contends that the public domain in shrinking but Lessig neither offers any evidence to support this contention nor makes any effort to catalogue which resources and information are leaving the public domain and explain why these departures are reason for worry."  

The public domain is 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. The public domain sits uneasily with some of the theories for intellectual property. For instance "the Lockean labour theory... is that everyone has a natural property right in his or her own "person" and in the labour of his or her body – the famous metaphor of labour mixture."  

This theory respects the fruit of ones labour but also respects that in doing so it is reducing the “common pool” available to all, thereby encouraging minimum protection. The greater the degree of protection the less that is available for others.

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70 W.I.P.O. Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, Consolidated Analysis Of The Legal Protection Of Traditional Cultural Expressions, Fifth Session Geneva, July 7 to 15, 2003, Annex para. 27.  
71 Dan Hunter provides a comprehensive history of the concept of the public domain in copyright law at, Hunter, D. Culture War (August 10, 2004). Available at SSRN: http://ssrn.com/abstract=586463  
74 Zemer L, On the value of copyright theory, Intellectual Property Quarterly, No. 1 2006 p.62. The “romantic” notion of authorship again seems to sit uneasily with the public domain. The system is based on a single author and a rejects the notion of collaborative input or of the use of previous texts or cultural influences.
Chander and Sunder\textsuperscript{75} carefully deconstruct the concept of public domain and consider whether enhancing the public domain will enable innovation and development. They conclude it will not, for the public domain whilst empowering some disempowers others.\textsuperscript{76} Some groups by their nature, they argue, will be better placed to exploit a larger public domain; such groups will predominantly be large corporations.\textsuperscript{77} A larger public domain will therefore increase the size and value of their existing private interests. Yet again, however, little evidence is brought forward to substantiate these claims and we find ourselves in an evidence free zone. Perhaps all we conclude is that a completely unlimited public domain provides difficulties, for the unlimited use and exploitation of public domain leads to tragedy, as Garrett Hardin (1968) famously explains in the “\textit{Tragedy of the Commons}.”\textsuperscript{78}

The difficulty in placing the concept of the public domain within the context of the folk process is as illustrated by Cancer and Sunder that the public domain rather than encouraging creativity may actually disempower as, for some, there is an inability (or unwillingness) to exploit a public domain in the context of an intellectual property regime as inevitably enhancing the public domain will essentially increase the size and value of those private (closed) interests. The folk process continues irrespective of and often in ignorance of the relationship between intellectual property and the public domain, folk revivals continue to come and go. The very intellectual framework is wrong, intellectual property is a process to give ownership to something that shouldn’t be owned. As Lange comments:

\begin{quote}
"I have come to think that the problem with intellectual property was in the nature of the property itself – not merely in the boundary fixing… in the far more central ability of proprietors to exclude others from their works in plenary fashion and to demand compensation for trespass where no damage necessarily might follow."\textsuperscript{79}
\end{quote}

Therefore whilst Judge Kozinski’s dissent in \textit{White v Samsung Electronics} is to be credited in attempting to hold back the overarching growth of intellectual property the fact that he remains behoved to the idea of property ownership and of its link to innovation has naturally restricted and limited the nature and scale of any solutions proposed. The debate is reminiscent of Don Quixote tilting at his windmills,

\begin{quote}
“At this point they came in sight of thirty forty windmills that there are
\end{quote}

\textsuperscript{76} See op cit Chander and Sunder, p.1335
\textsuperscript{78} Hardin G, \textit{The Tragedy of the Commons}, Science, 162(1968):1243-1248.
on plain, and as soon as Don Quixote saw them he said to his squire, “Fortune is arranging matters for us better than we could have shaped our desires ourselves, for look there, friend Sancho Panza, where thirty or more monstrous giants present themselves, all of whom I mean to engage in battle and slay, and with whose spoils we shall begin to make our fortunes; for this is righteous warfare, and it is God’s good service to sweep so evil a breed from off the face of the earth.” “What giants?” said Sancho Panza.”

In conclusion therefore the link and justification for intellectual property that it encourages innovation is unproven in consequence any discussion on the scope and size of intellectual property becomes irrelevant and so does the view that innovation and development will only continue to be encouraged by some lesser intellectual property regime and a bigger public domain.

And finally...

A British Council report published in 2006 has received widespread criticism – typical was the comment of Emma Pike, director general of British Music Rights:

_To suggest that Creative Commons is the 'solution' to copyright in the digital age is to miss the point entirely. Creative Commons makes it easier for creators to give their work to others for free. It does nothing at all to address the much more difficult challenge that the creators and the industries that invest in them are wrestling with, which is 'how will we be paid in the digital age?'_

Finally, finally there are substantial structural flaws within the Creative Commons initiative. As Bowrey comments;

...the attraction of commons/public domain licensing depend very much on who one is and where one stands, and in which communities... there are far more complex socially embedded ownership relations that must be considered than a communal/private ownership binary allows...(2005:168)^83

9. Why won’t the Creative Commons Work – what the artists say

Folk culture is about the use of the folk process a process where there is continuity, variation, and selection of the songs. To understand the concept of

[^80]: Cervantes Saavedra, M. 1547-1616 Don Quixote, Chapter 8. Available at Project Gutenberg http://www.gutenberg.org/etext/996
[^81]: Unbounded Freedom A guide to Creative Commons thinking for cultural organisations http://www.counterpoint-online.org/cgi-bin/item.cgi?id=618. 15th February 2007.
[^83]: See also Orlowski, Andrew On Creativity, Computers and Copyright http://www.theregister.co.uk/2005/07/21/creativity/ 9th March 2007
folk music and folk culture you should think of free as in free beer, not as in free speech. At the risk of repeating:

_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._ (Jones and Cameron, 2005: 270)

For the traditional folk song the author is lost in the mists of time and for the most part folk music performers when recording traditional songs make no attempt to claim copyright other than for arrangement and performance and adopt the 'Trad. Arr. Smith and Jones' format. Infringement claims are therefore limited to the individual’s creative arrangement additions. This is not always the case and extensions of the concept of originality and the merging of substantiality and originality has corralled material that should have remained available for the folk process and remained outside the scope of intellectual property protection whereby straining the relationship between folk musicians and intellectual property. McCann evidences this:

"_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."_87

The author has recently completed a survey that attempted to capture opinions in order to better understand the interplay of folk music, intellectual property and technology. The survey was distributed using the internet, through forums and folk websites as well as via the authors own website. The survey was also distributed to the Musicians Union Folk Roots and Traditional Music Group.89

85 That is not to say that some performers have not tried to claim authorship of traditional songs, for example Paul Simon who claimed the song "Scarborough Fair" as his own composition on the 1966 album _Parsley, Sage, Rosemary, and Thyme_.
86 For a detailed analysis of the UK caselaw on these points Jones, R and Cameron, _Full Fat, Semi-skimmed or No Milk Today – Creative Commons Licences and English Folk Music_, International Review of Law Computers and Technology, 19 (3) 2005, p.1-17.
89 "The Musicians' Union represents over thirty thousand musicians working in all sectors of the music business. As well as negotiating on behalf of our members with all the major employers in the industry, we offer a range of services for professional and student musicians of all ages." [http://www.musiciansunion.org.uk/site/cms/contentChapterView.asp?chapter=1](http://www.musiciansunion.org.uk/site/cms/contentChapterView.asp?chapter=1) Musicians Union has created a section that deals specifically with folk, Roots and traditional musicians. [http://www.musiciansunion.org.uk/site/cms/contentviewarticle.asp?article=534](http://www.musiciansunion.org.uk/site/cms/contentviewarticle.asp?article=534)
The survey itself was created using Bristol Online Surveys (BOS), which is an online survey application that provides report generation and real-time analysis of survey results. These features enabled the authors to continually analyse the responses to enable trends to be identified prior to the completion of the survey period. The design of the survey enabled statistical information to be gathered whilst at the same time enabling participants to comment on each question instead of simply selecting from available responses.

Only 23% of the artists responding to the survey saw intellectual property having any place in traditional music and arrangements of traditional music. Typical of the artists who responded to the authors survey was Paul Clifford who in an interview said:

"...intellectual property seems like a term made to once again give ownership to something that isn't ours, like land, and resources, in the true colonial spirit...ask a native American-Canadian what they feel about intellectual property. What really gets me is cultural appropriation. Is Paul Simon a thief or was he deeply inspired with a culture?"

Others commented:

"It's not ok for the specific restrictions (in copyright) to prevent the taking and adapting and developing existing songs...”

This should not be taken as a rejection of intellectual property, completely for many commented on the importance of intellectual property in rewarding and protecting innovation, but rather the application of intellectual property within the sphere of traditional (common music and arrangements and as restriction within the folk process).

"I want both protection for commercial endeavour in the folk/trad sector for those artists endeavouring to make a living i.e. parity with other genres AND freedom for trad songs/tunes to be played in their “natural home” i.e. non commercial settings – without unnecessary intervention.”

The survey did however reveal willingness in the folk community to embrace the internet. Almost 70% of those participating in the survey saw the internet as a positive medium to distribute music, with only 4% seeing the internet as a tool for exploitation. Typical responses include:

"Without the internet my music wouldn’t be possible, since I get most of my songs from archives of public domain materials”

"...it allows increased diffusion of a music form that is often shunted into’ specialist’ music categories and therefore minimum publicity by
other media. There is a great deal of artist input impossible in other forms of diffusion...in that nature of what we rather vaguely call 'Traditional music' transmission and diffusion leading to evolution or transmutation. A democratic form of the arts.”

Some however still distrust the internet Paul Clifford again commented:

"The Internet seems to be a positive medium and a place of thievery... it creates a culture that seems to feed yet another reality that harbours hope. I don’t quite understand it, proper distribution to me is direct to the souls, with air moving, bad breath, tea cups, clinking of trays etc. folk music is about folks, not about computers, distribution is for products not music.”

Whilst the majority embrace the internet the Creative Commons initiative has not yet made inroads into the British folk community. Only 28% who aware of the CC and even of these the majority admitted to knowing little about the nature of the initiative with only 18% (of the 28%) having ever considered using a CC licence.

"...creativity seems to be the relationship between inspiration and community in nature or otherwise, with individuals making sense of it in the wee hours of the morning, licence that? We don't need more red tape...”

Similar responses were gathered in an interview with Woven Wheat Whispers90 an internet based folk music distribution service.

*We and our artists don’t really trust the Creative Commons licence as a robust tool. Look at the rip off of artists by Radioactive Records who are bootlegging the industry at present, only strong legal enforcement will do. The Creative Commons is really a ‘gentlemen's agreement’ which is fine until a mass commercial exploitation happens. We have proper contracts and terms with our artists and explain them fully prior to working together.*

**9. Solutions**

Some folk artists have found Creative Commons licenses appropriate. By way of example see Roger McGuinn’s comments on the Creative Commons website.91 Such advocates of the Creative Commons are, through some invisible umbilical cord, tied to intellectual property regimes, they argue that innovation and development will be encouraged by some lesser form of rights and an enhanced public domain. However as illustrated the folk process is not

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an open source system and so does not fit seamlessly into such licenses. To understand the concept of folk music and folk culture you should think of free as in free beer, not as in free speech. This lack of evidence as to the worth of intellectual property and creativity and the role of the public domain and lack of obvious ‘fit’ has, I would argue, led to reluctance with the UK folk community to embrace the Creative Commons as evidenced from the survey results.

Enlightenment may however lie within the solutions being proffered for Traditional Knowledge. The action of the international organizations (WIPO and the Inter-Government Committees), has, as already has been stated, so far focused on trying to understand the needs and expectations of traditional/local communities, ascertaining the adequacy of current methods for protecting TK and surveying proposals to enhance such protection. A number of alternative theories have been put forward to protect traditional knowledge, and these can generally be categorised as follows. Firstly solutions based on intellectual property, this involves some legal systems providing this protection for traditional knowledge under private property law. Examples include Australia, Canada, New Zealand and Portugal, all of which have made use of trademarks in order to protect traditional knowledge and expressions of folklore. Secondly there are proposals to create data bases within which traditional knowledge can be registered and protected. Unfortunately this solution might be asking too much of some rural indigenous communities, presenting problems with how traditional knowledge is registered. Since many indigenous people live in rural communities, this type of protection might be more suitable for traditional medicine than music. Nevertheless, such a system could be of great benefit to folk and traditional artists that make use of the internet.

Ultimately, the protection afforded to traditional knowledge may not be able to be standardised and focus should be directed at multifaceted pluralistic regimes. The concept of legal pluralism is uncommon in many jurisdictions. 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.

93 The tenth session of the IGC (December 2006) in Geneva agreed on a number of issues to be addressed http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=71413
94 See B. Hoffman, Art and Cultural Heritage – Law, Policy and Practice, page 330-331
96 The reaction to the comments by the Archbishop of Canterbury in February 2008 on the possibility of some elements of Shar’ia law being embodied into the English Legal System is evidence of this hostility.
Pluralist structures and ideas were considered cumbersome, difficult to administer and dangerous. Yet opposition to the 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. A working definition would be the existence of more than one legal order. So for example the state laws would have a role in regulating individual behaviour whilst allowing personal laws and customs could 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 Woody 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 up then surely it is worth trying to do it to retain distinct and valuable cultural traditions.

Those benefiting most from the existing regimes have not been slow 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. A reluctance to admit some perceived lesser cultural values.

These three sets of arguments were used to justifying the inherent rightness of intellectual property regimes in the context of the film industry. "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." The veracity of such arguments is open to question since the construction of such arguments often is to justifying the inherent rightness of intellectual property regimes. As all such arguments, these are attempts to impose the dominant culture on the indigenous cultures of the countries in question. The unique aspect of this argument is that an attempt has been made to apply the same reasoning to all cultural groups. This is not the same as advocating a universal solution to the problem of intellectual property. It is the case that some groups may benefit more than others from the existing regimes, but this does not mean that they are inherently right or that they should be imposed on other groups.

97 s. 301 Copyright, Designs and Patent Act 1988, the Peter Pan exception.
98 For the range of justifications see Bently & Sherman (2004:3-5)
99 Jack Valenti, President of the Motion Picture Association Of America, Inc, giving evidence at the hearing before The Subcommittee On Courts, Civil Liberties, And The Administration Of Justice Of The Committee On The Judiciary House Of Representatives Ninety-Seventh
Rights holders, in response to the challenges of new forms of use have categorised users as criminals and pirates, have relied upon dubious date to use and abuse DRM technology and in response to attacks of the effectiveness of intellectual property systems have threatened a “cultural dark age.”\textsuperscript{100} We have lost sight of the fact that copyright should justified on the basis of the interests of society and not just the individual. The questions, should always be what do we want from our knowledge systems, and how can we adopt the architecture of such systems to achieve this? Positive collective systems that reinforce the idea of the folk process may be preferable to a system that is merely protecting what we have and not enabling development.

This would involve some mechanism of registration whereby recognition can be given as to what tune is traditional and what isn’t. Within the folk community there is a tacit recognition of what a traditional song is and what isn’t, which needs to be formalised. Then using a mix of customary/traditional rules that would prevent approbation of songs into the private sphere, intellectual property rights, common-law concepts (such as “undue enrichment”) to reward the genuinely new and legal and contractual agreements to aid exploitation could be used to provide the necessary protection for creativity. This would enable the folk process to continue, allowing and encouraging "continuity, variation, and selection" rather than as at present, stifling it.

\textsuperscript{100} Richard Parsons CEO of Time Warner made the statement: ‘if we fail to protect and preserve our intellectual property system, the culture will atrophy. And corporations won’t be the only ones hurt. Artists will have no incentive to create. Worst case scenario: The country will end up in a sort of cultural Dark ages.’ quoted by Siva Vaidhyanathan, the anarchist in the library: how the clash Between freedom and control is hacking the real world and crashing the System 22 (2004) (citing Jessica Litman, Digital Copyright: Protecting Intellectual property on the internet 151 (2001))